Contract from the Margins: The Becoming of a Minor Jurisprudence in the Minority Judgment of Froneman, J in *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 5 SA 247 CC

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Online ISSN 1727-3781

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Date Submitted

19 September 2023

Date Revised

4 December 2023

Date Accepted

4 December 2023

Date Published

11 June 2024

Guest Editors

Prof E du Plessis
Prof K van Marle

Journal Editor

Prof C Rautenbach

How to cite this contribution

Barnard-Naudé J "Traditional Contract from the Margins: The Becoming of a Minor Jurisprudence in the Minority Judgment of Froneman, J in *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 5 SA 247 CC" *PER / PELJ* 2024(27) - DOI http://dx.doi.org/10.17159/1727-3781/2024/v27i0a16893

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DOI
http://dx.doi.org/10.17159/1727-3781/2024/v27i0a16893

Abstract

This article explores the meaning of minor jurisprudence in the work of leading authors on the subject and concludes that the notion of becoming plays a major part in the philosophy of minor jurisprudence as a subtraction from or subversion of the major. The article then connects the preoccupation with becoming in minor jurisprudence to the notion of the hysteric's discourse in the work of Jacques Lacan, after which it moves to a consideration of Froneman, J's minority judgment in the *Beadica* case. The article suggests that Froneman's minor jurisprudence becomes in three modes: reliance on historical minor jurisprudences, deconstruction and imagination from the margins. As such, this becoming is an instance of hysterical discourse in Lacan's sense of the term.

Keywords

Becoming; contract law; fairness; minor jurisprudence; minority.

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1 Introduction: changing the tone

I propose to divide this paper into three parts. First, I will trace the concept of minor jurisprudence to its adumbration in the work of Minkkinen,[1] Goodrich[2] and Antaki.[3] From these accounts we will see that the concept of minor jurisprudence is, *inter alia*, but significantly and intimately connected with and to the Deleuzian idea of becoming. Thus, in the second part of the paper I shall have something to say about the concept of becoming and how it is treated in Deleuze and Guattari's work, by relying primarily on an article written by Todd May[4] in 2003. I shall argue in this part that the idea of becoming as harnessed to minor jurisprudence resonates with the discourse theory of Jacques Lacan[5] in that a Deleuzian becoming-minor is always already and necessarily an instance of what Lacan called the hysteric's discourse.[6] Finally, I will light on Justice Froneman's minority judgment in the recently decided *Beadica*[7] case to illustrate how and why this minority judgment represents an instance of minor jurisprudence and becoming-minor as explicated in the previous parts.

But first, let's take a detour to the realm of music, by way of gathering our bearings in terms of the notion of minority and minor jurisprudence that I see as at play in Justice Froneman's judgment. I will present what I think that I am getting at in this contribution with a short discussion of the notion of "parallel minor keys" in musical theory.[8] The parallel minor key of a given major key is produced by making an alteration to the scale degree of certain of the notes in that given major scale. For instance, the parallel minor key of C major is produced by lowering the scale degree of the third, sixth and seventh notes in the scale to what is known as flats. Thus, instead of the notes E, A and B in the C major key, the parallel C minor key produces the notes E flat, A flat and B flat in the scale from C to C. From this elementary account, two things should be noted: first, that the parallel minor key is necessarily and inexorably *in* the major key as an always latent possibility –

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1 Minkkinen 1994 *Social and Legal Studies* 349.

2 Goodrich *Law in the Courts of Love* 1-8; Goodrich 2017 *Law Text Culture* 30.

3 Antaki 2017 *Law Text Culture* 54.

4 May 2003 *Continental Philosophy Review* 139.

5 Lacan *The Other Side of Psychoanalysis.*

6 Lacan *The Other Side of Psychoanalysis* 14.

7 *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 5 SA 247 CC (hereafter *Beadica)* para 105-203.

8 For discussion, see Benward and Saker *Music in Theory and Practice* 38.

one does not change the notation of the notes themselves but rather the scale degree of the notes of the major in order to produce the parallel minor. Second, the parallel minor is produced by way of an addition or supplement to the major key that changes it from within, not from outside.

I will argue that this is precisely what Justice Froneman's text in the *Beadica* case produces. For Froneman does not attempt to produce a jurisprudence that comes radically from the outside of the contract law that figures in the case – he does not propose to resolve the case on a different basis; he does not propose, one might say, to change the notation of the notes themselves from one to the other. Rather, the jurisprudence that he produces changes what we may call, following theory of music, the "scale degree" of the majority judgment so that the material at hand – the notes and the tones – sound in an entirely different key.

