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"What remains? The language [culture] remains"[1]

Abstract

As scholars who have struggled with the question of the relationship between transformation and law for most of our work lives, we remain interested in and often perplexed by the ways in which legal scholars, the media and members of the public at large continue to talk about and comment on matters concerning law, constitution and change as if they are isolated or demarcated from each other. In this vein we were intrigued by the specific way in which the title of and the call for papers of a recent conference, held at the University of the Free State, was formulated: 'Transformative constitutionalism and private law'. In our paper delivered at this conference, we spoke about what this specific formulation elicited in our minds. This article is a reworked and expanded version of that paper.

Keywords: transformation, public, private, subsidiarity, entanglement, culture, tradition, inheritance

We wish to make two things clear from the start:

1. The call or framing of the conference that we refer to above *is not unique at all, but merely another example or manifestation of a more general trend*, namely to make sense of law (also with reference to private law

1 See Arendt 1994.

and public law), constitution[2] and change/transformation as if they were separate and could be thought of and applied as separate from each other. We note below, following Nuttall (2009), that separation is often at the centre of discussions of complex matters and consider how entanglement may be offered as an alternative way of reading, tracing, mapping and understanding manifold complexities.

2. We are aware of the fact that this perspective of diremption – as Rose (1992) will have it – is held in common by people who seemingly come from different political and juridical (jurisprudential) starting points. Those people, also legal scholars and other academics, who in a sense want to hold on to a certain private/common law/individual interested position associated with Western modern legal science have different reasons for approaching the constitution/transformation as separate from law than those people, also legal scholars and other academics, who deny that the constitution can or may bring any change and argue that the constitution is in fact an obfuscation of transformation and should be abolished. Our engagement in this piece is with the first group. This does not mean that we are ignoring/excluding or want to do violence to the second group. Our focus in *this* piece (as opposed to others that may or may not follow) is to reflect on the way in which law, constitution and transformation are conceptually treated as being separate by scholars who hold on to Western modern beliefs in law as a legal science. We argue that such a separation stands in the way of deep transformation and consider how entanglement may offer an alternative method.

Our reflection is prompted by the urgency of transformation, and the role of law, albeit limited, in such transformation. We feel the need at the outset to highlight legal culture as that which remains, although it is often not mentioned, as was seen also in the title of the conference above, 'Transformative Constitutionalism and private law'. Legal culture, even though it was prominent in Karl Klare's (1998:146) writing on transformative constitutionalism, is often forgotten when we talk about transformation/constitution/law.[3] We wish to think about its absence in conversations about law, constitution and transformation

2 We write 'constitution' in lower case throughout this article, regardless of context or purpose: to make the point that South Africa's 1996 constitution is (simply) law, is nothing other than the law of the land.

3 We are intrigued by the absence of engagement with, insight into and sometimes even knowledge of Klare's 1998 article that sets out the notion of 'transformative constitutionalism'.

in general, also as seen in the recent conference call, as said above, in this piece as it manifests in scholarship in a Western modernist, formalist/legal scientific tradition.

Some preliminary remarks at the outset about the call for papers for the UFS conference, that we do not all develop further below. The call read in part as follows: "Since the adoption of the South African Constitution in 1996, the nation's legal framework has undergone *a profound transformation*, shifting from an oppressive apartheid regime to a democracy grounded in constitutional principles." In a less optimistic vein, we argue that this "*profound transformation"* has not happened, and want to focus on what is preventing it from happening. The call also invoked the extent to which the Constitution "aims to advance the rule of law [and] safeguard human rights". Klare (1998), who of course coined the notion of "transformative constitutionalism" in his 1998 article, asks there whether traditional conceptions of 'rule of law' will be able to carry the load of transformation, as it were, and whether a transformative constitution does not also require a transformed (his term is "politicised") account of the rule of law. We are further cautious about the framing in the call for papers, of the purported 'discipline' of private law as "One of the most significant areas influenced by Transformative Constitutionalism" as if Private Law is somehow separate from the Constitution, and its 'mandate' (we develop this point below). Similarly, we are unsure about what different disciplines and sections are invoked when the call refers to "*interdisciplinary* discussions on the *intersections* between constitutional principles and the evolution of Private Law." Are 'constitutional law'/'public law' and 'private law' conceptualised in the call as different and separate *disciplines*? (As noted below we are not negating that within law there are different dynamics at play, different fields of law, but surely they are not different disciplines?) Finally, we are perplexed by the reference to 'evolution' in the very same context of invoking transformation. Can "evolution" and 'transformation' as forms of change be equated? What are the stakes of doing so?[4]

