‘Responsibility’ and the homonymy of autonomy
‘Take your time but be quick about it, because you don’t know what awaits you’, said French philosopher Jacques Derrida in 1998 at Stanford. Indeed. He would not have expected to be cited like this by Valérie Pécresse, French Minister for Higher Education and Research, in January 2009:

We are taking all the measures to ensure that a new ethic founds the autonomy gained by the university community in the conduct of its own destiny. … ‘To profess is to pledge oneself’ writes Jacques Derrida in ‘The University without Condition’. The hour has come to recognize fully this engagement that is at once individual and collective, to have confidence in the university and in academics.

One can truncate a citation, deform an aim, pervert its spirit. But perhaps one should in the first place rejoice that a French government minister knows her Jacques Derrida – unlike a president of the republic who hadn’t heard of Anne of Cleves.


One can read some of them in Derrida too, and in the same general sense: ‘and what matters here is this promise, this pledge of responsibility’.

I am thus referring here to a university that would be what it always should have been or always should have represented, that is, from its inception and in principle: autonomous, unconditionally free in its institution, in its speech, in its writing, in its thinking.

It is the ethic of responsibility that strikes, in a really Pétainist fashion today, when candidates for professorial positions are evaluated for their competence to ‘act as a civil servant [fonctionnaire d’État] and in an ethical and responsible fashion’. Not, however, the same responsibility, because Derrida’s ‘without condition’ is grasped in the ethic of desaisseissement, of non-mastery, of the always-excessive event, in short of masculine hysteria.

On the other hand, ‘autonomy’ (that of our ministers, in any case) is grasped in the ethics of performance – in other words, the culture of results. ‘Autonomy is essential for the university because autonomy is the culture of the result. If the minister decides, it is irresponsibility’; ‘it is necessary for us today to admit that the culture of results should be a part of the university’. As the icing on the cake, Pécresse added: ‘for the first time, a government will judge the universities, finance them, equip them as a function of their real performances’. Autonomy, then, is a ‘culture of results’ in so far as that culture is judged heteronomically. The university is autonomous when it suits the government, in itself the only judge of ‘real performances’. The university is quite literally ‘irresponsible’ (dependent on the minister) where it is said to be autonomous.

Today and in itself, then, autonomy is the mask under which everything that we do not want progresses – that is to say, the evaluation of performance. And if we have begun with Derrida–Pécresse, it is because it is very difficult, hic et nunc, to call into doubt the ethics of responsibility, even when it results in the requirement of evaluation. Do you refuse to be
evaluated? Do you want to be inefficient [non-productive]; or, as our Agency for the Evaluation of Research and Higher Education says, ‘non-productive’?

A knot to be untied then: responsibility, evaluation, performance.

Derrida unites it in advance, by speaking not of performance but of the performative. The performative intervenes three times in ‘The University without Condition’.

The first time, in the principle of an unconditioned University, frank/free, that is to say, set free of everything, and in particular of all ‘territorial (thus national) rootedness’. It performs itself in affirming itself, in ‘the place of the self-presentation of unconditionality that will go by the name “Humanities”’. Affirmation, ‘self-presentation’ – one might be tempted to say Selbstbehauptung (self-assertion) but for the difference of nationality, which is no small thing. Ecce Heidegger:

Battle alone keeps this opposition open and implants in the entire body of teachers and students that basic mood which lets self-limiting self-assertion empower resolute self-examination to genuine self-governance.

The second time, in the declaration of principles of the professor. ‘To profess or to be professor’ is to ‘promise to take a responsibility that is not exhausted in the act of knowing or teaching’: the ‘affirmation’ of the declaration of principles ‘in effect closely resembles a performative speech act!’ As we know, ‘to profess is to pledge oneself’, say the minister and our two philosophers, Derrida and Heidegger, calm, uneasy.

The final, contemporary, time: ‘at the moment that one takes into account not only the performative value of the “profession” but where one accepts that a professor produces œuvres’. That is to say, when, at the heart of the ‘transformed humanities’, between literature and philosophy, one thinks as a poet, as Heidegger – once again – would say.


