

JURISPRUDENCE, FRIENDSHIP AND THE UNIVERSITY AS HETEROGENEOUS PUBLIC SPACE

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I INTRODUCTION

Against the background of Gustav Klimt's Faculty Paintings¹ and William Kentridge's Black Box installation,² I introduce the notion of jurisprudence. Like the two artists seek to do in their respective artworks, I want to caution against overzealous beliefs in and reliances on a certain kind of rationality, which results in functionality and instrumentalism. The potential harm of jurisprudence (and the law) as portrayed by Klimt is recalled in order to underscore the sometimes seemingly forgotten ideals of truth and justice. Because my aim is also to include the teaching of jurisprudence (and law), the distinction made between 'optimal' and 'true' philosophy is significant. My fear is that the emphasis on optimal philosophy results not only in an impoverished jurisprudential discourse but in the lack of *educating* in contrast merely to *training* students who might become lawyers and legal scholars. The becoming of a post-apartheid jurisprudence for me rests on exactly an involvement with 'true' philosophy — in other words questions pertaining to truth, justice, and complexities that will always escape the urge to capture, fix and still. Integral to post-apartheid jurisprudence's becoming is its involvement with space, place and time. A post-apartheid jurisprudence as such is not yet achieved, and might be forever postponed. These ideas are tentative and by no means fully developed, but the call is at least for an approach to jurisprudence and law that is not always already bound up by the emphasis on what is and whether something is practical, immediate, easily

* BLC LLB (UP) LLM LLD (Unisa). What follows is a slightly reworked version of the inaugural lecture that I presented at the University of Pretoria in October 2009. My aim with the lecture was, and with this article is, to share a few thoughts on jurisprudence, friendship and the university as heterogeneous public space. In the respective parts of this article below I reflect on each of these themes.

¹ Representations of these paintings are available at <http://sexualityinart.wordpress.com/2007/11/17/gustav-klimts-lost-paintings/>, accessed on 19 August 2010.

² A video review of the installation is available at <http://www.youtube.com/watch?v=Nn38eZC840o>, accessed on 19 August 2010.

resolved. Earlier reflections on slowness, memorial constitutionalism and transformative constitutionalism as critique are recalled.

Why include a section on friendship? What is the connection between jurisprudence and friendship, and friendship and the university as heterogeneous public space? Below I recall Jacques Derrida's careful contemplation of friendship in his work, *The Politics of Friendship*. Although I do not expand on Derrida in this piece and turn to an argument of Alex Thomson for an ongoing theoretical reflection on politics (polemos) rather than engagements with agonistic/practical politics, Derrida's insights on friendship/democracy are crucial. As Thomson notes, Derrida's engagement with friendship/democracy involves a philosophical enquiry of ontology that is a 'necessary precondition for a thinking of politics which would be open to the future' (Alex Thomson 'Polemos and agon' in Andrew Schaap (ed) *Law and Agonistic Politics* (2009) 105 at 116). Jurisprudence, and for my purposes specifically post-apartheid jurisprudence, needs to place such a contemplation of friendship/democracy at its heart. Democracy — not merely the institutional structures of the state and supreme law, not merely arguments for a deliberative and agonistic politics, but also the ontological contemplation of the (im)possibility of democracy — must be studied and reflected on. But in the context of this article, friendship plays also another role. The precarious nature of academic friendships/collegiality must be reconsidered, including the role that the emphasis on the practical plays in these relations. Friendship/democracy for me connects the other two concepts — jurisprudence and the heterogeneous university — or at least opens the reflections on jurisprudence to the notion of the university as heterogeneous public space.

The university as heterogeneous public space for me relies not only on the creation of spaces to allow ongoing deliberation and contestation, but also on the content of these discussions. A certain understanding of democracy/friendship is crucial for the functioning of the university as a truly heterogeneous space and not in actual fact a space continuing hegemony. Arendt's recall of Nietzsche's and also Heidegger's notion that the elimination of the 'true', referring to abstract contemplation, will result also in the disappearance of the 'apparent', meaning practical concerns, summarises my main contention in the lecture. If our concern with justice is always already drawn into a certain practicality/functionality, the ideal of justice itself and thereby all potential just results might be abolished. This must be heeded in academic discourse and in the teaching of jurisprudence, in how we think about democracy in discourse and in teaching, how we engage in academic friendships and in how we (de)construct the heterogeneous university.

I start with a quotation from French philosopher Jacques Derrida:

'There you have one of my mottos, one quite appropriate for what I take to be the spirit of the type of "enlightenment" granted our time. Those who wish to simplify at all costs and who raise a hue and cry about obscurity because they do not recognize the unclarity of their good old *Aufklärung* are in my eyes

dangerous dogmatists and tedious obscurantists. No less dangerous (for instance, in politics) are those who wish to purify at all costs.³

II JURISPRUDENCE

(a) *Klimt's faculty paintings*

Austrian artist Gustav Klimt was commissioned in 1894 by the Austrian Ministry of Education to make ceiling paintings to portray the disciplines of Philosophy, Medicine and Jurisprudence. The theme of the Faculty Paintings was 'The victory of light over darkness' and the aim was to portray 'a vindication and glorification of rational science and its usefulness to society'.⁴ Klimt's portrayal of the three disciplines can be seen as anything but a celebration of rationality — rather, it is a refusal of the claim to rationality. The context within which these paintings were made was the time when the art scene in Austria was in its initial phase of change. Klimt was part of the Secession movement that was in the early stages of establishing itself in these years. All three paintings caused upset and outrage from academia and the public in general.

