

‘The Greatest Enemy of Authority’— Arendt, Honig and the Authority of Post- Apartheid Jurisprudence.

Jaco Barnard-Naudé*

*The greatest enemy of authority, therefore, is contempt,
and the surest way to undermine it is laughter.*
Hannah Arendt¹

*Laws are not just as laws. One obeys them not because
they are just but because they have authority.*
Jacques Derrida²

1. Introduction

This article primarily considers authority in the context of an unelected postcolonial judiciary founded by the post-apartheid Constitution of the Republic of South Africa. It considers this authority against the background of a recent judgment of the South African Constitutional Court (*Le Roux v Dey* 2011 (3) SA 274 (CC)) in which one of its judges (Justice Mogoeng) failed to provide reasons (justification) for his disagreement with the majority’s decision that it is not unconstitutional / unlawful / defamatory to depict or refer to someone as gay or homosexual, even if that may not, de facto, be the case. The facts of the case are as follows:

While surfing the internet on a Sunday in February/March of 2006, Pieter le Roux (the first applicant in the Constitutional Court) visited the website of his school (Hoërskool Waterkloof in Pretoria) and downloaded face pictures of the school principal and Dr Dey, the deputy principal. The pictures reminded Le Roux of an episode of a television programme (South Park) he had seen recently. In the episode,

* Professor of Private Law, University of Cape Town; Honorary Research Fellow, Birkbeck Institute for the Humanities, University of London. The author is indebted to James Wink for invaluable research assistance. Research for this contribution was supported by the National Research Foundation’s Incentive Fund for Rated Researchers.

1 Arendt 1970, 45.

2 Derrida 1990, 939.

one of the characters electronically placed the head of a boy on an image of the body of a gay bodybuilder. Le Roux then visited a website which contained depictions of gay bodybuilders. One of these images depicted two naked men, sitting next to each other on a couch in circumstances that could have been interpreted as sexually suggestive or intimate. The hands of the figures on the couch were positioned around their genitals and the left leg of one of them was placed over the right leg of the other. Le Roux downloaded the image and electronically superimposed the face pictures of the principal and of Dr Dey over the faces of the models in the image. He also downloaded an image of the school badge and superimposed this image over the genital area of the models, so as to obscure both the hands and genitals of both of them. Le Roux then sent the image to his friend's mobile phone who forwarded the image to the mobile of another learner at the school. As could be expected, the image was circulated amongst many of the learners, although Le Roux (allegedly) did not intend for this to happen.

A few days later, Christiaan Gildenhuys (the second applicant) printed the image and took it along with him to school in order to show it to his fellow learners. One of the learners to whom it was shown, suggested that the printed image be placed on the school noticeboard. Reinardt Janse van Rensburg (the third applicant) was the learner who carried out this task. The printout remained on the notice board for half an hour.

Upon the discovery of the image by the school authorities, the applicants admitted what they had done. They were disciplined by being prohibited from assuming leadership positions at the school or from wearing honorary colours for the rest of the school year. They also had to undergo detention for three hours for five consecutive Fridays.

Dr Dey, however, was not satisfied by these disciplinary measures on the part of the school authorities and insisted that the applicants be charged criminally. As a result of the criminal process the applicants were punished by way of community service: they were required to clean cages at the local zoo.

The principal accepted the apologies of the second and third applicants, but Dr Dey refused to entertain any discussion of an apology, because he obtained legal advice not to do so. Dr Dey subsequently pursued a defamation claim against the learners all the way to the Constitutional Court (to which the learners appealed, after the Supreme Court of Appeal upheld Dr Dey's defamation claim). Throughout, Dr Dey's argument was that the depiction of him was defamatory (in the sense that in the eyes of the reasonable person his reputation would be diminished) and, if not defamatory, it was a violation of his (subjective and actionable) interest in his human dignity.

The (narrow) majority of the Constitutional Court found that Dr Dey was defamed, not because he was depicted as gay, but because he was depicted as sexually immoral.³ It is in this context that the majority of the Court (also) held that it is not

³ Barnard-Naudé & De Vos (2011) have argued that the judgment that the depiction was one portraying sexual immorality (and hence, was defamatory) was directly linked to the fact that it was a depiction of

defamatory per se to depict someone as homosexual or gay. It is from this finding of the majority that Justice Mogoeng dissented, without having provided reasons for his dissent.

The South African Constitution famously became the first Constitution in the world to prohibit unfair discrimination on the ground of sexual orientation. The majority's reasoning for its conclusion that it is not, under South African law, defamatory to depict someone as homosexual (even if this is not the case *de facto*), flows directly from a sensitivity to the fact that unfair discrimination on the basis of sexual orientation is illegal:

An actionable injury cannot be based solely on a ground of differentiation that the Constitution has ruled does not provide a basis for offence. The Constitution does not condone individual prejudice against people who are different in terms of race, sex, sexual orientation, conscience, belief, culture, language or birth. These are unfair grounds for differentiation and the equality provision of the Bill of Rights protects against discrimination based on them. It therefore cannot be actionable simply to call or to depict someone as gay even though he chooses not to be gay and dislikes being depicted as gay—and even though stigma may still surround being gay. To hold actionable an imputation based on a protected ground of non-discrimination would open a back-door to the enforcement by the law of categories of differentiation that the Constitution has ruled irrelevant. (Le Roux 2011, para. 185.)