In Kantian language: Derrida – a child of the Republic with the Crémieux decree – is Kantian when he speaks of autonomy. He is moral and a universalist where Heidegger, speaking of Selbstverwaltung, is a national bureaucrat. Besides, a Kantian thinking of the autonomy of universities exists. It is neither moral nor bureaucratic but rather industrial and commercial, and is expressed in the first pages of the Conflict of the Faculties, those pages which Derrida precisely doesn’t comment on.

Whoever it was that first hit on the notion of a university and proposed that a public institution of this kind be established, it was not a bad idea to handle the entire content of learning … by mass production, so to speak – by a division of labour, so that every branch of the sciences there would be a public teacher or professor appointed as its trustee, and all of these together would form a kind of learned community called a university (or higher school). The university would have a certain autonomy (since only scholars can pass judgement on scholars as such).

In Austinian language: almost all the way. The distinction between performative speech acts and constative speech acts, in play from the start of the profession of the professor, ‘will have been a great event in this century – and it will first have been an academic event’, ‘in the university’, via ‘the Humanities, that made it come about and that explored its resources’. Evidently it is not same thing ‘when, performatively, one professes’ like Derrida, and when one responds to the call of Being.

In Levinasian language: ‘In the face of what arrives to me, what happens to me, even in what I decide … in the face of the other who arrives and arrives to me, all performative force is overrun, exceeded, exposed’. It is the Other, in (the) place of Being, which, for Derrida, makes the ‘event’. (Ereignis all the same – Levinas as Jewish Heideggerian?) Is this a motive for finally abandoning the performative? We will come back to this.

We are moving too fast, and in play. But through these caustic remarks we have wanted to show that, once predicated of the university – in the trembling Heidegger/Kant – autonomy is a fundamentally homonymic notion.

We now want to show that the performative is a good way to outsmart the performance imperative and the ‘culture of results’, on condition that one thinks it to the very end – without stopping, like Derrida, at the doubtful ethics of the ‘event’.

‘Ethics’ and the homonymy of performance

After the homonymy of autonomy, we will take as our new point of departure the homonymy of performance. New European politics evaluates the university. It evaluates it on its ‘real performances’. Such is the ‘culture of results’ into which the university is invited to enter. This is to say, very officially, that those who
evaluate the university are external, foreign to it, and intend to remain so. The president of the French republic, Nicolas Sarkozy, is not a university type. On the other hand, he is a big theorist of the link between evaluation, performance and the culture of results. The university served as a privileged example for him for a while. He barely altered his formulas as a result of the global economic crisis. He may even have toughened them up.

As for us, less speculatively, we will ask: what is understood – here and elsewhere – by ‘performance’? Let us take out our dictionaries. Klein’s Comprehensive Etymological Dictionary of the English Language tells us that the English forged performance on the [model of the] old French parfournir (from the Medieval Latin perfurnire) and/or parformer, before the French borrowed it, at least three times, if Alain Rey’s Dictionnaire Culturel de la langue française is to be believed. In 1869, by analogy with the language of horse racing, ‘performance’ signifies the ‘manner of developing a subject, of executing a work in public’. In 1953, it signifies the ‘individual result in the accomplishment of a task’. In 1963, and in the wake of Chomsky, it is opposed to ‘competence’. It is a moving, bilingual form, which unites sport (performance-record), technique (performance-efficiency of a machine), psychology (performance-test), linguistics (performance/competence) and modern art (performance-happening – without forgetting theatrical representation in English). It is difficult not to add that today performance occupies centre stage in Europe, along with evaluation and the culture of results.

So, as a consequence let us continue with our definitions. In the language of received – and thus uncontrover-sarial – opinion (that is, Wikipedia): ‘evaluation is a method that allows a result to be evaluated and thus the value of a result that can’t be measured to be known. It is applied in numerous domains where results are expected but not measurable.’ Neither research nor health can be measured, and that is precisely what evaluation says when it talks of the ‘performance’ of a hospital or a system of research. The challenge of quantifying the unquantifiable is met thanks to performance.

What is magical about performance is that it is enough to transform more into better, quantity into quality, cardinal into ordinal. It comes at the right moment then: it is the synthesis of quality and quantity. The tension internal to the concept derives from the fact that it designates at the same time the most objectively measurable (the performance indicators of a machine) and what is most singular about the individual act, the performance of a horse, a champion, an artist – that which is unrepeatable. Not only does performance measure the unquantifiable and make the most singular enter into the most objective, but that gives it the democratic look of a numerical figure without being arbitrary. ‘To exit a purely mechanical, legal, egalitarian, anonymous approach’ so as to promote genuine equality, genuine equality and not egalitarianism, says Sarkozy. What is that to say? Genuine equality is not the equality of opportunity; it is the equality of compensation for an equal performance. When we perform well, we are each and every one of us like a racing car, a top-level sportsman, even a champion in bed. Visible and thus profitable.