4 We don't think 'evolution' and 'transformation' can be equated. Instead, we, as several others who have thought and written about transformation in/of/through law follow Drucilla Cornell (1993: 1)) in her careful distinction between 'evolution' (change of a system from within) and transformation (change of the system itself into something new: "change radical enough to so dramatically restructure any system – political, legal, or social – that the "identity" of the system is itself altered."). See also Fraser (2003: 74); Krog (2003: 126).

With these preliminary questions in mind, the article unfolds as follows: we start by revisiting some of the debates on the shift to constitutionalism that took place before and after enactment of the new constitutional order. Recalling this history is important for many reasons, for our purpose because it highlights something significant about the legal culture that we believe remains even at a time when we are all constitutionalists – albeit not realists as many US legal theorists will have it (e.g. Singer 1988). We then turn to several observations or rather musings that are loosely related. However, the aim of this piece is not to come up with a fully worked out vision for transformation but rather to reflect on a few of the concepts that for us are crucial in thinking law, constitution, transformation in reaction to aspects of an attitude, culture or tradition that we saw in the UFS conference's title and call for papers. If anything our focus here is on other ways of reading, mapping, making sense.

Our concern here is conceptual, we do not discuss many examples of how specific institutions have dealt with the issue. We consider the extent to which constitution and transformation are often embraced without cognisance of the essential conceptual work, taking time to think and unpack the different logic that a shift to constitutionalism, in particular as envisioned by the South African constitutional text, entails. Do we think, read, understand, see and look differently, as in our view the constitution requires? Do we employ a different language (and with language we are not referring to different vernaculars, but rather how we speak about law, constitution, transformation)? We follow Mahmood Mamdani's (1996) observation that even though the Truth and Reconciliation Commission (TRC) aimed to follow something different from a criminal justice framework, it remained fixed in a certain criminal justice logic, akin to Nuremberg-style hearings. We ask if the same can be said about the shift to a public orientated framework embodied by the constitution – that many of us remained stuck in a private law logic.

Our observations/musings include thoughts on transformative constitutionalism/transformation; law/private law/public law; subsidiarity; entanglement; tradition/inheritance/culture.

What came before?

Wessel le Roux (2006: 104) recalls the opposition to the turn to constitutionalism and human rights by legal scholars, in particular coming from private law before the formal adoption and during the early years

of constitutionalism. These scholars hoped that "an autonomous legal science"could be restored and believed that rights should be rejected because of their "political, un-Christian and ideological nature". When it became clear that constitutionalism and an entrenched Bill of Rights would be adopted, the arguments shifted to calls to keep so-called 'private law' apart and insulated from constitutional invasion. Having their desires thwarted again, a renewed attempt was to argue that constitutional rights should be interpreted by way of a private law conception of subjective rights. We recall this recollection of Le Roux to highlight the initial opposition of traditional private law scholars to the notion of a supreme constitution with entrenched rights, their attempts to hold on to the *status quo*. This may shed some light on the framing of the UFS conference as "Transformative constitutionalism and private law". The traces of this framing are to be found, among others, in the initial rejection of the constitution. For Le Roux (2006: 105), André van der Walt, by embracing the notion of the public, "set the agenda for a new body of critical legal writing in South Africa." Van der Walt's insight was to show how modern legal science made meaningful participation in public life impossible. Focusing on property rights, he exposed how a private law approach not only set up rights in such a manner that it turned on the power to exclude; it also reduced "open-ended public questions" to issues of technique and administration. It is in particular the reduction of the notion of a public life and political action to a clash between private powers and interests that remains in current discourse. Le Roux (2006: 107) holds that:

> The crux of Van der Walt's argument was that the postapartheid constitution should be embraced as an opportunity to effect a radical break with the privatising tendency of modern law. A new constitutional rights discourse should be developed which has not been modelled on the private law discourse of (subjective) rights. The constitutional rights discourse could only then become the medium through which we can appear to each other and live some sort of public life. This meant that the constitutional rights discourse had to retain a link with the constitutive moments and emotions of crisis, uncertainty, painfulness, frailty, fear, and insecurity typical of living together with other people (precisely what the private law quest for a science of subjective rights set out to eliminate from what has come to be called the administration of justice).

