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South African Legal Culture in a Transformative Context

By

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Submitted in fulfilment of the requirements for the LLM degree in the Faculty of
Law at the University of Pretoria

June 2009

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.

Thank you to the Department of Legal History of the University of Pretoria for providing a stimulating environment in which I could explore ideas. Thank you to my supervisor, Prof. Karin van Marle, for inspiring and supporting me in many ways, for her patience and for exemplifying critical thinking. Thank you for inviting me on this journey.



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The ordinary:
refusal of spectacle.
A critical view

on transformative
constitutionalism and
our legal culture.



Table of contents

1	Introduction.....	1
1.1	Problem statement	2
1.2	Delineation and limitation.....	18
1.3	Underlying assumptions and theories.....	22
1.4	Chapter overview.....	26
1.5	Significance	30
2	Law and legal culture as spectacle.....	32
2.1	Introduction.....	32
2.2	The notion of spectacle.....	34
2.3	Stifling transformation: Examples of and engagements with a legal culture of spectacle.	43
2.4	Conclusion.....	76
3	Law and legal culture as a refusal of spectacle and rediscovery of the ordinary	77
3.1	Introduction.....	77
3.2	The notion of refusal and of rediscovery of the ordinary.....	78
3.3	Opening up possibilities for transformation: Examples of and engagements with refusal and rediscovery of the ordinary.	92
3.4	Conclusion.....	119
4	South African literary examples: <i>The Cry of Winnie Mandela</i> and <i>Horrelpoot</i>	121
4.1	Thus far	121
4.2	Refusal in <i>The Cry of Winnie Mandela</i> and <i>Horrelpoot</i>	125
4.3	The ordinary and the everyday of <i>The Cry of Winnie Mandela</i> and <i>Horrelpoot</i>	135
4.4	Routes and roots in <i>The Cry of Winnie Mandela</i> and <i>Horrelpoot</i>	142
4.5	Conrad and <i>The Cry of Winnie Mandela</i> and <i>Horrelpoot</i>	147
5	Conclusion.....	155
	Bibliography	161

1 Introduction

There are few things as frustrating as the inability to express oneself effectively. Not being able to find the apposite word or realising that there are simply no words to explain something can be paralysing. Words are the way in which we interact with our world. As our world changes, our words need to change and adapt as well. South Africa's transition and the journey towards a post-apartheid jurisprudence also entail the arrival of a new vocabulary: new words, and old words with new meanings, to think about our new and not-so-new world. One of these neologisms is transformative constitutionalism.

Ever since Karl Klare coined the term “transformative constitutionalism” in an article ten years ago, our vocabulary has expanded as legal scholars interpreted and applied this term.² Post-apartheid legal writing is characterised by symbolisms, metaphorical references and invented terminology, all applied in an attempt to describe, criticise and explain the role, the limits, the importance and the flaws of the law but also of the new constitution in our transformative society.³ To describe our society as transformative already hints at a specific vision of the context. The term “transformative”, as opposed to “transformed”, “transitional” or “transforming”, supposes a context of change with the possibility and potential of change but also non-change. This term anticipates the notion and necessity of transformation as a continuous process, and not transformation as an occurrence or single event.

² Klare K, “Legal Culture and Transformative Constitutionalism” *SAJHR* 1998 14 146. Scholarly articles provide an interesting treasure hunt to related and opposing interpretations of the term. One article points you to another, where you encounter a reference to another interpretation in an article where you find quotes from other articles, and in many cases these include quotes from the initial article.

³ The use of metaphors and symbols can be found in, among others: Woolman S, “Metaphors and Mirages: Some marginalie on Choudry’s ‘The Lochner era and Comparative Constitutionalism and Ready Made Constitutional Narratives’” *SAPL/PR* 2005 20 281, Botha H, “Metaphoric Reasoning and Transformative Constitutionalism” *TSAR* 2003 20 and Le Roux, W “Bridges, Clearings and Labyrinths: The Architectural Framing of Post-Apartheid Constitutionalism” *SAPL/PR* 2004 19 629. The list of added terminology is long. I take note of them as my spell-checker underlines them in confused red waves, this time not because they are wrong – but because they are new. As I left click on these words to “add to standard dictionary”, I try to envisage how we would left-click these terms and concepts and metaphors into our society and into our legal culture.

Klare's 1998 article is the point of departure and transformative constitutionalism forms the backdrop of this argument. Ten years after his article, it seems appropriate to investigate not only the way in which this term has been engaged with, used and implemented but also how it could have been and can be engaged with, used, and implemented.⁴ As I indicate above, a new vocabulary has been created and the concept of "transformative" is part of this new language. The objective of this research, however, is to ask how we can rethink South African legal culture in order to move closer to the aims of transformative constitutionalism. This dissertation stands in the context of a broader search for a post-apartheid jurisprudence. Transformative constitutionalism poses a challenge: it confronts us to think differently about longstanding ideas and to see South Africa in a transformative context. The suggestion is that this challenge has not been met.

1.1 Problem statement

The proposed problem I identify is that there is a continuation of a formalistic legal culture in South Africa, and this continuation of formalism stifles the transformation envisioned by our constitution and the project of transformative constitutionalism. To lay a basis for my argument I illuminate four key elements in this problem statement. The first is transformative constitutionalism and the second legal culture. I explain both these elements by relying mainly on Klare's article. The third element of this problem statement is formalism and the fourth continuation. I address these points by explaining what I understand and mean by formalism and anticipate how it links with what is later called "the spectacle" and also expand on the notion of continuation. I now proceed to discuss these elements in this order, before I move on to formulate the thesis statement.

⁴ In August 2008, Prof Sandra Liebenberg, HF Oppenheimer Chair in Human Rights Law, and Prof André van der Walt, SA Research Chair in Property Law, hosted a one day seminar at the Stellenbosch University law faculty. I had the privilege of attending this seminar and thus allude briefly to the papers delivered at this seminar.

1.1.1 Transformative constitutionalism

With transformative constitutionalism, Klare means “a long term project of constitutional enactment, interpretation, and enforcement committed (not in isolation of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction”.⁵ Klare emphasises that the aim of transformative constitutionalism should be present when we enact, interpret and enforce the constitution. The use of these three different verbs points to the broad spectrum of agents who should be involved in the project. Although Klare focuses in his article on the role of judges, it is clear that this project is not confined to the sphere of adjudication but pertains to any agent involved in the enactment, interpretation or enforcement of the constitution.⁶ The project of transformative constitutionalism is specifically aimed at altering the institutional character of South African law. Power relations, political institutions and social institutions should be changed in a “democratic, egalitarian, participatory direction”. The underlying structures and culture of our society should be changed.

Klare sees the way in which transformative constitutionalism should take place as “large scale social change” that should be induced through “nonviolent political processes grounded in law”. This raises two questions – the first is

⁵ Klare *SAJHR* 1998 14 146 at 150.

⁶ Enact: ordain, decree, play part on stage or in life, law enacted (*The Oxford Handy Dictionary* 1991). Enactment in the theatrical sense (playing a part on stage) anticipates my argument on the inevitability of law as a spectacle, of the performativity of legal enactment. But it simultaneously pre-empts the possibility of “playing a part in life” in a more ordinary way.

Interpret: explain (dreams, foreign words), make out/ bring out meaning/explain or understand in specified way, translate context (*The Oxford Handy Dictionary* 1991). In conjunction with Klare I would argue for *interpretation*, suggesting a space in between (The space between, the tears we cry / Is the laughter that keeps us coming back for more / The space between the wicked lies we tell / and hope to keep safe from the pain) – ‘The Space Between’, Everyday Dave Matthews Band, quoted by Van Marle in “Love, law and South African Community: Critical Reflections on ‘Suspect Intimacies’ and ‘Immanent Subjectivity’” in Botha and Van der Walt (eds) *Rights and Democracy* 2003 at 231. This implies a not-yet and a reciprocity, also implicating interaction between the content of the constitution and the legal culture. Interpretation of the constitution also implicates legal academics, in the “explaining” that happens in lecturing of students and writing of articles.

Enforce: Persist in, press home, impose, compel observance of (*The Oxford Handy Dictionary* 1991).

whether large-scale change can be obtained without violence. The second is whether political processes can be grounded in law – in other words, whether law can contain politics.⁷

Pertaining to the first question, South Africa's democratic order rests on what Mahmood Mamdani calls a “negotiated revolution”.⁸ Martin Chanock also notes that in the South African revolution neither Bastille, nor Winter Palace were stormed, and no Nuremberg trials held, and the image projected in the absence of such dramatic symbolic events has been one of managed and consensual transition.⁹ The obvious fact, which Klare reiterates, is that transformative constitutionalism entails the furthering of initial change and implementing this change. An important question, however, is how to make this change durable through further non-violent processes. Large-scale initial change has been reached – transformative constitutionalism is however aimed at enduring change. The call is not only for outward or symbolic change but also change in the inherent structures underlying society.¹⁰ When Klare refers to transformation, he has in mind something much bigger than “reform”, but “just short of or different” from “revolution”. This confirms that he argues for something radical. In the words of Cornell, this entails transformation that is radical enough to go beyond mere evolution.¹¹ Klare calls for an ongoing, repeated moving away from the past.¹²

⁷ The violence Klare presumably refers to is literal violence, for example taking up of arms, killings, fighting and so forth. This notion that legal processes are non-violent is disrupted to show that law is violent in a figurative sense. by Drucilla Cornell in her article “The Violence of the Masquerade: Law Dressed up as Justice” *CLR* 1989-90 11 1047, drawing on Derrida’s “Force of Law: The Mystical Foundation of Authority” *CLR* 1990 11 921.

⁸ Mamdani M, *When Does Reconciliation Turn into a Denial of Justice?* 1998 at 11.

⁹ Chanock M, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* 2001 at 523.

¹⁰ My argument is that the spectacle involves an exaggerated emphasis on the outward and on appearance, whereas the rediscovery of the ordinary and refusal entails also a deeper engagement with substance and a higher regard for that which lies underneath the surface.

¹¹ “The philosophy of the limit, and more specifically the deconstruction of the privileging of the present, protects the possibility of radical legal transformation, which is distinguished from mere evolution of the existing system”. She continues to state that the “deconstructability of law is exactly what allows for the possibility of transformation, not just the evolution of the legal system”. Cornell D, “Rethinking Legal Ideals after Deconstruction” *Law’s Madness* 2006 147 at 149.

¹² Van Marle *SAPR/PL* 2004 19 605. To interpret this notion of transformation, which does not quite classify as revolution, I investigate revolution or revolt as element in refusal.

If we analyse Klare's understanding and identify the important elements in his definition,¹³ we find that time and historical self-consciousness are essential to his project.¹⁴ What is furthermore noteworthy is the emphasis placed on the necessity for the underlying structures of society to change.¹⁵ Where does a transformative approach to the rule of law that involves candour about the limits of law leave us? I would argue that law, but more specifically legal culture can definitely prevent dramatic social change; following from that, legal culture does have an influence on social change and therefore can drive social change. Klare assumes that dramatic, large-scale egalitarian social change is desirable in South Africa (he hastens to add the USA as well). It was obvious that egalitarian social change was desirable after apartheid. Given the ten years that have passed since Klare's article, the question would now probably be whether social change is *still* desirable or whether *more* social change is desirable. For the purposes of this work, I suggest that both these questions be answered affirmatively. The proposition is that our stagnant or continued legal culture stifles this social change and a change in this culture might open up the possibility for this desired change.

¹³ "long term", "committed". Remarks that "the whole reconciliation process is taking too long" or that "there should have been a time limit on affirmative action" are quite common. During an Open Forum Discussion hosted by the Afrikaans newspaper *Die Burger* on 26 March 2008, chaired by Prof Frans Viljoen from the University of Pretoria, one member of the audience who claimed to have studied law even raised a point that it is clearly stated in the constitution that affirmative action was only to be effective for a period of ten years, that it is now four years after that time limit and that she therefore does not understand why she did not get appointed in a certain teaching position. Although Klare's mention of commitment and use of "long-term" indicates a process that will take time, he does not state how long this period might be. What I conclude is that it should be an ongoing project – one that is endless, with a goal that can never be quite reached.

¹⁴ To investigate the reference to time I turn to Van Marle K, "Law's Time, Particularity and Slowness" 2003 19 *SAJHR* 239. Van Marle captures the idea of "slowness" from Milan Kundera to illustrate the importance of time, but also approach to time, in post-apartheid jurisprudence. She highlights that time aspect inherent to deconstruction, and explains that "a deconstructive approach embraces both a disruption of chronological time – and accordingly multiple notions of truth and fluidity of meanings – and a slowness or dwelling (strategy of delay)". Slowness in this sense does not necessarily call for the passage of actual time or the extension or dragging of processes, but rather for the exploration of "difference and particularity". The notion of historical self-consciousness features in my assessment of history both as spectacle and ordinary. The notion of historical self-consciousness echoes the post-amble of the interim constitution. It is however important to note that this self-consciousness should not be a reactionary self-consciousness or a compensatory self-consciousness. I expand on this statement later in my discussion of Chanock.

¹⁵ Because of institutional or structural momentum, what Christodoulidis would call inertia; it is now already important to note why refusal is important as a first step in changing these institutions, as noted in Christodoulidis E, *Law and Reflexive Politics* 1998 at 220 - 224. I explain this concept in depth in the part on refusal as a first step to counter inertia or momentum.

1.1.2 Legal culture

The term “culture” comes from the Latin word “cultura”, meaning “cultivation”, stemming from “colere” – to till or to toil over. A group creates, cultivates and grows a way of being and behaving through practices and gestures. Culture generally refers to a style of life that includes certain habits and mores, ways and customs. It involves patterns of human activity and the symbolic structures that signify the activity. The following definitions, from a plethora of others, prove useful to my investigation: “the total of the inherited ideas, beliefs, values and knowledge, which constitute the shared basis of social action”, “the total range of activities and ideas of a group of people with shared traditions, which are transmitted and reinforced by members of the group”, “the attitudes, feelings, values and behaviour that characterise and inform society as a whole, or any social group within it.”¹⁶ Culture is a celebration of ritual that relies strongly on legacies of the previous contributors of the culture. Language is an important component in culture and hierarchy and hegemony are considered to be significant for the functioning of a culture.¹⁷

Legal culture entails looking at law as culture; law consisting of rituals, where language plays a central part; law as situated within a context and with underlying systemic attributes.¹⁸ Therefore, the notion of legal culture calls to mind also the nature of law: law as masculine,¹⁹ law as violent, law as reductive, law as sacrifice, law as spectacle. Legal culture looks at how law is approached in order to convey something about law.

¹⁶ *Collins English Dictionary* 2003.

¹⁷ Further definitions include “[t]he customs and beliefs, way of life and social organisation of a particular group”, “a group with its own beliefs” and “the beliefs and attitudes about something that people in a certain group share.” *Oxford advanced learner’s dictionary* 2005.

¹⁸ Laster K, *Law as culture* 1997 at 1.

¹⁹ The law as masculine is associated with the law as patriarchal. This term is used in feminist scholarship to describe the dominance of masculine values. In law, patriarchy does not necessarily only refer to the actual domination of women by men, but to the underlying masculine ethic of law. This would point to the emphasis on rationality, insistence on an ethics of justice and other attributes, related to the notion of spectacle, which I later touch on. Through my suggestion of refusal and ordinary I want to allude to an ethics of care, following various feminist scholarship and specifically that of Carol Gilligan and Seyla Benhabib.

Klare's description of legal culture pertains specifically to how legal actors cognitively approach and view the law and their respective roles within it. His "stripped down" account of legal culture does not aim to provide for the intricacies of attitudes coupled with the legal profession. He does not try to address popular perceptions or certain professional beliefs, and neither does he attempt to decipher the sociology of the bar. What Klare means with legal culture is "professional sensibilities".²⁰ This would not only imply a current observable ideology, but also a susceptibility or predisposition towards a certain way or method of thinking, reasoning and arguing.²¹ He describes it as "habits of mind and intellectual reflexes", and also "rhetorical" and "argumentative" strategies.²² In other words, legal culture determines the validity of arguments, and sets the criteria for the acceptability of rhetorical devices. Legal culture would determine that valid arguments are those that feature again and again in legal discourse, forming and reinforcing that certain culture. Legal culture is also formed by the long-standing "political and ethical commitments that influence the profession". These commitments evidently presuppose certain understandings of and assumptions about politics, ethics, and social life in general as well as a specific vision of justice. Klare refers to the words of Justice Kriegler, in the *Du Plessis* case and explains legal culture as "the ingrained inarticulate premises" that inform "professional discourse and outlook".²³ Legal culture can therefore be understood as an underlying point of departure, a pervasive frame of reference and law's locus of control. Klare quotes the words of Duncan Kennedy to emphasise that "judges and the advocates who seek to persuade them (almost)²⁴ always aim to generate a particular rhetorical effect through their legal work, namely that of the legal necessity of their solutions without regard to ideology."²⁵

²⁰ Klare *SAJHR* 1998 14 146 at 151.

²¹ Capacity to feel, susceptibility.

²² Klare *SAJHR* 1998 14 146 at 151.

²³ *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at par 119.

²⁴ Added to the original Kennedy text by Klare *SAJHR* 1998 14 146 at 158.

²⁵ Kennedy D, *Critique of Adjudication: {Fin De Siecle}* 1997. Klare *SAJHR* 1998 14 146 at 158

Expressing law as culture disrupts the formalist claim that law is objective and neutral, and stresses that legal systems are in fact “culturally preferred ways of looking at the world”.²⁶ Klare also highlights the false consciousness of legal culture. To illustrate that we often (wrongly) perceive legal cultural constraint as natural, non-political or non-ideological, Klare sketches two scenarios.²⁷ The first is of an adjudicator, so immersed in traditional values and influences that she does not identify or notice the ambiguities in the material she is dealing with, which is not apparent at first sight. The other adjudicator, led by her moral and political convictions, describes these gaps in the (same) materials. She consequently finds a different meaning in them than can be concluded at first sight. From this description one can be tempted to infer that the first adjudicator does not commit a political act. But surely she does enact a politics external to the materials, by inscribing a “*status quo* ideological spin” to the materials, regardless of the fact that they might not require or even allow it.²⁸ Legal constraint is culturally constructed and constraint is part of culture.²⁹ Legal culture restricts and inhibits, but also provides the possibility of transformation. This dissertation’s claim is not that there is a single distinct legal culture and that all participants in South Africa approach or think about law or “do” law in the same way. But I do however identify some main foundational attributes. It is much more complex to determine and recognise legal culture or context than it is to look at content. Similarly it is much easier to address content. Just like cultures in general, legal culture takes longer to change. The content of law can be changed easily, but the context remains. This systemic momentum is also true for the South African legal culture, a tendency that can be investigated through the notion of continuation.

²⁶ Laster 1997 at 32.

²⁷ Klare 1998 14 *SAJHR* 146 at 162.

²⁸ As above.

²⁹ Klare *SAJHR* 1998 14 146 at 161.

1.1.3 Continuation

The prolongation of a distinct legal culture implies that a legal culture that was created at some stage in the past is preserved – or does it? The initial argument entailed that although the content of law has changed significantly in the transition to a democratic, egalitarian state, the context or culture has remained largely the same. It can be emphasised again that this dichotomous vision of content and context is an exaggerated one. I acknowledge that content can never be completely separated from context and *vice versa*, and it is specifically for a focus on both of these elements that I argue. Our changes have been much celebrated, while our continuations have been mostly ignored. An overemphasis on content has led to the neglect of investigation of our culture. By drawing attention to culture I want to underline the interconnectedness of law and legal culture. An insightful piece of work in this regard is that by Chanock.³⁰ In the chapter “Reconstructing the state: Legal formalism, democracy and a post-colonial rule of law”, Chanock compares the making of the South African state in 1910 with the making of the South African democratic state in 1994. It is through this non-linear appreciation of time that he identifies various connections and several instances of continuation:

...a new state, being constructed after prolonged violence and a spectacular reconciliation between (white) elites. A new constitutional order built on an external model of parliamentary supremacy, and based on a “rule of law” was the foundation. A new binary private law was evolved, which struggled with the problems of uniformity and diversity. A huge task of legislative re-making of the country was embarked upon to provide it with the institutions of a twentieth-century state. This idealised legal order rapidly degenerated in the face of political realities.³¹

He refers here not to the formation of the new SA, but in fact returns to the beginning – the formation of the Union of South Africa in 1910. Chanock also notes differences: colonial racial supremacy is gone, and the absence of women

³⁰ Chanock 2001.

³¹ Chanock 2001 at 537.

is in sharp contrast to the situation of half of the 1993 negotiators being women and a quarter of the parliament today also being women. But then, the development of legal culture in a conflictual political culture of a state that has never been united or stable will be focused around the old matrices – international acceptability and internal economic struggle; centralisation, disunity and diversity – and new ones – popular justice and democracy and constitutionalism. Despite the decisive break with the past, the South African state’s first making is in many ways closer to the present, than the chronologically more recent years of its disintegration.³² He tries to

generate an idea of legal culture and to consider the relationship, in the period of making the white state, between the formalism of the superior courts and of professional legal ideologies, and the other legal discourses and practices which existed both inside the state and beyond it.³³

Interestingly, he starts his book by telling four stories.³⁴ It is important to give a brief summary of these stories here because it is easier to identify the continuations and the similarities between South Africa’s first making of state and its most recent remaking, when we look at ordinary stories as opposed to grand narratives. By telling these stories I aim already to introduce a way of looking at history that I call for later. Importantly, it also serves to show how the ordinary has been neglected and ignored in the making of South African legal culture and ever since. It is also meant to pave the way for my use of South African stories, more specifically novels, and to place this work within the aesthetic movement, which I explain below.³⁵ These four stories – a trial, an execution, common law and an uncommon lawyer – provide us with four descendants, four products of

³² Chanock 2001 at 511.

³³ As above. Continuation is also brought about by the fact that lawyers create law primarily with reference to the intellectual concerns in legal texts, legislation and court cases and learned treatises. This ensures that some elements stay in tact, and causes this continuation.

³⁴ Chanock 2001 at 3. This is of interest because through his narratives he conveys a lot about the legal culture at the time of his stories, and also subtly shows how there are still elements one can identify in South African legal culture. Interestingly, but also useful as well to illustrate the effectiveness of narratives.

³⁵ See p 21-25.

South African legal culture.³⁶ They sketch respectively the relationships between judges and accused, judges and parliament, judges and the legal texts which are their “authorities” and the relationship between lawyers and government. In this sense they look at history as relational and law as a culture and a network of interactions. I briefly mention the stories to underline Chanock’s assertion that history is a “myriad of narratives each in its own context” and thereby introduce the theme of continuation through these different narratives.³⁷

The first story starts with the survivors of the Bulhoek revolution standing on trial. Among these, who were all injured in the attack by the authorities, is Enoch Mgijima. Central to the trial was an eviction order, but the inhabitants who were to be evicted believed that the land was “God's land” and their revolutionary visions of freedoms included their riding away on a golden chariot. It was a trial that demarcated the areas of strength and weakness of state actors – where the police commander who commanded the killing of the revolutionaries was promoted, while the minister of Native affairs who tried to salvage the eviction situation by rather registering the “illegal” occupants than evicting them, lost his job. The trial was concluded by judge president Graham, who stated that what bound this sect together was not only the attraction of indiscriminate kissing between men and women, but the “crazy notion that the day was coming that the black man was to have his say”.³⁸

A year after this trial, another revolutionary group of white labourers on the East Rand was also tried for sedition. Four were sentenced to death, but the judges privately suggested a pardon to the Governor General in Samuel Taffy Long’s (one of the accused) case. The Governor General stated that he could not contemplate the reasons for the suggested pardon, but ascribed it to a nervousness resultant of dealing with execution cases. In the discussions that

³⁶ In chapter 4 we meet four other descendants through Njabulo Ndebele’s novel, *The Cry of Winnie Mandela* 2003.

³⁷ Chanock 2001 at 4.

³⁸ Chanock 2001 at 6-7.

followed the initial rejection of the pardon by the Governor General affirmed the sovereignty of parliament and his consequent devotedness to the opinions of the ministers. Long was hanged.

The third story turns the focus on common law. It tells of a case concerning a credit agreement between Mapenduka, an African farmer, and Ashington, a white trader, in which Mapenduka bought 152 bags of maize at 109 pounds from Ashington. This was something that often happened. Native farmers frequently had to buy back maize at higher prices because they had to sell their crop directly after the harvest due to taxes. Mapenduka could not pay the debt when it was due and subsequently had to give up his six oxen, cow, calf and horse that he had pledged. Later, however, he could repay the amount and demanded his property back in exchange for the payment of the amount. Ashgate only had the one ox in his possession then and as a result Mapenduka sued him for the difference between the debit sum and his estimated value of his livestock pledged – 51 pounds. In a wondrous display of knowledge, foreign cases, and foreign languages, the judge on appeal reached the same conclusion as the judge in the first instance (albeit by a much more spectacular scenic route). He concluded that even though he accepted the point that the credit provision agreed upon by the parties could be oppressive, the value of the animals (labelled native oxen – as if a white ox would have been worth more) gave in pledge did not exceed the amount due to Ashgate. In an enjoyable comment Chanock says that there are a number of ways in which the case can be read. When it is read as an exercise in scholarship it can be read with pleasure. But, he states, it should also be read with incredulity if one asks “why Carpzovius’ ‘Law of Saxony’ or the rescripts of the emperor Severus could have been applied to Mapenduka’s oxen”.³⁹

The last story is more well known than the previous three, the story of MK Ghandi and the resistance against the “Black law” which forced Indian citizens to

³⁹ Chanock 2001 at 13-16.

provide their fingerprints in order to obtain registration documents similar to “passes”. As a conclusion to this story and in what also serves as an apt conclusion to the other three, the words of Ghandi are recalled: “Something obtained through violence can only be kept through violence”.⁴⁰

These stories identify both the nature of law and the continuance in legal culture. In his concluding statements, Chanock asserts that law depends on the effectiveness of administration and rights are dependant on a strong state – “not a weak one”.⁴¹ This is also why texts can change but their interpretation still follows the culture of the previous text and therefore no real change is brought about. The constraint of legal culture has also been called the constraints of convention, context and tradition.⁴² In a well-argued essay, Rosemary Coombe clearly sets out the well known arguments of legal indeterminacy and explains why law stays the “same as it ever was”. She firstly discusses the attempt of Owen Fiss to depoliticise the interpretation process, namely by finding “disciplinary rules” and through the “interpretive community” which recognises these disciplinary rules as authoritative.⁴³ Coombe however submits that legal interpretative communities “do not exist *a priori*, but are constituted and continually reconstituted in a process of ongoing struggle”.⁴⁴ She says that seeing indeterminacy only as the fact that law is indeterminate yet constrained by disciplinary rules, impartiality, and other conventions “only celebrates and validates the authority of the legal elite because the conventions of legal culture reflect their perspectives”.⁴⁵ These perspectives will then inevitably maintain the *status quo* and favour the dominant group. This is why Coombe characterises

⁴⁰ Chanock 2001 at 19 quoting Gandhi 1928 at 306.

⁴¹ “A declining effectiveness of the state's administrative machinery and a growth of corruption at a time in which new rights are being proclaimed would weaken any new legal order. An effective yet accountable administration and a confident democracy could be better guarantees for a new legality than a bill of rights. For lawyers a simple neo-realism which paid greater attention to the process of law-making and administration than to the philosophies of interpretation, could provide a better understanding.” Chanock 2001 at 536.

⁴² Coombe R, “Same as it Ever Was: Rethinking the Politics of Legal Interpretation” *Mc Gill LJ* 1989 34 604.

⁴³ Coombe *Mc Gill LJ* 1989 34 604 at 618.

⁴⁴ Coombe *Mc Gill LJ* 1989 34 604 at 619.

⁴⁵ As above.

interpretation both as inherently political but also inherently violent. She warns against unquestioningly accepting the constraints of legal culture.⁴⁶

Related to the notion of neologisms to explain our new order, Chanock creates two terms for this maintenance of the *status quo*, or what he identifies as continuation: neo-formalism and neo-colonialism. Pertaining to the latter, he explains that as it had been nearly a century earlier, South Africa was colonised in the 1990s by a new kind of internationally sanctioned state: this time not the “Westminster system” but the “constitutional state”. Regardless of South Africa's recent legal revolution, an example of neo-colonialism is that, like the legal system of the original Union, South Africa is still bringing in answers from the outside. “Is it not a purpose of the reconstruction to make South Africa's legal system look like those of other ‘normal’ countries?”, he asks, and validly then asks whether there is subsequently any place for specific local transformation.⁴⁷ These two questions are asked in the light of a widening range of uniformities. With what Chanock refers to as “a tightening web” of international agreements, conventions and expectations that has become the textual universe of a new positivism, how relevant can the specific cultural features of local meanings and practices, narratives and purposes, be for any legal system?⁴⁸ The state made at the beginning of the century was integrated into a global empire; and the state now being constructed is part of a new globalised legal order. The other term he uses to label the continuation he identifies is neo-formalism. Chanock does not intend these terms to be separate or dichotomous, but rather to be two ways to illustrate the continuations in legal culture. While admitting that neo-colonialism is implied in neo-formalism I now proceed to discuss what Chanock means with the term neo-formalism, and also explain the continuation of formalism in general.

⁴⁶ “To accept the standards for the evaluation of interpretations that are found within the disciplinary rules authorised by (and authorising) the interpretive community, is to wilfully ignore the fact that these embody moral and political principles which are hegemonic; to cast aside as non-legal (and implicitly therefore, as non-legitimate) criticisms which derive from standards emerging outside that community, is to effectively assign legitimacy to the victor's by virtue of their victory.” Coombe 1989 34 *Mc Gill LJ* 604 at 620.

⁴⁷ Chanock 2001 at 524: “There may well be eagerness among lawyers to take this road, rather than to look to the development of local discourses, if only because these ideas have already been validated as “law” elsewhere by courts or in conventions.”

⁴⁸ Chanock 2001 at 525.

1.1.4 Formalism

On the side of neo-formalism, Chanock first explains the making of a formalist legal culture.⁴⁹ He contends that a legal culture cannot be understood by reference only to judges, or even more broadly to lawyers, but that it is carried on in other forums. Of these forums, politics is the most obvious, but perhaps the most important that he discusses in his book is the bureaucratic forum. In any highly bureaucratic state the main generators and users of law are the bureaucracy, and they are a major influence on the growth of a legal culture. During the making of a legal culture the distinction between administration and law blurred in both these institutions, over which was placed a judiciary with an “over-stated and self-styled separation” from the political.⁵⁰ He explains that despite the ideology of legal formalism and the prevailing legal narratives that cut the role of the judiciary out as one “above politics”, the courts were intensely criticised by the public in the first decades.⁵¹ This almost seems to mean that even though the courts pretended to ignore or deny the political nature of their actions, the public perceived it as highly political. He explains that it was not until apartheid, when the judiciary offered the opponents of the apartheid regime a little hope in judges, and gave the supporters of the regime the confirmation of the regime's propriety, that courts became so much a focus of discussions of law.

Similarly, Dugard explains (laments) that in the 1950s, judges began to “free themselves from the grip of literalism, with progressive generosity towards the intention of the legislation of apartheid”.⁵² This urges me to question the search

⁴⁹ Chanock 2001 at 553 “The current constitution has ushered in a realm of what might be called the ‘new formalism’, in which a bill of rights, and its associated global jurisprudence, will be used to provide exhaustively the primary and secondary texts of the new ‘rule of law’. However, people with all their eggs in the new rights-based formalist basket will be disappointed.” Neither law nor rights will trump politics, particularly as both may depend on an administrative capacity that the state may not have. And conversely those who might celebrate the discarding of form in the dash for change will soon discover the exposure and vulnerability that such a strategy involves for its protagonists. It seems to me that at least an awareness of this issue in all its complexity should be a part of the process of the growth of the new legal culture.

⁵⁰ Thus, while most of the legal business of the state was carried out by institutions and personnel which were part of the coercive bureaucratic apparatus, the top of the system embodied a symbolic separation between “law” and other aspects of state power.

⁵¹ Chanock 2001 at 157.

⁵² Dugard J “The Judicial Process, Positivism, and Civil Liberty” *SALJ* 1971 88 181.

for the underlying values of the constitution. Evidently this could be a dangerous – continual – endeavour if the aim is similar to looking for the intention of the legislator. Transformative constitutionalism urges not the intention of the drafters, or the underlying values as such to play the prominent role, but rather the needs of society, the situatedness of a certain principle and the underlying historical and transformative value thereof. As the courts more and more became instruments of punishments and could no longer hide behind legal impartiality that formalism provided, partly in fact because of the acquittal of the accused in the Treason Trial of 1956, their sense for legal correctness was being exploited. It was during this time that various strands of debates around the judiciary came into being.⁵³ One strand was concerned about the legitimacy of “Law” as an abstract entity, that black South Africans would cease to believe in it altogether.⁵⁴ Others debated the moral obligation of judges and called for judges to resign because the “true” function of the judiciary was undermined.⁵⁵ A more strategic line of argument is similar to what we encounter in Etienne Mureinik's vision of a conscientious judge, and also Dugard's article. Klare draws on Mureinik's notion of the “conscientious judge”.⁵⁶ According to this image it is a judge who, while functioning within the system, also challenges it. Although his argument is much more nuanced it would imply that a judge within the constraints of apartheid legislation still relied on his own convictions and subversively interpreted the legislation so that it to some extent undermined it.⁵⁷ This links with Dugard's argument that judges who do not morally agree with the apartheid legislation should not resign. Rather, judges could within the formalist paradigm revert to different paths inherent in South African common law itself. He explains that it

⁵³ Chanock 2001 at 519.

⁵⁴ Davis D, “Post Apartheid South Africa. What Future for a Legal System?” *Acta Juridica* 1987 220.

⁵⁵ Wacks R, “Judges and Injustice” *SALJ* 1984 101 266.

⁵⁶ Mureinik E, “Dworkin and Apartheid” in Corder H (ed), *Essays on Law and Social Practice in South Africa* 1988 181 at 182 as quoted in Klare *SAJHR* 1998 14 146 at 148.

⁵⁷ As above. What is significant about this image is that Mureinik explains it in a top dozen fashion, including the whole range of legal actors in legal culture. He says that it is vital for judges to be conscientious because otherwise there is no motivation for advocates to present conscientious arguments and consequently there will be no reason for attorneys to be conscientious and therefore lecturers and researchers will not be conscientious and there will finally also be no purpose in being a conscientious student. This domino conscientiousness gives us an idea of legal culture and also why a formalistic legal culture is inherently carried over through the layers of legal scholars and therefore continued through time.

was in many cases through following the letter of the law, as opposed to searching for the intention of the legislator, that better judgments were made. To add to this, Chanock says that the saving grace for legalism in South Africa was the bold statements made from the dock in cases where courts were the arena for “vital political positions that were manifested and political battles”, during the final years of the white state.

Klare refers to the South African legal culture as conservative. With this he does not mean politically conservative, but conservative in the formalistic sense. He means a strict adherence to rules and conventions and a separation of law and politics. Politically progressive judges can sometimes still be very conservative in their judgments. He contends that South African conservative legal culture will stifle or prevent transformative constitutionalism. Chanock succinctly remarks:

To understand South African legal culture one must start with its own formalistic self-image, and acknowledge also that without the centrality of formalism a state cannot be based on a “rule of law”. How can South Africa develop a democratic legal culture which is open to dialogue yet retains the distinctive characteristics of a rule of law? The idea of the rule of law, however peculiarly actualised, was an important component of the colonial state and white rule. This feature has remained central to the making of a new state in the era of global constitutionalism.⁵⁸

Formalism links with the spectacle, as does positivism and liberalism. It later becomes apparent how these terms and their meanings intersect. Now that the foundation of my problem statement is laid, I move on to outline my thesis statement. A critical investigation of South Africa’s continuous legal culture reveals that it is formalistic in a way that I describe as a continuation of spectacle. The spectacle and the continuation of a legal culture of spectacle stifles transformative constitutionalism. In a post-apartheid context, a culture of refusal of the spectacle and rediscovery of the ordinary is integral to moving towards a community envisioned in the project of transformative constitutionalism.

⁵⁸ Chanock mentions an inspiring contrast between the first state’s creation in 1910 which was proclaimed a “hanging year” and the creation of the second state which saw the abolition of the death penalty in *S v Makwanyane* in 1995 (Chanock 2001 at 513).

Formulated differently, the formalism and conservatism of South African legal culture is a continuation of an established legal culture, in spite of a change in legal content. Formalism and conservatism prefer the determinate, certainty, and emphasis on the external.⁵⁹

1.2 Delineation and limitation

A standard limitation of any work of this kind is the limited scope and time available. At first I wanted to include a thorough investigation of *Drum* magazine, but this proved to be too ambitious a task and I limited it to a few brief remarks on *Drum* in a footnote in the section on the notion of the spectacle. Furthermore, when attempting to explain legal culture, people often ask whether that would refer to traditions such as the way of dressing and addressing in court or the habits of practice that have become a culture within the legal sphere. These aspects do indeed form part of legal culture and are a reflection of an underlying perception of law, but I only focus my attention on this underlying approach. I should add here that the purpose of this research was not to do fieldwork or make an empirical analysis of the legal profession and the culture thereof, or to extensively compare court judgments to identify a legal culture. Although these endeavours might prove interesting, I hope that this work is the beginning of more research that I will do on this topic in which I can study legal culture in different ways. For now I chiefly rely on articles by a small circle of South African scholars whose academic work I identify as post-apartheid jurisprudence. I am therefore influenced by a wide spectrum of ideologies and these different voices will definitely emerge, not only in ideas but also in style.

⁵⁹ “But calculated dishonesty and betrayal of professional norms, whether common or aberrational, does not present a case of great conceptual difficulty for liberal jurisprudence. From a theoretical standpoint, far more challenging problems are posed by uncertainty, error and denial.” Klare *SAJHR* 1998 14 146 at 162 “Society’s values are viewed through one’s own spectacles and try as we will, we cannot escape the perspectives that come with our particular backgrounds and experiences. Not only particular interpretations but understanding of interpretive conventions themselves” Coombe *Mc Gill LJ* 1989 34 604 at 619. Our legal culture is a continuation of a spectacle; the spectacles through which we look at law is spectacular.

Klare makes much of the tension between freedom and constraint – the fact that legal texts are indeterminate and do not generate their own meaning, but are not endlessly open and flexible. It is important to acknowledge the pull between interpretive fidelity and interpretive freedom in order to identify the role that legal culture plays in transformation. Klare concludes by leaving us with a few last important characteristics of a transformative approach⁶⁰ – an approach that is transparent and self-conscious about the politics of adjudication. He also emphasises that this idea of adjudication has traditionally been perceived as a predicament, but that it should be seen as an asset. Honesty about the “plasticity of legal interpretation” and acknowledgement of how social visions can be voiced through interpretation are cardinal. This does not seem to be an easy task, and therefore the vision of transformative constitutionalism is also a challenge to lawyers to review their analytical practices and thought patterns. He finally suggests, or rather implores, that the constitution’s “massively egalitarian commitments” and “substantively progressive aspirations” should also echo through the method of legal interpretation. For this echo, this subtle presence and spectral repetition of the vision of the constitution in legal interpretation, Klare calls for a politicised account of the rule of law. This well-known mantra of critical legal studies, points to the ideological nature of law, or looking at law as culture.⁶¹

I identify some main foundational attributes in South African legal culture. It is much more complex to determine and recognise legal culture or context than it is to look at content, for the same reason that it is much easier to address content. Similar to cultures in general, legal culture takes longer to change; the content of law can be changed easily, but the context remains. This systemic momentum is also true for the South African legal culture, a tendency that can be investigated

⁶⁰ Klare *SAJHR* 1998 14 146 at 187-188.

⁶¹ In the light of South Africa’s recent quasi-legitimacy crisis, it may be valuable to note here that the statement that law or adjudication is political does not entail the much reported incident where judge Hlope wanted to influence judges of the constitutional court to pursue an ANC agenda. This might have been a very crass instance of party politics in law, and being candid about the political nature of law probably includes this, but the argument stretches much further and is more nuanced than the presence of party politics in law and legal processes.

through the notion of continuation. Also, I would not claim that I “prove” that South Africa’s legal culture is one of spectacle. I do not quote court cases to expose an illustration of spectacle or report on attorney practice customs to point out spectacle, but I rely on ideas already expressed with regard to South African legal culture and expand on these in light of the notion of the spectacle.

Another sticky point is how far back I need to go to identify this continuation. If we refer to our present, the period after 1994, as post-apartheid, how far must I go back in apartheid, or pre-apartheid – and are these pre-morphemes and labels helpful in any way? The idea of the constraint and continuation of legal culture should not leave lawyers despondent or cause them to fatalistically give up and accept that things are just “the same as it ever was” or will be, rather it should “encourage [them]... to enter the fray and compel [them]... to attend to the historical specificity and ‘significance’ of political struggle,” and to “take up the challenge of transformative constitutionalism, while knowing that it can never be fulfilled”.⁶²

Chanock warns that the “idealising language of law conceals not only the ambitions of the state, but also its incapacities,” and this is a major threat to a rule of law.⁶³ But to be candid about the notions of continuation in South African legal culture does not mean that we must discard the whole project because things will just continue the way they are. Klare emphasises the tension between freedom and constraint throughout the article.

Although I caution against the spectacle and call for the ordinary, I admit that I live in a “society of the spectacle” and therefore, inevitably, I revert to the spectacle at times. This tension forms an important part of this work; this in-

⁶² “Our heightened awareness of the indeterminacy of meaning should not cow us into positions where we either deny the politics of interpretation, reassure ourselves that our conventions protect us from the consequences of it, or retreat into a complacent, smug, or resigned sense that it’s the ‘same as it ever was’, and that we need do no more than leave it to the experts. It’s not the same as it ever was; it never has been, and it never will be.” Coombe *Mc Gill LJ* 1989 34 604 at 652 and Van Marle K, “Revisiting the Politics of Post-Apartheid Constitutional Interpretation” *SALJ* 2003 3 549 at 557.