In other words, Froneman, J remains as he must within the key of judgment and judging on the law of contract's vexed relationship to fairness, but he produces a variation in the tenor of such judgment and judging on the law of contract, he changes the way it *sounds*. In fact, it will be seen that Justice Froneman, for instance, works with exactly the same case material that the majority adduces but he works with that case material in an entirely different way. In similar vein, he is constrained by the subject matter of the case to work within the ambit of the role of fairness in contract law in South Africa, but again, he does so by making critical "minorist" or "minoritarian" additions to this debate and, as such, makes a profound difference to the debate itself. This idea of how the minor is produced from within the major through the making of additions, through changing the tone, will be the most important formal aspect of the minor jurisprudence that I see as becoming in Justice Froneman's minority judgment in *Beadica.*

2 Minor jurisprudence

With these thoughts uppermost in our mind as regards the form of minor jurisprudence that will be at play in this paper, it is necessary briefly to traverse the intellectual trajectory of the concept of minor jurisprudence, emerging in the late 1990s in the work of Panu Minkkinen[9] and Peter Goodrich.[10] As Christopher Tomlins[11] explains, the concept first appeared in Minkkinen's reading of Kafka published in 1994 and entitled "The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka". Minkkinen did no more in this piece than to link Kafka's literature to the idea

9 Minkkinen 1994 *Social and Legal Studies* 349.
10 Goodrich *Law in the Courts of Love* 1-8.
11 Tomlins 2017 *Law Text Culture* 1.

of "minor literatures" developed by Deleuze and Guattari. "Being outside the realms of all major literary traditions", Minkinnen wrote:

> Kafka cannot be read merely as an author trying to describe a particular life and its circumstances but, rather, as the initiator of a political programme.[12]

Minkinnen then argued that Kafka's work is not just an instance of minor literature because of this initiation of a "political programme", but indeed that—

> Kafka also writes what one could call "minor legal literature" or "minor jurisprudence".[13]

In Tomlins's view, what distinguished this initiatory sense of minor jurisprudence, was the fact that it stood for—

> a mode of jurisprudence that (like Kafka's literature) resisted accommodation within any established canon or genre.[14]

The point thus seems to have been that minor literature and, by extension, minor jurisprudence is a jurisprudence without pre-established category, canon or genre. Specifically, Tomlins writes that minor jurisprudence is characterised by the fact that it exists in a state "simply unlike the known 'major' canons of jurisprudential orthodoxy".[15] From Minkkinen we thus derive the negative sense of minor jurisprudence as a differential jurisprudence, a jurisprudence of what the major is not, a jurisprudence of what is not necessarily already something positive or genre specific, but simply a jurisprudence of what is "unlike" the major. In reference to my introduction, as regards the "change of tone" that characterises the minor, we could say that the initiatory sense of "minor jurisprudence" is a sense in which it functions to change the tone from the major and, by so doing, constitutes itself from within, but apart from, the major.

Two years later, Peter Goodrich[16] produced an addition to this initiatory mode of minor jurisprudence, when he argued that minor jurisprudence is any species of juridical knowledge that had escaped "the phantom of a sovereign and unitary law".[17] The product of "rebels, critics, marginals, aliens, women and outsiders", in this register "'minor jurisprudence' is simultaneously plural, subaltern and subversive".[18] Tomlins believes that

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12 Minkkinen 1994 *Social and Legal Studies* 357.
13 Minkkinen 1994 *Social and Legal Studies* 357.
14 Tomlins 2017 *Law Text Culture* 2.
15 Tomlins 2017 *Law Text Culture* 2.
16 Goodrich *Law in the Courts of Love* 1-8.
17 Goodrich *Law in the Courts of Love* 2.
18 Goodrich *Law in the Courts of Love* 2.

Minkkinen and Goodrich's originary accounts of minor jurisprudence are united by the fact that they essentially signify "a metaphor of difference and escape, and as such a movement away",[19] but I think that what Goodrich's account signified more clearly than Minkkinen's was the distinctly political aspects of this "movement away". In allying minor jurisprudence with "critics, marginals, aliens, women and outsiders" and by describing it as simultaneously "plural, subaltern and subversive", Goodrich was clearly interested in how *politically* marginal subjectivity inheres in the concept of minor jurisprudence, how minor jurisprudence is a jurisprudence of and for the politically marginal, the political minority (not necessarily numerical) or the politically minoritised, while Minkkinen was more concerned to show minor jurisprudence as a kind of formal overflow of jurisprudential genre as such, not necessarily or inevitably aligned with political marginality, but simply developing a "political programme" while simultaneously writing a particular life and its circumstances. Thus, whereas Minkkinen produced a formal and negative sense of minor jurisprudence, Goodrich's addition generated a more positive sense of what minor jurisprudence is in its substantive elements and commitments.

For well on twenty years, the concept was not further developed in any particularly critical sense,[20] until the "Law As … IV" symposium that was published in a special issue of *Law Text Culture* in 2017. Goodrich contributed an essay to the volume, which he entitled "How Strange the Change from Major to Minor".[21] In it, he proclaimed that the—

> goal of a minor jurisprudence is to cut holes in the fabric of law. The minor, aligned to the peripheral, the marginal and modal affect in music, if authentic, has to create a site of temporary evacuation, by which I mean an avenue of withdrawal and return, of exchange, and thereby the expression of a novelty in the putatively closed skein of legal rules. It is necessary to tear the seamless web.[22]

We see in this remark a more directed itinerary for what minor jurisprudence might look like in its actual practice. Goodrich, however, simultaneously stayed with his earlier positive adumbration of minor jurisprudence, but now linked it explicitly to jurisprudential practice as the production of "a novelty in the putatively closed skein of legal rules"[23] and a break with

19 Tomlins 2017 *Law Text Culture* 2.
20 See, however, Loizidou 1999 *Law and Critique* 71-86.
21 Goodrich 2017 *Law Text Culture* 30.
22 Goodrich 2017 *Law Text Culture* 30.
23 Goodrich 2017 *Law Text Culture* 30.