It was with this part of the judgment that Justice Mogoeng disagreed, without offering reasons for doing so. This article advances the contention that the refusal of Justice Mogoeng (as he was at that time) to provide reasons for his dissent in the case of *Le Roux v Dey*, constitutes a failure to act within the limits of his authority. As an unelected judge purporting to uphold the Constitution, his authority is necessarily contingent upon providing reasons for the decisions he reaches. This claim will draw on Hannah Arendt's historical understanding of authority as unquestioning obedience-in-respect, together with Honig's claim that the performative speech-act that founds constitutionalism creates a freedom-in-obedience. The article is also inspired by Honig's claim that Arendt does not simply mourn the disappearance from the world of the above old concept of authority—she also celebrates it, precisely because it allows for the opportunity to conceive of a new concept of authority that is suited for modernity (Honig 1991, 97). Following the theoretical arguments of South African scholar Etienne Mureinik and Arendt, this piece provides the basis for recognizing a necessary link in the post-apartheid era between a culture of authority and a culture of justification.

same-sex intimacy, in other words that it was a heterosexist judgment. I leave this argument for the reader's consideration. What I wish to focus on in this contribution is that part of the judgment in which the majority holds that it is not defamatory per se to depict someone as homosexual or gay and, most pertinently, Justice Mogoeng's dissent without reasons, from that part of the judgment—a situation which I defend as representing an implicit or explicit rejection of the authority of the post-Apartheid order.

As indicated above, the article draws on Arendt's influential account of the history of authority in her essay 'What is authority?' (Arendt 2006, 91). In the political philosophy of the twentieth century, there can be no doubt that Arendt remains the great thinker of the new, of beginning, and of birth, the thinker of the act of founding, then and so, of beginning. And not less so, of the beginning of authority.

It is in order to draw attention to the *original* (the *initial*) understanding of authority (where it first *began*), an understanding which has been so utterly occluded by ahistorical versions, that I will start with a discussion of Arendt's essay in order to foreground my ultimate contention, which is that the authority of a constitutionally established, unelected judiciary in the postcolonial context, crucially depends on providing justification for its decisions.

To be sure, then, part of my argument involves the contention that an unelected judiciary always already operates in what Arendt had identified as the crisis of the traditional concept of authority, the fact that unquestioning obedience in respect has disappeared from the world. In this sense, the argument reflects, as it were, Arendt's contention that authority has vanished from the world.

In its threadbare form, my argument is this: Each and every time a court, which derives its authority *only* from the postcolonial Constitution, provides justification for its decision, it is not only relying on the alternative concept of authority that Arendt strives to 'restore beyond modern secularism'—it also re-founds its authority, precisely by way of referring those who are expected to obey, back to the origin of its authority in the act of founding.

To put it differently, my argument is that a postcolonial judicial authority is and only can be *justified* by the justification that is its curial duty. This is crucially the case at the level of final instance, in other words, in the highest court, where there is no further possibility of appeal. In this way, I argue that the failure by Justice Mogoeng in the Le Roux case to provide reasons for his dissent represents a denial of what Arendt calls the modern 'crisis of authority' and, moreover, that it is grounded in a misunderstanding of the nature of the authority of a postcolonial judiciary.

2. Arendt and authority

In her 1954 essay entitled 'What is Authority?', Hannah Arendt advances a claim that strikes the modern ear as at least somewhat dissonant: she argues that authority has 'vanished' from the world (Arendt 2006, 91). An immediate riposte to this strange claim could refer to the proliferation of 'authoritarian' regimes throughout the modern age, culminating eventually as it did in the devastating totalitarianisms of the middle to late twentieth century—Fascism and Stalinism (Žižek 2005a). Such a riposte could then proceed to ask whether Arendt is perhaps in bad faith. Is she really in all seriousness attempting to argue that these events represented the *evacuation* of authority from the world? In any event, what does Arendt mean when she refers to 'the world'? And if authority vanished from the world, where did it go?

Arendt's answer to the latter question is intricately bounded up with her understanding of worldliness as distinctly a manifestation of the public sphere, a

sphere characterised by action and speech and thus by freedom understood not as the internal freedom of contemplation but as the external freedom of action and speech (Arendt 1958, 175).⁴ The disappearance of authority from ‘the world’ carried, for Arendt, a technical meaning: it signified specifically the disappearance of authority from the *political* sphere where it first appeared.⁵

Any reader of Arendt will know that, she, as someone who had been displaced from her country of birth and had acquired the unenviable status of refugee as a result of the unprecedented violence perpetrated by Nazi Germany, never denied the historicity of totalitarianism, nor of so-called authoritarian regimes. What she did deny, invariably so, was that these forms of government represented a culture of authority *as it was understood in the original Roman sense*. After all, it can hardly be denied that when it comes to political concepts, Arendt was interested in originality, that is, in their origin in history, in contradistinction to their modern appropriations in political philosophy. In accordance with this penchant, Arendt would argue in her essay on authority and more elaborately in her book on the antecedents of totalitarianism, that totalitarianism represented a novel form of government, characterised by a total breakdown of authority:

The rise of fascist, communist and totalitarian movements and the development of the two totalitarian regimes, Stalin’s after 1929 and Hitler’s after 1938, took place against a background of a more or less general, more or less dramatic breakdown of all traditional authorities. Nowhere was this breakdown the direct result of the regimes or movements themselves, but it seemed as though totalitarianism, in the form of regimes as well as of movements, was best fitted to take advantage of a general political and social atmosphere in which the validity of authority itself was radically doubted. (Arendt 1956, 403.)

Moreover, Arendt argues that totalitarianism could not be attributed to the rise of a culture of *power*, but rather to the rise of a culture of violence, a culture which she referred to as ‘total terror’ (Arendt 1973, 465-466).