Of course, many debates and discussions have taken place since the early rejection of the constitution and Van der Walt's significant break with the

privatising tendency of modern private law. Early debates on the question of how the common law should be developed in light of the constitution could be re-read to identify similar traces. In a similar vein, calls for what was called constitutional avoidance, could be related to a resistance to the radical break with modern law's privatising tendency. We do not delve into these early positions, deeply or at all. Suffice to say that our concern is whether Van der Walt's envisioned "radical break" with the "privatising tendency of modern law"ever occurred. Or even if there was a momentary break, or crack in the first decade after the adoption of the constitution, what happened thereafter?

As lecturers, we have been present during many (too many) attempts to redesign the LLB curriculum. And what remains every time is the holding on to rules, procedure and certainty, to the neglect of values and open-ended questions. Power, self-interest and one-to-one meetings reign in our faculties, while requests for open discussion, debate and deliberation in public fora are refused and resisted. In other words, the institutional culture playing out in law faculties (and of course not only in law faculties, but those are the immediate spaces in which we find ourselves) as well as the law curriculum remain private and interest-based while the notion of a public, public life, a broad interpretation of rights and ultimately the search for justice are renounced.

Our concern here is, even before we challenge this privatising tendency, for it at least to be surfaced and acknowledged. We ask, following Klare (1998) and Christodoulidis (1998) among others, for a candid and careful self-reflection. Following the work of Shaun McVeigh and Ann Genovese (2024), we highlight the question of lawful relations and ask whether in our current context, time and place, and with full cognisance of the unequal, racist, sexist and violent past and present, can lawful relations between everyone living together in this country be sought? We return to the question of lawful relations, tradition and inheritance below.

Observations/musings

'Transformative constitutionalism'/Transformation

In both the title of the UFS conference and the call for papers we find a recurrence of the term 'transformative constitutionalism'. We wonder whether in this context one should not simply talk rather of transformation? What bothers us about using transformative constitutionalism in the call, is that it can

create the impression that the notion that the constitution is 'transformative' (not in the sense that it transforms, or is supposed to transform, but in the sense that it requires transformation, requires all of us to enact transformation and enables and authorises us to do so) is an approach or an ideology (an '-ism', like liberalism, conservatism, communism) that one can choose whether or not to support.[5] We are concerned when the term 'transformative constitutionalism' is invoked in a way that sets up transformation as something external to the constitution ('extra-legal') that some people, with particular political or ideological purposes, wish to imprint upon the constitution and our law more generally. One can think, for example, of conservative warnings that constitutional interpretation has been captured by an ideology of "transformationism" (Malan 2018, 2020); or decolonial/abolitionist accusations that the notion that the constitution requires transformation is an ideologically informed (and dishonest) attempt to rescue the constitution from its Western liberal foundations and so to obfuscate and frustrate transformation (Sibanda 2022; Sindane 2024). Both these dismissals of the notion of a transformative constitution as 'simply' a matter of partisan and contingent ideology, are of course, quite ironically, manifestations of a formalist "mistake of logic".[6] According to such a logic it is possible to distinguish between what is 'legal' and what is not, and between the legal and the extra-legal. Klare identifies this logic as central to the transformation-limiting legal culture prevalent in South Africa (Klare 1998: 156-157: 168-169). But for the moment that is not the point. The reading of the constitution as 'transformative' in the sense that it does not only place limits on the exercise of power, but requires power to be used to advance ideals of freedom, equality, dignity and social justice, is not only a plausible reading of the constitution, but indeed in our view "the best" and "legally correct" reading (Klare 1998: 156).[7] When Klare coined the term "transformative constitutionalism" it was as an understanding of constitutionalism that is *required* by the constitution, an approach to interpretation, to law and to

5 Klare titled his 1998 article 'Legal culture and *transformative constitutionalism*' (our emphasis). In this article Klare presents his reading of the constitution, that he regards as the 'legally correct' understanding (Klare 1998: 156), as one that requires and enables transformation and then proceeds to consider some of the implications this has for the way in which lawyers and judges do their work.

