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Early in the Constitutional era, in *Qozeleni v Minister of Law and Order* 1994 3 SA 625 (E) Justice Johan Froneman called for the "*rubicon ... to be crossed out not only intellectually, but also emotionally before the interpretation and application of the ... Constitution is fully to come into its own right*". He further argued for the Constitution "to become ... a living document".

In his many judgements in a judicial career spanning 25 years, Justice Froneman suggested some of what such a crossing of the Rubicon could entail. He also gave meaning to the idea of the Constitution as a living document. The contributions in this special edition unpack, reflect on, evaluate and further the work of and themes tackled by Justice Froneman.

Justice Johan Froneman retired from the Constitutional Court in 2020. He was appointed to the Constitutional Court in 2009 after serving as Judge of the Eastern Cape High Court, Grahamstown (1994-2009); Deputy Judge President of the Labour Court and Labour Appeal Court (1996-1999) and two terms in 2002 acting on the Supreme Court of Appeal.

In 1999 he was a visitor at Harvard University by invitation of Professor Frank Michelman. He was also Extraordinary Professor in Public Law at Stellenbosch University (2003-2008) and a Visitor at the Centre for Socio-Legal Studies, University of Oxford, in 2008. He is currently an extraordinary professor in the Department of Public Law, University of the Free State. He has delivered judgements in a wide range of cases. Of particular interest is his careful deliberation on issues pertaining to transformation, legal interpretation, property and language. Justice Froneman in his many carefully argued judgements displayed not only the intellectual rigour that he was calling for, but also the emotional and very much personal crossing that he referred to in 1994.

This special edition comprises some of the peer reviewed papers delivered at a workshop that was titled, "Artifacts of judging". We were inspired by the title of a collection titled, *Artifacts of Thinking*, in which various scholars reflect on Hanah Arendt's *Denktagebuch*. What is an artifact? Merriam-Webster describes it as an object/tool or ornament with specifically, historical and cultural meaning. In the context of a scientific experiment an artifact is that which is "extraneous" due to human agency. Our aim in the workshop and the papers included here is to engage with the judgements of Johan Froneman as "artifacts", as deliberations that mark a specific time and place. Judgements have the potential to contribute to the writing and re-writing of history, to contribute to the transformation and becoming of the archive. However, not all judgements succeed or aim to engage with the practices of daily life, and ultimately law as a human practice. Froneman and his life on the bench symbolises exactly such an engagement with law and judgement as a record, an archive of a certain understanding of and thinking about the world.

Ian Storey in the introduction of *Artifacts of Thinking*, describes Arendt's "intellectual diary" as "a unique record of an intellectual life and one of the most fascinating and compelling archives of twentieth-century literature, political thought and philosophy."¹ He notes that the diary is different from other examples, neither confessional, nor autobiographical or narrative. The entries were made in a structured and thematic manner. The notebooks ultimately reflect Arendt's thinking, writing and significantly how she thought with others, "in a community of thinkers".² Of course Arendt never invoked the "I" which is where Froneman's later judgements strike an important difference. However, the tentative claim is that his judgements reflect his thinking in relation to other texts, and other thinkers, and go far beyond what is traditionally deemed as law. What we see in the notebooks and in the judgements of Froneman is a particular concern with and reflection on responsibility for the past and the (im)possibilities of any easy reconciliation. If Arendt's world is "the world of German philosophy",³ Froneman's is South Africa's enduring past and the struggle to be and do better - and in his context for law to be and do better. Arendt's approach described as "conceptual flexibility and responsiveness to the world around her" is visible in Froneman's careful deliberations albeit about property, contract, delict, language.

The gesture here is not any grand comparison or claim about two vastly different people but to find a way to read and interpret and situate the work and life of a judge that will open rather than close further engagements not only with him but with judgement, law, and justice. Froneman hinted at alternative ways in which

¹ Storey 1.

² Storey 2.

³ Storey 3.

we can be good and do good, and in this way challenged and rejected what Storey describes as "anticommunicative" and "ultimately antipolitical" approaches.⁴ He bore the brunt of criticism for doing this. Arendt's fascination with scientist Adolf Portman is recalled. She was inspired by Portman's resistance to functionalism and relied on it in her own anti-instrumental approach to appearance. She believed that appearances are "sensed", not described empirically and as all sensing is unreliable, we should accept diversity and plurality as inevitable. The contributions below underscore Froneman's commitment to diversity and plurality. Storey describes a turn in Arendt from knowledge to meaning, and from singularity to plurality and adds that to make meaning through knowledge made it possible for her to love the world and to take responsibility for it.⁵ It is this love for the world, for this country, that Froneman's attentive judgements manifest.

The contributions focus on various fields of law, approaches to law from multiple perspectives. Danie Brand argues that Froneman's judgement in *Bengwenyama* offers the start of what a transforming property law (developed by scholars such as Andre van der Walt, Tembeka Ngcukaitobi and Stuart Wilson) can look like. He describes this as a democratised or a democratising property law. Jaco Barnard Naudé reflects through the framework of psychoanalysis on Froneman's judgement in *Beadica* and relates the judgement to writing on minor jurisprudence. Turning to delict, Emile Zitzke unpacks Froneman's decentering of the common law's hegemony in the field and underscores his insistence on constitutional spirit, the role of the legislature, the Africanisation of common law and restorative justice. Isolde de Villiers revisits Froneman's *Schubartpark* judgement in which he found that the city's actions amount to eviction rather than evacuation. She reads the judgment and its aftermath alongside Ivan Vladislavić's story, 'We came to the monument' and considers the possibilities and impossibilities of inhabitation amongst ruins. Felix Dube takes this opportunity to contemplate Froneman's navigation of collegiality and dissent. To link with the above, one can say that he underscores the extent to which Froneman thinks and writes with a community of thinkers. Matthew Kruger, taking the *Shoprite* case as his cue reads Froneman as disclosing ways to interpret and apply the law in a radical transformative way. Karin van Marle reads Froneman as a subversive historian and as someone whose work stands in the guise of a re-orientation and rewriting of jurisprudence and law.

The contributions reflect the ethos that Froneman established during his tenure as a judge: a tentativeness that can be easily misinterpreted as hesitancy; empathy and insight into the underlying issues and how they affect the law; and

⁴ Storey 6.

⁵ Storey 6.

the courage to be creative, to imagine what doing law with a Constitution might look like.

Bibliography

Berkowitz R and Storey I (eds) *Artifacts of Thinking*. (2017 New York Fordham University Press)

Qozeleni v Minister of Law and Order 1994 3 SA 625 (E)

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1. Emphasis added.