

Channelling endogenous knowledge through civil litigation in South Africa

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Summary

The main aim of this thesis is to expose and address some of the current problems of the civil litigation system with specific reference to the issue of access to justice. I will argue that there is a tension between the ideals strived for by and within the Constitution and how they are realised within the context of access to justice considerations.¹

With access to justice I refer to a broader notion of justice. It does not merely entail being able to enter the Courts for purposes of litigation. It also involve an alternative conceptualization of the nature of rights and the attainment and enhancement of such rights by and on behalf of members of the general public. Moving away from a strict contractarian approach where there is a focus on “just institutions” to what Amartya Sen refers to as the behaviours, freedoms, choices and interactions of people involved in ordering their lives.² Sen posits this idea of justice as a framework for developing a civil justice system not based only on “ideal institutions” but also on the facilitated behaviours and interactions of parties in the pursuit of what they deem to be justice.

I am of the opinion that it is this difference of perception with regards to the notion of justice (and by implication access to justice) that is the catalyst behind the tension between the ideals strived for by and within the Constitution on the one hand and how they are realised within the context of access to justice considerations.

In my study I investigate how the utilization of endogenous knowledge could be of value to the civil litigation system in an attempt to alleviate the tension as mentioned above.

¹ The Constitution of the Republic of South Africa, 1996 (Hereinafter referred to as “the Constitution”).

² Sen, A *The Idea of Justice* : Harvard University Press (2009) p 390.

Foreword

I am a firm believer in the power of intention due to the fact that everything that happens in the universe begins with intention as point of departure. It is the creative power that determines the way in which we approach many aspects of our daily lives. It therefore naturally follows that we do not merely need improved (authentic) information and knowledge, but also a higher level of awareness and understanding in order to enable us to develop creative problem solving abilities.

“..... I believe you'd be surprised to see
That you've been blind and narrow minded, even unkind.
There are people on reservations and in the ghettos
Who have so little hope, and too much worry on their minds.

Brother, there but for the grace of God go you and I.
Just for a moment, slip into his mind and traditions
And see the world through his spirit and eyes
Before you cast a stone or falsely judge his conditions.

Remember to walk a mile in his moccasins
And remember the lessons of humanity taught to you by your elders.
We will be known forever by the tracks we leave
In other people's lives, our kindnesses and generosity.

Take the time to walk a mile in his moccasins.”

Mary T. Lathrap 1895

I would like to take this opportunity to thank the Department of Jurisprudence, University of Pretoria for providing me with the opportunity to explore and enrich my thoughts.

I would also like to thank Prof Karin van Marle, my mentor, for her inspiration and support throughout the course of this study. Thank you for teaching me to think in a critical manner and encouraging me to constantly explore and ask new questions in life and law.

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1 Introduction

As a lawyer I sometimes find it difficult to explain to a client why there is little or no understanding in some instances for his / her / their situation. It seems at times that the legal system is failing them in more than one way. One pertinent aspect is that although the institutional shift from apartheid to democracy has happened more than twenty years ago we are still functioning within the context of a mainly traditional apartheid perspective. It is a reality that our institutional structures and systems does not take into account the experiences of traditionally marginalized individuals such as gays, lesbians, people of the working class, as well as people of various races and ethnicities seen against the backdrop of the history and within the context of South Africa.

The main aim of this dissertation is to expose and address some of the current problems in the civil litigation system within the South African context. In my study I specifically refer to the issue of access to justice. I argue that there is a tension between the ideals strived for by and within the Constitution and how they are realised within the context of access to justice considerations.¹ Endogenous knowledge is studied as an approach that could expand the current knowledge base, legal culture and practices linked to civil litigation.

With access to justice I refer to a broader notion of justice. It does not merely entail being able to enter the courts for purposes of litigation, but also involve an alternative conceptualization of the nature of rights as well as the attainment and enhancement of such rights by members of society in general. I support a move away from a strict contractarian approach where the main focus is “just institutions” to what Amartya Sen refers to as the behaviours, freedoms, choices and interactions of people involved in ordering their lives.²

¹ The Constitution of the Republic of South Africa, 1996 (Hereinafter referred to as “the Constitution”).

