Law Critique (2008) 19:87–114
DOI 10.1007/s10978-008-9024-z

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SOVEREIGNTY WITHOUT SOVEREIGNTY: DERRIDA'S *DECLARATIONS OF INDEPENDENCE*

ABSTRACT. This article questions the common assumptions in legal theory regarding Derrida's well-known *Declarations of Independence*. Through a close reading of this text, well-known ground such as the relation between speech and writing, the notion of representation, speech act theory, the signature, and the proper name is covered. The contribution that this analysis makes in the present context lies in the additional 'step' that it takes. The article seeks to give an explanation of the laws at work in Derrida's thinking in the above respects and to explain more specifically how they find expression in *Declarations of Independence*. The article in this regard also investigates the importance and role of the 'notions' of death, loss of meaning, loss of ownership, and loss of sovereignty in Derrida's thinking. The contention is that if we take account of Derrida's reading in *Declarations of Independence*, it is possible to view constitutions in a very different way, more specifically their 'origins', with inevitable implications for constitutional interpretation.

KEY WORDS: constitution, Derrida, interpretation, iterability, justice, proper name, representation, signature, sovereignty, speech acts

Introduction

The importance for constitutional theory of Jacques Derrida's 1976 essay *Declarations of Independence*[1] has been acknowledged and

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[1] J. Derrida, "Declarations of Independence", in *Negotiations: Interventions and Interviews, 1971–2001* (Stanford: Stanford University Press, 2002), 46–54. This translation first appeared in *Caucus for a New Political Science* 15 (1986), 7–15. Hereafter cited parenthetically in the text as DI.

commented on by a number of scholars.[2] This short essay of Derrida touches upon themes which relate to the founding and therefore also the functioning of all institutions, including that of a constitutional democracy. These themes include representation and delegation, the promise, the proper name, the signature, the event, time, place, the other, and responsibility. In addition, the essay refers to, but does not discuss, speech act theory, undecidability and *différance*. From the above it should already be clear that at least two caveats are called for in reading *Declarations of Independence*. Firstly, in order to understand what is at stake in this essay, it should not be read in isolation, but with reference to Derrida's other texts, which explore these themes in more detail. Such 'cross-referencing' can also not be restricted to those texts of Derrida that overtly deal with the law as these texts themselves draw on ideas more fully developed in earlier and later texts.[3] In analysing Derrida's other texts the importance of *inter alia* language and psychoanalysis in his thinking should not be lost sight of.

[2] A number of texts have dealt with Derrida's essay. Although my analysis differs in various respect from these, I have benefited particularly from the reflections of C. Norris, *Derrida* (Cambridge, Massachusetts: Harvard University Press, 1987), 194–199; J.C. Evans, "Deconstructing the Declaration: A Case Study in Pragrammatology", *Man and World* 23 (1990), 175–189; B. Honig, "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic", *The American Political Science Review* 85 (1991), 97–113; P. Fitzpatrick, "*Modernism and the Grounds of Law*" (Cambridge: Cambridge University Press, 2001), 79–84; P. Hanafin, "Constitutive Fiction: Postcolonial Constitutionalism in Ireland", *Penn State International LR* 20 (2002): 339–61; S. Motha, "The Sovereign Event in a Nation's Law", *Law and Critique* 13 (2002), 311–338; B. Collins, "The Belfast Agreement and the Nation that 'Always Arrives at its Destination'", *Penn State International LR* 20 (2002), 385–413; N. Horwitz, "Derrida and the Aporia of the Political, or the Theologico-Political Dimension of Deconstruction", *Research in Phenomenology* 32 (2002), 156–176; J.C. Barton, "Iterability and the Order-Word Plateau: 'A Politics of the Performative' in Derrida and Deleuze/Guattari", *Critical Horizons*, 4 (2003), 227–264; S. Bischoff, *Gerechtigkeit – Verantwortung – Gastfreundschaft: Ethik-Ansätze nach Jacques Derrida* (Freiburg: Switzerland, 2004), 175–178; and P. Fitzpatrick, "'What are the Gods to Us Now?': Secular Theology and the Modernity of Law", *Theoretical Inquiries in Law* 8 (2007), 161–190.

[3] J. Derrida, "Force of Law: The "Mystical Foundation of Authority", in D. Cornell, M. Rosenfeld and D. Gray Carlson, eds., *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992), 3–67; J. Derrida, "Before the Law", in *Acts of Literature* (New York: Routledge, 1992), 181–220; and J. Derrida, "The Laws of Reflection: Nelson Mandela, in Admiration", in J. Derrida and M. Tlili eds., *For Nelson Mandela* (New York: Seaver Books, 1987), 13–42.

Secondly, account should be taken of one of the most challenging aspects of Derrida's texts: the way in which he deals with the conceptual oppositions of metaphysics.[4] What is not always realised, and this danger is particularly acute in a short essay such as *Declarations of Independence*, is that Derrida, in doing so, does not simply overturn (or equalise) the existing hierarchy of concepts. Insofar as *Declarations of Independence* is concerned, it could easily be and indeed has been read as if Derrida simply seeks to de-legitimise state institutions by showing that the Declaration is performative (and not constative) in nature and that it is not the people who create the Declaration, but the Declaration that creates the people. Such a reading, by ignoring this caveat, would thus point to the groundlessness or self-authorising nature of a constitution. What Derrida does or what happens through his reading of texts is, however, that a further inscription takes place. In his texts Derrida relentlessly searches for and brings out the conditions of possibility of concepts. This leads to the invention of 'non-concepts' such as iterability, general writing or *différance* within which the concept(s) analysed are reinscribed.[5] Another way of expressing this 'strategy' is to say that Derrida seeks to show that every concept is inhabited by its other. The other is not here to be understood as a person or, for example, as writing which would be the 'other' of speech. The 'other' here refers to death and that which represents death. Derrida does this in order to show the life–death structure in every concept. This is to be compared with the metaphysics of presence which characterises Western philosophy and which construes concepts based on an ideal or pure structure where death and that which represents death is excluded as not belonging to the concept. Showing that the relation with death inhabits every concept is similar to inscribing a conceptual opposition within a 'new concept' – the new concept in each instance gives expression to the relation with death. Derrida's analysis[6] of representation, the

[4] J. Derrida, *Positions* 2nd edn (London: Continuum, 2002), 23, pp. 38–39; J. Derrida "Signature Event Context", in *Margins of Philosophy* (Chicago: The University of Chicago Press, 1982), 329–330.

[5] This is not to assert that deconstruction is a method, doctrine or general procedure. In an interview dating from 1978, Derrida hesitantly described it as a nomadic war, a war "consisting of small clandestine operations"; see F. Tellez and B. Mazzoldi, "The Pocket-Size Interview with Jacques Derrida", *Critical Inquiry* 33 (2007), 386.

[6] I retain this word, which is perhaps not the most appropriate, using it in a specific sense. 'Analysis' usually has connotations of neutral 'constative' description, whereas Derrida's 'analyses' are also of a performative and even pure or meta-performative nature, as we will see below; see also J. Derrida, *Rogues: Two Essays on Reason* (Stanford: Stanford University Press, 2005), 91–92.

constative/performative, the signature, and the name, which are the most prominent themes in *Declarations of Independence*, illustrates this well and will be explored in more detail in what follows. This reading of *Declarations of Independence* can nevertheless, for reasons of space as well as for structural reasons,[7] not be an exhaustive one. Its modest aim is to suggest that there is much more to the essay than appears at first sight.

Constitutions And The Communication Of Meaning

For whom does one write, who accepts or refuses? For whom is this gift that never becomes present?

Derrida *Glas* 80[8]

In constitutional theory today, and following from the United States' and French revolutions, a constitution is predominantly viewed as a written document through which the people as sovereign and as the originating source of political power (*pouvoir constituant*) determine the way in which they will govern themselves.[9] The written nature of a constitution is nevertheless

[7] See J. Derrida and M. Ferraris, *A Taste for the Secret* (Cambridge: Polity Press, 2001), 31.

[8] J. Derrida, *Glas* (Lincoln: The University of Nebraska Press, 1986).

