

# Metaphoric reasoning and transformative constitutionalism (part 2)\*

HENK BOTHA\*\*

6 *In search of new metaphors: law as an expression of relationship and dialogue*

I have argued above that the apartheid logic of separation and exclusivity was structured in terms of the container metaphor. Racial and other identities and physical spaces were thought to have clear boundaries, which separated white from black, men from women and owners from non-owners. Legal concepts and categories were thought to mirror reality. It was, for instance, believed that race and gender referred to natural, immutable characteristics; that legal concepts such as property and contract could be defined in terms of essential attributes; that legal relationships were governed by scientific logic. This induced normative closure. Normative distinctions (*eg* between white and black, the public and private, the legislative and judicial functions, or ownership and other real rights) were treated as absolute and impenetrable boundaries. Normative questions about the relation between different race groups or the distribution of land were reduced to technical questions about the best way to give effect to pre-existing boundaries.

The South African constitution requires lawyers to abandon the formalism, objectivism and reductionism which characterised law under apartheid. It requires them to reconceive notions like individual rights, the rule of law, democracy, intergovernmental relations and the separation of powers in less essentialist terms; to reconceptualise the relationship between law and politics, the individual and society, private and public law, and common law and legislation in ways that transcend the dichotomies and hierarchies which characterised apartheid law. The constitution, in my understanding, seeks to uphold the rule of law without postulating a rigid division between law and politics.<sup>78</sup> It entrenches fundamental individual rights, but does not entrench an abstract individualism which sees the individual as prior to and detached from the society in which she lives.<sup>79</sup> It is committed to the separation of powers, but not to the idea of strict boundaries between the legislature, executive and judiciary.<sup>80</sup> It provides for a division of authority among the national, provincial and local spheres of government, but characterises the relationship between the different spheres as one of co-operation, rather than a strict

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\*\* Professor of Law, Unisa.

<sup>78</sup> See Botha (n 55).

<sup>79</sup> As Sachs J remarked in his concurring opinion in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) par 117: "While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times."

<sup>80</sup> De Ville (n 47) 24-25 argues that the relationship between the judiciary and other branches of government is best characterised as a dialogue, rather than as a rigid division.

division or hierarchy.<sup>81</sup> The constitution also relativises the distinction between private law and public law<sup>82</sup> and between common law and legislation. At least some of the rights in the bill of rights bind private actors;<sup>83</sup> and common law, along with legislation and customary law, must be developed to promote the spirit, purport and objects of the bill of rights.<sup>84</sup>

The constitution, then, requires us to reconsider the dichotomies in terms of which apartheid law was structured, to move beyond an objectivist approach to categorisation, and to reconceive legal concepts and categories in *relational* terms. The constitution does not seek to entrench rigid boundaries between the individual and collective,<sup>85</sup> but requires us to structure social relationships in a way that is conducive to the dignity, equality and freedom of all. It stresses the importance of co-operation and dialogue in the relationship among different organs of state, and requires the entire legal system to be harmonised with the constitution. In short, the constitution eschews the idea that adjudication is simply a matter of categorisation on the basis of fixed, essential properties, or that legal concepts have rigid boundaries. It recognises that social and institutional relations are constructed rather than objectively given, that we do have a choice in structuring relationships, that things can be different.

The constitution also represents a fundamental break with the assumption that it is possible to capture the essence of people's identities, or acceptable to erect legal walls of separation to prevent challenges to an individual's or group's self-understanding. The constitution seems to recognise that individual and collective identities are not natural or prepolitical, but are created discursively. These identities are not cast in stone, but are subject to a continuous process of self-revision. For instance, the constitution seeks to prevent a repetition of the past, when racial and other differences between individuals were used to determine their status and worth. It outlaws unfair discrimination on grounds such as race, gender, disability, sexual orientation, religion and language.<sup>86</sup> It is committed to the eradication of systemic or structural inequality, and prohibits the state from basing its decisions on, or perpetuating, harmful

<sup>81</sup> See ch 3 of the constitution. See also Simeon "Considerations on the design of federations: the South African constitution in comparative context" 1998 *SA Public Law* 42.

<sup>82</sup> Cf the *dictum* of Ackermann J in *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) par 57 that "it could be dangerous to attach consequences to or infer solutions from concepts such as 'public law' and 'private law' when the validity of such concepts and the distinctions which they imply are being seriously questioned".

<sup>83</sup> See s 8(2).

<sup>84</sup> s 39(2).

<sup>85</sup> This is evident from the fact that the bill of rights imposes a positive obligation on the state to promote and fulfil the rights guaranteed in it (*eg* s 7(2)), provides for the horizontal application of fundamental rights (*eg* s 8(2), 8(3) and 9(4)), and guarantees socio-economic rights (*eg* s 26, 27 and 28(1)(c)) alongside civil and political rights. It is also hard to square the inclusion of a general limitation clause (s 36) with a view of rights as rigid boundaries between the individual and collective.

<sup>86</sup> s 9(3) and (4).

stereotypes.<sup>87</sup> It seeks to promote multiculturalism and multilingualism,<sup>88</sup> and requires the state to protect the individual in the free development of her personality.

It has also been argued that the constitution favours “a cosmopolitan understanding of the nation as a nation of citizens over and against an ethnocentric interpretation of the nation as a prepolitical unity”.<sup>89</sup> The constitution, in this view, does not present the South African nation as something that is fully accomplished and enclosed within well-defined boundaries. The national identity and the bounds of the political community can be defined only in relational terms; they are open to an ongoing process of contestation and redefinition.<sup>90</sup> Instead of assuming the political community’s moral completeness, constitutional decision-makers should acknowledge their own responsibility in the construction of a national identity. Their decisions never simply reflect the choices made by “the people” at some historical moment, or the moral consensus of “the people” at present, but are partly constitutive of the way we perceive ourselves and define the bounds of the political community.<sup>91</sup>

A number of metaphors have been used to express this concern with relationship, rather than with the supposed essences of people or things. I shall

