

REFLECTIONS ON POST-APARTHEID  
BEING AND BECOMING IN THE  
AFTERMATH OF AMNESTY:  
*DU TOIT v MINISTER OF SAFETY AND SECURITY*

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What interests me isn't the law or laws (the former being an empty notion, the latter uncritical notions), nor even law or rights, but jurisprudence. It's jurisprudence, ultimately, that creates law, and we mustn't go on leaving this to judges.

Gilles Deleuze in conversation with Toni Negri<sup>1</sup>

## 1 Introduction

In this note I discuss the case of *Du Toit v Minister of Safety and Security (Du Toit)*.<sup>2</sup> Also, although my main focus will fall on *Du Toit*, I refer to the recent defamation case of Robert McBride briefly.<sup>3</sup> Both these cases disclose a few of the many complexities of the 'intersection' between an apartheid past and a future that is post-apartheid, particularly post-apartheid being or rather becoming. Beyond illuminating the wider questions of post-apartheid being, becoming and subjectivity, these cases also contribute to something more specific, namely the becoming of a post-apartheid jurisprudence.<sup>4</sup>

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<sup>1</sup> G Deleuze *Negotiations* (1995) 169.

<sup>2</sup> *Du Toit v Minister of Safety and Security* 2010 1 SACR 1 (CC).

<sup>3</sup> *The Citizen 1978 (Pty) Ltd v McBride* 2010 4 SA 148 (SCA).

<sup>4</sup> In a previous version of this paper I explicitly also referred to and included the possibilities of a *critical* approach to law within a post-apartheid context in light of the cases of *Du Toit* and *McBride*. Following comments by the referees that the paper might attempt to cover too many aspects and strands I removed the references to the development of a critical approach as far as possible. However, I should note that my research is broadly informed by an interest in critical legal theory and a critical approach to law. This note was written while I was working on a project, *Genres of critique* at the Stellenbosch Institute for Advanced Study (Stias), and was delivered at the Critical Legal Conference (CLC) in Utrecht,

Historically, South African approaches to law have been marked by formalism and positivism. Although there were a few voices during apartheid raising objections against these approaches and problematising them it is probably safe to say that formalism and positivism reflected the mainstream approach to and understanding of law.<sup>5</sup> During the nineties South African law underwent major changes. However, what is becoming more pertinent is that the major change in form has not been accompanied by a major change (or any change, at that) in substance. The adoption of and development of constitutional and human rights discourse has to a large extent followed the traces of a liberal and ultimately positivist tradition. One attempt to create an alternative to these traditional approaches has been that proposed by US Crit, Karl Klare more than a decade ago.<sup>6</sup> Klare suggested 'transformative constitutionalism' as one reading of the South African Constitution, a document that he reads as postliberal.<sup>7</sup> For Klare, alternative approaches to constitutionalism, human rights and law in general will be disclosed only if the present conservative (formalist) legal culture could be exposed, challenged and altered.<sup>8</sup> South African legal scholars responded in various ways, from supporting the notion and translating his ideas to particular South African aspects of law;<sup>9</sup> to rejecting the notion, arguing that the late modern liberal ideas developed by Ronald Dworkin would be as well-suited and indeed better than Klare's Marxist and Crit inspired suggested path.<sup>10</sup>

What we get from the various responses to Klare are at least two approaches to law in present South Africa, namely a US Critical Legal Studies inspired path, and a liberal Dworkinian inspired one. But there are of course many others, ranging from judicial avoiders, to common law loyalists, to a few inspired by European/continental philosophy/Brit crits as well as an ever more emerging brand of empiricists/

September 2010 and should be read against the concern with the possibilities of critical theory for and a critical approach to law in a post-apartheid context. My thanks to everyone involved with the Stias *Genres of critique* project and those who participated in the workshop as well as those present at the session during the CLC for valuable discussions and comments.

<sup>5</sup> See eg J Dugard 'The judicial process, positivism and civil liberty' (1971) 79 *South African Law Journal* 181-200; D Visser 'The legal historian as subversive or Killing the Capitoline Geese' in D Visser (ed) *Essays on the History of Law* (1989) 1-29.

<sup>6</sup> K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

<sup>7</sup> Klare (n 6 above) 151.

<sup>8</sup> Klare (n 6 above) 166.

<sup>9</sup> A van der Walt 'Legal history, legal culture and transformation in a constitutional democracy' 2006 *Fundamina* 1-47.

<sup>10</sup> T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 *Stellenbosch Law Review* 258.

social-legalists.<sup>11</sup> The latter group adhere to the insights of the American Realists of the 1930's, namely that legal formalism should be rejected and the fallacy of law exposed after which better law and legal decisions can be made by making use of empirical methods of data collection. These realists, of course, subscribed to the separation between law and morality and supported a functionalism devoid of normativity.<sup>12</sup> Close to these are those scholars who stand critical towards the value talk of the Constitutional Court and the accompanying strand of legal discourse on values.<sup>13</sup> When reflecting on the becoming of a post-apartheid jurisprudence all these approaches come into play. It is not my aim in this case note to address the question of which of these approaches are more or most suited to the current context. However, they do provide an important background to the discussion that follows.

I start with a reflection on the notion of post-apartheid and post-apartheid becoming, after which I turn to the issue of amnesty in general, and then to the facts and decision of the constitutional court in *Du Toit*. My contention is that three things should be at the heart of our reflections on amnesty: (1) crisis; (2) *ubuntu*; and (3) reparation. I elaborate on these after the discussion of the case. Reflecting on the becoming of a post-apartheid jurisprudence I draw from two works, the one by David Scott,<sup>14</sup> in which he argues for a recasting of post-colonial engagement in tragic rather than the romantic terms traditionally employed, and the other by Marianne Constable<sup>15</sup> in which she, following Nietzsche's<sup>16</sup> 'History of an error', made pertinent observations about the direction of US legal theory. I conclude by contemplating the becoming of post-apartheid jurisprudence, and post-apartheid becoming as liminal.

An important thread that connects the various thoughts raised in the next few pages is the notion of 'becoming'. In part 2 I spend some time putting forward the notion of becoming as initially suggested by Deleuze and Guattari. What is at stake, is post-apartheid becoming,

<sup>11</sup> I Currie 'Judicious avoidance' (1999) 15 *South African Journal on Human Rights* 138; A Fagan 'The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development' (2010) 127 *South African Law Journal* 611-627; A Kok, 'An analysis of the planning and implementation of the training of equality court personnel relating to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000' parts 1-4 (2010) 43 1 & 2 *De Jure* 38-75; 271-307.

