

Beyond the Brother: Radical Freedom

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it is always a question of the body . . .¹

Deconstruction is the prophet of a new kingdom of ends.²

I INTRODUCTION

In a 1954 essay attempting to understand (and thus to oppose) totalitarianism as a then novel form of government, Hannah Arendt writes as follows: ‘In order to *fight* totalitarianism, one need *understand* only one thing: Totalitarianism is the most radical denial of freedom . . . whoever cannot be mobilized when freedom is threatened will not be mobilized at all.’³

Given philosophy’s obsession with, but also inability to articulate, ‘the nature and stakes of what we call “freedom”’⁴ today, Arendt’s statement raises perhaps more questions than it offers answers, or opens up horizons for action. For do we ever finally and properly know when freedom is *radically* denied? Is there an ethical difference between the denial of freedom and its *radical* denial? And does this epistemological inability/instability to *know* when freedom is or is not (radically) denied, not ultimately instil despondence and paralysis? I believe that this need not be the case if one is prepared to see in Arendt’s terse statement the starting points of a response and, therefore, a responsibility as well as perhaps most importantly, a resistance. To approach and to affirm such a responsibility and such a resistance it will be necessary to begin to come to terms with what it means to posit specifically *totalitarianism* as the radical denial of freedom. What are the nature and stakes of the freedom that totalitarianism so radically denies? Does totalitarianism *merely* consist in the

* Senior Lecturer, Department of Private Law, University of Cape Town. The bulk of this essay was written in the weeks following the sudden departure of my friend, confidant and brother, Louis Janse van Rensburg Joubert on 20 July 2008. Without the support, patience and generosity of friends during this difficult time, it would have been impossible both to conclude this article and to continue my involvement as editor in this project. In recognition of the gift that friendship always already is, I dedicate this article to the memory of my friendship with Louis as well as to the following people: André Barnard–Naudé, Marelize Barnard, Jurné le Roux, Karin van Marle, Danie Brand, Pierre de Vos, François Finlay, Drucilla Cornell and Elizabeth Lotz – together they sign here more than I could ever do.

¹ J L Nancy *The Experience of Freedom* translated by B McDonald, foreword by P Fenves (1988) at 66.

² J K A Smith *Jacques Derrida Live Theory* (2005) at 90.

³ H Arendt ‘On the nature of totalitarianism: an essay in understanding’ in H Arendt *Essays in Understanding 1930–1954* edited by J Kohn (1994) at 328.

⁴ Nancy (n 1) at 1.

ideologically motivated encroachment by the state on those aspects of citizens' lives that are considered to be private? Does freedom then consist, by virtue of the same logic, in radical governmental non-intervention that would open up the lawful ability to choose amongst sets upon sets of available alternatives? In other words, is Isaiah Berlin's version of individualist, negative freedom⁵ not the best version of freedom available for a post-totalitarian society such as the one envisaged in South Africa?

In his decision in *Ferreira v Levin NO*,⁶ Justice Ackermann – inspired by Berlin – appears to favour the negative conception of freedom. Yet at the same time Ackermann insists that 'a broad and generous interpretation of freedom does not deny or preclude the constitutionally valid, and indeed essential, role of state intervention in the economic as well as the civil and political spheres.'⁷ In this contribution, I want to argue that, in the context of freedom, the 'broad and generous interpretation of freedom' can and should take account of a radically different version of freedom – a radical freedom – if we are to remain committed to the excision of the totalitarian nightmare from the political (un)conscious of the South African body politic.

I want to assert then that Arendt's choice of formulation in the passage I cited above leads to a different configuration of the (non-)relationship between totalitarianism and freedom, quite simply because Arendt's version of freedom differs radically from the negative version of freedom offered by Berlin and endorsed by Justice Ackermann.⁸ In this contribution I also want to draw attention to the elaboration and extension of Arendt and Heidegger's thought on freedom in the work of Jean-Luc Nancy.

But before elaborating on these versions of freedom – and attempting to point out their significance for South Africa – I want to keep in sight another particularity of South African democracy, namely (and it is on this that everything turns here) that it is, *and remains*, as a particular kind of democracy; one that does not simply mark the end of a totalitarian order, but rather and specifically calls into being a post-totalitarian order *as a post-apartheid* order.⁹ The question of freedom – which is always already

⁵ I Berlin 'Two concepts of liberty' in I Berlin *Four Essays on Liberty* (1969) at 121–22.

⁶ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC).

⁷ *Ibid* para 52.

⁸ See *Ferreira* (n 6) para 54.

⁹ See J van der Walt *Law and Sacrifice* (2005) at 3. For Van der Walt the cornerstone of a post-apartheid theory of law is the horizontal application of fundamental rights embodied in s 8(2) of the Constitution of the Republic of South Africa, 1996. This horizontal application of fundamental rights, argues Van der Walt, 'is bound to disrupt the classical liberal scheme of South African law and jurisprudence . . . '.

a question of *sexual* freedom¹⁰ – in South Africa thus can and must be understood in the context of a society that explicitly aspires to a post-apartheid order – an order that is post-totalitarian not just by virtue of the fact that it precludes the denial by the state of the equal value and worth of every human being, but also because it is an order that calls for a togetherness that *takes responsibility* for the dignity of everyone, that is, to paraphrase Derrida, for the singularity of every one as a wholly other one.¹¹ I do not want to suggest by any means that the possibility of a post-apartheid order is a particularly South African possibility, but what I do want to suggest is that the South African experience can serve as a type of metonymy for the fight against totalitarianism and the fight against apartheid worldwide and in all its forms.¹²

Nevertheless, totalitarianism and apartheid remain inextricably bounded up with specifically *South Africa's* political history and for this very reason the success of its future will be determined (measured) by its ability to overcome this history. This is another way of saying that the success of South Africa's future will be determined by the extent to which it is able to realise the freedom of its citizens practically.

In order to begin such an illustration it will be necessary to understand more fully the nature of the responsibility (and thus the freedom) that ensues in the fight against totalitarianism. To that end, it is necessary that we enquire more directly into Arendt's understanding of human freedom, which is heavily influenced by Heidegger yet intimately connected with the ancient principle of action or praxis that, in turn, forms an integral part of her theory of politics. Following this exposition, I will turn to Jean-Luc Nancy's engagement with Heidegger and Arendt in his *The Experience of Freedom*. I will then turn to Drucilla Cornell's reading of the concept of love in Derrida's *Politics of Friendship*¹³ in order to show that, if freedom is to be taken as that which radically

¹⁰ As Drucilla Cornell indicates, freedom is always already the freedom to create ourselves as sexed or sexuate being(s). See in this regard D Cornell *At the Heart of Freedom* (1998) at ix–xi. Also see R Robson 'Sexual democracy' (2007) 23 *SAJHR* 409 at 410: 'It is necessary to consider the sexual in a broader context than marriage or even "relationships" in order fully to explore the importance of the sexual to democracy.'

¹¹ See J Derrida *The Gift of Death* (1995) at 58–62, 78. To be sure, Derrida's discussion of the phrase '*tout autre est tout autre*' references an infinite and impossible (or paradoxical) responsibility through a discussion of the myth of Abraham and Isaac. According to this impossible law of responsibility I have to both take responsibility and relinquish it in order to remain true to it. In involving the notion of *tout autre est tout autre* in the context of dignity – as the absolutely singular worth of every one – this responsibility would of course call for a certain heteronomy that complicates the individualist autonomy of the ontological history of dignity. See further the discussion of Cornell's reading of love hereafter.

