‘Do you understand how much I have transgressed here?’: interrogating dynamics and consequences of noticing in the post-colonial legal self

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1 Introduction

In Western thought since the turn of the 20th century, technocratic and emotional influences continue to challenge positivist legality shaped by the assumptions of the Age of Enlightenment (Laster and O’Malley 1996: 24). In the context of a judicial institution, this is seen, for example, in a shifting scholarly focus from abstract norms to the conduct and experiences of judges. This can be seen in European Judge Gaakeer’s (2019) reflections on the judicial role, British scholar Moran’s (2019; 2021) work on the judiciary, an international study calling to ‘reconstruct the imagined judge, to more closely reflect the realities of judicial practice and culture’ (Anleu et al 2020: 146).

This literature is largely focussed on common law or the Western European civil law experience of judging. What has been less considered is the Baltic experience, nation states that had previously been subject to the formalities of Soviet legality as a mode of positivism, and the move to a different legality grounded in the ethos of Western European legalities. Lithuania provides rich grounds to explore changes in positivist legality because of the historical entanglement of different

legal cultures, using theatrical jurisprudence to rethink the practices of judging. After half a century of the Soviet rule, thirty years since the end of the totalitarian regime and seventeen years of European Union (EU) membership, Lithuania's ongoing negotiation of historical reality could be seen in the European Court of Human Rights' recognition of Soviet repressions against Lithuanian resistance as genocide, as well as from the judicial corruption scandal involving a part of the Lithuanian judiciary that made international headlines in 2019. The role of Lithuanian judges has been continuously reformed. This is driven by both national and EU politics and in pursuit of professional delivery of justice as a practical exercise. In a recent study, Lithuanian scholars acknowledged the importance of practical ethics in judicial work (Navickienė 2018) while Max Weber's *ideal type* was used to rethink the ideal of a judge (Navickienė and Žiemelis 2016).

What has not been considered in this nascent rethinking of the judicial role in Lithuania of how judges react to and respond to the challenges of law in this state of flux. What is clear is that there is only so much that formal explanations of law and judging can do to help judges negotiate and traverse these challenges. In this paper, I will explore an alternative, that is, how an awareness of the body (trans)forms an understanding of the judicial role, and conversely, the consequences that flow from a negation of the judge as a responding body. To do this, I use data generated in focus group discussions and interviews[2] that I conducted in 2019 with Lithuanian judges and the creators of a historic Lithuanian television judge show. I draw on cultural legal studies methodology (Sharp 2015), underpinned by active audience and legal consciousness theories and theatrical jurisprudence as a critical practice, to explore the conditions of noticing through reflective analysis of emerging awareness in the postcolonial legal self. Theatrical jurisprudence provides invaluable tools to interrogate the shift of legal self from dogma to embodied practice of law 'because theatre takes us back to our bodies and how they attenuate law' (Leiboff 2019: 31).

Deploying theatrical jurisprudence, as performed through these judges, reveals complex negotiations of legal positivism and the

disembodied ideal of a judge, as well as a shift towards the practice of performance in the theatrical jurisprudence sense. Positioning this transition from dogma to practice on the tension between the fiction and reality provides in-depth insights on the development of noticing legal self, and what this means for judges in Lithuania.

2 Towards a caring legal self and the conditions of noticing

In the outset I briefly explained my interdisciplinary methodological approach as I practise challenging positivist abstract legality in Lithuania, through my own experience. Starting as a legal secretary and progressing to a judge's associate, I lived my life for more than 15 years in a Lithuanian court. As this life under transitioning Lithuanian law progressed, I developed a feeling of something unbearable – or perhaps dying – in me but had no means, nor courage, to articulate it. So, I left. It is theatrical jurisprudence that encouraged me to pursue this in-depth interrogation of Lithuanian legality and legal self. Critical reflexivity, emerging from the overlap of liminality and transformability of a postcolonial agency with theatrical jurisprudence's demand for bodily response and responsibility, enriches noticing for the post-colonial legal self. It also offers ways to notice and respond to injustice through the challenging experiences of a democracy in flux. This critical reflexivity allows one to interrogate conditions of challenging the Weberian or Kantian denial of the body.

Now I want to elaborate on my borrowing and adaptation of theatrical jurisprudence to Lithuanian legality. Through the practices of post-dramatic theatre, theatrical jurisprudence aims to inculcate responsiveness into the legal body and gives tools to challenge common law practices of antitheatrical legality in order to notice when law goes wrong (Leiboff 2015; 2019). I am indebted to theatrical jurisprudence as I borrowed and adapted its wide range of tools: the theatrical as an encounter and experience that demands bodily response (Leiboff 2005: 33, 35-36; Leiboff 2015: 29-30), noticing (Leiboff 2005), theatrical antonyms that enable noticing by revealing what law is missing (Leiboff 2019: 138), challenges to the algorithmic lifeless practice of law (Leiboff

2019: 4) and performance as practised humanity (Leiboff 2020: 334).

The conditions in which I interrogate a shift from dogma to performance were created through judges' engagement with the judge shows. At the start of the focus group discussion, judges had an opportunity to watch the extracts from two Lithuanian fictional courtroom television shows. First, they watched a decision in a civil case announced on the 28 February 2003 episode of the Lithuanian television show *Court*, which aired from 2001-2004 and was produced by the production company Just.tv. Then, judges watched a verdict announced in the 9 March 2018 episode of the Lithuanian television show *Culture Court*, which aired from 2017-2018 and was produced by the production company Pradas. The focus group participants were unfamiliar with any of these shows, except Judge Andy who admitted having seen the historic show and advertisements for *Culture Court*, while Judge Brook, despite not having seen these shows, described them as 'auto-erotic' and compared them to similar popular shows in other countries like Russia (Focus Group 2: 2). The largest focus group consisted of one judge who was trained before the independence and then equal parts of judges trained in between or after Lithuania joined the EU. The tension between fiction and reality shaped by court shows generates exceptionally responsive space because it functions like the theatrical, which 'is encounter, and a physical experiential encounter … that … expects us, requires us, to accept and respond to the things that simply occur' (Leiboff 2010: 389).