<sup>12</sup> F Cohen 'Transcendental nonsense and the functional approach' (1935) 35 *Columbia Law Review* 809-849; 'The problem of a functionalist jurisprudence' (1937) 1 *Modern Law Review* 5-26.

<sup>13</sup> WB le Roux 'Migration, street democracy and expatriate voting rights' (2009) 24 *South African Public Law* 370-399.

<sup>14</sup> D Scott *Conscripts of modernity. The tragedy of colonial enlightenment* (2004).

<sup>15</sup> M Constable 'Genealogy and jurisprudence: Nietzsche, nihilism and the social scientification of law' (1994) 19 *Law and social Inquiry* 551.

<sup>16</sup> F Nietzsche *Twilight of the idols* (1968) (transl RJ Hollingdale) 40-41.

which includes the becoming of individuals/subjects as well as the becoming of communities, and the becoming of a post-apartheid jurisprudence. By reading *ubuntu* as a notion that unsettles, as what Mark Sanders calls an ethics that is ‘resistant at its core’,<sup>17</sup> I contemplate the possible role that *ubuntu* can play in the becoming of post-apartheid jurisprudence. An underlying strand or trace to this note that is inherently part of the notion of becoming is what could be called a feminist concern or a feminist ethic that, at least from my perspective, is an inevitable part of post-apartheid becoming and the becoming of a post-apartheid jurisprudence.<sup>18</sup>

## 2 Being and becoming in post-apartheid South Africa

‘Post-apartheid’ has been described as that which ‘hints at a specific period of South African history, designating both a beginning and – though perhaps less obviously so – an expected ending.’<sup>19</sup> However, the beginning and expected ending of post-apartheid must be problematised. On 2 February 1990, De Klerk’s announcement that seemingly jump-started the beginning of the dismantling of the apartheid system was ‘neither fully a beginning [of a new era] nor truly an end [of apartheid].’<sup>20</sup> It took many years of negotiations between the representatives of the apartheid government and those of the struggle against apartheid before 2 February 1990 and many such years after 2 February 1990 to begin what in some sense has not yet begun fully – the dismantling of apartheid.

We accept nevertheless some dates as markers or hints in the unfolding of the story of the dismantling of apartheid: 2 February 1990; the adoption of the negotiated Constitution of 1993; the first democratic election on 27 April 1994; and the adoption of the 1996 Constitution.<sup>21</sup> Present South Africa thus can be described as ‘being in the process of leaving behind the old order and constructing the new’, a state or moment that is generally referred to as a period of transition.

However, as noted by some commentators ‘This sense of being post-apartheid, already somewhat dated, is bound to fade with

<sup>17</sup> M Sanders *Ambiguities of witnessing. Law and literature in the time of a truth commission* (2007) 120.

<sup>18</sup> My gratitude to one of the referees who pointed at the ‘feminist undertone’ of the note and for suggesting that it should be made more prominent.

<sup>19</sup> F du Bois & A Pedain *Truth and reconciliation in post-apartheid South Africa* (2009) 1.

<sup>20</sup> Du Bois & Pedain (n 19 above) 1.

<sup>21</sup> Du Bois & Pedain (n 19 above) 1-2.

time.<sup>22</sup> But this raises the present post-apartheid dilemma – that which should have dated, faded, hasn't, or has not yet - mainly because it 'looks as if the socio-economic devastation bequeathed by apartheid is *clinging on and will remain for quite some time to come*, ensuring continued significance to a different sense of the country being post-apartheid.'<sup>23</sup> 'Post-apartheid' then can be referred to as that which 'hints at the intersection of the transitional and the apparently enduring.'<sup>24</sup> This intersection (or maybe we could think of this as a liminal space) between transitional and enduring, between the successes and failures, between the continuities and disruptions of the past is what makes a post-apartheid becoming. How to respond in an ethical manner to the continuance of devastation?

It might be useful to recall briefly the notion of becoming and how it could come into play in post-apartheid South Africa. French philosophers Gilles Deleuze and Felix Guattari in *A Thousand Plateaus*<sup>25</sup> suggest Virginia Woolf's style of stream of consciousness writing as an illustration of a new mode of becoming.<sup>26</sup> Distinguishing between a 'molar' and a 'molecular' politics – the former being concerned with female identity as such, the latter with the questioning of exactly female identity as such – they argue for feminist politics as double movement.<sup>27</sup> The molar politics designates a political movement with a firm 'ground, identity or subject'.<sup>28</sup> The molecular provides space for the 'mobile, active and ceaseless challenge of becoming'.<sup>29</sup> Any assertion of woman as a subject must not double or simply oppose man, 'but must affirm itself as an event in the process of becoming'.<sup>30</sup>

What exactly the implications of these assertions of Deleuze and Guattari are for feminism is beyond the scope of my argument here.<sup>31</sup> However, the notion of becoming could have important implications for not only a post-apartheid jurisprudence, but also post-apartheid society. The notion of a double movement is quite apt for the future of South African law, one in which an identity (stability) is asserted, but in the same move, one in which a becoming, a ceaseless challenge is asserted. In conversation with Toni Negri, Deleuze distinguishes becoming from history: History records particular circumstances, but

<sup>22</sup> Du Bois & Pedain (n 19 above) 2.

<sup>23</sup> Du Bois & Pedain (n 19 above) 2.

<sup>24</sup> Du Bois & Pedain (n 19 above) 2.

<sup>25</sup> G Deleuze & F Guattari *A thousand plateaus* (1987).

<sup>26</sup> I Buchanan & C Colebrook *Deleuze and Feminist Theory* (2000) 1.

<sup>27</sup> As above.

<sup>28</sup> As above.

<sup>29</sup> As above.

<sup>30</sup> Buchanan & Colebrook (n 26 above) 1-2.