> the strands that trap and hold the imagination in the dead zone of a sticky and immobile lex, the iron cage of a putatively comprehensive rule, decision, or other major mode of code.[24]

Goodrich also explicitly connected minor jurisprudence here with the notion of critique as generated by what he called "the excluded, the others of law, the laws of others".[25] "There is the goal", Goodrich wrote,

> the future of the minor, in its alternation of the major mode, in the past that was discarded, the practices that were denied, the strangers who were kept out.[26]

As regards the attitude or scholarly orientation that may attend minor jurisprudence, Goodrich argued that it, necessarily, would also have to be a minor one which he called modesty:

> the minor counterposes a modest movement within law, away from law, in the resuscitation of lesser writings, a legal scholarship with passion and, to coin a term, a jurisprudence of *minumenta*.[27]

It was also in this essay that Goodrich explicitly linked minor jurisprudence to the notion of becoming in Deleuze, when he quoted Deleuze's remark that "'minority has no model, it's a becoming, a process'"[28] (note how this remark creates a veritable oscillation between the earlier negative sense of minor jurisprudence and the later positive sense of it). Goodrich linked this idea of the minor as a becoming to notions of creativity, non-conformity and fabulation and mentioned specifically in this regard as the becoming of minority,

> the point of internal contestation of doctrine, the alien within, the foetus in the heart of the present.[29]

This is a version or variation of minor jurisprudence that I will explicitly pursue in what follows and which, as we shall see, has profound implications for how we read Froneman, J's minority judgment in *Beadica.*

In the essay that immediately followed Goodrich's in the special issue, Mark Antaki[30] also ceased upon the notion of becoming. Antaki argued that minor jurisprudence has "a dual vocation and valence".[31] The first involves what he called "un-stating law"[32] (note the double meaning of "un-stating": removing the State as political entity from the law, as well as un-stating law

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24 Goodrich 2017 *Law Text Culture* 30.
25 Goodrich 2017 *Law Text Culture* 30.
26 Goodrich 2017 *Law Text Culture* 31.
27 Goodrich 2017 *Law Text Culture* 32.
28 Goodrich 2017 *Law Text Culture* 33.
29 Goodrich 2017 *Law Text Culture* 33-34.
30 Antaki 2017 *Law Text Culture* 54.
31 Antaki 2017 *Law Text Culture* 59.
32 Antaki 2017 *Law Text Culture* 59.

in the sense of no longer stating it positively) and, as such it is a valence and vocation that is explicitly juridical and/or political – a vocation and a valence, I would suggest that still bears the signature of a certain Marx even if this is post-Marxist or no longer simply Marxist, a spectre of Marx(ism).[33] The second, which is however intimately related to the first, is "metaphysical or ontological" and involves the rejection of what has been called the Western metaphysics of presence, tied as this metaphysics inexorably is to the study of being as stable ground for thought. In resisting such a metaphysics, the second mode's appeal is to becoming rather than to being.

Having becoming as one of its principal concerns, Antaki's essay makes sense of minor jurisprudence by focusing on its opposition to the systematicity of law. "History", he writes,

> is marshalled to "recall minor jurisprudences [note the plural] from oblivion" so that these can "destabilize" the - monopolizing and totalizing - project of modern law … the idea, as I understand it, is to found a law and modes of life in, of, or with law that are not "systematic" and tied to domination, but nonetheless durable and existentially, if not logically, of some coherence.[34]

The second principal concern of Antaki's essay is the relationship between majority and minority and specifically what we may call the becoming major of minor jurisprudence. Throughout the essay, Antaki asks questions such as whether the minor is possible without the major, whether the minor is always already an inflection of the major, whether the minor aspires to be the major and how the minor is a kind of practice of or within the major. His position, ultimately, via Deleuze and Guattari, returns us neatly to the beginning of this article: the major and the minor are, he writes "intertwining".[35] Antaki here quotes Deleuze and Guattari to the effect that—

> [m]inor languages do not exist in themselves; they exist only in relation to a major language and are also investments of that language for the purpose of making it minor'[36]

Here, Antaki lights again on the notion of becoming when he quotes Deleuze and Guattari's insistence that the problem is not the distinction between major and minor, it is one of becoming and all becoming is minoritarian. Antaki concludes his essay by alluding to the possibility that minor jurisprudence is, or should be, radically anti-foundational while still remaining in the shadow of foundations.[37] "Perhaps", he writes,

33 See Derrida *Specters of Marx*.
34 Antaki 2017 *Law Text Culture* 58.
35 Antaki 2017 *Law Text Culture* 69.
36 Antaki 2017 *Law Text Culture* 69.
37 Antaki 2017 *Law Text Culture* 72.