In order to understand Arendt’s novel claims in this regard, one needs to pursue the political taxonomy that Arendt deploys in her book on violence, a book which was a direct outcome of the earlier essays in *Between Past and Future* in which the essay on authority is contained. In *On Violence* (from 1969), relying heavily as she did on the ancient Greek and Roman categorisations of political concepts, Arendt

4 For Arendt, modern ‘world-alienation’ was man’s alienation from the public sphere caused by the rise of ‘the social’. Worldliness corresponded to the public sphere and therefore was a condition of human freedom in action and speech. See (Kateb 1977, 163) who identifies worldliness as the commitment to maintain ‘a place for the conversation of diverse equals.’

5 That Arendt regards the world as the public sphere in which men come together in speech and action, is most clear from her Lessing Prize acceptance speech. See (Arendt 1968, 4): ‘the world lies between people’; (9): ‘the public space—which is constituted by acting together and then fills of its own accord with the events and stories that develop into history’; (9): ‘escape from the world into the self’; and (10): ‘the world—the thing that arises between people and in which everything that individuals carry with them innately can become visible and audible’. Also see (Kateb 1977, 175): ‘the world means, by definition, the public, what all can see (in all the ways of seeing) or hear or read about.’

draws a distinction between power, strength, force, authority and violence (Arendt 1970, 44).

Power, she argues, corresponds to the human ability to act concertedly. It is therefore always a collective concept—an ability of the multitude to act suddenly and in an unprecedented way. Strength designated 'something in the singular'—an inherent property in a person or object 'which may prove itself in relation to other things or persons'. She accordingly understands 'force' strictly as 'the energy released by physical or social movements' and berates the perfect substitution in common parlance of 'force' for 'violence'. In the Arendtian taxonomy, violence is distinct from force in that the former reveals an instrumental character—it is phenomenologically close to strength in that it amounts, through the use of instruments or 'implements', to a multiplication of natural strength (Arendt 1970, 44-45).

Crucial for present purposes, Arendt distinguishes authority in this context from all of the above by referring to what she calls its 'hallmark': 'unquestioning recognition by those who are asked to obey; neither coercion nor persuasion is needed' (Arendt 1970, 45). The political sensibility that is crucial to authority is respect for the person or office. As Arendt writes in *The Human Condition*: 'Respect, not unlike the Aristotelian *philia politiké*, is a kind of "friendship" without intimacy and without closeness; it is a regard for the person from the distance which the space of the world puts between us, and this regard is independent of qualities which we may admire or of achievements which we may highly esteem' (Arendt 1958, 243). It is this emphasis on respect which leads Arendt to conclude that contempt, the very opposite of respect, is the 'greatest enemy of authority' (Arendt 1970, 45).

Arendt's claim that authority has disappeared from the world corresponds to her claim that our world is characterised by a 'modern loss of respect' (Arendt 1958, 243). This, she continues to argue, is a symptom of a greater malady, namely the 'increasing depersonalization of public and social life' (Arendt 1958, 243)—a condition that, in turn, corresponds to the rise of the bureaucratic form—a system of pure administration and normalisation which represents the eclipse of politics understood as the realm of free action and speech: 'bureaucracy unhappily is the rule of nobody and for this reason perhaps the least human and most cruel form of rulership' (Arendt 2003, 31).

3. Revolution and authority

Arendt's definition of authority, linked as it is with respect, is more or less uncontroversial. As indicated above, it is her claim that authority has *disappeared* from our world that is more difficult to understand.

This claim will lead us to another dimension of Arendt's thought on authority. Taking as her point of departure that authority is a concept distinctly Roman in origin, Arendt construes a lengthy and fairly complex history of authority. What stands central in this history is the original understanding of authority in Rome as 'the sacredness of foundation, in the sense that once something has been founded it remains binding for all future generations'. From this point of view, political

engagement was first of all synonymous with the preservation of the founding of the city of Rome. Unlike the Greeks, argues Arendt, the Romans were unable to repeat the founding of the polis. For them, the Greek counsel to found a new city at times of overpopulation or emergency, came across as completely unintelligible. The Greek saying 'wherever you are you will always be a polis' did not make sense to them. This was the case because the Romans were, from the outset, bound to the 'specific locality' of Rome; their conquests simply added to 'the original foundation until the whole of Italy and, eventually, the whole of the Western world were united and administered by Rome'. In short, '[t]he foundation of a new body politic—to the Greeks an almost commonplace experience—became to the Romans the central, decisive, unrepeatable beginning of their whole history, a unique event'. (Arendt 2006, 120).

The primary implication of this understanding of authority was that in Rome 'religious and political activity could be considered as almost identical'. This was the case because the founding of Rome formed 'the deeply political content of Roman religion'. In this context, religion literally meant *regilare*: 'to be tied back, obligated, to the enormous, almost superhuman and hence always legendary effort to lay the foundations, to build the cornerstone, to found for eternity'. This is also why the Romans' most revered divinities were Janus, the god of beginnings and Minerva, the goddess of remembrance. (Arendt 2006, 120-121).

Arendt emphasises that the word *auctoritas* derived from the verb *augere*, to augment. The task of those in authority thus was constantly to augment the foundation. Authority was thus rooted in the past, unlike power which is rooted in the living and therefore in the present. In fact, Arendt is at pains to point out that authority, 'in contradistinction to power (*potestas*), had its roots in the past' and that 'this past was no less present in the actual life of the city than the power and strength of the living' (Arendt 2006, 121-122).