[9] E.-W. Böckenförde, *Die verfassunggebende Gewalt des Volkes – Ein Grenzbegriff des Verfassungsrechts* (Frankfurt am Main: Alfred Metzner Verlag, 1986); H. Mohnhaupt and D. Grimm, *Verfassung: Zur Geschichte des Begriffs von der Antike bis zur Gegenwart* 2nd edn (Berlin: Duncker & Humblot, 2002), 100–141; G.F. Schuppert, *Staatswissenschaft* (Baden-Baden: Nomos, 2003), 157–160 (on internal and external sovereignty), 745–151; J. Rubenfeld, "Legitimacy and Interpretation", in L. Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998), 194–234. On the possibility of constitutions beyond a national state and a people; see inter alia P. Häberle, *Europäische Verfassungslehre* (Baden-Baden: Nomos, 2006), 187–193; and T. Herbst, *Legitimation durch Verfassunggebung: Ein Prinzipienmodell der Legitimität staatlicher und supranationaler Hoheitsgewalt* (Baden-Baden: Nomos, 2003), 177–181.

not generally viewed as something that needs to be enquired into.[10] It is mostly viewed as a fairly self-evident way in which to contribute towards legal certainty.[11] The written nature of a constitution is sometimes more prosaically described as serving the function of a storehouse or memory (*Speicher*) of the consciousness, desires or meaning (*Sinn*) of a political community,[12] or as medium of the cultural self-positing of a people, a mirror to their cultural inheritance.[13] These prosaic statements as well as those that simply stress the advantage of legal certainty, imply a distinction between semantic content and expression in language.[14] They imply a notion of the sign where the signifier is structurally second to the signified.[15] The language of a constitution is, in other words, traditionally viewed as an instrument that is used consciously, intentionally or purposively to express certain natural or self-evident ideas, such as the sovereignty of a people or a nation, the existence of a state, the protection of human or fundamental rights, the granting and (mutual) limitation of a variety of powers (*pouvoirs constitués*), and a certain idea of justice. These ideas or principles are regarded as existing beforehand and must simply be expressed or communicated in the most appropriate way. A constitution is in this way viewed as a vehicle or medium of unified

[10] This does of course not imply that there has been no reflection in legal scholarship on the relation between language and law. A number of approaches have been developed including ones based on the ideas of classical speech act theory, which will be referred to in more detail below; see inter alia T.A.O. Endicott, "Law and Language", in J. Coleman and S. Shapiro, eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), 935–968 for a discussion of some of these approaches and for further references. The implications of Derrida's texts that deal with the privileging of speech and the denigration of writing in the metaphysical tradition have on my reading not as yet been adequately explored in the legal context.

[11] See e.g. K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* 20th edn, (Heidelberg: CF Müller, 1999), 14–15.

[12] U. Haltern, "Internationales Verfassungsrecht? Anmerkungen zu einer kopernikanischen Wende", *Archiv des öffentliches Recht* 128 (2003), 532.

[13] Häberle, *supra* n. 9, at 204.

[14] J. Derrida, *Who's Afraid of Philosophy? Right to Philosophy 1* (Stanford: Stanford University Press, 2002), 34.

[15] *Ibid.*, at 81. Derrida uses the term 'mark' or 'trace' rather than sign because of the sign's metaphysical presuppositions – based on the notions of a signifier and a signified; see J. Derrida, *Speech and Phenomena and Other Essays on Husserl's Theory of Signs* (Evanston: Northwestern University Press, 1973), 138; Derrida, *supra* n. 4 (*Positions*) at 17–22.

meaning. Derrida's *Declarations of Independence* can be read as complicating significantly, more so than has been realised, many of these seemingly self-evident ideas which express a specific philosophy of language.

One of Derrida's texts that spell this out most clearly is *Signature Event Context*.[16] Derrida contends in this text that the traditional approach to communication is based on a specific idea of writing. In accordance with this idea people write because they have to or want to communicate their thoughts, ideas or representations.[17] Writing is viewed in this sense as an extension of oral or gestural communication, the latter having inherent limits due to space and time.[18] Writing thus serves as a different, technically more powerful vehicle, transport or site of passage for meaning, ideas or thoughts.[19] It follows upon a pure presence. In writing, according to this model, the unity and integrity of meaning is not affected in its essence; should meaning be affected, this would be a mere accident. Stated differently, this model presupposes that writing does not in principle have the least effect on the structure or the content of the meaning, ideas or thoughts it is supposed to transmit.[20] Derrida's reference to Jefferson as merely the 'secretary' and 'draftsman', as responsible for writing (not in the creative or initiating sense of the term), who cannot sign, as having been delegated 'the task of drawing up what they [the delegates] knew *they* wanted to say' (DI 48, 52) must be understood in this light.[21] Jefferson plays the same subordinate role as Theuth (Thoth), the god of writing, in Plato's *Phaedrus*, analysed by Derrida in *Plato's Pharmacy*.[22] On this view, '[w]riting thus only intervenes at a time when a subject of knowledge already possesses the signifieds, which are then only given to writing on consignment'.[23]

The traditional model is based on a theory of communication that fails to investigate the structure of writing and which privileges

[16] For an excellent commentary, see Bischof, *supra* n. 2 at 123–155.

[17] Derrida, *supra* n. 4 (*Margins*), at 312.

[18] *Ibid.*, at 311.

[19] *Ibid.*, at 309, 311.

[20] *Ibid.*, at 312. See also Derrida, *supra* n. 4 (*Positions*), at 21–22.

[21] See also R.S. McDonald, "Thomas Jefferson's Changing Reputation as Author of the Declaration of Independence: The First Fifty Years", *Journal of the Early Republic* 19 (1999), 169–195.

[22] See J. Derrida, "Plato's Pharmacy", in *Dissemination* (London: Continuum, 2004), 91–97. The role is nevertheless an ambivalent one, as will be indicated below.

[23] *Ibid.*, at 136, 153.

speaking or the voice. This happens because of the fact that what is said seemingly does not cease to belong to the speaker, and because the sensible 'body' of the signifier seems to disappear in the act of speaking.[24] This is directly related to the attempt made by metaphysics to domesticate, dissimulate and annul death.[25] The seemingly self-present living act of speech appears not to 'risk death in the body of a signifier that is given over to the world and the visibility of space'.[26] Classical speech act theory does not examine the absence of the addressee (one writes for those that are absent) and of the sender from the marks he or she abandons and which continue to produce effects beyond his or her presence, which clearly happens in writing, but which is not restricted to writing.[27] This 'absence' is traditionally understood as a continuous modification and progressive extenuation of presence. In the Declaration and in constitutional theory we see this in the notion of the people as 'signatories' or as the (legitimising) origin of a constitution. Language in this model is thus understood as simply 'supplementing' presence. This 'supplementation' is not understood as involving a break in presence, but as 'a continuous, homogenous modification of presence in representation'.[28]

Derrida seeks to investigate the implications of the notion of absence, which is such a clear feature of writing but, which, as noted above and as he shows, does not remain restricted to writing in this sense. In order for it to function as writing, thus its condition of possibility, one's written 'communication' must remain legible, iterable, or repeatable in the absolute absence and thus in the event of the death of every determined addressee in general.[29] This structure also applies insofar as the sender or producer of written words is concerned. The disappearance, absence or death of the sender does not prevent in principle the sign from continuing to function, to be legible

[24] Derrida, *supra* n. 15, at 76, 77.

[25] Derrida, *supra* n. 22, at 126; Derrida, *supra* n. 15, at 10, 54.

[26] Derrida, *supra* n. 15, at 77–78.

[27] Derrida, *supra* n. 4 (*Margins*), at 313. This loss of presence which occurs through writing has of course been part of the reason why writing has been condemned so often and consistently in the history of philosophy; see e.g. J. Derrida, *Of Grammatology* (Baltimore: John Hopkins University Press, 1974). See also Derrida, *supra* n. 4 (*Positions*), at 22–23.