6 The description of formalism as a mistake in logic is Klare's, that we first heard when he responded to a paper at a conference in Stellenbosch in the early 2000s.

7 Albeit that, in concert with Klare 'in saying so [we] employ a non-traditional notion of "legal correctness" that takes account of and accords interpretive legitimacy to background moral and political values' (Klare 1998: 156).

notions such as rule of law *dictated* by the constitution to give effect to the transformation it requires.

The use of the term transformative constitutionalism also reminds us of the extent to which Klare's notion, originally at heart both a theoretically critical and politically radical notion (Van Marle 2009), has been mainstreamed and institutionalised (CHE LLB Review 2015), in this way paradoxically losing its transformative force.

In this light, instead of 'transformative constitutionalism and private law' we would prefer to talk of transformation and private law (well, of course, actually 'transformation and law' or 'transformation and so-called private law', but more on this below).

Law

We are troubled by the confident use in the conference title but also in multiple other, related contexts, of the term 'private law'. In a legal system that requires its own transformation, is there at all still something such as 'private law', distinct from and as opposed to 'public law'? Why would one still wish to think of a private law distinct from public law? Is it not better to think simply of 'transformation and law'? Of course, one can consider the relationship between transformation and law within contexts that we are used to describe as 'private' – disputes between ordinary people about property; what to do when one person inflicts damage on another; etc. But it seems to us that at a very basic level, the distinction between private and public law simply doesn't accord with the notion that the constitution requires transformation of our living together, including of our law.

If we take seriously the constitution's command that our law must be transformed in an egalitarian, emancipatory direction, then this means whenever we apply, develop, interpret and enact law, in whatever context, we must (that is, there is a legal duty on us to) consider and give effect to the command to transform. That is per definition a public consideration, so that under a transformative constitution, the law is always at least also public – constitutional or 'public' considerations are always at least also at play.

An example to illustrate this is Andre van der Walt's understanding of the property law system envisioned in the constitution. Van der Walt describes this vision of property law as a system of regulation of the different overlapping

and entangled interests that may apply to property (that are most often what we are used to describe as 'private' interests) *but* in a manner that advances (public) constitutional goals (Van der Walt 2012: 139). Van der Walt sees this operating most clearly in the context of eviction disputes. In an eviction dispute, the purpose of the law of eviction is of course to mediate the clash between the (most often 'private') interests of owner and occupier. But under the transformative constitution these private interests are never all that is at stake. The transformative constitution requires that the regulation or mediation of the private interests at play occur in a manner that considers and advances constitutional/'public' goals such as our commitment to land reform and social justice. To this one must add an awareness of our history and the need to account for and move away from that; also a public, or at least a collective (and constitutional) concern (Van der Walt 2012: 139–147).

Van der Walt derives this understanding of the intermingling or interwovenness (as we suggest below, the *entanglement*) of constitutional/public and 'private' from Sachs J's judgment in *Port Elizabeth Municipality v Various Occupiers*.[8] It is in this case (a stock in trade eviction matter) that Sachs J set out the new approach to eviction matters required by the constitution. From a point of departure that the new constitutionally ordained eviction law has to be understood and interpreted "within a defined and carefully calibrated constitutional matrix" (*Port Elizabeth Municipality v Various Occupiers 2005:* para 14), he proceeds to describe the process of deciding eviction disputes as yes, "to balance out and reconcile the opposed claims [of property owner and unlawful occupier] in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case" (*Port Elizabeth Municipality v Various Occupiers 2005:* para 23). But "the starting and ending point of the analysis must be to affirm the [constitutional/public] values of human dignity, equality and freedom" (*Port Elizabeth Municipality v Various Occupiers 2005:* para 15) and "the need for … redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa" (*Port Elizabeth Municipality v Various Occupiers 2005:* para 16).

This approach is also echoed in Froneman J's suggestive phrase in another housing-related case, the matter of *Daniels v Scribante*: "[T]he values of the Constitution are not aimed solely at the past and present, but also the future."

8 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

Here too we find an understanding of property law (our law generally) being concerned of course with the specific interests at play in a dispute between specific parties and mediating the interplay between those specific interests; but also having to account for the need to redress the injustices of our past; and considering what future we are aspiring to.