> "Minor Jurisprudence" signals nothing other than the steadfast refusal of foundation in its embrace of the initiatory.[38]

3 Becoming

At this stage, it becomes necessary to say something more about this becoming that is always minoritarian. In this regard, I will rely on an essay by Todd May,[39] published in 2003 and entitled "When is a Deleuzian becoming?" In this essay, May takes the position that becoming is not just one concept amongst others in Deleuze's philosophy. Rather, it is the central animating concept of his entire philosophy. May explains that for Deleuze the task of philosophy is not to tell us the truth but rather to create concepts that engage us in the interesting, the remarkable and the important.[40] For Deleuze, becoming is just such a concept, one with which it should be possible, as May puts it, to—

> see and to live in a fresh way, a way that might not have been available to us without the concept.[41]

May argues that Deleuze's early work presents four ideas in relation to becoming that remains at the heart of his thought throughout his life. The first is that "becoming is the final reality",[42] "there is no being beyond becoming".[43] This is quite clearly a pronounced subversion of the metaphysics of presence grounded in Being that I have referred to earlier in relation to Antaki's work. So, both Antaki and May share the view that the Deleuzian idea of becoming amounts to a thorough subversion of the metaphysics of presence grounded in Being. With respect to the law or law's involvement in such a subversion through becoming, Antaki in fact quotes Deleuze and Guattari's invocation of *nomos* in *A Thousand Plateaus* to the effect that involved here is a law that represents a—

> very special kind of distribution [nomos], one without division into shares, in a space without borders or enclosure.[44]

This invocation of *nomos* amounts to a clear subversion of law as grounded in the stability and finitude of Being with all the borders and enclosure that we have come to know as intimately related to the modern version of law.

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38 Antaki 2017 *Law Text Culture* 72.
39 May 2003 *Continental Philosophy Review* 139.
40 May 2003 *Continental Philosophy Review* 140.
41 May 2003 *Continental Philosophy Review* 142.
42 May 2003 *Continental Philosophy Review* 143.
43 May 2003 *Continental Philosophy Review* 143.
44 Antaki 2017 *Law Text Culture* 69.

Deleuze's second idea in relation to becoming is that becoming is aligned to multiplicity.[45] May says that this signifies that it is difference – difference itself, as not identifiable in terms of sameness - that we must understand if we are interested in becoming. "Becoming", May writes, is the

> unfolding of difference in time and as time … becoming is the being of being.[46]

The third idea is that becoming, although a final reality, is not a transcendent reality, there are no realities beyond appearance.[47] The idea here is that becoming does not play the role that Being is enlisted to play in the metaphysics of presence, namely as some kind of stable ground beyond appearance as it is posited, for instance, in Plato. On this, May remarks that for Deleuze—

> both difference and becoming are immanent to our reality. They do not lie elsewhere, but here ... The difference that produces qualitative diversity – the different stable identities of conscious experience – lies within the sensible, within appearance, not outside of it. This is because the present carries the past and its difference within it, as a constitutive moment, rather than existing separately.[48]

The fourth idea is that "becoming is the affirmation of being".[49] This idea sounds contradictory and paradoxical if we consider that the whole target in this elaboration is being as the stable ground of thought. But May suggests that we have to take being here—

> not as a matter of stable identities but as a matter of whatever it is that founds those identities. If becoming is the affirmation of being, it is the affirmation of difference in itself, of a pure difference that is not reducible to the identities, the actualities, that present themselves to us.[50]

May then goes on to note that whereas becoming is used simpliciter in Deleuze's early works, in the collaborative work with Guattari the concept takes on specificities such as becoming-women, becoming-animal and becoming-imperceptible. May argues that these specifics of becoming nonetheless have important points of connection with becoming as such:

> [t]hey are affirmations in the sense that they call us back to the becoming of difference as the fundamental non-ground of specific identities.[51]

In order to illustrate the point, May refers to becoming-minor as one of the specifics of becoming. First, May notes that minorities, in Deleuze and

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45 May 2003 *Continental Philosophy Review* 146.
46 May 2003 *Continental Philosophy Review* 147.
47 May 2003 *Continental Philosophy Review* 147.
48 May 2003 *Continental Philosophy Review* 147-148.
49 May 2003 *Continental Philosophy Review* 148.
50 May 2003 *Continental Philosophy Review* 148.
51 May 2003 *Continental Philosophy Review* 149.

Guattari's use, do not refer to specific groups of people that constitute numerical minorities.[52] Rather minorities are—

> fluid movements of creativity that subvert the dominant, i.e., majoritarian, identities our current arrangements bestow upon us.[53]

May here quotes Deleuze and Guattari directly:

> When we say majority, we are referring not to a greater relative quantity but to the determination of a state or standard in relation to which larger quantities, as well as the smallest, can be said to be minoritarian. … Majority implies a state of domination.[54]

"Minority, in turn", May remarks,

> implies a subversion of the domination of the majority *by a creation that explodes it from within*.[55]

Below we shall see how Froneman, J's minority judgment in *Beadica* explodes the majority judgment from within, but for now let me stay with becoming to assert that it should be obvious, following from the above, that all becomings are becoming-minor. May argues that becoming-minor consists of two movements. In the first, the subject is withdrawn from the majority and in the second the medium or agent rises up from the minority. It is worth quoting May at length at this, his point of conclusion:

> What becomings undermine are stable identities, those 'fixed terms' given to us by the majority culture as the framework within which our world is to be understood and acted upon. In undermining stable identities, becomings do not substitute other stable identities or fixed terms for the abandoned ones. Rather, they return us to process itself, to the temporal unfolding of difference in itself, that difference which is always betrayed when it is, as it is inevitably, frozen into stable identities.[56]

