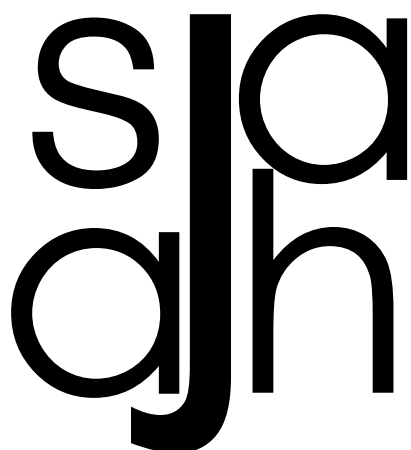




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Editorial: The visual arts and the law

Readers of this thematic issue of the *South African Journal of Art History* may wonder why the editors decided to address the issue of the visual arts/law interface. Our answer is set out below.

The constitution of a free country, its primary legislation, protects freedom of expression, which pertinently includes freedom of artistic creativity. Without this protection, artists of all types and in all media would be limited in their output to what is approved by the government of the day. In addition, the law protects the art that has been created, most directly in the form of copyright. Countless further examples can be given – for example, the law protects our cultural heritage by requiring its preservation, it affords legal protection against defamation and infringement actions by providing the defence of parody. Other examples of the interface will be found throughout this issue.

But the protection is not one-sided – art has been effective when laws have failed or been absent. During the apartheid years in South Africa, cartoons and visual images spoke against injustices that the law did not prevent. Even today, an arresting visual image is infinitely more effective than a written statement, and art can challenge where prohibitions are ignored.

The editors welcome further scientific papers on the theme of the visual arts and the law.

The editors

Roshana Kelbrick

Ingrid Stevens

Estelle A. Maré

How far can artistic speech go with the use of famous trademarks & designs?

K.E.A. de Beer

Master student Information Law at the University of Amsterdam
Email: kea.debeer@gmail.com

On the 4th of May 2011 the District Court of The Hague (the Netherlands) reached a decision on the dispute between Louis Vuitton and artist Nadja Plesner. Louis Vuitton claimed Plesner had infringed the design right of Louis Vuitton with her work “Simple Living”. The work shows an African child holding a chihuahua dressed in pink and a handbag which resembles a Louis Vuitton handbag. Plesner’s work can be seen as a criticism at the media interest in celebrities like Paris Hilton and the lack of interest for the conflict in Darfur. The case shows the difficulties of the use of trademarks or designs of well-known companies as Louis Vuitton by artists as Nadja Plesner. Both Louis Vuitton as Nadja Plesner based their claims on fundamental rights, respectively the right to the protection of property and the right to freedom of (artistic) expression. This article is about the question on how to draw a fair balance between these rights. What are the most important aspects a court has to look at when deciding on which right should prevail in a certain case?

Key words: Freedom of expression, artistic speech, trademark rights, design rights

Hoe ver mogen kunstenaars gaan met het gebruik van bekende merken en modellen?

Op 4 mei 2011 sprak de Rechtbank in Den Haag (Nederland) vonnis uit in de zaak tussen Louis Vuitton en kunstenaar Nadja Plesner. Louis Vuitton stelde dat Plesner inbreuk had gemaakt op het modelrecht van Vuitton met haar werk “Simple Living”. Op het schilderij staat een Afrikaans kind afgebeeld met in de armen een chihuahua gekleed in het roze en een tas die lijkt op een Louis Vuitton handtas. Plesner haar werk kan worden gezien als kritiek op de media-aandacht die wordt besteed aan beroemdheden als Paris Hilton en het gebrek aan aandacht voor het conflict in Darfur. De rechtszaak laat de moeilijkheden zien bij het gebruik van merkenrechten en modelrechten van bekende bedrijven als Louis Vuitton door kunstenaars als Nadja Plesner. Beide partijen baseren hun claims op fundamentele rechten, respectievelijk het recht op de bescherming van eigendom en het recht op de vrijheid van (artistieke) meningsuiting. Dit artikel gaat over de vraag hoe een belangenafweging tussen deze twee rechten dient te worden gemaakt. Wat zijn de belangrijkste aspecten waar een rechter naar moet kijken bij zijn beoordeling welk recht prevaleert.

Sleutelwoorden: Vrijheid van meningsuiting, artistieke uitingen, merkenrecht, modellenrecht

On the 4th of May 2011 the District Court of The Hague (the Netherlands) delivered its judgment in the dispute between Louis Vuitton and artist Nadja Plesner. In 2008 Nadja Plesner made a painting called “Simple Living”. The work shows an African child holding a chihuahua dressed in pink and a handbag which resembles a Louis Vuitton handbag. Plesner sold t-shirts and posters containing the picture of “Simple Living”. The work was later integrated in a painting by Plesner called “Dafurnica” which is loosely based on Picasso’s “Guernica”. “Dafurnica” was offered for sale at an exhibition in Copenhagen. On the invitation to the exhibition the “Simple Living” picture was used. There was also a cardboard print of the picture in front of the building where the exhibition was held. With “Simple Living” the artist refers to celebrity Paris Hilton who is often seen in public carrying the same kind of items as the African child. One of the important themes in Plesner’s work is the difference in the amount of media attention to on the hand areas in crisis as in Darfur (Sudan) and on the other hand the entertainment industry. Her work can be seen as a criticism of the media interest in celebrities like Paris Hilton and the lack of interest for wrongdoings in Darfur.¹

Louis Vuitton did not appreciate Plesner’s use of the handbag in her work. According to Vuitton, it resembled one handbag in particular called “Audra”. The design used for “Audra” is protected by a (European) Community Design Right. Therefore Vuitton requested an order

against Plesner and the gallery to stop further infringement of Louis Vuitton's design right. In preliminary relief proceedings the Court ordered Plesner and the gallery owner to cease and desist any infringement of the design rights of Louis Vuitton.² The District Court of The Hague had to review whether the preliminary injunction had to be annulled or not. The Court firstly points out that both parties base their claim on a fundamental right. Plesner claims her right to freedom of expression has been infringed. On the other hand, Louis Vuitton claims an infringement of the right to the protection of property, such as intellectual property rights. The Dutch Court had to decide which of these rights should prevail in these particular circumstances. The Court eventually concludes that in these particular circumstances, "the interest of Plesner to (continue to) be able to express her (artistic) opinion through the work "Simple Living" should outweigh the interest of Louis Vuitton in the peaceful enjoyment of its possession".³

Artistic speech vs. trademark & design rights

The *Dafurnica* case shows the difficulties of the use of a trademark or design of a well-known company as Louis Vuitton by an artist as Nadja Plesner. Nowadays, it is not uncommon that certain (well-known) designs and trademarks function as symbols for being part of a certain social group. In the "Simple Living" picture the Louis Vuitton handbag referred to Paris Hilton who symbolises the celebrity which receives a lot of (undeserved) media attention. Designs and trademarks are also associated with the good or bad political and social influence of companies. The symbolism in well-known designs and trademarks makes them very suitable for use in works of art. However, the use of designs and trademarks in art can clash with the interests of the rightholder of the trademark or design right. Depending on the way a trademark or design is used in the work of art, it can damage the reputation of the trademark or design and subsequently (the interest of) the rightholder (Sakulin 2011: 3).

The artist and the rightholder can both claim an infringement of a right which can be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR). The artist can base his claim on the right to freedom of expression as protected by Article 10 of the ECHR. On the other hand, the rightholder can claim protection based on the right to the protection of property, such as intellectual property rights, as guaranteed by Article 1 of the first Protocol of the ECHR.

This article is about the question of how to draw a fair balance between these rights. What are the most important aspects a court has to examine when deciding which right should prevail in a certain case? Does the European Court of Human Rights (ECtHRs) provide guidelines to answer this question in its case-law with regard to artistic speech? In answering these questions this article has been structured as follows. Firstly, I will explain some general principles the ECtHRs has established with regard to freedom of speech. Secondly, I will narrow the focus to artistic speech. Then I will look into some specific aspects which I think are relevant for answering the question which right should prevail. The article will close with a few conclusions.

Freedom of speech

Freedom of speech is a human right which can be found in the constitutions of most of the countries in the world. In Europe, freedom of speech is also guaranteed by Article 10 of the ECHR. The ECHR was drafted by the Council of Europe and all its members are a party to the Convention. The European Union (EU) drafted the EU Charter on Fundamental Rights. Article 11 of the Charter deals with freedom of expression and information. However, in practice the EU respects and follows the jurisprudence of the European Court of Human Rights on freedom of expression.

Freedom of speech protects several categories of information. While in principle, all categories of freedom of speech are protected, the ECtHRs does make a distinction between different kinds of speech with regard to the level of protection. The main categories acknowledged by the ECtHRs are political speech, artistic speech and commercial speech.⁴ The Court grants political speech the highest level of protection in comparison to other forms of speech (Castendijk 2008: 51-59). According to the ECtHRs “there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest”.⁵ The emphasis on matters of public interest lies in the importance of the right of the public to receive information. Article 10 not only protects the right to express information but also to receive it. In these matters, the policy freedom for member states is small. When the information disseminated does not contribute to public debate, the protection of the expression will be lower. An example of a case in which the Court concluded there was no contribution to the public debate is the *Caroline von Hannover* case. Gossip magazines had printed private photos of princess Caroline von Hannover. The Court considers that “the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution, since the applicant exercises no official function and the photos and articles related exclusively to details of her private life”.⁶

With regard to commercial speech the Court seems to assume that in principle there is no contribution to the public debate. The Court in general grants (pure) commercial speech the lowest form of protection. The European Commission of Human Rights⁷ explained that “the level of protection must be less than that accorded to the expression of “political” ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention are chiefly concerned”.⁸ This explains that the focus of the ECtHRs and the Convention is more concerned with political speech and matters of the public interest than commercial speech. Thus especially when expressions fall within the category of commercial expression, the protection will be lower.

The case-law of the Court shows it is not always easy to place an expression in one of the three categories. The Court has dealt with cases in which expressions could be qualified as a so-called hybrid form of speech. Examples of these are advertisements containing elements of political speech and political speech presented in a work of art. A popular example of a hybrid form of speech is found in the *Barthold* case. The case concerned Dr. Barthold, a veterinarian who had violated the advertising ban applied to the liberal profession. In an interview for a newspaper he had mentioned the opening times of his clinic for the weekends and at night. The Court was of the opinion that in doing this Barthold was trying to draw attention to a matter of public interest namely the absence of a night service by veterinarians in Hamburg. The Court stated that a strict prohibition of advertising in the liberal professions discourages members of liberal professions to participate in the public debate. Thus the Court concluded that there was a violation of Article 10.⁹

Obviously, the right to freedom of speech is not absolute. It can be limited in accordance with Article 10 (2) of the ECHR, to protect other interests or rights such as national security, the prevention of disorder or crime and the protection of the reputation or rights of others. Rights of others include human rights, such as the freedom of religion or privacy, but also intellectual property rights such as design rights and trademark rights. According to Article 10 (2) a limitation has to be prescribed by law, the limitation has to be based on one of the interests mentioned in Article 10 (2) and it has to be necessary in a democratic society. In practice, this last element is the most important part of the Article 10 (2). The Court has interpreted “necessary” as the

existence of a “pressing social need” to limit freedom of speech.¹⁰ Furthermore, the measure has to be proportionate to its purpose. When assessing whether the interference is necessary in a democratic society, the doctrine of the margin of appreciation plays an important role. The margin of appreciation concerns the amount of policy freedom national authorities have when examining the restriction in question. In cases where the Court allows the national authorities a wide margin of appreciation, the close examination of the restriction will be left to the domestic courts. If the Court does not allow much policy freedom, it will look at the facts more closely and apply a European norm (Castendijk 2008: 43-44). The amount of policy freedom depends on whether a European norm applies to the restriction in question. For example, with regard to religion and morals it is not possible to find a uniform European norm in the legal and social orders of the member states. The national authorities are in a better position than the Court to judge whether a restriction is necessary in a democratic society.¹¹

Artistic speech

While it is safe to say that political speech is granted the highest level of protection and pure commercial speech the lowest form, it is difficult to say what level of protection artistic speech can expect of the ECtHRs.

In the *Müller* case the ECtHRs explicitly placed artistic expression within the scope of Article 10 ECHR. The case was about the artist Müller who made a painting for an exhibition. The painting contained abstract figures in different sexual poses. Müller was convicted and fined and the painting was confiscated. According to the Swiss Courts Müller had violated the Criminal Code, which prohibited obscene publications. The ECtHRs first states that Article 10 ECHR “includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds”. The ECtHRs continues by stating that artists contribute to this public exchange of information and ideas. Furthermore, the Court is of the opinion that “those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression”.¹²

However, artists like everyone who expresses his/her opinion, are not immune from the possibility of limitations, whoever exercises his freedom of expression must act in accordance with certain duties and responsibilities. The scope of the duties and responsibilities depends on the circumstances of the case.¹³

When analysing the case-law of the ECtHRs with regard to artistic speech it is not easy to find consistent patterns in when exactly it establishes a violation of Article 10.¹⁴ Two conclusions can be drawn from the case-law of the ECtHRs. First of all, the description of the possibilities of artistic speech in the *Müller* case meaning the “public exchange of cultural, political and social information and ideas of all kinds” seems to be broader than the category “political speech and the debate on questions of public interest”. However, this does not mean that artistic speech cannot fall within the category of political speech. In that case, artistic speech is granted the higher level of protection which is granted to political speech. As art often entails a criticism of (aspects of) society, it is therefore likely that it will be on matters of public interest. With regard to satire the Court has explicitly stated that it is “a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist’s right to such expression must be examined

with particular care”.¹⁵ A significant part of artistic speech will contribute to the public debate and therefore receive a higher form of protection. This leaves this question open of what kind of protection artistic speech can count when it does not belong within the category of political speech? At first sight, the protection seems less than political speech but higher than commercial speech. Commercial speech deserves less protection than political speech since it does not serve the values with which the ECHR is mainly concerned. In my opinion the same cannot be said of artistic speech. The ECtHRs links artistic expression to two of the justification grounds for the right to freedom of expression in Article 10: the self-fulfillment of individuals¹⁶ and the role art plays in the public debate (Sakulin 2010: 138). Furthermore, the Court explicitly acknowledges the importance of artistic expression in the *Müller* case. It also does that by reference to the last sentence of article 10 of the ECHR: “which refers to “broadcasting, television or cinema enterprises”, media whose activities extend to the field of art”.¹⁷ This also seems to indicate that artistic speech does serve the values with which the ECHR is mainly concerned.

A second conclusion that can be drawn from the case-law of the Court is the relevance of the used justification-ground for the limitation. The relevance of the justification-ground has everything to do with the margin of appreciation for member states. As I said before, especially with regard to issues of religion and morals, the margin of appreciation will be wider. With regard to issues like these there is no European consensus therefore member states themselves will be in a better position to judge whether a limitation of freedom of expression is *necessary in a democratic society*. Therefore, it matters which justification-ground is used for the limitation.¹⁸ When freedom of expression is being restricted because of issues of religion or morals, practice shows it is more “difficult” for the Court to establish a violation of Article 10.

Relevant aspects with regard to artistic speech vs. trademarks & designs

In my opinion five aspects in particular are important to answer the question if the right to artistic freedom or the right to the protection of property should prevail. The five aspects are: the contribution to the public debate, the justification of the intellectual property right, the fame of the trademark or the design, the function of the use of the trademark or the design and the damage to the reputation of the rightholder. I will refer to the *Dafurnica* case in which these five aspects were all dealt with to at least some extent.

Contribution to the public debate

The first question that should be answered is whether the work of art entails a contribution to the public debate and falls within the category of political speech. In the *Karatas* case the Court had to decide whether the conviction of an author of a collection of poems was a violation of Article 10. The poems expressed deep-rooted discontent with the lot of the population of Kurdish origin in Turkey and criticised the Turkish government. The Court pointed out that the poems had a political dimension and emphasised that there is little room for restriction when it comes to political speech.¹⁹ Therefore if a work containing a trademark or design entails a contribution to the public debate the work will enjoy a higher form of protection. As I said before, in my opinion a significant amount of art does contribute to the public debate. Since (well-known) trademarks and designs function as symbols for social groups, ways of life, companies etc. it is not uncommon that when a trademark or design is used in art it entails a matter of public interest. This was the case in the *Dafurnica* judgment, the Court emphasised the theme in Plesner’s work meaning the difference in media attention between areas in crisis as Darfur and the entertainment industry. Plesner wants to show that the enormous media interest in celebrities like Paris Hilton

negatively affects the interest for topics which deserve a lot of attention as the situation in Darfur.²⁰ With her work she is criticising the media and maybe even society as a whole. In doing so, she is contributing to the public debate and thus her work deserves a higher form of protection. In principle, the right to freedom of speech and the right to the protection of property are on an equal base. However, when a work containing a trademark or a design contributes to the public debate it will become more difficult for the right to the protection of property to prevail. Of course, particular circumstances of a case can still lead to the conclusion that there is no violation of Article 10 ECHR because the limitation based on the right of the protection of property was justified.

The justification of the intellectual property right

In the *Dafurnica* case the Dutch Court briefly mentions the motivation of Louis Vuitton to take action against Plesner. It concludes that the main motivation for starting a legal procedure was the (potential) damage to Louis Vuitton's reputation. However, the Court points out that Louis Vuitton based its claim on its design right. A design right primarily aims to establish a sole right for the rightholder to use the appearance of a product registered. The Court does not answer the question whether the reputation of the rightholder may play a role with regard to the function of the design right. It does come to the conclusion that under preliminary judgment this function is to be deemed less essential.

Just as the ECHR refers to the justification grounds for freedom of (artistic) expression it is also necessary to look into the justification grounds for the intellectual property rights. I agree with the Dutch Court that the problem with the design right is that the protection of reputation is not necessarily a justification for a design right. By using the design right to protect the reputation, something it was not originally intended for, it did not make the case of Louis Vuitton stronger. This might be a little different with regard to trademark rights. The justification for trademark rights lies in the different functions of the trademark. First of all, there is the identification function of the trademark. On the one hand, it is necessary for producers or providers of goods and services to be able to distinguish between their products and those of their competitors. On the other hand, it helps consumers to establish the origin of products and make a well-informed decision on what goods and services to purchase (Sakulin 2011: 3). Secondly, there is the advertisement function of a trademark which justifies the protection of the reputation of a trademark. For instance, the European Regulation on the Community Trademark explicitly protects well-known trademarks against damage to their reputation. The line of reasoning of the Dutch Court with regard to the justification of design rights can probably not be applied to trademark rights. However, in any balance between fundamental rights it is necessary to look into the justification grounds for the rights.

The fame of the trademark or the design

One of the important aspects in balancing the rights of the artist and those of the rightholder is to what extent the trademark or design is well-known. It matters whether the trademark or design used belongs to McDonalds, Mercedes, Chanel or to a small local company. With regard to politicians and well-known companies the ECtHRs is of the opinion that the boundaries of acceptable criticism go further than with private individuals. With regard to politicians, the Court has emphasised that a politician "inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance".²¹ The same line of reasoning was applied to well-known companies in the *Steel and Morris* case (also known as the *McLibel* case). The case was about

two people who were involved in a small group which campaigned on environmental and social issues. McDonalds sued Steel and Morris for distributing pamphlets containing criticism of McDonalds. The Court pointed out that the limits of acceptable criticism should be wider in the case of well-known companies as McDonalds.²² This line of reasoning should in my opinion also be applied to famous trademarks and designs. The criterion of “inevitably and knowingly laying themselves open to close scrutiny of their acts” also applies to famous trademarks and designs. As the Dutch Court in the *Dafurnica* case points out, not only does Louis Vuitton sell products which enjoy a considerable reputation, Louis Vuitton stimulates this image by using famous people for its advertisements. The Court is therefore of the opinion that Louis Vuitton must accept critical use as the present one to a greater extent than other rightholders.²³ In practice, I think it will rarely be the case that an unknown trademark or design is used in art. When trademarks or designs are used in art they will usually function as a symbol, which implies that they are well-known to at least some extent. However, I believe the principle is important and the Dutch Court was right in emphasising that Louis Vuitton should accept use of its design rights to a greater extent than less well-known designs.

The function of the use of the trademark or the design

Trademarks and designs can be used in art in different ways. In assessing whether this is a violation of the intellectual property rights it is necessary to assess whether the use is functional. If the use of the trademark or design has no particular function in the work of art and is just integrated in the work of art as a free ride with the reputation of the well-known company, the artistic expression shows elements of commercial speech. Therefore, when the use is not functional the work runs the risk of falling within the category of commercial speech and thus being granted a lower form of protection. Not only does the use have to be functional, in my opinion it also has to be proportional. The way the trademark or the design is used should be proportional to the function of the use. In other words, the trademark or design should not appear in a way which does not justify the purpose of the use. In the *Dafurnica* case the Dutch Court regarded the use of the image of the handbag as functional and proportional. It goes even further by stating that it therefore does not serve a mere commercial purpose. The Dutch Court emphasised correctly that Plesner did not use this particular handbag as a free ride with Louis Vuitton’s reputation in a commercial sense. The particular handbag was used to refer to Paris Hilton who represents a celebrity to whom the media pay a lot of attention. The handbag was used to make her point about the unfair (and perhaps disturbed) division in media attention. The fact that another luxury item, being the chihuahua, was also presented in the picture strengthens this line of reasoning.²⁴ The attention to the Louis Vuitton handbag was not excessive; it was about making the reference to Paris Hilton and thus making a statement about media behaviour. The use of the design was therefore functional and proportional.

The damage to (the reputation of) the rightholder

In the *Dafurnica* case it was very questionable whether the use of the design caused damage to the reputation of Louis Vuitton. Plesner did not in any way suggest that Louis Vuitton was involved with the conflict in Darfur in any kind of way. Furthermore, the Dutch Court was of the opinion that it did not seem very plausible that the public would believe this was the case.²⁵ The fact that Plesner did not use the handbag as a criticism at Louis Vuitton and did in that sense not damage the reputation of Vuitton was an argument to let her right to artistic freedom prevail. When trademarks and designs are used in art, it is possible that it will cause damage to the rightholder of the trademark or design right. The art work can contain a direct criticism at the rightholder which could damage his reputation. There can also be indirect damage by using the

design or trademark as a symbol without directly criticising the rightholder. If for instance the picture of “Simple Living” had been slightly different and parts of the public would start to think that Louis Vuitton actually had a connection with the situation in Darfur, Louis Vuitton could have argued that the work damaged its reputation. However, the occurrence of damage itself is not enough to limit the artistic freedom but it is a factor that should be part of the assessment of which right should prevail.

Conclusion

The ECtHR leaves no doubt whether artistic expression should fall within Article 10 ECHR. As every form of speech, artistic speech can be limited. One of the legitimate aims which can limit the right to freedom of speech is the protection of the rights of others. Intellectual property rights such as trademark rights and design rights are examples of rights of others.

Several aspects are important in assessing whether a trademark or design right can limit artistic speech. In their assessment courts should look at the particular circumstances and take the aforementioned five aspects into account. While none of the aspects are decisive on their own some are more important than others. In my opinion, the first and probably the most important question is whether the work contributes to the public debate. If the work of art falls within the category of political speech it receives the highest level of protection. In that case, courts can still establish a lawful limitation of the artistic expression but this will become more difficult. The same line of reasoning applies to the aspect of the fame of the trademark or the design. If the trademark or design used in the work of art is well-known, rightholders should withstand use of their intellectual property to a greater extent than unknown trademarks or designs. The third important aspect is the functionality and the proportionality of the use of the trademark or the design. Artistic speech can justify the infringement of an intellectual property right but it has to be functional and proportional. The aspects of the justification for the trademark and design right and the damage to the rightholder are of less importance in my opinion but they should at least be taken into account in the assessment.

In analysing the aspects in the *Dafurnica* case one can conclude that the Dutch Court had to deal with an ‘easy’ example. All aspects were in favour of the artist, this will not always be the case. It becomes especially interesting if a work of art does not contribute to the public debate, the other aspects will have to decide whether there is a violation of the right to freedom of expression. Assuming we have not seen the last example of an artist using a trademark or design in his or her work it will be interesting to observe how the case-law with regard to artistic freedom and trademark rights and design rights will develop.

Notes

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| <p>1 District Court of the Hague 4 May 2011, case-number 389526 / KG ZA 11-294, p. 2.5 - 2.7. An English translation of this court case can be found at: http://www.nadiaplesner.com/Website/Verdict_English.pdf.</p> <p>2 District Court of the Hague 4 May 2011, case-number 389526 / KG ZA 11-294, p. 2.12.</p> <p>3 District Court of the Hague 4 May 2011, case-number 389526 / KG ZA 11-294, p. 4.6.</p> | <p>4 EHRM 24 February 1995, nr. 15450/89 (<i>Casado Coca/Spain</i>), p. 35.</p> <p>5 ECHR 25 November 1996, nr. 17419/90 (<i>Wingrove/United Kingdom</i>), p. 58.</p> <p>6 ECHR 24 June 2004, nr. 59320/00 (<i>Caroline von Hannover/Germany</i>), p. 76.</p> <p>7 The European Commission of Human Rights was a special ‘tribunal’ which examined court cases before they were sent through to the</p> |
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- European Court of Human Rights. Currently individuals can file a complaint directly with the European Court of Human Rights.
- 8 European Commission of Human Rights 5 May 1979, nr. 7805/77 (*X. & Church of Scientology/Zweden*), p. 5.
 - 9 ECHR 25 March 1985, nr. 8734/79 (*Barthold/Germany*), p. 54-58.
 - 10 ECHR 26 April 1979, nr. 6538/74 (*Sunday Times/United Kingdom*), p. 59.
 - 11 ECHR 29 October 1992, nr. 14234/88; 14235/88 (*Open Door/Ireland*), p. 68.
 - 12 ECHR 24 May 1998, nr. 10737/84 (*Müller and others/Switzerland*), p. 27 and 33.
 - 13 ECHR 25 April 2004, nr. 68354/01 (*Vereinigung Bildener Künstler/Austria*), p. 26.
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 - 15 ECHR 25 April 2004, nr. 68354/01 (*Vereinigung Bildener Künstler/Austria*), p. 33.
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 - 22 ECHR 15 May 2005, nr. 68416/01 (*Steel and Morris vs. the UK*), p. 94.
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Kim de Beer obtained her degree in Law from the University of Amsterdam (UvA) in 2008. She wrote her thesis on the regulation of players' agents by the FIFA. She is currently following the UvA's Master's Course on Information Law. Her main interests are copyright, freedom of speech, art & law and sport & law. She has completed a research internship at the Institute for Information Law (IViR). In 2010 she also was a research assistant at IViR for six months, mainly focusing on copyright law. Currently she is finishing her thesis on the compliance of ambush marketing legislation with freedom of speech principles. In addition to finishing her thesis, she works at the Dutch Performing Arts Fund as a legal advisor.

The Protection of Traditional Knowledge: challenges and possibilities arising from the protection of biodiversity in South Africa

Joelle Dountio

LLD Student University of Pretoria
Email: joelle56310@gmail.com

Indigenous communities are richly endowed with some unique knowledge. This knowledge was for much of history held only by these indigenous communities, and was unwritten because it is transmitted orally from one generation to the next, forming part of their ancestral heritage. This knowledge may be in the field of medicine, agriculture, music, dance, folklore, poetry, ecology, biodiversity, artistic, spiritual, and cultural expressions. This is what is referred to as Traditional Knowledge (TK). TK relating to biological resources today is greatly threatened as it is exploited and registered without the knowledge of their holders for Intellectual Property (IP) protection by researchers from developed countries through bio-piracy.¹ Even though the World Trade Organisation (WTO) Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement) requires individual member states to choose whether to protect their plant varieties through *sui generis* laws or through IP laws, developing countries in general, and South Africa in particular face, several challenges in seeking to protect their TK.

TK has been defined as;

‘tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and, all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields’.²

Key Words: Traditional Knowledge, bio-piracy, indigenous communities

La protection des Connaissances Traditionnelles : Défis et possibilités découlant de la protection de la biodiversité en Afrique du Sud

Les communautés indigènes sont dotées de connaissances qui leur sont uniques. Ces connaissances sont, pour la plupart, non-écrites connues seulement par les membres des ces communautés, transmises oralement de générations en générations et faisant partie du patrimoine hérité de leurs ancêtres. Ces connaissances peuvent être du domaine de la médecine, de l’agriculture, de la musique, du folklore, de la poésie, de l’écologie, de la biodiversité, des expressions artistiques, spirituelles et culturelles. C’est cet ensemble de connaissances que l’on appelle « Connaissances Traditionnelles ». Les Connaissances Traditionnelles portant sur les ressources biologiques sont, de nos jours, en danger dans la mesure où elles sont exploitées et enregistrées, à l’insu de leur détenteurs, pour des raisons de protection de la propriété intellectuelle à travers la bio-piraterie par les chercheurs venant des pays développés. Bien que l’Organisation Mondiale du Commerce (OMC), à travers son Accord sur les Aspects des Droits de Propriété Intellectuelle (Accord ADPIC), demande à chaque Etat Membre de choisir de protéger ses variétés végétales par des lois *Sui Generis* ou à travers les lois portant sur la Propriété Intellectuelle, les pays en développement en général, et l’Afrique du Sud en particulier, font face à de nombreuses difficultés lorsqu’ils cherchent à protéger leurs Connaissances Traditionnelles.

Mots Clés: Bio-piraterie, Communautés Indigènes, Connaissances Traditionnelles

TK has also been defined as knowledge held and used by people who identify themselves as indigenes of a place based on cultural distinctiveness, prior territorial occupancy, distinct, and dominant culture.³ TK is held by a distinct group of people inherently, constituting part of their culture, while it is mainly acquired by others,⁴ say, by enquiring into that culture. The word *traditional* in this appellation merely refers to knowledge systems which have been transmitted from one generation to the next. Hence, TK is *traditional* only to the extent that its creation and use are part of the cultural traditions of a community, and not necessarily that the knowledge is ancient or static;⁵ as TK evolves in response to changing environment.⁶

In the context of biodiversity, TK refers to knowledge possessed by indigenous communities of their environment. Such knowledge is derived from living close to nature, its richness and the complexity of its ecosystems for centuries; developing an understanding of properties of plants and animals; of functions of the ecosystem; and of techniques for using and managing them.⁷ South Africa is one of the 17 countries of the world that is classified as mega-diverse. The country alone has more than 20,000 species of plants, (about 10% of all the known species of plants on earth), making it particularly rich in plant biodiversity.⁸ The country is the third most bio-diverse country in the world, after Brazil and Indonesia, and has greater biodiversity than any other country of equal or smaller size.⁹ Most South Africans rely on TK as a source of medication, or at least for primary health care,¹⁰ this because it is affordable, and forms part of their culture. In fact, given its position in the biodiversity world, South Africa seems to be one of the African countries that is most affected by bio-piracy. Common cases of bio-piracy in the country include; the Hoodia Cactus Plant, the Pelargonium plant, Rooibos and Honey Bush plants.¹¹ Other more recent cases include; Skin Whitener, Tube worm extracts, Sponge extracts and Sea pen extracts.¹²

The main causes of bio-piracy are; the desire by pharmaceutical companies to exploit TK as an alternative source of medicine without having to compensate their holders, and non-regulation of, or poor regulation of biodiversity conservation in these countries.

Challenges arising from the protection of plant biodiversity in South Africa

Regulating the protection of TK is a contentious issue. This is because it requires the efforts of both developed countries (in need of TK in their biotechnological industries), and developing countries (holders of this knowledge). The topic has been debated upon at the international level by these two blocs with no unanimous outcome. Developing countries call for the harmonisation of the Convention on Biodiversity (CBD), the Nagoya Protocol and the TRIPS Agreement, so as to compel persons applying for IP protection over plant varieties to disclose information relating to; the source of origin of the plant varieties,¹³ proof that the indigenous community from which the TK originates consents to its exploitation,¹⁴ and that an access and benefit sharing agreement (ABS) has been reached with the indigenous community, as required by the CBD and the Nagoya Protocol.¹⁵ This position is rejected by developed countries. The only logical explanation for this opposition by the latter may be that they encourage, and want to continue with bio-piracy. The WTO's silence on this issue (bio-piracy), presupposes that it finds nothing wrong with bio-piracy. The Agreement merely allows individual countries the laxity to decide on how to protect plant varieties, making no allusion the CBD. Hence, developing countries, individually, are confronted with a problem that requires international cooperation to resolve.

It is not as though developing countries are not capable of seeking solutions to their problems, the drawback lies in the fact that TK protection is an issue that concerns every country. Consequently, there is need to establish a bottom line on how these two blocs will make use of TK and *equitably* benefit therefrom, failure which the weak will lose to the strong as is the case today. We shall now proceed to discuss some of the challenges that arise from the protection of TK with particular attention to South Africa.

Lack of education in the field of TK

Creating awareness on the value of TK, and its misappropriation by foreign researchers is a great

step towards seeking a solution to the problem. One of the challenges faced by South Africa in seeking to protect its TK is that the country still lags behind in terms of educating its citizens on taxonomy and TK;¹⁶⁻¹⁷ hence, there is lack of knowledge in this field.¹⁸ Taxonomy refers to the science of naming, describing and classifying organisms, including all plants, animals and microorganisms of the world,¹⁹ and it provides basic understanding about the components of biodiversity, which is necessary for effective decision-making about conservation and sustainable use.²⁰

The New Partnership for Africa's Development (NEPAD), of which South Africa is a member has emphasised on securing Africa's indigenous knowledge through amongst others, developing and promoting an African body of methodology and guidelines for integrating indigenous knowledge systems into formal education and training.²¹ None of these measures seem to have been adopted by South Africa so far. Due to changing natural environments and fast-paced socio-economic conditions like urbanization, indigenous knowledge system is at risk of becoming extinct. However, at the request of the Department of Science and Technology and the South African Qualifications Authority, measures are being taken to introduce an accredited degree in Indigenous Knowledge Systems.²² Time alone will tell how far this will be achieved.

Co-ordination of TK experts in South Africa

South African experts in various fields related to TK seem to be improperly co-ordinated; this is evident from the fact that no active measures seem to have been taken so far to document TK.²³ While Nigeria has taken practical measures to document her TK, India has come up with a Traditional Knowledge Digital Library (TKDL), though both countries have limited financial resources when compared to South Africa.²⁴ This is thanks to good co-ordination of their TK experts. Changing natural environments and urbanisation have resulted in indigenous knowledge systems fast becoming extinct, as the intrusion of technology aggravates the disappearance of indigenous knowledge.²⁵ Hence, proper co-ordination of experts in the field of TK protection is necessary for the protection TK. Such proper co-ordination will create a conducive atmosphere for the documentation of TK. South Africa will be able to easily prove prior art in seeking to protect TK in cases of misappropriation through bio-piracy once TK is documented.

Non documentation of TK

The fact that TK is not documented prevents its holders from seeking its protection. In order to apply for a patent right, an inventor should be able to properly describe the invention. The TRIPS Agreement provides that WTO Members States shall oblige patent applicants to disclose their invention in a manner sufficiently clear and complete such that it can be carried out by a person skilled in the art.²⁶ Furthermore, the applicant may be required to indicate the best mode for carrying out the invention at the filing date or, where priority is claimed, at the priority date of the application.²⁷

It could be inferred from this provision that documentation is important, though not necessarily mandatory; this has a negative impact on TK holders. Firstly, because a great deal of TK is not documented, and because when a traditional healer prescribes a mixture of herbs as cure for a sickness, he may not be able to isolate and describe the chemical compounds and their effects on the body in terms of modern biochemistry.²⁸ Nevertheless, the healer is able to provide an efficient treatment based on generations of clinical trials, and on a solid empirical understanding of the interaction between the mixture and human physiology.²⁹ These

are fundamental characteristics of TK; this explains why a *sui generis* law seems so far the only appropriate mode of protection for TK. Such a *sui generis* law will have to take into account all these features of TK, and be able to, in spite of them, provide a means of protecting this unique form of intellectual creation.

Unwillingness of some developed countries to participate in seeking a solution

Most developed countries are unwilling to participate in the fight against bio-piracy. The US, for example, has not ratified the CBD, the Nagoya Protocol, and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)³⁰ which today stand as the only international agreements which recognise the contributions of TK holders in plant varieties, provide for the protection of TK and compensation for its exploitation based on prior informed consent.³¹ These agreements require each State Party to take active measures to secure the protection of TK.

US patent laws do not encourage the preservation of TK relating to the general biological resources of indigenous communities as it provides that objections to patent applications based on prior art shall be accompanied by documentary proof,³² a provision which frustrates TK holders willing to enforce protection of their TK as the TK is not documented in writing.

The US patent laws define prior art to mean;

‘...everything which has been made available to the public anywhere in the world by means of written disclosure [emphasis added] (including drawings and other illustrations) and which is capable of being of assistance in determining that the claimed invention is or is not new and that it does or does not involve an inventive step...’³³

It is clear from this provision that documentary proof is a *conditio sine qua non* for challenging the application of, or grant of a patent right based on prior art in the US. This is disadvantageous to holders of TK relating to biological resource because a great part of their knowledge is undocumented, consequently, it may be difficult and even impossible for indigenous communities to seek for revocation of such patents whenever they are granted, or when an application for such a patent is lodged with the USPTO. Hence, the USPTO has been described by Ragnar as being a source of bio-piracy because it insists that prior art can only be proven through documentary proof in applications for revocation of patent.³⁴

The idea of prior art

Prior art refers to a situation where in an invention sought to be patented is already available to the public.³⁵ The bulk of TK is available to the public because it is known, disseminated and used by members of a community. It seems that the spirit of ubuntu³⁶ which is typical of traditional communities who produce and utilise TK, works against them when it comes to obtaining protection: this is because these communities share the knowledge with others for purposes of solidarity. Critics hold that modern IP encourages the erosion of TK since it promotes individual ownership, hence, inherently at odds with indigenous cultures which emphasise collective creation and ownership of knowledge.³⁷ This is because indigenous communities believe in communal ownership of their TK, and do not hesitate to share it with others. In fact, some holders of TK relating to medicine have the duty of sharing the knowledge with other members of their community.³⁸ This is contrary to contemporary IPRs wherein intellectual property is concealed and registered for pure and personal economic gains. Hence, only a *sui*

generis law will provide a solution to TK protection, and erode and bio-piracy.

Cost

Another challenge faced by South Africa in creating a database for registration of TK is financial constraints. It is estimated that the Indian government spent close to US\$ 2 million to document and translate databases for its TKDL.³⁹ Moreover, the TRIPS Agreement does not require any formal national registration system for IPRs, implying that the cost and processes of registration, and enforcement lies with the holders of the IPR (in this case TK holder) and not the government.⁴⁰ Moreover, the cost of obtaining a patent under the US patent law alone is estimated to range between \$5,000 and \$10,000.⁴¹ Even thereafter, it is the responsibility of the patent holder to enforce it against infringements, which equally entails cost.⁴²

However these should not act as hindrances to the documentation and protection of TK as government can allocate a specific budget each year for that, and carry out the process progressively. Again, the value of setting up a TKDL should not be underestimated as not only will benefit from royalties to be paid by researchers for gaining access to TK cover the cost in the long run, but the cultural identity of the TK holders will be protected as well.

Possible measures which can be taken to protect TK

Sui generis modes of protection

Protection under Biodiversity Laws

TK can be protected through Act No 10 of 2004: Biodiversity Act of South Africa. The Act provides that access to bio prospecting activities shall be granted upon obtaining a permit to this effect. Such a permit shall be granted only after some conditions have been met, namely; that all stakeholders have been identified (i.e. state organs or indigenous communities);⁴³ their interests have been guaranteed;⁴⁴ the applicant has fully disclosed all material information relating to the bio prospecting activity to the stakeholders; has obtained their prior consent;⁴⁵ has signed a material transfer agreement with them;⁴⁶ and has specified the source of the biological resources.⁴⁷ The act further incriminates persons who either make use of, or export biological resources without a permit, or use a permit for purposes other than that for which it is granted.⁴⁸

Protection under a TK Protection Law

Rather than amending IP laws to include TK protection, enacting a separate law which addresses the specific characteristics of TK, including the fact that part of it is already available to the public, may prove more effective in eliminating bio-piracy in South Africa. This strategy has been adopted by India where a Traditional Knowledge (Protection and Regulation to Access) Bill 2009 has been drafted.⁴⁹ Though still pending, it assigns clear and specific duties to the various organs it creates avoiding duplication of duties,⁵⁰ and above all assigns the Traditional Knowledge Authority (one of the organs created) to educate communities on TK protection and just and fair negotiations for bio prospecting activities.⁵¹ This is an example worth emulating.

Creation of a Database

Creation of a database wherein the TK of South African indigenous communities will be registered (documentation) will play a great role in the protection of TK. Such a database will serve as

documented proof of prior art in defeating patent applications on this TK in institutions like the USPTO and the European Patent Office. This practical measure has been taken by the Indian government. The 2010 Intellectual Property Amendment Bill of South Africa makes mention of the creation of a database for the registration of TK, but provides no further information as to how such a data base would operate.⁵² Such a database should be accessible to all indigenous communities, have a central office capital city (Pretoria), alongside regional and local offices in some indigenous communities, with a good representation of indigenous communities. In Costa Rica, the National Biodiversity Administration Committee (CONAGEBIO), charged with the duty of preparing access and benefit sharing policies, is required to ‘coordinate with indigenous people in carrying out its functions.’⁵³ The aim is to ensure the participation of these people in seeking a solution to a problem which affects them, as this will create a minimum degree of democracy as well. Members of the regional and local offices should be assigned the duty of educating these communities on the value of their TK, how to engage in bio prospecting activities, and how to avoid bio-piracy. This will create awareness and encourage registration of TK for fear of bio-piracy.

Payment of non-monetary compensation to TK holders

The South African government can also protect holders of TK relating to biological resources by amending the Commencement on Bio-prospecting, Access and Benefit- Sharing Regulations 2008 to expressly provide non-monetary and monetary compensation or at the very least the former, to TK holders in exchange for TK in bio prospecting agreements. A close examination of this regulation gives the impression that only monetary compensation can be paid to indigenous communities for use of their biological resources,⁵⁴ which may not have lasting impacts on the lives of their recipients. The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation 2002 provide for payment of monetary or non-monetary compensation in access and benefit sharing negotiations.⁵⁵ By so doing, indigenous communities will stand to benefit a lot more. Such non-monetary benefits include; information technology skills (since the benefit to be reaped from utilisation of TK by these companies are usually very high),⁵⁶ or sale of the products manufactured out of the biological resource to South Africans at a reduced price. Recalling the bio prospecting agreement on the Hoodia Cactus plant of South Africa, it is quite ironical that being the source of the TK used in manufacturing weight losing tablets, 61% of South Africans are obsessed.⁵⁷

In Bangkok, where Novozymes has negotiated access and equitable benefit sharing agreements with a home company, BIOTEC,⁵⁸ while the latter collects, isolates, identifies and screens samples, Novozymes sponsors the research; provides training to BIOTEC workers; and transfers enzymes technology, bioinformatics and royalties to BIOTEC.⁵⁹ In addition, In Costa Rica, the Asociacion Instituto Nacional de Biodiversidad (INBio), a private non-profit scientific organisation, and Merck a US pharmaceutical multinational corporation signed a bio prospecting agreement in 1993⁶⁰ in which in exchange for the biological resources received, Merck was to pay monetary compensation; royalties on the sales of the products manufactured out of the biological resources obtained; transfer technology necessary to manufacture, direct the marketing of the commercially valuable end-products of genetic materials (biotechnology);⁶¹ and train Costa Rican citizens.⁶²

Again, these companies could be required to compensate by providing social services like, good water supply and electricity which are still lacking in some of the communities from which the biological resources are obtained. If corporations are required to pay indigenous communities monetary and/or non-monetary compensation in bio prospecting agreements, then

the country will reap long term benefits even at the end of the bio prospecting agreement.

Compensation in terms of percentage

Requiring companies to pay indigenous communities a specific percentage of their sales, after exploiting, harnessing, and selling products made out of TK and biological resources will guarantee greater benefit from the use of TK to its holders. At the time a bio prospecting agreement is contracted, the issuing authority may not know the value of the biological resources it is making available to a foreign company, on the other hand, the latter might also not be sure of the results it will obtain from conducting tests on the particular biological resource it is contracting to gain access to.⁶³ In such a situation it becomes difficult for both parties to evaluate the profit that will be made out of the said use at the end of the day, so as to determine what is will be *equitable* to offer as compensation to the TK holders,⁶⁴ as the CBD and the Nagoya Protocol provide for *equitable* share of benefits. South Africa could in some cases contract for a specified percentage of the profits that will be made after the products are manufactured and sold. This will avoid situations wherein foreign company will make huge benefits from exploitation of TK, and provide insignificant benefits to TK holders.

Providing funds to Bio-safety organisations

Measures should be taken by the government to provide a legal basis and mechanisms for funding activities of bio-safety NGOs having as objective to assist indigenous communities in securing a benefit from exploitation of their TK, as this will spur an increase in their number.⁶⁵ With the degree of corporate governance required of NGOs in South Africa, risk of misappropriation of such funds, or not channelling the proceeds to indigenous communities is reduced.⁶⁶

IP protection of TK

The Patent Amendment Act provides that patent applicants shall indicate in their specifications, whether or not the invention for which protection is sought is based on or derived from an indigenous biological resource, genetic resource, or TK.⁶⁷ Where this is the case, such applicants shall furnish proof of authorisation to use the TK, or indigenous biological resource.⁶⁸ Such authorisation may be in the form of; a proof of prior informed consent of the indigenous community;⁶⁹ proof of a material transfer agreement;⁷⁰ and proof of a benefit sharing agreement between the applicant and the indigenous community.⁷¹ This in fact is what developing countries want the EPO, and the USPTO to implement in their patent laws, as it will help eliminate bio-piracy.

Conclusion

To conclude, one may therefore say that, TK protection today is still a dream for many developing, and South Africa in particular. Though a number of challenges stand on the way of securing its protection, there is a way out. These countries just need to be committed and determined, follow the examples of India and be driven by the desire to protect their heritage, and ensure that their indigenous communities reap the fruits of their labour.

Notes

1 This refers to patent claims over biodiversity of indigenous knowledge that are based on the innovation, creativity and genius of indigenous

communities. See Shiva V. 'Biopiracy' in (Ed) Protect or Plunder: understanding intellectual property rights'. 49.

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- 3 UNEP/CBD/COP/3/Inf.33, Annex 2.
- 4 These are people who do not belong to that indigenous group.
- 5 WIPO IP and TK Report (1998-1999) 25.
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- 15 Article 15(3) and (4) of the CBD; article 6 of the Nagoya Protocol.
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- 23 Raphesu 'Vulnerability of Indigenous Knowledge Management Systems in South Africa' 5 available at <http://www.slideshare.net/Mphelar/vulnerability-of-indigenous-knowledge-management-systems-in-south-africa> (accessed 16/11/2010).
- 24 Ibid.
- 25 Ibid.
- 26 Article 29 of the TRIPS Agreement.
- 27 Article 29 of the TRIPS Agreement.
- 28 WIPO 'Intellectual Property and Traditional Knowledge' 8 Booklet No 2 available at http://www.wipo.int/freepublications/en/tk/920/wipo_pub_920.pdf (accessed 17/10/2010).
- 29 WIPO 'Intellectual Property and Traditional Knowledge' 8 Booklet No 2 available at http://www.wipo.int/freepublications/en/tk/920/wipo_pub_920.pdf (accessed 17/10/2010).
- 30 Robinson 'Biopiracy Concerns Heat Up over Chilli Pepper' (2009) available at <http://ictsd.org/i/news/bioresreview/56902/> (accessed 28/05/2011).
- 31 Article 15 (3) and (4) of the CBD.

- 32 The US patent law provides that; ‘Any person at any time may cite to the office [the USPTO] in writing prior arts consisting of patents or printed publication which that person believes to have a bearing on the patentability of any claim of a particular patent. If the person explains in writing the pertinency and manner of applying to at least one claim of the patent, the citation of the prior art and the explanation thereof will become part of the official file of the patent....’ See the ‘Patent Opposition and Revocation’ section 301 of the USPTO available at www.patentlens.net/daisy/bios/2624/.../Patent%20Opposition%20US.pdf (accessed 15/10/2010).
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Dountio Joelle is an LLD student in Human Rights and Intellectual Property Rights at the University of Pretoria, South Africa. She holds of a Bachelor Degree in Law (LLB) from University of Buea in Cameroon, and an LLM in International Trade Law from the University of Western Cape in South Africa. Through her research, she seeks to bring to the lime light the human rights implications of intellectual property regulation, and how a balance of interest between intellectual property right holders and society in general can be achieved.

The effect of media law on selected Zimbabwean editorial cartoons during Zimbabwe's 2008 harmonised general elections

Knowledge Mushohwe

Graphic Design, Nelson Mandela Metropolitan University
Email: knowwleh@yahoo.com

Heidi Saayman Hattingh

Photography, Tshwane University of Technology
Email: hmhattingh@gmail.com

Inge Economou

Graphic Design, Nelson Mandela Metropolitan University
Email: inge.economou@nmmu.ac.za

During the 2008 elections the Zimbabwean media laws had a direct impact on the way that editorial cartoonists expressed themselves. The study contextualises an understanding of the editorial cartoon as practised in an environment of freedom of speech and defined by the four categories identified by Press (1981) and Manning and Phiddian (2004), and delineates the effects of media law on the newspaper industry in Zimbabwe. We review four editorial cartoons reading the semiotic nonverbal communication and meaning principles as defined by Du Plooy (1996) according to the criteria: symbols/metaphors, exaggeration/distortion, stereotypes, caricature, irony, captions and background knowledge as developed by Fetsko (2001). A comparative analysis of the cartoons reveals that objectives and functions of the unmediated *zimonline.co.za* and mediated *Herald* newspapers are exactly the same. They are propagandistic representations of Zimbabwean politics that are more of an extension of political ideology than they are a reflection of the country's socio-political landscape.

Key words: editorial cartoon, Zimbabwe media law, press freedom, censorship, Robert Mugabe

Die uitwerking van media wetgewing op geselekteerde Zimbabwe se redaksionele spot prente gedurende die 2008 geharmoniseerde algemene verkiesing in Zimbabwe

Gedurende die 2008 verkiesings het die Zimbabwe media wette 'n direkte impak gehad op die manier hoe redaksionele spot prent tekeners hulself uitgedruk het. Die studie kontekstualiseer die verstaan van die redaksionele spot prent, beoefen in 'n omgewing waar vryheid van spraak heers, soos gedefinieer deur die vier kategoriee van Press (1981) en Manning en Phiddian (2004), en skets die uitwerking van media wetgewing op die koerantwese in Zimbabwe. Ons beskou vier redaksionele spot prente deur die uitlees van semiotiese nieverbale kommunikasie en betekenis beginsels soos gedefinieer deur Du Plooy (1996) en volgens die kriterium: simbole/beeldspraak, oordrywing/verdraaiing, stereotipes, karikatuur, ironie, onderskrif en agtergrond kennis soos ontwikkel deur Fetsko (2001). 'n Vergelykende ondersoek van die spot prente bring aan die lig dat doelwitte en funksies van die ongeredigeerde *zimonline.co.za* en die geredigeerde *Herald* koerante identies is. Hulle is slegs propagandistiese uitbeeldings van die Zimbabwe politiek en meer 'n verlenging van politieke ideologieë, as wat hulle 'n uitbeelding is van die land se sosio-politieke landskap.