[28] Derrida, *supra* n. 4 (*Margins*), at 313. See also Derrida, *supra* n. 15, at 80–81; and Derrida, *supra* n. 14, at 26 where he refers to this kind of approach as "a techno-semiotic, purely conventionalist and instrumentalist approach to language".

[29] Derrida, *supra* n. 4 (*Margins*), at 315–316.

and to produce effects. The marks 'signed' by an author continue to function in his or her radical absence, thus also in the event of his or her death. Absence as a characteristic or rather condition of writing is not simply a modification of presence as is normally assumed – it constitutes a break with presence. The possibility of the death of the addressee as well as of the sender is inscribed within the structure of the mark.[30] Writing, one could also say, leaves behind a mark which remains and which is iterable in the absence of and beyond the presence of the subject who produced or emitted it.[31] This mark furthermore contains within itself a force which can break with every determined context, be it that of its producer or its own semiotic and internal context.[32] This structure of being severed from the referent/signified/producer/addressee makes of every mark 'the nonpresent *remaining* of a differential mark cut off from its alleged "production" or origin'.[33] Iterability thus structures the mark of writing itself.[34] The presence of a speaking subject, fully conscious to him or herself cannot therefore be that which makes possible the functioning of signs as is usually presumed by speech act theorists. Signs consequently cannot be viewed from this perspective. The same necessarily applies to constitutions. Signs (or rather marks) are not secondary, following upon a first immediate self-presence. Everything can be said to 'begin' with representation, and representation does not 'belong' to the subject; it ex-appropriates the subject from the beginning.[35] The relationship with death is what makes the sign possible.[36] This also applies to the 'signs' used in spoken communication and in 'solitary

[30] *Ibid.*, at 316; and Derrida, *supra* n. 15, at 40, 93–97.

[31] Derrida, *supra* n. 4 (*Margins*), at 317; and Derrida, *supra* n. 22, at 116.

[32] Derrida, *supra* n. 4 (*Margins*), at 317. An essential feature of the mark is that it can function independent of the intention of the producer. Words or parts of words can furthermore be cut out from their original context and grafted into new contexts. This force of a mark is due to spacing which constitutes the written mark; the spacing that separates it from other elements of the internal contextual chain and also from present referents.

[33] *Ibid.*, at 318. This is necessarily tied to Derrida's discussion of *différance* which engages inter alia with the contention of Ferdinand de Saussure that in language there are only differences without positive terms and that language is not a function of the speaking subject; see J. Derrida, "Différance", in *Margins of Philosophy* (Chicago: The University of Chicago Press, 1982), 1–27.

[34] See further J. Derrida, *Limited Inc* (Evanston: Northwestern University Press, 1988), 47–54 on this structural law.

[35] Derrida, *supra* n. 15, at 45 note 4, 57 note 6.

[36] *Ibid.*, at 54.

mental life'.[37] This 'law' of communication is referred to by Derrida as general writing or iterability: the condition of possibility of all communication (which would include both speech and writing in the traditional sense).[38]

Derrida in *Signature Event Context* thus seeks to explain how 'signs' and 'communication' function. What he shows there and also in his other texts is that language is 'other' to the speaker/sender/writer and the addressee.[39] Language is not something that can be possessed. Language, Derrida would say in a later text, is the language of the other; it returns to the other, exists asymmetrically, always for the other, kept by the other, coming from the other, *the* coming of the other.[40] The 'other' should not be understood here as another person, but as we saw above, as the relation with death.[41] Language has a separate 'existence'.[42] This does not however make it arbitrary and does not leave it at the mercy or choice of every user or interpreter. Language is structured by a law – in *Signature Event Context* referred to as iterability, in other texts as *différance*, the trace, etc. (DI 50). Iterability 'is', as shown above, necessarily related to death, a loss of ownership, a loss of control over meaning, which can be said to inhabit the structure of the mark. In *Force of Law* Derrida shows through a reading of Walter Benjamin's *Critique of Violence* how iterability is similarly a part of the structure of law.[43] The 'notion' of iterability has a number of implications for the way in which a constitution is viewed, a few of which can be spelt out here. In the

[37] See *ibid*., at 49–50, 56l; and Derrida, *supra* n. 4 (*Margins*), at 316–318. Also in the case of spoken communication this takes place by means of the unity of a signifying form, which in turn can only function as such because of its iterability – its ability of being repeated in the absence of its referent as well as in the absence of a determined signified or a present intention of signification.

[38] Derrida, *supra* n. 4 (*Margins*), at 320. As Derrida, *supra* n. 22, at 91–97 read with fn 29 (at 173–174) reminds us, in Egyptian mythology, Thoth – the god of writing (who is also the son of the sun-god Ra, the secretary of Ra, a supplement to Ra, the nocturnal representative of Ra (the moon), the god of death, the god of non-identity) ultimately eclipses his father, becomes the god of the gods, the god thus also of the king, the father of speech.

[39] Derrida, *supra* n. 4 (*Margins*), at 315.

[40] J. Derrida, *Monolingualism of the Other; or, The Prosthesis of Origin* (Stanford: Stanford University Press, 1998), 23–25, 40, 68.

[41] See Derrida, *supra* n. 4 (*Margins*), at 18–19 on the pleasure and reality principles in Freud's *Beyond the Pleasure Principle*.

[42] In quotation marks because it is not a presence.

[43] Derrida, *supra* n. 3 ("Force of Law"), at 38. See also Derrida, *supra* n. 22, at 126.

first place a constitution can no longer be understood in terms of the traditional model of communication – in other words, as a transportation of present meaning originating in the people. It also challenges the ideas of preservation and safe-keeping and also that of legal certainty that we saw above are usually associated with a constitution. These ideas are necessarily related to health, immunity and security.[44] When a constitution is enacted, even when this happens in the mother tongue, 'something radically other' intervenes which no longer belongs to the people.[45] This 'something', referred to in certain of Derrida's other texts as autoimmunity, deprives them of control (which they never had in the first place) over the meaning of the constitution.[46] A constitution in other words has no transcendental signified which can be anchored in the people, or in God, as we will see later. The first 'law' of a constitution is thus not that of the people as origin and point of return.[47] 'The people' as signifying mark is merely an effect of iterability. A constitution can in other words function as a combination of signifying marks only due to iterability. It is therefore not untrue to say that a constitution is intended to communicate certain ideas or meaning. What we can term the 'law' of communication, of gesture, speech and writing, however shows that the communication of ideas and of meaning is a secondary effect of a constitution. The 'law' of the constitution[48] or iterability, its condition of possibility, is in some of Derrida's other texts elaborated on and related to incalculable justice, the perfect gift

[44] Derrida, *supra* n. 6, at 112.

[45] Derrida, *supra* n. 40, at 34, 58.

[46] See Derrida, *supra* n. 6; and J. Derrida, "Faith and Knowledge: The Two Sources of 'Religion' at the Limits of Reason Alone", in J. Derrida and G. Vattimo, eds., *Religion* (Stanford: Stanford University Press, 1998), 1–78; J. Derrida, *Memoires for Paul de Man* (New York: Columbia University Press, 1986 and 1989), 96–97.

[47] See, for example, A. Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power", *Constellations* 12 (2005), 238 who, referring to Carl Schmitt, describes democracy as the regime in which "the people is the subject of the constituent power and gives to itself its own constitution".

[48] This "law" should obviously not be confused with the law in the sense of the legal system. See in this respect also Derrida, *supra* n. 3 ("Before the Law"), at 183 where he speaks of the law of law or the law itself which as the text makes clear, has to be brought into relation with iterability, *différance*, unconditional justice, etc in Derrida's other texts. This is confirmed by Derrida, *supra* n. 3 ("Force of Law"), at 17. See also Derrida, *supra* n. 3 ("Laws of Reflection"), at 22–29, 34, 37–38 where a superior law, also referred to as justice, the law of laws – a law which has not as yet presented itself – is invoked in the name of which Mandela challenges the apartheid legal system.

and absolute hospitality.[49] All of these non-concepts are, like iterability, related to death, a loss of possession, a loss of subjectivity, a loss of mastery. They open up a constitution to that which goes beyond the limits of context and the horizon of meaning.[50]

Representation

There are only representatives. Death is nothing. But its representatives are even less than nothing. And yet everything is written for Death, from Death, to the address of the Dead.

