

Breaking cycles of subjugation through bodily performance: lived experience inside legal processes at the Marikana Commission of Inquiry

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1 Introduction

On 16th August 2012, the South African Police Service (SAPS) fired live ammunition into a crowd of striking mine-workers at Marikana, a platinum mine operated by Lonmin near Rustenburg, South Africa. 17 people died in the initial volley of bullets, which was caught on the camera rolls of numerous media houses that were on-site covering the strike and its ensuing unrest. The disturbing footage was soon circulated both domestically and abroad² – but it did not show the scene of the second shooting, where strikers attempting to escape police fire were followed by the SAPS into the surrounding scrublands. A further 17 people were killed near a small, rocky outcrop, about half a kilometre from the initial scene. In total, 34 miners were killed that day, in what was soon dubbed ‘the Marikana massacre’. In response to this outrageous police action, then-President Jacob Zuma instituted a Commission of Inquiry, a quasi-legal mechanism with British roots that is commonly used in countries that have inherited English law through colonial history. This article takes issue with such a legalistic approach to truth-finding after atrocity, questioning the sense and

applicability of a teleological legal process that prioritises ideas of forensic truth and a quest for closure – if it comes at the expense of bodily experience.

Foregrounding bodily experience, as framed through Marett Leiboff's work on theatrical jurisprudence, alongside interrogations of aesthetics, corporeality and rhythm, this article critiques ideas of legal progress and aims of closure and truth exposition. Bringing bodily experience to the centre of analysis, as opposed to linear, legal procedure, reveals an alternative appraisal of truth-seeking at Marikana. Examined from a corporeal perspective, it is possible to see an alternative rhythm at the Commission, developed by prioritising how physical bodies engaged with legal procedures. Travel, bodily fear and safety concerns, and financial exclusion demonstrate how bodies were trapped into cyclical rhythms of interaction with legal procedure; their repetitive performances in stark contrast to the linear pathways of legal processes.

Deploying Mariana Valverde's critique on legal teleology, this alternative bodily rhythm raises the sobering concerns of the Commission as a place of danger, not truth and justice; the fact that some kinds of bodily absence were interpreted as a reflection of privilege, which joined with financial exclusion in creating a hierarchy of stakeholders that is counter to the ideal of equality before the law; and that bodily absence resulted in a disjunction or fragmentation between bodies and their worlds – whether through the presence of voice without the corresponding corporeality or the splitting of attendees, who divided themselves numerous times between lives at home and lives at the Commission.

This alternative, cyclical rhythm was present throughout the Commission, and can be discovered by foregrounding bodily performance through iterative reading of the legal transcripts of the Marikana Commission – a rhythm created by bodily presence and absence, speaking, saying and showing as 'experts in their own life-worlds' (Tilley 2017: 39). If, as Henri Lefebvre suggests, linear and cyclical rhythms are based on 'antagonistic unity' (2004: 76), then

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the operation of two rhythms inside the law – one celebrated and the other dismissed – suggests that an acknowledgment of the implications of bodily experience – an acknowledgment of cyclicity alongside teleology – would have made this mechanism more relevant to key stakeholders and, crucially, could have allowed the Commission to better manage the expectations of what it could reasonably be expected to achieve. But the foregrounding of bodily performance not only highlights problematic cyclicity and alternative legal rhythms – it can also demonstrate how physical performance can break the cyclical subjugation of how non-legal bodies engage with truth recovery mechanisms.

2 Bodily presence inside the law

The idea of examining justice and truth-seeking by linking a body and its lived experience has been highlighted by the work of Carrol Clarkson. In her book *The Aesthetics of Transitional Justice*, Clarkson references Jacques Rancière's identification of an aesthetic regime of art – one that removes norms of representation, allowing for the boundaries of the visible and audible to change (Rancière 2004: 4). Clarkson describes Rancière's aesthetic acts as an 'encounter that makes it possible to reset social perceptions of what counts and what matters, especially in relation to questions of social justice' (Clarkson 2014: 2). Clarkson argues that knowledge 'obtained through the senses' – or rather, 'lived experience' – is the original definition of the Greek word *aesthesis*, the root from which 'aesthetic' is derived. Thus, Rancière's aesthetic acts could be seen as lived experience, processed through the senses, which makes it possible to 'reset social perceptions of what counts and what matters' (Clarkson 2014: 2).

Clarkson's use of the word 'encounter' when describing recalibrating perceptions around lived experiences of justice is particularly interesting for this article's examination of bodily performance inside the law of the Marikana Commission – a mechanism designed to uncover truth about police murder. Writing about Hindi cinema and extra-legal murder by Mumbai police, Anustup Basu engages with this word in

three ways: he first describes ‘encounter’ as a legal definition, meaning the exchange of gunfire between police and criminal suspects; the second is a colloquialism – in common parlance, an ‘encounter’ is used to describe vigilantism from the police, where suspects are often shot from behind to simulate escape (a grim feature shared by the Marikana crime scene); the third definition is from Hindi cinema – the ‘encounter’ film genre which focuses on realism and gritty authenticity, as a direct counter to the mythical and fantastical Bollywood films of the 1980s (2010: 182-184). In particular, the encounter film genre focuses on a hero who is authentically, even aggressively ordinary. His very averageness is used to propel him and his actions into the spotlight – there is nothing inherently exceptional about him (Basu 2010: 183).

Drawing on these three strands, Basu ultimately defines ‘encounter’ as something between the ‘immanence of daily life and the transcendence of the state’ (2010: 184). As extra-legal killing, an encounter of this kind ensures that the body falls between the law – as an act of vigilantism committed by an officer of the law, the death does not have to be formalised through institutions or bureaucracy; the sovereign state claims this act as a ‘just exception’ to otherwise human-rights centred rhetoric (Basu 2010: 187). But perhaps the most relevant part of Basu’s definition on ‘encounter’, is that he defines this act of killing as both invisible and visible, something that must be accidental and thus excused from formal judicial process and, yet, must be recognised and acknowledged by the public as intended. Only the combination of these two supposedly paradoxical elements – public visibility and bureaucratic secrecy – gives the encounter its power, a way to demonstrate the power of the state over its residents, whether citizen or not (Basu 2010: 184).