It is crucial to my argument in this article to take note of Arendt's reference in the course of this discussion, to Montesquieu's understanding of the judiciary branch of government. Montesquieu argues that the judiciary does not have power, but nevertheless 'constitutes the highest authority in constitutional governments'. The binding force of the judiciary's pronouncements consist in its augmentation of the act of founding, 'binding every act back to the sacred beginning [...] adding, as it were, to every single moment the whole weight of the past'. As Arendt interprets Montesquieu, this meant that, in Rome, precedents were always binding, creating a crucial link between authority and tradition, unless those previously established precedents could themselves be found to be incompatible with the sacred act of founding and thus could be said to have undone the link between authority and tradition: '[a]s long as this tradition was uninterrupted, authority was inviolate; and to act without authority and tradition, without accepted, time-honored standards and models, without the help of the wisdom of the founding fathers, was inconceivable'. (Arendt 2006, 122-124).

Arendt did not see the decline of the Roman Empire as consubstantial with

the demise of the Roman spirit of authority, linked as it was to tradition. On the contrary, the Roman spirit passed to the Christian Church with the fall of the Roman Empire: 'the Church became so "Roman" and adapted itself so thoroughly to Roman thinking in matters of politics that it made the death and resurrection of Christ the cornerstone of a new foundation, erecting on it a new human institution of tremendous durability'. In fact, the Church's political career hinged on a distinction between power and authority—it reserved for itself the 'old authority of the Senate' and left the power to 'the princes of the world'. The result was that the properly political lost its authority 'and with it that element which, at least in Western history, had endowed political structures with durability, continuity, and permanence'. (Arendt 2006, 125-127).

The inevitable result of this configuration thus was that with secularisation, authority as such disappeared from the public realm and became the distinct prerogative of the church. It was only in the modern age that the 'usefulness of religion' for politics was rediscovered. This occurred at the time of the American and French revolutions when its leaders preached that the people must not be allowed to lose their religion, for those who tear themselves away from God 'will end by deserting his earthly authorities as well' (Arendt 2006, 134).

It was, as Arendt argues, in fact the appeal to the Immortal Legislator and a future state of rewards and punishments that sanctioned the revolutions and justified the American constitutions as 'the only true foundation of morality' (Arendt 2006, 134). But these attempts to retain the element of violence and of using it as a safeguard for the 'new, secular political order' were in vain. Rather, it was modern ideologies that served to immunise man's soul 'against the shocking impact of reality' (Arendt 2006, 135). As Arendt states: 'the pious resignation to God's will seems like a child's pocket knife in competition with atomic weapons'. For Arendt then, religion loses its political significance as a potential force or ground of authority in modernity just as 'public life was bound to lose the religious sanction of transcendent authority'. (Arendt 2006, 134-135).

Yet, Arendt admits that in our political history, there was one political event of the modern age for which the notion of founding (and thus of authority) remained decisive. These were the revolutions of the modern age. In this context she refers to the thought of Machiavelli who insisted that 'every contact between religion and politics must corrupt both' (Arendt 2006, 138). It was Machiavelli who rediscovered that the whole of the Roman political experience 'depended upon the experience of foundation' and it was he who thought that this experience could be repeated through the founding of a unified Italy that would become the precursor of the modern nation-state. (Arendt 2006, 136-138).

But, for this repetition of founding or of re-founding, Machiavelli, like Robespierre, argued that violence was indispensable. Arendt points out that when Robespierre justifies terror as 'the despotism of liberty against tyranny' he sounds as though he is repeating Machiavelli's statement with regard to the necessity of violence for the foundation of new political bodies. Machiavelli and Robespierre then,

go beyond what the Romans had understood about foundation. For the Romans, foundation was a mystical event of the past; for Robespierre and Machiavelli it was a supreme end that had to be achieved for which all means and 'chiefly the means of violence' could be enlisted. Foundation was now inextricably caught up with the act of making, which necessarily implies violence: 'You cannot make a table without killing trees, you cannot make an omelet without breaking eggs, you cannot make a republic without killing people.' (Arendt 2006, 139).

4. Post-colonial authority

Arendt concludes her essay on authority with an emphatic denial that authority has been anywhere re-established through revolution or restoration 'and least of all through the conservative moods' that 'occasionally sweep public opinion'. For Arendt this loss of authority and the concomitant understanding that the source of authority transcends all power and those who are in power, primarily means that we are 'confronted anew' with 'the elementary problems of human living-together'. (Arendt 2006, 141).

Contemporary commentators often read in Arendt a nostalgia for a conservative concept of authority (Warren 1996, 51),⁶ but as Honig has argued: 'Arendt does not simply mourn the disappearance of political authority in modernity; she also celebrates it' (Honig 1991, 97). Moreover, according to Honig, Arendt, 'in the spirit of celebration', realizing that the old concept of authority was lost with the birth of modernity, constructs a replacement for a practice of authority that is suited for modernity—and for this construction she turns to a 'fabulist' reading of the American incidence of revolution.

In this regard, Arendt celebrates the American revolutionaries for 'seeking in the end not just liberation but the reconstitution of the political realm in order to enable the citizenry of the new republic to experience the happiness of public freedom and political action'. On the other hand, Arendt criticises the revolutionaries for a 'lack of faith' which led them to seek reassurance in antiquity that their actions were not 'radical but derivative'. In this they were mistaken, 'for their action *was* unprecedented'. With the Declaration of Independence the American revolutionaries founded a new authority in a new way, that is, through political action: 'a speech act that in itself brings "something into being which did not exist before"' by virtue of the enunciation 'We, the people' by way of which the legal order is reconstituted and also legitimized through the adoption of the new Constitution. And as Honig points out, since the Declaration represents the written word, we are confronted by an instance of political action so profound that it erects its own monument. (Honig 1991, 98-99).