<sup>87</sup> The constitutional court found in *National Coalition for Gay and Lesbian Equality* (n 79) that the outlawing of sex between consenting men stigmatised gay sex, reinforced existing prejudices against gays, and impaired their dignity, personhood and identity. See in particular par 23, 28 (Ackermann J) and 108-109 (Sachs J, concurring). It was also found in *Hoffmann v South African Airways* 2000 11 BCLR 1211 (CC) par 35-37 that an organ of state may not base its treatment of people who are HIV positive on prejudice and stereotyping. Cf also the finding of Sachs J in his minority judgment in *Harksen v Lane* 1997 11 BCLR 1489 (CC) that s 21 of the Insolvency Act promoted “a stereotyped and outdated view of marriage” which “inhibits the capacity for self-realisation of the spouses, affects the quality of their relationship with each other as free and equal persons within the union, and encourages society to look at them not as ‘a couple’ made up of two persons with independent personalities and shared lives, but as ‘a couple’ in which each loses his or her individual existence” (par 124). Cf *President of the RSA v Hugo* 1997 6 BCLR 708 (CC). In his dissenting judgment in *Hugo*, Krieger J described the assumption that women are the primary care givers of young children, upon which a presidential pardon to mothers in prison was based, as “a root cause of women’s inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so violently condemns” (par 80). The majority conceded that the president’s act rested upon a stereotype that was harmful to women, but found that the discrimination in question was not unfair, as South African mothers still generally bear far greater burdens than fathers in the rearing of children. See par 109-115.

<sup>88</sup> See *eg* s 6, 29(2), 30, 31, 185 and 186.

<sup>89</sup> Davis (n 9) 10 (quoting Habermas).

<sup>90</sup> See Davis (n 89) 9-13; Botha *The Legitimacy of Law and the Politics of Legitimacy: Beyond a Constitutional Culture of Justification* (unpublished LLD thesis, Pretoria (1998)) 409-412.

<sup>91</sup> In the words of Michelman *Brennan and Democracy* (1999) 52: “A minor national refounding occurs with every judicial resolution of a reasonably contested question of constitutional meaning.” The capacity of judicial decisions to help shape the national identity is dramatically illustrated by the decisions of the US supreme court in *Dred Scott v Sandford* 60 US 393 (1857) and *Brown v Board of Education* 347 US 483 (1954). The court legitimised slavery in *Dred Scott*. *Brown*, on the other hand, outlawed racial segregation in public education, and had a profound effect on political beliefs and attitudes in the USA. Cf also the decision of the appellate division in *Collins v Minister of the Interior* 1957 1 SA 552 (A) — the decision which finally enabled the South African government to remove coloured voters from the common voters’ roll.

mention only a few metaphors which have been used to describe rights or rights litigation under the constitution. In the first place, rights are sometimes described as a relationship.<sup>92</sup> Rights, in this view, are not rooted in abstract individualism. They are, rather, an expression of connectedness among the self and others. On this understanding, the language of individual rights is fully compatible with the insight that the self is forged within a network of social relations, that the self is always situated within a concrete context.

It is important to understand that these metaphors of connectedness and situatedness need not result in a form of collectivism, and do not imply a return to objectivist categorisation. Connection does not imply identity or sameness, but refers to a link between things or people that are different and separate from each other.<sup>93</sup> It is an expression of relatedness, not of fixed, essential characteristics. Moreover, to be situated within a particular context is not the same as being enclosed within a particular (objectivist) category.<sup>94</sup> Contexts are not fixed, immutable or based upon essential characteristics. They are, rather, relational, overlapping and forever changing. They are also a matter of perception, perspective and imagination. By situating legal actors within concrete contexts, we do not attempt to capture their essence and strip away all that is inessential. We are, rather, trying to understand the world from their perspective, by placing ourselves imaginatively in their shoes.<sup>95</sup>

To claim that individual identities are shaped discursively, that the values and ends chosen by individuals are influenced by their social and cultural backgrounds, interaction with others and the power relations within a society, is therefore not to assert the primacy of the collective over the individual, or to deny the possibility of individual autonomy. It is, rather, to inquire into the conditions of autonomy. In the words of Frank Michelman:

“Individuals are what matter in the end. Individuals are also, however, as a matter of fact, socially constituted, enmeshed in various relations and communities, thoughtways and cultures, institutions and practices. Out of these multiple, overlapping formative contexts, individuality forms itself. Individuals, then, depend for their identities and self-understandings on affiliation and commitment, as they depend for justice, security, and certain other conditions of thriving on public institutions of law and government.”<sup>96</sup>

By challenging the liberal conception of the individual as someone who exists prior to any specific commitments, values or ends, and by situating the self within concrete relationships and contexts, we may become able to counter the reductionism of law, to locate our understanding of law in the lived experience of people affected by it. This should alert us to the fact that our social reality is

<sup>92</sup> This conception of rights has been put forward by feminist and civic-republican authors in North America. See eg Nedelsky “Reconceiving rights as relationship” 1993 *Rev of Constitutional Studies* 1; Minow “Interpreting rights: an essay for Robert Cover” 1987 *Yale LJ* 1860 and Michelman “Justification (and justifiability) of law in a contradictory world” in Pennock and Chapman (eds) *Justification in Law, Ethics and Politics* (1986) 71-91. See also, in the South African context, Albertyn and Goldblatt (n 9) 251-254.

<sup>93</sup> See JWG van der Walt “Die toekoms van die onderskeid tussen die publiekreg en die privaatreë in die lig van die horisontale werking van die grondwet (deel 2)” 2000 *TSAR* 605-607-608.

<sup>94</sup> Cf the way in which Sachs J contrasted a context-based approach with a categorisation approach in *National Coalition for Gay and Lesbian Equality* (n 79) par 113 and 126.

<sup>95</sup> The word “context” is derived from the Latin *contextus* (coherence, connection) and *contexere* (to weave together). Contexts are, indeed, woven together from the multiple fabrics of our existence, rather than simply found.

<sup>96</sup> (n 91) 133 and see 66-67.

infinitely more complex and varied than allowed for by the binary thought structures characterising legal thinking. It should make us more perceptive to prevailing patterns of disadvantage and inequality, and the ways in which disadvantage and exclusion are naturalised and normalised in legal discourse. It should also make us aware of the possibility that things can be different, that our current world of inequality and stratification is not as inevitable as it may appear to be.

