

Constitutional patriotism or constitutional nationalism? A response to Wessel le Roux's paper^{*}

Karin van Marle^{**}

Wessel le Roux's paper argues for new conceptions of citizenship. His starting point is a change in the old Westphalian world order that must give way to new forms of empire, transnationalism, postnationalism and cosmopolitanism. He critically reflects on the Constitutional Court decision in *Richter*. Willem Richer argued that he should be allowed to vote in the general elections of 2009 while working abroad. The Electoral Act allowed a special vote for voters absent at the time of elections for the purposes of a holiday, a business trip, attendance of a tertiary institution or an educational visit, or participation in an international sports event, but not for someone working abroad in a private capacity - in other words, the person is not working abroad for diplomatic or government purposes.

As Le Roux explains, this case disclosed the issue of who should or should not be allowed to participate in the political life of the country through the voting process - resident citizens, non-resident citizens and/or non-citizen residents. Without going into all the technical details already explained by Le Roux, the implication of the Constitutional Court's decision is that not only voters who are temporarily abroad for private work should be allowed to vote, but also those who are permanently abroad. In doing this, the court negated the residence-based approach that stands at the heart of the current Electoral Act. It is particularly this aspect of the judgment that troubles Le Roux.

^{*}This paper was delivered as a response to Wessel le Roux's presentation at the State of Statelessness Colloquium, Unisa 2009-08-06. The version of Le Roux's paper published here differs from his initial presentation to which my response was written. However, the main arguments remain the same.

^{**}BLC LLB LLM LLD. Professor of Law, University of Pretoria.

I will focus on only a few of the issues raised - Le Roux's main concern is the *expansion* of voting rights to non-citizen residents as a way of allowing migrant populations to be politically active in the place where they are not merely working but, in fact, living. Related to this is a particular understanding of and support for politics, democracy and citizenship, one that *breaks with the liberal view* that supports an instrumentalist conception of politics and democracy. Le Roux points out that the only concern in the liberal view is the relation between the individual and the state; voting rights are important merely for the protection of an individual's interests. According to this view political and economic interests could be protected sufficiently by representation. Liberal politics would be content with the idea of non-resident voting. Le Roux echoes the critique of many others that this is an instrumental concept of politics, democracy and citizenship and one that the South African Constitution and Constitutional Court rejected.

The model embraced by the Constitutional Court and supported by Le Roux is one of *participatory democracy*. In this understanding democracy and politics means much more than going to the polls once every four years. This version of democracy is linked to a republican notion of politics, where collective efforts, public deliberation and some notion of a common good stand central. But Le Roux highlights another aspect, namely the idea of democratic accountability. Politics is not merely about maximizing individual interests, but also about being accountable, having certain duties and obligations. This argument brings him to make the following statement: '[O]nly citizens who are directly subject to the jurisdiction of the South African courts should be able to vote'. Non-resident citizens could thus be 'stripped of their right to vote'. To be clear:

[C]itizenship in the narrow sense of the term should be determined with reference to the value of democratic accountability: those who are directly subject to the jurisdiction and violence of law should have a say in the making and administration of the law; those who are not ... should not.

The element of accountability relates to the necessity of residence, and further the issue of being *subject to the law*. Expanding voting rights to non-citizen residents in this view must mean a simultaneous limiting of voting rights of non-resident citizens.

Up to this point I have highlighted the following from Le Roux's paper: a call for the *expansion* of voting rights that implicates a rejection of a *liberal* idea of politics and democracy and a support for

a *participatory* idea. Relating participatory politics to *obligation*, paradoxically leads to a *limiting* of voting rights, in other words in the same gesture that we expand voting rights to non-citizen residents, we limit the voting rights of non-residents or rather strip non-resident citizens of their voting rights. The distinction between formal citizenship (nationality) and active participatory citizenship is used to explain this move. Le Roux also recalls the distinction made by Jürgen Habermas and followed by, amongst others, Seyla Benhabib between national patriotism and constitutional patriotism. I elaborate on the notion of constitutional patriotism below.