If now we get closer to performance evaluation in the university sector, we come across two things: the search engine and the evaluation form. Do you think that we exaggerate? Look at how we work already, with Google on-screen, and how they want us to work when we apply for research funding or evaluate research projects.

Research and the Search Engine. Google, then, is a model of evaluation by performance. With Google, basic research and the research of a search engine no longer have anything homonymic about them. The PageRank algorithm that ranks the page responses to a query and is one of the things that gives Google its great superiority, functions – if Bryn and Page are to be believed – according to the academic model of the citation: pages that are clicked or cited the most are ranked first. It is even a question here of a doxa raised to the power two: at the top of the page ranking are the sites that are most cited by the sites that are most cited – a ‘cultural democracy’, according to Google, with a balancing mechanism, however, which gives this democracy a star system; a link from a site that is not cited much is worth more than a link from one cited a great deal.

Now, this ranking mechanism is precisely that put into operation by Hirsch’s famous H-index or impact factor, more or less amended to avoid absolute ridicule (no matter what neo-Nazi negationist is evidently ranked higher than Lévi-Strauss). It determines the admissibility of the applications for senior researcher submitted to the European Research Council in Brussels. It classifies researchers, for example, by the number of their publications, in journals that are themselves classified and rated, by balancing them with the number of citations that are made of these publications in journals that are themselves classified and rated. The classification of journals is evidently the object of a fierce national and international battle, since it forms
part of the barometer. ‘Tell us how many articles you have published in journals with editorial board A and how many times these articles have themselves been cited in journals with editorial board A, and we will tell you what you are worth!’ Of course, we will not take into account the linguistic bias, which means that you may not necessarily be publishing in English – or rather in *globish* – and that maybe it is necessary to ensure that continuing to speak in French or German (thus maintaining them as languages and not simple dialects) doesn’t penalize you. Of course, we will not take into account either the disciplinary bias, which means that the human and social sciences, unless they are strictly cognitive, can require publications that are lengthier and take longer to write (did you say ‘books’?). Nor the fact that it might be a matter of reading and of thinking, even when evaluating; nor the practice of citing one’s own little clique, or accounting for the impact that is forgotten tomorrow.

That such a treasure may make Google’s fortune – which subordinates everything, including so-called cultural democracy, to ‘legitimate commercial goals’ – is the name of the game, or at least of a certain game. But for this kind of ‘research’ – such as it is practised by a ‘search engine’ – to become the regulatory norm for the evaluation of basic research is something that must be opposed by every possible means and to the very end, because it evidently contradicts the very idea of emerging research. By definition, the (too singular) base of a Gaussian curve is invisible. Performance and the H-factor are incapable of measuring originality as such. As Lindon said apropos Beckett: one doesn’t notice the absence of an unknown. Now innovation would like researchers to produce prototypes, not stereotypes: there is no H-factor that could ensure either its rating or its conformity.

Language and the ethic of forms. Let us now come to the form. Performance has its calculus, as we have just seen. But it also has its ethics, the ‘responsible’ ethics of ‘autonomous’ universities. It is interesting that this ethic has to pass through the sections of a form. What is it a question of? Phenomenologically, the form is the primary perception of evaluation. The project leader, the leader of the research team being evaluated, completes an ‘evaluation form’. The evaluator of the project or of the research team completes another form. What is called evaluation may be described – phenomenologically still – as the passage from one form to another. Why the form? We propose two answers.25

First, the form is the point of contact between language and evaluation. It is composed of sections that must be completed one after the other. The first function of the form is to sequence: it transforms the object evaluated – the illness of a patient and his or her being taken into care, for example – into analogous portions that can be costed on a per action basis according to a pre-established protocol. The ‘personal appreciation’ or statement of the evaluator is itself a section – generally the last one, because it is the least important. After evaluation, as the passage from one form to another, a closer description makes evaluation appear as the passage from one section to another. What do we do when we pass from one section to another? It is difficult to say. In any case we do know what we don’t do, or don’t do any more: we don’t write or write up any longer; we don’t develop ideas any longer. We progress in the form by separating, segmenting and sequencing. Unlike the *topoi* of Ancient Greek rhetoric, which – although decried – constituted a reservoir of arguments for invention that one was free to assemble in the most appropriate, and singular, manner each time, the form is a fixed sequence.