At this point, it becomes impossible for a Lacanian like myself not to think of Lacan's four discourses and specifically the discourse of the hysteric, despite the anti-oedipalism of Deleuze and Guattari and precisely because of the revision of Oedipus by Lacan in the seminar on the four discourses. This is not the time and place to engage upon a full-fledged flight into the reasons why Deleuze and Guattari's discourse on becoming and minority can, despite *Anti-Oedipus*,[57] be read in a psychoanalytic key. All I will say here is that it is by no means certain, given or unequivocally established that *Anti-Oedipus* condemns Lacan and Lacanianism. The reason why Deleuze and Guattari equivocate on Lacan in *Anti-Oedipus* is precisely because of

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52 May 2003 *Continental Philosophy Review* 149.
53 May 2003 *Continental Philosophy Review* 149.
54 May 2003 *Continental Philosophy Review* 149.
55 May 2003 *Continental Philosophy Review* 149 (emphasis added).
56 May 2003 *Continental Philosophy Review* 150.
57 Deleuze and Guattari *Anti-Oedipus.*

Lacan's revision of Oedipus in Seminar XVII.[58] For one thing, Lacan's insistence that the master signifier (S1) can be occupied by any signifier whatsoever is very far removed from the omnipotent Father as the target of *Anti-Oedipus*. Then there is Elisabeth Roudinesco's emphatic assertion that Lacan criticised the oedipal emphasis in Freudian theory from as early as 1938 and that fifteen years later, after his intellectual encounter with Lévi-Strauss, "he was exploding the whole system of the Oedipal complex".[59]

Furthermore, the mere projection and practice of a discourse of anti-oedipalism does not thereby and as such exempt the authors of such a discourse from a diagnostic psychoanalytical reading: despite the authors' protestations, the *Anti-Oedipus* project is not exempt or insulated from a psychoanalytical reading. In other words, it remains possible on my reading to psychoanalyse Deleuze and Guattari in a Lacanian key and all I claim here is that the discourse of "becoming" is very much, vis-à-vis the history of Western philosophy, a discourse of the Hysteric.

For Lacan, the Hysteric is the subject who has the power to unmask the discourse of the Master,[60] which is par excellence the discourse of domination and the stable identities of master and slave, major and minor. This is the case primarily because the Hysteric is, as Lacan says "a subject impossible to pin down to the signifier which tries to fix it, name it, assign it a place".[61] The Hysteric's resistance to the signifier thus necessarily means that she is a subject interested in or ex-posed to becoming as becoming-minor and remains, as such, a subject of a desire that is always in motion, never static. Ragland[62] remarks that she "lives castration at the surface of her life and discourse". The Hysteric's discourse is characterised by an incessant interrogation of the master and thus of majority, the Hysteric never let's the master and his majority go. The purpose of this interrogation is, as Žižek[63] has argued, that the master must produce knowledge of what the Hysteric is as object for the master. But, as Verhaeghe[64] has suggested, the knowledge that the master produces will always be insufficient and lacking, because the master is structurally incapable of producing the truth of the Hysteric's desire. We could thus say that the Hysteric's desire is always a minor desire or a desire to become minoritarian, precisely because the

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58 On Lacan's revision of Oedipus in Seminar XVII, see Verhaeghe 2006 "Enjoyment and Impossibility" 37-45.

59 Roudinesco *Jacques Lacan* 216.

60 Voruz "A Lacanian Reading of Dora" 175.

61 Lacan *The Other Side of Psychoanalysis* 143.

62 Ragland "The Hysteric's Truth" 85.

63 Žižek "Lacan's Four Discourses" 89.

64 Verhaeghe 1995 http://doctorabedin.org/wp-content/uploads/2015/07/Lacans-Theory-of-four-discourses.pdf.

knowledge that the major as master produces is not sufficient to meet the Hysteric in her demand – her demand is always more than or other to what the master as major can produce. The desire that drives the Hysteric is desire that is not *of* the master and, as such, not of majoritarianism. From the point of view of the majority as master, the Hysteric's desire is thus, strictly speaking, an impossible minoritarian desire.

What the Hysteric effectively does, is that she exposes the master as an Other that lacks. She thus concretely and practically stands for that which the major as master *is not*. As such, she does not stand for a stable identity but rather for the differential movement of desire. As Žižek writes:

> the hysterical subject is the subject whose very existence involves radical doubt and questioning, his entire being is sustained by the uncertainty as to what he is for the Other.[65]

Lorraine Schroeder[66] has proposed that the discourse of the Hysteric is "accusation and critique". In this regard, she writes that the Hysteric is in the position to question the law's claim as law, as power. Furthermore, Schroeder believes that it is through the Hysteric's discourse that the master's discourse of positivist command can be interrupted, because the Hysteric's discourse allows for a return of morality to the position of the law's desire.[67] "The hysteric's discourse", Schroeder writes,

> enables us to identify how the substantive content that has been excluded from the law serves to harm the subjects subjected to the law … . In order for the law to be just, it must be rewritten to include the excluded.[68]

So, my proposition is that becoming-minor and the minor jurisprudence that is derived from such a becoming-minor is always already a discourse of the Hysteric, precisely because it is a discourse that ceaselessly interrogates and exposes the lack of the master as law, as Being.