Returning to Clarkson’s interpretation of Rancière’s aesthetic acts as a sort of encounter, it is possible to see lived experience – or bodily performativity – as that critical link between daily life and the power of the state, when considering state-sponsored truth recovery after violence; but a critical link that remains ignored, rejected or sidelined by conventional understandings of law and legal procedure. This is one of

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Marett Leiboff's key critiques in her work on theatrical jurisprudence. In her book *Towards a Theatrical Jurisprudence*, Leiboff challenges positivist jurisprudence which she terms 'law without life', highlighting how modern law and legal institutions have been reduced to mere acts of seeing, not acknowledging law's inevitable impact on lifeworlds surrounding it (2019: 6). She writes that modern law operates on the incorrect assumption that rules and legal instruments stripped bare offer clarity; which ignores the fact that legal selves will always bring their own assumptions, experiences and perspectives into their work. Modern law seems to think it is 'immune from the world around it' (Leiboff 2019: 24). But with no focus or attention on how law impacts the lifeworlds around it, law becomes endlessly self-referential, abstract and ultimately without responsibility for its consequences. Law delimits by creating a closed world around itself, and aims to 'protect' the legal interpreter from bodily unruliness – the bodies inside law end up papered over by doctrine and dogma (Leiboff 2019: 24-25).

Leiboff suggests using a theatrical lens to bring the law and legal interpreters back to bodily knowledge, reminding law of the worlds that created it. The idea that theatre is reserved for the stage is an outdated premise – as Leiboff (2019) states, theatre only requires bodies and space. In this interpretation, any set of bodily interactions has the potential to be theatrical – even the legal sphere. Framing the law inside a conception of theatricality becomes powerful when considering what a theatrical response asks of those bodies engaged in space. A theatrical response, as Leiboff understands it, is one that prompts bodies to respond first, prior to an intellectual evaluation. Law assumes that actions follow thoughts – rational law has no space for experiences that don't follow causality, despite the mistakes that are commonly made when we rely on our minds only. But, grounded in bodily response, a theatrical approach is acutely aware of impact beyond the self, awareness triggered by lived experience, followed by an intellectual response (Leiboff 2019: 12). Such a focused response would allow the law to react to legal injustices that a rational and deductive legal approach ignores, glosses over or considers irrelevant.

Leiboff reminds us that our minds and our bodies are interactive – there is no sensible form of separation between them; while Clarkson highlights that lived experience can help recalibrate how justice is felt, perceived and prioritised. The theoretical link between these two ideas is the foregrounding of bodily response: ensuring that bodily impacts and experiences are seen as integral to discussions of law and justice. Framing such lived experience as an ‘encounter’ demonstrates how the everyday and ordinary can provide a crucial link to truth-seeking, performing as the bridge between daily life and the power of the state.

With the foregrounding of physical experience, as highlighted by Clarkson and Leiboff, ideas of movement and rhythm become key analytical touchstones for investigating corporeality. As Janine Clark argues, bodies are in a permanent state of becoming, making corporeality a dynamic and ever-changing space (2019: 17). Without taking movement and rhythm into account, any theorising of the body falls prey to the analytical trap of positionality: decoding how something or someone was formed, by interrogating only the structural conditions that surround it (Massumi 2002: 2).

Brian Massumi argues that this kind of positionality captures a body ‘in a cultural freeze-frame’ (2002: 3) which denies the possibility of movement and change – a direct contradiction to the inherent dynamism of bodily experience. Yet, conventional western views of law require exactly such a ‘freeze-frame’ from those who interact with it – a predefined and specific set of spatial and temporal characteristics, before law and bodies’ engagements therewith can be considered ‘real’. Renisa Mawani highlights how temporal linearity inside the law is often assumed rather than interrogated, with time being considered a ‘natural’ phenomenon that follows a ‘sequential and directional line’ onto which lives can be mapped (2014: 69-70). As Carol Greenhouse states in her seminal article on linearity inside the law, the West sees temporality and legality as ‘conceptually fused’ (1989: 1631). Modern notions of law that respect, for example, precedent, reinforce a continual expansion of legal linearity: using past legal decisions to inform the present – which, in turn, builds a foundation for the future (Greenhouse 1989: 1642). In

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a similar vein, Jessica Cooper argues that jurisdiction performs the same enforcement of legal linearity – defining the limitations of actions and capacities a body is responsible for, based on a fixed time (2018: 87).

Arguing against such reductive linearity, Mariana Valverde suggests that legal procedures, like literary genres, are products of specific spaces and times (2015: 11). She uses the term ‘chronotope’ to identify the manner in which temporal and spatial aspects of law influence one another (Valverde 2015: 9) and uses the example of a court – which is only a court when a member of the judiciary has opened session; at other times, it is simply a room in a building. Legal time and space do not start at a beginning and halt at a satisfactory end, despite the aforementioned conventional ideas of law’s linearity (Valverde 2015: 43).

This falsity of linear notions of legal time in Western law runs in parallel with literature that is concerned with decolonising methods in academic research. Lisa Tilley, critiquing sociology and anthropology, writes that linear time and its implications are indicative of a colonial mindset that separated European man from his research subjects in the global south, whereby the European man’s time was in motion, while the research subject remained static and preserved; and papered over the violence and extractive nature of such research through deploying the ideals of both work and progress (2017: 30-31).

This teleological nature of time denied the repetitive cycles of extractive research practices, whereby the researcher grew in knowledge while the subject endured ‘colonising repetitions’. Using the term ‘spirals’, borrowed from Silvia Rivera Cusicanqui, Tilley highlights the circular nature of time – both for some indigenous communities, and as part of research methodology (2017: 31). The idea of spirals resonates with Valverde’s spatiotemporality – both highlighting that the notion of linear time is at best an out-dated way in which to view the law; and at worst, a framework that can actively disenfranchise and reinforce colonial hierarchies of progress.

