
DESIGNS OF THE TIMES: THE REMAKING OF SOUTH AFRICAN AND DUTCH COURTROOM ARCHITECTURE DURING THE 1990s

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1 Introduction

Architecture is to living history what archaeology is to ancient history. One would therefore expect to find numerous examples in which legal history is researched by studying the designs of existing and former court buildings. Unfortunately the opposite is the case. Such studies are only on the rarest of occasions undertaken in a comprehensive fashion.¹ The modern reification of law as a collection of written rules, as opposed to a set of enacted rituals and visible symbols, may have contributed to this curious gap in legal scholarship. The same could be said of the institutional autonomy of law as a professional discipline in modern society. Whatever the case might be, it nevertheless still happens from time to time that a new court building is inaugurated amidst self-conscious claims that the building represents a significant moment or shift in the history of law. The new Constitutional Court building in post-apartheid South Africa is one such example.

Given that the executive and legislature of the new South African were originally (and still are) housed in buildings inherited from the colonial past, the new Constitutional Court building was the first major public building to be erected in the young democratic state. Not surprisingly, the building project was immediately embraced as a unique opportunity to “physically dramatise the transformation of South Africa from a racist, authoritarian society to a constitutional democracy”.² The architects responsible for the project gave concrete expression to this transformative agenda and soon unveiled the design of what they aptly called a “new symbol for a new democracy”.³ In light

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1 A few notable examples include Brigham “From temple to technology: The construction of courts in everyday practice” in Sarat (ed) *Everyday Practices and Trouble Cases* (1998) 199; Evans “Theatre of deferral: The image of law and the architecture of the Inns of Court” 1999 *Law and Critique* 1; Halder “The function of the ornament in Quintilian, Alberti, and court architecture” in Douzinas & Nead *Law and the Image* (1999) 117; Le Roux “Studying legal history through courtroom architecture: Scattered comments on the Palace of Justice, Pretoria” 2003 (44)*Codicillus* 34.

2 Sachs “Judge and jury” 1998 *South African Architect* 27 29.

3 Makin & Masojada *Design Proposal: Competition for the Constitutional Court of South Africa* (1997).

of these claims and intentions, the building may be read as an important aesthetic index of, or aesthetic analogy to, the transformation of post-apartheid law and legal culture.⁴

This is not to suggest that the new Constitutional Court building is historically unique in this regard. The Palace of Justice on Church Square in Pretoria played a similar role in the legal culture of the late nineteenth century. The design and construction of the building during the 1890s coincided with a constitutional crisis in the *Zuid-Afrikaansche Republiek* (ZAR) that led to far-reaching constitutional reforms and eventually resulted in the South African War (1899-1902). The crisis also left its marks on the design and architecture of the Palace of Justice as the two protagonists, President Kruger and Chief Justice Kotzé, both tried to exploit the building project to strengthen their own constitutional views.⁵ The Palace of Justice has never lost the symbolic status and expressive function that it acquired during those early years. After a century which saw the building become an icon of the apartheid state (it is where Nelson Mandela was tried and sentenced during the 1960s), the Palace underwent a comprehensive restoration process during the mid-1990s. During the renovation work a long forgotten painting of Johannes Voet was rediscovered. Many legal scholars regarded this as a significant symbolic event. The building became inscribed in the debate of the times about the restoration and future of the Roman-Dutch common law tradition in post-apartheid South Africa.⁶ From its inception to restoration, the Palace symbolically marks a century of turbulent legal history in its architectural design and symbolism.

4 Le Roux "From acropolis to metropolis: The new Constitutional Court building and South African street democracy" 2001 *SAPR/PL* 139; Le Roux "Bridges, clearings and labyrinths: The architectural framing of post-apartheid constitutionalism" 2004 *SAPR/PL* 629; Le Roux "Planning law, crime control and the spatial dynamics of post-apartheid street democracy" 2006 *SAPR/PL* 25; Le Roux "War memorials, the design of the South African Constitutional Court building and counter-monumental constitutionalism" in Le Roux & Van Marle *Law, Memory and the Legacy of Apartheid: Ten Years after Azapo v President of RSA* (2007) 78. The importance of aesthetic analogies in post-apartheid constitutional theory in general is discussed in Le Roux "The aesthetic turn in post-apartheid constitutional scholarship" 2006 *TSAR* 101.

5 See the discussion by Le Roux (n 1).

6 Van der Walt "Un-doing things with words: The colonisation of the public sphere by private property discourse" 1998 *Acta Juridica* 280 reacted to the discovery in no uncertain terms: "The enthusiasm about the symbolic value of this painting reminds one of the view, expressed by eminent lawyers such as the current Chief Justice, that the Roman-Dutch tradition was not fundamentally tainted by decades of apartheid, and that it, like the old Palace of Justice and the painting of Voet, could and should be restored to its former glory and receive its due place of honour in the legal system of the new South Africa ... I, for one, would like to see the painting go to an art museum. We should not have a painting of Voet on a wall of the Palace of Justice." The reasons for Van der Walt's strong views need not be repeated here. The point is simply that the building had assumed such iconic status by the mid 1990s that it came to be regarded by many as an index of the status and fate of a whole legal tradition.

One need not look too far beyond our own legal shores to find similar examples of the significant role that court buildings often assume during periods of legal transition. The recent constitutional reforms in Britain, for example, have already found symbolic expression in the architectural design of a new Supreme Court building on the site of the old Middlesex Guildhall, opposite the Houses of Parliament in Westminster.⁷ An even more important and ambitious attempt to architecturally underscore the transformation of a legal order took place in the Netherlands during the 1990s. As part of what is widely known as the “*JR120-huisvestingsprogramma*” twenty one prominent new court buildings were designed and constructed during this time. These buildings formed part of an official and self-conscious attempt to provide the modern Dutch state and judiciary with a new public image.⁸

The design and construction of the *JR120* buildings in the Netherlands unfolded more or less during the same time as the design and construction of the new Constitutional Court building in South Africa. Both projects were characterised by the desire to find an appropriate architectural expression of the role and status of law in a modern democracy. These features probably provide sufficient academic justification for a comprehensive comparison between the two building projects. Whatever the case might be, such a comparison would in this instance also be motivated by a personal experience.