A second metaphor, which is closely related to the idea of rights as relationship, is that of rights as dialogue.<sup>97</sup> If rights are conceived not as fixed boundaries, but as relationship, their content and limits must be subject to debate. Rights, in this view, are not prepolitical, but are shaped through political and legal discourse. Rights are not inimical to the democratic process, but provide us with a vocabulary to discuss matters of common concern. The constitutionalisation of rights needs not stifle democratic debate; it is, rather, a way of facilitating and structuring debates over the reach and content of rights, the justifiability of official conduct, the kind of social relationships envisaged by the constitution, and/or the bounds of the political community.

The view of rights as dialogue emphasises the need for constitutional decision-makers to promote democratic dialogue not only by protecting the equal right of everyone to engage in public discourse, but also by being receptive to the broadest range of interests and interpretations that are publicly articulated. According to Michelman, the official decisions that are most worthy of our respect are those

“that pay us the respect of striving to make themselves ever more effectively available to be influenced by public debates that are fully and fairly receptive to everyone’s perceptions of situation and interest and, relatedly, to everyone’s opinions about justice – including, recursively, everyone’s opinions about what sorts of arrangements really do make public deliberations fairly receptive to everyone’s views and really do render official bodies available to the influence of those views”.<sup>98</sup>

The rights as dialogue metaphor also emphasises the shifting nature of our understanding of rights. In terms of this metaphor, the content, reach and permissible limitations of rights are determined through an ongoing process of public dialogue. Current understandings of rights therefore remain open to critical inquiry and a process of dialogic modulation and re-interpretation.

By conceiving rights as dialogue, we declare our readiness to listen to other viewpoints, to enter into discussion over our own beliefs, to open ourselves to the possibility of a dialogic modulation of deeply held convictions and prejudices. We commit ourselves to the idea of a public sphere that is characterised

<sup>97</sup> See eg Häberle *Verfassung als öffentlicher Prozeß: Materialien zu einer Verfassungstheorie der offenen Gesellschaft* (1998); Michelman “The Supreme Court 1985 term — Foreword: traces of self-government” 1986 *Harvard LR* 4 and Nedelsky (n 92). See also, in the South African context, Mureinik “A bridge to where? Introducing the interim bill of rights” 1994 *SAJHR* 3; Davis (n 9); Botha “Judicial dissent and democratic deliberation” 2000 *SA Public Law* 321 and Le Roux “From acropolis to metropolis: the new constitutional court building and South African street democracy” 2001 *SA Public Law* 139. Cf also Sachs J’s observation in *S v Mhlungu* 1995 7 BCLR 793 (CC) par 129 that constitutional interpretation takes the form of “a principled judicial dialogue, in the first place between members of this Court, then between our Court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large”.

<sup>98</sup> (n 91) 59.

by openness, equality and plurality, and the transformation of institutions that do not fully embrace these values.

### 7 *Proportionality and balance*

It would appear, then, that the conception of rights as relationship and dialogue is better suited to the democratic-transformative aspirations of the South African constitution than the idea of rights as boundaries. The former conception of rights is said to promote a pluralistic, responsive democracy, in which current understandings of the principles governing political life are subjected to continual challenge and reconsideration. The latter is associated with normative closure: the idea of fixed boundaries between the individual and collective allows constitutional interpreters to evade responsibility for their decisions (“we are merely policing pre-existing boundaries; they were drawn not by us, but by history, nature, or the authors of the constitution”), and makes current patterns of inclusion and exclusion appear normal and natural.

Putting it differently, a rigid categorisation approach assumes that law is neutral; that judges can avoid becoming embroiled in moral and political controversies; that justice is blind and legal meaning disembodied. Against this view, proponents of a relational, dialogic conception of rights recognise that there are different ways of looking at the world; that legal distinctions do not reflect pre-existing boundaries, but depend on the perspective of those making them; that the idea of justice that is blind and therefore neutral with regard to competing conceptions of the good invariably privileges certain ways of seeing over others. Here, understanding is conceived metaphorically as seeing.<sup>99</sup> One’s understanding of a legal problem is necessarily influenced by the lens through which one looks at it and the angle and distance from which one perceives it. The *understanding* is *seeing* metaphor enables us to scrutinise the concepts and categories through which we filter legal problems; to stop focusing exclusively on what is in the foreground of legal analysis and take time to examine the background assumptions which condition what we see and how we perceive it.<sup>100</sup> It allows us to ask what is hidden or masked by a particular approach,

<sup>99</sup> This is a conventional metaphor, which is closely related to the conduit metaphor discussed above. However, unlike the conduit metaphor, which presents the interpreter as passive and knowledge as more or less static, the understanding is seeing metaphor “captures both the dynamic quality of intellectual processes and the necessarily perspectival nature of human knowledge, which, after all, is always knowledge from a point of view”. Winter *A Clearing in the Forest* (n 5) 66. This is achieved by combining the conduit metaphor with the mind as body metaphor, which conceptualises thought in terms of movement and exploration.

<sup>100</sup> Critical legal theorists often point out, with reference to legal realism, that differences in power and wealth in the “private” sphere never simply reflect the natural differences between individuals, private choices and/or the workings of a free, self-regulating market, but are shaped to a significant extent by the background rules of private law. A critical examination of these background rules can give us a sense of the contingency of current social arrangements, and help us to imagine more humane alternatives. See eg Klare “Legal theory and democratic reconstruction: reflections on 1989” 1991 *Univ British Columbia LR* 69; and Williams “Welfare and legal entitlements: the social roots of poverty” in Kairys (ed) *The Politics of Law: A Progressive Critique* (1998) 569. See also Winter *A Clearing in the Forest* (n 5) 212-213. Winter criticises the tendency of constitutional scholars to focus on “the foreground question of constitutional interpretation”, and to neglect the role of sedimented social meanings in legal interpretation. He quotes from Llewellyn: “An inch from the eye is a portion of the Text; the whole living world is ‘covered’ by it” (212).

and how it blinds us to alternatives.<sup>101</sup> It reminds us that the ideals of impartiality and even-handedness require a willingness to change perspective, to try to see things through the eyes of the other.

It is hardly surprising that South African proponents of the idea of rights as relationship/dialogue have stressed the need for the courts to move away from a categorisation approach, and to adopt instead a justificatory or limitation-based approach.<sup>102</sup> A justificatory or limitation-based approach is said to be relational to the extent that it focuses on the relationship between a fundamental-rights limitation and its purpose and/or the comparative weight of competing rights and interests. It is dialogic to the extent that it institutes a debate about the cogency of the justifications offered for the limitation of a fundamental right, and requires judges to articulate the substantive reasons for their decisions, rather than simply declare the case to fall within a particular category.

