

Karin van Marle

Prof Karin van Marle,  
Department of Public  
Law, Faculty of Law,  
University of the Free  
State, 205 Nelson  
Mandela Dr, Park West,  
Bloemfontein 9301;  
E-mail: VanMarleK@ufs.  
ac.za

DOI: <http://dx.doi.org/10.18820/24150479/aa51i1.6>

ISSN:0587-2405

e-ISSN: 2415-0479

*Acta Academica* • 2019 51(1):  
109-124

© Creative Commons With  
Attribution (CC-BY)



## A 'Right' to the university

First Submission: 31 January 2018

Acceptance: 21 January 2019

I consider to what extent, if at all, rights – or to take it wider, law – can contribute or even respond to what is referred to as the 'current crisis' in higher education. To what extent does rights discourse still enable radical political claims that could engage with the complexity of the moment and support a politics of resistance? I recall arguments on the limits of law, in particular the inability of law to be self-reflexive, and also some critical responses to rights as such. Could these critical responses disclose possibilities for a radically different conception of right, of a 'Right' – particularly the Right to the university – that emerges from a place of anxiety, disruption and 'unselfing' rather than preservation? What could be at stake in thinking about a 'Right' to the university against the background of the notion of the Right to the city? The potential relevance of the Right to the city, linked to the notion of 'inhabitation', is that it challenges the modern, technical and functional notion of 'habitat'. Habitat is devoid of any notion of politics, most pertinently political resistance. A contemplation of a Right to the university will have to have at its core the notion of 'inhabitation' that will resonate with Lefebvre's notion of "lived space".

**Keywords:** limits of law, politics of resistance, crisis in higher education, Lefebvre, right to the city, lived space, inhabitation

The main issue that I consider in this piece is the extent to which, if at all, rights – or to take it wider, law – can contribute or even respond to what is referred to as the ‘current crisis’ in higher education. To what extent does rights discourse still enable radical political claims that could engage with the complexity of the moment and support a politics of resistance? In what follows, I recall arguments on the limits of law, in particular the inability of law to be self-reflexive, and also some critical responses to rights as such. Could these critical responses disclose possibilities for a radically different conception of right, of a ‘Right’ – particularly the Right to the university – that emerges from a place of anxiety, disruption and ‘unselfing’ rather than preservation?

I start by recalling some of the ways in which constitutional supremacy and rights have been questioned, problematised and rejected. I consider if and how rights could be used in a critical way that could support a radical politics and resistance to the status quo. But before I do that, I want to make a few brief remarks on the student protests as they played out on the Hatfield campus of the University of Pretoria (UP), and in particular the extent to which, if at all, rights or rights discourse was invoked by students in a progressive and transformative manner. My remarks are those of an academic who is concerned about fair and just access to higher education. From where I stand, the critical questioning of present systems – political, economic, social, legal and epistemological – lies at the heart of what a university is all about. The first slogan that caught my attention when protests first started on the UP campus in October 2015 simply stated “We are not clients”. With those words, students voiced one of the defining features of the neoliberal, corporate governance that is being imposed on staff and students. One of a few victories was when, without any announcement, new nameboards went up towards the end of 2016 in which ‘Client Centre’ was replaced with ‘Student Centre’. This happened without any rights being invoked and came about as a result of students, and later some academics, voicing their opposition to the corporatisation of the university. To those who may observe that this example is too insignificant to substantiate an argument that rights discourse did not play a significant role in an emancipatory moment, my response is simply that I am not making any grand claims. This is merely a tentative remark. However, in my experience of protests at UP, rights were and constantly are being invoked by those who stood and continue to stand in opposition to the students protesting for free, quality, decolonised education. In the context of the battle over language as medium of instruction, minority Afrikaans speakers invoked the right to have all lectures, tutorials and study materials in Afrikaans; non-protesting students invoked their right to education; students and staff insisted on their right to a safe learning and teaching environment; university management, teaching and support staff invoked their right to dignity, to list but a few examples. Of course, all

these rights are legally valid rights to invoke and the extent to which these rights were recognised or violated, infringed upon or protected, is not the subject of this piece. The question that I ask is whether rights and rights discourse could play a constructive role in protest and resistance. This question is driven by concern over the extent to which rights and rights discourse not only prohibit protest and resistance, but actually obstruct any chance of radical transformation. Another way of putting this question could be following Hannah Arendt (1958; 1963; see also Honig 1991) to ask to what extent rights and rights discourse have become “self-evident”, grounded in absolutes and therefore, as Arendt would have it, anti-political. Arendt (1951) of course famously asserted that the only right that matters is the right to have rights.

