INTRODUCTION

Karin van Marle and Wessel le Roux

Friendships

The wider context of the essays that have been brought together in this collection can be traced back to a series of constitutional events in post-apartheid South Africa during the second half of the 1990s. The first democratic elections had taken place on 27 April 1994. The newly created Constitutional Court had heard its first case on 15 February 1995 and was slowly making its way into uncharted constitutional territory. The first fully democratic South African Constitution had been adopted on 8 May 1996 after many years of colonialism and apartheid (the so-called interim Constitution of 1994 was still promulgated by the apartheid parliament). The Truth and Reconciliation Commission\(^1\) had survived a constitutional challenge on 25 July 1996\(^2\) and was beginning to hear harrowing evidence of past human rights abuses. These institutional events shook the South African legal community to its roots. A sense of expectation hung in the air. Spurred on by the energy released by the anticipation of new possibilities, a few colleagues and friends came together once a week to read texts, and discuss themes and issues of the day.\(^3\)

These meetings and discussions did not form part of a bigger academic or theoretical agenda. It was left to the members of the reading group to select and propose, without any programmatic pressure, texts that could form the basis of the discussions. These personal choices became the contingent events that eventually fostered and sustained both new and already established friendships. This collection of essays is the result of those friendships, and, as such, continues to bear the marks of those little contingencies amidst a series of over-determined constitutional events of global significance.

The weekly meetings eventually came to an end as some of us moved to other universities; the discussions and friendships, however, continued.\(^4\) Towards the end of 2003, the friends decided to organise a panel at the Law and Society Association annual meeting, which was

1. The South African Truth and Reconciliation Commission was established in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995.
2. \(\text{AZ IPO v President of the Republic of South Africa} 1996 (4) SA 671 (CC)\)
3. André van der Walt and Johan van der Walt started with these discussions in the early 1990s. Henk Botha joined them later and eventually, during 1997, Karin van Marle and Wessel le Roux, Danie Goosen, although not a regular member, gave much direction to some of the discussions, in particular the reading of Hannah Arendt. At some stage all members of the group were working in various departments at the University of South Africa (Pretoria).
4. The annual conference of the Research Unit for Legal and Constitutional Interpretation (RULCI) is one example of a space where most members of the reading group came together and where the early discussions were continued in a wider context.
to take place in Chicago during May of 2004. The organisers accepted the proposed panel – loosely billed as a session of, or on, fragments from post-apartheid jurisprudence – and Jonathan Klaaren kindly agreed to chair it. This collection of essays is the direct result of the papers that were presented at that event. The brief was nothing more than an engagement with, and reflection on, texts and themes that were originally of concern during the discussions in the late 1990s and the years thereafter. The aim was in no way to limit the focus or restrict the imagination by forcing a particular theme or framework onto the individual contributions, the session itself or, finally, this collection of essays as a whole.

Given this history, it would be extremely reductive suddenly to reconstruct a single unifying theme or closed conceptual framework for this collection as a whole. The various chapters are reflections of engagements with many of the diverse texts, themes and thoughts that featured in the group discussions over a decade. This is not to say that those engagements are merely abstract, disembedded and disembodied contemplations. Each chapter is in its own way marked with material concerns of a specific context, time, space and place. The title of the collection captures the spirit and aim of the collaboration: to put forward reflections – which are by no means representative, but nevertheless examples – of the becoming of post-apartheid jurisprudence.

Texts

Fragments of the weekly discussions that took place among the contributors to this volume (Stewart Motha excluded) can be located to a lesser or greater degree in all of the chapters, as they can between them. A closer look at these fragments reveals one of the larger themes that animated many of the earlier meetings and discussions: a critical concern with the relationship between law and politics within the context of constitutional democracy and the discourse of constitutional rights. The more contingent interpersonal context of the collection also reveals itself in the nature of the texts that became focus points during some of the discussions and still remain so for most of the contributors today. Karl Klare’s article on ‘transformative constitutionalism’ from 1998 is one such example.5 It became the vehicle for a return to the different ways in which the American Realists6 and (US) CLS7 had exposed the politics of law; or, as it was described by Klare, to the tension between freedom and constraint in legal interpretation. The advent of the South African Truth and Reconciliation Commission during those years placed the theme of reconciliation

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5 Karl Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 S. JHR 147.
on the table. From the very first discussions a prevailing concern was the possibility of a (re)construction of a public sphere. Hannah Arendt’s *The human condition* provided a central focus for the discussions in the group and for the research of individual members of the group. For us as legal scholars, language is central to everything we do and because of the effect of the interpretive turn, our discussions were also marked by what can be described as certain postmodern or poststructuralist tendencies. Feminist concerns were also voiced.

This eclectic choice of texts and reading material soon impressed on everybody’s work the understanding that post-apartheid legal scholars, facing the failures of positivist as well as natural law approaches of the past, had to think about the relationship between law, politics and critique in new ways while they confronted the shift from authoritarianism to democracy, parliamentary sovereignty to constitutional supremacy, inequality and discrimination to equality.