¹² On the dangers of 'externalising' institutionalised racism, see P Cilliers 'On Derrida and Apartheid' (1998) 17(1) *South African Journal of Philosophy* 75. Also see J Derrida *Spectres of Marx: The State of the Debt, The Work of Mourning and the New International* (1994) at xv.

¹³ J Derrida *Politics of Friendship* translated by G Collins (1997).

denies, prohibits and weeds out totalitarianism, then it can and must be practically thought and lived as the love of lovence.¹⁴ In short, then, I want to argue that we are in need of a radical understanding of freedom in order to fight the radical denial of freedom that is constitutive of totalitarianism.

II FREEDOM AS DEPENDENT ON ACTION AND PLURALITY (READ APPEARANCE)

Hannah Arendt's understanding of freedom is fundamentally tied to the concept of appearance. Given her conviction that the public sphere is the sphere of light and visibility, appearance is a possibility only of the public realm. In this sense, the existence and maintenance of a public sphere distinct from the private sphere is essential for the appearance of freedom. Given this connection between freedom, appearance and the public realm, Arendt insists that '[t]he *raison d'être* of politics is freedom and its field of *experience* is action'.¹⁵ Put differently, Arendt believes that the reason why human beings live in a political organisation at all is for the sake of 'the experience of freedom'.¹⁶ For Arendt the transposing of freedom from its original field of politics to an inward domain, the will, has distorted, instead of clarified the idea of freedom.¹⁷

In addition to the necessity of a public sphere, Arendt ties the principle of action to freedom. She insists that 'the fact that man is a being endowed with the gift of action must always be present to our mind when we speak of the problem of freedom'.¹⁸ And she even goes as far as to equate freedom with action: 'to act is to be free'.¹⁹ Acting, then, is the activity by way of which we actualise our capacity for freedom. Action, as Arendt asserts, is identifiable by reference to the principle of natality – it consists in the ability to begin something new, to call something into being which did not exist before, to do the unexpected, something which is not mundane or part of an everyday routine, norm or even normalisation.²⁰ For Arendt, man himself is constituted as beginning and in this sense, man possesses from birth the capacity to 'be' free. However, this capacity to begin, which is 'the hidden source of production of all great and beautiful things',²¹ develops fully only when it passes into the light of the public sphere; when it makes its appearance. This implies,

¹⁴ Ibid at 7.

¹⁵ H Arendt *Between Past and Future* introduction by J Kohn (2006) at 145.

¹⁶ Nancy (n 1).

¹⁷ Arendt (n 15) at 145.

¹⁸ Ibid.

¹⁹ Ibid at 151.

²⁰ Ibid at 150.

²¹ Ibid at 167.

argues Arendt, that action – and thus freedom – depends *fundamentally* on the presence of others:

Freedom needed, in addition to mere liberation, the company of other men who were in the same state, and it needed a common public space to meet them – a politically organized world, in other words, into which each of the free men could insert himself by word and deed.²²

A different way of putting this would be to say that plurality undergirds Arendt's conception of the public sphere and her suggestion that the experiential field of freedom is action. This is because plurality is *constitutive* of the political, 'the condition of all political life, the fact that men, not Man, live on the earth and inhabit the world'.²³ Yet the constitutive plurality of the political is for Arendt only sustainable *as plurality* where and when it spaces. The field of freedom's experience is thus inconceivable without the space of appearance.²⁴ Action as the actualisation of freedom – as the activity by way of which freedom *reveals* itself to the actor and the spectator – thus depends in a fundamental way on plurality – the existence of multitudes of different others in the world. Action – freedom – is thus not something that can be done 'in isolation from others, that is, independently of the presence of a plurality of actors who from their different perspectives can judge the quality of what is being enacted'.²⁵ Arendt aligns her concept of freedom with the concept of *virtu* in Machiavelli, which she defines as 'the excellence with which man answers the opportunities the world opens up before him'.²⁶ For her the virtue of action lies in the fact that it is an end in itself, a performance that is not (necessarily) outlasted by anything. As Thiele indicates, the reason why Arendt strips freedom both from the initial motivations for its pursuit as well as from its goal is because for her freedom is a public event.²⁷ The end of politics, then, is for Arendt to establish and maintain 'a space where freedom as virtuosity can appear'.²⁸ And whatever happens in the space of appearance is political by definition, because the space of appearance is only constituted through speech and action.²⁹ Given Arendt's resistance to the idea of freedom as the *liberum arbitrium*,

²² Ibid at 147.

²³ See H Arendt *The Human Condition* introduction by M Canovan (1998) at 8.

²⁴ As Arendt puts it: 'The space of appearance comes into being wherever men are together in the manner of speech and action, and therefore predates and precedes all formal constitution of the public realm and the various forms of government, that is, the various forms in which the public realm can be organized.' Ibid at 199.

²⁵ M Passerin d'Entrèves *The Political Philosophy of Hannah Arendt* (1994) at 70.

²⁶ Arendt (n 15) at 151.

²⁷ L P Thiele 'Heidegger on freedom: Political not metaphysical' (1994) 88(2) *The American Political Science Review* 278 at 287.

²⁸ Arendt (n 15) at 153.

²⁹ Ibid.

the notion of appearance – words that can be heard and deeds that can be seen – stands central in her conception of freedom. This is simply a different way of saying that in Arendt's thought the bringing into being of the space of appearance distinguishes the human being as human. From the Arendtian position it is possible to infer the notion that human beings cannot be fully human without each other, precisely because appearance is meaningless where it is not appearance *for or before* the spectator.

I have previously argued that the South African Constitutional Court has, on a number of occasions, confirmed the importance of this configuration of plurality for the transformation of South African society.³⁰ In *Prinsloo v Van der Linde*,³¹ for example, the court acknowledged that apartheid totalitarianism denied plurality as constitutive of politics, and affirmed that the protection of plurality is a central feature of the task of transformation:

Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the arrival of the new constitutional order.

In *National Coalition for Gay and Lesbian Equality and Others v Minister of Justice and Others*,³² Ackermann, explicitly linked plurality to the constitutional guarantee of equality and contrasted it to the totalitarian South African past where he stated that: 'The desire for equality is not a hope for the elimination of all differences. "The experience of subordination – of personal subordination, above all – lies behind the vision of equality."³³ This assertion that the experience of subordination is the matrix through which constitutional equality is to be approached already implies the affirmation of freedom. For if subordination consists in the renunciation of freedom then freedom is the liberation from that renunciation.

This judgment marks the Constitutional Court's strongest,³⁴ unequivocal affirmation that plurality fundamentally depends on differ-

³⁰ J Barnard 'Totalitarianism, (same-sex) marriage and democratic politics in post-apartheid South Africa' (2007) 23 *SAJHR* 500.

³¹ 1997 (3) SA 1012 (CC) para 20.

³² 1999 (1) SA 6 (CC).

³³ *Ibid* para 22.