In this piece I start by drawing on Emiliios Christodoulidis (1996), who, from a Luhmanian system theory perspective, exposes the incapacity of law to allow for a politics of questioning. I then revisit the critique of Costas Douzinas (2000) on human rights, which involves retracing a genealogy of rights in the western paradigm. For Douzinas, rights lost something of their original radicalness because of, among other reasons, the strong influence that Christian mediaeval theology and the rise of modernity had on human rights. A central critique of human rights is the extent to which the ‘human’ has been used as a form of categorisation and exclusion. Douzinas (2013) engages this issue when, in his seven theses on human rights, he explains the way in which the proliferation of demands for rights as an ever-including and expanding phenomenon can be explained as an attempt to include everything and everyone previously excluded. However, the ongoing add-ons have done nothing to confront what is at the heart of the matter, namely a vision of humanity that is nothing short of perverse.

A re-thinking of rights should involve thinkers from the South – for example Caribbean theorists and their “alternative/new visions of humanity” (see Cornell and Seely 2014) – in which, for rights to make any “sense” at all, nothing short of a “spiritual revolution” that also “encompasses erotic transformation” will have to take place (Cornell and Seely 2014; see also Rose 2014). Closer to home, I recall Mahmood Mamdani’s (1998) poignant remarks to the effect that a narrow interpretation of rights would result in South Africa’s negotiated settlement amounting to little more than a Hobbesian pact. Following from Mamdani, I revisit Sampie Terreblanche’s (2012) insights on the influence the capitalist west had on that settlement.

I conclude by considering if the right to the city – Henri Levebvre’s Marxist cry for a radical politics – could be of value for understanding the #MustFall movement. If the right to the city turns out to be co-opted by constitutional and traditional rights discourse, it will have a politically stifling effect (Butler 2014;

Christodoulidis 1996). But what if the right to the city were rather understood as a 'Right' that goes beyond traditional rights discourse, one that could be paired with the idea of "an aesthetic humanist education" (Böhme 2017)? I consider tentatively if #MustFall could be read in terms of a 'Right' to the university as a call, not only for the right to free education, fair language policy and a transformed and decolonised curriculum, but as a call for spatial justice and an alternative vision of humanity. I focus on some of the institutional responses to the student protests at UP and consider to what extent these responses opened or closed, or made possible or prevented a right to the university.

## Law's incapacity to allow for a radical politics

Christodoulidis (1996; 1998) puts forward a strong argument against any notion that law, constitutionalism and rights discourse could act as vessels for radical politics. For him (1996: 227-233) the inability of law to be self-reflexive will always amount to a legal imperialism that will conceal political-reflexive questions by replacing them with arguments that rely on necessity or naturalness where there is only contingency. He explains law's inability to be self-reflexive with reference to the notion of "exclusionary reason" as developed by Joseph Raz. Raz distinguishes between first and second order reasons. First order reasons refer to reasons to act, where second order reasons refer to reasons to act for a reason – first order reasons are in other words reasons that may be questioned, whereas second order reasons are presented as inevitable/ natural. Second order reasons may be positive (the reason to act for a reason) and negative (the reason not to act for a reason). The latter, negative second order reasons are called exclusionary. In other words legal rules (and I argue traditional approaches to rights) are examples of exclusionary reasoning: it should be followed not because of its moral, ethical or political force but simply because it is a legal rule. In this way first order reasoning is blocked. This blocking insulates decision making from taking into account all other considerations that inform all reasons. For Christodoulidis, "exclusionary" is the opposite of "reflexive". Legal rules and traditional approaches to rights cannot allow for their own revisability in view of substantive, moral and political concerns. Law therefore cannot contain conflict and revisability and is therefore not reflexive. Christodoulidis (1998: 53) states that "Reflexivity is an invitation to think something through; a reduction is a reason not to ... Reduction means simplification."