It is this authority that 'salvages political authority for an age unable or unwilling to support the authority of tradition and religion', that is, the old concept of authority as unquestioning obedience. Honig argues that it is through this construction of

⁶ Also see Flathman 1980 and Friedman 1973.

authority as grounded in the performative—action and beginning—that Arendt thus 'saves' authority, 'because she realises that without it there can be no politics' (Honig 1991, 101).

5. The founding of post-apartheid authority

I find Honig's characterization of the re-founding of authority in the act of Constitution founding as a performative act—an act that appears in (written) words—particularly compelling for the post-apartheid context. Famously, the end of institutionalized Apartheid coincided with the reconstitution of the South African legal order through the adoption of the interim Constitution of 1993 and, ultimately, the Final Constitution of 1996. By subordinating all other (pre-existing, colonial) domestic law to it, these Constitutions became the ultimate source of legal validity.

South African scholar, Etienne Mureinik, characterised this legal revolution, this shift from Apartheid to transformative constitutionalism, as a shift from a culture of authority to a culture of justification (Mureinik 1994, 32; Langa 2006, 353). Employing the metaphor of the Constitution as a 'bridge' he argued that it was a bridge from a culture in which the parliamentary sovereignty of a minority parliament reigned supreme, from a culture that taught that what Parliament says is the law, 'without the need to justify even to those governed by the law'. As Mureinik puts it: 'The effect of these teachings, at the apogee of apartheid, was to foster an ethic of obedience' (Mureinik 1994, 32). What the Constitution is a bridge *to* is what he characterized as a culture of justification: 'a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command' (Mureinik 1994, 32).

Arendt's political taxonomy, linking authority to respect, would perhaps have trouble describing the totalitarianism of the Apartheid government as representing a culture of authority, given her warning, in the earlier essay on authority, 'how careful we must be lest we mistake tyrannical forms of government, which rule by order and decree, for authoritarian structures' (Arendt 1956, 404). In the same essay, Arendt writes about the often conflated notions of violence and authority: if violence makes people obey, so the argument goes, then it fulfills the same function as authority, so that the two can be regarded as perfect substitutes.

Arendt berates these arguments for confusing political issues and specifically for blurring the distinction between familiar forms of government and totalitarianism as a novel form of government: 'I do not believe that atheism is a substitute for or can fulfill the same function as a religion any more than I believe that violence can become a substitute for authority' (Arendt 1956, 417). From this vantage point, we can understand Arendt's account of totalitarian government: a government that is characterised by a breakdown of authority and which consequently rules through that extreme form of violence she calls terror. Moreover, a totalitarian government does not deploy its violence in the name of re-founding political authority, but rather, as she famously argues, in the name of death itself. (Arendt 1973, 467). A totalitarian

government enforces its decrees through the implements of violence and nothing else even when it is not yet firing the gun or launching the missile or dropping the bomb. It is this rule through violence that finally rendered the Apartheid government totalitarian.

For Arendt the central political problem of modernity was precisely the act of founding authority without appealing to what Derrida has called, following Montaigne, a ‘mystical foundation’ (Derrida 1990). As Honig puts it: ‘Can we conceive of institutions possessed of authority without deriving that authority from some law of laws, from some extrapolitical source? In short, is it possible to have a politics of foundation in a world devoid of traditional (foundational) guarantees of stability, legitimacy, and authority?’ (Honig 1991, 98). For Honig, and I agree with her, the answer to this question for Arendt was: yes, on condition that we are willing to retheorise authority for a nonfoundational politics.

I believe that Arendt would have characterized the bridge that is the post-Apartheid Constitutions as a bridge from a culture of violence to a culture of authority, but here an authority that finds its source outside government per se, an authority that is grounded in the performative, the ‘We ... adopt’ (as it is in the preamble to the South African Constitution), in the act of founding itself. This performative speech act, as Honig points out, is uniquely human and represented for Arendt a true political act—an act in which people come together and bring something truly new into the world: ‘an authoritative exemplification of human power and worldliness’ (Honig 1991, 101). This, of course, implies that in the Arendtian taxonomy power (a plurality of people coming together and acting) and authority are interdependent. It also means that the appeal to a transcendent source of authority becomes redundant (Honig 1991, 101).⁷ The preamble to the Constitution ‘provides the sole source of authority from which the Constitution, not as an act of constituting government but as the law of the land, derives its own legitimacy’ (Arendt 1963, 193).

A shift from a culture of violence to a culture of constitutional authority necessarily involves, (and here one can agree with Mureinik)—indeed necessitates—a culture of justification, in order to prevent it from regressing back into a culture of violence. For, when political authority is established by the performative act, authority is nothing without justification. This is what Mureinik meant when he characterized the shift brought about by the post-apartheid Constitution as a shift from authority to one of justification: justification is what ensures the implied but no less essential element of authority namely that it is an ‘obedience in which men retain their freedom’ (Arendt 2006, 105).

The reason why justification allows for this freedom-in-obedience is because it is through justification that men are referred back to the moment of their liberation from tyranny, their performative act of founding. As Frank Michelman puts it

⁷ In this regard, Jean-Luc Nancy (2007, 9) has argued that the very ‘invention of sovereignty’ at the beginning of the modern State represented the end of the appeal to transcendent authority: ‘the State, cannot by definition depend upon any authority other than itself, and its religious consecration does not, despite appearances, constitute its political legitimacy.’

specifically in the context of judicial review: 'The Court helps protect the republican state, that is, the citizens politically engaged from lapsing into a politics of self-denial. It challenges "the people's" self-enclosing tendency to assume their own moral completion as they now are and thus to deny to themselves the plurality on which their capacity for transformative self-renewal depends' (Michelman 1988, 1532). Therefore, in Arendt's terms, justification amounts to an act of authority, binding or tying every act back to the beginning that is represented in the foundation and, by doing so, augmenting that foundation (Arendt 2006, 121).