The constitutional court's limitation jurisprudence can be seen as an attempt to place relationship and context at the centre of fundamental-rights litigation, and thus to avoid the rigidity of a categorisation approach. According to the court, section 36(1)<sup>103</sup> of the constitution involves "the weighing up of competing values on a case-by-case basis to reach an assessment founded on proportionality".<sup>104</sup> In determining whether the limitation of a fundamental right is reasonable and justifiable, the court must be guided by the factors enumerated in the subsection. However, these factors should not be seen as exhaustive. "In essence, the court must engage in a balancing exercise and arrive at a global

<sup>101</sup> Again, this is a recurring theme in critical legal theory. See *eg* Kennedy "The structure of *Blackstone's Commentaries*" 1979 *Buffalo LR* 205 (describing how mainstream legal scholarship hides the fundamental contradiction which is at the heart of modern law).

<sup>102</sup> See *eg* Mureinik (n 97); Van der Walt and Botha "Coming to grips with the new constitutional order: critical comments on *Harksen v Lane NO*" 1998 *SA Public Law* 17; and particularly Rautenbach "The limitation of rights in terms of provisions in the bill of rights other than the general limitation clause: a few examples" 2001 *TSAR* 617. Rautenbach writes 639-640: "The bill of rights provisions concerning the limitation of rights embody the idea that in the field of contact and contest to assert and protect interests neither the interests protected by the rights nor the interests by virtue of which the rights may be limited prevail as of right. They serve the purposes which Johan van der Walt has poignantly set out the distinction between justification and justice: '[I]t vacates the scene of power. It proscribes the occupation of this scene. It reserves this scene for the entry of more than one and/or multiple entries.' After the commencement of the bill of rights, no party to a dispute in this field and no institution which has the power to authoritatively settle the dispute is entitled to exclude bearers of the rights described in the bill of rights by definition, to negate the duties prescribed in the bill of rights by definition, or to place conduct and interests beyond the reach of the rights as formulated in the bill of rights by definition — in every concrete dispute, an outcome must be achieved by taking into account [the factors enumerated in section 36(1)]".

<sup>103</sup> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —  
(a) the nature of the right;  
(b) the importance of the purpose of the limitation;  
(c) the nature and extent of the limitation;  
(d) the relation between the limitation and its purpose; and  
(e) less restrictive means to achieve the purpose."

<sup>104</sup> *S v Manamela (Director-General of Justice Intervening)* 2000 5 BCLR 491 (CC) par 33. See also *S v Makwanyane* 1995 6 BCLR 665 (CC) par 104.

judgment on proportionality and not adhere mechanically to a sequential check-list.”<sup>105</sup>

A variety of metaphors have been used to express this concern with balance and proportionality. A limitation must be “narrowly tailored to fit its purpose”<sup>106</sup> and may not use a sledgehammer to crack a nut.<sup>107</sup> It must be properly focused,<sup>108</sup> finely tuned,<sup>109</sup> appropriately balanced,<sup>110</sup> and not too great in sweep.<sup>111</sup>

Of these metaphors, the balancing metaphor is perhaps the most common – and also the most controversial. The balancing metaphor is directly grounded in our experience as embodied beings.<sup>112</sup> As babies, we learn to acquire a balanced, erect posture. When we lose our balance and fall, we rise again and “re-establish a prior distribution of forces and weight relative to an imaginary vertical axis”.<sup>113</sup> We experience bodily health as equilibrium and sickness as a loss of equilibrium. These basic bodily experiences are metaphorically extended to structure our experience of psychological states and social relationships.

In law, the balancing metaphor is most commonly identified with the weighing of conflicting values or interests. The legal decision-maker typically attaches weights to different legal interests. On this basis, it either pronounces that one interest outweighs the other, or formulates a rule or standard which attempts to strike a balance between conflicting rights or interests. Such an approach has obvious advantages over a rigid categorisation approach. Constitutional balancers do not assume that all cases can be fitted into neat categories; that they need simply give effect to pre-existing, bright-line boundaries which demarcate the public from the private, or legitimise government objectives from rights violations. It is often said that balancing signals a willingness on the part of the judge to recognise the open and contested nature of (constitutional) adjudication; to acknowledge the need to engage in substantive legal reasoning and to engage with the social context.<sup>114</sup> In the formulation of Henkin, constitutional balancing “provides bridges between the abstractions of principle and the life of facts . . . . It softens the rigors of absolutes, makes room for judgment and for sensitivity to differences of degree”.<sup>115</sup>

However, not everyone agrees that balancing is conducive to the realisation of constitutional values such as democracy, accountability and the rule of law. In the first place, critics argue that balancing is indeterminate and unprincipled. In this view, it is impossible to reduce conflicting interests to a single

<sup>105</sup> *Manamela* (n 104) par 32.

<sup>106</sup> *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 7 BCLR 771 (CC) par 74.

<sup>107</sup> *Manamela* (n 104) par 34.

<sup>108</sup> *S v Mbatha*; *S v Prinsloo* 1996 3 BCLR 293 (CC) par 24; *Manamela* (n 104) par 50.

<sup>109</sup> *Mbatha* (n 108) par 21.

<sup>110</sup> *Mbatha* (n 108) par 24.

<sup>111</sup> *Manamela* (n 104) par 50.

<sup>112</sup> See Johnson (n 3) 74-100.

<sup>113</sup> (n 3) 76.

<sup>114</sup> See eg Michelman “Conceptions of democracy in American constitutional argument: The case of pornography regulation” 1989 *Tennessee LR* 291 304-305.