Sleutelwoorde: redaksionele spot prent, Zimbabwe media wette, sensuur, Robert Mugabe

In countries where freedom of speech is promoted the editorial cartoon is a platform for the cartoonist to push the boundaries of this freedom by exercising 'a right to mock' on the one hand, while on the other taking into consideration legal and ethical implications of misrepresentation. Cartoonist Linda Boileau (as cited by Colldewei 1998: 48) maintains that "cartoons must have a bite to them, you've got to burn some ego, get the knife out now and then, because if you don't, you're just not worth your stuff." Pulitzer award winner Michael Ramirez¹ concurs, "you've got to push the issue to extreme" (Langston 1998: 189). He adds that he feels "neither regret nor guilt about his work, even when some people find it offensive" (Langston 1998: 189).

Media laws protect the right to freedom of speech in the work of media personnel. In many countries of the developing world media laws are routinely redefined to curtail media personnel, leading to ‘one sided’ or ‘political propaganda’ in newspaper content. For example the proclamation of two media laws⁷ in Zimbabwe in 2002 led to the closure of several independent newspapers, including the largest independent daily in the country, the *Daily News*. In 2008 when Zimbabwe held its general elections on 28 March, as well as the presidential run-off on 27 June 2008, the country’s radio and television was in the hands of the government and the only source of locally produced printed independent news was the weekly newspapers, *The Financial Gazette*, the *Zimbabwe Independent* and the *Standard*. By 2008 Zimbabwean daily published news presentations were only available either in the state media or in a non-regulated online media, the latter created by former independent daily newspaper the *Daily News* staffers who had lost their jobs after the media laws in the country effectively resulted in the paper’s demise.

In this paper we evaluate the possible differences in editorial cartoons published in *zimonline.co.za*, with no media restrictions, to those published in the state controlled newspaper *The Herald* during the 2008 general elections in the country. The *zimonline.co.za* editorial team were based in South Africa and not subjected to the Zimbabwean media laws. In order to simplify the study for the purpose of this paper only four cartoons commenting on the defending President Robert Mugabe have been considered. The significance of this comparison lies in the fact that the findings have the potential to highlight the impact of media laws that restricted freedom of speech during the 2008 election period on the content and roles of the editorial cartoon.

We proceed by firstly contextualising the understanding of the editorial cartoon as practised in an environment of freedom of speech² and defined by the four categories identified by Press³ in 1981 and further elaborated on by Manning and Phiddian⁴ in 2004, as well as contextualising the effects of media law on the newspaper industry in Zimbabwe. We continue by reviewing four editorial cartoons, reading the “semiotic nonverbal communication and meaning principles” as defined by Du Plooy⁵ (1996: 112-141) according to the criteria: symbols/metaphors, exaggeration/distortion, stereotypes, caricature, irony, captions and background knowledge as developed by Fetsko⁶ (2001). We conclude by comparing the analysis of the cartoons depicting Robert Mugabe published at *Zimonline.co.za* to those published in *The Herald*, state media publication, in order to determine the effect of media regulation on the editorial cartoon.

An understanding of the editorial cartoon as practised in an environment of freedom of speech

In the broadest sense, an editorial cartoon is described as being made out of two principal elements – graphic art and commentary (Zyglis 2003: 13). This definition is too broad and encompasses other forms of graphic art such as comics and illustration for advertising. Scholarly studies on editorial cartoons, or cartoons in general are a fairly recent phenomenon. Zyglis (2003: 14) makes a distinction between editorial cartoons and other forms of graphic art by stating that, “a work of graphic art with commentary is an editorial cartoon only if its commentary conveys a distinct editorial message portrayed in a clever or witty manner”. Though the above distinction appears to detach the editorial cartoon from all other forms of graphic art, it is not without its shortcomings. Some sections of comic art have drifted into political subjects such that the distinction between them and editorial cartoons is hardly noticeable. However, Harrison (1981: 14) offers three elements that not only differentiate editorial cartoons from other forms of graphic art, but also stand out as the facets of the art that the ruling elite has had problems

with since their inception. These include; “[the editorial cartoon’s] savage ability to depict in unflattering caricature; the ability to crystallize complex issues into a simple metaphor, and the cartoon’s availability, even to those who may not be especially literate or politically aware” (Harrison 1981: 14).

Press (1981), a prominent scholar in the field of editorial cartoons, identifies three different categories of editorial cartoons. He however concedes that one of them is too broad and requires further subdividing. Researchers Manning and Phiddian (2004) take up the challenge and establish an additional fourth category. Editorial cartoons can therefore be grouped into the four categories: 1 – descriptive; 2 – laughing satirical; 3 – destructive satirical and 4 – savage indignation.

The first category consists of the descriptive editorial cartoon. This is arguably the most neutral of all since it does little more than describe situation or events (Press 1981: 75), albeit with a little humour (Townsend, McDonald & Esders 2008: 8). It may well make readers laugh, but only in response to general humour rather than satire (Manning & Phiddian 2004: 27). It is a very basic form of comic commentary that makes comments on the affairs of the day, and its objective is to merely amuse readers while “their chief side effect is to naturalise the political process for the audience” (Manning & Phiddian 2004: 27). Because of this, they are consequently “especially suited to the expression of status quo viewpoints” (Manning & Phiddian 2004: 28). Manning and Phiddian (2004: 27) add that at one point or the other, all cartoonists draw this form of cartoon, “when they lack strong convictions about the subject they are working on” (Manning & Phiddian 2004: 27).

The second category comprises the laughing satirical editorial cartoons. These are most common in Western-style democracies. They have “a ‘corrective’ tone indicating that although the political system the cartoonist is commenting about is generally viewed as legitimate, there is need for reform and for the politicians and the powerful to modify their behaviour” (Townsend, McDonald & Esders 2008: 8). These editorial cartoons accept the legitimacy of authority, but point out whatever flaws are inherent in the system. They are the “checks and balances” of a democratic system and they “make it difficult for people to get away with abuses of common standards or morality, probity, and wisdom” (Manning & Phiddian 2004: 30). Press (1981: 75) adds:

The cartoons are aimed at reform of administration rather than destruction of the system. They are the [sic] corrective in keeping politicians honest without chastising them severely. A kind of chaffing tone, with some bite suggests a message: ‘You have these faults and we wish you would reform but whether you do or not, we will still support and perhaps even like you’.

The destructive satirical editorial cartoon found in the third category is not as lenient as the laughing satirical cartoon. In fact it is ‘revolutionary’ and fails to accept the legitimacy of the political system about which they comment (Townsend, McDonald & Esders 2008: 9). They are not merely critical, but use language and signs bordering on contempt, radicalism and hate. Though in rare cases the satire may be harmless humour, it is mostly “hate [that] shines through, uncontrolled and slightly insane... since the drawing is meant to be cruel and to hate” (Press 1981: 76). Destructive satirical cartooning is clearly extremists’ views that “come out of revolutionary fervour or social despair” (Manning & Phiddian 2004: 30). Given the nature of the message in them, they are not widely distributed. “They tend overwhelmingly to circulate among the already converted”, therefore “seldom change minds, though they may strengthen revolutionary cadres in their convictions” (Manning & Phiddian 2004: 30).

Editorial cartoons that depict savage indignation form the final category. This category is identified by Manning and Phiddian and adds to the categories formulated by Press. The two researchers argue that it is possible for an editorial cartoon to “express quite deep reservations about the established patterns of distribution of power and resources without hating the system and its minions or seeking their wholesome destruction” (Manning & Phiddian 2004: 29). They seek “revision of the world without demanding revolution” (Townsend, McDonald & Esders 2008:8). “For savagely indignant cartooning, the legitimacy of the system and those who hold office is not the urgent issue” (Manning & Phiddian 2004: 31), but poorly handled national issues or scandals within the political system are. Issues and scandals such as the lies over the weapons of mass destruction in Iraq, the President Clinton sex scandals or the Jacob Zuma rape trial fit in this category. “The tone of these cartoons is more urgent and there is a sense that the issues covered are of great concern” (Townsend, McDonald & Esders 2008: 8), though “they do not propose a systematic solution to society’s ills” (Manning & Phiddian 2004: 30). The primary objective of these cartoons is “to say something like, ‘Whether or not most things are OK in this country of ours, this act/inaction is rotten. Any citizen of good faith needs to concentrate on fixing this plight’” (Manning & Phiddian 2004: 32). With savage indignation, “the cartoonists are expressing their alarm [for example] at the distribution of wealth and power and the urgent need for action on the issue at hand” (Townsend, McDonald & Esders 2008: 8). Manning and Phiddian however warn that if “done too persistently or predictably, savage indignation can descend into alarmist preachiness”, but if done well it has the ability to “provoke serious thought about the distribution of power, wealth and justice” (Manning & Phiddian 2004: 32).

The effects of media law on the newspaper industry in Zimbabwe

Since the establishment of independence in 1980, Zimbabwe’s traditional newspaper media landscape has been dominated by strong state-owned publications (Moyo 2005). Shortly after independence the Robert Mugabe-led government bought the Argus Company of South Africa out of its controlling stake as the country’s main media group and initiated the setting up of a new company, Zimbabwe Newspapers (Zimpapers). Zimpapers inherited three newspaper titles, two dailies, *The Herald* and the *Chronicle*, as well as the weekly *Sunday Mail*. It added to the stable *Kwayedza*, a vernacular weekly newspaper in the early eighties, and several community newspapers through its affiliate, Community Newspapers Group (CNG). The creation of Zimpapers was a noble idea meant to keep the public informed about the country’s political and social landscape (Moyo 2005: 112). However, its independence was short-lived as government started to meddle in the day to day running of the company almost immediately after its establishment (Saunders 1991: 8). Moyo (2005: 113) points out that the interference led to a “peculiar type of journalism that avoid[s] confronting those in power”. The Government, by making part of the media its public relations department, narrowed the definition of the journalism profession and in fact gave itself the role of determining what was in the public interest. Since independence, and particularly during election periods, titles under Zimpapers deteriorated into propaganda mouthpieces, losing much of their credibility in the process (Moyo 2005: 113).

Perhaps not surprisingly, Zimbabwe did not have an independent daily newspaper until the launch of the *Daily Gazette* in 1992. Throughout the 1990s a number of daily Zimbabwe newspapers such as *The Tribune* and the *Daily Mirror* were established. Their impact and relevance in the country were minimal as their readership figures were low, compared to those of *The Herald*. The establishment of the *Daily News* in 1999 changed the print media landscape

in Zimbabwe. The paper, characteristically anti-establishment, fared well against the 100-year old *Herald*, at times even out-selling it (UNESCO 2002).

The *Daily News* did not last long. The Public Order and Maintenance Act (POSA) bill was enacted on 10 January 2002 while the Access to Information and Protection of Privacy Act (AIPPA) was passed into law exactly three weeks later⁷. The Zimbabwe government maintained that the laws were meant to promote responsible journalism and greater accountability on the part of the media. Despite the government's assurance that no malice was intended by the promulgation of the laws, most observers did not concur. On 14 September 2003, the state used the laws to shut down the *Daily News* leaving the country with only two state-owned daily newspapers, *The Herald* and the *Chronicle*. A United Nations report in 2005 lamented that the laws were "extremely restrict[ive]" while Balule and Kandjii (2004: 122-124) concluded that both AIPPA and POSA were "broadly cast", "vague", "unclear" and "notoriously subjective", prohibiting legitimate criticism of both the government and the President and giving law enforcement agencies grounds for action against almost anything of a political nature which was published.

The demise of the *Daily News*, however, led to the establishment of new online newspapers managed by Zimbabweans living outside the country. Zimbabwean journalists, most of them former *Daily News* staffers, used computer-based technology to inform readers and escape prosecution. Among the pioneers to venture into this new medium in Zimbabwe was Geoff Nyarota, former *Daily News* Editor-in-Chief, who started *thezimbabwetimes.com*, a United States-based online newspaper. Ex-managing editor Abel Mutsakani and former senior reporter Mduduzi Mathuthu formed *zimonline.co.za* in South Africa and *newzimbabwe.com* in the United Kingdom respectively. The new online newspapers were markedly similar to the defunct *Daily News* in both stance and content, hence more or less filling the shoes left vacant in 2003. Since the majority of the staff reporting online lost their jobs as a direct or indirect result of the Zimbabwe laws, their stance towards the status quo may possibly be linked to their discontentment with government action. Since they published online, and were in most instances based outside of Zimbabwe, these publications were not bound by Zimbabwean laws. The choice for daily printed news on Zimbabwe by Zimbabweans was between a dominant, regulated state media and a new, small but vibrant online media community. The following section investigates how the publishing of editorial cartoons in these two markedly different media sources under varying degrees of freedom in a vastly polarized country affected the editorial cartoonists' approach to commenting on society during Zimbabwe's 2008 watershed elections.

The analysis of editorial cartoons depicting Robert Mugabe during the 2008 election period in Zimbabwe

The intention of the following analysis is to review the selected editorial cartoons in the light of how they could possibly be read as a comment on newsworthy issues. It is not the intention of the authors to advantage a particular political point of view neither the standing of a particular electoral candidate. The analysis should therefore not be regarded as pertaining to the political standing of the authors. It needs to be kept in mind that in order to limit the scope of the study only one electoral candidate has been chosen as the subject being commented on in both publications namely Robert Mugabe's portrayal in both *zimonline.co.za* and *The Herald*.

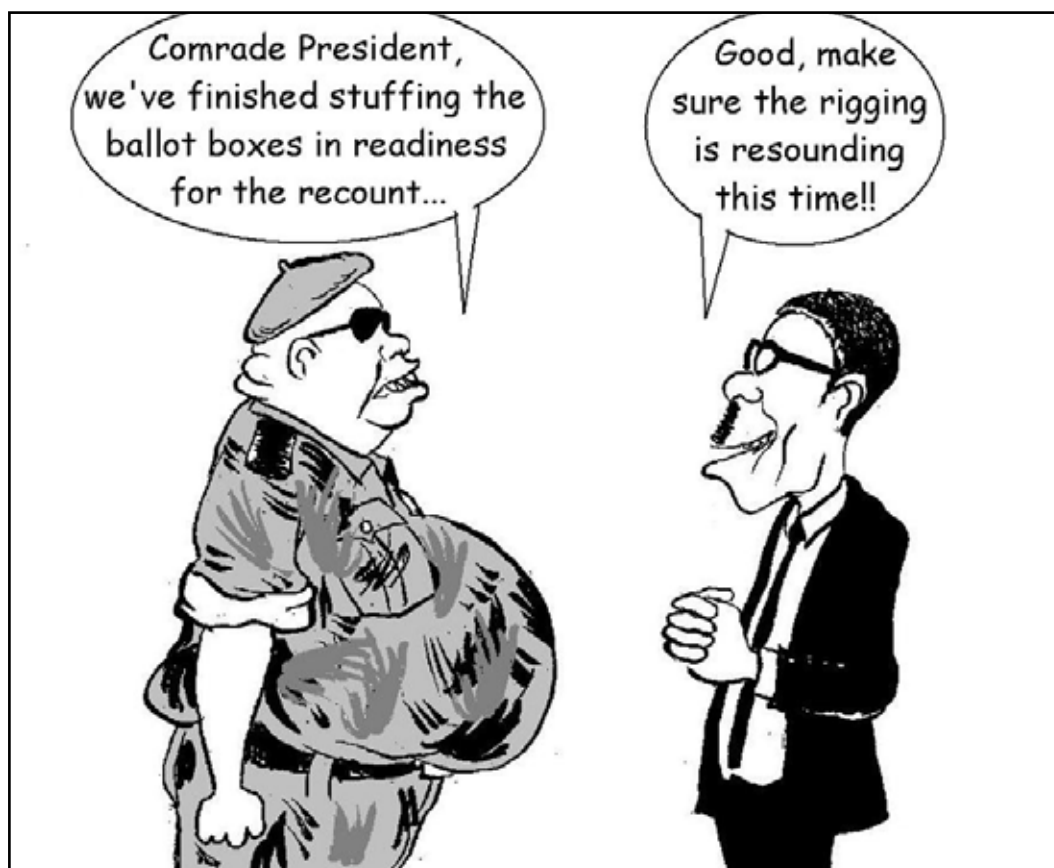


Figure 1

Published by the *zimonline.co.za* newspaper on 17 April 2008 (Zimonline, 2008a).

The editorial cartoon, shown in Figure 1, was published by the *zimonline.co.za* newspaper on 17 April 2008, about two weeks after the polling date in the Zimbabwe harmonized elections. It shows President Mugabe receiving a briefing from a member of the army regarding the outcomes of a particular mission. The mission, as made apparent by the text in the speech bubbles above the two figures, was to 'rig' the elections by secretly filling ballot boxes with votes to help swing the Presidential elections into Mugabe's favour. At the time the cartoon was published, the election results were yet to be made public, yet the Zimbabwe Electoral Commission (ZEC), the independent body that ran the polls, had released a statement inviting competing candidates or their agents to present themselves for a recount of the ballots (Monster Sand Critics 2008). The editorial cartoon reflects concerns raised by the opposition figures and supporters. On 13 April 2008, the Movement for Democratic Change (MDC) spokesperson Nelson Chamisa said (New Zimbabwe, 2008):

We will not accept any recount because for us that is accepting rigged results. ZEC are in custody of the ballot boxes for two weeks and heavens know what they have done to the ballot papers. They might have stuffed them with their votes.

The 'might' in the last part of his statement shows the assertions are only fears and not fact based on available evidence. The editorial cartoon is therefore more speculative than it is a reflection of Zimbabwe's political developments.

The text and language used in the composition gives the impression that Mugabe uses the army to tip elections in his favour. The speech bubble attributed to the soldier shows the recently completed act of electoral fraud as a calculated and deliberate task, sanctioned by the Zimbabwean leader, who reciprocates with words suggesting satisfaction with the progress

made. The last two words attributed to President Mugabe, ‘this time’ alleges that the Zimbabwe leader is a ‘serial’ rigger of elections who has not participated in the act with the same character for the first time.

The irony provided by the composition is the suggestion that Mugabe who, as President, is supposed to adhere to strict moral and political codes has in fact gone beyond the laws governing democratic elections, not for the first time, to manipulate a democratic process in his favour. The editorial cartoon therefore depicts President Mugabe as a dishonest and cunning politician who intends to hold on to power at all costs, even against the wishes of his own people. The Zimbabwean army is reflected as a corrupt, convenient partner to Mugabe who is rewarded for all the dirty work with considerable wealth. Evidence of the army’s affluence is provided by the use of an indexical sign, the bulging stomach. The exaggerated soldier’s abdomen is a sign of living comfortably. It suggests abundance of wealth. In addition, the animated soldier’s face, aptly caricatured with large dark glasses suggests flamboyance. President Mugabe’s face is animated too, but the expression on the caricatured face points more to a happy reaction to the news he has just received than a reference to his personality. The composition uses the lone soldier as a metaphorical representation of the Zimbabwe army, implying that President Mugabe owes his continued stay in power to the uniformed forces.



Figure 2

Published by the *zimonline.co.za* newspaper on 14 April 2008 (Zimonline, 2008b).

The editorial cartoon, shown in Figure 2, was published by the *zimonline.co.za* newspaper on 14 April 2008, two weeks after the polling date in the Zimbabwe harmonized elections. It shows President Mugabe dipping his hand into a cookie jar and grabbing one cookie labelled ‘Presidential Elections’. The editorial cartoon effectively suggests that the Zimbabwean President orchestrated a deliberate plan to illegally and unconstitutionally retain political power that he had lost through the ballot box. Certainly, concern was raised with regards to the delay in the announcement of the presidential elections in particular – it took 34 days between the polling date and the official release of the result. The Zimbabwe Election Commission Chief Election (ZEC) Officer, Lovemore Sekeramayi insisted the delay was technical, as the commission had received ballots from the furthest and most remote areas in the country late. He urged the nation to “remain patient as ZEC... [went] through... [a] meticulous verification process”

(Nyamagambiri & Munda 2008). The cartoon, by suggesting the delay automatically translated to electoral fraud without any evidence available in the mainstream media or any public forum, challenges the notion of free speech. The cartoon does not comment on current affairs, neither does it creatively ‘invent’ a scene to place a comment into context, rather, it suggests an event that is at odds with reality. The results that were released two weeks after the publication of the editorial cartoon confirm this. When official results were finally announced on 2 May 2008, Tsvangirai had 47.9% and President Mugabe 43.2%, results that both candidates accepted and they expressed their willingness to participate in a presidential run-off called by ZEC, as under the country’s laws, one has to receive at least 50+1% to be declared winner.

Very short and precise text is used in the form of labels in the cartoon. The labelled cookies contextualize the ‘harmonised’ in the elections. It shows in addition to the presidential elections, parliamentary and senatorial elections were also contested. The lifting of one cookie labelled ‘Presidential Elections’ distinguishes it from the rest, and the use of the caption, ‘The Cookie Jar,’ as well as the attire and demeanour of the figure suggest the act by the Zimbabwean President is not that of ‘placing’ but ‘taking’.

Metaphorical representations feature strongly in the editorial cartoon. The school/boy scout uniform is used as a symbol to suggest mischief, naivety and immaturity of the Zimbabwe leader, while ZEC is depicted as a cookie jar and the elections the cookies. The metaphors feed into the stereotypical representations suggested by the editorial cartoon. ZEC is presented as a powerless body open to manipulation and the elections as neither free nor fair as they are open to abuse. President Mugabe is depicted as a power hungry, immature leader willing to go to extremes to maintain his position as President. The irony in the composition is the childishness of President Mugabe, who only two months before had celebrated his 84 birthday. He is shown wearing clothes associated with children and also caught in the act of a child-like deed. The caricatured face of the Zimbabwe leader shows his age, with several lines punctuating it. The lines on his forehead, the low jaw line, the wrinkles on the lower part of the face, the white hair and the dropped eyes suggests that the figure is too old to act in the manner he is seen taking part in. The facial features however, appear to have been exaggerated to contradict the youthful appearance presented by his attire.

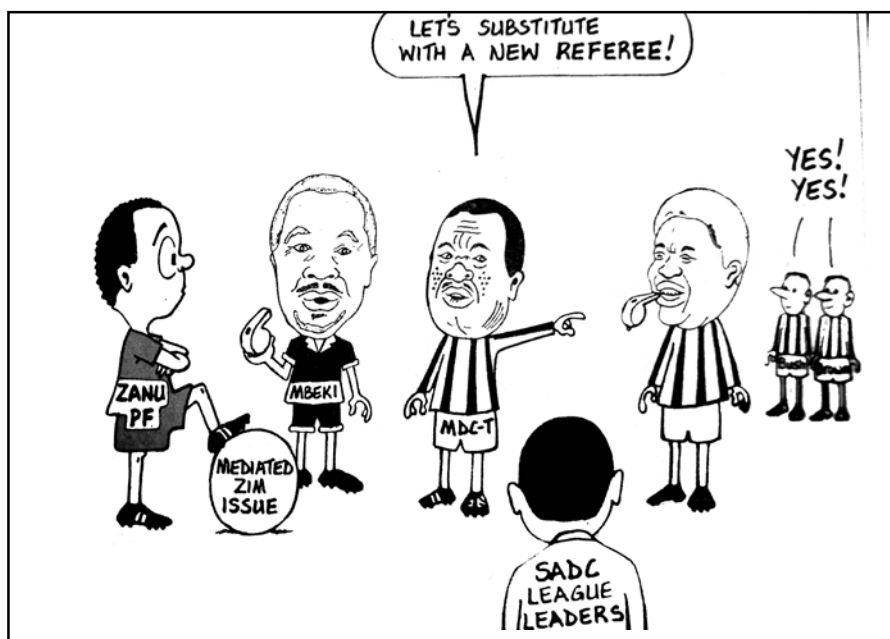


Figure 3

Published by *The Herald* newspaper on 23 April 2008 (The Herald, 2008a).

The editorial cartoon, shown in figure 3, was published by *The Herald* newspaper on 23 April 2008. It refers to behind the scenes negotiations for a power sharing deal between the MDC and ZANU(PF). Zimbabwe is part of the regional body – Southern African Development Community (SADC). In 2008, SADC had 15-member states, namely Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe (SADC 2010). SADC noted the deteriorating relations between the two main Zimbabwe parties and in 2007, at a summit in Tanzania, the regional body appointed South African President Thabo Mbeki to mediate, as a way to “to promote dialogue of the parties in Zimbabwe” (My Broadband, 2007). The harmonized elections held in 2008 and the SADC guidelines that regulated them were agreements brokered at the talks (BBC 2008a). Though Zimbabweans went to the polls to elect new leadership on 29 March 2008, talks aimed at securing a political solution were taking place behind the scenes.

Major fallout occurred at the talks in April 2008 when Mbeki said, “there is no crisis in Zimbabwe”, a statement he later elaborated on by insisting he referred to the election situation and not the broader Zimbabwe situation (Msomi 2008). This resulted in Tsvangirai questioning the ability of the South African leader to broker a deal acceptable to the MDC. On 17 April, Tsvangirai stated without elaborating, “We want to thank Mbeki for all his efforts, but he needs to be relieved of his duty” (Msomi 2008). Tsvangirai suggested that then Zambian President, the late Levy Mwanawasa should replace Mbeki, declaring, “We have asked Mwanawasa to lead a new initiative due to the urgent situation in Zimbabwe [caused by] the violence, intimidation and changing electoral conditions” (Msomi 2008). The G8⁸, a grouping of the most powerful states that include Britain and the United States, opposed Mbeki’s handling of the talks, suggesting that the South African leader was not putting enough pressure on President Mugabe for political reforms in Zimbabwe (Wintour & Elliott 2008). Yet, despite the reservations by the MDC and the Western countries, SADC refused to bow down to pressure and retained Mbeki as the mediator for the Zimbabwe talks. Zimbabwe’s government undoubtedly felt uneasy with Mwanawasa who had a year before had become the first African leader to voice strong public criticism of the government south of Zambia’s border, likening Zimbabwe to “a sinking Titanic whose passengers are jumping out in a bid to save their lives” (Muponda 2007).

The cartoon’s composition, a metaphorical representation of the Zimbabwe talks, shows the main players in Zimbabwe’s political paradigm in a soccer field. Action has however stopped as the players, referee and onlookers listen to Tsvangirai. Soccer is the most popular sport in Zimbabwe and the placing of the politicians in a field helps contextualize the topic being discussed. Text is used to label the majority of those present, namely Mbeki, SADC league leaders, 2008 American President George W. Bush and then British Prime Minister Gordon Brown. Though two other figures are labelled MDC-T and ZANU(PF), the context in which they are presented suggests they are Morgan Tsvangirai and President Mugabe respectively. Tsvangirai’s speech bubble reflects his 17 April statement that suggests Mwanawasa should replace Mbeki. The repeated shouts of affirmation by the two Western leaders in the background reflect the supposed twinning of Zimbabwe opposition views to those of their alleged handlers.

The irony in the composition is provided by the treatment of one particular artifact – the soccer uniforms. Tsvangirai, Bush, Brown and Mwanawasa are depicted wearing similar uniforms. Mwanawasa in particular is being suggested as a replacement for Mbeki, seen wearing an impartial black uniform, yet appears as part of Tsvangirai’s team. The irony is extended to include the two western leaders that are seen to be also playing for Tsvangirai’s team. The ball is understandably big, exaggerated to suggest the magnitude of the issue facing the Zimbabwe

leader. The two Western leaders in the background are depicted with exaggerated long noses, suggesting they are alien to the forum and subject being discussed. The exaggerated noses heighten the suggestion or sense of conflict caused by the interference by Western leaders on an internal issue that is being solved by fellow African leaders, and alludes to the familiar metaphor of ‘sticking one’s nose in when it does not belong’. The calmness shown by the Mbeki and Mugabe caricatures, juxtaposed with the animated portrayals of Mwanawasa and Tsvangirai, suggest that the appointed referee and one party (Mugabe) are ready for the talks that are being disrupted by a group coming to the negotiating field with bad intentions. As a result Mugabe, on the ball and with remarkably fitter physique in comparison to his rival, is seen as calm, physically fit and in control, while Mbeki is portrayed as a fair mediator. President Mugabe is depicted as quite young and almost innocent with ‘friendly’ big childlike eyes. Tsvangirai is viewed as a dishonest player seeking an unfair advantage in the negotiations; while Mwanawasa is seen as a willing participant in a charade plot to control Zimbabwe’s mediated issue. Bush and Brown are viewed as eavesdropping politicians openly meddling in Zimbabwe’s internal affairs to rid Zimbabwe’s political playing field of President Mugabe.

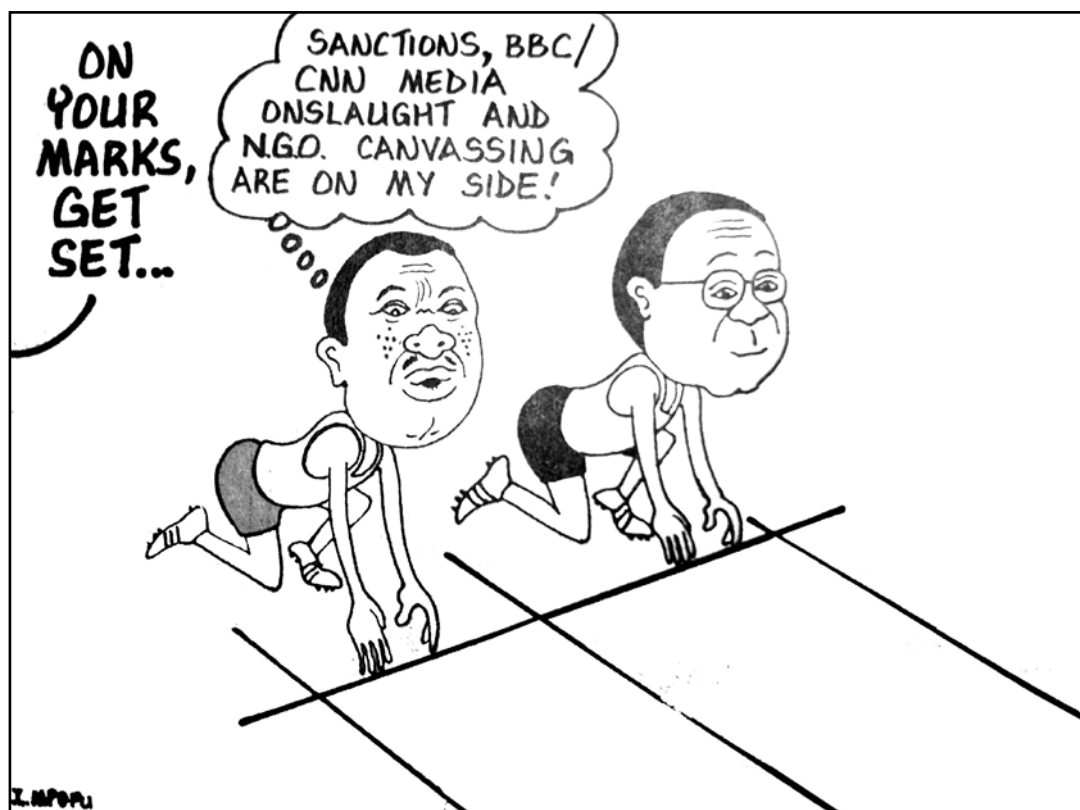


Figure 4
Published by *The Herald* newspaper on 16 May 2008 (The Herald, 2008b).

The editorial cartoon shown in figure 4 was published by *The Herald* newspaper on 16 May 2008. It refers to a looming presidential run-off between President Mugabe and Morgan Tsvangirai scheduled for 27 June the same year. Zimbabweans went to the polls on 29 May 2008 to elect among others, the country’s president. Under new electoral laws, a presidential candidate could only be proclaimed winner if he/she received more than 50% of the votes. Failure by any of the four candidates to get 50+1% meant that the two candidates with the most votes – Tsvangirai and President Mugabe – had to contest a run-off election (BBC 2008b). The composition uses a racetrack as a metaphorical representation of the run-off. Similar to an athletics running track,

the objective of the run-off was to determine one winner at the end of the race. The ‘athletes’ are depicted as ready and waiting in the official starting position, seemingly possessing similar physical attributes and ready to race.

The major difference between the two candidates may be identified in the language and text employed in the editorial cartoon. A thought bubble above Tsvangirai’s head discloses the opposition leader’s opinions. He reflects on three factors that were supposedly in place to enhance his chances of winning the election, namely sanctions, BBC/CNN media onslaught and non-governmental organisations’ (NGOs)⁹ canvassing.

Following a land reform exercise characterized by isolated but regular incidents of violence during the 2000 elections in Zimbabwe, Western countries, led by Britain, the former coloniser, led the European Union and United States in applying sanctions on Zimbabwe. The sanctions were said to be ‘smart’ or ‘targeted’, meaning that they only affected Zimbabwe’s ruling elite (Downer 2002). However, several Asian and African countries including China (Fin24 2011), Malawi (ZBC 2010), South Africa (Howden 2010), Namibia (All Africa 2011) openly opposed the sanctions, insisting they hurt ordinary Zimbabweans.

Meanwhile, Tsvangirai and his party supported the move and the Western countries insisted they would only act otherwise on the insistence of the opposition party (All Africa 2010). The British government also gave credence to ZANU(PF) accusations that the sanctions were less about punishing the country for human rights violations but more about effecting regime change in Zimbabwe. In 2004, then British Prime Minister Tony Blair told the House of Commons (Grebe 2010: 12):

We work closely with the MDC on the measures that we should take in respect of Zimbabwe, although I am afraid that these measures and sanctions, although we have them in place, are of limited effect on the Mugabe regime. We must be realistic about that. It is still important ... to put pressure for change on the Mugabe regime.

Blair’s assertions challenge the view that imposition of sanctions on Zimbabwe were solely meant to address human rights issues in the country. Whatever the reason for their imposition however, there is little doubt that they gave Tsvangirai and his party an upper hand on the Zimbabwe political landscape, as restrictions placed on Mugabe and his close associates were not applied to the opposition.

By the time Zimbabwe held its harmonized elections in 2008, Cable News Network (CNN) and British Broadcasting Corporation (BBC) had refused the privilege to report from Zimbabwe for seven years (Plunkett & Holmwood 2009), having been accused by authorities in the country of biased reportage against the government. The Zimbabwe government accused the two media houses and other foreign media of fabricating negative stories on Zimbabwe and blatant support for the opposition. Representatives of the foreign media showed their open sympathy for the opposition at a press conference in 2008 when MDC senior member erroneously pronounced Tsvangirai as the winner of the presidential election. They reacted to the claims with rapturous applause (Tran 2008). The two media houses CNN and BBC however continued to report on, and at times under cover from, Zimbabwe. Zimbabwean government claimed that news by foreign media on Zimbabwe was mostly inaccurate and without verification and asserted that the MDC and the foreign media were deliberate partners. This encouraged the notion that most of foreign media reports were fabrications meant to tarnish the government’s image and improve the opposition’s position (Maimbodei 2007, All Africa 2007, Tyehimba 2006).

The government also had reservations regarding foreign-funded non-governmental organisations (NGOs) accusing them of using a food distribution programme, which was under way at the time as a result of chronic food shortages, to solicit support for the opposition leader, Morgan Tsvangirai. President Mugabe, specifically referring to the presidential run-off alleged, “Food assistance is required, ...[but] NGOs were cashing in on that and coming to you saying, ‘We are feeding you so don’t vote ZANU-PF, vote the MDC instead’” (AFP 2008). The government alleged that all of the above were orchestrated with the help and blessing of Tsvangirai. A Mugabe win in this instance and according to the cartoon would therefore be viewed as ‘honest’ and ‘sincere’.

The words on the extreme right of the composition, taking the ‘athletes’ through the starting rituals but attributed to a figure outside the composition show the source is the controller of the race with the power to start it. This means they are coming from the regulator of the elections, ZEC. These words signify that the start of the race is imminent and reflect the time the cartoon was published.

There is an interesting distortion of figures in the composition. Mugabe is depicted looking much younger than Tsvangirai, despite the fact that the Zimbabwe President, who was 84 in 2008, is 28 years older than his rival. In addition Tsvangirai’s face is highly animated, with numerous expressive strokes punctuating it. President Mugabe’s face on the other hand is depicted as spotless, making the 84 year-old leader look like a teenager. The caricatures and distortions feed into the stereotypical representations pronounced by the composition. Tsvangirai is seen as an anxious politician, not confident in his own abilities but counting on outside help to aid his win. The expressive lines on his face heighten the anxiety. President Mugabe is depicted as a calm and focused politician who keeps cards close to his chest. Unlike his rival, he is not immersed in deep thought; neither does he utter a word. He is portrayed as the perfect candidate, hence the idealized personality emphasized by the facial features. There is no sign of satire or irony in the composition. It is a somewhat serious presentation that is unusual for a government-owned newspaper to publish. It acknowledges the formidability of Tsvangirai’s challenge, though he is seen to have an unfair advantage. However, the cartoonist, perhaps prompted by the first round results that showed President Mugabe in second place for the first time in Zimbabwe’s political history gives the two rivals identical physical prowess but adds a slight advantage, to Tsvangirai.

A comparison of the editorial cartoon as published in *zimonline.co.za* and in the state media publication *The Herald*

This section compares the mediated versus the unmediated publications in order to establish the possible impact of media regulation within the Zimbabwean context. The editorial cartooning evident in the Zimbabwean context is then reviewed as a possible category, as determined by Press (1981) and Manning and Phiddian (2004), in an attempt to place it within the broader context of editorial cartooning.

In figures 3 and 4 President Mugabe is depicted in the state owned newspaper *The Herald* as faultless, ideal and speechless. The editorial cartoons support the view that the current President is the only option to follow for the country’s future. The editorial cartoons prefer to present him quiet, avoiding ‘putting words into his mouth’, presumably lessening the chances of accidental ambiguity. In addition, President Mugabe is portrayed as a victim of his political rival, who is battling against unfair and mostly unethical odds against him. The presentation of President Mugabe by *The Herald* is logical, given that the ZANU(PF) government is the

majority shareholder in the parent company that prints the publication. The role of the editorial cartoon in *The Herald* publication has therefore deteriorated into a propaganda mouthpiece.

Online editorial cartoons seen in Figure 1 and 2 refer to President Mugabe as undesirable as the country's president and, to a certain extent, a liability that Zimbabwe's politics could be better off without. They portray him as an election cheat, questioning his credibility, and by extension, his legitimacy. President Mugabe is depicted as an unpopular aging leader desperately seeking to cling to power at all costs. He is accused in the *zimonline.co.za* editorial cartoons of being a manipulator using unethical methods to gain political power. The end result of the online publication mirrors that of *The Herald* in that the real difference is that the roles are now switched and the disadvantaged of the regulated publication becomes the advantaged in the unregulated media. Both are therefore essentially propaganda mouthpieces for opposing political parties.

Zimbabwean editorial cartoons published in the two news sources are remarkably dissimilar to the general editorial cartoon forms. In the traditional sense, editorial cartoons should be "watchdogs", keeping power-holders "honest" and "accountable" (Press 1981: 56–7). However, the selected Zimbabwe editorial cartoons generally align themselves with political movements. Instead of "stimulat[ing] the intellect" (Tunç 2002: 49), a role they should play, the selected editorial cartoons act as forms of political persuasion or propaganda. The regulated editorial cartoons published by *The Herald*, supports Mugabe's candidature advancing his cause by depicting him as a simple politician 'ready' to fight for the position of president (see Figure 3 and 4). The *zimonline.co.za* editorial cartoons counter *The Herald's* viewpoints by presenting Mugabe as an undesirable candidate with only his interests at heart (Figure 1 and 2). The main argument presented, and the principal idea stimulating the reviewed *zimonline.co.za* editorial cartoons, is the questioning of Mugabe's credentials and his ability to hold the office of the presidency, while those editorial cartoons reviewed from *The Herald* endorse Mugabe and openly criticise his opponent Tsvangirai. The *zimonline.co.za* cartoons present a directly opposite view, one that criticises Mugabe and therefore essentially supports the oppositional, Tsvangirai's campaign. The objective in both forms of publications appears to be that of presenting one political side as 'good' and the other as 'undesirable'. There is also inherent in the editorial cartoons unproven arguments that are not supported by facts available at the time. Allegations that President Mugabe is an electoral cheat are not supported by objective reports from the period. However, the claims were started or repeated by political movements and therefore show that editorial cartoons were developed as a manifestation and reinforcement of political ideology.

It is therefore observed that when trying to categorise the Zimbabwean editorial cartoon discussed in this paper it does not fit into any of the four specific groups suggested by Press (1981) and expanded on by Manning and Phiddian (2004). The descriptive editorial cartoon is "neutral" and "merely describe situations and events" (Press 1981: 75), while the laughing satirical cartoons category had editorial cartoons that accept the legitimacy of authority, but point out whatever flaws are inherent in the system (Manning and Phiddian 2004: 30). The online Zimbabwe editorial cartoons are similar to the destructive satirical cartoon category in that they are "revolutionary" but that "they do accept the legitimacy of the political system about which they comment" (Townsend, McDonald & Esders 2008: 9). By depicting Mugabe in a dark suit and being offered respect by a supposedly senior member of the army, the online editorial cartoon says, 'though the Zimbabwean President is not our choice, we accept he wields enormous political power'. Editorial cartoons from both *zimonline.co.za* and *The Herald* do not depict savage indignation. They merely express and reinforce one-sided political ideology.

A possible new category for the editorial cartoon, termed ‘*advocacy editorial cartooning*’ can therefore be considered. An essential understanding of the Zimbabwean editorial cartoon indicates that this category reflects a specific viewpoint that is closely related to political movements. Other editorial cartoons that may fall into this category include those that support or campaign against war in such times, those presented by political parties in their publications, and cartoons used in political advertisements, especially those published during elections.

Conclusion

Zimbabwean editorial cartoons published in the two news sources display characteristics that cannot be placed within the general theoretical editorial cartoon categories defined in this paper (Press 1981; Manning & Phiddian 2004). In the traditional sense, editorial cartoons should be “watchdogs”, keeping power-holders “honest” and “accountable” (Press 1981: 56–7). However, the selected Zimbabwe editorial cartoons tend to align themselves with political movements. Instead of “stimulat[ing] the intellect” (Tunç 2002: 49), a role they should play, the selected editorial cartoon instead acts as forms of political persuasion or propaganda. The regulated editorial cartoons published by *The Herald*, a state-owned newspaper supported Mugabe’s candidature, helping his cause by depicting him as an uncomplicated politician ‘ready’ to fight for the position of President, displaying the tendencies identified in the theoretical descriptive category but not a complete fit due to the political propaganda present in the commentary. The *zimonline.co.za* editorial cartoons countered the state media’s viewpoints by presenting Mugabe as an undesirable candidate with only his own interests at heart displaying the tendencies identified in the theoretical laughing satirical category but once again not a complete fit due to the political propaganda present in the commentary. The main argument presented, and the principal idea stimulating the selected online editorial cartoons is the questioning of Mugabe’s credentials and his ability to hold the office of the presidency, while state media editorial cartoons endorse Mugabe while attacking his main rival in both compositions. Though the state media editorial cartoons essentially support President Mugabe’s candidature and dismiss that of opposition leader Morgan Tsvangirai, while the online cartoons present a directly opposite view, the objective on both sides appears to be that of presenting one political side as ‘good’ and the other as ‘undesirable’. There is also inherent in the editorial cartoons baseless arguments that cannot be supported by facts available at the time. Allegations that President Mugabe is an electoral cheat could not be support by objective reports from the period. However, the claims were started or repeated by political movements and therefore show that editorial cartoons were developed as a manifestation and reinforcement of political ideology.

Possible reasons for *zimonline.co.za* mirroring the propagandist approach when commenting on the political situation, as reflected on in this study, could include: 1 – the cartoonists of the *Daily News* were previously exposed to or conditioned by the mediated form of commenting; 2 – the *zimonline.co.za* cartoonists were biased against Mugabe as a direct impact of the *Daily News*’s closure due to restrictive media laws and 3 – the cartoonists were attempting to counter the biased favour shown to Robert Mugabe in *The Herald*.

As a result of the stereotypical representations in editorial cartoons from the two media sources, it may be concluded that the objectives and functions of the *zimonline.co.za* and *The Herald* newspapers are in essence the same. They are propagandistic representations of Zimbabwean politics that are more of an extension of political ideology than they are a reflection of the country’s socio-political landscape.

Notes

- 1 The Pulitzer Prize is the highest honour bestowed on journalists in the United States. The list of recipients includes editorial cartoonists. The Pulitzer website indicates that Michael Ramirez won the 1994 prize for “his trenchant cartoons on contemporary issues” (The Pulitzer Prize).
- 2 Both Britain and the United States are signatories to the Universal Declaration on Human Rights (UDHR), which guarantees the right to freedom of expression. Article 19 of the bill says, “Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” (British Council 2004: 1). In addition, the United States’ first amendment mentions that, “the government cannot control what is printed in newspapers... or offered online (Freedom Forum). Under the United Kingdom’s 1689 Bill of rights, “the Government cannot arrest any man because he disagrees with the Government’s policies” (BritsAtTheirBest).
- 3 Press’s *The Political Cartoon* (1981) is a definitive book exploring the meanings and roles of political/editorial cartoons in Western democracies.
- 4 In *Censorship and the Political Cartoonist* (2004), Manning and Phiddian identify categories of editorial cartoons and their possible role in a Western society.
- 5 Du Plooy deals with nonverbal communication and meaning in *Communication and the Production of Meaning* (1996), edited by Pieter Fourie.
- 6 William Fetsko developed the seven properties for editorial cartoon analysis as an educational package titled, *Using and Analyzing Political Cartoons* (2001). He says, “editorial cartoons... express opinions about very specific news events in the real world” (Fetsko 2001: 7). Fetsko’s properties are: symbols/metaphors, exaggeration/distortion, stereotypes, caricature, irony, captions and background knowledge.
- 7 Zimbabwe’s 2008 media laws AIPPA and POSA among other things makes it offensive for one to (Balule & Kandjii 2004: 122):

Publish or communicate a statement that is wholly or materially false with the intention or realizing that there is a risk or possibility of:

i) inciting or promoting public disorder or public violence or endangering public safety;

ii) adversely affecting the defence or the economic interests of Zimbabwe;

iii) undermining public confidence in a law enforcement agency, the prison services or defence forces of the country; or

iv) interferes with, disrupts or interrupts any essential service... Prohibits the publication of statements undermining the authority of the president or that are abusive, indecent or false about or concerning the president.
- 8 The G8 is a grouping of eight of the world’s richest and most powerful countries. It was created by France in 1975 and has the United States, Britain, France, Russia, Germany, Japan, Italy and Canada as its members (The Telegraph 2011).
- 9 Zimbabwe has several registered non-governmental organisations (NGOs) working in various disciplines, such as civic society, law, elections, food, health, labour, constitution and gender-related issues. However, following post-millennium food shortages in the country, most NGOs were forced to make food security a primary objective.

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Knowledge Mushohwe graduated from Chinhoyi University of Technology in Zimbabwe, where he obtained a B. Tech (Honours) in Creative Art and Design, and is a final year M. Tech Graphic Design student with Nelson Mandela Metropolitan University in South Africa. He is also an editorial cartoonist with 12 years of experience in the field. Mushohwe has worked with, or for both state-owned and independent newspapers in the country since 1999, mainly as a cartoonist but occasionally as a Sub-Editor, Graphic Designer, Illustrator and Art Direction Consultant. His work has been published widely, including in the *Daily News*, the *Daily News on Sunday*, *The Herald*, the *Sunday Mail*, the *Daily Mirror* and the *Financial Gazette*. He is an editorial cartoonist with a Zimbabwean tabloid newspaper, *H-Metro*. Mushohwe is currently doing postgraduate research in the field of editorial cartooning.

Heidi Saayman Hattingh is currently busy with post-doctoral studies dealing with iconic images in South African social documentary photography at the Tshwane University of Technology. Her doctoral research concentrated on 1980s and 1990s South African 'struggle photographers' while her earlier postdoctoral work, hosted by Nelson Mandela Metropolitan University, reviewed contemporary post apartheid social documentary photographers. In 2009 she received funding from the American Council of Learned Societies as a fellow in their African Humanities Programme.

Inge Economou graduated from the PE Technikon (currently the NMMU) in Port Elizabeth with a BTech in Graphic Design (Cum Laude). She obtained her MTech degree at the Nelson Mandela Metropolitan University (NMMU), focusing on the historical-theoretical background to contemporary graphic design practices. She is a visual communication lecturer at the NMMU, where she is programme leader of the undergraduate course. Her more recent research focuses on facilitating social and environmental awareness in graphic design education and on visual plagiarism.

Can intellectual property legislation adequately protect the South African craft industry?

Roshana Kelbrick

Department of Mercantile Law, UNISA.

Email: kelbrra@unisa.ac.za.

Ingrid Stevens

Department of Fine & Applied Art, Tshwane University of Technology.

Email: stevensie@tut.ac.za

This article examines the legal protection available to works of craft in South Africa. Current protection in terms of intellectual property legislation is measured by determining whether three different enterprises enjoy protection, and then assessing whether this protection is adequate. The conclusion is reached that, while current protection is insufficient, additional protection cannot be sought in the field of intellectual property law.

Key words: craft protection; intellectual property law

Kan intellektuele eiendomswetgewing die Suid-Afrikaanse handwerkbedryf voldoende beskerm?

Hierdie artikel ondersoek die regsbeskerming wat in Suid-Afrika vir handwerke beskikbaar is. Die huidige beskerming wat ingevolge intellektuele eiendomsreg beskikbaar is, word gemeet aan die hand van drie bestaande handwerkondernemings, en daar word dan bepaal of hierdie beskerming voldoende is. Die gevolgtrekking is dat, alhoewel bestaande beskerming onvoldoende is, daar nie bykomstige beskerming in die gebied van die intellektuele eiendomsreg verwag kan word nie.

Sleutelbegrippe: handwerkbeskerming; intellektuele eiendomsreg

In South Africa, and the majority of countries that are signatories of the Berne Convention, craft and other artisanal works are protected by the relevant copyright legislation as artistic works, more specifically ‘works of craftsmanship’ in terms of the South African definition (s1(c) (‘artistic work’) Copyright Act 98 of 1978). However, craft work is exceptionally vulnerable to counterfeiting, as the individual items are frequently not of sufficient value to make recordal of copyright details, or a claim of copyright infringement, a viable proposition. In some instances, their very nature makes reproduction easy and inexpensive. Despite this, craft works are generally viewed as having major economic force in developing nations, and can empower communities who would otherwise have little prospect of earning a livelihood (Fowler 2004:113).

The position in the same in South Africa, and many craft enterprises are destroyed by imitators and counterfeit copies. Those that are successful often owe their success to the difficulty in reproduction of the items concerned – usually because they are so labour-intensive and because the makers are so skilled. Elsewhere, attempts have been made to increase the protection given to craft works by copyright legislation (Fowler 2004: 114). This has not occurred in South Africa, despite the fact that such works form a valuable contribution to the South African economy and assist those who are particularly vulnerable, the uneducated rural poor.

In this article, we study three successful South African craft enterprises to determine whether the protection that is currently available in terms of existing intellectual property legislation is adequate. All three these enterprises are what the lay person would consider examples of ‘South African craftwork’. Each of the enterprises illustrates a different facet of the protection required by craft enterprises against unauthorised copying. Schmahmann (2000:92) suggests that one should be wary of referring to works as ‘products’ as this automatically defines them as produced “in the context of a factory” or at best as a work of craft produced anonymously,

rather than a piece of ‘art’. Because of different words and categorizations used by interviewees in the different enterprises, we shall use a variety of words such as ‘art’, ‘craft’, ‘product’ and ‘goods’ and do not intend that any should be pejorative, nor do we intend to imply that there is a hierarchical difference between them.

We provide a very brief general outline of the protection that is available when works of craft are copied, and outline some of the problems that might arise in respect of each type of protection.