In the post-apartheid context and in the face of the reality of an unelected judiciary, former Chief Justice Pius Langa puts it succinctly: '[u]nder a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values' (Langa 2006, 353). Justification is, then, precisely the constant reference back to the act of authority-in-founding. In the South African context this authoritative act of founding is contemporaneous with the founding of freedom and the instrument of this founding is the Constitution, its liberating ideals, its ideas and its values. Frederik Schauer, in turn, picks up on Arendt's identification of the linkage between authority and respect by arguing that while authority in the traditional sense does not require reasons, in the modern age respect in law and politics must be earned. When decision makers expect respect for decisions 'because the decisions are right rather than because they emanate from an authoritative source' giving reasons becomes a way of bringing the subject of the decision into the enterprise (Schauer 1995, 658). In the context of an unelected judiciary this point seems to be particularly apposite. To a large extent, an unelected judiciary cannot but rely on voluntary compliance which is contingent upon earning respect—it cannot enforce many of its decisions across the body politic or the class of persons to whom it applies (as opposed to the narrow category of the parties before the Court). But even if compliance is not the issue 'giving reasons is still a way of showing respect for the subject, and a way of opening a conversation rather than forestalling one' (Schauer 1995, 658). Especially when a court makes decisions that seem to go against the wishes of the vast majority, giving reasons, explaining why the particular decision accords with the people's original constitutional (founding) commitment, is crucial for the maintenance of its (countermajoritarian) authority. As Ronald Dworkin puts it: 'A legislator who proceeds in this way, who refuses to take popular indignation, intolerance and disgust as the moral conviction of his community, is not guilty of moral elitism. He is not simply setting his own educated views against those of a vast public which rejects them. He is doing his best to enforce a distinct, and fundamentally important, part of his community's morality, a consensus more essential to society's existence' (Dworkin 1966, 1002).

Mark Warren (1996, 47) has linked justification to the very idea of democracy as such. Under democracy, he argues, authorities cannot legitimately hide behind the old concepts of tradition and authority: 'They must, in the final analysis, justify their decisions and convince that they are deserving of trust. The possibility that

decisions will have to be justified in the face of challenge pervades authority [...] when authorities can justify their decisions, they generate a trust that does not depend on the habitual loyalty or fearful obedience of subjects.' To this Langa adds that under a transformative post-apartheid Constitution, justification renders law inescapably political in the sense that 'our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions. This is vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given' (Langa 2006, 353).

6. *Le Roux v Dey*: refusing justification

But what happens when someone who is supposed to uphold authority through a justification of every exercise of power, no longer appears to believe that justification (which, in the judicial sphere essentially amounts to providing reasons for a judgment on the substantive law in the context of precedent and a commitment to transformative constitutionalism) is required for the exercise of authority? In Arendt's terms as developed by Honig, this would amount to nothing other than a breakdown of the kind of authority retheorized for modernity, precisely because it would no longer be possible to speak in such circumstances of an obedience-in-freedom. And this would represent the emergence of a power that is not vested in authoritative concerted action but rather in a power that would correspond to a nostalgic longing for a culture of violence.

These are the *ex post facto* problematics of Justice Mogoeng's refusal to provide reasons for his dissent with that part of the Court's judgment in *Le Roux v Dey*⁸ that holds that it is not defamatory per se to refer to someone as homosexual or gay. Mogoeng's refusal (indicated by the dissent without reasons) to accept the majority's decision that it is not unconstitutional to refer to or depict someone as gay or homosexual (along with its reasons for this decision), itself represents a refusal not only of the authority of the Constitution's protection against unfair discrimination on the basis of sexual orientation, it would also amount to a refusal of the Constitutional Court's jurisprudence in relation to the sexual orientation cases in which the Court held, *inter alia*, that against the background of the Constitution's progressive provisions as regards sexual orientation, '[t]he concept of sexual deviance needs to be reviewed' and that the 'heterosexual norm' that was established 'ceases to be the basis for establishing what is legally normative.'⁹

The refusal to provide reasons also amounts to a refusal of the culture of justification itself. If we were to bear in mind Mureinik's logic (which sees the constitutional moment as contemporaneous with the shift to a culture of justification), then there can be no doubt that the refusal to provide reasons amounts to a refusal of

⁸ *Le Roux v Dey* para. [181] – [189].