<sup>115</sup> “Infallibility under law: constitutional balancing” 1978 *Columbia LR* 1022 1047.



measure of value.<sup>116</sup> For instance, how is one to translate freedom of speech and national security into a common currency for comparison? How are we to balance values like equality and freedom of association, or environmental conservation and economic development? The balancer, according to Frantz, attempts to “measur[e] the unmeasurable” and to “compare the incomparable”.<sup>117</sup>

The critics further point out that constitutional texts generally contain little or no guidance on the relative weights to be attached to conflicting rights and interests. Balancers, in their zeal to weigh up all relevant interests (whether derived from the constitution or not), tend to lose sight of the constitutional text. The weighting and ranking of interests are not grounded in constitutional interpretation, but are based on the subjective preferences of individual judges.<sup>118</sup>

These criticisms raise important questions about the separation of powers between the legislature and judiciary. It is often said that balancing is essentially a legislative function, and that judges should not second-guess the way elected legislatures have decided to balance conflicting interests. Advocates of balancing may counter that this argument rests upon an oversimplified view of the division between the legislative and judicial functions, which fails to come to terms with the realities of the modern state. But even if this is true, the indeterminacy critique remains unsettling, as it raises the spectre of judicial arbitrariness. Balancing, it is feared, may turn out to be a smokescreen which allows judges to mask controversial value choices behind a supposedly objective evaluation of the relative weight of different legal interests.

Secondly, balancing is sometimes associated with a conservative bench. In the United States, balancing got a bad name during the McCarthy era, when it was used to rationalise and validate serious infringements of freedom of expression.<sup>119</sup> However, this is not necessarily the case. Balancing often results in an extension of the scope of constitutional rights and freedoms, and has, at various times in history, been associated with liberal and progressive causes.<sup>120</sup> But even if balancing does not necessarily translate into a readiness to sacrifice individual rights and freedoms in the name of collective interests, there may still be something conservative about it. Balancing is often associated with a cautious, incremental approach. Balancers take account of a broad range of consequences and considerations. They also tend to restrict their finding to the case at hand, as the next case may require a different balance. There are obvious advantages to such an approach; however, it is said to be unlikely

<sup>116</sup> See eg Aleinikoff “Constitutional law in the age of balancing” 1987 *Yale LJ* 943 972-976; Pretorius “Meaning in constitutional interpretation” 1998 *Acta Juridica* 282 286-287; Tushnet “An essay on rights” 1984 *Texas LR* 1363 1372-1373 and Woolman “Out of order? Out of balance? The limitation clause of the final constitution” 1997 *SAJHR* 102 114-119.

<sup>117</sup> “Is the first amendment law? A reply to Professor Mendelson” 1963 *California LR* 729 748.

<sup>118</sup> Aleinikoff (n 116) 977 writes that “balancing — by transforming any interest implicated by a constitutional case into a constitutional interest — is the ultimate non-interpretivism”. See also Blaauw-Wolf “The ‘balancing of interests’ with reference to the principle of proportionality and the doctrine of *Güterabwägung* — a comparative analysis” 1999 *SA Public Law* 178 198.

<sup>119</sup> See eg *Dennis v United States* 341 US 494 (1951). See also Frantz “The first amendment in the balance” 1962 *Yale LJ* 1424.

<sup>120</sup> See Sullivan “Post-liberal judging: the roles of categorization and balancing” 1992 *Univ Colorado LR* 293 (describing the dialectical relationship between categorisation and balancing in the USA).

to result in sweeping reform or bold innovation.<sup>121</sup> Putting it differently, balancers tend to take current distributions of wealth and power as their point of departure, instead of subjecting them to a transformative critique.

Thirdly, balancing judges often resort to “scientific” language (*eg* cost-benefit analysis) in an attempt to make their decisions appear objective. This may result in a new type of formalism, which, like a rigid categorisation approach, precludes dialogue about important moral and political issues. In the words of Aleinikoff:<sup>122</sup>

“Scientifically styled opinions, written to answer charges of subjectivity, make us spectators as the Court places the various interests on the scales. The weighing mechanism remains a mystery, and the result is simply read off the machine. Scientific balancing decisions are neither opinions nor arguments that can engage us; they are demonstrations.”

The fourth criticism is closely related to the second and third. It is said that balancing rests upon the assumption that the primary aim of constitutional law is to mediate between pre-existing interests. These interests are thought to be exogenous to the legal process. This assumption precludes the possibility of a constitutional dialogue which is characterised by diversity and a willingness on the part of participants to subject their perceptions of self-interest to dialogic modulation.<sup>123</sup> Distinctiveness of voice is drowned out by the use of a supposedly neutral calculus, while the judge’s role is seen as akin to that of a grocer,<sup>124</sup> rather than a facilitator of and participant in normative dialogue.

These are powerful criticisms which are not easily answered. However, I believe that there is a case to be made for a form of balancing which is grounded in practical reason rather than science, and which does not profess to be value-neutral. Alternatively, one can argue for a form of proportionality analysis in which the role of balancing is minimised. For instance, Stuart Woolman<sup>125</sup> argues that a comparison of the burdens imposed by a fundamental-rights limitation and the benefits said to flow from it should be undertaken, if at all, only at the end of the limitation inquiry, after factors such as the purpose of the limitation, the relation between the limitation and its purpose, and the availability of less restrictive means have been considered. In a similar vein, Canadian author David Beatty<sup>126</sup> argues that courts should focus mainly on the questions whether the means used by the government to translate its objectives into law are rational and do not interfere with individual rights and freedoms more than is necessary. They should, however, show deference to the legislature’s evaluation of the importance of particular government policies, as measured against the adverse impact they may have on individuals. Such an approach is said to institute a constitutional dialogue between the judiciary and legislature over the least intrusive means to attain legislative ends, while leaving it to the legislature to do the balancing.<sup>127</sup>

<sup>121</sup> See Nagel “Liberals and balancing” 1992 *Univ Colorado LR* 319.

<sup>122</sup> (n 116) 993.

<sup>123</sup> (n 116) 993.

<sup>124</sup> Sullivan (n 120) 293.

<sup>125</sup> (n 116) 111.

<sup>126</sup> “The end of law: at least as we have known it” in Devlin (ed) *Constitutional Interpretation* (1991) 22.

<sup>127</sup> Hogg and Bushell “The Charter dialogue between courts and legislatures (or perhaps the Charter isn’t such a bad thing after all)” 1997 *Osgoode Hall LJ* 75.

An interesting attempt to place limitation analysis on a firmer grounding than can be provided by the notion of balancing is that of the German constitutional scholar Konrad Hesse. According to Hesse,<sup>128</sup> the notion of a balancing of interests is not only too vague to guide constitutional decision-making, but also detracts from the principle of the unity of the constitution. He proposes instead the notion of a harmonisation and optimisation of conflicting interests (*praktische Konkordanz*). The constitutional decision-maker may not simply declare the primacy of one set of constitutionally protected interests over another, but must construe conflicting interests in a manner which gives them both optimal protection. This is done through an inquiry into the proportionality of fundamental-rights limitations. Constitutionally protected interests may not be sacrificed in the name of a greater good and may not be restricted more than is necessary.

