

Struggle, refusal, narrative

*Karin van Marle**

Introduction

I had the privilege of hearing Christof present his ‘A struggle approach to human rights’ at the 2001 International Association for Philosophy of Law and Social Philosophy (IVR) World Congress in Amsterdam.¹ Over the years it was an approach that I often discussed with students in seminars and engaged with in my own research. In this reflection in honour of Christof I revisit his suggestion of a struggle approach to human rights as well as my earlier engagement with it against two theoretical frameworks. I draw on the latter to revisit and reconsider aspects of my earlier critical engagement that questioned if the notion of struggle, something that holds the possibility of a radical politics, could and should be coupled with an institution like human rights.

I engage with Bonnie Honig’s take on the politics of refusal and her insistence on ‘the return to the city’,² and with Robert Cover’s belief in the law’s redemptive transformation.³ I neither aim to throw (and to force) all three in the same basket nor to mix them all together to come up with some sort of hybrid end-product. Reading the ‘struggle approach’ alongside work on ‘refusal’ and ‘nomos and narrative’ helps me to understand better Christof’s adherence to the institutional, to what is ‘legitimate’.

South Africa, but also the world at large, finds itself in a very different place and time today than in 2001 when Christof delivered his paper on the struggle approach. The theme of the conference where he delivered his address, which is also the title of the book in which it was published, is *Pluralism and law*. Arendt Soeteman, at the time president

* Professor of Law, Faculty of Law, University of the Free State.

1 CH Heyns ‘A “struggle approach” to human rights’ in A Soeteman (ed) *Pluralism and law* (Kluwer Academic Publishers 2001) 171. ‘IVR’ refers to the German ‘Internationale Vereinigung für Rechts- und Sozialphilosophie’.

2 B Honig *A feminist politics of refusal* (Harvard University Press 2021) 1; 72-100.

3 RM Cover ‘The Supreme Court 1982 term. Foreword: nomos and narrative’ (1982) 97 *Harvard Law Review* 34-40.

of the IVR and editor of the book, refers to the tension between on the one hand being part of 'one world', while at the same time coming from 'many different traditions'.⁴ He asks: 'What can we say about justice in our pluralist world?'⁵ Twenty years later the question of justice, or maybe better put, the question on the absence of justice remains. But the question of pluralism and the law / legal pluralism is also with us. All three authors - Christof, Honig and Cover – in their own way are dealing with these questions; not to provide answers but to open new angles from which to approach them.

I start with briefly describing the crux of the struggle approach as suggested by Christof, followed by my earlier reflection on it, after which I turn to Honig and Cover. As noted, I sense in the writings of Honig and Cover lines that can be connected to Christof's understanding of human rights. At the same time there are significant differences between them.

This is a tentative reflection done in honour of Christof's work, his contribution and his life.

'A struggle approach to human rights'

Christof described human rights as 'the flipside of the coin of legitimate resistance'.⁶ For him the idea of human rights can be captured in the phrase 'human rights = legitimate resistance'. He explained the 'force' of human rights through the link between human rights and resistance. Christof believed that no matter how one explains human rights, in other words which political, philosophical or theoretical approach or perspective one follows, the 'concept of human rights' itself serves as a 'countervailing force' to the power of the state as well as society.⁷ This belief in the force of human rights resulted in the statement that human rights are 'guides to action and triggers of resistance'.⁸ For Christof human rights is a 'potentially revolutionary concept'. He relied on 'the clampdown worldwide by authoritarian regimes on human rights organisations' as evidence for this claim.⁹ However, notably, Christof said that he did not view human rights as being part of 'the anarchist tradition' and explained that human rights draw on the sense 'that there is a general duty to political obedience, to which human rights norms constitute exceptions'.¹⁰ I come back below to the idea of anarchy with reference to Cover, who boldly associates himself with the anarchist

4 A Soeteman 'Introduction' in A Soeteman (ed) (n 1) vii.

5 Soeteman (n 4) viii.

6 Heyns (n 1) 171.

7 Heyns (n 1) 171.

8 Heyns (n 1) 171.

9 Heyns (n 1) 171.

10 Heyns (n 1) 172.

tradition. Christof argued that human rights do not oppose or challenge the existence of the state as an institution, but in fact endorse it. As I show below this position is different from Honig and Cover, who stand critical towards the state. Important for my argument though is that neither of them believe that the state can be totally left behind. For Christof, disobedience can be allowed only in ‘extreme cases’ if it is ‘justified’, because of a general obligation to obedience.¹¹ Subscribing to the traditional view of constitutions as social contracts, Christof perceived human rights as the ‘escape clause’. For him the concept of human rights is the ‘ultimate guarantor of popular sovereignty’ as well as the ‘foundation for intervention by the international community’ in the domestic affairs of states.¹² He applied the struggle theory to specific examples that I do not delve into in this chapter.¹³