⁹ *National Coalition for Lesbian and Gay Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) para. [134].

the enterprise of transformative constitutionalism itself. To be sure, Justice Mogoeng's refusal is qualitatively different. It is not, like other refusals to provide reasons for a judgment in South African law,¹⁰ an *authorised* refusal, that is, a refusal sanctioned by the post-apartheid legal order. Nor is the phrase 'save for' in the text of the judgment (by way of which Mogoeng's dissent is indicated) the same 'save for' as the other ones that are to be located in the *Le Roux* judgment. The other 'save fors' are authorised—they indicate that there are other dissents and separate judgments. But these 'save fors' are authorised because they introduce those judgments that do provide reasons for disagreement with, or supplementation of, the majority's reasoning¹¹—they are not simply terse statements recording the fact that a particular judge disagreed with the majority, as is the case in respect of the 'save for' that applies to Mogoeng.¹²

Justice Mogoeng's refusal to provide reasons in this case does not simply amount to a negligible oversight. As the Constitutional Court recently held in the *Strategic Liquor Services* case, acknowledging that there is no express constitutional obligation on judges to give reasons,¹³ '[i]t is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, [...]. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the [...] process'.¹⁴

In his address at the first orientation course for new judges in 1997, Justice Corbett remarked that it is 'in the interests of the open and proper administration of justice that the courts [where they deliver a final judgment] state publicly the reasons for their decisions', because a statement of reasons 'gives some assurance that the court gave due consideration to the matter and did not act arbitrarily' (Corbett 1997, 117). As Schauer has argued, 'whatever the hierarchy between reason and authority, reasons are what we typically give to support what we conclude precisely when the mere fact that we have concluded is not enough' (Schauer 1995, 637). In the context of an unelected judiciary, the mere fact that one has, as a judge, concluded on an issue of substantive law that goes directly to one of the most important provisions of the Constitution (the non-discrimination clause), is simply not enough. And it contributes in no way to the augmentation of the legitimacy of an unelected judiciary that locates its authority precisely in the people's act of founding *this* Constitution.

It is possible to stretch the Arendtian taxonomy in order to consider a judge's refusal to provide reasons as representing an act of violence, but here not the law preserving violence that is characteristic of every legal decision (Derrida 1990, 927),

10 In *Strategic Liquor Services v Mvumbi* (2010) (2) SA 92 (CC) para. [17] the Constitutional Court referred to the 'long-standing practice' in the Supreme Court of Appeal not to give reasons when deciding applications for leave to appeal where there has been no oral argument—a practice that it upheld in *Mphahlele v First National Bank of South Africa Ltd* (1999) (2) SA 667 (CC).

11 As alluded to before, the Constitutional Court was heavily divided: apart from a judgment authored by 'the Court' and the majority judgment authored by Justice Brand, there is a dissenting judgment authored by Justice Yacoob, a dissenting judgment authored by Justices Cameron and Froneman (parts of which also represented the judgment of the majority) and a separate judgment authored by Justice Skweyiya.

12 See *Le Roux v Dey* 2011 (3) SA 274 (CC) para. [8].

13 *Strategic Liquor Services v Mvumbi* (2010) (2) SA 92 (CC) para. [17].

14 *Ibid.*, para. [14].

but rather something closer or related to the law destroying violence that Walter Benjamin characterised as ‘bloodless’ (Benjamin 2009, 24). This is the bloodless violence of the legal text’s enunciation that ‘save for Mogoeng, J’, the other judges agreed with that portion of the judgment.¹⁵ And this bloodless violence, the violence of the ‘save for’, by way of which the exception (and the state of exception in relation to this text) is created (Agamben 2005, 59); this violence of a refusal to provide reasons for a substantive decision, is not a violence aimed (as Robespierre and Machiavelli knew well) at a new act of founding. It is a violence aimed at violence itself, violence as what Benjamin called ‘pure means’ (Benjamin 2009, 15). It is, moreover, no coincidence that the text here involves the lexicon of salvation, of the ‘save for’, saving, redemption or exception, because, for Benjamin it is precisely this bloodless violence that corresponds with that violence which is called divine. It is as if, by way of a dazzling sleight of hand, a state of exception is indeed, at least momentarily and judicially, created in this judgment, in the specific sense that a judge’s ordinary constitutional (one could say authoritative) responsibility to provide reasons for a judgment on a substantive matter of law is *excepted* and, more worryingly, accepted.

If all this sounds more than a bit exaggerated, somewhat evangelical and even eschatological, let us not forget to read the refusal to provide reasons in the context of the fact that (now) Chief Justice Mogoeng has unequivocally offered us the ‘truth’ that he had received a revelation in the form of a sign from God that the divinity wanted him to be South Africa’s Chief Justice, when, in his public interview for the vacancy of Chief Justice, he stated without irony and with as much sincerity as awkward gravitas, that ‘[w]hen a position comes like this one, I wouldn’t take it unless I had prayed and satisfied myself that God wants me to take it. I got a signal that it was the right thing to do’ (Majavu 2011). The appeal to transcendent authority, divine will and signature (like the writing on the wall of king Belthazar’s dining room) thus here re-inscribes itself into the office of what is supposed to be worldly authority.

But when Arendt wrote that the source of authority transcends those who are in power, she was not referring to a return of the authority of religion or the divine into the affairs of the political. Rather, she was referring to the act of founding that always transcends the particular individuals in power.

Arendt did not live to comment on the founding of post-apartheid authority, but she would certainly have cautioned that if authority did return to the political sphere through the founding, admittedly accompanied by much founding violence,¹⁶ of South Africa’s post-apartheid Constitutions through the performative ‘We, the people [...] adopt’, it remains as precarious and in need of alarm when under threat, as it was when it first vanished from the world.

¹⁵ *Le Roux v Dey* 2011 (3) SA 274 (CC) para. [9].

¹⁶ In this regard, Žižek’s estimation of contemporary acts of founding is accurate: ‘Political space is never “pure” but always involves some kind of reliance on pre-political violence. Of course, the relationship between political power and pre-political violence is one of mutual implication’ (Žižek 2005b, 125).