The point of these attempts to rethink limitation analysis is not to banish the balancing metaphor from constitutional adjudication,<sup>129</sup> but to find an alternative to a crude model of weighting and ranking interests. Hesse's notion of *praktische Konkordanz* itself invokes the image of rights and interests that are held in balance by a process of constitutional interpretation which is aimed at the harmonisation of conflicting legal interests. He seems to reject only one variant of the law as balancing metaphor, and proposes another interpretation which is better suited to the ideal of constitutional accountability.<sup>130</sup>

Consider, also, Stuart Woolman's endorsement of a storytelling approach to limitation analysis as an alternative to judicial balancing.<sup>131</sup> Woolman argues that storytelling is well suited to constitutional adjudication, as it "recognises a plurality of different ways of looking at, understanding and being in the world".<sup>132</sup> Storytelling can help us to make sense of complex and highly specific situations, and allows us to engage with concrete contexts and power relations. Stories enable judges to make and explain hard legal choices – without trying to reduce incommensurable goods to a common measure of value, or to articulate a unified theory which effectively denies the legitimacy of alternative ways of looking at the world.

Now, of course, we make sense of stories by virtue of our pre-understanding of what a story is and how it is typically structured.<sup>133</sup> For instance, we conceptualise a story as something with a beginning, middle and end, which progresses along a path. Such unfolding of a story is often structured in terms of the balancing metaphor. As Winter points out, numerous stories start

<sup>128</sup> *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (1999) 28 142-143 146.

<sup>129</sup> with the possible exception of Beatty's argument. See also Woolman (n 116) 134 n 66 on the possibility of a non-balancing, deferential approach to limitation analysis. But see also Ely "Flag desecration: a case study in the roles of categorization and balancing in first amendment analysis" 1975 *Harvard LR* 1482 1485-1487 (arguing that "less restrictive alternative" analysis must involve balancing, as less restrictive alternatives usually involve some added cost).

<sup>130</sup> Cf also Häberle *Die Wesensgehaltgarantie des Art 19 Abs 2 Grundgesetz* (1983). Unlike Hesse, Häberle advocates a balancing approach. However, his understanding of a balancing of interests is in many respects similar to Hesse's notion of *praktische Konkordanz*. See Hesse (n 128) 28 n 31.

<sup>131</sup> (n 116) 119-133.

<sup>132</sup> (n 31) 121.

<sup>133</sup> Put differently, "we have an idealized cognitive model for the concept 'story'". Winter *A Clearing in the Forest* (n 5) 107.

“with the description of a *status quo*: an initial state in which life is in harmonious balance. Something disturbs the balance – a need, a lack, a deprivation, or a transformation. The protagonist sets out to restore the balance. There is conflict and resolution. The original state is restored, or some new balance is attained”.<sup>134</sup>

By conceptualising legal decision-making as a type of storytelling, Woolman tacitly invokes the balancing metaphor. However, he does so in a way which allows for a far more nuanced approach than simply attaching weights to conflicting interests.

### 8 *Rethinking categorisation*

Whatever the criticisms against a categorisation approach, it seems impossible to dispense with categorisation. Before a court can inquire into the reasonableness and justifiability of a fundamental-rights limitation, it must first answer questions such as whether the bill of rights applies to the dispute at hand, whether the applicant has standing, and whether a fundamental right has been limited. That these inquiries may tempt judges to fall back on old, formalistic habits is evident from a line of cases in which the constitution’s application provisions were interpreted overly restrictively,<sup>135</sup> in which rights were interpreted without due regard to the values underlying them,<sup>136</sup> and in which courts showed insensitivity to context and/or the structural dimensions of power.<sup>137</sup>

The challenge, it seems, is not to eliminate categorisation from constitutional adjudication (that would be impossible),<sup>138</sup> but to reconceive categorisation in relational terms. Such an approach must break with the objectivist assumption that our categories mirror reality, or that we can decide cases correctly and objectively by fitting them into the right category. It must acknowledge that our concepts and categories are products of human experience and imagination, which may need to be remodelled and re-imagined in the light of changing circumstances and new experiences. Far from being a mechanical process

<sup>134</sup> (n 5) 109-110.

<sup>135</sup> See *eg Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) (interim constitution has no direct horizontal application); *Korff v Health Professions Council of South Africa* 2000 3 BCLR 309 (T) (Health Professions Council is not an organ of state).

<sup>136</sup> See *eg* Woolman’s critique of *Beinash v Young* 1999 2 SA 125 (CC) in “The right consistency” 1999 *SAJHR* 166.

<sup>137</sup> See *eg* the criticisms of the constitutional court’s majority judgment in *Hugo* (n 87) in Davis (n 9) 79-84 and Van Marle “Equality: an ethical interpretation” 2000 *THRHR* 595 599-600; and of the majority judgment in *Harksen* (n 87) in Albertyn and Goldblatt (n 9) 261-263; Davis (n 9) 90-92; and Van der Walt and Botha (n 102).

<sup>138</sup> That it is not possible to avoid categorisation is also evident from the fact that s 9 outlaws unfair discrimination on specified grounds such as race, gender and sexual orientation. Discrimination on any of the listed grounds is deemed to be unfair. Claimants are thus required to locate themselves within a particular group, to ignore their own experience of the dehumanising effects of such categorisation and to “caricature themselves in order to fit into . . . rigid categories”. Jagwanth “What is the difference? Group categorisation in *Pretoria City Council v Walker* 1998 2 SA 363 (CC)” 1999 *SAJHR* 200 207. Pieterse “Stereotypes, sameness, difference and human rights: catch 22?” 2001 *SA Public Law* 92 102 argues that s 9 demonstrates both the reliance of legal and constitutional discourse on potentially harmful social constructs, and the constitution’s commitment to eradicate the stereotypes arising from these constructs.

which simply affirms the real-life essences of persons or things, legal categorisation is an imaginative activity which depends on metaphors and other forms of figurative speech, and which does not allow us to evade responsibility for the moral and political implications of legal decisions.