I want to note his view on the notion of history and time, responsibility and passion. He tied history closely to the concept of legitimacy and explained this by saying that the normative aspect of the struggle approach can be captured in the word ‘legitimate’. For him what is legitimate is to be found in history – ‘history reflects beliefs that have stood the test of time’.¹⁴ His understanding of responsibility is closely tied to the concept of human rights – the struggle approach to human rights is for him a call for responsibility to give direction to new struggles and also to protect existing norms. He described passion, the foundation of human rights, as ‘passion tempered by history’.¹⁵

The limits of the law

I draw here on a previous engagement with the struggle theory which comes from a perspective that underscores the limits of the law and is in particular cautious of the way in which law reduces the political.¹⁶ At the time, I highlighted that an obvious problem that one could have with the struggle theory is its ‘grand narrative’ style of argumentation. I read the struggle theory as an attempt to claim to provide the *ultimate foundation* and *explanation* for human rights; as a claim to solve all possible tensions, debates and struggles (!) on human rights. I highlighted the extent to which the theory relies on a modernist acceptance of rationality and human reason, follows an abstract form of agency and supports the notion of the all-and-ever-

11 Heyns (n 1) 172.

12 Heyns (n 1) 172.

13 Heyns (n 1) 178-187.

14 Heyns (n 1) 187.

15 Heyns (n 1) 188.

16 K van Marle ‘Lives of action, thinking and revolt: a feminist call for politics and becoming in post-apartheid South Africa’ (2004) 19 *South African Public Law* 608.

present subject. The theory, although it recognises with some reluctance the problematic consequences of asserting a single history, ultimately assumes the possibility and desirability of one universal truth. This is of course ironic given that the focus of the conference and the subsequent publication was on pluralism. Re-reading the piece, I was struck by the emphasis placed on actions and the ‘empirical observation of historical processes.’¹⁷ In this view, human rights should be seen as a form of action, not a set of moral truths. I invoked Hannah Arendt’s fear that to concentrate on rights that are attached to politically passive and invisible legal subjects could lead to a misdirection in our resistance to totalitarianism.¹⁸ Christof might have argued that this is what he envisioned in the formulation of the struggle approach to human rights. However, I was concerned about the strong requirement of legitimacy and the reliance on mostly Western history as yardstick, which is not true to the Arendtian tradition of active politics and the centrality of life and narrative.¹⁹

Another reason why in my view the struggle approach failed to address post-apartheid politics is because I was worried about its aim to provide a reason and justification for the existence of human rights, without showing concern for politics. Also, for the struggle approach, the eventual entrenchment of human rights in international treaties is the end of political struggle rather than its beginning. I came to the conclusion that the struggle theory is not only celebratory and monumental but is, in a sense, despite Christof’s claim to the contrary, not all that different from natural law explanations of the origins of and justification for human rights. I read the meaning of struggle as reduced to the level of explanation and justification and not taken to be part of an active and continuous politics. Encompassed in this approach is the danger of institutional politics that functions only within the sphere of what is perceived as legitimate.

In my previous reflection I relied on Hannah Arendt and Julia Kristeva, to warn against the reductions that occur when coupling politics with law (‘struggle’ with ‘rights’) and humanity and human life with legitimacy (‘human’ with ‘legitimate’).²⁰ I was concerned also about the ethical notion of responsibility that is reduced to a mere instrumental responsibility that corresponds with rights. I lamented that passion and the passion of the moment is limited and reduced to a tempered passion. Just as Arendt’s approach to human life and humanity

17 Heyns (n 1) 181.

18 H Arendt *The origins of totalitarianism* (Schocken Books 1951).

19 Van Marle (n 16). H Arendt *The human condition* (The University of Chicago Press 1958).

20 Van Marle (n 16), Arendt (n 19), J Kristeva & H Arendt *Life is a narrative* (University of Toronto Press 2001).

(her belief that political action and thought are what distinguish human life from other forms of being) is critical of the notion of a society, or life captured by 'human rights' and of the equalisation of 'human' with 'legitimate', Kristeva's call for eternal revolt disrupts the coupling of rights with struggle. Following Arendt and Kristeva, the dangers of a society overtaken by human rights discourse become clear – the result being a complacent society where political action, thought, eternal questioning and contestation are absent and replaced by an understanding of freedom as mere commercial/economic freedom and of thought as calculated and instrumental.