7. Conclusion

*[w]e are of necessity led in a twofold manner: by authority
and by reason. In point of time, authority is first;
in the order of reality, reason is prior.*
Hannah Arendt¹⁷

It is perhaps a stroke of luck—a divine irony?—that the appellants in the very case that has been under discussion here, offer those of us who wish to counter the resistance to the culture of authority-through-justification, inaugurated by the post-apartheid Constitutions, the best manner in which to do so. The appellants in *Le Roux v Dey* rebelled against the conventional concept of authority by taking a picture of two naked men sitting next to each other on a couch and superimposing the face pictures of their school's principal and deputy-principal on the bodies. They then published the collage to friends' mobile phones and it also ended up briefly on the school's notice board. In short, some would say they were making a joke, others that they were ridiculing / resisting authority.

Arendt remarks that the greatest enemy of authority is contempt and that 'the surest way to undermine it is laughter' (Arendt 1970, 45). Yet, by the force of a strange deconstructive twist in this regard, we could argue that the greatest enemy, not of authority, but rather of a certain *resistance* to worldly authority *is*, precisely, contempt and its manifestation in laughter ... this laughter that always marks—precisely as the appellants in *Le Roux* illustrated so vividly and I imagine knew very well—the vanishing point, the absence, the crisis and the flight of authority from our world.

¹⁷ Arendt 1996, 5.

Bibliography

Agamben, Giorgio: *State of Exception*. Translated by Kevin Attell. The University of Chicago Press, Chicago 2005 [2003].

Arendt, Hannah: 'Authority in the Twentieth Century'. 18 (04) *Review of Politics* (1956) 403–417.

Arendt, Hannah: *The Human Condition*. The University of Chicago Press, Chicago 1958.

Arendt, Hannah: 'On Humanity in Dark Times: Thoughts about Lessing'. In Hannah Arendt: *Men in Dark Times*. Harcourt Brace & Company, New York 1968, 3–31.

Arendt, Hannah: *On Violence*. Harcourt Brace Javanovich, New York 1970.

Arendt, Hannah: *The Origins of Totalitarianism*. Harcourt Inc, New York 1973.

Arendt, Hannah: *Love and Saint Augustine*. The University of Chicago Press, Chicago 1996.

Arendt, Hannah: *Responsibility and Judgment*. Schocken Books, New York 2003.

Arendt, Hannah: 'What is Authority?' In Hannah Arendt: *Between Past and Future*. Penguin Classics, New York 2006, 91–141.

Barnard-Naudé, Jaco & Pierre De Vos: 'The Heteronormative Observer: the Constitutional Court's decision in *Le Roux v Dey*'. 128 *South African Law Journal* (1990) 407–419.

Benjamin, Walter: 'On the Critique of Violence' In Walter Benjamin: *One-way Street and Other Writings*. Translated by J. A. Underwood. Penguin, Harmondsworth 2009 [1921].

Constitution of the Republic of South Africa, Act 108 of 1996.

Corbett, Michael: 'Writing a Judgment. Address at the First Orientation Course for New Judges'. 115 (1) *South African Law Journal* (1998) 116–128.

Derrida, Jacques: 'Force of Law: the "Mystical Foundation of Authority"'. 11 *Cardozo Law Review* (1990) 921–1045.

Dworkin, Ronald: 'Lord Devlin and the Enforcement of Morals'. 75 *The Yale Law Journal* (1966) 986–1005.

Flathman, Richard: *Authority and the Authoritative: The Practice of Political Authority*. University of Chicago Press, Chicago 1980.

Friedman, Richard: 'On the Concept of Authority in Political Philosophy'. In Richard Flathman (ed): *Concepts in Social and Political Philosophy*. Macmillan, New York 1973, 121–145.

Honig, Bonnie: 'Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic'. 85 (1) *Political Science Review* (1991) 97–113.

Kateb, George: 'Freedom and Worldliness in the Thought of Hannah Arendt'. 5 (2) *Political Theory* (1977) 141–182.

Kristeva, Julia: *Hannah Arendt*. Columbia University Press, Irvington 2001.

Langa, Pius: 'Transformative Constitutionalism'. 17 *Stellenbosch Law Review* (2006) 351–360.

Le Roux v Dey 2011 (3) SA 274 (CC).

Majavu, Anna: *Mogoeng: God wants me to be Chief Justice*. Sowetan Live 2011. Available on <<http://www.sowetanlive.co.za/news/2011/09/05/god-wants-me-to-be-the-chief-justice---mogoeng>> (visited 24 January 2012).

Michelman, Frank: 'Law's Republic'. 97 (8) *Yale Law Journal* (1988) 1493–1537.

Mphahlele v First National Bank of South Africa Ltd (1999) (2) SA 667 (CC).

Mureinik, Etienne: 'A Bridge to Where? Introducing the Interim Bill of Rights'. 10 *South African Journal on Human Rights* (1994) 31–48.

Nancy, Jean-Luc: 'Church, State, Resistance'. 34 (1) *Journal of Law and Society* (2007) 3–13.

National Coalition for Lesbian and Gay Equality v Minister of Justice 1998 (12) BCLR 1517 (CC).

Schauer, Frederik: 'Giving Reasons'. 47 *Stanford Law Review* (1995) 633–659.

Strategic Liquor Services v Mvumbi 2010 (2) SA 92 (CC).

Warren, Mark: 'Deliberative Democracy and Authority'. 90 (1) *American Political Science Review* (1996) 46–60.

Žižek, Slavoj: *The Two Totalitarianisms*. London Review of Books 2005a. Available on <<http://www.lrb.co.uk/v27/n06/slavoj-zizek/the-two-totalitarianisms>> (visited 25 January 2012).

Žižek, Slavoj: 'Against Human Rights'. 34 (July-August) *New Left Review* (2005b) 115–131.