³⁴ See the earlier judgment in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 41: 'At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.'

ence, that equal respect for difference is at the heart of equality³⁵ and that equality depends, in large parts, on the protection of political minorities:

It is easy to say that everyone who is just like “us” is entitled to equality. Everyone finds it more difficult to say that those who are “different” from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.³⁶

Per Sachs J, the Court also emphasised that there is inherent in the concept of plurality a notion of togetherness:

[T]he 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.³⁷

Sachs J concluded his judgment with the opinion that the decriminalisation of sodomy ‘should be seen as part of a growing acceptance of difference in an increasingly open and pluralistic South Africa’ and hoped for ‘greater sensitivity to the variability of the human kind.’³⁸ In many ways the *National Coalition* judgment implicitly argues that the sodomy prohibition laws were not simply a totalitarian invasion of the fundamental right to privacy – the sodomy prohibition laws *also or simultaneously* denied homosexual men the space of appearance. In this sense it denied them their humanity because it denied them the possibility of the experience of freedom – in the fact that they, too, are creatures marked by natality and capable of action predicated on such natality. In addition, the judgment furthers the argument that these laws also implied the denial of humanity itself in that they denied plurality as constitutive of distinctively human life. That this matter was not a- or pre-political in any way is dramatically played out in the opening sentences of the judgment of Sachs J:

Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community.

³⁵ *National Coalition* (n 32) para 112.

³⁶ *Ibid* para 22.

³⁷ *Ibid* para 117.

³⁸ *Ibid* para 138.

At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.³⁹

Given the numerous defences of plurality offered by the Constitutional Court I want to argue that these defences of plurality can be seen as implicitly, though unintentionally, defending a different understanding of freedom than the defence of negative freedom offered by Justice Ackermann in *Ferreira* – a defence which Ackermann himself equivocates about and a defence of which he is the sole champion in *Ferreira*.

Ackermann famously defines freedom ‘negatively as the right of individuals not to have “obstacles to possible choices and activities” placed in their way by (for present purposes we need go no further) the State’.⁴⁰ I would argue, however, that the Arendtian understanding of freedom depends on a vision of the state as precisely mandated to place limitations ‘on possible choices and activities’ when those choices and activities are directed at the denial of the space of appearance. Perhaps it is not entirely (or no longer) a question here of limitation on possible choices and activities but rather a case of limitation that is at once *de*-limiting – a case of the limitation that in the first place makes plurality (and thus freedom) possible; a *de*-limitation then that is intent on saving the space of appearance.⁴¹

The negative version of freedom offered by Ackermann is, undoubtedly, haunted by the spectre of (state) totalitarianism. Yet the liberal, non-totalitarian freedom that is proposed here does not take account of the extent to which totalitarianism is not just, or simply, a state activity. Or perhaps Ackermann’s liberal, negative definition does precisely that. Perhaps it acknowledges precisely that the source of state totalitarianism is not the state itself. In this respect, it is important to note that Ackermann’s definition of negative freedom views freedom as the *liberum arbitrium* – it is the *individual* who cannot be limited in his *choices* and activities. This is confirmed when Ackermann approvingly cites Kant’s definition of freedom as ‘independence of the constraint of another’s will’.⁴² Even though Ackermann stops just short of a definition that would include other persons (others’ wills) as sources of ‘obstacles to possible choices and activities’, and even though he rejects the ‘concept of the individual as being in heroic and atomistic isolation from the rest of humanity, or the environment, for that matter’,⁴³ Ackermann ultimately

³⁹ Ibid para 107.

⁴⁰ *Ferreira* (n 6) para 54 (reference omitted).

⁴¹ The instant ‘appropriation’ of the instability of the word ‘delimitation’ is inspired by Johan van der Walt’s use of it in J W G Van der Walt ‘Horizontal application of fundamental rights and the threshold of the law in view of the *Carmichele* saga’ (2003) 19 *SAJHR* 517 at 539.

⁴² *Ferreira* (n 6) para 52.

⁴³ Ibid.

sees that the dangerous potential of *others' wills* is that they can radically deny freedom.

This, however, is the denial of a freedom very different from that of Arendt, because the freedom that is at issue here is a freedom of the will. Ultimately, Ackermann's definition of freedom is not sufficiently concerned with the (radical denial of) freedom that Arendt identifies as dependent on plurality, the freedom that is appearance and the freedom that is constitutively dependent on the presence of others.

I want to emphasise, however, that it is not my contention that the rest of the court in *Ferreira*, by way of its rejection of Ackermann's reading of freedom, on the one hand, and its affirmation of plurality, on the other, defends an explicitly Arendtian version of freedom. Indeed, many contributions in this volume show that a significant part of the court's disagreement with Ackermann in *Ferreira* lies not so much in his defence of negative freedom but rather in his admirable defence of residual freedom rights. To put it more bluntly, I believe that Ackermann's defence of a residual right to freedom undermines his own defence of negative freedom and it is the residual right to freedom that can be argued to include Arendt's conception of freedom as appearance.⁴⁴

What I am suggesting about the court's concern for plurality is – given the above reading of Ackermann J in the *Ferreira* judgment – that it opens the door for arguing that the Arendtian understanding of freedom deconstructively seeps into the court's jurisprudential texts by way of a particular reading of its defence of plurality.⁴⁵ In this way Arendtian freedom (and freedom thought in or along the Arendtian trajectory) not only comes to inform the ideal of freedom as a foundational ideal in our Constitution, but also comes to contest both Ackermann J's defence of freedom as negative and the rest of the court's denial that there can be a freedom other than the freedom envisaged in the rights enumerated in Chapter 2 of the Constitution.

In her essay on freedom, Arendt worries that in the wake of totalitarianism we come to doubt the co-occurrence of freedom and politics; in fact, she argues, 'we are inclined to believe that freedom begins where politics ends, because we have seen that freedom has disappeared when so-called political considerations overruled everything

⁴⁴ To be sure, the political rights in the Constitution serve as formal protections of the space of appearance, but in many cases the space of appearance depends for its realisation on an extension or re-interpretation of the traditional substantive concept of political rights. A good example in this regard is Sachs J's notion of *moral* citizenship, which does not posit as precondition the formal existence of citizenship, as is illustrated in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC). In these instances it can be argued that the space of appearance is more meaningfully protected under a residual freedom regime.

⁴⁵ As Thiele (n 27) at 289 puts it: '[T]he task is one of problematizing, supplementing and, and perhaps sublimating practise.'

else'.⁴⁶ Yet it is important to point out, going forward, that totalitarianism represents the very opposite of politics as Arendt defines it, because in her thought politics is constituted by plurality, whereas totalitarianism, as she makes quite clear in *The Origins of Totalitarianism*, is (constitutively) concerned with the destruction of plurality and thus with the destruction and the end of politics.⁴⁷

From the quotations above it is clear that the South African Constitutional Court supports a vision of *human* life as constituted by plurality. It is, as I have asserted, by no means clear that it supports a vision of freedom as appearance through action and speech (i. e. a version of freedom grounded in the Arendtian version of the political). In what follows I will argue that the unqualified support for plurality creates space for a radical understanding of freedom as grounded not so much in what Arendt calls natality but rather in what Jean-Luc Nancy calls 'birth' in *The Experience of Freedom*.

III SHARING FREEDOM FREEDOM SHARING

Lesley Thiele has argued that Arendt's insistence on the link between appearance and freedom 'is most fruitfully viewed as a reconstruction of Heidegger's notion of disclosive freedom'.⁴⁸ In Heidegger disclosive freedom is neither negative nor positive. Instead, disclosive freedom designates both the arrival of beings to presence and their withdrawal into absence.⁴⁹ In its most important difference with Berlin's notion of freedom, Heidegger's disclosive freedom attempts to go beyond the mastery inherent in Berlin's conceptions.⁵⁰ In this way, Heidegger's freedom is an attempt to go beyond the thinking of freedom in relation to a firm or grounded self-present subjectivity.⁵¹ As Heidegger puts it: "To be free is to understand oneself from out of one's own capacity-to-be; but "oneself" and "one's own" are not understood individually or egoistically . . . They are understood in the basic possibilities of transcending *Dasein*, in the capacity-to-be-with with others, in the capacity-to-be by extant things."⁵²

Jean-Luc Nancy takes the reconstruction of Heideggerian freedom further but in the registers – or along the trajectory – of Arendtian

⁴⁶ Arendt (n 15) at 148.