The constitutional court's jurisprudence on the right to privacy contains traces of such an approach to categorisation. The court has made it clear in a number of judgments that rights, including the right to privacy, should not be construed as rigid boundaries which shield socially detached individuals from state interference. In the view of the court, such a conception of rights is untenable for at least three reasons. First, no right is absolute: "from the outset of interpretation each right is always already limited by every other right accruing to another citizen".<sup>139</sup> Second, individual rights are not premised upon a view of individuals as unencumbered selves, but are fully compatible with the idea that individuals are socially constituted.<sup>140</sup> For instance, what is protected by the right to privacy is not merely the right to be left alone, but the right freely to express one's personality and to form intimate relationships.<sup>141</sup> And third, rights are not merely a shield against government interference in the private sphere; even the right to privacy places a positive duty on the state "to promote conditions in which personal self-realisation can take place".<sup>142</sup>

The court conceptualises the right to privacy not in terms of the container metaphor, but as a radial category consisting of both core and peripheral areas. Consider, for instance, the following observation of Ackermann J on the scope of the constitutional right to privacy in *Bernstein v Bester*:

"[I]t is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. . . . Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."<sup>143</sup>

Here the right to privacy is presented as having an inner core which is shielded from the erosive impact of conflicting interests, as well as peripheral areas

<sup>139</sup> *Bernstein v Bester* 1996 4 BCLR 449 (CC) par 67.

<sup>140</sup> According to Ackermann J in *Bernstein* at par 67, this follows from the fact that rights are not absolute: "[C]ommunity rights and the rights of fellows members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society." See also par 65-66.

<sup>141</sup> (n 140); *National Coalition for Gay and Lesbian Equality* (n 79) par 32 (Ackermann J), 116 (Sachs J).

<sup>142</sup> *National Coalition for Gay and Lesbian Equality* (n 79) par 116 (Sachs J concurring). See also Sachs J's opinion in *Ferreira v Levin* 1996 1 BCLR 1 (CC) par 250-251 (role of the state in promoting personal freedom); and the opinion of the court in *In re: Certification of the Constitution of the RSA, 1996* 1996 10 BCLR 1253 (CC) par 77 (the enforcement of civil and political rights, just like that of socio-economic rights, may have direct budgetary implications); *Christian Education SA v Minister of Education* 2000 10 BCLR 1051 (CC) par 40 (state under a constitutional duty to take steps to protect all people and especially children from maltreatment, abuse and degradation); and *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC) (obligation on the state to prevent gender-based discrimination and to protect the dignity, freedom and security of women).

<sup>143</sup> (n 139) par 67.

where the privacy right is more likely to be outweighed by conflicting community rights.<sup>144</sup>

It may appear from the statement quoted above that privacy is conceptualised purely as physical space, that the core of the privacy right is constituted by the physical enclosure of the home, and that the right gets progressively weaker as one moves into the public sphere. Such a spatial conception of privacy would share many of the problems of the idea of rights as boundaries. It would tend to shield abusive and violent behaviour from state interference, as long as it is confined to the private space of the family home. It would insulate contentious social issues from democratic debate and perpetuate the subordination of vulnerable groups, such as women and children. It would make challenges under the right to privacy turn on a formalistic inquiry into the place where an alleged violation occurred, rather than the values it seeks to protect.

However, it would be wrong to interpret Ackermann J's discussion of the scope of the privacy right in purely spatial terms. Elsewhere in the judgment, he seems to approve the view that the concept of privacy has not one, but three cores: the first relating to private living space, the second inhering in the person, and the third concerning the protection of certain relationships.<sup>145</sup> He also makes it clear that the right to privacy is not simply a right to be left alone, but is, more fundamentally, a right to "have one's own autonomous identity".<sup>146</sup> Autonomy is not construed merely negatively, but as the right of a socially constituted individual, who is enmeshed in various relations, cultures, communities and thoughtways, to develop and express her own identity.

It follows that the right to privacy is neither restricted to, nor absolute within, the physical enclosure of the home. It may well be that the right will be most jealously guarded where two or three of the core areas overlap. For instance, the court found in *National Coalition for Gay and Lesbian Equality* that the criminal prohibition of sodomy infringed both the right to equality and the right to privacy. This prohibition not only penetrated into the private living space of gays, but also restricted their capacity to establish an autonomous identity and to form intimate relationships. By contrast, the court made it clear in *S v Baloyi* that privacy may not be used to justify non-interference in domestic violence.<sup>147</sup>

It seems as if the idea of rights as radial categories offers far more scope for a critical debate about the meaning of constitutional norms than the idea of rights as boundaries. It may also allow us to rethink the relationship between categorisation and limitation analysis. The closer a limitation comes to the core of a right, the heavier the burden on the state should be to justify the limitation.

<sup>144</sup> See par 90. See also the references under s 3 above on the idea of radial categories which consist of a central case and certain conventionalised extensions. The idea of legal categories as having both a core and peripheral areas is closely related to the idea that a legal norm or concept has both a core meaning which is relatively settled, and penumbral areas where the meaning and applicability of the norm or concept are less certain. See eg Hart "Positivism and the separation of law and morals" 1958 *Harvard LR* 593 at 607 ff; *Griswold v Connecticut* 381 US 479 (1965) (per Douglas J); Henly "'Penumbra': the roots of a legal metaphor" 1987 *Hastings Constitutional LQ* 81 and Winter *A Clearing in the Forest* (n 5) 197-202.

<sup>145</sup> par 65 n 89; par 80.

<sup>146</sup> par 65. Cf also *National Coalition for Gay and Lesbian Equality* (n 79) par 117 (Sachs J concurring).

<sup>147</sup> 2000 1 BCLR 86 (CC) par 16-18.

However, where the periphery of a right has been affected, there is a greater chance that the right will be outweighed by conflicting societal interests.

### 9 *Concluding remarks*

Legal reasoning, like all forms of reasoning, is structured metaphorically. Many of our metaphors are so deeply entrenched in our conceptual system that we are often not even aware of them. This has serious implications for attempts to transform the legal order, as our ability to imagine alternatives to current legal understandings and practices is constrained by cognitive processes that we are hardly aware of.