² Sen, A *The idea of justice* : Harvard University Press (2009) p 390.

I am of the opinion that it is this difference in perception with regards to the notion of justice (and by implication access to justice) that is the catalyst behind the tension between the ideals strived for by and within the Constitution on the one hand and how they are realised within the context of access to justice considerations.

I investigate how the utilization of endogenous knowledge could be of value to the civil litigation system in an attempt to alleviate the tension as mentioned above.

In today's context many reforms initially associated with constitutional democracy such as political, legal and social reform were not accompanied by reforms in our civil litigation system. The failure to apply political, legal and social reforms that played out more in a theoretical sense to civil litigation, subsequently resulted in a "tension" between normative standards, remedial procedural avenues as well as certain institutional structures.³

In order to unpack and clarify the research problem I deem it prudent to highlight three key concepts which play an important role in the development of the argument in this dissertation; namely: transformative constitutionalism; legal culture and endogenous knowledge.

1.1.1 Transformative constitutionalism

For Klare transformative constitutionalism entails:

³ Boule, L *Promoting rights through Court-based ADR (A paper presented at the Access to Justice Conference, Office of the Chief Justice, 8 – 10 July Sandton) (2012) 28 SAJHR pp 1 – 2.*

“[A] long term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.”⁴

The current situation in South Africa is complex in that we are struggling to constitute new social relations whilst failing to gain knowledge from the lived experiences of traditionally marginalized people.

The interpretation of our Constitution as a legal document cannot be separated from the ideals reflected therein. Certain unique characteristics that stands in stark contrast with classical liberal documents can be highlighted in our Constitution for example, the inclusion of social rights, substantive justice, participatory governance, multi-culturism and historical consciousness.

For Klare the specific features of the South African Constitution makes an approach of transformative constitutionalism suitable. Societal challenges can be best addressed by way of utilizing the Constitution and its supremacy as the basis for societal transformation.

Mashele Rapatsa views transformative constitutionalism as essential to guide the nation to a better future in three ways; namely: providing a true meaning of democracy, enriching the human rights discourse and reshaping social welfare within the country.⁵

For Rapatsa it is essential to understand that the concepts of *transformation* and *constitutionalism* are considerate of the aspirations and fundamental values of the Constitution.⁶

⁴ Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAHJHR p 150.

⁵ Rapatsa, M *Transformative Constitutionalism in South Africa : 20 Years of Democracy* Medditerranean Journal of Social Science Vol 5 No 27 Dec 2014 p 887.

⁶ Rapatsa, M *Transformative Constitutionalism in South Africa : 20 Years of Democracy* Medditerranean Journal of Social Science Vol 5 No 27 Dec 2014 p 887.

He reiterates the view of the late Justice Langa that *transformation* can be viewed as a permanent ideal. It is a way of looking at the world in such a manner that a space is created in which dialogue and contestation are truly possible. New ways of “being” are constantly explored and created, alternatively accepted and rejected. During this process of looking at the world in a manner in which dialogue and contestation are truly possible change might well be unpredictable, but the idea of change will be constant.⁷ Therefore although it is not subject to a universally accepted definition, *transformation* can be viewed as a notion which denotes “change”.

Rapatsa refers to *constitutionalism* as the doctrine which governs the legitimacy of government action. It is therefore succinctly premised on promoting the Constitution as the supreme law of the country and place emphasis on the creation of institutional structures to control political power in the interests of all citizens.⁸ The notion of constitutionalism can therefore be utilized as a normative tool due to the fact that it identifies the values which should be upheld in the process of democratic governance.

Transformative constitutionalism can therefore in essence be described as a permanent ideal of openness with the main purpose of healing the nation. It refers to an approach to the Constitution and law in general to be utilized as tools to transform political, social, economic and legal culture in such a manner that it will alter radically existing assumptions about law, politics, economics and society in general.⁹

1.1.2 Legal culture

⁷ Rapatsa, M *Transformative Constitutionalism in South Africa : 20 Years of Democracy* Mediterranean Journal of Social Science Vol 5 No 27 Dec 2014 p 890.