Derrida *Glas* 78

In *Declarations of Independence*, Jefferson is referred to as representing, in drafting the Declaration, the representatives of the people who do not yet exist at the time of drafting. The representatives furthermore had the right to revise, correct and ratify the draft prepared by Jefferson. The right to sign the Declaration belongs to the 'good people' who, Derrida notes, 'declare themselves free and independent by the relay of their representatives and of their representatives of representatives' (DI 49). They furthermore do so in the name of the laws of nature and of God, the creator of nature (DI 51). It is only through the signing of the Declaration that the people come into effect and that the representatives obtain their legitimacy (DI 50). If the people do not as yet exist at the time of the drafting of the Declaration, we may ask who the representatives actually represent at this stage. The same can be asked of God (DI 53). In order to understand the notion of representation in *Declarations of Independence* it is necessary to refer to two other texts of Derrida where he explores this notion: *Of Grammatology*[51] and *To Speculate – On Freud*.[52]

In *Of Grammatology* Derrida explores the notion of representation through the writings of Rousseau. Rousseau, in contemplating the

[49] See Derrida, *supra* n. 3 ("Force of Law"), at 28; J. Derrida, *Given Time: I. Counterfeit Money* (Chicago: The University of Chicago Press, 1992); J. Derrida and A. Dufourmantelle, *Of Hospitality* (Stanford: Stanford University Press, 2000).

[50] Derrida, *supra* n. 4 (*Margins*), at 310, 316. This should not be confused with plurality or masterable polysemy; see *ibid.*, at 310; Derrida, *supra* n. 40, at 26.

[51] *Supra* n. 27.

[52] J. Derrida, *The Post Card: From Socrates to Freud and Beyond* (Chicago and London: University of Chicago Press, 1987), 257–409. See also J. Derrida "Envoi" in Jacques Derrida, *Psyche: Inventions of the Other vol I* (Stanford: Stanford University Press, 2007), 94–128.

origin of language and society, shows his desire for presence through a critique of political representation. Representation, Rousseau contends, leads to the transformation of the general will or the sovereignty of the people into the will of only particular people, to the delegation of power and to legislation expressed in writing, inequality and the deprivation of freedom.[53] The people in Rousseau's model are the ultimate source of legitimacy and origin. Derrida contends that this view on political representation is closely linked to Rousseau's views on language, which corresponds in this respect with the thinking of all Western philosophers since Plato.[54] Rousseau, in a similar way as described in the previous section on traditional views regarding the constitution and communication, privileges speech as he sees it as an immediate representation of thinking; writing for Rousseau is a mere supplement of speech, a mediated representation of thinking.[55] Writing and representation are associated with death, loss of meaning, loss of self-sameness, loss of autonomy, loss of property, and loss of freedom.[56] Rousseau consequently condemns a number of forms of representation or supplements to nature: consonants (as opposed to vowels), servitude (as opposed to liberty, speech being the best expression of liberty), the theatre and actors (as opposed to the festival and the balls for young marriageable persons), political representation (as opposed to an electoral meeting of the freely assembled people).[57] Representation is viewed by Rousseau and the whole of metaphysics, Derrida says, as the loss of an original presence, the loss of the self-presence of sovereignty.[58] Representation is in other words an evil, an accident, a catastrophe that occurs to what is good, to a pure and self-sufficient origin.[59] Rousseau consequently desires the disappearance of representation, the repression of the relationship with death.[60]

Derrida however also shows a different logic at work in Rousseau's texts, a logic that is not explicitly thematised. Rousseau in another context, for example, praises writing (hieroglyphic language) rather than speech as being able to represent immediate presence and regards

[53] Derrida, *supra* n. 27, at 296–297.
[54] *Ibid.*, at 167.
[55] *Ibid.*, at 295.
[56] *Ibid.*, at 303, 306, 307.
[57] *Ibid.*, at 168, 286, 304–308.
[58] *Ibid.*, at 306. See also Derrida, *supra* n. 4 (*Positions*), at 22.
[59] Derrida, *supra* n. 27, at 296–297.
[60] *Ibid.*, at 296–297, 306–307.

writing as preceding speech, being part of nature rather than outside it.[61] Something similar happens in the case of political representation. Rousseau not only condemns representation but, also, viewing it as a necessary evil, expects of it to restore presence.[62] The representatives need to be changed often so as to make their seduction more costly and more difficult, Rousseau says.[63] With respect to speech and writing, Derrida explains this other logic in Rousseau's texts with reference to the 'violence' of speech in that it penetrates into one violently and, furthermore, itself consists of a violence to or loss of presence of the object through the acoustic sign.[64] In respect of political representation, Derrida points out that even the social contract, which is supposed to precede representation and writing, is already characterised by representation and writing.[65] With reference to what was said in the section above on constitutions and communication, we can say that the body politic already begins to die when it is born; it carries within itself the causes of its destruction.[66] This, furthermore, corresponds with Rousseau's acknowledgement that the state of nature is characterised by pure dispersion, inertia and indolence.[67] Rousseau's attempts at excluding writing from spontaneous assemblies of the people, is similarly unsuccessful, as Derrida shows.[68] The characteristic of death in speech causes uneasiness in Rousseau and causes him to adopt contradictory positions, Derrida contends.[69] We could also ask why presence requires an addition – in this case written and political representation – if presence was self-sufficient, if it did not already contain a 'lack' in itself. The acceptance of the need for writing and representation to restore presence can only be understood with reference to their role as substitutes, not of presence, but of a natural order that is deficient, that is, one that is already characterised by degradation or death.[70] In other words, representation does not follow upon a pure presence; the desire for presence expressed by Rousseau is instead the result of the limitation, restriction or repression of absolute dispersion, of death.

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[61] *Ibid.*, at 236–238.
[62] *Ibid.*, at 297–298.
[63] *Ibid.*, at 302, 352 fn 21.
[64] *Ibid.*, at 240.
[65] *Ibid.*, at 297.
[66] *Ibid.*
[67] *Ibid.*, at 231–232, 256, 274.
[68] *Ibid.*, at 302.
[69] *Ibid.*, at 141.
[70] *Ibid.*, at 298.

The above is another way of expressing the logic of *différance*, which Derrida deals with *inter alia* in *To Speculate – On Freud*. Derrida explores in this text the Freudian notion of the death drive in *Beyond the Pleasure Principle*.[71] Derrida refers in this respect to Freud's description of the reality principle (PR), which, in Derrida's words, acts as a delegate, slave, informed disciple or representative of the pleasure principle (PP). The reality principle sometimes, especially in sexual matters, under the influence of the ego's (conservative) instincts of self-preservation, has to discipline the pleasure principle, thereby postponing satisfaction.[72] Freud furthermore contends that the pleasure principle, which supposedly reigns in the psyche, is actually a secondary process. The primary process (pp) is dominated by the death drive, a desire to return to the inorganic state.[73] This drive or instinct, in order for life to be possible at all, has already to restrain, limit or bind itself, independently of, but also in collaboration with the pleasure principle.[74] The conservative drives which appear to serve the pleasure principle or to be the guardians of life are also or in the first place the satellites or couriers (*Trabanten*) of death; they seek not to keep the organism from death or to maintain the organism from death, but to avoid a death that would not be its own.[75] This 'stricture' of *différance*, or what we could refer to here as the double role of representatives, is extended by Derrida to every organism, organisation, corpus and movement.[76] 'Every being-together', Derrida states, 'begins by *binding-itself*, by a binding-itself in a differantial relation to itself'.[77] What Derrida alludes to in *Declarations of Independence*, when he refers to Jefferson as representative of the representatives of the people, is that Jefferson and those he represented had a similar double role:

> If he [Jefferson] knew all this, why did he suffer so? What did he suffer from, this representative of representatives who themselves represent *to infinity*, up to God, other representative instances?

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[71] S. Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud Vol. XVIII (1920–1922)* (London: Vintage, 2001).

[72] *Ibid.*, at 10; Derrida, *supra* n. 52 (*The Post Card*), at 282–283.