Considering truth-seeking after atrocity and the bodies engaged with it from Leiboff’s theatrical perspective – in other words, how theatricality and bodies interacting in space inspire the prioritisation

of bodily response – foregrounds the corporeal as key in navigating the potential injustices of law stripped bare of all but rule and doctrine. This section has highlighted the power of bodily response and experience, examining authors who claim that foregrounding the corporeal inside the law can recalibrate perceptions of justice; re-animate a positivist legal approach currently severed from the lifeworlds that created legal frameworks; and act as a bridge between the supposedly distinct worlds of the everyday and state power when considering truth recovery after violence. Further, a corporeal approach highlights the importance of movement, rhythm and spatiotemporality, bringing forward notions of spiralling and cyclicity that would otherwise be over-looked in conventional legal analysis. This article now turns to the Marikana Commission itself, to demonstrate the ideas laid out above. The next section will highlight the cyclicity foregrounded by the prioritisation of corporeal performativity; whilst also offering some redemption through examining bodily performance. In this way, corporeality can be seen as a way to not only identify dangerous cyclicity overlooked by the law – but also, to break it.

3 Linear law: the Marikana Commission of Inquiry

The Marikana Commission of Inquiry, despite being outside a court of law, was a fundamentally legal creation. The Chair of this Commission was announced as Ian Farlam – a retired judge of South Africa’s Supreme Court of Appeal, referred to by a colleague as ‘a really traditional lawyer’ (Killean 2016: 21). The first Terms of Reference (ToR), published on 12 September 2012, laid out the relevant legislation that provided for the creation of such a Commission of Inquiry, as well as provided guidance on how such a Commission should be both constituted and managed. The ToR cite section 84(2) (f) of the *Constitution of the Republic of South Africa 1996*, as providing for the creation of the Commission; and the *Commissions Act 1947* as providing for the management of the mechanism (South African Government 2012). Alongside this founding in law, the ToR also allowed the Commission to refer matters for legal prosecution, further

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investigation or for the creation of a separate inquiry; and clause 6 ensured that the regulations would allow the Commission powers to search premises, secure witness attendance and compel the production of documentation (South African Government 2012).

Legal rules were also in place for the presenting of evidence outside of the Commission's formal investigative staff structure: anyone could submit evidence, but such evidence would need to be called to the Commission through the serving of a subpoena, meaning the furnishing of particulars – including name, address and some form of identification such as a South African Identity Document or passport – would be required for the serving of such a subpoena (Marikana Commission of Inquiry 2012). Such formal channels did not take into account the transient, unstable and sometimes illegal employment and housing conditions of migrant mineworkers and their families; and by choosing this process for the submission of evidence, effectively removed anyone who was not able to access state documentation, from contributing evidence to the Commission.

The way in which bodies interacted with this quasi-legal mechanism was primarily negotiated by the legal processes of the Commission – linear and teleological – ascribing a specific endpoint to the Commission – the submission of the Final Report to the President of South Africa – through a strategy of progressive building blocks, each propelling the path of the Commission forward to a final end point: 'The Commission shall inquire into, make findings, report on and make recommendations' (South African Government 2012). The Commission was specific about these progressive building blocks having the purpose of closure: as closing arguments began, evidence leader Geoff Budlender summarised one of the key purposes of the Commission as 'looking forward' (Marikana Commission of Inquiry Day 294: 38494-5). The ToR were also clear that this progression would be managed through the application of legal procedure, highlighting that these progressive steps would be undertaken by consulting 'the Constitution and other relevant legislation, policies and guidelines' (South African Government 2012) as well as the Regulations for the

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Marikana Commission that were published in the Government Gazette on 28 September 2012. The order of the Commission's operation was also strictly regulated through legal procedure: documents for the witness would be circulated; the witness would be examined-in-chief, cross-examined by stakeholders in a pre-determined order, then re-examined and dismissed.

Any attempts to disrupt the linear progress of the Commission were summarily dealt with, with the Chair constantly reminding himself and the Commission attendees of their obligation to the President of South Africa and its citizens: the production of the Final Report, as articulated in this quote:

In bringing the work of the Commission to a conclusion we have to strike the proper balance between two matters. On one hand to ensure, the need to ensure that the process is fair and as inclusive as possible. On the other hand, the need for us to report as soon as possible to the President and to the people of South Africa on the very important matters which are raised in our terms of reference. The Commission is committed to completing its task without undue delay and will do everything reasonable in its power to achieve that result. (Marikana Commission of Inquiry Day 118: 12246).

When time pressures began to be felt, new cross-examination rules were introduced; when this failed to save the amount of time needed, lawyers were allotted specific time slots for their questions, with the Chair cutting them off, sometimes in mid-question, when their time capacity had been reached. As Farlam stated, 'we have rules that we have introduced and we've got to stick to them. So that's the end of your cross-examination' (Marikana Commission of Inquiry Day 230: 28480). The Marikana Commission's focus on moving from a starting point to an end point, achieving closure along the way, is exactly the kind of false linearity Valverde challenges through her focus on spatio-temporality inside legal spaces. The focus on causality – that a set of procedures involving witness statements, corroborated and interrogated by legal practitioners will result in truth and closure – highlights Leiboff's concern that these kinds of legal interactions risk injustice if

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they deny experiences of events that do not follow these rules.

Bodies were largely irrelevant to these procedures. For example, bodily absence at the Commission was an obstacle to be navigated, not an obstruction that encouraged reflection or change of operations. This was made clear when the examination of witnesses continued in spite of a widespread walk-out that removed most key stakeholders from the Commission's operation. This walkout was based on financial exclusion, an issue which had been a sticking point from the Commission's inception. Key parties at the Commission – one of whom had already acknowledged responsibility for the shooting, SAPS – were robustly financed by their respective government departments and had big teams of lawyers at their disposal. The widows and family members of those who had died at Marikana, were substantially less monied – but had access to financial support from Legal Aid South Africa. The injured and arrested miners had no access to any state financial support to enable them to hire lawyers or represent their case. This extremely asymmetrical situation was compounded by the fact that the state was funding those who many viewed as the culprits, leaving minimum wage labourer victims to fend for themselves.

Both advocates for the widows, Dumisa Ntsebeza, and the injured and arrested mineworkers, Dali Mpofo, flagged this financial discrepancy on the first day of the Commission; and Mpofo continued to raise financial fair play as a key issue to ensure attendance at the Commission of all interested parties, not merely those with resources. Things came to a head in June 2013, when Mpofo told the Commission that he was going to court to compel the state to pay for the injured and arrested miners' legal representation – his own fee. Until the court had ruled, he would not participate in the Commission. Despite the absence of such a major stakeholder, Farlam continued the Commission. Two days later, the lawyers for the families and the Association of Mineworkers and Construction Union's legal team also absented themselves indefinitely in solidarity. On the following day, the Bapo Ba Mogale withdrew; two days after this, in the absence of most major players apart from the SAPS and the National Union of

Mineworkers (NUM), the Legal Resources Centre stood down too. Mporu's applications for postponement were repeatedly denied, and the Commission continued to hear witnesses until a court ruling in Mporu's favour resulted in him returning to the Commission half-way through October 2013.