We then discuss the specific enterprises that form the subject of each study. In each instance, we first sketch the origins and background of the enterprise, and discuss the work produced to illustrate whether it might or should be considered ‘craftwork’. We then discuss the current legal protection available to that enterprise against infringement, and consider whether additional protection is necessary or desirable and, if so, who or what requires such protection

Current legal protection

Copyright

The definition of an artistic work in the Copyright Act reads as follows:

‘artistic work’ means, irrespective of the artistic quality thereof-

- (a) paintings, sculptures, drawings, engravings and photographs;
- (b) works of architecture, being either buildings or models of buildings; or
- (c) works of craftsmanship not falling within either paragraph (a) or (b) (section 1 (1)).

Clearly, works of architecture (b) are not relevant here, but the craftworks discussed below will always qualify under (c), while a few of the large Ardmore works might qualify as sculptures under (a). The distinction is not relevant for present purposes.

The next important matter is to determine ownership of the work, as only the owner can institute action for copyright infringement. The Act provides that the author is first owner of the work, and the author is the person ‘who first makes or creates the [artistic] work’ (section 1(1)). The exception is where a work is made ‘in the course of the author’s employment by another person under a contract of service or apprenticeship’ when the employer is owner (section 21(1)(d)). Two possible problems can be identified here – what happens when more than one person is involved in the creation of a work; and when is a work made ‘in the course of employ’? The second problem, while very relevant in other circumstances, when a person creates something that is only tangentially connected with his or her employment,¹ is generally not an issue in the three enterprises discussed below. However, it is only the craft enterprise that might wish to institute an infringement action – the authors of the types of craftworks discussed below are generally not in a financial position to protect their creations. If a person is not ‘employed’ by the craft enterprise, but works on contract or under some looser arrangement, an assignment of all rights under copyright is essential, as otherwise the enterprise cannot sue for copyright infringement. Even employees should be asked to sign an acknowledgement that the enterprise is owner of any works that they create, so that it is easier to prove copyright if required. The first problem appears easily solved, as the Act makes provision for works of joint authorship (section 3(1)) where two or more persons are involved in the creation of a work. However, if a work has

gone through various phases of development which involve input by different people, it can be difficult to assess whether the different individuals are co-authors or mere assistants.

When is a work in which copyright subsists infringed? The Act provides that only the owner of the work may reproduce, publish or adapt the work (section 7). So anyone else who performs any of these actions infringes the work concerned. The problem arises when it becomes necessary to prove that a work, which shows similarities to the original craftwork, has been reproduced or adapted from that work. The courts have created a two-fold test to determine this. Firstly, objectively speaking, are the works substantially similar? Second, is there a causal connection between the original work and the copy? This is clearly illustrated in a decision on whether the design for a curtain and wallpaper had been copied, for use by another textile manufacturer (*Cavendish Textiles Ltd v Manmark (Pty) Ltd* 115 JOC (T)). The court held that, in determining whether or not there had been an infringement, it had to be determined whether or not substantial features of the artistic work in which the plaintiff held the copyright remained recognizable in the defendant's design. If they did, then there would have been an adaptation of the work as defined in the Copyright Act. The test to be applied was a two-fold test. It had to be determined 1. whether there was any possible causal connection between the two works and 2. whether there was sufficient similarity between the two works objectively determined (at 116). So, for an enterprise to prove infringement, not only similarity but the opportunity to copy must be shown.

Finally, the courts have held that copying of a substantial part of the work is essential before infringement occurs. Here, the test is not one of quantity but of quality - the copying of a small but essential part of the work will constitute infringement (*Galago Publishers v Erasmus* 1989 (1) SA 276 (A)).

Copyright subsists automatically if the inherent (originality and material embodiment) and formal (author a qualified person or work made in South Africa) requirements are met. It is not necessary to record copyright anywhere, although a copyright notice (©) is useful to serve as a warning to others. Copyright lasts for the duration of the author's life plus fifty years (section 3(2)(a)).

Trademark protection

It is easier to prove trademark infringement than copyright infringement. A trade mark must be registered by the person who wishes to use it – here the enterprise concerned, not the individuals constituting the enterprise. Registration takes place in one or more of specific classes – for example, one class includes clothing and footwear, while another class includes textiles (section 11(1) Trade Marks Act 94 of 1993). A trade mark is usually infringed by unauthorised use on the goods for which registered, or on similar goods (section 34(1)(a)(b)). Once registration has taken place, the proprietor can act immediately against parties who use the same or a similar mark, and merely has to show his or her registration certificate to prove entitlement to use the mark concerned. In contrast, in copyright matters, it is always necessary to prove ownership in court, from the author to the current owner, which is time-consuming and expensive.

A trademark registration lasts for ten years, but can be renewed indefinitely on payment of a renewal fee. Copyright, on the other hand, lasts for the duration of the author's life plus fifty years (section 3(2)(a) Copyright Act).

Other intellectual property protection

If a craftwork is copied and it is not possible to prove ownership for copyright purposes, it is possible for the enterprise concerned to institute an action for passing off. This is a common-law action where a trader represents to the public that his or her goods are those of his or her competitor, by using the competitor's marks or getup. However, should the competitor wish to stop this passing off, he or she will have to prove not only that that his or her enterprise has a reputation, but also that the other trader's dealing in similar goods will confuse or deceive the public (*Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc* 1972(2) SA 916 (A)). It is an expensive exercise to prove this degree of reputation in court.

Finally, design protection is available, but only for registered designs that are made by an industrial process, which makes it generally not relevant for craft works.

We have shown what legal protection might be available for craftworks against copying, and will now discuss the various enterprises and how this relates to the works they produce

Ardmore Ceramic Art Origin and background

Ardmore Ceramic Art is an enterprise producing decorative ceramics in the KwaZulu-Natal Midlands. It has been in existence for twenty-three years, since 1985. Fée Halsted-Berning, a fine arts major in painting and ceramics, started Ardmore after she married and went to live on her husband's farm, Ardmore, in the KwaZulu-Natal Midlands. The enterprise remains situated on Ardmore Farm, although a second studio with a museum has since been opened at Lavendula Farm near Caversham.²

Halsted-Berning began working with Bonnie Ntshalintshali, a daughter of one of the farm workers, producing ceramics together. Although Halsted-Berning had training in hand-made ceramics, neither woman had been trained to throw pots on the potter's wheel, so they approached ceramics more creatively than would many potters, using clay as an expressive medium. Ntshalintshali, although illiterate and uneducated in terms of western schooling, proved to be exceptionally talented and knowledgeable about Zulu customs and practices. She became a creative and well-known artist and the two women formed a strong, fruitful partnership.

Because the work was noticed by buyers and the art world almost immediately and sold well, more local people joined the studio, making work that initially resembled Ntshalintshali's. Both Halsted-Berning and Ntshalintshali took part in prestigious exhibitions and Ardmore also began to exhibit as a studio. Individual artists then joined Ardmore and made their own, individual work and the studio also produced certain studio lines in larger batch productions to cover costs.

Ardmore has since become famous both nationally and internationally and has achieved the highest prices ever paid for South African ceramics. The work is exceptionally creative and of impeccable quality. Ardmore now employs 50 people working from the two studios.

Design of the products

The design and appearance of Ardmore have changed throughout its history, although the products remain identifiable as Ardmore's. Halsted-Berning, the founder of the enterprise, was influenced

by the lush paintings of Henri Rousseau and traditional European and English ceramics like English Staffordshire figurines, English porcelains and the works of Bernard Palissy. She was also inspired by ethnic ceramics, such as the painted and modelled folk ceramics of Mexico. Ntshalintshali and subsequent local Ardmore artists brought a knowledge of Zulu patterns and decorations, as well as traditions of clay modelling, for example, figurines of small domestic animals.

Initially, Halsted-Berning and Ntshalintshali worked in a creatively symbiotic relationship and the Ardmore style developed relatively quickly. The designs developed through a process of looking at varied pictorial source material, followed by an intense process of making and high productivity. They made painted sculptures because, at that time, neither had ceramic technology skills such as knowledge of glazing. They also developed a more utilitarian line, for example modelled and painted candlesticks and eggcups, to make money.

When more women joined the studio, they would initially copy existing Ardmore products until they developed confidence and began to contribute their own ideas. A major design impetus occurred when men began to join, influenced by the fact that their wives were earning more than they themselves could in the cities. The men began to throw on the wheel and it is they who now do the throwing, the sculptural pieces and almost all the modelling onto thrown vessels. So they have contributed greatly to the designs of Ardmore. Other workers, both men and women, are the painters of the sculpted pots. An Ardmore ceramic piece is usually made by three people: a potter who throws the basic shapes, a sculptor-modeller who models the complex clay additions and a painter who adds the equally complex painted decoration. Ardmore artists are required to be creative and may not produce repetitive work. Each piece, even if its subject is the same as another, must be inventive and unique.

In general, while there is an Ardmore style, based on simple vessel shapes elaborated with complex modelled additions and highly detailed, brightly painted decorative surfaces, there is a great deal of individuality in the work of different artists. The essential Ardmore subject is nature, which is not restricted to South African topics but reflects natural themes from all around the world. The vessels are covered with modelled animals like leopards, lions, cheetahs, panthers, tigers, elephants, zebra, giraffes, fish, birds such as toucans, flamingos and sunbirds, and many flowers that are indigenous or exotic. These are painted with details that elaborate the forms while the spaces between are painted with decorations consisting of flowers, foliage and abstract, geometric patterns (figure 1).

The studio produces what may be seen as three ‘ranges’. The first is the utilitarian line, or ‘curios’, which are sold through upmarket shops and are very expensive compared to most other South African ceramics. These cups, bowls, platters, eggcups, small jugs and candlesticks all have simple modelling, for example, dishes surrounded by modelled leaves or traditional ceramic forms like teacups which have a sculpted handle. They are painted in elaborate and exuberant patterns. The ‘art’ pieces, made by the best Ardmore artists, are kept for exhibitions and are extremely expensive. They consist mainly of larger vessels with inventive and extravagant modelled additions and very elaborate painting. The third range, of which fewer are made, is the purely sculptural ‘tableaux’ depicting, for example, the artists at work or typical rural scenes. These are often left plain white.



Figure 1
Ardmore Ceramic Art. 1992. Modelled and decorated casserole, painted by Punch Tshabalala.
(Photograph, Susan Sellschop).

The Ardmore products were from the beginning viewed as ‘art’ by buyers, curators and collectors, rather than as ‘crafts’, which is the more common categorization of ceramic vessels. This was greatly encouraged when Halsted-Berning and Ntshalintshali jointly won an important South African art award in 1990. Ntshalintshali was invited to participate in the prestigious Venice Biennale in 1993. Events such as these helped to establish both women and the other Ardmore studio artists as noteworthy artists. In keeping with this approach, the work has always been signed by the artists involved in its making and their names have been publicized on exhibitions and in all Ardmore’s publicity material. The work of the best artists is priced much higher than the others and is not sold through shops but on exhibitions. The artists are promoted as individuals and not as part of a collective.

Ardmore is one of South Africa’s most successful craft enterprises judged by its longevity, the number of artists employed, their very high earnings for the sector and the renown of its products, which is reflected in their very high selling prices. They are bought around the world as collectible art or objets d’art. Recently, Ardmore branched into new areas, creating limited edition dinner services, scarves, cushion covers and table cloths. These were created by an outside designer who used key elements of Ardmore ceramic ware to create repeat patterns suitable for fabrics and ceramic sets.³

The aesthetic appearance of Ardmore is not particularly South African in that the natural subjects are taken from all over the world, its historical precedents are certainly in European and English ceramics and its technologies are western. However, Halsted-Berning notes that the ability to observe and model from nature and the rhythms, patterns, repetition and colours of African art and artefacts, particularly Zulu aesthetic sensibilities, form the visual foundations of the work. It is certainly unique and not like anything else being made locally or internationally. It can be seen to be part of the formation of a new or invented South African vernacular, following a postmodern aesthetic that juxtaposes widely divergent, hybrid sources in complex ways.

Protection

Current protection

The name ‘Ardmore’ is a registered trade mark. Ardmore is a registered close corporation, with Halsted-Berning as the sole owner. The logo @, for Ardmore, is also used on the ceramics. The name and logo enjoy trademark protection and the name is registered as a company name.

Ardmore is the name of the farm where the ceramics were first produced, but it is unlikely that it qualifies as a geographical indication (GI). While GIs are not protected per se in South Africa, they can be registered as collective or certification marks (section 42 and section 43 Trade Marks Act). However, such registrations are not appropriate for an enterprise structured like Ardmore, with a proprietor who selects employees on the basis of their skills. Neither does the pottery owe anything to the specific location where it is produced. Also, if the name Ardmore were viewed as a GI, the fact of a second studio elsewhere would be problematic.

At first glance, one would assume that each work enjoys copyright protection. They are original artistic works, and all the makers are qualified persons within the meaning of that term. Additionally, the works are made in South Africa. But a closer study of the artistic process shows that a claim founded on copyright might be problematic. The descriptions indicate that more than one person is responsible for each work, and that many of the works are reworkings of existing designs. None of these matters is insurmountable – a work may be created by more than one person, and an adaptation of a work by the copyright owner also enjoys protection. Unfortunately, problems with proof of authorship make litigation more difficult, and more expensive. Also, copyright does not give protection against derivative works by others produced ‘in the style of’ Ardmore Ceramics.

None of the three ranges enjoy protection in terms of the Designs Act – the two ‘art’ ranges because they fall outside the definition of an aesthetic design, and the ‘bread-and-butter’ range because the pieces are not intended to be multiplied by an industrial process (section 14(1)(a) read with section 14(4) Designs Act 195 of 1993).

The Ardmore products have been copied – in one instance, an Ardmore design that had featured in a book on the enterprise was reproduced on fabric. As illustrated above, the only current remedy would be to institute action for copyright infringement by adaptation of an artistic work (section 23(1) read with section 7(e) Copyright Act). If, at that time, the fabric was marketed as ‘Ardmore’ fabric, and the trademark had been registered in the appropriate class,⁴ an action for trademark infringement could have been instituted. A claim based on unlawful competition might also have been a possibility. While all three of these options are expensive and time-consuming, the Ardmore enterprise is sufficiently successful that its products are worth protecting - smaller craft enterprises would not have the wherewithal to fund litigation.

To protect the new ventures into textile and homeware, Ardmore is seeking trademark protection in a number of classes.

Kaross

Origin and background

Kaross is an embroidery business that has been in existence for more than twenty years. It is situated on a farm in Limpopo Province in a rural area near the town of Letsitele in the Guyani District, surrounded by small, scattered rural villages.⁵

Irma van Rooyen, who was a practising artist, moved to the farm in 1985 with her husband. According to van Rooyen, the wives of the farm employees and women from villages in the area had no work and poverty was rife. They were largely uneducated, illiterate and unsophisticated. While there is no historical, indigenous tradition of embroidery in southern Africa (Nettleton 2000:20), the Shangaan women from the area did have some tradition of decorating their houses and clothes, for example the *minceka* (a flat, rectangular cloth, often decorated with beads or embroidery, that is wrapped around a woman's body as clothing (Nettleton 2000:37). They also made tray cloths and bed spreads embroidered with flowers in a European style that may have been adapted from Afrikaner traditions of embroidery and quilting. So embroidery skills existed. In order to help the women earn some money, van Rooyen offered them cloth and thread, suggesting that they embroider pictures of their lives, which she would try to sell.

The women were initially not able to do this as they lacked design and drawing skills or even any conception of what van Rooyen wanted. So she made drawings of their homes and villages and the surrounding bush and its animals, which they embroidered. Initially her family and friends bought the work. As news of the project spread, more and more women joined, until very soon there were 125 embroiderers. By 1987, Kaross was established as a business. Solomon Muhati, a young local man who showed drawing and design skills, came forward and, with some training from van Rooyen about what kinds of designs were suitable for embroidery, began to assist her by designing and drawing the designs onto cloths. Shops began to buy the embroideries and slowly the enterprise grew.

Kaross is a registered close corporation owned by van Rooyen, which sells its products to many shops as well as through a major craft and curio retailing chain. It has over a thousand crafters, mainly Shangaan women, embroidering from their homes, and a small managerial staff working from a converted tobacco barn on the farm, with three young local men doing all the drawing and design.

Design of the products

The initial Kaross designs came from van Rooyen, because she did the drawings for the first women who attempted embroidery. She also selected the backing cloth, which is usually black, chose the colours and type of thread and advised on stitches and colour combinations. She was inspired by other embroidery projects in the area, such as Xihoko, which had been started in Guyani in 1981, and Chivirika, which started in 1986.⁶ As she admits, the initial 'character' and appearance of Kaross was hers, combined with the embroidering abilities of the women. Much of her style still undoubtedly remains, as the appearance of the smaller animal-and-background cloths has changed little through the existence of the enterprise.

However, van Rooyen has for a number of years done no designing. Instead, the designing and drawing of all designs onto the black cloths is now done by three young local men, Solomon Mohate and Calvin Mahluale, who have been employed for a number of years, and Thomas Khubayi, who joined more recently. They all initially approached van Rooyen asking to design, showed talent and are now remarkably skilled, fluid and rapid in their designing and inventive in their ideas and their interpretation of subject matter. Van Rooyen still discusses ideas and designs with the designers and suggests new ideas when the drawings seem to become too repetitive. So she has a strong advisory and, one might say, a teaching role. She directs and makes suggestions for large commissions, such as the aviation scenes for South African Airways and the scenes for the Oprah Winfrey school, because the local designers are not always familiar with such urban

themes, and she constantly provides them with visual source material.

The most characteristic design of Kaross is a relatively simple one of an animal, bird or plant on a decorative and textured ground created by different stitches in bright colours on a black cloth, surrounded by geometric borders. Van Rooyen refers to these as the ‘bread-and-butter’ cloths, because they remain popular and have been made throughout the existence of the enterprise. These designs are repeated, so that items are linked, for example, a number may be selected as matching place settings, but no two are ever exactly the same. Other designs are produced as one-offs or in limited repeats such as ‘white-on-white’ cloths, which are complex, all-over designs done on white, grey or other subtle colours of cloth in matching colours of thread. These are visually sophisticated, beautiful and quite distinctive, as the light coloured backing cloth gives them a character different from the work of most other South African embroidery projects, which is done on black cloth. (Schmahmann 2000:111) points out that black cloth was often used for the minceka and became the trademark of projects such as Xihoko, Chivirika, Kaross and Mapula. It may also, however, simply be easier to keep clean during the embroidering process and may now, through its familiarity, be demanded by buyers.) Other limited ranges are the ‘interior’ cloths, beautiful and complex designs of birds, flowers and foliage that are made into wall hangings, bedspreads and upholstery material, and ‘story telling’ cloths, which are filled with figures, animals and objects.

The simple ‘bread-and-butter’ embroideries either have portraits or, more commonly, have an animal in the centre and a geometric border, which was initially based by van Rooyen on the geometric painting found on some houses in the area (figure 2). The larger cloths, the ‘theme’, white-on-white or ‘story-telling’ cloths, have more space for numerous objects, such as houses, trees, flowers, people and birds. They tell stories, usually from the area, in complex narrative arrangements of figures and objects. Subjects are very varied and include scenes such as the marula tree, the cattle, the traditional healer or sangoma, the nearby Risaba Crossing with its taxis and buses, and events such as weddings. Some of these theme cloths have a myriad of intertwining motifs across their surfaces and are as complex, decorative and beautiful as oriental carpets. They are highly decorative in their repeating motifs, their patterns and their flowing, curvilinear lines and arabesques. This has developed into the recognizable Kaross signature style or ‘house style’.



Figure 2
Cushion covers (portraits). Anonymous. 2006. Kaross. Thread and backing cloth. Approx. 31 x 30 cm. (Watterson S.a.:43).

Kaross designs are thus very varied in their subject and forms and also in that they reflect the ideas of three designers, yet are strongly identifiable as coming from Kaross, rather than being the work of individuals. Constant visual elements are the use of black cloth as a backing, the type and ranges of rich embroidery colours and the fact that Kaross cloths are almost all completely covered in stitching, with no 'open' areas. This makes them richly colourful and textured, with a dense and complex surface, even on those cloths with relatively simple subject matter and design.

The Shangaan embroiderers do not develop their own designs and are given cloths with designs drawn onto them in white pencil. These designs are in outline and fairly simplified, and do not indicate details of the patterns and textures which will fill them out. Along with a drawn cloth, each embroiderer is given a measured assortment of threads in a variety of colours that have been chosen by the managers in the workshop in good colour combinations that work well together. The women have seemingly few creative decisions to make. However, the amount and placing of colours on the design, the stitches used and textures that result are their decisions, so there is an element of creativity and the work is not in any way mechanical.

Van Rooyen describes the style of Kaross as 'South African', and this is a convincing description as the embroideries combine her initial Eurocentric approach with the design inputs of the Tsonga-Shangaan designers and the aesthetic sensibilities of the embroiderers. The approach can be seen as part of a developing South African vernacular. The cloths are marketed as typical and representative 'South African' products. The website describes the works as 'rewriting a culture by exploring its heritage and re-applying it to modern, marketable products and artworks' (www.kaross.co.za). The website gives general information on the enterprise and its setting and stresses its origins in the Tsonga-Shangaan culture, as all the workers come from this group. The products are sold almost exclusively in South Africa, rather than internationally, as they have a particularly South African style that might be inappropriate overseas.

In summary, Kaross is a well-established, well-managed enterprise with inspired leadership and a long history, producing products of an exceptionally high quality. It provides employment to more than a thousand people and is still expanding due to growing demand for its products. It has become large enough to improve the surrounding communities by uplifting thousands of people to a marked extent, and it has established a tradition of embroidery in the area.

Protection

Current protection

The enterprise Kaross (meaning blanket in Shangaan) has obtained trade mark protection for both the name Kaross and for the logo in a variety of classes, including leather goods, textiles, clothing and embroidery work. The close corporation is called Karosswerkers CC trading as Kaross so the name itself is not a registered company name.

The works are more strongly linked to a single individual than in the case of Ardmore. One of three designers is the author of each individual piece – the embroiderers add their skill in execution but cannot be said to assist in the creative process. As such, it is easier to prove that copyright subsists in the individual works, and Kaross has an excellent method of recording authorship. Each piece of work is photographed on completion and filed by date, so it would be relatively simple to prove copyright in an individual work. However, when Kaross recently wished to prohibit reproduction of one of their works, the photographic evidence that the work originated from Kaross was insufficient, as there was no proof of the identity of the original

author (designer of the pattern), neither was there a written assignment of copyright. So it was impossible to prove current ownership of copyright, which is essential to found a claim of copyright infringement (Jonker 2011).

Some works are made as a linked series of items, for example sets of table mats, but do not enjoy the protection of the Designs Act because they are handmade. Although Kaross works have been copied, the work is so painstaking to make that copies have not affected the success of the original works. Clearly, if machine-made copies were ever feasible, this would be a greater threat. Once again, copies that are made ‘in the style of’ Kaross cannot be prevented unless passing off proceedings are instituted, and, given the existence of other enterprises that also produce embroidered works, this might be problematic.

Monkeybiz South Africa Origin and background

Monkeybiz is a bead making project that has been running for over ten years. It is part of a larger community project that was started in Cape Town in 1999 by two sculptors, Shirley Fintz and Barbara Jackson.⁷ Fintz had an interest in African art and in popular culture and both Fintz and Jackson had extensive collections of, amongst other objects, African art and particularly antique African beadwork. Fintz, inspired by beaded dolls that she had seen at the Grahamstown Festival, encouraged her char, Mathapelo Ngaka, who needed extra income, to make such a doll. Jackson and Fintz supplied beads bought from a local bead shop and the char’s friends and neighbours soon started delivering dolls that they had made. The dolls were bought by Jackson and Fintz, who initially had no market for them. They were primitively made and not marketable as they were. Ngaka organized the group of women making beaded dolls. She was creative and talented, and eventually became one of the directors of the project. Word spread and more and more women turned up, wanting to make beaded objects. Jackson and Fintz bought all the dolls, even the poorly made ones. Eventually they had many thousands of rands worth of dolls, together with some other objects such as bags. The dolls were initially largely unsaleable, as no design aesthetic or style had been established and the work was, and looked, experimental.

Jackson and Fintz began to exhibit the work, alongside regular studio exhibitions of work by established artists. They found that it did not sell well, unless displayed interestingly, for example, as an installation which made the individual pieces more impressive as part of a larger whole. Jackson and Fintz, who both travel overseas regularly, began to show the works to shops encountered on their travels, and, as word spread, sales began to increase. The beaded products diversified to include animals, which became very popular, as well as other objects.

The project, a Section 21 (or not-for-profit) company, now employs a small number of people, such as Fintz, in full time managerial and marketing positions, and has 450 women making beaded objects. The women generally come from very poverty-stricken backgrounds such as urban townships and informal settlements like Khayelitsha, Mandela Park, Samora Machel and Phillipi. The profits are used to run charitable projects started by Monkeybiz, such as an HIV-Aids clinic and a soup kitchen.

Design of the products

Beadwork is an African tradition found in South Africa and throughout the continent. This is important for the project as, firstly, many women still know how to do beadwork or can learn

it from other women, so basic technical training becomes unnecessary. Although it is perhaps a dying tradition, many of the women remember it from their grandmothers. Secondly, when it comes to marketing, bead work can be branded as typically African or South African, which is appealing both to South Africans looking to support local products and to tourists wanting to buy an 'authentic' memento of a visit. More specifically, beads are associated with Xhosa and Zulu decorative arts and most of the members of the project are women from these tribes. So beadwork has the advantage of being a product of indigenous cultures. Products themselves are not traditional in any way.

The aim of Fintz and Jackson was not necessarily to produce African art or craft, although the materials, techniques, the dolls, deriving from Zulu traditions, and the animals, which are associated with Africa, might automatically be associated with Africa. Their aim was to make something contemporary, fresh, unique and colourful. The nature of beadwork itself helps to unify the diverse products and identify them as coming from Monkeybiz. Fine geometric patterns, rhythmic repetition and bright colours with strong contrast are inherent in the material and technique. The actual objects made are now diverse and new ones are added as and when Jackson and Fintz think of them, such as snowmen and Father Christmases at Christmas time. Generally, the products include: dolls and animals in a variety of types and sizes, single, grouped or stacked into totems; renditions of popular consumer products including packaging, logos and labels, like Lion Matches or Marmite bottles transposed into beads; beaded picture frames and flat objects like refrigerator magnets, table place mats or 'pictures'. Some small, colourful sculptural tableaux are also produced (figure 3).

Within these, the range of subject matter is wide: modern and traditionally dressed women and men; narrative scenes of activities such as boxing, weddings or domestic scenes; abstract geometric patterns; portraits such as that of Nelson Mandela; well-known commercial products and labels; political and educational slogans, like Aids education messages; and more. So, while materials and techniques are traditional, the objects are not and the work bears little resemblance either to traditional beadwork or to the ubiquitous beaded curios.

Ideas and themes are developed by Fintz and Jackson or by their full-time assistants and are suggested to the bead makers, who then make the products as they see fit. Individual project workers, whether seen as crafts people or artists, may, within this system, develop more or less individual approaches and styles and are encouraged to do so, according to Fintz. So Fintz and Jackson are the designers in the sense of being the originators of ideas and themes and the controllers of colours, while the bead workers are the designers of their own particular versions of these.

The products of Monkeybiz are marketed as 'authentic' contemporary South African products, which may seem contradictory but their material and techniques are often identifiably 'African', while they are simultaneously innovative and not at all traditional in their forms or subject matter. The objects are generally not functional, but are instead decorative and may be categorized as ornaments or sculptures. They are innovative when compared to the plethora of other beadwork found in South Africa, from curios such as beaded cups and covered bottles to traditional beaded jewellery.

Every doll and animal has a tag on it, signed by the artist and telling a story, often about their circumstances, their lives and their hopes. This helps to personalize each piece, making it more special in the eyes of the buyer. It also helps, by positioning the maker as an individual rather than an anonymous craftsman, to situate the works in the realm of art rather than craft.

This can, and often does, lead to higher prices. The fact that little of the work, except for items such as tablemats, is functional might be a constraint on selling, so its classification as art is necessary to persuade buyers to purchase what are essentially purely decorative object.



Figure 3
Stacked animals. Anonymous for Monkeybiz. 2003. Coloured beads. Sizes varied. (Viljoen 2003:6).

Monkeybiz is a non-profit community project or ‘social’ business which uses its profits for community projects. It has provided an opportunity to earn an income to large numbers of unemployed women from Cape Town’s townships and squatter communities and, furthermore, has provided creative opportunities which have resulted in some of the bead makers considering themselves and functioning as artists. Its products are an innovative combination of African traditions and contemporary ideas.

Protection

Current protection

Monkeybiz has no trade mark protection. The tags on each item identify an individual as its author, and so copyright protection could be available if a direct copy of a specific work is made. This is unlikely, and it is more usual for the style to be imitated than directly copied. To quote one of the founders ‘As we started a revival of beadwork as a craft, many companies opened after seeing that there is a market and beads could be used in a contemporary way. As artists we know there is not much you can do to prevent copying, especially considering everything is a one off’. Once again, design protection is not relevant as the items are hand-made. So, at the moment, apart from copyright, any protection would be in terms of unfair competition law, which requires proof of reputation and so makes litigation notoriously expensive. The company registration merely protects against another company appropriating the same name.

Analysis

We have dealt with these three craft enterprises in some detail. It is clear from the narrative that artists and craftspeople at all three create work that has artistic value and deserves some form of protection against direct imitation. It is equally clear that, from a social viewpoint, all three enterprises are laudable projects that empower many people, mostly women, from extremely disadvantaged backgrounds.

From an intellectual property rights viewpoint, all these works qualify for copyright protection as works of craftsmanship. However, copyright litigation is expensive and it is unlikely that any of the enterprises, except possibly Ardmore Ceramics, would be interested or able to legally protect the artists' works against infringement. But this is the position with artists everywhere, and very few authors of 'art' are able to enforce their intellectual property rights.

Do the South African craftworks described above require more protection than now available?

The specific enterprises we have described above function like any other art or craft collective. The artists work together, under some form of supervision or quality control that they have subscribed to, and they are paid for the works that they themselves produce, either with others or alone. As with any other artistic enterprise, they have the current legal protection of copyright, trade mark and passing off available. Whether this protection is accessible or affordable is an issue that affects all artists and craftspeople, not only these workers.

But this is not to say that craft workers need no further protection. Many other, less fortunate or less skilled workers, spend many hours each day producing handwork for which they are paid a pittance. Maureen Liebel and Tirthankar Roy 'Handmade in India: Traditional Craft Skills in a Changing World' in *Poor People's Knowledge* (2004:53), recount harrowing stories of talented artisans dying from starvation or living in extreme poverty, while their handworks support a flourishing export trade. Similar abuses happen in South Africa. This requires labour or social assistance legislation - intellectual property legislation, no matter how well-intentioned, cannot rescue these people.

The proposed South African Intellectual Property Laws Amendment Bill 8 of 2010 offers no assistance to such craftworks. The policy document accompanying the original Intellectual Property Laws Amendment Bill of 2007 (GN 552 in GG 31026 of 5 May 2008 at 9) states that the country is disadvantaged economically without immediate protection against the poaching of traditional knowledge locally and internationally. At first glance, it would appear that it was designed to also assist the handicraft industry, because it lists a benefit of the Bill as: 'laws of copyright, designs, trade mark and geographical indications may be used to protect indigenous culture. Designs unique to South Africa, for example, could be protected using the laws of design. There is a need for aggressive marketing of these products and there should be market access' (South Africa 2007:10).

This quotation, while legally incorrect, implies that the intention of the legislature is to offer such extended protection for handicrafts, as these are the only craft products that could be 'aggressively marketed'. However, the definition of 'traditional' in the Bill excludes the majority of currently produced South African craft works, as its proposed amendment of the Copyright Act 98 of 1978 includes a definition of a traditional work as '...an artistic work which is recognised by an indigenous community as a work having an indigenous origin and a

traditional character’ (s 5(g) draft Bill). Most South African craftwork, and all the enterprises we have dealt with above, are not considered ‘traditional’ nor are they created by a homogenous ‘indigenous community’.

The Bill has come in for much criticism. It is overbroad, and various key concepts are either undefined or ill-defined.⁷ Judge Harms describes such intellectual property legislation as illustrating ‘the tendency to adopt unrealistic legislation having little or no practical consequences but that makes political statements and earns politicians kudos’ (Harms 2009:176). The Bill will not protect current South African craft work, the ‘new South African vernacular’.

Conclusion

We have dealt with three of the most successful craft enterprises operating in South Africa today. These are enterprises that contribute enormously to the welfare of the most vulnerable sector of the South African public. They provide an income for craftspeople without requiring their relocation to an urban environment. They empower specifically women and the rural poor.

It is unfortunate that there is no legislation that can easily and inexpensively protect such craftspeople against imitation of their creations. However, western concepts of intellectual property focus on individuals, not groups, and legal protection of intellectual property rights is only available through the court system.

Protection for these enterprises lies in their skills and the quality of their work. The enterprises remain successful because they create works that are sought-after, and the authors of these works display talent and artistic ability. Their future protection lies in the continued encouragement of younger creators of craftworks, and in their ability to innovate and continue to maintain the quality of their work.

Notes

1. See *King v South African Weather Service* 2009 (3) SA 13 (SCA).
2. We shall refer to the enterprise simply as Ardmore throughout. Ingrid Stevens visited Ardmore over two days, 02/07/2007-03/07/2007), in order to spend a day at each of its two studios, interviewed the enterprise’s owner, Fée Halsted-Berning, as well as various others involved as potters, sculptors, painters and managers in the enterprise, investigated the existing literature and the company’s website and viewed the company’s products both in its own showrooms, on exhibition and in a number of galleries and shops.
3. A couch covered in fabric designed by Ardmore was voted one of the ten most beautiful objects in South Africa (Design Indaba 2011 reported in SA Art Times May 2011:44).
4. Ceramics fall in class 21 while fabrics fall in class 24.
5. Ingrid Stevens visited Kaross on two separate occasions. On a preliminary visit (22/08/2006), she observed the workplace and the products and spoke informally to its employees. On the second visit (01/02/2007), she interviewed the enterprise’s owner, Irma van Rooyen, as well as various others involved as managers, embroiderers and designers. She also investigated the existing literature and the company’s website and viewed the products both in its own showroom and in a number of galleries and shops.
6. Xihoko no longer exists. It ceased operations when its founder, Jane Arthur, left South Africa and, while Chivirika may still be operational, little information and no craft work that was made recently could be found.
7. Ingrid Stevens visited Monkeybiz’s offices and showroom in Cape Town for a day, (05/12/2006), interviewed one of the enterprise’s two founder-managers, Shirley Fintz, as well as various others involved

as managers, assistants and craft workers in the enterprise, investigated the existing literature and the company's website and subsequently viewed the products both in its own showroom and in a number of shops.

8. See for example Tracy Renecas 'Protection of traditional knowledge systems in South Africa' part 2 *De Rebus* October 2008 24:25 – 26 and LTC Harms 'A few negative trends in the field of intellectual property rights' 2009 (72) *Tydskrif Hedendaagse Romeins-Hollandse Reg*, p1:14-15.

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Roshana Kelbrick is a professor of intellectual property law at the University of South Africa. She has an LLD from that institution on the remedies available for trademark infringement, and has published widely both in South Africa and Europe.

Ingrid Stevens is the Head of the Department of Fine & Applied Arts at Tshwane University of Technology. She has a D Tech (Fine Arts) degree from that institution, which focused on sustainability in South African craft projects. She has published extensively, both in the popular press and in scholarly journals, on contemporary art, South African crafts and the discipline of art criticism.

Author-architects and the moral right of integrity in copyright law¹

Thorsten Lauterbach

Lecturer in Law, Aberdeen Business School
Robert Gordon University (Scotland, UK)
Email: t.lauterbach@rgu.ac.uk

The agenda for current discussion in copyright law has largely been set by digital technology. But whereas issues like illegal file-sharing and fair dealing rightly occupy centre-stage, the issue of moral or author's rights has become increasingly important, particularly amongst architects of commissioned works. Buildings, plans and sketches regularly attract copyright protection if they comply with the minimum requirements of originality or individual creative contribution. Often, author-architects find themselves required to take legal action against owners of their creations: authors object to modifications of their works, arguing that these breach their integrity right, while owners point to their property rights and the change of purpose or function which necessitates lawful changes to buildings. This paper considers recent decisions in civilian jurisdictions in an analysis of the breadth of the integrity right and available remedies.

Key Words: Copyright; authorship; work of architecture; moral rights; right to integrity

Architekten als Urheber: Werkentstellung und -bearbeitung

Digitale Technik bestimmt zur Zeit größtenteils die Diskussion in und um das Urheberrecht. Während Themen wie illegales File-sharing und faires Handeln im Mittelpunkt stehen, werden jedoch auch Fragen, die das Urheberpersönlichkeitsrecht betreffen, immer häufiger gestellt, vor allem in bezug auf Architekten und deren kommissionierte Werke. Sowohl Gebäude als auch deren Pläne und Skizzen erhalten regelmäßig urheberrechtlichen Schutz, wenn sie die rechtlichen Voraussetzungen, z. B. die des individuellen schöpferischen Beitrags erfüllen. Oft sehen sich Architekten als Urheber dazu gezwungen, rechtliche Schritte gegen die Eigentümer ihrer kommissionierten Werke zu unternehmen: Urheber wehren sich gegen Veränderungen an ihren Werken durch die Besitzer, weil sie angeblich ihr Recht auf Werksintegrität verletzt, während die Besitzer sich auf ihr Besitzrecht berufen und argumentieren, daß neue Nutzungswege und Verwendungszwecke des Werkes legale Veränderungen nach sich zögen. Dieser Artikel kommentiert die neuere Rechtsprechung in ausgewählten Zivilrechtssystemen im Zuge einer Analyse des Umfangs des Rechts auf Werksintegrität und Rechtsmittel.

Key Words: Urheberrecht; Urheberpersönlichkeitsrecht; Bauwerke; Entstellung, Bearbeitung und Umgestaltung

Copyright law distinguishes between ownership and authorship, and different rights attach to the respective labels. While owners of copyright works control the economic exploitation of the work (copying, adapting, lending etc), authors hold on to what some jurisdictions call moral rights, or *droit d'auteur*, most prominently the right to be identified as author and the right to object to derogatory treatment. There are many examples of iconic buildings; indeed, specific events may herald the design of specific buildings: for some striking examples one does not have to look much further than the recent football World Cup tournament staged in South Africa. Works of architecture, i.e. buildings themselves, but also plans, sketches and models, have long enjoyed protection under copyright law. As will be seen, the term has been interpreted widely by some courts to include specifically designed gardens, while a recent decision by a US court demonstrated the narrow application of the Visual Artists Rights Act 1990 by concluding that a garden does not fall within the definition of a 'work of visual art'.

In any event, this field acts as a classic example of the ownership-authorship dichotomy: architects rarely are both, as they are usually contracted by a party to plan, design and build a particular work. That work is owned by the contracting/commissioning party, while the architect is recognised as its author. Problems occur when the owner wants to modify the work in a way the author opines mutilates their work which, in turn, harms their reputation as architects. It is

easily comprehensible that owners of buildings may want to modify aspects of them in order to modernise them, or to comply with anti-discrimination and equality legislation for example. Buildings are usually commissioned to fulfil a – sometimes public – purpose, not merely for the sake of artistic expression and admiration by the architect. The purpose of buildings may change over the years, making changes necessary. Recent decisions in civilian countries, most notably Germany, assist in the assessment of what courts take into account when attempting to balance the competing interest of owners of works of architecture and author-architects. This paper seeks to analyse the most notable German court decisions focusing on the right of integrity, drawing also from other jurisdictions by way of comparison and illustration.

International context²

Copyright laws are invariably territorial. Therefore, while most jurisdictions cater for the protection of works by copyright, there are various differences between those jurisdictions when it comes to the detail the laws afford. Moral rights are but one example: most countries may recognise the necessity to protect these, but the level of protection differs starkly. Germany and France, for example, are representatives of the civilian tradition in upholding strong, inalienable moral rights, labelling these *Urheberpersönlichkeitsrecht* and *droit d'auteur* and having protected these *authors'* rights as a matter of principle. The United Kingdom explicitly wrote moral rights into the Copyright Designs and Patents Act as recently as 1988, requiring the paternity right to be asserted by the author as well as providing that moral rights can be waived. The United States may offer some protection in common law, but the only statutory protection is given to rather self-contained subject matter in the Visual Artists Rights Act 1990.

That there should be such a wide and varying spectrum of protection for moral rights is surprising, since there are at least two major international treaties which set out to address the problems created by the territoriality principle. The Berne Convention³ 1886 introduced the first international layer of copyright regulation. Signatories would provide the same rights to both their citizens as well as citizens from other member states and agree to implement the minimum standards set by the Convention in order to generate a low-level playing field. Since its revision in 1928 the Convention provides for the protection of moral rights in Article 6*bis*, namely the paternity and the integrity right. Many argue that those rights are non-transferable or inalienable, since the provision distinguishes moral rights from transferable economic rights. As alluded to above, and as illustrated by the following discussion, it is clear, however, that member states of the Convention have interpreted and implemented it (if at all) differently to the detriment of authors. The Universal Declaration of Human Rights 1948 recognises moral rights in Article 27(2) stating that “everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author,” thereby furthering their international standing. However, since there is such a width of interpretation of those provisions and often delayed or watered down implementation, some of these proclamations have got a hollow ring to them. The General Agreement on Tariffs and Trade (GATT) negotiations produced the Agreement on Trade-related Aspects of Intellectual Property Rights 1994 (TRIPs) which focused almost solely on the economic interests relating to copyright. While this is to some extent understandable, as the measure was composed under the auspices of trade, it is noteworthy that TRIPs states in Article 9 that members must comply with the Berne Convention. That, in addition to the fact that TRIPs comes with a more stringent enforcement mechanism under World Trade Organisation rules, however indicates that there may have occurred an indirect strengthening of moral rights on the international plane – but one which has yet to be tested.

Moral rights protection in German law

Works of architecture are protected under German Copyright Act § 2(1) Nr. 4 if they go beyond what the Federal Supreme Court termed “general building work”.⁴ The test employed to gauge whether the work should attract copyright protection is the aesthetic impression given by the work according to the judgment of an individual who is both interested in and reasonably acquainted with artistic subject matter. Authors of copyright works enjoy what German law labels “authorial personality rights”, or moral rights. The authorial right of integrity is anchored both in §14 (objection to derogatory treatment/mutilation of a work) and §39 (objection to modifications of a work). §97 covers the availability of remedies which includes removal of the impairment, (interim) injunctions and damages; criminal penalties cannot be incurred by infringing the right of integrity (Adeney, 2006: 274-275).

The German Federal Supreme Court held on a number of occasions that the right of integrity cannot be regarded as absolute. There may be occasions, particularly in respect of works of architecture, where the owner of said building has a legitimate desire to undertake modifications. Such conflicts of interests in the law of copyright and the law of property can only be resolved by a careful balancing act according to the particular facts of each case. While the courts have developed certain criteria to be taken into consideration, their respective weighting will necessarily vary on a case by case basis. This has led to a number of intriguing disputes, some of which resulted in “knife-edge” decisions.

Obstruction or interference with the work

It is clear that an author may argue that the quality of his work and thereby his reputation are diminished by actions undertaken “peripherally” to the work. For example, a high wall, hedge or tree may obstruct or interfere with the view on a building. The question whether the right of integrity could be enacted in such circumstances was addressed by the court in the *Innenhofgestaltung* decision, an interesting dispute concerning a garden.⁵ The German translation of landscape artist is *Gartenarchitekt* which explains why this case was raised on the basis of the garden being an artistic work of copyright. The garden at issue was located in the interior courtyard of the Friedrich-Rohwedder-House in Berlin. The building itself has had a chequered history; while it hosts the Ministry of Finance these days, it used to be the centre of the Imperial Aviation Ministry in Nazi-Germany. The architect composed the garden using white travertine tiles, evergreen box tree, white tulips and rhododendron, red-flowering chestnuts and Japanese pagoda trees. The ministry planned to erect a huge, 35-tonnes steel sculpture, much to the dismay of the architect. She argued that this monstrosity infringed her right of integrity, looking for an interim injunction.

While the remedy was denied by the court, since the claimant had lodged her argument too late, it held that her legal argument based on copyright was a sound one in principle. Organic materials may be used to create an artistic work of copyright, and there were many examples of gardens which doubtless were the personally created works of the respective architects. In the case before the court the architect had put in a lot of creative effort into the expression of her idea to counter the geometric strictness of the building cast in stone with the creative force of nature, achieving a correlation between totalitarian construction and horizontal botanical architecture. The effect of the garden would be completely lost and trumped by the overbearing sculpture. Therefore, the balancing exercise of the competing interests led to the claimant’s objection to mutilation of her work having the upper hand, especially since the respondents could not point

to a particular purpose of the courtyard requiring the planned erection of the sculpture.

Naturally, such extreme factual circumstances are rare, but the judgment by a Dutch court in *An artist v The Municipality of Groningen*⁶ suggests that judges in civilian jurisdictions may generally be sympathetic to a claimant in such circumstances, especially when there is no sound public policy reason or specific purpose for the alleged interference. This dispute revolved around the painting of a ceiling in the hall of a local government building in the style of a fresco. During a renovation of the building it was decided to also repaint the walls and lay a new carpet. However, both the paint and the carpet were of a significantly darker colour, something to which the artist in question took exception. Relying on the right of integrity, the claimant argued that the surroundings of her painting being cast in a darker colour had an adverse effect on the work which itself had been left unchanged. The court agreed with the claimant, and the carpet had to be replaced and the dark painting to be undone. While not elaborating on the point directly, in all likelihood the respondent was unable to offer a plausible argument founded in public policy as to why the renovation had to be carried out in that particular way. Nevertheless it is evident that the right of integrity may be of assistance even in cases where the work itself remained untouched, but where changes made in close proximity to the work affected its presentation and effect. This considerably strengthens and widens the scope of this right.

Destruction per se does not equate to derogatory treatment

Considering the right to object to derogatory treatment the most extreme form of such modification appears to be the complete destruction of the work. While there has been debate on this point, most jurisdictions now postulate the view that the concept of destruction is located outside the right of integrity. Indeed, curiously, the only jurisdiction which recognises such a right are the United States, where moral rights generally are, at best, protected at common law, and not explicitly by statute. This point regularly leads to an argument that the United States do not fully comply with the Berne Convention. While this is not the place to expand on this discussion, it is important to point out that the only statutory provision which protects moral rights of US authors in a self-contained area of copyright works is the Visual Artists Rights Act 1990 which includes the right to prevent the destruction of a work of visual art if it is of “recognised stature”.⁷ This, however, seems to be the exception to the rule.⁸

The German Federal Constitutional Court clarified this in a decision about the construction of a memorial building, a documentation centre “Topography of Terror” based on a staged contract.⁹ The architect had started to build the memorial, but the employer then decides to terminate the agreement prohibiting the architect to move on to the next stage of the work and planning to knock down what had been built to date. The claimant relied on the right to integrity to stop the destruction of his work and to demand the completion of it. The court sided with the respondent, the only party with a right to completion according to the contract. In addition, the court reiterated that a total destruction of a copyright work could not invoke the authorial right of integrity. The owner’s property right include the right to destroy it. A further interesting argument based on the constitutional right to protection of one’s personality was also unsuccessful. The court held that damage to an author’s reputation may well lead to the infringement of that right when an author’s work had been destroyed, but that the burden of proof in such cases must be high. The mere statement that a complete destruction of a work invoked the personality right was insufficient, particularly when coupled with an admission by the claimant to have signalled agreement to terminate the contract. Therefore, when author’s rights are pitched against constitutional – or human – rights, the former may emerge victorious

in truly exceptional scenarios. Another case relevant to the current discussion concerns the partial destruction of a goblet-shaped building.¹⁰ In this instance, all parts which concerned the particular shape and which formed the basis of the originality and individual creativity by the architect were to be removed. The remains of the building would not be reminiscent of the architect's input. His action based on the integrity right therefore had to fail.

Courts in other jurisdictions which follow the author's rights tradition have come to the same conclusion, albeit with a slight *caveat*. For example, the Netherlands "recognize a moral right of integrity in rather generous terms" in Article 25(1)(d) of the Copyright Act (Hugenholtz 2010: 292). In *Jelles v The Borough of Zwolle*¹¹ the architect of an office complex by the name of the Wavin Building, a typical example of 1960s architecture opposed the destruction of his work. Municipal reorganisation of the area some 40 years later aimed at replacing the building with flats for elderly people. It was mooted to use the Wavin Building for this purpose, but cost of the reconstruction for the new purpose turned out to be out of all economic proportion. The Dutch Supreme Court embarked on a detailed legal analysis of the right of integrity. It was held that deliberations that led to Article 6*bis* of the Berne Convention expressly declined to include destruction as an impairment of the right (Verzijden 2004: 10). In addition, a study of the debates in the Dutch Parliament showed that the government intended to implement the moral rights provision of the Berne Convention as it stood, without going beyond the minimum standard set. Drawing from other civilian and common law jurisdictions, the court reached the conclusion that this interpretation of the right of integrity was fully in tune with that of her judicial and legislative counterparts. But while the architect lost that argument, the court also held that the owner of the building could not just do as he pleased and destroy it at his leisure. Destruction of a unique, original work must be based on sound reasons, the author must be given notice of the intended destruction and opportunities to document the work must be provided.

Modification of the work

By far the most litigious area of the integrity right in respect of works of architecture concerns modifications made to the work either by altering plans during construction or the building itself when the building allegedly has fulfilled its original purpose. Not only does the balancing exercise between the competing interests of author and owner of the work become multi-faceted, the issue of remedies also become more varied and pronounced.

A prominent example is the *Lehrter Bahnhof* decision,¹² which had at its heart the new main railway station in Berlin. The architect Meinhard von Gerkan was contracted to plan this new station which was supposed to be modelled on the concept of "cathedral of mobility". That concept did have an effect on the status of the building externally, but also internally, with arched ceilings reminiscent of a dome. Deutsche Bahn AG, the German railway corporation who contracted von Gerkan insists on changes to the plans during the construction of the station in order to cut project costs. Amongst others, these changes affected particularly the ceiling of the main subterranean hall. The planned arched ceiling structure was replaced by a comparatively mundane and less expensive hanging flat horizontal ceiling. The author-architect, of course is not impressed. He took exception to these actions which not only deeply offended him as a professional, but also harmed his reputation. He certainly did not want to be associated with such a bland alternative which would serve to spoil the work as a whole. He demanded that the current construction was replaced with what he had originally planned – in agreement with Deutsche Bahn. The respondents pointed to the significant extra costs – around 45 million Deutschmark at the time - such a replacement would amount to, now that the station had been completed and trains were running through and stopping there.

The court held for the claimant, stating that, first of all, the work was undoubtedly a work of authorship, since it went well beyond the average creative effort of an architect. The underground arrival and departure hall with its ceiling construction was a significant part of that work, thereby enjoying copyright protection. The author is afforded the right to present his work – the expression of his individual architectural creativity - to his contemporaries and posterity without having to agree to changes which unlawfully interfere with the integrity right. Not every modification equated to interference relevant to moral rights. In this case, however, the respondent had every opportunity to negotiate what the work should eventually look like during a lengthy planning stage. Once the final plan had been agreed, the integrity right would trump any interests of the respondent, especially if they were solely of an economic nature. Unsurprisingly, this decision was widely reported and discussed.¹³ The peculiarity of the case is that the changes were made during the construction of the work by Deutsche Bahn AG; generally, one would have expected that while a completed work should preclude interference by its owner, a work under construction may sometimes require modifications. The court held that once the blueprint had been agreed, significant modifications were not permissible – a point open for discussion and, possibly, criticism: practice in construction seems to suggest that changes to plans are regularly made particularly during the construction, rather than the planning process. Previous examples revolving around the destruction or part-destruction of a work reinforce this argument. Still, moral rights enthusiasts – rightly or wrongly – regard this decision as something akin to the Holy Grail.