Christodoulidis (1998: 59), following Luhman, identifies three dimensions in which the reduction of law becomes evident, namely the temporal, social and material. The temporal reductions come to the fore when the law insists on providing normative expectations; in its social reduction, law abstracts concrete otherness into legal personality while the material reduction plays out in the law's

limited focus. Christodoulidis demonstrates these reductions with reference to the distinction between law and marriage, or the distinction between a loving and a legal expectation. In law, a rule emanating from a legal order defines and manages expectations; in love, what the lover normatively expects of the concrete other is what counts. Material thresholds can also not be set in a relationship of love – in fact, love often defines itself through the defiance of material conditions and expectations; similarly, in love normative thresholds are not impersonal but interpersonal. In light of these reductions and the law's incapacity to be self-reflexive in this precise sense, law cannot serve as a vessel for the actualisation of political aspirations, because these aspirations are per definition expressions of the temporal, social and material dimensions of human life. In addition to this, the law is incapable of voicing a divergent plurality that is continuously dissonant and contested.

I now turn to shifts that occurred in the natural law tradition that resulted in rights being positivised and their radical potential and possibilities for resistance thwarted.

### **From natural law to natural right to human right to “new collective practices of being human”**

At the dawn of the new millennium Douzinas (2000) noted the paradoxical nature of human rights in the sense that its “triumph” and “end” came to the fore at exactly the same time. By the late 1980s and early 1990s human rights had become part of the dominant discourse of governments and international organisations. It was said at the time that with the fall of communism and official apartheid, human rights had won the “ideological battle of modernity”. However, this did not bring an end to the abuse of human rights in multiple places as massacres, genocides, and ethnic cleansing proliferated while the gap between the rich and the poor continued to widen. To understand this apparent contradiction, it may be useful to briefly retrace the shift from a classical notion of natural law, to the rise of natural rights in the early modern period and after that, to human rights in late modernity. Comparisons between, for example, the trial of Antigone and that of Nelson Mandela show interesting differences despite the fact that in both cases the accused relied on some notion of moral or higher law beyond the laws of the state. Le Roux (2004: 27) succinctly summarises a number of shifts that explain the differences between these two trials. Antigone, in defiance of the King, relies on an external, objective, unchanging order to be found in the unwritten demands of the gods; Mandela's higher law lies in the internal, subjective consciousness of all thinking people, and in Bram Fischer's statement rights are explicitly invoked. Time and space do not allow me to retrace this crucial shift in more detail, but suffice it to say that the version of human rights that ended up in our

codified documents is quite different from the classical understanding of rights. The influence of Christian theologians during late scholasticism – in particular the nominalist embrace of voluntarism – played an important role in the early modern construction of subjective understandings of rights. For someone like Grotius, the notion of subjective right was always already tied to the right to ownership, which explains not only the centrality of property in most modernist constitutions but also its presence in conquest as the test to ascertain the presence of a ‘civilised’ system of law in areas proclaimed as ‘terra nullius’. The evolution of human rights discourse is not the simplistic coming-of-age story of a traditional *Bildungsroman*. South Africans who are troubled by the ‘uncritical continuance’ of the western common law (Roman Dutch) tradition would do well to remember the shared roots of this tradition with the rise of natural rights theories that eventually became positivised in various documents. They should also bear in mind, as I noted above, that the understanding of humanity implicit in this legal tradition is a perverse one of exclusion, othering and violence.

But let’s look at Douzinas’s (2013) “Seven theses on human rights”. Thesis 1 (2013: 1–16) addresses “the idea of humanity” that, according to Douzinas, cannot serve as a source of moral or legal rules because of the impossibility of a fixed meaning. He explains how the idea has been used through the ages to classify people into “the fully human, the lesser human, and the inhuman”. Thesis 2 (2013: 1–4) talks to power, morality and structural exclusion and exposes how human rights have failed to take abstract norms to situated beings, “to close the gap between the abstract man and the concrete citizen; to add flesh, blood and sex to the pale outline of the ‘human’ and extend the dignities and privileges of the powerful (the characteristics of normative humanity) to empirical humanity”. Thesis 3 (2013: 1–4) focuses on the combination of neoliberal capitalism and voluntary imperialism and unpacks the “fraudulent” promise to the developing world that the neoliberal market-driven policies will better their circumstances. Douzinas underscores the continuance of, and similarity between, present impositions of “reason and good governance” and human rights, and the missionary aims of Christianity, which was “both part of the cultural package of the West, aggressive and redemptive at the same time”. Thesis 4 (2013: 1–3) argues that universalism and communitarianism are interdependent. Both positions negate the fact that “every person is a world and comes into existence in common with others; that we are all in community”: the universal position, by relying on individualism, and communitarianism by defining community through commonality of tradition, history and others. For Douzinas, “humanity ... is the definition of groundlessness” and can therefore not serve as a normative principle. But it is perhaps Thesis 5 (2013: 1–4) that speaks most directly to the #MustFall moment, because it concerns the depoliticisation of human rights.