⁶³ Chanock 2001 at 571.

between space. But that is indeed where refusal lies, within the tension and with the liminal. Refusal of the spectacle lies at the limit of the spectacle, somewhere between the spectacle and the ordinary. It is therefore difficult to escape the spectacle and the ordinary can easily turn again into spectacle. This thin and shifting line also marks the importance of the symbolic or aesthetic and at the same time the potential of spectacle within it. Symbols and symbolic change are important, are necessary, and all symbolisms or symbolic change are not necessarily spectacle. But symbol turns into spectacle when the content disappears and only the form remains. This pull between the spectacle and the ordinary and between form and substance, but also within the domain of symbolism, is present in my dissertation. I acknowledge this tension and argue for this tension as an in-between space where refusal awaits and eludes us.

I need to make an important remark about the inclusion of the literary works as a separate chapter – four. The fact that I discuss literary works in a separate chapter can be misleading. The aesthetic turn in South African post-apartheid writing entails specifically that the strict borders between law and art and literature fade. It is about having a broad definition of the aesthetic, seeing law itself as text and art. It also views the interpreter of law and the legal scholar as text and as aesthetic. I inserted the literary works in a separate chapter for the sake of structuring my thoughts and the ideas from various writers. I also emphasise here as I do later, that I follow a school of thought which propagates that narrative should not only be a part of law, but law should also be seen as narrative and therefore this approach should be observed also in legal writing as storytelling. A further exception with regard to separation is the division of legal culture into history, constitutionalism, democracy and rights. When I refer to our approach to history and time it is impossible not to imply our application of the constitution as well. Democracy is hard to separate from rights and likewise from constitutionalism. Again, these elements should by rights be part of one flowing chapter discussing simultaneously the spectacle and proposing the ordinary of South Africa's legal culture. Although it is not written in an integrated fashion, the

reader should please take note of these remarks and keep in mind that these terms are more than interrelated – they are in fact different dimensions of the same aspect.

My first limitation concerns the little time I had for this project and my last limitation is, not contradictory, the long time I spent on it. The period of time that lapsed in the course of this research, roughly two and a half years, brings about two remarks. The first is that the environment, national and international, has significantly changed since I have embarked on this. Main issues such as the international credit crunch and our approaching national elections has changed the world about which I write, while I wrote and thought about it.⁶⁴ What I attempted, though, is not a description of the legal culture in my present world, but an evaluation of South African legal culture and the continuation of its formalistic nature. I am wary of the danger of a meta-narrative, and with asserting some kind of continuation I do not mean an underlying governing account or all general universal concepts. However, some examples I mention would not be that recent anymore, but considering the less linear approach to time I allude to later, these should still be relevant. The last issue that comes along with the passage of time during such a project is that of individual growth, personal awakening and self-discovery. This experience has brought immense academic and personal development in varying degrees, which resulted in a somewhat corresponding variation in style. This research was as much about learning about different theories and expressing them as it was about learning how to express myself, how I think about different ideas and about trying to find my own voice among them.

1.3 Underlying assumptions and theories

Part of the ideological foundation and underlying theories or assumptions of my research is critical theory. I realise that this is a broad statement and must be

⁶⁴ The elections have of course also occurred since I formulated this introduction.

qualified. The influence of American critical legal studies is clear from my reliance on Klare and also Chanock as the point of departure for my argument.⁶⁵ Similar to, but also unlike Klare's conservative adjudicator, who inscribes an ideological "*status quo spin*" on the material she is dealing with, I also acknowledge a certain spin I inscribe on Klare's article.⁶⁶ My attempt is to draw not only on the American critical legal scholars, but on a broader community of critical legal scholars.⁶⁷ Critical legal theory is diverse and interdisciplinary in nature. I side with Nancy Fraser, who recognises the appeal of Marx's definition of critical theory as "the self-clarification of the struggles and wishes of the age".⁶⁸ With critical legal theory I primarily intend to mean the eternal contestation of law and legal culture as an attempt to re-think, re-present, re-write and re-imagine established ideas around and related to law. It is an attempt to step back, while I know I cannot step back or outside of law or texts, to ask questions about, to scratch at and expose and "confess" the restrictions and restrictiveness of law. However, the "spin" on the critical legal theory I draw on is of a South African post-apartheid jurisprudence. It carries the banner of the aesthetic or symbolic. This involves an acknowledgment that the terminology of law, our legal vocabulary, is insufficient to cover, contain, encompass or express "the event" and therefore takes recourse to various forms of art. The "event" is a Derridean term that falls in the ambit of deconstruction.⁶⁹ South Africa's transformation in 1994 brought a new flag, a new national anthem, a new president and a new parliament; a new

⁶⁵ This involves the acknowledgment that law is political, that law is indeterminate because it is always interpreted and furthermore, that within this claim of indeterminacy there is a tension between the freedom and constraint within and that it propagates candour about the limits of law.

⁶⁶ Klare *SAJHR* 1998 14 146 at 162.

⁶⁷ It is by implication an endeavour of moving away from the work of primarily white males, and looking at other contributions to the field of critical theory. My focus falls on South African contributions.

⁶⁸ Fraser N, "What's Critical about Critical Theory: The case of Habermas and Gender" in Benhabib and Cornell (eds) 1987. This phrase is taken from "Karl Marx, Letter to A. Ruge, September 1843" in Marx K (trans Livingstone R and Brenton G), *Early Writings* 1975 at 209. This is the third in the series of letters Marx [age 25] wrote to his friend, Arnold Ruge. He continues in this letter: "This is a task for the world and for us. It can succeed only as the product of united efforts. What is needed above all is a 'confession', and nothing more than that. To obtain forgiveness for its sins, mankind needs only to declare them for what they are".

⁶⁹ In 3.3.2 (Constitutionalism as refusal and rediscovery of the ordinary) I explain the idea of the event(s).

symbolic order for a new constitutional, democratic dispensation. My interest lies in the change, but also in the use of symbols.⁷⁰

Wessel le Roux calls this “striking feature” in post-apartheid constitutionalism the “aesthetic turn”.⁷¹ He refers to a broad spectrum of art and art forms, which South African scholars have referred to and relied on. A remarkable list – ranging from carvings and sculptures, architecture and drawings, to films and plays, novels and short stories, and even folk dances – highlights this movement in rights discourse. These images, metaphors and analogies serve in an attempt to resist the privatisation of constitutional rights. This privatisation includes *inter alia* the application of rights in a scientific, formalistic manner. Therefore, not only the assertions made in these texts, but also the texts themselves are attempts to move away from the formalism that marks law and legal discourse. It is because of this possibility of aesthetic jurisprudence that I aim to place my work also in the framework of this school. Le Roux compares the South African aesthetic turn with America and Britain’s, and points out that where this movement has failed in the latter countries,⁷² South Africa’s is distinguished from them on the ground that it focuses on specific art and artists and specifically South African artists.⁷³ This might well not be a new turn in jurisprudence, but in South Africa the turn has definitely been unique.

To talk about the aesthetic turn in the singular might indicate that there is only one distinct way of approaching law and aesthetics. This, as Le Roux aptly points out, is not the case at all. There is in fact a tension within the aesthetic turn. Le Roux identifies two main streams: one depends on the belief that rights can be a

⁷⁰ Later in this dissertation, symbolic change as a form of spectacle prompts the question of the importance of spectacle. Furthermore with regard to the use of symbols, I draw on the style of the “aesthetic turn” for purposes of this dissertation.

⁷¹ Le Roux *W*, “The Aesthetic Turn in Constitutional Rights Discourse” *TSAR* 2006 101.

⁷² Le Roux quotes Tim Murphy in “Brit-Crits: Subversion, Submission, Past, Present and Future” *Law and Critique* 1999 237 at 269: “here he states that the “law and aesthetics scholarship is the latest (failed) attempt to revive critical legal thought in Britain”.

⁷³ For the sake of simplicity, Le Roux refers to the generic terms “art” and “artists” without qualifying painters, writers, musicians, architects etc.

medium for public politics,⁷⁴ and the other relies on the paradox between the private and the public to which constitutional rights are inevitably confined.⁷⁵ It is clear that South African aesthetic discourse is rich and diverse, and Le Roux aims to emphasise this variety rather than to try and reconcile or solve the tension between different theories. The aesthetic turn is also linked to substantive constitutionalism; Le Roux calls this effect of formal reasons “conversation curbing”, as opposed to value based reasoning in constitutional adjudication.⁷⁶

Le Roux draws from the work of Immanuel Kant on aesthetic judgment. He relies on the notion that objective rationality and validity for knowledge is found through science; for desires it is instituted in morality; and for feelings validity lies in aesthetics. The first two, he labels “determinant”, and the last “reflexive” in nature. Determinant rationality and validity would entail that there is an existing universal rule and judgment means merely taking account of the new details under this rule. This process follows rationally and no further guiding principles are required. Reflexive judgment on the other hand is in want of a universal rule – there is no universal category to determine what is beautiful, because it is only the specific thing at hand which is known or given, but the universal category for it has to be found. The aesthetic turn makes use of symbols, and, as I argue later, these symbols are not inherently spectacular, but have the potential of being or becoming spectacles. In this sense, my project falls also within the law and literature movement, with specific use of novels by South African writers. It is against symbolism as spectacle and not symbolism as such that I argue. Given the work of the scholars I draw from and the nature of post-apartheid critical jurisprudence, my research is also coloured with theories of feminism, deconstruction and post-colonialism.

⁷⁴ As examples of this line of thought, he refers to the work of Lourens du Plessis, Stu Woolman, and Narnia Bohler-Müller.

⁷⁵ The proponents of this stream according to Le Roux, are Karin van Marle and Johan van der Walt.

⁷⁶ Le Roux W, “The Aesthetic Turn in Constitutional Rights Discourse” *TSAR* 2006 101 at 103.

1.4 Chapter overview

This dissertation can broadly be divided into four chapters. The first is the introduction, which lays the foundation for my argument, explaining transformative constitutionalism, legal culture, formalism and continuation. The next two chapters should be read in conjunction. Chapter two explains South African legal culture as spectacle and part three proposes a culture of refusal of the spectacle and a rediscovery of the ordinary. In the final chapter I conclude with South African literary examples, illustrating the arguments formulated and concepts dealt with in the preceding three chapters. These chapters set down the overarching structure.

Chapter one starts with transformative constitutionalism as a project, a challenge to legal culture and a vision of a society that should come. It provides a thorough account of this term and anticipates various engagements with it. An explanation of legal culture then follows, which starts by analysing culture and argues that law and legal culture cannot be strictly divided, but that legal culture consists of the way in which we think and even more importantly do not think about law. I rely here mainly on Klare's definition and also draw on Chanock. Having examined transformative constitutionalism and the fact that it requires a specific legal culture, followed by an explanation of legal culture, I move on to the tendency of continuation in legal culture. I turn to Chanock's formulation of neo-formalism and neo-colonialism and Coombe's concept of "business as usual". I relay Chanock's four stories to show how the ordinary has been neglected in the past and to thereby identify continuation. Hereafter I argue that a continuation of formalism in South Africa's legal culture and rely on the general definition of formalism and also an extension of Klare's claim of conservatism; an article by Dugard also contributes to an understanding of this argument. I then argue that formalism and what has been described as the spectacle is the same. This first chapter then leads me to conclude that South African legal culture is a continuation of spectacle.

Chapters two and three commence with an explanation and exploration of the notion of spectacle (chapter two), and the notion of refusal and rediscovery of the ordinary (chapter three). I explain the spectacle by looking at Njabulo Ndebele's critique of it, Mamphela Ramphele's problematising of the miracle nation idea and Guy Debord's essays on the society of the spectacle. To describe refusal, I use the ideas of Karin Van Marle and Patrick Hannafin, and to outline rediscovery of the ordinary I return to Ndebele's proposal.

In conversation with one another, chapters two and three are further divided into what I consider elements of our legal system and our approach to them is an indication of South African legal culture. These are history, constitutionalism, democracy and rights. With history as spectacle I refer to Verne Harris's work on the archive. I argue that the positivist paradigm that views the archive as a mirror of reality is a form of spectacle, but seeing the archive as a sliver of a window and acknowledging the thin shifting line between the two refuses this spectacle and assists in rediscovering the ordinary. Further to history as spectacle, I draw on the work of Pierre de Vos and André van der Walt on the grand narrative and use their suggestions to propose how we can refuse this grand narrative in the corresponding section in part three. Van der Walt does this by exposing reliance and denials in history and calling for the stories of those on the periphery of society to be included when we take account of history. De Vos shows how the past is incorporated in the present and the future and stresses the importance of counter-narratives and sub-narratives.

Sections 2.3.2 and 3.3.2 both address constitutionalism. The former looks at constitutionalism as spectacle and the latter asks how it can be a rediscovery of the ordinary. In constitutionalism as spectacle I revisit Klare's opposing modes of the rule of law, namely a traditional account of the rule of law and a politicised account. I argue that the traditional approach sides with the spectacle but that a politicised account is a way of refusing this potential spectacle. Following these ideas of Klare, I continue and look at transformative constitutionalism again. I

identify an instrumentalist approach to transformative constitutionalism, which I discuss under constitutionalism as spectacle, and also a critical approach to transformative constitutionalism, which resorts under constitutionalism as refusal and rediscovery of the ordinary. With regard to the instrumentalist approach, I investigate the work of Cathy Albertyn, Beth Goldblatt and Marius Pieterse. In looking at the critical approach, I draw on Van Marle, Van der Walt and Henk Botha, among others. I look at Lourens Du Plessis's formulation of the Constitution as memorial and monument and construct an argument that the Constitution as monument can be associated with the spectacle, and the Constitution as memorial with refusal and rediscovery of the ordinary. I also allude to the tension between the spectacle and the ordinary by using Du Plessis's ideas. With Peter Fitzpatrick's "neo-constitutionalism" I recall Chanock's concept of neo-colonialism, and touch on these aspects as forms of spectacle and look for a way to critically engage with neo-colonialism in the part on refusal. A last aspect of constitutionalism as spectacle is the over-emphasis on public law and the public sphere. With Van der Walt's work as a foundation and Dennis Davis's article on horizontal application of the Constitution I illustrate this over-emphasis in 2.3.2. I return to this idea in 3.3.2 in the part on constitutionalism as refusal, where the focus should shift also to private law.

The next two parallel sections concern democracy as an element of legal culture. In the part on democracy as spectacle (2.3.3) I recall the hope for a deep form of democracy, but try to indicate how democracy as spectacle leaves little room for this hope. To lay a foundation, I use a chapter by Theunis Roux, to discuss the distinction between direct and representative democracy and also participatory and deliberative democracy, which both resort under representative democracy. In the section on democracy as refusal (3.3.3), I argue for deliberative democracy, but in 2.3.3 I warn against the possibility of spectacle that it carries. I rely on an article by Van Marle in which she addresses the "suspect intimacies" within civic republican thought. The rest of the part on democracy as spectacle looks at law's reductive force, and briefly investigates a few court cases to

determine whether we have moved away from the spectacle. In the related section of democracy as rediscovery of the ordinary, I touch on these ideas again and combine Michel de Certeau's city walker, Gerald Frug's inner city community and Le Roux's street democracy in the search of democracy that refuses the spectacle. In support of the argument for a democracy to come and a community of becoming, I rely on the character of in Herman Melville's novel *Bartleby, the Scrivener: A Story of Wall Street*.

The final sections in chapter two and three are respectively rights as spectacle (2.3.4) and the rediscovery of the ordinary in rights (3.3.4). I discuss rights-talk in general as spectacle, then turn the focus to human rights and look at Christoff Heyns's struggle approach to human rights as an example of spectacle. Critique by Costas Douzinas and Upendra Baxi with regard to the proliferation and pervasion of human rights helps to show the spectacular potential of rights. The work of Jennifer Nedelsky stands central to 3.3.4. in order to rediscover or reconceive rights as relationships. This section revisits Baxi and Douzinas for ideas on how to possibly refuse the spectacle of human rights. It also calls on Ramphele's work in both sections to help me identify the spectacle but also to propose refusal and rediscovery of the ordinary in rights.

Finally, chapter four serves to illustrate the arguments that precede it. Because of this, I first give an account of chapters one, two and three. This chapter uses two South African novels, *Horrelpoot* by Eben Venter and *Cry of Winnie Mandela* by Ndebele, to expand on the ideas of a legal culture of refusal and rediscovery of the ordinary. I firstly give a brief synopsis of the storylines of the novels and then identify certain themes. Refusal in both novels can be identified within the stories, through what the characters do and say, but also through how the novelists write and apply certain techniques. Using literature and relying on narratives are already ways of rediscovering the ordinary. Inspired by these novels, I expand on the ordinary and the everyday. Because I suggest that transformation should be an ongoing process and should be seen as a continuous journey, I consider the

journey theme that is central to both novels. This also leads me to look at history and heredity in these works of art. In the final section of this last part, I briefly look at Joseph Conrad's novel *Heart of Darkness* and draw from post-colonial theories to conclude my dissertation. My conclusion in the end is less an ending or a final closing-off, but rather a beginning and an opening-up.⁷⁷

1.5 Significance

The significance of this research, as already mentioned, is to ask how we can move closer to the kind of society envisioned by Klare. After explaining what he means with transformative constitutionalism, and indicating how it should be obtained, Klare continues to sketch the conditions and community within which this change should take place.⁷⁸ He mentions a “community”⁷⁹ that is “highly egalitarian”, “caring” and “multicultural”. Klare's project requires a specific type of community which should be, amongst other things, multicultural. Multiculturality would necessarily include multilingual, multi-religious, and other features of plurality. The question persists whether the concept of pluralism and of community can be reconciled.⁸⁰ It can be contended that although Klare calls for a community that is multicultural; a “culture” of transformation should be ingrained in this community. A caring community would be one that subscribes to an ethics of care; it also coincides with a community which supports the principles of Ubuntu.⁸¹ According to Klare, this community should be governed through participatory, democratic processes in both polity and large portions of the private sphere. I expand on the concept of democracy and participatory democracy in detail in the part on democracy. Transformative constitutionalism

⁷⁷ Full references to all sources above are provided in the chapters.

⁷⁸ Klare *SAJHR* 1998 14 146 at 150.

⁷⁹ Klare does not expand beyond this on the specific community he has in mind to host transformative constitutionalism. I argue further on that a community of refusal and of the ordinary is required to fulfil the challenge transformative constitutionalism.

⁸⁰ The notion of community is already something that negates pluralism and sacrifices difference for the sake of being together and being the same. I search at how, while acknowledging that community will always endanger plurality, community can also facilitate plurality.

⁸¹ Considering attributes of Ubuntu is a way of rediscovering the ordinary and turning to values in African jurisprudence in order to rethink classical liberal conceptions of community.

invokes two elements: context and content. It looks at law within a legal culture. The idea is not that these must be viewed as two separate dichotomies but rather as facets of a single notion – the idea of transformative constitutionalism. When I look at legal culture, I also look at the law as a system and law as culture.

Many legal scholars are committed to formulating and searching for a post-apartheid jurisprudence – transformative constitutionalism has played and is playing a role in this pursuit. The hope is that the meaning or worth of this dissertation lies therein that it falls into step with those in search of a suitable South African way of approaching and thinking about law. I believe that investigating South African legal culture and the notions of the spectacle and ordinary can assist in this exploration. Having introduced the concept of legal culture and expanded on Klare's allegation of conservatism and Chanock's idea of neo-formalism, it now leads me to identify South Africa's legal culture as a continuation of the spectacle.

2 Law and legal culture as spectacle

2.1 Introduction

Magnificent! WOW!
No words can seem to describe
the empty inside.⁸²

The first part of this chapter aims to ascertain the meaning of the notion of the spectacle. It further investigates how this notion of the spectacle can be discerned in various elements of South African legal culture, namely the way in which we view and approach history, constitutionalism, democracy and rights. South Africa's conservative or formalistic legal culture is encompassed in a culture of spectacle, a continued spectacle that prevents transformation because it fails to recognise the ordinary. The notion of the spectacle in this chapter, specifically intends the meaning of the spectacle as Ndebele explains it in his article *South African Literature and Culture: Rediscovery of the Ordinary*.⁸³

Above, I express my interest in symbols and symbolism and am mindful of the possibility that the symbolic or aesthetic can turn into a spectacle. But the spectacle is symbolism without meaning and aesthetic without substance – a shiny empty shell. Formalism links with spectacle because the spectacle is about display, the outward is of the greatest importance and form takes preference over substance. The idea of the spectacle lurks in many other concepts and metaphors employed by other legal scholars. It has been captured under other names before. The notion of spectacle is analogous to a “monumental” or

⁸² Inspired by the film *Moulin Rouge*: “Spectacular, Spectacular / No words in the vernacular / Can describe this great event / You'll be dumb with wonderment.”

⁸³ Ndebele NS, “Rediscovery of the Ordinary: Some New Writings in South Africa” JSAS 1986 12 143.

“celebratory” mode of constitutionalism,⁸⁴ a “struggle approach to human rights”,⁸⁵ “bumper-stickering”,⁸⁶ “grand narrative”,⁸⁷ “pamphleteering and sloganeering”,⁸⁸ “lip-service and window dressing”,⁸⁹ “archiving”,⁹⁰ “reification”, “the masquerade”,⁹¹ “fetishism” and “commodification”,⁹² “rhetoric”, “kitsch”, “miracle nation”,⁹³ “constitutional optimism”,⁹⁴ and a “triumphalist” approach – among others.

These are different images, symbols, terminologies or concepts to describe something similar to what is explained here as the spectacle. The term “spectacle” is suitable in this context because of the linguistic possibility of “spectator” and “spectacles” and even “spectre” that it renders.⁹⁵ I explore and expand on some of these other above-mentioned metaphors and engagements with the spectacle, with specific reference to South African legal culture. Firstly, I explain the notion of spectacle, by relying primarily on Ndebele, and also drawing from Ramphela and Debord.

⁸⁴ Johan Snyman coined the idea of memorial-making and constitutional-creating as a politics of memory in Snyman J, “Interpretation and the politics of memory” *Acta Juridica* 1998 312. Lourens du Plessis (“The South African Constitution as Memory and Promise” *Stell LR* 2000 11 385) took this lead to formulate the distinction between monumental and memorial constitutionalism, which was later taken up by different scholars.

⁸⁵ See Van Marle’s critique on this approach and discussion of the struggle approach as monumental (Heyns CH, “‘Struggle Approach’ to Human Rights”, in Soetman (ed) *L&P* 2001 172) in Van Marle K, “Lives of Action, Thinking and Revolt – A Feminist Call for Politics and Becoming in Post-Apartheid South Africa” *SAPR/PL* 2004 19 605.

⁸⁶ Woolman S, “On Rights, Rules, Relationships and Refusals: A Reply to Van Marle’s Jurisprudence of Generosity” *Stell LR* 2007 18 508.

⁸⁷ See among others De Vos P, “A Bridge Too Far? History as Context in the Interpretation of the South African Constitution” *SAJHR* 2001 1.

⁸⁸ Ndebele NS, “Against pamphleteering and sloganeering the future” in *South African Literature and Culture: Rediscovery of the Ordinary* 1994.

⁸⁹ See for example Dyzenhaus D, “Intimations of Legality amid the Clash of Arms” *IJCL* 2004 244.

⁹⁰ Harris V, “The Archival Sliver: Power, Memory, and Archives in South Africa” *AS* 2002 2 63; Van Marle K, “Constitution as Archive” in Veitch (ed) *Law and the Politics of Reconciliation* 2007 at 215; and also in general Hamilton C *et al* (eds) *Refiguring the Archive* 2002.

⁹¹ Cornell Cardoza *LR* 1989-1990 11 1047.

⁹² Van Marle K, “Meeting the World Halfway” *FJIL* 2004 16 651 at 653.

⁹³ Ramphela M, *Laying Ghosts to Rest; Dilemmas of the Transformation in South Africa* 2008.

⁹⁴ Christodoulidis E, “Constitutional Irresolution: Law and the Framing of Civil Society” *ELJ* 2003 9 401.

⁹⁵ “Spectator”, implies passiveness and non-involvement in contrast to participation with specific relevance to participatory democracy or deep democracy. “Spectacles” insinuates that we look at things from a certain viewpoint or through certain lenses; this links with the notion of legal culture as a way of “looking” at, or rather approaching, law. And finally, “spectre”, inspired by Ramphela’s book’s title, “*Laying Ghosts to Rest*” and how laying ghosts to rest proves to be similar to refusing the spectacle. “Spectre” is relevant because of how South African legal culture is haunted by the spectacle, as if it is an ever-present residue that remains and continues.

2.2 The notion of spectacle

On the splendid stage
The dancer looses himself
in his shining sequence

In the eighties Ndebele warned writers against the trap of the spectacle. He specifically addressed and criticised the use of spectacle in certain *Drum* magazine stories.⁹⁶ *Drum* magazine nowadays is an equivalent of *Huisgenoot* and *You*, but in the 1950's it was considered to be part of South Africa's resistance press.⁹⁷ Ndebele's critique is aimed against the *Drum* stories of the sixties, where stories became more sensational and according to him, had less political impact.⁹⁸ Names such as Es'kia Mphahlele, Can Themba, Richard Rive, James Matthews, Nat Nakasa, Casey Motsisi and Alex la Guma have established themselves as important figures in our literary and cultural life. The culture of that period is captured in Zola Maseko's film: *Drum*.⁹⁹ This film tells the story of Henry Nxumalo and the romantic vision of the swinging multicultural community of jazz, tsotsi's and political radicalism. A time where the ruling motto, according to legend, was "live fast, die young and make a good looking corpse". Ndebele uses a La Guma short story written in 1965 and his understanding of the spectacle is inspired by Roland Barthes's essay on wrestling.¹⁰⁰ The summarised

⁹⁶ Ndebele *JSAS* 1986 12 143.

⁹⁷ *Drum* was initially an attempt to refuse urbanisation, to help the rural "native" adjust to the stresses of urban life and still maintain rural simplicity. Present-day *Drum* journalism (like *You* and *Huisgenoot*) involves South African celebrities' love lives and scandals and various how-to-in-ten-steps lists, where it first used to be a podium for political commentary. Early *Drum* magazines of the fifties and sixties were an attempt at defiance, refusal, resistance against the Apartheid regime. See in general Switzer L and Adhikari M (eds) *South Africa's Resistance Press: Alternative Voices in the Last Generation Under Apartheid* 2000.

⁹⁸ As I indicate in my introduction, an investigation of *Drum* magazine's evolution would make for an interesting research project, but one of which I barely skim the surface in this work. Looking at the stories in *Drum* presents the possibility of approaching history in an aesthetic fashion. John Matshikiza writes "These stories are an invaluable part of our missing store of memories – without which we are destined to have no future." (Chapman M [ed] *The Drum decade: stories from the 1950s* 2001 at ii.).

⁹⁹ Maseko Zola *Drum* (film) South Africa 2004.

¹⁰⁰ Barthes R, "The world of wrestling" in *Mythologies* (trans Lavers A) 1972 at 15. This comparison is interestingly fitting for regarding law, legal culture and specifically legal education. I recall the explanation of the accusatory process of civil procedures from my first year Introduction to Law text book (Kleyn, D and Viljoen, F, *Beginnersgids vir Regstudente* 2002). In this first encounter with what the law entails, the textbook explains to students that South African civil and criminal cases are of an accusatory nature. The

characteristics of the spectacle are the following: the spectacular “documents”, it “indicts implicitly”, it is “demonstrative”, it “prefers exteriority to interiority”, it “keeps the larger issues of society in our minds, obliterating the details”, it “provokes identification through recognition and feeling rather through observation and analytical thought”, spectacle calls for “emotion rather than conviction”, it “establishes a vast sense of presence without offering intimate knowledge”, and it confirms “without necessarily offering a challenge”.¹⁰¹ Ndebele refers aptly to the “mind-bogglingly spectacular” politics that formed the South African society during apartheid – everything in South Africa's history seemed to be made up out of spectacle.¹⁰² This spectacle of apartheid, as explained by Ndebele, was followed by an extraordinary transition to a democratic state, in which South Africa has been lauded as a “miracle country”. Ramphele is particularly sceptical of describing South Africa's transition as a miracle. In a chapter entitled: “A miracle that never was: living with ordinariness”, she illustrates how deep the roots of the miracle-concept lie in South Africa.¹⁰³ Her construal of miracle links with Ndebele's description of spectacle, because it is convenient, it serves as a good cover, it permits amnesia, it promotes fatalism, it is difficult to learn from, it is safe, it overawes or paralyses, it creates unrealistic expectations and it creates vulnerability for the “overconfidence of triumphalism”.¹⁰⁴ The spectacle of apartheid, the spectacular transition to democracy and now, living with one of the world's most advanced constitutions, continues the spectacle. We are rolling on in a “society of the spectacle” as

authors continue by saying that an accusatory system is one where the two parties oppose one another like boxers in a ring. The judge acts as the referee; he never enters the ring, but makes sure that the rules are followed. The notion of spectacle can be found in the “boxing” and “wrestling” performances in courts, however, it also addresses deeper elements of law and legal culture. La Guma A, “Coffee for the Road” in Ellis A and Mphahlele E (eds), *Modern African Stories* 1964 85-94.

¹⁰¹ Ndebele *JSAS* 1986 12 143 at 143-145.

¹⁰² Ndebele *JSAS* 1986 12 143 at 143.

¹⁰³ Ramphele 2008 at 41.

¹⁰⁴ Ramphele 2008 at 30-44.

Debord will call it.¹⁰⁵ According to him, the whole of life (thus including law and legal culture) presents itself as an immense accumulation of spectacles.¹⁰⁶

The danger of course exists of turning the idea of “the spectacle” or critique of the spectacle into a spectacle itself.¹⁰⁷ When analysing the spectacle “one speaks, to some extent, the language of the spectacular” itself, and therefore “critique that goes beyond the spectacle must know how to wait”.¹⁰⁸ Critique must be responsible and not hasty, otherwise critique for the sake of critique can turn into mere “word games”.¹⁰⁹ Patricia Williams, as critical race scholar, criticises the Critical Legal Studies movement for failing to “make its words and un-words tangible”.¹¹⁰ Noting this caution I identify aspects of the spectacle to link it with South African legal culture. The notion of spectacle involves the use of hyperbole, opulence, a “paceyness” and a disregard for history.¹¹¹ Other features entail an extraordinary display and of course unreflective, non-political, passive and despondent spectators. The spectacle is universal and generalising and it uses stark contrasts.

¹⁰⁵ Debord G (trans Nicholson-Smith D) *The Society of the Spectacle* 1994. The essay was written in 1967. His nine chapters are divided into a total of 221 theses; I refer to the number of the relevant thesis throughout.

¹⁰⁶ He says this specifically of societies where modern conditions of production triumphs.

¹⁰⁷ With caution and slowness I want to investigate various avenues for the spectacle’s application and content. In order to keep the term open and to not use it in a closed fashion, I define it further as I go along.

¹⁰⁸ “To describe the spectacle, its formation, its function and the forces which tend to dissolve it, one must artificially distinguish certain inseparable elements ... the spectacle is none other than its use of time. It is the historical movement in which we are caught.” Debord 1994 at 11. “If the logic of false consciousness cannot know itself truly, the search for critical truth about the spectacle must... struggle in practice among the irreconcilable enemies of the spectacle... The abstract desire for immediate effectiveness accepts the laws of the ruling thought, the exclusive point of view of the present.” Debord 1994 at 220.

¹⁰⁹ Williams PJ, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” *HCR – CLLR* 1987 22 401. She wrote a parable called ‘The Brass Ring and the Deep Blue Sea’ to show the shifts from formalism to realism and then to critical legal studies, and illustrates how every moment amounts to mere ‘word games’: “Once upon a time, there was a society of priests who built a Celestial City ... [they] were masters of the Word...liked to ride their strong, sure footed steeds around and around the perimeter of heaven” (formalism); “In time, some of the priests-turned-gods tired of this sport, denounced it as meaningless... In this recursive passage they acquired the knowledge of Undoing words” (realism); and then finally on critical legal studies: “Beyond the walls of the City lay a Deep Blue Sea. The priests built themselves small boats and set sail ... the City appeared as a mere shimmering illusion; and the priests knew that at last they had reached a place that was Beyond the Power of Words.” But then Williams continues, and draws our attention away from this spectacle of ‘word games’ to the ordinary struggling masses: “Under the Celestial City, dying mortals called out their rage and suffering...at the bottom of the Deep Blue Sea, drowning mortals reached silently and desperately for drifting anchors dangling from short chains overhead, which they thought were life-lines meant for them.”

¹¹⁰ Williams *HCR – CLLR* 1987 at 403.

¹¹¹ Ndebele’s neologism. *JSAS* 1986 12 143 at 144.

The first attribute that Ndebele states from the outset, referring to the opening lines of the Barthes essay, is the hyperbole of spectacle.¹¹² It is only through its opulence that spectacle succeeds to capture its audience. This abundance does not necessarily imply over-exaggeration or over-the-top fabrication, but is sometimes also the mere documentation of life in the form of spectacle. Therefore the genre of spectacle found in the *Drum* writings that Ndebele uses, features “pacey style” and suspenseful plots with unexpected endings and a very strong American influence. The spectacle wants to surprise, but its unexpectedness can be predicted. The aim of the spectacle is to be clear and obvious so that inferences can be drawn quickly, so that it can be efficient and enjoyable.¹¹³ In this sense the spectacle does not know slowness; it only knows efficiency and quick, compelling persuasion.¹¹⁴ This fast-paced elation invokes Milan Kundera’s image of the motorcycle rider who “in a state of ecstasy” is rushing in “the present instant of his flight”, “wrenched from the continuity of time”.¹¹⁵ This illustrates how the spectacle is the “false consciousness of time” because of its emphasis on the present – its “paralysis of history and memory”.¹¹⁶ This separation or isolation of incidents from their context joins in with the miracle image, in the sense that the miracle is equally arbitrary. The vision of a miracle is seen as the final event or the perfect ending. In that way it simultaneously

¹¹² The inclusion of Barthes, the structuralist, and Debord, the situationalist, might seem unusual or even inappropriate. I include Barthes to the extent that Ndebele relies on him, and Debord forms part of theorists who attempted, along with Barthes and others, to continue Marxist ideas. My references both serve to enhance my understanding of the spectacle, rather than to thoroughly explore their respective theories. The intention is not that the complete scope of their ideas should underlie my work. Both Barthes and Debord, however, take a critical stance on society and culture and I hold this aspect of their thinking. “The virtue of the all-in wrestling is that it is the spectacle of excess” Barthes 1972 at 15.

¹¹³ As above.

¹¹⁴ Likewise, the miracle is not a process, it is an event. Therefore it is impossible to view transition as a process, when there is no acknowledgement of the process that brought about initial change. Transition viewed as an isolated event corresponds with the notion of transformation as a goal – a form of evolution that has an end, as opposed to transformation as an ongoing process, a journey that will take time, which has taken and will take for ever. The idea of the miracle does not entail any thought process and therefore does not permit contemplation. Ramphele 2008 at 32.

¹¹⁵ Kundera M, *Slowness* 1996 at 4 as also quoted in an article I rely on: Van Marle “Law’s Time, Particularity and Slowness” *SAJHR* 2003 239.

¹¹⁶ Debord 1994 at 158.

disables history and future, and merely becomes a neat tick in the transformation box.¹¹⁷

The second trend associated with spectacle is its exteriority. This emphasis on the appearance, on the outward, compromises content and substance. Ndebele calls this “obscene social exhibitionism”¹¹⁸ and draws from Barthes in explaining that “it is the emptying out of interiority to the benefit of its exterior signs, the exhaustion of the content by the form”.¹¹⁹ When we look at law and legal culture, this aspect of the spectacle relates to formalism or overemphasis on form and insistence on neutrality and objectivity. It also links to pretence, simulation and sheer display.

Because of its focus on the external, the spectacle is obvious, it is easy, not intended to inspire thought or critique and does not demand too much (if anything) from the spectator.¹²⁰ It therefore results in unreflective, non-political, passive and despondent spectators. The absence of politics is also a striking trait of the spectacle.¹²¹ The spectacle is only focused on telling “fantastic” stories aimed at entertainment and not at contemplation, at raising awareness or at compelling the reader to think.¹²² The result is important, not the process.¹²³ The spectacle leaves nothing to the imagination – that is what makes spectacle a monster. It leaves nothing to the reader and hence closes the debate, it ends the conversation and does not allow any space for creative construal. In this sense the spectacle is so thorough in describing every event, its cause and its ending,

¹¹⁷ Ramphela 2008 at 44 tells of how she was on sabbatical in Cambridge at the time of the voting in 1994. After voting at Boston City Hall, she “watched the rest of South Africa snaking its way to voting booths country wide. Freedom had come at last. We had at last crossed the river Jordan into the “promised land”. This reminds of the interpretation of the bridge metaphor as a one-way transition into Utopia. A journey that has an end, an ‘other side’.

¹¹⁸ Ndebele JSAS 1986 12 143 at 144.

¹¹⁹ Barthes 1972 at 18.

¹²⁰ In this regard Barthes writes on wrestling: “Each sign in wrestling is therefore endowed with an absolute clarity, since one must always understand everything on the spot. As soon as the adversaries are in the ring, the public is overwhelmed with the obviousness of the roles.” Barthes 1972 at 19.

¹²¹ Ndebele JSAS 1986 12 143 at 145.

¹²² “It might be asked why the vast majority of these stories in *Drum* show an almost total lack of interest in the directly political issues of the time... The writers of these stories seemed keen only to tell fantastic stories so that the readers could enjoy themselves much” Ndebele JSAS 1986 12 143 at 143.

¹²³ Associated with instrumentalism and pragmatism.

that the readers are not left in suspense at any time. The spectacle, in fear of the reader not seeing the immensity of the event, is almost patronisingly overexplanatory, to ensure that readers are not left wondering or imagining what the extent of the situation is. No interpretation of the spectacle is necessary, what you see is what it means. This proposes falsely that there is no room for interpretation and thus no need for interpretation. This element of the spectacle pacifies in two regards: firstly it creates spectators in the true sense of the word – mere passive onlookers, and secondly it deprives these onlookers of the belief that they have agency and can be more than spectators.¹²⁴

This explicitness of the spectacle leaves nothing to the imagination. There is no subtlety in its overtness, and it rids the readers of their imagination. Ramphele highlights a similar problem in the idea of the miracle. According to her the miracle takes away the possibility that “anything is possible”, and it steals the dream.¹²⁵ As with the spectacle, this is an apparent contradiction. The idea of a miracle is supposed to be the idea of the impossible that was achieved – to enhance a belief in the possibility of the impossible? But the miracle actually kills dreams and hope, because it is suggestive of something extraordinary – that the only way things can be done is through a miracle or that it requires an intervention larger than life to change circumstances. This same idea is captured in the paralysing effect of the spectacle.

Ndebele’s spectacle is devoid of any detail; it is a generalisation consisting of faceless characters in nameless places. The spectacle is universal – an intended

¹²⁴ Reliance on a miracle is branded by despondency coated in an exaggerated belief in that inexpressible “something” that can revolutionise. The importance of this space for imagination is reiterated by Cornell. The “imaginary domain” is one of the three conditions for individuation. (Individuation is a psychoanalytical concept and is discussed in the part on *Horrelpoot*.) The other requirements for individuation are the protection of bodily integrity and access to symbolic forms. The imaginary domain is a space for “re-imagining who one is and who one seeks to become”. Cornell D, *The Imaginary Domain: Abortion, Pornography and Sexual Harrassment* 1995 at 6.

¹²⁵ The spectacle promotes fatalism in political affairs through interpretation of historical events in the language of miracles. If radical political change comes from divine intervention, what motivation would there be for “governments to negotiate settlements, or for citizens to take the risks of shaping their own destinies by challenging unjust authority and holding public officials accountable?...What stands out about Mandela’s leadership style during the first years of our transition is his ability to make people feel that with him around, everything is possible.” Ramphele 2008 at 35.

grand narrative that should grip the spectator with its commonality. There is no specificity in spectacle, the spectacle's aim is to impress and to shock, and finds this enormity in anonymity. Ndebele invokes La Guma's story *Coffee for the road*, and illustrates this lack of specificity by referring to parts of the story.¹²⁶ The spectacle has no time; it is omnipresent and pervasive, constructed to fit in any time slot. It is also placeless and faceless, with caricatures instead of well defined characters.

This might appear contradictory, the spectacle on the one hand leaving nothing to the imagination and on the other hand completely lacking detail. But the spectacle is thorough in its generality, using facelessness and explicitness, overt dramatic elements and predictability to compensate for a want of carefully detailed events and full characters, trading clear and obvious situations for clever suggestive moments. The spectacle, like law, operates in cliché's, rhetoric, stereotypes and kitsch, for this generality is also within law. International law specifically aims to address universal issues through conventions, but never deals with specific issues or particularities. In generalising language it covers countries and the world, but fails to touch individuals. This gives international law, but also law and legal culture the "makings of kitsch".¹²⁷ Kitsch is synonymous with spectacle. Kundera formulates the concept of kitsch as follows:¹²⁸

Kitsch causes two tears to flow in quick succession. The first tear says: How nice to see children running on the grass! The second tear says: How nice to be moved, together with all mankind, by children running on the grass! It is the second tear that makes the

¹²⁶ Alex La Guma was an anti-apartheid activist and contributed fiction for *Drum* magazine. His story *Coffee for the Road* is about an Indian woman and her children, driving through the Karoo on their journey to Cape Town. La Guma A, "Coffee for the road" in Ellis A and Mphahlele E (eds) *Modern African Stories* 1964 85. Ndebele quotes parts of this story: "But finally they have to stop at a white town, just some place in the Karoo." *JSAS* 1986 12 143 at 146.

¹²⁷ Douzinas in *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* 2007 at 234 munificently cites Martti Koskenniemi in Koskenniemi M, "International Law in Europe: Between tradition and Renewal" *Eur J Int Law* 2005 16 113 at 119, who declared that "international law has all the makings of kitsch".