I visited the new *Paleis van Justitie* in 's-Hertogenbosch (one of the flagships of the *JR120* project) during June 2002 on a research visit to the Netherlands. The bottom halves of the walls in the courtrooms are covered with beautiful panels of wood. The panelling lends a familiar and comforting austerity to the

7 The *Constitutional Reform Act*, 2005 created a Supreme Court to take over the function of the Law Lords. For a general background to the constitutional reforms see Le Sueur *Building the UK's New Supreme Court: National and Comparative Perspectives* (2004). The government has expressed itself as follows on the symbolic significance of the building: “In 2004 we undertook a comprehensive evaluation of a number of buildings within central London. After thorough consideration, Middlesex Guildhall was chosen, as the preferred location. Locating the UK Supreme Court on Parliament Square, opposite the Houses of Parliament and alongside Westminster Abbey and the Treasury Building, will symbolise the Supreme Court as a cornerstone of our constitutional rights in this country”: www.dca.gov.uk/supreme/index.htm (27 February 2007).

8 Dutch society has certainly not been unique in its attempt to find a new image of justice for the twenty first century. A similar attempt is described in the (United States) American context by Brigham (n 1). According to him, the 1990s witnessed a shift “from temple to technology” in (United States) American legal culture and courtroom design. Beginning with the OJ Simpson trial, the integration of information technologies into courtroom design has completely redefined law's public image. The computer screen has now all but replaced more traditional icons of justice in American courts. Numerous companies already specialise in the use of information technology during trials. Computer generated reconstructions of crimes and crime scenes (especially motor vehicle accidents) are increasingly becoming a standard feature of American trials. The Courtroom 21 Project of the Center for Legal and Court Technology at the William and Mary School of Law is a good example of the shift that Brigham describes. The courtroom sells itself as the technologically most advanced in the world, and presents something of an ideal courtroom of the future: large plasma screens on all the walls, power-point presentations flashing on and off, laptop computers on every table.

courtrooms. What appears above the panelling, however, gives the new courtrooms their unique character. Large multi-coloured tapestries of dramatic and visually arresting artworks cover the remainder of the walls on all sides of the courtrooms.⁹ The tapestries serve both an acoustic and decorative function. The effect of these artworks on the ambience of the building is particularly powerful in one of the larger courtrooms on the ground floor of the complex. The tapestries in question were designed by South African born artist Marlene Dumas and depict a number of large, computer generated faces and figures set against a dusty yellow-brown background (see figure 1). The abstract human images appear infinitely vulnerable, as if they are urgently appealing for help (to the court and the law perhaps?), but are waiting desperately upon a reply and a sign of redemption. The tapestries introduce a haunting and disruptive sense of postponement into the otherwise familiar court environment and the small finalities of the daily administration of justice.

Two years later, on a visit to the new South African Constitutional Court building shortly after its inauguration, I was unexpectedly struck by the same haunting images that I saw earlier in 's-Hertogenbosch. Identical Marlene Dumas tapestries cover the top half of the western wall in the large foyer of the new building, immediately overlooking the permanent art exhibition of the court, but also the entrance to the courtroom slightly further away (see figure 2). The tapestries immediately establish a puzzling, but physically and experientially commanding, connection between the Constitutional Court building in Johannesburg and the *Paleis van Justitie* in 's-Hertogenbosch. How did it come about that the tapestries were installed here? What does their presence say about the project to architecturally re-fashion the public image of justice in post-apartheid South Africa? This essay is a first attempt to come to terms with the relationship between the two buildings and the captivating work of art they share in common.

The essay begins by exploring how the *Ministerie van Justitie* (Department of Justice) in the Netherlands has turned to courtroom architecture in order to symbolically underwrite fundamental changes in Dutch law and legal culture. It then situates the tapestries by Marlene Dumas within the context of this governmental project. I argue that although they had been commissioned to support the high-tech image of a completely business-like judiciary, Dumas actually highlights the limitations of this judicial self-concept and its reduction of justice (or ethics) to the administration of justice (or law). The second part of

9 See Spijkerman (ed) *Verzachtende Omstandigheden: Wandtapijten in het Paleis van Justitie 's-Hertogenbosch* (1998).

the essay explores the architecture of the South African Constitutional Court building and asks whether the metaphors which inform the design do any better to accommodate Dumas's implicit critique of modern law. I suggest that they don't, but that the power of the design lies precisely in the disruption that it causes within the institutional and physical space of law.

2 The *Paleis van Justitie* in 's-Hertogenbosch: In search of a new public image for the judiciary in the Netherlands

At the beginning of the 1990s the administration of justice in the Netherlands was facing a major crisis. The number of advocates in the Netherlands had increased more than three-fold between 1970 and 1990 (from 2000 to 6400) and the number of cases nearly by the same number (from 167 000 to 370 000).¹⁰ In many places the accommodation of courts had simply become inadequate to ensure the effective administration of justice. Courts were, for the most part, still housed in first generation court buildings, small, neo-classical monuments in the city centre. These old buildings were unable to house the large body of bureaucratic support personnel which had grown around increasingly diversified courts during the twentieth century. The administration of justice in 's-Hertogenbosch, for example, was scattered across seven different buildings in the city. This dysfunctional state of affairs was an undeniable symptom of the far-reaching changes that Dutch society and legal culture had undergone since the nineteenth century (when most of the then existing court buildings were originally constructed).

2.1 The juridification of Dutch society and the changing role of the courts

Pieter Ippel provides a helpful socio-jurisprudential overview of these changes and suggests a shorthand expression to capture their essence. He speaks in this regard of a movement in Dutch law from *codificatie tot modificatie* (codification to modification).¹¹ Nineteenth-century ideals of a codified and formally rational legal system have given way to postmodern demands for the constant modification and fluidity of law and legal processes. Ippel uses a variety of sociological buzzwords in order to characterise this movement. He describes modern Dutch society respectively as a "risk society" (after Ulrich Beck), as a "choice society" (after Lawrence Friedman), and as a "juridified

¹⁰ Ippel *Modern Recht en het Goede Leven* (2002) 27.