The judge shows are expected to be perhaps controversial but still entertaining. To quote the producer of one of the fictional courtroom television shows who kindly agreed to be interviewed but chose to stay anonymous:

> We should understand that it was really hard to bring in people to a TV show … which was [a] theatre or circus of sorts … But the majority of the cases that were on our TV trial would have hardly reached the real courtroom. So, sometimes we had simply to succumb to the game (Tae 2019: 3, 5).

But for the judges in the focus group discussion, short extracts of

the shows did not function as entertainment. Instead, this tension between fiction and reality animated a sense of powerlessness through the perceived threat of doubts in courts' ability to achieve justice. After talks about the characters and performance of authority on the shows, question four invited participants to self-reflect on the effects and influences of the shows. I invite participants' reflections on this *Culture Court* message:

> Thank you, Honoured Jurors, for your opinion. Today we have a twofold situation. An issue regarding the newest [book] 'Criminal Odyssey of the Cucumiform' by the honourable journalist and the facts depicted in it, real facts, has been previously brought to the court and a ruling already issued. The character should have been acquitted of all the charges against him under the Article 39(1) of the *Criminal Code* of the Republic of Lithuania.
>
> However, this is a court procedure in this studio, and I wish to slightly twist the verdict. Considering some contempt of the court that we faced in the studio, also a total absence of repentance, as well as what has been proven by the prosecutor that the accused Vytas has shown no remorse, nothing ensures that after leaving this studio he will not return to the previous activities of the gang.
>
> Therefore, my decision would be as follows: to concur with the prosecutor and to apply the article 59.2.1 of the *Criminal Code* of the Republic of Lithuania that it [active cooperation with the criminal investigation] was a mitigating circumstance as it helped to solve the crimes committed by the organised group of criminals. I would like to conclude by saying: let us not chase and succumb to the allure of quick money. There is a good expression that 'Almighty gives with one hand and takes away with the other.' Hence, it is better to earn an honest penny and to sleep tightly. I will see you the next time when solving the problem that is no less important (*Culture Court* 44:20-45:47).

Experiences of the shows' effects generated different concerns as participants responded to this message. The interplay of concerns revealed two competing paradigms, but in both the judicial role is seen as determined by law. As Judge Nole reflects on effects, a threat of

doubt in courts' ability to achieve justice is revealed, where the reality determined by the shows is seen as interfering with legality shaped by the rules of conduct, the court procedure rules, and responsiveness to the public:

> These shows have a purpose to determine the truth for the society, but they never show the aspect of the judicial work. I often notice that people ask: "Why the decision is like this? The right decision would be different" … As a result, people do not understand that judges also have to obey the rules of conduct as well as the court procedure rules. They never show that. We see the court procedure clearly in the American movies but in these shows we do not portray that … For example, like in [*Culture Court*], as I understand, the person was acquited, but the society wants to sentence him. Perhaps a judge also wants to sentence, perhaps he sees that something happened in there, but he has no evidence (Focus Group 2: 10).

The interplay of Judge Nole's cautious articulation of her understanding of the *Culture Court* idea 'acquitted, as I understand', and her association with the public through a shared punitive desire reveals a concern with obscuring shared interests due to the evidentiary rules. The significance of evidence plays out through the concern with a prohibition to punish in their absence, which hinders a shared desire to punish. In the continental legal tradition, that was described as an 'antilegalism … culture in which the idea of democracy resides in politics alone' (Villez 2009: 332). The fear of the TV shows obscuring this shared desire and challenging courts' ability to achieve justice could be seen as a manifestation of a 'bow to the popular will' (Porsdam 2017) which at the time of the focus group discussion was shaped by the populist right-wing politics of the ruling majority.

Unlike Judge Nole's perceived threat to a punitive desire shared with public, Judge Nev responds to a perceived threat to the image of a judge as objective and impartial as he builds on Judge Nole's interpretation:

> Judge Nev: Well, a judge also doesn't say "I think you did it, but I don't have evidence. So, you are free to go." This is not acceptable, but this is what they conveyed in that show.

> Judge Andy: No, no, no, a judge cannot say this.
>
> Judge Nev: The problem here is that sometimes the category of justice is being mystified, what is right, what is wrong (Focus Group 2: 10).

With a certainty, Judge Nev reformulates the *Culture Court* message as if the fictional verdict set the defendant free. The significance of evidence plays out through a concern with an act of saying that a defendant is free despite the judge's belief in his guilt. Therefore, I suggest that Judge Nev's response also evokes a threat to an illusion of an unquestionable authority. Judge Nev's condemnation[3] of an imagined stepping over the boundaries by the fictional judge is also shared by Judge Andy as she passionately concurs by reiterating the act of 'saying this'. Psychology research has argued that, in communication, condemnation is used to make claims to objectivity and impersonality (Lamb 2003: 932); therefore, these judges' passionate disapproval could indicate a perceived threat to the ideal of a positivist judge.

These few examples revealed interplay of different legalities on a tension between fiction and reality, as perceived through *Culture Court*. What is common to these accounts is their shared commitment to formal law. Discussions shed a light on the participants' experiences, shaped in the conditions that demand bodily responses to a challenge of the legality that these judges were trained into, because:

> a sensory disruption of the theatrical interferes with law's ontologies, including a spectral normativity that has its origins in a deep hostility towards theatre, out of which legal antitheatricality was shaped … provoking a dangerous and transgressive response, initiating and provoking potential lawlessness (Leiboff 2019: 9, 90).

