RIGHTS AND DEMOCRACY

in a

Transformative Constitution

Edited by

Henk Botha
André van der Walt
Johan van der Walt

SUN PRESS
CONTENTS

Preface vii
Foreword ix

Anél Boshoff
Law as Dialogical Politics 1

Henk Botha
Rights, Limitations and the (Im)Possibility of Self-Government 13

Danie Brand
The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or ‘What are Socio-Economic Rights For?’ 33

Dennis Davis
Elegy to Transformative Constitutionalism 57

Lourens du Plessis
Some of Frank Michelman’s Prospects for Constitutional Interpretation in South Africa – In Retrospect 67

Johan Froneman
The Impossibility of Constitutional Democracy 93

Jonathan Klaaren
An Institutional Interpretation of Socio-Economic Rights and Judicial Remedies after TAC 105

Irma J Kroeze

Hanri Mostert
Liberty, Social Responsibility and Fairness in the Context of Constitutional Property Protection and Regulation 131

André van der Walt
A South African Reading of Frank Michelman’s Theory of Social Justice 163

Johan van der Walt
Frankly Befriending the Fundamental Contradiction: Frank Michelman and Critical Legal Thought 213

Karin van Marle
Love, Law and South African Community: Critical Reflections on ‘Suspect Intimacies’ and ‘Immanent Subjectivity’ 231

Bibliography 249

Publications of Frank I Michelman 265
CONTRIBUTORS

Anél Boshoff  
Associate Professor, Rand Afrikaans University  
Faculty of Law  
E-mail [anelboshoff@hotmail.com]

Henk Botha  
Professor, University of South Africa  
Department of Constitutional, International and Indigenous Law  
E-mail [Bothah@unisa.ac.za]

Danie Brand  
Senior Lecturer, University of Pretoria  
Department of Public Law  
E-mail [dbrand@hakuna.up.ac.za]

Dennis Davis  
Judge of the High Court of South Africa  
Cape Provincial Division  
E-mail [DDavis@justice.gov.za]

Lourens du Plessis  
Professor, Stellenbosch University  
Department of Public Law  
E-mail [lmdp@sun.ac.za]

Johan Froneman  
Judge of the High Court of South Africa  
Eastern Cape Provincial Division  
E-mail [jcf@telkomsa.net]

Jonathan Klaaren  
Professor, University of the Witwatersrand  
Research Unit on Law and Administration, Wits Law School  
E-mail [klaarenje@law.wits.ac.za]

Irma J Kroeze  
Professor, University of South Africa  
Department of Jurisprudence  
E-mail [kroezij@unisa.ac.za]

Hanri Mostert  
Associate Professor, Stellenbosch University  
Department of Private Law  
E-mail [hmos@sun.ac.za]

André van der Walt  
Professor, Stellenbosch University  
Department of Public Law  
E-mail [ajvvdwalt@sun.ac.za]

Johan van der Walt  
Professor, Rand Afrikaans University  
Faculty of Law  
E-mail [jwgvwdw@rau.ac.za]

Karin van Marle  
Associate Professor, University of Pretoria  
Department of Legal History, Comparative Law and Legal Philosophy  
E-mail [kvanmarl@hakuna.up.ac.za]
PREFACE

It was in May 2001 that the idea of a Festschrift for Frank Michelman first occurred to us. Frank had just turned 65, and we thought a Festschrift might be a fitting way of honouring his contribution to constitutional thought in this country. Just over two years later, the project has come to fruition. In the end, the book is not published formally as a Festschrift, and the title does not bear Frank’s name, but it is still, unmistakably, a collection of essays in his honour. All the individual contributions engage with his scholarship: by analysing his work, challenging it, exploring it within the South African context, and/or using it as a tool for the development of theoretical frameworks or avenues of critique.

Frank’s ideas have been - and continue to be - a source of inspiration for many of us who are interested in the possibility - and limits - of ‘transformative constitutionalism’.¹ His writings on the judicial function and the capacity of rights discourse to facilitate and deepen democratic dialogue are among the most original and thoughtful on the topic - as are his reflections on constitutionalism as a tool for protecting a plurality of cultures, thoughtways and lifestyles; redressing inequality; and promoting social justice. It is therefore hardly surprising that South African legal academics and judges would have turned to his ideas in an attempt to break with the formalism and authoritarianism characterising our legal past, and to make sense of the democratic and egalitarian aspirations of the Constitution. For those who still wish to engage with the Michelman oeuvre, we included a full bibliography of his publications at the back of this volume.

However, the substance of Frank’s ideas alone cannot account adequately for the influence he has wielded, or the enthusiasm with which this project has been embraced by fellow academics and judges. There are other reasons as well: his commitment to the democratic transformation of the South African state and society; his engagement, through academic and judges’ conferences, but also by means of private correspondence, with South African colleagues; his passion for reasoned argument; and above all, the intelligence, wit, generosity, and dialogical spirit with which he has engaged us. This book is a token of our appreciation for Frank’s collegiality and friendship.