⁴⁷ See H Arendt *The Origins of Totalitarianism* (1985) at 466: '[T]he iron band of terror, which destroys the plurality of men and makes out of many the One . . .'; and 467: 'In a perfect totalitarian government, where all men have become One Man . . .'.

⁴⁸ Thiele (n 27) at 287.

⁴⁹ *Ibid* at 283.

⁵⁰ *Ibid* at 282.

⁵¹ A Norris 'Jean-Luc Nancy and the myth of the common' (2000) 7(2) *Constellations* 272 at 274.

⁵² M Heidegger *The Metaphysical Foundations of Logic* translated by M Heim (1984) at 214 as quoted in Thiele (n 27) at 283.

plurality and natality.⁵³ Nancy's *The Experience of Freedom*, however, represents an attempt to think a non-subjective freedom, the freedom that is in the first place the condition of all subjective freedoms.⁵⁴ Of course, deeply informed by the Heideggerian version of freedom, Nancy takes issue with the classical thinking of freedom which associates freedom with what he calls 'the determination of an ontology of subjectivity'.⁵⁵ In this ontology of subjectivity, freedom is thought as nothing other than 'the fundamental modality of the act of appearing for oneself',⁵⁶ which has as its corollary a potentialisation of this act so that freedom becomes the act of representing oneself as the potential for representation. This is none other than the Kantian idea of freedom as free will.⁵⁷

The Experience of Freedom, however, is dedicated to the inability and destitution of subjectivity in grounding itself. In this sense it is dedicated to the experience of groundlessness, which is not at all the experience of simple impotence.⁵⁸ As Fenves indicates in his foreword to *The Experience of Freedom*:

[S]ubjectivity is not simply impotent; if power implies causality, which it surely does, then the shipwreck of subjectivity means it has *none*, and this marks the end of subjectivity altogether. But in this end there is *finite* freedom, a freedom that does not amount to a limited space of action but is, rather, the opening . . . onto the limit, onto groundlessness. . . .⁵⁹

It is this thinking beyond subjectivity, beyond the 'limited space of action', that represents Nancy's most significant departure from Arendt. Nancy's pre-occupation in this notion of freedom beyond subjectivity is to open our eyes to the freedom that underlies the logic of 'freedoms' in the first place, namely the freedom that designates existence itself. To quote Nancy: '[I]t is a question of offering human beings to a freedom of being, it is a question of presenting the humanity of the human being (his "essence") to a freedom *as being* by which existence absolutely and resolutely *transcends*, that is, *exists*.'⁶⁰ Taking as his point of departure the famous phrase in Heidegger that existence is its own essence,⁶¹ Nancy radicalises the Arendtian notion of plurality by arguing that existence itself is always already plural – that is, existence is originally divided, not

⁵³ See Norris (n 51) at 276 in the elaboration of Arendt's influence on Nancy.

⁵⁴ Nancy (n 1) at 7.

⁵⁵ *Ibid* at 4.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at 5.

⁵⁸ *Ibid* at 14.

⁵⁹ *Ibid* at xxiii.

⁶⁰ *Ibid* at 13.

⁶¹ M Heidegger *Being and Time* translated by J Macquarrie & E Robinson (1978) at 67.

present to itself. And this means that existence – the term that Heidegger reserves exclusively for *Dasein* – is originally a relation to otherness.⁶² Freedom is the fact of this ex-istence, the name of the original and constant mediation: the ‘restlessness of the exposition to otherness’.⁶³

What is the link between a non-subjective freedom and totalitarianism? Andrew Norris argues that totalitarianism consists essentially in the self-production of the subject. ‘The dream of subjectivity’, he asserts, ‘entails the denial of difference, plurality and, in the end, what we might call the human condition – that is, *Da-sein*’s finitude’.⁶⁴ If we were to read Arendt’s warning that totalitarianism is the most radical denial of freedom against this insight, it would appear that totalitarianism consists precisely in the denial not *primarily* or *originally* of subjective freedom or a freedom tied to subjectivity, but rather and precisely in a denial of that freedom that is *untied* from the subject. Nancy thinks of totalitarianism in terms of a renunciation of this freedom through its subjection to a form of essence.⁶⁵ For Nancy, we need to think of freedom as the *fact* of existence (as its own essence), which here designates the inability to provide – *or give oneself* – a ground or identity or constancy.⁶⁶ As Norris indicates, the decision in favour of existence would entail (at the very least) a denial of the pursuit of a common identity that attempts to suppress our being-in-common.⁶⁷

This freedom as the restless relation to existences – Nancy’s reconstruction of a Heideggerian version of disclosive freedom – does not depend (as is the case in Arendt) on the positing of relations as *preceding* freedom – relation exists contemporaneously with freedom in the same way that singularity exists contemporaneously with the being-in-common.⁶⁸ Succinctly put, Nancy argues that the Heideggerian *Dasein* exists contemporaneously or co-originally with the *Mitsein* in that *Dasein* is always already thrown into relation with others.⁶⁹ As Nancy puts it: ‘One could say: the singular of “mine” is by itself plural.’⁷⁰ From this point of view, the locution ‘I am’ cannot but announce the plurality of the ‘we are’ for the ‘I am’ and the ‘we are’ are co-original. Nancy’s main philosophical charge against Heidegger is that Heidegger paid too much attention to *Dasein* and thereby underemphasised – in some cases even

⁶² P Matteo ‘The sense of freedom. The surprise of being-in-common’ (2005) 16 *Law and Critique* 315 at 326.

⁶³ *Ibid* at 333.

⁶⁴ Norris (n 51) at 278.

⁶⁵ Nancy (n 1) at 17.

⁶⁶ *Ibid* at xxii.

⁶⁷ Norris (n 51) at 285.

⁶⁸ Nancy (n 1) at 66.

⁶⁹ *Ibid* at 67.

⁷⁰ *Ibid*.

ignored – the (constitutive) importance of *Mitsein*.⁷¹ For Nancy, however, freedom is always already a freedom-with and in that sense ‘freedom is relation, or . . . freedom is in relation and as relation’.⁷²

Nancy’s intervention is of course deeply informed by his acute awareness of the problematic that inheres in communitarian thought. Although it is true that Nancy unequivocally places the ‘with’ ‘back into the heart of being’⁷³ this is not a notion of being-together/being-with that depends on or is predicated on notions of similarity, sameness or commonality. The aspects of such a problematic of community could be collected under the signifier of ‘oneness’.⁷⁴ Its pathology is best summarised by what Derrida calls ‘identitarian compulsion’.⁷⁵ Against such a dangerously totalising notion, Nancy emphasises plurality by arguing that what is shared in the being-with as being-in-common is singularity.⁷⁶ The relation that is inaugurated in this sharing is a relation without relation or a restless relation that is ever exposed to otherness and as such undermines any firm, fixed or closed identity.⁷⁷

Nancy also radicalises Arendt’s notion of natality through the elaboration of his idea of ‘birth’ and the ‘each time’. He argues that the freedom of an existence is essentially a surprise: it arises or arrives unpredictably as birth.⁷⁸ The sur-prise of the freedom of an existence, argues Nancy, accords with ‘the act of the subject at the limit of subjectivity’ which is the place/space ‘where the self essentially differs and differs in itself’.⁷⁹ It is because of its presentation of this *sur-prise* (the being overtaken – struck – by the fact of the freedom of existences) that Fenes argues that *The Experience of Freedom* could also be called “‘the experience of the other’ or ‘the experience of difference’”.⁸⁰

In reflecting on Nancy’s notion of ‘birth’, Derrida indicates why it is a radicalisation of Arendt’s idea of natality. Derrida argues that Nancy’s notion of birth falls to be distinguished from creation, beginning or origin: ‘The experience of birth, with all it implies, does indeed call for a singular thought – singular first because it does not reduce birth to either

⁷¹ See J L Nancy ‘The being-with of being-there’ (2008) 14(1) *Continental Philosophy Review* 1. Also see I Devisch ‘A trembling voice in the desert: Jean-Luc Nancy’s rethinking of the space of the political’ (2000) 4(2) *Cultural Values* 239 at 241.