4 Froneman, J's minority judgment in *Beadica*: a study in the becoming of a minor jurisprudence

It is now time to turn to the minority judgment of Justice Froneman in *Beadica* in order to illustrate the becoming of a minor jurisprudence that I see in it. My argument is that this becoming of a minor jurisprudence takes place by way of three routes or in three modes. First, it involves what Antaki calls in the aforementioned the marshalling of legal history to "recall minor

65 Žižek "Four Discourses, Four Subjects" 81.
66 Schroeder 2000 *Tex L Rev* 72.
67 Schroeder 2000 *Tex L Rev* 85-86.
68 Schroeder 2000 *Tex L Rev* 86.

jurisprudences [note the plural] from oblivion"[69] so that these can "'destabilize'"[70] the - monopolising and totalising - project of modern law. In *Beadica*, the monopolising and totalising project of modern law is the hegemony of freedom of contract understood as *pacta sunt servanda.* Against this hegemony, Justice Froneman draws on the historical record of what I consider to be minor jurisprudences of contract in the sense that they do not support the majority position of modern contract law as the hegemony of *pacta.* First, Justice Froneman invokes the work of James Gordley to explain an idea of fairness in contract as the equivalence in exchange.[71] He then moves on to another jurisprudence of minority in contract law, Patrick Atiyah's *The Rise and Fall of Freedom of Contract*,[72] to describe the decline of equivalence in exchange and the rise of unfettered freedom of contract, pausing at the extreme individualism that underlies this rise:

> It is assumed that the parties know their own minds ... that they will calculate the risks and future contingencies that are relevant, and that all these enter into the bargain. It follows that the unfairness of the bargain – gross inadequacy or excess of price – is irrelevant.[73]

According to this idea—

> contract serves autonomy by adopting the principle of freedom of contract, and contract underpins rational planning by adopting the principle of sanctity of contract.[74]

Justice Froneman then uses Atiyah to trace the decline of the rigid conception of contractual freedom as *pacta*, as a process by which—

> [f]reedom of choice was whittled down in many directions, government regulation replaced freedom [of] contract ... and paternalism once again was the order of the day.[75]

In what is perhaps the most provocative retrieval of minor jurisprudence from the historical record, Justice Froneman invokes the work of one of the most prominent figures in American Critical Legal Studies, Duncan Kennedy, to argue that—

> [t]he notion that freedom of contract speaks for itself in only one voice has also been debunked.[76]

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69 Antaki 2017 *Law Text Culture* 58.
70 Antaki 2017 *Law Text Culture* 58.
71 *Beadica* paras 114-115.
72 *Beadica* paras 117-121.
73 *Beadica* para 117.
74 *Beadica* para 118.
75 *Beadica* para 120.
76 *Beadica* para 122.

On this he concludes as follows:

> Freedom of contract can thus never be absolute. It is constrained, inevitably. Modern remedies for regulating unfairness are found primarily in doctrines of unconscionability and good faith.[77]

What we see in Justice Froneman's review of the minor jurisprudences of contract is a freedom of contract, a *pacta*, that neither speaks for itself, nor is absolute – it is "inevitably" constrained in modern times through a huge variety of mechanisms, whether through direct State intervention by way of legislation that prohibits certain terms or agreements as such, or more indirectly through courts' interventions on the basis of "unconscionability and good faith" – a jurisprudence that does not see this, as the majority jurisprudence, is a jurisprudence that is wilfully blind to the very modern developments that it supposedly wants to protect through an absolute invocation of *pacta.*

Justice Froneman next moves on to consider the rise of unfettered freedom of contract grounded in extreme individualism in colonial-apartheid contract law. Again, he quotes from the canon of minor jurisprudence, namely Alfred Cockrell's "Substance and Form in the South African Law of Contract"[78] to summarise the policy position that prevailed in our law by 1992 when the article was written:

> It should be obvious to anyone familiar with the South African law of contract that the privileged position here is occupied by a substantive individualism couched in a rules-based form. Freedom of contract, the sanctity of individual promises, the minimal role for the courts in matters of contractual agreement, the need for certainty in the law – these are the ideas which permeate the surface of the law. But it is important to note that this privileging invariably proceeds on the basis that the preference for individualism and the rules-form is an axiomatic truth rather than a controversial premiss in an ongoing argument'[79]

Justice Froneman continues to be guided by Cockrell's article to the conclusion that—

> [o]ne can mention more instances of judicial interference in supposed "freedom of contract" in our law, but the point is already clear. In the formation of contracts, in the formulation of their terms, and in their enforcement, our courts second-guess, or "make" and "unmake" contracts for parties, independently of the individual consent of the contracting parties.[80]

Thus Justice Froneman relying on the minorist position of Cockrell make it clear that our law of contract has seen exactly the same kind of modern developments in relation to constraint upon *pacta* that have been prevalent

77 *Beadica* para 123.
78 Cockrell 1992 *SALJ* 40.
79 *Beadica* para 132.
80 *Beadica* para 139.

in other jurisdictions internationally, only that our jurisdiction is punctuated with an even more compelling reason as to why *pacta* cannot be and never was absolute, namely that in apartheid South Africa it could not have been said that the majority of the population were in possession of even a modicum of so-called freedom of contract. As Justice Froneman writes:

> the moral justification for freedom of contract was virtually non-existent in relation to the vast majority of people. The reason was simple and brutal: there was no freedom to contract with anyone they chose on the terms they wished, because this was forbidden by law.[81]

So much for the first mode in which Justice Froneman's minority judgment becomes minoritarian through a retrieval of minor jurisprudences from the historical record.