<sup>31</sup> See for example Buchanan & Colebrook (n 26 above) and R Braidotti *Transpositions* (2006).

the ‘event’s becoming is beyond the scope of history.<sup>32</sup> With reference to Péguy, Deleuze explains two ways of considering events: The one is to follow an event and relates it as history; ‘the other way is to go back into the event, to take one’s place in it as in a becoming, to grow both young and old in it at once ...’.<sup>33</sup> Reflecting on South Africa’s recent past, the following explanation is suggestive: ‘Becoming isn’t part of history; history amounts only the set of preconditions, however recent, that one leaves behind in order to “become”, that is, to create something new.’<sup>34</sup> Related to the continuance of devastation referred to above, Deleuze’s view on revolution is also of relevance. He argues that people say revolutions are bad, because they confuse ‘the way revolutions turn out historically and people’s revolutionary becoming.’<sup>35</sup> For Deleuze ‘Men’s only hope lies in a revolutionary becoming: the only way of casting off their shame or responding to what is intolerable’.<sup>36</sup>

An important term in the writings of Deleuze and Guattari is the idea of ‘lines of flight.’ Deleuze explains:

[W]e think any society is defined not so much by its contradictions as by its lines of flight, it flees all over the place, and it’s very interesting to try and follow the lines of flight taking shape at some particular moment or other.<sup>37</sup>

South African poet and author, Antjie Krog, in her latest work, *Begging to be black*<sup>38</sup> explores the Deleuzian notions of becoming and lines of flight. Krog, in conversation with Paul Patton, tells him that in order for her to understand something she has to write it, and ‘while writing – writingly as it were – I find myself dissolving into, becoming towards what I trying to understand.’<sup>39</sup> Patton responds as follows: ‘Tracing the lines of flights is what Deleuze calls it ... Not flight as in fleeing, but flight as in going in a particular direction. One moves from an established known identity by transforming oneself.’<sup>40</sup> Krog is struggling with the challenge of finding frameworks/ points of reference other from the mainstream and pervasive ‘Western or European frameworks’ seeking ‘an African perspective’.<sup>41</sup>

Patton refers to Deleuze’s invocation of the notion of ‘becoming minor’. All becoming for Deleuze would mean becoming minor

<sup>32</sup> Deleuze (n 1 above) 170.

<sup>33</sup> As above.

<sup>34</sup> Deleuze (n 1 above) 171.

<sup>35</sup> Deleuze (n 1 above) 171.

<sup>36</sup> As above.

<sup>37</sup> As above.

<sup>38</sup> A Krog *Begging to be black* (2009).

<sup>39</sup> Krog (n 38 above) 92.

<sup>40</sup> As above.

<sup>41</sup> Krog (n 38 above) 93.

because it requires a shift from the standard or norm – ‘[B]ecoming majoritarian is not becoming in the real sense of the world.’<sup>42</sup> Deleuze, in response to Negri, explains that the difference between minorities and majorities is not their size, but that a majority is defined by ‘a model you have to conform to: the average European-male city dweller for example ... A minority, on the other hand, has no model, it’s a becoming, a process.’<sup>43</sup> Krog asserts her interest in becoming, transforming into something new, not as, for example, an issue of ‘African versus Western philosophy, but rather in what kind of self I should grow into in order to live a caring, useful and informed life – a “good life” – within my country in southern Africa.’<sup>44</sup> Deleuze, in response to Negri’s observation that there is a tragic note in the subversion brought about by the invocation of lines of flight agrees that there is a ‘certain tragic or melancholic tone.’<sup>45</sup> With reference to the Nazi camps he says that it has given us ‘a shame at being human ... we’ve all been tainted by it, even the survivors ...’.<sup>46</sup>

Post-apartheid becoming entails the search for something new, for becoming minor in the sense of challenging the major model and standard. Given the socio-economic inequality brought about by decades of colonialism and apartheid, revolutionary becoming as espoused by Deleuze might be the only thing that could respond to what is intolerable. What are the implications for a post-apartheid law and particularly post-apartheid jurisprudence becoming minor? Let us turn to amnesty as visualized in the 1993 constitution and provided for in the Promotion of National Unity and Reconciliation Act.<sup>47</sup>

### 3 Amnesty revisited

#### 3.1 At the heart of amnesty

As has been said before, South Africa’s negotiated settlement, fraught in many respects, seemingly didn’t involve general or blanket amnesty, but instead opted for an amnesty process as quasi-judicial procedure through which specific people could apply for amnesty. Applicants’ success depended on two things: (1) whether they gave full disclosure of all facts surrounding the act of crime committed and (2) whether they could establish proof of a political motivation.<sup>48</sup>

<sup>42</sup> Krog (n 38 above) 100.

<sup>43</sup> Deleuze (n 1 above) 173.

<sup>44</sup> Krog (n 38 above) 95.

<sup>45</sup> Deleuze (n 1 above) 172.

<sup>46</sup> As above.

<sup>47</sup> Constitution of the Republic of South Africa, Act 200 of 1993 (the 1993 Constitution); Promotion of National Unity and Reconciliation Act 34 of 1995.

<sup>48</sup> Sec 20(10) of the Promotion of National Unity and Reconciliation Act.

Many questions arise, amongst others, how full disclosure is established; what a political motivation is; and what happens to those who applied for amnesty but were unsuccessful, or to those who never applied for amnesty – will criminal prosecutions be initiated against them?<sup>49</sup>

The issue that I am taking up here, mainly because it discloses some of the complexities of a post-apartheid becoming and ethic is the case of offenders who received amnesty but who are unsatisfied with the aftermath. Two stories: the one of Mr du Toit who was in the police force at the time when he killed four political activists, an act for which he was granted amnesty. However, because he had been prosecuted and found guilty of these murders before amnesty was granted, he was discharged from the police force on account of a section in the Police Service Act<sup>50</sup> that stipulates that employees of the police force may not have a criminal record. Having been granted amnesty, Du Toit argued that he had to be reinstated in his position and approached the courts to achieve this. The Constitutional Court held against him. More recently – the second story – former activist Robert McBride, who was granted amnesty for planting a bomb that killed several civilians, took *The Citizen* (a newspaper) to court for defamation for referring to him in a series of reports as a murderer. McBride argued that, because he had received amnesty he could no longer be called a murderer. The Supreme Court of Appeal held in his favour and the case is at the time of writing on appeal before the Constitutional Court. We should consider to what extent, if at all, either of these two men have even considered the possibility of revolutionary becoming, of becoming minor, of giving up traditional standards.

We could ask after the significance of them being men.<sup>51</sup> Given the fact that the Deleuzian notion of becoming subscribes to becoming woman, becoming minor, not directed towards accepted models, ‘the average European-male city dweller for example,’<sup>52</sup> the gendered aspect of becoming shouldn’t be left behind, at least not

<sup>49</sup> See for example W James & L van de Vijver (eds) *After the TRC: Reflections on truth and reconciliation in South Africa* (2000) and A Boraine *A country unmasked* (2000).

<sup>50</sup> South African Police Service Act 68 of 1995.

<sup>51</sup> I do not wish to make an essentialist claim here. I am not saying all men are the same, share similar experiences and respond to trauma similarly. Neither am I saying all women are the same, share similar experiences and respond to trauma similarly. The difference between sex and gender, the former meaning biological make up the second meaning how we respond to and perform and live our biological make up is important here. The reality and power of stereotyping and social construction are of course also important. We should at least note the fact that both these cases are about men, one white, a former police servant of the apartheid government, the other black, a former activist in the struggle against apartheid.