⁷² Nancy (n 1) at 69.

⁷³ Devisch (n 71) at 242.

⁷⁴ On the problematic nature of oneness in the guise of plurality simply understood as ‘the numerosness of the like-minded’ see Van der Walt (n 9) at 8–10. Also see Derrida *Archive Fever* (1995) at 78: ‘As soon as there is the One, there is murder, wounding, traumatism.’

⁷⁵ J Derrida & E Roudinesco *For What Tomorrow . . .* translated by J Fort (2004) at 21.

⁷⁶ Nancy (n 1) at 67.

⁷⁷ Matteo (n 62) at 326.

⁷⁸ Nancy (n 1) at 68.

⁷⁹ *Ibid* at 115.

⁸⁰ *Ibid* at 182.

genesis or creation or beginning or origin'.⁸¹ In this regard Derrida worries about the extent to which birth becomes precisely reduced in politics to something that forges relations based on identity, similarity or proximity, for example citizenship by birth. This reduction closes down precisely the *surprising* aspect of birth and thus threatens to close down the idea of 'a cosmopolitanism and its beyond, the future of international law'.⁸² Derrida concludes that Nancy's notion of birth and of the each time is directed at the displacement of the calculative, conditional and economic appropriations of birth.⁸³ In *The Experience of Freedom* this is most apparent in the following passage, which Derrida quotes in *Rogues*:

Singularity consists in the "just once, this time" whose mere enunciation – similar to the infant's cry at birth, and it is necessarily *each time* a question of birth – establishes a relation at the same time that it infinitely hollows out the time and space that are supposed to be "common" around the point of enunciation.⁸⁴

On Nancy's own terms, then, it is not the end that is interminable but rather the beginning and it is freedom that is the beginning and remains the beginning, or remains as beginning.⁸⁵ Nancy goes as far as to assert that one of the greatest problems with thought about democracy today is precisely that it fails to think this initiality; this initiality that consists in the surprise of being-in-common. For the reason that democracy has always been thought in terms of the guarantee of freedoms without first guaranteeing initiality, (the freedom that is not *established*), Nancy is sceptical that it will – in thinking the future – be possible to think in terms of *democracy*.⁸⁶ The initiality in terms of which Nancy thinks freedom – the radical initiality – is uncontrollable and non-calculable. As such, it is an initiality that points to a beyond of politics towards a different political – a political that no longer consists in the 'composition and dynamic of powers' but 'in the opening of a space'⁸⁷ which is the space where freedom *appears* as existence in accordance with relation.

For Nancy, then, freedom is a matter of 'the free space and spacing of time where only the singular *one time* is possible'.⁸⁸ But he insists that freedom precedes singularity in the sense that freedom is that which both spaces and singularises. And as such, freedom gives, or is, relation in such

⁸¹ J Derrida *Rogues: Two Essays on Reason* translated by P A Brault & M Naas (2005) at 61.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ Nancy (n 1) at 66.

⁸⁵ *Ibid.* at 77.

⁸⁶ See the discussion in J Derrida *Negotiations* edited and translated by E Rottenburg (2002) at 178–82.

⁸⁷ Nancy (n 1) at 78.

⁸⁸ *Ibid.*

a way that this relation is a being-in-common: ‘nothing that we would have as common property’ or differently put, a being singular plural, a matter of ‘ipseity constituted by and as sharing’.⁸⁹ Stewart Motha summarises Nancy’s being singular plural – the fact of freedom – as follows (it is worth quoting at length):

I am a *singular* being *among* a multiplicity of other singular beings. I and each of the others are originally singular, but it is a singularity that is at once plural: the Latin *singuli* means “one by one” (a word that exists only as a plural). “The alterity of the other is its being-origin”. These being-origins are multiplicitous. The “other” is not the “essential stranger who is simply opposed to what is proper” as in many constructivist accounts. The other of being-origins is “one of the two”. Each one is the other origin of us all because we cannot “be alone being alone”. I am, we are, singular plural. In this way the “being-with” is never secondary to an origin. The origin itself is a coexistence of origins. This is essentially what is expressed in the phrase “being singular plural”.⁹⁰

IV SPACING FREEDOM (DIGNITY?)

The fact that freedom is for Nancy at the heart of being as always already *shared* being would mean, as we have seen, that it is freedom that opens/clears – as opposed to fills – the space for this sharing: ‘[F]reedom’, as Nancy puts it ‘is that which spaces and singularises’.⁹¹ In this sense, freedom is the *withdrawal* of being which gives relation.⁹² This would imply, argues Nancy, that freedom is immediately linked to equality. From Arendt we see that plurality (as a fundamental precondition to the experience of freedom) must exist as a matter of equality. On the one hand, freedom as that which clears this space of the sharing of singularities is thus that which makes this plurality possible. On the other hand, freedom alone cannot guard this plurality. For the plurality to be honoured, (or differently put, for freedom *to* space) equality must necessarily be part of thinking freedom. This is why Nancy insists that freedom ‘is immediately *equal to equality*’.⁹³ In other words, the being-with others in the world requires an unbreachable equality of being as being-in-the-world and this equality ‘belongs’ to, or is a condition of, freedom.⁹⁴

Nancy clearly favours an interpretation of equality that focuses explicitly on the ‘equality of singularities in the incommensurable of freedom’.⁹⁵ However, as Derrida has noticed, Nancy concedes an aporia

⁸⁹ Ibid at 69–70.

⁹⁰ S Motha ‘The sovereign event in a nation’s law’ (2002) 13 *Law and Critique* 311 at 336.

⁹¹ Nancy (n 1) at 68.

⁹² Ibid.

⁹³ Ibid at 71 (emphasis in the original).

⁹⁴ Ibid at 168.

⁹⁵ Ibid at 71.

in equality. This is the case because Nancy denies that equality of singularities in the incommensurable of freedom necessitates doing away with 'a technical measure of equality . . . which actually makes possible, under given conditions, access to the incommensurable'.⁹⁶ Derrida argues that political, ethical and legal responsibility is in fact constituted by this aporia. This aporia is precisely what grounds the institution of the political and the democratic in the technical measure of equality but, *at the same time*, the incommensurable that Nancy reserves in equality is put into negotiation with this technicity and so points to a beyond of the political and the democratic constituted in this limited (measured) way.