Second, the form is the point of contact between evaluation and *morality*. From the point of view of the evaluated, more and more frequently it contains the moment of *self-evaluation*, with the previous noting and identification of one’s ‘strong points’ and ‘weak points’. In laboratories and research centres one frequently ironizes the similarity between self-evaluation and the confession of sins (or Maoist self-criticism, depending on one’s preferences). That sort of irony is
easy. What is happening in reality is very serious. If you can only find ‘weak points’, it is because you really must have a problem; but if you only credit yourself with ‘strong points’, in a sense this is even worse. What self-evaluation tests is your ability to acquire the Anglo-Saxon and Protestant virtue of fairness. What is fairness? It is exactly that which remains of the subjectivity of the researcher who puts his work through the grid of the form: just enough subjectivity not to be confused with a computer.

It is the same for both evaluator and evaluated. The form is what assures me that no-matter-what evaluator would have made the same decision as me. Here once again is fair play and something to soothe my conscience: the idea that I might have shown judgement, even taste, was in fact a source of deep insecurity. Who am I to judge when I am no longer elected by my colleagues and my task is to return my correctly completed form before the deadline? The form, with its neatly ordered sections, gives at least a momentary response to my anxiety, until the moment when I have to compare my form to those of peer evaluators with as little legitimacy as me. But even at this stage, that of the so-called ‘update meeting’, the comparison of forms will not require any more than the minimum of subjectivity that was required of those being evaluated. There will be trouble for me if I talk beyond the confines of the sections on the form: I will have come close to insider dealing, or – as the evaluation agencies call it – a ‘conflict of interest’.

The language of forms is thus transparent and honest, consensual, euphemistic and gentle. Its transparency is guaranteed by the procedure: the justice of evaluation is a procedural justice, à la Habermas. Fairness is ensured by process. That is why those in charge of the national and European evaluation agencies are generally decent, competent and above all profoundly cooperative people: they will always encourage you to sit down next to them in order to ‘refine the criteria’, as they say; to multiply them if necessary. The essential point is that this refinement of criteria only ever leads to a longer form. Just try getting away from forms: you will find yourself talking into thin air, for your own amusement. You will be considered irresponsible.

The performative versus performance

To finish, let us posit – delicately, provisionally, because it is where all the difficulty lies – a universitarian ‘we’, a university thought as (a) ‘we’. There are two ways in which to call ‘ourselves’ to ‘responsibility’: either by designating for ourselves the historical mission of the university – that is the old formula, born with Humboldt, continued deformed by Heidegger, and the incantation of Selbstbehauptung – or, by summoning ourselves, at last, to ‘perform’ efficiently – to publish, to be ‘productive’, and, even more so, to be ‘evaluated’. This is the call that is coming from our government ministries, our evaluation agencies, our states today. In one case, we will have to answer for the university, as one answers for an idea that is greater than oneself. In the second, it will be necessary for us to ‘defend’ our university (each one his or her own university, different and in competition with all the others, co-petitive, as Google says), in the way that one defends one’s team, one’s business, one’s country: our responsibility will be to respond to calls for tenders. Always responding.

Those are the two current discourses on the university. Sometimes they seem to be opposed. Most often, as with Valérie Pécresse, they reinforce each other. What the present moment of the university shows us is that the ethics of responsibility has been unable to do anything against the culture of results; quite the contrary, in fact.

Here, we rediscover our initial knot: responsibility, evaluation, performance.

In 1998, Jacques Derrida’s ‘The University without Condition’ was barely touched by the fever of evaluation. Performance was not yet completely the university’s business. Derrida placed the performative in the face of responsibility.

In our knot, then, one of the threads splits in two: performance and performative. That is without doubt the strangest thing that we discovered in ‘The University without Condition’. But how the devil did we pass from the performative university to the performances of the university, judged by the criteria of a ‘culture of results’?


But other evolutions have taken place. From the performative to performance, the journey sums up two centuries of the European university.