[73] Freud, *supra* n. 71, at 38.

[74] *Ibid.*, at 35; Derrida, *supra* n. 52 (*The Post Card*), at 350–351, 396.

[75] Freud, *supra* n. 71, at 39; Derrida, *supra* n. 52 (*The Post Card*), at 82, 356, 360.

[76] Derrida, *supra* n. 52 (*The Post Card*), at 347, 356.

[77] *Ibid.*, at 402.

It would appear that he suffered because he clung to his text. It was very hard for him to see it, to see *himself* corrected, emended, 'improved,' shortened, especially by his colleagues. A feeling of wounding and mutilation should be inconceivable for someone who knows not to write in his own name, his proper name, but *simply by representation* and in place of another. If the wound is not erased in the delegation, it is because things are not so simple, neither the structure of the representation nor the procuration of the signature (DI 52).

Derrida's reference to Jefferson's 'suffering' because he 'clung to his text' must furthermore be read with an interview of Derrida on *Glas* where he refers to the theory of Imre Hermann (and Nicolas Abraham) of the clinging instinct and a traumatic archi-event of de-clinging which constructs the human topical structure and which precedes the Oedipus complex.[78] This archi-myth of clinging is for Derrida another way in which to give expression to the desire for absolute pleasure or the death drive as well as the desire for presence. Although Jefferson and the other representatives therefore appear to be the representatives of the people, they are in the first place the 'representatives' of the death of the people, of dissemination, or of unconditional justice. The representatives are consequently no longer to be viewed as 'representatives' in the traditional sense, as what is 'represented' here (unconditional justice), cannot be brought to presence. The desire for presence expressed in the Declaration as well as in Rousseau's writings, we could also say, is a consequence of the repression of this pre-origin; of the anguish of dispersion or dissemination.[79]

Speech Acts

I give you – a pure gift, without exchange, without return – but whether I want this or not, the gift guards itself, keeps itself, and from then on you must-owe, *tu dois*. In order that the gift guard itself, you must-owe.

Derrida *Glas* 243

In *Declarations of Independence* Derrida refers to the necessary undecidability between the constative and the performative. He asks the question whether the people, in so declaring themselves have

[78] J. Derrida, *Points…Interviews, 1974–1994* (Stanford: Stanford University Press, 1995), 5–9. See also J. Derrida, *Without Alibi* (Stanford: Stanford University Press, 2002), 277–278 where the hiatus between the performative and the constative is related to a wounding and an absolute cut.

[79] Derrida, *supra* n. 27, at 244, 277.

already freed themselves (and are thus simply declaring or stating this) or whether they only become free through the signature (DI 49). This is asked because, as Derrida points out, the people do not 'exist' as an entity before the Declaration. The people appear to give birth to themselves through the act of signature (DI 49–50). The representatives, when they 'sign' in the name of the people also only obtain this right or the legitimacy (to sign) retroactively (DI 50). The people, through the intervention of their representatives, thus give themselves a name, as well as the power, right or ability to sign, and they do so in the future perfect tense (DI 50). Derrida furthermore points out that through the Declaration another state signature was erased by dissolving the paternal or maternal link with the colonial country and that this dissolution similarly involves a structure which is both performative and constative (DI 50).

Declarations of Independence does not fully explore, it only hints at Derrida's other texts, which deal with the performative/constative speech act distinction. The distinction between these speech acts is necessarily closely related to the concept of communication, which was discussed above and which, as we saw, Derrida inscribes within iterability or general writing. A constative speech act is usually understood as consisting in saying or describing what exists. A performative speech act on the other hand is said to do something insofar as it is said. Examples of performative speech acts are promises, the naming of a ship, marrying, the making of a bet, and the giving of a gift.[80] When I make a promise, according to the proponents of this distinction, I do not speak about an event, my speech act constitutes the event, brings about the event.[81] In *Declarations of Independence* Derrida at first stresses the performative nature of the Declaration (itself pretending to be a constative speech act): 'It performs, it accomplishes, it does what it says it does: this at least would be its intentional structure' (DI 47).[82] One may be tempted to infer from this emphasis of Derrida of the performative nature of the Declaration (and from his later statement about the people not existing before the Declaration) that he wishes to question the legitimacy of this performative, to expose its vicious circularity, or that he wishes to emphasise the fact that a foundational origin (in this

[80] Derrida, *supra* n. 4 (*Margins*), at 323.

[81] *Ibid.*, at 321. See also J. Derrida, "A Certain Impossible Possibility of Saying the Event", *Critical Inquiry* 33 (2007), 441–61 at 446.

[82] See also Derrida, *supra* n. 3 ("Laws of Reflection"), at 18, 19–20; Derrida, *supra* n. 14, at 32–33.

case God) is always needed. From the fact that Derrida describes this retroactivity, with reference to Francis Ponge, as 'fabulous' one might even be tempted to conclude the converse: that he praises in Arendtian fashion performatives of this nature (DI 50).[83] Such readings would fail to engage adequately with *Declarations of Independence*. The 'point' Derrida is making is a much more subtle and profound one. What he is saying is that viewing the Declaration as a performative that brings about a pure event[84] is problematic because of the iterable structure of the mark. Because of its inscription within iterability a performative speech act can never be a pure event,[85] in other words absolutely singular, a present and singular intervention, or 'something' that happens for the first and last time – it is always split, dissociated from itself.[86] Iterability necessarily limits what it makes possible, rendering its rigor and purity impossible.[87]

Derrida furthermore relies on or makes temporary use of the traditional distinction between constative and performative speech acts (in spite of their instability) in order to bring to the fore the 'notion' of undecidability and of iterability (DI 47). The statement of Derrida that the undecidability between the performative and the constative structure produces the sought-after effect is of importance here (DI 49). In *Signature Event Context*, Derrida points out that the same sentence can be used on different occasions of utterance in both ways – performative and constative.[88] This 'confusion' is provoked by iterability, the possibility of the repetition of the same sentence in different contexts and through grafting. One cannot therefore rigidly distinguish between constative and performative utterances.[89] The 'declarations' of a Declaration also inevitably have a repetitive or citational structure. The 'event' of the Declaration is therefore always already split. It is (as a performative) always already inscribed within this structure of possibility (iterability).[90] A performative speech act

[83] See H. Arendt, *On Revolution* (New York: Viking Press, 1963).

[84] This idea of pure eventuality is tied to the notion of the signature; see Derrida, *supra* n. 4 (*Margins*), at 328.

[85] See also G. Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (Chicago: The University of Chicago Press, 2003), 90.

[86] See Derrida, *supra* n. 4 (*Margins*), at 325, 327; Derrida in Borradori, *supra* n. 85, at 86; Derrida, *supra* n. 81, at 446.

[87] Derrida, *supra* n. 34, at 59.

[88] Derrida, *supra* n. 4 (*Margins*), at 325 note 14.

[89] See also Derrida, *supra* n. 3 ("Force of Law"), at 27; Derrida, *supra* n. 46 (*Memoires*), at 133.

[90] Derrida, *supra* n. 4 (*Margins*), at 326.

cannot function without this structure. The statement of Derrida about undecidability thus suggests that something that is not a 'thing' (and which as we saw above can be referred to as general writing or iterability), 'precedes' or makes possible the performative speech act which is the Declaration.[91] This idea is explored further by Derrida in some of his other texts on law and justice. In *Force of Law* Derrida speaks of this 'something' as an overflowing of the performative, and in *Specters of Marx* as originary performativity.[92] In *Rogues* Derrida elaborates further on the 'notion' of undecidability of the constative and performative touched on in *Declarations of Independence*:

> Now, just like the constative, it seems to me, the performative cannot avoid neutralizing, indeed annulling, the eventfulness of the event it is supposed to produce. A performative produces an event only by securing for itself, in the first person singular or plural, in the present, and with the guarantee offered by conventions or legitimated fictions, the power that ipseity gives itself to produce the event of which it speaks – the event that it neutralizes forthwith insofar as it appropriates for itself a calculable mastery over it.[93]

Another reason thus why a speech act such as a Declaration does not constitute an event is insofar as it is subject to the mastery of 'I can, I may'.[94] The notion of the performative is in traditional speech act theory necessarily tied to consciousness or to intention.[95] This approach aims at ensuring and has the consequence "that no remainder escapes the present totalization".[96] In other words, it seeks to prevent marks from operating beyond the intention of the speaker or the original context within which the speech act was produced. Iterability necessarily entails that intention can no longer govern the

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[91] With reference to Derrida, *supra* n. 46 (*Memoires*), at 132–138 we could say that the undecidability between the performative and the constative provokes a displacement of thinking, leading us to a new thinking "whose structure is wholly other, forgotten or yet to come…and always presupposed by the opposition" (at 133).