In his portrayal of *Philosophy*, Klimt explicitly rejected the idea of rational science and supported the view that humanity and history were part of the cyclical processes of nature. This view had specific political implications for the liberal middle classes and for the notion of individualism. History, time and space were treated in such a way in the painting that it did not 'allow any clear-cut space-time definition'.⁵ The predominance of nature in these portrayals and the challenge of the idea of man's rational domination over nature also had significant implications for beliefs in the value of technology and capitalism. In addition, Klimt debunked the idea of depicting academic knowledge in a positive light, much to the dismay of university professors.⁶

The second painting, *Medicine*, caused even greater upheaval. In this portrayal Klimt, instead of depicting medical science as therapeutic and healing, represented it as a continuance of suffering. Klimt's engagement with the theme of the paintings (the celebration of rational science) thus resulted in a portrayal of the distinction between rational science and irrational nature; as a rebellion against the institutional stronghold of the arts, and a vision of another future, which relied on a rejection of patriarchy and an embrace of 'femininity' and a 'feminine culture'.⁷ These portrayals of nature and femininity are of course highly problematic, because of the reliance on certain stereotypes — the link between the feminine and nature

³ Jacques Derrida *Limited Inc* (1988) 119.

⁴ Gottfried Fliedl *Gustav Klimt 1862–1918: The World in Female Form* (1989) 77.

⁵ *Ibid* at 79.

⁶ *Ibid*.

⁷ *Ibid* at 80.

and irrationality is exactly one upon which that patriarchy relies.⁸ But for the moment the importance is to illustrate Klimt's refusal to embrace rational science in the portrayal of *Philosophy* and *Medicine*, and even more so in the third painting, *Jurisprudence*.

As in the other two paintings, *Jurisprudence* is not portrayed as an institution that could benefit society, but as harmful — a punitive and ambitious, vengeful power.⁹ In the centre of the painting we see a naked man who is held tightly in the grip of an octopus-like creature that devours him. The man is surrounded by three Furies who administrate justice, instead of Truth, Justice and the Law, who occupy a marginal position in the painting. Even though, in terms of hierarchy, Truth, Justice and the Law are at the top of the painting, the naked man and the Furies are centered. This has the effect that the three Furies, here the administrators of justice but traditionally mythical instruments of revenge, and the naked man are seen as more important than Truth, Justice and the Law.¹⁰

An interesting interpretation of the work holds that Klimt was not merely criticising the socio-political role of law but also challenging myth:¹¹ in Aeschylus' *Oresteia*, the goddess Athena substitutes the matriarchal law of blood vengeance with rational law and paternal power. After building her court she persuades the Furies to become its patrons, thereby co-opting them and, as in all co-options, diffusing their power. This act is taken as symbolising the triumph of reason and culture, civilization over instinct and tradition. The related interpretation of Klimt's works holds that Klimt wanted to return the Furies' original power to them and to illustrate that rational law was not successful in overcoming violence and cruelty — violence and cruelty were merely concealed and legitimised by law.

Panu Minnikinen observes that the majority of the legal community accused Klimt of reducing the function of the law in society to the execution of punishment and of not paying sufficient attention to the constructive possibilities of law.¹² Many of his defenders argued that the portrayal was an accurate depiction of the fundamentally violent essence of the law. However, according to Minnikinen both these evaluations come down to one single interpretation and ask whether there might be other dimensions involved in the painting 'that escape our enlightened eyes?'¹³ He notes Klimt's choice to call the painting *Jurisprudence* and not law and continues that the painting is accordingly not about law, but about a 'juridical mode of prudence, of a foresight that is related to law'.¹⁴ Either law is 'looked upon in a particular

⁸ See for example Louise du Toit *A Philosophical Investigation of Rape. The Making and Unmaking of the Feminine Self* (2009); Luce Irigaray *Speculum of the Other Woman* (1985), *This Sex which is Not One* (1985), *Sexes and Genealogies* (1987).

⁹ Fliedl op cit note 4 at 81.

¹⁰ Ibid.

¹¹ Ibid at 82.

¹² Panu Minnikinen *Thinking Without Desire. A First Philosophy of Law* (1999) 183.

¹³ Ibid.

¹⁴ Ibid.

way’, or ‘law itself is a foresight, a way of somehow seeing the world in advance. But what sort of seeing are we talking about?’¹⁵ Minkkinen notes that the man himself and all other humans in the painting are looking away. The figures doing the looking are the goddesses and the Furies. We find two different ways of looking — one way, the looking of the goddesses, represents the rationality of law, truth and tempered justice from a distance; the other way, the looking of the Furies, represents the brute and fierce force of the law on the ground. In this reading Klimt is either inviting the goddesses of truth, justice and the law to intervene and to bring light to the darkness or he is stating that jurisprudence itself introduced the Furies into the world. Minkkinen, in offering these two interpretations, is not yet moving that far from the two mainstream evaluations. He argues, however, that the painting is telling us something about ‘different ways of seeing, of darkness and light’.¹⁶

He recalls Plato’s cave story as one of the best-known accounts of the ability to see. The prisoners in the cave can only see the objects in front of them and the shadows on the wall of the cave, because of the fire burning inside the cave. Plato wants the prisoners to be freed from their chains and *forced* to confront the light of the fire and ultimately the light of the sun, the truth of the ideal world. What is important is that the prisoners in the cave can see perfectly well. The problem is not with their ability to see, but with the direction in which they are looking. Instead of looking at the eternal and divine, the light of the sun, they are focused on the shadows and trivial objects of the cave.¹⁷ Minkkinen refers to Russian philosopher Léon Chestnov, who notes that Plato is in fact talking about two different philosophies: optimal philosophy, forcing the prisoners to turn their eyes to the sun, and true philosophy. The former is not engaged in the search for truth, but rather the imposition of an already revealed truth. The latter, true philosophy, is neither a science nor an already revealed or identifiable truth — ‘true philosophy is always the preparation for death’.¹⁸ Plato chooses, without hesitation, optimal philosophy. He has no use for true philosophy. Minkkinen refers to Chestnov’s questioning of this choice — what is the justification of the choice of a useful optimal philosophy rather than a search for truth? Chestnov interprets the cave dweller as the jurist, distinguished from the philosopher because of his unwillingness to turn his eyes toward the light. The philosopher is interested in education, not in truth.