Our tentative attempts to this end have resulted in this collection of essays. The collection is no more than a fragment of a larger ongoing debate about the nature and place of law in post-apartheid South Africa. It does not represent a single position in this debate. There are to be found here fragments of a vision of post-apartheid politics; or what Karin van Marle describes in chapter two as ‘bits and pieces’ of a post-apartheid politics of action. The collection is also marked, finally, by the fragmented nature in which it draws on two frequently opposed philosophical and jurisprudential traditions, most notably ‘post-realist’ American constitutionalism (i.e., Klare and Michelman) and ‘post-structuralist’ French thinking (i.e., Nancy, Derrida, Lyotard and Kristeva).

**Traces**

All the chapters are animated by the attempt to rethink the idea of the public, politics and democracy in a post-liberal manner, that is, as qualitatively different from the administration of an aggregate of private interests. From this perspective the discourse of constitutional rights is rethought beyond its traditional liberal confines: not as pre-political bounded spaces of individual freedom, but as something inherently contested.

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8 The South African Truth and Reconciliation Commission was established in terms of the Promotion of National Reconciliation and Unity Act 34 of 1995. The Act survived a constitutional challenge on 25 July 1996, when the Constitutional Court held in *AZAPO v President of the RSA* 1996 (4) SA 671 (CC) that the widespread amnesty provisions of the Act did not violate the interim Constitution of 1994. The commission started its proceedings shortly thereafter. For an account of the early days of the Commission’s proceedings see Antjie Krog *Country of my skull* (1998).


10 See for example Rosemary Coombe ‘Same as it ever was: Rethinking the politics of legal interpretation’ (1989) 34 McGill LR 604.

11 These texts included, among others, Jean-François Lyotard *Just gaming* (1985); Jacques Derrida ‘The force of law’ in Carlson, Cornell and Rosenfeld *Deconstruction and the possibility of justice* (1992); and Chantal Mouffe *The return of the political* (1993).

12 Such as those raised by Drucilla Cornell ‘The doubly prized world: Myth, allegory and the feminine’ (1990) 75 Cornell LR 644.
and political. The relationship between rights and politics is complex, however. Two different sets of questions can be distinguished in this regard. How can the politics of legal interpretation be fashioned into a politics of legal transformation? How must the traditional doctrinal engagement with the right to property and the right to equality, to take the two examples discussed in chapters four and five respectively, be rethought in order to open the constitutional rights discourse to the possibility of transformative politics or public action?

Henk Botha argues in chapter five that the politics of interpretation is at work, not only when subjective preferences inform legal judgments, but also where a reliance is placed on apparently neutral legal principles. The critical task is to force open the interpretive politics of legal formalism in order to reshape the hidden politics of interpretation into an open site of democratic contestation and transformation. To this end, Botha argues that the ‘dignity-based concept of equality’ that dominates the post-apartheid constitutional equality discourse should be doctrinally replaced with a ‘complex conception of equality’.

André van der Walt explores a number of water disputes in chapter four in order to illustrate that the dominant private law doctrine of property rights fails to give proper expression to the public or political dimension of property law. He argues that the classical liberal view of subjective property rights, from which the post-apartheid property rights discourse has largely been derived, will have to be doctrinally reworked if it is to support the possibility of post-apartheid transformative politics. The task of property law is not (exclusively) to create wealth, but to constitute a specific social or political order, that is, to contribute to an aspect of public life without which individual life is unthinkable; an aspect that transcends both the private interest and the public interest (understood as the harmonisation of individual entitlements).

The first set of questions dealing with the politics of legal interpretation also opens a second. Karin van Marle argues in chapter two that the post-apartheid constitutional rights discourse can never become the medium of political action and revolt. Law is precisely for this reason not politics. From her perspective the drive towards the politisation of constitutional rights must also confront the limits of law’s ability to doctrinally or theoretically reconstitute itself as a medium of politics and transformation. What the limits of law constitute and how those limits should be registered combine to form a second set of questions which animates this collection.

Johan van der Walt takes up these questions in chapter one. Relying on the work of Derrida and Nancy, he urges us to be attentive to the aporetic difference between the subjective intentionalities of politics (the Schmittian pull of unity) and the in-tensionality of the political (the Arendtian pull of plurality). He proceeds to interrogate critically the threat that mercantilism, religious moralism, multicultural language politics and the politics of the unitary state pose to the ‘complexity of the political’ and to the time of reconciliation in post-apartheid South Africa. These phenomena all tend to reduce the complexity of the political to some form of unity. Van der Walt finds the ‘obnoxious solidarity’ of these attempts just as problematical as the ‘placid plurality’ of political liberalism.
Karin van Marle argues in related terms in chapter two that constitutional rights are, and will always be, caught up in their own monumentality and closure. This poses dangers in the post-apartheid context, where constitutionalism and human rights have seemingly become all-pervasive. On the one hand, rights have tended to become monumentalised and are not open to continuous questioning; on the other, rights have become the only legitimate avenue of politics. The result of this reduction is an absence of action, thinking and revolt, as is evident in the mainstreaming of gender politics. Relying on the work of Arendt and Kristeva, Van Marle argues that in this context critique should take the form of a memorial life or an ‘ethical engagement with the limits of the law’. It is only in its memorial moments (moments of failure) that the constitutional rights discourse is able (if at all) to recall the possibility of a politics of becoming.