¹¹ *Idem* 5.

society" (after Jurgen Habermas). On the basis of these large-scale sociological descriptions, Ippel proceeds to characterise contemporary Dutch legal culture as relatively informal and non-legalistic. Law is increasingly understood as an open-system of regulation which requires far greater judicial freedom and activism than was regarded constitutionally sound in the nineteenth century. Legal decisions can no longer be made with reference to the letter of a pre-existing system of rules and legislation alone, but requires practical value judgements in which a variety of factors – including moral considerations of fairness, international norms and the social consequences of decisions – must be taken into account. He calls this shift in the nature of modern adjudication the "vermaatskappelijking van het recht".¹²

Jurisprudentially speaking, Ippel characterises modern Dutch legal culture as an assimilation of post-realist legal scholarship, and, in particular, of the calls for a sociologically grounded jurisprudence (as formulated by Roscoe Pound) or what Nonet and Selzinck call "responsive law".¹³ Law has become an instrument for the regulation of all spheres of social life, gradually displacing other regulative mechanisms of the life-world, such as social traditions, religion and customs. Whether this juridification of society is regarded as a positive or a negative process, the net result is a radical increase in judicial activity and litigation in society. With this increase in judicial activity, questions about the efficiency of legal regulation begin to assume centre stage. Ippel aptly summarises the shift from nineteenth-century demands for the formal nationality of law (still embraced by Max Weber and the German Pandectists) to the present-day demands for its efficiency:

Het moderne recht is sterker instrumenteel geworden. Het is gericht op het verwezenlijken van maatschappelijk gewenste, in de politieke arena vastgestelde beleidsdoelstellingen. Al snel duikt dan de vraag op of het doel – de realisering van het beleidsprogramma – gehaald wordt en of dat met de mees geschikte, minst belastende middelen gebeurt. Hier gaat het dus om vragen van effectiviteit en efficiëntie.¹⁴

Ippel's characterisation of the sociology of modern law in general and Dutch legal culture in particular, has much appeal. The rise of the welfare state, the greater role of the courts as watchdog of the executive, the collapse of romantic notions of popular democracy, the linguistic turn, and the increasing importance of international human-rights norms, have all placed the classical

12 *Idem* 27.

13 *Idem* 24.

14 *Idem* 46.

understanding of the rule of law (as the law of rules) under pressure. Law can no longer be seen as an autonomous and internally coherent system of basic classifications and their logical elaboration. The measure of law's rationality is no longer internal consistency, but its effectiveness as a social regulator. Ever greater areas of social life have become regulated through law, and more and more people come into contact with the legal order. Justice has lost its mythological sense of "Right", and has become merely the administration of justice as the secularised harmonisation of subjective rights.

Ippel's characterisation of modern legal culture in the Netherlands is widely shared by other contemporary Dutch writers. Hol, for example, describes the juridification of society and the *vermaatskappelijking van het recht* as key determinants of modern Dutch legal culture.¹⁵ His analysis is helpful because it focuses specifically on the impact of this process on the role and status of the judge in society. The task of the judge is no longer to give effect to legislative commands (ie to apply the law as in the tradition of nineteenth-century textualism), but to remove and compensate societal inefficiencies in an attempt to achieve a harmonisation of interests in society. This implies that judges must creatively solve disputes where gaps exist in the existing law. However, far more is at stake in the changing role of the judge:

De kern van de maatschappelijking van het recht door de rechter steekt echter wellicht niet zozeer in zijn taak om het recht aan te vullen waar dit onbepaald is. Meer nog betreedt het idee naar voren in die gevallen waarin hij omwille van het belang dat wordt gehecht aan het behoud van een bepaald maatschappelijk evenwicht het recht in zijn werking corrigeert.¹⁶

Ippel and Hol describe how Dutch legal culture has increasingly embraced an activist judiciary which is no longer restrained by the quest for the formal rationality or scientific coherence which characterised the scholarly study of the Roman-Dutch common law in its heyday. Legislative norms are increasingly formulated in broad terms which enable judges to fill gaps and correct the working of the law through purposive interpretation. It should be noted that this vision of (or aspiration for) the judiciary is not unique to Dutch society. Hector Fix-Fierro describes similar changes in the nature of law and the role of the courts in other developed societies, most notably the United States of America.

15 Hol "Individualisering en juridificering: Determinanten van de moderne rechtscultuur" in Havelaar-Datema *De Rol van de Rechter en de Wetgever bij de Rechtsontwikkeling in België en Nederland* (1995) 1.

16 *Idem* 10.

According to him, these changes affect both the quantity and *quality* of modern law and litigation in society:

The expansion in the size and scope of administration and legislation has not merely generated more business for the courts. It has also expanded the scope and meaning of adjudication itself, so that, in addition to the traditional fields of criminal and civil law, the courts have become involved in new areas of the law and public policy in general. Consequently, courts are not merely supposed to apply and enforce existing laws any more. They have also been granted law-making powers and the capacity to formulate and implement policies [...] sometimes supplementing, at other times replacing, and even opposing the policies of executive agencies and legislative bodies. The courts – or at least some of them – participate openly in the constitutional and political process by controlling and monitoring the actions of the legislative and executive branches. They have become a third, real branch of government, at least in the sense that they now play an important role in shaping the general direction of society.¹⁷

The *vermaatskappelijking van het recht* has therefore not merely resulted in more law and the need for more courts, but also in *law of a different character* and courts of a different nature. It is against this background that the inherited nineteenth-century courtroom architecture in the Netherlands had become functionally inoperative at the end of the 1980s, and equally important, aesthetically and symbolically anachronistic. The buildings referred back in neo-classical style to Greek temple architecture. They were neither capable of accommodating the increased size and scope of the judiciary as a branch of government, nor the changing nature of law and adjudication in society.

2.2 The JR120 project and modernisation of the judiciary

It is therefore not surprising that judicial reform in the Netherlands became a cabinet priority in 1989. A policy decision was taken to rapidly modernise the judicial system and its outdated facilities. The *Ministerie van Justitie* (Department of Justice) and the *Rijksgebouwendienst* (Department of Public Works) were instructed to jointly coordinate this modernisation process. The result was the formalisation of what has come to be known as the “JR120-huisvestingsprogramma” (the name is derived from a combination of *Justitie* +

17 Fix-Fierro *Courts, Justice and Efficiency: A Socio-legal Study of Economic Rationality in Adjudication* (2003) 14.

Rijksgebouwendienst + 120 million guilders per year). The project included the design and construction of twenty one new court buildings (in addition to a number of prisons and police stations). The first construction work began in 1993 and the majority of the so-called “second generation”¹⁸ court buildings were completed during the next five years. The program was officially concluded in 2005 with the inauguration of a new court building in Haarlem.

