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South African Legal Culture in a Transformative Context

By

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Summary

Joining in the search for a post-apartheid South African jurisprudence, this dissertation departs from transformative constitutionalism, as formulated by Karl Klare. Transformative constitutionalism is a long-term project of bringing about social change through the interpretation and enactment of the constitution. Because the project envisions transformation not as single occurrence but as a continuous process, it requires a legal culture that is conducive to this change. Legal culture pertains to the way in which law and legal concepts are approached. The suggestion is that there is a continuation of a formalistic legal culture in South Africa, and this continuation of formalism stifles the transformation envisioned by the South African Constitution and the project of transformative constitutionalism. The idea of continuation emphasises the momentum of legal culture and is related to institutional inertia. This dissertation links conservatism, positivism, formalism and other related concepts with the notion of spectacle as outlined in the work of Njabulo Ndebele and proposes that South African legal culture is a continuation of spectacle by looking at approaches to history, constitutionalism, democracy and rights.

The spectacle, like formalism, prefers the determinate, values display and emphasises the external - it is an overt and celebratory mode devoid of thought. Because the spectacle and the continuation of a legal culture of spectacle stifles transformative constitutionalism, the submission is that there should be a refusal of spectacle in South African legal culture and a return to the ordinary. The notion of refusal comes from an article by Karin Van Marle, and links with a critical and slower approach. Ndebele introduces rediscovery of the ordinary, which is related to the concept of the everyday. Opposed to the spectacle, refusal and the ordinary favours contemplation and commemoration. This leads to a view on approaching history, constitutionalism, democracy and rights as refusal of spectacle and rediscovery of the ordinary. It is an attempt to rethink South



Africa's legal culture in order to move closer to the aims of transformative constitutionalism.

Following the aesthetic turn in South African jurisprudence, this dissertation makes use of literary examples to illustrate the arguments. Ndebele's *The Cry of Winnie Mandela* and Eben Venter's *Horrelpoot* introduce the themes of storytelling, travelling and post-colonialism and aptly expands on the call for a refusal of spectacle.

Foreword

Reflection and loss

Suspended ordinary

A simple haiku

I appreciate Haiku and Senryu for their ability to suspend an everyday moment and for the way in which they manage to grab a fistful of observation from a situation. I have often thought of this form of poetry, of Japanese origin, as a photograph in words. When you look at a photograph, you interpret a reproduction of reality from your perspective, but the eyes and lens of someone else has already restricted the material available for your interpretation. Haiku would be to zoom in randomly on the scene of this photograph. The word “Haiku” derives from *hokku*, meaning “hook”.¹ This name is aimed at the brevity of these verses and of how they were originally linked together in a chain.

Although Haiku in its modern form appears in many languages and does not strictly follow the five seven five syllable format, it is still an art form with rules and restrictions. It is often because of these rules that the Haiku has more impact than a full length poem or an essay would have. But be careful, because herein lies the possibility of the spectacle. Some Haikus are clichés or have become proverbs and some are only catchy or sentimental. Nonetheless, in general, it is an attempt to attain perspective and look at a situation from the outside by focussing on a very small shard of the inside. Haiku recalls a situation in a pending fashion, as if it is happening now and is eternally occurring repeatedly. It does not try to capture a complete overview of a situation, but rather illuminates a slice of a moment – providing detail on that small fragment to demand reflection on the entire situation. Every syllable is weighed and thought through.

¹ Verity K, *Breathing With the Mind: Verses in Senryu and Haiku Style* 1993 at 1.

It has rules but it is creative, it is both spectacle and ordinary, it suspends and continues but does not capture time, it compels reflection, it is both violent in its exclusion and incorporating in its omission, it is art – it is both Haiku and law.

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The ordinary:
refusal of spectacle.
A critical view

on transformative
constitutionalism and
our legal culture.



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