Something of the paradox of human rights invoked in Douzinas's earlier work is echoed in this thesis when he notes how human rights simultaneously expose some forms of exclusion, domination and exploitation and conceal the roots of these, by supporting remedies that might improve the position of a few selected individuals while ultimately failing to bring about any real structural or systemic change. Thesis 6 (2013: 1-8) elaborates on how human rights become vessels for continuous and ever growing desire. Drawing on Lacan, Douzinas explains the entry into law as a second entry, which, much like symbolic castration, denies the "perceived wholeness of family intimacy". Rights can never fulfill the promise of wholeness and can only ever offer partial recognition. However, the "imaginary domain of rights" projects precisely such a fantasy of wholeness. As Douzinas explains, even though rights have become the way in which civility is measured, they have limited success:

No right can earn me the full recognition and love of the other.  
No bill of rights can complete the struggle for a just society.  
Indeed the more rights we introduce, the greater the pressure  
is to legislate for more ... In a strange and paradoxical twist, the  
more rights we have the more insecure we feel.

Before I turn to Thesis 7, it may be useful to conclude the brief discussion of Theses 5 and 6 with a more optimistic or hopeful evaluation of human rights. Towards the end of his discussion of these two theses, Douzinas raises the possibility of a politics of resistance to be "reactivated" by human rights. For him, the (slight) interrelatedness between "early natural rights, (religious) transcendence, and political radicalism" opens the possibility for human rights to play a part in a politics of resistance. At the end of the discussion of desire in Thesis 6 he invokes the "right to resistance and revolt" together with the "real of radical desire". He regards "resistance and revolution" as the social equivalent of "taking risks and not giving up on your desire" and as "the ethical call of psychoanalysis".

Thesis 7 (2013: 1-4) concerns cosmopolitanism, equality and resistance and here Douzinas returns to the utopian ideals of Marxist thinker Ernst Bloch. For Douzinas (see also Cornell 1994), the imaginary domain is a utopian ideal, a non-place, but yet the "promise of the cosmopolitanism to come – or the idea of communism". If law is the "principle of the polis" or that which carries "ontological power", then radical desire is "the longing for what has been banned and declared impossible by the law; what confronts past catastrophes and incorporates the promise of the future". Douzinas finds hope in the "being together of singularities in resistance". The question that can be raised here is whether or not this holds any relevance for a social movement such as #MustFall.

In their recent work, Cornell and Seely (2016) call for erotic transformation, political spirituality and for a “re-politicization” or new “political imagination”. For them this requires of us to reconsider traditional fundamental political concepts in conjunction with theorists from the ‘global South’. I am interested to what extent their argument could also be used to consider a re-politicisation or re-imagining of rights. They argue, for example, that we have for too long thought about revolutions only through western frameworks, through “the philosophy of Man”. By “shifting the geographies of our political imagination”, the integral connection between spirituality and revolution can be made. They follow Foucault in his phrasing of “political spirituality”, meaning “the will to discover a different way of governing oneself through a different way of dividing up true and false” (in Cornell and Seely 2016: 10). They critically engage the various ways in which humanism has been rejected by feminist and queer theorists who often end up either accepting the status quo (because hoping for a different future would inevitably be heteronormative), or accepting ephemerality, extinction and the death drive. Relying on a concept developed previously by Cornell (1992), they argue that the “philosophy of the limit” – that means the very limit to any idea of the possible – places a responsibility on us to struggle exactly against colonialism, capitalism, racism, phallocentrism and heterosexism (2016: 13). This struggle involves nothing less than challenging the “Reign of Man”.

Cornell and Seely (2016: 160) support thinkers who have been arguing for a “new communism”. They follow Rosa Luxemburg’s insistence on participatory democracy and echo her call for a “spiritual transformation”. This also resonates with Henry’s notion of a “vertical revolution” as a transformation of our inner lives that recognises that what is at stake is not only a “discourse”, but a material episteme that shapes the way we live, not simply the way we think (2016: 161). Relying on the work of Afro-Caribbean writers, they seek to find “a new collective praxis of being human”. They call for a rejection of metanarratives that aim at providing us with “blueprints or roadmaps that tell us what ‘the’ revolution must look like based on the way that revolution has been thought” (2016: 162). They invoke Foucault’s notion of the “until now” and recall his words: “a revolutionary undertaking is not only against the present but against the rule of the ‘until now’” (2016: 162).