In these conditions, bodily responses animated negotiation of formal legality through practices of theatre. This is the focus of the next section.

A Theatrical antonyms in post-totalitarian context

Negotiation of the formal law in response to the challenges of theatrical antonyms and self-reflection created the conditions to raise awareness

about various dimensions of judging, which in turn led to rethinking of impartiality and emotions in the judicial role. I outlined in the outset the circumstances that indicate the context of democracy in flux due to memory politics. Cserne argues that 'unresolved problems of collective (political) identity of the societies' (2020: 883) are revealed in the debate on formalistic judicial styles of Central and Eastern Europe countries. A clash of competing narratives manifested between Judge Greer and Judge Brook in the beginning of the focus group discussion. Underpinnings of an anti-formalist narrative are visible in Judge Brook's challenge to the core of the formalist judging, specifically – depersonalisation of a judge:

> Judge Greer: The first mistake which caught my eye was that the judge announces a decision as if from herself. But the judge never announces [a decision] from himself, he announces a decision on behalf of the Republic of Lithuania or on behalf of the court. Well, because the decision is depersonalised from the judge. It was "Well, I say this, and I make this decision", right? It is at once her decision, not the court's. This is a mistake, of course.
>
> Judge Brook: I could argue with [my] colleague about this being a mistake. Because in contrast to you, I announce the introduction and resolution, after that I do not look at my text and explain what I am thinking and why I made such a decision (Focus Group 2: 12).

In contrast to the normative Judge Greer's commitment to the abstraction, Judge Brook's gesture of resistance speaks of the presence and the personal against the declared detachment. This challenge of the embodied authority to the depersonalised authority plays out as a tension between the theatrical and antitheatrical through 'transgression as antonymic of order, [which] offers a means through which we manifest what it is we notice, while liveliness and courage, as antonymic of morality, asks us to act and respond rather than deferring to ideals and abstractions' (Leiboff 2019: 138). That is, Judge Greer points out as a clear mistake a fictional announcing of a decision based on one's personal choice. His impatience is situated on a tension with a fictional whim that interferes with a judicial authority given by the State through

the Constitution. In response to Judge Greer, Judge Brook invites discussion on the role of a judge. Judge Brook actually cites Article 308 of the *Code of Criminal Procedur*e of the Republic of Lithuania, 'Announcement of the Sentence', but he animates the abstract norm with his own lived experience. Juxtaposed to Judge Greer's critique of an announcement from oneself, Judge Brook's liveliness created conditions to notice how announcement only in the name of other animates the theatrical mask which evokes the distance from the responsibility of the decision (Mohr 2007: 123) by separating the grounds of legal judgment from the judicial self.

Theatrical antonyms function as tools for awareness of the reappearing injustices of the past (Leiboff 2019: 138). However, they can also easily deny justice if a body is not trained 'to unite consciousness and instinct' (Leiboff 2019: 37). Judge Brook's second challenge to the formal law also undoubtedly speaks about the legal disruption. This time, the abstract law confronts liveliness that is positioned on the very 'edge of danger' (Leiboff 2019: 105). This interplay of theatrical presence and formal legality created an encounter that demands bravery. But animation of the theatrical antonym of courage, situated on the opposite end of a scale to morality, created conditions to notice manifestation of the body politics of the past. As I suggested in the previous section, participants' interpretation of the *Culture Court* message problematised judicial authority through the evidentiary rules, although with different stakes. It is in these conditions that Judge Brook's transgression steps over the rules of ethics into the life to prompt nonconformity:

> Judge Brook: People are people, especially in the criminal cases. Someone from the civil case hearing judges, perhaps Judge Nev, said that we shouldn't. Well, I have not much time left to work so I am not afraid of anything. [*laughter*] The time has come when I can misbehave. Not literally, so that not to disrespect and breach ethics. Well, if I acquit, I say, you know, I don't have evidence, but I feel intuitively that they could have and perhaps they did that. Well, there are those situations when. in the evening, you think, "I will sentence". But later you think: "There [is] no evidence, but well maybe."

Judge Alex: I'd like to.

Judge Brook: So that the person would leave with the realisation that I am not that naïve, and it is especially needed. My rules of the game are the Code, the court procedure rules, the examination of evidence and so on. But also, there is life. I don't want to give up. I don't want a person to leave, and I let him know that, you know, according to the examination of evidence and so on, but intuitively I think to myself that he could have done it. Someone could say that it is not good but …

Judge Andy: In my mind, it is awfully wrong, because there is such thing as the presumption of innocence.

Judge Brook: Huh.

Judge Andy: And we must respect it. But when we say so, that is it. There is no presumption of innocence.

Judge Brook: No, no, no. Here, I disagree. No, I disagree. This is a dilemma of life and work, the problem of all judges in all tiers and in all countries.

Judge Andy: Um.

Judge Brook: Well, but how, if you intuitively comprehend that most likely he has done it, but you must acquit because you don't have that base. You must …

Judge Andy: You must respect that verdict and that person and do not say anything (Focus Group 2: 12-13).

The tension between Judge Brook's passionate defence of judicial authority and Judge Andy's similarly passionate outrage about disrespect of human rights constructs an atmosphere where a clash between formal legality and authority beyond law becomes visible. I see a role of Judge Andy's insistence to respect human rights as a twofold here. On the one hand, it is undeniably inhumane to strip a person's ability to defend themselves at the court of law. However, the 'strong rhetorical function' (Sliedregt 2009: 260) of the presumption of innocence here also could be seen as a muting of a speaking body

(Leiboff 2015: 83) while Judge Brook's passionate insistence on the importance of lived experience could be seen as resistance to the law's dramatic pretence which functions to guard:

> the legal interpreter from the unruliness of the body. The lawyer's lifeworld is held in the body, through training that points us to notice, or fail to notice, what law holds within it … What that training does is make us responsive or unresponsive, through law (Leiboff 2019: 30).