As indicated above my attempt in this chapter is tentatively to revisit and reread the struggle approach to human rights and reflect also on my earlier response in light of Honig's work on refusal and in particular her reworking of the way in which refusal has been invoked by other theorists to argue for a politics of refusal that does not retreat, does not reject, disavow or abolish but returns to the city, to politics and maybe even to law and rights, albeit with caution. I read Christof's approach also alongside the writing of Cover. I find moments of connection in a shared belief in law's jurisgenerative potential, albeit always already confronted by the violence of state law and courts.²¹

Refusal

Honig, in her latest work, *A feminist politics of refusal*, draws on the Greek tragedy by Euripides, the *Bacchae*, to develop her view.²² Honig's theory of refusal is based on her feminist re-reading, re-interpretation and re-telling of the tragedy. If it is not obvious, I read Honig here alongside Christof, because of the possible connections between refusal and struggle. As indicated above, there are lines of connection but also of divergence. A divergence is that Honig's story is a tragedy that does not end well, where Christof's one is a story of optimism, one of success.²³

The *Bacchae* tells the story of Dionysus coming to Thebes and the events that unfold when the women of Thebes join the festivities, reject work, leave the city to explore alternative lifestyles but later return to claim the city. According to Honig, refusal occurs in three moves in

21 R Cover 'Violence and the word' (1986) 95 *Yale Law Journal* 1601.

22 Honig (n 2).

23 The 'struggle approach' can be placed along the lines of a traditional coming of age story, usually a story of a male character leaving his rural place to come to the city whereby becoming a man he fulfill his destiny. I have compared the lives of Nelson Rohihlahla Mandela and Winnie Madikizela Mandela to the coming-of-age story and showed how if Nelson's life mirrors the coming-of-age story, Winnie's life does not. K van Marle 'Post-1994 jurisprudence and coming of age stories' (2015) No foundations. Christof notably associates the life of Nelson Mandela with the struggle approach.

the tragedy: firstly, women refuse to work in the city; they then move outside the city to live differently ; before they return to the city with certain demands. She reads these acts as ‘a single arc of refusal’, which conveys ‘a normative, civic, and feminist obligation to risk the impurities of politics on behalf of transformation’.²⁴ For her the return to the city is central to a feminist politics -of refusal, even though the return may fail. The city for Honig symbolizes political community. I previously have raised the question whether the city can be imagined also as the constitution, prompted by the call for the constitution to be abolished in the South African context.²⁵ I asked whether the engagement with the constitution as return to the city could open space for critical constitutionalism and not its abolishment or abandonment.²⁶

I should note that this is not the first time that refusal has been considered as a strategy for critical constitutional scholarship. Drawing on Cavarero’s work on Penelope’s weaving and unweaving as well as the laughter of the women of Thrace, I explored refusal as a critical response to a certain way of understanding and doing law.²⁷ Henk Botha, inspired by Njabulo Ndebele’s *The cry of Winnie Mandela*, has also argued for refusal as a critical way to think about constitutionalism.²⁸

Honig recalls three ways in which refusal has been invoked in critical theory, namely, Agamben’s ‘inoperativity’; Cavarero’s ‘inclination’; and Hartman’s ‘fabulation’.²⁹ She re-reads each of these together with another theorist to substantiate her argument for a return to the city, for a politics of transformation. Agamben’s inoperativity is read with Butler’s idea of ‘assembly’; Cavarero’s inclination with Ahmed; and Hartman’s fabulation with Arendt.³⁰ Honig reads the women’s actions in the tragedy as being part of an ‘arc of refusal’ which forms the basis for a feminist politics of refusal. I find her version of refusal, that is prepared to take the risk of ‘the impurities of politics

24 Honig (n 2) 1.

25 K van Marle ‘Refusal and critical constitutional scholarship’ *Critical Legal Conference* 2021 (unpublished paper, on file with author).