Minkkinen identifies three figures from the cave story: the jurist who has settled for the dark world; the optimal philosopher who wants to force the jurist to see the light; and the true philosopher who is concerned only with death.¹⁹ He argues that the relationship between law and philosophy is

¹⁵ Ibid at 184.

¹⁶ Ibid.

¹⁷ Ibid at 185.

¹⁸ Ibid.

¹⁹ Ibid at 186.

described as one between the jurist and the optimal philosopher: ‘philosophy facilitates law by providing it with the required theoretical and conceptual tools with which it can reach out towards the light’.²⁰ But, as Minkkinen pertinently asks, ‘what about truth?’²¹

(b) *Kentridge — The Magic Flute and Black Box*

South African artist William Kentridge, on a commission for the Guggenheim Museum in Berlin, in his engagement with the themes of light and darkness also questioned the celebration of light, Enlightenment, and rationality as the only version of truth. In a work titled *Black Box*, he remembers the brutal murder in Namibia of the Herero population by German colonial forces during the nineteenth century. In a reflection on *Black Box*, Kentridge notes the significance of light/darkness and the nature of shadows for the work.²² He describes light as ‘an infinite series of projections aimed toward us’, ‘the sun as an infinitely promiscuous source’.²³ He draws attention also to shadows: how shadows make us conscious of seeing. He is interested in the nature of the meeting point between projection and reception, which is not only important for looking but also for how we experience the world.²⁴ His project before *Black Box* was the staging of Mozart’s opera *The Magic Flute*, a story of the Enlightenment in which the young prince Tamino is told by the Queen of the Night to rescue her daughter Pamina, who was abducted by Sarastro. The Queen of the Night, of darkness, is contrasted to Sarastro as bearer of the light. What is significant about the story is that, just like the cave-dwellers in Plato’s story, the young princess was abducted by Sarastro with *force*. Kentridge notes the event of the Berlin Conference not long after Mozart’s opera and the beginning of colonialism as a project of the Enlightenment, bringing the light of the Western world with *force* to the ‘dark’ African continent.²⁵ Similarly, in *The Magic Flute*, coercion is tightly connected with the ideal of light and Enlightenment.²⁶ Kentridge repeats his interest in shadows and argues that ‘the extraordinary violence’ of colonialism as an Enlightenment project could be illuminated by looking at the shadows.²⁷ In relation to his interest in shadows, he refers to the well-known habit of children playing games with shadows by making animal shapes with their hands. He captures this experience of knowing that the shapes are mere shadows while wanting to believe that they are real, with the phrase the ‘willing suspension of disbelief’. This phrase is suggestive for the contemplation of post-apartheid law and for a post-apartheid jurisprudence — to what extent do we suspend our

²⁰ Ibid.

²¹ Ibid.

²² William Kentridge *Black Box/Chambre Noire* (2006) 43.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid at 45.

²⁶ Ibid.

²⁷ Ibid at 49.

disbeliefs in service of some ideal of, for example, constitutionalism, human rights, substantive equality, rule of law?

Kentridge indicates three possible meanings of *Black Box* that could all be significant for interpreting the work. In the first place, *Black Box* refers to the theatre and the performance on a stage.²⁸ A second association is with the lens of a camera — the central chamber of a camera between the lens and the eyepiece into which light enters and in which infinite possibilities of the outside world are possible until one single image is chosen when the photo is taken.²⁹ A third reference is to a flight data recorder that is used to trace the last moments before an airline disaster.³⁰

I am interested in Kentridge's use of *Black Box* and the three associations as metaphors for the project of post-apartheid South Africa. The idea of the rule of law or constitutionalism as performance is a familiar link. The second association with the lens of a camera is as true to the experience of interpretation — with every legal decision, infinite possibilities are possible, but only one is ever chosen to the exclusion of all others. Even though aspirations towards transformative constitutionalism, engagements with memory, might lean towards something more, we end up ultimately with one version. The third meaning is maybe most troubling — the aspirations for democracy, rule of law, constitutional sovereignty merely a recording of events before disaster strikes. For Kentridge, *The Magic Flute* represents the utopian end of the Enlightenment, *Black Box* the other end of the spectrum. What end of the spectrum does the endeavour of post-apartheid law represent in contemporary South Africa?

Minkkinen, following Aristotle, describes law as 'the most immediate association between thinking and truth. . . . [A] divine relationship that has been purged of the human flaw that tarnishes thinking, namely desire'.³¹ However, in Klimt's portrayal of jurisprudence the only one unaffected by desire is the humble figure who, like Socrates, the true philosopher, 'prepares for death'.³² As a beginning for our contemplation of post-apartheid jurisprudence, let us read one more reflection by Minkkinen:

'Truth is the ultimate object of thinking, but because it is also the object of our desire, it must remain unresolved, an aporia. Thinking without desire and, by the same token, law as such, are authentic paradoxes. Desiring to know, we can only anticipate how truth as justice would take place and, while doing so, decide on what is "right," what is "correct." This is "jurisprudence," a juridical foresight, an anticipation of truth and of justice that are forever delayed.'³³

We might also consider a better-known definition of jurisprudence — jurisprudence generally is understood as the theory and philosophy of law.