⁸ Rapatsa, M *Transformative Constitutionalism in South Africa : 20 Years of Democracy* Mediterranean Journal of Social Science Vol 5 No 27 Dec 2014 p 890.

⁹ Rapatsa, M *Transformative Constitutionalism in South Africa : 20 Years of Democracy* Mediterranean Journal of Social Science Vol 5 No 27 Dec 2014 p 890.

Klare describes legal culture as the “professional sensibilities, habits of mind, and intellectual reflexes” of judges, lawyers and legal academics.¹⁰ He frames the South African legal culture as still formalistic and conservative in nature.

In a broad sense it can be said that legal culture determines the way in which the Constitution is interpreted, how the law is applied and practiced as well as how it subsequently influence developments in the country.

De Villiers describes legal culture as the default way of thinking about legal problems, legal issues and the nature of law in general.¹¹ She also refers to the fact that even though some radical changes took place in the country, we still have not managed to escape a legal culture of spectacle. She points out that the notion of spectacle can be discerned in various elements of South African legal culture; for instance, in the way we approach history, constitutionalism, democracy and rights.

It is this formalistic and conservative nature of legal culture that forms a structural impediment towards the comprehensive realisation of the ideals strived for by the notion of transformative constitutionalism.

Klare argues that although courts experience constraint in the way they interpret and apply the Constitution this constraint is not total, in other words there is also a freedom in how they interpret and give meaning to the Constitution. Legal and social change in a broader sense can therefore only be achieved in the event that the adjudication process explicitly adapts an activist transformative approach.

¹⁰ Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAJHR p 166.

¹¹ De Villiers, I *South African Legal Culture in a Transformative Context*, LLM Dissertation (UP), June 2009 p 35.

Klare comes to the conclusion that transformative constitutionalism can only be attained in instances where the judiciary are not scared or unwilling to move away from traditional ways of thinking.

1.1.3 Endogenous knowledge

Andreas Velthuisen describes the concept of endogenous knowledge as the product of the creative fusion between knowledge inherent to the social fabric of a developing society and knowledge acquired from “developed” societies.¹² This being said I am very aware of the so-called western perspective and worldview which influence the context, thought processes, reading and writing. I will deal with this aspect at a later stage in the dissertation.

Velthuisen views the term *endogenous* as a term that has supplanted the term *indigenous*. Where *indigenous* refers to “which is born or produced naturally in a land or region”, the term *endogenous* refers to “that which is engendered, produced, grown or found within”.¹³ It therefore implies that local knowledge may also be influenced by other surrounding influences.

For me this concept is important when identifying what we deem as “access to justice considerations”. Even though there might be a clear legal definition for this term, in general society it might be understood as something else.¹⁴ There is therefore a need to bridge this tension between prevailing legal knowledge, legal culture and legal practice on the one hand and society’s interests and needs on the other hand.

¹² Velthuisen, A *Applying Endogenous Knowledge in the African context : Towards the integrated competence of dispute resolution practitioners* AFRICA INSIGHT Vol 42 (1) June 2012 p 75.

¹³ Velthuisen, A *Applying Endogenous Knowledge in the African context : Towards the integrated competence of dispute resolution practitioners* AFRICA INSIGHT Vol 42 (1) June 2012 p 75.

¹⁴ Mbembe, A *Decolonizing knowledge and the question of the archive (the basis of a series of public lectures given at the Wits Institute for Social and Economic Research (WISER)* pp 1 – 28.

1.2 Theoretical approach

I follow a general jurisprudential approach that entails the return to classical concerns of [legal] philosophy and adopt a much wider concept of legality than a restricted jurisprudence (positivism).¹⁵ I rely on the idea of endogenous knowledge as a method of expanding knowledge and techniques in a quest for a general integrated jurisprudence in order to enable me to take a critical approach to the notion of transformative constitutionalism.¹⁶

In doing so I make use of different narratives and illustrate how it can be utilized to channel endogenous knowledge within the context of the civil litigation system for purposes of improving access to justice and interpretive techniques. By expanding the current knowledge base, legal culture and practices linked to civil litigation I am of the opinion that we would be able to alleviate the tension between the ideals strived for within the Constitution on the one hand and how they are realised on the other hand.