¹²⁸ Kundera M, *The Unbearable Lightness of Being* 1984 especially in Part Six, "The Grand March" at 251.

kitsch kitsch. The brotherhood of men on earth will be possible only on a base of kitsch.¹²⁹

Kitsch is a “folding screen set up to curtain off death.”¹³⁰ Just like the spectacle, kitsch also serves as a cover. The universalising effect of the spectacle reduces actual life to representations or symbols.¹³¹ Law deals not with individuals, but with what they symbolise – with what individuals represent, and what precedents they lie down.¹³² This degree of generalisation recalls Carol Gilligan’s discussion of the distinction between the “generalised other” and the “concrete other”.¹³³ I highlight the link between the spectacle, liberalism and positivism above.

Further to that, the spectacle, just like liberalism and positivism, negates actual circumstances and the specific person or “concrete other”. The “concrete other” is associated with an ethics of care and the generalised other with an ethics of justice.¹³⁴ A focus on universality is of course exclusionary because it favours

¹²⁹ As above.

¹³⁰ Kundera (1984) at 253.

¹³¹ “In societies where modern conditions of production prevail, all of life presents itself as an immense accumulation of spectacle. Everything that was directly lived has moved away into representation.” Debord G (1994) at 1.

¹³² This is illustrated in work on biopolitics. Especially insightful is an example from Hannafin P, “Rights of Passage: Law and the Biopolitics of Dying” forthcoming in Braidotti R, Colebrook C and Hannafin P (eds), *Law after Deleuze* 2008 at 3. He refers to cases jointly heard in the supreme court in the United States (*Washington v Glucksberg and Quill v Vaco*). The appeal courts before gave constitutional protection to physician assisted suicide and held that assisted suicide should also be permissible on the grounds that like persons must be treated alike. However, the supreme court overruled these previous judgments. The plaintiffs had already died by the time the supreme court rendered its judgment. Hannafin points out to how the law “attempts to summon forth a living figure and refuses to see the dying or dead figures before it”. The law deals only with abstractions, it is not really concerned about the life in front of it as much as it is concerned about the symbolic life – what the life in front of it represents, namely state power in the form of citizenship.

¹³³ Benhabib S, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* 1992 at 148 explains that the terms “generalised other” and “concrete other” encapsulates two conceptions of self-other relations. She borrows the term “generalised other” from George Herbert Mead (*Mind, Self and Society. From the Standpoint of a Social Behaviorist* 1955 at 154) but defines it differently from him. The distinction between these two is also mirrored in other modern dichotomies: autonomy/nurturance, independence/bonding, the public/the domestic, and justice/the good life. The generalised other entails seeing the individual as a “rational being entitled to the same rights and duties we would want to ascribe to ourselves” this assumes that the other is like ourselves and the relation to the other is “governed by the norms of ‘formal equality’ and ‘reciprocity’”. In contrast to this view, the “concrete other” requires us to view “each and every rational being as an individual with a concrete history, identity, and affective-emotional constitution”.

¹³⁴ Gilligan C lays the foundations for an ethics of care opposed to an ethic of justice in her article “In a Different Voice: Psychological Theory and Women’s Development” (*HER* 1982 47). The ethics of justice involves that as a legalistic process, it formulates rules which structure the values at issue in a hierarchical way and then applies those rules to the facts. The ethics of care on the other hand, adopts a more holistic

the dominant group. The spectacle proclaims an ethics of justice that cannot connect to social relations.¹³⁵

Another element of spectacle is its stark contrasts. To add to its intense effects, the spectacle poses opposites against one another in a fashion aimed at achieving the highest level of shock or drawing the greatest reaction. The spectacle operates in absolutes. With reference to the La Guma story, Ndebele points out how he describes the dire living conditions of the workers, sketched against the luxury of the whites (note the generality again), the noble humbleness of the Indian mother, in contrast to the ogre-like callousness of the white shop owner. The problem with these contrasts is that they do address important discrepancies, but in a desperate attempt to convince, it loses its believability to larger than life depictions of reality. It neglects the ordinary and embodies the “impoverishment, servitude and negation of real life”.¹³⁶ The discouraging and paralysing effect of the spectacle is clear from Ndebele's text: “It is the literature of the powerless identifying the key factor responsible for their powerlessness. Nothing beyond this can be expected of it.”

Linked to this is the numbing effect of the spectacle. The immensity that it entails seems too much to digest and results in defeatism and importantly insensitivity to real life disaster and dire situations. The spectacle is “the guardian of sleep,” it lulls into a comfort zone.¹³⁷ The stark contrast between the past and the present, how things were as opposed to how they are, also brings about this mode of ease. The danger lies therein that it makes people grateful that “we have come such a long way” and relieved because “it could have turned out much worse”,

approach to moral or legal questions by exploring the context and relationships as well as the values involved and producing a more complex but less conclusive result. Gilligan found that women have a tendency to solve moral problems with an emphasis on relationships and contextuality, whereas men are rational and abstract.

¹³⁵ Social relations require engagement and not detachment or objectivity. For a discussion of the problematic nature of an ethics of justice and the universal trend of law, see in general Young IM, “Polity and Group Difference: A Critique of the Ideal of Universal Citizenship” *Ethics* 1989 99 250.

¹³⁶ Debord 1994 at 215.

¹³⁷ “To the extent that necessity is socially dreamed, the dream becomes necessary. The spectacle is the nightmare of the imprisoned society which ultimately expresses nothing more than its desire to speak.” Debord 1994 at 215.

and stops them from being critical about and questioning the status quo.¹³⁸ Klare also warns against this. He says that law professors will regularly “lampoon some decisions” not only for its results but for “its anachronistic reasoning style”.¹³⁹ His warning entails that professors use these examples to show how far law has developed to make students laugh at how lawyers once “actually” reasoned, diverting the attention from the similarities in thought and installing a false sense of progress. This concludes the discussion of the main traits of the spectacle. I mapped out its meaning, and its relation to formalism, positivism, liberalism and the miracle. Ndebele, Ramphela and Debord all proceed in a cautionary tone and warn against the spectacle. In the next section of this chapter I discuss different elements of South African and indicate why I label it as a culture of spectacle.

2.3 Stifling transformation: examples of and engagements with a legal culture of spectacle¹⁴⁰

Above, I draw from Klare’s definition of legal culture, which includes intellectual reflexes and habits of mind. I further explain that legal culture can be described as the default way of thinking about legal problems, legal issues and the nature of law in general. Because my point of departure is transformative

¹³⁸ Such blind optimism reminds of Voltaire’s *Candide*, Voltaire (trans Cuffe T) *Candide, or Optimism* 2006. In a South African article, by James Myburgh, following the Eskom crisis at the beginning of 2008, he explains how Voltaire subjects optimism to an extended satire. Myburgh J, “Voltaire and the Eskom crisis”, available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=86618&sn=Detail> (accessed 6 March 2008). He argues that the end of optimism brings hope. The storyline of *Candide* can briefly be summarised as follows: The novel’s central character is Candide, a young man brought up in the castle of Baron von Thunder-ten-tronckh in Westphalia, Germany. The castle’s philosophy tutor is Pangloss who, Voltaire writes, ‘could prove to wonderful effect that there was no effect without cause, and that, in this best of all possible worlds, His Lordship the Baron’s castle was the finest of castles and Her Ladyship the best of all possible baronesses’. Voltaire subjects his characters to the most terrible misfortune and depredations – through this he satirically comments on the belief that ‘all is for the best’. Eventually at 52, Candide comes across a slave in South America who has lost his hand in the machinery of the sugar mills and then had his leg cut off after trying to run away. On witnessing this abomination Candide declares that he is giving up on Optimism. “What is Optimism?” his servant Cacambo inquires: “Alas!” Candide replies, “It is the mania for insisting that all is well when all is by no means well”.

¹³⁹ “Can you imagine – respectable lawyers once actually believed that this was a plausible way to argue.” Klare *SAJHR* 1998 14 146 at 161.

¹⁴⁰ With looking at engagements on the notion of the spectacle, I endeavour to group together different lines of critique on features of South Africa, South African law and legal culture. Even though these lines of critique address different facets, they are all aimed at the same culture – a culture of spectacle. But, as I point out later, try as I may to escape the spectacle, traces of its inescapable (and also arguably necessary) reductiveness will remain.

constitutionalism and my research stands in the guise of developing a post-apartheid jurisprudence, I focus specifically on elements of our new order. The adjective “new” might seem strange for two reasons: firstly because South Africa’s transition to a democratic order is already more than ten years ago and secondly because new should imply that things have changed. That is exactly the point. My argument is not only that South Africa had a legal culture of spectacle or that we have one now, but that there is a continuation of spectacle. Despite some radical changes, we have not managed to escape this spectacle. I therefore investigate specifically elements of constitutionalism and democracy and rights that came along with the 1994 transition. Because of this difficulty and centrality of time I start off by looking at history and how approaches to history and time add to a culture of spectacle. If we were to see this part on legal culture as a performance or a spectacle, the stage would be a miracle country, the backdrop an instrumentalist approach to transformative constitutionalism, and the characters, all clad in magnificent costumes, would be history, constitutionalism, democracy and rights. Enjoy the show!

2.3.1 History

Assuming she’s right
The history teacher makes
her second mistake

That history, as captured time, is not neutral, is a familiar concept. In fact, the way in which the past is gathered and documented largely impacts on South African, just like a legal culture of spectacle influences the mode of or approach to history. The spectacle documents and it disregards history. The ways in which history is collected, recorded, documented, stored, recollected, recalled and remembered all impact on the role, influence and power of history. This can be described as the politics of the archive. I mainly investigate the work of Harris on

the archive. The spectacle shares a tight bond with the positive paradigm. This is evident from the four examples mentioned by Harris to illustrate the “inflated accounts of accomplishments” that underpin work by positivist archivists. These four examples place the emphasis on “packaged information”, the belief that it is possible to create a single true version of reality, the inability to expose the multiple layers of a text and a neglect of oral history. I use these four examples with reference to critique on the notion of a “grand narrative” in the work of De Vos and Van der Walt.¹⁴¹ I also draw from Ramphela to expand on these examples.

The relationship between spectacle, legal culture and history can be expressed through what Harris terms “the politics of the archive”.¹⁴² Race, capitalism and domination are key role players in the politics of the archive. This has been evident from archives from the apartheid period, but also from accounts of more recent history. These forces are not only present in the destruction of records, as Harris also discusses, but indeed also in the preservation of records or accounts of the past.¹⁴³ Transformation discourse needs to engage the realities of memory and also make use of all the space this provides. Harris blames this failure on the fact that it “remains wedded to a positivist paradigm rooted in the nineteenth-century birth of archival science”.¹⁴⁴ The positive paradigm views archival records as a mirror of reality. A mirror image implies that there is no possibility for alternative interpretation, for distorted or fragmented images and reflections. It rather implies a perceived identical duplicate that is captured. Therefore the

¹⁴¹ Harris *Archival Science* 2002 2 63. Harris is the director of the South African History Archive. This is an independent archive that documents the struggles against apartheid and for justice in post-apartheid South Africa. He propagates a specific approach to the archive – namely to regard it as a sliver of a sliver of a window, and not as a reflection or account of reality. I identify this conception of the archive as a reflection of reality as a spectacle approach to history. Later I relate his notion of the archival sliver as a possible “ordinary” account of history and memory. His view of the archive as a sliver of a sliver of a window is in response to Derrida’s challenge to “refigure the archive” (in Derrida J, *Archive Fever: A Freudian Impression* 1996). See also Van der Walt, AJ “Legal History, Legal Culture and Transformation in a Constitutional Democracy” *Fundamina* 2006 (12-1) and De Vos *SAJHR* 2001 17 1.

¹⁴² Harris *Archival Science* 2002 2 63 at 63.

¹⁴³ Harris *Archival Science* 2002 2 63 at 70.

¹⁴⁴ Harris *Archival Science* 2002 2 63 at 82. In this paradigm the meaning of words like “archive”, “archivist”, “record”, and a host of others are simple, stable and uncontested... Archivists, then, cling to outmoded Positivist ideas which underpin inappropriate strategies, distorted notions of their role, and inflated accounts of their accomplishments. Here we detect the simplification and uncritical nature of the spectacle.

metaphor of viewing the archive through the sliver of a window, as I further discuss in 3.3.1, departs from this paradigm. This approach to the archive allows for the possibility to see history as liminal and not fixed or closed.

When Harris claims that archivists too often opt for neatly packaged information, a product for easy consumption, than the rich contextualisation of text, it is the epitome of the spectacle as easy, convenient, aimed at accessibility at the cost of complexity.¹⁴⁵ In the positive paradigm, the meanings of terms are simple, stable and uncontested.¹⁴⁶ It provides little or no space for competing narratives and so, archivists easily adopt the language of the meta-narrative.¹⁴⁷ It means that there is no space for opposing or contradicting versions or voices. This contributes to the commodification of knowledge. Harris refers to the work of Jean-Francois Lyotard in respect of commodification of knowledge. According to my construal, commodification is tied to the spectacle. When knowledge and the production thereof are simply for the sake of knowledge, as a mere consumable, there is no substance. I revisit this point on commodification in my discussion of De Certeau's notion of the everyday, which he suggests to challenge commodification.¹⁴⁸ Therefore it is important, as I explain in the part on history as refusal and rediscovering of the ordinary, to approach the archive, time, memory and history, not in a spectacular positivist way, but to be critical, and to continue questioning its making.

Harris continues by raising the “worrying tendency to underestimate, or simply not to grasp, the problematic of converting orality into material custody”.¹⁴⁹ He points out that among archivists there are those who preserve the notion that their work is “simply about the building of a coherent reflection of ‘reality’ through

¹⁴⁵ This happens in their serious attempts to reach out to users and to create new users, to expand the market. He says that this mode of work contributes to what Jean-Francois Lyotard has called the “commodification of knowledge” in *The Postmodern Condition: A Report on Knowledge* 1984 at 5, 45 and 51.

¹⁴⁶ Harris *Archival Science* 2002 2 63 at 83.

¹⁴⁷ “... using our exhibitions, posters, pamphlets, and so on to tell the story of, for instance, the struggle of apartheid or of nation building or of transformation.” Harris *Archival Science* 2002 2 63 at 82.

¹⁴⁸ See the notion of refusal and rediscovery of the ordinary in 3.2.

¹⁴⁹ Harris *Archival Science* 2002 2 63 at 83.

the jigsawing of individual appraisals”.¹⁵⁰ The issue of a disregard for oral history is important because it anticipates the call for stories and storytelling and importantly fleeting stories, embodied by the appeal for a rediscovery of the ordinary. To identify a possibility in archiving, which is inherently reductive, also presents us with a sliver of possibility in law, which is similarly unable to pay heed to voices. The aim of the archive and the process of archiving is to close, to account, to end, to record. It seems that the aim of law is also to end, to close off and to finalise. In this sense it is an approach to history that can be stored away and stay in the past. There is no acknowledgement of the fluidity of time or the continuance of the past into the future.

However, seeing the archive not as a mirror of reality but as a view through a sliver of a window, as Harris suggests, provides us with a glimmer of hope for the archive and approaches to time and history and accordingly also for law and legal culture. This glimmer lies in awareness of the amnesia of the archive. Amnesia would here mean a way of conveniently forgetting the trails of history behind an event. It is a form of spectacle in the sense of a-history caused by viewing events in isolation and outside of context. This is also the case with what Ramphele calls the phenomenon of the miracle.¹⁵¹ Linked to this is the spectacle that escapes accountability. Ramphele explains this denial by saying that the saga of our changeover as peaceful is “believed” by historical facts. We feel the need to cling on to this idea, because should we acknowledge loss of life in the run-up to the final settlement, it would detract from the mystique of a miracle. That is why the miracle is linked to the spectacle, as the ordinary advocates a frankness and an openness about limits and defects – ordinariness is awareness. As 3.3.1 shows, the ordinary, as opposed to the spectacle, is not an

¹⁵⁰ This conception that their task is “neutral” or “simple” can be linked with the idea of recording “for the sake of a record”; it denies influence and agency and politics and dismisses any possibility of contribution.

¹⁵¹ It allows lack of memory and forgets the betrayal of black people by the UK as former colonial power in South Africa. In unison with the claims of Chanock, Ramphele also proclaims that the “granting of self-governance by the UK to the union of South Africa in 1910 that excluded the majority of the population from full political participation, set the scene for the formalisation of apartheid”. Ramphele 2008 at 31.

isolated attention to the individual, but an awareness that acknowledges the group as it acknowledges the process.

Meta-narratives or grand narratives are forms of spectacle because they are general and universal. De Vos and Van der Walt warn us against reliance on grand narratives.¹⁵² It is important to keep in mind that history and legal culture are inseparable because history is often used as an interpretive tool when judges need to appear objective in the application of open-ended, and sometimes vague, principles as found in the constitution. Adjudicators then find their answer in history as a grand narrative or a super context. Viewed in this way, the story of the constitution is universally accepted and “meaning-giving” about what the objectives and origins of the constitution entails. This appraisal then satisfactorily limits the discretion of the judges, and they can better understand the provisions of the constitution without having to resort to very subjective influences such as political, philosophical, or personal views to clarify the dilemma. In this way history is used, instrumentalised and spectaclised as something elevated, fixed, discernable and wonderfully definable, the magnificent remedy in sticky cases, the perfect context, the objective neutral escape that saves judges from having to confront the everyday and the reality of the malleability of history. De Vos sees this attempt to position South Africa’s recent history as undesirable, specifically because it “ignores the emerging view of history as a profoundly subjective account of selected events” that occurred in the past.¹⁵³ History as a grand narrative or history as spectacle does not only generalise and universalise but it also simplifies and reduces.

What is referred to as South Africa’s miracle transition, as Ramphela explains, is often coupled with the “miraculous” document that is our constitution. Our constitution is admittedly one of the best of its kind, but that is not the argument. Because of this association with the miracle and other attributes, the constitution

¹⁵² De Vos *SAJHR* 2001 17 1 and Van der Walt *AJ Fundamina* 2006 12 1.

¹⁵³ De Vos *SAJHR* 2001 17 1.

can easily be approached and used as a spectacle. How we approach history stands central to constitutionalism. Without wanting to create the idea that these are separate or dichotomous concepts, rather as a progression of the same argument, I move on from our approach to history to constitutionalism.

2.3.2 Constitutionalism

Writing on water

The court chooses our leader

Without precedent!¹⁵⁴

The rule of law in South Africa refers to the supremacy of the constitution, as opposed to parliamentary rule in our pre-constitutional state. The constitution's supremacy already places it on a pedestal, but it is not this mere elevation that makes the doctrine of the rule of law a spectacle. Rather it is the way in which this constitutional altitude is reached. As Le Roux points out, the fall of apartheid created the opportunity to end the tendency to use law as an ideological instrument and restore the "real scientific image and rightful place of law in society".¹⁵⁵ To argue that the theory of rule of law in South Africa is a spectacle seems a rather obvious claim to make. Much has been said about the rule of law in reaction to the recent jeopardising of the independence of the judiciary in, among others, the Zuma and Hlope sagas. Former president Mr. Thabo Mbeki referred to it in his resignation speech and with the inauguration of new president Kgalema Motlanthe, leaders of the different political parties chanted rule of law and democracy in respective rhetorical unison as if it was a core requirement for their addresses. Statements that the investigations, allegations and broader crisis should be resolved "politically" (i.e. not legally) gives all the reference to the rule

¹⁵⁴ Grantmore G, "Constitutional Law Haiku" *Constitutional Commentary*, 2001 18 481.

¹⁵⁵ He refers to the use of the legal order by both the Marxist left and the apartheid right as an ideological instrument: "This opportunity was clouded, however, by the new human rights discourse which entrenched the political exploitation of the law as permanent feature of the post-apartheid legal order." Le Roux *TSAR* 2006 101 at 104.

of law a hollow ring. With this farcical quality of our rule of law, most South Africans would readily agree to a label of “spectacle” on the rule of law.

The concept of the rule of law as such contains the possibility to be turned into a spectacle. The term already predicts formalism, because “constitutionalism” as opposed to “parliament sovereignty” suggests that it would not be humans (and the whole range of politics, emotion, and ideology) at the steer of the national vehicle, but rather (rest assured) the law – an objective, logic, unbiased and neutral force. But let us look beyond this immediate apparent spectacle and rather investigate the subtleties lying at its core. These developments are not merely arbitrary events, but are situated within and indicative of South African. I specifically address our “political and ethical commitments that influence our approach towards constitutionalism”¹⁵⁶. I look at constitutionalism, but more specifically transformative constitutionalism and monumental constitutionalism as spectacle as well as Fitzpatrick’s concept of neo-colonialism. Furthermore, I briefly allude to the fact that there is too much emphasis on public law, and that this is also a form of spectacle. Later, in 3.3.2, I indicate how shifting the attention to private law (as well) can be a form of rediscovery of the ordinary and refusal.

Opposed to a spectacular account of the rule of law, Klare specifically calls for a politicised account of the rule of law.¹⁵⁷ He contrasts the politicised account with the traditional account (and by extension the spectacular account), which denies the political nature of the rule of law. The spectacle is devoid of politics, but transformative constitutionalism requires us to move away from the formalistic view of the rule of law and to be candid about the politics of law.

Associated with transformative constitutionalism, I identify two approaches: the one an instrumentalist and the other a critical approach. The former can be associated with the notion of spectacle and the latter with refusal and rediscovery

¹⁵⁶ Klare *SAJHR* 1998 146 at 162.

¹⁵⁷ Klare *SAJHR* 1998 146 at 163.

of the ordinary.¹⁵⁸ Two central aspects of this approach is the role of time in transformation, and the primary reliance on substantive equality for the achievement of the egalitarian society as envisioned by Klare.¹⁵⁹ Instrumentalism and pragmatism are spectacles because their main focus is the outcome. The constitution is seen as a tool to achieve the goal of transformation, as opposed to transformation as an ongoing process and the constitution as a dynamic component of that process. Cornell calls this evolution and not transformation.¹⁶⁰ With reference to Stanley Fish's theory of systems, she explains that evolution is when a system changes, but retains its identity.¹⁶¹ It entails using the system to bring about change in the system and it "privileges the present".¹⁶² Change as transformation and not just evolution, however, lies in the "possibility implied in the word 'transformation'".¹⁶³ This is when change is of such nature that a system generates new meanings and does not confirm its identity anymore. Understood as such, evolution is a process with an end, but transformation is ongoing. Followers of the instrumentalist approach see the end as an egalitarian society, and the means as a specific program of legal but also social reform encompassed in substantive equality.¹⁶⁴ An article by Cathi Albertyn and Beth Goldblatt was published in the same journal as Klare's article and therefore does not use the term "transformative constitutionalism" but engages extensively with the concept of transformation. They understand transformation as follows:

¹⁵⁸ See discussion later in 3.3.2.

¹⁵⁹ Van Marle K, "The Spectacle of Post-Apartheid Constitutionalism" *GLR* 2007 16 411 at 417.

¹⁶⁰ Cornell D, *Transformations: Recollective Imagination and Sexual Difference* 1993.

¹⁶¹ Fish S, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* 1989 and "... of course, Fish recognizes that repetition as iterability also allows for evolution. But evolution is the only possibility when 'justification' is identified as the functioning of the system itself. Law, for Fish – in spite of his remarks to the contrary – is not deconstructible and, therefore, is also not radically transformable." in Cornell D, "Rethinking Legal Ideals after Deconstruction" in *Law's Madness* 2006 147 at 158.

¹⁶² As above.

¹⁶³ Cornell 1993 at 2. See also "The philosophy of the limit, and more specifically the deconstruction of the privileging of the present, protects the possibility of radical legal transformation, which is distinguished from mere evolution of the existing system." Cornell in *Law's Madness* 2006 at 149.

¹⁶⁴ See as main examples: Albertyn C and Goldblatt B, "Facing the Challenge of Transformation, Difficulties in the Development of an Indigenous Jurisprudence of equality" *SAJHR* 1998 14 248; De Vos P, "Grootboom, the Rights of Access to Housing and Substantive Equality as Contextual Fairness" *SAJHR* 2001 17 258 and Pieterse M "What Do we Mean when we Talk about Transformative Constitutionalism?" *SAPR/PL* 2005 20 155.

...to require a complete reconstruction of state and society, including a redistribution of power and resources along egalitarian lines... eradication of systemic forms of domination and material disadvantages based on race, gender, class or other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive human relationships.¹⁶⁵

They also turn to the legal profession itself, and state that it has to develop its “own expertise” and learn about “a new and quite different approach to litigation”, this “new and different” approach is analogous to a transformative approach.¹⁶⁶

Pieterse also places the value of substantive equality central because he argues that it will address “structural and entrenched disadvantages at the same time as it aspires to maximise human development”.¹⁶⁷ He is in favour of an instrumentalist approach to the constitution in which the constitution is read as a tool for “social empowerment of vulnerable sectors of society”.¹⁶⁸ He attempts a tentative investigation of the content of “constitutional transformation” and defends an essentially “social-democratic” understanding of the concept. According to this vision, transformative constitutionalism mandates substantive equality and social justice, as well as “the infiltration of human rights norms into private relationships and the fostering of a 'culture of justification' for every exercise of public power.” He continues, and quotes (“the”) three ways in which the Constitution contributes to transformation as stated by De Vos.¹⁶⁹ It namely does not “stand in the way of political projects aimed at transformation”, and secondly “mandates the state to actively pursue transformation”, but importantly: “Thirdly (and perhaps most controversially) the constitution itself functions as a tool of transformation by requiring that its provisions are interpreted in a manner that furthers their transformative purpose.”¹⁷⁰

¹⁶⁵ Albertyn and Goldblatt *SAJHR* 1998 14 248 at 248.

¹⁶⁶ Albertyn and Goldblatt *SAJHR* 1998 14 248 at 274.

¹⁶⁷ Albertyn and Goldblatt *SAJHR* 1998 14 248 at 250.

¹⁶⁸ Pieterse *SAPR/PL* 2005 20 155 at 163.

¹⁶⁹ De Vos P, ‘Substantive Equality After *Grootboom*: The Emergence of Socio and Economic Context as a Guiding Value in Equality Jurisprudence’ *Acta Juridica* 2001 52 64 at 68-69.

¹⁷⁰ Pieterse *SAPR/PL* 2005 20 155 at 164.

Pieterse accepts that to advocate a “uni-dimensional theory of the tenets and objects of transformative constitutionalism” can be “self-defeatingly limiting the potential of transformation”.¹⁷¹ Therefore he appeals to the judiciary to “aim in their judgments to further the achievement of substantive equality and social justice” and also to abandon “the remnants of a culture of extreme deference to the executive.”¹⁷² He describes the desired change or transformation as a metamorphosis, and argues that these three requirements are central to applying the constitution in order to facilitate this metamorphosis: firstly the attainment of substantive equality, secondly the realisation of social justice and thirdly the infusion of the private sphere with human rights standards and the cultivation of a culture of justification in public law interactions.¹⁷³ The instrumentalist approach perceives time in a linear fashion and transformation as a cycle similar to that of metamorphosis, with a beginning and an end. This view of the role of time associates the instrumentalist approach to transformative constitutionalism with monumental constitutionalism or rather the constitution as monument.¹⁷⁴

The constitution as monument and memorial was first introduced by Du Plessis. He suggests two opposed modes of memory for the constitution, memorial and monumental.¹⁷⁵ Where a monument carries the meaning of celebration, a memorial connotes commemoration. This distinction is admittedly a context specific one, and is explained as “heroes and achievements can be celebrated or lionised. The same cannot be said of anti-heroes, failures and blunders; they can be remembered, but not celebrated. Du Plessis equates celebration to an “exultant or jubilant mode of remembering”.¹⁷⁶ It is of importance to note that he does not promote a need to “reconcile or resolve these contradictions” but rather he proposes that “jurists in particular (should) learn to live with and make sense”

¹⁷¹ Pieterse *SAPR/PL* 2005 20 155 at 156.

¹⁷² Pieterse *SAPR/PL* 2005 20 155 at 165.

¹⁷³ Du Plessis *Stell LR* 2000 11 385.

¹⁷⁴ Snyman *Acta Juridica* 1998 312 and Du Plessis *Stell LR* 2000 11 385.

¹⁷⁵ This article is a very good example of the aesthetic turn in post-apartheid writing. Without attempting a long explanation or persuasion, Du Plessis simply states in the introduction that “Monuments and memorials are aesthetic creations. There is no reason why a constitution cannot be the same”. Du Plessis *Stell LR* 2000 11 385 at 386.

¹⁷⁶ As above.

of the contradictions.¹⁷⁷ He sketches the possibility of the “due and simultaneous” acknowledgment and honouring of both modes of the constitution.¹⁷⁸ The monumental mode of memory links to the notion of spectacle and the memorial to that of refusal and rediscovery of the ordinary. I focus my attention here on the constitution as monument, or then monumental constitutionalism, and turn to memorial constitutionalism in 3.3.2.

Looking at the text of the constitution, it is evident that it does not contain humble aspirations or provisions, it is by no means a “modest text” and Du Plessis rightly says that one can look at it and be “awestruck”.¹⁷⁹ He starts with the preamble of the final constitution, based largely on the post-amble of the interim constitution, and identifies the monumental moments where there is reference to “recognis[ing] the injustices of our past” and “honour[ing] those who suffered for justice and freedom in our land” and “healing the divisions of the past”.¹⁸⁰ He also draws attention to the monotheistic faith confession that appears, true to the mode of monumental memory, at the end of both the post and preambles. “Nkosi Sikile! iAfrika”. This reminds me again of Ramphela’s remarks on the role of religion in our transition. What is important is that, just like the spectacle, the monumental qualities are obvious, they are “immediately evident”,¹⁸¹ apparent at first glance. Du Plessis highlights an interesting monumental touch, in connection with values.¹⁸² The values of human dignity,

¹⁷⁷ As above.

¹⁷⁸ The promise of the constitution comes from these opposing notions of the constitution as memory in Du Plessis *Stell LR* 2000 11 385 at 385: “The manner in which we deal with the constitution as memory predetermines the fulfilment of the constitution as pledge.”; and also at 386: “Living with contradictions in our postmodern world is not a fate. It is rather an opportunity to appreciate the contrasts that constitute the full picture of the reality we experience, in other words, an aesthetic mode of coping with the dilemma of contradiction.”

¹⁷⁹ Du Plessis lists the remarkable achievements in the constitution firstly as a peaceful transition, secondly into a non-racial democracy, and thirdly, after more than three centuries of mostly violent racial aristocracy. Du Plessis *Stell LR* 2000 3 385 at 386.

¹⁸⁰ As above.

¹⁸¹ Du Plessis *Stell LR* 2000 11 385 at 387.

¹⁸² Values are however not only limited to the understanding of human rights, but also make their appearance at co-operative government and public administration, respectively in chapters 3 and 10 of the final constitution. On another level, various institutions have also adopted a value system in an attempt to reflect the constitution. Examples at the University of Pretoria are the SRC and Department of Residence Affairs. These values, however, remain a list of hollow (spectacular) words, a façade to fulfil requirements, get documents approved and of course, for the marketing value it has.

equality and freedom are “proclaimed” as the core of South African constitutionalism,¹⁸³ “depicted” in describing the value sensitive manner required in limiting rights,¹⁸⁴ and “prescribed” as the way in which rights should be understood.¹⁸⁵ The role of time stands central to the monumental and memorial because it is so closely linked to memory and history.¹⁸⁶

Fitzpatrick captures another way to describe spectacular constitutionalism as the new-constitutionalism.¹⁸⁷ With this term he means something very similar to what Chanock labels neo-formalism and neo-colonialism. In Chanock’s context the arrival of the constitution is not necessarily the eradication of formalism. Just as formalism relies solely on legal texts and views them as neutral, neo-formalism occurs when only the constitutional text is used and no other outside factors or circumstances outside the text are taken into account; this is the neo-formalism, formalism that poses as something different because it pretends to depart from what is conventionally known as formalism in the sense that it is relying on the constitution, but it is the over-reliance that constitutes the neo-formalism. Then, related to Fitzpatrick’s arguments, he contends that just like South Africa was colonised by Britain and had to follow the Westminster system, the South African legal order has been colonised by the idea of constitutionalism and by international law.¹⁸⁸ Chanock warns that if these international concepts are not adopted with cognisance to the unique South African context, it will amount to another form of colonialism – a neo-colonialism.¹⁸⁹ Fitzpatrick also picks up on these ideas in describing the new-constitutionalism in two parts, as a universal economy and secondly as a universal sovereignty, emphasising however that the two can not be distinguished as different aspects, but that new-constitutionalism

¹⁸³ Final Constitution s1.

¹⁸⁴ Final Constitution s36.

¹⁸⁵ Final Constitution s39.

¹⁸⁶ See 2.3.1.

¹⁸⁷ Fitzpatrick P, “‘The New Constitutionalism’: Globalism and the Constitution(s) of Nations” *Law, Democracy and Development* 2006 10 2.

¹⁸⁸ The international community frowns upon a country not adopting constitutionalism, international law compels countries to apply the regulations they are parties to, and governs large areas of the world. Of some international treaties can be said that the sun never sets on the empire of that treaty – as have been said of the British Empire.

¹⁸⁹ Chanock 2001 at 524 – 525.

is both of these. This new way of conceiving of constitutions goes to the heart of a nation, to the centre of the national but also the international. The new constitutionalism involves a “certain indistinction between the international and the national”.¹⁹⁰ He invokes this indistinction to respond to other academics’ perception of the new constitutionalism as something emerging from international treaties or as “an incipient global constitution, an emergent juridical world order“, which views are not aimed only to “rehearse the worn thesis of the decline of the nation state in the advance of globalisation” but rather to indicate that “the international and the national are mutually formative”. Fitzpatrick sees the non-division of international and national as a consequence of their mutual formativity.¹⁹¹ But why would I identify this “new constitutionalism” as a spectacle? It is a form of spectacle because of its pervasiveness, because of the attempt to control the ordinary and the everyday and because of its force, its universality and close association with “capitalist economic relations” and the danger of only focusing on the new constitutionalism emanating from inside the national domain.¹⁹²

A further issue of the Constitution as spectacle or spectacular transformative constitutionalism concerns an exaggerated focus on public law or the public

¹⁹⁰ Fitzpatrick *Democracy and Development* 2006 10 2 at 2.

¹⁹¹ “Yet the pervasive and illimitable quality of nation’s responsiveness, as well as nation’s constituent relation to the commonalities of the international and the global, result in an indistinction between what is inside and what is outside, and we must expect to find the same phenomena on both sides of the border” Fitzpatrick *Democracy and Development* 2006 10 2 at 8.

¹⁹² Attempt to control the everyday and the ordinary – “Its conditionalities and such seep into the minutiae of everyday life...” Fitzpatrick *Democracy and Development* 2006 10 2 at 11.

Force: “It should be apt now, in an engagement with constitutions, to offer a theory of the constitutive force imported by Mandela’s poignant identification of these opposed dimensions, the dimension of determinate existence and the dimension of responsiveness to what is ever beyond determinate existence...” Fitzpatrick *Democracy and Development* 2006 10 2 at 5.

Universality and close association with capitalist economic relations: “and that constitutional matter could be seen as effects of the new constitutionalism even if the term usually signals some significant presence of capitalist economic relations” and “[t]here are, beside the European Union, broadly similar combinations where constitutional matters of a more traditional kind shelter an element of capitalist economic relations. Fitzpatrick *Democracy and Development* 2006 10 2 at 10 and also at 18.

“Beside the economic impetus, the other remarkable difference found with the new constitutionalism is that the typical constitutional concern with matters or aspirations of great import jostle now with numberless matters of seeming detail, matters of comparatively inconsequential import, such as a concern with “promoting co-operation between sporting bodies” and with “protecting the physical and moral integrity of sportsmen and sportswomen” – which in itself may seem puzzling until one remembers the “big business” and general corruption associated with sport in Europe” Fitzpatrick *Democracy and Development* 2006 10 2 at 10.

sphere. Van der Walt warns that the civil courts could, if attempting to develop private law in terms of its own doctrinal dynamism instead of under the more or less direct and possibly more immediate influence of the constitution, tend to “preserve existing law and resist or minimise” the change envisioned by the project of transformative constitutionalism.¹⁹³ Transformative constitutionalism requires that the rule of law should be perceived as the constitution being available to everyone, and should be applied as such. This does not only depend on the concept of subsidiarity used by Du Plessis, but also on horizontality of the constitution, invoked by Dennis Davis in his article “Elegy to Transformative Constitutionalism”.¹⁹⁴ The rule of law as spectacle conforms to liberal divisions between the public and the private sphere. Spectacular constitutionalism then focuses on the public sphere, the visible. Rediscovery of the ordinary regarding the rule of law also requires that the South African Constitution infiltrates the private sphere and the domain of private law. It is a distinct trait of South African legal culture, that the whole gamut of private law must be kept intact and that commercial law must remain business as usual. Proponents often observe that the constitution can “interfere” in obvious constitutional issues such as the death penalty, access to medical services and housing, but must rather not attempt to change the law of contracts or notions of private ownership.¹⁹⁵ Constitutionalism that returns to the ordinary, places emphasis on private relationships just as much as it looks at public exercise of power.¹⁹⁶

Remaining on the point of the spectacle that neglects the gaze on private relations and attention to the ordinary, Davis points out that racism in South

¹⁹³ “Much more work is required in this area, particularly in the form of more technical, focused debates about the development of the common law in specialised areas of private law where the demand for change and development might be more urgent or more radical than in others; hot spots where either the scale or the direction of the required development might not fit in with the scale.” Van der Walt, AJ, “Transformative Constitutionalism and the Development of South African Property Law (part 1)” *TSAR* 2005 669.

¹⁹⁴ Davis D, “Elegy to Transformative Constitutionalism” in Botha, Van der Walt and Van der Walt (eds) *“Rights and Democracy in a Transformative Constitutionalism”* 2003 at 57.

¹⁹⁵ In legal education there is a strong division between public law and private law and lecturers in private law subjects would often mark the constitutional chapter in the material as “self study” or tell students just to read through it because it is not really applicable. Perhaps the fact that study material even contains a separate chapter on the constitution and example contracts, as if it is an add-on, is the beginning of the problem.

¹⁹⁶ I return to transformative constitutionalism's appeal to change in private and property law in 3.3.2.

Africa had various sources, not only in the relationship between government and individual, but definitely between individuals. He argues that the constitution indeed responded to all these forms of racism, but then he draws on the cases of *Du Plessis* and *Holomisa*,¹⁹⁷ to show how the promise of the constitution to address racism in other structures than in the public sphere has not been fulfilled. The shift from authoritarianism to a culture of justification, as explained by Mureinik's metaphor used by Klare, asks for the justification of all power, irrespective of where it is sourced. Therefore, the upsetting and questioning and refusal of the public/private divide are at the centre of transformative constitutionalism. It calls for a rediscovery of the ordinary, an unveiling of discrimination and its momentum in private relationships, such as the conception of "private property as a pre-political, 'natural' phenomenon, which purported to exist independently from the state and the public sphere".¹⁹⁸

¹⁹⁷ *Du Plessis v De Klerk* 1996 (3) SA 850 and *Khumalo v Holomisa* 2002 8 BCLR 771 (CC).

The facts of the cases are briefly the following: De Klerk sued the newspaper and its editors for defamation. Defendant raised a constitutional defence in terms of section 15 of the interim Constitution, the guarantee of freedom of expression. The court was thus required to answer the question whether the Constitution had horizontal application; that is, could the provision of section 15 apply to a case when two private parties were involved in an action for defamation. In *Khumalo v Holomisa* the Constitutional Court was granted its first opportunity to interpret the meaning of section 8. The respondent, a well-known South African politician and leader of a political party, sued applicants for defamation arising from the publication of an article in a newspaper. In the article, it was stated that the respondent was involved in a gang of bank robbers and that he was under police investigation for this involvement. The applicants entered and exception to the respondent's particulars of claim. They contended that the contents of the statement were matters in the public interest, and that failure by the respondent to allege in his particulars of claim that the statement was false rendered the claim excipiable in that it failed to disclose a cause of action. This exception was based upon the direct application of section 16 of the Constitution which enshrines the constitutional guarantee of freedom of expression. In the alternative, applicants averred that the terms of the common law should be developed to promote the spirit and objects of the Bill of Rights in such a manner as to justify the exception. It is important, however, not to be blinded by a result in a particular dispute. The judgment in *Holomisa* gives a particular interpretation to the phrase 'all law'; one which ignores the plain meaning of the words 'all law'. The reason for moving from the plain meaning can be found in the approach adopted in the *Holomisa* case that is predicated on an insistence that there should be a clear divide between public and private law. There is a resistance to a constitutional project that would insist that the entire body of South African law should be subjected to a mandatory investigation as to whether the principles thereof are congruent with the foundational commitments of the Constitution. The interpretation in the *Holomisa* case is one that maintains a conceptual divide between the public and private and thereby weakens the level of accountability of private power through constitutional scrutiny.

¹⁹⁸ Davis in Botha, Van der Walt and Van der Walt (eds) 2003 at 57.

South Africa's apartheid system propagated the privileged existence of whites.¹⁹⁹ Even though the Constitution promised to address this inherent privilege, the court's findings on horizontal application is an obstacle in the way of social transformation into an egalitarian direction. In paragraphs under headings such as "A false start" and "Transformative hopes dashed?" Davis laments this, because he argues that much of the legacy of apartheid would "continue to be immune from the imperative of changing the essentials of apartheid society". That is the reason why the transformative hopes of the constitution are "dashed" when the constitution cannot be applied to private power on the basis that its source is private individuals and institutions who possessed individual autonomy, and whose sphere of sovereignty cannot be invaded by the state.²⁰⁰ This is also where the link between constitutionalism and democracy can be seen. Similarly, in respect to history and constitutionalism, constitutionalism and democracy are not two completely separate concepts and I do not want to create that impression through my dealing with them under separate headings. These are all important elements in South African, and our approach to the one reveals plenty of how we approach the other elements. With this I now move to democracy.