26 Honig concedes that her suggestion might not be useful to all with specific reference to some areas in Black studies who regards the city as ‘unsalvageable’. However, she says that even those who regards the city as ‘unsalvageable’ may find something useful in the agonism that she finds in the Bacchae.

27 K van Marle ‘Laughter, refusal, friendship: thoughts on a “jurisprudence of generosity”’ (2007) 18 *Stellenbosch Law Review* 194; K van Marle (ed) *Refusal, transition and post-apartheid law* (ed) (Stellenbosch University Press 2009).

28 H Botha ‘Refusal, post-apartheid constitutionalism and The cry of Winnie Mandela’ in Van Marle, K (ed) *Refusal, transition and post-apartheid law* (Stellenbosch University Press 2009) 29.

29 G Agamben *Potentialities* (Stanford University Press 1999) 250; A Cavarero *Inclinations: a critique of rectitude* (Stanford University Press 2016); S Hartman *Wayward lives, beautiful experiments: intimate histories of social upheaval* (WW Norton & Company 2019).

30 J Butler *Notes toward a performative theory of assembly* (Harvard University Press 2015); S Ahmed *Queer phenomenology: orientations, objects, others* (Duke University Press 2006); Arendt (n 19).

on behalf of transformation', suggestive for critical legal scholarship. She identifies a feminist politics that shifts from the quest for power to collaborative experiments; from hubris to agency but notably also from heterotopia as fugitivity to heterotopia as a space/time of rehearsal and ultimately from heterotopia to a return to the city. Important features of the approach are its wordliness and the attention to the politics of storytelling. I turn briefly to inoperativity; inclination and fabulation and Honig's take on each of them.

Agamben situates his inoperativity, the suspension of use, in 'exceptional, liminal spaces', spaces associated with festival, exception and exhibition.³¹ The *Bacchae's* refusal of work can be read as inoperativity and suspension, but for Honig it is not only the suspension of use but its intensification.³² Instead of Agamben's exhibition and spectacle associated with the male gaze we find in the *Bacchae's* refusal a different inoperativity. The *Bacchae's* refusal presents us with a new sociability; 'new use in common'; new ways of being.³³ Honig recalls an account of feminists who wanted to partake in a strike in support of Not One (Woman) less but who were involved in cooking food in a soup kitchen. Faced with the dilemma of 'We want to strike, but we can't strike' the women made the decision to provide raw food. What happened here is described as an evaluation of the 'sensible qualities of things', which recalls Ranciere's notion of redistribution of the sensible.³⁴ The *Bacchae's* new ways of being also bring a new sense of time, a slow time, 'slow tempo of transcendence that refuse[s], by intensifying, everyday normativity and make[s] alternatives imaginable.'³⁵ Instead of an ethics or politics of pure means we find a 'more wordly and impure agonistic and politics of refusal.' The difference between the *Bacchae's* refusal and inoperativity reminds us of Critical Race Scholar, Patricia Williams, who as alternative to the view of certain Critical Legal Studies theorists to reject rights (refuse and make them inoperative) called for rights to be unlocked.³⁶ Her notion of a jurisprudence of generosity is also an evaluation and ultimately redistribution of the sensible. Honig comments that Agamben's inoperativity ultimately leaves us with a notion of use that looks very much like the old – it is solitary, not common and exhibitivite, not experimental; an untransformed use.³⁷

31 Honig (n 2) 15-16.

32 Honig (n 2) 16.

33 Honig (n 2) 22.

34 Honig (n 2) 27. See J Ranciere *The politics of aesthetics. The distribution of the sensible* (2004) 12.

35 Honig (n 2) 43. K van Marle 'Law's time, particularity and slowness' (2003) 19 *South African Journal on Human Rights* 239. Christof showed specific interest in the idea of slowness and engaged with it in his time as Special Rapporteur.