While von Gerkan “merely” sought compliance with his original plans, other architects sometimes seek monetary compensation in form of damages. Amounts sought and granted vary. In certain jurisdictions, e.g. France, damages amounts can run beyond the one million Euro threshold¹⁴ - although none of those cases involved architects. A decision by the Higher Regional Court Munich I shed some light on the calculation of damages.¹⁵ An architect had argued successfully that the renovation work undertaken on a secondary school he designed was contrary to his integrity right. He sought damages of 48.000 Euro which he calculated by means of licence analogy. The rationale of this type of assessment is that the wrongdoer must not be in a better position he would have been if he had entered into a licence agreement with the right holder. Therefore, reasonable royalties could be sought by the claimant. However, the court denied permission to use the licence analogy, as it was only relevant in cases of pecuniary, financial loss. In the present case, however, the loss was in the nature of solatium, i.e. hurt or injury to feelings and reputation. The court granted damages amounting to 15.000 Euro, still a comparatively high amount for the breach of the humble moral right of integrity.

As hinted at previously, French courts are often even more generous when it comes to damages claims. This may cause problems vis-à-vis the boundary to the economic rights of owners of the work, infringement of which regularly leads to considerable damages claims and accounts of profit. However, we need to remind ourselves that the author occupies centre-stage in the civilian approach to copyright. This position may well be the basis of an argument that the breach of moral rights damages the individual’s personality, getting close to their human rights, which in turn is serious and merits an appropriate reflection in compensation claims. The recent *Le Fouquet* decision is a good example, where both respondents were held to pay each compensation of 50.000 Euro.¹⁶ *Le Fouquet* is a famous restaurant/hotel in the French capital. Modifications were planned to a part of the building known as “le Carré d’or” (Ulman and Rodari 2010: 3). The purpose of the changes was to make it easier to move between different parts of the building as well as to enable the erection of a hotel around the original restaurant. To some extent, the changes were proposed based on convenience, but also further development

of the site. The court dismissed this argumentation, since the changes were not based solely on technical or administrative/regulatory necessity.

A final example on modification of a public work which led to an inflated damages claim concerned the well-known Calatrava's *Zubi Zuri* bridge in Bilbao.¹⁷ Development on one side of the footbridge required its extension over a four-lane motorway, so that safe access to the new flats and business units was provided. The city cut off some of the landing and simply added another part-bridge to it, to the annoyance of the architect. Here, the balancing act was tipped in favour of the city, due to the overriding public interest, but still a higher court awarded 30.000 Euro in damages – a far cry from the 2.5 million originally claimed!

The right of integrity – becoming infirm as it grows old

The right to integrity does not come to an end with the death of the author. Right to the contrary, like their more prominent counterparts – owners' rights of economic control and exploitation – they live on. Quite how long for they are allowed to do so differs between jurisdictions. In German law they have been given the same duration of protection, namely 70 years after the author's demise. This also means that they may come as part of the inheritance to those who are left behind. There have not been many disputes pitching the owner of a work against an heir of moral rights, but this is exactly what very recently occurred in Germany. At the heart of it all was a work of architecture.

The dispute which led to the *Stuttgarter Hauptbahnhof*¹⁸ decision features Peter Dübbers, the grandson and heir of architect Paul Bonatz in his attempt to assert his grandfather's authorial right of integrity associated with the Stuttgart railway station building. The outcome suggests that if the period of copyright protection is close to its conclusion, it may be even more difficult than usual for that right to be enforced vis-à-vis interests of the owner of the building at issue, especially when coupled with the presence of public interest for the latter to prevail.

The dispute revolves around the Stuttgart terminus railway station which was completed in the 1920s. The building is held in very high esteem amongst the architectural fraternity and regarded as one of the most important creations of its type in Europe. The owners of the construction Deutsche Bahn AG (again), however, have long been pursuing plans to turn the terminus into a through station, thereby allowing a more effective link to the European high-speed railway network. A competition led to plans for a modern underground through station which renders large parts of the terminus building, platforms and rail network, as well as the grand staircase to the booking hall obsolete. The project, known as Stuttgart 21, is has become highly political, as it comes with a considerably steep price tag in times of economic austerity. As owners of the buildings and land, Deutsche Bahn AG point to their property rights, while Peter Dübbers relies on the authorial right of integrity he inherited from the architect of the terminus, his grandfather. In short, it is a classic dispute between what some may regard as esoteric right of integrity originally awarded to an author-architect of copyright work and traditional property right of the owner of the building which was created – with the added twist that it is a member of the architect's family who inherited the right leading the fight for the preservation of his grandfather's work.

In this dispute the court had no problem to establish that the Stuttgart railway station easily surpassed the threshold of copyright protection, rendering it a work of architecture of high stature, something that incidentally was not disputed at all by the respondents. The court then restated that a general prohibition to modify a work was applicable also to owners of copyright

works: the author may forward an argument that the work he created remains in its original form. The court moved on to embark on a careful balancing act of the various interests raised by the parties.

The first key criterion which the court considered was the ranking of the work according to its individual degree of creativity. The higher the authorial creativity expressed by the work, the stronger the weighting of the author's desire in retaining the work in its original form. That desire depends on the type and the level of alleged changes to the work; in addition, the right of integrity may steadily weaken after the death of the author. Further aspects of the balancing act revolve around changes to the purpose and use of the building, as authors must expect needs owners have for buildings to change. He knows that the owner of the building required it to be created for a particular purpose – such purposes may well change for a variety of sound reasons, and this in turn may require modifications to the building itself. Therefore, the interest of maintaining a *modern* building enters the balancing act, with economic arguments permissible in support of modifications to ensure such modernity. Merely aesthetic reasons which the owner may raise, however, cannot trump the right of integrity.

It is clear that the court did not regard the matter as straightforward, as it offered a detailed analysis before reaching a knife-edge decision in favour of Deutsche Bahn AG. Although the claimant had a very strong case both in terms of the outstanding nature of the building and the comparatively drastic modifications suggested by the respondent, the owner's property rights had to prevail. The railway station in its current form had been built 90 years ago and had been subject to – agreed - changes before. However, the plan to turn the terminus into a through station leads to the underground railway to cut through the foundations which support the side wings of the original building, which the ceiling of the new station would be unable to support. Also, the grand staircase would no longer serve as entrance to the new platforms and be obsolete. Unless the side wings are demolished, it is impossible to build the new through station. In addition, the wings will no longer fulfil their original purpose to act as framework for the platforms and physical borders to the surroundings of the station: there will no longer be a terminus, and the underground platforms do not require to be architecturally boxed in with wings.

The court then emphasised that the authorial right of integrity must be regarded as substantially diminished in this particular case, as it is due to reach the end of term of protection in 2026, seventy years after Paul Bonatz' passing. It is this express notion of author's personality rights becoming infirm with age which poses a problem. It goes against the grain that authors', or moral rights which are meant to be inalienable should weaken with time. This is a new suggestion, and one which probably can only occur in respect of those type of rights. It is difficult to fathom that a court would make similar statements in respect of the rights of the owner of a copyright work; these are frantically defended up to the last day of their validity. Therefore, it is at least doubtful whether other courts will follow this particular line of argument. In addition, in the view of the court there was a strong public interest in securing a modern public transport infrastructure by means of a through station, and the respondents were under an obligation to provide such. Finally, the fact that Mr Dübbers waited to raise this action almost until the diggers and wrecking balls had been put in place to commence their destructive assignment was further tilting the balance to the right holders. The planning of Stuttgart 21 project had been going on for over a decade, and Mr Dübbers should have raised his concerns *ab initio*. Since both instances kept on returning to this point seems to suggest that it was indeed this lateness effectively prevented Mr Dübbers from succeeding. A vital lesson may be learnt not only by author-architects themselves, but also in particular their heirs to commence legal action timeously and not wait to the metaphorical final minute.

Having been refused leave to appeal, the claimant has lodged a complaint against this refusal before the Federal Supreme Court which is to be considered later in the year. It appears unlikely, however, that a court would grant the rebuilding of the already demolished north wing and rule against a project which secured planning permission many years ago – all in the name of the ever-diminishing right of integrity of an author who passed away over fifty years ago.¹⁹

Architects should be aware of authorial rights

The discussion has shown that the integrity right is multi-faceted and well protected in many civilian jurisdiction. This is particularly so in respect of works of architecture where we have seen increased judicial activity since the beginning of this century. This key moral right of authors cannot enjoy absolute status in the face of legitimate claims of modification by owners of the work in question, but authors are given an opportunity to tip their arguments in a balancing exercise against those of the proprietor. Some commentators may rightly suggest that architect-authors should accept that their authorial personality rights should be limited (Adrian 2008: 529), but this should not be equated with an acceptance that owner's rights are apparently stronger by definition. Courts have built up a wealth of experience in balancing the various interest at stake, reaching decisions that stand up to critical analysis. What authors and their heirs should keep in mind, however, that time does matter: moral rights can be compromised by delaying their defence. Finally, the Berne Convention has set the scene for a level playing field of protection, in an era of convergence, globalisation, free movement and the internet it may be timely to review Article 6*bis* in the wake of differences in its implementation as well as provision of remedies amongst its noble signatories. Large payouts in damages for breach of moral rights appear inappropriate, blurring the boundaries to rights of commercial exploitation.

Notes

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| <p>1 The author wishes to thank Gregory Dyke, LL.B. (Honours) student at RGU, for his contribution on the class discussion of moral rights, and Virginie Ulman and Sophie Rodari (Baker McKenzie LLP) for providing a scanned copy of the <i>Le Fouquet</i> decision.</p> <p>2 See, Adeney, Elizabeth. 2006. <i>The Moral Rights of Authors and Performers. An International and Comparative Analysis</i>, chapters 5-7.</p> <p>3 Berne Convention for the Protection of Literary and Artistic Works 1886.</p> <p>4 I ZR 166/05 – St. Gottfried decision, 19 March 2008.</p> <p>5 Regional Court Berlin, <i>Innenhofgestaltung</i> (Case No. 5 U 9667/00), 9 February 2001.</p> <p>6 Regional Court Groningen, AR1050, 10 September 2004.</p> <p>7 Visual Artists Rights Act 1990, section 603, amending the US Copyright Act 1976, section 106A(a)(3)(B).</p> | <p>8 Arguably, this provision does not comply with the parameters set by the Berne Convention.</p> <p>9 Federal Constitutional Court, 24 November 2004, 1BVR 2516/04.</p> <p>10 Higher Regional Court Hamburg, 3 December 2004, 308 O 690/04.</p> <p>11 Dutch Supreme Court, AN7830, 6 February 2004.</p> <p>12 Regional Higher Court Berlin, GRUR 2007, 964 – <i>Lehrter Bahnhof</i>.</p> <p>13 For a detailed discussion of the decision, see Zentner, Laura Maria. 2011. <i>Das Urheberrecht des Architekten bei der Werkverwirklichung</i>, ch. 2A.</p> <p>14 See Ulman, Virginie and Rodari, Sophie. 2010. 'Architectural Copyright: A Key Issue'.</p> <p>15 Higher Regional Court Munich I, 20 January 2005, 7 O 6364/04 - <i>Gymnasium</i> (secondary school).</p> <p>16 Tribunale de grande instance de Paris, 1 March 2010, No. 09/00827.</p> |
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- 17 Bilbao Commercial Court No. 1, 23 November 2007, No. 543/2007. For a more detailed discussion of the case and background, see Peris, José IJ. 2008. 'A bridge too far: Calatrava's bridge is copyright-protected, but not enough', *Journal of Intellectual Property Law & Practice* 3(4): 218
- 18 Higher Regional Court Stuttgart, 6 October 2010 (Case No. 4 U 106/10). The author has written two separate case notes on this decision: Lauterbach, Thorsten. 2010. 'Copyright Law: Architect's right of integrity railroad?' *TICCIH Bulletin*, 50: 6-7 and Lauterbach, Thorsten. 2011. 'A narrow defeat is still a defeat: integrity clipped before its best-before date', *Journal of Intellectual Property Law & Practice* 6(6): 371-373.
- 19 Elections held in spring 2011 swept aside the Stuttgart 21-friendly conservative-liberal leadership of the region and replaced it with a green-social-democrat coalition. The new government held a referendum on the construction of Stuttgart 21 and called a halt to all building work on the project. A decision taken in a political, rather than judicial arena could have come to Mr Dübbers' aid and the building's rescue, but the outcome of the referendum of 27 November 2011 resulted in a resounding "Yes" for the project to go ahead.

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Thorsten Lauterbach obtained an LL.M. by research from the University of Aberdeen in 2002. He is currently seeking to complete a PhD on the notion of joint authorship comparing the approaches taken by the UK, the US and Germany at the University of Edinburgh. His main interests are copyright law and authorship, but also other areas of Scots private law and the influence of European Union law. His current role as lecturer and learning enhancement coordinator rekindled an interest in methodology in law teaching and learning.

The Biblical account of Moses receiving the Tables of the Law and a pictorial interpretation of the event by Jacopo Tintoretto

Estelle Alma Maré

Department of Architecture, Tshwane University of Technology, Pretoria
E-mail: mare_estelle@fastmail.fm

According to the Hebrew Bible, Moses, who led the Hebrew people out of Egypt, received the Tables of the Law directly from the Lord, God Yahweh, on Mount Sinai. During Moses's absence on the mountain his brother, Aaron, fashioned a golden calf for the people to worship. When Moses descended from the mountain and witnessed the people's idolatrous debauch, he smashed the Tables of the Law in anger. This scene has been depicted by various artists, from among which the version by Jacopo Tintoretto, *Moses Receiving the Tables of the Law*, is chosen for discussion. Tintoretto's painting not only depicts the narrative, but also contrasts the transcendence of the written law and the visual symbol system of the idolaters, respectively in the upper and lower zones of the painting.

Key words: Moses, Tables of the Law, Tintoretto's *Moses Receiving the Tables of the Law*

Die Bybelse weergawe van Moses wat die Tafels van die Wet ontvang en die visuele voorstelling daarvan in 'n skildery deur Jacopo Tintoretto

Volgens die Ou Testament het Moses, wat die Jode uit Egipte gelei het, die Tafels van die Wet direk van die Here, die God Yahweh, op die Berg Sinaï ontvang. Gedurende Moses se afwesigheid op die berg het sy broer, Aaron, 'n goue kalf geskep vir die mense om te dien. Toe Moses van die berg afgekom en die volk se afgodsfees aanskou, het hy die Tafels van die Wet in woede stukkend gegooi. Hierdie toneel is deur verskeie kunstenaars uitgebeeld, onder wie die weergawe van Tintoretto, *Moses ontvang die Tafels van die Wet*, vir bespreking gekies is. Tintoretto se skildery stel nie net die verhaal voor nie, maar verbeeld ook die transendensie van die geskrewe wet teenoor die visuele simboolstelsel van die afgodedienaars, respektiewelik in die boonste en onderste gedeelte van die skildery.

Sluitelwoorde: Moses, Tafels van die Wet, Tintoretto se *Moses ontvang die Tafels van die Wet*

According to the Hebrew Bible (Christian Old Testament) Moses (assumed to have lived 1391-1271 BCE), who led the Hebrew people out of Egypt, received the stone tables inscribed with the Law [*Torah*], generally referred to as the Ten Commandments,¹ directly from the Lord, God Yahweh, on Mount Sinai (Exodus 31:18). This happened at a time during the exodus when the people wandering in the desert were informed about what Yahweh expected of them.²

Laws engraved on stone predated the time of Moses. The most memorable are the laws codified by Hammurabi, King of Babylonia (1792-50 BCE), carved on a stele, which was found in 1852 by French archaeologists at Sushan.³ This city, situated some 300 km east of Babylon, was the capital of ancient Elam, in which events that took place in the time of Daniel, Nehemiah, Queen Esther and King Ahasuerus (Xerxes) are recorded in the Bible. It is indeed possible that the Hebrew people had knowledge of Hammurabi's Code. Though their culture and religion were unique, they were not completely isolated from influences in the Eastern Mediterranean. Not surprisingly, there are similarities between the Mosaic law and the Code of Hammurabi; however, there are also marked differences between the two sets of law.⁴

The Mosaic laws, or Ten Commandments, are formulated in two books of the Bible: Exodus 20: 2-17 and Deuteronomy 5: 6-21. Historically the Bible version of how they originated involve supernatural events. According to Exodus 24: 12 Moses was first summoned by Yahweh to ascend Mount Sinai to receive "tables of stone, and a law, and commandments". These were "the work of God" (Exodus 32: 16), in the form of "two tables of testimony, tables of stone, written with the finger of God" (Exodus 31: 18) "on both their sides" (Exodus 32: 15).⁵

According to Hebrew belief Yahweh initially inscribed the Ten Commandments on two stone tables, which Moses received on behalf of the wandering people who had left Egypt (Exodus 20: 2-17).

The Biblical description relates that on the mountain, before returning to the people, Yahweh had told Moses of his followers' pagan debauch. Yahweh wanted to turn his wrath against them, but Moses pleaded with Him not to do so. Descending after a period of time from the mountain with these two tables, Moses, beheld the transgression of the people celebrating a golden calf⁶ – an idol that was created by Aaron,⁷ his brother, in his absence. This sight caused Moses to cast the tables “out of his hands and break them” (Exodus 32: 19) in anger.

The wayward people's transgression of the relevant commandments (Exodus 4-5) that Moses was bringing to them (after the idolatrous event)⁸ reads as follows in a modern translation:

You shall not make for yourself an image in the form of anything in heaven above or on the earth beneath or in the waters below.

You shall not bow down to them or worship them; for I, the LORD your God, am a jealous God, punishing the children for the sin of the parents to the third and fourth generation of those who hate me, but showing love to a thousand generations of those who love me and keep my commandments.

The reason for the wandering people's request to Aaron, for an idol was that they were not sure of what had become of their leader on Mount Sinai. Upon his return, standing at the camp gate, Moses saw that the people were dancing around a golden calf, disgracing themselves in the practice of idolatry. This sight caused him to smash the tables in anger because Aaron had caused the people to degrade themselves to the level of their pagan enemies.

When Moses came down from Mount Sinai, with the two tables of the testimony in his hands he did not know that the skin of his face shone because Jahweh had communicated with him. When Aaron and all the people of Israel saw him thus transformed they were afraid to approach him. But Moses called to them and Aaron and the leaders of the congregation returned to him. Aaron explained to Moses that the people brought their golden jewellery to him to be melted down in order to cast the calf. He then erected an altar before the calf, declaring the next day to be a feast of the Lord. When the people saw the precious golden artefact they rejoiced and praised it as the god that brought them out of Egypt.

It is told that Moses proceeded to ground the calf fine, mix the powder with water and forced the people to drink the poisonous mix. He then asked those men who were on the Lord Yahweh's side to gather about him, and instructed them to go through the camp, putting to the sword all the unrepentant transgressors. About three thousand men were killed. After the slaughter Moses called upon his loyal followers to consecrate themselves to the Lord, that He might bestow His blessing upon them.

Deuteronomy 5: 6-20 states that after the revelation at Sinai the Ten Commandments were re-issued for the sake of the generation born wandering in the desert, prior to their entry to the promised land of Canaan. Moses was ordered by Yahweh to engrave two tables of stone resembling the first that he had smashed. On these he wrote the laws, identical to what had been written on the original tables (Deut. 34: 1-4). The new tables were designated “the two tables of the testimony” (Deut. 34: 29). According to I Kings 8: 9, Moses put them into the Ark at Horeb, but when the Solomonic Temple was dedicated they were placed in the Ark of the Covenant.⁹

The *Aggadah*, a primary component of Rabbinic tradition, attests that there is not a misfortune that Israel had suffered which is not attributed to the calf. Consequently: “The High

Priest would not enter the Holy of Holies wearing any item of gold, lest it recall the Golden Calf.”¹⁰

A depiction of the Biblical narrative by Jacopo Robusti, called Il Tintoretto (1518-94)

There are many depictions of Moses with the tables of the law. The most famous is Michelangelo's (1475-1564) larger than lifesize sculpture of *Moses* (1513-16),¹¹ showing the seated figure with the Tables of the Law held under his right arm, but glaring in the opposite direction (*a sinistra*) where the viewer supposedly knows that the golden calf is being celebrated. Also famous is the portrayal of *Moses Smashing the Tables of the Law* (1659)¹² by Rembrandt Harmenszoon van Rijn (1606-69) that shows the lawgiver holding the tables written by God above his head, ready to hurl them down in anger when he witnessed the idolatry of his followers. Other portrayals, among which that of Marc Chagall (1887-1985), entitled *Moses and the Tables of the Law* (1966),¹³ reveal only one incident of the Biblical narrative. A survey of well-known representations from early times to the present, including those by Lorenzo Ghiberti (1378-1455),¹⁴ and Raphael Sanzio (1483-1520),¹⁵ confirm the judgment of the present author that the composition by Tintoretto (1561) is the supreme example of an integrated visualization of the Bible narrative (figure 1).

Tintoretto's representation is not merely an episodic illustration of Moses receiving the tables of the law from Yahweh on Mount Sinai while the Jews below prepare to elevate the sculpted idol in the form of a calf for festive veneration, but is a complicated and meaningful work of art on various levels. It includes, in a total vertical composition, reference to both Moses and the golden calf according to the Biblical description. While waiting for Moses to return from the mountain where he went to receive guidance from Yahweh, the people became anxious and pleaded with Aaron to make them a god to go before them and lead them. Forgetful of the commandment forbidding the worship of a sculpted idol, the Hebrew people engaged in the preparation of a heathen rite are represented in stark contrast to Moses on the mountain, surrounded by angels, his body transfigured by divine light into an exalted figure.¹⁶

First of all, it is important to note that Tintoretto contextualized the above mentioned painting in the Gothic church of the Madonna dell Orto in Venice. Its brick facade is transitional from Romanesque to Gothic and from Gothic to Renaissance. The interior, consisting of a nave with two aisles, contains numerous works of art, also other paintings by Tintoretto, who lived nearby (number 3399 on Fondamenta dei Mori) and was buried there, in an apsidal chapel.

The format of the painting shows the composition divided into two interlinking parts. The upper or heavenly zone is fitted into a Gothic arch format that echoes the Gothic arched windows of the church building. It directs the viewer's attention upwards to the clouds and moving figures representing angels (without wings), where the figure of Moses is placed in a central position, looking heavenward with his arms outstretched above his head in a gesture that resembles the ancient posture of praying. The tables of the law are placed on a cloud opposite Moses. It is held in place by the left hand of a bearded figure facing exactly into the centre of a blaze of light, and who, with his right hand touches the horseshoe, parabola-like shape into which the burst of light fits as a small circle, surrounded by a larger circle that contains the light. With his left hand he places the stone tablet in the form of an arched artifact on a cloud where it is kept in position by the angel opposite the Moses figure.



Figure 1
Jacopo Robusti, called Il Tintoretto (1518-95), Moses Receiving the Tables of the Law,
1561, oil on canvas, 135 x 59 cm, Madonna dell Orto, Venice (free internet).

The lower or earthly zone is fitted into a square format containing a rocky background landscape and human figures. The foreground activity on the earthly or human level is concerned with preparation for the casting of the precious golden calf. The women are helping each other to remove their earrings and gold jewellery that are collected in baskets, while four muscular men carry a life-sized clay model of the calf through the camp to the altar. Aaron, who oversees the fashioning of the idol, is seated in the right foreground, giving instructions to the craftsman Belzaleel, with the compasses, and his assistant Oholiab.

The tables of the law are compositionally placed vertically above the golden calf to emphasize the dissimilarity of worship. The written law is contrasted with the sensuous idol of a pre-literate people, represented by Tintoretto in contemporary Venetian dress and opulence. The correspondences are meaningful: that between the tables of the law and the head of the calf on the vertical middle line of the painting as well as the fact that the work is placed in the choir of the church of the Madonna dell'Orto. Both the setting in the picture and in the church is meaningful to emphasise the wisdom of the written law in contrast to the folly of adoring the artefact in the form of an inanimate, senseless beast.

What is represented in the upper zone of Tintoretto's painting is transcendental and invisible to the earthly group who are surrounding the visible, but lifeless image of a calf. In the upper and lower zones the main contrast is between the presence of the unseen, transcendental God who manifests his presence by reflecting divine light onto Moses, and the sculpted calf as an inanimate, tangible artifact that has no life of its own, only the deceptive brilliance of gold. In the upper zone the tablet is covered with engraved letters that represent the Ten Commandments, the sacred and eternal laws, or Torah, that Moses is receiving directly from Jahweh. Moses transcends pagan idolatry because the written word is an advanced invention of the human mind.¹⁷ In the lower zone Aaron's followers indulge in a visual culture manifested in the glitter of a golden object that represents an emulation of pagan culture. Moses's figure is exalted by divine light while the figures of Aaron's followers are clad in rich garments, representing a sensuous and materialistic culture. Moses has advanced to the presence of the living God where his body is dematerialized by sacred light. In contrast, the earth-bound Israelites that surround the calf are unenlightened and have not been taught to read the abstract signs that comprise writing, carved into stone, the meaning of which is not only totally different but also more meaningfully lasting than a golden sculpture resembling a calf.

Conclusion: the contrast between word and image

The Biblical narrative of Moses receiving the written tables of the law while Aaron and his followers fashion a glittering image of a calf provides a stark contrast between the "fundamental incommensurability between image and word".¹⁸ Moses transcends pagan idolatry because the written law is an advanced invention of the human mind intended to change the natural inclination of a pre-literate people whose religion requires material manifestations of divinities. While the written word is visual, its meaning is abstract, in contrast to the purely sensual and emotional impact of the image which requires no abstract cognition.

In a sense, "word versus image" is the very essence of the difference between hominid and homo sapiens, that is the difference between primitive and complex thinking. These are two distinct stages in the evolution of intelligence. Image or visual thinking is the least abstract mode of thinking because one creates images only with regard to perceptual or imaginary entities of first order of abstraction. This was the case for hundreds of millions of years since the formation

of fish and before, until about a million years or so, when humans have developed language, the only species who do have done so. All the other animals have different kinds codes based on vision, smell etc, but not languages, which is a symbol system.

The written law and idea of monotheism as Moses presented it was much too abstract for the Hebrew people of thousands of years ago. His followers in the desert needed some concrete and nature-based deity such as the golden calf that they could understand. They did not worship it as such. Rather, the golden calf as object, was a substitute or surrogate for the deity. It was an not solely an object, but an intermediate being: between god and object.¹⁹ However, by introducing a set of written laws Moses initiated a transcendental approach to monotheistic worship, independent from visual earthly gods and the sensuality of artefacts representing them.

The theme of Tintoretto's *Moses Receiving the Table of the Law* is the existence of opposites that do not blend in reality: the metaphysical and the sensory experience of the world; the world of ideas and the literal interpretation of events; the abstract and the concrete; the spiritual and the earthly. In his representation, however, he demonstrated his compositional mastery by blending these unresolved opposites.

Notes

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| <p>1 For the text and a discussion of the Ten Commandments, see Bowker (1997: 962) and Unger (1966: 256-7).</p> <p>2 All the Biblical quotations are from the <i>New English Translation of the Bible</i>.</p> <p>3 The stele inscribed with the Code of Hammurabu was discovered at Susa in 1901 and is now in the Louvre Museum, Paris. It is in the form of a round-top stele more than two metres high and contains 282 laws. On the upper part Hammurabi is depicted in relief standing before the seated sun-god Shamash, the god of justice.</p> <p>4 For a comparison between the Code of Hammurabi and the Ten Commandments, see http://www.specialityinterests.net/codexhammurabi.htm.</p> <p>5 According to Wecker (2010: 1), "Biblical and rabbinic texts seem to have avoided the question of the shape of the tablets for the most part".</p> <p>6 The golden calf fashioned by Aaron as an idol was presumably a male or bull calf. The bull as a male deity was certainly familiar to the Israelites since many of their neighbours worshiped gods in this form. In addition to the Egyptian bull god, the Israelites would have recognised the Canaanite Baal who was worshiped in the form of a bull.</p> <p>7 For information about Aaron's career, see Browning (1997).</p> | <p>8 The guilt of the Israelites who worshipped the golden calf during the exodus was certainly not a case of retrospective guilt, because the worship of Yahweh excluded idolatry. In actual fact, in their oral culture the commandment against idolatry was know to the Israelites, since the Ten Commandments actually preceded Moses. The Bible gives examples of various of the commandments being kept before the time of Moses. For example, in Genesis 35: 2-3 Jacob warned the people: "Put away the strange gods that are among you, and be clean...". Jacob obviously knew that Yahweh forbade idolatry.</p> <p>9 See: http://www.jewishencyclopedia.com/view.jsp?artid=8&letter=T#ixzz1J9WZ3XTg.</p> <p>10 Bowker (1997: 382).</p> <p>11 Rembrandt van Rijn, <i>Moses Smashing the Tables of the Law</i> (1659), Gemäldegalerie, Berlin.</p> <p>12 Michelangelo, <i>Moses</i> (1513-16), Tomb of Julius II, San Pietro in Vincoli. Rome.</p> <p>13 Marc Chagall, <i>Moses with the Table of the Law</i> (1956), Marc Chagall Inauguration Catalogue, 1973, Musee National Biblioteque.</p> <p>14 Lorenzo Ghiberti, Baptistry door (1425-52), Florence.</p> <p>15 Raphael, <i>Moses Receiving the Tables of the Law</i> (1518-19), Palazzi Pontifici, Vatican, Rome.</p> |
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- 16 “Exalted figure” is a phrase used by the author to describe the transformation of a human body into a schematic figure that is not detailed anatomically, but is represented as transformed by divine intervention. See Maré (2010) and also Maré (2011).
- 17 According to David Abram (1996: 41) the ancient Hebrews eventually forsook their former corporeal religiosity and its responsiveness to the natural environment by shifting to a purely phonetic set of alphabetic signs that allowed an epistemological independence from earthly sensuality: “To actively participate with the visible forms of nature came to be considered *idolatry* by the ancient Hebrews; *it was not the land but the written letters that now carried ancestral wisdom*”(italics in the original).
- 18 This phrase is borrowed from Holly (1990: 372).
- 19 Ideas based on an e-mail communication from Prof. Tsion Avital.

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Estelle Alma Maré is the present editor of the *South African Journal of Art History*. She practices and encourages interdisciplinary research.

‘Sustainable’ architecture and the ‘law’ of the fourfold

Bert Olivier

Philosophy, Nelson Mandela Metropolitan University, Port Elizabeth.
Email: Bert.Olivier@nmmu.ac.za

There are several senses in which one can understand a constellation that is set up between architecture and the ‘law’, the most salient of which is the way that the former is influenced, or directed, by laws of different countries or regions (such as urban or building laws which restrict or challenge architects’ creativity, or the environmental aesthetics that cities expect architects, by law, to honour). In this paper, however, I would like to focus on a ‘law’ that is arguably more fundamental – in fact, primordial – as far as architecture is concerned. Just like other laws, this one can, and often is, overlooked, or ignored by many architects, but at their peril (and that of those who occupy these buildings). The ‘law’ in question is that of what Heidegger evocatively named the ‘fourfold’ of *earth, sky, mortals* and *divinities*, which is further intimately connected to and informed by the ‘life-giving struggle’ that Heidegger perceives in the relationship between the constituent elements of a work of art, or what he terms ‘world’ and ‘earth’. The aim is to draw out the implications of these concepts, considered as a primordial ‘law’, for architecture, especially in the sense of ‘sustainable’ architecture, albeit not in the usual sense of ‘sustainable’. To enhance understanding of Heidegger’s fruitful heuristic, the paper draws on Harries’s illuminating elaboration on it, and its resonance with other, compatible concepts – like Lefebvre’s tripartite conceptualization of social space – is briefly explored.

Key words: architecture, art, earth, fourfold, Harries, Heidegger, law, Lefebvre, sustainable, world.

‘Onderhoubare’ argitektuur en die ‘wet’ van die Viervoud

‘n Mens kan die konstellasië wat tussen argitektuur en die ‘wet’ in sig kom, op verskeie maniere interpreteer, die mees opsigtelike waarvan die wyse is waarop eersgenoemde deur die wette van verskillende lande of streke beïnvloed word (soos stedelike of bou-wette wat argitekture se kreatiwiteit beperk, of die omgewingsestetika wat deur stedelike owerhede wetlik aan argitekture voorgehou word). In hierdie artikel word daar egter op ‘n ‘wet’ gefokus wat volgens die argument meer fundamenteel – selfs primordiaal – is ten opsigte van argitektuur. Net soos ander wette, word hierdie ‘wet’ ook dikwels deur argitekture oor die hoof gesien, weliswaar ten koste van hulself (en van diene wat die ooreenstemmende geboue moet bewoon of benut). Genoemde ‘wet’ is wat Heidegger veelseggenderwys die ‘viervoud’ van *aarde, lug, sterflikes* en *godhede* noem, wat verder intiem met die ‘lewegewende worsteling’ verbind is, wat Heidegger in die verhouding tussen die konstitutiewe elemente van ‘n kunswerk waarneem, te wete ‘wêreld’ en ‘aarde’. Die oogmerk is hier om die implikasies van hierdie begrippe, as verteenwoordigend van ‘n primordiale ‘wet’ vir ‘onderhoubare’ argitektuur, uit te werk. Ten einde insig in Heidegger se vrugbare heuristiek te bevorder, word daar op Harries se verhelderende uiteensetting daarvan gesteun, en ander, daarmee versoenbare begrippe – in die besonder Lefebvre se drieledige konseptualisering van sosiale ruimte – word kortliks ondersoek.

Sleutelwoorde: aarde, argitektuur, Harries, Heidegger, kuns, Lefebvre, onderhoubaar, viervoud, wêreld, wet.

What is sustainable architecture today? In the 19th century, Friedrich Nietzsche (1984: 331-333) exhorted humanity to be true to the earth in a world where the framework of premodern, metaphysical values has collapsed, and where a new humanity must move beyond good and evil to a world where life-enhancing values would be embodied in human action. Martin Heidegger takes this thread of Nietzsche’s legacy further in the 20th century, with his critique of technology and the ‘age of the world-picture’, as well as his thought of the ‘fourfold’ as a measure of a life worthy of being-human. The ‘fourfold’, I want to argue, therefore also instantiates a touchstone for an architecture that would be ‘sustainable’ in a more profound sense than merely complying with the latest so-called ‘green’ initiatives, which often have more to do with new capitalist marketing ploys than with preserving the earth.

One can approach the question of a ‘constellation’ that is set up between architecture and the ‘law’ in the obvious manner, namely from the angle of the way that the former is influenced, or directed, by laws of different countries or regions. These would include urban or building laws which restrict or challenge architects’ creativity, as well as the ‘environmental aesthetics’ that some cities expect architects, by law, to honour, lest their more recent designs mar the city-skyline or the traditional pattern of existing architecture. Important as these considerations are for architecture as a practice, however, I would like to focus on a ‘law’ that is arguably more fundamental – in fact, primordial – as far as architecture (as well as the other arts) is concerned. Just like other laws, this one can, and often is, overlooked, or ignored by many architects, but at their peril (and that of those who occupy their buildings). The ‘law’ in question is embodied in what Heidegger evocatively named the ‘fourfold’, which is further intimately connected to and informed by the ‘life-giving struggle’ that Heidegger perceives in the relationship between the constituent elements of a work of art, or what he terms ‘world’ and ‘earth’. My claim here is that any architecture or art that does not circumspectly orient itself, implicitly or explicitly, according to the normatively life-sustaining principles represented by these concepts, would ultimately fail, as art, to impart meaning to human life.

The ‘fourfold’

A constellation of four interrelated concepts (or values) – ‘earth’, ‘sky’, ‘mortals’ and ‘divinities’ – which, together, according to Heidegger, comprise the indispensable means of orientation in the world for human beings, is configured in his concept of the ‘fourfold’ (1975:149-151).¹ Given their meaning, one could possibly find different names for these, as long as those names resonate, to an equal degree, with the inescapable axiological parameters of human existence indicated by the members of the ‘fourfold’. This implies that, if one or more of these are absent as ‘markers’ to determine one’s ‘place’ in the world, one would not be able to claim that one is living a truly ‘human’ life, which is why Heidegger remarks that the four together comprise ‘a simple oneness’. ‘Earth’ denotes the bearer of (human) life, but in the most archetypal sense conceivable: the earth as condition of the possibility of life, including human life, but also as that which resolutely resists humans’ penetrating, objectifying, controlling (and ultimately violating) scrutiny. It is the ‘serving bearer, blossoming and fruiting, spreading out in rock and water, rising up into plant and animal’ (Heidegger 1975: 149). The ‘sky’ is the ‘vault’ which is the matrix of seasonal blessings as well as inclemency, but it simultaneously marks the limit that reminds humans of their finitude. ‘Mortals’ are humans whose nature makes them ‘capable of death’ (1975: 151), and ‘divinities’ are the ‘messengers of the godhead’ (1975: 150), who are awaited in hope by mortals, whether they reveal or conceal themselves.

The American Heidegger scholar, Karsten Harries (1997:159-162), provides a lucid, insightful interpretation of Heidegger’s ‘fourfold’. He reminds one that the ‘earth’ as the ‘given’, or as ‘material transcendence’, is a ‘gift’ uncreated by human understanding, and which, as such, limits the ‘world’ or sphere of intelligibility. He further points out that what ‘opens’ humans to ‘earth’ in this sense, is the *body*, and urges one to remember that (1997: 159):

...the embodied self is a caring, desiring self. To be in the presence of the earth is inevitably to be affected, moved, claimed. Earth thus...refers to the elusive affective ground without which all talk of essences, meaning, values, or divinities is ultimately groundless, merely idle talk.

This is to say, that which inescapably limits ‘world’ – the cultural, linguistic space of a tradition – is the earth or ‘ground’ which moves humans as affective, caring, desiring beings in the first place to articulate their desires, fears and projects. These articulations belong to the

open cultural space of what Heidegger refers to as ‘world’. The ‘earth’ is therefore that which affects the human, embodied self, and any discourse or language game that does not somehow acknowledge this is, as Harries points out, ‘merely idle talk’, an expression that carries all the connotations of inauthenticity and empty ‘everydayness’ that Heidegger gives it in *Being and time* (1978). Seen in this way, ‘earth’ is, despite its inscrutability, ultimately inscribed *as such* in language (in an encompassing sense, which includes ‘discourse’, every time desire, affectivity, need, or satisfaction is registered) as that which enables humans to traverse the realm of openness or ‘world’. ‘Earth’, as the inescapable geo-physical context in which every human being finds her or his bearings through the human body, is therefore an inescapable consideration for architecture. If an architectural work does not address the body – through colours and texture, or a sense of light, height and of depth, for instance – it lacks something human.

To elaborate on this through an illuminating digression, Gilbert Germain (2004) enlists Jean Baudrillard, Paul Virilio and Maurice Merleau-Ponty to make a similar point about the urgency of waking up to the consequences of the increasing distance between humanity and the earth being created by cyber-technology. He shows at length that the ‘reality’ of cyberspace is incompatible with the earthly reality correlative to human embodiment and perception – where distance and mediation via the body are inescapable – and argues persuasively that this technological drive towards a ‘reality’ that is wholly of human making ignores the paradoxical truth, that the experience of nature, or the earth, as ‘other’, is a precondition of a meaningful existence. This is also true of architecture, I would contend. The more architecture resembles a realm entirely of human design and manufacture, with hardly any constitutive features acknowledging the ‘otherness’ of the earth, which is unavoidably co-constitutive of human embodiment, the more it becomes a domain which alienates humans from their ineluctable bond with the earth. The incorporation of design features that employ light and shadow, height and depth, ‘earthy’ textures (marble, granite, sandstone, red brick) and perceptual vantage points for placing it in a landscape as a humanly accessible, yet, distanced region, simultaneously ensures that such architecture imparts a sense of belonging to the earth, despite its transcendence in relation to us. Paradoxically, humans are both immanent and transcendent to the earth – it is our ‘originary’ spatio-temporal home, but as such ‘different’ from us. The more our consciousness coincides with a substitute cyber-world, however, the more we lose our salutary, embodied, ‘human’ contact with the earth-bound world. A ‘sustainable’ architecture, reconcilable with the ‘law’ of the earth (as part of the fourfold), would contribute to humans’ ‘existential soundness’, and already does in many instances of extant architecture the world over. Anyone who has ever set foot in the Hagia Sophia in Istanbul, will know intuitively what I mean – in fact, this early-medieval church may be regarded as paradigmatic of an architecture that exists in accordance with the implicit normativity of the ‘fourfold’.

To return to Harries’s interpretation of the ‘fourfold’, his (1997:160) elaboration on ‘sky’ reminds one that, in addition to what Heidegger says about it, it is metaphorically linked to the awareness that humans are able to surpass the ‘here and now’, that they are always ‘ahead of’ or ‘beyond’ themselves. This, says Harries, is partly what the spiritual dimension of being human entails. This is a reminder of Heidegger’s contention, in *Being and time* (1978: 458), that humans are not merely characterized by ‘thrownness’ (the facticity of being-in-the-world), but also by ‘projection’, even if they further tend to be subject to ‘falling’ (back into conventional ways of doing things). ‘Projection’ here means the ineradicable capacity of individuals to appropriate a given situation and transform or elaborate on it creatively, even if the tendency to ‘fall’ back into the comfort zone of tradition and custom – or, one may add, of valorized discourses such as those of bureaucracy and capitalism – always exercises its gravitational pull

on them. Hence, 'sky' suggests the creative ability to renew or transform cultural traditions or the 'normalizing' discourses surrounding one in the face of their inherent tendency to regulate one's life in a carceral or imprisoning manner. 'Sky' therefore denotes the symbolic limit to everyday experience, and as such challenges humans to go 'beyond' it – literally, to explore outer space, for example, or figuratively, to create novel, hitherto unheard-of literary, artistic, architectural, scientific or philosophical forms and genres.

Harries (1997:160) reminds one of the link between 'mortals' and Heidegger's existential analysis, in *Being and time*, of *Dasein's* resolute acceptance of its death as precondition for an 'authentic' existence. As long as one does not reconcile oneself with ageing and everything that it entails, one is also never free to live a culturally or intellectually creative life. Accepting one's mortality liberates one for 'adding one's verse' to the ongoing drama of the tradition (see Olivier 2002). 'Mortals' is therefore a concept that reminds one that we have only a limited time to live on earth, and that unless we accept our mortality, we may not find a reason or the strength to live a constructive, socially responsible life. Nor would an architecture lacking any markers of finitude – such as building materials that register the passage of time (such as those mentioned in connection with 'earth'), for example stone or red brick – be one which signifies humans' earthly sojourn as a temporary one, in this way refusing its occupants the opportunity to reconcile themselves with their own mortality.

As Harries (1997: 160-161) observes, Heidegger's notion of 'divinities' is the most questionable of the 'fourfold', given the secularism of the present age. Nevertheless it points, for Heidegger, to the deepest source of meaning for humans. Not, to be sure, the god or 'God' of any specific tradition, but precisely the divine as *unknown*, because naming it would violate, for Heidegger, what is essential about '...the many-voiced ground of all meaning and value' (Harries 1997:161). If this is what the term 'divinities' ultimately denotes, it is the most profound, but also most ambiguous (but ubiquitous) source of all cultural activities and practices on the part of humans, including the cultural practice of designing and actualizing architecture. 'Divinities' is therefore a salutary reminder that, whatever one may understand by a deity or deities, everyone (including an atheist) who is able to face the demands of living, has some 'ground' of meaning in their lives – the (often unconscious) source from which they live their lives. It is Heidegger's claim that, together, these four concepts provide the criteria for assessing whether an artwork or a work of architecture (or any other cultural practice, such as education) is capable of being appropriated and understood by individuals in a meaningful, life-enriching manner.

What is the relevance of Heidegger's discourse on the 'fourfold' for this inquiry into the relation between architecture and 'law'? Just this: if architecture were not to be guided by, or evaluated in terms of a fundamental 'law' such as that embodied in Heidegger's discourse on the 'fourfold', it is likely to be as alienating as the infamous Pruitt-Igoe building, large parts of which were demolished in St Louis, Missouri, in 1972 because it had become a site of social 'dysfunctionality' (Jencks 1984: 9). With regard to architecture, it is nothing new that human beings experience space or spaces in qualitatively different ways. As most people know, there is a unique 'feel' to a specific city, and even within the same city, to different locations, buildings, parks, streets, and so on. This phenomenon is intimately related to the fact that, as embodied beings, we are inalienably spatial, as much as we are immersed in time – even the virtual spaces accessible to us today in online games such as World of Warcraft exercise their allure through the simulation of all kinds of spatial modulations, exterior as well as interior. (Which is not to overlook the fundamental differences between 'real' space and cyberspace; humanity needs an occasional reminder that the earth gives us the measure for an architecture that would maintain the salutary spaces separating us from nature, instead of acting as if the world is entirely of human making. Cf. Germain 2004).

‘World’ and ‘earth’

For the sake of a thorough understanding of its relevance for architecture, one should not leave a discussion of Heidegger’s ‘fourfold’ un-amplified by what he wrote in an earlier piece – *The origin of the work of art* (1975a) – on two inseparable concepts, as far as an adequate grasp of artworks is concerned. The two concepts in question are ‘world’ and ‘earth’ (which is here cast in a slightly different way compared to its meaning in the ‘fourfold’), which Heidegger offers as a replacement of the Aristotelian conceptual pair, ‘form’ and ‘matter’, because, he argues, in an artwork the ‘material’ involved does not ‘disappear’ into the artwork’s ‘form’ the way that it does in the case of a piece of equipment (like a hammer, where the material has to serve the ‘form’ so completely that it does ‘vanish’ into it). With a work of art it is different, hence Heidegger’s choice of words for his proposed alternative to Aristotle’s principles. He replaces Aristotle’s ‘form’ with ‘world’, and ‘matter’ with ‘earth’ (Heidegger 1975a: 27-29; 41; 44-46; 49).

By ‘world’ Heidegger names that aspect of a work of art that makes it interpretable – that is, its susceptibility to semiotic or symbolic appropriation. He calls ‘world’ that element in an artwork which places it in the ‘open’, and through which one can gain access to the cultural world within which it was made, built, painted or written. So, for instance, the *Iliad* opens up the myth-pervaded world of the pre-philosophical Greeks, and the *Hagia Sophia* in Istanbul (completed in 537 CE), even upon entering it today, fleetingly transports one to the Byzantine world of Justinianus, with its sense of spirituality and otherworldly beliefs – the world, Heidegger intimates, within which the decisions determining the destiny of that specific cultural world were made. Compare Frank Gehry’s Guggenheim Bilbao with the Hagia Sophia, and at once Heidegger’s meaning becomes clear: Gehry’s building, with its titanium ‘roof’ wrapped around it, strikes one as something simultaneously harking back to the middle ages and yet also something signalling forward in time, reminiscent of the starship Enterprise from Gene Roddenberry’s *Star Trek*. In a word, these two magnificent pieces of architecture (re-) present different worlds through those elements constituting them which lend themselves to interpretation.

‘Earth’, on the other hand, for Heidegger, unlike Aristotle’s ‘matter’, denotes precisely that which stubbornly resists any attempt at interpretation in artworks – that which, paradoxically, shows itself, yes, *but as something that refuses to yield to humans’ prying, interpretive or analytical scrutiny*. In painting, for instance, the sheer givenness of pigmentation, of colours, certainly contributes to the decipherable meaning of the painting, but the colours or the pigments themselves remain inexplicable – they simply *are*. Hence, the relationship between ‘world’ and ‘earth’ is not a dialectical one in the Hegelian sense, where a ‘higher’ meaning emerges from their ‘synthesis’ or reconciliation, but one where they are, as Heidegger (1975: 49) says, engaged in a mutually ‘life-giving struggle’, one that will remain for as long as the artwork retains its integrity (instead of being destroyed).

These two principles, which are inseparably, but ‘tensionally’ conjoined in every work of art, amplify the meaning of ‘fourfold’ in so far as it enhances one’s comprehension of ‘sustainable’ architecture in the sense that I understand it here. ‘Earth’ here adds a new dimension to what it means in the fourfold, reminding us that an architecture – or literature, for that matter – which attempts to reduce ‘earth’ to ‘world’ through hyper-transparency, must fail (explaining every word in a novel, instead of allowing their musicality and metaphoric density to work their ‘earth’-magic; trying to let every material, like wood or steel, in a building, ‘vanish’ into functionality, instead of letting them manifest their inalienable attachment to the ‘earth’).

‘World’, on the other hand, amplifies what Heidegger subsumes under ‘sky’, ‘mortals’ and ‘divinities’ in the ‘fourfold’², to the extent that these three notions comprise different aspects of everything that is interpretable in a novel, a painting, a symphony or an architectural work. The ‘world’-aspect of the Hagia Sophia can be comprehended in terms of spiritual, limit-transgressing striving (‘sky’), the fears and supplications of people who know they must die, and are preparing for that day (‘mortals’), and its variously (in murals, mosaics and architectural fixtures-) embodied conception of the deity (‘divinities’).

‘Perceived space’, ‘lived space’ and ‘conceived space’

To be able to grasp fully what is at stake here, and simultaneously enhance one’s understanding of the dimensions of meaning opened up by the ‘fourfold’, and by the conceptual pair – ‘world’ and ‘earth’ – a brief reconstruction of Henri Lefebvre’s equally fecund tripartite typology of historically and socially ‘produced’ space is called for. In his book, *The production of space* (1991: 26-27), Lefebvre claims that a particular social organization happens via a distinctive ‘production of (social) space’, and remarks further that such space ‘...is constituted neither by a collection of things or an aggregate of (sensory) data, nor by a void packed like a parcel with various contents...’ It is therefore ‘...irreducible to a “form” imposed upon phenomena, upon things, upon physical materiality’. This is to say that space, for Lefebvre, is never homogeneously and self-identically ‘there’ throughout history, but is instead ‘produced’ through the actions of human beings. Moreover, the modality of these actions changes over time, so that space must be understood as being fundamentally historical. Instead of conceiving of space as a fixed construct – the way the Enlightenment did, according to Lefebvre (which does not really do justice to Kant’s account of space and time, in my view) – we should regard it as an incomplete, tension-filled process, always subject to the effects of the (political) actions of humans.

From this it should already be clear that space, for Lefebvre, is nothing homogeneous – in fact, he argues (Lefebvre 1991: 33) that such historically and socially produced space may be understood as comprising three interwoven, qualitatively different kinds of spatial production, namely ‘spatial practices’, ‘representations of space’, and ‘representational spaces’ (perhaps better indicated as the obverse of the former, namely ‘spaces of representation’). To be able to explain human beings’ epistemic-theoretical access to these different spatial modes, Lefebvre names three cognitive modes, correlative to the three types of produced space, namely ‘perceived’ space, ‘conceived’ space, and ‘lived’ space (Lefebvre 1991: 38-39). The first – ‘perceived’ space – corresponds to ‘*spatial practices*’ and marks the abstract spatial counterpart of the actual process of social production (and reproduction), whether this is characterized by disintegration or by cohesion and ‘structure’. ‘*Conceived space*’ – the second kind – corresponds to ‘*representations of space*’, or what most people would probably intuitively regard as ‘space’ in the true sense. It refers to the way in which space is conceptualized (whether it is in life-world terms, Aristotelian, Newtonian, Kantian or Einsteinian relativity theory-terms) and it stands to reason that it is via such conceptualization (‘conceived space’) that one has cognitive access to the other two spatial modes, the ‘perceived’ and the ‘lived’. The last cognitive category – that of ‘*lived space*’ – correlates with ‘*representational spaces*’, which denotes not only space in the sense in which it is passively ‘lived’ by inhabitants of space through non-verbal symbols and images, but also as it is ‘described’ by philosophers and imaginatively appropriated by artists and architects.