The second mode through which Justice Froneman's minor jurisprudence becomes is through what I can only call a veritable deconstruction of the majority judgment and the Supreme Court of Appeal's reading of the cases that have been decided since the enactment of the Constitution. Most important in this regard is Justice Froneman's forthright advance of the correct interpretation of the *Barkhuizen*[82] judgment. He writes:

> *Barkhuizen* is authoritative and binding precedent that the application of public policy in determining the unconscionableness of contractual terms and their enforcement must, where constitutional values or rights are implicated, be done directly in accordance with notions of fairness, justice and equity, and reasonableness cannot be separated from public policy.[83]

Justice Froneman then quotes extensively from *Barkhuizen* to let it speak for itself, as he says, before he reiterates as follows:

> This is direct authoritative precedent that in cases where constitutional values or rights are alleged to be implicated in the application of public policy in the invalidation or enforcement of contractual clauses, so-called abstract notions of fairness, reasonableness and simple justice between persons are the unmediated standards against which the validity of the clauses or their enforcement is judged.[84]

Unfortunately, it is a sad fact that this is now a minority position in our law, since the majority judgment of Theron, J explicitly held that "abstract values"[85] cannot be used to decide this sort of cases in our law of contract. Justice Froneman's retort is that—

> [t]he unmediated and direct application of the standards of reasonableness and fairness does not translate into a pejoratively depicted dependence 'on the idiosyncratic inferences of a few judicial minds. As with other open-ended

81 *Beadica* para 142.
82 *Barkhuizen v Napier* 2007 5 SA 323 (CC).
83 *Beadica* para 146.
84 *Beadica* para 151.
85 *Beadica* para 79.

> standards in our law … individual application may in time develop into generally applicable rules.[86]

However, the real deconstructive thrust of Justice Froneman's minor jurisprudence comes in his innovative reading of the *Bredenkamp*[87] decision by the Supreme Court of Appeal. He begins by stating the interpretation followed by major jurisprudence:

> That case has been interpreted as giving *Barkhuizen* an inhibiting gloss, namely that in *Barkhuizen* the claimant had claimed that the constitutional right of access to court was infringed; and it was only to determine that infringement that the Constitutional Court had invoked the fairness standard – crucially this did not, therefore, operate as a 'free-standing ground upon which a court may refuse to enforce a contractual term on the basis of public policy'.[88]

Justice Froneman boldly asserts that this interpretation of *Bredenkamp* is incorrect. "Harms JA did not purport", he writes,

> to contradict *Barkhuizen*'s general import that in a case where constitutional rights and values underlying public policy are invoked and implicated, the contractual clause or its enforcement may be invalidated as being in conflict with fairness, justice and equity, reasonableness, the necessity to do simple justice between individuals, or ubuntu […] It should not be read as saying that fairness is not a free-standing requirement for the exercise of a contractual right when the validity of the right is attacked as being in conflict with constitutional values or other public policy considerations.[89]

Justice Froneman goes on to criticise the uncritical adoption in later judgments and now also in the majority judgment of Theron, J of—

> the mantra that "abstract values of fairness and reasonableness" may not directly be relied upon by the courts in the control of private contracts through the instrument of public policy.[90]

Justice Froneman refers to the precedential and logical shortcomings of this approach and his judgment illustrates that the approach is in line neither with *Barkhuizen*, nor with *Bredenkamp*, nor, for that matter, with *Sasfin.*[91]

But this is not where the deconstruction ends, for Justice Froneman also compellingly shows how the majoritarian insistence on so-called "substantive rules" only for the determination of public policy does not bear examination. These so-called substantive rules are as follows: (a) "the power to invalidate a contract or not to enforce it must be used 'sparingly'";[92] (b) only "in the clearest of cases";[93] (c) when the harm to the public is

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86 *Beadica* para 152.
87 *Bredenkamp v Standard Bank of SA Ltd* 2010 4 SA 468 (SCA).
88 *Beadica* para 153.
89 *Beadica* para 155.
90 *Beadica* para 156.
91 *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A).
92 *Beadica* para 159.
93 *Beadica* para 159.

"substantially incontestable";[94] and (d) when it does not depend on the "idiosyncratic inferences of a few judicial minds".[95]

However, the point that Justice Froneman makes is as simple as it is perceptive:

> no "objective standard" is provided to determine when a power is used "sparingly", or only in "the clearest of cases", or when the harm to the public is "incontestable", or when judicial minds make "idiosyncratic inferences". These are themselves not "rules" of law, but at best also abstract standards. They suffer the same vice of uncertainty as "notions of fairness and reasonableness". And so does the first judgment's use of the mediating 'rule' of public policy.[96]

With this remark, as far as I am concerned, the majority judgment of Theron, J lies in deconstructed ruin and what stands clearly delineated is not only an explosion of the major by the minor from within, but also a minor jurisprudence as what Goodrich calls the "expression of a novelty in the putatively closed skein of legal rules". This is the judge as the cutter of holes in the fabric of law, the judge as someone who tears the seamless web. We see here how what Goodrich calls the dead zone of a sticky and immobile lex, begins to become thoroughly undone. As for the *Botha*[97] case, Justice Froneman again convincingly shows how the much-maligned standard of good faith played a decisive role in that case, as it should have.[98]