1.3 Significance of the study

As previously mentioned this dissertation aims to critically examine civil litigation in South Africa with specific “access to justice considerations” in mind. I study endogenous knowledge as an approach that could be used to expand our current knowledge base, [legal] culture and practices which are linked to civil litigation.

I highlight the fact that the civil litigation system is still based on dated and often very conservative (anachronistic) legal knowledge, legal culture and legal practices. This state of affairs resulted in a *lacuna* between our legal knowledge base, legal culture

¹⁵ Douzinas, C and Geary, A *A Critical Jurisprudence : The Political Philosophy of Justice* (2005) pp 8 – 10.

¹⁶ Van Marle, K *Transformative Constitutionalism as / and critique* STELL LR (2009) p 287.

and the civil litigation system in general on the one hand and developments and reform in the political, economic and social spheres on the other hand.

There is a great need for the integration of knowledge and techniques used by different disciplines in an effort to alleviate the aforementioned “tension” in an attempt to provide fast and effective implementation of the transformative ideals as contemplated by and within the Constitution.

I am however of the opinion that one must be very cautious not to follow a “copy and paste” approach. There is a recent intellectual trend of “dissolving disciplinary borders”. Scholars such as Sandra Harding, is of the opinion that it is rather a matter of having conversations across disciplinary borders in an effort to advance knowledge from “the inside out”.¹⁷ She is of the opinion that cross field appropriation is a crucial element of how knowledge advances. She refers to writers such as Kuhn who are of the opinion that it is difficult to create paradigm shifts within a specific field / discipline due to the fact that scholars of a specific discipline are too socialized within their specific field. They are simply too invested in the older ways of doing things. It is therefore quite useful to develop new paradigms within a specific discipline by way of having conversations with experts from different fields / disciplines whose way of thinking has not been restricted by the traditional way of thinking about a specific subject matter. This form of conversation can therefore enable the legal scholar to think new thoughts and ask new questions from a different perspective. I am of the opinion that our South African legal culture needs to undergo a paradigm shift in order to alleviate the tension as mentioned above.

The concept of transformative constitutionalism is associated with social reform and change on a large scale by way of making use of non-violent political processes based in law. Klare highlights the fact that we should ask ourselves if transformative

¹⁷ Olson, GO & Hirsch E *Starting from Marginalized lives: A conversation with Sandra Harding* JAC Vol 15 (1995) pp 202 – 206.

constitutionalism is an attainable goal within the context of a postliberal interpretation of the “rule of law” principle.¹⁸

As mentioned above Klare comes to the conclusion that transformative constitutionalism can only be attained in instances where the judiciary are not scared to adapt an activist approach. Such an approach still requires that the norms and standards inherent to the Constitution must still be adhered to.

It is my contention that society in general has a perception that the legal system is failing them. This perception is due to the tension as mentioned above.

In my opinion there is a need for a general integrated jurisprudence and the expansion of our knowledge base and techniques by way of relying on endogenous knowledge.

1.4 Chapter division and structure of the dissertation

This dissertation consists of five chapters.

Chapter two, the chapter that follows on the present one, focuses on the current civil litigation system and how and to what extent it fails to live up to the transformative ideals of the South African Constitution with specific emphasis on access to justice and the advancement of rights.

Chapter three pauses on the aspect of prevailing legal culture in South Africa as an obstacle to the realisation of the advancement of rights and access to justice and explores the argument that South African jurists are hesitant to move away from traditional ways of legal thinking and interpretive techniques.

¹⁸ Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAJHR pp 148 – 151.

In chapter four I focus on how we might utilize the notion of endogenous knowledge in an effort to curtail the prevailing formalist and conservative legal culture in an attempt to alleviate the tension between the transformative ideals strived for within the Constitution and how they are realised within the context of access to justice considerations.