Indeed, Judge Brook's voicing of the lived experience appears to me too chaotic to be unambiguously shoehorned into the presumption of innocence. By letting the body speak Judge Brook again challenges disengaged judging, and the myth of an ideal of justice through formal law. The theatrical antonym of 'instinct, as antonymic of thinking … is what's needed to respond to the liveliness of being or the possibility of noticing as sympathy' (Leiboff 2019: 138) but this instinct must be united with consciousness or else it becomes exhibitionism (Leiboff 2019: 37). Judge Brook's intuition here is situated on a tension between irrational and rational, but this tension strongly resonates with a theorisation of the slippery boundaries within the Soviet criminal justice, where a more:

> imaginary than real political criminality embodied one basic principle of the Soviet concept of crime – a replacement of the concept of guilt with the concept of danger to a personality. Those people were prosecuted not because of what they had done but because of who they were. Here the concept of a 'possible crime', developed by Arendt seems to be close to reality (Kareniauskaitė 2017: 191).

Another echo of legal antitheatricality is evoked by Judge Brook's form of encouragement in response to Judge Nev's concern with vulnerability of an absolute authority but without any concern how it effects law; like 'an image of law that affords the legal self – not only the actual site of power – an untrammelled sense of self-authorisation' (Leiboff 2019: 25).

The importance of awareness beyond the self and the work it can do for legal antitheatricality manifested in the conditions created through an intersection of three competing paradigms. After reflecting about

the effects of the shows, the focus group participants were invited to imagine an ideal judge to be portrayed on television:

> Judge Nev: The Code of Judicial Ethics ... clearly states what is forbiden ... Because at least those people in my environment do not understand and they say, "Why judges are silent when someone slander them [or] that silly or smart decision." A judge cannot do it, ethics do not allow. [*laughing*]
>
> Judge Alex: But I'd like to take notice of how [on television] they show a judge after he announced the verdict. He is interviewed and he himself comments about the sentenced person that the behaviour was brutal. [*sighs*] That was really inappropriate for me. The judge can't do this himself. You decide, you make a professional announcement, you tell what the sentence is. But when the judge evaluates the behaviour after he leaves [the courtroom]. I don't know – this conduct is certainly not appropriate. You know, afterwards I at once turned off [the television] and didn't watch it anymore. You know, it is not acceptable in any way. …
>
> Judge Brook: I've also heard how a chairperson of a judicial panel, a woman read the sentences and then commented … Starting from the Polish Constitution and finishing with emotions and all. That was fantastic. That was the judge. I am not sure if I could read a verdict like that. But this part impressed me as a judge.
>
> Judge Alex: In opposite. [*laughing*]
>
> Judge Brook: In opposite to Judge Alex. Have you recently heard our former colleague's comment in one case? I had a pre-trial detention and questioning in a murder [case] of a watchman.
>
> Judge Alex: Um.
>
> Judge Brook: I liked the comments. By the way, her comments were spontaneous when she left after [the announcement] of the verdict. Her comments were good, emotional. But I believed her. And I think that people believed her too.
>
> Judge Alex: But does the judge have to do that? (Focus Group 2: 14-15).

Against Judge Nev's retreat to the formal rules on display, Judge Alex's disruptive sharing of a memory as antonymic of order manifests a practised humanity and awareness beyond the self (Leiboff 2019: 138). Instead of imagining an ideal as the question asked, Judge Alex expresses care about professionalism but also about a person who was condemned by the judge publicly. A fascinating contrast between the judges' reactions to the public speaking of their colleagues plays out. This contrast is surprising to the judges themselves. What created a strong bodily repulsion for Judge Alex, for Judge Brook inspired awe.

As two competing paradigms clash, I suggest that Soviet legality and justice plays out in Judge Brook's narrative. In particular, it resonates with guidance in a Soviet 1949 instruction book for adjudication whereby 'the persuasion that the decision was just and fair rather than taking the just and fair decision was considered to be the most important task of the judge' (Kareniauskaitė 2017: 190), but also with the later Soviet justice practice of 'public condemnation and contempt as a method of social control, crime education and prevention ... [in which] possible public condemnation of the criminal became one more aspect of punishment and a punitive measure' (Kareniauskaitė 2017: 295).

In contrast to Judge Brook, Judge Alex does not embrace the control paradigm. But it would be a mistake to ignore their surprise about the disagreement, and I suggest that Judge Brook is surprised about why Judge Alex does not share his resistance to the negation of the body. But, in fact, Judge Alex does not share his shaming and social rejection of the offender. It is important how, in his second story, Judge Brook replaced the judicial shaming of the offender, which had been bodily protested by Judge Alex in her reflection, with the emotional aspect in the judicial talk. This indicates his active self-reflection during their communal meaning-making, even before Judge Alex openly prompted him to reflect on the judicial role. In this liminal space created by the encounter, three competing paradigms get a chance to negotiate, reflect and embody a new way to relate to the self and beyond the self.

B Transformations: performance v antitheatricality

> The body reveals something to the self: that she or he sublimated through learning *to be decided* wrought by dealing with practices, methods and logics that are counterintuitive to that self at best, and antithetical at worst. … But one form of physicality and training into the body means that it's also possible, through training, to become habituated into the practices imbued in the theatrical antonyms to shape new intuitions, to trigger different responses based in responsiveness (Leiboff 2019: 39, 40).