2.3.3 Democracy

Clutching her ID
The woman in front of me
in the voting queue

Our transition to a democratic nation in 1994 sparked hopes of the entire community of South Africa participating in governing ourselves. It carried

¹⁹⁹ "Writing from his Robin Island prison in the 1970s. Walter Sisulu said: 'Racism serves to perpetuate the privileged existence of the whites. Apartheid which is racism in its most burning form, is founded on and gives expression to this privileged way of life'. Twenty years later, Madala J captured this idea in his judgment in *Du Plessis v De Klerk* when he said: 'The extent of the oppressive measures in South Africa was not confined to government/individual relations, but equally to individual/individual relations.'" Davis in Botha, Van der Walt and Van der Walt (eds) 2003 at 57.

²⁰⁰ Davis in Botha, Van der Walt and Van der Walt (eds) 2003 at 58.

prospects of something deeper than mere representative democracy. I now distinguish between a shallow and a deep form of democracy. I associate a shallow notion of democracy with spectacle, where citizens are not participants, but mere spectators.²⁰¹ At the core of this distinction lies different descriptive accounts of current existing systems of democracy, as opposed to normative accounts that are aimed at an understanding of the “ideal form” of democracy.²⁰²

Democracy has a very important symbolic value in South Africa but it is not moving beyond this symbolic nature and not proceeding further than this spectacle. With our latest national election just finished and considerable turmoil and excitement in party politics recently, the notion of democracy is often dismissed completely. This is democracy as spectacle and not as it is envisioned in our constitution. Opposed to this spectacle, I argue in 3.3.3 for democracy of refusal and of rediscovery of the ordinary. My argument is in support of a vision of democracy that resembles the notion of street democracy,²⁰³ and “a democracy to come”²⁰⁴ for a “community of the becoming”.²⁰⁵ Democracy as spectacle is a “sham of independence”.²⁰⁶ I look at the various forms of democracy, specifically a distinction between representative and deliberative democracy, to set the scene for democracy in terms of refusal and of rediscovery of the ordinary.²⁰⁷

²⁰¹ “Thus the spectacle would be caused by the fact that modern man is too much of a spectator...men do not themselves live events.” Debord 1994 at 200.

²⁰² Roux “Democracy” in Woolman et al (eds) 2006 at 10 – 2.

²⁰³ Employed by Le Roux, who draws on the work of Iris Marion Young and Hannah Arendt. Le Roux W, “From Acropolis to Metropolis: The New Constitutional Building” *SAPL* 2001 16 139.

²⁰⁴ Explained by Douzinas 2007 and Hannafin *JLS* 2004 31 3.

²⁰⁵ Expressed by Van Marle, in drawing on Cornell. Van Marle K, “Love, Law and South African Community: Critical Reflections on ‘Suspect Intimacies’ and ‘Immanent Subjectivity’” in Botha, Van der Walt and Van der Walt (eds) *“Rights and Democracy in a Transformative Constitutionalism”* 2003 at 231.

²⁰⁶ Roux quotes Marx’s explicit rejection of the liberal separation of powers doctrine. “The judicial functionaries were to be divested of that sham independence which had but served to mask their abject subservience to all succeeding government to which, in turn, they had taken, and broken, the oaths of allegiance. Like the rest of public servants, magistrates and judges were to be elective, responsible and revocable.” Roux “Democracy” in Woolman et al (eds) 2006 at 10 – 9.

²⁰⁷ “This line of thought involves a reconfiguration of the public sphere as a republican sphere of deliberative (or communicative) interaction, as opposed to the strategic interaction associated with classic liberal conceptions of interest groups group pluralism.” Le Roux *TSAR* 2006 101 at 103.

Direct democracy and representative democracy are the two most basic forms of democracy. Direct democracy refers to a system of government in which the members of the political community make important decisions themselves. This stands in contrast with representative democracy, where the mediation by elected representatives from the community is involved.²⁰⁸ Representative democracy can further be divided into two main schools of thought – participatory and deliberative democracy. South Africa’s Constitution refers to constitutional, representative, participatory and multi-party democracy.²⁰⁹

Roux points out that the notion of direct democracy only existed in some isolated instances,²¹⁰ and he labels representative democracy the “modern pre-eminent” form of democracy. Even though it occurred in its pure form only in a few instances, it can still be detected in two ways.²¹¹ From a thorough discussion in Roux’s chapter on this form of democracy it transpires that direct democracy entails self rule as actual rule by the self and not as delegated to elected representatives. This also embodies the civic republican ideal as explained by Botha.²¹² Because direct democracy can never be achieved, representative democracy is often presented as the inevitable.²¹³ This inevitability serves as a justification for representative democracy – an idea that links with the notion of being grateful for democracy.²¹⁴

²⁰⁸ Roux, “Democracy” in Woolman et al (eds) 2006 at 10 – 4.

²⁰⁹ Final Constitution s181(1) and ss57(1)(b), 70(1)(b), 116(1)(b) and s236 respectively.

²¹⁰ Roux, “Democracy” in Woolman et al (eds) 2006 at 10 – 4; at footnote 1 he mentions the fifth century BC in the city state of Athens, the medieval Italian city-states, the Paris Commune of 1871 and contemporary New England town meetings.

²¹¹ There are traces of direct democracy in the contributions to democratic theory by Rousseau, Marx and Engels, as a normative ideal and secondly in a subsidiary institutions within representative democracies, as noted by Roux’s “Democracy” in Woolman et al (eds) 2006 at 10 – 4 and 10 – 8. Examples of subsidiary forms are the right to freedom of assembly, provisions for holding of referendums and greater degrees of citizen participation in local government.

²¹² Botha H, “Civic Republicanism and Legal Education” *Codicillus* 1999 23.

²¹³ Roux, “Democracy” in Woolman et al (eds) 2006 at 10 – 8.

²¹⁴ As with the miracle, society must settle for something just short of direct democracy, which is impossible, and therefore should be very glad that they are granted the gift of representative democracy.

Representative democracy can be divided into participatory and deliberative democracy.²¹⁵ The notion of representation causes the alienation of the spectacle that Debord refers to.²¹⁶ The aim of both the deliberative and participatory democracy theories, however, is to create a more active citizenry, to achieve a form of democracy where involvement in political processes does not consist merely of the right to vote at periodic intervals; it attempts to move beyond this reduced and token form of democracy to something requiring a deeper level of involvement. These theories do however differ with regard to what this deeper involvement entails.

Participatory democracy is generally perceived as an approach that attempts to inject some elements of direct democracy into a system of representative democracy. It endeavours to answer not only whether citizens should participate in decisions that affect them, but also how they should participate in these decisions. This model envisages some form of actual involvement in political processes.

Deliberative democracy entails that a specific form of participation, namely deliberation, is necessary to legitimise collective decisions. The deliberative process will counter fundamental moral disagreement between participants in the democratic process. This model is predominantly concerned with the process of reaching decisions and not necessarily with the substance of the decisions made, therefore Roux describes it as a “procedural model of democracy”.²¹⁷ I am

²¹⁵ As indicated above, democratic theory at present mainly consists of accounts or descriptions of actual systems of democracy in an attempt to identify flaws or point out where current systems diverge from the idea of democracy. Before he discusses participatory and deliberative democracy, he firstly gives a brief account of two other influential attempts at defending democracy: the competitive elitist model (associated with Joseph Schumpeter) and the concept of polyarchy (the theory of Robert A Dahl). The first is connected to the idea of democracies as “pluralist” systems – i.e. it is not the general will that is expressed but rather the aggregate of diverse interests, interests represented by political parties. The notion of polyarchy is however founded on a more optimistic view of the possibility of citizen participation. Based on the identification of “intermediate sites of power” between the governors and the governed it suggests that there could be mediation between different asserted interests. Roux, “Democracy” in Woolman et al (eds) 2006 at 10 – 11.

²¹⁶ “The alienation of the spectator is expressed in the following way: the spectator feels at home nowhere, because the spectacle is everywhere.” Debord 1994 at 30.

²¹⁷ Roux, “Democracy” in Woolman et al (eds) 2006 at 10 – 14.

not too hasty to deduce that this is a spectacle, however, the means justify the end in deliberative democracy.²¹⁸ Deliberative democracy comes closer to a different vision of democracy – one that has not only symbolic value but also constitutive value.

Roux says that to improve the quality of democracy, “citizens need to develop a sense of themselves as something more than passive consumers of political goods”.²¹⁹ Throughout the first part of his chapter, Roux refers to this fact that democracy improves citizen participation or educates citizens. He argues on the other hand that democracy requires citizens who are already educated in participation.²²⁰ The argument of circularity is levelled against participatory democracy, namely that its two virtues – reducing socio-economic inequality and producing more active citizens – are also its prerequisites.²²¹ According to him, because of this “vicious-circle” argument, democratic purists would often label theorists of deliberative and participatory democracy “utopian dreamers”, even though their theories seem much more attractive. If this “vicious-circle” argument entails that deliberative and participatory democracy theories are too idealistic and therefore unrealistic and unfeasible because its requirements are also its outcomes, it assumes that prerequisites can never be acquired through the process that it is required for. I am not convinced that this is reason to discard the whole participatory project. The “vicious-circle” argument is similar to asserting

²¹⁸ He refers to a statement by Macpherson: the best way to a more participatory form of democracy, is to retain the present system, and to rely on political parties to encourage citizen participation in their internal structures.

²¹⁹ Roux, “Democracy” in Woolman et al (eds) 2006 at 10 – 4.

²²⁰ This is also at the core of Mill’s argument that democracy was preferable because “authoritarian societies might be able to out-perform representative democracies in the short term, their inability to produce public-spirited citizens made them less attractive in the long run. Rousseau argued that voting in a representative system masked domination, but Mill insisted on the possibility of “learned” democracy.

²²¹ Macpherson CB, *The Life and Times of Liberal Democracy* 1977 at 6 gives this line of critique against the work of Carole Pateman (considered the main proponent of participatory democracy): *Participation and Democratic Theory* 1970. “This paradox leaves theorists of participatory and deliberative democracy occasionally looking like utopian dreamers, however much more palatable their models may be to the democratic purist.” Roux, “Democracy” in Woolman et al (eds) 2006 at 10 – 12.

that to speak a language you should know the language and because you do not know the language you cannot learn the language through speaking it.²²²

Deliberative democracy's claim, as an important composite of republicanism and communitarianism is that it can aid in respecting other individuals' viewpoints. Deliberation and consideration of what the public good is can result in self-rule and how the interest of the community surpasses that of the individual.²²³ But Van Marle warns against these "suspect intimacies" in republican thought.²²⁴ Well known critique on communitarianism and republicanism is levelled at the presupposition of a degree of moral consensus, a "solidaristic doctrine" that does not exist in modern society. After touching on the main points raised by republicanism, as put forward specifically by Frank Michelman, Van Marle continues to render a critique on civic republicanism as a spectacle. She questions its containment thesis, emphasises law's tendency to normalise conflict and explains the notion of reflexive politics. In all three instances, she draws on the work of Emiliios Christodoulidis.²²⁵

Democracy as spectacle can be seen as democracy of a community of spectators, where there is no participation but simply observation on representative governance. Likewise it can also be found in romanticised construals of community. Gerald Frug describes this sense of "community as romantic togetherness" as a "group of people who share the same history, goals and values".²²⁶ This Pleasantville-like community is also further characterised "by feelings of identity and unity among its members". It is clearly a spectacular appraisal of community in which there is an elevated optimism regarding the possibility of togetherness.

²²² Or to state that to be able to play a board game you should know the rules of the game. It negates the possibility that you can learn the rules through playing the game.

²²³ Botha *Codicillus* 1999 23-31.

²²⁴ Van Marle in Botha, Van der Walt and Van der Walt (eds) 2003 at 231.

²²⁵ As above.

²²⁶ Frug *Stanford LR* 1996 48 1047 as explained in Le Roux *SAPL* 2001 16 139. In this article, Le Roux contrasts the monumental state Union Buildings with the Constitutional Hill complex, which is according to Le Roux, "devoid of monumental" elements in its vibrant urban setting. He uses these images to put forward a notion of street democracy.

Van Marle's article looks critically at this possibility of togetherness and the nature of democracy that cannot contain the complexity of the ordinary and the everyday and the diversity and difference, but instead reverts to the neutral predictability, the extreme uniformity and conformity of the spectacle and the accumulation of faces into the faceless symbol. According to republicanism's containment thesis, the law, but specifically a constitution, encompasses both law and politics and law and community, through deliberation. Let me pause a moment to reflect on the requirements of such containment. The law needs to "pick up all voices", says Christodoulidis, all voices in the sense that none must be excluded. Not only does the law need to pick up these voices, but it also needs to do it in such a fashion that the voices are not distorted or changed or realigned. Therefore, this exercise should contain true voices. A prerequisite for this requirement is a "congruence" between official and unofficial voices and between "formal democratic process and informal events of public deliberation".²²⁷ He states that republicans make a false claim that law can contain politics, for they merely envision reconceiving all that is political as legal. Instead of this reconception that seems political but does not really entail political freedom as the possibility to contest *everything* politically, he suggests politics that is reflexive. Regarding law's tendency to normalise conflict, it is valuable to keep in mind the argument of legal culture I raise earlier in connection with the "momentum" of legal culture. This momentum is brought about by various factors, among others false consciousness, and I have argued the subsequent importance of refusal as an event. Republicanist thought derives from the ideas of critical legal studies that law can drive a radical politics that can change the structure of a system from the inside. This is evident also from Klare's transformative constitutionalism concept.²²⁸ But granted this, the underlying assumptions of the institutional identity of law cannot be changed through this claim. To illustrate this normalising tendency of law, Christodoulidis distinguishes

²²⁷ "Congruence" implies a similarity, correspondence, resemblance, equivalence or analogy. Christodoulidis 1998 at 220 – 224.

²²⁸ Changing the inherent political and institutional structures of law.

between simple inertia and structural inertia. Whereas simple inertia can be changed from the inside, structural inertia cannot:

Indeterminacy cannot provide for political contestation as such because the indeterminacy itself is fixed and framed by concepts and assumptions. Although Critical Legal Scholars and republicans can argue that the confines of law can be facilitated and immanent critique can make law more aware of what is latent within it and therefore less confining, the facilitative cannot be identified with the reflexive itself.²²⁹

This is because of the fact that law is always reductive, whereas politics is reflexive. His argument stems from his comparison of law to love. He states that love is reflexive and reflexivity lies at its constitutive moment because love can only exist in “the not yet”. On the other hand law’s constitutive moment is reductive. Reflexivity points to “an invitation to think something through” and reduction “is a reason not to”. This is where the link between reflexivity and refusal and the challenging of structural inertia surfaces. Christodoulidis argues that civic republicans and critical legal scholars make the mistake of attributing containment and reflexivity to law. Although simple inertia (one source of normalisation) can be countered, deep-seated structural inertia cannot. This tendency to normalise or to generalise and simplify, coupled with the reductive nature of law and the claim to be an all-encompassing structure, is the spectacle within attempts to rethink democracy.

Nonetheless, South Africa has moved closer to democracy in the deep sense. Cases such as *Modderklip*,²³⁰ *PE Municipality*,²³¹ and *Rand Properties*,²³² placed emphasis on the deliberation between the parties and valued the participation of the parties in the process. In *Modderklip*, the Supreme Court of Appeal took cognisance of the fact that the squatters and the property owner had already

²²⁹ Christodoulidis 1998 at 224.

²³⁰ *President of the RSA and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 BCLR 786 (CC).

²³¹ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC).

²³² *City of Johannesburg v Rand Properties (PTY) LTD* 2007 SCA 25 (RSA).

negotiated. In *PE Municipality* the court came down hard on the state because the state ignored their duty to or was unwilling to negotiate with the squatters. The *Rand Properties* case involved unsafe living conditions, where squatters were living in a collapsing building. Judge Yacoob issued an interim order that the municipality should substantively engage with the squatters to determine suitable alternative accommodation. These cases come closer to a deeper form of democracy, but are still a way off from the democracy of the community of refusal and of ordinary.

This idea of democracy requires us to move away from general conceptions of democracy as merely collective choice but as the “expression of ‘rights’ to an equal voice in the determination of that collective choice”.²³³ Therefore, as I note above, democracy is closely connected to how we approach the notion of rights. I now look at rights in general and also more specifically at human rights.

2.3.4 Rights

On the high court stairs
he sells the evictees: Rights
Cameras, Action!

The link between democracy and rights echoes in what Nedelsky proposes as a reconceiving of rights as relationships.²³⁴ I argue for perceiving rights as relationships, as a way to rediscover the ordinary, in 3.3.4. In this part I look at her critique on rights, Heyns’s struggle theory to illustrate human rights as spectacle and added discussions by Baxi and Douzinas, to map out rights and human rights as spectacle.

²³³ Nedelsky J, “Reconceiving Rights as Relationships” *RCS* 1993 1 1 at 5.

²³⁴ Nedelsky *RCS* 1993 1 1. The notion of relationships is a central tenet of feminist theory, and relates in my view to a rediscovery of the ordinary.

Nedelsky's critique against rights talk can be summarised in three points. First, rights are undesirably individualistic, second, rights obfuscate the real political issues and third, rights serve to alienate and distance people from one another. I suggest that rights in general but specifically rights talk and the reification of rights as some form of cover serves the spectacle. Her first point, of rights as undesirably individualistic, illustrates the spotlight of the spectacle and rights as classic liberal entitlements also known as negative rights. This is the over-attention to individuals at the cost of the community. It is a spectacle because it fails to shed light on the context; it only singles out individuals. Rights as spectacle draw the attention away from the deeper underlying political aspects; in this sense it serves as a cover. Because of these elements involved in a spectacular approach to rights, it estranges and isolates individuals in a community and that is why it is linked to democracy as spectacle. Associated with these points of critique is also the idea that rights are in themselves executable and that they are the end of the process; this is clearly illustrated in some accounts of human rights.

The human rights movement is the new emerging world order and humanitarianism defines this century's political ideology. The production of human rights aims to make it the single vision of the global community, the new empire.²³⁵ Human rights are an important ingredient in South Africa's democratic order and our Bill of Rights has been highly praised. This much celebrated universal ideology is a spectacle; I look at few elements. In the South African context the spectacle of human rights is illustrated pertinently through what is called the "struggle approach". In Cristoff Heyns's vision of this "struggle approach" and also in critique of this emerging empire,²³⁶ I identify a few spectacular moments. Human rights as a spectacle is the new grand narrative of humanity; it is only a reactionary response to oppression or suffering; it is the new form of religion and it is an exemplary illustration of commodification.

²³⁵ Douzinas 2007.

²³⁶ I mainly use Heyns Soeteman A (ed) 2001, Baxi U, "Voices of Suffering, Fragmented Universality and the Future of Human Rights" in McCorquodale R (ed) *Human Rights* 2003 and Douzinas 2007.

I explain the link between the spectacle, liberalism and positivism above. The traces of spectacle glide into view with the examples and language that Heyns uses to illustrate this victory of human rights.²³⁷ Among others, he refers to the wording of the American declaration of independence which includes the idea of natural rights: life, liberty and *pursuit of happiness*. Classic liberal notions of human rights are further celebrated in the struggle approach in invoking the declaration of the rights of man and citizen (“the natural, inalienable and sacred rights of man”, “liberty, property, security and resistance to oppression”) and the social contract of John Locke. According to this view, resistance is legitimate when the core interests of life, liberty and property are threatened.

Heyns equates the defence of human rights with justice, and presents human rights as the end of struggle, as the prevention of conflagration, as the flip side of legitimate resistance, the bringers of peace.²³⁸ He invokes examples of “struggle” and their respective “human rights counter parts”.²³⁹ His section on universalism and relativism starts by allowing that there is not a single “Human History” and because human rights are rooted in history there is a surfeit of conceptions of human rights. He questions the first assertion, however, on the grounds that “the forces of globalisation” are pushing in the direction of a unified history of the world. He argues that human rights facilitate interaction between the “different histories of the world”, because of the role of human rights language. Different histories on the surface “overlap” on fundamental points because they share underlying issues.²⁴⁰ Of course, these underlying issues are the ones contested

²³⁷ Heyns in Soeteman (ed) 2001 at 173.

²³⁸ “It is in this context that the adage ‘If you want peace, work for justice’ comes to the fore, implying that justice (and in our context the protection of human rights) may be defined as that which will in the long run bring peace”. Heyns in Soeteman (ed) 2001 at 173.

²³⁹ The conflict between King John and his rebellious barons and the *Magna Carta* of 1215, the War of Independence and the American Declaration of Independence of 1776, the Declaration of the Rights of man and citizen and the French Revolution of 1789, The Mexican Revolution and the Mexican Constitution of 1917, the Bolshevik Revolution of 1917 and the USSR of 1924, World War II and the United Nations Charter of 1945, and finally the South African Constitution as “culmination of struggle” and “reaction to apartheid”. Heyns in Soeteman (ed) 2001 at 176.

²⁴⁰ “The foundation of human rights consequently lies in *coherence* with historically accepted grounds of resistance, not *correspondence* with abstract or even metaphysical rules of morality or natural law.” Heyns in Soeteman (ed) 2001 at 183.

and fought for, namely human rights. Human rights in this sense is the new grand narrative.²⁴¹

This grand narrative illustrates the universalising tendency of human rights.²⁴² Heyns states that “here the familiar notion of ‘fit’ between the underlying principles and specific human rights claims is helpful”.²⁴³ This illustrates again the assumption of a universal; a spectacle. On this point, Baxi distinguishes between the globalisation and universalisation of human rights.²⁴⁴ He says that the inability to make this distinction “casts a long shadow” over the future of human rights.²⁴⁵ Globalisation of human rights happens when leading states govern in such a manner that they enforce only certain sets of rights or certain interpretations of them on subordinate states.²⁴⁶ The universality of rights includes not only the concept of grand narrative, but also new versions of essentialism about human nature.²⁴⁷ On essentialism, Baxi reminds us that the

²⁴¹ “Focusing on the recognition of the right of resistance to identify human rights claims throughout history and across cultural divides, as was done above, leads one to identify a much wider and more universalistic basis for human rights than is otherwise the case.” Heyns in Soeteman (ed) 2001 at 187. It may appear a much more acceptable grand narrative (for now) than say that of “Western enlightenment” or “White superiority” or “Colonial heroism” but it is its view of grand narrative that renders it a spectacle.

²⁴² Heyns employs this universalising element of the grand narrative also to explain the counter-majoritarian argument. His point of departure is that human rights are inalienable. This justifies resistance against authoritarian rulers when they violate human rights. It then follows (logically according to Heyns) that there is also a right to resistance against democratically elected rulers, should they violate inalienable rights. The right of judges to therefore also rule against the majority, on the grounds of human rights, can be similarly deduced from the inalienability of rights. Looking at counter-majoritarianism from this angle seems a little confusing. If human rights are the accumulation of a collective struggle – of a group effort of a democratic process, then looking at the counter-majoritarian dilemma defined in this way, entails ruling against the present majority in favour of a previous majority. It is therefore not truly counter-majoritarian but merely counter-current-majoritarian. Heyns explicates this by saying that judges have the “longer-term” majority in mind – “the humanity throughout history”. Heyns in Soeteman (ed) 2001 at 184.

²⁴³ He refers to Dworkin’s constructive interpretation, which requires judges to find the best “fit” and then justify their choice. Dworkin rears his head again in the perception of society, in that judges need to try to get as close to “applying the view of humanity as a whole, and as such it is ‘the people’ who govern, not merely the people who happens to be members of that particular community at that particular time, but community through time”. He continues and acknowledges that this struggle approach can present difficulties in instances of socio economic rights. “In the case of those socio economic rights (as opposed to the civil and political right – freedom of conscience) that are subject to progressive realisation, the conclusion that there is no alternative but to break the law is much more difficult to reach.” Heyns in Soeteman (ed) 2001 at 184. Further Dworkinian elements can be detected in the struggle approach to human rights. In the case of rights of detainees, prisoners have not struggled to obtain the rights, however, through “acts of bloody struggle” against discrimination and specifically detention without trial, they have taken part indirectly in the establishment of a broader underlying value – namely dignity.

²⁴⁴ Baxi in McCorquodale (ed) 2003 at 188.

²⁴⁵ Baxi in McCorquodale (ed) 2003 at 176.

²⁴⁶ Baxi in McCorquodale (ed) 2003 at 187.

²⁴⁷ Baxi in McCorquodale (ed) 2003 at 176.

concept “human” is not pre-given but constructed, and that this is also by extension true of “human rights”.²⁴⁸ This universality (meta-narratives and essentialism) problematises the globalisation of human rights. This universalism of human rights started when colonialism ended; human rights can also be described in terms of the neo-colonialism Chanock refers to.²⁴⁹ Baxi calls this “westoxification”: the “divine right to rule the unenlightened”.²⁵⁰

The reactionary nature of the struggle approach to human rights is clear from a variety of explanations by Heyns. Among other things, he understands it as “a response to what eventually has come to be seen as a characteristic of the human species that has to be accommodated”; also that “establishing human rights norms often functions retrospectively where a realisation of the extent of suffering that has been inflicted results in a decision to grant human rights”.²⁵¹ This is also evident from his reading of the wording of the Freedom Charter: “These freedoms we will fight for side by side, throughout our lives, until we have won our liberty”. The freedoms *in casu* entail a list of civil, political and socio-economic rights. Human rights are portrayed as the prize of struggle, the reward for suffering, the delayed compensation for enduring hardship. According to Heyns, the 1996 Constitution should in many ways be understood as a “reaction to apartheid” and the “culmination of struggle”.²⁵² In this sense, he returns to bygone traditions as a source of reactionary constitutionalism.²⁵³

²⁴⁸ As above.

²⁴⁹ Baxi in McCorquodale (ed) 2003 at 191.

²⁵⁰ Baxi in McCorquodale (ed) 2003 at 195.

²⁵¹ Heyns in Soeteman (ed) 2001 at 182 – 183. He later adds, however,: “The process of creating law – and as a result often the process of legitimising struggles – is not exclusively retrospective and reactive. Wise lawmakers and judges will understand social currents and anticipate – and try to diffuse – future struggles. They will attempt to protect human rights before the people do so themselves. Heyns in Soeteman (ed) 2001 at 185.

²⁵² Heyns in Soeteman (ed) 2001 at 176.

²⁵³ In contrast with for instance Le Roux who specifically envisions returning to a forgotten tradition as “a source of critical constitutionalism”. In this sense the 1920’s and the 1930’s increasingly appears to have had a decisive impact on the development of 20th century critical legal thought. While the Realists were insisting on the functionalism encapsulated in the American constitution, the aesthetic nature of constitutionalism was thrust into the limelight in Germany by the critique of the Weimar Constitution and the rise of fascist or reactionary political aesthetic. Le Roux TSAR 2006 101 at n 21.

In Heyns's theory, human rights and struggle operate in an axiomatic, logical, mathematical fashion, as flip sides of the same coin.²⁵⁴ This demonstrates the spectacle as predictable. Heyns does not put his stamp of approval on all forms of struggle. He specifies that struggle should be legitimate.²⁵⁵ He defines this relative term by employing a list of others. He mentions two grounds for legitimate resistance, namely attacks on conscience, as well as life, liberty and property (the cause for first generation rights) and unacceptable material living conditions.²⁵⁶ Legitimacy, according to Heyns, entails firstly that an interest should be at stake. This interest should be important to the human species where importance is determined by "ample historical evidence". In addition, the measure taken to resist the infringement of a right should be proportionate to the infringement of the right. It must balance; the two "opposite" actions should cancel out.²⁵⁷

Baxi is of the view that human rights activists are the new missionaries.²⁵⁸ He refers to "human rights evangelists" who celebrate human rights as a new civic religion that will solve the major problems of humanity as long as there is enough faith in it.²⁵⁹ This is a world tendency that can be seen in South Africa. It is also apparent in the struggle approach to human rights:

²⁵⁴ Heyns in Soeteman (ed) 2001 at 174. Douzinas also uses the coin image of Heyns, but in a different fashion. He shows how humanity is broken into two – one part is a humanity that suffers and the other a humanity that saves and rescues. There can be no goodness without suffering, but also goodness will not be recognised without suffering – the "two parts call each other into existence like the two sides of the same coin." Douzinas 2007 at 68.

²⁵⁵ Heyns in Soeteman (ed) 2001 at 181.

²⁵⁶ Heyns in Soeteman (ed) 2001.at180.

²⁵⁷ Keeping this in mind, he says that illegal resistance should only be used as a last resort. "The fact that infringements of a particular interest has given rise to resistance over many years and in many cultures, with a wide variety of acceptance in those cultures, lends credence to the conclusion that one is in fact dealing with legitimate resistance and consequently with human rights." Heyns in Soeteman (ed) 2001 at 182.

²⁵⁸ Baxi in McCorquodale (ed) 2003 at 194.

²⁵⁹ Baxi in McCorquodale (ed) 2003 at 175. When I think about the spectacle of human rights, the lyrics from "One Vision" come to mind. This song was written and recorded by the band Queen, inspired by the euphoric feeling that came from their performance at Live Aid, the predecessor of Live 8. "All we need is one world wide vision / One flesh one bone / One true religion / One race one hope / One real decision." Live 8 was a string of benefit concerts that took place on 2 July 2005, in the G8 states and in South Africa. They were timed to precede the G8 Conference and Summit. These concerts show how the human rights movement has become the new religion. Douzinas says that the Live 8 concert in London in 2005 combined hedonism and a good conscience. He stands critical towards concerts like the Live 8 and the way in which it reduces politics and one of the easy ways in which "postmodern philanthropists" can again "rescue" the poor in a colonial missionary fashion. Douzinas 2007 at 67 and 83.

... a significant part of human rights is written in blood. However, the process is not always so dramatic... protesters cannot rely on precedents from the past or wait for the sympathy of their contemporaries – they need to make charismatic choices, believing that eventually, some time in the future, they will be vindicated by history.²⁶⁰

Heyns emphasises the “creative” role of struggle by using the example of Cain and Abel. He refers to it as a “familiar account at the dawn of history”. From this statement it is clear that the universal history he has in mind is indeed a Christian history.²⁶¹ It calls to mind the opening lines of Baxi’s article, where he states that “[m]uch of the Christian twentieth century... will be recalled as an ‘Age of Human Rights’”.²⁶² By inserting the adjective he effectively reminds me that the Western calendar is not the only one or necessarily the calendar everyone uses and not a neutral one. Heyns fails to see this specificity and continues in his universal history tone. The purpose of his Cain and Abel analogy is that it was Cain’s act of killing his brother, along with other rejections of similar acts, that called the right to life into being.²⁶³

Of course, Ramphela reminds us that this association with religion is to some extent unavoidable. Throughout Ramphela’s book, she outlines the role of religion in not only the liberation struggle and in the Truth and Reconciliation Commission, but also the broader history of South Africa, with specific reference to the Boer war. She refers to “the Afrikaner’s covenant with the divine” that

²⁶⁰ Heyns in Soeteman (ed) 2001 at 183. This new religion therefore is not a conservative stoic Christianity, but has all the makings of a charismatic new age religion.

²⁶¹ Earlier in the article he refers to other Christian examples and recalls the story of Daniel as a “celebration of illegal resistance”. Heyns in Soeteman (ed) 2001 at p 179 “For example, Daniel’s friends defied King Nebuchadnezzar’s order to worship an image of gold that he has set up. Daniel, a hero of Judaism, defied a decree of King Darius not to worship his god. Without using the term, ‘freedom of conscience’ was being supported”. He does not attempt to hide the Western Christian situatedness of that which he proclaims to be “universal” human rights. The struggle approach shows successfully, although not intentionally, that human rights is Christianity – along with the convenient justification that the moral high ground brings.

²⁶² Baxi in McCorquodale (ed) 2003 at 159.

²⁶³ This is very confusing, because it might explain criminal law, but to force this into an explanation for the right of life is a long haul. It emphasises Heyns’s vision of the redemptive quality of struggle. The article concludes with a call on those “who believe in human rights” to be responsible and to continue the struggle for human rights. Although struggle has called separate rights into being, this call is not for these rights as culminations of struggle, but a call for the concept, the religion and language of human rights. It ends in the true style of a charismatic pastor, an abstract statement, in spectacle style: that “the foundation of human rights is passion, but passion tempered by history”.

entailed taming the hostile land that was given to them.²⁶⁴ She continues to explain that the Afrikaner as chosen people is also linked to being delivered from humiliation and suffering.²⁶⁵ Ramphela warns against regarding suffering as ennobling, because “history is full of examples of people who had been oppressed turning into oppressors of others weaker than themselves.”²⁶⁶ It is exactly this role of liberation theology and the involvement of religious leaders in the struggle for freedom that renders the formulation of miracle “emotionally and intellectually appealing”

Another feature of this spectacle is the idea that human rights are merely turned into consumable commodities. One of the crassest examples of the commodification of human rights I came across is Sara Melkko’s “Marketing Human Rights”.²⁶⁷ In this thesis she explains how human rights should be marketed just like any other product. She refers to well known marketing strategies and argues that these exact same methods should be applied to human rights. Human rights as commodity divorces rights from needs. Human rights in this fashion relate not to human suffering but to human desire. Douzinas points out how “human rights keep desire going”.²⁶⁸ This means that every victory in the new rights struggle leads to new and further demands in the “spiral of demands that cannot be fulfilled”.²⁶⁹

²⁶⁴ “Their theologians went on to justify apartheid as ordained by the same divine force that had given them South Africa as their heritage”, and “[t]he Afrikaners, winning their freedom from the dominance by British colonials following the 1948 election victory of the National Party, also felt special.” Ramphela 2008 at 28.

²⁶⁵ “The suffering endured in the concentration camps of the Anglo-Boer war and especially the deaths of many women and children remained fresh in the minds of many Afrikaners. Their resilience throughout these traumas was seen as a sign of the hand of the Divine being upon them. Suffering was seen as the strengthening the chosen people for service.” Ramphela M 2008 at 30.

²⁶⁶ As above.

²⁶⁷ This is one of the five awarded theses of the academic year 2003/2004 of the European Master's Programme in Human Rights and Democratisation run by the EIUC – European Inter-University Centre for Human Rights and Democratisation. The E.MA Awarded Theses collection belongs to the series “Ricerche” published by Marsilio Editori S.P.A. in Venice. I stumbled across this thesis in one of many library rambles.

²⁶⁸ Douzinas (2007) at 49.

²⁶⁹ As above.

The commodification of human suffering as human rights – what Baxi calls the proliferation of rights – is spectacle.²⁷⁰ Rights were originally awarded to white males, and then were expanded to white females, thereafter to black males, with black females following and disabled persons also acquiring rights later, and so the increasing production of rights persisted until now, where rights are awarded to animals and to nature. It is this belief or hope in the possibility that rights might fill the void, might actualise freedom, and might sate the desire that causes the explosion and almost bizarre creation of more and more rights. He addresses the danger that overproduction of human rights holds for their future and also the danger of turning human rights movements into human rights markets.²⁷¹ What he calls “human rights evangelism” and “human rights romanticism” celebrates this production of human rights.²⁷² Human rights romanticists include NGOs that tirelessly pursue “the removal of brackets in pre-final negotiation texts” and celebrate this as “triumphs in human solidarity”.²⁷³ In the language of economics, Baxi explains how movements are organised into markets where a network of transactions serves the interest of human rights investors, producers and consumers: “These transactions rely upon the availability... of social capital in the form of international human rights norms, standards, doctrines, and organisational networks.”²⁷⁴

Furthermore, mass media commodifies human suffering on a dramatic basis. In this sense mass media play a creative role, because they “create” a disaster or suffering when they identify it.²⁷⁵ It operates on the logic of excess – the more horror stories there are in circulation, the more success there is in establishing accountability and the better the commerce in human rights then. The danger of this overproduction is compassion fatigue.²⁷⁶ This spectacle of human rights markets desensitises people for human suffering and consequently denies the

²⁷⁰ Baxi in McCorquodale (ed) 2003 at 174.

²⁷¹ Baxi in McCorquodale (ed) 2003 at 200.

²⁷² Baxi in McCorquodale (ed) 2003 at 175.

²⁷³ As above.

²⁷⁴ Baxi in McCorquodale (ed) 2003 at 202.

²⁷⁵ Baxi in McCorquodale (ed) 2003 at 204.

²⁷⁶ Baxi in McCorquodale (ed) 2003 at 205.

ordinary in anguish, recognising distress only in its exaggerated, spectacle format.

2.4 Conclusion

The show in chapter two brings to the stage the notion of the spectacle and its main features, such as its lack of detail, universalising tendency, pacyness and insistence on form and display. The characters in this spectacle, in magnificent costumes, are related elements of South African legal culture and we see how the aspirations of transformative constitutionalism are stifled when we approach these aspects in the manner of the spectacle. This entails history as grand narrative and archive in the positive paradigm as a perceived neutral and objective way to document the past. Linked to this is transformative constitutionalism that perceives the constitution as an instrument or tool to obtain transformation in the sense of some kind of goal that much be reached. To this I connect the constitution as monument and proceed to look at democracy as a mere cover, as a shallow concept of a collective, where participation does not feature. From democracy as spectacle I move to rights and human rights as reified ends in themselves. I discuss human rights as the flipside of struggle as commodities and as the new moral high ground. The characters take their final bow and it presents us with the question of where this spectacle leaves us. How do we address or respond to a legal culture of spectacle? I draw the curtains on this magnificent display and propose that we need to move away from a culture of spectacle. This shift requires a culture of refusal of the spectacle and rediscovery of the ordinary.

3 Law and legal culture as a refusal of spectacle and rediscovery of the ordinary

3.1 Introduction

Late and lost again!
I discover the quiet
second hand book shop.

When I was in high school, rumours were doing the round that the grade twelve class of our neighbouring school was given “Courage” as a topic for a creative writing assignment. One of the pupils handed in his script with the single sentence “This is courage” and according to the legend (which I have since heard in different versions and hence question the validity of the original story) he scored a distinction for the assignment. This act can be read as a form of refusal, a way of refusing the authority and prescriptive nature of school. But it can also be seen as a form of retreat or evasion, an opting out or withdrawal. I can similarly therefore type the whole second chapter in one (courageous?) sentence: “This is refusal”. This embodies a certain misunderstanding of the term “refusal” in isolation. I use the notion of refusal as an active politics, a way of questioning the current order and not simply a refusal to engage or a decision to stand back and accept circumstances. But this second chapter is not a single sentence, because my appreciation of and approach to the notion of refusal in the context of law and legal culture does not entail this misunderstanding. Refusal and rediscovering the ordinary is not a romanticised redemption, but rather a possibility or option.

In this chapter I investigate the notion of refusal, of rediscovery of the ordinary, everyday life and also the relationship between these concepts. This mirrors the

first chapter on a culture of spectacle in form and also deals with history, constitutionalism, democracy and rights as elements of South African. It addresses democracy as attending feature of constitutionalism, with specific attention to a community of ordinary and a community of spectacle. Human rights follow thereafter and I will touch on refusal of human rights as a new religion and propose to focus on the ordinary , such as human suffering, instead of the spectacle of the struggle approach. I conclude with the relationship between the spectacle and the ordinary and the implication thereof on South African legal culture.

3.2 The notion of refusal and of rediscovery of the ordinary

Midnight corrections.

Fell asleep in the office.

Being Bartleby

An article by Van Marle marks my point of departure.²⁷⁷ This article introduced the South African discourse around and engagements with the notion of refusal. I also briefly look at the South African conversation on refusal. Tracing the development of the concept of refusal in South African legal discourse delivers two characters; the “forlorn” character in a novel by Melville, and the “patient” character in Homer’s *Odyssey*. The dejected character of Bartleby is carried into the South African discourse on refusal, on the back of an article by Patrick Hanafin.²⁷⁸ Van Marle refers to his comparison of Maurice Blanchot to Bartleby and she also invokes the image of the patient Penelope. Van Marle’s reading of these two characters outline the way in which I understand refusal.

²⁷⁷ Van Marle K, “Laughter, Refusal and Friendship: Thoughts on a ‘Jurisprudence of Generosity’” *Stell LR* 2007 18 194.

²⁷⁸ Hanafin P, “The Writer’s Refusal and Law’s Malady” *JLS y* 2004 31 3.

The ideas of “refusal” are closely related to notions of “action”, “revolt”, “risk” and “equivocation” in Van Marle’s article. She explains that a “generosity” in the “unexpected” and “unpredictable” can create the possibility for rethinking politics and ethics of law, and thereby challenge our human rights discourse and the pervasiveness of law.²⁷⁹ She contemplates this possibility with reference to aspects of the works of, among others,²⁸⁰ Adriana Cavarero. Cavarero’s feminist rereading of the character of Penelope inspires the refusals proposed by Van Marle.²⁸¹ Van Marle suggests that this reading opens up the possibility to refuse aspects of western philosophy: its association with death, with the mind and a life that completely lacks “hands” and also its withdrawal from politics. This also highlights a refusal “of a patriarchal assignment of confined and predetermined oppressive spaces to women, in particular spaces that could be associated with a politics of refusal”.²⁸² She refers to Julia Kristeva’s mentioning of Hannah Arendt’s “critique on the metaphysical tradition that grants privileged status to the contemplative life”, which links with Adriana Cavarero’s argument that philosophy is frequently a male activity which is “devoid of hands”.²⁸³ This abstraction, this elevation of thought detached from the body is what recalls the spectacle.

The broader point here is that there is a continuation of South African legal culture, not only the continuation of the apartheid legal culture but also of law in general and law as patriarchal institution. This feminist concept of patriarchy relates nowadays not only to equality between men and women, but also to law as a system which is primarily obsessed with rationality and abstract notions of reasonableness and justice. In this sense refusal is also a way of questioning the logocentrism of our legal culture, the fact that it is based primarily on the notion of a “centre” or central truth.²⁸⁴ Deconstruction continually sets out to discredit this notion. With his critique of logocentrism, Jacques Derrida examines what he

²⁷⁹ Van Marle *Stell LR* 2007 18 194 at 195.

²⁸⁰ Hanna Arendt, Julia Kristeva, Gillian Rose, Drucilla Cornell, Roger Berkowitz and Patrick Hanafin Van Marle *Stell LR* 2007 18 194 at 194-198.

²⁸¹ Cavarero A, *In spite of Plato* (1995).

²⁸² Van Marle *Stell LR* 2007 18 194 at 198.

²⁸³ As above.