In the final chapter I conclude my argument that there is a tension between the ideals strived for by and within the Constitution and how they are realised within the context of access to justice considerations. I reflect on how the utilization of endogenous knowledge could be of value to the civil litigation system. The promotion of access to justice and the advancement of rights are highlighted against the background of transformative constitutionalism as a project driven by a commitment to transform the country's social, political and legal culture.

2 Access to justice and the advancement of rights: too much lawyering too little justice?

2.1 Introduction

As noted in the introduction the aim of this dissertation is to expose and address some of the current problems in the civil litigation system within the South African context. The aim of this chapter is to ascertain how and to what extent our current litigation system fails to live up to the transformative ideals of our Constitution. In doing so, specific emphasis is placed on the notions of justice and the advancement of rights within our current civil litigation context.

In the first part of this chapter I highlight the current disconnect between transformative constitutionalism and access to justice. It is this disconnect that leads to a tension

between the ideals strived for by and within the Constitution and how they are realised within the context of access to justice considerations. I discuss the fact that transformative constitutionalism does not address access to justice and I look at different approaches that may be adopted in order to curtail this phenomenon.

In the second part of this chapter I discuss the idea of justice in general. I previously alluded to the fact that I refer to a broader notion of justice. I start with a discussion on modernity's take on the idea of justice and subsequently the Platonian idea of a broader notion of justice. I then ponder on justice as an idea within the African context and end with a discussion on different perspectives which may assist in the formulation and understanding of a broader notion of justice.

In the third part of this chapter I look at the way in which disputes and processes influence the advancement of rights in the day to day battle for justice within our civil litigation system. I briefly discuss the two broad schools of thought as to the nature of civil proceedings and how these different views impact the way in which the civil litigation system functions. In my opinion these schools of thought become extremely relevant when trying to understand why we as legal scholars think the way we do and practice law the way we do. Change can only happen once we are able to understand and grasp the significance and origin of a problem. The only way in which we will be able to ensure a positive outcome is if we allow ourselves to obtain the proper objective vision and insight before we attempt to proceed with problem solving.

I conclude this chapter by highlighting the aim thereof and reviewing the important aspects which came to light during the course of the study.

I now proceed with a discussion on the need for a link between transformative constitutionalism and access to justice.

2.2 Making the connection between transformative constitutionalism and access to justice

In the first chapter I discussed what is understood under the term transformative constitutionalism. It can be summarized as a permanent ideal of openness with the main purpose of healing the nation.

This brings me back to what the late Justice Langa pointed out, namely that we need a new way of looking at the world.¹⁹ A space must be created wherein dialogue and contestation is truly possible. It is only through constantly exploring, creating, accepting and rejecting new ways of “being” that a permanent ideal of openness would be achievable. New ways of “being” will allow the nation to return to a memory of wholeness, a point of departure from which the healing process may start. It is however a never ending process. This enables our Constitution to have longevity and adaptability with whatever challenges it might be faced with in future. According to Langa the Constitution must not be viewed as transformative due to its historical position or its particular socio-economic goals, but rather as a document that envisions a society that will always be open to change and contestation.²⁰ He reiterates what Van der Walt stated, namely that the notion of transformation itself needs to be sustained, rather than the view that it is merely a means to construct a new society. It is clear that we need to have a flexible, diverse approach due to the fact that society is always changing and adapting.

Du Plessis describes the Constitution as the manifestation of a dialogue between memory and promise.²¹ Within the South African context we are still coming to terms with a notorious past and still getting to grips with the future.²² Langa points out that it entails a process of both remembering and forgetting. We need to remember why

¹⁹ Langa, P *Transformative Constitutionalism* STELL LR (2006) 3 p 354.

²⁰ Langa, P *Transformative Constitutionalism* STELL LR (2006) 3 p 354.

²¹ Du Plessis, L *Constitutional dialogue and the dialogic constitution (or: Constitutionalism as culture of dialogue)* (2010) 25 SAPL p 684.