36 P Williams *The alchemy of race and rights* (Harvard University Press 1991) 164-165; Van Marle (n 22).

37 Honig (n 2) 45.

Cavarero's inclination does not reject use but rather presents a way 'to rethink or recover use as care and mutuality'.³⁸ Normativity is not suspended but reoriented. Cavarero suggests inclination as alternative to rectitude associated with autonomy. She relies on maternalism's gesture of care to suggest 'a subversive ethics of altruism'.³⁹ Inclination of course recalls also feminist work on care and attunement.⁴⁰ I am interested also in linking inclination with horizontality, the horizontal working of constitutionalism. Honig recalls the riddle that the Sphinx gives to Oedipus, which although he manages to solve it still misses the lesson that she is trying to teach him, being the wisdom of inclination. ('What crawls on all fours in the morning, walks on two legs midday, and then the evening on three'.)⁴¹ Another lesson coming from the riddle is pluralization, that human life is made of multiple gestures, none of them essential.⁴² Pluralization, pluralism is another important feature of a critical constitutionalism. As noted above, Christof presented the 'struggle approach' at a conference on legal pluralism. He draws on the plurality of actions as grounding for the struggle approach.

Honig reads the main relation of kinship in the *Bacchae* as one of sorority rather than maternity and combines this with Ahmed's notion of disorientation to shift Cavarero's maternal care and pacifism to sororal love, care and violence.⁴³ The turn to sorority can be fruitfully compared to Jacques Derrida's lamentation of fraternity as the basis for democracy.⁴⁴ Honig identifies four moments of inclination in agonistic contexts of care: Firstly, when the women of Thebes join the foreign women, they refuse not only domestication but also sovereignty's demarcation. Secondly, when leaving the city for the Cithaeron the women 'join together in dance, worship, and sleep and in caring for the animals in whose midst the women find themselves.' The third and fourth examples are when Agave, the King's mother leans over him first to kill and then to bury him.⁴⁵ For Honig, Ahmed's disorientation opens up the possibility of 'gathering' differently; of reaching the 'very limits of social gathering'.⁴⁶ In her words, 'to love out a politics of disorientation might be to sustain wonder about the very forms of social gathering'.⁴⁷ The possibility of 'new social relations' and not mere restoration to old ones, unfolds. The shift from maternal care and pacifism to sororal

38 Honig (n 2) 46.

39 Honig (n 2) 47.

40 Honig (n 2).

41 Honig (n 2) 52.

42 Honig (n 2) 52.

43 Honig (n 2) 58.

44 J Derrida *The politics of friendship* (Verso 1997) 236.

45 Honig (n 2) 54.

46 Honig (n 2) 55.

47 Honig (n 2) 55.

agonist politics urges another shift, namely after time spent at the Cithaeron as a heterotopian space to return to the city.

To expand on the return to the city, Honig relies on Hartman's fabulation in telling the stories of wayward women.⁴⁸ In addition to Arendt's view of the importance of the city and the archive to 'hold' stories of human action Hartman addresses how the archive 'hold[s] (back) the city'.⁴⁹ Hartman fabulates in order to bring the stories of women whose lives were deemed obscure to the archive. However, Honig notes that Hartman's counter-narratives are only 'momentary triumphs'. She is concerned with the question whether fabulation can also collectivize or politicize? She concedes to the slow time of transition. It is notable how Cadmus, Agave's father who took up the position of King after the death of Pentheus, tries to restore her to her role as wife and mother, to kinship back into the 'patriarchal fold'. Arendt's distinction between the who and the what comes to the fore in Cadmus' denial of who Agave is, a huntress, a revolutionary leader to a what, a daughter, a wife and mother. By doing this, he relocates her, dismembers and reassembles her, she is 'repatriated to patriarchy'. He restores her to his sensibility, kills the world that she created in order to make her legible to him.

Honig writes:

... we know from Cadmus' example how the conventional center holds on to power in the face of such challenges when they come home: by turning such heterotopias into sites of madness of exception and reinserting wayward women into their proper locations in the structural map of patriarchal kinship.⁵⁰

Ultimately Honig refabulates the story of the Theban bacchantes: The women rejected confinement to work and labour; seeking more freedom-intimating moments; they flee the city; however, they wanted more than flight, something more lasting, an alternative, so they joined a chorus; and at the Cithaeron rehearsed new ways of being.⁵¹ Honig suggests that the women wanted to establish equality in the city, not only outside the city in an exceptional moment. I sense a connection here with Christof's holding on to the institutional and to what is legitimate. For struggle to result in something that is accepted and that can make a difference it needs some kind of institutional legitimacy. Honig notes: 'Were the women successfully to claim the right to the city, the effect would be a repartitioning of the sensible.'⁵² The women were not successful, the city was not ready for them, might not be ready