²⁸ Ibid at 51.

²⁹ Ibid.

³⁰ Ibid.

³¹ Minkkinen op cit note 12 at 186.

³² Ibid.

³³ Ibid at 187.

Scholars engaged in the study of jurisprudence — legal philosophers — are interested in the study of the nature of law in order to obtain a deeper understanding. What is or what could post-apartheid jurisprudence be, and is it significant to name it as such? To think of the *becoming* of a post-apartheid jurisprudence is to situate one's contemplations on the nature of law or the search for deeper understandings within a specific time and place.³⁴

A good example of the possible implications of such a time and place comes from the character Lucy in J M Coetzee's novel *Disgrace*. When she responds to her father's probing about why she does not want to report that she was raped, she does so by referring to 'place' and 'time', arguing that '[i]n a different place, at a different time' she would have acted differently.³⁵ This formulation recalls the title of Peter Harris's book, *In a Different Time*, a title that holds multiple meanings. Harris is referring to a different time, the time of the state of emergency under apartheid, a time that is in the past. However, Lucy is referring to a different time that is to come, that is not yet.

Some scholars prefer terms such as transitional and or transformative rather than post-apartheid. The term apartheid and thus also post-apartheid tends to create discomfort — one would hear voices urging for a new beginning, for a forgetting of the past, for an embrace of the positive ideals and promises of a new order distorted by the insistence on apartheid. From another perspective it is argued that it is far too soon to be talking about a post-apartheid, similarly urging that the post has been added too quickly. I tend to hold on to the notion of apartheid, because every day we still experience the legacy of apartheid on many levels. The 'post' in turn indicates the attempts to deal with the past, the struggle of the becoming of something that could be named as 'post' but not 'past', at least by no means yet.

(c) *Post-apartheid jurisprudence*

The artistic portrayals of Klimt and Kentridge discussed above disclose some of the tensions and struggles of and for the becoming of a post-apartheid jurisprudence. I think to a great extent the tension between 'optimal philosophy' and 'true philosophy' is played out in some of the academic debates in and on post-apartheid jurisprudence. On many issues at least two divergent lines of thinking come to the fore — one would be closer to the

³⁴ I have been working on the notion of the becoming of a post-apartheid jurisprudence since 2005 when I initiated a LLM module in post-apartheid jurisprudence. The notion of becoming is central in the work of Gilles Deleuze; see for example Ian Buchanan & Claire Colebrook *Deleuze and Feminist Theory* (2000); Gilles Deleuze *Negotiations* (1995). See also Karin van Marle (ed) *Sex, Gender, Becoming. Post-Apartheid Reflections* (2006). I have recently connected the ideas of becoming with Krog's notion of a change of tongue (Antjie Krog *A Change of Tongue* (2003)). In her recent publication *Begging to be Black* (2009), she explicitly engages the Deleuzian notion of becoming. I will further reflect on these notions in future.

³⁵ J M Coetzee *Disgrace* (1999); Meg Samuelson *Remembering the Nation, Dismembering Women? Stories of the South African Transition* (2007) 140.

optimal position, calling for instrumentalism and functionality, for quick and immediate applications and seeming solutions; the other approach valuing slow reflection, attention to particularity, continuous problematisations. Where the one line of thinking takes a clear stand, offers a specific method or methodology to be followed, suggests a new definition or formulation, lists five steps to be followed, the other line of thinking offers a much more 'modest' approach from a liminal position, sincerely believing that complex issues do not have easy answers or solutions. This position is often regarded as of less significance, as 'weak'.

Paul Cilliers responds to this claim by arguing that modesty does not necessarily imply weakness, and that in fact he is not making apologies for modesty but rather arguments for the importance of modesty.³⁶ Modest positions in this view are not weak, but responsible. The failure to recognise complexity is not merely a technical error but also an ethical one.³⁷ My view of post-apartheid jurisprudence, of what it should become and what I attempt tentatively to put forward here is for the complexities and tensions of the past, present and future to be heeded and not too easily to be boxed, recorded, methodologised in the guise of practical relevance.

I have previously argued for an approach of slowness to law and legal interpretation as an approach that would be more attentive to particularities, to context and lived experience.³⁸ I have contrasted this approach with traditional/formalist approaches to law — that an emphasis on law's generality and universality could result in speedy decisions that negate the complexities and nuances of life. In that context I have distinguished between two divergent approaches to language and memory. The one, by being aware of the materiality of life, recognises the multiple meanings of words and holds the past as something that will always be open for re-interpretation — remembering and memory ask for slow contemplation in order to notice the specificity, the detail and therefore the complexity of meaning and of events. The other approach, by focusing more on abstract ideas and grand notions of the past, monumentalises in a quick and solid fashion, fixing and closing further reflection.

This initial reflection on slowness was followed by an engagement with writings that connected the distinction between memorial and monumental to South African political memory and also to the South African Constitution.³⁹ In earlier writings the monumental and memorial aspects of the Constitution but also of constitutional decisions were highlighted.⁴⁰ Memo-

³⁶ Paul Cilliers 'Complexity, deconstruction and relativism' (2005) 22(5) *Theory, Culture & Society* 255 at 256.

³⁷ *Ibid.*

³⁸ Karin van Marle 'Law's time, particularity and slowness' (2003) 19 *SAJHR* 245.

³⁹ Karin van Marle 'Lives of action, thinking and revolt: A feminist call for politics and becoming in post-apartheid South Africa' in Wessel le Roux & Karin van Marle (eds) *Post-Apartheid Fragments. Law, Politics & Critique* (2006) 34.