But not even this lack of legal representation could alter or derail the progress the Commission was focused on. When the lawyers' walk-out left a substantial amount of people unrepresented, the Chair simply assigned the task of safe-guarding those people's interests to the evidence leaders, justifying this by stating that it was their job anyway to 'put the facts before the Commission' (Marikana Commission of Inquiry Day 120: 12294). This new procedural rule was hotly contested by Mporu when he argued for a postponement a few days later, reminding the Chair that only his team had consulted with his clients for almost a year, and that asking his clients to rely on the evidence leaders, while the SAPS were sporting a state-funded staff of seven, was 'really kicking the victims in the teeth' (Marikana Commission of Inquiry Day 129: 13570). Despite the argument that the Marikana Commission was prioritising 'expedition and speed at the expense of reconciliation' (Marikana Commission of Inquiry Day 129: 13557) with the postponement application denied, the witnesses kept coming and the Commission kept going.³ The assumption that the evidence leaders – legal practitioners in their own right – would somehow be neutral vehicles for the representation of a wide range of contestatory stakeholders highlights Leiboff's concern that the law creates its own 'closed world', becoming problematically self-referential and thus, unable to see and act on potential injustices within its operation.

The unstoppable progression of the Marikana Commission – even in the face of absent legal representatives – indicates how focused the Commission was the attainment of its end goal – the Final Report. The Final Report was continually articulated as the ultimate prize of the Commission, despite literature that cautions pinning closure on such a document. Gerry Simpson argues that judicial inquiries, with their narrow ambits, can never realistically aspire to closure (2007: 139).

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Hakan Gustafsson agrees, stating that an attempt at closure through the law, simply amplifies the inevitable gaps and silences that such closure would leave behind:

We are trying to find and to say the last word, to come to a final conclusion, to determine a decision and to bring it to a close so that, in the end, everything will be taken into account ... The definite comment, then ... becomes the definite silence (1996: 100).

Unfortunately, a ‘definite silence’ was how many interpreted the conclusions drawn by this document when it was published in June 2015. This report certainly represented the end of the Commission and its run, but it fell substantially short on providing closure. Most importantly, this report offered no clear resolution for some of the most critical matters the Commission had to deal with. For example, there was no clear fact-finding on what had happened at the scene of the second shooting, Scene 2. The shooting at the first scene was caught on camera, and the discussion of liability there boiled down to what was an acceptable interpretation of self-defence. But the shootings at Scene 2 were much more disturbing. Forensic evidence suggested that the men killed there had been shot from behind, and eye-witnesses reported men being shot while surrendering and begging for mercy. The police had difficult questions to answer about how, at the very least, their chain of command and communication broke down.

But ultimately, the Commission was unable to answer this key question. Answering legal questions requires knowledge of fact and evidence, and the Commission had this to say about Scene 2: ‘To accept or reject any version, with any degree of certainty, requires further interrogation of many factors’ (Farlam, Tokota and Hemraj 2015: 326-328). So this Final Report, the ultimate aim that years of linear legality had been focused on, succeeded only in summing up its own ineffectiveness. The teleological, linear progress of the Commission had succeeded in reaching its end goal; but the result of this end goal fell far short of expectations.

This section has briefly highlighted how the Marikana Commission can be interpreted as an example of Leiboff’s ‘positivist jurisprudence’

– a space of ‘unadorned rules’ where the law creates a closed space of self-referential doctrine and procedure (2019: 10). The focus on linearity, and the teleological assumptions of progress and closure brings Valverde’s critique of Western legal ideals to the fore, demonstrating how the Marikana Commission’s denial of how time, space and lifeworlds interact could lead to injustice and irrelevance – and replicates imperial ideals of progress at any cost. The following section will expand on these critiques by analysing key instances of bodily performance at the Marikana Commission. Leiboff’s theatrical response – whereby bodily awareness beyond the self is prioritised before intellectual reaction – and Clarkson’s ideas of how prioritising lived experience can expose new perceptions of justice, demonstrate how corporeal perspectives reveal cyclicity in direct contrast to legal linearity.

4 Cycles and rhythms

Bodily experience of the Marikana Commission’s legal approach created its own rhythm, almost as soon as the Commission began. The sections that follow investigate the bodily performance – or ‘encounters’ – of those who Basu (2010) would define as ‘authentically, even aggressively ordinary’ – those who positivist law deems irrelevant or extraneous to the critical legal question of forensic truth. By foregrounding such lived experience at the Commission, it is clear that a two-tier system was in operation: with legal procedure creating a linear, progressive timeline, and bodily experience highlighting – through its performance – the futility of such attempts at linear truth-seeking through the development of cycles of repetition. In place of legal procedure’s focus on teleology and the overriding goal of forward motion, an embodied perspective reveals how cyclical truth-seeking after atrocity can be; and highlights the fragmented worlds that those pulled into its gravitational force endured, despite truth-seeking’s commitment to uncovering a singular, accepted narrative of events. Agreeing with Henri Lefebvre’s contention that rhythmic analysis can reveal the ‘antagonistic unity’ of linearity and cyclicity, this section suggests key moments of bodily performance that demonstrate the

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power of bodily engagement to alter, change and mould legal space. Using Leiboff's theatrical focus on the immediacy of bodily response, this section also shows how foregrounding corporeal actions do not only reveal cyclicity in the face of legal teleology – but demonstrate disruption of the repetitious subjugation of the ordinary and everyday body inside truth-seeking after atrocity.