Referring to arguments justifying voting rights for non-residents on the basis of their economic contribution, Le Roux argues that the main concern is not whether expatriate citizens remain patriotic or economically productive, but that expatriate citizens who are no longer subject to the jurisdiction of the law should not have a democratic say in the making of the law. The law and the political life enabled or disabled by law is thus crucial for the view that refuses non-resident voting rights.

It is this embrace of law, and in particular of the constitution, that I will focus on now. My concern is exactly the centrality given to the law and to the Constitution; politics, democracy and citizenship are directly related to and enabled by law. Although I support the notion of expanding voting rights to non-citizen residents and agree with the critiques levelled against a liberal, instrumental notion of politics and democracy, I am unsure about the emphasis on residence as the yardstick for participation and, more than that, the concession to law and constitutionalism as a vessel for community, politics and democracy.

Emilios Christodoulidis cautions against what he calls the ‘optimism’ inherent in an endorsement of a republican understanding of politics, democracy and citizenship.¹ His claim is specifically against the republican belief that the law and in particular constitutionalism can serve as a basis for politics and the community. Although the vision of an active citizenship is promised because of the containment inherent in law and constitutionalism, the ‘politics of civil society’ will be inhibited and the ‘acquisition of social and political identity’ obscured.² Christodoulidis explains constitutional patriotism as follows: ‘What Habermas has termed

¹Christodoulidis “‘A new constitutional reality for civil society’? Some cautionary remarks on republican citizenship’ in Bellamy *et al* (eds) *Democracy and constitutional culture in the Union of Europe* (1995) 177.

²*Id* 178.

“constitutional patriotism” pronounces its ties to both active participation and membership in the State (and consequently the Nation due to the historically contingent connection between State and Nation).³ What is significant about Christodoulidis’ argument is that he exposes how both models are connected to law. The liberal model and the republican model have a shared premise, namely law. ‘The existence of the constitutional framework underpins both competing (liberal and republican) positions because neither transcends the language of citizenship and rights and both seek their anchorage, ultimately, in law’.⁴ The differences of course should be noted, what is important for the liberal is ‘accommodation of interest’, ‘a one-way process of feeding his/her contribution’ and what is important for the republican is ‘inter-subjectively shared praxis’, ‘a feedback’.⁵ In the republican view, law provides the substantiation for popular sovereignty through the constitution, by providing a constitutional/political home for participation and deliberation.⁶

Zenon Bankowski and Emiliios Christodoulidis, within the context of debates on the issue of citizenship in the European Union, argue for citizenship based on ‘participation’ and not any form of ‘received membership’.⁷ For them ‘a community’s constituency should not be taken as a given as when membership is its precondition’. A community should in fact contest its political space, and, more than that, is generated by treating its political space as contestable, thereby ‘postponing its fixity’.⁸ They attempt to create a position between ‘bounded’ (linked to nation) and ‘unbounded’ (linked to globalism) notions of citizenship by putting forward the notion of an ‘essentially contested’ constituency. According to the authors in the contestation over constituency ‘community comes about’.⁹ In this context they invoke the metaphor of home but strongly argue for a conception of home that is fluid and constantly changing.

I raised a concern above, that Le Roux by supporting the notion of constitutional patriotism is making law and the constitution too central to citizenship, political participation and democracy. I agree with his

³*Id* 179.

⁴*Id* 180.

⁵*Ibid*.

⁶*Ibid*.

⁷Bankowski and Christodoulidis ‘Citizenship bound and citizenship unbound’ in Hutchings and Dannreuther (eds) *Cosmopolitan citizenship* (1999) 83 at 85.

⁸*Ibid*.

⁹*Id* 89.

suggestion of expanding voting rights to non-citizen residents and agree with his critique of a liberal understanding of politics and democracy resulting in a support of negative freedom and the notion of fixed identity. However, my sense is that the trust in constitutionalism as a vessel for politics reduces the kind of politics, political community and identity that Le Roux himself supports and by institutionalising democracy (the street) limits exactly the expansion of voting rights to non-citizen residents. We can only recall the case of *Khosa* and the Constitutional Court's inclusion of permanent residents (non-citizens) in the social security allowance of the state, but not of other people finding themselves in need of social security albeit not legally declared as permanent residents. We could ask why voting rights of permanent residents are, in Le Roux's conception, limited to local elections, why can it not be expanded to national elections. One line of argument could be that the reasoning for the expansion is residence, that political rights are linked to a material political community that permanent residents must be allowed to have a say in local issues.