[92] See Derrida, *supra* n. 3 ("Force of Law"), at 27. See also at 7 and 24 where Derrida links undecidability with unconditional or incalculable justice. See further J. Derrida, *Specters of Marx: The State of Debt, the Work of Mourning, & the New International* (New York: Routledge, 1994), 30–31.

[93] Derrida, *supra* n. 6, at 152. See also J. Derrida, "Performative Powerlessness – A Response to Simon Critchley", *Constellations*, 7:4 (2000) 466–468 at 466–467; and J. Derrida, "Composing 'Circumfession'", in J.D. Caputo and M. Scanlon, eds., *Augustine and Postmodernism: Confessions and Circumfession* (Bloomington: Indiana University Press, 2005), 20–21.

[94] See also Derrida, *supra* n. 78 (*Without Alibi*), at 233–234.

[95] Derrida, *supra* n. 4 (*Margins*), at 322.

[96] *Ibid.*, at 322.

scene of speech acts. This is because by virtue of iterability the intention animating an utterance is never purely present to itself, but rather always already dissociated from itself.[97] For an event that is worthy of the name, both the constative and the performative must capitulate.[98] Performativity, in its traditional meaning, always remains a legitimised or legitimising power, and it remains protective.[99] For an event without sovereignty and without power to come about, the constative as well as the performative need to be exposed to another language – to a performative powerlessness.[100] The latter could be said to be another name for the 'other' to which iterability refers – the ability of signs to function in the event of the death of the author/addressee. This is what happens *to* a people in a Declaration and which, as we saw above, can also be expressed in terms of the Freudian death drive. The Declaration thus finds itself within the paradoxical structure of the event. It seeks, without the intention, consciousness or sovereignty of its signatories to bring about the impossible event (as its condition of possibility) whereas it 'succeeds' only in bringing about the possible. The performative that is at stake here inevitably neutralises the event.[101] Yet the Declaration and all constitutions following in its wake, all Bills of Rights, in spite of the limitations imposed upon unconditional justice, continue and will continue to be haunted by the impossible, which constitute a part of their structure, as their condition of possibility.[102]

It is necessary to return at this point to the notion of the promise.[103] In *Declarations of Independence* Derrida starts off by saying that he is not going to keep his promise of speaking about that which he was asked to speak. He nevertheless undertakes to do so in the form of an excuse (DI 46). Is there any relevance in this side remark for constitutional theory? The answer would have to be a double 'yes'.[104] The

[97] *Ibid.*, at 326.

[98] Derrida, *supra* n. 81, at 460.

[99] Derrida, *supra* n. 93 (''Performative Powerlessness''), at 467.

[100] *Ibid.*, at 467–468.

[101] Derrida, *supra* n. 81, at 452.

[102] *Ibid.*, at 452–453.

[103] For an excellent discussion of the relation between the beyond of the performative and the (messianic) promise in Derrida's texts, see Bischof, *supra* n. 2, at 218–229.

[104] See in this regard J. Derrida ''Ulysses Gramophone: Hear Say Yes in Joyce'', in *Acts of Literature* (New York: Routledge, 1992), 297–300 where he discusses the first ''yes'' in the ''sense'' of a pre-performative force (a promise to the other) and the second ''yes'' which recalls the first. See also Bischof, *supra* n. 2 at 229–243.

promise, Derrida says, is the privileged example used by speech act theorists of a performative speech act, seeing that it involves the doing of something, an event.[105] For Derrida however the promise is more than simply an example of a performative speech act. Every speech act, every sentence involves a promise, the promise of one's own death, we could say with reference to Derrida's explorations of the Freudian death drive. One could also say that the promise is the basic or general element of language or that all language is 'in a certain way caught up in the space of the promise'.[106] In *Monolingualism of the Other* Derrida explains as follows the structure of the arche- or messianic promise without proper content contained in language:

> An immanent structure of promise or desire, an expectation without a horizon of expectation, informs all speech. As soon as I speak, before even formulating a promise, an expectation, or a desire *as such*, and when I still do not know what will happen to me or what awaits me at the end of a sentence, neither *who* nor *what* awaits whom or what, I am within this promise or this threat – which, from then on, gathers the language together, the promised or threatened language, promising all the way to the point of threatening and *vice versa*, thus gathered together in its very dissemination.[107]

This 'originary' promise is given in every constitution as its condition of possibility, although always lost, put in reserve, set aside, dissimulated, destroyed almost without remainder.[108] This originary promise or 'yes' to the other, which is linked to death, a loss of property and absolute hospitality, tends therefore to end up in a betrayal, in a return primarily if not exclusively to the interests of the self, the people as 'origin', as sovereign. The promise in this unconditional sense, we could also say, inevitably ends up being corrupted in performative speech acts.[109] The event is thereby neutralised, but as noted before it cannot completely exclude its being haunted by the other, the impossible. This explains the 'relevance' of the opening statement of *Declarations of Independence* for constitutional theory. Every speech act is, as we now know, also a performative, and

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[105] Derrida, *supra* n. 81, at 458.

[106] *Ibid*., at 458; Derrida, *supra* n. 46 (*Memoires*), at 96–98; Derrida, *supra* n. 78 (*Points*), 384; J. Derrida 'Remarks on Deconstruction and Pragmatism', in Mouffe, ed., *Deconstruction and Pragmatism* (London and New York: Routledge, 1996), 82.

[107] Derrida, *supra* n. 40, at 21–22; see also at 67–68.

[108] See Derrida, *supra* n. 33, at 24 on the trace; and further J. Derrida, *Eyes of the University: Right to Philosophy 2* (Stanford: Stanford University Press, 2004), 19 on the translation of Descartes' text in Latin.

[109] See also J. Derrida, *Of Spirit: Heidegger and the Question* (Chicago: The University of Chicago Press, 1989), 93–94.

involves a betrayal of the promise and therefore the need for an excuse, a seeking of forgiveness.[110] A constitution, we can say, promises more than what appears. A performative speech act inevitably belongs to the horizon of the masterable possible.[111] The 'origins' of a constitution – and this is the point that needs to be emphasised – lies not in the people, but in the promise to the other, the overflowing of the performative, unconditional justice.[112] This un-readability and untouchability of the constitutional text clearly holds important implications for constitutional interpretation.[113]

The Signature

The stake of the signature – does the signature take place? where? how? why? for whom?

Derrida *Glas* 3

'[W]ho signs, and with what so-called proper name, the declarative act that founds an institution?' asks Derrida (DI 47). Although Jefferson was the draftsman or 'writer' of the Declaration, Derrida reminds us that he was not the signatory (DI 48). The representatives were also not 'in principle' the signers of the Declaration. Although they did factually 'sign' or adopt the Declaration in their own name, they also 'signed for' others (DI 48). As the Declaration indicates, the representatives 'signed' in the name of the 'good people' (DI 49). It is therefore the 'good people' who actually 'sign' and declare themselves to be free and independent through their representatives. Derrida furthermore stresses the link between the signature and the constituting act of finding an institution and notes that in order for an institution to function as an institution it must both cut itself off from those empirical individuals who contributed to its founding and 'maintain within itself the signature' (DI 47–8). These signatures are, furthermore, according to the Declaration, guaranteed by yet other signatures. The people, in inventing for themselves a signing identity, 'sign' in the name of the laws of nature and in the name of God (DI 51). God, the creator of nature and the founder of natural laws, in effect

[110] See also Derrida, *supra* n. 46 (*Memoires*), at 148–149 on the need for an excuse.
[111] Derrida, *supra* n. 78 (*Without Alibi*), at 234.
[112] Derrida, *supra* n. 3 ("Force of Law"), at 27.
[113] Derrida, *supra* n. 3 ("Before the Law"), at 211–212.

guarantees the rectitude of popular intentions and of the unity and goodness of the people. God thus provides the 'good people' with the ultimate signature, confirming that they are (factually) and ought to be (legally) free and independent (DI 51–2). There are consequently only countersignatures in this 'differential' process, Derrida notes, and he asks 'Who signs all of these authorizations to sign?' (DI 51, 53). Something that has been pointed out by most commentators and which has already been referred to above is Derrida's statement that 'only in the act of signature' is birth given to the people 'as possible signer'. 'The signature invents the signer', he says (DI 49). Should one not take account of what was said above regarding writing, representation, performative speech acts, the promise, and the event, one could easily be misled by these statements and questions.