5 Conclusion

I now come to my conclusion, which will be somewhat extensive for it also involves Justice Froneman's application of the aforementioned exegesis of the law to the facts of the particular case, which brings me to the third mode of the becoming of Justice Froneman's minor jurisprudence in *Beadica*. This mode of becoming of a minor jurisprudence is critically related to André van der Walt's notion of marginality as it was set out in his 2009 *Property in the Margins.*[99] In this book, Van der Walt asked a simple question: what would property law look like if it was written from the margins of society, from the perspective of marginalised property holders and users? Van der Walt wrote as follows:

> What I do is more modest, namely to explore the possibility of opening up theoretical space where justice inspired changes to (or transformation of) the extant property regime can be imagined and discussed more or less fruitfully

94 *Beadica* para 159.
95 *Beadica* para 159.
96 *Beadica* para 160.
97 *Botha v Rich* 2014 4 SA 124 (CC).
98 *Beadica* paras 163-170.
99 Van der Walt *Property in the Margins.*

> from an unusual perspective, namely the effect that enforcement of strong property rights has on marginalised property holders and users.[100]

My contention here is that Justice Froneman, in the concluding section of his minority judgment in *Beadica* does precisely in contract what Van der Walt does in property: he imagines contract law from the perspective of the marginalised contracting parties. Here, Justice Froneman is once more bold and forthright. He begins this section by stating categorically his disagreement with the majority judgment's finding that the applicants did not explain why they did not comply with the notice clause.[101] On the contrary, Justice Froneman writes, the applicants explained that they "were unsophisticated and not versed in the niceties of the law".[102] He notes that this explanation was not contradicted by any direct evidence and that the circumstantial evidence backed this explanation up quite sufficiently.[103] Justice Froneman accounts how the applicants were not businessmen in their own right, but former employees of the respondent, how they acquired their businesses in terms of a black empowerment initiative "that sought to facilitate 'business ventures pioneered and run by historically disadvantaged persons'".[104] The reference here to historically disadvantaged persons is an echo of Justice Froneman earlier comment about the simple brutality of apartheid as a fundamental constraint upon freedom of contract which basically removes all ground for justifying an absolute conception of *pacta* in post-apartheid South Africa:

> There was no equality of opportunity, because rank and privilege applied. There was no proper reciprocity in exchange because the disadvantaged lacked the means to decide freely what they valued in that exchange.[105]

On the back of this frank assessment of the applicants as contracting parties in the margins, comes the most stark and realistic assertion in the entire judgment of the court as such:

> It is closing one's eyes to reality to deny the obviously unequal relationship between a franchisor and franchisees, and this one was no different. Mr Sale [the respondent] had the power of life and death over their franchises.[106]

This reference to the power of death, (with its Foucaultian overtones echoing Foucault's notion of biopolitics and the critique of sovereignty therein), is then redoubled in the conclusion of the judgment when Justice Froneman writes that the "probable inferences" that can be drawn from the "undisputed facts" is that the applicants were "novices in how to play a hard

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100 Van der Walt *Property in the Margins* ix.
101 *Beadica* para 196.
102 *Beadica* para 196.
103 *Beadica* para 196.
104 *Beadica* para 197.
105 *Beadica* para 142.
106 *Beadica* para 197.

business game",[107] that they sent communications to Mr Sale that "clearly show their ignorance of the 'niceties of law'",[108] that they were lulled into a false sense of security by Mr Sale, only to be hit by the attorney's letter that gave "effect to their franchisor's power of death over the future of their franchises".[109]

Finally, Justice Froneman writes that—

> assertion of relative lack of sophistication is clearly apparent when contrasted with the conduct of the third respondent. Their explanation of why they did not comply with the strict notice requirement rings true. The disproportionate unfairness between their conduct and that of the first respondent is equally clear. Their prejudice in losing their businesses is obvious against that the first respondent, who loses nothing. And the inequality in bargaining power between the applicants as franchisees and their franchisor is there for all to see.[110]

By way of rushing to a conclusion, let me briefly state in summary form the ultimate position of this paper. Justice Froneman's minority judgment in *Beadica* is an instance of minor jurisprudence for three reasons: first, because it retrieves from the historical record of the law minor jurisprudences that it enlists in order to come to a minority position on the law in the case; second, because it avails itself in the reading of the cases before both majority and minority, of a minor reading strategy, namely deconstruction, which represents Goodrich's "point of internal contestation of doctrine" and so signifies becoming-minor; and third, because it imagines the law of contract from the position of social marginality, from the position of historically disadvantaged people in order to come to a minority position in terms of the application of law to facts.

But this elaboration of a minor jurisprudence is also a becoming-minor in that it asserts difference as such on the three levels which I have described, the most important of which, in my view, is the assertion of the difference as such of the numerical majority of South Africans who have been and are minoritized by the law of contract that they have to engage with and in on an everyday basis. In this sense we can say with Goodrich that Justice Froneman's minor jurisprudence is "simultaneously plural, subaltern and subversive". I have already called Justice Froneman, by necessary implication, a deconstructionist. Is the further implication that his becoming-minor in *Beadica* also makes of him a hysteric? I think so, and if that is the case I would say of him what Lacan said of Hegel: that he is to me "the most sublime of hysterics".[111]

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107 *Beadica* para 200.
108 *Beadica* para 200.
109 *Beadica* para 200.
110 *Beadica* para 202.
111 Lacan *The Other Side of Psychoanalysis* 35.

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List of Abbreviations

SALJ	South African Law Journal
Tex L Rev	Texas Law Review