<sup>52</sup> Deleuze (n 1 above) 173.



yet. At least two other writings on change come to mind, one the definition that Drucilla Cornell gives to transformation, as a change not only of a system but of the subjects within a system<sup>53</sup> and the second, Njabulo Ndebele's account of giving up certitudes.<sup>54</sup> Much has been written on the notion of the feminine standing in for minor, for having a de-centered, fragmented subjectivity, the scope of which lies beyond the focus of this case note.<sup>55</sup> Suffice to say that there are arguments in support of it and some rejecting it: Louise du Toit, for example has described the marginalization of the feminine in philosophy and has shown how this has played out in the Truth and Reconciliation process to the detriment of women.<sup>56</sup> To reduce a rich and sophisticated philosophical thesis by way of a summary, her main argument was that the TRC did not provide for reconciliation between men and women to the effect that women were excluded again from citizenship and that this ultimately could be seen as a reason for the continued sexual violence and rape against women in post-apartheid South Africa.<sup>57</sup> Mark Sanders, however, has interpreted the role of women in the TRC process differently, arguing that women performed, albeit not the role of telling stories of individual suffering, a very significant and crucial role during the TRC.<sup>58</sup> In reading the cases of *Du Toit* and *McBride* against the notion of post-apartheid becoming and the becoming of a post-apartheid jurisprudence these questions on sex and gender, even if socially constructed, should not go unnoticed.

But let's return to amnesty for a moment. When does amnesty come into being in the discourse of transition, in leaping from the past into the intersection (or to use the metaphor of the 1993 Constitution, the bridge) that may open the future?<sup>59</sup> Amnesty, accompanied by all the talk of reconciliation, reparation and also *ubuntu* appears in a

<sup>53</sup> C Cornell *Transformations* (1993) 1.

<sup>54</sup> N Ndebele *Fine lines from the box: Further thoughts about our country* (2007) 221.

<sup>55</sup> See eg A Lorde *Sister outsider* (1984); B Hooks *Feminist Theory: From margin to center* (1984); C Kaplan 'Deterritorializations: The rewriting of home and exile in Western feminist discourse' *Cultural Critique* (1987) 6 187-198; MB Pratt 'Identity: Skin blood heart' in E Bulkin, MB Pratt & B Smith (eds) *Yours in struggle: Three feminist perspectives on anti-semitism and racism* (1984); M Cliff *Claiming an identity they taught me to despise* (1980). See also G Deleuze & F Guattari 'What is a minor literature?' in *Kafka: Towards a minor literature* (1986) 17. In a South African context some of the many responses to JM Coetzee's *Disgrace* (1999) have been around the issue of identity and subjectivity, see for example E Boehmer 'Not saying sorry, not speaking pain. Gender implications in *Disgrace*' (200) 4 *Interventions* 342-351; M Samuelson *Remembering the nation. Dismembering women?* (2007) 140 and Sanders (n 17 above) 168.

<sup>56</sup> L Du Toit *A philosophical investigation of rape. The making and unmaking of the feminine self* (2009) 9-32.

<sup>57</sup> Du Toit (n 56 above).

<sup>58</sup> M Sanders *Complicities: The intellectual and apartheid* (2002) 197-201; Sanders (n 17 above) 168.

<sup>59</sup> Epilogue of the 1993 Constitution.

moment of *crisis*, the moment in which the talks about the new South Africa had turned sour. The epilogue of the 1993 Constitution, capturing this aspect of the negotiated settlement of a new South Africa relying on concession and compromise, reads as follows:

These can now be addressed on the basis that there is a need for understanding but not vengeance, a need for reparation but not retaliation, a need for *ubuntu* but not for victimization. In order to advance such reconciliation and reconstruction, amnesty shall be granted ...<sup>60</sup>

The founding moment of amnesty as one of crisis has bearing on the becoming of a post-apartheid jurisprudence – because of amnesty’s roots in a time of crisis one could argue that it opens an inevitable moment of critique.<sup>61</sup> I argue below that because of its roots in crisis the same can be said for *ubuntu*, that rather than closing opportunities by unifying and solidifying it discloses alternatives by unsettling and disrupting accepted certainties. This line of engagement with amnesty and *ubuntu* could expose the ‘tragedy’ of the South African settlement.

We should recall David Scott’s call for an engagement with the past in tragic rather than in romantic terms.<sup>62</sup> Scott discusses the later edition of CLR James’ *The black Jacobins*,<sup>63</sup> in which James recast the initial telling of the Haitian Revolution from romance to tragedy. In *The Black Jacobins* James tells the story of the Haitian Revolution of 1791-1804, the emancipation of the New World slaves. Scott focuses on the 1963 edition, which he describes as ‘a very profound meditation on tragedy.’<sup>64</sup> James in this edition, by carefully weighing the tragedy of Toussaint Louverture against revolutionary romance also comments on the tragedy of colonial enlightenment.<sup>65</sup> South Africa’s negotiated settlement, the acceptance of constitutionalism and human rights conditioned on amnesty in post-apartheid South Africa similarly should not be recalled in romantic or monumental terms. Amnesty, the need for the granting of amnesty and, now, living in the aftermath of amnesty underscore and recall the tragic past – the many deaths, abuses, violence committed. For amnesty not to bring into effect a total forgetting and erasure of the past, the tragic past must be remembered, but also, the story of the transition itself shouldn’t amount to a romantic recall. In this guise we could go along with the Court’s argument in *Du Toit* that it will be

<sup>60</sup> As above.

<sup>61</sup> See in general the special edition ‘Instances of critique’ *Law and Critique* 2005 16 1.

<sup>62</sup> Scott (n 14 above).

<sup>63</sup> CLR James *The black Jacobins* (1938, revised edition 1963).

<sup>64</sup> Scott (n 14 above) 11.

<sup>65</sup> As above.

impossible to ‘restore to the victims what they have lost’ and that the Court cannot restore the ‘perpetrator, in every respect, to his or her position prior to the commission of the offence.’<sup>66</sup> The Court here concedes something of the tragedy of the past that is swept away when it engages in the romantic restoration of the rule of law to which I refer below. Following Scott, Stewart Motha has recently phrased the need for the shift from anti-colonial longing to post-colonial becoming.<sup>67</sup> In a similar guise, post-apartheid becoming, in remembering the tragic, should entail an endless putting into question.