## Rights and lost transformation

In the South African context the turn to constitutionalism and human rights, in particular as product of a negotiated compromise, has been criticised from numerous vantage points. In his critique of the Truth and Reconciliation Commission (TRC), Mamdani (1998) made a number of pertinent observations

about the role of rights in a post-1994 context. He criticises the TRC for leaving us with a “diminished truth”, for focusing on perpetrators and not on beneficiaries and thus neglecting to acknowledge the majority of those people who suffered under apartheid. The TRC – even though it attempted not to follow a criminal justice route – stuck to that logic. Reparation, i.e. the reason and the incentive for *not* choosing that route, did not receive the urgent attention that it should have received during the process. Already in the 1990s, Mamdani warned that rights might be used to protect the rights of the haves to the detriment of the have-nots. In a more direct way, Mamdani’s observation speaks to the same concern raised by Douzinas. And similarly, by referring to the negotiation as “a mere Hobbesian pact if we do not confront the continuance of the status quo”, Mamdani could be interpreted as having left open the possibility of/for a future politics of resistance.

Terblanche, in his book *Lost in transformation* (2012: 2), explains why he was wrong when, in *A History of Inequality* (2002), he described the transformation of the mid-1990s as an “incomplete transformation”. Back then he believed that the transformation was incomplete because only the political dimension of the system had changed, from minority white rule to majority black rule, while the economic system of free-market capitalism remained unchanged. But subsequently he came to realise that, on the contrary, the transformation had indeed been complete. This confirms Mamdani’s warning of a Hobbesian pact with an added twist: whites gave up their political power in exchange for holding on to economic power in a way that included a relatively small class of the black elite. It is interesting to note that for Terblanche 1986 was the real turning point in the transformation of South Africa, almost a decade before the promulgation of the 1996 Constitution. For him, South Africa’s transition to democracy should be understood against the global changes that took place after the Second World War: Chernobyl in April 1986, the state of emergency in South Africa in 1986, the Comprehensive anti-apartheid Act passed by the USA congress in October 1986 and the summit in Reykjavik between Reagan and Gorbachev, 11-12 October 1986. Against this backdrop, Terblanche (2012: 124-127) lists a number of things that went wrong in South Africa’s transition. I mention only those that I think are pertinent to the failure of human rights in relation to #MustFall: the continuance of poverty, unemployment and inequality; the failure to replace apartheid with a moral and humane system; the fact that only a minority of black people benefited, and continue to benefit from black economic empowerment (BEE) or even broad-based black economic empowerment (BBBEE); and that the vision of a “people-centred society” was never realised, and that unequal power relations were left intact by a combination of capitalism and corporatism that monopolises power in South Africa. Terblanche relates most of these failures to the elite compromise of the negotiations that led to a reconfiguration of power that did not do much,

if anything, to address socio-economic inequality and injustice. Not only did a seemingly progressive Constitution with entrenched socio-economic rights fail to bring about, or at least set the stage for, radical change, but it could be interpreted as actually being the most problematic aspect of the compromise that marked the transition to democracy.

## 'Right' to the university

The concept of the right to the city as formulated by Marxist thinker Henri Lefebvre is central to, if not synonymous with, spatial justice. The right to the city claims an "active presence in all that takes place in urban life under capitalism" (Soja 2010: 96). In the words of Lefebvre:

The right to the city, complemented by the right to difference and the right to information, should modify, concretize and make more practical the rights of the citizen as an urban dweller (citadin) and user of multiple services. It would affirm, on the one hand, the right of users to make known their ideas on the space and time of their activities in the urban area; it would also cover the right to the use of the center, a privileged place, instead of being dispersed and stuck into ghettos. (1996: 34, Soja 2010: 99)