In the conditions created on the tension between fiction and reality shaped by the judge shows, transformations revealed challenges to the disembodied ideal of a judge. The understanding that impartiality should not deny humanity shows how law's function was reconsidered from a formalist instrument into the relationship with the parties of the case. Judges Nole and Alex resisted body negation politics and this prompted a reshaping of the dispassionate role of a judge:

> Judge Nole: My position is that a judge should not be very formal. I mean, the judge should respond to a person. I don't mean instructing what is forbidden but also not saying how you understand them, how sad you are, how sorry you are about their misfortune. But you should not be cold, stone-faced and unresponsive. We laugh in the courtroom.
>
> Judge Andy: No, no.
>
> Judge Brooke: Because it [being cold and stone-faced] is not genuine, not genuine.
>
> Judge Nole: And we all laugh. Well, I mean if the situation is really funny, I definitely do not sit stone-faced as if I do not understand what is happening. So, my opinion is that the judge should not be completely formal.
>
> Judge Brook: Yes.
>
> Judge Alex: We have very formalised [court procedure]. I'd like to share my experience of participation in … England's [court] procedure. I was surprised when a judge came. They do not have to wear robes

> at the first instance court. Then the parties arrived. And they all sat together in the front and communicated as friends. This impressed me a lot because I saw it six or seven years ago and I thought, this is it.
>
> Judge Nole: In the Southern [European] countries it is the same.
>
> Judge Alex: Yes, they are like friends; they came to talk to the judge as friends. And there is this proximity. Of course, [if] you can reach more amicable settlements that would lead to the effectiveness and efficacy of your work. Because for example sometimes it is pleasant when they say: "Judge, could you help us to agree?" So, they come, and they trust you. You are not ice-faced, arrogant, [or] vain. You sit and communicate closely. So, I think, perhaps the most important is that proximity of communication. Not coldness, formality. I am certainly against formalised court procedure (Focus Group 2: 18).

The judges collectively challenge a formal judging style, which is unresponsive and stone faced. This demonstrates practical empathy as responsiveness, as shared laughter, as well as showing how 'for law to inscribe itself in the various bodies it turns into effect' (Philippopoulos-Mihalopoulos 2019a: 217). But it is Judge Alex's transformation that marks a theatrical shift in judging practice. In line with her earlier expressed repulsion of condemnation of the offenders, here Judge Alex further de-centres attention from the judge and, by doing this, challenges the dichotomy between the authority and a subjugated, bringing change into an understanding of the relation between a court and the litigants.

Judge Alex dramatised her encounter of a procedure in an English court of first instance, prompting these experiences 'to press on our expectations and assumptions in law, and to think law differently' (Leiboff 2019: 64). That is, the interplay of feelings, bodies, past and present reveals that Judge Alex's body is ingrained with an impression of a style of judging that is very different to a disciplining court environment in Lithuania. Prudence in a theatrical sense (Leiboff 2019: 64) here develops as a relationship of friendship, where an interplay of sympathy and proximity replaces the distance expected of an ideal judge but also uncovers that masked under the ideal of an ice face are

arrogance and pride. Judge Alex is bodily returning this ideal to the past as she articulates her experience of being strongly affected and impressed around 2010. At this time, while Lithuanian legality still transitioned from uncertainty, lacked judicial competence, and applied outdated legal norms, it also started moving towards technological effectiveness of court procedure. Once Judge Alex returns the friendly relationship to the present, it becomes 'an engagement that uses the agitations of the soul to take responsibility for our practices, the actions and manifestations of our own law' (Goodrich 2020: 598). I suggest this because of Judge Alex's pleasure in proximity when parties ask her help to settle as it creates trust. This trust is in stark contrast to a formal disciplining of an ice-faced ideal. This is a performance in the theatrical jurisprudence sense because Judge Alex manifests a shift from an abstract formal authority into the embodied practice of law (Leiboff 2020: 332).

Another instance of the shift in the understanding of a role of judge was prompted by awareness that impartiality does not require body negation. Judge Nev's understanding of the judicial role transformed through the reshaping of the impartiality as not threatened by the body:

> Judge Nev: My concern in the scope of this topic would be a signal for the public to understand us. Because in Judge Greer's talk, I detect the same subtext that a judge adjudicates, I don't like the word, objectively. He is impartial. He is a subject; he always passes the evidence through himself. This way he listens to the law that talks about sufficiency of evidence – whether there is sufficient evidence or not. But I decide it subjectively; impartially, but subjectively. So, this suffice for me if people understand that I am a person, subject, not some robot, impartial but personal.
>
> Judge Alex: Not an object. [*laughing*] (Focus Group 2: 19).

Judge Nev's awareness about subjectivity not being in breach of impartiality prompts him to resist body negation politics. Note how Judge Nev's law is talking – it is animated from the books into orality as the judge, through the embodied self, decides on the sufficiency of evidence. In this context, the embodied practice of law is juxtaposed

to a robot, and deciding in a formalist manner is problematised like Judge Brook did in the beginning of the focus group. This significant transformation of understanding about the role of the judge is in stark difference to the formalist judge.[4] Resistance to body negation that plays out in this quote is indicative of the totalitarian body politics that persists to this day in the training methods of Lithuanian judiciary that propose judicial professionalism as a Weberian charismatic practice of detachment of the self (Navickienė and Žiemelis 2015: 194).

The implications of this demand of disembodied authority played out in Judge Greer's concern with the judicial impartiality. This concern manifested early in the focus group, when Judge Brook and Judge Andy shared a desire for the authority as seen in United States movies. The judges were impressed with a harsh punishment for contempt of court:

> When a litigant said a phrase which a judge disliked, the judge used the beckoning finger to summon him … then in front of everyone … the judge said: "Now I amend the ruling and you will not be released." So, my purpose is to have the court procedure like that (Focus Group 2: 5).