The 'public' is in this sense always already present in property law's resolution of eviction disputes – and, we would say, in any context in which our law is implicated, applied or relied upon. In this light, specifically when we think about how transformation and areas of our law relate, rather than transformation and private law, we would prefer to talk simply of 'transformation and law'.

To be sure, we do not claim here that there are no contexts that can be described as private, or that one cannot distinguish usefully between state power and 'private' power. Our point is only that one can no longer usefully speak of a private *law*, as opposed to a public *law*. That is, whether a dispute is one between two non-state ('private') parties about breach of contract, regulated primarily by the law of contract; between a non-state party and an organ of state about an invalid administrative decision, regulated primarily by the administrative law; or between organs of state about scope of authority, regulated directly by provisions of the constitution, public/constitutional/transformation-required considerations are always at play.

Subsidiarity

We are surprised by the use in the conference title of 'and' between Transformative Constitutionalism/private law. It is for us another manifestation of diremption, of the notion that the constitution is something separate or distinct from private law, or indeed law more generally, so that we have to think about how they relate to one another. This separateness is for us incongruous in the context of a transformative constitution. More concretely, for us it conflicts with the doctrine or approach of subsidiarity that has become so widely accepted in our law: the understanding that disputes should be decided in terms of legislation, customary law or the common law first, before one reaches directly for the constitution.

Subsidiarity is in our view often misunderstood as a reincarnation of the doctrine of constitutional avoidance – an unleavened version of Kentridge J's

"general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed" (*S v Mhlungu* 1995: para 59). Neither of the two chief scholarly protagonists concerning subsidiarity in South African law – the introducer of the notion in South Africa, the late Lourens du Plessis, and its chief developer, the late Andre van der Walt, shared this understanding. Instead, their understanding of subsidiarity is quite the opposite – they both, along different routes, see it as a way in which to operationalise the idea that the constitution is not separate from, but imminent in, part of our ('ordinary') law, something to be dealt with, lived with in the ordinary course.

Du Plessis (2000) invokes subsidiarity in the context of describing the constitution's monumental and memorial aspects. The constitution as monument and subsequent monumental readings of the constitution signify celebration. Du Plessis relies on the German term, *Denkmal,* to capture the constitution as monument. The constitution as memorial commemorates and Du Plessis relates this to the German *Mahnmal,* that over and above to commemorate also means to warn and to castigate. For Du Plessis, subsidiarity comes to the fore in the context of the memorial, restrained constitution, remembering that the constitution is the supreme law but not an 'overarching, all-encompassing super law' (2000: 388).

He explains as follows (2000: 388):

> This restrained Constitution is the Constitution as memorial – a written law-text that does not profess to constitute the moral high ground of justice all by itself; instead it reminds us of our pledge (and provides us with some legal means) to achieve social justice. The *human obligation* to do justice cannot be assigned to any law-text, not even the Constitution.

Subsidiarity is the restraint, that although not mentioned as underlying value is "vital in memorialising the Constitution" (388), by bringing a balance of power among organs of state but more than that by making central "constitutional construction … the responsibility of a public and open community of constitutional interpreters" (389). Far from telling us to avoid the constitution, that is, subsidiarity requires us to work with the constitution.

Turning to Van der Walt, ever since the *New Clicks* decision,[9] where the Constitutional Court held that there are not two bodies of administrative law, one under the constitution and the other in terms of the common law, it is settled in general that there is only one system of law, that we don't have one system under the constitution and another under the common law, we don't have the constitution and the 'ordinary' law – we just have law. Van der Walt invoked what he called his "angle of approach" of subsidiarity (first resort always to a lower order norm, i.e. to the common law, customary law or 'ordinary' statute, only thereafter resort directly to the Constitution) precisely to enact the one system of law principle – to ensure that we engage the 'ordinary' law as much as possible so that the constitution could be enacted in it. To be clear here, the one system of law-principle that Van der Walt invokes in concert with subsidiarity is more profound than simply to say that our legal system in its entirety is founded on the constitution or that all law must comply with the constitution as supreme law. It is in fact to say that *we only have one system of law* – the constitution, other legislation, customary law and the common law are one and the same thing, our law.