Because of the limited budget available at the time for the construction of new court buildings, and the urgency of the project as a whole, a decision was taken to finance the new buildings on the basis of operational lease agreements with private developers.¹⁹ This unique new public-private partnership had a decisive impact on the architectural design of the new buildings. Because the court buildings were only leased by the state (and not owned and purposefully designed by the state, as in the past) the private developers had to ensure that the buildings would remain commercially viable, should the state decide to relocate after the end of the lease agreements. The problem was that the dedicated courtrooms and holding cells made the long term commercial marketability of the buildings problematical. To overcome this difficulty, two far-reaching solutions were adopted. The courtrooms themselves were concentrated and located outside the administrative office blocks in separate buildings or structures. This meant that these purpose specific parts of the court buildings could easily be demolished or converted should the need arise. In order to ensure that demolition would not have any adverse financial complications, the courtroom complexes could be written off for taxation purposes at a faster rate than the rest of the administrative support buildings.

Contracts were concluded on this basis with six private developers for the design, construction and lease of the new court buildings. Not surprisingly, all of the resulting court buildings were essentially conceived as commercial office blocks with a set of courtrooms juxtaposed in a variety of creative ways. Although this design feature and the basic aesthetic appearance of the new court buildings were largely determined by commercial considerations, the new buildings were quickly embraced by the *Ministerie van Justitie* as an appropriate aesthetic expression of the new role of law and the judiciary in Dutch society.²⁰ As the project drew to a close in 2003 with the laying of the

18 Ministerie van VROM & Ministerie van Justitie *JR120 Tussenbericht 2: May 1992* (1992) 6.

19 Ministerie van VROM & Ministerie van Justitie *JR120 Tussenbericht: Januari 1991* (1991) 3. Bakker “Huurcontract van 1 miljard: Eens maar nooit meer?” 1994 *Bouw* 8; Boekraad “Mijlpalen in omslag: Van Tweede Kamer en Vrom tot ‘markt-conforme’ huisvesting” 1992 *Architectuur/Bouwen* 10.

20 Schlag “The aesthetics of American law” 2002 *Harvard Law Review* 1061 describes how the modern office block also captures the essence of modern (United States) American

cornerstone of the new court building in Haarlem, the then serving Minister of Justice looked back at the programme as a whole and explained that its overriding aim was to provide functional accommodation for the Department of Justice. He then proceeded to ask:

Maar wat is een functionele behuizing? Dat is meer dan een vraag van bouwkunde alleen. Wat een functionele behuizing is, is in de eerste plaats uitdrukking van hoe we in iedere tijd de rechtspleging zien.²¹

The aim with the building program was therefore also to give symbolic expression to a new understanding of law and its role in modern Dutch society. In this regard the Minister explained that it was only after the French Revolution that dedicated courtroom architecture became a concern in Western societies. Initially, the location of the court was more important than the design of the building itself. Central locations were later supplemented by imposing neo-classical buildings. However, these buildings had become both functionally and aesthetically obsolete in the twenty first century.²² The new generation of Dutch court buildings, the Minister continued, more appropriately represented the shift from authority to accountability that characterises the democratisation of society. Echoing these ministerial views, Rothuizen suggests that the new building of the *Ministerie van Justitie* in Den Haag could be regarded as the main symbol and architectural expression of this shift in legal culture:

Honderd jaar geleden moest een regeringsgebouw nog gezag uitstralen. Die voorwaarde is achterhaald. Met het huidige ministeriegebouw aan de Schedeldoekshaven toont Justitie een gezicht dat radicaal anders is dan van zijn voorganger aan het Plein. Het contrast kon nauwelijks groter zijn.²³

The old building of the Department of Justice in Den Haag to which Rothuizen refers was constructed during the latter half of the nineteenth century. It was a time when the unification of Germany was perceived as a threat to the independence of the Netherlands. An upsurge in nationalism resulted in a call for a national building style. After a heated debate a compromise was reached

law as an instrumental administration of the world. The abstraction of legal thought is architecturally supported by the office towers of the modernist grid-like city and the "fancy corporate law office on the thirty-eighth floor, where the ethereal, perfectly typed words of impeccably dressed attorneys produced highly mediated, largely unseen effects on the messy flesh of humanity below".

21 Donner "Speech Donner bij nieuwbouw gerechtsgebouw Haarlem, 20 Oktober 2003" www.justitie.nl/pers/speeches/archief/archief_2003/221003Donner_nieuwbouw (17 August 2005).

22 See also the discussion in Ministerie van VROM & Ministerie van Justitie (n 19) 3.

23 Donner (n 21).

between the two main protagonists, Cuypers and De Stuers, in favour of the old Dutch style of the sixteenth-century Renaissance.²⁴ The building of the Department of Justice became a icon of the new national state architecture.²⁵ It was accordingly designed to reflect centralised state power and national authority. By contrast, the aesthetic demands which are today placed on the new building of the Department of Justice are markedly different:

[Het gebouw] hoefde geen greintje gezag van uit te stralen. Er moest gewoon een degelijk kantoorgebouw komen, groot genoeg om alle verspreide afdelingen in onder te brengen. [...] De verhuizing was in zekere zin symbolisch voor het veranderde tijdsbeeld. De Nederlandse samenleving was na de jaren zestig versneld gedemocratiseerd. De generatie ambtenaren van de oude stempel ging met pensioen, de omgangsvormen en de kleding werden informeler, meer in overeenstemming met een eigentijds, niet-monumentaal kantoorgebouw dat geen gezag uitstraalt, eerder nuchterheid en efficiency.²⁶

If the contrast between the old and new buildings of the *Ministerie van Justitie* in Den Haag already marked an ideological shift in legal culture from authority to efficiency, then, as Minister Donner confirms, the *JR120* court buildings gave further and more concrete meaning to this shift. The *JR120* project was officially presented by the Department of Justice as a symbolic expression of the *vermaatschappelijking* of the law described by Ippel and Hol (embraced and celebrated by the *Ministerie van Justitie* as a positive phenomenon). An official publication of the *Ministerie* puts it as follows:

Justitie is in beweging. De vermaatschappelijking van het recht stelt nieuwe eisen, zowel aan de organisatie als aan de gebouwen waarin zij zetelt.²⁷

How then does the new ideology of judicial efficiency find symbolic expression in the *JR120* court buildings? The design of the new building in Lelystad is a good place to start in search of an answer.