⁴⁰ Lourens du Plessis 'The South-African Constitution as memory and promise' in Charles Villa-Vicencio (ed) *Transcending a Century of Injustice* (2000) 63.

rial and monument came to be used as metaphors for not only the South African Constitution, but for constitutionalism as such.⁴¹ My initial reflections showed stronger support for memorial constitutionalism in contrast to monumental celebratory and optimistic constitutionalism. I later critically considered the distinction between monumental and memorial itself and questioned my earlier alliance with memorial in light of the slippage between the two — when does memorial become monumental, monumental memorial?⁴²

In an earlier reflection on post-apartheid constitutional interpretation, and the extent to which courts have embraced the notion of transformative constitutionalism put forward by US Crit Karl Klare, given the prevailing legal culture of conservatism, I relied on an argument that emphasised the limits of the law and law's consequent incapacity to contain politics and political community.⁴³ According to this approach, Klare's notion of transformative constitutionalism, the project of 'large scale social change through non-violent political processes grounded in law',⁴⁴ will not be possible, because legal rules function as 'exclusionary reasons' and political considerations, balancing and reflexivity will not be possible within the limits of the law.⁴⁵ Following that argument, I asked how legal scholars who accept the critical theses like indeterminacy, fundamental contradiction, false consciousness, the reification of rights, and who realise the limits of the law (in a radical sense, not in the sense that all lawyers to a certain extent concede the fact that law is a limited structure),⁴⁶ but who are committed to legal transformation, social change and also social and political change through law, should go about the work that they believe should be done. With reference to certain scholars, I described an approach that realises this tension and seeks to 'play with both hands'. This means that, while being aware of the ethical limit of the law to address the position of others fully, it at the same time attempts to broaden the law, doing the groundwork for more generous approaches by judges.⁴⁷

We can distinguish roughly between two strands in engagements with transformative constitutionalism — an 'instrumental/functionalist' approach

⁴¹ See Wessel le Roux 'War memorials, the architecture of the Constitutional Court building and counter-monumental constitutionalism' in Wessel le Roux & Karin van Marle (eds) *Law, Memory and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa* (2007) 65.

⁴² Karin van Marle 'Haunting (in) equalities' in Rosemary Hunter (ed) *Rethinking Equality Projects in Law: Feminist Challenges* (2007) 125.

⁴³ Karin van Marle (2003) 'Revisiting the politics of constitutional interpretation' 2003 *TSAR* 549, relying on Emiliios Christodoulidis *Law and Reflexive Politics* (1998).

⁴⁴ Karl Klare 'Legal culture and transformative constitutionalism' (1998) 15 *SAJHR* 156.

⁴⁵ Van Marle op cit note 43 at 555–6; Christodoulidis op cit note 43 at 227–33.

⁴⁶ See for example Stuart Woolman 'On rights, rules, relationships and refusals: a reply to Van Marle's "jurisprudence of generosity"' (2007) 18 *Stell LR* 508.

⁴⁷ Van Marle op cit note 43 at 557.

and a “critical” approach’.⁴⁸ An instrumental approach will attempt to evade the complexity and tension; the critical approach, at least in the sense that I want to understand and support critical work, will accept the tension between freedom and constraint, the potential and limits of the law. The notion of transformative constitutionalism is central to post-apartheid jurisprudence, at least in so far as it engages with constitutionalism and the application of the constitution. The various readings of and approaches to equality can also be linked to the two approaches to transformative constitutionalism, the one more interested in very specific outcomes, the other more engaged in the notion of complex equality or even haunting (in)equalities.⁴⁹

Similarly a celebration of, or at least a firm commitment to, the value of human rights and also a politics based on and confined to human rights have been posed against the notion of refusal — refusal by no means implying a retreat from engagement but meaning saying no to business as usual, problematising the pervasiveness of law. In this case we can also see the tension between the search for quick solution and functionality, and a slow reflection. Within the context of refusal I called for a term used by Patricia Williams, namely a jurisprudence of generosity, meaning an approach that could be open to unpredictable and unexpected events, that refuses known and given modes of doing, that could be expansive in what it considers of relevance.⁵⁰

Questions that may be posed are what entails research in post-apartheid jurisprudence, and what implications does it have for teaching and education at the university? I will tentatively get to these questions in the final part, but before that I need to turn to friendship and its place within the becoming of a post-apartheid jurisprudence.

III FRIENDSHIP

‘Oh my friends, there is no friend’ is the introductory sentence of Jacques Derrida’s work, *The Politics of Friendship*, in which he contemplates the history and the current state of Western politics and democracy.⁵¹ I believe that law and legal theory in general, but maybe more pertinently post-apartheid jurisprudence, cannot be separated from notions of politics, democracy, from the notion of political friendship. In this section I turn to an argument for what Alex Thomson calls ‘a studied indifference to politics’; an

⁴⁸ Karin van Marle ‘Transformative constitutionalism as/ and critique’ (2009) 20 *Stell LR* 286.

⁴⁹ Henk Botha ‘Equality, dignity and the politics of interpretation’ in Le Roux & Van Marle op cit note 39; Van Marle in Hunter op cit note 42 at 125.

⁵⁰ Patricia Williams *The Alchemy of Race and Rights* (1992); Karin van Marle ‘Laughter, refusal, friendship. Thoughts on a “jurisprudence of generosity”’ (2007) 18 *Stell LR* 194; See also Karin van Marle (ed) *Refusal, Transition and Post-Apartheid Law* (2009).