²⁸⁴ Derrida J, (trans Spivak GC), *Of Grammatology* 1976 at 49-51.

considers to be a fundamentally repressive philosophical tradition. Logocentrism, according to Derrida, has characterised Western philosophy since Plato and constitutes the desire for an original guarantee of all meanings. It entails an over-exaggerated reverence for the word. Taken from the Greek, the word *logos* can simply be translated as “word”, but in philosophy, it often signifies an ultimate principle of truth or reason. This ties in very well with the relationship between refusal and a return to the ordinary. Penelope challenges patriarchy in the sense that she refuses the role given to her by patriarchy. Looking at refusal as a way to challenge patriarchy is refusal as something that can slow down institutional momentum, something that can hold a mirror up to the falsely perceived naturalness of legal culture.

Very importantly, refusal also encompasses a refusal “of the pervasiveness of the economical, or instrumental, calculated mindsets that aim to prevent amongst other things any form of questioning, opposition or resistance”.²⁸⁵ This economics and instrumentalism echo the spectacle, the calculatedness that results in predictability. But it is also the focus on generality that causes detail to wither. In this regard Van Marle finds “Cavarero’s interpretation of Penelope and the link with another time in which the politics of the everyday, a certain slowness and attention to seeming insignificant things is acknowledged” suggestive for her thoughts on a “jurisprudence of generosity”.²⁸⁶ She explains that at the core of generosity is “the idea of unexpectedness”.²⁸⁷ This randomness breaks with spectacle in the sense that it moves away from “the formality and predictability of law”. This is a significant element also of the ordinary - the everyday that consists of ritual but also of randomness. It is not simply a contemplated, well-planned forced surprise element, but a complete unpredictability, an absolute uncertainty, a “startling unexpectedness”.

²⁸⁵ Van Marle *Stell LR* 2007 18 194 at 198.

²⁸⁶ Van Marle *Stell LR* 2007 18 194 at 195.

²⁸⁷ As above.

The image of Penelope's weaving and unweaving and reweaving of her father-in-law's shroud – the completion of which is her condition for getting married to one of her suitors – is (also) what constitutes her refusal. This re-imagining of Penelope is also found in Margaret Atwood's *Penelopiad*.²⁸⁸ Atwood weaves different genres into a rewoven myth that aims to rewrite archetypical notions of passivity associated with female. It is a story in which Penelope retells her story, feels a responsibility to retell the story of Homer, because she is not satisfied with his depiction of her. She refuses the label of "ideal loyal wife" that Homer gave her. The book also gives the maids (who were killed by Telemachus, Penelope's son, by order of Odysseus, because they were suspected to be conspiring with the suitors) the opportunity to retell their story, of how they were used to spy on the suitors and also of how the suitors raped them.

While Penelope is still reweaving, we can look at another image, that of writing or of not-writing – as introduced by the character of *Bartleby*.²⁸⁹ Similar significance of these two characters is their refusal in everyday life. It is within the ordinary that their refusal starts. Again we can detect the relationship between refusal and the ordinary – the ordinary creating possibilities for refusal and refusal then allowing a return to the ordinary. *Bartleby* enters into the notion of refusal by Hanafin's article.

Hanafin explains how Blanchot as main author of the *Declaration of the Right to Insubordination in the Algerian war*²⁹⁰ called for "an absolute right to refuse to accept" the war that the state claimed was executed in the name of the people. It was through the writing of this document that the authors brought on a "solitary responsibility" and not a responsibility to the patria – a responsibility to the people as opposed to a responsibility to what was conducted in the name of the people. Hanafin through his article explains this responsibility as a "disastrous

²⁸⁸ Atwood M, *The Penelopiad: The Myth of Penelope and Odysseus* 2005.

²⁸⁹ Melville H, "Bartleby the Scrivener: A Story of Wall Street" in McCall D (ed) *Melville's Short Novel : Authoritative Texts, Contexts, Criticism* 2002.

²⁹⁰ Blanchot was involved in a movement against the French colonial war in Algeria.

responsibility to a non-community”. These terms – “disastrous responsibility” and “non-community” – are important for understanding the nature and character of refusal.

From his comparison of Blanchot²⁹¹ it becomes clear that refusal encompasses a broad range of subversiveness. It is a way of questioning the relationship between sovereign power and the public, and an assertion of an own voice, an insistence on individual speech.²⁹² This is evident from the scenario of Blanchot interrupting the magistrate in his trial when the magistrate started to dictate Blanchot’s deposition in his own words to the legal clerk. Blanchot then confers his statement directly to the clerk.

Refusal is also portrayed as disruption. Ndebele also uses this idea of disruption in *The Cry of Winnie Mandela* . Winnie tells of how her house was raided countless times, and how this brought her to “rage against order and embrace disruption”. This was her rule: that she would continue raging, raging and disrupting. Hanafin calls it “infinitesimal moments of interruption to expose the limits of legal discourse”. Refusal exposes and exhausts the limits of law and shows law’s frailty.²⁹³ It unsettles; it disturbs the machinery of politics and of justice; it is “a fading before the law which widens law’s limit point” and it increases the mode of suspension. Refusal happens in and creates an in-between space.²⁹⁴

²⁹¹ From Hanafin’s article I gather that Blanchot’s work concerned the contest between law and its other, the play between power and transgression, and the notion of responsibility. Although I have not read any primary texts by Blanchot, my interest lies primarily in how he features in Hanafin’s vision of refusal.

²⁹² Hanafin, *JLS* 2004 31 3 at 4.

²⁹³ “...enchancing the law, calling it forth from within itself to address its own irresponsibility, exhausting its limits” and “...this subversive moment provokes not a new state or a different elite but rather the power of a withdrawal, a haunting, a seduction”. Hanafin, *JLS* y 2004 31 3 at 6 and 9.

²⁹⁴ “...that space of resistance wherein is traced the flashing line that causes the limit to arise.” and “...it is in the empty space between utterance and recording that Blanchot’s words leave their trace.” Hanafin, *JLS* 2004 31 3 at 8 and 10.

Refusal is also depicted as a way of taking up the responsibility to “the unknown other”.²⁹⁵ This portrayal places the emphasis on refusal as responsibility, an obligation to refuse. It is as if Hanafin’s call to refusal corresponds with the call from Klare to the project of transformative constitutionalism. Refusal is not just a new term that has entered legal scholarship, but indeed, as transformative constitutionalism, a challenge formulated almost as duty, but with closer inspection rather as a right to refusal. When Hanafin phrases it as a “solitary responsibility to an unknown other” he expresses the ethical moment in refusal. The notion of refusal in the South African context is also an attempt to create spaces for the unknown other – a movement towards ethical jurisprudence. This turn towards ethics stands in contrast to an emphasis on ontology or a quest for knowledge. This follows the Lévinasian critique and refusal of Western philosophy.²⁹⁶ According to Emmanuel Levinas, everything begins with confronting “the other”. Hanafin rightfully refers to this as an impossible responsibility, but with a possibility of a non-reductive relationship.²⁹⁷

Bartleby’s character in the novel embodies this “otherness”.²⁹⁸ The narrator in *Bartleby the Scrivener* is an elderly lawyer with his chambers on Wall Street on the second floor of a building surrounded, very depressingly, by other very tall buildings. The total view from his office’s windows amounts to two walls - one white and one grey.²⁹⁹ He refers to himself as a “safe man” and an “unambitious lawyer” whose practice involves doing a “snug business among rich men’s bonds and mortgages and title-deeds”. He continues to say that he never addresses a jury or draws on public applause; he just gets on with his business uneventfully.³⁰⁰ Or so he does until Bartleby arrives. After the lawyer advertises a

²⁹⁵ Hanafin, *JLS* 2004 31 3 at 4.

²⁹⁶ Van Marle K and Le Roux W, “Postmodernisms and the Law” in Roederer C and Moelendorf D, *Jurisprudence* 2004.

²⁹⁷ “The Other in the ethics of alterity is not the other to the self, the self’s alter ego, nor its extension”. Van Marle and Le Roux in Roederer and Moelendorf 2004 at 369. See also the discussion of the general other and the universal other in 2.2.

²⁹⁸ Melville H in McCall D (ed) 2002.

²⁹⁹ “Deficient of what landscape painters call ‘life’” Melville in McCall (ed), 2002 at 11.

³⁰⁰ This provides apt comment on the nature of private law. A return to the ordinary as part of the notion of refusal implores for close scrutiny of private law.

position for another scrivener, Bartleby is the only applicant. He moves into the office, with Turkey, the alcoholic scrivener, Nippers, the scrivener troubled by indigestion and also Ginger Nut, the office boy whose main errand is buying ginger nuts for the rest of the staff in the office. It is precisely these “eccentricities”³⁰¹ of the two other copyists that led the narrator to hire another scrivener. On his arrival Bartleby emerges himself in his work. He copies documents without end. It is when he is asked for the first time to verify the documents he has copied with the others that he refuses. This is the first of a series of refusals. His refusal takes the form of his stating his preference each time. Ndebele reminds us of this in *The Cry of Winnie Mandela*, where the character Delisiwe warns the other characters and the reader to “hold on to your options” because they are all you’ve got.

Bartleby simply and calmly states that he “would prefer not to” when requested to do anything he would prefer not to do. At first the narrator wrongly assumes that it is only work that Bartleby prefers not to do, but when one looks closely at what it is that he refuses, it is evident that Bartleby prefers not to be forced into submission through subtle requests.

His first refusal can be read as a refusal of an assumption, of an arrogant expectation and of hastiness and rush. This illustrates the spectacle’s association with speed and refusal and the ordinary’s corresponding link with slowness:

I abruptly called to Bartleby. In my haste and natural expectancy of instant compliance... Imagine my surprise, nay, my consternation, when without moving from his privacy, Bartleby in a singularly mild, firm voice, replied, ‘I would prefer not to’.³⁰²

³⁰¹ The narrator refers euphemistically to Turkey’s drinking problem and Nippers’s dyspepsia as “eccentricities”. Their respective “eccentricities” result in the two of them effectively doing the work of one scrivener. Turkey is usually drunk and ineffective in the afternoons and Nippers’s cramps subside only after lunch.

³⁰² Melville in McCall (ed) 2002 at 12.

The slowing quality of his refusal is also portrayed later in the story where the narrator explains that Bartleby's rebuttals breaks his momentum and slows him down.³⁰³ This is an essential element of the kind of refusal I envisage: one that will slow down the momentum of the spectacle, and halt legal culture in order to facilitate change. This refusal of what is assumed to be perfectly reasonable figures throughout the tale.³⁰⁴ He also refuses assumed necessity.³⁰⁵ This is already an important point to note: his refusal upsetting the *status quo*, questioning assumptions and paralysing that which is accepted as perfectly reasonably and normal. He refuses to be trapped, misled or seduced into clever tricks aimed at enticing him or catching him out. One noteworthy incident is where the narrator inquires into Bartleby's history.³⁰⁶ The point of this inquiry serves as a kind of test, much more than it is a token of genuine interest or really wanting to know where Bartleby comes from. Rather, the sole aim of the question lies in the answer. According to what Bartleby answers, the narrator will decide whether to keep him or to fire him. The narrator therefore uses Bartleby's history as a kind of display, a token or a screen for another purpose, it is inquiring into his past for the sake of appearing concerned, but not for the sake of actually using the information obtained through the inquest. He uses Bartleby's past as a tool, a special test. And of course, Bartleby prefers not to give him insight into his roots.

He emphasises numerous times that he does not bluntly reject the request, but that he simply "prefers not to". Does this seem like an arbitrary distinction? Is there any difference between preferring not to do something and stating that one

³⁰³ Bartleby's second refusal is again expressed as a preference not to be hurried, but also a refusal of what is assumed to be common sense, or common usage (culture?). "Bartleby! Quick, I am waiting.' I heard a slow scrape of his chair legs on the uncarpeted floor, and soon he appeared standing at the entrance of his hermitage. 'What is wanted?' said he mildly. 'The copies, the copies,' said I hurriedly. 'We are going to examine them. There'—and I held towards him the fourth quadruplicate. 'I would prefer not to,' he said, and gently disappeared behind the screen. Melville in McCall (ed) 2002 at 14.

³⁰⁴ Later the narrator asks himself: "What added thing is there, perfectly reasonable, that he will be sure to refuse to do?" Melville in McCall (ed) 2002 at 16.

³⁰⁵ As the narrator states: "He was more a man of preferences than assumptions. I buttoned up my coat, balanced myself; advanced slowly towards him, touched his shoulder, and said, 'The time has come; you must quit this place; I am sorry for you; here is money; but you must go.'" I would prefer not to,' he replied, with his back still towards me." Melville in McCall (ed) 2002 at 16.

³⁰⁶ Melville in McCall D (ed) 2002 at 17.

will not do it? More importantly even, is there any actual difference in Bartleby's preference not to do and his stating that he will not do, as even the narrator translates his preference as "refusing point-blank"? When examining his words, the significance of his insistence on this distinction is that he does not dispose of his options. He does not merely choose the opposite of "will do" i.e. "will not do", but rather keeps his options open; he expands the possibilities put to him. Where the requests expect of him to obey or disobey, Bartleby chooses not to pick one of the options but to suspend the request and thereby defy closure. An interesting avenue is posed when the narrator explains that the two things that make Bartleby valuable is the fact that he "is always there" (which in the context is not entirely the same as saying that he is reliable) and that he has "singular confidence in his honesty". It is this notion of refusal as honesty that seems an interesting take. The narrator points out that he appreciates the fact that Bartleby does not pretend that he wants to do things when actually he prefers not to perform the task, and then expresses this preference candidly.

Bartleby's solitude is striking. It becomes clear when the reader realises that Bartleby resides in the offices, not only that, but that he never goes out for lunch or for any other reason.³⁰⁷ Moreover, Bartleby refuses to assume an identity, refuses to be categorised in order for the narrator to gain control over him. "Bartleby was one of those beings of whom nothing is ascertainable."³⁰⁸ He further also refuses to reveal anything of his history or of himself, he prefers not to disclose his association with specific character traits used to sum him up, to figure him out or to classify him. It is what Hanafin recalls when he says that refusal "calls for another politics beyond the time of the political, made not of

³⁰⁷ "Yet, thought I, it is evident enough that Bartleby has been making his home here, keeping bachelor's hall all by himself. Immediately then the thought came sweeping across me, What miserable friendlessness and loneliness are here revealed! His poverty is great; but his solitude, how horrible! Think of it. Of a Sunday, Wall Street is deserted as Petra; and every night of every day it is an emptiness". Melville in McCall (ed) 2002 at 21.

³⁰⁸ Melville in McCall (ed) 2002 at 12.

inscribed, clearly delineated subjects but of ghosts, traces, people without qualities, people without identity, whatever singularities.”³⁰⁹

This defiance of classification marks a refusal of the determined nature of the spectacle and a rediscovery of the ordinary. At the outset of these subsequent paragraphs, devoted to the explanation and expounding of the notion of the ordinary, I want to already express an uneasiness and acknowledge a tension brought about by the invocation of the ordinary. The ordinary cannot escape the spectacle, and I am aware of this while I propagate, following Ndebele, a return to the ordinary, which involves a refusal of the spectacle. I look at two main pieces of work to illustrate this idea of the ordinary: Ndebele's *Rediscovery of the Ordinary*³¹⁰ and De Certeau's *Practice of everyday life*.³¹¹ Already I detect an unease with the mentioning of the ordinary and the everyday. It seems as if these terms connote something similar to ritual, something alike to tradition, and immediately this calls to mind the concepts of habit, customs, practice, institution – of culture. And therefore it can easily turn into empty routine practices, into formality – into spectacle. However, the ordinary is not only the spectacle clothed as the mundane – let me for now be candid about the spectacle possibilities of the ordinary.

The ordinary does not entail a return to the everyday as the redemption of spectacle and the solution to or salvation of a cultural momentum. Rather it is a step, a step back, in order to create some space, and a step out of the rush and drive of the spectacle for a better vantage point and some perspective. It is not a suggested retreat to the past or a celebration of the pervasiveness of law in even the most ordinary everyday particle of life. It has a specific meaning and I elaborate on it using the mentioned texts. This relationship between the ordinary and the spectacle is an important one; not only is it unavoidable, but I suspect that it might be crucial and valuable. But in this regard it is vital to mention

³⁰⁹ Hanafin *JLS* 2004 vol 31 3 at 9.

³¹⁰ Ndebele *JSAS* 1986 12 143.

³¹¹ De Certeau M (trans Rendall S), *The Practice of Everyday Life* 1998.

Ndebele's take on the culture of spectacle: "The water will continue to flow";³¹² the spectacle will always be a presence, a residue, a spectre; it is the default mode in a culture of spectacle and therefore it is clear why the spectacle must be actively refused in order to allow for a possibility of traces of ordinary.

Ndebele uses three stories from *Staffrider* magazine to introduce his understanding of a rediscovery of the ordinary. They are all historically situated in the period after the Sharpeville killings of 16 June 1976.

These three stories remind us that the ordinary day to day lives of people should be the direct focus of political interest because they constitute the *very content* of the struggle, for the struggle involves people not abstractions. If it is a new society we seek to bring about in South Africa then that newness will be based on a direct concern with the way people actually live³¹³.

This article, written in 1986, resonates with Klare's project. Transformative constitutionalism that ultimately envisions a "new society" by bringing about a new legal society, is also concerned with the way in which people in fact live. I refer to the changing of our symbolic order and the symbolic change of our order above, and I want to emphasise here that with a return to the ordinary I mean going beyond the symbolic (not completely discarding the value of symbols and symbolic change) to investigate how the constitution can change the way people actually live. This then calls also for an ordinary approach to constitutionalism which will at the same time also acknowledge the inability and limits of law to establish this kind of change and also peek at the problematic nature of law controlling "the way people actually live".³¹⁴

Although Ndebele still identifies elements of spectacle in these three stories, sporadic participation in the spectacle tradition (such as the use of conventional symbols) in these stories in general qualify as examples of ordinary based on the

³¹² Ndebele *JSAS* 1986 12 143 at 150.

³¹³ As above.

³¹⁴ Baxi in McCorquodale (ed) 2003 at 102.

following: it parts with tradition and does not follow expectation. The stories openly acknowledge and appreciate the ordinary – there is no attempt to artificially elevate the “experience of African people all the time” to something “strange” or out of the ordinary.³¹⁵ Writing in the mode of the ordinary, for Ndebele, is moving beyond the mere activity of holding up a mirror to reality. It does not simply reflect and document, but rather offers “methods for its [reality’s] redemptive transformation”.³¹⁶ This reading of Siluma’s application of the ordinary might be a point of critique against Ndebele’s theory. The fact that he sees the method of ordinary as something that does not merely report the ordinary but that suggests solution reminds strongly of what was called an “instrumentalist approach” to transformative constitutionalism. However, read from another angle, Ndebele makes this comment specifically with reference to a call to the main character in Siluma’s story to join the struggle. Given the historical context of this comment it can also point to the empowering ability of the ordinary, the moving beyond defeatism through employing the ordinary. The ordinary moves away from mere symbolic representation and the use of reality as only a token.³¹⁷

A rediscovery of the ordinary opens up a space because it defies the obvious and therefore opens up possibilities. Just like Bartleby refuses to choose one of the obvious choices of yes or no, but instead creates options through his refusal, Ndebele’s suggestion of ordinary also creates spaces with opportunity for reflection, understanding and action in a similar way,³¹⁸ because it refuses the obvious, the easy answer, the overt assumption. Ndebele puts it very aptly when he states that “[t]he ordinary is sobering reality; it is the forcing of attention on

³¹⁵ Ndebele on the story “The Conversion” by Michael Siluma. “Traditionally this would be the moment for cheering him for he will have fulfilled the demands of spectacular justice.” Ndebele *JSAS* 1986 12 143 at 151.

³¹⁶ As above.

³¹⁷ “Where before the South African reality was a symbol of spectacular moral wrong, it is now a direct object of change.” Ndebele *JSAS* 1986 12 143 at 152.

³¹⁸ Ndebele *JSAS* 1986 12 143 at 152.

necessary detail. Paying attention to the ordinary and its methods will result in significant growth of consciousness”.³¹⁹

The ordinary is honest and piles up detail, whereas the spectacle’s aim is to mislead, if not directly then in being vague and creating an impression of greatness through abstraction and overwhelming indistinction. Writing in the ordinary is powerful. Ndebele mentions towards the end of his article a feature of the ordinary that corresponds with De Certeau’s depiction of the everyday life. Ndebele contends, in defence of a seeming lack of political consciousness of a character from the Joel Matlou story, that “people are always trying and struggling to maintain a semblance of normal social order”.³²⁰

De Certeau’s *The Practice of everyday life* propagates the shifting of focus in the studying of culture. It averts the gaze from the producer (classically the writer, or the city planner or the scientist or the lawyer) and also from the product (texts or books, cities, research and discourse or law) to the consumer of these products (the reader of the books, the pedestrian in the streets, the legal consumer). His book is dedicated to the “ordinary man”, to “a common hero, an ubiquitous character, walking in countless thousands of streets”.³²¹ He seeks to see how this ordinary individual has devised means to function and to operate within but importantly also against dominant culture.

What is immediately evident from De Certeau’s depiction of everyday life is his insistence on agency and departure from the idea that everyday living is a passive enterprise. The title already reveals this: *The practice of everyday life*. He refers to everyday living as “making do” – a creative exercise, an active participation as opposed to a docile consumption of the ordinary. He identifies the problem already in the term “consumption” and conclusively replaces it with

³¹⁹ Ndebele JSAS 1986 12 143 at 154.

³²⁰ Ndebele JSAS 1986 12 143 at 155.

³²¹ De Certeau (trans Rendall) 1998 in the introduction to the book.

"procedures of consumption" which then further changes to "tactics of consumption".³²²

His starting point is that of language and linguistics, speech and rhetoric. He contends that speakers tell stories of everyday life as they elaborate and invent on and manipulate language. In the book, ordinary life is shown as an ongoing, subconscious struggle against the institutions that compete to consume the ordinary individual. The individual struggles against these institutions, or refuses the spectacle, through "practice". He looks at cultural products and then at the parallel practice that will resist and refuse this cultural product. In this regard I focus on his discussion of spatial practices. He invokes the "rhetoric of walking" and shows how the city walker creates his own space by walking around in the city. Refusal is encapsulated in the acts of weaving and writing and now also in walking above.

Within the rigidly fixed framework of the city space, the city walker creates shifting spaces, defies the rigidity through the practice of everyday walking, and refuses the spectacular determinedness. In his chapter "Walking in the City", De Certeau looks from the 110th floor of the (late) World Trade Centre at the city walker and describes walking as an urban practice.

The ordinary practitioners of the city live "down below", below the threshold at which visibility begins. They walk – an elementary form of this experience of the city; they are walkers, whose bodies follow the thicks and thins of an urban "text" they write without being able to see it. These practitioners make use of spaces that cannot be seen.³²³

De Certeau explains that the utopian and urban concept of the city is decaying but guards against the thought that this "illness... afflicts the urban population as

³²² De Certeau (trans Rendall) 1998.

³²³ As above, at 91. Own emphasis added.

well”. Walking in the city constitutes an “individual reappropriation” within the “collective mode of administration”.³²⁴

An engagement with the everyday life involves an acknowledgement of the complexity and complicatedness of ordinary life. Law’s reductive force and spectacular simplification tries to deny this fact. Patricia Williams notes that life is complicated, and that this is “a fact of great analytical importance”, but that law “too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths”.³²⁵

3.3 Opening up possibilities for transformation: Examples of and engagements with refusal and rediscovery of the ordinary

Let me investigate the notion of refusal and ordinary in a culture of spectacle. I specifically address our “political and ethical commitments that influence our approach towards constitutionalism”.³²⁶ I look firstly at the memorial constitutionalism and also a focus on private law in constitutionalism, and then turn to history and memory as important ingredients in the memorial approach. Democracy as attending feature of constitutionalism is addressed thereafter with specific regard to a community of ordinary and a community of spectacle, and human rights follow after that. In looking at human rights I touch on the refusal of the new religion of human rights and propose to focus on the ordinary such as human suffering, compared to the spectacle of the struggle approach to human rights. I conclude by looking at the relationship between the spectacle and the ordinary and the implication thereof for our legal culture.

³²⁴ De Certeau (trans Rendall) 1998 at 91-93.

³²⁵ Williams P, *The Alchemy of Race and Rights* 1991 at 10 as quoted in Van Marle *Stell LR* 2007 18 194 at 195.

³²⁶ Klare *SAJHR* 1998 146 at 162.

3.3.1 History

Standing on tiptoe
I can just manage to see
The letter's corner

The best we can invent is not history, but merely 'imaginings of history' by fabricating metaphors.³²⁷

As already emphasised, slowness and a non-linear approach to time and history stands central to a critical approach to transformative constitutionalism and to a legal culture embedded in refusal and rediscovery of the ordinary. To envision transformative constitutionalism as a challenge and possibility, these concepts and constructs need to be re-imagined. I revisit the ideas of Harris, Van der Walt and De Vos, specifically pertaining to their value for the possibility of rediscovery of the ordinary and refusal in legal history, memory and time.

I said that the positivist approach to the archive is akin to the spectacle. I argue this by using Harris's description of the traditional or positivist approach and his four examples thereof, namely the desire for neatly packaged knowledge, a disregard for oral history, the idea that there can be one true reflection of reality and a denial of the layered nature of texts. Harris however suggests that the archive should be regarded as a view through a window, through just a sliver of window, enabling you to view only a fragment or a portion.³²⁸ This suggestions stands in contrast to the positivist view that the archive encapsulates a, or in fact the, comprehensive complete version of reality as history. Viewing accounts of history as a sliver of a sliver of a sliver is a mode of refusal because it is contra this traditional, positivist approach. It urges the archive to work against itself,

³²⁷ Brink A, "Stories of History: Reimagining the Past in Post-Apartheid Narrative" in Nuttall S and Coetzee C (eds), *Negotiating the Past: The Making of Memory in South Africa* 1998 at 42 as quoted by Harris *Archival Science* 2002 2 63 at 82.

³²⁸ Harris *Archival Science* 2002 2 63 at 65.

counter-intuitively, to resist its familiar mode of capturing and reducing, to open up and acknowledge fluidity. It involves turning away from the spectacle of the archive and turning towards the ordinary. His metaphor of the archival sliver is a direct challenge to the metaphor of the archive as a mirror.³²⁹ Harris's fourth example of the positivist paradigm involves the failure to appraise the context of the archival venture. One of the central points in his averment is that the archive is inevitably shaped by the process of archiving.³³⁰ This is an illustration of rediscovery of the ordinary, in the sense that the process is acknowledged. A rediscovery of the ordinary would therefore cover not only the inclusion of different voices but definitely also the context and situatedness of the archiving act, also accepting that words are instruments of power and therefore the capturing of history is a "construction of knowledge and an exercise of power".³³¹

Post-apartheid South Africa is marked with a myriad of narratives and an attempt to search for the meaning of these multiple stories. Harris concludes his article with a warning and acknowledgement that his suggested approach can also potentially turn into a spectacle. He notes that it is impossible to "invite in what is always beyond the limits of understanding", to "avoid the danger of speaking for these other voices" and to "avoid reinforcing marginalisation by naming the 'marginalised' as such".³³² But then he hints at the relationship and thin, shifting line between the ordinary and the spectacle, and this phrase captures the idea of refusal and a rediscovery of the ordinary with regard to our approach to history aptly:

These archivists would not be "romanticisers of otherness". They fear it as they respect it. They know that, as much as it is 'outside' it is also already 'inside' as the converse spectre of power. But ultimately, they know only that justice calls them to engage it continually,

³²⁹ As above.

³³⁰ As above.

³³¹ Harris *Archival Science* 2002 2 63 at 85.

³³² Harris *Archival Science* 2002 2 63 at 86.

honestly, and openly, without blueprint, without solution, without answers.³³³

Van der Walt sheds light on how to approach legal history as a form of refusal.³³⁴ In this specific article he contends that legal culture can be changed through critical legal history. He suggests that a good place to start with transformative constitutionalism is Klare's proposition that searching and critical examination of the legal culture and its multifaceted and diffuse influences on interpretative practices would seem to be a constitutional duty in the new dispensation. He starts by describing the transformation of social relationships as inevitable and he reiterates the tension between “the want for much needed political change and the fear of an uncertain future”.³³⁵ Through the words of Coombe he argues that it is the task of the legal historian, in a time of transformation, to “open up” and “to re-evaluate the relation of dependence between legal culture and the social structures within which the law functions.”³³⁶ In conclusion he states that as a starting point, we need to accept the interpretive turn and come to terms with the paradoxes but also the limitations of human knowledge.

Through the assertions of Harris, I argue that the archive as a way of documenting history and specifically the positivist paradigm in archival science is a form of history as spectacle. I look into critique on the grand narrative as spectacle in 2.3.1 and explain there that Van der Walt challenges the idea of a golden thread in history. He suggests that it will be more useful to look at the breaks in history and not at the continuances.³³⁷ In a lecture presented to the University of Pretoria's Faculty of Law, under the title “Reliance and denials in history”, he reflected “slightly critically” on history as a source of dramatic

³³³ As above.

³³⁴ Van der Walt *Fundamina* 2006 12 1.

³³⁵ Van der Walt *Fundamina* 2006 12 1 at 37-39.

³³⁶ Van der Walt *Fundamina* 2006 12 1 at 38.

³³⁷ “My aim is to investigate the notion of legal culture from the perspective of legal tradition in an attempt to define the status and the prospects of legal history during a time of large-scale transformation within a constitutional democracy” Van der Walt *Fundamina* 2006 12 1 at 6.

renewal, but also continuances.³³⁸ This is an expansion on the ideas in the mentioned article, particularly with regard to the tension and choices between continuances and breaks in history and also in connection with the common law, as a source of history but also of possible transformation. He indicated how a reliance in/on history results simultaneously in a denial of history, by using (relying on) Bernard Schlink's new novel *Das Wochenende*. I here recall the notion of amnesia, discussed in 2.3.1 as history as spectacle. He mentioned core values of the common law, such as sanctity of contract, which is seen as "neutral" or "inherently good". The focus on the common law is part of a rediscovery of the ordinary. It entails identifying the spectacle and refusing the continuations within South African legal culture. Through this depiction of reliances and denials, he called for the inclusion of the histories of the margins – the stories of those on the periphery of our society, the histories of our community's "others". In spectacle spurning statements he exclaimed that we must turn from a celebratory to a reflective account of history by "not relying on selections of self-congratulatory success histories" but by critically reflecting on marginal histories. Acknowledging these different narratives in history is a way of refusing history as a grand narrative.

If history is deployed not as establishing the Constitution as 'grand narrative' but with an acknowledgement of its open ended nature, it might assist in establishing the Constitution as a living document, a document that will adapt to changing circumstances in South African society.³³⁹

This possibility of ordinary in history is the glimmer of hope, the archive through a sliver of a window. It consists of a rediscovering of ordinary stories and a refusal of the grand narrative. History as refusal embraces the contingencies, open-endedness and the suspension associated with ordinary life and living, instead of viewing the constitutional as a dead and final text where history as grand narrative affirms instead of challenges this conclusiveness and closedness.

³³⁸ On the third of November 2008.

³³⁹ De Vos *SAJHR* 2001 17 1 at 2.

Harris is of the view that there must be an appreciation of the voices of our indigenous past. These stories would embody Ndebele's idea of a return to the ordinary. Chanock expresses a similar sentiment in his suggestion as to how the notion of neo-colonialism should be addressed. He says that if we do not genuinely reconsider the position of indigenous law and find a South African interpretation of international law, we risk being colonised again, this time by international conventions and ideas.³⁴⁰

History is not only about the past; on the contrary, it is just as much about the present and also about the future. This is aptly illustrated in De Vos's article through his George Orwell quotation from the novel *1984*: "Those who control the present control the past and those who control the past control the future". Counter-narratives and sub-narratives should be included.³⁴¹ Also, history poses questions as to inclusion and exclusion, because it constantly asks who and what should be part of or not part of history (present and future). It is this part of approaching history as spectacle that is problematic, this instance that sees the choices between inclusion and exclusion as unavoidable. Choosing the one or the other as inevitable part of the process of taking cognisance of history, and therefore this process is reductive, in the sense that it prevents more inclusive readings of the constitution.

Van der Walt reminds that the transformation process is an ongoing one, that it therefore "remains very important to keep debating the question whether (and when) developments can be left to "the normal" dogmatic processes of private law as a living system" and when "constitutional inspiration and impetus are required for (and need to be recognised as) the origin and indicator of the pace and scope of such development".³⁴² Transformative constitutionalism requires approaching the constitution as memorial. Above I indicate that an instrumentalist approach to transformative constitutionalism links with the spectacle, and the

³⁴⁰ Chanock 2001 at 537.

³⁴¹ Harris *Archival Science* 2002 2 63 at 84.

³⁴² Van der Walt *TSAR* 2005 684.

critical approach on the other hand can be associated with one of refusal and of the ordinary.³⁴³ The constitution as memorial is that historically self-conscious constitution Klare refers to – self-conscious in such a way that it does not remember history for the sake of remembering the past but also to be reminded of the future, of the promise of the constitution.³⁴⁴ The constitution as memorial has at its core the fact that one cannot address the past without visiting it. History stands central to the notion of memorial constitutionalism. In light of this I proceed to discuss how constitutionalism can be approached as refusal and rediscovery of the ordinary.

3.3.2 Constitutionalism

On a con-court tour
Through the ground level window
I see small school shoes

The image of the archive as applied above encapsulates approaches to history and the constitution.³⁴⁵ I discussed an instrumentalist approach to transformative constitutionalism in 2.3.1, and the Constitution as monument as possible examples of approaching constitutionalism as spectacle. I now continue to look at transformative constitutionalism, and specifically at what can be identified as a critical approach to transformative constitutionalism. Furthermore I also investigate the Constitution as memorial as a way of looking at constitutionalism as refusal and rediscovery of the ordinary.

³⁴³ See 2.3.2 above.

³⁴⁴ History for the sake of history, as a form of token heed paid to heroes and sufferers that result in a shallow spectacle.

³⁴⁵ “With reference to the meaning of archive as the place where things commence, the place from which order is given and the place that contains memory, an analogy can be made between the archive and constitution.” Van Marle *SAPL* 2004 19 605 at 609.

While an instrumentalist approach would look at transformation as an event, something that needs to be attained and which can be attained, a critical approach engages more sceptically with the possibility of transformation, capturing its possibility in the impossibility. It views transformation as a process and not an event and as a constitutive route as opposed to an end or a destination. A critical approach to transformative constitutionalism is based on refusal and rediscovery of the ordinary. It involves the acknowledgement of the political nature of the project of transformative constitutionalism and moves away from a mere instrumental application of the Constitution in order to achieve societal change. The focus is rather on the power relations and inherent structures and constructions in society, what Klare would call a politicised account of the rule of law. In order to explain this critical approach as a form of refusal, I only select examples from a few proponents of this approach to illustrate how his approach differs in its approach to time and to the limits of law.

The critical approach to constitutionalism and also to transformative constitutionalism departs largely from the instrumentalist approach in the sense that it acknowledges and critically interrogates and investigates law's inability and law's non-superiority. For this reason, I associate the critical approach with the notion of refusal. Botha and Van der Walt³⁴⁶ for example are not very optimistic about transformation achieved up to now when they state that "bureaucratic inefficiency, corruption, high incidences of crime, the government's failure in many areas to deliver basic services to the mass of the people, the widening gap between the rich and the poor, the lack of a strong political opposition, and the increasingly authoritarian overtones of those in government, make one wonder how deep the transformation of South African society really goes."³⁴⁷ They express transformation as a battle, and claim that "many more battles will have to be fought" to realise the transformative and egalitarian aspirations of the

³⁴⁶ Van der Walt J and Botha H, "Democracy and rRights in South Africa: Beyond a Constitutional Culture of Justification" *Constellations* 2000 7 3 341.

³⁴⁷ Van der Walt and Botha *Constellations* 2000 7 3 341 at 341.

constitution.³⁴⁸ They focus specifically on the constitution instituting a culture of justification. Although the necessity of a huge redistribution of wealth for durable peace, security and stability is beyond debate, they ask “whether such a general redistribution can truly achieve justice”.³⁴⁹ A general redistribution of wealth also appears to be just when one considers the brutal racial politics that lead to this racial division between rich and poor. However, the question of whether such a general redistribution can truly achieve justice must be considered more closely. They believe that a “radical regard for the acknowledgement of unjust sacrifice, evident in the principles of administrative justice, could transform the essential dynamics of social co-existence”³⁵⁰ and would fight the battle of transformative constitutionalism.

Van Marle acknowledges the limits of law and difficulty of transformative constitutionalism in her description of it as a challenge posed to all legal scholars. She supports Klare's argument that false consciousness results in perceiving your own culture as natural or necessary – which in turn causes the continuation in the conservative legal culture that Klare claims stifles transformation.³⁵¹ She further expresses her doubt that legal scholars have taken up this challenge and is sceptical about their ability to do so. By referring to Derrida's notion of “playing with both hands”, she explains that along with the attempt to attain transformative constitutionalism should also be the realisation that it is unattainable, to acknowledge the limits of law,³⁵² without being nihilistic and defeatist in this acknowledgement, not to “play with both hands” and to recognise the possibility

³⁴⁸ As above.

³⁴⁹ Van der Walt and Botha *Constellations* 2000 7 3 341 at 356.

³⁵⁰ Van der Walt and Botha *Constellations* 2000 7 3 341 at 359.

³⁵¹ “Karl Klare... challenges legal scholars, lawyers and judges to take up the challenge of a transformative constitutionalism. He concedes that this will be a difficult task given the prevalent conservative legal culture in South Africa. He asks for participants in a legal culture to recognise that their legal practices are situated, in other words that they are not natural and fixed. He urges legal scholars critically to examine practices under a new dispensation.” Van Marle, K “Art, Democracy and Resistance: A Response to Professor Heyns.” *PULP Fiction* 2005.

³⁵² Van Marle *SALJ* 2003 3 549. With reference to Christodoulidis stating that law is too limited to contain our aspirations for politics and community.

within the impossibility. The notion of refusal is also closely linked to that of slowness and the constitution as memorial requires this approach to time.³⁵³

In following an approach of slowness to law and legal interpretation, an openness to traces and other ways of remembering, imagining and justifying could come to the fore. Such an approach could offer a way in which justice – although it can never be done, nor be seen to be done – and in our responsibility of acting justly can be reflected on in ways different from mere rule-bound justice, and the suffering of the other can become more prominent.³⁵⁴

Slowness is the “considering of detail and particularity”,³⁵⁵ it is attentiveness and a tentativeness, it is taking greater care in order to try to widen law’s limits. In the words of Ndebele, it provides the time to “pile up the details”. It does however not deny law’s violence and reductive force. Like the ordinary shows up the spectacle to itself, slowness shows up “the limits of speedy institutionalised and legalised processes”.³⁵⁶ With reference to events in art Van Marle show that slowness is concerned with material objects and a materialist approach to memory in which linear and chronological time are not significant. She further argues for a critical approach, because it will “soften” the strict distinction between law and politics and law and morality and will focus on the “reality” of legal interpretation. Critical approaches also accept the tension between freedom and constraint:

...there are South African scholars who presently attempt to play with both hands, who continuously attempt to broaden the scope of law, to stretch interpretation while also being aware of the ethical concern of the limit, the reduction, the violence.³⁵⁷ While playing with both hands a scholar experiencing this tension and living this paradox would say

³⁵³ “A deconstructive approach [to interpreting legal texts] embraces both a disruption of chronological time – and accordingly multiple notions of truth and fluidity of meanings – and a slowness or dwelling (strategy of delay). The ethical aim of such an approach is not to deny the reductiveness and the limits of law, but rather to expose the violence inherent in institutional and legalistic approaches.” Van Marle *SAJHR* 2003 19 239 at 250.

³⁵⁴ Van Marle *SAJHR* 2003 19 239 at 243.

³⁵⁵ Van Marle *SAJHR* 2003 19 239 at 246.

³⁵⁶ Van Marle *SAJHR* 2003 19 239 at 241.

³⁵⁷ Mentions Van der Walt, Botha and Le Roux.

to the constitutional court judges that they haven't lived up to Klare's challenge while knowing that they never really can.³⁵⁸

A similar tension is displayed in the relationship between spectacular and ordinary constitutionalism.³⁵⁹ If the Constitution as monument, as spectacle, as celebration, professes the Constitution to be a “moral high ground of justice all by itself”, the constitution as memorial, as ordinary, as a refusal of spectacle would be somewhat restrained and less carnivalistic. It would serve as a reminder of the constitution’s pledge of social justice. Monuments honour, admire and celebrate obvious important figures or events in history but memorials commemorate mistakes, faults, ordinary people and even anti-heroes. Memorials do not only tell the success story, do not only proclaim the miracle, that which is evident with first glance, but takes time to investigate beyond the surface, to adopt a slower approach to history and events and to look at the everyday which is filled with mishaps and misfortunes.

Central to the notion of the constitution as memorial is the term “subsidiarity”.³⁶⁰ This term fits uneasily with the idea of a supreme constitution; a rule of law, a super-ordinate constitutionalism, and indeed it is nowhere to be found among the munificent terms and value statements of the constitution. Du Plessis explains this term and notes that the concept features in constitutions such as that of Germany and Britain. It entails that a super-ordinate body or community should not handle matters that a smaller or subordinate body or community can deal with; this emphasises the restrained mode of memorial constitutionalism. Not only does this subsidiarity lead to a balance between organs of state, but also secures ownership of the constitution. It is especially this second aspect that illustrates the link with memorial to refusal and ordinary. In this sense the Constitution is not the sole property of the grand constitutional court and

³⁵⁸ Van Marle *SALJ* 2003 3 549 at 556. An important element that this approach adds is that transformative constitutionalism also affects legal scholars personally.

³⁵⁹ “A ‘good’ democrat and constitutionalist, remembering the tyranny of the past, cannot be cynical about the monumental achievements under both South Africa’s supreme constitutions so far. She also dares not wallow in them” Du Plessis *Stell LR* 2000 11 385 at 388.

