

Human rights concern much more than only racial differences and discrimination

Van Marle, Karin, ed. 2009. **Refusal, transition and post-apartheid law.** Stellenbosch: Sun Press. 163 p. Price: R180,00. ISBN: 978-1-920338-08-4.

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The constitutional change in South Africa forms the basis of this publication. In 1994 with the change to a constitutional democracy, human rights were institutionalised. Implications of this change were, however, not clearly grasped and appreciated by most citi-

zens, including lawyers and politicians. For most the change still spells, more or less, business as usual – it only affects, so they tend to think, the government and people working in the field of law. Laws should not clash with the constitution, lawyers should conduct their business in line with the constitution and judges must accept and apply where relevant the litmus test of constitutionality and the constitutional court as the final guarantor of constitutionality, has to establish human rights. To this kind of view Van Marle and her co-authors object. For them the new dispensation cannot be business as usual – a human rights culture involves much more than institutionalisation and formal structures. But what more? What are the conditions for the possibility of such a culture? For Van Marle “refusal” depicts the attitude and activities required to prepare the ground to answer this question – she suggests a break in legal tradition, a politics of refusal, refusal of “traditional ways of thinking and doing law” and a preparedness to accept “unexpectedness that breaks with the formality and predictability of law”.

Hannafin in his concluding essay embroiders on this with descriptions such as “another thinking of both law and politics”, an act which “reveals the limits of law, its internal paradox, and the impersonality of the person with rights”. An important aspect is that “refusal provides another mode of thinking our relation to each other, to law and to the political”. Refusal indicates more than only a critical analysis, because it aims at reconceptualisation, changes in attitudes, and even practical measures. Van Marle, Hannafin and De Vos show the width of the scope of the discussion by referring to the rights of women and gays. With reference to the contributions, the editor points out that “all the contributions to this volume engage with the notion of refusal in unique and suggestive ways”. In this she is correct. As we shall point out, a wide range of issues are addressed with no overlaps or repetition. There are differences of approach and emphasis and even debate, but the focus remains and the general theme is constantly developed in an interesting and thought provoking direction.

The book contains an introduction by the editor, Karin van Marle, “Refusal, risk, luminosity”, which is followed by her article, “Laughter, refusal, friendship: thoughts on a ‘jurisprudence of generosity’”, the only contribution to this book which was published previously. Then follows “Refusal, post-apartheid constitutionalism, and *The cry of Winnie Mandela*” (Henk Botha), “Property and refusal” (A.J. van der Walt), “Six (individually-named) notes on the counter-aesthetics of refusal” (Wessel le Roux), “*Hayi bo!* Refusing the plan – acting,

thinking and revolting by post-apartheid social movements and community organisations” (Tshepo Madlingozi), “The work of mourning, refusal, forgiveness” (Jaco Barnard-Naude), “Refusing human rights? A Foucauldian account” (Pierre de Vos) and “Is technology a fatal destiny? Heidegger’s relevance for South Africa and for all ‘developing’ countries” (Drucilla Cornell). Patrick Hanafin gives a retrospective overview of all the contributions and draws the threads together in the concluding essay, “All that remains – refusal’s ‘no’?”. Although there is a unity between all these articles, each one stands on its own legs and can be read and used as such.

The first essay by Van Marle has to be read with the introduction as part of setting the scene. She feels human rights are lacking in the capacity to effect real change. Her worry, and this is the central problem here, is why this is the case and how it can be changed, seen from a legal perspective. Her diagnosis is a certain view of law and legal reflection, and the envisaged remedy, an attitude of refusal. A different approach is needed for which she uses different terms such as “a jurisprudence of generosity” (“... the idea of unexpectedness that breaks with the formality and predictability of law”) and “refusal”. She asks for “the refusal of traditional ways of approaching law”, which introduces risk (“taking the risk of using law to address ... or achieve ... [a] need or aim”, and “a risking law arises because of the refusal of traditional and unreflective approaches”), a shifting of the limits of law (“whether law can be reflexive”), reconciliation, thinking (“a law that refuses thoughtless accounts”). She is “challenging law in its mode of business as usual” and concludes: “The aim is to call for a refusal of instrumental reliance on knowledge. Refusal is an action in the limit, action imbued with reflection ...”. Her plea then is for refusal, which expresses an attitude, but also action, critical analysis, but also practical change, which is destructive, but with the idea to rehabilitate. This then is the challenge to the other contributors.