How does Lefebvre’s highly suggestive contemplation of historically and socially produced modes of space relate to Heidegger’s own reflections on the ‘fourfold’, as well as

on ‘world’ and ‘earth’ with their distinctive implications for space and for architecture? While *conceived space* and *lived space* appear to flesh out, specifically in terms of social production, Heidegger’s notion of ‘world’ and what is subsumed under it of the ‘fourfold’ (‘sky’, ‘mortals’ and ‘divinities’; see note 2 regarding the latter, though), *perceived space* strikes one as the socially ‘produced’ counterpart of Heidegger’s ‘earth’, given its implication of social practices that are always taking place ‘in full view’, and are yet, somehow, ‘under the radar’ of conceptual or imagined (and imaginary) appropriations of space in cognitive terms. In this respect, as in the case of Heidegger’s ‘earth’ (and related to what Lacan calls the ‘real’, or that which surpasses linguistic symbolization; cf. Lee 1990: 82), the *perceived space* of ‘social practices’ shows itself only to the extent that it resists scrutiny aimed at complete transparency.

Just as I would claim that Heidegger’s *fourfold*, together with ‘world’ and ‘earth’ (in the amplified sense) represents a ‘law’ or touchstone for ‘sustainability’ against which architecture may be judged, I believe that Lefebvre’s tripartite conceptualization of socially produced spaces further amplifies such a set of criteria. Unless architecture heeds the normative implications of these ‘legislative criteria’, it would fail to be truly ‘sustainable’, in so far as there are certain ways of ‘producing’ space through social action which pervert the very notion of the ‘social’ in the encompassing, normatively ‘human’ sense. These include the perverse spaces that have been produced through social and political practices such as German and apartheid-fascism – think of the ‘(anti-) social’ spaces of German death camps like Auschwitz and Dachau, and the ‘ethnically cleansed’ spaces of apartheid, in both of which architecture played a major role.

Architecture and the ‘law’ of the (amplified) ‘fourfold’

But what are examples of architecture that meets the requirements of this fundamental ‘law’? A brief, broadly spatio-architectural excursion to the American city of Philadelphia³ is instructive in this regard. I believe that one can relate the concepts discussed earlier illuminatingly to Philadelphia’s ‘places’, that is, to its buildings, its streets and the spaces that are given shape between them. Looking down from the monument of George Washington towards the Benjamin Franklin Parkway (Philadelphia’s very own *Champs Élysées*), I always – in the course of one of my frequent visits – *know* in my ‘world’- and ‘earth’-oriented body that I am back in one of my favourite American cities. Before going down to this specific area, with the Philadelphia Museum of Art, Boathouse Row, the Rodin Museum, the Franklin Institute, the Swann Memorial Fountain, Logan Square, the Free Library of Philadelphia and the Basilica of Saints Peter and Paul all within easy walking distance from one another, that feeling of being back here is not yet tangible, not yet in my bones, as it were. When I have sipped my coffee at Starbucks on Market to prepare for my visit to the museum district, and started walking down the Parkway, I start getting that feeling of having at last arrived on American soil again, and the feeling culminates in the satisfaction derived from turning around at Washington’s statue to look back the way I have come. I have often wondered why this is the case, and concluded that it is not simply the proximity of these wonderful buildings to one another, but especially the manner in which they modulate this part of the city’s space into a configuration of interconnected places with a very distinctive spatial quality, one that imparts to it the character of a ‘region’ with what Christian Norberg-Shulz (1980) called its own special *genius loci* (spirit of place).

Moreover, this ‘region’ gathers together places where the (amplified) ‘fourfold’ described earlier may be encountered at every level – in the physical exhilaration of walking the distance, which accompanies the visual experiences, in the time it takes to walk and to stand still while taking in the changing scene, and finally in the experience of satisfaction and edification in

the face of so much creativity. Nor is this experience restricted to the area described in its entirety, either; it repeats itself in proximity to individual buildings. Take the Philadelphia Museum of Art, for instance, where it majestically presides over the space projected by the Benjamin Franklin Parkway at its far end. To most movie-going people in the world it may be recognizable as merely being the magnificent building that provided a grand staircase for Sylvester Stallone's character in the film, *Rocky*, to train; to anyone truly familiar with this space, however, it marks the point of arrival after the exhilarating walk down the Parkway, and the gateway to a variegated aesthetic experience afforded by one of the finest collections of art in the world. While still outside, walking towards the main entrance, one may admire the colourful north pediment of the Museum, with its Olympian figures reinforcing the symbolic presence of ancient Greece already intimated by the Museum's Parthenon-like appearance; once inside, the statue of the huntress, Diana, at the top of the stairs, uncompromisingly signals the neoclassical provenance of the building, with all that this entails regarding the cultural tradition represented by it. Only someone who is completely insensitive to such a transformation of space into a 'place' where one may discover variegated artistic 'worlds', as it were, would not feel welcome to explore the various artistic traditions preserved here. On the other hand, if anyone has become as accustomed as I have to the Museum's various domains, he or she would probably experience the same tranquillity and edifying viewing as I have, visually as well as existentially – at the level of Heidegger's 'fourfold' – exploring the unique works preserved there, such as the (Marcel) Duchamp collection, to mention one of my personal favourites.

The experience briefly described here is pervaded by the normatively structuring function of the 'fourfold', in the sense that what 'sky', 'divinities' and 'mortals' (subsumed under 'world') and 'earth' signify, as explained earlier, is demonstrably at work in these buildings as well as in the spatial interrelationship between them. The exhibits in the museum(s), together with the buildings themselves, testify with rich multivocality to everything that 'world' stands for, albeit in a way that still requires interpretation on the part of visitors. Every building and artwork also embodies the element of 'earth', which reminds visitors of art's guardianship over the sanctity of the 'earth'. Moreover, a familiarity with Lefebvre's fecund socio-spatial conceptual threesome – 'perceived space', 'conceived space' and 'lived space' – enables one to see the architecture and the artworks in question as themselves issuing from the multifarious spatially productive engagement of people through social action at different levels.

These considerations also apply to Boathouse Row along the Schuylkill River in irreplaceable Fairmount Park, the biggest municipal park in America, where one could easily forget that one is in close proximity to the city of Philadelphia. These rowing club homes, some of which date back more than a century, conjure up a distinctive sense of witnessing generations of people traversing a specific time and space by engaging in shared social activities which impart to them a sense of belonging. Walking, skating or cycling along the walkway parallel to the river, one is invariably struck by the civic congeniality of a space configured, once again, into a distinctive place susceptible to interpretation along the hermeneutic axes of Heidegger's 'fourfold' and Lefebvre's typology of socially produced spaces, not least in the case of the many sculptures encountered along the way – including Lipchitz's *The Spirit of Enterprise*, with its paradigmatic connotations of America's pioneering role in history. Even the thought of *Star Trek's* imaginary starship, the *Enterprise* (which can hardly be avoided), is consonant with this pioneering spirit, and it is not difficult to see in this sculptural work (as indeed in much of the architecture in this proximity) – within its setting – an instantiation of the combined presence of 'earth' (physical desire and striving, as well as resistance to complete transparency), 'mortals' (the meaning of limited human time), 'sky' (the challenge to live creatively beyond existing

boundaries), and ‘divinities’ (giving meaning to life through constructive, self-transcending activity, drawing on the ‘deepest’ source of meaning in one’s life, personally and collectively).

It is impossible to enumerate, let alone do justice to, all the spaces in Philadelphia – appropriately, the city of ‘brotherly love’ or friendship – which have been transformed into ‘places’ that instantiate the sway of the ‘fourfold’ in various ways, usually by a combination of the architectural design of buildings and the spatial interrelationships between different buildings of such distinctive design. As the example of the Philadelphia Art Museum illustrates, the architectural design of a building determines both the quality of its interior space(s) and the space immediately exterior to it, but in both cases the design of other buildings in proximity to it, as well as the modulation of the spaces connecting them, interacts with, and modifies the space(s) of the building in question. Hence, looking down Broad Street from inside Philadelphia’s City Hall, one is aware of the effect of this dialogue between the exterior ‘Avenue of the Arts’ and the interior civic space, namely to allow the spectator a vivid experience of the city as a place where creative cultural pursuits are intimately connected with municipal policy and functions – something that confirms the interpretive pertinence of the ‘fourfold’ and of understanding space as socially ‘produced’.

As for the buildings and places encountered on Broad Street, suffice it to say that Philadelphia would not have had such a strong association with the arts if the latter were not enshrined in these buildings and the manner in which they interconnect spatially. Architecturally speaking, for instance, the Philadelphia Academy of Fine Arts surpasses its pragmatic function as art school and repository of a fine collection of early American art: both its exterior and its interior testify to its being an artwork itself, in which a variety of stylistic influences converge. But more than being an artwork, in its role as the oldest art school in the United States it also demonstrates – as does the new Kimmel Center – what Karsten Harries has described as the ‘ethical function of architecture’ (a notion compatible with Heidegger’s ‘fourfold’) in a book with that title. The fact that the Academy has provided students of art with a congenial space for pursuing artistic studies for a long time is witness to the success with which it has transformed ordinary space into a ‘place’ ethically oriented towards the arts, and a place, moreover, that embodies the ‘fourfold’ in a tangible manner.

Conclusion

This extended reflection on some aspects of architecture in Philadelphia could easily be extended to any city in the world, including South Africa, but with the *caveat* in mind, that not every city would yield as rich a harvest of ‘fourfold’-compatible architectural experience as the ‘city’-part of Philadelphia (some of its suburbs would surely fail in this respect) or of Istanbul. There are parts of Cape Town, Durban and Port Elizabeth that would satisfy the touchstone found in Heidegger’s and Lefebvre’s work with regard to architecture, but other parts would fail dismally. The mere fact that one does come across architecture imbued with the qualities demanded by these normative notions, however, is sufficient to evoke a kind of existential astonishment on the part of anyone who is susceptible to the varied voices in which the ‘fourfold’ addresses us. Astonished at what? At the sheer miracle of being, and of being able to discover, not only in the most architecturally breathtaking of buildings, but even in the ostensibly most ordinary of experiences or places, a world, or ‘fourfold’, of meaning, an easily forgotten ethos by which to find orientation in what often seems to be a world lacking all sense of direction. And such discoveries affirm that there is indeed a (perhaps primordially spatial) ‘law’ by the acknowledgement of which truly ‘sustainable’ architecture may be recognized.

Notes

- 1 On previous occasions (see Olivier 1998, 2003 and 2009) I elaborated on the 'fourfold' in the context of the pertinence of Heidegger's thought for art and architecture, and for a specific instance of installation art, respectively. On two of these occasions, I also looked at Heidegger's earlier introduction of the concept of 'earth' in a somewhat different sense than it bears within the context of the 'fourfold', as well as its counterpart, namely 'world'.
- 2 Although it could be argued that 'divinities' may be linked to 'earth', as it marks the pluriform manifestation of something that is essentially inscrutable.
- 3 What follows here regarding Philadelphia is an abridged and modified part of an essay that was previously published in *The Schuylkill Valley Journal of the Arts* (Olivier 2005).

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Bert Olivier is Professor of Philosophy at the Nelson Mandela Metropolitan University in Port Elizabeth, South Africa. He holds an M.A. and D.Phil. in Philosophy, has held Postdoctoral Fellowships in Philosophy at Yale University in the USA on more than one occasion, and has held a Research Fellowship at The University of Wales, Cardiff. At NMMU he teaches various sub-disciplines of philosophy, as well as film studies, media and architectural theory, and psychoanalytic theory. He has published widely in the philosophy of culture, of art and architecture, of cinema, music and literature, as well as the philosophy of science, epistemology, psychoanalytic, social, media and discourse-theory. In 2004 he was awarded the Stals Prize for Philosophy by the South African Academy for Arts and Sciences, in 2005 he received the award of Top Researcher at NMMU for the period 1999 to 2004, in 2006, 2008, 2009, 2010 and 2011 he received the award for Faculty Researcher of the Year in the Faculty of Arts, and in 2008 and 2009 also that of Top Researcher at NMMU.

Human rights and human wrongs: public perceptions of Diane Victor's *Disasters of Peace*¹

Elizabeth Rankin

University of Auckland, New Zealand
Email: e.rankin@auckland.ac.nz

Diane Victor's print series, *Disasters of Peace*, pays homage to Goya's revelations about war but addresses the violence of peace in post-apartheid South Africa. The delicate line and tone of her etching processes seduce the eye into a close reading of material that would normally be avoided, and which has shocked even lawyers who should investigate such cases. The works were withdrawn from display in the new building of the Faculty of Law at the University of Pretoria, and became the subject of a special issue of their journal. This paper investigates how Victor exposes the gap between human rights principles in a constitution recognised as the most advanced in the world, and the insidious underbelly of South Africa's human abuses.

Key Words: South African art; Diane Victor; etching; civil rights; human abuses.

Menseregte en die menslike onreg: openbare persepsies van Diane Victor se *Disasters of Peace*

Diane Victor se print-reeks, *The Disasters of Peace*, bring hulde aan Goya se onthullings oor oorlog, maar fokus op die geweld van vrede in 'n post-apartheid Suid-Afrika. Die delikate lyn en toon van haar ets prosesse mislei die oog in 'n beslote lees van materiaal wat normaalweg vermy word, en wat skok selfs prokureurs wat sulke gevalle moet ondersoek. Die werk is onttrek uit die nuwe gebou van die Fakulteit Regsgeleerdheid by die Universiteit van Pretoria, en is die onderwerp van 'n spesiale uitgawe van hul tydskrif. Hierdie artikel ondersoek hoe Victor ontbloot die gaping tussen die menslike regte in 'n grondwet erken as die mees gevorderde in die wêreld, en die verraderlike onderbuik van Suid-Afrika se menslike misbruik.

Sleutelwoorde: Suid Afrikaanse kuns; Diane Victor; ets; burgerregte; menslike misbruik.

Ten years after the freeing of Nelson Mandela, Diane Victor began a new print series, *The Disasters of Peace*. While she did not discontinue the experimental works that challenge the conventional limits of her medium in scale and process, this series moved away from the sense of technical *tour de force* that had characterised much of the work with which she made her name as a printmaker. *The Disasters of Peace* reverted to modest scale and the more familiar processes of etching, perhaps in homage to historical prints such as Goya's *Disasters of War* which inspired the title of her series. Yet these prints were to attract more public attention than any of her earlier works. Moreover, this took place primarily outside the usual channels of communication related to exhibitions and art reviews. To explore the controversy the works provoked it is necessary to set the scene for their public reception.

Architecture and art for Pretoria's Faculty of Law

In 2005 the new Faculty of Law building and the Oliver Tambo Library at the University of Pretoria were formally opened by President Thabo Mbeki. Architects KrugerRoos of Cape Town had been the winners of the open competition, responding to the brief from the Dean of Law that the building should embody the values of the South African Constitution. The Dean had summarised these as transparency, democracy, equality, human dignity, and the achievement of each person's potential. His document "emphasised that law as a discipline presupposes continuous debate and highlighted the role of human rights and the African context in the life of the Faculty." (Heyns 2005: 4) The award-winning building placed its emphasis on transparency, not only literally in the use of glass but in a novel form of circulation on an open multi-storeyed walkway. The citation for the South African Institute of Architects Merit Award in 2006 claimed

that the building embodied “some of the higher ideals associated with the legal fraternity – gravitas and transparency – by contrasting visually weighted solids to lighter steel components and glazing. The innovative use of natural light throughout appropriately strengthens this concept.” (Citation 2006)²

No doubt the Dean had a similar agenda in mind for the artworks which would grace the new building. But it seems that the embodiment of the constitutional principles was somewhat easier to achieve in the abstract forms of architecture – it was certainly to prove less contentious.³ When the building was finished at the end of 2004, the Dean selected the artworks for public areas personally, not by purchase but from a pre-existing collection. Evidently through the connections of Dr Johan van Zyl, Vice Chancellor of the University of Pretoria until 2001 and subsequently CEO of SANLAM, it had been agreed that a selection of works from that company’s collection would be made available to the university on long-term loan.⁴ For the Centre for Human Rights the Dean chose Victor’s *Disasters of Peace*, which at that stage numbered sixteen works.⁵

The Disasters of Peace enters the public domain

As Victor’s series evolved, the etchings had been seen in dealer galleries and had been shown twice in the SANLAM Gallery in Cape Town. On one occasion, the company apparently received a written complaint, reported to the curator Stefan Hundt, who responded not by removing any prints as later curators of more public spaces were to do, but by providing an explanatory text linking the works to their historical precedent in Francisco Goya’s nineteenth-century *Disasters of War*. It can be assumed that in a gallery setting Victor’s etchings had a preselected audience that would be familiar with the conventions of art: viewers may have found some of the prints uncomfortable, as was presumably the case with the SANLAM complainant, but they would generally have accepted the artist’s prerogative to make discomfort her intention. It will be interesting to see if any other premises come into play, and whether the reception of the works is modified by cultural differences, when the etchings are on exhibition at New York’s Museum of Modern Art, which has purchased the series.⁶ But here we are concerned with the display of the works outside a gallery environment, which opened them up to new spectators and new responses. No sooner were the works installed at the University of Pretoria than there was an outcry: as one outraged staff member of the Faculty of Law expressed it: “men with drills entered our premises unannounced and turned the Centre into a chamber of horrors.” (Heyns 2005: 5)

The Director of the Centre, Professor Christof Heyns, responded swiftly: he asked the Dean to have the works removed. In an explanatory document he circulated, Heyns maintained that the Centre had developed a policy for imagery associated with it in posters, publications and the artworks on its walls, and that this was breached by the installation of Victor’s works. It was claimed that, in occupying the Centre’s entire public space, they left no space for alternate messages. He argued further – and this seems to be the nub of the complaint – that the Centre had not been consulted about the works. At this point Professor Christo Botha of the Department of Public Law stepped in with a request that the prints be transferred to the corridors of his Department. But this did not lay the matter to rest. There were protests from those who objected to the removal of the works from the Centre for Human Rights, and others who opposed their new installation in the Department of Public Law, and the Vice Chancellor, who had received some twenty letters, set up a committee to investigate the matter. Its findings were never released, but the Dean was instructed to find a solution.

At a subsequent meeting of the Faculty’s departmental heads, Botha suggested that the

Disasters of Peace should remain in the corridor of the Department of Public Law, but that the two prints that caused the greatest offence should be placed in his office, where they could be viewed on request.⁷ The proposal was endorsed, although there were to be further complaints about these removals. It was ironic that while some felt that their rights were violated by the images which they found offensive, others felt that their rights were undermined by the prints' removal. Whose rights should prevail was something that could not readily be resolved. The only point on which those at either extreme of the reactions to the works could seem to agree was that they had been insufficiently consulted. The debates continued, with a full discussion at a Faculty Board meeting, and the 'Tuks Art Rumpus' reported in the *Mail and Guardian* in February 2005. (Krouse 2005) Later that year a special publication of the Law Faculty was devoted to the topic – Number One of the occasional papers called *PULP Fictions*, PULP being the acronym of Pretoria University Law Press. As the Director of the Centre wrote,

... events in the Faculty of Law of the University of Pretoria illustrate how art and human rights on a university campus can impact on each other, and in the process challenge conventional wisdom and certainties, and be a catalyst for change. (Heyns 2005: 3)



Figure 1
Diane Victor, *In Sheep's Clothing*
(Etching, 28x32cm)

Debating *The Disasters*

Victor professed herself pleased that her works were the subject of open debate and attracting attention from new audiences, saying, "For once I felt that my images had done their work and raised an awareness and reaction in a non-art circle and achieved ... a measure of success in what I had hoped for."⁸ The works certainly triggered intense discussion in new circles, but whether it was entirely directed at the issues which Victor intended to raise is questionable. The debates were chiefly around who gets to choose what is appropriate to represent a group, and the need for consultation, and the change the Director was referring to related to University

procedures rather than attitudes to the art – or to what it represented. He claimed that, beyond sharing valuable discussions about freedom of expression and censorship, faculty members had revisited processes for decision making in general. “To cite one example: Positions on the faculty journal, that were previously passed on from one person to the other, were thereafter advertised for the first time.” (Heyns 2005: 12)

It could certainly be argued that greater transparency was a positive outcome in the broadest terms of constitutional rights, but this did not address the atrocities that transgressed those rights at a more fundamental level, which were the subject of Diane Victor’s works. The prints themselves, although they certainly sparked the controversy, seem to have received little enough direct attention in the discussions. Indeed, one cannot help questioning how closely they were actually scrutinised by those who were caught up in the debate. My scepticism is fuelled by the fact that the caption for the illustration of Victor’s work in the PULP publication refers to it as painting not etching and, to add insult to injury, the image used on the cover, *Down on the Farm*,⁹ has been reversed. The respondent to Heyns’ article, Professor Karin van Marle (from the Department of Legal History, Comparative Law and Jurisprudence), remarked that most colleagues positioned themselves in relation to “specific difficulties with the procedures (or maybe lack of procedures) that were followed without commenting on the merits of the art.” (Van Marle. 2005: 18) Perhaps law professors are not the best placed to discuss the aesthetic merits of etchings, but some debate around their content would have been apposite. After all, the subject matter, which focused on the breaches of human rights that were occurring in South Africa despite the admirable principles of the new constitution, was not unrelated to the work of the Centre for Human Rights – presumably the reason that the Dean had chosen them in the first place. And it seems highly improbable that there would have been the same debates on processes of selection and display if he had chosen works that were less disturbing.

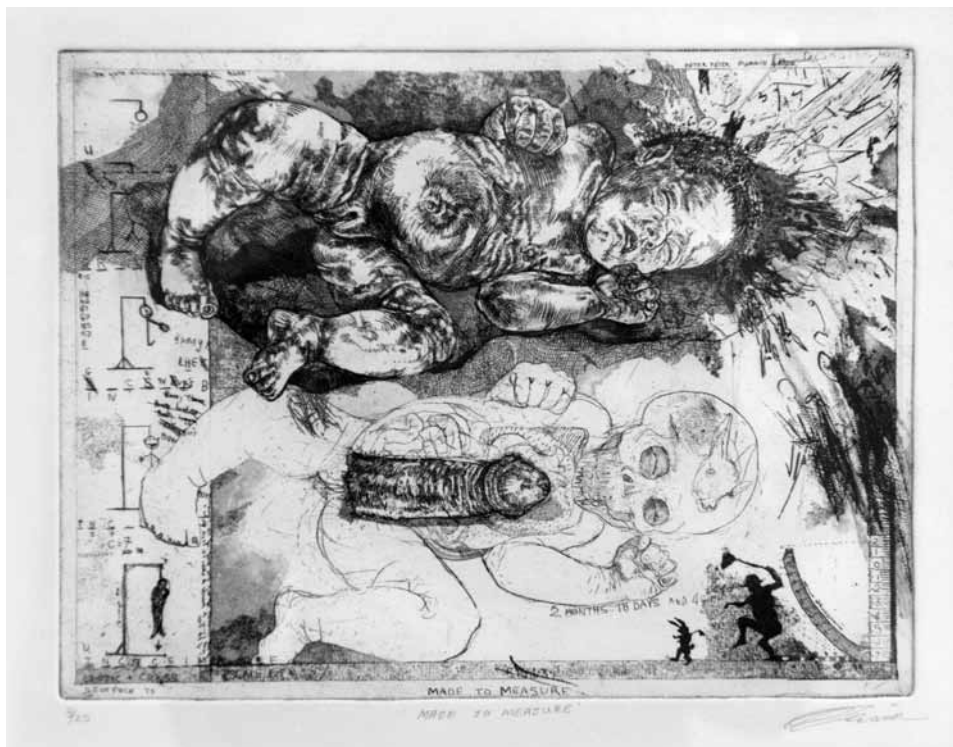


Figure 2
Diane Victor, *Made to Measure*
(Etching, 28x32cm)

Issues of Intention and Interpretation

The driving force behind the series was Diane Victor's sense of revulsion, not only at these aberrations of the law and the wrongs that human beings suffer, but at how little attention was paid to them – often no more than a few lines buried in the inner pages of newspapers. The series was initiated with *Why Defy* which responded to a report of the appalling abuse of a woman who was not only gang raped over three days but disfigured with an iron, its brand name – a gruesome pun – providing Victor's ironic title. The violation of women has been a continuing theme in *The Disasters of Peace: All for the Right Price* relates to the exploitation of defenceless prisoners, for example. That rape became a metaphor of the breakdown of social values in general for Victor is suggested by one of the more explicit etchings made in 2008, ironically entitled *And Justice for All*; it is described by the artist as the "gang rape of the criminal justice system", referring to the rape of hundreds of children by repeat offenders.¹⁰ She also picks up on news stories that expose the criminal maltreatment of those who are in institutions that should be caring for them, such as hospitals – the rape and subsequent death of a patient in an Intensive Care Unit in *An Easy Wind Up*; the sale of body parts from hospitals in *5000 Rand a Head*. Some of her works that are less overtly violent still have a sense of excruciating vulnerability, such as *Witch Hunt* and *She was Killed like a Goat*.

Drawing on a long heritage of fine printmaking, Victor's processes add a lingering poignancy to these scenes, for the exquisite skill of the etched line is seductive and entices us into closer, more protracted observation. *Down on the Farm*, with its title conjuring up a children's story book about holidays in the country, evokes the gentle naturalism of picturesque rural scenes in Dutch landscape etchings. But closer scrutiny reveals another meaning for 'down' in the prostrate victims of a farm killing, lying on the steps and in front of the agitated animals, which ruptures any affinity this work may have with children's tales or seventeenth-century prints. *The Man, the Lion and the Fence* depicts a specific farm incident, the killing of worker Nelson Chisale, who met his death in 2004 when he was thrown into a lion enclosure by his former employer: it is a composition that is strongly reminiscent of some of the scenes in Goya's *Disasters of War*; and relies, like his, on the subtleties of aquatint tones to avoid being visually unbearable.

The powerful imagery and iconic status of Goya's etchings that addressed the atrocities perpetrated by Napoleon's troops in Spain has made them of ongoing interest to contemporary artists. Jake and Dino Chapman, for example, have reworked Goya's *Disasters of War* in many different versions, most notably in *Insult to Injury* (2004), where they defaced an edition of the 83 etchings which they had purchased, 'improving' them by over-painting gas masks and clown-like faces onto the prints. Their *Great Deeds Against the Dead* (1994) which reworks Goya's print *Great Feat! With Dead Men!* as a sculpture is possibly more instructive for an understanding of Victor's referencing of Goya. The Chapmans' emphasis is on the subject matter, dead bodies impaled on a tree in a macabre display, which, recreated in three-dimensional form, increases its potential to shock. But Victor does not reproduce Goya's content: her subject matter is of our own world, although it may be equally disturbing: like him, she is a commentator on contemporary events. What she draws from Goya is his use of subtle print processes to capture the horror of human atrocities – challenging viewers with a paradoxical uniting of aesthetic delight and moral revulsion.

Yet, while Victor's works can thus be considered to take their place in a long tradition of fine prints, they do not fit entirely within a historical definition of printmaking. The margins, for example, are often contaminated with graffiti and the images too may spill out of the boundaries of

their format. This was a device that the eighteenth-century Italian printmaker Piranesi sometimes used to provide virtuoso trompe l'oeil illusions to add to the three-dimensional impact of his images; but any texts in the margins of his prints are finely engraved titles and identifications of the subject matter, not scrawled graffiti that provide an informal and often acerbic commentary on the content in some of Victor's prints. Piranesi's monumental architectural forms may be influential too. We find evocations of them in the ostentatious buildings of Victor's *Cluster Complex* which contrasts the extremes of housing developments for the wealthy with the squalor of squatter camps, and exposes with dark humour the vulnerability of pretentious villas.

More contemporary practice is also drawn into play with the use of comic book conventions, which have been deployed for satirical purposes by other South African printmakers in such publications as *Bitterkomix*. Repetitive frames in Victor's prints comment on the endless recurrence of crime, also implied by the title of *Graphic – To Be Continued*, or offer a cynical five-step guide to car hijacking in *As Easy as Pie*. Such compositions have older precedents in the border images of map making, such as we see in the map on the wall in Johannes Vermeer's painting, *Artist in his Studio*. It is a compositional device which enables Victor to frame a life limited to what can be stored in a supermarket trolley by a 'bag lady' with the indulgences of upmarket real estate advertisements, in a work entitled *Mind the Gap*. Victor points out that her inspiration is often drawn from outside the print tradition, as in her quotation from Edward Kienholz's mixed media assemblage, *My Country 'Tis of Thee*, with its merciless visualising of hypocritical politicians with one hand on heart, the other clutching the genitals of whoever follows. In a similar composition, entitled *Memories*, Victor literally 'exposes' politicians repeating the stupidities of the old regime that serenades them on the right. In another print, *Mad Bob*, Robert Mugabe beats his drum in emulation of Nero fiddling while Rome burns. Further corrupt institutions and irresponsible office bearers are the subject of *Blind Justice*, which mocks dishonest and incompetent judges, the protagonist here blindfolded with a hood reminiscent of the Ku Klux Klan. *Blind Man's Bluff for Boys in Blue* depicts an ineffectual police force, exacerbating rather than controlling criminal violence. The police fail even to halt the carnage on South Africa's roads, which is the subject of *Keeping Score* and of *Funeral March*, where the intensity of the high profile funerals for political victims that were familiar under apartheid mutates into a funeral procession for multiple road fatalities, crowded into a coffin that is a close relative of lethal minibus taxis.

Victor's concern is always for the victims – the wronged take precedence over the wrongdoers. She refers to the ravages of HIV Aids in *Or Had You Forgotten?* and to the fallacious cures suggested by Health Minister Manto Tshabalala-Msimang, such as the African potato, *Hypoxis Rooperi*, which Victor depicts growing on mounds that pitifully mark the graves of the fatalities it failed to prevent. Regarding the particular frailty of children, she highlights their vulnerability to drugs in *Glue Boys* and *Fizz Pop* and, above all, to child abuse.

Responses to *The Disasters*

It was Victor's works that addressed child abuse, *In Sheep's Clothing* and *Made to Measure*, that caused particular offence to members of the Law Faculty in Pretoria, and these were the two prints which were removed to the Head of Public Law's office. It might be remembered that works such as *And Justice for All* and *An Easy Wind Up* with their explicit sexuality had not yet been made when the series was loaned to the university, or Professor Botha's office might have been the refuge of further works. Indeed those two prints were amongst those removed from display when history repeated itself at another public venue, the insurance company Hollard's

precinct in Parktown, Johannesburg, some time later. In that context there was an attempt to handle the controversy around the display of Victor's works in a different way, as explained by Sheila Surgey, who is their "head of brand and business development". "Victor's etchings are rocking the boat, and works like *Honest Politician* – a large piece in which a business-suited man's genitals hang out of his trousers – cause consternation in the corridors."¹¹ She clarified that they were placing "a notice next to Victor's work that explains the artist's thinking behind the etchings, and asking the viewer to question their own concerns about life in South Africa and the kind of society we are striving for." (Shaw 2008: 68-69) But ultimately five works were removed from the display of the extended series of *The Disasters of Peace*.¹² Clearly Victor's prints continue to cause offence – and also to heighten awareness beyond the limited audience of the art world, as the artist intended.

Sexual abuse of children is a particularly distressing aberration which probably explains why *In Sheep's Clothing* and *Made to Measure* attracted most attention at Pretoria. Looking at images like these that evoke such profoundly disturbing aberrant behaviour can undoubtedly be upsetting: the potency of images over words for provoking emotion is widely recognised, all the more so when the subject matter is so painful. Yet both words and images can lose their impact when endless repetition in the media blunts the senses.¹³ But reports of incidents like these, whether endlessly aired in the media or scarcely mentioned, lodged sharply and persistently in Victor's memory, and she recounts she has used her art as a way of quite literally drawing the images out of her head in order to cope with them.¹⁴ In giving them visual form, Victor has been accused of sadomasochism. But these were not self-indulgent inventions for the sake of sensationalism: they were based on real episodes in the breakdown of civil society.

Intended to heighten our awareness, the images are intensely invasive, but they are not literal descriptions.¹⁵ *In Sheep's Clothing* does not avoid the repugnance of the gross bulk of the man kneeling in front of the slender child, but it uses metaphorical reference to bring home the implications of the confrontation, such as the transformation of the child's head into that of a lamb, which conjures up helplessness and sacrifice. The young girl's pathos is heightened by the touching details of her room which might suggest a much loved daughter, and by the double meaning of the inscribed nursery endearment 'Daddy's Girl'. *Made to Measure*, which is particularly discomfiting, does not show the actual molestation, but instead makes explicit in visual terms the sickening reality of what such an act implies, through the imagined device of an X-ray. It reveals the form of a phallus filling the interior of an infant body, which provides a highly disturbing counterpoint to the naked baby that lies so plumply unmolested alongside. The concept was made even more abhorrent in the *Mail and Guardian* newspaper report which, in illustrating *Made to Measure*, turned it 90 degrees, making the image all too appropriately erect.

In the light of such press coverage, it seems unarguable that Victor's works can stir up sensationalist reactions. So were the opponents of the works at the University of Pretoria right in feeling that they were inappropriate for public exhibition? Or were their opponents correct in claiming that the removal of the works was an act of censorship that violated human rights in another way? It is of interest to recall that even in the harshest days of censorship under apartheid, works with content that was deemed to be in some way pornographic were the most likely to attract the attention of the authorities.¹⁶ For example, *Slugabed*, a resin sculpture by Michelle Raubenheimer was removed from a group exhibition at the Shell Gallery in Johannesburg in the mid 1980s because its undoubtedly erotic nature was considered obscene. Nor were censorious attitudes altogether set aside in post-apartheid South Africa, as is demonstrated in the outcry about a prizewinning student work by Kaolin Thompson in a exhibition at the University of the Witwatersrand in 1997. Her ceramic piece, *Useful Objects*, representing a vaginal form as an

ashtray housing a discarded cigarette, was all the more contentious because it was interpreted by some as representing black female genitalia, and was in their eyes not only pornographic but racist. As Brenda Schmahmann (1999) points out, those who objected to *Useful Objects* apparently failed to realise that it could be understood as a transgressive work intended as a feminist critique, but rather read it in a reductive and somewhat literal way. While it seems unlikely that any of those objecting to Victor's prints would have misunderstood her critical intention, what is pertinent for a study of their reception is that the censorship advocated in the case of *Useful Objects* by Baleka Kgosisile, then Deputy Speaker of the National Assembly, was not aimed at what was exhibited in art galleries, but at the representation of works considered sexually explicit and degrading in the public domain of the media (Schmahmann 1999: 231). The protests about Victor's work arose chiefly as a result of their being encountered outside the art gallery, first at a law school then corporate offices.

The focus on child abuse in the works that were removed from display at the University of Pretoria differentiates them from the more usual debates about censorship which most often relates to the representation of women's bodies. But there has also been debate around subjects that involved children which might be thought of as prurient: Terry Kurgan's photographs of her own sons aroused heated discussion in art circles because a number of the shots showed their bodies naked after bathing. Sometimes such debate may reveal ideas more unwholesome than the works themselves. It seems improbable though that Victor's images could be thought of in this way – there is nothing about them that could be interpreted as titillating in any sense. Rather it is the way that they evoke the horrifying realities of aberrant behaviour that makes them so memorable.

In the end of the day the decision to remove Victor's works from display at the University of Pretoria seemed ironically to trump the act of display as a meaningful action. Removing the works not only gave them and their subject matter increased prominence, it implied not mere prudishness, but a political position on the part of those who supported that removal. It could be seen to represent an unwillingness to acknowledge the challenges facing South Africa in transition, all the more problematic amongst lawyers who would surely be directly involved in the process. In *PULP Fictions* Von Marle commented: "What kind of art we display is not on the same level of whether we want the carpets in the building to be blue or grey. The choice of the artworks, the reaction to them and their removal go to the heart of the Faculty's academic project. The question all of this poses is how we see our role as legal academics in a transforming society." (Von Marle 2005: 23) Von Marle acknowledges that in the past the University of Pretoria "...did not sufficiently object to the atrocities of the apartheid regime. Within the Faculty of Law, legal education, for example, did not in any way address the unfairness in apartheid legislation...." She argues that being involved in current mainstream areas of law and politics "... does not in itself necessarily imply a critical engagement. A critical engagement would mean exposing the limits of rights, the impotence of rights to address many wrongs within society. The Diane Victor series, *Disasters of Peace*, stands in the framework of this kind of critique." (Von Marle 2005: 24)

While Victor's works are clearly addressed to a South African audience, the issues that they raise have a wider significance.¹⁷ What the controversy brought home so keenly is that art is not outside society: it has a role to play, although it is usually symbolic rather than literal. The impact of Victor's prints, even if the response was often negative, shows that they are doing their work of consciousness-raising, whether or not there is any likelihood of their being socially transforming in a literal way. As expressed by Susan Sontag (whom Chris Heyns also quotes):

To designate a hell is not, of course, to tell us anything about how to extract people from that hell, how to moderate hell's flames. Still, I would like to suggest that it is a good in itself to acknowledge, to have enlarged, one's sense of how much suffering caused by human wickedness there is in the world we share with others. Someone who is perennially surprised that depravity exists, who continues to feel disillusioned (even incredulous) when confronted with evidence of what humans are capable of inflicting in the way of gruesome, hands-on cruelties upon other humans, has not reached moral or psychological adulthood.

No one after a certain age has the right to this kind of innocence, of superficiality, to this degree of ignorance, or amnesia. (Sontag 2003: 114)

The role of imagery in conscientising audiences is one that Sontag herself has questioned and re-questioned, arguing in *Regarding the Pain of Others* that, while the high incidence of photographs and movies depicting violence has become a commonplace, this does not necessarily mean that we have become immune to their impact.

Sontag acknowledges that the choice of what to photograph, which may even involve staging the subject, is a potent factor. In artworks that deal with atrocities, it will invariably be the intention of the artist to create works that are in some way unfamiliar, so that they jolt us out of the complacent pragmatism with which we come to view the stream of traumatic images of photo-journalism to which we are endlessly exposed. Diane Victor's strategy has been to make works where the medium seems familiar and unshocking: the nuanced forms of her etchings draw the viewer into a close reading that engenders an intimacy with their content, which can then impact more strongly. If seen in an art gallery which provides a special set of circumstances for viewing, insulated as it were from the 'real' world, it is possible to maintain a sense of privacy in the encounter that does not make it less disquieting but may make it more bearable. The controversy and censorship that Victor's *Disasters of Peace* has engendered suggests that the context of a public place, where the works are no longer shielded by the 'aura' of a gallery, makes such viewing infinitely more disturbing. Fine art in the public domain may be less likely to carry an expectation of aesthetic contemplation, revealing its content all the more starkly. It remains a moot question, however, whether images like Victor's have the power to change attitudes wherever they are displayed, and whether, in exposing ongoing violations of human rights, they can contribute towards a renewal of social values in a post-apartheid South Africa. I would contend, however, that the works are more likely to achieve their consciousness-raising goals when they are displayed outside the domain of art galleries and specialist audiences, in contexts where they will be seen by a wider range of viewers, less prone to viewing with aesthetic disinterest – and where attempts to avoid engaging with them by censoring their display may, ironically, bring their content to even wider attention.

Notes

- 1 This article is based on a paper which was read at a conference of the South African Visual Art Historians, held at the University of Stellenbosch in 2008.
- 2 http://www.saia.org.za/awards_merit_2006_citations.php accessed 15 March 2010.
- 3 Heyns defines a proactive role for the architecture: "The design of the building – the open corridors, windows and spaces – guided and informed the discussions about the etchings and gave it context and direction. ... While debates raged in the new corridors, meeting rooms and offices of the Faculty, the art of the building entered into its own, less noisy but more powerful dialogue with the art of the etchings." (2005: 15)
- 4 Stefan Hundt, the collection's curator, recounts that SANLAM acquired the initial eight prints from the Open Window Gallery in Pretoria

- in 2000, and has continued to purchase additional works in the series, retaining the edition number 1 throughout. The more recent etchings have not been added to those already lent to the Law Faculty. (Hundt e-mail correspondence with the author, July 2008)
- 5 Although work on *The Disasters of Peace* still continues, Victor had intended to start a new numbering series after she had reached number 30. But after adding eight further etchings, with subjects that continue to address social issues in South Africa such as recently rampant xenophobia, she has embarked in 2011 on the production of a limited edition artist's book of *The Disasters of Peace*, and decided to include all 38 etchings in the series.
- 6 As suggested below (note 15), *The Disasters of Peace* have more than South African interest and address matters of international concern. It is noteworthy that, in addition to the acquisition of *The Disasters of Peace* by the Museum of Modern Art, New York, where they are currently part of a 2011 exhibition on South African prints, a more recent series by Victor, *Birth of a Nation*, was acquired by the Library of Congress in 2009. Yet, while her work has attracted much attention in the form of reviews, there have been relatively few substantial publications on her work, other than the slim book in the 'Taxi series' by Elizabeth Rankin and Karen von Veh. Victor's recent major exhibition at the Faulconer Gallery at Grinnell College in Iowa, USA, was accompanied by a catalogue available on line at <http://www.grinnell.edu/files/downloads/VictorCatalog.pdf>.
- 7 Viewing conditions in Botha's office were hardly ideal: the works were not hung on the wall, but propped up on top of filing cabinets, where they were at times obscured by piles of papers. When I visited the University of Pretoria in July 2009, the other fourteen prints of the *Disasters of Peace* were still on display on the walls of the corridor, with empty gaps proclaiming the act of censorship that had taken place. It is noteworthy that this corridor can only be entered by those with swipe card access (I had to arrange permission for access), so the works are not really in a fully public context.
- 8 Victor e-mail correspondence with the author, February 2007.
- 9 It is noteworthy that the cover image was not one of the two that were considered most offensive, although they were reproduced in the pages of the publication.
- 10 E-mail correspondence with the author, November 2009.
- 11 It may also be pertinent that this image has been identified by some as Jacob Zuma, although Victor disclaims any intention to create a specific portrait.
- 12 Hollard owns edition number 24/25. In this case five etchings were removed after there were complaints when *The Disasters of Peace* were installed in the staff café area: *Kom Vrou en Bring die Kinders; And Live off the Fatta the Land; Made to Measure; An Easy Wind Up and Justice for All*. It is interesting to note that the first two do not have directly sexual connotations, but may have raised objections because of their inclusion of male nudity. *In Sheep's Clothing* was not amongst those removed in this case.
- 13 Heyns argues the possibility of the same neutralising effect through regular exposure to the etchings, asking whether "portrayals of horror" in the public realm could be "a good thing, because it serves as a prompt to action, by confronting the viewer with reality in all its harshness, or is it always a bad thing because it has a dampening effect, by creating an environment in which the prevailing mood is 'this is how things are and nothing can change it?'" (2005:12) He also recalls that "Hendrik Verwoerd, who had some authority on these issues, wrote his doctoral thesis on 'The blunting of the senses'." (2005: 13). The notion that visual images lose their potency is challenged in Susan Sontag's book *Regarding the Pain of Others*.
- 14 E-mail correspondence with the author, January 2007.
- 15 Heyns writes that "The etchings portray ... specific incidents of child rape and family violence." (2005:5) While they undoubtedly draw on particular events, however, they are not in fact representations of identifiable occurrences.
- 16 Surprisingly, more politically directed art was often overlooked by the censors unless it was in a popular public form that could be widely distributed, such as a poster. A telling example was Gavin Young's *Hansard Series* which attracted no attention when it was exhibited in a gallery in the 1970s, but one of the screenprints was banned when used for a poster.

- 17 It is confirmation of their wider relevance that Victor's *Disasters of Peace* excited much interest amongst non-South African viewers when her works were included with those of other printmakers in papers I presented at the IMPRINT International Print Conference at Bristol ('Signs of Subversion: Printmaking

and Politics', September 2009) and a session on 'Art and the Crises of the Contemporary World' at the Art Association of Australia and New Zealand conference in Canberra ('Mediating the Media: the graphic art of Daniel Heyman and Diane Victor', December 2009).

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Elizabeth Rankin held the chair of History of Art at the University of Witwatersrand, Johannesburg, for many years before she was appointed Professor of Art History at the University of Auckland in 1998. She has continued to pursue research on South African topics, notably in *Rorke's Drift: Empowering Prints* (2003) and *Listening to Distant Thunder: The Art of Peter Clarke* (2011), both written with Philippa Hobbs, and the book on Diane Victor in the Taxi series, co-authored with Karen von Veh (2008).

redress-un-dressed

Introducing a play of judicial and aesthetic processes of redress

Elgin Rust

Master graduate of the Michaelis School of Fine Art,
Faculty of Humanities, University of Cape Town.
info@elginrust.net

The documents compiled for this journal are extracts from the mini-dissertation part of the Fine Art Masters *redress¹-un-dressed*, ADVOCATE ALICE PRESENTS: *R v JR 2010*, completed in 2010 at the University of Cape Town. This investigation into processes of redress (that is, strategies of transformation) led me to juxtapose processes of what I have termed ‘aesthetic redress’ against processes of judicial redress. Here I present a selection of discursive arguments underpinning the fictional case *R v Judicial Redress 2010 (R v JR2010)* which manifest in the practical body of work as a performative installation. For the purpose of this paper, I have chosen to focus on the play of judicial and aesthetic processes that highlight links between law, art and culture.

Key words: law, art, redress, aesthetic redress, play.

Redress-un-dressed

’n Inleiding tot die spel tussen regs- en estetiese prosesse van af restelling

Die dokumente wat saamgestel is vir hierdie joernaal, is uittreksels uit die mini-tesis vir *redress¹-un-dressed*, ADVOCATE ALICE PRESENTS: *R v JR 2010*, ter verkryging van ’n meestersgraad (2010) in Skone Kunste aan die Universiteit van Kaapstad. In hierdie ondersoek na regstelling (*redress*), oftewel strategieë van transformasie, jukstaponeer ek wat ek beskryf as estetiese regstelling naas prosesse van regterlike regstelling. Ek bied hier ’n seleksie van betoë as grondslag van die fiktiewe hof saak *R v Judicial Redress 2010 (R v JR2010)*, wat in die praktiese groep werke as ’n vertoonkuns-installasie manifesteer. Vir die doel van hierdie verhandeling het ek besluit om te fokus op die spel tussen regterlike en estetiese prosesse wat die skakels tussen kuns, kultuur en die reg belig.

Sleutelwoorde: wet, kuns, regstelling, estetiese regstelling, spel.

This investigation into processes of redress grew out of an awareness of the consequences of the many acts of violent transgressions committed by humans against one another, against humanity. These are clearly not exclusive to South Africa. Hal Foster goes so far as to propose that we live in a “trauma culture” (Foster in Bennett 2005: 6). I argue that as long as major institutions, such as the judiciary, continue to sideline emotional redress¹ by focusing purely on punishment and economic compensation², we will continue to live in this “trauma culture”, as these institutions continue to perpetuate what Pierre Bourdieu describes as “gentle violence”, imperceptible and invisible even to its victims. It is “exerted for the most part through the purely symbolic channels of communication and cognition (more precisely, misrecognition), recognition, or even feeling” (Bourdieu in Nice 2001: 1 - 2). As a countermeasure, he proposes a materialist analysis of the economy of symbolic goods and the creation of symbolic weapons capable of shaking the institutions (Nice 2001: ix – 3). This is especially pertinent for a country which is currently grappling with the fallout from a major social crisis, the legacy of apartheid. *The Truth and Reconciliation Commission* (TRC) was a brave attempt to facilitate processes of redress, but the need for further redress continues to be overwhelming. This need for redressing the legacy of apartheid overshadows the growing need for redressing the social crisis due to the increasing number of violent crimes such as murder, rape and assault committed daily against the weakest in society: women, children and anyone considered other (Gallagher 2005; Mistry 1997 [Online]). The war against them persists as their voices continue to be silenced by the patriarchal system of the judiciary which, in denying truth, denies processes of redress (Motsei 2007: 37 - 54; Greenbaum 2008: 81 - 98) (Thomson 2002: 187).

Case No. 001/05/2008

This fictional case engages the services of the invented characters Detective L. Prince and Advocate Alice, which are loosely based on *Alice in Wonderland* (Carroll 2009) and *The Little Prince* (de Saint-Exupéry 1987). I chose these two as they were characters which accompanied my youth and still have popular appeal. The form of detective fiction allows me to mimic and subvert real processes of judicial redress by applying a process of redress through art, which I have termed ‘aesthetic redress’.

I open the case with a statement regarding my personal experience of judicial redress, given to the fictional figure Detective L. Prince via an artwork (Figure 1). This response not only recalls the experience I shared with my mother, but one I share with all women and children who have had the courage to participate in the judicial system, in an attempt not only to redress emotional and physical harm for themselves, but for all citizens.



Figure 1
for my mother and me, 2008, ink on digital collage,
inkjet on hahnemühle paper, 22cm x 30cm, London, private collection (Source Rust 2010: 671).

The scene of the crime is established as the courtroom, which attempts to redress a crime as it is here that the victim becomes a state witness who appears in court to testify. During this process, the victim is cross-examined by the defence, an interrogation which attempts to destabilise the position of the witness. This is especially true in cases of sexual assault, where the reputation of the victim/witness is called into question by attacking her [sic]³ character, thus repositioning her as the perpetrator (Zefferett 1998: 47).

In this manner, I initiate the investigation into judicial redress. The process documented in *Case Docket 001/05/2008* records the investigation in the form of letters, reports and memos compiled by the fictional characters. Their investigation does not seek to reveal a hidden truth – rather it makes use of the material/evidence to act as memory triggers for the audience to imagine what remains invisible (de Oliveira 2003: 134). In this case that which is excluded in judicial redress is emotional transformation.

Photographic documentation and physical evidence collected from the Cape Town courts is used by the fictional characters to interrogate the abstract concepts of redress by applying a specific process of research + reconstruction + reinterpretation to these symbols (objects,

At this point, it is important to note that the processes of aesthetic redress do not aim to redress a harm in the judicial sense, which is defined as *to set right; to remedy; to compensate; to remove the causes of a grievance* (Brevard County Clerk 2010 [Online]). Neither does it attempt to remedy, balance or set right any personal harm nor social grievance (Dictionary.com, 2010a [Online]). Rather, the aim of aesthetic redress is to offer strategies of affirmative transformation which produce new political subjectivities. It includes research, reconstruction and reinterpretation of object/subject relations to deconstruct in the Derridian⁴ sense, rather than reconstructing empirical rational subjectivity and in this manner ‘making good’. The process of aesthetic redress is therefore personal and specific, yet also communal and ambiguous.

Memo **001/2011**
From: **Judicial Officer**
Case No. ***001/05/2008***

Memo **Aesthetic Redress 002/2011**
From: **Judicial Officer**
Docket Date: *15.06.2008*

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redress = back + arrange + again,

where redress is the aim and back + arrange + again is the process. This formula represents a real life, subjective process of emotional transformation. The concept of what makes good is defined by the individual subject involved in the process. The judicial system applies legal processes in an attempt to achieve redress for its subjects. This process fixes positions of truth and fiction to establish a harmful act and to take action in an attempt to re-establish the situation which would, in all probability, have existed had that act not been committed (Redress 2010 [Online]). To understand these processes better, I suggest we make visible this abstract argument by situating the formula in the aesthetic realm. The formula could then read as follows:

aesthetic redress = research + reconstruction⁶⁺ reinterpretation.

This process of transformation, which I tentatively term aesthetic redress, is the result of a process whereby specific objects of the past are rearranged in a new context, thereby giving rise to new meaning. Objects can, visually and symbolically, carry the past into the present. I consequently have the sense that the aesthetic process will be helpful in making processes of redress more tangible. Both processes (the legal and the aesthetic) use objects to reconstruct an event / experience. As things progress, these objects will become the very evidence we need to successfully resolve this case.