Engaging with post-apartheid becoming often places one in the position of being asked what in *instrumental terms* the *outcome* of the reconciliation process is. Marianne Constable’s reliance on Nietzsche’s telling of the six stages of metaphysics is of significance here.<sup>68</sup> Constable’s connection between Nietzsche’s stages and the development of (US) legal theory is pertinent because of the disappearance of the call for justice in later phases. Law and legal theory’s occupation has become social-legal – the concern is with the ‘apparent’ (the material), the ‘real’ (the ideal) forgotten.<sup>69</sup> What Constable exposes is that the engagements with materiality in fact do not necessarily emphasise or open us to justice, but rather could lead to a certain functionalism, programmes of reform, transformation, *techne*, the call for justice once again forgotten. One could argue that this kind of functionalism corresponds with Deleuze and Guattari’s notion of molar politics – an attempt to establish a firm ground. But as we’ve seen, the molar politics must be accompanied by molecular politics that would challenge. My contention is that the search for justice is connected to becoming, becoming minor. Below, following Sanders’ reliance on Klein, I recall the distinction between reparation on a symbolic level and various reparations, that is, reparations of a material kind. Following Nietzsche’s stages as discussed by Constable, symbolic reparation could be seen to represent the real, and various material reparations the apparent. However, my concern is also the instrumentality of a new order that is not first and foremost concerned with reparation or reparations, but with the instantiation of exactly that, a new order (molar politics). It is the romance of the discourse about the possibilities of a new order and the forgetting of the past that is troubling about the aftermath of amnesty.

The creation of a South African Truth and Reconciliation Commission provided for in the epilogue of the 1993 Constitution

<sup>66</sup> Para 51.

<sup>67</sup> S Motha “‘Begging to be black’ Liminality and critique in post-apartheid South Africa’ 2010 *Theory, Culture & Society* 1-21.

<sup>68</sup> Constable (n 15 above).

<sup>69</sup> Constable (n 15 above) 556.

enters with a certain ambiguity. It could be evaluated and interpreted merely as a tool of a new state to deal with the past, to bring a past to an end, to provide a certain future. I would like to consider the TRC and specifically the provision of amnesty in a way that does not link it merely to the settlement of a new order. As already noted, amnesty comes to the fore in the story of post-apartheid becoming in a moment of crisis – amnesty, reconciliation and *ubuntu*, but significantly also reparation, are intimately connected in the epilogue of the 1993 Constitution. In *AZAPO*, the Constitutional Court decision in which the late judge Mohamed in literary rather than legal terms justified the amnesty provision that prevented the families of activists Steve Biko and Griffiths Mxenge from asking for criminal prosecution or delictual liability of those who killed their loved ones, rested on the promise of reparations.<sup>70</sup> The state of dissatisfaction of those who were granted amnesty must be placed on the table next to the very acute lack of reparation in the aftermath of amnesty and the TRC.

### 3.2 Facts and judgment

As briefly explained above, in *Du Toit* the applicant had been convicted of four counts of murder and as a result, in terms of section 36(1) of the Police Act, was dismissed from the Police Service. Some time after his conviction and dismissal, he was granted amnesty for the four murders. As a result, in terms of section 20 of the Reconciliation Act, his conviction was expunged. He approached the courts arguing in the main that, since his conviction had been expunged, the basis for his dismissal no longer existed, so that he had to be reinstated. The main legal issue that arose from this argument was the question whether the grant of amnesty for acts for which a person had already been criminally convicted, undid all the consequences of the conviction, irrespective of whether they had occurred before or after the granting of amnesty – whether the granting of amnesty had full retroactive or only retrospective effect. Justice Langa for the Constitutional Court held that the grant of amnesty had only retrospective effect and not full retroactive effect: that is, amnesty had the effect of expunging the conviction and preventing in this way any consequences of the conviction that might have occurred after the date of amnesty, but amnesty did not affect any consequences of the conviction that might have arisen before the grant of amnesty. He based this holding on a contextual interpretation of the amnesty provision. For him both the textual context of the section (there were a number of other provisions in the Amnesty Act explicitly excluding certain legal consequences of a conviction that

<sup>70</sup> *Azanian People's Organisation (AZAPO) v President of the Republic of South Africa* 1996 4 SA 1098 (CC).

occurred before amnesty was granted from the reach of amnesty) and the broader socio-historical context (the fact that the Reconciliation Act sought to achieve a balance between benefit and disadvantage for perpetrators and victims or families of victims) indicated that the grant of amnesty should have only retrospective effect in the sense described above.

In *McBride*, *The Citizen* newspaper had described McBride, who had been convicted of three counts of murder, but had received amnesty from the TRC, as a murderer and a criminal in a series of newspaper articles. McBride sued for defamation. At issue in the case was whether or not *The Citizen's* description of McBride as a murderer and criminal was true. Streicher JA held for the majority of the SCA that the effect of amnesty was not only that the conviction of McBride was expunged and he would also be insulated against any legal consequences that might flow from that conviction, but also that he could no longer be regarded as a murderer or criminal. As such the statement that he was a criminal and murderer, was no longer true.

Let me recall a few aspects of Langa CJ's judgment in the case of *Du Toit*.<sup>71</sup> He concedes that the issues concerning amnesty are complex, and close to the constitutional project and national reconciliation.<sup>72</sup> He refers to the reference in the Epilogue of the interim Constitution to the 'historic bridge' and, importantly, the envisioned 'well-being' of South Africans, reconciliation between the people of South Africa and the reconstruction of society. Although he acknowledges that many of the 'unjust consequences of the past can never be fully reversed', he is of the opinion that it is 'necessary to close the book of the past.'<sup>73</sup> The latter is of course highly problematic. His reading of the amnesty provision in instrumental terms – 'a means to an end', 'an important mechanism', 'a necessary tool' – clears the path for his next move with respect to amnesty, that it was a necessary step in restoring the rule of law.<sup>74</sup> However,

<sup>71</sup> The wording of section 20(1) of the Reconciliation Act, the section providing for amnesty, is as follows: 'Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be *deemed not to have taken place*.' The judge decided quite firmly that the issue before the court was indeed a constitutional one (para 14).

<sup>72</sup> *Du Toit* (n 2 above) para 15.

<sup>73</sup> *Du Toit* (n 2 above) para 18.