A Bodily cycles: the performance of presence

The issue of travel is one of the clearest instances of bodily experience developing an alternative, cyclical rhythm to the Commission. Family members of the deceased and injured live in far-flung rural locations around South Africa; and some are in other countries altogether, like Lesotho, Swaziland, Mozambique and Malawi. Travel stipends for family members travelling to the Commission's proceedings were only provided for in the Commission regulations on 14 November 2012, while the Commission began hearings in October; and attendance at the Commission meant absence from home and its duties. With victims of the massacre being entirely male,⁴ the women who survived their family members now had to make difficult choices: to be present at the Commission, or to earn a living, care for children, and look after homesteads, livestock and assets. Many women attempted a compromise, travelling to and from the Commission in regular cycles that they tried to time with the deposition or cross-examination of witnesses by their own lawyers. The ebb and flow of the widows' attendance made little impact on the truth-finding program of the Commission. But their periodic presences and absences hinted to a world outside the Commission's walls, and provides a way in to understanding the Marikana Commission from a perspective of fragmentation, rather than the teleological coherence suggested by legal procedure. Leiboff's salient critique that law does not concern itself with the lifeworlds it impacts is of critical relevance here.

The repetitive presence/absence through travel of the widows of the Marikana massacre is representative of how some of the Commission's key stakeholders felt themselves caught up in a cyclical spiral, pulling them both backwards towards their past history, and then propelling

them forward again into the Commission's operation – only to be pulled backwards again as they were required to travel between home and the Commission. This incessant motion, evocative of Silvia Rivera Cusicanqui's spirals, placed alongside the perpetual stasis that is inherent in waiting on the law – waiting to hear legal arguments, waiting for the exposition that it seemed would only arrive with the Final Report – made some attendees physically ill. The psychological motion-sickness of so much moving and yet so much stasis was summed up by Nandipha Gunuza, a widow of the massacre: 'If the commission doesn't come to an end soon, it will make us all sick, literally' (Falanga 2014). Journalist Gabi Falanga (2014), who interviewed some of the widows, explained how the women felt trapped by stagnation: while the Commission appeared no closer to its end goals, their lives at homes also came to a standstill while they performed the long commute to and from the Commission. Mary Langa, another widow, explains to Falanga: 'The children are expecting us to bring something home. They don't understand the commission; they think we're away working. It's pretty bad for us but there's nothing else we can do' (2014). In her work with the Khulumani Support Group, Agnes Makopano Thelejane articulates the confusion that comes from such continual splitting between home and away, when she states: 'I am standing here not knowing what to say as I am moving in and out of this Commission. I don't know what I am going to combine to make life' (Bonase and Seidman 2013: 8). Gunuza, Langa and Thelejane are demonstrating a disturbing and painful aspect of the Commission's three year run – a fragmentation between bodies and their worlds, as these women are forced to subject themselves to a cyclical double life, split between home and away, dividing their bodies up between competing demands.

Of course, not only women attended the Commission: other family members, including brothers, uncles, fathers and grandfathers also attended to hear what had happened to their loved ones. Interviewed by journalist Niren Tolsi, Andile Yawa described his cyclical journeys to the Commission, to hear the truth about what happened to his son, Cebisile. Yawa was himself a miner, before he was medically boarded with lung disease, and his son took his place on the mine. He

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explains how these journeys to the Commission are simply a repeat of the journeys he made when he was still a migrant labourer: ‘There are similarities in these journeys ... but now [after these trips to the Commission] I come back with nothing. Before, there was money and I was making a living for my family’ (Tolsi 2014). But his daily routine is not the only thing that has spiralled back towards a time he thought was past: he explains that his relationship with his wife, Nosipho, has reverted back to what it was during his time on the mines – with the similarly compressed time they are now able to spend together reminding them both of his years of distant labour (Tolsi 2014).

Confusion and co-mingling between past, present and future disrupts the idea that a single, linear engagement with truth-finding after atrocity can encapsulate the aftermath of violence. As Andile Yawa finds himself cast back into decades-past living patterns, and the widows split themselves into many parts to cover both the stasis and the endless movement required of them, time becomes more complex than a teleological Commission with a beginning, a middle and an ending can encapsulate.

B Bodily cycles: absence as safe / presence as dangerous

In contrast to this cyclical experience of those travelling to and from the Commission, the methodical legal approach of the Commission – and its focused, linear trajectory – was unassailable: any attempts to waylay progression of the Commission through bodily absence were summarily dealt with through legal procedure. One of the key issues such procedure had to address, to keep propelling the Commission forward to progress, was how stakeholders were interpreting the physical space of the Commission as dangerous.

Fear, trauma and intimidation – both real and perceived – were key bodily experiences at the Marikana Commission. Fear was woven into the fabric of the Commission from the first day, when advocate Dali Mpofu – lawyer for the injured and arrested miners – flagged that some of his clients and witnesses were too afraid to testify at the Commission, fearing reprisals: ‘People are ... uneasy about coming forward with evidence, they’re uneasy about the prospect of

giving oral evidence' (Marikana Commission of Inquiry Day 1: 41). Mpofo reported to the Commission that some of his witnesses had been arrested and taken to four different police stations; some were granted bail and then immediately re-arrested (Marikana Commission of Inquiry Day 5: 383). He further alleged that those arrested were subjected to torture, and accused the police of using attendance at the Commission as an 'informal ID parade', with people being followed to and from the Commission in an attempt to crack down on so-called trouble-makers or those involved in police fatalities in the days leading up to the massacre (Marikana Commission of Inquiry Day 5: 391). Mpofo often reported his clients were absent due to fear, as well as due to tensions in their community at Marikana. As Mpofo stated, 'they would like to be here but they also don't want to be killed when they get home' (Marikana Commission of Inquiry Day 101: 10872).

Mpofo's statement of the division his clients felt mirrors the complex splitting of lives that the widows articulated in the previous section. When Farlam was challenged on this aspect of witness safety, he was quick to reassure everyone that the *Witness Protection Act 1998*, as well as the 'full weight of the law', were at the Commission's disposal (Marikana Commission of Inquiry Day 48: 5258). However, this provided no reassurance or assistance to the vast majority of Mpofo's more than 250 clients, the majority of whom were not sworn in as witnesses. The weight of such law could provide no protections for them.

Bodily absence from fear and intimidation gave an impression of the Commission as a dangerous place that was risky to be involved in. Indeed, a small paragraph, four pages before the end of the Final Report, acknowledges the 'fear factor' of presence at the Commission – adding only that such fear was indeed a 'justifiable suspicion'; and that murder to prevent the giving of evidence was ongoing (Farlam, Tokota and Hemraj 2015: 560). Yet, this Commission was the only sanctioned space where truth-seeking after the atrocity of the massacre was taking place. As Mpofo says, his clients wanted to be present – but they also wanted to stay safe.