In this article I have explored some of the metaphors that are used to describe rights and rights adjudication under the constitution. I have argued that the idea of rights as relationship and of fundamental rights litigation as dialogue can enable more humane possibilities than the idea of rights as boundaries. I have argued further that the balancing metaphor, the various metaphors in terms of which proportionality analysis is structured, and the idea of legal concepts as radial categories can assist us in developing a relational, contextual and potentially transformative constitutional jurisprudence.

However, these metaphors are themselves partial, and highlight certain aspects of our experience at the expense of others. They are, moreover, open to different interpretations. For instance, the balancing metaphor is often used to stress the need for judges to move away from a rigid categorisation approach, to be sensitive to context, to acknowledge responsibility for their decisions. However, the same metaphor has been used to underpin a new type of formalism, to reduce complex normative questions to the application of a “scientific” method, to hide controversial value choices behind a supposedly neutral weighting of interests.

The debate on alternatives to balancing also demonstrates that the same metaphor can be elaborated differently. For instance, Hesse’s notion of *praktische Konkordanz* invokes the metaphor of balance; however, it refuses to treat constitutional rights as expendable interests that can simply be outweighed by conflicting considerations. In Hesse’s view, it is the task of the constitutional interpreter to harmonise conflicting constitutional values, to optimise the scope of different constitutional interests, to integrate conflicting considerations into the normative universe governed by the constitution. Such an approach has obvious advantages over a simple weighting of interests. However, if we truly believe that the constitution recognises the equal moral citizenship of all, that no one’s constitutional rights may simply be negated in the name of a supposedly higher interest, we should take care not to invoke this conception of balance in such a manner that we convince ourselves that there is a “natural and seamless concord”<sup>148</sup> between conflicting rights and interests. Even if we succeed in keeping a variety of constitutional rights and interests in play without subjugating or reducing some to others, we are still bound to sacrifice legitimate interests in our attempts to harmonise, optimise and integrate conflicting claims and values. To deny this in the name of an underlying balance or unity would be to dismiss the legitimacy of deeply held convictions, to banish

<sup>148</sup> Rautenbach (n 102) 639.

certain claimants from the moral community. Important as it is, the rhetoric of balance and optimisation needs to be supplemented by a recognition of the sacrifice and harm that are invariably sanctioned by law.<sup>149</sup>

Legal history offers numerous examples of the use of metaphors to challenge conventional wisdom and reformulate rules and standards.<sup>150</sup> Such metaphors often have great liberating potential; however, unless used critically and reflectively, these metaphors soon become inscribed in a new orthodoxy, which makes it just as difficult to imagine new alternatives.

André van der Walt's analysis of the metaphor of the constitution as a bridge between an authoritarian past and a future founded on democracy and human rights<sup>151</sup> is a brilliant example of the type of critical, imaginative reflection on metaphors advocated in this article. Van der Walt argues that the conventional understanding of the constitution as an instrument that allows us to get out of one place (apartheid) to another (constitutional democracy), rests upon the assumption that both apartheid and constitutionalism are more or less fixed, stationary positions. Constitutional transformation is understood in terms of a linear progression from one position to another. While this metaphor captures something of the dynamic nature of South Africa's journey to democracy, it fails to account for the complexity and inherent uncertainty of the transformation process. It assumes that the past is completely knowable,<sup>152</sup> that the destination of the transition process can be clearly defined in advance, that the constitutional transformation will be completed once the bridge has been crossed. Van der Walt advances an alternative interpretation of the bridge metaphor,

“where the bridge is not simply an instrument for getting out of one place and into another, but an edifice that is inherently related to the abyss which it spans. Here, the focus is not on the two spaces on either side of the abyss, but on the abyss itself – the bridge is functionally and essentially linked to and obtains its significance from the abyss beneath it, so that the bridge is not a temporary instrument for a single crossing, one way, but allows and invites multiple crossings, in both directions, since there is no inherent value attached to being on one side of the bridge rather than the other. In this alternative interpretation of the bridge metaphor the danger is to stay on one side, while the bridge allows us to connect one side with the other”.<sup>153</sup>

It is significant that Van der Walt does not discard the bridge metaphor, but rather reinterprets it in a less linear, more historicist and relational manner. His argument is still constrained by the metaphor of the bridge; however, by emphasising other aspects of our experience of (literal and metaphorical) bridges, he is able to move beyond the narrow, instrumentalist conception of constitutionalism and democracy that informs the dominant interpretation.

The metaphors we use constrain, but do not determine, our choices. The challenge is to use metaphors in a reflective and imaginative manner, to be alert

<sup>149</sup> See Van der Walt and Botha “Democracy and rights in South Africa: beyond a constitutional culture of justification” 2000 *Constellations* 341; Van der Walt “Law as sacrifice” 2001 *TSAR* 710.

<sup>150</sup> See Winter *A Clearing in the Forest* (n 5) 259-294 for examples from American constitutional history.

<sup>151</sup> (n 9) 294 *ff.*

<sup>152</sup> See De Vos “A bridge too far? History as context in the interpretation of the South African constitution” 2001 *SAJHR* 1 for a critique of this assumption.

<sup>153</sup> Van der Walt (n 9) 295-296.



to the ways in which metaphors highlight certain aspects of our experience, while downplaying or hiding others, to open up new possibilities through the reinterpretation of existing metaphors and the use of alternative metaphors which enable different ways of seeing and thinking.

#### **SAMEVATTING**

##### **METAFORIESE DENKE EN TRANSFORMERENDE KONSTITUSIONALISME (deel 2)**

Regsdenke word in terme van metafore gestruktureer. Die metaforiese aard van regsdenke word egter dikwels deur regsgeleerdes negeer, wat nog vasklou aan die objektivistiese siening dat regsbegrippe met 'n objektiewe werklikheid ooreenstem. In dié artikel, ondersoek die skrywer 'n aantal metafore wat onderliggend was aan die apartheidsregsorde, sowel as sommige van die metafore wat gebruik word om die nuwe grondwetlike orde te beskryf. Die skrywer argumenteer dat die idee van regte as verhouding en/of dialoog, en die metafore van balansering en regte as straalvormige kategorieë veel meer kritiese en transformerende moontlikhede bied as die idee van regte/begrippe as houers. Die metafore wat gebruik word om die nuwe grondwetlike orde te beskryf, beklemtoon egter self sekere aspekte van ons ervaring ten koste van ander, en moet self voortdurend herinterpreteer en opnuut bedink word.