In Derrida, for a time at least, the performative saves the ‘university without condition’ from Selbstbehauptung and the pathos of destining. For Derrida, the unconditioned and the absolute are said performatively,
so as to avoid repeating Humboldt’s lesson and even more so its being led astray by Heidegger. In affirming itself without any condition, the university fabricates itself [se fait] – is constituted as university – in anticipation of any merely transmitted knowledge.

The idea of the university becomes a language act, that of the professor who knows that his or her freedom is not exhausted by the ‘pure technoscientific knowledge’ that it accompanies.22 In a word, the performative university is no longer the essence that one contemplates and that one endeavours to realize. It is the act that one performs, the university that starts all over again with each lecture course.

The performative as a support for and vector of a knowledge – that of the university: we must hold this to be something the topicality of which is still and always established. To tell the truth, we must maintain it for much longer than Derrida. Because for Derrida the performative is rapidly directed towards a ‘place where it fails’,23 Derrida designates this place as ‘event’. The event ‘disregards the performativie’. It has to ‘dissociate’ the Humanities from ‘every phantasm of indivisible sovereignty and of sovereign mastery’ shortly after the same Humanities has been associated with ‘engagement’ and the ‘promise’ of a profession of faith characterized as performative.24 That is what we called masculine hysteria: an apology for impotence through fear of the counter-performance (‘without power’ or ‘without defence’ – Derrida’s quotation marks26); the poetry of désavourement versus the ‘masterable possible’, with a definition of the event – in a dialectico-phenomenological patois – that is evidently oxymoronic as ‘impossible possible’ (‘only the impossible can happen’); the normative exacerbation of this impossible possible as the only ‘event worthy of the name’; and the final choice of the event as the antonym of the performative.27 The whole argument is summarized in the superbly forged formulation ‘the force of an event is always stronger than the force of a performative’.28

The performative obliges us here to judge things by effects. The effect is that eight years after its appearance, ‘The University without Condition’ finds itself cited by a French government minister who has the whole of the university against her.

Certainly what is at stake here, as usual, is an appropriation of the other, not for the fundamentals of what they say but for the emblem, self-designated as ‘opening’ – whether it is a matter of Jaurès, of the signifier Mitterrand, or of Derrida. What is at stake is a governmental ventriloquism in which no word, no idea, comes out unscathed.

However, we find a real convergence where the philosopher is most philosophical and the minister most political. Valérie Pécresse paraphrases: ‘to profess is to pledge oneself, wrote Jacques Derrida’.29 For his part, Derrida wanted to ‘exceed pure techno-scientific knowledge in the pledge of responsibility’.30 On the one hand, there is engagement,31 thought as motivation in the horizon of an ‘ethics’ (the word the minister uses) of responsibility; on the other, for the philosopher, is an ‘ethico-political responsibility’, the principle of the ‘unconditional resistance of the university’.32 Two concepts of responsibility, doubtless, and two ethics also, but in both cases an appeal, an exhortation, a paraenesis.

The university without condition that, for our part, we are demanding, is a university without appeal (sans appel). Without appeal covers without ethics, without responsibility, but also without the dilemma between an autonomy desirable for every corporation and a heteronomy that is necessary to bring the university out of itself.

Is it worth specifying here that to reject the injunction to responsibility is not to vindicate irresponsibility – or immorality – for oneself. (Should one say ‘non-ethics’?) In fact, our response, like Derrida’s in his time, is strategically determined. It has nothing to do with a perennial, timeless – that is to say ‘essential’ – definition of ‘the’ university. In this sense, it is not ‘responsible’ (ethico-ontologically responsible); or responsibility must be understood here as the strength to respond ‘no’. As it happens, in fact, we respond ‘no’ to the responsibility that is ideologically hammered out, as the responsibility of the citizen professor and citizen student of a techno-scientific neoliberal state concerned with performance. And we protest – this is what we are maintaining – that this performance is radically counterproductive on all levels: but first of all on that of knowledge and invention, including the invention that is the transmission of knowledge.33

Just as the performative utterance – the university thought in the form of an enlarged perlocutory – has been able to get the university out of an autonomy reduced to Selbstbehauptung, so – thought all the way through – it will serve us as a provisional arm for subtracting us from an autonomy confused with the performance of a manager. Its other name is: ‘let us continue the combat’.