<sup>74</sup> 'Amnesty in terms of the Reconciliation Act requires broad consideration, for it is part of a restorative and prospective process of transitional justice, heralding the coming-of-age of the proper rule of law in a society emerging from conflict. Judicial action, truth-telling, reparations and institutional reform are each

it was simultaneously at ‘odds with ... the rule of law’.<sup>75</sup> There are many problems in the Court’s approach to amnesty and reconciliation that have been commented on before. The easy belief in the potential of the amnesty process to bring about reconciliation, understanding and even solace is highly contestable. The fact that closure is set out as something to be desired is fraught and goes against the historical self-consciousness/ memory inherent in the Constitution. But what I want to highlight is the alliance between amnesty and the restoration of rule of law, of the state, of governance – of a molar politics only. The TRC and specifically amnesty is directly linked to the new constitutional dispensation, the new settlement and ultimately that and how South Africans in a new order will be governed. The argument goes that, even though amnesty limited rights in the new dispensation severely, it could be justified, because it was ‘an extraordinary time and extraordinary measures had to be taken.’<sup>76</sup> The interplay of benefit and disadvantage, between certain individuals and the nation as a whole is part of the ‘ethos of the constitutional order’ and makes amnesty acceptable ‘despite the tensions and strains it imposes on the rule of law.’<sup>77</sup> The framing of amnesty as standing in service of a new way of governance is what bothers. Although the judge says that ‘the past can never be undone’, he adds that ‘the future may be forged as desired.’<sup>78</sup> The future forged here is one that abides one very specific way of governance, rule of law, as if it has a neutral non-ideological meaning and effect. This is particularly troubling given the fact that the link between amnesty and reparation has become vague, superseded by a government that subscribes to neo-liberal democracy and free market capitalism. A more convincing and more just argument for accepting amnesty could have been to tie it to reparation. Urging reparation and not rule of law could forge another future. But the difficulty and messiness of reparation make for a less attractive means to an end – rule of law of course appears much cleaner.

inadequate on their own to apprehend the past, and too narrow to advance the goals of the future. Used in intelligent unison, they may achieve the delicate balance needed to afford solace to those who suffered, whilst simultaneously strengthening peace, democracy and justice for the future’ (para 21). He continued to say that ‘though the amnesty process may appear to be a device to facilitate forgiveness, closing the door on the past and moving on, it is also a pragmatic venture’. Along these lines the judge recalled the political impasse and that the purpose of the amnesty proceedings was to bring ‘closure and understanding’, for ‘South Africans to get together, listen and share interpretations of history, and then walk away to exorcise their inner demons’ (para 22). *Du Toit* (n 2 above)

<sup>75</sup> *Du Toit* (n 2 above) para 23.

<sup>76</sup> *Du Toit* (n 2 above) para 27.

<sup>77</sup> *Du Toit* (n 2 above) para 29.

<sup>78</sup> *Du Toit* (n 2 above) para 56.

To turn to the *McBride* case: Khulumani, a social movement of apartheid victims, objected strongly to the case of Robert McBride.<sup>79</sup> In their media statement they declared alliance to him as someone who actively struggled against apartheid, but they objected to the interpretation of amnesty he propounds as one that will lead to total amnesia, erasure of the past, and the specific memories of the past.<sup>80</sup> Two family members of apartheid victims, Joyce Sibanyoni Mbizana and Mbasa Mxenge, supported by Khulumani, filed an application as *amici curiae* in the case. They argued that the freedom to speak the truth about the past should not be suppressed. Ms Mbizana stated that she should have the freedom to talk about the crimes committed against her brother and to refer to those who killed him as murderers.<sup>81</sup> The Supreme Court of Appeal decision that ‘once amnesty had been granted’ the person who committed a crime ‘could no longer be branded a criminal and a murderer in respect of [the act for] which amnesty had been granted’ has been criticized widely.<sup>82</sup> It has been argued that the Court not only wrongly conflated law and morality,<sup>83</sup> but also incorrectly interpreted the law. Julian Jonker, for example, distinguishes between the possible convictions that an act could have led to and the legal descriptions of the underlying acts. Amnesty, he maintains, affects the convictions but not the legal descriptions.<sup>84</sup>

Whether one agrees or disagrees with the specific judicial decisions here is not of primary concern – rather, the understanding of amnesty followed by both courts, in conjunction with the virtual absence of reparation is. It has been noted so many times now that South Africa did not accept general amnesty, but given the lack of socio-economic reform, restoration and reparation, the stakeholders that negotiated on behalf of South Africa accepted at the very least a general socio-economic amnesty. And in this sense neither the goals of truth or reconciliation have been achieved. But of course, talk about reparation should not be glib, denying the complexity of even thinking about repairing such a vast problem of injustice and inequality.

<sup>79</sup> Khulumani Red Card Campaign ‘The waving flag and freedom’ <http://redcardcampaign.wordpress.com/tag/amnesty/2010/08/31>

<sup>80</sup> As above.

<sup>81</sup> As above.

<sup>82</sup> J Jonker ‘Truth and amnesty’ For Voet’s sake! <http://forvoetsake.blogspot.com/2010/03/truth-and-amnesty.html> accessed on 2010/08/03.

<sup>83</sup> E McKaiser ‘McBride was convicted - period!’ Mail & Guardian online <http://www.mg.co.za/article/2010-08-03-mcbride-was-convicted-period>

<sup>84</sup> Jonker (n 82 above).

#### 4 The aftermath of amnesty: incalculable futures, reparation, and *ubuntu*

‘[H]ow to think of the future if we know we cannot calculate it.’<sup>85</sup>

I find the phrase above useful when reflecting on the aftermath of amnesty: amnesty as providing a future free of criminal or delictual prosecution but nevertheless a future that cannot be calculated, an incalculable future. The notion of becoming has bearing on the notion of an incalculable future. Becoming entails exactly the opposite of a ground, a preconceived plan. The possibilities of a post-apartheid becoming lie in this critical intersection, the liminal space between an enduring past and a delayed future, a space of discomfort,<sup>86</sup> provisionality, or as George Pavlich, inspired by South African author Ingrid Winterbach has recently formulated it, ‘negotiating dissociation’.<sup>87</sup>

As I have been trying to bring to the fore in the paper so far, reparation lies at the heart of this discomfort and provisionality and I turn now to some thoughts on reparation. Mark Sanders, in a work titled *Ambiguities of witnessing: Law and literature in the time of a truth commission*, phrases reparation as *aporia*.<sup>88</sup> The TRC’s task was to recommend material and symbolic reparations to the state. Three weeks after the presentation of the final volumes of the TRC report, President Thabo Mbeki announced that a once-off payment of R30 000 would be made to victims who approached the TRC. This was far less than the amount suggested by the Commission. Mbeki also opposed the lawsuit brought by Khulumani against international corporations for their compliance in apartheid. Sanders asks, ‘would any amount have been enough?’<sup>89</sup> The *aporia* that we are faced with is that on the one hand no amount would have been enough; on the other hand there must be acknowledgement of those who suffer and continue to suffer.<sup>90</sup> Or, put even more intensely by Sanders, ‘there must be reparation; there can never be (adequate) reparation.’<sup>91</sup> Drawing on Jacques Derrida, he explains the need for a decision, a decision ‘where responsibility lies in deciding in a “night of knowledge” and where justice is irreducible to the application of a law, or to any other calculus’.<sup>92</sup> He refers to the government insisting on ‘responsibility

<sup>85</sup> *Genres of critique*, Stellenbosch Institute for Advanced Study, 10-11 August 2010.