⁵¹ Jacques Derrida *The Politics of Friendship* (1996) 1.

argument for *polemus* in contrast to *agon*.⁵² Central to this discussion is the distinction drawn between the notion of politics and the notion of the political. ‘Politics’ refers to examples of how actual political relations and partisan politics are acted out. ‘The political’ describes the theoretical reflection on the possibility of politics. During the time when all political contemplation was overtaken by Marxism, French philosophers Jean Luc Nancy and Philippe Lacoue-Labarthe argued for the retreating of the political in order to find a space for a contemplation of the possibility of politics.⁵³ I will conclude by tentatively making a connection between the politics/political distinction and the notion of heterogeneity at the university.

(a) *Agon and polemus*

As background to the argument for *polemus* we need to trace the distinction between three models of politics and democracy briefly; namely the distinction between a liberal model, a deliberative model and an agonistic model. Authors employ various terms to capture the meaning and application of a liberal approach to democracy and politics, amongst others strategic, procedural, aggregative and interest-based. The crux of this conception is an understanding of democracy and politics as nothing more than a process through which individual preferences and demands can be expressed by voting for leaders, rules or policies.⁵⁴

Deliberative democracy is the most popular conception posed as alternative to the classical liberal conception. According to this conception democracy is a process where citizens meet in order to discuss issues of collective concern, for example rights and values. In contrast to the strategic/interest-based concern of the classical liberal model, in deliberative democracy citizens would transform their preferences to public-minded ends through a process of rational deliberation.⁵⁵

Iris Marion Young argues for a broader conception of deliberation — communicative democracy — that includes three additional elements which are excluded from the deliberative model, namely greeting, rhetoric and storytelling.⁵⁶ According to Young these elements recognise embodiment and particularity and assist in establishing and maintaining plurality. More than that, these elements could accommodate cultural differences in the absence of shared understandings.⁵⁷

⁵² Alex Thomson ‘Polemus and agon’ in Andrew Schaap (ed) *Law and Agonistic Politics* (2009) 105 at 116.

⁵³ Philippe Lacoue-Labarthe and Jean Luc Nancy *Retreating the political* (1997).

⁵⁴ Iris Marion Young ‘Communication and the other: beyond deliberative democracy’ in Seyla Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 120.

⁵⁵ *Ibid* at 121.

⁵⁶ *Ibid* at 129.

⁵⁷ *Ibid*.

Chantal Mouffe puts forward a conception of ‘agonistic’ democracy as alternative to both liberal and deliberative models of democracy⁵⁸. She argues for a model able to grasp the ‘nature of the political’ by placing power and antagonism at its centre.⁵⁹ In contrast to deliberative democracy, which holds that a democratic society will be able to escape power in its social relations, agonistic democracy focuses on how to ‘constitute forms of power more compatible with democratic values’.⁶⁰ The distinction between politics and the political stands central to agonistic democracy:

‘By “the political”, I refer to the dimension of antagonism inherent in human relations, antagonism that can take many forms and emerge in different types of social relations. ‘Politics’, on the other hand, indicates the ensemble of practices, discourses and institutions which seek to establish a certain order and organize human coexistence in conditions that are always potentially conflictual because they are affected by the dimension of “the political”’.⁶¹

Alex Thomson offers a critical engagement with agonism that I find significant for my contemplation of jurisprudence, friendship and the university as heterogeneous public space. His critique, to which I now turn, will connect with the distinction that we encountered earlier between optimal philosophy and true philosophy, and with the tension within post-apartheid approaches to law, and within post-apartheid jurisprudence itself. As we have seen above, agonists, disillusioned with current notions of politics and democracy, want to rethink and reformulate the relationship between the two. A ‘revitalization of modern democratic culture’ is called for by making contestation central.⁶² Thomson notes that accompanying the call for agonist politics is the urge of a re-articulation of the relationship between political theory and democratic practice, which comes to a re-articulation of the relationship between ‘politics and its ground’.⁶³ Seemingly following Nietzsche, practice and not theory is taken as the ground for politics. With reference to many theorists of agonistic politics, Thomson comes to the neat conclusion that ‘agonism requires something like a theoretical attack on theory’.⁶⁴ Agonist thinkers, for all their flirtation with practice, cannot move away from the two approaches they so heavily criticise — agonism is ultimately searching for a new foundation cast in epistemology, and as Thomson notes ‘the desire for a new ground echoes the desire for the unity of theory and practice characteristic of both the rationalist approach of the Kantian and the radical approach of the revolutionary’.⁶⁵ If the three most prominent features of agonism are first the insistence on conflict, secondly

⁵⁸ Chantal Mouffe ‘For an agonistic model of democracy’ in Noël O’Sullivan (ed) *Political Theory in Transition* (2000) 124.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at 125.

⁶¹ *Ibid* at 126.

⁶² Thomson in Schaap op cit note 52 at 105.

⁶³ *Ibid* at 107.

⁶⁴ *Ibid* at 108.

⁶⁵ *Ibid* at 109.

that this conflict is constitutive of politics, and thirdly the epistemological concern to re-ground the theory of politics, the insistence on conflict is not consistent. There is an attempt to ‘induce a theoretical agreement regarding the grounds on which they commend political conflict’.⁶⁶