The contributions to the book are varied. A number of themes which run through different essays and reflect some of Frank’s main theoretical concerns can, however, be identified. One is legal indeterminacy and the politics of law. Some authors rely upon Frank’s view of indeterminacy as a condition of normative and doctrinal revision, which is indispensable to constitutional dialogue and the struggles of marginalised groups for recognition. Others raise critical questions about the ability of a legal system that is riven with contradiction to rise above instrumental politics. Johan van der Walt addresses the question to what extent Frank’s frank and honest liberalism can address the sacrifices required whenever law is invoked to reconcile fundamentally conflicting interests in society … Anel Boshoff addresses Michelman’s dialogical conception of legal politics against the background of two diverging claims that law and politics should be kept apart, namely, the formalist

¹ As far as we are aware, the phrase ‘transformative constitutionalism’ has been coined by Karl Klare, a close friend of Frank. See K Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 SAJHR 146.
or conceptualist claim that politics should be kept out of law so as to preserve the integrity of law, and the radical democratic claim that law should be kept out of politics so as to preserve the integrity of politics. A number of essays also engage Frank’s writings on the relation between democracy and rights and the problem of democratic self-government (or what he calls the ‘paradox of constitutional democracy’). For instance, Johan Froneman deals with the question how the constitutional demand for the rule of law can be reconciled with the democratic demand that the people govern themselves. He addresses in this regard Michelman’s arguments as to why the duty and responsibility to effect this essentially impossible reconciliation ultimately falls on the judge.

A second - closely related - theme deals with questions of alterity and difference. Irma Kroeze draws upon Frank’s reflections on self-government and difference to criticise the Constitutional Court’s failure in freedom of religion cases to question normative assumptions that are embedded in mainstream morality, and to seek to include the marginalised other. Karin van Marle reads Michelman as a hybrid thinker who occupies a space between liberalism and civic republicanism. She argues in this regard that Michelman’s adherence to certain basic principles of liberalism necessarily detaches him from the concern with the reflexive horizon of love raised in recent European legal theory.

A third theme relates to the need for judges to engage in practical reasoning and judgment, to explain the moral and political reasons for their decisions, rather than purporting to derive their judgments from ‘self-applying’ legal materials. Lourens du Plessis explores Frank’s reflections on practical reasoning within the context of constitutional interpretation, while Henk Botha looks at it from the perspective of the limitation of rights and debates about judicial balancing.

Finally, a whole range of essays deal with issues of social justice, socio-economic rights, and the need to subject private-law institutions and social and economic power relations to a transformative critique. André van der Walt, Danie Brand and Jonathan Klaaren explore this theme with reference to the issues surrounding the promotion of socio-economic rights in the South African Constitution. In the process, they are able to engage the rich source of publications that Frank has written in this field since 1967 and the emerging case law from the South African Constitutional Court. Hanri Mostert, on the other hand, approaches the tension between the protection of private rights and the promotion of social justice from the perspective of the property clause, arguing that a sound balance between these two goals can be found according to both Frank’s writings on property as a constitutional right and German constitutional case law. Dennis Davis criticises the Constitutional Court’s reliance, in cases dealing with the horizontal application of the Bill of Rights, on the conceptual tools of the past, and argues instead for a future-orientated or transformative approach.

We wish to thank the University of South Africa for hosting a colloquium in January 2003, where authors presented extracts from their essays and were given the benefit of Frank’s direct engagement with their ideas. Thanks also to Gerhard du Toit for his editorial assistance and the bibliography, and to Frederik de Jager of AFRICAN SUN MeDIA for his enthusiasm for the project. We trust that this collection of essays will, in the spirit of Frank’s own scholarship, stimulate much further intellectual argument and debate.

Henk Botha
André van der Walt
Johan van der Walt
Editors
FOREWORD

FRANK MICHELMAN

I wouldn’t call myself an admirer of Frank Michelman. You admire something from a distance. Frank is friendly, approachable and someone who loves nothing more than a spontaneous interchange of ideas. He manages to be very American and un-American at the same time. On his first visit to South Africa he slipped in a whole range of original and critical ideas without once banging a gong and announcing: ‘these are original and critical ideas’. Later, when I was doing a teaching stint at Harvard, he would throw out large concepts as we walked along the corridor or drove in his car, with the casualness of someone speaking about the weather.

When solving a problem you bring into play a whole range of imagined situations and hypotheses. As I write various drafts of my judgments, many figures stand over my shoulder, at my side, above me, jeering, cheering, smiling, and frowning. How can you say this? Lovely phrases, but what do they actually mean? And through the throng of these chattering ghosts come the quiet, reflective, discerning and comitose (note the spelling) interrogations of Frank. How can judges be passionate and dispassionate at the same time, the first about justice and the second about the parties? If parties behave unjustly, should you be dispassionate about them? To what extent do historically constituted mind-sets influence judicial reasoning and the way problems are set out? Is context simply the necessary backcloth against which forensic debate is carried out, or is it part of the very fabric of debate?