48 Honig (n 2) 73.

49 Honig (n 2) 75.

50 Honig (n 2) 96.

51 Honig (n 2) 92.

52 Honig (n 2) 93.

for the kind of democracies we seek, but that is not a reason not to try. Recalling Du Bois's notion of 'splendid failure', maybe the 'splendidness of the failure can itself have the power to generate new readings'.⁵³

Redemptive transformation

Robert Cover famously asserted the extent to which we create law and live a life of law through our narratives.⁵⁴ He insisted that what law teachers mostly tell students about law – 'rules and principles of justice, the formal institutions of the law, and the conventions of a social order' - provides only a partial account of the 'normative universe that claims our attention'.⁵⁵ He underscored that no law or legal institution exists in isolation from the narratives within which it is situated and its meaning created. 'For every constitution there is an epic, for each decalogue a scripture.'⁵⁶ Law is not simply a system of rules that should be followed 'but a world in which we live'.⁵⁷ He notes the extent in which legal interpretation, legal hermeneutics, the question of 'meaning' in law' is often associated with a specific problem on which an official must decide. However, he urges us to see this also differently, and acknowledge that 'the normative universe is held together by the force of interpretive commitments' and that these commitments ultimately decide the meaning and existence of law.⁵⁸ Legal orders and principles are for him 'signs by which each of us communicates with others'.⁵⁹ Cover is a theorist of jurisdiction and thus refers to the role of jurisdiction to construct meaning in our normative world. With reference to *Marbury v Madison* he remarks that '[e]very denial of jurisdiction on the part of a court is an assertion of the power to determine jurisdiction and thus to constitute a norm'.⁶⁰ He stresses the important role of legal tradition, which includes language and myth and is 'part and parcel of a complex normative world'.⁶¹ The main difference between Cover and the struggle approach as supported by Christof, is Cover's scepticism about the state and his belief in the power of narratives to make law. At the same time the history of various struggles, resistances against power perform a law making, at least right making role in the struggle approach.

53 Honig (n 2) 96-97.

54 Cover (n 3) 4-68.

55 Cover (n 3) 4.

56 Cover (n 3) 4.

57 Cover (n 3) 5.

58 Cover (n 3) 7.

59 Cover (n 3) 8.

60 Cover (n 3) 8. *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

61 Cover (n 3) 9.

Cover described the law as a ‘system of tension or a bridge’ that has the task of connecting ‘reality’ with ‘an imagined alternative’.⁶² Often reality is perceived as unredeemed. Law, he believes, can bring about transformation. ‘Law is a force, like gravity, through which our worlds exercise an influence upon one another, a force that affects the courses of these worlds through normative space.’⁶³ Narratives assist by connecting different force fields, they connect ‘the “is”, the “ought” and the “what might be”’.⁶⁴ Cover worked with a number of important and related distinctions: two versions of *nomos*, the insular and the redemptive; two ways of interpreting law, *jurisgenerative* and *jurispathic*; and two patterns/communities, *paideic* and *imperial*. *Paideic*/world creating patterns entail ‘(1) a common-body of precept and narrative, (2) a common and personal way of bringing education into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law.’⁶⁵ An *imperial*/world-maintaining pattern relies on universal norms which are enforced by institutions. Where in *paideic* patterns law is seen as pedagogic and to understand it translates to obedience, law in the *imperial* pattern needs not be taught and must be effective. Cover explains that all normative worlds rely on both *paideic* and *imperial* patterns. The *imperial* mode of world maintenance is needed exactly because of the fertile forces of *jurisgenesis*, which causes ‘the problem of the multiplicity of meaning’.⁶⁶

I want to think about the struggle approach to human rights together with Cover’s ideas on *nomos* and narrative. To what extent does the notion of struggle open possibilities for *jurisgenesis*, for the making of meaning in the interpretation of rights? Can the struggle theory be used to counter *jurispathic* decisions? De Sousa Santos describes modern law in terms of a tension between emancipation and regulation.⁶⁷ The failure of the nation-state caused the collapse of emancipatory ideals, resulting in over-regulation. I see an interesting resemblance between the idea of emancipation and *jurisgenesis* and regulation and *jurispathia*. De Sousa Santos strives to revive law’s emancipatory ideal. Cover is known for his hope for redemptive transformation. He supports the idea of ‘redemptive constitutionalism’ to respond to contexts where a transformational politics is needed.⁶⁸ In this way there is a shared belief between Cover and Christof about law’s potential. Cover, however, underscores the extent to which the *jurisgenerative*

62 In the South African context Etienne Mureinik famously invoked the image of the constitution as a bridge, E Mureinik ‘Bridge to where? Introducing the interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 31.