Thomson turns to philosophy, specifically to the works of Heidegger and Derrida, in order to propose an alternative position. Heidegger is of significance because many scholars turn to his work when engaging with the relationship between politics and philosophy. The politics/political distinction is connected to Heidegger’s distinction between the ontic and ontology where the former (ontic) is associated with politics and the practices of democratic politics, and the latter (ontology) with the political.⁶⁷ Heidegger is of importance also because of his engagement with Nietzsche in his reading of *polemos*. Derrida comes in because of his struggle with Heidegger and quite pertinently what Thomson calls ‘the possibility of extending the specifically philosophical orientation . . . raising anew the question of philosophy’s constitutive and aporetic relationship to politics’.⁶⁸ In *Being and Time*, Heidegger introduces the distinction between ontic and ontological questions — the ontic is interested in a particular type of being or in being, where the ontological is concerned with being as such. As Thomson aptly notes, to support *polemos* rather than *agon* is to support Heidegger’s enquiry into being — ‘enquiry after truth rather than rhetorical persuasion or a historical science’.⁶⁹ What is at stake is to think the ontological difference, the difference between Being and any determinate being.⁷⁰ Thomson associates the term *polemos* with two features of Heidegger’s thinking: *polemos* as a term engaged with the notion of Being, and more importantly *polemos* as a term for another way of thinking. To compare *agon* with *polemos* is not only to contrast an engagement with Being as such with determinate beings, but with two different manners of enquiry. The engagement into two different manners of enquiry resonates with the distinction made earlier between optimal philosophy and true philosophy and its manifestations in post-apartheid jurisprudence. Without going into the intricate details, Thomson’s argument that *agonists* miss in which way Heidegger in his engagement with *agon* goes further than Nietzsche is important. Heidegger is interested in asking after the grounds of *agonism*, thereby taking it further than Nietzsche’s interest in a historical and anthropological enquiry. Thomson explains this as follows:

‘The result is to move the horizon to which our gaze is directed from the city, governed by contest to the cosmic strife within which the city is itself located. Both the method and the results of the enquiry have political consequences.’⁷¹

⁶⁶ Ibid.

⁶⁷ Ibid at 110.

⁶⁸ Ibid.

⁶⁹ Ibid at 110–11.

⁷⁰ Ibid at 111.

⁷¹ Ibid at 112.

Referring to Carl Schmitt, the following is offered as further explanation of Heidegger's position:

'If, for Schmitt, political theory is oriented towards a decision that exceeds the theoretical because it is a matter of practice, for Heidegger philosophy is oriented towards a decision that exceeds the practical because it exceeds the human.'⁷²

If we link this with, for example, the contemplation on the relationship between law and justice the following emerges: it is impossible ever to determine the relationship between the two because justice serves as the ground for law whether one views it from natural law, positivist, transcendent or immanent perspective; it is however also inseparable from laws, protecting or denying justice. The result of support for polemus will be 'thinking the complication of this relationship rather than its clarification'.⁷³ The consequence of following Heidegger's distinction between the ontic and the ontological cannot result in any attempt of translating philosophy into political use. The engagement with Being entails bringing to light that which cannot be calculated or put into a formula or programme.

Thomson notes two divergent responses to Heidegger, one coming from Hannah Arendt, the other from Jacques Derrida. Where Arendt turned to a theory of political action and a philosophy of praxis, Derrida stays true to the philosophical enquiry of ontology. However, Derrida goes beyond Heidegger in that he underscores the importance of the history of political institutions and political language. We can, for example, look at Derrida's work on hospitality, in which he argues that the duty of offering hospitality should be unlimited. However, this is impossible not only because of practical considerations but because 'identity depends on the maintenance of borders . . . the identity on which my capacity to offer hospitality depends will always contravene the duty to offer hospitality'.⁷⁴ For Thomson, Derrida's deconstructive response to politics must be distinguished from the thinkers of praxis — polemus must be distinguished from agon. The former's approach can be regarded as 'something like a studied indifference to politics'. It does not, however, necessarily amount to something that is 'anti-political'. It is, rather, a 'necessary precondition for a thinking of politics which would be open to the future'.⁷⁵

IV THE UNIVERSITY AS HETEROGENEOUS PUBLIC SPACE

The political theory of Hannah Arendt has been central in the contemplation of political action and in calls for the revival of an active public sphere. Arendt, in her 1958 work, *The Human Condition*, distinguishes between labour, work and action. For her, action (to be precise, political action) and speech that take place in the public sphere should be valued and prevented

⁷² Ibid at 113.

⁷³ Ibid at 114.

⁷⁴ Ibid at 115.

⁷⁵ Ibid at 116.

from being taken over by the cyclical processes of labour and the mere functionality of work. Arendt views the public sphere and action as the only spheres where plurality can come to the fore, where humans can appear to each other. Similarly, Iris Marion Young's notion of city life as a space that allows difference on all levels comes to mind.⁷⁶ In the South African context, Wessel le Roux, following Arendt and Young, has introduced the term 'street democracy' to describe the need for a South African space that protects radical difference, plurality and heterogeneity.⁷⁷

I have argued previously for the notion of the university as heterogeneous public space, emphasising the need for plurality and difference, multiple voices, clashing values to be protected, but more than that, actively pursued within the context of the university.⁷⁸ But the question is how, within an academic space where the pursuit of intellectual ideas is of primary concern, should heterogeneity be pursued and protected? Taking the distinctions between optimal and true philosophy, politics and the political, or the ontic and ontology as possible starting points, how could plurality and difference, heterogeneity best be pursued?

I take it for granted that the university must be open to, accommodate, protect and actively support plurality concerning language, religion, culture, sex, gender, sexual orientation, race, ethnicity, amongst others. It is the task of the management of the university to see that this is integrated at all levels. My concern is more with how, by pursuing knowledge and intellectual thought, heterogeneity can be actively pursued. A while ago, during student representative council elections, some students were unhappy about the fact that these elections are not allowed to take place along political party lines. The university management might have certain institutional concerns justifying the decision to ban party politics from the student representative council elections. However, I would like to put forward also a more theoretical argument in support of such a ban. One could argue that students, while being students, should be challenged to engage in political interaction that is not always already taken up in the strict economy of partisan politics. Student politics could thus be seen as an opportunity to engage with the political, the potential of politics, to engage in a public realm encountering alterity, without the immediacy of party politics to limit their participation and deliberations.