³⁶⁰ Supplementarity, auxiliarity, secondarity, ancillarity. Du Plessis *Stell LR* 2000 11 385 at 388.

celebrated judges, it is in the hands of ordinary individuals, organisations and other groups, branches and levels of the legislature, judiciary and executive bodies, all who exercise public power and who together form a community of constitutional interpreters. To view the Constitution as memorial therefore realises the words in the Constitution which states that the Constitution belongs to all of us.

The association with a memorial as a site of mourning brings us back to the idea of refusal as an event, an event coupled with mourning because of the inevitable loss caused by the event. Where monumental constitutionalism entailed a celebration and commemoration, the memorial involves remembrance and even grief. Danie Goosen explains that the symbolic order suffers a true loss during the event. He goes as far as to explain that reminding us about this break, this interruption between language and *sein*, is the ethic-political dimension of deconstruction.³⁶¹ This exercise in memory is aimed at reminding us of the inability of symbolic orders to overcome the loss with regard to reality, in spite of attempts to simulate or pretend the fact that it can be overcome. This is where a jurisprudence of generosity arises,³⁶² which entails in other words to have an openness to the event. Goosen reiterates that a politics of remembering entails a generosity to the event.³⁶³ He highlights the difference between the “what” of the event and the “that” of the event. A generosity to the event entails a generosity to the *quid* – the that of the event and not to the *quod* – the what of the event, in other words an openness to the fact that the event occurs. The work of mourning therefore stands central to the notion of the event, which is coupled with real loss.

Above, in the part on constitutionalism, I refer to the ideas of Fitzpatrick and how they correspond with Chanock’s. I argue that both writers’ warnings against neo-

³⁶¹ Goosen D “Verlies, Rou en Affirmasie: Dekonstruksie en die Gebeure” *Fragmente* 1998 54 at 57. The documentary film *Derrida*, directed by Kirby Amy and Ziering Kofman, released in January 2003, consists of various clips that try to combine Derrida’s ordinary day to day life with his ideas, lectures and seminars. One clip records him to explain deconstruction as an exercise in memory, which only reminds of what already lies within structures, such as law.

³⁶² See again Van Marle *Stell LR* 2007 18 194.

³⁶³ Goosen *Fragmente* 1998 54 at 58.

colonialism and neo-formalism (Chanock's terms) and new-constitutionalism (Fitzpatrick's term) represent cautions against the spectacle. Fitzpatrick gives us an indication of how this spectacle should be refused. He starts by unsettling distinctions between the national and the international, written constitutions and unwritten constitutions, and public law and private law, in order to reconceive what "typically goes in a constitution and what typically does not".³⁶⁴ Because, he states, if a constitution relates to what a people is or is becoming, then the way we understand constitutionalism presently is growing increasingly inadequate. Constitutions are at the same time constituting and also constitutive. Where the old constitutionalism was only vertical and linked to the sovereign and the nation state, some boundaries had to open, and hence the emergence of a new constitutionalism, where a relationship with the global is imperative. Even though he outlines some "imperatives" it is not clear throughout whether Fitzpatrick is in favour of this new-constitutionalism or whether he condemns it. He rather observes it. In this sense, it is a valuable appraisal for me because it recognises the haunting character of the spectacle.

Part of the Constitution as everyday should entail that ordinary people feel that the Constitution is theirs, and constitutional adjudication should confirm this belief.³⁶⁵ I discuss the overemphasis placed on public law in constitutionalism in 2.3.2. Constitutionalism as rediscovery of the ordinary requires an examination of private law. The law of contract and the law of delict, family law, and all the other day to day private matters that is heard in the course of everyday life, should be scrutinised against the Constitution in the spirit of critical transformative constitutionalism. In other works Van der Walt investigates the effect of the Constitution on private law from Klare's dynamic perspective of transformative

³⁶⁴ Fitzpatrick *Democracy and Development* 2006 10 2 at 1.

³⁶⁵ "Sound, contemporary constitutional adjudication has to ratify the sense of the contemporary people at large that it's their constitution (not the judges') that their judicial officers are applying to their lives and affairs." Michelman F, "Constitutional Authorship, 'Solomonic Solutions', and the 'Unoriginalist Mode of Constitutional Interpretation'" 1998 *Acta Juridica* 208 at 232.

constitutionalism.³⁶⁶ Central to the focus on private law is the application debate. He sets out the debate around direct and indirect horizontal application:

However they still insisted that horizontal application was a vital requirement for the success of the transformative constitution. It could be said therefore that arguments in favour of horizontal application were always backed up by the aspirations of transformative constitutionalism.³⁶⁷

The application clause in the eyes of Davis should be approached through a process of “mapping”. This notion echoes an approach of refusal and rediscovery. Davis acquires the term from Roberto Ungerer and explains it by quoting Ungerer:

Mapping is the attempt to describe in detail the legally defined institutional micro-structure of society in relation to its legally articulated ideals. Call the second moment of this analytical practice criticism... Its task is to explore the interplay between the detailed institutional arrangements of society as represented in law...³⁶⁸

Section 8(2) requires a refusal, a criticism of current institutional microstructures by describing it in detail; “piling up the detail” as Ndebele would say. Horizontality problematises traditional notions of sovereignty. In this way the memorial aims of subsidiarity and the consequent ownership of the Constitution can be met.

Aware of the fact that the Constitution cannot really “belong” to everyone, in the sense of addressing everyone’s needs or fulfilling the promise anyone might find in it, I detect already the potential of this ordinary element mutating into a spectacle. With ownership or belonging in terms of the Constitution as memorial and refusal, it is not possession by means of clasping the values of the Constitution like sand in the hand, which will just run out, but rather a suspended

³⁶⁶ Van der Walt *TSAR* 2005 655 at 656.

³⁶⁷ Van der Walt *TSAR* 2005 655 at 663.

³⁶⁸ For my argument, “second” does not connote temporally second or after the moment of describing, but either refers to an “also” or “additional” moment, which is simultaneously present. Unger R “Legal Analysis as Institutional Imagination” *Modern LR* 1996 59 377 at 387.

possession. The primary question is not how the ordinary person can utilise the Constitution in their everyday needs; rather memorial constitutionalism coupled with subsidiarity asks for an approach to the constitution, a certain culture of constitutionalism that will grant ownership of the Constitution to ordinary individuals, that will give a voice to singularities.

The hopes and potentiality of transformative constitutionalism can only be met if “the Constitution as monument does not overpower the Constitution as memorial, but also when the Constitution as memorial does not enervate the Constitution as monument”.³⁶⁹ Seen in this way, the spectacle is not only unavoidably or inevitably part, incorporated, always already present in the ordinary but it seems as if it is also useful or desirable. Du Plessis argues that the monumental provides the “inspiration to come to terms with an undecided future”.³⁷⁰ In thinking about the link, relationship and tension between ordinary and spectacle in constitutionalism, it is important to pay heed to Du Plessis’s statement:

There is no predetermined recipe for rescuing the constitution as monument from the constitution as memorial and *vice versa*.... An alertness to the perennial antithesis of constitutional monumentalism and memorialism neither obviates nor resolves this contradiction in a higher synthesis of dialectical opposites. It reminds us, however, not only that the antithetical dimensions of the constitution as memory can coexist, but also that they must be honoured.³⁷¹

The borderline between monumental and memorial as with ordinary and spectacle is a thin and shifting line where memorial can easily fall over into monumental and the other way around. Again I can ask whether this is an easy assimilation, a sidestepping of the question to choose between monument and memorial, a fence sitting or a too quick answer, or ultimately something that renders refusal feeble in the sense that the spectacle can never be completely

³⁶⁹ Du Plessis *Stell LR* 2000 11 385 at 390.

³⁷⁰ Du Plessis *Stell LR* 2000 11 385 at 393.

³⁷¹ Du Plessis *Stell LR* 2000 11 385 at 393.

refused and turns the rediscovery of the ordinary into a meagre concept because one can never entirely return or rediscover the ordinary. And again I would have to answer that refusal is not pure negation, that refusal as an event, as denegation opens up possibilities, refusal is the borderline and therefore creates the potentiality of both ordinary and spectacle, both memorial and monumental.

The constitution's relationship to time is closely tied with its ambitions. Davis concludes his article with invoking the aspirations of the constitution to "look forward to a society in the 'becoming' but states that instead of fulfilling this vision to "locate the constitutional text in the future, it has constrained the interpretation thereof by the exclusive use of the conceptual tools of the past". His reference to community as linked to the notion of horizontality brings me to another attribute of constitutionalism. One of the attending features of South Africa's constitutionalism is democracy.

3.3.3 Democracy

Platform Announcement:
our 6:10 train is delayed
The stranger sighs too

As I indicate in chapter one, our new democratic order carried the hope that democracy would be a deep form of participation in society and not only a surface involvement through voting every few years, albeit voting in very exciting elections. Where I explain the relation representative democracy bears to spectacle, I would like to call for a refusal of that spectacle and a rediscovery of something slower, something fuller than mere representation. Together with other South African scholars, my plea is for a deep form of democracy that focuses on the everyday in the sense of eradicating the liberal distinction between the public and private spheres and for democracy that does not merely

have a mediating function but constitutive value and for democracy that has participation, conversation, contestation, refusal and rediscovery at its core. In trying to articulate this democracy, I return to the works of Le Roux, Van Marle, Hanafin and Botha.

“Like meat and poison, democracy has a way of meaning different things to different people.”³⁷² Roux uses this quote, and at face value it might merely seem like a suitable remark to illustrate the familiar notion that there exist many concepts and understandings of democracy. The constitution certainly provides us with different notions and possibilities of democracy, as I explain above. The quote can also allude to the fact that the concept of democracy has changed through the ages or even hint at well-known ideas of indeterminacy.³⁷³ This quote for me hints however at a deeper significance and I read it to form the basis of an exploration of the nature of democracy, associated with law and constitutionalism. Reference to “poison” can also be found in the works of Derrida.³⁷⁴ He points to the “what” word – *pharmakon* – which can mean both medicine and poison. Admittedly he states that the context of the word will give an indication of its specific situated meaning, but even so, there is the possibility of this dual meaning. Expanding on this thought it shows the autoimmunity of law and both its medicinal and always already poisonous effect. This can expose law’s autoimmune reaction and democracy’s attempt to heal or remedy or counter-authoritarianism ending up in another (often worse) mutated form of authoritarianism, or just basically its inability to address it.³⁷⁵ I acknowledge this autoimmunity, and therefore now wander off in search of some form of democracy towards and away from. Moving towards a re-imagined community with a reconceived democracy will also entail moving away from, or refusing

³⁷² Plato 1974 as quoted in Roux in Woolman S et al (eds) 2006.

³⁷³ At first glance, the quote might also appear to be a classic instance of confusing translation.

³⁷⁴ In his reading of *Phaedrus*, Derrida focuses on the “*pharmakon*”. *Pharmakon* can mean philtre, drug, recipe, substance, charm, medicine, spell, artificial colour, or paint. It therefore carries the possibility of remedy and poison, good and bad, true and false, positive and negative, interior and exterior, and for purposes of this research ordinary and spectacle. Derrida D, (trans Johnson B) *Dissemination* 1981 at 130.

³⁷⁵ Goosen *Fragmente* 1998 54 at endnote 16 refers to Derrida D (trans Johnson B), “Plato’s Pharmacy” in *Dissemination* 1981.

familiar notions of democracy in order to open up the possibility of another democracy and therefore another community.

If a classic liberal construal of democracy ends up in spectacle, my search is for an “alternative normative vision”.³⁷⁶ Klare indicates the possibility of this shift by referring to the “post-liberal” elements of the constitution. He deliberately steers clear of “Civic Republican” or “socio-democratic” – because these terms already invoke a specific political rubric and carry at least some “baggage” with them. Consequently, he settles for a post-liberal reading. Botha also aims to move in a direction away from the liberal notion of democracy and does indeed, as many other scholars, choose civic republicanism to drive this movement.³⁷⁷ He explains how deliberation can aid in respecting other individuals’ viewpoints, how reflection and consideration of what the public good is can result in self-rule and how the interest of the community supercedes that of the individual.³⁷⁸

In light of the scepticism on republican democracy that I explained in 2.3.3 through the work of Van Marle, drawing on Christodoulidis, I investigate other ways of re-imagining community. This community is a community of refusal, a community that rediscovers the ordinary. This implies that an attempt to turn away from democracy as spectacle is also a departure from the individual as spectator in a community. In this investigation I focus on construals of community that can be associated with the ordinary and refusal. Even though I deal with them separately – first with the “ordinary community” and then the “refusing community” – it still forms part of the same idea. As I indicate above, the ordinary and refusal are not two dichotomous notions but rather summon and incorporate each other.

³⁷⁶ Botha *Codicillus* 1999 23 at 24.

³⁷⁷ See also Michelman F, “Law’s Republic” *Yale LJ* 1988 97 1493. It is mainly this work of Michelman that Van Marle uses in her chapter. The book in which the chapter appears is a tribute to Frank Michelman. He also suggest a republican constitutionalism; I investigate the problematique around this approach from the angle of Van Marle’s chapter.

³⁷⁸ Botha *Codicillus* 1999 23.

I mention the two conceptions of community contrasted by Frug above. The one entails a romanticised perception and the other imitates a community living together in an inner city. It is this second notion of community that illustrates a community that refuses the spectacle and rediscovers the ordinary. If we can meet De Certeau's city walker on a street corner now, we will recall how his practice of the everyday opens up possibilities and turns his urban environment into a space of refusal. Similarly this inner-city community presents the possibility of a democracy of refusal and the everyday, or as Le Roux calls it: a street democracy.³⁷⁹ Frug's understanding of the inner city community is one that is not characterised by feelings of "unanimity" and "unity", but rather the "desire to share one's life with strangers and strangeness, with the in-assimilable, even with the intolerable".³⁸⁰ This notion echoes the characteristics of the ordinary: difference, complexity and strangeness.³⁸¹ Frug's conception is inspired by the work of Iris Marion Young. Young in turn draws on the work of Hannah Arendt with regard to her attempts to find a republican alternative to typical liberal democracy. I focus my attention on how her ideas have been expanded by Young.³⁸²

³⁷⁹ Le Roux *SAPL* 2001 16 139.

³⁸⁰ Frug G, "The Geography of Community" *Stanford LR* 1996 48 1047 as explained in Le Roux W, "From Acropolis to Metropolis: The New Constitutional Building" *SAPL* 2001 16 139 at 153.

³⁸¹ Difference: Ndebele *JSAS* 1986 12 143, complexity: Williams 1991 at 10, strangeness (unpredictable): Van Marle *Stell LR* 2007 18 194 at 195.

³⁸² To quote Le Roux: "Arendt refers to this process (Socratic philosophers tried to cure Greek politics of its fragility by replacing the logic of the public world and politics...with the logic of this private world) as the decline of politics and the rise of the social. The public sphere, in which the necessities of life were left behind and citizens could immortalise and individualise themselves through great Homeric like words and extraordinary deeds, was overtaken by everyday social concerns." Le Roux *SAPL* 2001 16 139 at 144. In the sense that this argument also entails that "politics was overtaken by an instrumentalised logic". I acknowledge that Arendt's argument is much more complex and nuanced than the mere appearance of words like "immortalise", "extraordinary" and the like which would cause a quick read to categorise it in the promotion of spectacle. So we arrive once more at the place where we lingered before, because it might seem like this argument contradicts the "ordinary". However, my understanding of ordinary is also not "instrumental logic", which is more at home with ideas on "spectacle". But as I have indicated, to avoid this particularly sticky (apparent) contradiction I proceed to how these ideas of Arendt have been incorporated by Young.

She starts at Arendt's conception of judgment, and specifically reflective judgment.³⁸³ Expanding on this idea, Young shows that "good reflective judgments can only result from a public dialogue" given that for those involved in the dialogue, their "embodiment and particularity... are recognised with wonder, and maintained with respect".³⁸⁴ She criticises liberalism and communitarianism for what I identify as elements of the spectacle³⁸⁵ – communitarianism because in "the communitarian community people cease to be other and not understood".³⁸⁶ Alternatively, she insists on "communicative democracy" which translates into Le Roux's "street democracy". This includes "greetings, rhetoric and storytelling as legitimate dimensions of public dialogue". This already illustrates the heed that this vision of democracy pays to the everyday.³⁸⁷ A further aspect of communicative democracy is that it can only take place in the habitat of good reflective judgment.³⁸⁸

To sketch the community of refusal I rediscover Bartleby. I recall how Bartleby constantly defies and escapes definition and how he cannot be placed or

³⁸³ Taken from the Kantian notion that judgments of beauty or taste are of a reflective nature and therefore only happens when there is a real or an imagined dialogue with others – a dialogue that reflects – and therefore it needs the presence of other people.

³⁸⁴ Young I, "City Life and Difference" in Kasinitz P (ed), *Metropolis: Centre and Symbol of our Times* 1995 260 as explained in Le Roux *SAPL* 2001 16 139 at 147-149. This calls to mind another very interesting notion of community, namely the social series, as formulated in Young IM, "Gender as Seriality, Thinking About Women as a Social Collective" *Signs* 1994 3 713 and explained in Vanessa Munro's *Munro VE*, "Resemblances of Identity: Ludwig Wittgenstein and Contemporary Feminist Legal Theory" *Res Publica* 2006 12 137. This article of hers is mainly concerned with formulating an alternative to gender essentialism and is valuable in this context for the attention given to the notion of "group". To illustrate her argument for gender as seriality, Young draws on an example by Jean Paul Sartre that people at a bus stop would create a social series. She explains the difference between a social series and a social group by pointing out that the commuters are a social series in the sense that they are minimally related because they are all waiting for the bus, but apart from this, they do not necessarily share anything else. However, the series can assemble around a certain project and transform into a social group – this would be the case if the bus did not arrive and the commuters were then to share a taxi. But as quickly as the series transforms into a group – it can revert to a series. This image of commuters waiting for a bus and a fleeting moment of solidarity and a fragile form of community captures something of the "temporary being together" that Van Marle mentions in *Van Marle Stell LR* 2007 18 194 at 204. She refers to an Auster film – *Smoke* – in which the characters only come together while smoking and links this to Hanafin's comment on the reaction of the citizens of New York to the 2003 blackout as a "temporary coming together, a provisional friendship created in times of adversity ... an inoperative community in an inoperative city" in Hanafin, *JLS* 2004 31 3 at 14.

³⁸⁵ Le Roux *SAPL* 2001 139 at 149.

³⁸⁶ This illustrates the spectacle's mainstreaming, its accessibility and emphasis on that which is easy and efficient.

³⁸⁷ Reflective judgment reminds me of Christodoulidis's critique of the law's inability to be reflexive and the impossibility of community.

³⁸⁸ Habitat, because reflective judgment is both needed and made possible by the street.

captured. I find this analogous with what Hanafin refers to, in reference to Agamben, as a “non-community”. This entails another community that would not be tied or bound by the “law’s word” or a community without identity.³⁸⁹ Furthermore it is a formless community, which constantly interrupts the “grounded commonality of the state”. By encompassing “groundlessness” and “non-identity”, this brings the possibility of a community beyond the juridico-political state form.³⁹⁰ Through the work of Fitzpatrick, I also gather this antithesis, namely that the only way that a community can be constituted is through an insistence on singularity.³⁹¹ “This is an event of being in common as different, of being together as apart. The poetic nature of Blanchot’s gesture is to be seen in its comparing of singular beings. It is making that is simultaneously unmaking.”³⁹²

At the beginning of this discussion on an alternative vision of democracy I referred to Derrida’s juxtaposing of the two meanings of *pharmakon*. Let me now return to Derrida on democracy, as illuminated in the Goosen article.³⁹³ The argument goes that just as a symbolic order can be generous, or has a generosity toward the event, democracies must be open to the “democracy to come”.³⁹⁴ In this it is evident that the “that of the event” corresponds with the “democracy to come”. I argue above that refusal can be seen as an event, in the sense that it involves to be overcome by the unexpected and singular other that opens up possibilities. Because democracy will always already contain some form of force against the unique and singular, the democracy to come never assumes a permanency or a final presence. Instead, it is always something that should happen again and something that should be rediscovered. If justice lies in the hope that the voice of the unique can be heard at the other side of symbolic orders, then the democracy to come contains this hope or this justice.

³⁸⁹ Hanafin, *JLS* 2004 31 3 at 6.

³⁹⁰ As above.

³⁹¹ Fitzpatrick, *Law, Democracy and Development: Democracy and Development* 2006 10 2 at 6.

³⁹² Hanafin, *JLS* 2004 31 3 at 10.

³⁹³ Goosen *Fragments* 1998 1 54.

³⁹⁴ As above at 56-59.

According to this consideration, the democracy to come exists specifically in the yet to come, the keeping open of boundaries and limits which is the generosity towards the event. This is where refusal lies, in the limit and on the borderline. The same can be detected in approaching rights by refusing the spectacle and rediscovering the ordinary. This vision of community is closer to a deep form of democracy, as opposed to a shallow or surface democracy of the spectacle. It is an approach that might assist in viewing community and its exercising of self-rule more than merely the collection of the expression of some collective interest or of individual rights. That is why this approach to democracy requires a re-imagining of rights as well.

3.3.4 Rights

The hindu woman's
Roof: a human rights poster
In roman letters

In 2.3.4 I discuss Nedelsky's critique of rights talk, as rights being undesirably individualistic, obfuscating the real political issues and serving to alienate and distance people from one another. Seeing rights as relationships is the beginning of rediscovering the ordinary in rights in general. Picking up on this line of thought, Baxi also proposes a rethinking of human rights with specific focus on actual (ordinary) human suffering. I argue above that his view on the proliferation of rights coincides with human rights as a spectacle. In this chapter, I develop these arguments towards rights, in general and also human rights, as refusal of spectacle and rediscovering of the ordinary.

To view rights as relationships requires a consideration of the question of what it takes to bring about relationships that will result in a free and democratic society. It extends beyond rhetoric and beyond the spectacle of "rights talk". Through this

suggestion Nedelsky does not aim to get rid of the basic contention that democracy can threaten individual rights, but rather proposes that the terms “democracy” and “individual rights” and the tension between them should be revisited, reconsidered and rediscovered. She continues to indicate that the “neat characterisation between democracy and individual rights is not adequate for the actual problem”. In other words, she stands critical towards the notion of rights as natural and pre-political entitlements, which no government should be able to infringe on. Her argument is an attempt to move away from rights as abstract, reified entitlements that can trump one another, towards rights as relationships.³⁹⁵ In her discussion of “rights talk”, she refers to various debates on whether the term “rights” should be used at all. She contends that it is useful to use the term, hinting at the inescapability and value of form, symbolism and terminology.³⁹⁶

This process requires actual participation and a return to the ordinary. Nedelsky starts by probing at the history of human rights. She describes how rights like equality have changed through the years and mentions the example of how the restriction on women’s legal rights and actual opportunities has changed from a position where this restriction was seen as in accordance to the principle of equality. She also mentions legislation such as minimum wages, which would have been unthinkable a few decades ago. This trip down memory lane is not to show how far we, or rights for that matter, have progressed,³⁹⁷ but instead to take account of the “depth of the ongoing disagreement” and contestation on what rights mean. It stands in contrast to rights as spectacle and human rights in terms of the struggle approach. In Heyns’s article, ordinary people only get a mention on the second last page: “At various points in history heroes as well as ordinary people put their feet down, and created new values through their struggles”.³⁹⁸

Apart from this, the struggle approach to human rights displays its spectacular nature through the fact that it involves symbolic participation and a form of

³⁹⁵ Spectacle.

³⁹⁶ These can potentially be turned into a spectacle as opposed to substance or real value and meaning.

³⁹⁷ This exercise can potentially be a form of congratulatory spectacle – as I discuss above.

³⁹⁸ Heyns in Soeteman (ed) 2001 at 188.

struggle mathematics, that it is reactionary and employs a liberal language of rights. Symbolic participation in the struggle for human rights seems sufficient to render them “group rights or people's rights in that they are the products of a collective effort”. Opposed to this and adding to these ideas around rights as natural entitlements and human rights, Fitzpatrick, in an all but celebratory mode, recalls the constitutional pronouncements generated by the French Revolution. In referring to the French people and the constitutional terms, he states: “this is a citizenry politically reduced by the very rights that were to empower it, rights that the Declaration announced as ‘natural’ and ‘sacred’ and rights that the Constitution rendered ‘natural’ and ‘fundamental’”.³⁹⁹

In 2.3.4 I show the link between liberalism and spectacle and argue that liberal concepts of rights are a spectacle. Liberal conceptions of rights view them as limits on democracy, or as boundaries, but Nedelsky offers an alternative and founds it on the re-assessment of “autonomy”.⁴⁰⁰ She emphasises that relationships enables autonomy and not separation. Autonomy is ensured by interdependence that “becomes the central fact of political life, not an issue to be shunted to the periphery”. She continues: “The whole conception of the relation between the individual and the collective shift: we recognise that the collective is a source as well as a threat to it.”⁴⁰¹

Also moving away from the liberal idea of rights and specifically human rights as natural entitlements, Douzinas states that “[h]uman rights do not belong to humans and do not follow the dictates of humanity”, instead, he says that they “construct humans”.⁴⁰² This theory revolves around the idea that legal subjectivity and rights are not natural, but are created and situated. This is derived from speculative theory of, among others, Georg Wilhelm Friedrich Hegel. Because legal subjectivity is attained through the recognition by other subjects, an

³⁹⁹ Fitzpatrick *Law, Democracy and Development: Democracy and Development* 2006 10 2 at 14.

⁴⁰⁰ Nedelsky 1993 1 1 at 7.

⁴⁰¹ Nedelsky 1993 1 1 at 8.

⁴⁰² Douzinas 2007 at 68.

individual becomes a subject through social relations, which is done by creating rights. This argument sounds circular, because it is circular. Douzinas continues, and relies on Lacanian theory to derive at the assertion that individuals can actualise their freedom through rights and subjectivity. For this reason individuals “desire” social relations with others.

Baxi questions the claim that human rights constitute some form of sociolect, in the form of “a common language of humanity”.⁴⁰³ On the other hand he admits that the potential of human rights language lies in the norms that empower people’s movements and also in the fact that it sanctions diligent policy makers to question political practices, even though it cannot radically ameliorate “here-and-now-suffering”.⁴⁰⁴ Baxi takes for granted the notion that human rights’ historical goal is to provide human suffering with a voice, and then he warns that the only hope that there is for the future of human rights is to recover “the sense and experience of human anguish”.⁴⁰⁵ He uses the word “recovery”, because the historical mission or the initial aim has been lost in the production, the pervasiveness, the glitter and lights of contemporary human rights. This anguish must be rediscovered. He continues that the future of human rights depends on how “imaginatively” we can deal with globalisation and other international trends. Through this invocation of the imagination, Baxi propagates a non-technocratic approach. He points out that except in cases where it suits the current order and therefore is useful to rely on pain and suffering, these languages of pain and suffering are not generally incorporated in human rights discourse. In stark contrast to the absence of pain and suffering in human rights, it is found in and directly linked to people’s struggles against cruel regimes. I am reminded of Heyns’s coin with two sides, and therefore know that notions of suffering and struggle can be problematised. Baxi mentions specifically the cosmology attached to human suffering in the religious tradition, for example found in the

⁴⁰³ Baxi in McCorquodale (ed), 2003. at 159.

⁴⁰⁴ “Human rights language are perhaps all that we have to interrogate the barbarism of power, even when these remain inadequate to humanise fully the barbaric practices of power.” Baxi in McCorquodale (ed) 2003 at 160.

⁴⁰⁵ Baxi in McCorquodale (ed) 2003 at 161.

work of Aquinas, and also recent emphasis on the distinction between “necessary” and “unnecessary” suffering.⁴⁰⁶ An important problem is the way in which human rights organises suffering in a hierarchy. This is evident from aspects such as the provision for the limitation of some rights in states of emergency and also the division between political rights and socio-economic, cultural rights.⁴⁰⁷ In a discussion on the “logics of inclusion and exclusion” he explains how human rights protect the “haves”; in this sense it is of cardinal importance to turn away from this spectacle and focus the attention on the “don’t-haves” for whom human rights bring more suffering than good. Baxi mentions a list of these invisibles, marginalised individuals: the girl-child, the migrant-labour, indigenous peoples, gays and lesbians, prisoners, refugees and asylum seekers. This shift to the ordinary is aimed not only at a fresh approach to human rights but also a way of identifying human rights abuses, or suffering due to what Baxi calls “cruelty”. It also entails to identify not only cruelty exercised by states or rulers or governments, but to expose the justification of cruelty as natural and ethical (as brought about by social Darwinism, patriarchy and racism) that results in the “cruel complicity by ordinary citizens”:

While feminist scholarship has demonstrated the power of storytelling, social human rights has yet to conceive of ways and means of investigating individual biographies of the violated with the power of social texts.⁴⁰⁸

The call to translate human rights into human suffering involves the telling of stories of everyday violation and resistance that recognise the role of women and other marginals as authors of human rights.⁴⁰⁹ Whenever storytelling surfaces, it

⁴⁰⁶ As above.

⁴⁰⁷ Also, “some global human rights regimes... justify massive, flagrant, and ongoing human rights violations” in the name of securing human rights. Baxi in McCorquodale (ed) 2003 at 166.

⁴⁰⁸ Baxi in McCorquodale (ed) 2003 at 166, footnote 80.

⁴⁰⁹ “The feminisation of human rights cultures begins only when one negotiates this conflict between meta- and micro-narratives of women in struggle.” See in this regard Frug MJ, “A Postmodern Feminist Legal Manifesto” in *After Identity: A Reader in Law and Culture* 7-13. Baxi shows the lived reality of sex-trafficking, sweat labour, aggresstic serfdom, workplace discrimination, sexual harassment, dowry murders, rape in peacetime as well as in war as a means of doing politics, torture of women and medicalisation of their bodies, as present problems of routinisation of terror. “The feminisation of human rights cultures begins only

is accompanied by the warning of the meta-narrative as I explain in chapter one. Baxi calls this rediscovery of the ordinary in human rights “humanising human rights”.⁴¹⁰ This process avoids familiar ideological rhetoric and tells of pain in a singular individual voice.

To give language to pain, to experience the pain of the Other inside you, remains the task, always, of human rights discourse and narrative. If the varieties of post-modernisms can help us to accomplish this, there is a better future for human rights; if not, they continue a dance of death for all human rights.⁴¹¹

Above, I raise the point that human rights have evolved into a form of religion, by relying on examples and arguments from Heyns’s article, claims by Baxi, and also Ramphele’s depiction of the miracle nation. The problem with strong religious or ideological convictions however, according to Ramphele, is that it leaves little room for doubt, for questioning and contestation. Religion ends the conversation.⁴¹² This is where the need for refusal, reflection and contestation in human rights pans into view. However, in the light of the religious and historic disposition of South Africa, Ramphele admits the inevitability of the image of a miracle, but adds that “the emotional boost we receive from being special needs to be tempered by historical lessons that should inform our conduct and public accountability within the human rights constitution we have adopted.” She acknowledges the inescapability but plays with both hands, showing the difficulty of not completely discarding the miracle, because of its sporadic virtues, and remaining critical of the miracle designation.⁴¹³

when one negotiates this conflict between meta- and micro-narratives of women in struggle.” Baxi in McCorquodale (ed) 2003 at 166.

⁴¹⁰ “One may even call the task or mission as one of *humanizing human rights* – going beyond rarefied discourse on the variety of post-modernisms and post-structuralisms to histories of individual and collective hurt.” Baxi in McCorquodale (ed) 2003 at 183.

⁴¹¹ Baxi in McCorquodale (ed) 2003 at 184.

⁴¹² President of the ANC, Jacob Zuma, has recently declared that the ANC has a “God-given” right to rule. “Challenge unchristian laws, urges Zuma”. (*City Press* 8 April 2007) The paper also reports that Zuma read out the preamble of the constitution and reminded congregants that it called upon God to protect the people of South Africa.

⁴¹³ Ramphele 2008 at 45. An interesting recent coincidence of religion and human rights was the dismissal of a staff member of the Moreleta Park Dutch Reformed Church academy on the basis of his involvement in a same-sex relationship. This incident posed the question whether non-state institutions are compelled to

3.4 Conclusion

I lay the basis of the spectacle in chapter two and with chapter three indicate that our legal culture should be that of refusal of spectacle and rediscovery of the ordinary to open up the possibilities of transformative constitutionalism. I explained the notion of refusal as a critical mode of thinking that challenges the *status quo* and breaks the momentum of structural inertia. Refusal requires slowness and reflection. I also lay out the idea of the rediscovery of the ordinary, coupled with the notion of the everyday, as an engagement with that which is substance and not obvious and showy like the spectacle is. I revisit the aspects of legal culture and the arguments of spectacle related to these aspects that I raise in chapter two. Hereby I indicate how we should refuse to approach these aspects in the mode of the spectacle and rather in a way that corresponds with a rediscovery of the ordinary. I argue that this shift would create spaces for the aims of transformative constitutionalism.

Before I move on to literary examples that will illustrate the points raised in chapters two and three, let me briefly make an important remark about the relationship between the spectacle and the ordinary. If a legal culture of spectacle entails intellectual reflexes and habits of mind then it is evident why refusal and slowness is imperative in the slowing down of the momentum and inertia of culture. If it entails a focus on the external in the emptying out of the internal, an emphasis on finality and predictability, a rushed performativity, and an instrumentalist drive of transformation it is clear why a rediscovery of the

observe the dictates of the constitution. The Pretoria High Court found that the DR Church Moreleta Park discriminated against a gay music teacher. The church was ordered to apologise to Strydom (the staff member) and to pay more than R86 000 to compensate for his loss of dignity and income. Frans Viljoen, in anticipation of the decision of the Pretoria high court, commented that an outcome that forces churches, by the constitution, to uphold the values that they should be representing in the first place such as tolerance, compassion and acceptance, would lend support to the idea that human rights have, indeed, become humanity's new religion. Viljoen F, "Churches Also Subject to Values of Constitution" *Pretoria News* 26 August 2008 at 11, available at http://www.chr.up.ac.za/press%20releases/Sexual_orientation_PtaNews_Viljoen.doc (accessed 7 December 2008).



ordinary and its openness and randomness, together with slower, critical, detailed thought is called for.

4 South African literary examples: *The Cry of Winnie Mandela* and *Horrelpoot*

4.1 Thus far

The frame of my argument is now completed. I start with our transition and the aims of transformative constitutionalism and pointed out that this project is stifled by our conservative legal culture with a continuation of formalism. Thereafter, I explain what legal culture, continuation and formalism mean. Legal culture amounts to an approach to law and legal concepts. From there I show why South African legal culture is a spectacle – I look specifically at history, constitutionalism, democracy and rights and how these concepts are applied and approached in our country. In other words, the context of law or the way in which law is practiced and thought of, or not thought of, amounts to an outward display or a cover, a pacey process - where the individual is preferenced above the community and form above substance.

My aim is not to find solutions to the spectacle or to solve a legal culture of spectacle, but rather to look beyond the spectacle and expose the nature of South African legal culture. This process of questioning, exposing and acknowledging the limits and spectacle of law and legal culture is the alternative culture I propose. This culture is one that refuses the spectacle and rediscovers the ordinary. I explain the notion of refusal and rediscovery of the ordinary and then illustrate how it would echo in the aspects of history, constitutionalism, democracy and rights. The argument up to now is fairly segmented and separated, which separations – I admit – are rather artificial. This concluding chapter aspires to cross some of these boundaries and to link the concepts. I rely

on two novels by South African writers: Njabulo Ndebele's *The Cry of Winnie Mandela* and Eben Venter's *Horrelpoot*.⁴¹⁴

The storylines of the novels are briefly the following. *The Cry of Winnie Mandela* tells the stories of women, of waiting and of South Africa from the viewpoints of a public figure, four fictional black women, and a classic character from a Greek tragedy. What these women have in common is their waiting. The four women are introduced as descendents of Penelope and their stories sketch the picture of the departures of their husbands in and because of Apartheid South Africa. Mannete Mofolo, the first descendent's husband left her and her five children in the highlands of drought-ridden Lesotho to find work at the mines in Johannesburg, never to return. She goes on a search for him in vain and later finds out via a relative that he has remarried.

Delisiwe Dulcie S'khosana's husband left when he obtained a scholarship to study medicine in Scotland, living with the hope that she will visit him and the dream that he will return as the first medical doctor of their sleepy East Rand township. But in the tenth year of his absence she falls pregnant with the child of a family friend who was also one of her lenders. When her husband returns and finds her with the child, he divorces her and marries a nurse. Mamello Molete, or Patience, loses her husband in an exhausting process of political exile and imprisonment on his return from prison and then remarriage to a fellow (white) comrade on his release from prison. She finds it hard to accept that she has finally lost him, and declares herself "fine but insane".

Joyce Marara Baloyi shares the mode of waiting with the others, even though her husband never physically departs, but is absent through his infidelity. As one of the first blacks to rise high in a multi-national company, he at first enjoys the life of fancy hotels and rendezvous, but later this lifestyle costs him his job and

⁴¹⁴ Ndebele 2003; Venter E, *Horrelpoot* 2006. *Horrelpoot* has also been translated: *Trencherman* (trans Stubbs L) 2008 Tafelberg. I mainly work from the Afrikaans text, but keep the English version at hand for translations.

health, leaving him in the care of Joyce, who ultimately gives him a decent burial in an expensive casket. These four women form an *ibandla* – a group of waiting women.⁴¹⁵ In this symbolic and imaginary gathering, they start to play a game. Their game entails conversations with Winnie Mandela – the most unmarried married woman – who also waited, but waited in public. The four of the *ibandla* scratch at the most intimate and personal aspects of her waiting, and waiting in general. Winnie also finally takes part in their game and responds to the other four but also plays the game with herself. This group of five is then joined in the end by Penelope in the final chapter of the book, as she briefly joins them on a holiday trip. Through these six women, Ndebele succeeds in giving a voice to thousands of other South African women through his storytelling.

Venter's *Horrelpoort* tells a different story. It presents an apocalyptic and dystopian vision of a future South Africa in ruins,⁴¹⁶ where poverty and AIDS have reached dismal proportions, little is left of any infrastructure, communication or transport systems, almost all natural resources have been depleted and there is barely any form of wildlife or vegetation, corruption and theft prevails, meat is power and the country is generally viewed as lawless, where the only law that survived is the law of survival. We see this South Africa through Marlouw (Martin Jasper Louw). Marlouw is a clubfooted middle aged white man, who has been sent on his mission by his sister, Heleen Spies, to find his nephew, Koert, and bring him back to Sydney. Marlouw and Heleen emigrated to Sydney twenty

⁴¹⁵ The online dictionary <http://www.isizulu.net/> (accessed 8 December 2008) translates “ibandla” as “congregation”. A more thorough definition can be found in Vukile Khumalo’s paper “Warm Oneself at the Society of Men, and Women: Reconfiguring the Idea of Ibandla in 19th Century Natal and Zululand”. She says that “Warm oneself at the society of men, and women” is a direct translation of the Isizulu saying “ukotha ibandla”. She further explains ibandla as networks of correspondence, circles and spheres to influence each other’s ideas. Abstract available at <http://fiftieth.shotnews.net/?cat=5> (accessed 8 December 2008).

⁴¹⁶ If Venter’s South Africa of the future is dystopian, it calls to mind the close link between Derrida’s democracy to come and the utopian tradition. Douzinas points out that Derrida’s “messianism without a messiah” is another name for utopianism, even though Derrida wants to distinguish it from the Greek utopian tradition. Utopian visions and dystopian depictions both involve power of the imagination. Venter’s dystopia can help us to formulate a different vision for a community to come and a South Africa to come. Douzinas 2007 at 296, footnote 13, Baxi suggests that this mode of imagination should be a “rooted Utopianism”. He explains this as a non-technocratic way of imagining futures that focuses on the work of ordinary people who refuse to submit to a state and do not fulfil their duty for material gain, whereas a technocratic way assumes the persistence of political structures. Baxi in McCorquodale R (ed) 2003 at 165.

years ago and have been living there since. He flies via Fiji to Johannesburg and from there, after much bribing, to Bloemfontein where he buys a white bakkie in which he proceeds to the farm that belonged to his ancestors and where he grew up – Ouplaas. On the farm, he shares the house of his childhood with the three families of farm workers, and of course with Koert. Koert's quarters are however sealed off from the rest of the house, and this indicates how hard it is to reach Koert. Marlouw meets him only several days after his arrival on Ouplaas, after a confusing dream-like kidnapping to Koert's bed where he lies in a white mass of bulging fat, flowing like lava from his body. Marlouw comes face to face with a huge maggot-like caricature, the supposedly powerful meat eater. The reader discovers here that Koert has a rotten foot, because of gangrene, and the parallels between the two cripples start to form. In a fantastic scene filled with elements of rite, Koert is murdered/slaughtered by the farm workers and other guests attending the party. Marlouw has to return to his alcoholic sister in Sydney. He meets her in an opulently sophisticated restaurant; aptly juxtaposed with the direness of the South African scene he left, and presents a lie about Koert's death. Marlouw tells Heleen that Koert was poisoned, that he suffered a long sickbed and that he mentioned her name when he died.

The ending in South Africa and the ending in Sydney is followed by the final ending of the book, a grim picture of Ouplaas, a piece of land that no human voice or human footprint will ever grace again and where the wind blows through the farmhouse as if there have never been any humans at all. All traces of the colonisers, the colonised, the returned masters and the re-assumed slaves have disappeared. *The Cry of Winnie Mandela* and *Horrelpoot* contain various similar themes. The four themes that I identify and now discuss here are: Refusal, rediscovery of the ordinary, journey and memory, and the novels' relation to Conrad's *Heart of Darkness*.⁴¹⁷

⁴¹⁷ Conrad J, *Heart of Darkness* 1997.