In chapter three Wessel le Roux explores a number of spatial metaphors that are associated with the architectural design of the new South African Constitutional Court building. He does so in order to interrogate the limits of a republican politics of constitutional rights. Relying on the work of Lyotard, he argues that constitutional rights mark an aporetic boundary between the ethical and politics, between obligation and norm. The aporetic structure of rights necessitates a constitutionalism of negative representation, such as that which Lyotard associates with the aesthetics of the sublime. The constitutional rights discourse can therefore never simply be approached as the normative gathering of the political community. It is always and also the moment that marks the limits and the labyrinthian dislocation of all laws, norms and communities.

Traces of these and other arguments cut across the borders of all the individual chapters. Johan van der Walt, for example, tackles reconciliation explicitly in chapter one, but the theme also resonates in Karin van Marle’s discussion of action in chapter two. The former author’s exposition of mercantilism is echoed by the latter’s discussion of Mamdani’s critique of reconciliation. Van der Walt’s warning against a Schmittian totalisation of politics likewise recalls Van Marle’s criticism of the monumentalism of constitutional and human rights politics. Le Roux’s insistence on justice as *differend* (following Lyotard) or *differance* (following Derrida) in chapter three resonates with Johan van der Walt’s reliance on Nancy’s empty or inoperative community in chapter one. Hannah Arendt’s understanding of politics and the public flows through the collection, from Johan van der Walt’s reliance on her notion of plurality, through van Marle’s commitment to the centrality of life in her thought, to André van der Walt’s explicit use of her exposition of the public/private distinction in chapter four. Henk Botha similarly develops the Arendtian notion of politics into the concept of complex equality in chapter five. Botha shares Le Roux’s concern with the spatial metaphors that structure the post-apartheid rights discourse, as well as Le Roux’s critical response to the Constitutional Court’s decision in *Jordan*. Botha’s exposure of the claim to neutrality that lies at the heart of the post-apartheid dignity jurisprudence, is at the same time echoed by van Marle’s concern with a monumental approach to rights that seemingly

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13 See *Jordan* 2002 (6) SA 642 (CC) 2002 (11) BCLR 1117 (CC)
ignores the politics of the past. These traces are marked in the respective chapters by short cross-referencing footnotes.

The concluding chapter by Stewart Motha provides a critical reflection on some of the key themes and tensions in the collection as a whole. It is written by somebody outside the immediacy of the post-apartheid context. The chapter formulates its own challenge to critical legal thought in post-apartheid South Africa and elsewhere. At the same time it begins to assess the way in which each of the individual chapters in this collection tries to respond to this challenge. As such it reformulates many of the questions that have been raised in the course of those chapters. The focus here, as in the rest of the collection, is not on what has been achieved, but on what remains to be thought in the ongoing debate on the relationship between law, politics and critique.

Images

The photographic images that appear on the front and back covers of this collection of essays are from The Lost Men Project by South African artist Paul Emmanuel. This outdoor site-specific memorial installation was launched in July 2004 at the National Arts Festival, Grahamstown, South Africa. The images interrogate the fragility of public memory and constitute a site of resistance to fixed and monumental representations and the closure of meaning. As such, the images and the whole project resonates closely with some of the central themes that infuse the essays in the collection as a whole.

The artist himself explains the background to, and spirit of The Lost Men Project in the following words:

The installation has a delicate, fragile presence and invites the viewer to contemplate the work against the surrounding landscape. This project is a development from a previous series of works dealing with memory and loss, namely the Air on the Skin series. Traditionally, war memorials have idealised and/or emphasised the glory of war. Usually, the materials chosen for memorials, for example, granite, marble and bronze, signify the permanence of the memory of those who have died. To make the ultimate sacrifice for one’s country or ideals is perceived as a noble concept, as is that of the ‘glory of war’. This project emphasises the complete opposite. The Lost Men talks about loss, the pathos of impermanence, the fragility of life, the memories that remain and how in time they fade, and questions traditional notions of masculinity. The materials specifically emphasise and speak of delicacy and transience, and use the ephemeral quality of the imprinted silk to contrast with the use of lead type used by the artist in a process of blind embossing.

Our hope is that the images will inspire a desire to read the printed texts in this collection from the inside outwards. Temporarily bound together by the images on the covers, but ultimately, like them, mere fragments; impermanent and fragile.