This game⁷, the play between different aesthetic politics, is not new. It has been around since modernity. We can trace it back to surrealist collages which influenced writers and artists, from Bertolt Brecht and Martha Rosler to Georg Hegel, who declared the “end of art”⁸. However, it is precisely from this moment that new art emerged, as it allowed objects to cross the border from the realm of art to life/ commodity and vice versa. The borders had become permeable due to museums’ multiplication of temporalities. This resulted in a linking of the artistic with the historical. From then on, any object could be elevated to being “viewed as a poetic body wearing traces of its history” (Rancière 2002: 143). “By becoming obsolete, unavailable for everyday consumption, any commodity or familiar article becomes available to art, as a body ciphering a history and as an object of ‘disinterested pleasure’”(Rancière 2002: 144). This translation functions in both ways, as any art object can also become obsolete. These processes reveal an ever-increasing sensitivity to the hidden lives of objects and their mediating potential (Rehberg 2010: 54). Rancière argues that what this process does is to transform the artist into a decipherer of the unconsciousness of society, which is engraved in the ordinary (or in our case, I suspect, the court room) (Rancière 2002: 145). This process makes society aware of its own hidden fantasies which, according to Rancière, dear Alice, could be featured as a phantasmagoria (Rancière 2002: 145).

The Detective believes that these object-subject relations are crucial points of departure when considering processes of aesthetic redress. They open the reading to a diversity of positions, deconstructing social and cultural binaries (e.g. internal/external; masculine/feminine; truth/appearance) which is arguably the opposite of a legal reading, which attempts to fix positions (Irvine 2004 [Online]).

Memo

From:

Date:

Summary of Precedents 003/2011

Judicial Officer

23.06.2008, 02.07.2008 & 29.09.2008

After establishing the theoretical points of departure, the investigating team Advocate Alice and Detective L. Prince proceed to compile three precedents to underpin the arguments. This lays the foundations for the **Case Strategy 03.02.2010**.

Precedent 1

Advocate Alice selects Dinh Q. Lê’s collaborative *The Farmers and the Helicopters* 2006 (Figure 2) because of his particular use of material: aviation and other machine scrap collected around

the Tay Ninh Province, home to the US military in the American-Vietnam war. Together with two farmers/mechanics, Lê literally redressed this trash into Bell UH-1 or “Huey” helicopters (Cruz 2008 [Online]). This process is captured on three channels in a high-definition colour video installation intercut with American-Vietnam war movies (Cruz 2008 [Online]).



Figure 2

Dinh Q. Lê in front of the home-made full-sized helicopter built by Tran Quoc Hai and Le Van Danh, Singapore Biennale 2008, South Beach Development, © Photo Haupt & Binder (Source universes-in-universe 2010 [Online]).

It strikes the Advocate as important that the collaborators returned to the original site of war to collect the residue, loaded with history and memory, to re-construct hand-crafted helicopters, thus performing a process of research + reconstruction (Mouret 2007 [Online]). By creating something from nothing, the subjects are making a new version thereof. Interspersed with clips taken from American blockbuster war films, which reflect a popular western culture and their collective ‘histories’; these objects are read in a way that slips between chaos and order, obscurity and revelation. The work expresses a basic human experience which turns it into a mirror for society. “The fulfilment of their dream [Lê and the farmers] acts to hone their own version of history. It is replete with overtones of reclamation, of having the wherewithal to wrest away bias from larger stories [the American] than their own” (Cruz 2008 [Online]). The process of weaving different cultural strands of memory and history serves as a metaphor for the mind’s struggle to integrate different representations. This completes the process of aesthetic redress = research + reconstruction + re-imagination.

Precedent 2

Our Advocate chooses Walid Raad’s *The Atlas Group* 1998-2004 as the second precedent because both artists work with the residue of war using similar processes of aesthetic redress, in which the performativity of an archive is applied to propose new subjectivities. These subjectivities are shaped by the past, but have moved beyond the initial harm or trauma. Unlike Lê, who plays Hollywood war movies off against the real stories of the farmers, Raad incorporates fictional figures into real stories to produce an archive focusing on the Lebanese civil wars between 1975 and 1991.

Advocate Alice cites as an example thereof, *War Notebooks* (2004) (Figure 3), which uses documents from the actual archives in Lebanon. These archives are re-staged by the fictional historian, Dr Fadl Farl Fakhouri, who is understood to have donated all his files to the Atlas Group (Raad in Maimon, 2009: 99). Dr Fakhouri's collection contains photographic and textual notations of horse races that he attended. Writer and critic Verd Maimon argues that, while they refer to no historical war, the archive alludes to the traumatic effects of war in general (Raad in Maimon, 2009: 99).

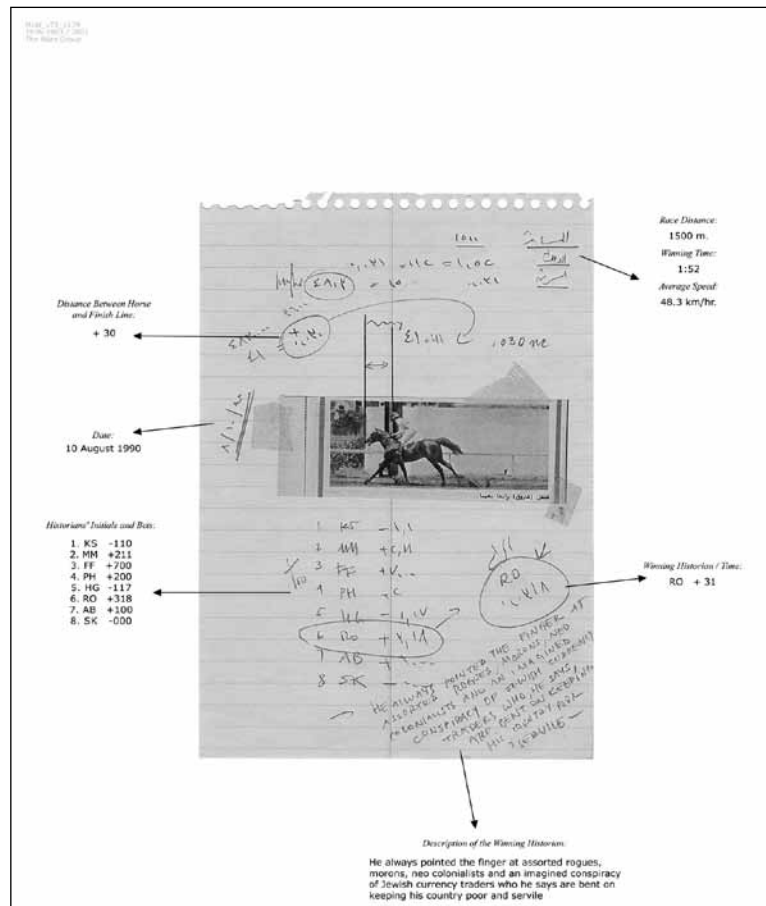


Figure 3
Walid Raad, *Missing Lebanese wars, 1996-2002*,
archival inkjet prints, single print, 112 x 127cm (Source Elsewhere ©, 2010 [Online]).

Advocate Alice observes that in this manner the artist, in this case Raad, can use his position outside of the 'official role of recording history' to maintain freedom of expression and produce alternative narratives and subjectivities (Maimon 2009: 97 - 99). Alice argues that Raad's body of work encapsulates a straightforward translation of aesthetic redress, albeit one in which historical forms of representation are very limited. For her, art that mimics empirical strategies (like the archive) to destabilise fact production risks replicating the same forms it tries to destabilise.

She therefore argues that when presenting the evidence for *Case Docket 001/05/2008* they, Advocate Alice and Detective Prince should be wary of falling into the same trap. They should ensure and not eliminate disagreement. They could do this using a process of dis-identification and declassification to create new partitions between subjects and roles, names and identities, and speech and noise (Maimon 2009: 103). In addition, Advocate Alice argues it will be important not to keep the viewer at an emotional distance as disagreement in this form

is produced without affect and thus continues to fail to register the emotional affects traumatic events such as war, have on subjectivities.

The good Detective explores this issue in a follow-up letter, suggesting that the registration of affect is incorporated through a form of sense memory. This memory “operates through the body to produce a kind of ‘seeing truth’ rather than ‘thinking truth’” (Bennett 2005: 26). Sense memory allows engagement with a traumatic experience that may otherwise be unintelligible, especially when the cognitive system of a victim/witnesses is overstretched. According to current trauma studies, “the subject is often incapable of making a narrative memory regarding the event” (Janet in Bennett 2005: 23). If that is the case, justice (and redress) cannot be achieved.

Detective Prince then mentions a theory postulated by Deleuze, which asserts that artists think in terms of sensations that are generated through the artist’s engagement with the medium. In this process, “what is being painted on the canvas is the body, not insofar as it is represented as an object, but insofar as it is experienced as sustaining this sensation” (Deleuze in Bennett 2005: 37). This engagement shifts the emphasis from expression to production, from object to process, wherein sensation is the modus, not the subject. Therefore, “seeing truth” can be understood as part of the process of aesthetic redress. Conversely, it can be argued that judicial redress relies purely on the polar opposite, “thinking truth”. Prince concludes that, when questioning how this “seeing feeling” works, one should not look for the meaning, but rather the production of answers, as it is “the how” which allows affect to “lead to a critical understanding that undercuts rather than affirms the bounds of subjectivity, thereby taking us beyond ourselves” (Bennett 2005: 41, 104).

Precedent 3

This leads Advocate Alice to present Kentridge/Handspring’s play *Ubu and the Truth Commission* 1997 as, unlike Raad, they achieve a “reconfiguration of the inescapable” by incorporating sense memory into his production of “dialectical images” (Hickey 2009: 18).

Directed by Kentridge and written by Jane Taylor, this script is based on original testimonies of the Truth and Reconciliation Commission (TRC) and Alfred Jarry’s 19th-century fictional character of Ubu Roi (Handspring Puppet Company, 2002 [Online]). It mimics the TRC, using the narrative to show what it means to live with the burden of history. Its process involves research and reconstruction, not only to explore emotion *per se*, but to allow the intensities of affect to flow in and out of the characters, allowing the work to go beyond the psychological and emotional. The theatrical production achieves this by bringing binaries into play (such as perpetrator/victim and/or past/present) while at the same time incorporating and engaging emotions, psychology and agency – thereby producing an affective experience for the audience.

Advocate Alice takes to heart Kentridge’s emphasis on process as creative production, a strategy that evolves as it de-constructs and reconstructs an idea (Kentridge 2010 [Online]). It includes productive misunderstandings and plays with fact and fiction to produce an artefact, which is called art. For Kentridge, art, much like life, is a journey. Unlike life, though, in the realm of art one can go back in time. This process changes chronological history into one that is different from the one that could have been (de Certeau in Dubow 2007: 50). Here the “temporal delineation is part of the remedial relation of sickness to cure, of retrieval to reflection to repair” (Dubow 2007: 50). Temporality is revealed as a codification which is linked to the restoration of the body politic (Dubow 2007: 50). And this is at the heart of Alice’s argument for the case.



Figure 4

***Ubu and the Truth Commission* 1997, witness puppet with puppeteers Basil Jones and Busi Zokufa in play written by Jane Taylor from the production by William Kentridge with the Handspring Puppet Company (Source Handspring Puppet Company, 2002a [Online]).**

These three precedents lead Detective L. Prince to spearhead the in-depth investigation of the crime scene: the spaces housing the judicial processes. He creates a photographic archive of evidence and also collects real evidence for the CASE ARCHIVE 001/05/2008: approximately 1000 x 90 minute magnetic tape cassettes containing recordings of proceedings, five leather-bound statutes of South Africa dating around 1960, one Advocate's robe, one pigeon-hole cupboard, one metal document cupboard, one wooden office filing cupboard and key, four large wooden office desks, one justice tuck-shop sign on metal, one Regional Court sign and seventeen blue court chairs, to list a few.

These are used to produce the subsequent case strategy for the trial hearing *R v JR 2010* presented by Advocate Alice in the Egyptian Building on Orange Street, October 14th 2010.

<u>Case Strategy</u>	<u>Date: 03.02.2010</u>
To:	His Lordship
From:	Adv. Alice
Case No.	001/05/2008

Your Lordship,

Respectfully, please find attached the proposed strategy arguing for the re-staging of the evidence of *R v JR 2010*, based on the extensive research compiled by Det. L. Prince and myself to date. Herewith, I briefly draw together the most important elements of the arguments:

We are investigating judicial and aesthetic redress, therefore it must be pointed out that this theatrical process of redress limits agency to a strict set of rules. The agency of the witness and the perpetrator is especially controlled, to such an extent that they are no longer telling their story, but one constructed by the system (Bennett 1981: 3-10). Agency is displaced. In the art system, "both disinterested art and surrealism were interested in the displacement of the artist's agency" (Iverson 2004: 49). Our use of these strategies allows us to compare the judicial and the aesthetic systems, as both operate in the same social context.

These interacting yet operationally closed function-systems produce different version of reality. They describe the world through defining elements of communication, and generating their own special environments according to their own rules of self-organisation. The law system, for example, is situated in court houses, while the art system operates through galleries,

museums, project spaces, etc. (Van Assche 2007: 105 -109). A place (or an object in space) becomes a type of communication, producing narratives within the social system. As closed from one another as these systems may appear to be, they nonetheless interact, as they are environments within the same social system which produce relevant context for one another (Van Assche 2007: 105–109). Interactions between citizens, which are simultaneously situated in several social systems, can lead to changes of reality, power and knowledge (Van Assche 2007: 110 – 112).

Based on this relationship, I recommend the re-staging of the arguments for the case *R v JR 2010*, using the processes of aesthetic redress proposed by Detective Prince and supported by the cited precedents in an attempt to deconstruct the performative processes of redress. This re-staging can take place as a form of mimicry that allows fact and fiction to be staged in the same space. In this theatre, the subject's personal experience, i.e. that which is explicitly 'off-stage' or outside, is staged inside, in the imagined court room. A theatre is thus created in which the viewer feels that the reality has been changed.

The investigation for the case, much like the process of aesthetic redress, goes back to the sites – the scenes of the crime – to collect as much evidence (photographic and real) as possible. This actual material, this archive, which we currently have in our possession, loosely refers to the actual process of judicial redress. This material will be re-staged for a cumulative trial hearing, which attempts to deconstruct judicial redress in a three dimensional space. Theorist Peter Osborne argues that this is a process in which each object/experience/image is re-evaluated according to its own particularities and which in itself constitutes evidence that becomes as real as the event it portrays. "The real now coincides with the image" (de Oliveira 2003: 134).

The final case hearing takes the form of an installation assembled through the processes of aesthetic redress. The playful mimicry of the judiciary inherent in the evidence produces what is real for the subject. The constructed submissions participate in an act of double speech which allows trash to be elevated. Simultaneously they activate sense memory, in this manner revealing human beings' affinity for chaos and ambiguity. An installation is, therefore, a logical strategy to employ for the presentation of this complex case, as it allows for the literal, physical, conceptual and spatial processes of redress to manifest the abstract processes of law and art.

This staging, my Lordship, is arguably a co-appearance⁹. The installation functions as a form that can facilitate a political staging of subjectivities¹⁰ as it places agency with the viewer rather than taking it away. To achieve this, the evidence collected for *R v JR 2010* is re-staged as a performative¹¹ installation which juxtaposes official and unofficial means of retrieving and reconstructing evidence in a process that destabilises the existing system (the judicial system), which is public and global, through private and individual means (de Oliveira 2003: 123). Repopulating the space with object-subject relations allows the processes to make a shared social experience visible (Rancière 2004: 90).

Should you have any queries, these can be discussed on 22 July 2010, when we meet for the trial hearing in Room 5, Hiddingly Campus.

Respectfully,
Adv. Alice

Trial Report**From:****To:****Case No.****Subject:****Date: 23.07.2010****Judicial Officer****Adv. Alice****001/05/2008****1st Hearing *R v JR*/JULY 2010**

Dear Prosecuting team,

Due to the docket being lost, this trial very nearly did not proceed. However, thanks to the intrepid Detective Little Prince, who at the urgings of Advocate Alice had a backup copy at hand, we were able to proceed. The preliminary staging in preparation for the final case hearing allowed all parties involved to reflect on the arguments in the process. It was noted that the submissions are not final and are subject to change. Nonetheless, some initial observations can be made regarding the final performative installation of the evidence of *R v JR 2010*. Please find attached the documentation and respective observations.

Yours kindly

J. O.

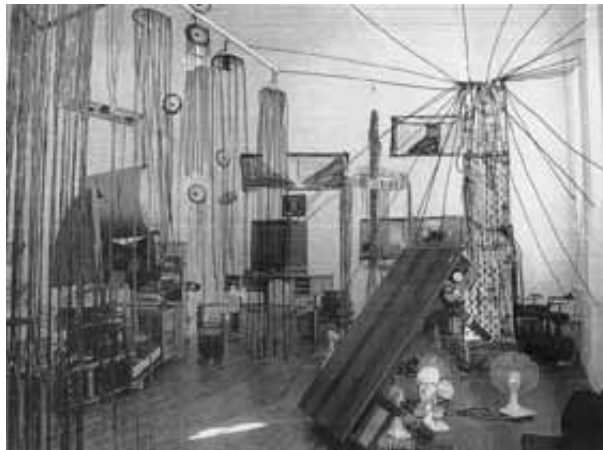
Submission 1

Figure 5

Installation view of *R v JR, July 2010*, mixed media: court room furniture, photographic documentation, dimensions variable, Cape Town (Source Rust 2010: 739).

On entering the installation, the viewer/jury/judge might at first glance be overwhelmed by the chaos of furniture, games, and reels and reels of loose magnetic tape. However, closer inspection of the disparate collection reveals in-depth considerations that structure the arguments presented. The installation is roughly laid out, based on the formal structure that defines key positions in a court room. The viewer is led along a trail, much like a detective game with clues leading one on. These leads are, however, not definitive and the viewer can choose what leads to follow, thus constructing a narrative in a free form puzzle style.

What makes this installation different from, for example Andrea Loefke's installation *Once Apon a Time* (2008), is that the work does not start out with sweet and innocent objects which become sinister. Instead, the work starts out with a bureaucratic system represented by the evidence. This becomes a phantasmagoria of toys comprising a fantastical ship, games, towers and craft collages – all part of our fictional investigation, much as a child might turn the furniture

of their home into an imaginary fortress or pirate ship. The structure echoes that of a fairy tale in which the primary narrative contains a secondary narrative. The primary narrative is the detective fiction led by the two protagonists. The secondary narrative consists of the processes of judicial redress (Black 2008: 35).

Submission 2A



Figure 6

Evidence by Det. L. Prince, 2010. Two pin boards, two square tables, Exhibits A and B. dimensions variable, Cape Town (Source Rust 2010: 740).

The initial investigation was taken up by Det. L. Prince. He collated his research into three main exhibits: Exhibit A, a 1000 piece puzzle; Exhibit B, a 49 piece memory game with joker; and Exhibit C, part of a series of photomontages. Exhibits A and B, which call for viewer participation, are placed on two square tables collected from the Cape Town Magistrate's Court as evidence.

However, unlike evidence used in a judicial setting, these images were digitally manipulated to enhance visual elements contained within their frames. In this manner, playful and conscious processes of decision-making were interwoven to trigger sensations based on shared experiences of curated objects, materials, colours and textures to produce new ways of redressing.

Submission 2B



Figure 7

Dornröschen, 2009, preliminary collage for Exhibit A, 2010, inkjet on hanemuehle paper, ink, glitter and watercolour pencil, 53cm x 73cm, Cape Town, private collection (Source Rust 2010: 741).

For this collage, Detective Prince chose a photograph from CASE ARCHIVE 001/05/2008 which documents the crime scene. The architecture of this space is what Judge Albie Sachs would describe as “architecture that proclaims authority, that says ‘Beware, the state is on top of you’” (2009: 91); the kind of space that makes anyone interacting with it feel guilty (2009: 91).

The image shows part of the perpetrators bench and a waiting bench at the back of the court. Wood panelling dominates the space, which is colonised by an array of figures in an unstable drama. The different narratives, the real and the fantasy collide and destabilise the image as the drawing style does not sit comfortably within the court room space. The viewer is drawn in by the colours and figures but is simultaneously jolted out into another context by the court room space. Mather Rosler’s collage series *Bringing the War Home* (1967-1972) can be understood as a precedent for this form of collage. In her series one can observe a clash of fact (images of war) with the fiction of a magazine’s idealised domestic setting. In the collage created for Exhibit A, the fictional story of the figures is inserted into the actual court room space, recorded as real photographic evidence for *R v JR 2010*.

This collage was used by Detective Prince as the source image for the 1000 piece puzzle which is *Exhibit A 2010*. The viewer can choose to interact with this work by attempting to piece the puzzle together, but the repetition of colour and texture in the image confuses and makes the game exceedingly difficult. This difficulty is intended to echo a popular understanding of law, which is often fragmentary and obscure.

Submission 3

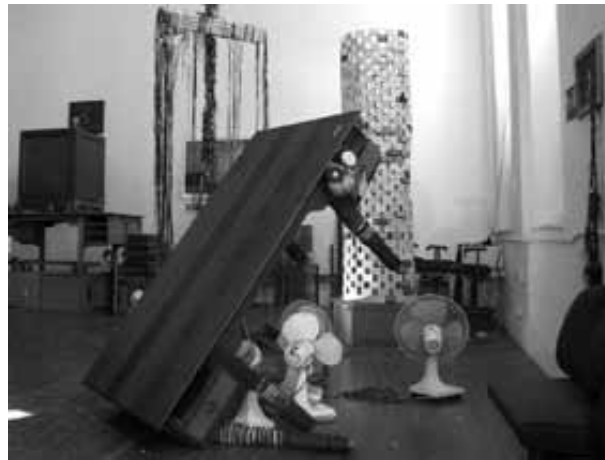


Figure 8

Adv. Alice, 2010, court room office desk, 5 broken fans, magnetic tape of court hearings, dimensions variable, Cape Town (Source Rust 2010: 742).

Propped up at an angle, a heavy office desk collected from the Cape Town Magistrate’s Court acts as a fort for the group of figures hiding underneath, which are assembled from discarded court room fans, magnetic tape and modified prints. It is a space which protects but also remains a site of potential danger, as the teetering table looks as though it might topple over at any moment.

Submission 4



Figure 9

Das Narrenschiff, 2010, found court room table, filing cabinet, chairs, storage cupboard and signage, dimensions variable, Cape Town (Source Rust 2010: 743).

Das Narrenschiff in this first hearing, *R v JR July 2010*, is situated in the middle of the installation space, roughly where the main performance of a judicial trial would take place. Here perpetrator, witness, victim, prosecutor, defence, judicial officers and supporting clerks of the court perform the ritualised process of law. The German title, *Das Narrenschiff*, a reference to Sebastian Brant's *The Ship of Fools* (1494), brings aboard a more sinister reading than a simple fantasy journey of the courtroom performance. Brant's satire, based on the allegory of the ship, carried all undesirable citizens cross-country to Narragonia, a fool's utopia (Zeydel 1944: 15).

The ship has been deployed as a metaphor by many artists throughout the ages as a vessel for meaning. Ilya Kabakov, Cai Guo-Qiang, Kcho and Yinka Shonibare are a few who have done so in the form of installation. Their ships are deconstructed, reconfigured, assembled from real boats, shipwrecks, books and any other flotsam and jetsam contemporary culture produces. For his most recent exhibition, *Looking up...™*, Yinka Shonibare produced a miniature of an antique trading vessel, rigged with his trademark "Dutch wax" fabric, sailing high on waves which appear to recall Katsushika Hokusai's work *The Great Wave Off Kanagawa* (Shonibaremba 2010 [Online]). In this manner his work addresses issues of migration, notions of colonialism and globalisation.

The ship in this installation is assembled from court room furniture, again in much the same way that children would make use of home furniture. It is designed to be accessible, but more so for a child than an adult. Nonetheless, the viewer can step on to the ship and take hold of the steering wheel, perhaps to travel to a fantasy destination, inviting them to imagine themselves back in childhood when they still built tree houses, forts and other hideouts. This kind of game play can transform a cardboard box into a house or a spaceship, a bunk bed into Mount Everest and a table into a ship (unlike their real counterparts, of course, they never physically move). The symbolic, makeshift ship often appears in children's stories¹² as a vessel which allows the imagination to travel beyond the confines of the real space it occupies. In this manner notions of memories of childhood play and contemporary social concerns are mixed.

Submission 5



Figure 10
Babble, the law is, 2010, tower of court tape cassettes, dimensions variable,
Cape Town (Source Rust 2010: 745).

The tower in this fictional restaging of evidence was constructed using discarded tape recordings of court proceedings in a way which echoes the use of Lego blocks. This system of building blocks is instrumental in allowing children to construct imitations of real and imagined environments. In this instance the tower can be associated with the religious story of the tower of Babel in Genesis, the fairy tale towers of Rapunzel or Sleeping Beauty and the satire of *Gulliver's Travels* (1726) by Jonathan Swift in which Gulliver is tied down by miniature people after he is shipwrecked (Wikipedia 2010 [ONLINE]). Instead of a person, the tower is tied down by its content, the magnetic tape.

The tower is a contested structure that can be used to exert control, in the same way that a judge controls the judicial space and processes of redress. It stands symbolically for the judge, the figure who is meant to show the way by pronouncing just verdicts. However, in relation to the ship, the tower is more readily associated with a lighthouse, a guiding light instead of a judging force. In this instance it fails on both counts, as the voices on the reams and reams of magnetic tape are silenced and threaten to ensnare the boat.

The play with scale is important in the entire installation, as it has effects on the body of the viewer. These spaces impose a child's perspective on the viewer, as for example, the viewer is

overpowered by the scale of the tower. The affects of the scaling invite or preclude participation, positioning the viewer within the work. As a participant in this universe, the viewer occupies a subjective position which is never fixed, but changes as the viewer moves through the different spaces.

Submission 6



Figure 11

Law of dreams 2010, witness bench, courtroom office desk and two filing cabinets, dimensions fixed.
Cape Town (Source Rust 2010: 747).

“Dreams are theatres which put on the appearance of a play in order to slip other unavowable plays between the lines of the avowal scenes” (Derrida 2003: 31).

In the real world the witness bench is positioned on the level of the main trial performance. In the exhibition space, a little ladder allows the viewer to climb up and survey the terrain much like a judge would survey the court performance. Here, viewers have a double role as participants and performers with subjective experiences within the piece, but can also place themselves outside of this creation, in an objective position, by climbing into the elevated witness bench. This repositioning of the witness attempts, above all, to once again place agency in the hands of the subject.

Conclusion

Through the investigation of redress, I have come to observe the close link between art, justice and society. The manner in which one understands the judicial system is largely based on how popular culture, art and courtroom spaces portray the judiciary's function. This also works in reverse, as one's understanding of a system dictates how one interacts with it. It is vital that citizens take an active interest in the processes of justice and redress, as they have real effects. Laws are passed, sentences executed and compensations awarded to redress the wrongs and harms done within our society.

This extract focuses on the theoretical and practical arguments underpinning an *aesthetic redress* that is played out as a story of detectives trying to create a symbolic order of judicial redress in the real world. In this game, characters from well-known fairy tales are swapped with narrators in the real world, placing them in actual courtrooms usually controlled by adults. This offers a critical sign-play between different discourses. As the processes and strategies of the judicial and art systems are mimicked, they are subverted and appropriated to create their own story. This interpretation of the evidence (photographic and real) opens up multiple inherent yet undecided positions. Agency is crucial but is restricted to the actual processes of redress. Without agency, I argue, the production of subjectivity – which is at the heart of redress – is not possible. The complete transcripts of *Case No. 001/05/2008* may be found at Hiddingh Hall Library, UCT.

Notes

- 1 This is specifically the case as the law takes physical injury much more seriously than emotional distress. For example, a minor cut entitles a plaintiff to damages whereas the negligent infliction of 'purely' emotional harm, such as shock, anxiety and stress, normally do not, even though mental harm can be profoundly disabling. This is especially the case when the damage has no specific physical source. Compensation is then only available when the mental suffering constitutes a "recognisable psychiatric illness" (Teff, 2009: i). To discourage the perceived threat of a 'compensation culture' (Treff, 2009: 4), the law imposes strict limits on who can recover damages for emotional harm. Bryant Greenbaum argues that this applies especially to compensation for sexual crimes in South Africa, which is hindered by a gender bias inherent in the judicial system (Greenbaum, 2008: 3 -6).
- 2 Since 2009, restorative approaches to justices have been introduced due to a growing awareness of its role in rebuilding torn societies: "restorative justice seeks to release the emotional suffering caused by an offence." (Masson, 2009: 18) (Mkhize, 2009 [Online]). However, "what counts as harm for the purposes of legal redress is highly instructive. It tells us much about social and judicial perceptions" (Teff, 2009: 1-2).
- 3 This is a very gendered statement in the South African Law of Evidence. Today one is more aware than ever that any person can become a victim of a sexual assault.
- 4 My understanding of deconstruction is the acceptance of the possibility of multiple readings of a text, image, musical piece or object, as they contain contradictory readings which go against the original intention (Cobussen, 2002 [Online]). These readings exist simultaneously, never arriving at one fixed final argument (Balkin, 1999 [Online]).
- 5 All cases are cited in the abbreviated format: *R v JR 2010*, which follows the English style. For cases in criminal matters, R stands for Rex or Regis (King or Queen) if the case is brought on behalf of the monarch. However, South Africa and other countries have become independent democracies. Criminal matters are brought by the State, cited as *S v* whomever. In all civil matters the Plaintiff / Claimant will be cited first, the Defendant second. As the fictional case does not fit into the traditional legal division between criminal and civil, *R v JR* can be used. R, the main complainant/s could in fact also be a princess in the fictional world the case inhabits (Kemp, 2010 unpublished) (LLRX, 2010 [ONLINE]) (UCT Law Library, 2010 [ONLINE]).

- 6 In the judicial system evidence is used to reconstruct a real event, i.e. to form an impression, model, or re-enactment (of something) from evidence (Pearsall, 1999: 1197). This process is, however, more akin to a reconfiguring, i.e. to a rearrangement in a particular configuration or order (Pearsall, 1999: 299).
- 7 For Jacques Rancière this game is a clash or breaking of past and present, which creates disagreements that challenge the enforced binaries affecting the viewer. He describes this as “the game”, a strategy applied by those artists engaged with critical art which is only possible because there are existing relationships between politics and art (Rancière, 2004: 86, 88).
- 8 “Once the Romantic stage had been reached (which Hegel believed had occurred during his lifetime), art will have completed its evolution and would cease to develop further. Art will have served its usefulness, the role it played in helping the Spirit reach full self-realization, and the evolution of human consciousness would be over, its purpose fulfilled. There would no longer be any need for images and symbols and therefore no longer any need for any art by which they would be expressed. Art would come to an end.” (Witcombe, 2010 [Online]).
- 9 “The problem is not who is ‘represented’, but who can make claims that turn him or her into a political subject rather than simply indicating membership in a disadvantaged social and racial group” (Maimon, 2009: 111).
- 10 This staging of subjects is crucial in Lê’s, Raad’s, and Kentridge’s work, as outlined in the precedents in the **Summary of Precedents 003/2011** compiled by the Judicial Officer.
- 11 The process, the researching, reconstructing and restaging of the collected evidence for the case *R v JR 2010* is akin to what Irit Rogott describes as the performative aspect of an archive (Rogott in de Oliveira, 2003: 134). This allows the artist to move away from solid sites of accumulated knowledge in a “series of archive effects” (de Oliveira, 2003: 134). The archive, understood as a technology of control, now gives rise to the construction of sites of fantastic fiction.
- 12 Stories such as *Where the Wild Things Are*, *My Bed is a Boat* and many more.

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Elgin Rust was born in Düsseldorf, Germany, in 1974. After receiving her BA(FA) in Studio Practice and Theory at The University of Cape Town, Rust completed an MFA (with distinction) at the Michaelis School of Fine Art (UCT). Focusing her energies mainly on sculpture and installation, she nonetheless works with a wide range of media. She has participated in numerous group shows in Cape Town at the Michaelis Gallery; the Association of Visual Art (AVA); the Rooster Theatre Collective, as well as participating in a workshop facilitated by the L'Atelier D'Alexandrie (Egypt, 2009). *Judgement - Uitspraak 2011, Case No 001/05/2008* was her first solo exhibition hosted by The AVA Gallery, Cape Town. Currently she is preparing *Appeal 2012, Case No. 001/05/2008* a collaborative research project that responds to the investigation presented. She lives and works in Cape Town.

Art, law and politics: the Vermeegeren forgeries

Leoni Schmidt

Dunedin School of Art, Otago Polytechnic, Dunedin, New Zealand
Email: leoni.schmidt@op.ac.nz

This article is based on a contribution to the Art & Law Symposium held at the Dunedin School of Art at Otago Polytechnic, New Zealand on 29 October, 2010. This symposium was jointly organized by the Dunedin School of Art and the Law Faculty at the University of Otago in Dunedin, New Zealand. The aims of the symposium were, for example, focused on highlighting the many interfaces between art and law as systems in which social values are embedded and reflected; to present examples of works of art in which the concerns of the law find manifestation; to consider copyright law in relation to the visual arts; to consider the roles of the law in establishing and protecting cultural traditions; to view art as a context for critical dialogue about law; art as a critique of law; art as a broad arena wherein the struggle for rights in law take place; art and law as both creating worlds – *fare mundi* – or frameworks for us to live in; law and art engaging in an hermeneutics which often questions the very grounds of interpretation in any given context. The symposium found that art and law are not hermetically sealed areas of activity; they are interconnected in many and often surprising ways. The case of the Vermeegeren Forgeries can be seen as an exemplar of such interconnectedness. Exploring this case as an interface between art, law and politics touches on some of the above-mentioned ways in which art and law intersect.

Key words: art, law, politics, forgery, copyright, social values, copy, technology

Kuns, regte en die politiek: die Vermeegeren vervalsings

Hierdie artikel is gebaseer op 'n bydrae tot die "Art & Law Symposium" wat gehou is by die Dunedin School of Art, Otago Polytechnic, Nieu-Zeeland op 29 Oktober, 2010. Die simposium was gesamentlik gereël deur die Dunedin School of Art en die Faculty of Law aan die University of Otago. Die doel van die simposium was o.a. gefokus daarop om die vele interaksies tussen kuns en die reg uit te wys as sisteme waarin die waardes van gemeenskappe vervat is en gereflekteer word; om voorbeelde van kunswerke aan te bied waarin oorweging van die reg direkte uitbeelding vind; om aspekte van kopiereg in verhouding tot die visuele kunste te oorweeg; om die rol van kuns en die reg in die vestiging en bewaring van kulturele tradisies te ondersoek; kuns as 'n konteks vir kritiese dialoog oor die reg; kuns as a breë arena waarin die stryd om regte afspeel; kuns en die reg as skeppers van wêreldes of raamwerke – *fare mundi* – vir ons om in te lewe; kuns en die reg as beide betrokke in 'n hermeneutiek wat dikwels die basis van interpretasie in enige gegewe konteks bevraagteken. Die simposium het bevind dat kuns en die reg geensins hermeties geseëde areas is nie, dat hul wedersyds op mekaar inspeel op vele en dikwels verrassende wyses. Die geval van die Vermeegeren vervalsings kan beskou word as 'n uitmuntende voorbeeld van sulke inspelings tussen die kuns en die reg. 'n Studie van hierdie geval as 'n interrelasie tussen kuns, reg en politiek raak aan sommige bogenoemde wyses waarop die kuns en die reg met mekaar verbonde is.

Sleutelwoorde: kuns, reg, politiek, vervalsing, kopiereg, gemeenskapswaardes, kopie, tegnologie

The case on which this article centres is the Vermeegeren forging of 17th-century Vermeer paintings in the decade leading up to the Second World War. I will commence by pointing to the salient facts of the case. Johannes Vermeer was a seventeenth-century Dutch painter of genre scenes of everyday life and of a religious painting entitled *Christ in the House of Martha and Mary* (1654-55) which was painted in the style of a genre painting with a religious pretext. Han van Meegeren, a twentieth century dealer, portraitist and forger, made paintings in the thirties and early forties entitled, for example, *Head of Christ* (1940-41) and *Christ and the Adulteress* (1943), works which would become especially infamous together with another slightly earlier one entitled *Christ and the Disciples at Emmaus* (1937). He sold these works as original Vermeers. How experts involved could not see the visual anomalies now seems inexplicable, but the fact is that they did not, maybe because it suited them not to. The paintings are compositionally quite awkward for real Vermeers. Van Meegeren justified this by claiming

they were early Vermeers, before that master had developed his exquisite mature style.

Moreover, Van Meegeren had succeeded in getting some of his work validated by a leading Vermeer scholar of the time by making it fit this art historian's pet theory of the time: namely that the young Vermeer had travelled to Italy and studied Caravaggio's paintings and had been influenced to paint large religious paintings, which might eventually turn up, hopefully on his own doorstep. Art historian Dirk Hannema, Director of the Rotterdam Museum Boijmans from 1921 to 1945, curated a major exhibition there in 1935 entitled "Vermeer: Origins and Influence" and another exhibition held in 1938 entitled "Masterworks from Four Centuries" which featured the then recently purchased *Christ and the Disciples at Emmaus* (1937). Hannema believed this painting to be a genuine Vermeer and purchased it for the museum collection as a prize which would situate the museum more favourably in relation to its competitor, the Rijksmuseum in Amsterdam. The exhibition was welcomed and led to accolades and opportunities for Hannema:

In 1939 Hannema received a doctorate *honoris causa* from Utrecht University. During World War II, Hannema collaborated with the German occupiers of the Netherlands. In 1940 he was instrumental in the illegal sale to the Nazis of part of the Koenigs Collection, which by that time had come in the possession of the port magnate D. G. van Beuningen (1877-1955). Under German occupation he became a member of the Kultuurraad (Culture Council), on invitation of *Reichskommissar* A. Seyss-Inquart, and accepted the position of supervisor of the Dutch museums under Anton Adriaan Mussert (1894-1946), the head of the Dutch Nazi party. (Ebbinge Wubben, 1985: 257).

However, in "May 1945, following the liberation of Holland, Hannema was arrested by the Dutch Military Authority and interned for eight months. He was dismissed from his position by Museum Boijmans" (49). The reputation of the museum was almost destroyed. Then, arguably the most famous forgery case of all times unfolded between 1945 and 1947, when Vermeegeren was put on trial for treason by the Allies in the Netherlands for having collaborated with the Nazis by trading a national treasure, an 'early Vermeer', to Hermann Göring for two hundred lesser Dutch paintings. The forger had to confess and prove his craft or be convicted for treason, Van Meegeren confessed to forgery and his defense was that he was a national hero because he'd painted the Vermeer himself and had exposed even an élite Vermeer scholar such as Hannema. He proved his expertise by painting another 'Vermeer' in court, and he was ultimately convicted only of fraud and sentenced to a year in prison for the various fake 'Vermeers' he'd sold to others, another example being where he forged Vermeer's famous *Woman in Blue Reading a Letter* (1663-64) through his *Woman in Blue Reading Music* (1935-36).

An interesting aspect of the case revolves around the popularity which Vermeegeren enjoyed despite the crimes he had committed. An available documentary on the case at *Vermeegeren's Fake Vermeers* http://arttube.boijmans.nl/en/video/VanMeegeren_en/ issued by the current Museum Rotterdam Boijmans van Beuningen focuses on this aspect. Vermeegeren's popularity should be seen in the context of the immediate post-war years in Europe. He was hailed as a hero even though he had been seen eating caviar on the Keisergracht in Amsterdam during a time of strict rationing. The status bestowed on him seems to have been based on four issues: 1) He had exposed a member of the academic élite; 2) this museum director had been exposed as a Nazi collaborator; 3) Vermeegeren had also fooled Göring (who was viewed in Nazi Germany as an art connoisseur); and 4) the forger had illustrated his craft in court for all to be impressed with.

Some key issues are raised by this case. Returning to the focus areas of the symposium in which context this case study was first presented, the text below touches on some of them particularly relevant to the case under enquiry.

Social values are embedded and reflected in systems of art and law: conjunction and conflict

The case of the Vermeegeren forgeries foregrounds the conjunction between two systems in which social values are embedded and reflected. This particular case involved, however, conflict rather than convergence of two systems. The court of law handed down a very light sentence despite collateral evidence of the forger's allegiance to Hitler (see *Vermeegeren's Fake Vermeers*) and his *intent* of selling a Vermeer – a national treasure belonging to the Netherlandish State, a state which had very recently been at war with Germany and had then been occupied by its enemy. One can only surmise concerning the reasons for the light sentence. Possibly, the postwar context with its attendant sensibilities concerning collaboration with the enemy, played a part. Another view could be that the theatrics acted out in the court served as a kind of carnivalesque vent for the communal stress built up through the war years and that Vermeegeren played the role of the 'fool' or the 'pícaro' (see Cornew, 1995) in this performance, thereby ameliorating his actual role during the war.

Values embedded in the arena of the arts, however, were in conflict with the light sentence meted out. Processes of validation and evaluation of art works take time and involve complex layers of analysis, contextualization and audience reception. Milan Kundera writes:

Applied to art, the notion of history has nothing to do with progress: it does not imply improvement, amelioration, an ascent; it resembles a journey undertaken to explore unknown lands and to chart them. The [artist's] ambition is not to do something better than his or her predecessors but to see what they did not see, say what they did not say. Flaubert's poetics does not devalue Balzac's, any more than the discovery of the North Pole renders obsolete the discovery of America...Let us imagine a contemporary composer writing a sonata that in its form, its harmonies, its melodies, resembles Beethoven's. Let's even imagine that this sonata is so masterfully made, that if it had actually been by Beethoven, it would count among his greatest work. Any yet no matter how magnificent,, signed by a contemporary composer it would be laughable...No way around it: historical consciousness is so thoroughly inherent in our perception of art that this anachronism (a Beethoven piece written today) would be spontaneously (that is , without the least hypocrisy) felt to be ridiculous, false, incongruous, even monstrous. Our feeling for continuity is so strong that it enters into the perception of any work of art (2007: 15 & 4).

Unfortunately for the system of art at the time, its main proponent for the case of Vermeer was himself complicit and according to records, astonishingly, would not concede that the work acquired by the Rotterdam Museum Boijmans was forged, not even after Vermeegeren had confessed and created a 'Vermeer' for all to see in the court rooms (Ebbinge Wubben, 1985: 258).

Art works as manifestations of issues relevant to law: the copy and copyright

There exists many famous art works which directly depict moments important to the long history of law. Examples are Phillipe De Champagne's *Moses and the Tablets of the Law* (1648) and Jacques Louis David's *Oath in the Tennis Court* painted in late 18th century revolutionary France when members of the national assembly barricaded themselves in a space to make decisions which would later be acted upon in future law. Vermeegeren did not depict any such literal subject matter relevant to the law. However, his forgeries were made in a context which would later prove to have been pivotal with regard to the law and art interface. In 1936 Walter Benjamin wrote his essay entitled "The Work of Art in an Age of Mechanical Reproduction", a seminal text which explored the implications of reproductive technology for notions of authenticity, originality and value in the visual arts.

Benjamin built on a sense which were prevalent within the early decades of the twentieth century, a sense of significant change in the perception and reception of the visual arts. Paul Valéry wrote, for example, in 1931 as follows:

Our fine arts were developed, their types and uses were established, in times very different from the present, by men whose power of action upon things was insignificant in comparison with ours. But the amazing growth of our techniques, the adaptability and precision they have attained, the ideas and habits they are creating, make it a certainty that profound changes are impending in the ancient craft of the Beautiful. In all the arts there is a physical component which can no longer be considered or treated as it used to be, which cannot remain unaffected by our modern knowledge and power. For the last twenty years neither matter nor space nor time has been what it was from time immemorial. We must expect great innovations to transform the entire technique of the arts, thereby affecting artistic invention itself and perhaps even bringing about an amazing change in our very notion of art (Valéry, 1931: see the preface to Benjamin's text at <http://www.marxists.org/reference/subject/philosophy/works/ge/benjamin.htm>)

Benjamin himself was deeply under the impression of fundamental changes occurring and how these interfaced with technology: "In principle a work of art has always been reproducible. Man-made artifacts could always be imitated by men. Replicas were made by pupils in practice of their craft, by masters for diffusing their works, and, finally, by third parties in the pursuit of gain. Mechanical reproduction of a work of art, however, represents something new" (1936: 1). He continues:

Even the most perfect reproduction of a work of art is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be. This unique existence of the work of art determined the history to which it was subject throughout the time of its existence. This includes the changes which it may have suffered in physical condition over the years as well as the various changes in its ownership. The traces of the first can be revealed only by chemical or physical analyses which it is impossible to perform on a reproduction; changes of ownership are subject to a tradition which must be traced from the situation of the original.

The presence of the original is the prerequisite to the concept of authenticity. Chemical analyses of the patina of a bronze can help to establish this, as does the proof that a given manuscript of the Middle Ages stems from an archive of the fifteenth century. The whole sphere of authenticity is outside technical – and, of course, not only technical – reproducibility. *Confronted with its manual reproduction, which was usually branded as a forgery, the original preserved all its authority; not so vis-à-vis technical reproduction.* The reason is twofold. First, process reproduction is more independent of the original than manual reproduction. For example, in photography, process reproduction can bring out those aspects of the original that are unattainable to the naked eye yet accessible to the lens, which is adjustable and chooses its angle at will. And photographic reproduction, with the aid of certain processes, such as enlargement or slow motion, can capture images which escape natural vision. Secondly, technical reproduction can put the copy of the original into situations which would be out of reach for the original itself. Above all, it enables the original to meet the beholder halfway, be it in the form of a photograph or a phonograph record. The cathedral leaves its locale to be received in the studio of a lover of art; the choral production, performed in an auditorium or in the open air, resounds in the drawing room (1936: 2-3, my emphasis).

Vermeegeren's forgeries and the law suit brought against him occupy an interesting position within this realisation of the increasing mobility of the art work as copy. His work falls within Benjamin's category of imitation "by third parties in pursuit of gain". Vermeegeren had gone to great lengths to imitate the works of a past master; he bought 17th-century canvases and scraped the paint off while being careful to retain as much of the surface cracks as possible; he then mixed paint with bakelite which hardened the paint quickly on drying, thus avoiding detection through the slow drying characteristics of oil paint. His endeavours were focused on the effects of the past with outcomes gained through modern technology in the form of bakelite, used for the long playing records and telephones for which Vermeer's time would have to wait more than

three centuries. His forgeries were singular, ‘once offs’, as he tried to emulate the authenticity and singularity of his model, Vermeer. He traded his *Christ and the Disciples at Emmaus* for two hundred supposedly ‘lesser’ Dutch paintings with Göring, an indication of how he prized his forgery. However, once in court, he revealed all. An audience could see how he imitated Vermeer, could see his techniques and the materials and tools he used. Although he became a national hero for hoaxing the élite and for his gifts as a performer to the gallery in court, only the original Vermeer paintings retained their authenticity, the “aura” which Benjamin discusses; while Vermeegeren’s forgeries – once unmasked – were received as oddities. They were, in turn, copied by his son, Jacques Vermeegeren, with his forgeries becoming ever further removed from their source.

While the strategies mentioned above harkened back to the past, Vermeegeren’s court case deployed the very technologies which would catapult the issue of the copy into the future, while rendering imitation obsolete. The court case was filmed for a start. In *Vermeegeren’s Fake Vermeers* documentary footage is included in various places. Photographic copies of his forgeries started a life of proliferation which would later escalate beyond all expectations, even those of Benjamin, when the internet became an integral part of our lives. Benjamin, did foresee this process:

In the case of the art object, a most sensitive nucleus – namely, its authenticity – is interfered with whereas no natural object is vulnerable on that score. The authenticity of a thing is the essence of all that is transmissible from its beginning, ranging from its substantive duration to its testimony to the history which it has experienced. Since the historical testimony rests on the authenticity, the former, too, is jeopardized by reproduction when substantive duration ceases to matter. And what is really jeopardized when the historical testimony is affected is the authority of the object.

One might subsume the eliminated element in the term “aura” and go on to say: that which withers in the age of mechanical reproduction is the aura of the work of art. This is a symptomatic process whose significance points beyond the realm of art. One might generalize by saying: the technique of reproduction detaches the reproduced object from the domain of tradition. By making many reproductions it substitutes a plurality of copies for a unique existence (1936: 4).

As a Marxist, Benjamin connected this process with the mass movements of the twentieth century as he understood how perception and concurrent modes of production shift in relation to historical circumstances: “...the mode of human sense perception changes with humanity’s entire mode of existence. The manner in which human sense perception is organized, the medium in which it is accomplished, is determined not only by nature but by historical circumstances as well” (1936: 5). Furthermore, Benjamin understood how this shift would play out around the mid-twentieth century and beyond:

To an ever greater degree the work of art reproduced becomes the work of art designed for reproducibility. From a photographic negative, for example, one can make any number of prints; to ask for the “authentic” print makes no sense. But the instant the criterion of authenticity ceases to be applicable to artistic production, the total function of art is reversed. Instead of being based on ritual [also read: tradition], it begins to be based on another practice – politics” (1936: 7).

Here, one can return to the case of the Vermeegeren forgeries. His activities within the context of WW11 intersected with politics. He used the political situation to enrich himself as he found a ready market for his forgeries in relation to the Nazi drive to procure as many European art treasures as possible to bolster their need for a superior ‘culture’. Hannema’s ambitions intersected with this drive and thus he was fair game for a forger like Vermeegeren. Political motives, power, lay at the root of these manoeuvres and tradition became the victim.

***Fare mundi* – art and law creating worlds or frameworks: a culture of the copy**

Although it was in 1936 that Benjamin published his now famous essay, the issue of the copy (also of forgeries) already had a history by that time. Hillel Schwartz's *The Culture of the Copy: Striking Likenesses; Unreasonable Facsimiles* (1998) stand out in this regard as it provides a comprehensive survey of the Western fascination with replicas and duplicates of all sorts. Since the advent of modern photography in the 1830s, this fascination has duplicated itself manifold. Benjamin realized what the implications of mechanical reproduction would be for the 'aura' and tradition of art. Nearer to our century, Douglas Davies wrote "The Work of Art in the Age of Digital Reproduction (an Evolving Thesis: 1991-95)", in which we read:

The work of art in the age of digital reproduction is physically and formally chameleon. There is no clear conceptual distinction now between original and reproduction in virtually any medium based in film, electronics, or telecommunications. As for the fine arts, the distinction is eroding, if not finally collapsed. The fictions of "master" and "copy" are now so entwined with each other that it is impossible to say where one begins and the other ends. In one sense, Walter Benjamin's proclamation of doom for the aura of originality, authored early in this century, is finally confirmed by these events. In another sense, the aura, supple and elastic, has stretched far beyond the boundaries of Benjamin's prophecy into the rich realm of reproduction itself.

Davies acknowledges that this "rich realm" impacts on mind and perception; that it constructs our world differently. Strategies such as collage, deconstruction, remixing, revisioning and rearranging are deployed amongst many others to recreate what is already there. He even acknowledges the work of forgers such as Vermeegeren who could argue that his "...work brings pleasure in the same measure as the copied master" (1995: 383). Nonetheless, the spectre of the 'original' remains with us through, for example. Davies's positioning of his 90s work using VideoFusion software to alter the conclusion of the *Last Nine Minutes* he had co-created with Joseph Beuys and Nam June Paik in 1977 as being a "post-original original" (1995: 383).

Celebrations of the "rich realm" of the digital find a counterpoint in Jean Baudrillard's text on *Simulacra and Simulation*, published in 1981 and later translated into English in 1995. His approach is profoundly critical as he presents our current world as one of copies without originals. But, Baudrillard also had a sophisticated historical consciousness and provided readers with a threefold shift or fundamental changes in Western culture with regard to issues of imitation and copying:

Simulacra and Simulation identifies three types of simulacra and identifies each with a historical period:

First order, associated with the premodern period, where the image is clearly an artificial placemaker for the real item. The uniqueness of objects and situations marks them as irreproducibly real and signification obviously gropes towards this reality.