I want to explore the potential of the right to the city for rethinking rights in the context of #MustFall. How could this idea be used as a way to reconfigure and re-conceptualise, but also to imbue with revolutionary spirit, the call made by the various authors discussed above? In the late 1960s and 70s both Lefebvre and Foucault raised concerns about how spatial thinking in their view tended to be "straightjacketed into a tight dualism that limited its critical capacity" (Soja 2010: 101). A majority of spatial thinkers focused on a "materialist concept of space, characterised by concrete, mappable, and empirically defined geographies, or 'things in space'" (Soja 2010: 101). Writing that resulted from this focus amounted to descriptive or highly empirical accounts. Only a small minority of scholars were more interested in "'thoughts about space', how materialized space is conceptualized, imagined, or represented in various ways" (Soja 2010: 101). Lefebvre's well-known distinction between "perceived space" (the focus on materiality) and "conceived space" (the focus on ideas) relates to this dualism. He suggested a different way of combining the two approaches that also included an understanding of "lived space". According to Lefebvre, "[l]ived space like our lived time is never completely knowable ... Beneath all surface appearances, there is always something mysterious, undercover, undiscoverable [..]" (in Soja 2010: 102). Foucault, in a lecture published posthumously in 1984 and titled 'Of other spaces', described his understanding of a third or different way of looking at space as "hetero-topology" (Foucault 1986: 22). By focusing on

“heterotopias” that arise from the intersection of space, knowledge and power, Foucault opened up new ways of thinking about space (Soja 2010: 103). What could rights and rights discourse learn from spatial theory understood in this way?

David Harvey (2008: 23), one of the key theorists in the field, notes that even though human rights have become centralised in our time, this has not altered the “hegemonic liberal and neoliberal market logics or the dominant modes of legality and state action”. He states that this is of course because the rights to property and profit are regarded as more fundamental than any other rights. Harvey draws on Lefebvre’s formulation of the right to the city with reference to the 1968 uprising in Paris and elsewhere. He agrees with Lefebvre, that the revolution “has to be urban, in the broadest sense of the term, or nothing at all”. (2008: 40). For Harvey, the adoption of the right to the city as “working slogan and political ideal” could be a way of unifying multiple struggles against capital, dispossession and class exploitation. In this context, he turns to the right to the city as “another type of human right”. He formulates it as follows (and let’s bear in mind the relevance of this formulation for the Right to the university):

The question of what kind of city [university] we want cannot be divorced from that of what kind of social ties, relationship to nature, life styles, technologies and aesthetic values we desire. The right to the city [university] is far more than the individual liberty to access urban resources: it is a right to change ourselves by changing the city [university]. It is moreover, a common rather than an individual right since this transformation inevitably depends upon the exercise of a collective power to reshape the processes of urbanization [higher education]. The freedom to make and remake our cities [universities] ourselves is, I want to argue, one of the most precious yet most neglected of our human rights. (2008: 23)

## Conclusion

In this piece I revisit a number of views on rights in order to reflect on the question whether or not rights could have any significance for the many and complex issues that face us at this moment. Douzinas’s seven theses problematise rights from multiple angles, with some lingering hope for the possibility of a radical resistance in and through rights. Cornell and Seely urge us to re-imagine and re-conceptualise traditional political traditions and concepts and not to accept the views that all engagements with those traditions and concepts will uncritically affirm the hegemony and heteronormativity of the west. Drawing on Luxemburg’s embrace of participatory democracy and Foucault’s call to resist the “until now”, they revive the possibility of a spiritual revolution. Reflections on the South African change of the mid-1990s reveal doubt about the potential that

rights, as currently institutionalised, may have for bringing about radical change, but also here, possible alternatives are suggested.

What could be at stake in thinking about a 'Right' to the university against the background of the notion of the Right to the city? The potential relevance of the Right to the city, linked to the notion of 'inhabitation', is that it challenges the modern, technical and functional notion of 'habitat'. Habitat is devoid of any notion of politics, most pertinently political resistance. A contemplation of a Right to the university will have to have at its core the notion of 'inhabitation' that will resonate with Lefebvre's notion of "lived space".