Derrida enquires into the notion of the signature in a number of texts. The most often referred to in this respect is *Signature Event Context*.[114] In classical speech act theory the signature, as well as the word 'hereby', play a role in writing similar to that of the presence of the speaker in the case of oral utterances.[115] The signature therefore traditionally has the role of guaranteeing legitimacy, authority and meaning through a continuing presence.[116] God, as we saw, is referred to in the Declaration as the final and ultimate signatory – the transcendental signified that assures presence and meaning (DI 52).[117] In *Signature Event Context* Derrida contends that, similar to the position regarding speech and writing, the signature's condition of possibility lies in its iterability. There can be no pure signature as an intentional fully present and singular speech act. In order to function, a signature must be iterable, imitable – it must be detachable from the intention of its production, also when the signatory dies.[118] Once inscribed within or on the border of a text[119] it becomes part of the text, and is due to the law of iterability with death as part of its structure set into the abyss, dispersed without return, and

[114] More exhaustive explorations are to be found in J. Derrida, *Signéponge/ Signsponge* (New York: Columbia University Press, 1984) and in Derrida, *supra* n. 8.

[115] Derrida, *supra* n. 4 (*Margins*), at 328. In the case of a constitution there is usually somebody (or more than one person) who literally signs the constitution. The analysis here does not concern itself primarily with this signature.

[116] *Ibid.*, at 328. See also Derrida, *supra* n. 1, at 52.

[117] See also Norris, *supra* n. 2, at 197.

[118] See also Derrida, *supra* n. 34, at 32–34; Derrida, *supra* n. 114, at 108.

[119] See also Derrida, *supra* n. 1, at 48: "[B]y reason of the structure of instituting language…the founding act of an institution…*must maintain within itself the signature*".

overflows itself.[120] One could also say that inscribing the signature in the text 'amounts to signing twice in the process of not signing any more'.[121] Its iterability is, in other words, its condition of possibility. Its sameness, its repeatability, at the same time corrupts its identity and singularity and denies it a singular purity.[122] The 'seal' of the signature is divided. This ties in with Derrida's statement in *Declarations of Independence* that there are only countersignatures here. All signatures are already and every time they take place inscribed within a structure of iterability. They respond to and invoke at the same time an 'originary' or general signature, a counter-signature, the signature of the other.[123] Elsewhere Derrida has compared the paradoxical event of signature with circumcision:

> The event is absolutely unpredictable, that is, beyond any performativity. That's where a signature occurs. … [C]ircumcision is precisely something which happens to a powerless child before he can speak, before he can sign, before he has a name. … This happened to him and leaves a mark, a scar, a signature on his body. This happened before him, so to speak.[124]

The structure of the signature in Derrida's elaboration thereof does not simply entail the active act of signature that creates the people as possible signer. Something else happens here. The signature is something that in the first place happens *to* a people. Their own signature, those of their representatives and that attributed to God, are simply countersignatures inscribed within the structure of iterability. Signing is countersigning; it is to say yes, in response to a first yes.[125] It is an affirmation of both life *and* death.[126] What gives rise to this gift of the Declaration to the self, this appearance of subjectivity, 'is' in other words the pure gift, the gift without return to the self.[127] The signature does not have its origin in subjectivity (which is created only in the act

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[120] See Derrida, *supra* n. 114, at 22, 34, 50, 80, 114, 120.

[121] *Ibid.*, at 36.

[122] This partly explains Derrida's questioning in relation to the signature of the Declaration (*supra* n. 1, at 48): "But whose signature exactly? Who is the actual signer of such acts? And what does actual [*effectif*] mean?"

[123] See Derrida, *supra* n. 114, at 54, 128–132. The other should here also not be understood as another person, but as death.

[124] Derrida, *supra* n. 93 ("Composing Circumfession"), at 21.

[125] See Derrida, *supra* n. 78 (*Points*), at 367; Derrida, *supra* n. 104, at 279; Derrida, *supra* n. 114, at 54.

[126] J. Derrida, "Living On", in H. Bloom, P. de Man, J. Derrida, eds., *Deconstruction and Criticism* (London and New York: Continuum, 2004) 62 at 78–79.

[127] See Derrida, *supra* n. 8, at 238–244 read with 1–6; Derrida, *supra* n. 114, at 96.

of signature) but in a signature that does not belong to the order of signification.[128] In signing, the signatures of the people, their representatives, and of God, thus keep nothing of all that they sign; the signatures are stolen (like flowers) in advance.[129] The signatures are a part of the text; they operate as an effect within the text, a mere part of that which they claim to appropriate.[130] The signature, viewed as such, necessarily implies that the text escapes what is traditionally viewed as the hold of the signatory on the signification of the text. The text is not simply the property of the signatory. Instead both the text and the signature are inscribed within a structure that entails the total absence of property, propriety, truth and sense.[131] Signing thus constitutes a risk, but also a chance. It is here that the responsibility of the signatory begins as a response to the pure gift, as a response to the promise. This responsibility does not come to a halt in the act of constitution making; it is reinstituted each time 'effect is given' to the constitution.

The Proper Name

> When Genet gives names, he both baptizes and denounces. He gives the most. …But a gift of nothing, of no thing, such a gift appropriates itself violently, harpoons, 'arraigns' [*arraisonne*] what it seems to engender, penetrates and paralyzes with one stroke [*coup*] the recipient thus consecrated. Magnified, the recipient becomes somewhat the thing of the one who names or surnames him, above all if this is done with a name of a thing.
>
> Derrida *Glas* 6

There is necessarily a close relationship between the signature and the proper name. This we already saw above in the primary question Derrida poses for discussion in *Declarations of Independence* (47): '[W]ho signs, and with what so-called proper name, the declarative act that founds an institution?' The representatives sign the Declaration for themselves but also in the name of and by the authority of the (good) people and ultimately in the name of God (DI 48-9). The invocation of the people and of God must be understood in the

[128] Derrida, *supra* n. 8, at 31–32.

[129] See Derrida, *supra* n. 34, at 30–31; Derrida, *supra* n. 114, at 80–82; Derrida, *supra* n. 8, at 32 (''the flower, for example, inasmuch as it signs, no longer signifies anything''), also at 39.

[130] Derrida, *supra* n. 8, at 4.

[131] See *ibid*., at 239; Derrida, *supra* n. 114, at 56.

context of the political onto-theology of sovereignty, of the metaphysical desire for presence.[132] By pointing to the people (of the United States) and ultimately to God, the Declaration seeks to invoke a presence and a ground in order to halt the play of signification. It attempts to ground the Declaration in proper names (with a fixed meaning and referent) outside of the act of language and writing which the Declaration is, unsoiled by the common.[133] This also ties in with the anachronous (undecidable) desire of Jefferson (or of God) for the erection of his proper name that Derrida speaks of, illustrated by Jefferson's suffering, his wounding, his mutilation, his exposure, his being put in question (DI 52).[134] There is no desire without aphoristic separation or without circumcision as we saw above; desire can only be posited by risking death.[135] The proper name, however, seeks to be unique; it seeks to stand above language, seeks to avoid contretemps.[136] Yet the proper name never arrives by itself; it does not come all alone.[137] This is shown by the story of the hatter that Jefferson was told and which is recounted by Derrida; the 'moral' of the story being that a proper name is always shared (DI 53).