24 Van der Woud *Waarheid en Karakter: Het Debat Over de Bouwkunst 1840-1900* (1997) 187-230.

25 Kleijn, Smit & Thunnissen *Nederlandse Bouwkunst* (1995) 162ff. *Rothuizen Gezichten van Justitie 1798 - 1998* (1998) 111.

26 Donner (n 21).

27 Ministerie van VROM & Ministerie van Justitie (n 19) 5.

2 3 Looking in on justice in Lelystad

Typical of the project as a whole, the court building in Lelystad was developed by a private developer with a long-term lease by the *Rijksgebouwendienst* in mind.²⁸ Equally typical of the *JR120* project, the court building is visually dominated by the divide between its courtrooms, to the left of a large entrance hall, and an imposing office block, to the right of the entrance hall. The only connection between the two sections of the building is a pedestrian bridge from the one side to the other. Aesthetically speaking, the architects combined a strict classical portico on the side of the office block with the extensive use of glass on the side of the courtroom complex. As the architects put it: "*Het gebouw moet niet alleen rechtvaardigheid, zorgvuldigheid en evenwicht uitstralen, maar ook openheid*".²⁹ The glass-like transparency of the courtroom complex is enhanced by the fact that all the corridors of the complex are situated on the outer perimeter of the building, directly behind the large glass wall. From the street one can see all the movement inside the courtroom complex, including those of the presiding officers and lawyers in their official court regalia, moving in and out of the courtrooms. This design feature introduces a sharp contrast between the courtroom complex and the office block, where the usual practice was followed of hiding corridors on the inside of the building behind outward facing offices.

The court building has no physical or symbolic interior depth anymore. The building has been turned inside out. It hides no sacred secrets in its hidden and inaccessible depths, but merely performs secular social functions. The glass panels do not reveal eternal truths, but the pragmatic response to societal dysfunctions. The same applies to the postmodern legal culture that the building represents. The architectural design visually reflects the dynamic nature of the *legal process* rather than the static *legal content* of a code of law. The contrast between the modernist building and its neo-classical predecessors powerfully captures what Ippel describes as the movement from *codificatie tot modificatie*. Law is no longer seen as a static body of enlightened and scientific knowledge, based on certain fixed proportions and foundational values (the essence of neo-classical architecture and the building as monument). Law has become a regulatory mechanism which is constantly changed and modified in order to ensure its effectiveness in a globalising world (the essence of functionalist architecture and the building as machine).

28 Elfering "Klassiek en streng versus transparent en open: Gerechtsgebouw in Lelystad" 2001 *SMAAK* 19.

29 *Idem* 20.

Much the same cultural message is contained in the designs of the other *JR 120* buildings, such as the new court building at the *Kop van Suid* in Rotterdam.³⁰

2.4 At the offices of justice in Rotterdam

The exterior of the new court building in Rotterdam is aesthetically dominated by the familiar separation of the courtroom complex and supporting administrative office block. As is the case in Lelystad, the office block is given sufficient prominence to compete favourably with the other office complexes of the surrounding business district. Situated at the *Kop van Suid*, a new commercial development outside the city centre, the design of the building furthermore underscores the shift away from insignia of centralised state authority to purely functional imperatives. The choice of location in this case, as in the case of most of the *JR120* buildings, is officially explained and justified as follows:

In de hedendaagse sameleving moet een rechtbank niet zozeer macht uitstralen of ontzag inboezem, maar vooral herkenbaar, representatief en bereikbaar zijn.³¹

However, the exterior of the courtroom complex lacks the dynamic impact of the glass court in Lelystad. It is rather in the interior design of the complex that the focus on operational efficiency and law as efficient regulator becomes clear. The courtrooms are completely devoid of any permanent fixtures and attachments. Each courtroom resembles a corporate seminar room in which loose pieces of office furniture have temporarily been arranged for the purpose of the day, but can just as easily be removed or re-arranged for another purpose. No inherent or fixed hierarchies of power or authority are therefore openly established. National symbols are absent and have been replaced by commissioned works of art in the corridors and waiting areas of the building (itself increasingly typical of the office aesthetics of the international corporate environment). The aura of law has all but disappeared in this minimalist office environment. The legitimacy of the court, the design seems to be suggesting, attaches purely to its operational or business-like efficiency and responsiveness to social dysfunctions.

30 Ministerie van VROM "Gerechtsgebouw Rotterdam onderdeel stedelijke vernieuwing" *Projectdocumentatie 9* (1996).

31 Ministerie van VROM & Ministerie van Justitie (n 19) 2.

In spite of the differences between the new court buildings in Lelystad and Rotterdam, a basic pattern emerges that is repeated throughout all of the *JR120* court buildings, including the new court in 's-Hertogenbosch. However, in 's-Hertogenbosch a unique element is added to the design aesthetic that deserves special attention.

2.5 Before the art of justice in 's-Hertogenbosch

The *Paleis van Justitie* in 's-Hertogenbosch is in one sense a typical representation of the *JR120* building program. In the official government publication which accompanied the opening of the building, the central theme of legal change and its architectural representation play a prominent role. The theme is by now familiar but deserves to be highlighted one more time:

A Palace of Justice represents much history and tradition, not only in its programme but in its very name. After all, a judge is the practitioner of a very old and venerable profession; the place in which the law is proclaimed has a very special, almost sacred character in all cultures. Yet much has changed over time. Judges, priests, professors and doctors are no longer what they used to be. Just as priests are no longer go-betweens for the Almighty but concentrate more on helping from earthly perceptions, so the law has become more horizontal. It seems now to represent not so much the pillars of social order, but rather a sophisticated form of mediation and arbitration. Everything has become much more ordinary – more businesslike. And more informal.³²

The new *Paleis van Justitie* in 's-Hertogenbosch is in this context actively promoted as a contemporary architectural expression of the change in legal culture from the sacred to the social. The court building visually presents itself as a large office complex in the shape of a fully closed square. It is located outside the old city centre as the first major building of a larger commercial property development project. The immediate context of the building is thus not an established national civic precinct but a global business environment. Like most of the *JR120* buildings, the *Paleis* has to hold its own, not against other public buildings, but against other corporate office blocks. The complete assimilation of this corporate aesthetic into the design of the building is accentuated by the fact that the courtrooms themselves are not visible from the outside of the building (as in the other two *JR120* designs discussed above).