Up to now, we have spoken of two of the traditional emancipatory ideals, freedom and equality. In South Africa 'fraternity' as a third traditional emancipatory ideal was replaced with human dignity. This human dignity is often said to lie at the heart of the new constitutional order. As regards fraternity, Nancy argues that fraternity thought consistently with his notion of freedom must be understood as 'the relation of those whose *Parent*, or common substance, *has disappeared* delivering them to their freedom and equality'.⁹⁷ This would entail that there is no measure for freedom, that freedom does not measure itself against anything. Nancy refers in this regard to Freud's tale in which the sons of the primal father share the responsibility for his death (which in a sense gives them the force of law) but they also share his dismembered body. He concludes with the contention that fraternity is 'equality in the sharing of the incommensurable'.⁹⁸ In *Rogues*, Derrida takes serious issue with Nancy's use of fraternity in this context. Pointing out that Nancy himself is not so certain about the use of this word, Derrida draws attention to his own attempt in *Politics of Friendship* to deconstruct fraternity in the philosophical discourse on friendship. He concludes that his greatest concern with Nancy's use of fraternity is that it risks, precisely, a de-radicalisation of Nancy's notion of birth:

[W]hen it comes to politics and democracy this fraternalism might follow at least the temptation of a genealogical descent back to autochthony, to the nation, if not actually to nature, in any case, to birth, to *naissance*. I would wish to put this crucial word from the same family, this word *naissance*, before any other, before nature and before nation.⁹⁹

It is at this point that I find it necessary to take leave of Nancy, or perhaps I will take leave of him by following him and not following him. In any event, I do this primarily to explain what I see as the symbolic and

⁹⁶ Ibid at 71. See Derrida (n 81) at 47–55.

⁹⁷ Ibid at 72.

⁹⁸ Ibid.

⁹⁹ Derrida (n 81) at 61.

ethical significance of replacing fraternity as emancipatory ideal with dignity, as was done in the South African Constitution in addition to grounding the entire reconstituted legal order on the ideal of dignity. To explain this significance as I see it, I must follow both Derrida and Nancy. I must follow Derrida in his assertion in the same chapter in *Rogues* 'that pure ethics, if there is any, begins with the respectable dignity of the other as the absolute *unlike*, recognised as non-recognisable, indeed as unrecognisable, beyond all knowledge, all cognition and all recognition'.¹⁰⁰ Yet, inspired precisely by both this insight of Derrida's *and* by Nancy's argument that the *disappearance* of the common substance is what delivers equality and freedom, I would argue that in South Africa 'we, the people'¹⁰¹ share the dismembered body (the disappearance) of the old apartheid South Africa which first and foremost consisted in the *maintenance, preservation and upholding* of 'common substance'. Apartheid was undergirded by the most perverse understanding of the political as fraternity, ('fraternocracy' as Derrida puts it¹⁰²) and this fraternity consisted precisely not in Nancy's specific understanding of fraternity but in an ideology that attempted the ongoing *preservation* of common substance. It was a fraternity that turned murderously *against* the respectable dignity of the other (including against the other in oneself), *against* equality in the sharing of incommensurability.

Moreover, apartheid consists in a denial not merely of the dignity of the oppressed other; it also consists in a suicidal denial of dignity that opens the possibility of oppression – the renunciation of freedom – in the first place. It is the sharing of the dismembering of the 'common' body (the sharing in the (ongoing) destruction – *disappearance* – of the corpus of apartheid) that points to the respectable dignity of the other as the beyond of the political and therefore as the law of the political – which delivers us to 'our' freedom and equality as it gives us the force of law. It is the recognition that 'we' (as the pronouncement of the plural of singularity, the singularity that is at once plural) are 'united' by (and thus sharing our incommensurability, our equal non-belonging *to* (our non-objectifiable, non-commodifiable, no-thingness¹⁰³) that must similarly be understood as delivering us to our freedom and equality. If this

¹⁰⁰ Ibid at 60.

¹⁰¹ See the preamble to the Constitution of the Republic of South Africa, 1996.

¹⁰² Derrida (n 81) at 50.

¹⁰³ See 'Love and Community: A round-table discussion with Jean-Luc Nancy, Avital Ronell and Wolfgang Schirmacher' available at www.egs.edu/faculty/nancy/nancy-roundtable-discussion2001.html (accessed 6 September 2008). Nancy distinguishes nothingness from nihilism in the following way: 'Precisely, nothing is nothing nihilist. All these questions are somehow about what we should do with nihilism. That is sure, that we are in the middle of nihilism. That means we no longer have a heaven of value, or a tradition, or a nature. This is precisely the reason for what we have, in so different a manner, to do with the nothingness, which precisely is not nihilistic. If we go a step further with nothing, we say that nothing is

equality in the sharing of the incommensurable is a fraternity without fraternity, a fraternity without fraternisation and considered no longer on the basis of common substance but on the basis of the *absence* of common substance in approximation to the respectable dignity of the *other*, then freedom spaces and equality shares, the withdrawal of being that gives relation. Dignity then – the respectable dignity for the one who is *un-like* – is the equality in the sharing of the *incommensurable* of freedom – equality in the sharing of that for which there is no measure. And from this we can see that, at its very heart, ‘to be (to exist) is to share’.¹⁰⁴

To emphasise then, I do not wish to dispute by any means that this respectable dignity of the other has immense implications for what currently passes under the signifier of ‘the political’ or of ‘democracy’. It is to that transformation that I turn below.

V THE SPACE OF SHARING

What is the nature of this space in which we share; this space that constitutes existence as being singular plural? It is not by virtue of any whim that Arendt is the one to whom Nancy turns when he faces this question. He points out that Arendt was the theorist who pointed out that ‘the originary form of freedom was the free space of movements and meetings: freedom as the external composition of trajectories and outward aspects, before being an internal disposition’.¹⁰⁵ Accordingly, in Arendt, as we have seen, freedom originates in the public or political space.

Nancy, however, takes a view of the public or political that is different from Arendt’s. In the first place, Nancy attempts a conceptualisation of the political that is itself non-subjective or post-subjective.¹⁰⁶ From this it follows that freedom *does not wait* for the political¹⁰⁷ – the political is *initiated* by freedom as itself initial and initiating. This is why Nancy argues that ‘the political is the “spaciousity” (itself spatiotemporal) of freedom’.¹⁰⁸ The political, Nancy argues, is the space of the inaugural sharing¹⁰⁹ of freedom as spacing, as giving space and time.¹¹⁰ It ‘is given from the outset in the form . . . of the common (absence of) measure of an incommensurable’¹¹¹ (dignity). This means that the task of politics is

no-thing. What is no-thing? This is I would say is everything which is not a thing. You and me, for example. Who here would accept to be a thing?

¹⁰⁴ Nancy (n 1) at 72.

¹⁰⁵ Ibid at 74.

¹⁰⁶ Devisch (n 71) at 246.

¹⁰⁷ Nancy (n 1) at 77.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid at 79.

¹¹⁰ Ibid.

¹¹¹ Ibid.

'each time' a task of beginning (again) – a task of (re)opening the space of sharing. What is important to bear in mind, then, is that when, it comes to freedom, this spacing is 'a partitioning of the origin in which singularities space apart and space their being-in-common'¹¹² such that *displacement*, in any negative sense, is constitutively precluded, perhaps foreclosed.