These two needs were conflictual, not symbiotic. Fear separated

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bodies from the world they wanted to be present in, resulting in absence from the only designated space that was focused on truth recovery after the massacre. The body absent due to fear creates a different evaluation of the Commission: deemed a place where truth and justice take place, some bodies viewed it as a place where trouble, hardship and death were more likely. This was painfully articulated by one of Mporu's witnesses, himself suffering from advanced cancer, who described the suicide of one of his comrades who was injured in the massacre, and had attended the Commission:

That person was also shot and he was now walking with crutches. He used to attend the Commission whilst it was sitting in Rustenburg. He was stressed ... He had to go to the hospital, he ended up hanging himself. Now things like that make you feel very bad (Marikana Commission of Inquiry Day 275: 36168).

This suicide could be the suicide referred to in a memoranda handed to the Commission's Chair, Ian Farlam, on 1 April 2014, whereby a group of people labelling themselves 'concerned members of the community' complained to the Chair that one of their body had been 'displayed in public against their will' at the Commission via a subpoena, and had subsequently committed suicide (Farlam, Tokota and Hemraj 2015: 590). Fear and death became further intertwined in July 2014, when Mporu angrily reported to the Commission that a man mentioned by name in testimony from a SAPS source, Mr Bongani Mehlomkomo, had been gunned down. Mporu stated that his clients were speculating whether this murder was linked to the evidence given that accused this man of wrong-doing – evidence which they said was completely false (Marikana Commission of Inquiry Day 261: 32808).

The Commission's distinction as a place of danger, not one of reliable legal procedure leading to 'truth, restoration and justice',⁵ was further cemented when the same memoranda referred to above described how infuriated the signatories were at the treatment one SAPS witness, Mr X, received from the Commission. This witness, known to the public as 'Mr X', had requested anonymity due to fears for his physical safety and gave his testimony from a secret location known only to the

Commission. He took the stand in-camera, with the general public banned from entering during his testimony; only those who could prove they were a client of a lawyer at the Commission were allowed to hear his evidence. His voice gave testimony without his corporeal body, the sounds and pixelated images coming from video-linked TV screens displayed around the room (Gill-Leslie 2019: 118).

The memorandum authors viewed his bodily absence as privilege, and accused the Commission of giving Mr X ‘special treatment’ (Farlam, Tokota and Hemraj 2015: 589). In particular, they demanded that Mr X give testimony ‘in the same way as other witnesses who were also afraid’ – in others words, with his body present in the courtroom, subject to the same perceived dangers that others had to face (Farlam, Tokota and Hemraj 2015: 590). This was compounded by the general view – supported by the Final Report – that Mr X had routinely fabricated his testimony, in an attempt to discredit the striking mineworkers and vindicate the SAPS (eg Nicolson 2014).

The Commission was viewed by some as being a place of danger, where the threat of physical harm over-shadowed participation; and yet, the Commission continued its operation without modifying any proceedings. Indeed, in response to the memorandum, Farlam washed his hands of such concerns, explaining that any special requests for alternative testimony arrangements had to be evaluated against legal procedure rules – the first of which was the lawyer’s duty to request such treatment from the Commission beforehand, which no lawyer had done for other witnesses. The law, as per Leiboff’s arguments, must protect its interpreters from the unpredictability of bodily unruliness. This refusal to acknowledge both the detrimental and beneficial aspects of bodily absence at the Commission, in favour of legal procedural rules that made forward motion inevitable, was a reduction of the kind of justice being delivered. This dismissal of these concerns around fear and safety, while conforming with legal procedure, came across as narrow and lacking in compassion. It was a wilful rejection of complexity, in favour of the ease of the known and legally protected rules, which continued to usher the Commission forward.

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This section has suggested that the rhythm created through bodily experience at the Commission is in contrast to the teleological progress of the Commission; and that this alternative rhythm, developed through bodily experience, raises important evaluations of the Commission that legal procedure has ignored. The alternative rhythm of bodily experience raises the concerns of the Commission as a place of danger, not truth and justice; the fact that some kinds of voluntary absence were interpreted as a reflection of privilege, which created a hierarchy of stakeholders that was counter to the ideal of equality before the law; and that bodily absence resulted in a disjunction or fragmentation between bodies and their worlds – whether through the presence of voice without the corresponding corporeality – or the splitting of attendees, who divided themselves numerous times between lives at home and lives at the Commission.

This section's focus on lived experience has embodied key critiques from Leiboff and Valverde when considering how law that denies the body can deny justice and absolve itself of responsibility for its impact and actions. A focus on lived experience has highlighted, as per Clarkson's ideas of recalibration, how perceptions of the justice on offer at the Marikana Commission can change when considering corporeal as opposed to procedural goals. But Leiboff's ideas on theatrical jurisprudence highlight how recognising bodily response – being aware of impact beyond the self, triggered by lived experience – can allow the law to react to injustice. This next section highlights two bodily performances at the Marikana Commission that aimed to do just that.

C When the body breaks the cycle: performance as challenge

Mr Vusimuzi Mandla Mabuyakhulu was one of the first survivors of the Marikana massacre to appear before the Commission. He was injured in a pre-massacre clash on 11 August 2012, while marching to the NUM offices. His medical records show him receiving a head injury as well as a gunshot wound near to his spinal column, which required extensive hospitalisation. As survivors took the witness stand, it was clear that they were only present to substantiate or refute aspects of their written statements that had been submitted to the Commission already.

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As participants tellingly referred to the Commission's operations as a 'script',⁶ it was clear that survivors were not there to offer anything new or off-point. That is, until Mr Mabuyakhulu asked the Commission to look at his stomach wound.

As per the Marikana Commission's requirements, Mabuyakhulu submitted a written statement on which he was examined and cross-examined. During his evidence in chief, Mr Mabuyakhulu's advocate, Dali Mpofo, took on Mr Mabuyakhulu's voice and read part of Mr Mabuyakhulu's statement into the record at the Commission in the first person. Mpofo spoke:

I now have a bloated bubble of skin on my stomach which is expanding inside over the malt, the soft skin covered in the wound keeps on expanding to the extent that my intestines are visible from the outside. When I lie down on my back the bubble deflates (Marikana Commission of Inquiry Day 48: 5296).