The focus of this piece does not fall on subsidiarity in all its complexities, suffice it to say that subsidiarity as constitutional restraint also underscores the public and democratic features crucial to the notion of transformation. Subsidiarity in a concrete way speaks to tradition, inheritance and culture that we discuss below.

Entanglement

At a metaphoric level, to talk of 'constitution *and* private law' recalls for us spatial apartheid. It reflects a lack of consciousness of the fact that the constitution requires us to find ways to live together rather than apart. Nuttall (2009) employs entanglement as a way to make sense of life in the aftermath of apartheid. She defines it as "a condition of being twisted together or entwined, involved with; it speaks of an intimacy gained, even if it was resisted, or ignored or uninvited" (Nuttall 2009: 1). She describes the concept further as one that can identify a relationship or group of relationships that is "complicated, ensnaring, in a tangle, but which also implies a human foldedness" (2009: 1). Entanglement, albeit not blind to difference, is concerned with overlap, which

9 *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674.

is often ignored. In analyses of cases, entanglements between various legal subjects, and their entanglement with law, space and time, are encountered.

It is Nuttall's (2009: 20-25) proposal of entanglement as method, as way of reading, a rubric, that beckons opportunities for law, legal scholarship, at least for us. She explores creolisation as an example of entanglement as "a way of thinking, a method of reading, the possibility of a different cartography." Nuttall (2009:2) identifies six ways in which entanglement has been interpreted in South African academic writing and can be used as a "rubric" to make sense of contemporary issues. Firstly, historical entanglement as used by CW de Kiewiet to expose how dispossession, instead of resulting in more segregation, forced a dependence. Hamilton has argued that colonial rule could be read as "the complex historical entanglement of indigenous and colonial concepts" (2009: 2). Secondly, Achille Mbembe has written about temporal entanglement to describe the postcolony as "made up of discontinuities, inertias and swings that overlay one another, interpenetrate one another" (2009:4). Another way in which entanglement comes to the fore is in the work of literary scholars invoking the seam and complicity: De Kock defined the seam as "the place where difference and sameness are hitched together" and Sanders introduced the notion of complicity to argue that apartheid and its aftermath cannot be understood by only looking at apartheid. Instead, interventions of "affirmation and disavowal" as a way of "human foldedness" must be traced. Nuttall (2009: 6) recognises in the work of Sanders also a reading strategy, a way of refusing "the stance of being 'merely oppositional'". Fourthly, Nuttall (2009: 7) reflects on "an entanglement of people and things". Fifthly, she looks at how DNA signature challenges fixed ideas of racial identity that provided a foundation to colonial rule and apartheid. A sixth rubric is that of racial entanglement. Nuttall (2009: 9) recalls the work of Eduard Glissant, who in the context of the Caribbean related entanglement to "the point of difficulty" of creolised beginnings: "We must return … to the point from which we started, not a return to the longing for origins, to some immutable state of Being, but a return to the point of entanglement, from which we were forcefully turned away … ."

For Nuttall, entanglement as method/ rubric/ way of reading opens other ways to engage with identities, spaces and histories. The aim of this piece is not to explore in any detail how entanglement can be used as a different way of reading law, constitution, transformation but as a start we employ it here as a way to reflect on what is often seen as separate (private/public; law/ constitution; law/transformation), as not, or not simply, separate. Nuttall (2009: 11) concedes that entanglement calls for "a utopian horizon, while

always being profoundly mindful of what is going on." This relates for us to reading the constitution as aspirational, as fable (Arendt 1963; Derrida 1986; Honig 1991), fiction, an 'as if' (Motha 2018). It is a way of reading also to make relations visible. As indicated above, entanglement does not ignore difference or the extent to which apartheid violently enacted and still enacts difference. We end this section already thinking about the next one by noting the two responses to change identified by Nuttall (2009:17). The one response named by Nuttall as reiteration and return asserts continuity with the past, invoking loss in various ways. Another response is more turned to the future: without denying continuity or difference this approach argues for new angles and new tools. This is the response that we want to explore concerning constitution, law, transformation. Entanglement seeks to find "points of intersection in unexpected ways" (2009:20). How does entanglement speak to tradition/ inheritance/legal culture? We turn to this question below.