Following the Arendtian line that Le Roux follows to a certain extent we must recall her distinction between labour, work and action and that, for her, action is a space where people appear to each other, not where social issues are elevated to politics. Of course Arendt has been criticised for this view, how can social and economic issues not be seen as political issues in present times. But then Le Roux is making a similar distinction between economic activities, issues of identity and politics in his argument as to why South African citizens living abroad, contributing to the South African economy, and identifying themselves as South Africans, should not be allowed to vote. Politics and democracy for Le Roux are separate from issues of economics, culture and identity. My question is whether we can make such strict distinctions, are not these issues more fluid - particularly if the claim is for identities that are continuously constructed. My sense is that Le Roux's argument for expanding voting rights to non-citizen residents instinctively 'gets' the impossibility of such a distinction.

Le Roux underscores the importance of residence, and makes thereby a certain understanding of space and time central to his argument. As with the issue of identity we might consider a less rigid understanding of time and space that I think would be more in line with Le Roux's conception of the street. My main contention is thus that Le Roux by relying so much on law and the Constitution undercuts his own vision of an alternative citizenship. Historically property rights and ownership were seen as central to citizenship and

voting rights. Le Roux is clearly trying to question this, however, by relying so much on law and residence he is almost institutionalising living, life itself. It is not ownership or a vested right in property that is connected to political rights, but the normative claim of living (and accepting?) the norm of the law.

I referred above to Bakonwski and Christodoulidis' reliance on the metaphor of home and their support of a notion of home that is fluid and constantly changing. Louise du Toit, within the context of rethinking feminine subjectivity, relies on Iris Marion Young's argument for an alternative vision of home.¹⁰ Women have been linked to a certain understanding of home - an understanding that restricts women to the traditional role of caretaker and nurturer of husbands and children. Du Toit raises a crucial question: 'Where do women's homes reside, in distinction from the homes that women create for men?'¹¹ The argument is that women as homemakers find themselves homeless and rootless and that these conditions keep women in a place of subordination. Young puts forward a vision of home that could afford women a sense of belonging and that breaks with the traditional conception. The notion of a constitution is quite often referred to as providing a political home to the citizens and in most aspects residents of a country. However, many South Africans (residing and non-residing) do not identify with the Constitution and find themselves politically homeless. If the concern is with a notion of politics and democracy that could provide a notion of home to South African citizens and non-citizen residents my concern again is that constitutional patriotism instead of expanding political rights and invigorating democracy will not succeed.

Du Toit relies on a phrase from a story by Jeanette Winterson: The goddess Artemis, uncomfortable with the traditional trappings of womanhood persuades her father to allow her to be a hunter. Du Toit observes that Artemis 'In the process, ... quickly discovers that the real challenge of freedom has more to do with spiritual strength (and learning to live with all one's various selves) than with physical ability or movement'.¹² She makes herself 'at home', lives in a shack with her dogs, a temporary home, rather than living as someone's wife, mother or daughter creating home for them. The god Orion, upset because of her rejection of him destroys her home, kills her dogs and rapes Artemis.

¹⁰Du Toit *The making and unmaking of the feminine self* LLD thesis UJ (2005).

¹¹*Id* 26.

¹²*Id* 30.

Artemis kills Orion with a scorpion and discovers another notion of home, she discovers that it is possible to 'hang in space supported by nothing at all'. Du Toit interprets this phrase as a rejection of nostalgia for the perfect, timeless and maternal home. For Du Toit this story opens the question of whether it is possible to think of a feminine identity that neither affirms masculine identity nor affirms notions of nothingness. The phrase hanging in space supported by nothing at all captures for her the need to have a space, but the lack of a fixed foundation. My question is to what extent can we think of notions of citizenship, political subjectivity and democracy that do not amount to an eclectic postmodern anything goes - as some notions of cosmopolitanism might entail - but that is also not limited to life under the law and the Constitution.