A ‘veritable’ autonomy, then? Of course, it is this ‘ethic’ that we will begin by breaking with.

Translated by Andrew Goffey
Notes


3. It is worth noting that the original French of the expression that Pécresse cites is ‘Professer, c’est s’engager’. The verb s’engager can mean ‘to take a stand’, ‘to commit oneself (to something)’. Derrida plays on the verbal form engager and the nominal expression en gage (pledge). (Trans.)


7. New modes of organization relative to the ‘concours’ for the recruitment of academics (the agrégation, CAPES, CAPET, etc.), contained in the decrees of 28 December 2009. See the Journal Officiel de la République Française, 6 January 2010.


11. Ibid., p. 208.


14. When Derrida ultimately interrogates himself about the nature of his discourse, in ‘The University without Condition’, he asks: ‘is it philosophy or literature? Or theatre? Is it an œuvre or a course, or a sort of seminar?’ (Trans.)


17. Ibid., p. 209.

18. Ibid., p. 235.

19. Thus, ‘Personally, I see in evaluation the compensation for performance. If there is no evaluation, there is no performance.’ (Speech given by the President of the Republic on the occasion of the launch of the reflection on the National Strategy for Research and Innovation at the Palais de l’Élysée, 22 January 2009.) Or: ‘the culture of results and of performance has always been at the centre of my action. We should not have any taboo with regard to figures and I have always advocated the greatest transparency.’ (Speech given by the President of the Republic at a meeting with the main actors in security, prisons and national education, 28 May 2009.) All of Nicolas Sarkozy’s speeches can be read online at www.elysee.fr.

20. ‘I have a deep conviction: we will not change our behaviour if we don’t change the measure of our performance. And our behaviour absolutely must change.’ (Speech of the President of the Republic at the International Conference for the Presentation of the Conclusions of Commission for the Measurement of Economic Performance and Social Progress, at the Sorbonne, Paris, 14 September 2009.) The measure changes, perhaps. However, it remains a measurement of performance. See on this point Barbara Cassin, ‘L’État schizophrène, Dieu et le nous raisonnable’, in Roland Gori, Barbara Cassin and Christian Laval, L’Appel des Appels, Pour une insurrection des consciences, Editions Mille et une nuits, Paris, 2009) pp. 351–74, especially pp. 373–4; and Philippe Büttgen, ‘D’ailleurs toute activité sans evaluation pose un problème’, MethIS, Spring 2010.

21. Speech by the President of the Republic during a visit to the Institut Régional de l’Administration, Nantes, 19 September 2007.


23. Eugene Garfield created the Journal Impact Factor in 1960 to support the Garfield Impact Factor in selecting reviews for the Canadian Medical Association. We insist on the fact that the H-factor constitutes the unwaranted extension, even the uncontrolled importing, of a practice that has its place in bibliometry, introduced in Canada for the well-controlled and numerically significant collections of medical publications.

24. The term that the authors use is grille, which in this context can be translated as ‘form’, ‘grid’ or ‘questionnaire’ (Trans.).

25. On this and the previous aspects, see Philippe Büttgen and Barbara Cassin, ‘“J’en ai 22 sur 30 au vert”. Six theses sur l’évaluation’, Cités 37, 2009, pp. 27–41.

26. The expression that the authors use is pour le plaisir. It is an oblique reference to Cassin’s work on the sophistry and the plaisir de parler (Trans.).


28. Ibid., p. 209. For the rest of the argument one would have to measure exactly the impact of the debate between Searle and Derrida: the mention of ‘Signature, Event, Context’ and of Limited Inc has an important part to play in Derrida’s destitution of the performative (see p. 301 n6).

29. Ibid., p. 235 (Derrida’s italics) – a sequence that sketches out one of the principal trajectories of ‘The University without Condition’.

30. Ibid., p. 206.


32. Ibid., p. 236.

33. See n2 above.


35. See n3 above (Trans.).


37. On performance as the principle of an economic thought bankrupt since 2008, see Barbara Cassin, ‘L’État schizophrène, Dieu et le nous raisonnable’, cited in L’Appel des appels. This ‘appeal of appeals’ has for its first function an appeal to say ‘no’, from the heart of each trade [métier], and, in particular, to say ‘no’ to performance. In its own way it too is without appeal.