The finger in this story marked untrammelled power for Judge Brook but for Judge Greer this gesture evoked a concern with impartiality. This finger returns in Judge Greer's imagination of the judicial public image:

> Every person has their own sense of justice, and they leave a court unsatisfied with a court's decision. So, it could be shown how judges make decisions … It's not done simply with the finger, "Well, I don't like that one, therefore I will mistreat him" (Focus Group 2: 11).

Here, the finger instead of the former meaning of empowerment now marks the disturbing practice of a 'power over law' (Leiboff 2019: 26). Hence, though Judge Greer, like the other judges, shared doubt of courts' capacity to deliver justice, and he also became aware that it has some truth to it (Sharp 2016: 65). Consequently, in contrast to others, Judge Greer's strategy was not a move towards embodied judging; instead, he chose an extreme and highly contested method to ensure impartiality:

> Judge Greer: So maybe I would add to judge Nev's [*laughing*]

> impartialities. I totally agree that we are subjects, and we have both our own mood and opinion and position, but that we sometimes understand impartiality differently. Because impartiality, too, is, from my point of view, that I depersonalise, I am emotionless with each participant in a case. When I sit in a court procedure and listen, I can feel all kinds of emotions. But when I write a decision and consider evidence, I do not feel emotions to any of the litigants, not those strong [emotions], no? Because compassion can be for both.
>
> Judge Nev: You feel emotions for proof.
>
> Judge Alex: Neutralise yourself, in other words.
>
> Judge Greer: I neutralise myself; I decide and then, let's say, if it is unfavourable to someone … I feel sympathy.
>
> Judge Andy: Psychologists say that there are no decisions without emotions; it is impossible.
>
> Judge Brook: Impossible. No, no.
>
> Judge Alex: We are still human.
>
> Judge Greer: I still in a way know how to get emotionless.
>
> Judge Andy: No but really, a person without emotion could not do anything. Because what drives us is, well, are emotions. [*laughter*]
>
> Judge Brook: Come on Andy, get emotionless (Focus Group 2: 19).

Here we see how Judge Greer disowns his personhood for the sake of a role as he gets convinced in court's inability to deliver justice in the face of the untrammelled power over law. But this is:

> turning away from lived experience in the face of a structured script, as an exemplary instance of legal antitheatricality, and with concomitant consequences for justice, fairness and the lifeworlds of law, and for health and well-being of those caught in its wake (Leiboff 2019: 57).
>
> Judge Greer's arduous work 'to render the body, with all of its foibles, mute' (Leiboff 2015: 83) is not only a diligent conformity to the laws

> but also an embodiment of a hybrid post-totalitarian identity, a body disciplined into a submissive subject (Kvedaraite 2019: 26).

Comparative law scholar Mańko describes the concept of hyperpositivism as 'an extreme version of classical legal positivism, mixed with elements of orthodox Marxism-Leninism, in the form created in the Soviet Union in the 1930s and exported to Central European countries after World War II' (2013: 207). Judge Greer's hyperpositivism manifests as none other than the embodiment of a 'human algorithm' (Leiboff 2019: 6). I join here the long line of persons indebted to Marett Leiboff for her generosity in encouraging me to borrow and adapt her notion of a 'human algorithm' for the continental law context. Since by refusing own humanity Judge Greer also eliminates possibility of law as sympathy (Leiboff 2019: 133), his law is committed to save humanity at its own expense (Philippopoulos-Mihalopoulos 2019b).

These few examples shed light on the ways that emerging awareness of the body is transformative for judges and prompts them to challenge an ideal of a dispassionate judge and disengaged judging, but also provokes its embrace in the extreme form. The threat to judges' ability to deliver justice challenged 'law's ontologies, including a spectral normativity that has its origins in a deep hostility towards theatre, out of which legal antitheatricality was shaped' (Leiboff 2019: 16). The second part of the article turns to one more site of bravery. I am indebted to theatrical jurisprudence for being able to register a sacrifice of a courageous Judge Brooke who through his transgressions created conditions to respond to instrumental law and algorithmic judging.

3 Post-totalitarian 'poor theatre' as theatrical jurisprudence

At first, I believed that Judge Brook's theatricalisation of a case in the end of the focus group played out as a sacrifice of the courageous judge who performed theatrical jurisprudence:

> Judge Brook: In order to make you laugh, I am not afraid even when the recorder is present. No, I am not afraid of anything. Even of the

recorded! [*laughing*]

Judge Greer: Emotions are free. [*laughing*]

Judge Brook: It is from my court procedure. A man, I am not going to reveal his name, but I know, I remember. Summertime. [He is] overweight, with a shirt with some kind of emblem. He came to the court, he rushed in. He beats his wife. It is not the first time that he has committed violence against his wife, once I or someone else suspended his sentence. So, I started explaining that it [is] not acceptable. [He is] about 55 years old. The wife says: "You know, it's not that he drinks but he's somewhat crazy." She says: "He talks about the army where he was promoted to a sergeant. So, if something is not to his liking, he goes 'bring me, as the sergeant, a pancake' or hits me 'you know that you are disobeying the sergeant?'" And he started to misbehave in the court procedure. So, there was this problem: whether I will fine him, or I will order a temporary sentence of imprisonment. So, he keeps repeating about being the sergeant. Well, I see that he also disobeys the judge, so the court procedure is going somewhat not well. I am thinking what could be devised. I say: "S, please rise." I say: "Do you know who sits in front of you?" "No. The judge?" So, I say, and we have the recorder. Considering that I am not afraid of anything, that is not good, I repeat that for the third time, perhaps I am afraid of something, that's the logic. Alright, I [will] keep on telling the story. So, I say: "The captain is sitting in front of you." He turned around: "It's impossible." I say: "Well, there is the recorder, I am the judge, so I won't lie. Indeed, the reserve captain." He stood up: "I listen, what should I do?" I say: "Be quiet." "Alright, anything else?" says. [*laughter*]

Judge Nev: "Please allow to carry out."