Let me conclude again with a brief reference to the UP campus where I worked for twenty years. I have already stated that in my experience the law, rights and rights discourse – and I could include those situated within legal scholarship – did not come to the fore, let alone take the lead, by creating or supporting opportunities for radical transformation. At the same time the law was invoked quite extensively to curb protest, prevent change and to disallow critical questioning. Already in 2015, at the very beginning of what would become #MustFall, the university obtained an interim interdict prohibiting protest on and in the vicinity of campus for a wide range of student organisations. Early in 2016 this interdict was abandoned but the university soon obtained another in much the same terms. Since the start of the protests a number of students have been suspended from the university campus pending disciplinary action. Most of them were suspended in early 2016, yet their disciplinary hearings took place only at the end of that year or in early 2017, leaving them for an extended time in limbo. A group of 24 students were arrested in February 2016 on charges of public violence and since then an additional 30 odd students have also been arrested, charged mostly with contravention of the interdict rather than with any specific violent conduct (e.g. for holding a night vigil, a form of peaceful protest, in front of one of the university's entrances). In some cases students were even charged with trespassing, that is, for coming on to university premises while they were suspended. In January 2017 none of these cases had gone to trial: the original 24 students had their case struck from the roll after seven postponements and none of the others have as yet gone to trial. At the same time the university sent letters to all the students who had criminal charges pending against them informing them that, because charges were pending, they would not be allowed to register for 2017 unless they could persuade the university to allow them by making representations. This is not the space to expand on these micro-technologies of power. My point is that the law and rights were used very effectively to oppose calls for transformation; that rights were invoked by those on the other side of the #MustFall protests by relying on minority language rights

and seeking to retain the status quo, to protect the “dignity” of managers, and indulging white fear.

The official response to the students protests at UP was to establish three workstreams: one focusing on changing the double medium language policy of Afrikaans and English to English only; another focusing on the transformation of the curriculum and yet another to focus on the transformation of institutional culture. In 2018 the language policy even though adopted by senate and council already in 2016 had not been introduced yet. The curriculum transformation process is contested in some faculties in the most reactionary fashion imaginable. As far as the transformation of institutional culture process goes nothing concretely has happened or changed so far. Again it is not my main aim to unpack all of these processes here and I might be criticised for not sufficiently giving credit where it is due. My main reason for referring to these processes here is to relate it to my reflection on a “right to the university” and to say that in my view none of these three responses to the student protests have opened a space or spaces for real inhabitation of the university by all. In fact during 2017 a system was introduced whereby the biometrics of all students and staff were recorded and entrance to the university allowed only if one’s fingerprint is recognised.

It is perhaps important to refer here to the change of the name of one of the facilities on campus from ‘client centre’ to ‘student centre’ already alluded to above. This might appear to be a small victory, but it is significant for a number of reasons. It is a small concession to the critique of the neoliberal, corporate governance of the university. It is admittedly slight, but it is a little reminder of the fact that the university is a public good. This change came about because of collective opposition and not on the grounds of individual persuasion. At UP, management persisted in refusing to meet students’ requests to meet with them in groups, or to have a mass meeting.

I have argued elsewhere (Van Marle forthcoming) following the work of Gernot Böhme (2017: 11) on atmosphere for the importance of an “aesthetic humanist education”. Böhme, in reflecting on “aesthetic humanist education”, asks “what does life under the conditions of technical civilization mean?” thereby invoking the extent to which human communication and perception are dominated by technology. He argues that in a context of technical civilisation we find a radical separation between functionality and emotion. The human features coming to the fore under conditions of technical civilisation and aesthetic economy are objectivity, punctuality, functionality, mobility and fungibility. Under these conditions enjoyment is not important, but rather consumption; people live without passion, disembodied and “relationship-poor” (2017: 117).

Böhme (2017: 118) argues that atmospheres as “attuned space” and “quasi objective moods” could play a role in aesthetic education. Atmospheres are “the spheres of felt bodily presence”. And it should be noted that atmosphere also can create meaning; in other words atmospheres are not only something that is felt but something that can be produced by specific material conditions. Turning to education he asks if we can identify something like “atmospheric competence?” (2017: 119). The first step of an aesthetic education is to learn to perceive atmospheres. He explains that this will have three consequences: firstly, it shows us how to recognise and to learn the meaning of bodily presence. Secondly, the body will be rediscovered as a way to engage emotionally. Dispositions in this vein are experienced in a physical way, and we find these dispositions always in a spatial setting. Thirdly, we develop an “attitude of patience”. Böhme (2017: 119-120) urges that “atmospheres take time and openness, and we must allow ourselves to be involved and touched by them”.

I want to contend that to respond to the urgencies of transformation, to address enduring racism, sexism and homophobia we need different atmospheres and as a first step aesthetic education. Maybe the right to the university could go hand in hand with an aesthetic humanist education or disclose possibilities for it or vice versa.