The proper name is always already inscribed within a classification (and therefore a system of differentiation resulting in the obliteration of the proper), relating it therefore to the law of iterability.[138] This also applies to the name of God, which Derrida refers to as the 'best' name, 'the name of the best name in general' (DI 52). The (best) name, he says, ought to be a proper name, but one 'could not' replace 'God' with 'the best proper name' (DI 52). Jefferson knew this, Derrida says (DI 52). Had the Declaration referred thus to God, it would have shattered the illusion of an ultimate transcendental signified to secure meaning. But does it not happen nonetheless through its inscription in the text of the Declaration? And Jefferson may have

[132] See also Böckenförde, *supra* n. 9, at 12; Derrida, *supra* n. 6, at 17, 157; J. Derrida and E. Roudinesco, *For What Tomorrow…*A Dialogue (Stanford: Stanford University Press, 2004), 91–92.

[133] See J. Derrida, "Des Tours de Babel", in *Acts of Religion* (New York: Routledge, 2002), 109; J. Derrida, *The Ear of the Other* (Lincoln: University of Nebraska Press, 1988), 102; Derrida, *supra* n. 114, at 64; Derrida, *supra* n. 27, at 280.

[134] See above and see also Derrida, *supra* n. 52 (*The Post Card*), at 299 and 332 on a similar desire of Freud.

[135] J. Derrida, "Aphorism Countertime", in *Acts of Literature* (New York: Routledge, 1992), 423; Derrida, *supra* n. 8, at 137.

[136] *Ibid.*, at 419.

[137] *Ibid.*, at 416.

[138] See Derrida, *supra* n. 27, at 109, 110.

known this too. God having deconstructed his own name at Babel, the proper of the proper name vanishes into the common.[139] The proper name is a mark like any other; it is immediately also improper, a common noun.[140] Like any common noun it is imposed and therefore also immediately effaced, erased or expropriated through general writing, the originary violence of difference.[141] In the same way in which language is structured by its possibility of functioning in the absence, in the event of the death of the sender and of the addressee, the proper name is structured by the possibility of functioning after the death of who it names.[142] It lives on; it is destined to survive the subject.[143] In this way one can say that it announces the subject's death.[144] The proper name is a death sentence, a contretemps that condemns to death whilst at the same time securing a delay, suspending death.[145] The proper thus 'comes only in its erasure. … It arrives only to erase itself'.[146]

The 'proper name' of any people can consequently also be said to find its condition of possibility in iterability. The people only 'exist' within this paradoxical structure of death and delay; a structure of survival.[147] This structure, this double law of the name, indicates the risk, but also the chance for an event, for unconditional justice.[148] This necessarily ties in closely with the notions of sovereignty, the nation state, freedom, equality, and reason, elaborated on by Derrida in *Rogues*. The notions of the people and of democracy in their current manifestations are, he tells us there, tied together with sovereignty, freedom as power, calculable equality, and the reason of the strongest. Reason thus conceived finds its origin in itself, it autopositions itself, it collects itself, gathers itself, performatively gives

[139] See Derrida, *supra* n. 133 (''Des Tours de Babel''), at 104–111; Derrida, *supra* n. 133 (*Ear of the Other*), at 100–104; Derrida, *supra* n. 114, at 100. The proper name God chose (Babel) means confusion (a common noun).

[140] See Derrida, *supra* n. 133 (*Ear of the Other*), at 107; Derrida, *supra* n. 27, at 111; Derrida, *supra* n. 133 (''Des Tours de Babel''), at 109.

[141] Derrida, *supra* n. 27, at 108–112; Derrida, *supra* n. 8, at 86.

[142] Derrida, *supra* n. 133 (*Ear of the Other*), 7.

[143] Derrida, *supra* n. 135, at 421, 432. See also Derrida, *supra* n. 52 (*The Post Card*), at 39: 'The name is made to do without the life of the bearer, and is therefore always somewhat the name of someone dead.'

[144] Derrida, *supra* n. 135, at 432.

[145] *Ibid.*, at 418, 421.

[146] Derrida, *supra* n. 52 (*The Postcard*), at 360.

[147] Derrida, *supra* n. 135, at 422.

[148] *Ibid.*, at 430.

itself the right to reason.[149] Derrida however contends that sovereignty (in spite of its claims to purity and indivisibility), as is the case with the proper name, and because of its belonging to language and the need for it to be clothed with meaning, is necessarily shared, divided and partitioned, thereby compromising itself.[150] Through a reading of Plato and Aristotle, he furthermore shows how the concept or name of democracy, in the sense of the power or sovereignty of the people, is made possible by a certain indetermination, lack of proper meaning, a certain freedom of play of democracy, an autoimmunity, in other words, by the democracy to come. This strips the sovereignty of the people of its claim of origin.[151] Similarly freedom, equality, and reason are shown, through a reading of Plato, Aristotle, Nancy, Kant and Husserl, to find their condition of possibility respectively in incalculable, an-economic, power-less freedom, equality, and reason.[152] Every state, and therefore also every legitimate constitutional democracy, Derrida concludes, is 'properly' speaking, a rogue state, because of its essential link with sovereignty and because of its failure (albeit a necessary or inevitable failure) to give effect to the incalculable; the United States and its allies (mostly western constitutional democracies) with their foreign policy of calling other states rogue states, in violating international law, in abusing power, even more so than others.[153]

Sovereignty Without Sovereignty

Declarations of Independence calls on us to read differently. It calls on us to conceive differently of the notion of a constitutional democracy. The ontological question, asking what constitutional democracy is, its essence or its function, necessarily implies an answer presupposing presence.[154] Constitutional democracy should no longer be viewed in terms of the circular turning of a wheel – the people giving themselves a foundational document in order to rule themselves, giving themselves reason and rights in sovereign fashion. This wheel is also a free

[149] Derrida, *supra* n. 6, at 142, 154.

[150] *Ibid.*, at 101.

[151] *Ibid.*, at 25–27.

[152] See especially chapters 4 and 5 of Part I (on equality and freedom) and part II (on reason).

[153] *Ibid.*, at 95–107, 141–159.

[154] Derrida, *supra* n. 22, at 146, Derrida, *supra* n. 14, at 5–6.

wheel,[155] a dissymmetrical contract that does not return to itself.[156] This is indicated by an analysis of the inscription in writing of a constitution, the performative speech act that seems to institute it, its signatures, and its proper names. Constitutional theory has no choice but to engage with the structure of language, which is its very condition of possibility. As Derrida has stated regarding the Declaration of the Rights of Man, it 'implies a philosophy … but also a philosophy of philosophy, a concept of truth and its relations to language'.[157] Language cannot, however, be viewed within a philosophical model of speech as presence and of writing as a mere extension of speech. Such a model of language, apart from being based on a philosophy of presence, would have the result of a repeated neutralisation of the text of a constitution, of the irresponsible unfolding of a programme, of doing only the possible. If the inscription of a constitution within general writing, iterability, the overflowing of the performative, unconditional justice, and the democracy to come is affirmed (and thus no longer forgotten, repressed, unthought), only then does constitutional theory stand a chance of confronting responsibly questions about its interpretation and application, its principles, values and fundamental rights. This responsibility, called for by the impossible, extends beyond the boundaries of national states and of regional unions as well as beyond humanity. It puts in question meaning, application, principles, values, citizenship and human rights. It calls for the hospitable exposure to the event, without the domination and neutralisation of performative mastery and sovereignty, without alibi.

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[155] Derrida, *supra* n. 6 at 24, 37, 40.

[156] Derrida, *supra* n. 14, at 17–18.

[157] Derrida, *supra* n. 14, at 33. See also J. Derrida in Richard Kearney, *Dialogues with Contemporary Continental Thinkers: The Phenomenological Heritage* (Manchester: Manchester University Press, 1984), 114–115 on the close relationship between philosophy and other disciplines.