32 Verschaffel "A Palace with a voice" in Spijkerman *Paleis van Justitie 's-Hertogenbosch* (1998) 43.

The courtrooms are located in a free-standing building that is situated on the inside of the square. As is the case with the court in Lelystad, the use of glass dominates the design of this courtroom complex. The result is a visually dramatic contrast between the courtrooms and the heavy brickwork of the higher office blocks that surround them on all sides.

The courtrooms are, like those in Rotterdam, furnished with free-standing office chairs and tables which can easily be moved about. However, this does not apply to the seating of the judges which is, in a nod to tradition and authority, elevated and of a permanent nature. Moreover, as said in the introduction, the bottom half of all the interior walls are decorated with panels of solid wood. These attempts to create a traditional air of austerity in the courtrooms are given a modern twist by the prominent use of graphic designs on the thirty six commissioned tapestries which cover the remainder of the walls. Functionally speaking, these tapestries serve an acoustic purpose in the courtrooms and thus form an integral part of the overall design of the building. Aesthetically speaking, the effect of the tapestries on the ambience in the courtrooms varies from harmlessly ornamental to haunting. The latter none more so than in the case of the tapestries designed by Marlene Dumas (see figure 1).

The series by Dumas is titled *The Benefit of the Doubt*. The phrase is a well-known legal expression (the corollary of the burden of proof in criminal law cases). However, it is employed by Dumas not to reinforce an institutionalised legal discourse, but to establish doubt as a necessary precondition of law as such. Each of the three tapestries in the series monochromatically depicts a combination of abstract human faces and figures. The abstract images are respectively placed on the far left, far right and in the centre of each tapestry. The power of *The Benefit of the Doubt* lies in the fact that Dumas manages to depict each of the faces and figures with a poignancy that renders them immediately arresting and infinitely vulnerable at the same time. On the one hand, the abstract faces and figures evoke an immediate and powerful sense of responsibility towards these unknown strangers. On the other hand, the faces are completely decontextualised and therefore provide no starting point from which any concrete legal or moral response can be formulated (or even demanded). For a brief moment, therefore, the images have a paralysing effect on the onlooker. A hesitation or gap, however small, is opened between ethical responsibility and legal response. This accounts for the haunting and unsettling effect of the tapestries in the courtroom setting.

Each of the tapestries bears the same haunting effect within itself. Dumas depicts not only one face or figure demanding a response, but three. The

number is of particular significance. As she explains: "One is alone, two is a couple and three is politics."³³ Every response to the face of the other always takes place in the face of another. This plurality is the founding condition of politics and of law. However, this founding condition is no secure ground.³⁴ Law is, as it were, grounded in the gap between the single face, demanding unmeasured ethical responsibility, and the three faces demanding measured legal responsibility.³⁵ The law must judge and decide their fate. But who are these people? The images are infinitely vulnerable and unable to speak for themselves. The very vulnerability and nakedness of the images exposes a vulnerability and nakedness on the side of the law. Can a final judgement be expressed here? It is significant that Dumas calls her work "The Benefit of the Doubt" and that she proceeds to claim that doubt is the precondition or "basis of the constitutional state".³⁶

With the *The Benefit of the Doubt* a new dimension enters the discourse surrounding the second-generation court buildings in the Netherlands. Dumas refuses to celebrate the juridification of Dutch society and the *vermaatskappelijking* of the law in any unproblematical sense. The doubt at the heart of the law is precisely a doubt about the ability of modern law to neatly administer everything and everybody on the basis of logical or economic rationality. This doubt disrupts the modern ideal of a purely functional legal order. It paradoxically marks the limits of law as such, and provides an

33 Quoted in Spijkerman (n 9) 51.

34 The work of Lyotard *The Differend: Phrases in Dispute* (1988) raises the question whether the three faces can ever become the collective "We" of all nationalistic and republican discourses in whose name the law is always declared. According to Lyotard this collective "We" is always threatened by the actuality of obligation (the single face of the other). Obligation separates the "We" of our constitutional discourse into the "You" instance of the addressee (the judged) and the "I" instance of the addressor (the judge). These pragmatic poles are completely heterogeneous and can not be translated back into each other. What Dumas achieves with *Benefit of the Doubt* is to mark this heterogeneity. Lyotard continuous: "A single proper name, whether singular or collective, designates an entity astride two heterogeneous situations" (99). This heterogeneity also explains what Dumas calls the doubt at the heart of democratic constitutionalism.

35 The tension between the face of the one and the faces of the three is a central theme in the work of French philosopher Emmanuel Levinas. Levinas explained the tension as follows in an interview with Florian Rotzer: "The Bible says: Thou shalt not kill ... to be human is to be responsible for the other. I have a completely modern expression for this: I am hostage to the other. I am hostage to my other. One acknowledges the other to the extent that one considers oneself hostage ... But we're not only two, we're at least three. Even now we're three. We're one humanity. Then comes the question, the political question: Who is the first? And then everything is new and different. A moment ago the other was what I call a face. He is uniquely for me. His uniqueness is put in question when the third appears. I must also see the third in his face. One must thus compare the incomparable. That is for me the Greek moment in our civilization. We can't get by with the Bible alone ... With this, violence first enters in, for a judgment of justice is violence": Rotzer *Conversations with French Philosophers* (1995) 59-60. See also Levinas *Entre Nous: On thinking-of-the-Other* (1998) and Levinas *Alterity and Transcendence* (1999) 126: "Beneath the plasticity of the face (*figure*) that *appears*, the face (*visage*) is already missed." The images depicted by Dumas allude then to the otherwise hidden and always escaping Face (in the Levinasian sense of the term) in the faces of those who appear before the court.