What difference would a Right to the university make? What possible effect could it have to assert such a Right? Lefebvre formulated the right to the city as a way to challenge the functionalism but also injustice of modern bureaucracy. It was invoked as a revolutionary cry against the evil of capitalist exploitation. Linked to inhabitation and spatial justice, the right to the city is not focused on grand plans and schemes, but is concerned, rather, with the daily practices of everyday life; it is not obsessed with specific and concrete outcomes, but invokes a “sense” or “spirit” of place (see Tally 2012). It is this “sense of spirit” that a Right to the university might be able to invoke, or might at least encourage us to (re)imagine beyond the tables, grids and spreadsheets that have become the dominant intellectual sensibility. By making bodily presence recognisable; allowing emotions and developing patience, a sense of slowness, the space of the university might become less alienating. More and more students and staff suffer from mental “unwellness”, could the Right to the university challenge or at least disrupt these unhealthy patterns?

At present it is difficult to be hopeful about the future of the university. Managements have been successful in creating a learning and working environment at most South African universities that is close to unbearable. Who knows what the future holds – if a Right to the university seems like an impossible dream, it may be the only dream worth holding out for: “For if this impossible

that I'm talking about were to arrive perhaps one day, I leave you to imagine the consequences. Take your time but be quick about it because you do not know what awaits you" (Derrida 1995: 56).

## Bibliography

- ARENDT H. 1951. *The origins of totalitarianism*. New York: Harcourt Inc.
- ARENDT H. 1958. *The human condition*. Chicago: The University of Chicago Press.
- ARENDT H. 1963. *On revolution*. London: Penguin.
- BÖHME G. 2017. *Atmospheric architectures. The aesthetics of felt spaces*. London: Bloomsbury.
- BUTLER C. 2014. *Henri Lefebvre. Spatial politics, everyday life and the right to the city*. London: Routledge.
- CHRISTODOULIDIS E. 1996. *Law and reflexive Politics*. Dordrecht: Kluwer.
- CHRISTODOULIDIS E. 1998. "Law, love and the contestability of European community". In: H Petersen (ed). *Law and love in Europe*. Dartmouth: Ashgate.
- CORNELL D. 1992. *The philosophy of the limit*. New York: Routledge.
- CORNELL D. 1994. *The imaginary domain*. New York: Routledge.
- CORNELL D. AND SEELY S. 2014. *The spirit of revolution. Beyond the dead ends of man*. Cambridge: Polity Press.
- DERRIDA J. 1995. *Points ... Interviews, 1974-1994*. Stanford: Stanford University Press.
- DOUZINAS C. 2000. *The end of human rights*. Oxford: Hart Publishing.
- DOUZINAS C. 2013. Seven Theses on Human Rights. Available at: <http://criticalthinking.com> [accessed on September 13 2016].
- FOUCAULT M. 1986. Of other spaces. *Diacritics* 16(1): 22-27. <https://doi.org/10.2307/464648>
- HARVEY D. 2008. The right to the city. *New Left Review* 53: 23-40. <https://doi.org/10.1080/17415349.2008.11013714>
- HONIG B. 1991. Declarations of independence: Arendt and Derrida on the problem of founding a republic. *The American Political Science Review* 85(1): 97-113. <https://doi.org/10.2307/1962880>
- LE ROUX WB. 1994. Natural law theories. In: C Roederer and D Moelendorf (eds). *Jurisprudence*. Cape Town: Juta.
- LEFEBVRE H. 1996. *Writings on cities / Henri Lefebvre*. Kaufman E and Lebas E (eds) (transl). Oxford: Blackwell.
- MAMDANI. M. 1998. *When does reconciliation turn into a denial of justice?* Sam Nolutshungu Memorial Lecture Series, no 1. Pretoria: HSRC Publishers.
- ROSE J. 2014. *Women in dark times*. London: Bloomsbury.

- ROUX D. 2014. Mandela Writing / Writing Mandela. In: R Barnard (ed). *The Cambridge companion to Nelson Mandela*. New York: Cambridge University Press.
- SOJA E. 2010. *Seeking spatial justice*. Minneapolis: University of Minnesota Press. <https://doi.org/10.5749/minnesota/9780816666676.001.0001>
- TERREBLANCHE S. 2012. *Lost in transformation*. Sandton: KMM Review Publishing.
- TALLY R. 2012. *Spatiality*. London: Routledge.
- VAN DER WALT AJ. 1995. Tradition on trial: A critical analysis of the civil-law Tradition in South African property law. *South African Journal on Human Rights* 11(2): 169–206. <https://doi.org/10.1080/02587203.1995.11827559>
- VAN MARLE K. Forthcoming. Life is not simply fact: aesthetics, atmosphere and the neoliberal university. *Law and Critique*.