This is also true for their actual education — within the context of the Faculty of Law I often refer to the distinction between education and

⁷⁶ Iris Marion Young 'Impartiality and the civic public. Some implications of feminist critiques of moral and political theory' in Seyla Benhabib & Drucilla Cornell (eds) *Feminism as Critique: On the Politics of Gender* (1987) 56 and Iris Marion Young *Justice and the Politics of Difference* (1990) 96, 226.

⁷⁷ Wessel le Roux 'From Acropolis to Metropolis: The Constitutional Court building and South-African street democracy' 2001 *SAPL* 139 and 'Bridges, clearings and labyrinths: The architectural framing of post-apartheid constitutionalism' in Le Roux and Van Marle op cit note 39 at 59.

⁷⁸ Karin van Marle 'Universities as heterogeneous public spaces' 2000 *Codicillus* 32.

training. Our students, or at least those who will enter the legal profession as lawyers or advocates, will undergo practical legal training after, or sometimes even while completing their degrees. However, this training is, albeit connected with, also separate from the education that we as academics should be giving them. By this I am by no means protecting and justifying education without a context — the notion of the university as heterogeneous public space is premised on the reality of time and space, coming back to my support for a post-apartheid jurisprudence above. However, having the freedom to think, to read, to experiment intellectually within a specific context, and being limited to the economics of form and function quite often without any context is quite far apart. What will make the university a heterogeneous public space is giving students the freedom to be educated, to pursue academically multiple possibilities without too quickly, prematurely limiting them to the realities of practice.

V CONCLUSION

Struggling with the task of describing the notion of a ‘thinking space’ in a metaphor, Hannah Arendt suggested the metaphor of the ‘timeless now’.⁷⁹ She situates thinking in a place between past and future. Thinking, central to her notion of natality or new beginning, could disclose possibilities for the future. Following Heidegger, Arendt argued that ‘thinking does not endow us directly with the power to act’.⁸⁰ However, thinking is crucial to the existence of an active public sphere, democratic politics and democratic citizenship. For Arendt, the seeds of totalitarianism are to be found in thoughtlessness — the banality of evil exposed by Adolf Eichmann had its roots in the inability to think.⁸¹ She observes that Eichmann was literally at a loss for words in cases where he could not rely on clichés or conventional answers.⁸² Arendt is interested in the occurrence of thoughtless behaviour in everyday life. For Arendt, we rely on clichés and stock phrases as a defense against reality, and specifically against the call to thought/thinking.

Significantly, Arendt distinguished thinking from knowledge, good manners, moral codes and even comprehension. Contemplating thought inevitably brings one to the questions: what does it entail to think, and what is thinking? Arendt refers to her view on political action set out in *The Human Condition*,⁸³ and to the fact that certain philosophers connect thought with the contemplative life and thus distinguish it starkly from the active life. The contemplative life in this view is one of silence and passivity. Arendt exposes how thought, with the rise of the modern era, resulted in a form of organised knowledge.⁸⁴ Arendt, well aware of the problematic involved when asking

⁷⁹ Elizabeth Young-Bruehl *Hannah Arendt: For Love of the World* (2004) 450.

⁸⁰ *Ibid.* See also Hannah Arendt *Between Past and Future* (2006) (Penguin edition).

⁸¹ *Eichmann in Jerusalem. A report on the banality of evil* (1963).

⁸² *Ibid.*

⁸³ Hannah Arendt *The Human Condition* (1958).

⁸⁴ Arendt op cit note 80 at 25–8.

these kinds of questions, notes the response rejecting these questions as metaphysical without any practical value. However, for her, the positivist approach, regarding these questions as without meaning and value is not a reason to worry. What is worrisome is that when the world of thought comes to an end, the world of appearance (and political action) simultaneously reaches an end. She recalls Nietzsche:

‘We have abolished the true world. What has remained? The apparent one perhaps? Oh no! With the true world we have also abolished the apparent one.’⁸⁵

And also Heidegger:

‘The elimination of the suprasensory also eliminates the merely sensory and thereby the difference between them.’⁸⁶

According to Arendt, our frame of reference disappears when the fine balance between the world of thought and the worlds of appearance is lost, with the consequence that nothing else makes sense. Thought means more than applying it as an instrument.

Post-apartheid jurisprudence is a project that entails thought/thinking. It is a notion that involves re-imaginings, re-figurings and re-orientations.⁸⁷ It is a notion that must be imbued with a strong sense of political friendship and democracy. The university as heterogeneous public space urges an engagement with complex thinking.⁸⁸

‘These things are difficult I admit their formulation can be disconcerting. But would there be so many problems and misunderstandings without this complexity and without these paradoxes? One shouldn’t complicate things for the pleasure of complicating, but one should also never simplify or pretend to be sure of such simplicity where there is none. *If things were simple, word would have gotten round. . . .*’⁸⁹

⁸⁵ Ibid at 30.

⁸⁶ Young-Bruehl op cit note 79 at 450.

⁸⁷ Michel de Certeau *The Practice of Everyday Life* (tr Steven Rendall) (1984) 109–10 quotes Aristotle: ‘Metaphor consists in giving the thing a name that belongs to something else’ and continues to say that ‘metaphor is that which can be dreamed about a place. . . . To practice space is thus to repeat the joyful and silent experience of childhood; it is, in a place, to be other and to move toward the other.’

⁸⁸ See Paul Cilliers ‘On the importance of a certain slowness. Stability, memory and hysteresis in complex systems’ in Carlos Gershenson, Diederik Aerts & Bruce Edmonds (eds) *Worldviews, Science and Us: Philosophy and Complexity* (2007) 53; Van Marle op cit note 38 at 239.

⁸⁹ Derrida op cit note 3 at 119 (emphasis added).