In spite of his words being voiced by his lawyer, Mr Mabuyakhulu also wanted to physically show the Commission his injuries, as a protest against that fact that he had been declared fit for work by Lonmin mine. Mr Mabuyakhulu is a rock drill operator, a physically arduous job that requires the carrying, lifting and operation of heavy machinery balanced on the stomach, as well as the ability to crouch, crawl and stand for long hours underground. But the Chair refused his request, stating that that kind of physical, visual demonstration 'adds an element' (Marikana Commission of Inquiry Day 48: 5296), implying such a viewing would introduce an element of theatricality that was out of place in such a setting. Mr Mabuyakhulu saw this imposition of legal etiquette as unfair, and countered the Chair's refusal to see his injured body. He said, 'I would have liked the commission to say [*sic*] how I look like and that is why, the reason why I refuse to go underground. I do not know why the commission does not want to see it' (Marikana Commission of Inquiry Day 48: 5297).

A debate began, as the Chair attempted to placate Mr Mabuyakhulu, saying the Commission would have no power to determine whether he is fit for work, and that the Commission does 'accept that you have

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the injury *that you described* [own emphasis]' (Marikana Commission of Inquiry Day 48: 5298). The Chair deflected the request by indicating that Lonmin's Senior Counsel was present and suggested he review Mabuyakhulu's fitness to work through a referral to a medical specialist – which was acceded to (Marikana Commission of Inquiry Day 48: 5299). The Chair's view that a description of injury was sufficient and fair was juxtaposed with Mr Mabuyakhulu's view that physical display of his body – a performance of his wounds – was necessary. It became increasingly clear that the Chair could not continue to disallow a sworn witness from displaying his injuries, and while still refusing for the wounds to be displayed in public, he and his fellow Commissioners agreed to view Mabuyakhulu's body in Chambers, after which, the Chair stated 'I can understand where he is coming from' (Marikana Commission of Inquiry Day 48: 5322).

The insistence of showing his body meant Mr Mabuyakhulu was able to insert himself into proceedings that, while ostensibly gave him a fair platform to discuss what happened to him, did not allow his voice and body, unmediated by lawyers, to be heard and seen. Not only was his physical body and his injury able to influence the Chair to change his original ruling, he was also able to utilise this opportunity to advocate for his well-being outside of the court room, placing on record the fact that the Chair asked Lonmin to provide specialist medical assessment. By showing his body outside of the legal script of question-and-answer, Mr Mabuyakhulu created an immediate effect – a stretching or bending – resisting legal procedure's preferred method of interaction that keeps the body compliant and subservient to documents. The tranquillity that law encourages, that is a direct result of legal procedure's balance between permission and restriction, was broken; the viewing of the wound highlighted that 'without bodies, there is no law', as law is fundamentally relational (Mandic et al 2016: 4-6).

Mabuyakhulu's demand that his physical body be shown and viewed also seemed to provide a bridge between two men of vastly differing circumstances. After viewing his wound, albeit in private, the Chair claimed that he now understood Mabuyakhulu's pain and frustration.

The traditional hierarchy that places judges and lawyers above those whose stories they elicit, was altered – even if just for a moment – as the Chair’s sensory world expanded to include Mr Mabuyakhulu’s pain. The Chair emerged changed from this experience. At the outset, the Chair testily stated that he believed Mabuyakhulu’s injuries were ‘as described’ and he didn’t need to see them. But after his body was shown, the Chair acknowledged Mabuyakhulu’s perspective, embodying Clarkson’s ideas of lived experience recalibrating perspectives of what counts and who matters.

Leiboff’s theatrical jurisprudence seeks out moments like this – whereby an instinctual, bodily response expands the law’s ability to see outside of itself – and rectify injustice. The Chair’s encounter with Mabuyakhulu’s injured body became a way to bridge the gap between those who have such bodily knowledge, such as Mr Mabuyakhulu, and those who do not, such as the Chair, Ian Farlam. This encounter, as per Basu’s definition, provides a bridge between daily life and the power of state sponsored truth-seeking that denies the realities of those lifeworlds it is ostensibly designed to remedy.

This renegotiation of the traditional power dynamic between a judge and a witness at the Marikana Commission demonstrates the power of prioritising lived experience; or as Leiboff states, responding through the body. Such a renegotiation of authority, and the importance of Mabuyakhulu’s actions, became even clearer two days later, when a similar engagement occurred with a second survivor of the massacre. Mr Phatsha came to the witness stand on Day 50 of the Commission, and was one of the striking mineworkers caught up in the massacre on 16 August 2012. After attempting to escape from police fire, he jumped a fence into a kraal (a place fenced off, in which livestock is kept, near an informal settlement), when he had cause to look down at his foot:

What I noticed on my toe is that it was burst open and only a piece of flesh was left, or remaining ... it then gave me some difficulty running because this was a piece of flesh which was still sticking, so the whole, the bone in fact of my toe was completely gone and only a piece of flesh was remaining (Marikana Commission of Inquiry Day 50: 5439).

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Mr Phatsha explained that he was forced to cut this piece of flesh off, to enable him to continue moving. He came to the Commission with the same request as Mr Mabuyakhulu:

Mr Chairperson, I have this request that I have been talking about this injury, which nobody has seen. I suffer terrible pain. Do I have the permission to display this before the Commission? (Marikana Commission of Inquiry Day 53: 5681).

This time, after gaining clarity from his lawyer, the Chair allowed the wound to be seen and displayed in public, in the auditorium, and directed that the wound be photographed and added to the exhibit list. Phatsha removed his shoe and displayed his foot by placing it on the table in front of him. Cameras flashed and the spectators gazed. Thus, a new exhibit was entered into the official legal record. Mr Phatsha was able not only to achieve his objective of showing his wounds in public, rather than in Chambers; but to get evidentiary matter placed onto the official legal record, through having his injury shown and photographed – photographs which became listed exhibits. Mr Phatsha, who completed one year of formal schooling and was unable to read his own statement once it had been taken by his lawyer, inserted himself into the public record and expanded a chain of evidence that related to his own injury, through shrewd use of bodily performance. By forcing a viewing of his physical body – being what Henri Lefebvre and Leiboff both term unruly – Mr Phatsha performed a complete about-turn for legal procedure. Instead of the body being a mere carrier for the confirmation or rejection of predetermined legal texts or images, Mr Phatsha's body *created his own images* and the record thereof creates text – which legal procedure must sanction, as the exchange happened inside the Commission's operation.