Second order, associated with the modernity of the Industrial Revolution, where distinctions between image and reality break down due to the proliferation of mass-reproducible copies of items, turning them into commodities. The commodity's ability to imitate reality threatens to replace the original version, especially when the individual person is only concerned with consuming for some utility a functional facsimile.

Third order, associated with postmodernity, where the simulacrum precedes the original and the distinction between reality and representation vanishes. There is only the simulacrum, and originality becomes a totally meaningless concept (see http://en.wikipedia.org/wiki/Simulacra_and_Simulation).

One can argue that Vermeegeren operated within the second order outlined above and that his ‘moment in the limelight’ could not have happened earlier or later than it did. His fraud and its complex reception in a court of law and from within the general populace of the Netherlands immediately post-WW11 fit within the “...commodity’s ability to imitate reality threatens to replace the original version, especially when the individual person is only concerned with consuming for some utility a functional facsimile.” I think of Baudrillard’s use of words and phrases like “maleficence” and “sorcery”, “perversions of reality”, “unfaithful copies” which “mask and denatures reality” as an “evil appearance” (1995: 10).

In “Towards a Modern Art of Law” Laura Fitzgerald argues that: “Law is a builder of worlds. Through constitution-framing, legislation and adjudication, law structures individuals into patterns of rights and responsibilities...To acknowledge the creative quality of law is to recognise its kinship to other endeavours traditionally called art... which also builds worlds... for us to imaginatively inhabit.” According to this publication law involves world-building, building a *nomos*, a normative universe which involves patterns of human relationships with the places we inhabit, patterns of ethics and normative behaviours which are similarly constructed and reflected in art.

Copyright law has been struggling with the dramatic shifts in the ontology of art works. On the one hand, the internet allows unprecedented access to visual reproductions; on the other hand many mechanisms try to block this access through subscription and other means. In this respect “Am I a crook? copyright issues on the Internet” provides many insights.

Copyright laws are becoming ever more stringent, while many versions of learning commons proliferate on the worldwide web. The tension remains between original and copy, between access and profit, between tradition and popular proliferation. Han Vermeegeren’s Vermeer forgeries seem to occupy a very particular position in the history of these tensions, one which simultaneously looked back to the past and suggested the current conundrums we live with in our current world as constructed by art and law in close proximity.



Figure 1
Johannes Vermeer, The Love Letter,
1667-68



Figure 2
Johannes Vermeer, The Art of Painting,
1665-67



Figure 3
Johannes Vermeer, Girl Reading
a Letter at an Open Window,
1657-59.



Figure 4
Johannes Vermeer, The Girl
with a Wineglass,
1659.



Figure 5
Johannes Vermeer, Christ in
the House of Martha and Mary,
1654-55.



Figure 6
Han Vermeegeren, Head of
Christ,
1940-41.



Figure 7
Han Vermeegeren, Christ and
the Adulteress,
1943.



Figure 9
Johannes Vermeer, Woman in
Blue Reading a Letter,
1663-64.



Figure 10
Director and chief restorer
Dirk Hannema of Rotterdam
Museum Boijmans admiring
the newly discovered Emmaus
by Johannes Vermeer that
eight years later would appear
to be a fake made by Han van
Meegeren.



Figures 12-15
Trial of Han Vermeegeren,
1947



Figures 16-19
Jacques Vermeegeren's copies of his father's
forgeries a generation later.

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Leoni Schmidt is a full professor and Head of the Dunedin School of Art at Otago Polytechnic in New Zealand. Her research focuses on contemporary visual arts practices and their agency in political contexts. Although drawing is her primary concern in the visual arts, its roles in painting and other studio disciplines are also explored through her research.

Getting away with it

Myer Taub

Research Centre: Visual Identities in Art and Design, Faculty of Art, Design and Architecture, University of Johannesburg, South Africa
Email: myersuniverse@gmail.com

This paper applies an appropriation of leveling, as a performance / performance art construct, in order to contribute to the dialogue between art and authority in the post-apartheid city of Johannesburg.

Key words: performance, social intervention, constitutional law, and municipal law.

Om daarmee weg te kom

Hierdie dokument/vraestel pas 'n betrokke aanwending van gelykmaking toe - in die vorm van 'n optrede/ 'n 'vertonings kuns' konstruksie, om sodoende by te dra tot die dialoog tussen kuns en outoriteit in die na-Apartheids stad van Johannesburg.

Sleutelwoorde: Spel en optrede, sosiale ingryping of intervensie, grondwetlike staatsreg en regsfilosofie asook munisipale reg.

There is no desire more natural than the desire for knowledge. We try every means that may lead us to it. When reason fails us, we make use of experience, which is a feebler and less worthy means. But truth is so great a thing we ought not to despise any medium that will conduct us to it (Michel de Montaigne 1958:345).

Art is anything you can get away with (Andy Warhol [sa]).

Three trajectories

This paper follows three trajectories framed by an experiential interrogation of the operation of municipal by laws acting alongside constitutional law in relation to the practice of expressing social interventions in public art and performance. In doing so the research adds to the exploration of what might sustain a particular form of performance practice. The practice, as to follow Montaigne, is to express autonomy along with a desire for knowledge so experience as knowledge may be produced as part of an overall practice led research position in the creative arts.

The first trajectory is called 'Leveling the Enclosure' and it is reflective. It concerns my own experiences of making public art / performance projects in the social, urban environment of Johannesburg. (2009-2011) I concentrate, in particular, on one case study called *Florence*. (Johannesburg 2010–2011). This project used multi-disciplinary forms to attract and engage the public with the inner city art gallery and its separated Public Park while at the same time as present a retelling of Florence Phillip's life, founder of the Johannesburg Art Gallery. The work also correlated to an overall aim of the research project: of what it means to create performance as social intervention. In this case: transgressing or breaking through a municipally constructed fence that encloses the public park separating it from the public gallery.

The second trajectory called 'Leveling the Playing Field' is an interpretative deliberation investigating the relationship between South African constitutional law and its municipal by laws. A complex set of rules known as municipal by laws determine how an artist may operate and perform in public open spaces. But these rules may be interpreted by the *Constitution of the Republic of South Africa* (1996) with guarantees of the artist's constitutional right of freedom of expression. How the right to freedom of expression maybe interpreted may influence local law in regards to how performance and performance art occur as social interventions in public spaces.

The third trajectory called ‘Leveling as Equality’ combines ruminations from an informal discussion made with three other contemporary South African performance artists and public artists who have considered the operation of the law in relation to the making of their work in public spaces.

Leveling the enclosure

In late sixteenth century England, there were a series of mass mobilizations against enclosure of place as a symbol of the insurrection against ruling classes. There was the Beggars’ Christmas Riot of 1582, the Plasterers’ Insurrection of 1586, the Felt-Makers’ Riot of 1591 and the Southwark Candle-Makers’ Riot of 1592. These were rebellions that resisted enclosure demonstrated by tearing down the fences and filling in the ditches. The rebels were for the first time called the Levelers. (*Do or Die* Online: <http://www.eco-action.org>: 2000). My reference to the origin of leveling as a politic act emerging from the Middle Ages is to ironically demonstrate how enclosure is still situated as an indictment of both class and race segregation. Leveling, rather than merely suggesting erosion, might as an act of transgress supersede its politic by becoming performance. The performance of leveling suggests a temporary disruption of enclosure. This is to engender further integration of the contemporary constellation of diversity, particularly in a place like post-colonial South Africa.

However, when vulnerability is taken in account then enclosure might seem to be justified. In South Africa there has been an increase privatization of public spaces marked by the emerging enclosures of the gated community, boom estates, increasing high walls, barbed wire, metal fences and the increasing presence of security guards (*see* Bremner 2004; Landman 2006). All which provide a sense of security by fortifying against the anxieties of crime and the perpetration of crime¹ But the enclosure also suggests the perpetration of segregation, not necessarily of race but as an embodiment of the divisions of class.

To appropriate the idea of leveling the enclosure is an act of social intervention where there is a symbolic unsettling of the contemporary barricade. This is a symbolic act. It does not really remove the barriers, as this will not appease the fear of crime. Rather in enacting symbolic acts of transgression the paradox of emergent democracies is exposed where the violence is implicit not only in the fortification of the weak but segregation of the other. For it is these more contemporary forms of exclusions that perpetrate legacies of segregation and categorization (*see* Landman 2006:2).

Academic Achille Mbembe points to a symbolic state of duality, pertaining to the inside and the outside of Johannesburg, as a city that encloses and separates its inhabitants. He says: ‘the duality of inside and outside is visibly achieved by the walls that encircle and shield nearly every house and building’ (2008:47). This duality is part of a larger more complex shape than the one Mbembe describes when citing Giles Deleuze and Félix Guattari as “tubular...” (1987:93–94; 2008:47). In evoking this multi dimensional shape to the city, it might be portrayed as heterogeneously fragmented. A city that has fissure—embodied as an interfacing, intermingling interconnecting network of social exchange and existence. I symbolically integrate this multiple rhizomatic network of tensions revealed in the city into my own creative process I do this in order to produce intermodular and reflexive relationships that create drama. In doing so, project becomes heterogeneous and performative. The notion of the performative while originally stemming from the study of linguistics (*see* J. L Austin 1962) implies an activity where the self is consciously aware of its forms of production including a sense of “interiority – into which the

subject him or herself can ‘look’, and thereby enact a conscience, a subjectivity...”(Vicky Bell 2007:11–12), which is an effect of historically constructed relations. Along this line of thinking I want to subjectively understand how to use the dynamic suggested in the dual – as it refracts and multiplies – in order to symbolically unsettle and provoke enclosed, privatized public spaces.

These were objectives that were expressed when I developed *Florence* as a performance project. It occurred in variation as two phases, as an experimental project and a descriptive project. It was implemented as such in order to contribute to my research of case study methodology as an applied framework in practice led research.²

Florence, (Johannesburg 2010-2011) first began as an exploratory performance project and an experimental intervention.³ It took place in Joubert Park and the Johannesburg Art Gallery in Johannesburg, where performances from the project occurred as various stages or theatrical acts in and around the spaces of the Art Gallery and Public Park. The various acts each had a particular focus. In this context of this presentation I want to concentrate on the first acts that occurred in the original in 2010 and its replication a year later in 2011. These acts called ‘Only When it Rains’ and ‘anything for money’ both concern the relationship both park and gallery had with the fence that separated these two public spaces. Both these acts symbolically attempted to portray transgression and abject – otherness as ways to intervene and perforate enclosure and separation. In doing so I want to not only refer to Julie Kristeva’s *The power of horror*, (1982:4) where the abject is portrayed as a composite of the rejected being that does not respect “borders, positions, rules” – that which “disturbs identity, system, order”(Kristeva 1982:4). But also how in embodying this composite, the discarded can be used to transgress and disrupt boundaries as a strategy of social intervention (Jennifer Parker-Starbuck 2011:54). And furthermore in relation to Hannah Arendt’s: *The Jew as Pariah: A Hidden Tradition* (1948/2007) where she proposed how the pariah if self consciously realised, then a fluid type of stereotypical categorization could be self-informed, similarly by resisting against the presence of history (Arendt 2007: 275–297).

When the fence was originally erected in Joubert Park, (2002/2003) it was as gesture made for the sake of safety and placated as a commercial interest by the then curator of the gallery Clive Kelner who is quoted as saying:

The fence has increased visibility, allowing for access and providing additional parking to accommodate more visitors. It had improved the precinct’s image and increased the number of visitors. Museums play a significant role in galvanizing communities ... defining identity, collecting society’s heritage and cultural heritage and offering a space for open exchange (City of Johannesburg Online: 2007).

Working in these two spaces, park and gallery, I began by finding a suitable medium to express the research I had made in locating Lady Florence Phillips as a central motif in my project. Florence Phillips pursued a municipal if not National Art Gallery manifested in her contribution to the foundation of the Johannesburg Art Gallery in 1910. I found it hard to believe that Kelner’s fence fitted into Phillips plan. If there has been an increase in visitors than it has to do with the exhibits themselves rather than this mechanical gesture of safety. The fence had not galvanized communities but instead it has amplified separation, separating the immediate black, lower and middle class including immigrant communities who had inhabited the park and its surrounds from the gallery. The fence seemed like a paradox providing for some a symbolic sense of safety but for others a reminder of the legacy of apartheid where segregation is still in effect. ⁴

The fence in the performance project of *Florence* became instrumental in pointing to ways of how to disrupt the enclosure. This correlated to an overall aim of my research project,

of what it means to create performance as social intervention in the tradition of South African performance artist Steven Cohen who complicates the categories of identity through performance by performing subversive almost sacrificial engagements with identity as public interventions (see Van der Watt 2004: 125).

Intervention in the context of *Florence* means an experimental activation. In this frame it is a proposal of transgression. I was taking on intervention as problem posed at the fence and stimulated by the fence. But I was experimenting less as a social anthropologist. I was not being altruistic nor was I trying to replicate relational art à la Nicolas Bourriaud's *Relational aesthetics* (1998). I was using this site as a point of experimentation as opposed to "art taking as its theoretical horizon the realm of human interactions and its social context...." (Bourriaud 1998:14).

Part of my research suggests locating brackets between written dramatic narratives and practice led research. *Florence* as a project, questioned and experimented with intervention as notion of performance, but is also a catalyst for writing a play. The activities that occurred in the research project became stimuli for the play. This is a play about art. This is a play about a fence.⁵ The first act in the real life performance intervention, which occurred in April 2010, was called: 'Only When It Rains'. This was an invisible intervention. It intended to explore the power of invisibility. The object chosen for this was the mask. The un-announced performance occurred with intervention-like tactics. It occurred as an experiment, teasing out assumptions I had made in preparing the locus of performance. It occurred only when it rained. It only occurred once.

An inverted white *Scream*⁶ mask and Biohazard suit were used in the performance in Joubert Park on the Friday before the announced Sunday public performance. I performed a character that was primarily informed by the spontaneous interactions occurring with people in the park. Notably there was a significant encounter with several children in the park that led to them calling the character Uncle *Mlungu* who they constantly berated for performing like a trickster (see Arendt's "suspect" 2007: 287; Kristeva's abjected archetype 1982:4;184) as he attempted to transgress the boundaries of park fences and enclosures around fountains.⁷ Eventually Uncle *Mlungu* led the children into the art gallery. This was their first visit where they discovered the educational table and began to busy themselves by making drawings of our encounter.



Figure 1
Uncle Mlungu is dragged through the gate of the Fence.
Photograph by Rhesma Chibba and Anthea Buys. April 19 2010.

In this second intervention called *anything for money* I performed as a character called Greedburg (a Jewish art critic / art thief. This second act was made public. I performed as a mumbling, mutated hybrid of Soho Eckstein and Clement Greenberg and Uncle *Mlungu*.⁸ This hybridised, white, Jewish, clown-like figure performed an external route between the park and the gallery, the gallery and the exhibit, the collection and the recollection. The body in this performed piece became a projectile of both stereotypical misrepresentation and the re-mapping of sand and dust. The character's external costume was an old, gangster pin-stripped suit along with an additional internal costume, which had my body, wrapped in plastic filled with mine dust that began to leak out of the three-piece suit. These costumes along with the Uncle *Mlungu*'s mask intended to suggest both ideas of misrepresentation and remapping. The representation of stereotypes as in foreigner, outcast, gangster and Jew (as examples of Kristeva's abject and Arendt's pariah) were also aesthetically distressed and therefore the representations were remapped as misrepresentations.



Figure 2
Greedburg posing from the Fence.
Photograph by Simon Marcus. 2010.

The performance began in the park where Greedburg tries to scale the almost impenetrable boundary fence that separates the park from the gallery. In doing so, his white mask, once worn specifically for Uncle *Mlungu* is torn against the spikes of the fence and Greedburg eventually scrambles around the fence, revealing a bandaged man who has apparently damaged his tongue and can only say only one word: 'art'. This word was spoken aloud, repetitively. As it was uttered, it suggested a trail of leaking mine dust. This was a symbol that intended to indicate the detritus of mining, criminality and discovery. There was authentic mine dust leaking from my jacket. It made a trail that lead from the park entrance to the Gallery.



Figure 3
Greedburg, known also as Stephen Cone, performs at being stuck in the fence.
Photograph by Goethe Institute Johannesburg 2011.

A year later in 2011, I continued working, on the character of Greedburg, I added onto it, like a palimpsest, the character of Stephen Cone. What is evoked and made more certain by this grafting of character upon character is how “one text is read through another” (Craig Owens 1994: 54). The meaning implied here is to begin again, to advance backwards or to unfold the palimpsest back to the place where the self begins to break and dissipate. From this palimpsest process I was referencing the motion of multiple identities along with a composite of rejected identities and along with South African performance artist Steven Cohen and his strategies of subverting the marginalised identities of the Jew and Queer (examples of the abject).⁹ These strategies are seminal to my study, in order to understand how the categories of (abject) identity can be complicated and redeemed through performance. One such strategy is a process, which involves “the need to locate where the danger lies” (Gilman 1991:241). This is like performing an act of transgression, with a pursuit of risk as much as there is an engagement of risk. In Cohen’s work, difficult themes provoke hostility.¹⁰ Hostility is a dangerous hatred that produces stereotypes. Gilman notes that “an internalization of such stereotypes can led to self-destructive behavior (‘self-hatred’), but its sublimation can also lead to productive and successful means of resistance”(1995: 24). In the descriptive replication, I intended for the danger strategy to be sublimated with the irony I recognized in Cohen’s. I replaced the white mask with an orange cone covering my head. My suit became more heightened and hybrid, littered not only with mine dust, but with descriptive shwe-shwe patterning. Greedburg was ultimately an (abject) art thief whose intent was to break into the art gallery with his stolen work including a photocopy portrait of Florence Phillips.

In the performance project, my primary research subject that is the experience of the self articulated a particular kind of performative method that pronounced and excavates historical and genealogical fragments that surround the self so as to reassemble them in an enclosure of dramatic narrative. The enclosed dramatic character is situated around notions of the outsider. The outsider was a composite of abject characters framed in the character called Stephen Cone playing the role of Greedburg who had mutated from Uncle *Mhlungu*; all of whom attempted to transgress, or level, the enclosure of the fence. The act had progressed from an experimental frame and now occurred as a performance exposed through a descriptive frame. The descriptive frame might seem in its making to guarantee a further explanatory frame. It also intends to describe the intent of the hypotheses as replication. In the replicated case study, Cone as Greedburg, managed

to climb over the fence using an abandoned security guard house that was nestled on side of the fence as way to prop himself up over the fence.

But irony is perhaps most apparent in this reflexive written document. Here the written frame as a present explanatory review of the performance project as a transgression might only be activated when the variables of laws it has broken are re-addressed.¹¹

Leveling the playing field: performance, interpretation and the law

Analyzing my performance as a tool for social intervention means locating this construct within a sociological context. That context is the city. Johannesburg is characterized along with its histories, spatial dynamics and laws. The performance is characterized by the actions of the artist constituting intent of making and embodying art.¹² Doing so also means extracting dramaturgical terms originally extrapolated from dramatic theory by sociologists and re-applying them in a performance context. Erving Goffman's texts *Frame Analysis* (1974) and *The Presentation of Self in Everyday Life* (1976) present key examples of how this might be done. Goffman provides an understanding of the operation of performance by placing it within the operation of behavioral mechanisms. Goffman notes how performance is 'the activity of an individual which occurs during a period, marked by his continuous presence before a particular set of observers and which some influence on the observers' (1976:32). Bracketing performance is the organization of social activity into a form of analysis. Interrogation of the activity occurs once the activity is inside the bracket. The dramaturgical/sociological alignment or enclosure necessitates a showing of action through emplaced distance. This can inform meaning and promote activism, and, therefore, intervention.

In the context of my research, Goffman's bracketing becomes a strategic device that encloses the performance activity within a specific site while simultaneously activating and generating interventionist discourse. The construction of such a model assists in the analysis of value of a social activity that is marked off but simultaneously intervenes in the flow of surrounding events.

Analysis of transgressing or breaking through a municipally constructed fence that encloses the public park separating it from public gallery occurs also through affecting enclosure. The attempt at performative transgression and thereafter analysis suggests interplay between the intent of performance, its effects and affective outcomes. This amplifies the material-like co-exegesis that seems to be apparent within the double-like relationships that are apparent in the enclosed private, yet public, spaces of the city. The interplay of duality occurs between internal and external landscapes existing within and alongside the self and public space. These relationships might suggest how different compositions of reality inform each other and assist in performance. Understanding this plurality as a medium of concurrency in the states of being embodies both condition and process. This means, form continues to inform the process of forming (Chadhuri 2002:13). It is at this point where the practice of the work, as a medium towards experience of what is informed would follow.

In both occasions, the work in public space means there was an assumed sense that the performer did not need permission to activate the site beyond the general understanding from the gallery curators. During the descriptive phase of the project, I encountered two persons who called themselves park marshals. They interrupted a rehearsal and indicated that they worked for city parks, although they did not bear any real evidence of being so. One of them was the first to inform me during the rehearsals that I would need permission for this intervention. It became

clear to me at this point that I would need official park permission. I asked them to return with valid identification. They promised to return but did not. I continued to rehearse and thereafter to perform. I had permission from the gallery but not the park. I was breaking municipal law. But was I guilty or, in Kristeva's terminology, merely abject by "mocking the law" (Kristeva 1982:205).

South Africa's constitution guarantees that freedom of expression is my basic human right. Would denying the performance in the park similarly indicate denying a constitutional right to the freedom of expression?

What is apparent after studying three municipal by laws of the city of Johannesburg, (*Public and miscellaneous by-laws* (1996), *Public open space by-laws* (2004), *Culture and Recreation by-laws* (2004), is a specific position that qualifies 'nuisance' as an activity of transgression in the same way that performance as social intervention might qualify as an activity of transgression:

"Nuisance" means an unreasonable interference or likely interference with— (a) the health or well-being of any person; (b) the use and enjoyment by an owner or occupier of his or her property; or (c) the use and enjoyment by a member of the public of a public open space; (City of Johannesburg 2004).

If the intervention is anything but likely or reasonable then an artist intervening in public space as a tactic of nuisance is also engaging in criminal activity. If nuisance intends to unsettle and provoke then nuisance must also correspond to the spirit of play and is an essence of performance. For artists working in public spaces, coming to terms with what defines nuisance, as an act of (abject) criminality, is not the only law and complexity that must be negotiated. There are several others. What is apparent in all these by-laws is that permission is needed from a municipal officer in order to activate a performance in public open space. The officer becomes the gatekeeper.¹³ The perception of performance by local law and its councilors and gatekeepers might hinder utilizing transgression and spontaneity as signifiers of performance. Public open space in Johannesburg, in turn, is defined by the above three municipal by-laws are places which are managed by or on behalf of the City Council by one or more Gatekeeper for public recreational purposes. Places of public recreational places include:

any park, botanical garden, sports ground and playground, but exclude any golf course. A public space is also by definition a municipal property which means any structure or thing owned or managed by or on behalf of the Council and which is incidental to the use and enjoyment of a public open space and includes any building, *lapa*, kiosk, bench, picnic table, playground equipment, fountain, statue, monument, fence, pole, notice and sign' (*City By-Laws* [O]: <http://www.joburg.org.za/index>. 1996; 2004).

Disruptive acts of spontaneity and transgression as acts of performance (in the vein of the abject) disengage with the above municipal procedures when they do not follow the correct civil process prescribed by mandated civil ordinances. But are acts of performance, criminal acts? (Cf. Kristeva's concept of the abject.) In South Africa, if they disengage with municipal law but still occur as a right to freedom of expression than they are not. Perhaps in this context there is both "good" and "bad" criminality?

Section 16(1) of the *Constitution of the Republic of South Africa* (1996) states: Everyone has the right to expression, which includes-

- (a) Freedom of the press and other media;
- (b) Freedom to receive or impart information or ideas;
- (c) Freedom of artistic creativity; and
- (d) Academic freedom and freedom of scientific research (1996.)

Thus far there has not been any case, which tests the parameters of municipal law against constitutional law in relation to artistic performance in a public space. However there are several cases that do engage with these ideas in the interplay between local and state law and freedom of expression.¹⁴ One such case is *Phillips and Another v Director Public Prosecution: (Witwatersrand Local Division) and others 2003*. In this case, the appellant had been charged for contravening provisions of the Liquor Act 27 of 1989, which prohibits performances in certain circumstances.

The holder of a theatre liquor licence shall at all times maintain on the licensed premises a bona fide theatre at which dramatic performances, plays, concerts or films are regularly presented or shown to the public (Liquor Act 27 1989: 33).

Interpreting the act along the above parameters with the right to freedom of expression demands considering what make the place of performance a bona fide premise rather than an unobscene place. Meaning that granting a theatre liquor licence requires alongside it the legitimacy of a theatrical place. Determining what an act of obscenity is and what is a performance relies on our understanding what an act of creative expression is, as much as one must recognize that there may be different interpretations. The Court considered how the appellant's premises might be place of performance. The Court ruled that the liquor act proved to be unconstitutional as it went against section 16 (1) of the Constitution, which enables freedom of expression.

In this case the judge declared that what occurred on the premises could be interpreted as a theatrical production, which had objectives beyond those of erotic stimulation and therefore were not obscene. The exercises occurring on the premises could be creative. The Liquor Act had hindered freedom of expression. Any kind of expression if in its true form is a creative act as it is entrenched in the Constitution will also be protected by the Constitution.

Leveling as equality: conversation about relationships

Forming relationships with the everyday and with others is essential to the making of creative expression in public space. A definition which can serve as the explanation of public space is: "Public spaces are a fundamental feature of cities. They represent sites of sociability and face-to-face interaction, and at the same time their quality is commonly perceived to be a measure of the quality of urban life" (Cattel et al., 2008: 544).

What defines making relationships in the public space is what emerged from my informal conversation with three South African artists who work in performance art and public space. These artists are Anthea Moys, Nadine Hutton, and Lesley Perkes. Altogether we spoke for several hours although-specifically-what was recorded, as a document, meant for approximately fifty minutes we spoke together about the concerns of performing in public space in relation to municipal law and freedom of expression. For the sake of the brevity of this paper, I want to concentrate on our ruminations of engagement manifested as social relationships between artist and the public, and between artists and local authority that informed some of our conversation.



Figure 4
Moys in her work: *NessunDorma: None Shall Sleep Tonight*.
Photograph by Chris Saunders. Johannesburg 2008.

In 2008 Anthea Moys performed sleeping in the rose garden of Joubert Park in Johannesburg. In the documented form above, the intent is not to present her performance as a case study but to elude to the relationships that Moys and I ruminated on in our aforementioned conversation; social relationships that I assume are evident in this particular work. In the above figure (Fig.4) Moys conjures up both sleepwalking and social activism in a single frame that is not still performance but still remains so because of the act of sleeping and assumed benevolence, noted both as still-performance. Benevolence is thematised by the CSS tactical security guard who is closest in the frame. His substantiate: outward gaze that makes him more humane and perhaps less potent. And although his gaze can signal several things, it is his direct eye to the camera that disrupts his figure of authority. It also suggests a humane kind of benevolence that resonates with Moys' ideas about permission and activism. Moys got permission to perform this work; she made connections as in relationships with the relevant authorities as in the municipal gatekeepers and in those who guarded her act while asleep. But Moys declares in our conversation somewhat mournfully how she had only a few

Moys got permission to perform this work; she made connections as in relationships with the relevant authorities as in the municipal gatekeepers and in those who guarded her act while asleep. But Moys declares in our conversation somewhat mournfully how she had only a few hours to perform the work as a live yet sleeping activity (July 6 2011). Benevolence in this context suggests a more humane side to authority and power that Moys has strategically yet whimsically asserted onto its symbols and in doing so gets away with leveling its most potent forms.

Moys' social activism signified in things like freedom and play is subtly reinforced in her work through the juxtaposition between respecting authority and then equally irreverence to

it. In *Nessun Dorma*, it is the emplaced authority that assumes Moys will sleep peacefully but it is also the same authority that faces irreverent scrutiny by the artist.. It is this interplay that suggests there is equanimity in forming relationships and leveling power structures that allows Moys in getting away with performing in the everyday with certain irreverence.



Figure 5
Hutton and Perkes perform wrapping the ‘ladies man’ (the statue of Sir George Grey) during
M.T.H.A.F.K.R, Infecting the City Festival Cape Town 2011.
Photograph by Nadine Hutton 2011.

MTHAFKR is a twisted acronym for *Ministry for **THE** glorious preservAtion o**F** the **K**ultural **t**Reasures of the Mother City*. It is also a performance based intervention project commissioned by the *Infecting The City: Public Arts Festival* of Cape Town for February 2011. In this work, the commissioned artists Hutton and Perkes performed as insidious and corrupt yet glorified government ministers who paraded across the city along with their team from their ministry identifying problematic monuments and then proceed to wrap these in glad wrap. The work is both spontaneous yet calculating, involving the obtaining of permission. But in the spirit of spontaneity there is also a sense of subverted showmanship and gall that allows these incorrigible performing ministers to get away with it. In other words Hutton and Perkes by amplifying their own levels of performance will level the enclosures that performance artists might face when performing in public spaces. As live performance, their work is a vast and energetic work. Both are confident and obnoxious in their attempt to re-address public space and re-define the icons of colonialism, historical hegemony as well present an ironic assault on present day concerns of corruption, greed, opportunism, and folly.

Hutton says during our taped conversation: “I go to the gate-keeper and say thank you very much for letting me work in this space” (July 6 2011)

Perkes immediately agrees with this, highlighting how making social relationships is what really matters in the work—that relationships such as the ones between artist and the public are positioned and repositioned as things that are fluid and in states of flux. And it is this relational contrition that empowers performance in temporarily reclaiming public spaces from increasing privatization. Intervention, leveling and reclaiming are by necessity temporary; anything else is wishful thinking and unproductive.

Conclusion

To re-inhabit public space means locating ways of leveling fear of and anxiety over the abject as the criminal. It means leveling (as in temporarily undermining, deconstruction, and testing) power structures to produce relational engagement. It also means creating a sense of multiple flexible spaces that can resist (albeit temporarily) corporate control and private hold of the public space. Leveling thus becomes an attempt to reclaim space embodied in the celebration of freedom of expression; leveling is site-specific, temporary, actual and virtual, indefatigable. The notion of “getting away with it” demands freedom of expression. For freedom of expression ‘is an essential process for advancing knowledge and discovering truth. Knowledge and the search for the truth are promoted by a consideration of all alternatives’ (de Milo et al 2002:26).

Notes

- 1 Lindsay Bremner explains the emergence of the privatization of public space: The response by those living in targeted areas has been to mobilise every possible defensive mechanism against the violence — burglar proofing, burglar alarms, electric fencing, high walls, steel gates, automatic garage doors. Those who can afford to, move into one of the gated security suburbs on the city’s burgeoning periphery. Those who cannot, demarcate their street or neighborhood from the public realm by fencing it off and restricting access. Private security guards man the gates and patrol the suburbs. A widespread aesthetic of security prevails (Bremner 2004:464).
- 2 Case Study Methodology is a model, which I have adapted from Robert. K. Yin’s two textbooks: *Case study research: Design and methods* (Yin 2003a) and *Applications of case study research* (Yin 2003b). My model of case study methodology assumes and generates reproduction as a process of three distinct case study stages, namely: i) Exploratory: “[D]etermining feasibility of the desired research procedures” (Yin 2003b:5) ii) Descriptive: “[A] complete description of the phenomenon in question” (Yin 2003b:5)iii) Explanatory: “[E]xplaining how events happened” (Yin

2003b:5). Case study methodology provides

a framework for an analysis of making in the field of practice led research.

- 3 *Florence* had its origins in being part of selected art works commissioned by Anthea Buys who curated *Time Flies*: an exhibition, discussion and archival deliberation with the collection of the Johannesburg Art Gallery and its mining history (April 2010; see Buys 2010).

- 4 Martin Oosthuizen demonstrates another example of lingering segregation in his evaluation of The Victoria and Albert Waterfront where his “main findings show that 50% of the users felt that with the new developments taking place in the V&AW will result in the waterfront becoming more exclusive” ([O]: <http://www.academic.sun.ac.za/earthSci/honours/documents/Theses/maarten.pdf>).

- 5 Lines from a first draft of *Florence* the play read: There’s a plug switch somewhere on a central board. Come with me I know where there’s somewhere to hide. How did you get here? I got here by foot. We did you come from? From the Johannesburg Art Gallery I got here by foot. Where did you come from? From the Johannesburg Art Gallery... (Taub 2011: 10).

- 6 The *Scream* mask originated from Edward Munch's painting and a Hollywood horror movie series of the same name.
- 7 Mlungu seems to have a variety of origins and meanings, but in this context, I assume, that the word is used in describing a white person in a patronising way.
- 8 Soho Eckstein is South African artist William Kentridge's figurative persona, often used in his charcoal stop frame animation; he is a wry if not ironic allegory of a South African Jewish capitalist. Whereas Clement Greedberg as American Jewish art critic might symbolise the Jewish aesthete and intellectual .
- 9 Stephen Cone was a conscious incorrigible imitation of Steven Cohen. Where Cohen is detailed, focused and delicate in performance, Cone is clumsy, messy and unfocused.
- 10 In his work *Ugly Girl*, as developed from his character, *Princess Menorah* (de Waal and Sassyn 2003: 46), Cohen dressed in a grotesque assemblage of drag, wearing a bright orange wig, a corset, leopard-print stockings, shocking red high heels and severe make-up, visits a rugby match at Loftus Versveld stadium in Pretoria. The work is intended to be a public intervention, which stimulated interaction with South African rugby player enthusiasts who were reported to have responded with mixed reactions. (see also 'Media responses to Limping Into the African Renaissance on the dance Umbrella Festival [O]: <http://www.at.artslink.co.za/~elu/stevencohen>).
- 11 Locating an exact historical context to Shweshwe is complex, like its genealogy. It is a hybrid manifestation of colonial Delft and indigenous South African patterning and Indian cloth (see 2007 *The History of "Original Shweshwe"* [O]: <http://www.shweshwe.net>).
- 12 I am modifying a particular definition of performance art that I extracted from reading interpretations of art and South Africa's constitutional law. The original read: "In general, performance art is characterized by actions of the artists themselves constituting the work of art" (De Milo et al.:Fn -284:p38: 2002).
- 13 In anthropological terms, the gatekeeper is "a person who can provide a smooth entrance into the site" (Leedy 2005:137).
- 14 These cases include: Case and Another v Safety and Security and others; Curtis V Minister Safety and security and others (1996); De Reuk v Director Public Prosecutions (W Local Division) and others (2002); Gay and Lesbian Alliance v Electronic Media Network 2008; Blesch JR v e TV (2008)Phillips and another v DPP (WLD) and others 2008.

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Myer Taub is a postdoctoral fellow conducting research in performance and identity at *Research Centre: Visual Identities in Art and Design*, Faculty of Art, Design and Architecture, University of Johannesburg, South Africa. He considers himself to be an interdisciplinary creative practitioner involved in theatre, visual arts, video art, film, heritage and urban studies.

Dress and violence: women should avoid dressing like “sluts” to avoid being raped

Sindi Kwenaitse

Department of Fine and Applied Arts, Tshwane University of Technology, Pretoria
Email: kwenaitesm@tut.ac.za

Ariana van Heerden

Department of Fine and Applied Arts, Tshwane University of Technology, Pretoria
Email: vanheerdena@tut.ac.za

Dress is integral to visual culture. Judges, cultural vigilantes and in some cases, females themselves, have expressed or supported the notion that a woman deserves to be violated for her choice of dress. Such choice of dress need not necessarily be deemed risqué - violence towards women has been justified in incidents where women have worn short skirts, trousers, and even the traditional *kanga*. It emerges that such punitive practices take place predominantly in patriarchal, conservative communities, said to be influenced by cultural values. Various facets of South African law cause tension in executing the law to protect victims of, for example rape, as there are conflicting approaches to women's rights under customary law, the constitution and international human rights laws. This article aims to expand understanding of a complex and serious issue, namely, the perceived right to violate women due to their choice of dress – in this case the art – and the laws that are in place to protect victims.

Key words: dress choice, violation, culture.

Klerasie-keuse en geweld: vroue moet vermy om soos “slette” geklee te wees om sodoende verkragting te vermy

Kleredrag is 'n integrale deel van visuele kultuur. Regters, kulturele buurtwagde en soms selfs vroue ondersteun die gedagte dat 'n vrou verdien om geskend te word as gevolg van haar klerasie-keuse. Sulke keuses is soms nie eers gewaagd nie - geweld teenoor vroue is al geregtig in voorvalle waar vroue geklee was in kort rokkies, langbroeke, en selfs die tradisionele *kanga*. Dit wil voorkom asof sulke regstellende voorvalle veral in patriargale, konserwatiewe gemeenskappe voorkom, oënskynlik beïnvloed deur kulturele waardes. Etlike fasette van die Suid-Afrikaanse geregtelike veroorsaak spanning in die uitvoering van die geregtelike beskerming van slagoffers van byvoorbeeld verkragting, aangesien daar teenstrydige benaderings bestaan teenoor vroue se regte onder die vaandel van die gewoonreg, die grondwet sowel as internasionale menseregte. Hierdie artikel poog om die begrip van 'n komplekse en ernstige vraagstuk, naamlik die veronderstelde reg om vroue te skend as gevolg van hulle klerasie-keuse – in hierdie geval die kuns – en die wet wat bestaan om die slagoffer te beskerm.

Sleutelwoorde: klerasie-keuse, skending, kultuur.

Dress is often used as a justification for violence against women. In January 2011 a Toronto police officer told a group of university students that “...women should avoid dressing like “sluts” to avoid being raped” (Sapa-AP, 2011). Even though the notion may be universal, violent behaviour towards women seems to take place in South Africa in mostly conservative (often rural) communities where women are harassed or even violated for their choice of dress. It may seem apparent that violent or sexual offences may be reduced through the creation and implementation of laws against such offenders. However the laws themselves may be ambiguous. Violence against a woman is socially constructed to reflect her role in an attack against her, hence she shares the responsibility for her violation with the perpetrator. As a result she is judged for having initiated the violence against her on the basis of, amongst other factors, her provocativeness. It is the opinion of the authors that perceptions towards women need to change for laws to be effective – perceptions that the common man possesses but more importantly perceptions that men in the judiciary hold.

The perceived right to violate women is an issue that has plagued societies for millennia (D'Cruze & Rao 2005; Johnson 2004; Green 1999). Women, as well as children and the elderly, constitute the vulnerable of society, which is one reason why the violation of women persists. Violence against women is a multifaceted issue, the use of dress as the justification for violence against women merely one aspect thereof. In South Africa in some conservative communities women find themselves being oppressed through their simplest form of expression, which is the way they choose to dress. D'Cruze and Roa (2005:1) suggest that violence against women remains covert because women are muted by their vulnerability in being women in a male-dominated society. Women are vulnerable to men because women are generally less physically strong than men are. This "weakness" is emphasised when women are subjected to violence. This notion is reiterated by Green (1999: 2) who argues that gender violence is intended to perpetuate and promote hierarchical gender relations especially aimed at subjugating women.

Dress as justification for violence

According to Rasool (2002: 27), in South Africa, violence against women is perpetuated because women do not seem to acknowledge violence perpetrated against them and are unlikely to seek help when it occurs. Furthermore, it was discovered that abuse was being normalised in South African society (Rasool, 2002: 29). In other words abuse has become part of everyday life in South African society. Johnson (2004: 28) avers that violence against women is not considered as seriously by police as crimes against men or property, coupled by the so-called insensitivity in post-reporting 'handling' of a complainant and/or of her complaint by law-enforcement officers, medical officers and judicial personnel. The implication is thus that victims of violence remain silent about their plight and society thus allows such forms of violence to continue.

Dress has been used as a justification for violence against women. Violent behaviour towards women seems to take place mostly in conservative rural communities in South Africa. However, such conservative behavior also seems to spill over into urban areas. Mphahlele (2009) summarises an incident as follows:

On the 22nd July 2007, a 25 year old Zandile Mpanza was attacked by four men in Durban as a result of her non-compliance with a ban which stipulated that women are not allowed to wear trousers in the Umlazi T section. She was stripped naked and forced to walk through the streets. Her assailants destroyed her home and belongings and she was forced to move out of the township.

Mfusi and Mboti (2007) reported that the Commission [on Gender Equality] contended that women wearing pants was not a violation of customary practice and dismissed the mob action as a reflection of conservative opinion. Yet another incident occurred on February 17, 2008 in which a 25 year old Nwabisa Ngcukana was sexually assaulted by taxi drivers at the Noord Street Taxi rank in Johannesburg Central Business District for wearing a miniskirt. During the disturbing events that ensued, the taxi drivers sang a song which referred to a rape trial between the then deputy president of the African National Congress, Jacob Zuma, whom they supported, and the complainant, Khwezi, whom they demeaned for having worn the traditional *kanga* when the alleged rape took place. This action "...demonstrates a widespread belief in men's entitlement to women's bodies, and a sense of their impunity from the law" (Mphahlele, 2009). Professor Singh, a social anthropologist, explains this behaviour: "... [I]f one looks at South African societies, they are all patriarchal and it is difficult for people who assume authoritative roles in homes to adjust to women assuming their own roles and status within society" (BBC News, 2007).

Arguably the most demeaning form of violation is sexual abuse and sexual assault which falls under sexual offences in South African Criminal Law. A 2010 study led by the South African Medical Research Council states that more than 37 percent of men in Gauteng province said they had raped a woman (Rape Statistics, 2010).¹ The number of rapes reported in 2008/9 were 71 500 in the month of April to March of that year (South African Police Service, 2009: 1). Most rapists in SA go unpunished as rape is one of the most underreported crimes and it has the lowest conviction rates (Richards, 2001:1).

The prevalence of the commission of sexual offences in our society is primarily a social phenomenon which is reflective of deep systemic dysfunctionality in our society and [indicates] that legal mechanisms to address this social phenomenon are...necessary (Sexual Offences and Related Matters Amendment Act, 2007:4).

It may seem apparent that the issue of sexual offences may be reduced through the creation and implementation of laws against such offenders. However the laws themselves may be ambiguous.

Although most people agree that rape is bad, legislation and government action on sexual crimes are not always that clear. Indeed, rape seems to be graded on a scale from 'unconscionable' through 'bad luck' to 'much deserved' (Mollmann, 2008: 1).

According to Artz (2009:174) violence against women is socially constructed to reflect her role in an attack against her, hence she shares the responsibility for her violation with the perpetrator. Victims of sexual offences may encounter further abuse from judges if it is believed that women encourage sexual abuse or harassment towards themselves because of their dress choice or demeanour (Johnson 2004:28). A defence attorney in a sexual offence court case argued that the victim was "advertising her desire to be raped" by her dress choice (BBC News, 2009). This feeds into the perception that women are responsible for violence towards themselves because of the way they are dressed.

Dress as non verbal communication

Fashion and clothing are forms of non verbal communication; this is because fashion and clothing do not use the written or spoken word to relay messages (Barnard 1996: 26). This is reiterated by Eicher (1999:1) who states that "...dress is a coded sensory system of non verbal communication that aids human interaction in space and time". In many cases this non verbal communication provides information about the individual (Arthur, 1999: 3). Calefato's view (2004: 5) that dress uses a sort of syntax according to a set of rules to give garments the ability to attain metaphoric meaning, has been taken further by Lurie (in Barnard, 1996:27) in both a literal and a literary sense. Lurie believes that clothing is comparable to language, which consists of words, grammar and syntax. Individual garments have pre-existing meanings and when these garments are combined together by the wearer to form an outfit, a 'sentence' or collective meaning is established. Thus it is deduced that garments are a medium used by individuals to relay messages to others (Barnard, 1996: 28). The problem with this concept of dress is that it suggests that dress choice is always premeditated, which may not be true. People dress their bodies in ways that align with a certain standard of appropriate behaviour or according to their own sense of aesthetics and beauty (Cunningham & Voso Lab, 1991: 1). Furthermore people habitually expect others to be able to understand what is essentially being communicated through these sartorial devices.

There are several aspects which govern how these messages are sent and received.

According to Barnard (1996: 72) the meanings which garments possess are resolved in people's own thoughts and intentions. It is clear, whether to the detriment of either party or otherwise, that the perceivers' and wearers' intentions often differ concerning certain apparel choices (Barnard, 1996: 73). The interpretation of the language of dress is steeped in social, cultural and political implications (Keenan, 2001: 182). Keenan (2001: 180) further states that "...bodies are impressing themselves on society through dress". Each perceiver adds a unique perspective to a social situation and it is essential to be familiar with what the characteristics are that shape perceiver understanding, when considering communication in dress (Kaiser, 1997:272). Perceiver variables are any social contexts and characteristics that influence perceiver perceptions of the dressed body (Kaiser, 1997: 271). These variables influence the psyche and perceptions of individuals, and perceivers in particular. According to Kaiser (1997: 271) perceiver variables, amongst others, are: age, ethnicity, culture, gender, sexuality.

Sexual characteristics are affirmed by dress; it becomes the intention of the wearer to attract the attention of the opposite sex² by means of the superficial view of that person presented by dress choice (Crawley, 1965: 72).

Modern sexuality is rooted in our (sexed) body, making the things we use to decorate our bodies, potentially at least, sexually charged... However, it would be misleading to assume that bodily adornment such as clothes...reflect a pre-sexed and pre-sexual body... Materials [are] commonly used simultaneously to cover and reveal the body, adding sexual meanings to the body, that would otherwise not be there (Entwistle, 2000: 181).

This statement suggests that dress on its own, removed from the human, bears no sexually charged meaning. Only when it is used to reveal and cover certain parts of the body does the meaning become apparent to the perceiver. Furthermore the sexuality of those body parts is determined by cultural values. For example, some cultures believe that the breasts are highly sexual and thus a blouse with a plunging neckline revealing a woman's cleavage would be deemed highly provocative. Alternatively when a woman's legs and thighs are revealed some cultures deem this to be a sexually charged appearance. Entwistle (2000: 186) further states that Western culture places a great deal of sexual meaning onto the female body. Furthermore, this has little to do with a woman's 'natural' feminine identity but is rather a result of cultural associations which have a propensity to identify women more closely with sex and sexuality than men.

Girls are traditionally encouraged to place emphasis on their appearance as opposed to boys (Kaiser, 1997: 66). It is suggested that women primarily dress to please men (Craik, 1994: 56). Laver's Seduction Principle adds to this notion in that it suggests that women's clothes are intended to make the wearer more attractive to the opposite sex (Rouse 1989: 12). Furthermore, Rouse (1989: 12) argues that many women have garments that are meant to attract attention to their bodies. "... [W]omen are constantly linked to the idea of seduction through appearance" Entwistle, 2000: 186). Glad (2007:83) maintains that female clothing and support garments augment sexual allure and partially expose or emphasise sexually distinctive body parts. He further states that dress is "...intended to signal her intentions". If this is true then so is the notion that women encourage male sexual attention. A different argument suggests that women do not dress with the sole intention of appearing sexually attractive (Kaiser, 1997: 335). This argument suggests rather that males focus on sensuality in their perception of female dress.

Displays of sexuality and perceiver interpretation thereof differ within different cultures (Barnard, 1996: 56). There are extensive cultural sensibilities surrounding gender, sexuality, age and status, which converge on the dressed body, which is more heavily weighted on women's

bodies than on men (Hansen, 2004: 166). Furthermore, with cultures shifting their shame frontiers, the naked body has been redefined. In other words, cultures are continuously changing what they consider to be shameful when it comes to which parts of the body are exposed. This has led to the attachment of sexual charge onto certain body parts. Hansen (2004: 178) describes an incident which occurred in the National Assembly in Zambia to illustrate this point. Nkandu Luo, a professor of microbiology and pathology, in her forties, wore an outfit which consisted of a short skirt which was two inches above her knees with a slit at the back and a loose fitting floral print shirt. She was seated in the front row and her knees and legs were visible. Professor Luo was subsequently accused of provoking male members of parliament with her dress. The members of parliament asserted, that she was "... trying to change this chamber into a bedroom" (Hansen, 2004: 178).

There are noticeable differences in female and male perceptions (Kaiser, 1997: 273), and it is these differences that also perpetuate situations like the one mentioned above. The question arises whether appearance accurately delineates a female wearer's sexuality. It can be assumed that there is a high degree of possibility that there will be miscommunication between the female wearer and male perceiver, which may lead to dire consequences (Kaiser 1997: 335). According to a study by Kanekar and Kolsawalla (Kaiser, 1997: 335), males attributed more responsibility to a female rape victim for the rape, if her dress choice was deemed provocative. It is apparent when interpreting these results that appearance perceptions can be linked to serious social ills and gender-based power relations (Kaiser, 1997: 335). The perpetuation of these social ills can be linked to the value systems entrenched in the cultures to which women belong or are subjected.

In investigating why men violate women the aim is to understand how certain men use female dress as a justification for their behaviour towards women. Messages transferred through dress are interpreted by the perceiver using his own embedded perceptions - it is established that perceptions are influenced by a number of factors. Perceivers then react, which may lead to violent consequences. It is deduced that female dress seems to influence violence against women. Dress is also used as a cue when a perceiver makes inferences about a woman. These dress cues may also influence perceivers to attribute blame to a woman for being violated.

Dress and social cognition

The concept of social cognition provides insight into how female dress is used as a justification for male behaviour toward women and how people make sense of other people (Fiske & Taylor 2008: 1). Furthermore it is a phenomenon which is useful to the human condition and involves, among others, analyses of how people think. According to Wyer & Scrull (1994: 37) a social cognition perspective in research is rooted in cognitive representation and processes which are essential to comprehending all human responses to situations, objects and/or other humans. Dress is considered a cue which is interpreted in social interaction. In other words dress and appearance create a platform for messages about the wearer to be transmitted to the perceiver about the wearer's disposition. As the above description suggests, these messages are in turn interpreted by the perceiver and whatever message the perceiver interprets will influence the perceiver and the wearer's social interaction.

One major aspect of social cognition is social perception. Social perception is defined by Dijksterhuis & Bargh (2001: 3) as "...the activation of perceptual representation". In other words, social perception is how people perceive an object or person, and then rationalise what they see using their understanding of what the object or person represents in society. According to

Dijksterhuis & Bargh (2001: 3), social perception influences social behaviour. Social perception in turn leads to the perception of the individual – which is referred to as person perception - and this is highly influenced by pre-existing philosophies and stereotypes that the perceiver possesses.

A ubiquitous demonstration in person perception is that people's outputs (evaluations, impressions, memories) are shaped and guided by their knowledge and pre-existing beliefs about the social world. Rather than viewing individuals on the basis of their unique constellations of attributes and proclivities, perceivers prefer to instead furnish categorical (i.e. stereotype-based) conceptions of others...As such, rather than responding to the world as it really is, people's inferences and memories are embellished by schematic forces that guide information processing and its associated products in an expectancy-consistent manner (Macre & Bodenhausen, 2001: 240).

Thus when a person perceives others, his impressions, evaluations and memories of these people are guided by what he understands about the social environment. Hence a perceiver's first impression of another is not based on who that person really is, rather a perceiver makes use of categorical thinking. Categorical thinking is achieved by placing the perceived into categories also identified as stereotypes. This cushions the perceiver in that he has an expectation of how each stereotype will behave, which allows him to confidently prepare his approach or confrontation. To put it simply, perceivers perceive many people in a day and need a simple way to streamline the demands on their *person perception* (Macre & Bodenhausen, 2001: 242). Dress is one of the cues used by perceivers to establish stereotypes (Kaiser, 1997: 255). Dress becomes, in a manner of speaking, a 'social skin' which allows perceivers to scrutinize identities that the dressed body represents (Hansen, 2004: 372). For example, when a man perceives a woman in provocative dress, he may stereotype her as being promiscuous. This cue acts as a stimulus which suggests the appropriate behavioural response toward the perceived (Dijksterhuis & Bargh, 2001: 4). The question arises whether a man who sees a woman dressed in a certain way and stereotypes her as being promiscuous, will respond by violating this woman.