My philosophy is that we are all in this together, scholars, judges, public intellectuals, whatever we call ourselves or are called. What matters is the integrity of the dialogue, the willingness to listen and the willingness to speak, the boldness to advance novel interpretations and perspectives and the openness to accept refutation and to acknowledge contrary facts. Without exercising the right to be wrong, we can never be right. Without positing the right to be right/wrong, we end up with the position ironically proposed by Stephen Sedley, namely, that nothing should ever be done for the first time.

Frank listens and speaks. He takes a series of venturesome little steps that end up in terrain that is wholly new and yet apparently not too unfamiliar. Thank you, Frank, for sharing with so many of us your ideas, your life experience, and, above all, your eager yet non-egotistical style.

Albie Sachs
Chamber
Johannesburg
February 19, 2002
‘Law is politics.’ This infamous phrase has the brevity and provocative character of a political slogan, rather than the meticulous and clear nature of legal exposition. Since it was first expressed by members of the Critical Legal Studies movement, it has been widely and passionately contested. However, like most political slogans its apparent simplicity hides a complex range of interpretations and as a result opposition to the conceptual unification of law and politics springs from divergent ideological sources. Running the risk of oversimplification I shall divide the objectors into two groups. On the one hand there are those (the traditionalists) who see the law as an essentially objective and value-neutral system, capable of finding the correct interpretation of legal rules and impartially applying it to the facts. On the other hand there are those (the radicals) who also support the separation of law and politics – their aim, however, is not to keep law pure, but rather to keep politics safe from the pervasive and restrictive influence of the law.

The traditionalist view, that law should be protected from the corrupting influence of politics, enjoys near universal support. After all, the capacity of the law to yield objective answers, ‘right’ answers, depends on maintaining the division. The law, on this account, guarantees protection against the despotism of ‘men’ – against the unmodulated personal or irrational preferences registered in politics. More particularly, the law shields the weak from the naked political power wielded by the strong. The denial of the theoretical separation of law and politics therefore strikes terror in the hearts of traditionalist lawyers. It undermines or threatens to undermine the very project of ‘law’. In Owen Fiss’s words ‘[It] will mean the death of the law, as we have known it throughout history, and as we have come to admire it’.

The law/politics dichotomy, according to the traditionalists, also implies a certain hierarchical order, namely with law privileged as superior to politics. The ‘law’ side of the dualism is associated with positive values such as reason, objectivity, impartiality and public virtue. Politics, on the other hand, is associated with the negative values of will, subjectivity, bias and personal preferences. Goodrich et al provide us with the following description of the traditionalists’ conception of the law:

---

1 Many would say this proves the difference between law and politics, and hence the inaccuracy of the statement.
2 The phrase ‘government of laws and not of men’ entered American legal consciousness when used in Marbury v Madison 5 U.S. (1 Cranch) 137, 193 (1803).
For the bulk of modern jurisprudence, the law is public and objective; its posited rules are structurally homologous to ascertainable ‘facts’ that can be found and verified in an ‘objective’ manner, free from the vagaries of individual preference, prejudice and ideology. Its procedures are technical and its personnel neutral. Any contamination of law by value will compromise its ability to turn social and political conflict into manageable disputes about the meaning and applicability of pre-existing public rules.4

However, the merging of law and politics also comes under attack from a different, even opposite direction. According to a more radical view the real danger is not politics destroying law, but rather law infiltrating politics, turning all questions into ‘legal’ questions. The jeopardy we must guard against is the juridification of society, where law ‘colonises’ and thus impoverishes all aspects of society. Here we find the same law/politics dualism, but the political sphere is regarded as privileged or superior to that of the law.

II MICHELMAN’S COLLAPSING OF THE DICHOTOMY

In his 1988 Stevens Lecture, Frank Michelman makes the rather forthright statement that ‘law is best understood as a form of politics’.5 This assertion comes in reply to Fiss’s sharp attack on the Critical Legal Studies movement for collapsing the distinction between law and politics that would, according to Fiss, jeopardise the future of law as we know it. Fiss, clearly from the perspective of a traditionalist, sees the values underlying politics as irreconcilable with that of the law. Explaining the dissimilarity between constitutional adjudication (law) and legislating (politics), he says:

Legislatures … are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people – what they want and what they believe should be done.6

This statement, as Michelman correctly observes, indicates a particular understanding of what is meant by politics (and presumably also of what is meant by law). Michelman then proceeds to distinguish between instrumentalist politics (usually referred to as pluralist politics) and what he terms a dialogic conception of politics. Sunstein explains the basic features of a pluralist conception of politics thus:

[P]olitics consists of a struggle among interest groups for scarce resources. Laws are a kind of commodity, subject to the forces of supply and demand. Various groups in society compete for loyalty and support from citizens. Once they are organized and aligned, they exert pressure on political representatives who respond, in a market-like manner, to the pressures thus exerted.7

Pluralist politics are characterised by self-interested ‘deals’ between political actors and aggregating citizen preferences through majority rule. According to this view political decisions should reflect real existing preferences, in other words, there should be no attempt at

---

7 C Sunstein ‘Beyond the republican revival’ (1988) 97 Yale LJ 1539 at 1542.