63 Cover (n 3) 10.

64 Cover (n 3) 10.

65 Cover (n 3) 12-14.

66 Cover (n 3) 16.

67 De Sousa Santos *Toward a new legal common sense. Law, globalization and emancipation* (Routledge 2002) 2.

68 Cover (n 3) 34.

process never takes place in isolation of violence. For him courts, 'at least the courts of the state are characteristically jurispathic'.⁶⁹

It is remarkable that in myth and history the origin of and justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution.⁷⁰

Cover responds critically to the sentiment that courts, and their jurispathic function, are needed because of the problem of 'unclear law'. He insists that the problem is rather one of 'too much law', which puts the problem in a totally different light. To acknowledge the problem of too much law is 'to acknowledge the nomic integrity of each of the communities that have generated principles and precepts'.⁷¹ This acknowledgement recognises the role of narratives in the creation of law. To describe the problem as one of 'unclear' law assumes or maybe presumes that there is one correct interpretation, 'a hermeneutic that is methodologically superior to those employed by the communities that offer their own law'.⁷² Cover in this time was concerned about what he recognised as 'the statist impasse', which he believed will come to an end. He believed that this will be disrupted by 'some undisciplined jurisgenerative impulse, some movement prepared to hold a vision in the face of indifference or opposition of the state'. Holding on to the belief in the possibility of transformation, he noted:

Perhaps such a resistance ... will reach not only those of us prepared to see law grow, but the courts as well. The stories the resisters tell, the lives they live, the law they make in such a movement may force the judges, too, to face the commitments entailed in their judicial office and their law.

Do we see similar redemptive strands in the struggle approach to human rights? The firm belief that experience can translate in a law, a right that can generate new meaning? We may recall here Christof's coupling of rights with legitimate struggle. Cover notes that 'it is not the romance of rebellion that should lead us to look to the law evolved by social movements and communities.' He urges us to also recognise and distrust the reality of the power of social movements and to examine the worlds of law that they create.⁷³ He believed that the same way in which constitutionalism gives legitimation to the state, constitutionalism may give legitimation 'within a different framework' to communities and movements.

69 Cover (n 3) 40.

70 Cover (n 3) 40.

71 Cover (n 3) 42.

72 Cover (n 3) 42.

73 Cover (n 3) 68.

Conclusion

My aim in this chapter is to revisit the struggle approach as well as my initial response to it years ago by reading it alongside the work of Honig on refusal and Cover on the power of narratives.

The struggle approach, paideic patterns, jurisgenerative decisions, multiple gestures and fabulations affirm the importance of pluralism, plural accounts, plural histories, plural laws. At a time where the search for justice continues to be thwarted, the search for more than one, for alternatives, for alterity holds some hope. These reflections, although different from one another, share in varying degrees a commitment to the institutional, whether in the form of legitimate struggle, jurispathic courts or a return to the city. The importance of struggle, resistance, anarchy and refusal as sources of law comes to the fore even though our attempt to create law may fail splendidly, and the violence of the state lurks.

A difference between Cover, Honig and Christof is that where Christof relies on the history of world events and grand narratives, Cover recalls myth and Honig tragedy and rely on community and the everyday as source. Cover and Honig find themselves in the realm of narrative, stories and fabulation where Christof recalls evidence-based actions.

In the many tributes that followed after Christof's unexpected and untimely passing he was described as someone who had not only ideas but who made work to translate those ideas into material and practical plans. My sense is that the struggle approach is another example of Christof's method of making ideas real. For some there is a certain reduction, a violence in the translation of the conceptual to the real but that does not take away the respect for the brave ones like Christof who dare to be bold. As I was thinking, reading and writing I wished, like many others I am sure, for another opportunity to talk to Christof in the hall-ways of the law building, at a faculty festival with a beer in the hand or in Stilbaai.

Up until now: up until now, in sum, and still just a second ago, we were speaking of life's brevity. How short life has been, too short in advance ...

Up until now we have been speaking of the infinite precipitation into which an eschatological sentiment of the future throws us. Imminence, a world is drawing to a close, fatally, at a moment when, as we were saying a moment ago, things have only just begun: only a few brief millennia, and it was only yesterday that 'we were friends' already.⁷⁴