<sup>86</sup> M Foucault *The politics of truth* (2007).

<sup>87</sup> G Pavlich ‘Negotiating dissociation’ paper delivered at a workshop, *Genres of critique*, Stellenbosch Institute for Advanced Study, 10-11 August 2010; I Winterbach *The book of happenstance* (2006).

<sup>88</sup> Sanders (n 17 above) 114.

<sup>89</sup> Sanders (n 17 above) 115.

<sup>90</sup> As above.

<sup>91</sup> Sanders (n 17 above) 116.

<sup>92</sup> As above.



for the well-being of our country' in justifying their decision to oppose the lawsuit against international corporations. Sanders aptly asks whether 'responsibility is being simply used as an alibi for asserting national sovereignty aligned with global capital.'<sup>93</sup>

By looking at the psychoanalytical works of Melanie Klein, Sanders make a distinction between symbolic reparation and material reparations of various kinds. He notes the importance of this distinction in that, in the process of remembering the past, we are constantly confronted by the question whether specific material acts (reparations) can bring about the impossible goal of symbolic reparation.<sup>94</sup> Three concepts are central in the TRC Act and report, namely reparation, rehabilitation and acknowledgement. The TRC formulated a threefold formula on which to base individual grants: an amount to acknowledge the suffering; an amount to enable access to services and facilities; and an amount to subsidise daily living costs.<sup>95</sup> It is posed that suffering should be acknowledged through certain payments, even though no amount can ever compensate fully. Sanders argues that because the reparation policy is guided by the imperative of acknowledging suffering and not mere calculable material loss, it was ultimately determined by 'symbolic reparations' taking many forms.<sup>96</sup> The TRC's assistance in funeral rites and in mourning can be regarded as much more significant in addressing symbolic reparation. In contrast to a once-off grant attempting to pay off debt, symbolic reparation is 'not something ever to be over.'<sup>97</sup> Sanders notes the connection between restoring human dignity and *ubuntu*.

A well-known definition of *ubuntu*, translating the phrase *umuntu ngumuntu ngabantu*, is that a person is a person by or through other people.<sup>98</sup> Drucilla Cornell notes that the phrase is often wrongly translated by adding the word 'only', thereby defining *ubuntu* as meaning that a person is a person *only* by or through other persons.<sup>99</sup> She defines *ubuntu* as 'the African principle of transcendence through which an individual is pulled out of himself or herself back towards the ancestors, forward towards the community, and towards the potential

<sup>93</sup> As above.

<sup>94</sup> As above.

<sup>95</sup> Sanders (n 17 above) 118.

<sup>96</sup> As above.

<sup>97</sup> Sanders (n 17 above) 119.

<sup>98</sup> D Tutu *No future without forgiveness* (2000). See also D Cornell 'A call for a nuanced constitutional jurisprudence: Ubuntu, dignity and reconciliation' *SA Public Law* (2004) 666-675; D Cornell & K van Marle; 'Exploring ubuntu: Tentative reflections' (2005) 5 *African Human Rights Law Journal* 211; Y Mokgoro 'Ubuntu and the law in South Africa' (1998) *Potchefstroom Electronic Law Journal* 9; T Metz 'Human dignity, capital punishment, and an African moral theory: Toward a new philosophy of human rights' *Journal of Human Rights* (2010) 9 81-99.

<sup>99</sup> Cornell 'Ubuntu, pluralism and the responsibility of legal academics' *Law and Critique* (2008) 19 43-58, 47.

each one of us has.<sup>100</sup> Cornell describes *ubuntu* as encompassing both care and justice, we can only act in a caring way to others if by doing that we protect their dignity and aspire to having a just relationship with them.<sup>101</sup> *Ubuntu* can be seen as an ethical ontology, but at the same time the ethical demand inherent in *ubuntu* should be recognized – *ubuntu* in other words is an ethic that subscribes to the idea of a shared world but also demands that we bring about a shared world.<sup>102</sup> For Cornell part of the restoration of humanity of Africans must entail the recognition of African philosophy, including *ubuntu*.<sup>103</sup> But as far as law and jurisprudence are concerned the recognition of *ubuntu* must also be regarded as part of not only customary law, but also constitutional law. Given the concern raised in this note the ethics of *ubuntu* will be significant not only to a post-apartheid becoming, but also the becoming of a post-apartheid jurisprudence. Cornell puts forward the idea of ‘transculturation’ as a demand that ‘we must actually learn each other’s ways and grasp underlying competing values in order even to begin to make a judgement about the unconstitutionality of a ritual practice of customary law.’<sup>104</sup> She argues that transculturation ought to guide the transformation of constitutional law seeking to address the institutionalized racism of a former system.<sup>105</sup> Will such a transculturation be central to post-apartheid jurisprudence becoming minor, giving up established privilege and certitude? One more aspect of *ubuntu* that ties to the concern with the absence of reparation is Cornell’s explicit call for constitutional jurisprudence to take up the project of transculturation as a moral demand.<sup>106</sup> Relying on a Kantian in contrast to a Hobbesian notion of the social contract she argues for any defense of the Constitution to take account of the socio-economic inequality in post-apartheid society, and more than that, that the ‘brutal realities of neo-liberal capitalism’ cannot be reconciled with the moral view that is the basis of the Constitution.<sup>107</sup> This highlights how an ethics of *ubuntu* could be regarded as a demand to make a shared world, one in which socio-economic devastation continuously must be rejected and reparation sought.

For Sanders *ubuntu* is an ethics that ‘continually marks and remarks a loss of humanity, and of human dignity.’ He argues that *ubuntu* will never accept final restoration because it ‘resides in a perpetual remarking of default’.<sup>108</sup> Following Sanders and Cornell one

<sup>100</sup> Cornell (n 99 above) 47.

<sup>101</sup> Cornell (n 99 above) 48.

<sup>102</sup> Cornell (n 99 above) 48.

<sup>103</sup> Cornell (n 99 above) 50.

<sup>104</sup> Cornell (n 99 above) 55.

<sup>105</sup> Cornell (n 99 above) 55.

<sup>106</sup> Cornell (n 99 above) 56.

<sup>107</sup> Cornell (n 99 above) 58.