A person's 'lived experience' is rooted in culture – 'the structure of the wider context'. In other words the way we appear and the way we are viewed is influenced by culture. Culture influences *social perception*, in other words people's perceptions of others (Peng & Knowles, 2003: 1272; Chaiken & Trope, 1999: 17). The reason for this is that people's minds are predisposed to absorbing cultures as cultures socialise them (Fiske & Taylor, 2008: 16). In other words a person will automatically absorb a culture as he/she becomes a part of that cultural community.

Dress and culture

The concept of culture has evolved and continues to evolve through time. Hence the authors have assembled different definitions so as to capture the essence of culture in the most broad context and, more especially, aspects of culture that are central to this article. "Culture includes all the characteristics, activities and interests of a people" (Eliot, 1975: 298). This has not always been the description of culture. 'Culture' is taken from the Latin word *colere* which translated means "...to inhabit, to cultivate, to protect and to honour with worship" (Barnard, 1996: 32). In an anthropological context culture is described as, "... the inherited, primarily non-modern and uncontested values, beliefs and practices that organise individuals' relations to, and participation in, communities" (During, 2005: 7). Violence against women is commonplace within some cultural communities. Violence seems to transcend communities evolving into a societal issue (Johnson 2004:22). Societal values encompass culture, as cultures are at the centre of shaping values and beliefs.

According to Kemp-Gatterson & Stewart (2009: 37, 38) there are seven attributes of culture, which include the cultural experience. Firstly culture is man-made. People within a society decide deliberately or unintentionally what a culture will be. Secondly, culture is learned. Culture is shared among people, either formally or informally. Thirdly, culture is prescriptive. This means that the culture will create standards or norms by which people belonging to that culture may act or do something. Fourthly, culture is a group phenomenon. Culture is shared by the populace of a society and is emphasized by group pressure. These include shared apparel norms. Fifthly, cultures are similar but different. Similarities and differences within societies develop similarities and differences in cultures. Sixthly, culture satisfies a need. Cultures achieve this through the establishment of norms and values, and these play an important role in societies, through identifying, simplifying and sustaining that society. Lastly, culture changes. This is because cultures adapt to the need of those who have created them. Furthermore cultural changes happen as a result of communities and households responding to social and economic diversions that are linked to globalisation, new technologies, environmental pressures, armed conflict and development projects (Schalkwyk, 2000:1). Clearly, culture is not cast in stone and outdated and inappropriate cultural leanings should be questioned, challenged and changed.

Culture influences action not by only providing the ultimate values towards which action is orientated, but by shaping a repertoire or 'tool kit' of habits, skills, and styles from which people construct 'strategies of action' (Swidler, 1986: 273).

This relates to how compelling social perceptions are; in as much as culture plays an integral role in people's everyday lives, their social perceptions influence their behaviour. Culture is considered a major causal variable by Swidler (1986: 273). His theory suggests that people have separate identities which are activated by situational cues, driven by culture, thus becoming influential on behaviour (Burgess, 2002: 7). In other words culture is a catalyst for behaviour and 'invests behaviour with meaning'.

"Expectations about attributes and behaviours appropriate to women or men and about the relations between women and men – in other words, gender – are shaped by culture" (Schalkwyk, 2000:1). Thus the concept of culture is most certainly a gendered one, which emerges through the general social representation of women (Hallam & Street, 2000:3), especially so in patriarchal societies. Women's experiences within patriarchal structures, within a cultural concept, thus enforce the idea that men are superior to women. This plays itself out in facets of everyday life - at places of work, in politics and in the home. Societies naturally differentiate between men and women (Mihindou, 2006:4). Kaiser (1997:420) poses the question, "how do cultural messages about the meaning of gendered appearances assume relevance in our everyday lives?" Whether it is done consciously or unintentionally perceivers respond differently towards men and women and this is due to cultural messages about the value of men and women and how they are meant to appear (Kaiser, 1997: 423).

Dress may serve as a symbolic metaphor of the relationship of the individual to the cultural system. As such, dress can be an extremely powerful symbolic way of expressing and reinforcing subtle values, relationships and meaning in human culture (Hamilton, 1989: 16).

Culture in context

Africa has had a volatile history which includes the convergence of many cultures, especially European and African. Social perceptions held by indigenous people of Africa, especially those concerning appearance, were changed by the arrival of European settlers and later Christian missionaries to Africa. Christendom was imposed on these African cultures, leaving the recipients

in a crisis of confusion. This was further aggravated by the tendency of western Christianity to eliminate 'heathen objects', alter behaviour and replace African cultures with a new cultural order based on Christian principles. This includes changes in traditional African dress. "The struggle for souls entailed dressing African bodies in European clothes to cover their nudity and manage these bodies" (Hansen, 2004: 375).

The nudity of the female body troubled the settlers and missionaries (Doy, 1996: 17) and this attitude to the exposure of the female body seems to be perpetuated in contemporary Africa (Frenkel, 2008: 3). African women were especially viewed as hypersexual, which led to the surveillance and repression of their sexuality (McFadden, 2003). This suggests that African female sexuality was constantly monitored.

New scripts, reflecting these moralistic and anti-sexual edicts, were inscribed and continue to be inscribed on the bodies of African women, along with elaborate systems of control [...] sexuality is a key site through which women's subordination is maintained and enforced in postcolonial Africa" (Tamale, 2005: 11).

The argument is thus that female sexuality is controlled so as to keep women subordinate to men, especially in patriarchal societies (McFadden, 2005). The suppression of female sexuality in Africa is reinforced by patriarchy where it is essential for the domestication of African women, where gender roles are delineated and women are restrained from gaining control of resources (Tamale 2005: 11). As women's mode of dress has changed there has been the development of such styles as the hot pants, mini-skirt, skinny jeans, cleavage tops, etc. These fashions have filtered into Africa from the Western world and have caused conflict in many African societies. For example, "[t]ensions over 'proper dress' arising from the popularity of the miniskirt continue..." in African societies (Hansen, 2004: 376). Africa has seen a barrage of revolutions against the mini skirt, since its onset into female African dress codes (Allman, 2004). This is baffling because most African cultures, before the advent of colonisation, proudly displayed the female body (Hughes & Hughes, 1997: 114; Pilgrim, 2002). What is more disconcerting is that in these revolutions against certain kinds of female dress, women have been violated as a form of punishment for going against the established status quo of conservative dress (Allman, 2004). Popular dress such as the mini-skirt has been labeled as provocative dress. Furthermore, in Africa there is still an attitude that a woman who dresses provocatively deserves to be raped (Boima, 2010).

The issue lies in the perceived eroticism of the African female body (Frenkel, 2008). The portrayal of black women as lascivious by nature is an enduring stereotype (Pilgrim, 2002). This is best exemplified by the 'Black Venus' stereotype, which was infamously embodied by Saartjie Bartman, named the 'Hottentot Venus', that cast a specific image of racialised sexual 'otherness' (Frenkel, 2008:2). This is reiterated by Pattman and Bhana (2009:22) that black women's femininity is characterised as 'other'. This 'otherness' denies black women their femininity but rather creates a perception that these women are sexual objects. In South Africa, through the cultural history of the country, the black female body has been seen as 'consumerable' (ripe for consumption), an image of rapture (Frenkel, 2008: 3). In contemporary culture African women are portrayed 'thrusting their hips', scantily clad, in music videos (Pilgrim 2002). Lyrics such as, "hos, skeezers and bitches", are used to describe these women (Pilgrim 2002). In South Africa, young black women want to emulate these images which in their perceptions are images of success (Posel, 2004). Yet the social perception of a scantily clad woman is that she is sexually charged or sending the message that she desires sexual interaction (Pilgrim, 2002). This perception in itself is not a problem but it becomes dangerous if it solicits female violation.

South Africa has of the highest percentage of women who are violated in the world (Smith 2009). According to Nationmaster.com (2010) in South Africa 1.19538 per 1,000 people is raped. What is alarming about the South African statistics is that there are many women who have not been counted (Buhlungu, 2007:429). The law of a country is one method of effecting change in the lives of those who are vulnerable. Law is steeped in culture, especially in South Africa (Frenkel, 2008). According Steyn & Van Zyl (2009: 12), in South Africa, “Social institutions, the women themselves, families, as well as the justice system, which is supposed to protect women, are used as tools to control women’s sexuality.” What essentially occurs is a concept constructed by Artz (2009: 174) known as ‘subordination boundaries’, aimed at keeping women in positions of tempered influence. As women protest against abuse they break these ‘subordination boundaries’ to the dislike of those in power, thus perpetuating a cycle of violation. The question thus arises whether the criminal justice system is able to shelter women as it is steeped in gendered social institutions.

Gendered social institutions

South Africa is a Constitutional Democracy which means that the Constitution of that country is the Supreme Law; above all laws (Constitution 1996: 1243). The constitution of South Africa is applied *vertically*, thus regulating the interaction of government in relation to individuals and *horizontally*, thus regulating interactions between or among individuals (Barratt & Snyman, 2010). The Constitution contains the Bill of Rights which “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom” (Constitution, 1996: 1245). The Bill of Rights applies to all law (Constitutional Court of South Africa 2005; Barratt & Snyman, 2010). South Africa is a multicultural society, consisting of Hindu, Muslim, indigenous African and broadly speaking, Western or European communities. Law is part of a community’s culture and therefore various systems of law are applied in South Africa (Van Niekerk & Wildenboer, 2009: 27).

The South African legal system is made up of Indigenous African Law, also known as Customary Law, Western components namely Roman-Dutch Law and English Common Law, and a universal component which is namely Human Rights Law (Van Niekerk & Wildenboer, 2009: 150). These numerous facets of South African law cause tension executing the law as there are conflicting approaches to women’s rights under customary law, the constitution and international human rights laws (Farrar, 2009). For South Africa to transform into an African country after its Eurocentric suppression required an “Africanness” to be reflected in the legal system, which meant incorporating certain aspects of customary law (Andrews, 1999: 436). This is where women find themselves at a point of contention, as customary laws are still steeped in patriarchal principles. For example in customary law women are excluded from receiving inheritance. This is in clear contradiction to section 9 (3) of the constitution (Ozoemena, 2006: 2). Furthermore the notion of *primogeniture* also violates the right of women to human dignity as stipulated in section 10 of the constitution, as this effectively excludes women from inheriting property. “Some customary practices place women in a position of dependency in relation to their male counterparts and as such are subjected to a place of subordination to men” (Ozoemena, 2006: 2-3).

Farrar (2009) states that under customary law women have a limited voice and have no participation in decision making within traditional institutions. Some customary laws support violence towards women, as a part of cultural norms (Farrar, 2009). Such violence still persists unabated due to deeply rooted societal norms which condone such violence, perpetrators having

widespread impunity, lack of resources which hinder efforts of redress, and the attitudes that doctors, the police and judges have toward victims (POWA, 2010:5). The 'feminist jurisprudence' model offers an analysis of the law as society implementing its power to nullify women and their experiences of violence (Artz, 2009: 171). Consequently violence against women infringes on several rights that are guaranteed by the constitution (POWA, 2010: 5).

A large percentage of black women, in particular, are marginalised amongst the poor of South African society, which causes them to remain vulnerable to all forms of violence (POWA, 2010: 7). Furthermore these women do not have access to legal redress when rights violations occur. Discrimination, hostile legal, political and socio-cultural environments impede efforts to deal with the violation of the rights of vulnerable and marginalised communities of women (POWA, 2010: 9). This is further compounded by the fact that black women have an obligation to comply with customary law which is steeped in patriarchal tradition (Bennett, 2004: 248). The state invokes African custom and traditions to justify and continue the violation of women's rights (POWA, 2010: 20). Another issue hindering women in using legislative provisions is that court procedures are drawn out before the victim has an assurance that the perpetrator/s will be sentenced or that she has any protection from them if they are released. For example a woman named Buyisiwe was gang raped in October 2005. She reported the incident the following day and it took the police and court systems four years before the perpetrators were sentenced. According to Artz (2009: 12) violence and coercion are significant in the shaping, maintaining and restricting of women's sexuality. Furthermore, social institutions and the justice system are used to control women's sexuality rather than protect women. The female body becomes the site of violation unless a woman can prove that the sexual violence against her was unwarranted (Artz, 2009: 174). This is where dress plays a crucial role.

Assigning attribution in cases of sexual assault becomes complex, because perception toward victims of sexual assault are influenced by rape and sexual assault myths (Donecker, 2006). These myths suggest that a woman is responsible for being sexually assaulted if her dress choice suggests that she was 'looking for sex'. In a study conducted by Donecker (2006) it was discovered that women were more harshly judged if they were perceived by participants of the study to have been wearing revealing dress when they were assaulted than women who had been dressed in clothes that were not revealing. Furthermore, more male than female participants sympathised with the perpetrator and attributed blame to the victim if they perceived her to be wearing provocative dress. This difference in perception was also noted by Workman and Freeburg (1999: 261) whose research revealed that male participants considered gender and dress when attributing blame to rape victims. These men considered aspects such as how provocative the victim's dress was. However the female participants did not consider gender and dress of the victim in a rape situation and were more likely to attribute blame to the perpetrator.

The accurate imputing of the sexual attraction motive has implication for issues such as rape, where one viewpoint holds that the female is "asking for it" by dressing attractively. What role does attractiveness play in the crime of rape, which is widely regarded as a violent crime rather than a crime of lust? (Kaiser, 1985: 48). The same author (1985) refers to studies conducted by Terry and Doerge (1979) and Kanekar and Kolsawalla (1980) where the following were discovered: firstly that dress can be used to transfer attribution for sexual assault to the victim for sexually attracting a male perpetrator. However it is important to take into account with these findings that rape is a crime of violence which affects women who are not dressed in provocative attire as well (Kaiser 1985:49). Secondly, men are more prone to assign attribution to women in a rape situation. Clearly appearance dependence favours those whose appearance

connotes statuses held in high regard; with regard to crime, it favors those taken stereotypically to be no easy victims or who can manipulate appearance to suggest strength or imperviousness to assault...a woman is more likely to invite attack on the street if she is wearing tight, 'sexy' clothes (Gardener, 1990:). This statement asserts how important appearance is in creating perceptions and attribution for social issues, especially violence against women, especially sexual assault.

In general a person who dresses modestly will be perceived as someone who is self controlled and positively influences others. Yet, concepts of shame or modesty are different in different cultures (Barnard, 1996: 52). This is based on what certain societies deem to be acceptable or sexually disturbing (Ribeiro, 2003: 12). "There's no definition of modesty or shame that is natural or essential and therefore found in all cultures" (Barnard, 1996: 52). This suggests that the concept of modesty is not universal. On the contrary - some cultures do not even consider it to exist.

Sexual instincts of modesty and attraction feed into the concept of dress (Crawley, 1970: 47). This means that whether a person wants to be modest or attractive, dress will be used as the medium to achieve this goal. Clothing systems attempt to reconcile the spheres of modesty and exhibitionism which may also be linked to private and public erotic ideals (Entwistle, 2000: 187). Thus people will expose their bodies in certain ways and in certain environments because of their personal beliefs about what is appropriately sexy or 'erotic' for public viewing and what is suitably sexy for private purposes. The question arises whether choice of dress is inspired by sexual impulse or aesthetic quality of the attire (Perkins Gilman et al, 2002: 9). In other words a woman may make a particular dress choice not because she intends to sexually attract the perceiver but that she is merely drawn to this particular dress's aesthetic appeal. Modesty is particularly applied to women rather than men (Perkins Gilman et al, : 11). To add to this a man may appear in public scantily clothed but if a woman is seen in such a manner she is declared to be grossly immodest.

In conclusion

In the rape trial case against Jacob Zuma referred to previously, he employed his culture as a defence. This promoted the perception that revealing attire by women attracts sexual communications. "This can conclusively be said to support the Umlazi, Durban and the Noord Street Taxi Rank incidents as it resorts to the ideology that short or revealing clothes attired by women communicates either loose sexual behaviour by women or an invitation to sexual assault (Mphahlele, 2009)". In neither of these incidents have the females involved, to date been vindicated.

The subjugation of women is put into stark perspective when one views the evolution of most societies and the status of women within these societies. In contemporary culture, female issues have been hidden behind the façade of human rights, progressive constitutions and the emancipation of women. Women grapple with several issues especially concerning female violation, but the alleviation of these issues is hindered by politics and the justice system. The authors have explored the link between female violation, female dress and gendered social institutions in an attempt to demystify the perceived right that male violators have towards women. Female dress has been, and continues to be, an excuse to violate women, making women scapegoats for violent male behaviour. Furthermore rules are used to influence female dress choice through dress codes, which ascribe what is 'correct' and 'incorrect' dress, so as to sustain control of women, perpetuating the cycle of violation.

Notes

- 1 The same article refers to the Democratic Republic of the Congo as having the worst prevalence and intensity of rape in the world.
- 2 Opposite sex here refers to women and men. When concerning sexual attraction this is not always towards the opposite sex, however, same sex attraction dynamics will not be discussed in this article.

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Sindi Kwenaita is a part-time lecturer at Tshwane University of Technology, in Pretoria, South Africa. Her postgraduate M Tech: Textile Design and Technology research topic is entitled *The perceived right to violate women due to their choice of dress*. Her interests are mostly in gender studies and dynamics. Kwenaita works in marketing and communication for a SME run exclusively by women, whilst mentoring and tutoring high school girls in order for them to excel academically. She is passionate about encouraging individuals as to the necessity of education. Kwenaita also produces a blog about food as a leisure pastime.

Ariana van Heerden is senior lecturer in the Department of Fine and Applied Arts at Tshwane University of Technology, in Pretoria, South Africa. Her specialties are undergraduate business practice and research methodology, as well as postgraduate research supervision. Van Heerden is a practicing artist and is researching a doctoral topic entitled *The flow brain state of painting and drawing subjects*, in which the correlation between perceived propensity for optimal experience, experimental data from actual brain activity and brain pleasuring through art making activity are investigated. Her master's dissertation entitled *Overcoming capability deprivation through craft technology transfer*, completed April 2005 (*cum laude*) investigated and addressed issues pertaining to poverty and skills training in rural areas of South Africa.

“Cape of Execution”: The gallows at the Cape of Good Hope as represented in the colonial art of Johannes Rach and Lady Anne Barnard

Russel Viljoen

University of South Africa
Email: viljors@unisa.ac.za

During the eighteenth century, the Cape Colony developed into a violent society in every sense of the word. The type of crimes committed by perpetrators, the sentences imposed by the colonial authorities and the Court of Justice were equally violent. The depiction of the gallows by colonial artists has provided scholars with new insights on South Africa's past, especially with regard to the increase in violence and the punishment faced by the condemned.

Key words: execution, gallows, Lady Anne Barnard, Johannes Rach, colonial art

“Kaap van Teregstelling”: die galg aan die Kaap die Goeie Hoop soos voorgestel in die koloniale kuns van Johannes Rach en Lady Anne Barnard

Gedurende die agtiende-eeu het die Kaapkolonie ontwikkel in 'n gewelddadige samelewing in elke sin van die woord. Die tipe misdade wat gepleeg is deur oortreeders en die strawwe wat opgelê is deur die koloniale outoriteite en die Raad van Justisie was eweneens gewelddadig. Die uitbeelding van die galg deur koloniale kunstenaars, het skoliere voorsien van nuwe insigte aangaande die Suid-Afrikaanse verlede, veral met betrekking tot die toename in geweld en die straf wat die veroordeeldes in die oë gestaar het.

Sleutelwoorde: teregstelling, galg, Lady Anne Barnard, Johannes Rach, koloniale kuns

A key aspect of uncovering South Africa's colonial past over the last few decades was this pre-occupation of scholars: how violent the Cape society was in terms of social relations, the institution of slavery and the overall administration of justice at the Cape. As a result, scholars have over the last three decades devoted considerable attention to crime, violence and other forms of criminal activities as administered by the colonial authorities during the Dutch occupation of the Cape between 1652-1795 (De Kock 1963; Bredekamp 1987; Ross 1993; Worden 1982, 2009; Heese 1987, 1994; Worden and Groenewald 2005; Dooling 1992; Visagie 1984). In his book, *Cape of Torments: Slavery and Resistance in South Africa* (1983), the historian Robert Ross highlights how violence and resistance dominated relations between emerging colonial identities shortly after the founding of the new colonial settlement after 1652, while Kerry Ward has shown in her recent book, *Networks of Empire: Forced Migration in the Dutch East India Company* (2009) how the Cape Colony and specifically Cape Town had been a penal colony since the early years of colonial settlement in the mid-seventeenth century. While a great deal has been published on the repressive nature of the eighteenth century Cape by historians based on court records, very little, has been done to investigate how colonial artists depicted in their art the Cape colony as an oppressive colonial society. Even the recent special issue of the highly-rated academic journal, *Journal of Southern African Studies* entitled *Histories and Legacies of Punishment in Southern Africa*, completely ignored how the contributions of art, photographs, sketches, paintings and other visual images of violence could have shaped our understanding of violence, punishment and administration of colonial justice in Southern Africa (Alexander and Kynoch 2011: 395-643). Based on the paintings and sketches of at least two colonial artists, this article seeks to explore how the gallows featured in the colonial art of Johannes Rach and Lady Anne Barnard. Moreover, the availability of these depictions facilitates the convergence between written colonial texts and art, which is often vital in the reconstruction of the past.

Admittedly, in the last two decades we have seen an unprecedented proliferation of studies exploring punishment, death, suffering, repressions and martyrdom from various perspectives, academic disciplines and angles. The most famous of these is undoubtedly the work of Michel Foucault, *Discipline and Punish*. In the first two chapters, he explores the meanings of public executions through various historical ages and the human atrocities committed as a result of the death penalty and such executions. David Garland, for instance, explores the influence of culture on violent behaviour (Garland 1990; 2006), whereas Pieter Spierenburg (1984) has given an excellent historical overview of executions and forms of repression in early modern European cities. These and similar studies have therefore led the way in the pursuance of gaining a better understanding of public punishment in a continuously evolving world and society.

Moreover, the link between art and law, or the portrayal of artistic images and iconographic representations that placed the gallows at the epicentre of an execution, became an important one. As Lionello Puppi has written in his famous work entitled: *Torment in Art: Pain Violence and Martyrdom*, the “Gallows were, in fact, a concrete symbol of the law” (Puppi 1991: 380). Without the gallows, the spectacle of a public execution would be simply ineffectual. The gallows made the administration of law and justice within a particular society a ruthless undertaking, and allowed the legal authorities and the state to deal with deviant behaviour swiftly and decisively.

Slaves, Khoikhoi, colonists or any other individual who committed serious offences in the Cape district as well as in the outlying districts such as Graaff-Reinet, Swellendam and Stellenbosch were brought to Cape Town to stand trial. The local *Landdrost* in which district the crime was committed acted as public prosecutor and the case was heard by several members of the Court of Justice. Upon confession by the accused, the Court of Justice would in accordance with the severity of the crime imposed a sentence on the accused, which was invariably the death penalty. For instance, in 1759, a Khoikhoi woman, named Griet and her co-accused died brutal deaths at the hands of the executioner for having orchestrated the murder of her concubine husband Hendrik Eksteen near the Gourits River. Apart from being hanged at the gallows outside the Cape Castle, Griet’s lifeless body was put through further humiliation as she was also beheaded. Her head was then displayed on a stake for public viewing (Viljoen 1995: 23). Eight years later, in December 1767, Hans Jurgen Kettner was executed by firing squad for his role in murdering a Khoikhoi servant Arnoldus when he was tortured and beaten to death. He became the first European person to have been put to death for the murder of a Khoikhoi person. On August 21st 1777, a Chinese, Tsoa Toko, was sentenced to death for housebreaking and theft. He was executed on 20th September 1777 (Moodie 1960: 108). Based on the documented court cases that spanned nearly a century (1700-1800), individuals such as the Khoi woman, Griet, the burgher, Hans Kettner and the Chinese, Tsoa Toko represented a large constituency of the Cape population that were convicted and sentenced to death during the course of the eighteenth century (Heese 1994; Worden and Groenewald 2005).

Since public execution was in essence the most common method in which the Cape authorities meted out punishment and what most murderers, arsonists, deserters and thieves were subjected to, the gallows thus played a pivotal role in the function and execution of justice at the Cape. The punishments meted out were cruel and gruesome to say the very least. Two gallows were erected and used throughout the eighteenth century; one was found near the Castle in Buitenkant Street and the other was erected near the Green Point Common, known as Gallows Hill (Botha 1962: 285-6; De Kock 1963: 164).

The location of the gallows and the frequency of public hangings, torture, impalement, branding with hot tongs, strangulation, suffocation, being broken on the wheel, whipped,

dragged through the streets of Cape Town and beheadings in the presence of spectators impelled colonial visitors to the Cape Colony to relate harrowing recollections in their diaries of death and violence of the worst kind. Johannes Stavorinus, who visited the Cape in 1768, described the practice of public execution which he had witnessed as “barbarous”. He went on to describe how he stood and watched for a quarter of an hour how a slave was first broken on the wheel, had flesh torn from his body with red-hot pinchers and then hanged (Stavorinus 1798: 571).

Stavorinus was not the only European to have witnessed or commented on those that were executed at the gallows during VOC rule. Anders Sparrman, the Swedish botanist and scientist – recorded lengthy entries in his diaries concerning the gallows. The presence of the mammoth structure had certainly captured the imagination of Sparrman who stopped “to contemplate the uncertainty of human life”. Sparrman then continued to describe what he and his travelling party witnessed, saying “Above half a score wheels placed around it, presented us with the most horrid subjects for this purpose; the inevitable consequences, and at the same time the most flagrant proofs of slavery and tyranny; monsters, that never fail to generate each other, together with crime and misdemeanors of every kind, as soon as either of them is introduced to this country. The gallows itself, the largest I ever saw, was indeed of itself a sufficiently wide door to eternity; but was by no means too large for the purpose of a tyrannical government, that in so small a town as the Cape, could find seven victims to be hanged in chains” (Sparrman 1975: 86).

Carl Peter Thunberg, a contemporary of Sparrman and fellow Swede, who visited the Cape between 1772-1775 recorded how on two different occasions he witnessed how two slaves were executed. On one occasion, the slave was “being laid on the cross and tied to it, first his arms and legs were burnt in eight different parts with jagged things, made red hot; afterwards his arms and legs were broken on the wheel, and lastly his head was cut off and fixed on a pole”. A month later in August 1773, he again commented on how a slave was hanged and then diarised the following: “After malefactors have suffered at the place of execution”, wrote Thunberg, “within the town, they are always brought out in the evening to the gallows without the town where they are either hanged, and that generally in an iron harness, in which manner the skeleton may be preserved for a long time, or else drawn and quartered. There are two gallows out of the town, one at the entrance to the harbour, under Lion’s Trial on which Europeans are hanged, and the other beyond the citadel, near Zoute River, on which slaves and Hottentots are executed” (Thunberg 1986: 153).

So conspicuous and central to the colonial landscape of Cape Town was the gallows that visitors who stepped ashore in Table Bay were greeted with the words “*Heus Viator!*” (*Hail Traveller*), not only to attract the attention of visitors, but also to sound a warning that criminal behaviour would not be tolerated. The gallows therefore are “presented as an accepted feature of the urban landscape” (Weeder, 2006: 68). But the colonial authorities went a great deal further. They systematically created spaces that “coded power in a landscape” (Hall 2006: 195). The location of the gallows in close proximity to the Castle was one such code of power. It set the tone for public behaviour in Cape Town, but also in the remotest parts of the colony since those who transgressed on farms were hauled to Cape Town to face a trial and if found guilty, be subjected to the extremities of law and the pain of the gallows.

The spectacle of death by public execution had given the Cape of Good Hope the reputation of a brutal society with little respect for human life. Sparrman, for instance, commented how the presence of the gallows ruined an otherwise tranquil setting, colonial town and landscape. “But what disgraces the town”, wrote Sparrman “is a gallows, with racks and other horrid instruments of torture” (Sparrman, 1976: 49).

These harrowing experiences as recorded in colonial travelogues and aided by official colonial court records were buttressed by artistic representations of the gallows which suggests that the Cape of Good Hope was far from an idyllic world, but one which rewarded violence with violence and proved that the concept of forgiveness or rehabilitation was non-existent. The Cape was inherently a violent society, caught up in the cycle of violence where violent behaviour spawned an equally violent reaction. Even though the Cape authorities claimed that the severity of the punishment imposed on criminals served as a deterrent, in fact it spawned more violence. As David Cooper has written with regard to the concept of deterrence in the context of public executions “deterrence was a one-sided word. Disposing of offenders vindictively and cheaply was final, and the only rehabilitative object of public executions was to present a fearful example to the assembled audience. The more public the exhibition, the more effective was the lesson; the more awesome the execution, the longer the repressive sense of terror remained to control the passions and tendencies of those inclined to commit crimes” (Cooper 1974: 1).

Johannes Rach (1720-1783)

Johannes Rach was born in 1720 in the Danish city of Copenhagen. The Rach family was fairly affluent, as his father, Christoff Rach was an inn-keeper and brandy-distiller. The favourable position of his family allowed him the opportunity to study art under the tutelage of a Danish courtpainter, Peter Wickman. At the age of twenty, in 1740, he left Denmark and travelled to Russia, St Petersburg where he worked as a draughtsman. He returned to Denmark five years later and became a painter in the Danish court. He soon also established himself as topographical artist. At some point during the 1750s, Rach left Denmark and moved to the Netherlands, where he worked as an artist in Haarlem. Here he married, Maria Valenzin but soon after the birth of his daughter, he joined the VOC as a gunner. As a member of the VOC, this enabled him to travel to new locations and provided him with ample opportunities to sketch new topographical landscapes, especially of Batavia. Though stationed in Batavia, he frequently undertook short visits to the Cape Colony between 1762 and 1764 (De Loos-Haaxman 1958). In Cape Town, where he lived for about two years, the talented Rach became a productive artist. He produced an array of sketches depicting the inhabitants, buildings and landscapes of Cape Town and its immediate surroundings, all of which proved extremely valuable to historians and art historians, interested in representations of colonial images of eighteenth century Cape.

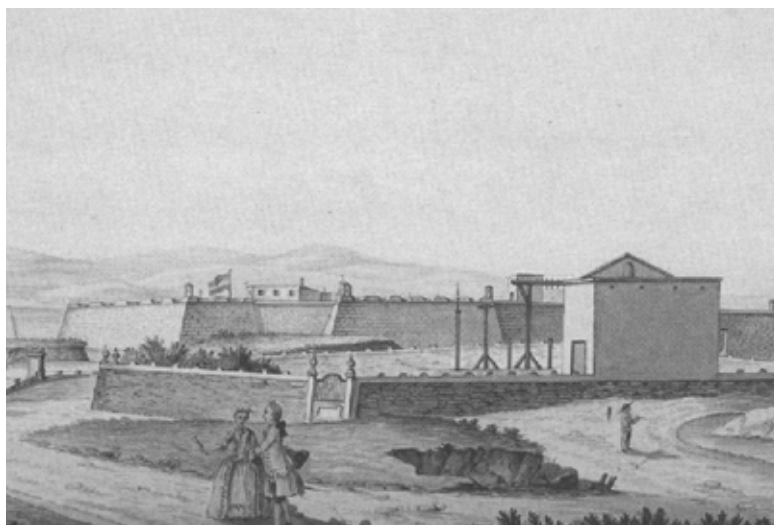


Figure 1
Johannes Rach, The Gallows at the Cape, 1764
(source: Worden and Groenewald, 2005).

This particular sketch was drawn by Johannes Rach in 1764. It depicts a view of Castle, the gallows, the wheel and impaling spike. These instruments were used most effectively to inflict pain and suffering upon individuals sentenced by the Cape authorities for transgressing certain laws. The area of the execution site was walled and access was obtained via a gate. In the background is located the Castle and the sketch appears authentic as Rach had indeed visited the Cape and produced other sketches of note between 1762 and 1764. As a topographical artist, Rach included not only the gallows, but also its immediate surroundings, namely the Castle, the mountain range and pathways around the execution site. The physical environment in terms of buildings appeared undeveloped. Not much activity in terms of people moving about or trade had taken place in and around the site of the execution and Rach gives the impression that Cape Town was indeed a tranquil colonial port. Included in the sketch are five individuals of which two appeared very prominent, based on the clothing worn by the Cape-Dutch couple. Upon Rach's arrival at the Cape, Rijk Tulbagh was the Governor. Through the promulgation of the "*pracht and praal*" ordinances that determined the dress code of the inhabitants and his involvement in the sentencing of criminals that became more pronounced, Tulbagh proved that he was a Governor with wide-ranging powers (Ross 1999: 9-11). In 1764, surprisingly very few criminals were sentenced to death through hanging. Three slaves were executed at the gallows for various crimes ranging from rape in the case of Mey, to murder in the case of Cupido, to resisting arrest using a knife and a sword, in the case of Titus of Batavia. The slaves Cupido and Mey were incidentally executed on the same day, 23 June 1764 and Titus on 18 August 1764 (Heese 1994: 189, 235, 265). For the rest of that year, to those that walked past the wooden structure, it represented colonial power that was either embraced or detested.



Figure 2
Johannes Rach, Public execution in Batavia
 (source: National Library of Indonesia and Rijksmuseum Amsterdam, 2001).



Figure 3
Johannes Rach, A detailed view of public execution in Batavia
 (source: National Library of Indonesia and Rijksmuseum Amsterdam, 2001).

Rach's return to Batavia, the head-quarters of the VOC, saw him sketch more than 200 drawings depicting the presence of the Dutch in Batavia (modern-day Jakarta) in the form of people, landscape and architecture during the latter half of the eighteenth century until his death in 1783. In 2001, the Rijksmuseum in Amsterdam and the National Library of Jakarta honoured Rach in a joint publication that showcased his most influential work. The sketch of relevance to his article is one which he entitled *Het Kastel Poort van Binnen*. It depicts the activities inside the square at Amsterdam gate, of which the primary focus was the execution of criminals. To the left of the square, Rach depicts the gallows and those about to be hanged. The gallows are elevated and erected on a large wooden scaffold. In front of the gallows and between the large crowd stood soldiers, which was customary in all VOC colonies, even the Cape. The way in which Rach posed the crowd, all facing the gallows, suggests that he had consciously sketched a common occasion within the Batavian-Dutch, the execution of offenders which often drew larger crowds. The presence of people is vital here. Compared to the sketch of the gallows dated 1764 at the Cape of Good Hope, which was unappealing from an artistic point of view, the Batavian version of a public execution appears much more interesting and informative. The image presents the modern observer with a sense of what transpired centuries ago, especially the rituals associated with the spectacle of a public execution. Rach, for instance, points out that the composition of the spectators varied, comprising different social classes and depicted by those that wore well-styled dress compared to those dressed in ordinary clothes. The presence of horses and carriages, a sign of wealth, and those on foot carrying umbrellas (*payungs*), suggests that people from all walks of life attended execution ceremonies. An execution of this magnitude no doubt constituted a social event and provided onlookers with a bizarre form of entertainment, namely suffering and death. The sale of food and beverages and the usage of the *payungs* clarifies that executions were indeed lengthy events that presumably took hours. The frequency of executions had other spin-offs. It led to entrepreneurial ventures such as street-trading, which is clearly depicted by Rach at this particular execution.

Lady Anne Barnard (1750-1825)



Figure 4
A youthful Lady Anne Barnard
(source: Burman 1990).

Lady Anne Barnard was a well-known personality and colonial figure of British ancestry who gained the reputation of a Cape socialite when she accompanied her newly-married husband, Andrew Barnard who had been appointed as the first Colonial Secretary at the Cape in 1797. The meticulous manner in which she kept a record of her personal life and her commentary on the goings-on of the political and social activities in her diaries, journals, personal letters and influential drawings depicting the landscape, architecture and colonial personalities of all social classes, saw her work etched in the colonial literature and art history in the South African context in a major way. Her fame was not restricted to her literary prowess, as a travel writer, but she soon gained a reputation as an artist of repute, having sketched a considerable number of influential portraits of the Cape and parts of its interior, notably Stellenbosch. These visual images of the Cape during the last years of the eighteenth century that included the first British occupancy of the Cape until 1802 have given us more than a glimpse of a colonial society in transition politically, socially, economically and even legally.

The personal philosophy expressed by Lady Anne Barnard towards the Cape or “Africa” as she referred to it, its people and its landscapes appeared noble. She firmly believed “that Africa may speak for itself by a narrative fairly given and by Sketches faithfully taken” (Robinson 1993: 145). Lady Anne was an amateur artist with natural talent and had sketched from a young age. As Nicolas Barker has written in a recently published book, *Lady Anne Barnard’s Watercolours and Sketches: Glimpses of the Cape of Good Hope*, “the truth of the matter is that Lady Anne was an equal artist in words and paints, and the two could not be separated in her hands and mind” (2009).

Lady Anne Barnard's first visual contact with the infamous Cape gallows occurred during the month of May 1797, a few days after setting foot on African soil. Dorothea Fairbridge (1925: 21) writes how Lady Anne Barnard walked "across the Parade Ground where they were somewhat horrified at the conspicuous position of the place of execution". Barnard's own diarized words are much more striking. She devoted considerable time to describe what she witnessed. This was clearly not the first time she had seen the structure of the gallows, especially since Tyburn Gallows located at Marble Arch in London had become famous for its public executions for centuries. She writes "The path to the Town for foot passengers was thro' a large parade ground; as we approached it an enclosed Square caught my eye with a building at the upper end of it and one or two Gallow'es erected before it, on ground which seemed to have been raised for the purpose of rendering the whole the more *conspicuous*. It was a place altogether sufficient to make an *honest person tremble*, how much more then must a Rogue have been struck with the Cape Court of punishment, and I may add of Torture, tho' it has never been applied to that purpose by the English since they were Masters of the place, but the dutch laws for the Natives and for the Slaves still continuing in force (according as I suppose to the Articles of Capitulation) I heard that there had been lately some executions of black people for heavy crimes, which execution had been so contrary to our own ideas of humanity, that it was expected the English would endeavour to abolish Torture altogether, by which they would very much displease the *dutch* ... I very heartily pray for this and pressed on" (Robinson, 1993: 157).

As the wife of the Colonial Secretary, the prominent couple took up residence in the Castle. It was from this vantage point, her bedroom and the roof of the Castle that Lady Anne would sketch the famous *Panorama of Cape Town*, a folio that contained seven sheets intended as a gift to Governor George McCarthy. Having had access to these scenic views from her room window and roof of the Castle brought Lady Anne into constant visual contact with the gallows, which she detested or had expressed strong views about. But, in order to remain loyal to her philosophical ideas "... that Africa may speak for itself by a narrative fairly given and by Sketches faithfully taken", her drawings needed to tell a story that reflected reality as truthfully and accurately as possible. Inclusion of the gallows in her selection of drawings was clearly inspired by this view to sketch what she saw and because it was centrally part of the Cape colonial landscape in every sense of the word. Its prominent location suggests that the wooden scaffold structure could not be ignored, but it was historically a visible reminder of VOC rule and what colonial rule represented and stood for in general. Moreover aesthetically, it was part of Cape Town's architectural design and the enclosed space (walled-in) gave it an uncanny status that it was a cleansing ground that rid society of criminals and transgressors.



Figure 5
Colonial Cape Town and the Gallows as depicted by Lady Anne Barnard
(source: Lady Anne Barnard's Watercolours and Sketches, 2009).

The comment made by Lady Anne Barnard about the gallows was quite riveting, but also very poetic and profound. “Life was abridged by the gallows...on a high ground hard by the entrance to the castle, it froze my blood at first, but Habit hardens the nerves, I hope without hardening the heart” (Anderson 1924: 25). These are the words expressed by Lady Anne Barnard in her personal letters when she related how a slave had murdered his master in an act of revenge when he refused to grant him a Sunday off. The slave was apprehended and executed “by the gallows an hour after the affair happened, to deter others”. In this case, justice was not only swift, but moreover cruel and violent, a hallmark of eighteenth century, colonial South Africa.



Figure 6
The Gallows as depicted by Lady Anne Barnard
 (source: Lady Anne Barnard's Watercolours and Sketches, 2009).

The sketches depicted in figures 5 and 6 of the gallows were drawn by Lady Anne Barnard over a period of time between 1797 and 1802. There are resemblances, but they were in fact different sketches altogether. Figure 5 formed part of the *Panorama of Cape Town*, whereas the one in Figure 6 was different in terms of its immediate surroundings and is effectively an enlarged version of the gallows, the wheel and the impaling spike. The street in front of the Castle that runs between walls of the execution site and the Castle was known as Keizergracht, now named Darling Street. The street activity appear, very busy and the portrayal of male and female characters which were either slaves or Khoikhoi suggests that the Cape was still a cosmopolitan city, where all, including slaves, “enjoyed” some kind of freedom. There is also a striking contrast between freedom, near-death and death. The relaxed mode in which the characters are represented indicates freedom, while the actual structure of the gallows being enclosed suggests that life is short and that it can be ended in a violent manner. And finally, once

those sentenced to death have entered the four walls of the enclosed area, and had been walked to the gallows, death was the ultimate and final outcome. And the person to bring about death was none other than the executioner.

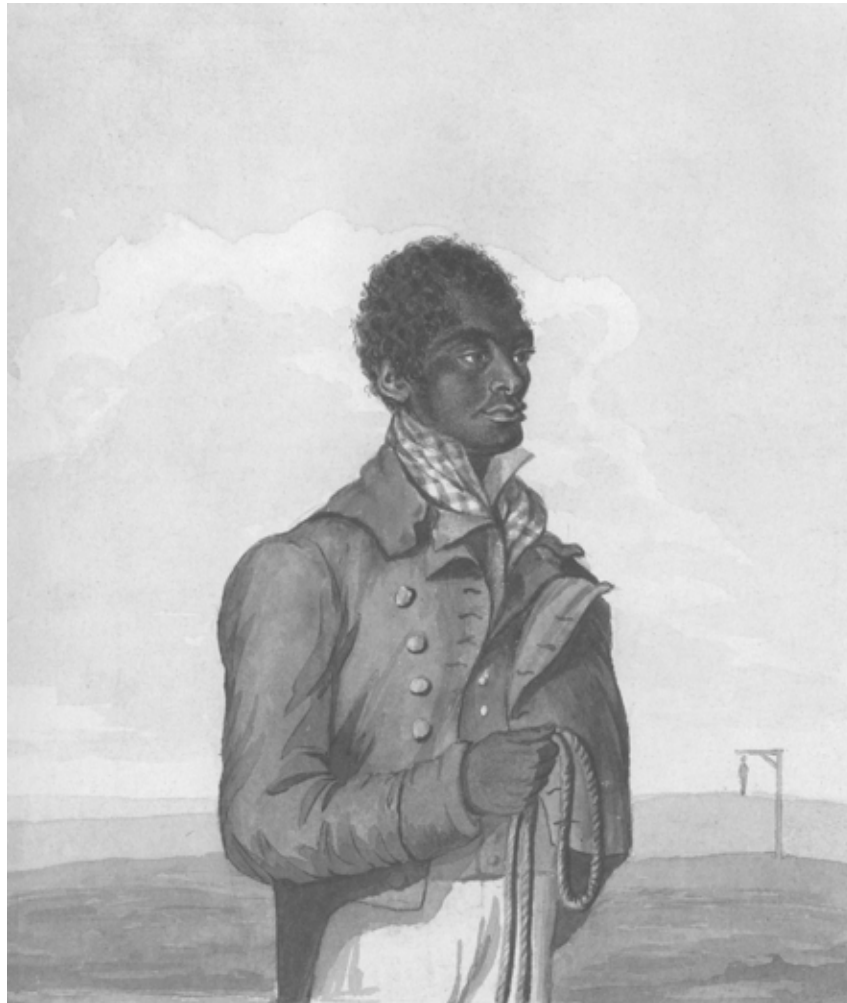


Figure 7
The Government Hangman as sketched by Lady Anne Barnard
(source: Lady Anne Barnard's Watercolours and Sketches, 2009).

The “Government Hangman”, as Barnard referred to him, is indicative of her continued focus on art and the law. Edgerton (2003: 246) refers to executioners as “adjuncts to the judicial system”. Barnard had sketched the executioner in a posed position holding a rope and indicating the noose of the rope. In the background is depicted the gallows and an image of a hanged person. Though the name and identity of the executioner are not mentioned by Barnard as she had done with most of her sketches, she stated that he was married to one of her servants and under-cook. He was therefore part of her household and she presumably kept his identity a secret. Though not mentioned by name, she described his demeanour as one “who had one of the best, most spirited and sweetest countenances I had seen amongst the Slaves”. In her journal, Barnard then penned the credentials of the hangman as follows:

“He was a hangman of the Government, and as such wore Regimentals – he was much respected as he never distressed the criminals who were to be executed by any blunder, but hanged them up in a far *Superior Style* as I was told to his predecessor – he made an excellent husband to the most frightful woman it was possible to suppose but she was his choice” (Robinson 1994: 211).

Samuel Edgerton (2003: 249) relates that in most communities, “professional executioners endured an unusual status in the communities which they served” and many had become an enigma in communities. This enigmatic image of the “Cape Hangman” was also created by Barnard. By not naming his identity, she created some sort of mystery about the executioner or she simply protected his identity to prevent future reprisals by angry individuals.

From what Barnard mentioned, this executioner had perfected the art of hanging, assuming, of course, that many botched or bungled hangings also occurred in the past. Dwight Conquergood, for instance, argued that executions were indeed a skill which required “a mastery of technique, and none guarantees a death that is quick, painless and clean. Hanging involves an intricate calculus between the length of the rope and the weight of the prisoner. If the drop is too short, the neck is not broken, and the condemned kicks and writhes in the agony of slow strangulation. If the drop is too long, the head is ripped off” (2002: 361). The way in which Barnard included the rope held by the hangman, suggests that he was indeed a skilful executioner and that the painting did in fact support what she had written in her journal about him.

The man was presumably of slave origin or from a community of freed slaves, known as free blacks or *vrij swarten*. With limited occupations available to freed slaves, many entered the service of the VOC either as assistant executioners or fully-fledged executioners. An executioner was a salaried occupation and employed by the VOC. Victor de Kock lists the amount of *rijksdaalders* (Dutch currency) earned by an executioner during the VOC period for performing certain tasks in accordance with the sentences imposed by the Court of Justice. Breaking limbs earned the hangman 12 *rijksdaalders* (rds), pinching with red-hot thongs 4rds, burning 12 rds, decapitating 8 rds, hanging 8 rds, strangling 6 rds, torturing 10rds, chopping off the hand 4rds, scourging 3rds, placing the rope round the neck under the gallows 2 rds, branding with iron 1 rds, scorching 2 rds and transporting the body to another location following the execution 3rds. In addition, an executioner earned a salary of f.18, board money s 12; 3 cans arrack, 4 loaves of bread and 92lbs meat. His assistant earned half (De Kock 1963: 167).

As for the Cape, neither Rach nor Barnard captured and produced what one would interpret as “live” execution scenes, in the sense that they incorporated into their sketches the assembly of large crowds, the executioner about to execute criminals and so forth. Their depictions of the gallows, were far less dramatic than those produced by other artists in Europe. For instance, Thomas Rowlandson’s portrait of *An Execution outside Newgate Prison in 1790* had all the ingredients of a spectacle, namely, large cheering crowds, a scaffold, ropes tied around the necks of the prisoners and the presence of an executioner (Bender 1987: 240). The same applies to a drawing by Annicale Caracci, entitled, *A Hanging, c1599*, depicting the execution of two criminals watched by onlookers (Edgerton 2003: 249). Barnard could have been more creative and informative with her sketches especially since she, on more than one occasion, by her own admission, witnessed how a slave was hanged. Perhaps this was deliberate and a matter of choice on her part as an artist not to sketch human beings being hanged or tortured. This would certainly have made her sketches of the gallows more dramatic, even if she had used her imagination and based on former recollections. After all, in her journal, she relates how she had witnessed the hanging of a slave that had murdered his master. In the end, she was perhaps not as loyal to her initial intention to be impartial, but had strategically made politically-correct decisions. More importantly, she decided what she wanted to sketch and what to ignore. Hans Heese, for instance, cited several cases of slave hangings occurring under the auspices of the British flag between the years 1798-1800 (Heese 1994). Barnard had certainly known of or even witnessed some executions, especially since each execution was accompanied by some kind of military parade and protracted rituals that presumably brought the usual activities in

the city to a halt. Had she sketched, for instance, the hanging of the slave, she would have in fact compromised the British government at the Cape of which her husband was the Colonial Secretary. Ironically, she preferred to sketch the “Government Hangman” in full colonial garb holding a rope, which suggests that executions were still rife and that the *status quo* as far as executions were concerned, was maintained by the British.

Epilogue

On 15th February 1990, shortly after the release of Nelson Mandela from prison, he addressed a large crowd that gathered on the Grand Parade, near the Cape Castle. It was not far from the former execution site where the lives of several men and women of different colonial identities were ended in a brutal manner by a rope and watched by onlookers. On this occasion, however, the crowds had gathered not to watch an execution, but arrived to see an iconic individual who not only brought freedom and democracy to South Africa, but also paved the way for the adoption of a constitution and Bill of Human Rights that outlawed the death penalty and all forms of torture as practised before by the state and its associated agencies. Sadly, however, despite the abolishment of capital punishment, South Africa is still a violent country and a sick society, still presumably haunted by an equally violent and dark colonial past. Even for a sophisticated lady like Lady Anne Barnard, living in violent society had gotten easier with time. “It froze my blood at first”, said Lady Anne Barnard, when she first saw the gallows, “but Habit hardens the nerves, I hope without hardening the heart”.

If we accept, as shown by other scholars, notably, Benjamin Myers (2009) and Kirk Fuoss (1999), that executions were indeed crowd-pullers, similar images were not portrayed in the art of Rach and Barnard. The manner in which both represented the gallows in their drawings and sketches suggests that the scaffold was merely an ornament or relic of a former world, yet it was certainly not the case in reality.

The fusion of the written record and visual images, as the recent literature suggests, especially the rapid emergence of visual pasts or “visuality”, has clearly added another dimension to our understanding of the past (Hays and Bank 2001: 5-6). Convergence of the written record and visual images reopens a new debate from a socio-legal perspective highlighting the unequal relationship between powerful and powerless and martyrs and murderers. Therefore, visual constructions of the gallows by colonial artists and the added blow-by-blow archival accounts of the condemned have given scholars a new perspective on the Cape as a colonial society and how it was actually in line with other major colonial cities around the world during the eighteenth century. By the early eighteenth century, as the Dutch entrenched their presence at the Cape, as Spierenburg has shown, Cape Town had joined European cities, notably, Paris, France, Amsterdam, the Netherlands, Ansbach, Germany, London, England and Seville, Spain as those cities that embraced public executions (Spierenburg 1984: 52-55). The documentary evidence of recorded cases that appeared before the Court of Justice, the variety of sentences imposed by the Court of Justice, the manner in which, particularly, slaves and Khoikhoi were put to death and the images in the form of art as depicted by Johannes Rach and Lady Anne Barnard of the gallows, suggests that the Cape of Good Hope had evolved into the “Cape of Execution”.

Finally, I wish to end by quoting Lionello Puppi, having made an important observation to suggest that artists were in fact “informers”. He writes, “So the Western artist, even without wanting to, became the most eloquent of informers on the horrors perpetuated in the name of sovereign laws imposed by a Power which took the form of a ‘*merum imperium*’ a Power that asserted its intangible privileges through the ritual of horror orchestrated within unspeakable misery and profuse wealth of the city” (1991: 58-9).

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Russel Viljoen is Professor of History in the Department of History, University of South Africa, Pretoria. He has published widely on the eighteenth-century Cape and studied at the University of Leiden, The Netherlands. He is an NRF-rated researcher.