Judge Brook: "Please allow to carry out, captain." [It] almost should be decided whether he needs a mental treatment. I have sentenced him; afterwards somebody annulled the enforcement of sentence. He telephones me: "This is a sergeant S, captain. What would be your advice for me? You know, some judge has annulled the enforcement of sentence and wants to send me ... What do you think captain, should I now pretend to be from a nuthouse?" He means psychiatric hospital. "Well, I don't know you should consult a lawyer." He says:

> "You know, captain, a nuthouse is not good. I will not be able to drive afterwards. Perhaps I should serve the term. So goodbye captain, until the next time." [*laughter*] I said: "Goodbye sergeant." This is my case; this is my life.
>
> Judge Alex: And what about the disorder?
>
> Judge Greer: What is this disorder? [*laughing*]
>
> Judge Brook: Do you understand how much I have transgressed here? If we would start discussing here to what extent and what is the reason.
>
> Judge Andy: Well, that is beautiful. You could show that on TV. [*laughing*]
>
> Judge Brook: You know, it is possible to write, to make a show à la comedy, a fictional court. But this was the real court. And you know when the sergeant called to consult with me if he should go to a madhouse or to a jail (Focus Group 2: 20-21).
>
> I was wrong.

A Responding to the total act

The combination of heterogeneous matter (body, language, space, rhythm) and sensory – mental reality – which is 'illogical' according to the standards of reason yet displays a structure all the same – offers the deceptive appearance of thinking; at the same time, it calls for one to think about the deception it practices (Leiboff 2019: 16).

As I resist my embodied positivist legal self, logocentrism and a strong pull towards antitheatricality, the discussion turns out not as perfect as I wish it would be – this wish is positivist as well. Nevertheless, I feel urgency in Judge Brook's drama that cannot wait so I keep finessing my skills as I go. The distressing antitheatricality of my initial thought prompted me to remember an opportunity to become aware of and to practise my responsibility as a listener.[5] So, to practise theatrical jurisprudence and to be a better listener of Judge Brook's story, I retold it and then compared my own retelling with the original Judge

Brook's story. Guided by the theatrical jurisprudence, the omissions and additions that I contributed speak of Weberian and theological underpinnings of the legality of this encounter, which I will discuss now.

In the retelling of the story, one of my omissions was a notion of a 'reserve captain' perhaps as unknown and irrelevant, but also as mundane due to the persisting 'national Soviet' heroic ideal and the cult of power still present after three decades of Lithuania's freedom.[6] The strong message of leadership in Judge Brook's story resonates with other two narratives that shape Weberian legal authority but also current Lithuanian political authority. Results of a Lithuanian research fieldwork expedition comprising a part of a national election study discussed on the major Lithuanian web portal Delfi concluded that the participants imagine an ideal president as strict but caring leader, like Jesus Christ (Voveriunaite 2021). The participants of that research see the current President Gitanas Nauseda as close to the ideal. Amongst diverse comments my attention caught the ones calling for firm leadership, where one of the interviewed retirees specified that a good German is needed to create order in Lithuania (Voveriunaite 2021). Along these ideal leadership expectations of a political authority, it is important to remember that it is a demand of judicial professionalism to operate through charisma concurrently with detachment of the self (Navickienė and Žiemelis 2015: 194) – a demand that was problematised in the outset of this paper and demonstrated through Judge Greer's commitment to depersonalisation and emotionlessness. In this context, Judge Brook's transgressive call against disembodied judging is like 'a signalling through the flames' (Artaud cited in Leiboff 2019: 5).

Similarly, Judge Andy's challenge of conformity to the dominant narrative at the time of the focus group discussion was especially daring because right-wing populists were in power, and current polls show that their popularity is growing again. Initially, I interpreted Judge Andy's challenge to judges' courage articulated as making 'public their opinions on the abortions and the same sex marriages' (Focus

Group 2: 17) as a display of politics that functions like a 'reiterating device that narrates a particular account of power over law' (Leiboff 2019: 26). Despite agreeing with Judge Andy that using 'the cloak of doctrine … to obscure politics, prejudice and so on' (Leiboff 2019: 31) would be hypocritical, I treated Judge Andy's courage as 'a threat to *logos*' (Leiboff 2019: 31). A formalist judge has only one way to resist inhumane formal law – by showing courage and burning to signal the circumstances of the oppression like Judge Brook or Judge Andy did.

Such sacrifice becomes unavoidable when democracy comes under threat. An interplay of fear and voice recorder in Judge Brook's story is underpinned by politics of control through the discipline of judicial bodies. Concerns over judicial independence as expressed by Lithuanian judges (Teismai.lt 2020: 3-26) resonate with the wider research on judicial control in EU region.[7] The growing number of vacancies for judges is one of the factors justifying currently adopted Amendments to the Lithuanian law on courts which continues the 2018 court's reform aiming to make the justice system more effective. In this context, Judge Brook and Judge Andy's resistance to disembodied law makes a space for a strong argument against the practice of law detached from the self or others because it is a deadly practice (Leiboff 2019: 31) that does not even require a human for the role.

Work with my omission of the notion of 'reserve captain' also helped me to notice how my lack of skills in the theatrical jurisprudence not only obscured, but participated in, a construction of an autocratic authority through Judge Brook's drama. Once again, I am challenging my ingrained legality, and to do so I borrow from Parsley's work with Agamben's critique of a construction of a person:

> The subject of Agamben's critique is a double gesture which stabilises throughout the Western tradition of theologico-philosophical constructions of the person. This gesture consists on the one hand of creating a parallel between the theatrical and the juridical, and arguing for their conflation; and on the other, in doing so, maintaining a division between the persona and the natura which is presupposed as the natural substance to which it attaches, a double gesture which founds both the juridical and moral person together (Parsley 2010: 25).