<sup>108</sup> Sanders (n 17 above) 120.

could contemplate the contribution of *ubuntu* to post-apartheid becoming and to the becoming of a post-apartheid jurisprudence as a critical one, one that will unsettle and open, rather than unite and confine.<sup>109</sup> Given the forging of a new order based on a notion of rule of law that is tightly connected to global capitalism, such an unsettling is a necessity.<sup>110</sup> *Ubuntu* is also important given the fact that the Epilogue of the 1994 Constitution, providing for national reconciliation, amnesty and reparation hinged on *ubuntu* as the ethos of a new order, one not of retaliation but of *ubuntu*. *Ubuntu* then not in the trite view of a togetherness, or a kind of communitarianism easily absorbed by non-African scholars, but *ubuntu* as that which perpetually resists. Sanders asks:

[I]s it good to hold to an ethics so resistant at its core to juridico-legal notions of final settlement? Or, on the other hand: is it good to hold to an ethic that is *not* resistant in this way?<sup>111</sup>

Coming back to Constable, this kind of questioning involves the question of justice and does not amount to a mere socio-legal inquiry.

This take on *ubuntu* goes along with the notion of becoming reflected on above – *ubuntu* then as an ethic that could disclose and demand new ways of being that might even transform society and transform jurisprudence. The notion of community or togetherness supported by this take on *ubuntu* is one of becoming, and with that becoming minor, challenging traditional models. Negri asks Deleuze ‘How can we conceive a community that has real force but no base, that isn’t a totality but is, as in Spinoza, absolute?’ Carol Clarkson, in a reflection on Phaswane’s Mpe’s, *Welcome to our Hillbrow*<sup>112</sup> remarks that the novel puts forward an understanding of the self not as an agent of cultural continuity but ‘tells a tale of radical discontinuity’ thereby ‘raising unsettling questions about individual identities and, consequently, of individual responsibilities’.<sup>113</sup> The ‘our’ in the title ironically registers notions of dispossession.<sup>114</sup> The ‘we’ sense of community is not a matter of which subjects are ‘encompassed by “we” but rather, it is matter of *which relations are brought to bear in my response*.’<sup>115</sup> This example from post-apartheid

<sup>109</sup> *The future of the ubuntu project*, 9 August 2010, University of Pretoria.

<sup>110</sup> It is beyond the scope of this case note to give a full account of the extent to which the South African government since the mid 1990s accepted and endorsed global capitalism. See for example S Tereblanche *A history of inequality in South Africa 1652-2002* (2002); P Bond *Elite transition: From apartheid to neoliberalism in South Africa* (2005).

<sup>111</sup> Sanders (n 17 above) 120.

<sup>112</sup> P Mpe *Welcome to our Hillbrow* (2001).

<sup>113</sup> Clarkson ‘Who are “we”? Don’t make me laugh’ (2007) 18 *Law and Critique* 361-374 367. See also Clarkson ‘Locating identity in Phaswane Mpe’s *Welcome to our Hillbrow*’ (2005) 26 3 *Third World Quarterly* 451-459.

<sup>114</sup> Clarkson (2007) (n 112 above) 367.

<sup>115</sup> Clarkson (2007) (n 112 above) 369.

literature is but one of many ways in which post-apartheid becoming comes to the fore.

Against the responses of two men who were granted amnesty and thereby the opportunity to continue their lives in a post-apartheid South Africa I have reflected on the notion of becoming. My argument was that both Du Toit and McBride failed to embrace the challenge of becoming minor, of breaking with the models given to us by Western/European society. Whether economic security or the protection of one's name, these applicants treaded in the path of an old regime not open to the calling of revolutionary becoming, 'of casting off their shame or responding to what is intolerable.'<sup>116</sup> The negotiators who constructed the new South Africa, the new government but also the Constitutional Court, to the extent that it forges rule of law as the new order, could be regarded as sharing this lack of responsibility. As Deleuze states: 'There's no democratic state that's not compromised to the very core by its part in generating misery.'<sup>117</sup>

## 5 Concluding remarks

Ultimately, the concern of this note is post-apartheid becoming and the becoming of a post-apartheid jurisprudence. The aim is not to provide a blueprint or a path, rather in the course of the note some pointers, tentative suggestions were named. In the nature of suggestions these are not worked out fully here, but merely raised as possibilities for further reflection and consideration. With reference to Deleuze and Guattari a double politics, in other words that the molar, the grounding of rule of law, subjectivity and identity be accompanied by a molecular politics, by *becoming minor* was considered and following on this to think of society in terms of *lines of flight* rather than *contradiction or opposition*. Scott's observations concerning a postcolonial engagement with the past brought to the fore a response that could counter the *romanticism* of a new order and the promises of rule of law, reconciliation, constitutionalism and human rights with *tragedy*. Constable's concern of how the pursuit of *justice* has been replaced by a *counting and measuring* is of particular concern and relevance in the construction of a post-apartheid society, and to the becoming of post-apartheid jurisprudence. My main response to the cases of two men living in the aftermath of amnesty was to ask after reparation, reparation in terms of socio-economic redistribution, but also reparation in terms of what Sanders calls symbolic reparation. Isn't becoming minor, giving up established privilege and certainties (what Cornell may call transculturation)

<sup>116</sup> Deleuze (n 1 above) 171.

<sup>117</sup> Deleuze (n 1 above) 173.

inextricably linked to reparation. Following on Sanders's description of *ubuntu* as 'an ethic resistant at its core' I reflected on *ubuntu* as playing a significant role in post-apartheid becoming, as one 'line of flight'.<sup>118</sup>

All of the notions or paths above can be considered, reflected upon, evaluated by way of thinking about the liminal. I have hinted in the note at the notion of a liminal space – liminal in a spatial sense, of in-between, of an intersection of many things coming together, but also liminal in the sense of becoming, not grounded in one subjectivity or identity, but constantly challenging. We must be aware that this does not mean that new forms of power will not be formed, but for a moment the new might have 'a rebellious spontaneity ... appear for a moment ... the chance we must seize.'<sup>119</sup> Post-apartheid becoming and the becoming of a post-apartheid jurisprudence should entail an openness to the 'new', more than that, an openness to the world.

What we most lack is a belief in the world, we've quite lost the world, it's been taken from us. If you believe in the world you precipitate events, however inconspicuous, that elude control, you engender new space times, however small their surface or volumes ... Our ability to resist control, or our submission to it, has to be assessed at the level of our every move. We need both creativity *and* a people.<sup>120</sup>

One would need to hear the face as it speaks in something other than language to know the precariousness of life that is at stake.<sup>121</sup>

<sup>118</sup> My suggestion is not that *ubuntu* might provide a 'bridge from past reparations to present depredations' as suggested by one of the referees. *Ubuntu* as line of flight is less and more.

<sup>119</sup> Deleuze (n 1 above) 176.

<sup>120</sup> As above.

<sup>121</sup> J Butler *Precarious life* 2004 151.