Tradition/ inheritance/ legal culture

Klare in his 1998 piece raised a concern about the conservative nature of South African legal culture and the extent to which such a conservative culture can stand in the way of urgent transformation. What does he mean with legal culture? We can recall his definition of it as those habits, professional sensibilities, unspoken 'truths' about what law 'is' accompanied by tropes such as how to think like a lawyer, write like a lawyer, talk like a lawyer. Instead of a critical self- reflection about these self-proclaimed 'truths' we have seen the rise and increase of an enterprise of people building careers on legal skills, legal education and the like. Klare is clear on this, culture is made by people, it is not natural and can be unmade. He warns that unmaking this culture will not be easy; that it is "very hard to develop and elaborate a new legal culture with the tools, training and habits of mind of earlier times." (1998: 171) Accordingly, he urges particularly judges, but also lawyers more generally, to "reimagine their discursive practices with an eye towards asking whether the democratic transition does not afford them a bit more scope for interpretive creativity and innovation than they might at first imagine" (171). However, as Sibanda (2011: 493-494) has noted, this may be more difficult than even Klare expected. Sibanda points out that the project of constitutional transformation faces other challenges than simply the conservative legal culture prevalent in South Africa. It is also potentially thwarted and inhibited by the fact that our transformative constitution is bound to be read and interpreted within a certain, what he calls

'liberal' tradition or inheritance of constitutionalism as essentially a mechanism for the *limitation* of collective power rather than its harnessing toward the creation of a new society. He doubts that this tradition or inheritance can be escaped simply through a leavened understanding of interpretation and the judicial role. We are interested in thinking about culture alongside tradition and inheritance and want to call for deeper and more self-conscious reflection and engagement with the various traditions and inheritances that continue to influence how we receive, understand and do law. What relations are at play here? For the necessary unlearning to take place a deeper and more conscious engagement with culture, tradition and inheritance and the relations that sustain them is necessary. A reading of the Constitution as memory, even before we think about how it remembers, but *that* it remembers and continues to remember, highlights the play of legal culture, tradition and inheritance in making sense of transformation.

We turn here briefly to an article directed at legal historians in which Van der Walt (2006: 4) reflects on the relationship between legal culture, legal history and transformation. Van der Walt at the time responded to tensions between continuity and discontinuity in the face of change. These tensions remain. Many white South Africans even though they claim to support change want it to occur without any disruption of their own privileged and secured and stable positions. Van der Walt's response is of relevance to us because of his exploration of the role of legal culture in supporting the *status quo* and thereby resisting change. He focuses on the links between legal history, legal traditions and legal culture. Relying only on certain (traditional) sources of law and interpretive tools is a good example of how legal culture obstructs new ways of thinking and doing and ultimately transformation. How we define 'the law' mirrors to a great extent "deeply entrenched attitudes towards and thinking" (2006:5) that obstruct transformation. As alluded to above with reference to Le Roux (2006), Van der Walt notes how many private law scholars argued for a "restoration of the scientific objectivity of law" that of course relies on a sharp distinction between law and its others – politics, society, economics and more. Change in this view should take place in an incremental way, i.e. through legislation. Van der Walt aptly responded that not only will this way of change be too slow, it will also not do anything to destabilise the law because "it is driven by the logic of doctrinal development." (2006:10) The important point here is that legal tradition is linked to legal culture and that the force of tradition/culture can restrict the kind of questions we ask as well as the answers we give. A final observation by Van der

Walt that is of relevance for us is that legal history and how we rely on history should not succumb to the lure of seeking continuity and consensus but rather seek to expose the discontinuity and dissent over years (2006:37). His call for legal scholars to deconstruct legal history and to study legal history critically is one that all South African legal scholars can learn from.