4.2 Refusal in *The Cry of Winnie Mandela* and *Horrelpoot*

4.2.1 Writing as refusal

In my sections on democracy I deal with a quote by Plato and alluded to Derrida's discussions on the concept "pharmakon".⁴¹⁸ The story on which Derrida bases his deliberation is a story about writing: Plato's Phaedrus. In this story Thoth, the Egyptian god of writing, gives writing to King Thamus as a "remedy" (*pharmakon*) to help him with his memory. However, Thamus refuses this gift because it will only cause forgetfulness. Writing, for him, is not a remedy for memory itself, but merely a way of reminding and therefore it is also a "poison" (*pharmakon*). According to Derrida, the *pharmakon* of writing itself cannot be reduced to the series of oppositional concepts that it precedes and produces.⁴¹⁹ The *pharmakon* concept is valuable for thinking about writing as something that is basically ambivalent and that cannot be reduced to simple dichotomies.⁴²⁰ The act of writing and of creating is simultaneously spectacle and a form of refusal and rediscovery of the ordinary in itself. These two novels are acts of refusal because they challenge and unsettle pre-existing ideas, but they also illustrate the notion of refusal through their characters and the narrative.

4.2.2 *The Cry of Winnie Mandela*

Refusal can be discerned as a continuous theme through both works. I look at how refusal is depicted in *The Cry of Winnie Mandela* through notions of solitude, suspension and slowness in waiting, also through the disruption of the public-private dichotomy, and lastly the refusal of the different characters. Although the four women in waiting form an *ibandla* their act of waiting is a solitary one. In Joyce's conversation with Winnie she puts Winnie's own words to her; a

⁴¹⁸ See 3.4.3.

⁴¹⁹ Derrida (trans Johnson) 1981 at 125.

⁴²⁰ Derrida (trans Johnson) 1981 at 103-126.

response to “the solitude and loneliness of Nelson’s departure” where she tells of how she missed “humane things” like waiting for Nelson with a glass of fruit juice on his return from his early morning jog.⁴²¹ But it is not only the absence of a partner that turns waiting into a solitary exercise, it is the inability to share the act of waiting with anyone else. Winnie’s banishing to Brandfort was also “times of deep loneliness” but simultaneously times in which she “turned punishment into the pleasure of defiance and total freedom”.⁴²² This idea of solitude within the context of the fleeting solidarity of the *ibandla* is suggestive of a form of community that acknowledges the limits of cohesion and the need for loneliness in being together; it brings a vision of community that admits the necessity of coming together, but admits that at the moment of unity there lies also exclusion and elimination.⁴²³

Waiting is also depicted as suspendedness, a liminality, being in an indeterminate state. Delisiwe explains this aspect of waiting to us. Her husband kept promising that he will send for her to visit him in Scotland. Because of her hope to join him, she started a life of going and staying, “[w]aiting. Not waiting. But waiting.” A life “in limbo”.⁴²⁴ This space without dimension and waiting without duration is a feature of the waiting of each of the women, Mamello believes until the end that she and her husband will be reunited despite his remarriage and Joyce hopes that her husband will leave his feckless ways. This constitutes their waiting, the moment that they accept the finality of their husbands’ departure, they do not wait anymore, they allow the loss. It is this idea of hope that conjures up Cornell’s “imaginary domain”, which is “a space for re-imagining who one is

⁴²¹ Ndebele 2003 at 74-75.

⁴²² We encounter solitude as refusal also in the character of Bartleby. For an expansion on this, see Nelson D, “The Virtue of Heartlessness: Mc Carthy, Hannah Arendt, and the Anesthetic of Empathy” *American Literary History* 2006 18 86 as quoted in Van Marle K, “The Sex of Knowledge, Ethics and Politics” paper presented at the annual meeting of *The Law and Society Association*, TBA, Berlin, Germany, 25 July 2007, available at http://www.allacademic.com/meta/p174503_index.html (accessed 17 November 2008).

⁴²³ Add this manner of being together to my remarks on a community of refusal and a community of ordinary. The tension between solitude and solidarity also stands central to Conrad’s work and the significance of this parallel becomes more apparent later. See Lord U, *Solitude versus Solidarity in the Novels of Joseph Conrad* 1998.

⁴²⁴ Ndebele 2003 at 14.

and who one seeks to become”.⁴²⁵ Waiting is therefore also a process of slowness, not only because of the actual length of the partner’s absence but evident in the way in which they engage with time coupled with a concern with the ordinary.⁴²⁶ ‘Manette points out how time becomes warped in memory, and the meaning of Mamello’s name – Patience – provides a clear association with slowness.⁴²⁷ Winnie, through her remembering of the past in an imaginary journey towards her past, creates the feeling of being in the past, present and the future all at once, of “remembering the future and imagining the past”.⁴²⁸

Ndebele also disrupts the distinction between the public and private spheres on many levels.⁴²⁹ Among other ways it is reached through the intimate questions and exposures of Winnie as public figure and a reclaiming of the private sphere (home) on the waiting women’s terms. The traditional view, á la Homer, is that of the woman staying within the private domain and the man going out into the public to work, engage in politics, study or educate himself, or socialise and gallivant. At face value, this is the situation of the women in the *ibandla*, but of course, Winnie’s participation in politics already disturbs that assumption. The line between the private and the public is blurred throughout. Winnie, who waited in public, is invited into the *ibandla* – where waiting is a private activity.⁴³⁰

⁴²⁵ Cornell 1995 at 5. Ndebele’s characters also illustrate this through Penelope’s “intermediate condition made bearable only by faith, the one device that makes infinity durable”; through Joyce’s statement of the re-imagining of the concept of home: “Is it the meaning of myself that has assumed the shape of a rectangular dwelling? Or is it the dream of self-actualisation beyond the rectangular dwelling, that takes the form of conventions of behaviour acted out within and without that dwelling”; and also Winnie’s imaginary trip towards herself, where she must choose between staying on the N1 or taking the R57 to join the N2. Even within this existing imagined set-up, she reminds herself that she can keep her options open. She says she can take both, “the one with your imagination. It is entralling to see your country and imagine it at the same time”. Ndebele 2003 at 1, 67 and 105 respectively.

⁴²⁶ “time measured in states of waiting” Ndebele 2003 at 7.

⁴²⁷ ‘Mannete recounts the morning of her husband’s departure and notices how things “in real time happens so slowly” but when you would look back on those events “everything seemed to happen so fast”. Ndebele 2003 at 9.

⁴²⁸ Cornell 1993 and Ndebele 2003 at 86.

⁴²⁹ Also with reference to Ndebele, Van Marle argues that the question of the private/public distinction, and specifically the feminist contribution on the topic (responses are varied: Arendt and Weil’s insist on a divide and Cornell’s insists on questioning all given assumptions of masculinity and femininity) should ask “to what extent private/public dichotomies and according stereotypes are disrupted, but also to what extent it address a majority of women”. Nelson *American Literary History* 2006 18 86 as quoted in Van Marle *The Law and Society Association* 2007 at 2.

⁴³⁰ “...why Winnie? Why not Albertina Sisulu? Why not Urbania Motopheng? Why not Veronica Sobukwe? Why not Ntsiki Biko? All these other remarkable women waited too, but unlike Winnie, their waiting was not

Delisiwe's exclamation regarding a love letter of Winnie published in a newspaper also hints at the public as spectacle.⁴³¹ Through this subtle disruption Ndebele does not only refuse to assign the public and private to their fixed places, but also refuses to assign feminine or masculine and other associated attributes to these categories.

The different characters offer different ideas connected to the notion of refusal. The refusal of the four of the *ibandla* happens against the backdrop of Penelope's refusal. Penelope as a character of refusal has been discussed with reference to the work of Van Marle in following Cavarero. Ndebele now poses another re-reading of Penelope. We are introduced to Penelope as the ancestor of the South African women in waiting; in this sense Penelope is recreated and re-personified in the stories of each of the members of the *ibandla*.⁴³² However, in her introduction as predecessor, Ndebele already offers a preliminary remark to anticipate her remaking. He verbalises the observation of the reader at the part where passersby comment that Penelope is a "heartless creature" when they conclude from the sounds of merriment in the house that she has remarried. This is clearly an unfair judgment, but it is "based on society's simple rule: a woman must stay eternally faithful to her husband". The fact that she proved her fidelity in the many years preceding the re-marriage seemingly does not count.⁴³³ But it is in the last chapter when we see Penelope again that she has truly changed – a change brought about by the pages before her re-entry into the novel, an indication of how the book is aimed to alter stereotypes and expectations of women in waiting and therefore changing Penelope as symbol and representative of those fixed ideas.⁴³⁴ We meet her again when she desperately

significantly different from ours. But there was a silent almost private dimension to their waiting... Winnie – ... her presence was active and pervasive" Ndebele 2003 at 39-40.

⁴³¹ "What kind of pressures lead a famous, married woman to write to her lover a letter that ends up in the newspapers, turning her private life into a public spectacle?" Ndebele 2003 at 43.

⁴³² These South African versions of Penelope sometimes disobey her laws as some go off in search of their husbands ('Manette) and some succumb to the advances of their "suitors" (Delisiwe).

⁴³³ Ndebele 2003 at 2-3.

⁴³⁴ When she meets the women, she explains that she was inspired by their stories, and that she came "to meet and to honour them" as women who are at peace with themselves. Ndebele 2003 at 120.

flags down the party of five⁴³⁵ on their holiday trip in a rented white Caravel – thinking that it is a taxi. It is a Penelope who has left on the morning just after Odysseus’s return. When he departed on his journey to forestall possible civil strife in Ithaca, because of his slaughtering of the suitors, Penelope also left on her own cleansing journey. On this journey she is looking for adventure, seeking out moments in the growth of consciousness of the world, bearing her message of freedom and of new ways to experience relationships.⁴³⁶

Delisiwe’s refusal lies in defying the power of a destructive pathological sexual relationship, where she was often raped by the same person she would sometimes cling to and beg not to leave.⁴³⁷ Joyce warns us against habit,⁴³⁸ which is doing without thinking, as this lack of thinking rids you of subjectivity.⁴³⁹ Winnie’s denials at the Truth and Reconciliation Commission (TRC) hearings,⁴⁴⁰ because of her scepticism of reconciliation,⁴⁴¹ but significantly also her (imagined) laughter at the hearings, reveal her refusal.⁴⁴² She laughs at the inappropriateness and universality, the force of generality of legal language, the ridiculousness of rhetoric and at the white male judge and the patriarchy of law

⁴³⁵ Ndebele 2003 at 117.

⁴³⁶ She explains to the travellers, – her descendants: “My journey follows the path of the unfolding spirit of the world as its consciousness increases; as the world learns to become more aware of me not as Odysseus’s moral ornament on the mantelpiece, but as an essential ingredient in the definition of human freedom. I travel around the world to places where women have heard of me, attempting to free them from the burden of unconditional fidelity I have placed on their shoulders”. Ndebele 2003 at 120.

⁴³⁷ “One day he came as usual to make his demands. ‘Give me !’ he demanded. And I said, on that wonderful day: ‘Mfanyana, stop right there, you little monster! Get out of my house and don’t ever come back’... He and I have lived under a psychological spell which I broke in a moment of desperation. He never returned. And I was free.” Ndebele 2003 at 49.

⁴³⁸ Recall here legal culture as habits of mind, thoughtless automatic reaction – as opposed to refusal’s call for thinking, reflection and contemplation.

⁴³⁹ “Sleeping with a man is not like drinking a glass of coca cola to kill thirst. Habit is doing without thought. ... When you lose them [thought and conscience], that’s when you become a mere thing to have another thing put into you. I refused to become such a thing.” Ndebele 2003 at 29.

⁴⁴⁰ “There is one thing I shall not do. It is my only defence of the future. I shall not be an instrument for validating the politics of reconciliation.” Ndebele 2003 at 112.

⁴⁴¹ Louise Du Toit argues that just as women are homeless because of their association with home, the TRC (in spite of being framed in feminine notions of reconciliation, forgiveness and care) did not provide spaces for women to reconcile. Winnie’s refusal in this regard is a refusal of the appearance or semblance of reconciliation where it cannot exist. Du Toit HL, “Feminism and the Ethics of Reconciliation”, in Veitch S (ed), *Law and the Politics of Reconciliation* 2007.

⁴⁴² In addition to detachment, Van Marle also suggests laughter as a way in which to “refuse and resist patriarchy”, she does not classify laughter as either active or passive, but puts it forward as a response of refusal. She does this with reference to Cavarero’s interpretation of Plato’s tale of Thales, who fell into a well while looking at the sky and the maidservant of Thrace who laughed at him. Cavarero A, *In Spite of Plato: A Feminist Rewriting of Ancient Philosophy* 1995 at 31 referred to in Van Marle *Stell LR* 2007 18 194 at 198.

and legal culture that is trapped in its own idioms.⁴⁴³ The novel's most important portrayal of refusal is however captured in Manette's advice to Winnie and all women in waiting, but also by extension to all participants in legal culture.⁴⁴⁴ I want to emphasise the wariness of reflex, the resistance of obligation, the stress on disconnection, on observance and especially on thought, the holding on to options – opening up possibilities, the image of the female body in a posture of refusal, all these elements, encompassing the very substance of refusal. Refusal in *Horrelpoot* is however more subtle and requires a slower read. There are still some parts that refuse to open up for a different read and embodies a withdrawal as opposed to a refusal. I look at these instances first and then proceed to notions of refusal in the Venter text: again slowness and then also the refusal of continuation.

4.2.3 Horrelpoot

In disagreement with Stewart Woolman's "gloss" on Van Marle's "ethics of refusal", I reassert here that refusal does not "shout 'Basta!'... 'I've had enough'".⁴⁴⁵ That is what Marlow and Heleen cried when they emigrated and fled from South Africa,⁴⁴⁶ with the others who also settled abroad, together with those still in South Africa who prefer to read *Horrelpoot* as a justification of the "white flight", a call to "*laertrek*" or even as a final boarding call out of a country on the brink of damnation.⁴⁴⁷ Another instance of this retreat can be identified in the

⁴⁴³ "Justice Stegmann, who – thoroughly exasperated – declared that I was 'a calm, composed, deliberate, unprincipled and unblushing liar'... I laughed to myself about how the good judge thought my black face could turn red." Mamello envisions Winnie replacing her laughter with a challenge to the judge to "find another language to describe me [Winnie]". Through laughing she refuses to be fooled by the pretence of this "law-talk". Ndebele 2003 at 112 and 65 respectively.

⁴⁴⁴ "The reflex thought you live with every day is that when one day your man returns, you have the emotional obligation to embrace him... Simulating naturalness to perfection. No, resist. Stay away from the trap of obligation. Turn obligation into serene detachment. Become a woman with her thoughts. A woman of detachment who observes, and holds on to her options. ...is a woman who finally realises that what she really missed about her man was no longer himself, but the idea of him. Hold back and observe, keep those arms folded over the cushion of your breast." Ndebele 2003 at 81.

⁴⁴⁵ His description of refusal and jurisprudence of generosity, in Woolman *Stell LR* 2007 18 508 at 508 and 515.

⁴⁴⁶ "The brilliance of the move", they exclaimed to one another. Venter 2006 Tafelberg at 9.

⁴⁴⁷ This is a tempting interpretation, especially given the fact that author Eben Venter spends his time in both Australia and South Africa these days. Most Afrikaans reviews read some form of warning to Afrikaans speaking South Africans in *Horrelpoot*. The most alarming of these is Van Coller HP "*Horrelpoot*" *Tydskrif vir*

steel and barbed wire fence of the NG church in Maitland.⁴⁴⁸ The fence tells of the “funk”,⁴⁴⁹ the approaching fear, similar to the paranoia that moves people to withdraw behind their security gates in gated communities.⁴⁵⁰

More problematic examples of retreat or denial are Marlow’s negative response to helping on the farm and his ignoring the poor.⁴⁵¹ In the taxi on his way to Bloemfontein city centre, he chooses to lower the small curtain between him and the beggars on the street; the taxi driver later also instructs him to “avoid their eyes”.⁴⁵² Through this denial he is not merely avoiding the fact of their need, but is denying their existence, or at least disallowing them to exist for him. And finally, we also see Marlow’s snubbing of Esmie when she begs him to take her with him.⁴⁵³

Letterkunde 2008 Autumn 1. He warns that the novel states in no unclear terms that the white man may be in Africa, but he is not from the continent. The only way he will survive is by joining superstition and lust of the senses, but this also destroys him; therefore the only option is to retreat into the country or through emigration. With brief reference to how this prophesy is already fulfilled in other countries in Africa and to an article in the German opinion page *Der Spiegel*, he professes the end of a white existence in Africa, and concludes dismally that he hopes Venter’s peep at the future can stay within the realm of fiction. Izak de Vries in his review, “n Tartende tien vir *Horrelpoot?*” *Litnet*, available at <http://www.litnet.co.za/cgi-bin/giga.cgi?cmd> (accessed 22 November 2007) shades the warning as one pertaining mainly to language, as one to speakers of Afrikaans. He claims that “if we all flee” the centre of Afrikaans will digress to nostalgic remnants to which poor people cling. De Vries suggests further that this is not a book to give to people contemplating to return to South Africa, or to a niece who is visiting South Africa for the first time. I agree most with the view of the warning as outlined in Dubbeld G and Gerber L, *Comparing Afrikaner Dystopias: Antiheroism, disaffection and devastation in PJ Haasbroek’s Oemkontoe aan die nasie and Eben Venter’s Horrelpoot*” paper delivered at AUETSA Conference, available at <http://academic.su.ac.za/English/AUETSA2007> (accessed 8 December 2008). They say that Venter’s dark vision should be taken seriously as a warning to both South Africa and the Afrikaners and to the fact that what this country, and Afrikaners, really need is an alternative, inclusive vision of a future South Africa. Another valuable warning is Willie Burger’s reproach in his review in *Beeld*, 13 November 2006 – “Op Reis na die Hart van Donker” – that an interpretation of all the clichés of Affropessimism (assumptions that “blacks cannot think or make a success of anything” or views on witchery as primitive) as merely a racist prediction of the future, will be short-sighted.

⁴⁴⁸ Venter 2006 at 111.

⁴⁴⁹ This word is taken from Conrad 1997.

⁴⁵⁰ For a thorough exploration of this trend in South Africa, and the law’s role in it, see *SAPL* 2006 1, with contributions by Van der Walt AJ, “Seminar proceedings: Gated communities Introduction 2. Enclosed Property and Public Streets” at 3, Le Roux W, “Planning Law, Crime Control and the Special Dynamics of Post-Apartheid Street Democracy” at 25, Landman K, “Private Space – ‘Private Citizen’: What Kind of Cities are we Creating?” at 51 and Moran LJ, “The Safety and Dangers of Enclosed Communities: Space, Social Justice and the Emotions” at 72.

⁴⁵¹ Although he goes into town to buy dip for the sheep, he does not want to buy any spares for the windmill (this is ironic, because they need the water much more than the meat of the sheep). Venter 2006 at 284-285.

⁴⁵² Venter 2006 at 111.

⁴⁵³ Venter 2006 at 229 and 312-313.

Subtler sketches present the notion of refusal in the form of slowness; especially through the concept of a “not-yetness”, a constant postponement.⁴⁵⁴ This notion of postponement of the present, serves to focus the attention on the future and also the past, on remembering and imagining. It disturbs the insistence on linear events or chronological time. We encounter Marlow’s affinity for chronology, his actual impatience and his inability to approach time with a generosity.⁴⁵⁵ This is then challenged through the fact that Marlow’s meeting with Koert is constantly postponed, to such an extent that the reader starts to wonder whether he will ever meet Koert, and even considers that Koert has already died and is only held up as a pretence, a symbol of power by the farm workers. Whether Koert is dead or alive, there is always the very strong possibility that Marlow can return to Sydney without ever laying eyes on Koert. Marlow realises that it is not only Koert’s refusal to see him, but the entire system on the farm, which will determine whether he will ultimately be allowed to meet with Koert.⁴⁵⁶ This suspense forces him to pay attention to the ordinary and lasts up to page 233 where he is “abducted” during the night and forced to Koert’s quarters in a disorientated swirl.⁴⁵⁷ Baker puts forward an argument that during this and the broader journey, Marlow “realises what colonialism, *baasskap* and his own role, identity and

⁴⁵⁴ Van Marle *SAJHR* 2003 19 239 at 240.

⁴⁵⁵ The woman at the airport annoys him when her reply to his outburst is that there are no flights to Bloemfontein. She suggests travel by bus and then remarks that “Everything is possible. We just have to be patient and wait”. Mildred picks up on this later when her thoughts are projected into Marlow’s: she understands why Marlow is in a hurry, because it has always been that way, the “whites” always had so little time and so many things, and them – Mildred and the rest – had always had so much time, but nothing to show for it. This link between commodity, desire and speed is carried on later when Marlow discovers all his parent’s furniture stacked in heaps, and thinks: “so many things, so little time”. Venter 2006 at 49, 172 and 242 respectively.

⁴⁵⁶ Marlow grasps that Mildred will guide him, and that she indicates the way to Koert through her body language and other signs. It is very important to note that he also realises that he must first take a good look at the house in order to understand how Koert’s influence has infiltrated and intoxicated their private spaces, and only then will he be able/allowed to see Koert. Venter 2006 at 124.

⁴⁵⁷ Walter Baker points to the resemblance, of the whole stay at Ouplaas and then specifically this journey to Koert,, to a Hieronymus Bosch painting depicting the world of dreams and nightmares (apt also the surname – ‘from the Bush’ – insinuating the Conrad text). Baker W, “Book Review: *Trencherman*” *Pretoria News* 28 July 2008 at 8. The work of this fifteenth, sixteenth century Netherlandish painter is familiar with the language of Freudian psychology. *Horrelpoot* is also framed in psychoanalytical ideas: the location of fear, recurring dreams and the Jungian concept of individuation. In this journey/painting to Koert features: a psychology exam on informal logic, wings, bottoms, children with swollen heads, strange smells, stars, different sounds and languages, dreams and sensation of where he urinates on himself, conversations with Heleen and his parents, a final journey past the bizarre heaps of unused furniture and then finally with Koert. Not much real growth can however be discerned in Marlow’s character. He might have come to new insights, but there are no signs of immense change.

affiliation during the period had spawned”.⁴⁵⁸ I am however sceptical about this redemptive vision of the journey. The postponement perhaps opened up possible ways to see and admit his involvement in the scene playing before him, and allowed him the time to perceive the detail and pervasiveness of the intrusion and exploitation of Koert (embodying whiteness and richness and power) The liminality of this postponement could have lead to some form of individuation, which we explore shortly.

Smaller pockets of refusal is seen in Pilot’s shying away from being associated with Koert when he is in town, thus escaping a category.⁴⁵⁹ Mildred also uses laughter as a form of upsetting or stirring mainstream ideas. Mildred’s laugh cannot be placed and causes discomfort.⁴⁶⁰

Van der Walt explores an interesting and important presence of refusal in *Horrelpoot*. He reads the fact that the former workers who now own the farm are living in part of the former homestead, but do not sit in the chairs or sleep in the beds left in the house after the white family left,⁴⁶¹ as a refusal.⁴⁶² His reading

⁴⁵⁸ Baker *Pretoria News* 28 July 2008 at 8.

⁴⁵⁹ Similar to *Bartleby*. Pilot speaks of “him” and “that” man, as if he does not deal personally with Koert. Postma and Slabbert contend that Pilot represents the antithesis of what his name suggests. According to them he is without his own goal because his only aim is to be loyal to Koert. I would rather read his directionlessness as a refusal to conform to expectations of him (that of the reader and fellow characters). They do however equate Pilot to the archetypal Harlequine and equinomical character in Conrad’s book, because Pilot frequently makes jokes or silly comments, when it is wholly unsuitable. This is a way of refusing the *status quo* and that what is expected of him by the system. Postma M and Slabbert MN “Memory, History and Oblivion in *Horrelpoot* by Eben Venter” *Literator* 2008 29 1 at 14.

⁴⁶⁰ Her laughter seems to be a way to react in order to alleviate some of the tension in tense situations. However, her laughter just brings about more anxiety and uncertainty. The first time she laughs at ‘Marlo’tjie’ who is looking at the curtains with the little aeroplanes on where he used to sleep. Very inappropriately and almost garishly she laughs boundlessly when she tells Marlouw why they do not use the house’s toilet any more. The last laugh that has an impact is where the families gather to eat. Mildred laughs loudly and uninhibited when she sees how Marlouw stares at the pot they are eating from. Her laughter is such that she is truly amused by Marlouw’s staring at the pot. Her laughter might convey various things. It might merely be that she finds it funny or that it is her habit to laugh when she is in uneasy situations. But somehow her laugh in this instance hints more at ridiculing Marlouw. She breaks the miracle, the spell, the spectacle of the stare, the mystery, with her laugh and doing so she question Marlouw’s most basic preconceived ideas – the fact that he cannot believe that they are now eating from the same pot shows how, with regard to the ordinary and the exact (as opposed to the abstract idea that the workers now have “ownership” of the farm) he is still confused that they are now eating from the same pot he once had. Is his false consciousness unveiled by the mundane?

⁴⁶¹ This is a valuable image, especially in the light of remarks on what legal culture entails. If legal culture includes a certain viewpoint, an approach or a perspective on law, it can be described as viewing law from a certain “chair”. This reiterates the idea that even though the person sitting in the chair might change (the

aims to highlight the farm workers' unease or uncomfortableness with their new position. It shows that in failing to use the furniture or even the bathroom of the previous white owners,⁴⁶³ they refuse to carry on with business as usual, "as if nothing much has happened", refuse to simply take over the role of the former white owners where the latter have left off. It is a refusal that incapacitates the system.⁴⁶⁴ It is an explicit negation of a continuation and an attempt to bring the momentum of the previous system to a halt or at least a slow down. This continuation, in Van der Walt's words, encompasses an "impoverished transformation that simply replace white owners with Black owners without ever critically questioning the justifiability and legitimacy of their roles in the established social and political hierarchies". By staying on the margins and refusing to enter the mainstream of the past, and continue the past into the

content), the law itself or legal actors (the context) stays the same, and therefore no real change or transformation can be attained. The metaphor of the furniture again aptly disrupts the strict distinction also between context and content – law and legal culture. It shows how they fade into close relation – overlapping and merger. Note that the furniture is stacked in Koert's quarters. He also does not use them. This also illuminates Koert's refusal to assume the traditional role of the former owners of the farm and by extension the previous white rulers. Koert must also not be read too quickly as the archetypal colonialist or white apartheid ruler, because his refusal is also discernable through the idiosyncratic language he uses, which is a mixture between Afrikaans, English, sms lingo and German simulations. Venter 2006 at 25, 245-254 and in general.

⁴⁶² Van der Walt AJ, "Property and Marginality" Paper presented at the conference entitled "Techniques of Ownership" presented by Cornell Law School and London School of Economics, at LSE, 20-21 July 2007, available at <http://www.lse.ac.uk/collections/law/projects/techniquesofownership/tech-vanderwalt.pdf> (accessed 18 November 2008). He explains at 26 that "they obviously are not entirely at ease in the position of the white family whom they once served as labourers. In a sense, they remain marginalised even now that they own the farm. Koert, the only white family member left on the farm, could be seen as a metaphor for the lingering presence of the white family – hence the desire of the remaining former farm workers in the latter stages of the novel to exorcise the past by killing him and burning down the part of the house he occupied, with the remains of the family's furniture and possessions stacked in it".

⁴⁶³ We note this refusal for the first time when Mildred explains how the furniture was carried away to be stored in Koert's quarters. She does not respond to Marlouw's insistence that it is their furniture. They refuse to use the toilet in the house. November is later described to be sitting on a chair that Marlouw does not recognise and concludes that it is a chair that did not belong to his "Mammie". This emphasises his insistence on agency and refusal of power over him, in creating a space where they can belong to themselves. It is interesting, though, to juxtapose the Ouplaas workers' refusal to sit on the chairs to Jocelyn sitting on Heleen's kitchen chair – something, Marlouw remarks, she will never do if JP (Heleen's husband) is there. Jocelyn's failure to sit on the chair in his presence can be seen to be done out of fear. But, she defies this power of JP when he is not around, and still sits on the chair. Venter 2006 respectively at 123, 125, 132 and 18. The clear reference to Jocelyn and her chair at the beginning of the novel shows that the reader must take note of the role that "chair-sitting" plays in the challenge or affirmation of power, but that one must not be too quick to try to classify these instances of sitting and non-sitting.

⁴⁶⁴ Marlouw remarks that the furniture has absolute none of their original worth left, because they are not used.

present and future, this marginality of the workers becomes a “symbol of real transformation” as they redefine their position through their refusal.⁴⁶⁵

Coupled with these refusals in both novels, there is also a simultaneous insistence and rediscovery of the ordinary. The novel as genre already presents us with stories, with ordinary routines and rituals in everyday life.⁴⁶⁶ As these stories are taken up (immortalised) in works of art, they to some extent escape to be part of the grand narrative and support an argument for the power of marginality.

4.3 The ordinary and the everyday of *The Cry of Winnie Mandela* and *Horrelpoot*

4.3.1 Storytelling

Storytelling is political because it is relational. Storytelling as a political act invokes the struggle of a collective subjectivity, but also emphasises the fragility of the unique.⁴⁶⁷

I already allude to the use of narratives as ordinary. Ndebele and Venter both employ this; Venter specifically in making use of a lot of dialogue. His novel opens with a telephone conversation and most of the novel is written through dialogue between the characters. Sentences are often not completed and characters interact and react to one another as in actual conversations, which gives it a feeling of immediateness and of realness. Also, as “*plaasroman*” *Horrelpoot* falls into pace with the likes of *Agaat*,⁴⁶⁸ *Disgrace*,⁴⁶⁹ *Toorberg*⁴⁷⁰ and

⁴⁶⁵ Van der Walt *Cornell Law School and London School of Economics* 20-21 July 2007 at 26.

⁴⁶⁶ In Van Marle *SAJHR* 2003 19 239 at 241, Van Marle presents the appeals of the novel: that of “time”, of “play”, of “dream” and of “thought”. She illustrates how these traits are linked to a spirit of complexity and spirit of continuity. – of complexity, because “things are not as simple as you think”.

⁴⁶⁷ Van Marle K, “Towards a Politics of Living” Introduction to *Sex Gender Becoming, Post Apartheid Reflections*.2006 at x.

⁴⁶⁸ Van Niekerk M, *Agaat* 2004.

⁴⁶⁹ Coetzee JM, *Disgrace* 2000.

⁴⁷⁰ Van Heerden E, *Toorberg* 1997.

others. Ndebele, while giving voices to untold stories of women, repeatedly acknowledges the silences left, but also created, in spite of and because of these stories.⁴⁷¹ It is also through the idea of a game that Ndebele puts into practice his previous call for the ordinary; the unpredictability and randomness of a game and the risk involved links this ordinary to refusal.⁴⁷² Moreover, the point of the game not to end conversation either, but ultimately to encourage more of it and to go beyond it.⁴⁷³ Ultimately, these novels illustrate the importance of focusing on doing and on the power of the practices of everyday life. Through this they also challenge the notion of spectacle and provide us with alternative visions of the “miracle nation”.⁴⁷⁴

4.3.2 *The Cry of Winnie Mandela*

The novel makes much of the concepts home, house, housekeeping and homelessness. It returns to this sphere of the everyday and rediscovers the traditionally assigned spaces of women, but also questions conventional

⁴⁷¹ See for instance ‘Manette’s question: “Will you listen to me?”, and then: “Perhaps the only game I can play is with myself, not with you. My game is a test of how to express my silences. Thoughts that have lived without a voice”. Also, direct references to the absence of voices in the game – those of Albertina Sisulu, Veronica Sebukwe and other waiting women. ‘Manette ends her part of the game by stating that she is “keeping quiet now”. Ndebele 2003 respectively at 78, 39 and 84.

⁴⁷² “The intangibility and randomness of imagination permit them absolute mobility. In these random journeys, they are subject to one requirement: to resist the urge to break out of the confines of thought into full desire.” Ndebele 2003 at 35.

⁴⁷³ Despite Joyce’s fear that the game might bring an end to their conversing: “Excuse me! Our conversations are the most wonderful thing that ever happened to us.” Delisiwe puts her at ease in reassuring her: “Who said our game will end conversation?” Ndebele 2003 at 39.

⁴⁷⁴ The unravelling of the fabric of the miracle nation is captured in the image of Esmie Phumzile in the final slaughtering scene. Esmie, who is seen as the “princess” of Ouplaas appears in full spectacular costume: high heels, purple lipstick and an impressive headdress, which in its brilliance suggests a flaw, because while everyone admires Esmie, Marlouw notes that there is “tog” (still) a piece of material on the left of the headdress that must be tucked in. Venter 2006 at 302. This subtle hint at the inherent flawedness of spectacle, extends my discussion of a legal culture of spectacle. Ndebele also directs our attention to the memorial moments in the struggle for liberation in South Africa. “Hope and despair. South Africans have an intriguing capacity to be disarmingly kind and hospitable at the same time as being capable of the most horrifying brutality and cruelty. So much killing went on after Nelson returned home. Home? We saw strange armies of black men terrorising townships, hacking children’s heads with machete’s. We abandoned patients to their deaths in hospitals because we were on strike; we held hostage people doing their work; trashed university campuses; blocked highways; burned to death old women we accused of being witches; abused our children and raped our women...” Ndebele 2003 at 70.

assumptions surrounding order. It is this idea of home and the link with order and house and law and justice that interest me.⁴⁷⁵

Mamello reminds us of the different forms of houses. She points out the variations on house as a permanent structure.⁴⁷⁶ While this refers to different structures of dwelling, house and home is clearly not the same. Joyce says: “While a home is always a house, a house is not always a home”.⁴⁷⁷ Through the recurring dream of Nelson Mandela in the aftermath of the Soweto uprising, we encounter the “ultimate death of home” as the emptying out of vision, the “death of dignity”.⁴⁷⁸ This dream is mirrored by Joyce’s dream that her children will “build homes of the kind that eluded” her.⁴⁷⁹ This dream shows that the rebuilding of homes and communities is “something far more than the political act of meeting the needs of ‘the constituency’”.

Winnie thinks about the link between housekeeping and orderliness.⁴⁸⁰ In considering the home/house, substance/form dichotomies, we can also add these ponderings of Winnie to a justice/law distinction.⁴⁸¹ Winnie tried to create a

⁴⁷⁵ South Africa’s devastating numbers of “houselessness” (human suffering) represents the homelessness of our people.

⁴⁷⁶ “Some houses are set up on foundations. Others are wrapped around pillars or poles like nomads do. Some houses have both.” Ndebele 2003 at 58.

⁴⁷⁷ Ndebele 2003 at 67.

⁴⁷⁸ Ndebele 2003 at 58. “He dreamt that he had been released from prison. There was no one to meet him. After walking for many hours...finally [he] would see his home, but it turned out to be empty, a ghost house”. The phrase “ultimate death of home” is repeated later on the same page with reference to Winnie’s call to liberate the country with necklaces and boxes of matches.

⁴⁷⁹ These are “homes that can never be demolished by the state in order to make memories impossible; homes that can sustain public life because they infuse into it the values of honour, integrity, compassion, intelligence, imagination, and creativity. This is the discovery of personal and social meaning through the pains and joys of belonging, participation, trusting and just feeling at home,” Ndebele 2003 at 72.

⁴⁸⁰ “Winnie, a housewife! Of course. Strange to say, I sought to be that at the time, what woman wouldn’t? I’m thinking about the link between housekeeping and order. There’s something about the home and orderliness. Putting things in their proper places. Where did we get this idea of putting things in their assigned places? The house must be clean and orderly. The four corners of a room, everything put in its place in that square or rectangle. The empty spaces of a room divided into endless squares and rectangles into which something square or rectangular has to be put. Rectangular tables. Rectangular wardrobes with rectangular shelves and drawers for clothes which have been folded into rectangles. We were all civilised into it. I kept my home clean and orderly. Everything in its place. Nelson would love it I thought. For all his radicalism, he’s an old-style gentleman. The orderly home I was going to make for him would be his sanctuary.” Ndebele 2003 at 88-89.

⁴⁸¹ The analogy of house and home can be read with Christodoulidis E, “Law, Love and the Contestability of European community” in Petersen H (ed) *Love and Law in Europe* 1998, in his phrasing of marriage (unreflexive, law) as opposed to love (reflexive, justice).

sanctuary through structure and orderliness, but this sanctuary created around structure could not survive the forceful raids. The law's obsession with structure and form and technicality and mechanical reasoning and formality is seen in the same conversation as mentioned above, between Mamello and Winnie. Mamello praises Winnie's "victory of the kind of technicality that characterises courtroom procedure", during the TRC hearings (where she met law on her own terms).⁴⁸² This places a question mark over procedural or formal justice favoured over substantive justice. Winnie later responds and explains how she understands law. To her it is the calculation of argumentation and the only variables in the equation is the evidence that is presented. She refers to the point where law becomes detached from the ordinary subjects it is dealing with and departs from life to operate on a considerable level of abstraction with subjects turned into symbols, as "a magical point". It is at this point, says Winnie, that "law takes on a life of its own, revealing a perilous gap between technical process and lived life".⁴⁸³ This is law as spectacle, deprived of ordinary, everyday or real life. But the orderliness of Winnie's image of home also represents an ordinariness, a slowness and thoroughness in the task of mundane house tasks, in putting things in their places. It is the orderliness of a house that enables it to be a home but also deprives the house of homeness. This is where Derrida will say that "it is this deconstructable structure of law (*droit*)..., that also insures the possibility of deconstruction".⁴⁸⁴

Another depiction of the ordinary lies in the tea drinking ritual between the members of the *ibandla*. The importance of this and most rituals is that the process itself has a constitutive value, and it is not only the substance, the tea, that is pursued as an end result. There is no instrumentality or forced efficiency in

⁴⁸² "Unfortunately technical proficiency only establishes technical victories and technical innocence. That was the nature of your innocence". Ndebele 2003 at 63.

⁴⁸³ As above.

⁴⁸⁴ "Justice in itself, if such a thing exists, outside or beyond law, is not deconstructable. No more than deconstruction itself, if such a thing exists. Deconstruction is justice. It is perhaps because law (*droit*) ... is constructible...that it makes deconstruction possible." Derrida *CLR* 1990 11 921 at 945.

their tea drinking, it is simply (and complexly) a way of being together.⁴⁸⁵ It is the accompaniment of their conversation. But this everyday practice does carry with it the spectacle, and a somewhat romanticised vision, as Delisiwe's tea ceremony is an imperialist remnant of her mother's education at a missionary school, a "science of etiquette" into which – in Winnie's words – we were all civilised into. Delisiwe explains the step by step requirements of a serving tea properly, from the time that the oven should be switched on, through to the presentation of the tray with warmed cups. But then this spectacle in the ritual of tea drinking in the *ibandla* turns into subversion. Delisiwe tells of how her father would declare "Oh, lovely! Lovely!" when the tea was served. Each "lovely" would not be projected as much at the tea as at what it represented: Delisiwe's willingness and ability to serve. Now, in the *ibandla*, she challenges this patriarchal image and through this ordinary practice takes ownership and turns it into an empowering exercise in memory.⁴⁸⁶ Later, where 'Manette continues her "keep you arms folded" entreat, she also says that when her husband returns, she will make him tea according to the ways of Delisiwe,⁴⁸⁷ to let him wonder about the new stove, new cups and saucers and other ingredients of the ritual, speaking of her belonging to herself.

The ritual of tea drinking is also present in *Horrelpoot*, and the farm workers would mock Delisiwe's tea making ritual as they do in their joking with Marlouw about the "cups and saucertjies" nearly knocking him off his feet.⁴⁸⁸ In the world of Marlouw, Delisiwe's scones are a luxury, and when Mildred presents him with a piece of bread with his tea, this instance of the ordinary speaks of suffering.

⁴⁸⁵ Throughout the book, this way of being is referred to as "mellowness". This is an ordinary way of just being, not conforming to a specific state of being. Ndebele 2003: as well as various references to the term throughout the novel.

⁴⁸⁶ "On that memorable day, everyone was waxed lyrical about the tea and hot scones. It was an opportunity for Delisiwe to relive her days of training, reproducing family practice." Ndebele 2003 at 37.

⁴⁸⁷ Ndebele 2003 at 82.

⁴⁸⁸ Venter 2006 at 127.

4.3.3 *Horrelpoot*

At first blush Ndebele would put *Horrelpoot* down as a specimen of the spectacular stories of the *Drum* writers that he criticises. Everything is there: the complete exteriority of it all, the extreme opposites,⁴⁸⁹ Koert's caricature-like obesity⁴⁹⁰ and the show-like quality of the two major events – the destruction of the graves and Koert's murder – that leaves very little to the imagination. It is blatant, overt and over the top. But this reading comes with a reminder. One of Marlouw's thoughts already suggests⁴⁹¹ that things aren't always as simple as they seem. Simultaneously there is a warning against the spectacle that presents things as simple and uncomplicated and easy to judge at face value, but also against the reading of spectacle. The tension between the ordinary and spectacle is again illustrated successfully throughout the novel and my identifications of ordinary will carry with them the stubborn spectres of the spectacular.

Following Baxi's call for attention to human suffering instead of the proliferation of rights, we can firstly identify the absolute need, emergency and urgent want of most of the population in Venter's South Africa.⁴⁹² Not only poverty and AIDS in shocking measures, but also an almost abandonedness surfaces. The country is overpopulated and there is very little decent housing⁴⁹³. There are ample references to illness, of which the description of Per Stand in the "Kolonie-restaurant" in Reddersburg is the bleakest.⁴⁹⁴ When Marlouw arrives back in Sydney, it is this vision of direness that does not leave him.⁴⁹⁵ Everyone's existence is exactly that – mere existence, bare life, a fight for survival.⁴⁹⁶ But the

⁴⁸⁹ The complete luxury and wastefulness in which Marlouw and Heleen live in Sydney opposed to the dire circumstances in South Africa. The juxtapositioning of the outstanding roads in Sydney opposed to the terrible ones in South Africa. Also, more subtly, in the pretentious presents Marlouw receive as a farewell from his work (handmade nougat, expensive pure olive oil) to the humble presents he takes for the farm workers on Ouplaas (socks, pantyhose, sweaters and a scarf).

⁴⁹⁰ This compared to Esmie's small, emaciated frame.

⁴⁹¹ "Only a desolateness from the years of rain with red grass and fat ewes has remained in the town. But it has never been that simple" Venter 2006 at 112.