36 Quoted in Spijkerman (n 9) 51.

important counter reaction to the seemingly limitless ability of law to administer society, the very ability that is otherwise celebrated by the new generation of Dutch courtroom architecture.

If the tapestries by Marlene Dumas serve to mark the limits of the ideology of pure judicial administration towards the end of the twentieth century, what position do they occupy in the transformation of the post-apartheid legal order of the late 1990s?

3 The new South African Constitutional Court building and the public image of law in post-apartheid society

3.1 Redesigning democracy

At the beginning of the 1990s South Africa faced the same two-fold dilemma as the Netherlands about the functional and symbolic appropriateness of its court buildings. The discomfort with the courtroom design and architecture which were inherited from the colonial and apartheid regimes is powerfully captured in the following remark by Julius Malema, then President of COSAS, after the conviction of Winnie Mandela of fraud: "The prosecutor is white, the magistrate is also white *and the court buildings also represent the boere regime*, however the accused is a black women from a township called Soweto, and it does not come as a surprise that she was found not guilty."³⁷

The design of a new Constitutional Court building during the late 1990s provided the new South African state with its first opportunity to refashion the public image of the democratic legal system. Everybody involved in the process understood the symbolic importance of the project. When the Constitutional Court heard its first case on 15 February 1995 it was housed in prime commercial office space in Braamfontein which had been temporarily leased and converted for this purpose. From the Dutch perspective of the time, this would have been close to the ideal location for the highest court in a young democratic state. However, the judges of the court felt from the outset that the office block was an inappropriate setting for the court and immediately started exploring alternatives. Interested developers presented a number of proposals to the judges. The basic idea was to relocate the Court to an important new commercial property development in Midrand, halfway between Pretoria and Johannesburg. The judges rejected this proposal and decided, instead, to

37 See Le Roux "The right to a fair trial and the architectural design of court buildings" 2005 SALJ 314 (my emphasis).

locate the court in down-town Johannesburg on the site of a derelict old prison complex. This decision grew from a distinctive understanding of the role that the Constitutional Court had to play in post-apartheid society and had a decisive impact on the eventual design and aesthetics of the building.

During the long years it was in operation before it was closed in 1983, the prison complex that was chosen as site of the new building was known as the Old Fort prison. In the minds of many South Africans, the place was synonymous with the brutal oppression of the apartheid state and the long, difficult struggle against it. Thousands of participants in the Defiance Campaign launched in 1952 were detained there. Nelson Mandela and his fellow treason trialists were held in the awaiting trial block during 1956, as were numerous activists during the state of emergency after the Sharpville Massacre in 1960, and hundreds of teenagers after the Soweto Uprising of 1976. The judges thought that this symbolic capital would enable architects and urban planners, through the design of the new building and redevelopment of the site, to “physically dramatise the transformation of South Africa from a racist, authoritarian society to a constitutional democracy”.³⁸

The concept for the site as a whole and the design requirements for the Constitutional Court building itself were formulated and carefully set out in the brief and conditions of the competition for the project. The basic idea was to transform the prison complex into Constitution Hill, a civic precinct, which would house the Constitutional Court, a series of museums, and other constitutional institutions like the Gender Commission. To make room for these developments, an agreement was reached to demolish the awaiting trial block. The remaining buildings on the site were to be rehabilitated and converted into either office or museum space.

3 2 The light of justice in Johannesburg

The design of Constitution Hill in general and the Constitutional Court building in particular are informed by three central metaphors: the street, the clearing and the memorial. The original idea was to symbolically replace the closed prison space with a vibrant inner city street network. Prisons are defined by the way in which they restrict movement. By contrast, the new building is defined by the way in which it is situated on an inner city street and draws people from previously separated communities into movement through its urban precinct. The building itself was, secondly, conceived as gathering place of the

38 Sachs (n 1) 29.

democratic community. The foyer of the building and its courtroom resonates with rural life and represents a clearing under the shading trees of the African bushveld which serve as a welcoming and protective meeting place. The Court was, thirdly, conceived as a memorial for the incarcerated victims of apartheid, situated as it is in the middle of a notorious apartheid prison. The design of the Court and the space that it creates therefore embodies the three themes of memory, movement and meeting.

These three themes all express a very particular understanding of the symbolic dimension of the building. The architects themselves explain this as follows:

In a democratic society civic buildings can either gain their symbolic value by expressing the openness they represent or they can be monuments to be seen from 20 km away as great domes, towers of light or some other kind of dominant symbol. Grand dominant monuments are only needed to represent victories of war, exclusivity in the face of threat to an unpopular social system, economic or elite social power, or the unattainable – places of God or the gods. The Constitution, and therefore its house and precinct, have nothing in common with any of these situations. The Constitution represents the opposite, and alternative means should be found to achieve symbolic importance for the building among the citizens of South Africa.³⁹

The symbolic significance of the building must thus be sought in the democratic manner in which it integrates itself into the urban, cultural and historical environment and stimulates new experiential, spatial, cultural and ecological interactions. As such the three themes share a concern with humanness and can be described as an example of *ubuntu* architecture. They combine to reject both function (twentieth-century modernism) and form (nineteenth-century neo-classicism) as self-contained determinants of abstract space. The African nature of the building must be sought in the concrete, responsive and embodied nature of space-making that unfolds through the design, rather than in references to typical African icons, images or patterns. It is also these features of the design that give the building its democratic quality.