I can see this double gesture in Judge Brook's story as I focus on my omission of the notion 'reserve captain'. Approaching this role of a captain as a theatrical role, a blurring of the judicial and the military roles is visible in Brook's further articulation of 'indeed, a reserve captain' as he affirms the actuality of this parallel. I also noticed how, in my retelling of Judge Brook's story, I rearranged 'I sentenced him' into 'We heard the case, I jailed him.' Despite using the same pronoun, 'I', my addition of imagined 'we heard the case' speaks of *court's authority* in addition to *'I' authority*. Also, I replaced 'sentenced' with what in literal translation would be 'seated in jail' which I see as turning of legal into vernacular but also my reframing of a judicial task into the ordered body movements which could be seen to speak of law's roots in religion (Yelle 2005: 178) and politics of control (Dobrynina 2016: 120). Interestingly, in the episode where the sergeant called for some advice, and Judge Brooke distanced himself into the role of a judge by prompting him to consult with a lawyer, my only omission in the retelling was discarding such words as *well, so*, that function as a 'noise' that creates uncertainty. While a rule of no judicial consultations for the litigants is embodied in me, in this story it evokes morality connected to the judicial persona despite the antitheatrical drama of the captain and the sergeant.

The accused Vytas in the *Culture Court* narrative was sentenced considering contempt of the court and failure to repent, while the sergeant in Judge Brook's story committed himself to imprisonment. In both cases their bodies become the instruments through which a struggle between politics and law plays out. The captain's method in Judge Brook's story proved to leave no space for resistance to this ambiguous authority. It resembles 'political religion', practiced under the totalitarian rule, which is driven by 'irrational belief, emotional devotion and the ultimate attachment of the citizens' (Putinaitė 2021: 68).

4 Conclusions

Initially, I believed that judge Brook's demand to respond instead

of stopping at noticing that the law went wrong by asking 'Do you understand how much I have transgressed here and why' (Focus Group 2: 21) creates a very direct and very Grotowskian call to perform theatrical jurisprudence. I thought that, as a challenge to formalist judging, Judge Brook's expressive reimagining of authority returns 'prudence [which] represents the ideal of the individual and the society advancing together rather than at the expense of each other' (Leiboff 2019: 64). In this light, I noticed Judge Brook's resistance to formalism as a performance emerging from the Grotowskian transgressions that demands of law to enter into an understanding relation with the parties of the case.

But through a critical reflexivity, emerging from the overlap of postcolonial agency with theatrical jurisprudence's demand for bodily response, I am developing awareness of my deeply antitheatrical accomplice in cultivating a drama of 'power untrammelled by law' (Leiboff 2019: 25). Through the interplay of Judge Brook's story and my omissions/additions to it, I attempted to show how ignorance of a practice of sharing a cult of power and penalisation politics with Judge Brook facilitates 'the life of perpetual and absolute power' (Leiboff 2019: 25) and how theatrical practices of better listening and theatrical jurisprudence challenged me to notice and respond to my own reproduction of the antitheatrical legality. Without the theatrical practices I was not able to notice, challenge and respond to Judge Brook's transgressions and the circumstances of the oppression.

Perhaps Judge Brook's theatrical challenge was not an invitation to muse on the reasons and extent of his transgression. The story enabled noticing what the politics of body control and discipline mean for the living beings as they strive to comply with a disembodied ideal. This small focus group discussion demonstrated how differently each of the judges made sense of the challenges of law emerging through their encounter with popular culture. Deploying theatrical jurisprudence to rethink the practices of judging is important in the context of moving away from the Soviet legality but also in the wider context of transition towards the digital legalities.

Endnotes

1 Aiste Janusiene is a PhD Candidate at the University of Wollongong, Australia. I am immensely grateful to Professor Marett Leiboff and Associate Professor Cassandra Sharp for their invaluable and patient guidance, to the reviewers for their feedback that allowed me to notice and deepen my responsiveness, as well as to Dr Sean Mulcahy for the meticulous editing and proofreading this paper. All errors, of course, remain mine.

2 University of Wollongong (UOW) Application for HREC Approval, approved by Human Research Ethics Committee on 05/07/2018; UOW Amendment to protocol number 2018/327, approved by Human Research Ethics Committee on 01/04/2019 and UOW Amendment to protocol number 2018/327, approved by Human Research Ethics Committee on 29/04/2019. The interviews and focus group discussions were conducted in Lithuanian, transcribed, and translated to English by the author.

3 About the communicative function of condemnation see Lamb 2013.

4 I am grateful to Associate Professor Cassandra Sharp for making me aware of this.

5 At the UOW Legal Intersections Research Centre Masterclass, 'Law, Listening and Injustice', on 20 February 2020, we retold each other's stories, and for me it was rather unpleasant experience since it exposed my tendency to rearrange *new* and *unknown* according to my prejudices and biases. Even so, I strongly appreciate this encounter and find it invaluable to fracture my embodied training in antilegality.

6 'The resilience of the cult of power, as well as ideological relics of Lithuanian nationalism and even Soviet utopianism in the current heroism discourse, has led to an unsettling conclusion that the process of hero-making simultaneously and repeatedly involved an exalted idealization and deep depreciation of the heroic figures and their original ideas and/or achievements and of the historical past and historical heritage in general' (Sviderskytė 2019: 76).

7 For concerns about judicial independence in the EU region see for example, Jarukaitis and Morkūnaitė (2021); Pereira de Sousa (2020); Balicki and Juškevičiūtė-Vilienė (2021).

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