⁴⁹² Baxi in McCorquodale (ed) 2003, as discussed in Chapter 2.

⁴⁹³ Venter 2006 at 58.

⁴⁹⁴ Venter 2006 at 85-91.

⁴⁹⁵ Venter 2006 at 269. "The sight, the smell, and immediateness of the extreme need haunted me."

⁴⁹⁶ Venter 2006 at 41 and 63.

rhetoric of poverty is at work in the descriptions.⁴⁹⁷ Jaap, the taxi driver, blames the high incidence of theft, general lack of infrastructure and the extreme helplessness of the people on the fact that more and more people became dependent on state grants, and after a while NGO's and the World Bank grew sick of the whole lot.⁴⁹⁸ He also warns Marlouw to avoid eye contact with the beggars but also with all the poor people around them. This focus on ordinary pain might recognise the human suffering but it is clear that the humans suffering are denied recognition. In the face of this suffering, the mention of NGO's, invocation of human rights and even Freedom Day rings with empty symbolism.⁴⁹⁹ I am also not sure that Marlouw's assumption that in his eating the same food as the workers on Ouplaas, he is slowly from the inside becoming equal to them,⁵⁰⁰ is a true appraisal. While I am not suggesting that exposing all people to the same hardships is an appropriate approach to attaining transformation and moving towards an egalitarian society, this sharing of ordinary might assist in breaking down false perceptions and respect for the situation of others. I remain sceptical, however, about Marlouw's feeling of attaining equality so easily.

Closely linked to notions of ordinary is also the idea of journey; as De Certeau showed us how the city walker can redefine the city space by his everyday activity of walking. Based on this, I am curious about the idea of journeys, routes and modes of travelling. Just like in South African post-apartheid jurisprudence,

⁴⁹⁷ Ross T, "The Rhetoric of Poverty: Their Immorality, our Helplessness" *Georgetown Law Journal* 1991 5 1499.

⁴⁹⁸ Venter 2006 at 61.

⁴⁹⁹ In support of the scepticism expressed in part one regarding the spectacle of human rights, and other institutions. Marlouw refers to the (failed) Love Life campaign, aimed at fighting AIDS. There is also reference to the Landless People's Movement's unsuccessful attempts to restore ownership of land. When the police repossess Marlouw's bakkie, he tries in vain to assert his rights; the words "basic human rights" have absolutely no meaning or effect in his situation. The workers celebrate Freedom Day as just a tradition that has not died out yet, but it has no bearing on any significant indication or experience of freedom. Venter 2006 at 61, 108, 189 and 202 respectively. Tshepo Madlingozi expresses his scepticism about the NGO-sation of social movements, usurping their politics into human rights language and technicalities, incapacitating and depoliticising these movements. See Madlingozi T, "The Limits of Post-Apartheid 'Transformative Constitutionalism' in the Struggle against Poverty, Inequality, and Marginalization", unpublished paper presented at the *Annual Graduate Workshop, Law and Society Association*, 2008.

⁵⁰⁰ Venter 2006 at 139.

the two novels also relate the idea of journey to memory. I look at journey and memory in Ndebele and Venter together.

4.4 Routes and roots in *The Cry of Winnie Mandela* and *Horrelpoot*⁵⁰¹

4.4.1 Travelling

The metaphor of a journey has been exhausted in the South African context. It however remains a powerful image, especially the idea of a journey and not a destination, of a journey to and fro on the bridge, a suspended journey, a long, long road.⁵⁰² The sugar sachet wisdom that rings that life is a journey and not a destination has turned into a cliché, or rather, has become a spectacle. The claim that transformation should not be seen as a destination but as a continuous journey is not as simplistic as its relation to the well-known slogan might suggest. A journey can also be a spectacle. I think here of carefully planned GPS routes, which keeps to the tarred roads at all times and navigates you around any random obstacles. De Certeau's city walker shows us journeying and detouring as refusal. Getting lost is often a valuable experience during which you discover things you would never have on the main road. It ensures a slower way of travel, the chance of traversing the same road twice, and the possibility of unexpectedness. These pieces of literature both converse thoroughly on routes and *en route* deal with roots or heredity. I refer briefly to the notion of "spectre" and the possibility of the word in "spectacle". Spectre suggests that we are haunted (by among other things the spectacle), it hints at the continuation I discussed and also brings us to the role of history.

⁵⁰¹ This mobile groundedness provides again the interplay between the spectacle and the ordinary.

⁵⁰² See as one example: "This conception of Transformative Constitutionalism reminds me of the old Nissan slogan: 'Life's a journey. Enjoy the ride'. What the slogan tells us is that we should enjoy the driving itself rather than seeing it merely as a means to arrive at a destination" Langa P, "Transformative Constitutionalism" Prestige lecture delivered at Stellenbosch University on 9 October 2006. available at 5-6. sun025.sun.ac.za/portal/page/portal/law/index.afrikaans/nuus/2006/Pius%20Langa%20Speech.pdf – (accessed 3 July 2007) at 5-6.

4.4.2 *The Cry of Winnie Mandela*

The women's imagined journeys, journeys towards the self, into the self, literal journeys and unending journeys are all sketched against the backdrop of the journeys of their husbands. These journeys happen in various vehicles and on different roads. Ndebele makes much of the idea of highways as energy forces connecting people.⁵⁰³ The final scene also finds the *ibandla* in a hired white Caravelle on a long deserved holiday trip, to celebrate their self-awareness and strength. It is on this trip that they meet Penelope, likewise on a trip to rediscovery and a pilgrimage of assertion. But to follow up on my interest in De Certeau's streets, let me look at Ndebele's use of the image of highways. Although highways are mainly in my mind a site of spectacle, with speed and fancy cars and road rage being its ingredients, it is maybe this mentioning of infinity, of infinite possibilities that links to refusal and the ordinary.⁵⁰⁴

I am also interested in journey, because a car is simultaneously a private and public space and in South Africa a taxi can be a vehicle for democracy in the sense that it can create a fleeting or momentary community.⁵⁰⁵ Mellowness, the state of just being, is also described as "a product of ambiguous journeys."⁵⁰⁶ The empowerment of driving is illustrated through the part from Nelson

⁵⁰³ Winnie is imagined as saying that she looked at a map of Congo and thought that she "understood why they have such difficulty in that country finding the formula for bringing about unity and coherence to their enormous size and diversity. There was not a single highway that runs across the country. Their energy ways are confined to regions, exacerbating an isolationist sense of regional autonomy. They must open up energyways of roads, railways, rivers, canals, airways and telephones that run across the land in every direction". Also in the words of Delisiwe, when she refers to the Basotho fondly calling the vagina Lesotho – the same name as their country – she ponders the idea that her body is a country that men want to enter but do not want to live in, but she says, should they stay, they will find out that "so it is. They must come to the primal wisdom that inside a woman are mountains. There are roads and highways through which human energy flows." Ndebele 2003 at 101 and 50 respectively.

⁵⁰⁴ "She is on the N1 now. She's going south. The traffic on the highway is heavy. There's something exhilarating about busy highways. There's no better picture of the flow of human energy. Highways are energyways. They carry blood to the many destinations on the national body. When you contemplate traffic from the top of a hill, you cannot escape the realisation that people are no different from ants... But there is Winnie, on the N1, probably thinking as I do. She's enjoying the possibilities of infinite travel to an infinite number of destinations, in the land with infinite possibilities." Ndebele 2003 at 101.

⁵⁰⁵ "She is on the N1 now. She's going south. The traffic on the highway is heavy. There's something exhilarating about busy highways. There's no better picture of the flow of human energy. Highways are energyways. Ndebele 2003 at 101. Recall here also the discussion of Young's example of people waiting for a bus at n383 and the haiku at the beginning of 3.3.3.

⁵⁰⁶ Ndebele 2003 at 51.

Mandela's biography where he teaches Winnie to drive.⁵⁰⁷

Journey is contrasted to travelling or tourism. Joyce explains that during apartheid, tourism was "something white people did" and black people had to travel not through time and distance, but through mental trauma. She uses this to show that the notion of tourism is inappropriate, an exercise of spectators, and cannot contain the experiences of real life.⁵⁰⁸ But also, connected to the uncertainty during apartheid of whether you would reach your destination, there is the possibility of getting lost during your journey, of randomly discovering a wonderful new place or ending up in a *cul de sac* or unsavoury area. This acknowledges also the absolute loss in a journey and even more so a journey with no destination.⁵⁰⁹

Each of the women journeys into her own history, imagines her past and travels to herself in the future. Their journeys are exercises of memory. Each woman tries to make sense of her own memories, tries to deal with her pain, tries to find "mellowness", but as Ralph Goodman observes, none of them reaches closure; their emotions are too intense and they remain dynamic, always on the move.⁵¹⁰ This relationship between and merging of memory and moving is portrayed in 'Manette's search for her husband.⁵¹¹ The preparation for the journey proves equally important in the novel, and "*padkos*" is an important part of the final trip, also, as when 'Manette prepares her husband's *mofau* with extra care to make sure that he will not be hungry or cold on his way.

⁵⁰⁷ "Driving in those days was the man's business; very few women, especially African women were seen in the driver's seat. ...when I attempted to give Winnie lessons along a relatively flat and quiet Orlando road, we could not seem to shift gears without quarrelling" Ndebele 2003 at 101.

⁵⁰⁸ Ndebele 2003 at 68-69.

⁵⁰⁹ "In offering no known destination, an unending journey of waiting can finally offer the real possibility of loss. Losing your way. the need to hold on to the pretence of being in control. The nightmare of being in control." Ndebele 2003 at 103.

⁵¹⁰ Goodman R, "History, Memory and Reconciliation: Njabulo Ndebele's *The Cry of Winnie Mandela* and Pumla Gobodo-Madikizela's *A Human Being Died that Night*." *Literator* 2006 27 1 at 4.

⁵¹¹ "Whenever she looks back at the time... time and distance blur into oblivion. In a bus or in a taxi, or a train, or walking... she remembers little of where she was... It was as if she had been in a cloud, being carried by a floating feeling: that one and only feeling that leads to some kind of death... Saved from memories, she remembers only being on the move." Ndebele 2003 at 12 -13.

According to Goodman, we need to challenge “the fixed binaries and legitimating narratives which ruled our past”; he calls for a fragmented underlying sense that consists of different accounts. He suggests that Ndebele’s characters’ trips down their own but also Winnie’s and South Africa’s memory lanes can be a powerful collective instrument.⁵¹² The message from all the women is that the process of waiting is a journey; a journey of self-discovery and rediscovery. The depiction of waiting as a journey shows to us memory’s self-making process.⁵¹³

4.4.3 Horrelpoot

Marlow’s journey is central to *Horrelpoot*, the whole book consists of his expedition and this also marks the strong relation to *Heart of Darkness*. It starts with his departure from Sydney and ends with his arrival back in Sydney – an apparent full circle with nothing accomplished because he ends exactly where he started. Not quite, because it is of course also the story of a mental voyage. With reference to walking as rediscovering the ordinary; both Marlow and Koert in *Horrelpoot* cannot walk – Marlow properly, Koert at all. This is symbolic of their inability to really change. Marlow’s club foot becomes in its criminal form Koert’s rotten foot.

Mariette Postma and Melodie Slabbert analyse Marlow’s trip as a Jungian journey to individuation.⁵¹⁴ They focus on the rich Jungian archetypal images in *Horrelpoot*. The book also refers to other psychological aspects such as the site of fear. In returning to the farm of his childhood, Marlow is constantly confronted with visions, apparitions and recollections of the past. They take the form of dialogues with these visions, presenting conversations with “archetypal forces in

⁵¹² Goodman *Literator* 2006 2 1 at 4 quotes Said E, “At the Rendezvous of Victory” in Said E and Barsamian D, (eds) *Culture and Resistance: Conversations with Edward W Said* 2003 at 182: “And it [memory] is something that can be carried not only through official narratives, but also through informal memory. It is one of the main bulwarks against historical erasure. It is a means of resistance”.

⁵¹³ Goodman *Literator* 2006 2 1 at 4 quotes: “From the Agora to the Junkyard: Social Memory and Psychic Materialities in Radstone S and Hodgkin K, (eds) *Regimes of Memory* 2003: “memory...names the ways in which people shape and transform, not only their past but crucially each other through collective authored stories”.

⁵¹⁴ Postma and Slabbert *Literator* 2008 29 1.

his conscious”.⁵¹⁵ This is then seen as individuation,⁵¹⁶ a concept that Jung uses to describe this constant psychic narrative. Marlow’s journey is therefore also one of memories, and specifically memories that “reveal that which he fears as ‘other’ is within himself”.⁵¹⁷

Marlow’s physical perils and actual threats in his physical journey is equally present in his hazardous psychological trip. This notion of a dangerous journey is apparently an archetypal one, which according to Postma and Slabbert “suggests the possibility of death and/or renewal”.⁵¹⁸ I am however not convinced that Marlow “discovers his true self” or “find[s] meaning” or even that his journey “suggests a realistic goal of personal transformation and growth, of self-realisation and integration”.⁵¹⁹ The growth of his character is underplayed very much, and his transformation is quite limited. I do not share this slightly optimistic view of a changed person or metamorphosis, and would rather emphasise their remark that “Jung’s idea of individuation, however, rests on the assumption that perfection is not possible”.⁵²⁰ Marlow’s journey, just like the women’s in Ndebele’s novel, is not a redemptive trip with a triumphant destination, but rather a journey through memory and into memory, which creates a possibility of change but ultimately leaves the traveller suspended.

The concept of journey already links these two novels in general to *Heart of Darkness*. There are however many intertextual interplays and also explicit references to the Conrad novel, especially in *Horrelpoot*. I point out a few. The presence of *Heart of Darkness* of course places the Ndebele and Venter books in

⁵¹⁵ Postma and Slabbert *Literator* 2008 29 1 at 5.

⁵¹⁶ Individuation is the process of distinguishing individual characteristics. According to Rowland S, *Jung and Literary Theory* 1999 Palgrave at 11 (as quoted by Postma and Slabbert *Literator* 2008 29 1 at 5) explains it as “a deconstructive process, privileging the ungraspable unconscious over the limitations of the ego as it continually reshapes identity and perceptions of reality.” Jung in turn points out that “[i]ndividuation does not shut one out from the world, but gathers the world to oneself.” I allude to the idea of individuation at the beginning of this dissertation in the context of Cornell’s imaginary domain.

⁵¹⁷ Postma and Slabbert *Literator* 2008 29 1 at 8.

⁵¹⁸ Postma and Slabbert *Literator* 2008 29 1 at 8 refers to Cotterell A and Storm R, *The Ultimate Encyclopaedia of Mythology* 1999 Hermes at 7.

⁵¹⁹ Postma and Slabbert *Literator* 2008 29 1 respectively at 9 and 16.

⁵²⁰ Postma and Slabbert *Literator* 2008 29 1 at 17.

the ambit of the post-colonial project. Without trying to touch on all the complexities of this field, I aim to briefly introduce a few identified tenets and illustrate its relation to my argument.

4.5 Conrad and *The Cry of Winnie Mandela and Horrelpoot*

4.5.1 Post-colonialism and *Heart of Darkness*

There are many debates surrounding the term “post-colonial”. The issues in post-colonialism often go beyond the boundaries of strict definition. In a very literal sense, post-colonial refers to everything after colonial. However, post-colonial studies or theories of post-colonialism do not indicate only a specific and materially historical event but rather seems to describe the second half of the twentieth century, after the prime of colonisation. In an even broader sense it signifies a position against imperialism and Eurocentrism and it questions Western ways of knowledge production and distribution and thinking. Post-colonialism then seeks alternative ways of expression and thinking. Just like the use of the prefix in post-apartheid and post-modern, and Klare’s post-liberal, “post” here encapsulates the same idea that we are not beyond colonialism, or done with colonialism, but it looks at ways to deal with the effect and remnants of colonial pasts in the present and future. As such, it is also the study of hegemony, of “the other”, of sovereignty, language, race, slavery and a range of different concepts associated with colonialism.⁵²¹

Colonialism features above in Chanock’s warning against neo-colonialism in the context of the notion of continuation. His warning entailed that South Africa runs the risk of being colonised again by international law and imported ideas of human rights and constitutionalism if we do not consider our very unique context and history in all of these instances. This idea of neo-colonialism is also present

⁵²¹ Gilbert H and Tompkins J, *Post-Colonial Drama: Theory, Practice, Politics* 1996 (only the introduction).

in post-colonialism as post-colonial studies and theories also focus on the continuation and the legacy of colonialism. Post-colonial theory is a complex and nuanced field of study and the ideas formulated therein are valuable for every instance where there is power relations and exploitation. It is not limited to the domain of law, but is applied to political science, to history and to other related fields.⁵²² Those who can be called postcolonial scholars generally see themselves as part of a large movement to expose and struggle against the influence of large, rich nations on poorer nations.⁵²³ Important founding proponents and texts in post-colonialism are Aimé Césaire's *Discourse on Colonialism*, Albert Memmi's *The Colonizer and the Colonized*, Frantz Fanon's *Black Skin, White Masks* and *Wretched of the earth*. Important other and contemporary works include Kwame Nkrumah's *Consciencism* and Edward Said's *Orientalism*, Gayatri Chakravorty Spivak's *Can the Subaltern speak?*, Homi Bhabha's *The Location of Culture* and Achille Mbembe's *On the postcolony*. There are many more, and the list of writers from the post-colonial world is equally long, but bibliographies in post-colonial works are likely to include books by Soyinka, Derek Walcott, Salman Rushdie, Chinua Achebe, Michael Ondaatje and of course Joseph Conrad.

I briefly discuss one of Fanon's books titled *Wretched of the earth*,⁵²⁴ mainly because there is an intertextual reference to it in *Horrelpoot*.⁵²⁵ He wrote the book at the height of the Algerian war for independence, and underlines the economic and psychological degradation inflicted by imperialism. Fanon was a psychotherapist and in his work he draws a connection between mental disease

⁵²² Aschcroft B, *On Post-Colonial Futures: Transformations of Colonial Culture* 2001 at 3.

⁵²³ Brians P, "Postcolonial Literature": Problems with the Term available at <http://www.wsu.edu:8080/postcolonial.-html> (accessed on 30 March 2009).

⁵²⁴ Fanon F, (trans Farrington C), *The Wretched of the Earth* 2001.

⁵²⁵ There is a scene in the book where Marlouw and Pilot drive with Koert on the back of the "bakkie" to the graves of Marlouw's mother and father and others from his family tree with the aim of destroying them because they are next to an informal settlement and are in any way plundered by the residents. This is fired by a dream that Marlouw had. When they arrive at the graves, Koert incites the residents of the informal settlement to destroy the graves. He yells from the back of the "bakkie" that they should leave everything that they are busy with and respond "op die call vannie great white master" (on the call of the great white master). He ends his long tirade with "Hierse is julle-se long awaited vlysbene. Juicy, cumin fetch. Indulge yours, wretched of the earth." (Here is yours long awaited meat bones. Juicy, cumin fetch. Indulge yours, wretched of the earth.) Venter 2006 at 273-275.

and the colonial war; this included his argument that the fight for freedom must be combined with building a national culture. The preface by Jean Paul Sartre states that the voices of a new generation, the product of colonialism, were saying ‘You are making us into monstrosities; your humanism claims we are at one with the rest of humanity but your racist methods set us apart’. This also puts in perspective Douzinas’s arguments, to which I refer above, about human rights as the new emerging Empire.⁵²⁶ The same danger that colonialism held is also contained in the value of “humanity” proclaimed by the rising universal order of human rights – or then the “new constitutionalism” as Fitzpatrick explains above.⁵²⁷

One of this field’s key contemporary proponents is Patricia Tuitt. Tuitt’s *Race, Law and Resistance* brings to life the thoughts of Fanon amidst the notions of the foundational (law creating) and reiterative (law preserving) violence of modern law, as found in the Benjamin-Derrida thoughts briefly touched on earlier.⁵²⁸ This book also interrogates the legacy of colonialism in private law. She looks at how racial oppression has profoundly influenced the development of legal doctrine and claims that the production of subjugated figures like the slave and the refugee have been integral to the development of private law institutions such as contracts and delicts. In a review of the book, Baxi⁵²⁹ writes that Tuitt “offer[s] some consolation in philosophy. Within the “law” we find possibilities to help erase the bright lines between its violence and terror.” This opens up the infinite openness and inherent negotiability that will enable law “to somehow recover its natural poise as violent but more than violent”.

Heart of Darkness is seen as one of the earliest literary works of critique against colonialism and an important source in post-colonial studies. The novel was written in 1899 at a time when the first fault lines of colonialism started to show.

⁵²⁶ See the discussions in 2.3.4 and 3.3.4.

⁵²⁷ See 2.3.2 and 3.3.2.

⁵²⁸ Tuitt P, *Race, Law, Resistance* 2004.

⁵²⁹ Baxi U, “Review: *Race, Law, Resistance*, Patricia Tuitt”, available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/tuitt1205.htm> (accessed 6 December 2007).

The story begins on the *Nellie*, a ship, where Marlow the sailor tells the story of his cruise upriver in the Congo. It is written in the first person, and Marlow alludes to various incidents and the effect it had on him. He was the captain of the steamboat but his main mission was to visit and, if necessary, bring back Kurtz, the mysterious but very successful agent of a continental trading company. Kurtz was reportedly very ill, and some speculated that he lost his mind in the “wilderness”. When Marlow finally finds Kurtz, he is set up like a god. During the entire expedition the mistreatment of natives by the Company and its agents, the prevalence of disease, the intimidating presence of the jungle and the absurdness of the colonial operation carrying on for a relatively small amount of ivory, strikes Marlow. Ultimately he takes Kurtz back against his will, but Kurtz dies on the return trip. His last words, “The horror, the horror”, has a bearing to the dismay of his surroundings but also the awfulness of his soul. Marlow has to break the news of his death to Kurtz’s fiancé, who idealises him. The book ends with Marlow’s lie to her that Kurtz said her name when he died.

4.5.2 *The Cry of Winnie Mandela*

Ndebele acknowledges at the back of the book that he has drawn insights from Conrad’s *Heart of Darkness*. We find references to the novel in Winnie’s part of the game. Once it is subtle, where she says that she looked at a map of Zaire a while ago and thought that she understood why they fail to unite the nation.⁵³⁰ She observes this while she is travelling on the N1, and thinks that there should be a road or any form of route (river or rail) that runs through the whole country. Marlow also alludes throughout to the impenetrability of the Congo, and even though the river runs through the larger part of the Congo, the journey is so difficult (sometimes impossible) that it is not at all the highway that Winnie is hinting at. Later, Winnie compares herself twice to the character of Kurtz. She sees her exile in Brandfort as similar to Kurtz’s mission in the *Heart of Darkness*. She does this by referring to the scene where Kurtz dies, and says if “Joseph

⁵³⁰ Ndebele 2003 at 101.

Conrad's boy, him of the 'insolent black head in the doorway' had been a fly on my wall, he could have announced to the world: 'Mees Winnie – she dead'.⁵³¹ Also, after she talked about her TRC hearing, she repeats this phrase⁵³² and implies that her conduct during the TRC is in way slightly similar to that of Kurtz. The equation of Winnie to these two characters, by another Winnie, created by Ndebele, repeats the theme found in *Heart of Darkness*, of how easily people become evil in an environment when their goal is to improve or save or change that environment. I am here reminded of Mureinik's idea of a conscientious judge as explained in chapter one. Although participants in legal culture should guard against naively believing that they could change the system and false consciousness of their intention to transform, this aspect of colonialism does not mean that it is impossible for a person to change a system and that the person is instead inevitably changed to fit into the system. On the contrary, it rather highlights the possibility to refuse. I warn against such fatalism and retreat in this dissertation, for traces and possibilities of transformation remain. It is helpful to consider this comparison of Winnie in the light of the culture of violence in South Africa. Winnie asks whether she might be the daughter, the product, of Major Theunis Swanepoel, the policeman who tortured her. This illuminates the continuation of violence.

⁵³¹ Ndebele 2003 at 103.

⁵³² "The point about people such as Quesalid and myself is that they are intimately in touch with their own folly, but choose to live with it. In time they find they are unable to live without it. Mees Winnie she dead" Ndebele 2003 at at 112. The reference to Quesalid is a story that features earlier in the book. Quesalid was a remarkable shaman of the Kuwait Indians. Writer Joel Kovel told that he initially became a shaman in order to expose and discredit shamanism because he did not believe that they had the power they proclaimed to have. In this process to unveil their trickery, he attended the Shaman meetings, and one day was invited to join them – this led to him starting a four-year apprenticeship. He convinced himself that if he had a thorough knowledge of the sorcerers' power he would be able to point out that it was illusion to which the patient was susceptible. But of course, he became so intrigued by the trickery that he could not find himself to continue with his initial task of exposing it. He "rearranged" his disbelief, because he could not bring himself to go on with criticising Shamanism. Instead, he turned his critique towards what he called "false supernatural" and concluded that some forms of supernatural were less false than others, and his own practices increasingly fell into the "less false" category. Through this he exposed the baser techniques of his colleagues and deprived them of their authority, while Quesalid just grew in his stature as healer and therefore also increased his healing power.

4.5.3 *Horrelpoot*

Venter's novel is clearly and cleverly modelled on the plot and themes of *Heart of Darkness*, with specific quotes,⁵³³ the similarity in the names of the characters,⁵³⁴ the recurring dream, references to images of a jungle and the journey as a river cruise,⁵³⁵ the sequence of the journey, Koert's and Kurtz's dying words,⁵³⁶ the farm workers and workers on the ship and the general similarity of the dire circumstances described in both novels.⁵³⁷ Fanon, post-colonial proponent, is implied in the text through Koert's words "Indulge yours, wretched of the earth".⁵³⁸ Darkness as central theme in *Heart of Darkness* relates to mystery, death, chaos, recklessness, futility and insecurity.⁵³⁹ It points to the darkness outside, but also to that inside of people, as we also see in *Horrelpoot*. Just like their phonological namesakes Koert and Marlow are both supposed "saviours",⁵⁴⁰ but Koert's disability (gangrene foot and being too overweight to stand) is so vast that he who was once powerful is now completely powerless.

There is a clear line of continuation in *Horrelpoot*, and in conjunction with *Heart of Darkness*, it calls to mind Chanock's continuation and neo-colonialism.⁵⁴¹ Gräbe accurately remarks that the fact that the erasure of all signs of human life

⁵³³ Each chapter of Venter's book starts with the lines (in English) from Conrad's novel. Chapter two opens with "Often far away there I thought of these two, guarding the door of Darkness, knitting black wool as for a warm pall..." In the chapter then, Jocelyn is knitting, with black wool, while trying to convince Marlow that he should not go to South Africa.

⁵³⁴ Marlow (from Martin Jasper Louw), Marlow, Koert, Kurtz, Headman, helmsman etc.

⁵³⁵ He describes the surroundings as a jungle of sensations and uses images of paw-paw, wet chicken feathers, as well as the begging palms of the bums that are like tray-ish leaves of a giant riverbed plant. Venter 2006 respectively at 51 and 59. Ina Gräbe also points out that the density of the forest in Conrad is embodied in the overpopulation and the pressing crowds in Venter. Gräbe I, "Apokalips Nou of Later? Eben Venter se Siening van die Suid Afrikanse Samelewing in *Horrelpoot* (2006)" *Tydskrif vir Geesteswetenskappe* 2007 4 59 at 63.

⁵³⁶ See Gräbe *Tydskrif vir Geesteswetenskappe* 2007 4 59 at 60 for a discussion on how the semantic and phonological entities of the title *Horrelpoot*, which means club-foot and resonates with Conrad's darkness. Kurtz proclaims the judgment of horror on his soul in his dying moments. Similarly, Koert counts himself a "horrel": phonologically: these two words sound very alike.

⁵³⁷ The list is (probably) much longer. Venter really paid attention to detail in mimicking Conrad.

⁵³⁸ Venter 2006 at 275.

⁵³⁹ Kelleher VMK, *A Study of Conrad's Concept of Darkness* MA dissertation, UNISA 1970.

⁵⁴⁰ In classic colonial language, Koert explains how he tried to enlighten the farm workers, bring them civilisation and sophistication and "true" knowledge, by bringing them Mario Kart (an electronic Nintendo game). This false consciousness is further illustrated in his belief that he introduced them to Bells whisky, stating that one surely can't be fully human if you haven't tasted Bells. Venter 2006 at 247.

⁵⁴¹ An obvious example is the words of Jaap: "You see sir, the imperial history has repeated itself here." Venter 2006 at 67.

(at the end of Venter's novel) is situated in a time frame thirteen years after the dismantling of apartheid – which can be seen as an ultimate form of colonialism – and democratisation, and calls for a “critical assessment of the present government [and legal system] and its apparent unwillingness to prevent, or even alleviate the dire consequences of illness, crime and annihilation”.⁵⁴² Ouma Zuka, the outsider, the *umthakathi*⁵⁴³ who represents African tradition, is the one who constantly and fearlessly tries to expose Koert and tells everyone that what he has done is bad. It is precisely then, because of this defiance, that Koert forbids her to stay on the farm and banishes her to the hills adjacent to the farm. But then it is under the instigation of Ouma Zuka that Koert is eventually killed. This might well be a bit too obvious, but it encompasses Chanock's call for a uniquely African approach to constitutionalism to prevent it from resulting in a neo-colonialism. It further embodies the rediscovery of the ordinary as a return but also a rethinking of African values such as Ubuntu as well as a re-evaluation of customary law as ways to slow down the continuation and interrogate neo-colonialism.

Koert's initial plan to return to South Africa was motivated by his need to drift.⁵⁴⁴ This invokes the claims of colonialists that they were “exploring”, or that they “discovered” a place. But now, Koert gives orders and runs the show. Koert is no longer the explorer but has become the conqueror. Therefore it is valuable to regard *Horrelpoot* from a post-apartheid or then post-colonial point of view. Discovery and sovereignty, bears close relation – Patricia Tuitt points out that “the thing discovered is different for being discovered”⁵⁴⁵ and she quotes Fitzpatrick who states that it is “a process of actively denying or undoing a previous condition”.⁵⁴⁶

⁵⁴² Gräbe *Tydskrif vir Geesteswetenskappe* 2007 4 59 at 60.

⁵⁴³ IsiXhosa word meaning witch.

⁵⁴⁴ Venter 2006 at 19.

⁵⁴⁵ Tuitt 2004 at 56.

⁵⁴⁶ Fitzpatrick P, *Modernism and the Grounds of Law* 2001 at 161-162.

The scepticism I express at the outset of chapter four, namely that a separate discussion of the novels will seem too fragmented and create the impression that the novels are disconnected from the rest of the dissertation, is now softened. Chapter four shows how the characters, storylines, images and symbols in the literary work support and illustrate the views expressed in the preceding part of the dissertation. The themes in these novels connect to the notions of spectacle and ordinary and serve to exemplify these concepts – I used the novels to illuminate refusal and a rediscovery of the ordinary. Through the work of Conrad, I explore post-colonialism and the novels also emphasised the idea that rediscovery and refusal are part of a journey towards transformation. These four themes from the literary examples – refusal, ordinary, journey and post-colonialism – now fill the frame of my argument, only some final remarks remain.⁵⁴⁷

⁵⁴⁷ Summary in “Thus far” 4.1.

5 Conclusion

A variety of new words and concepts and existing words and concepts with new or specific meanings have entered our post-apartheid vocabulary. I explore just a few of them in this dissertation. In retrospect, the route of this research is dotted and mapped out by various concepts, words and phrases. If we were to draw a map of stopovers and aspects visited, we would probably start at the beginning of this course – “transformative constitutionalism”. Klare introduced “transformative constitutionalism” as a project that envisions large scale socio economic change through non-violent processes grounded in law. From “transformative constitutionalism” we proceeded to “legal culture” which entails the thinking and absence of thinking in and about law. From there we strolled over to “formalism” – the belief in law as an objective neutral science, and it brought us to Klare’s label of South African legal culture as “conservative” and his example of the judge who inscribes a “status quo ideological spin” on the materials in front of her. From there, we encountered “systemic momentum” which links with “continuation” – Chanock’s term, and “same as it ever was” – Coombe’s term, and “business as usual” – Davis’s term. These words were all traversed to express the notion of a conservative or formalistic legal culture that persists or is set forth. Our detour to the discussion of “content” and “context” and “content within context” led me to conclude that there cannot be a too strict distinction between these two concepts. We then met Chanock again, with “popular justice” as a term that would form part of the “new matrices”, together with the old ones of “international acceptability and economic struggle”. Popular justice was important for thinking about the role of the community, and linked to what Coombe explained as “interpretive communities”. She warned that these communities do not exist *a priori*, but are continually reconstituted in a process of ongoing struggle. Our next stop was again at Klare, with “indeterminacy”, which he labelled “the tension between freedom and constraint”; Coombe then warned us against “unquestioningly accepting” constraint. The road then curved to

Chanock's "new formalism", which ties in with "positivism" and "new constitutionalism", which he described as a "tightening web" of international expectations. It was at this stage that we met Mureinik's "conscientious judge" and encountered Klare's mentioning of the Constitution's "massively egalitarian commitments" and "substantively progressive aspirations". "Post-apartheid" was introduced here, even though it was present and is present throughout the trip. An interesting next concept was "the idealising language of law" – Chanock's words in anticipation of a warning against the spectacle as cover which conceals the ambitions and also the incapacities of the state.

"Liminal" was the next stop, and this word featured prominently throughout the journey. It indicates the limit of the spectacle and that "in-between space" through Van Marle's invocation of the lyrics of the Dave Matthews band. Then "critical legal theory" featured, followed by "the event" – Derrida's notion, to which we often returned on the way. Le Roux was next to introduce "symbol" and "symbolic" along with the "aesthetic turn". Tied to the "aesthetic turn" came "substantive constitutionalism" and Kant's notion of "aesthetic judgment", which in turn took us to "determinant and reflexive judgment". We spent considerable time at our next stop – "spectacle" with all its synonyms and related concepts – the term also brought us "spectacles", "spectators" and "spectres". With this came Ndebele's list to explain the spectacle's characteristics: it "indicts implicitly", is "demonstrative", "documents", "has a vast sense of presence"; there is also its "payceness", "obscene social exhibition" and "hyperbole" and then a few others such as "over the top fabrication". Ramphele then stopped us to tell about "the miracle nation" and the "overconfidence of triumphalism". Debord joined in with "society of the spectacle", its "paralysis of history and memory" and "the false consciousness of time". Already at this juncture, Kundera's "slowness", as used by Van Marle, was introduced. But staying with the spectacle, we met "generalisation", "omnipresence" and "kitsch". "The generalised other" and the "concrete other" as conceptualised by Gilligan explained why we should guard against the generalising tendencies of the spectacle.

The spectacle's comfort zone was illustrated through Klare's example of professors "lampooning" judges for their "anachronistic reasoning style" and Debord's idea of the spectacle as "the guardian of sleep". Candide then joined our trip and we saw the relation between "optimism" and spectacle. "History" was our next stop, with Harris's "archive", "politics of the archive", "positivist paradigm", "neatly packaged information" and "mirror of reality" as opposed to "archival sliver". We then came across Van der Walt and De Vos's "grand narrative", "meta-narrative" and "golden thread through history" as well as "competing narratives" and arrived at the "constitution as monument". Here we found "celebration" versus "commemoration" along with "heroes", "anti-heroes" and "failures". Fitzpatrick showed us "neo-colonialism" and we revisited Klare's "politicised account of the rule of law". In the area of constitutionalism as spectacle, we came across "instrumentalist transformative constitutionalism" and on the other side "critical transformative constitutionalism". The former introduced "substantive equality", "the constitution as a tool" and "pragmatism". Cornell told us about Fish's "systems theory" and explained her concept of and warning against mere "evolution" where the system retains its identity despite change to the system. This hurried us on to "metamorphosis" as used by Pieterse. "Culture of justification" opposed to "authoritarianism", appeared again through De Vos, similar to Mureinik's allusion thereto earlier in the journey. The "public sphere" and the exaggerated focus on it came with transformative constitutionalism as spectacle – and Van der Walt cautioned against this. We proceeded, and discovered Roux's "direct and representative democracy", "shallow and deep forms of democracy", "sham of independence", "participatory and deliberative democracy", Hanafin's "democracy to come", Le Roux's "street democracy" and the "community of becoming" in Van Marle drawing on Cornell. We stopped to consider Roux's "vicious circle" argument and Van Marle's scepticism towards the "containment thesis" and the "suspect intimacies" in the "moral consensus" of "civic republicanism" linking to what Frug terms "romantic togetherness". Klare's escape of existing terms such as "communitarianism" and "republicanism" gave

us “post-liberal” instead. Christodoulidis added the terms “simple inertia”, “structural inertia”, “reflexive” and “reductive” to our list. Nedelsky introduced “rights as relationships” and Heyns the “struggle approach to human rights”. We questioned rights as “self-executing” and Baxi told us about “the human rights movement”, and “the age of human rights”, “westoxification”, “human rights evangelists” and “proliferation”. Heyns explained legitimate struggle” and then justified “counter majoritarianism” through invoking “humanity through history” and Baxi warned against this “essentialism” and later also against “compassion fatigue”. Ramphele joined Baxi with her “covenant with the divine” and Melkko illustrated the “commodification” of human rights through her work.

We took a turn and drove past “the constitution as memorial” or “memorial constitutionalism” and arrived at the next important stop: “refusal” and “rediscovery of the ordinary”. But first we got off at “patriarchy”, “logocentrism” and “institutional momentum”. Hanafin carried “refusal” into the journey and “an absolute right to refuse to accept” following Blanchot, together with “solitary responsibility” and a “disastrous responsibility to the non community” or to “the unknown other” and “whatever singularities”. Other terms that surfaced were “subversiveness”, “own voice” and “individual speech”. Ndebele showed us the link between refusal and “disruption”. Refusal exposes the “limit of the law” and “law’s frailty”. Our lingering at *Bartleby* of course gave us: “I would prefer not to” and “... refused to be categorised”. Van Marle showed us a “jurisprudence of generosity”, and referred to the “politics of the everyday” which summoned De Certeau’s “the practice of the everyday”. With him arrived “making do”, “procedures of consumption” as opposed to “consumption”. We stopped at Ndebele for “rediscovery of the ordinary” and spent quite some time to investigate links between “rediscovery of the ordinary” and “refusal”. Van der Walt looked at “reliance and denials in history”, a “reflexive account of history” and “histories of the margins”. Again the “constitution as memorial”, “the constitution’s pledge” and “critical approach to transformative constitutionalism” made their appearances.

Then Van Marle asked us to “play with both hands” using Derrida’s concept, and accept the challenge of transformative constitutionalism while acknowledging that it can never be met. The ordinary “piles up the detail” and we encountered “law’s violence and reductive force”. Du Plessis pointed out why “subsidiarity” promoted “ownership of the constitution”. Goosen took his time, and explained “the event” and the “quid of the event”, “the borderline”, the limit”, “symbolic order” and “the politics of remembering”. Unger showed us what “mapping” means and Plato introduced new possibilities for “meat and poison”. This lead us to Derrida and “*pharmakon*”. “Re-imagining” found its way onto the map through Van Marle and the “inner city community” via Frug. Arendt alluded to “reflective judgment” by referring to Kant and stated that good reflective decisions required “embodiment” and “particularity” from those involved in “public dialogue”. Nedelsky touched on the “undesirably individualistic” nature of rights and “rights talk” because there should be “disagreement” and “contestation” on what rights mean. Baxi’s “here and now suffering” and the “barbarism of power” were also *en route* to our final stop at the literary texts. We circled and wove back on our trial and found “ibandla” – or a “group of waiting women” from Ndebele; the “imaginary domain” and “remembering the future and imagining the past” from Cornell.

Joyce told us about “habit” which is doing without thinking, and Delisiwe about “reflexive thought”. We got to know the “posture of refusal” as arms folded over the cussion of your breasts. *Horrelpoot* asked some questions about “white flight”, “laer trek” and “baasskap”. With the help of Conrad we got to know the contentious term “post-colonial” and also “funk” – the approaching fear. We drove on and found, with the help of Winnie and Du Toit, that “house”, “home”, “housekeeping” and “homelessness” offered interesting thoughts. Some of the last stops were “hegemony”, “archetypes” and “individuation” – the Jungian concept used by Postma and Slabbert, connoting a process through which a person defines herself and establishes distinct individual characteristics. We also came across “journey”.

These words, stated here out of context, could serve as examples of the spectacle. As a mere list of terminology they have very little meaning and they merely mark a jargon or rhetoric without much sense. They should of course not be read in isolation but rather be seen as a form of index to a dissertation that encountered many (new) words and symbols - almost like a bag of memorabilia collected on an unforgettable trip. These words are like dots marking out a map, but dots that do not necessarily appear in a chronological or any other order, and dots or places that are not visited only once, but can in fact be revisited and returned to. A map is usually used at the beginning of a journey, but this is much less a conclusion than a beginning.

Transformative constitutionalism envisions a changing society. This presents our legal culture and the participants in our legal culture with a challenge. Our society should change – not because we have not transformed enough yet, or because we have not met the aims of transformative constitutionalism yet, but because we will never fulfil these goals. I argued that South Africa’s legal culture which has been described as formalistic and conservative can be seen as a culture of spectacle. What followed was by no means an answer or a counter-approach to the spectacle, but rather a call to acknowledge this spectacular culture and to continue questioning and contesting and refusing it through rediscovering the ordinary. It requires specifically that we should not close our legal culture but always leave it open and liminal – in the margins. Therefore I conclude by beginning. With a growing repertoire of words, concepts and changing symbols, I continue, with my fellow participants, this journey towards transformative constitutionalism.⁵⁴⁸

⁵⁴⁸ I fondly recall here our prescribed Afrikaans book in Grade 8, *Ek is `n Gideon*. The book started with “*Die einde, dit is hoe die einde moet lyk*” (trans. “The end, this is how the end should look”) and ended with “*Want hierdie is maar net die begin*” (trans. “For this is just the beginning”). With this (last) anecdote before I the acknowledgement of the texts I directly used - through my Bibliography - I acknowledge the indirect presence in this dissertation of all the texts I have encountered in my life up to now.

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