I have mentioned that the *measure* (in a certain sense) of the new South Africa will be the extent to which it will be able to overcome its totalitarian past. Nancy's account of freedom offers us the idea that the measure of the New South Africa will be the extent to which it measures the measurelessness of freedom. Nancy's account of freedom offers us a rethinking of the space of the political as 'each time' a space and time of appearance-as-birth, that is, the appearance of being in human beings that surprises and overtakes (*sur-prise*), does not wait. In this sense Nancy offers us a radical (space for) freedom which radically denies the onslaught of all totalitarianisms. His notion of freedom, I think, offers us the beginnings of a *post-apartheid freedom as a post-totalitarian freedom*, because it offers us the possibility of a thinking of freedom as relation, as being-with and not apart, as clearing the space of appearance and not violently closing it down. Yet, this is a *post-apartheid* freedom that is not totalitarian in that it denies that the self-production of subjectivity or the realisation of a common identity is a condition of a post-apartheid togetherness. Nancy's version of freedom offers us, to borrow from Johan van der Walt, a way in which it is conceivable to align the affirmation of radical horizontality (which is coupled with the resistance to all privatisations of the political)¹¹³ with the right to freedom in the Constitution. Well aware of the totalising dangers of communitarian thought, Nancy's conception of freedom offers us a version of freedom that escapes totalitarian compulsion. It also offers us an understanding of dignity that *makes sense* of (this) freedom.¹¹⁴

If freedom is thought of in these registers, then the South African transition may indeed be considered a revolution, because it was motivated by the very thing that the revolutionary tradition represents: the *taking* of freedom, the opening of a space, the production of the actor on the stage.¹¹⁵ Inscribing the respectable dignity of the other as that which reconstitutes (and is reconstituting) the South African legal order, also represents a revolution in that which is considered under, or as,

¹¹² Ibid.

¹¹³ Van der Walt (n 9) at 64–77. Also see J W G 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) *Journal of South African Law* 605 at 605–07.

¹¹⁴ Motha (n 90) at 334 indicates that Nancy's concept of sense indicates the border between the absolute value of myth and the complete absence of value (nihilism).

¹¹⁵ Nancy (n 1) at 78.

fraternity. This is the revolution that our Constitution sets in motion if there is ever to be talk of a post-apartheid South Africa or even of a post-apartheid world. This is a revolution built on the sharing of the equality in incommensurability that lies at the heart of being-with. It is a revolution that *favours* light, not darkness, appearance and performance, not enclosure and loneliness. Birth, not death. Beginning, not finality.¹¹⁶ But it is revolution that also acknowledges that, yes, *there is*, darkness, enclosure, loneliness, death and finality and that these are always at the very heart of their revered opposites; that the renunciation of freedom is always close to its enunciation.

Much more could be said about this revolution, but for now there remains the matter of civic or political friendship. In Arendt, this friendship is the public bond founded on two ideas that she borrows from Augustine, the first being *amor mundi* (love of the world) and the second the notion of *volo ut sis* (I want you to be). For Arendt political friendship can be characterised as ‘a regard for the person from the distance which the space of the world puts between us’.¹¹⁷ Under totalitarianism the ideal of political friendship – the friendship that would, in its radicalisation harbour the promise of revolutionary horizontality – is shattered precisely because totalitarianism destroys the space between. Arendt also rigorously distinguishes love from friendship. Love, she argues, is essentially anti-political by its very nature.¹¹⁸ Into this separation, the work of Jacques Derrida and Drucilla Cornell intervene in a brave and extraordinary way.

VI FOR THE LOVE OF LOVENCE

Sister blister we fight to please the brothers
 We think their acceptance is how we win
 They're happy we're climbing over each other
 To beg the club of boys to let us in¹¹⁹

As we have already seen, Derrida's work on friendship questions relentlessly the idea of a friendship founded in fraternity. As Derrida asks us already in the opening passages of *Politics of Friendship*: ‘Let us dream of a friendship which goes beyond this proximity of the congeneric double, . . .’¹²⁰ For Derrida the question of friendship turns on the question of the Other. Indeed, a self-other configuration of friendship – as opposed to a self-self or self-same configuration on which the notion of the friend

¹¹⁶ See J Derrida ‘Final words’ (2007) 33 *Critical Inquiry* 462 where the preference for, and the affirmation of, life (and existence) is clearly articulated/indicated.

¹¹⁷ Arendt (n 23) at 243.

¹¹⁸ Ibid at 242.

¹¹⁹ A Morissette ‘Sister Blister’ *Alanis Morissette The Collection* (2005).

¹²⁰ Derrida (n 13) at viii.

is predicated in Aristotle – is the concern of *Politics of Friendship*.¹²¹ Along with the dream of this configuration of friendship, Derrida reminds us of Aristotle's assertion that friendship consists in loving rather than in being loved.¹²² But, for Derrida, what is at stake in the 'politics' of friendship is the concept of *lovence*, the middle voice between loving and being-loved, between activity and passivity.¹²³ Nevertheless, Derrida firmly asserts that if we want to know what *lovence* means 'one must know that the only way to find out is by questioning first of all the act and the experience of loving rather than the state or situation of being loved.'¹²⁴ Alex Thompson has indicated that the concept of *lovence* or ('*aimance*') precedes and for this reason makes possible, any friendship. Thompson argues that Derrida in effect equates *aimance* with 'a calling of/for a politics beyond friendship modelled on fraternity'.¹²⁵

In a piece provocatively entitled 'The Shadow of Heterosexuality',¹²⁶ Drucilla Cornell argues that the metaphor of *lovence* lies at the heart of Derrida's rewriting of moral sovereignty. She explains that *lovence* requires from us 'a passivity that allows us to heed the other's demand on us and to respond to it'.¹²⁷ This passivity can be figured as a law that takes one out of the space of narcissism into a space where the decision to act springs precisely from this passivity which makes it possible to hear the call of the other.¹²⁸ As Cornell puts it: 'It is the other, in both actual people and ourselves, that calls in the first place, allowing us to figure as the moral law.'¹²⁹

Lovence allows us to *think* a political *decision* (not just a simple calculation) taken by the other in me – in the name of the ethical relation.¹³⁰ *Lovence* allows us to dream of that friendship beyond fraternisation. It allows us, as Derrida argues elsewhere, to *necessarily* 'deduce a politics and a law from ethics. This deduction is necessary in order to determine the 'better' or the 'less bad''.¹³¹ I believe that Derrida in fact reintroduces loving (as *lovence*) into the discourse on friendship in order to radicalise the notion that the work of the political, 'the properly

¹²¹ See D Wills 'Full dorsal: Derrida's politics of friendship' (2005) 15(3) *Postmodern Culture* para 16.

¹²² Derrida (n 13) at 235.

¹²³ *Ibid* at 7.

¹²⁴ *Ibid* at 8.

¹²⁵ A Thompson *Deconstruction and Democracy* (2005) at 85.

¹²⁶ D Cornell 'The shadow of heterosexuality' (2007) 22(1) *Hypatia* 229.

¹²⁷ *Ibid* at 238.

¹²⁸ *Ibid*.

¹²⁹ *Ibid*.

¹³⁰ Derrida (n 13) at 69. Also see S Critchley 'The other's decision in me. (What are the politics of friendship?)' (1998) 1 *European Journal of Social Theory* 259 at 271: 'Politics itself can here be thought of as the *art of response to the singular demand of the other*'.