We want to read these reflections on legal culture, tradition and history alongside the work of Australian legal scholars Ann Genovese and Shaun McVeigh (2024:108) on "differential and rival forms of conduct". They are concerned in particular with the "responsibilities and obligations" of being engaged with more than one law, "the law of the Indigenous peoples of Australia and the law of the non-indigenous people of Australia" and with the question of lawful relations. What we, following Klare, recognise as legal culture, Genovese and McVeigh call "the conduct of life tradition" which they see as a "question of training, and association". (2024:108) They note that Anglo-centred common law is not concerned with the link between method and forms of scholarly life, while this question is central to Greek and Roman traditions inherited by the West. South African law has been described over many years as a mixed legal system, that, not surprisingly, includes Roman law, Roman-Dutch law, Scottish law, aspects of German, French and English law but not African customary law. Genovese and McVeigh (2024: 109) draw on Pierre Hadot, who as historian and philosopher, argued that philosophy over and above being a knowledge is also "a type of 'know-how', an activity or training". (2024: 109) For him philosophy should be understood as "a series of exercises"that ultimately are aimed at responding to the question of life form (109). They refer also to many versions of "humanist" tradition geared at the development of "being human". Important to note that while humanist traditions centred participation in civic and public life, modern legal disciplines (private law in our context) have shown great concern with "methods, genres and substance of scholarship" and little concern for "how to transform [one's] way of living and seeing the world." (2024:110). Our sense is that when considering the question of law and transformation the latter is and should be of great concern. Western modern scientific approaches to law, traditional private law scholarship similarly have not been interested in questions about living and seeing and those questions have not been part of legal training and the law curriculum. In simple words, it has not been part of our legal culture. It is this very lack of concern with these questions that is now obstructing transformation by, among other things, holding on to separation between private and public, law

and constitution, law and transformation, constitution and transformation. The authors (2024: 110) re-iterate their point by saying that "despite differences, almost all contemporary practices of scholarship … announce a disciplinary role through inheritance of techniques, arts of association, and translocation of practice". We appreciate their emphasis of time and place and persona and take this on to also emphasise the time and place from where we write, and who we are. As white privileged legal scholars educated and trained, at least as far as undergraduate study goes, during the last breath of official apartheid, we carry a certain inheritance, and culture that we should consciously and with conscience expose, scrutinise, reflect on and debunk before lawful relations could be considered.

The Rural Women's Organisation in the *Shilubana* case[10] asserts the living customary law as "a flexible, living system of law, which develops over time to meet the changing needs of the community. It is not rigidly rule-based …" (per Van der Westhuizen J: para 35). Murungi (2006: 525) notes that African law turns on "what secures human beings in their being. The pursuit and the preservation of what is human and what is implicated by being human are what, in a particular understanding, is signified by African jurisprudence." Tshepo Madlingozi (2018:10) argues that the constitution negates the three realms of African being, namely the spiritual, the social and the material and therefore fails to re-member and re-constitute African life. As decided by the Constitutional Court, the country adopted a single system of law. African customary law is included by and in the constitution as part of law. Accordingly, African customary law, and its culture, traditions and inheritance as discussed above, is law and is constitution in South Africa. As with every other constitutional principle this is also aspirational. The constitution after all is not an empirical description of how things are. Following Arendt, it is the fable that we tell about our "founding" (Arendt 1963; Honig 1991; Motha 2018). As legal scholars we are familiar with legal fiction, the 'as if'. We relate this above to a reading of change as not a mere continuing of the past but as one that is open to a future. We said earlier that we want to emphasise the importance of conceptual thinking, and in this vein ask that all legal scholars and practitioners start to heed the inheritances, traditions and life forms of African customary law as part and parcel of our law.

10 *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC).

'What remains?'

Hannah Arendt in a famous interview with Günter Gaus that took place on 16 September 1964, responded to him asking what remains of the Germany in which she grew up before the war, as follows (1994:12): "The Europe of the pre-Hitler period? I do not long for that, I can tell you. What remains? The language remains."

The interview has been titled and has become known as 'What remains? The language remains?' We invoke this question of 'what remains?' as a way to think about how a certain legal culture, certain traditions remain, alongside, in some cases against, our attempts to embrace a language of transformation. To be clear, if Arendt can be seen as nostalgic for what remained, we are not. But we do think that different histories, legacies, cultures should be acknowledged, if only in order that one can deal with them.

We thus want to urge for a certain slowness, a more careful and detailed engagement with the notion of transformation. Thinking spatially and conceptually, transformation is already a place/space in the middle, a place and space from where we think, read, and do. But also where we meet each other. This middle carries traditions, inheritances, relation with sources, with a past, present and future and with others with whom we live together in transformation, as we continuously transform. If we are conscious (Klare may say candid) about the hold that all cultures/ traditions/ inheritance/ relations continue to exert on us, then we may be in a better place to think and do the urgent work of transformation.

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