The following eight articles address the main theme each from a different perspective, which means that various other related themes are also introduced into the discussion, making this small publication a rich source of jurisprudential considerations. Henk Botha explores the concept of refusal with reference to Ndebele’s novel. A.J. van der Walt discusses land reform and other property matters.

Wessel le Roux puts the idea of refusal and Van Marle’s scepticism about constitutionalism in a broader perspective. According to him she targets “... the core and value of a community that sought to define itself politically through the mediation of its democratic con-

stitutional institutions”, but offers no deeper understanding or alternative. This he wants to remedy by integrating her ideas with the ideas of five other thinkers on this theme and whose work Van Marle used in the development of her views: Hannah Arendt, Patrick Hanafin, Seyla Benhabib, Jean-Francois Lyotard and Lourens du Plessis.

Madlingozi takes a more practical, even activist stance in his contribution. He links refusal to active citizenship, the day to day attempts of ordinary citizens to live and to make sense of political, economic and legal arguments, slogans and programmes. Refusal then becomes refusal to be drawn into a way of life which cannot be lived meaningfully.

Jaco Barnard-Naude focuses on forgiveness in the context of refusal and the dilemma of forgiveness – forgiveness is based on the refusal to forgive, i.e. refusal as not being prepared to accept business as usual.

De Vos argues that on the accepted liberal interpretation, human rights refusal in its literal sense cannot be countered. Not only because the law (constitution) as such and human rights in particular lack the capacity to effect socio-economic reparation and address other social problems, but there is also a continuous possibility of their abuse to serve interests of power. It is a serious question whether human rights can play a role in the emancipation of marginalised groups and whether they are not possible tools for oppression and exclusion. Should refusal not be taken literally and radical because legal teleology is out? The idea of scrapping human rights would, however, be offensive viewed from different angles. Thus a reconceptualisation of power, the law and human rights seems necessary to such an extent that human rights could play a powerful emancipatory role in our society. This is what he does in this article using Foucault’s ideas.

Drucilla Cornell shows that in the new dispensation technology needs to be questioned. It is equated to development and thus a *sine qua non* in political, social, economic and ethical discussions relating to the new South Africa. Cornel considers a few possible answers which turns on development and tackles the technocratic notion of development – the idea that technology should provide the answer both in the sense of bringing technology to those in need of development and that technology will provide the answer to how technology should be applied, how people are to be moved into

development. Heidegger's attack on technology and his skeptical "solution" provides the basis of her consideration.

Finally Patrick Hanafin's article returns us to the starting point with his reference to Blanchot's refusal by focusing on the "figure who refuses". In trying to understand the refuser he shows us crucial characteristics of refusing, particularly the positive side to it. This brings him to arguing for an alternative (thinking) community, another way of being political, and a reconfiguration of rights. According to Hanafin, it is necessary to take the risk and to open a mode of critical thought and critical theory as a possible alternative approach to law, keeping in mind the need for transformation and the demands of transformative constitutionalism, challenges which cannot be met, according to the authors, with reliance on instrumental knowledge, neo-liberalism and modern technology.

This book brings different perspectives on human rights and their status. As such it is an important book in the light of the present debate about the constitution. It draws the reader into the discussion of this all important issue. It is a timely and thought-provoking publication.

One of the main advantages of the book is that it is putting the question, namely what is meant by having a human rights culture, in perspective. The change to a constitutional democracy was negotiated by political leaders, for many ordinary citizens the situation remained much the same, business as usual. This publication makes it very clear that much more is involved than an extra court and a different role for parliament. The change is more a way of life, a way of thinking, the establishment of a human rights culture. As is clearly indicated, this affects every citizen; it demands new ways of thinking, particularly for lawyers. In general this book brings greater clarity on what a human rights culture means, how it is strengthened and kept in place.

More could have been made of a practical human rights discourse in the country. Interesting judgments have been handed down and they could have been used to good effect by the authors – the book is poorer for the lack of this kind of references.

Who ought to benefit from a reading of this book? It is a book for every citizen, but unfortunately not a book which every citizen will be able to digest. People with an interest in human rights and the building of a human rights culture should read it. Politicians may particularly benefit to get a clearer picture of what is at stake when

they plan and legislate for transformation and deals with transformative constitutionalism.