¹³¹ J Derrida *Adieu to Emmanuel Levinas* translated by P A Brault & M Naas (1999) at 115.

political act or operation comes down to creating (producing, making, etc) the most possible friendship.¹³² As Thompson indicates: ‘If the friend–enemy choice were to be taken as the definition of politics, we could describe *aimance* as the politicisation of the decision, and brotherhood – what Derrida calls fraternisation – as its inexorable and inevitable depoliticisation.’¹³³

Any friendship in terms of fraternity or a fraternal compulsion is always already haunted by the ghost of what (who) it excludes. That a practical political activism opposed to the logic of phallogocentrism and heterosexism is a fundamental part of this work of thinking the beyond of a political no longer founded on fraternisation or a fraternal concept of friendship, is borne out by something that Cornell says right at the beginning of her essay on *lovence* – ‘We are all challenged to take a stand against heterosexism as the civil rights [and thus the freedom and also the community in Nancy’s sense] of gay, lesbian, and transgendered people have come under increasing attack.’¹³⁴

In Derrida’s wake, political – civic – friendship can and must be thought with *lovence* – loving of the other as other, a ‘fraternity’ possible on the basis only of this middle voice between loving and being loved. Derrida hopes that *lovence* would come to transform absolutely the traditional conception of friendship as fraternity and of a political founded therein:

Consequently, if there were a politics of this *lovence*, it would no longer imply the motifs of community, appurtenance or sharing, whatever the sign assigned to them. Affirmed, negated or neutralised, these “communitarian” or “communal” values always risk bringing a brother back.¹³⁵

Yet, immediately after this strict assertion, Derrida concedes that this risk should perhaps be assumed in order to prevent the question of the ‘who’ from becoming politically enframed, through the schema of being-in-common, in an identitarian question.¹³⁶ I read Derrida here as conceding a certain fraternity. But it is only a certain fraternity – that is, it is a fraternity that must be thought with the beginning of pure ethics – the respectable dignity of the other. The concession to a certain fraternity is confirmed by the claim, a few pages on, that nothing in *Politics of Friendship* ‘says anything *against* the brother or against fraternity . . . I have

¹³² Derrida (n 13) at 199. There are numerous agreements with this reading. See, for example, P D Fenves ‘Politics of friendship – once again’ (1999) 32(2) *Eighteenth Century Studies* 133 at 142 who indicates that *Politics of Friendship* is written in the name of the democracy to come. Also see Critchley (n 130) at 266 and Wills (n 121) para 30.

¹³³ Thompson (n 125) at 167.

¹³⁴ Cornell (n 126) at 229.

¹³⁵ Derrida (n 13) at 298.

¹³⁶ *Ibid* at 298–99.

never stopped asking myself, I request that it be asked, what is meant when one says “brother”, when someone is called “brother”¹³⁷ But for my part, if it was – this side of the politics of lovence – indeed necessary to risk bringing the brother back so as to save the ‘who’ from becoming a self-present subject yet again, I would want to risk bringing the brother back only in the form of what Nancy already suggested; in the form of a fraternity without fraternity – the fraternity of which Nancy speaks as ‘the sharing of a maternal thing which precisely would not be substance, but sharing – to infinity’.¹³⁸ Fraternity is the sharing of sharing, then, which is to say, equality in the sharing of the incommensurable (respectable dignity of the other).

Would the clearing of such a space, such a sharing, still be the work of ‘the political’?¹³⁹ Johan van der Walt has argued that the very possibility of love depends on the possibility of the political as plurality.¹⁴⁰ Following this argument, I would argue that radical freedom only stands the radical chance that Nancy hopes for when lovence becomes the way in which our being ethically political is conceived, even if this thought radically disrupts the boundaries between the ‘properly’ ethical and the ‘properly’ political. Yet, is such a radical disruption not precisely what is implied in what Van der Walt calls the ‘beginning of politics’?¹⁴¹ To quote Van der Walt: ‘The surprising advent of the political, the very dawn of not just *another*, but *an other*, non-murderous progression – would this not be the *heart* of progressive politics?’¹⁴²

VII CONCLUSION

In conclusion I want to return to Ackermann’s seminal decision in the *National Coalition v Minister of Home Affairs*¹⁴³ matter. At its very heart this matter is itself a matter of, or about, sharing, namely the sharing of a word and thus of a concept and the concern of the law. It is also a matter about fraternity and about the question of the brother and fratricentrism more generally. In this case Ackermann held that the word spouse in its ordinary meaning ‘connotes a married person; a wife a husband’.¹⁴⁴ A construction that would interpret this word as shared also by same-sex life partners would, according to the Court, ‘distort’ the meaning of the

¹³⁷ Ibid at 305.

¹³⁸ Nancy (n 1) at 168.

¹³⁹ See Derrida (n 13) at viii.

¹⁴⁰ Van der Walt (n 113) at 609.

¹⁴¹ J W G van der Walt ‘The quest for the impossible: the beginning of politics. A reply to Dennis Davis’ (2001) 118 *SALJ* 463.

¹⁴² Ibid at 472.

¹⁴³ *Supra* (n 44).

¹⁴⁴ Ibid para 25.

expression in the context.¹⁴⁵ Although the decision concluded that the relevant legislation was unconstitutional, the remedy was one of reading-in, which maintained the distinction between a heterosexual marriage and a same-sex life partnership.¹⁴⁶

Many good legal (political) reasons were offered for this decision, but I want to suggest tentatively that the decision not to share out this word was problematic as a matter of freedom, equality and of dignity (even if only on the ethico-political level of love). And I want to ask whether such a ‘distortion’ of the word ‘spouse’ was not precisely an integral part of what was (is still?) needed in the name of freedom, that is to say, in the name of the appearance of existence unconditioned by identitarian compulsion? For was this decision – the continued heterosexual reservation of the concept of the legal category of spouse – not precisely illustrative of a fraternity and fraternisation that refused and still refuses to question itself? Was this decision not precisely grounded in a preservation of the *like*-ness and the resemblance of brothers?

The decision in the second *National Coalition* case is often viewed purely from a liberal equality perspective. Yet it is as much about what is at stake for equality in the incommensurability of singularities as it is about the ‘proper’ ‘legal’ form for same-sex unions. While this decision is one that spaces and spaces *apart*, it is doubtful whether it was sufficiently concerned with the equality in the sharing of the incommensurable that lies at the heart of freedom. But then again, as Van der Walt emphasises with reference to Nancy, how does one think a heart?¹⁴⁷ Perhaps *one* does not.

And even though this word (along with ‘marriage’) has, to some extent, now been shared out,¹⁴⁸ even though the Lesbian, Gay, Bisexual, Transgendered and Intersexed ‘community’ of South Africa has now *taken* its freedom, the shadow of heterosexism and the darkness of another totalitarianism and another apartheid – another fraternity – remains, cast over the space and spacing of freedom. The allegedly hate-inspired murders of Sizakele Sigasa, a gay and lesbian rights activist, and her friend Salome Masooa in Soweto in 2007,¹⁴⁹ as well as the brutal murder of lesbian activist and footballer, Eudy Simelane, on April 28, 2008 in Kwa Thema near Johannesburg,¹⁵⁰ testify to this very fact:

¹⁴⁵ Ibid para 23.

¹⁴⁶ Ibid para 70.

¹⁴⁷ See Van der Walt (n 142) at 472 quoting J L Nancy *L'Expérience de la Liberté* (1988) at 149fn1.

¹⁴⁸ See *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) and Civil Union Act 17 of 2006.

¹⁴⁹ See B Ndaba ‘“Hate crime” against lesbians slated’ *The Star* (12 July 2007) at 2.

¹⁵⁰ See Anon ‘“I have lost a partner and everything”’ *The Star* (6 May 2008) at 3.

Today, more than ever, it is the 'to come' to which love points us – the democracy to come – that must guard the space and the spacing of (sexual) freedom: 'There are we. In this very place? No, there.'¹⁵¹

¹⁵¹ Derrida (n 13) at 123.