The design and its philosophy of space is best understood in Heideggerian terms as an example of local⁴⁰ or ecological⁴¹ architecture and as a definite

39 OMM Design Workshop & Urban Solutions *Concept for the New Constitutional Court Building of South Africa* (1997) 1.

40 Mugerauer "Architecture as properly useful opening" in Dallery & Scott (eds) *Ethics and Danger: Essays on Heidegger and Continental Thought* (1992) 215-226; and Mugerauer *Interpretations on Behalf of Place: Environmental Displacements and Alternative*

alternative to the ideal of abstract and infinite reproducible (office) space which characterise the majority of other property developments in modern society. There are many ways in which the contrast may be explored. Take the use of light, for example. In Heideggerian terms the way in which a building gathers the sky and thus allows for human dwelling is crucial. In this context Mugerauer argues that local architecture is architecture that begins by holding itself back, or keeping itself in reserve. Buildings are locally sensitive responses to the ways in which other human beings have responded to the natural, human and sacred realms of existence. As an example of such a restrained architecture Mugerauer refers to Louis Kahn's Kimbell Art Museum in Fort Worth.⁴² The building responds to its natural environment through the unique and extensive use of natural light. By providing slits in the roof, the interior of the museum is not subjected to uniform office light (as if it is merely an extension of abstract space) but to natural light in its daily and seasonal rhythms and variations. Young similarly relies on the use of light to contrast ecological architecture and other modern building types and design aesthetics, like the shopping mall and office complex. Young claims that the modernist shopping centre and office park are such depressing places because they block out the ever-changing natural light and replaces it with the monotonous and oppressive uniformity of fluorescent light.⁴³

All the design features of local or ecological architecture celebrated by Mugerauer and Young are prominently present in the design of the new Constitutional Court building. It is significant that, unlike its Dutch counterparts, the administrative offices which serve the Court are completely hidden from all the public spaces inside and outside the building. While the design is functional, there is no focus on the icons of technology and operational efficiency which dominate modern society. The building in no way features as a high-tech icon of technological mastery or as a symbol of technocratic ability and efficiency. It actively counters and resists these associations. The use of natural light is a key feature in this process. In the major public space of the building, the foyer, slits in the roof allow streaks of natural light into the formal space (see figure 3). This way of gathering the sky allows the richness and

Responses (1994) 65-120.

41 Young *Heidegger's Later Philosophy* (2002) enlists Heidegger in the name of ecological architecture.

42 Mugerauer (n 40) 218.

43 Young (n 41) 112.

unique qualities of particular things and events to be highlighted as shifting shadows mark the constant change of perspectives in every daily rhythm.

Martha Nussbaum recalls a single line from Walt Whitman's poem *By Blue Ontario's Shore*: "he judges not as the judge judges but as the sun falling around a helpless thing".⁴⁴ "What mode of judging is suggested", she asks, "by the strange metaphor of light?" She answers her own question as follows:

This complex image suggests enormous detail and particularity. When the sun falls around a thing, it illuminates every curve, every nook, nothing remains hidden, nothing unperceived. So to the poet's judgment falls around all the complexities of a concrete case, perceiving all that is there and disclosing it to our view. In particular, the sun illuminates the situation of the helpless, which is usually shrouded in darkness. But this intimacy is also stern and rather pitiless: by comparing judgment to sunlight rather than gentle shade, Whitman indicates that the poet's commitment to fairness does not yield to bias or favor; his confrontation with the particular, while intimate, is unswerving. There is an ideal of judicial neutrality here, but it is a neutrality linked not with quasi-scientific abstractness but with rich historical concreteness.⁴⁵

There is growing evidence in the jurisprudence of the Constitutional Court (despite some significant cases to the contrary) that the Court is particularly careful to contextualise and re-contextualise legal questions. Judgements like that by Sachs J in *Volks v Robinson* suggest that the transformation of law and adjudication that is physically represented in the design of the new Constitutional Court building should be understood as a shift towards the kind of contextualised poetic judging that Whitman and Nussbaum celebrate. If so, then the building is not merely a coffee-table example of democratic architecture, but also the physical signpost of a democratic post-apartheid theory of law.

4 Conclusion

In the architecture of the Constitutional Court building in South Africa and the *JR 120* court buildings in the Netherlands of the 1990s, we encountered two related but also highly specific attempts to symbolically express a modern

44 Nussbaum "Poets as judges: Judicial rhetoric and the literary imagination" 1995 *University of Chicago LR* 1477.

45 Nussbaum (n 44) 1480.

democratic theory of law in place of the old nineteenth-century ideals of legal formalism. It is in this context that the significance of *The Benefit of the Doubt* by Marlene Dumas in its two different legal settings must be understood. The tapestry draws attention to two court buildings that – each in its own way – mark the end of the classical ideal of law as a purely formal conceptual science. The new democratic aspirations that have replaced the classical ideal might differ, as the different designs of the two buildings seem to indicate, but the presence of the same tapestry in both courts also points to a more universal critique of law as a representational practice. This critique is perhaps even more important in the post-apartheid context where the idea of contextually rich adjudication (as opposed to functionally efficient adjudication) dominates legal rhetoric.

It is worth recalling that the subjects in *The Benefit of the Doubt* remain completely decontextualised. Dumas deliberately does not respond to the ethical imperative which is associated with the face of the Other by painting a fuller picture of the persons behind the faces in their concrete contexts. This is not to say that such contextualisation is not a *necessary* precondition of a democratic theory of legal adjudication. However, what Dumas seems to be suggesting is that such contextualised judging is not by itself a *sufficient* condition of such a theory. Any democratic form of adjudication must necessarily treat the subject that is judged as a concrete person (and not merely an abstract legal subject). However, even the most attentive care can never be a *sufficient* response to the infinite ethical demand that the other places on me. As Kant reminded us more than two centuries ago, normative statements can not be derived from descriptive statements, however richly contextualised they may be. The prominent place of *The Benefit of the Doubt* in the foyer of the Constitutional Court building reminds us of the basic Kantian insight. What is marked in the tapestries is the absolute and universal *fact* of our obligation towards the other before any contextualised legal response is or can be given.

The doubt whether any legal response, however sensitive and caring, can ever meet this obligation sets law and the administration of justice in motion and therefore ensures the future of a legal history, whatever the history of the law might otherwise be at different places and different times.



Figure 1

Marlene Dumas *The Benefit of the Doubt* (triptych: 2 hangings 1075 195cm, 1 hanging 742 198cm). Reproduced from Spijkerman *Extenuating Circumstances: Wall Hangings in the Hall of Justice in 's-Hertogenbosch* (1998) 51.



Figure 2

Marlene Dumas *The Benefit of the Doubt* (foyer, Constitutional Court building, Johannesburg).



Figure 3

The use of natural light in the foyer of the Constitutional Court building.