Despite both these two encounters being introduced and managed by advocate Dali Mpofu, the lawyer for the two men, the request for the showing of bodies came from the men themselves. Mpofu himself affirms this, when he says that in consultation, his clients repeatedly stated that they want to show their wounds in public. This kind of performative self-advocacy, through the tactile and strategic

performance of wounds, works towards adjusting the skewed view of fairness and inclusion that allowed judges and lawyers to make demands upon witnesses – and yet, not the reverse. The body and its demands to be seen and heard at the Commission had, even temporarily, changed access to social and political lifeworlds, as Mr Mabuyakhulu and Mr Phatsha forced the Commissioners and lawyers to reply to their requests. Legal procedure was pushed to respond rather than solicit.

The power of a bodily experience to alter a preordained power dynamic masked by the ideal of fairness lies in its ability to impact both the parties: those exhibiting a bodily performance, and those viewing it. This altered the preordained place for victims at the Marikana Commission – the place assigned by the legal view of fairness and inclusion: that bodily ‘encounters’ were important, but symbolic; that they could speak, but were mediated by documents and lawyers; that their lack of legal credentials meant they were present on sufferance and as guides, not on their own terms or in an unmediated voice. The manner in which survivors’ bodies and their performances challenged this is reminiscent of Basu’s view that bodily encounters provide a bridge between daily life or lived experience and the power of the state in investigating atrocity.

The bodily performances detailed in this section reject this state-sponsored legal procedure’s presumption that the body is merely a discursive place, used as a path to documentary truth. The result of these performances is an embodied reaction from the Chair – a reaction grounded in bodily response, empathy and subsequent decision-making that empowered ordinary legal subjects. The power of a corporeal perspective lies not only in its ability to foreground injustice inside legal fora – but also, to work towards dismantling it.

The creation of an alternative, cyclical rhythm – identifiable through foregrounding bodily experience – forces a questioning of the relevance and purpose of linear truth-seeking that aims for the difficult goal of closure through legal procedure. In particular, the fact that the ultimate goal – the Final Report – failed to disburse truth and justice on one of the most concerning aspects of the massacre, Scene 2, reinforces

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the concern that this kind of teleological truth-seeking is risking redundancy and irrelevance for key stakeholders.

The cyclical nature of bodily experience, and what such cyclicity can reveal about how stakeholders encountered truth and justice at the Marikana Commission, is a powerful analytical tool for foregrounding excluded or marginalised voices. The implication of cycles is that repetitions form, and new understandings can be based on recognition of such patterns. Similarly, foregrounding bodily experience and recognising the resultant cyclical nature of how bodies experienced truth-seeking at the Marikana Commission, shows the marks, damages and traumas left behind by both historical and current exploitation – migrant labour, apartheid and fractured family relationships. A corporeal lens reveals the cyclical and paradoxical patterns of travel and stasis that formed an intrinsic part of the Commission's operations, but that legal procedure glossed over in its teleological quest for the Final Report. Bodily experience reveals the fact that truth-finding after atrocity in South Africa is a rich and complex web of history, the present, and what is to come. To truly seek justice and 'truth', in this context, requires a perspective that is able to comprehend these different rhythmic timeframes.

5 Conclusion

This article has suggested that the Marikana Commission's focus on a linear trajectory that prioritised progress created a teleological approach to truth recovery that led towards the production of a Final Report, and thus, closure. This linearity, enforced by legal procedure, would not allow bodily experience to impact this course. But by foregrounding bodily encounters at the Marikana Commission, it becomes clear that bodies were caught up in a cyclical and repetitious pattern of engagement with the Commission that stood in stark contrast to legal procedure's linearity. These cyclical rhythms showed the Commission was considered a place of danger, not safety; a place where inequality and privilege influenced proceedings; and where legal procedure often led to a fragmentation of bodies from their worlds. Such linearity was

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made even more problematic by the publication of the Final Report, which failed to offer the long-awaited and advertised ‘closure’ for some stakeholders.

By the Marikana Commission’s failure to recognise the ‘antagonistic unity’ of linear and cyclical rhythms, as brought forward by a bodily perspective, the Commission was risking irrelevance for those stakeholders most impacted by the massacre – widows, survivors, and those injured, arrested and vanished. The alternative perspective brought to bear by bodily experience shows how disempowering linear legality can be; and highlights the mismatch of expectations and reality when considering the long-awaited goal of the Final Report.

The seeking out and valourising of the ‘antagonistic unity’ of linear and cyclical rhythms reduces the risk of approaches to truth-telling that actively disempower stakeholders. Recognition of cyclicity alongside linearity could allow such mechanisms to be better equipped to manage expectations regarding what can be realistically achieved by these fora – providing grounding for their oft-mentioned grand ideas of closure, truth recovery and justice. But critically, focusing on Leiboff’s ideas of a theatrical response – an immediate and visceral bodily engagement that uses lived experience to bring law out into the world that created it – bodily performance can not only alert to issues of injustice, but actively counter them too. Prioritising corporeal encounters inside truth-telling after atrocity at Marikana have been shown to increase empathy, give prominence to the ‘ordinary’ and bring law out of itself and into the lifeworlds of those it impacts. Such sensory engagement – and the resultant victories it can claim – demonstrates both the power and necessity of foregrounding bodily performance inside the law.

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Endnotes

- 1 Robyn Gill-Leslie is a Post-Doctoral Researcher at the University of Leeds.
- 2 eNCA, Eye Witness News and Reuters were three TV stations with cameras. See eNCA 2012.
- 3 The term ‘restoration’ appears in the Marikana Commission’s motto of ‘truth, restoration and justice’. While different from the term ‘reconciliation’, the motto implied an emphasis on the less forensic aspects of truth-seeking could be expected from the Commission.
- 4 The death of Paulina Masuhlo was excluded from the Commission’s ToR. See Marikana Commission of Inquiry Day 102: 10879 – 10882.
- 5 This is the motto of the Marikana Commission.
- 6 For examples of this, see Marikana Commission of Inquiry Day 26: 2745, Day 79: 8400.

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