²² Du Plessis, L *Constitutional dialogue and the dialogic constitution (or: Constitutionalism as culture of dialogue)* (2010) 25 SAPL p 684.

we are at a certain point in our evolution as a nation, but we must forget the hate and anger that fuelled some activities in order to avoid the same cycle of violence and oppression²³. Similarly to Langa, Du Plessis highlights the potential perpetuity of the dialogue due to the fact that the Constitution continuously narrates and authors the nation's history. I have previously mentioned that the notion of transformative constitutionalism derives its presence from the Constitution. I have also highlighted the fact that our Constitution stands in stark contrast with other classical liberal documents as it makes mention of concepts such as social rights, substantive justice, participatory governance, multi-culturalism and historical consciousness. It therefore becomes evident that constitutionalism as a culture of dialogue is necessary to enable a shift in consciousness. It is only through this shift in consciousness (a new way of "being" in the world) that positive change can be effected.²⁴

Langa however warns that even though change is necessary there is also an argument to be made out with regards to sticking to the rules when they are clear and good.²⁵ He points out that formalism becomes dangerous when upholding the law obscures or ignores the fact that it exists, however difficult it may be, to ensure justice. Langa emphasise the fact that at the heart of a transformative Constitution there must lie a commitment to substantive reasoning. We need to examine the underlying principles that inform laws as well as judicial reaction to such laws.²⁶ I therefore deem it important to explore the notion of constitutionalism as a culture of dialogue in greater depth in the course of the subsequent two chapters of this dissertation.

The aim of this chapter is specifically to ascertain how and to what extent our current litigation system fails to live up to the transformative ideals of our Constitution. The notions of justice and the advancement of rights within our current civil litigation

²³ Langa, P *Transformative Constitutionalism* STELL LR (2006) 3 p 359.

²⁴ Du Plessis describes the Constitution as memory as both a triumphant monument (Denkmal) as well as an admonitory memorial (Mahnmal). As a monument it celebrates the achievements of a nation and taking thought and responsibility for its future. As an admonitory memorial it commemorates the wrongs of the past, whilst assuming guardianship of our day-to-day democracy. See Du Plessis, L *Constitutional dialogue and the dialogic constitution (or: Constitutionalism as culture of dialogue)* (2010) 25 SAPL p 684.

²⁵ Langa, P *Transformative Constitutionalism* STELL LR (2006) 3 p 357.

²⁶ Langa, P *Transformative Constitutionalism* STELL LR (2006) 3 p 357.

context therefore becomes relevant. I have alluded above to the fact that “access to justice” considerations in the traditional sense, refer to a less prescriptive construct where there is arguably greater latitude for the incorporation of alternative procedures in civil litigation. Even though it has never entailed merely entering the courts for purposes of litigation I am of the opinion that we must go even further. In a broader sense it should involve also an alternative conceptualization of the nature of rights as well as the attainment and enhancement of such rights by members of society in general. I have mentioned also that it is this difference in perception concerning the notion of justice (and by implication access to justice) that is the catalyst behind the tension between the ideals strived for by and within the Constitution on the one hand and how they are realised within the context of access to justice considerations.

Gaining “access to justice” presuppose an understanding of what it is that we want to gain access to. John Bell reiterates that the difficulty with concentrating on access to court process only is that it presupposes that all legal needs can be met in this way and that resolution of disputes by the Court is what parties seek if given a chance.²⁷ However, it becomes clear that legal norms does not necessarily cover all aspects of social life. Disputes about non-economic values such as love, friendship, art or religion in the alternative purely intellectual and scholarly debates are not regulated by law. In some instances it may not appear socially appropriate to invoke the law within specific relationships. Disputes frequently needs to be of a particular seriousness, alternatively of a specific type, alternatively understood by the parties in a particular way before the law can be invoked.²⁸

I have previously indicated that with access to justice I refer to a broader notion of justice. I am of the opinion that even though access to the courts would form part of the notion of “access to justice”, we must also consider this concept within the context of what the term “justice” entails with reference to a certain individual, group, race or gender within their specific societal construct. What justice means to me from my personal perspective and reference point might not even respond to the view of

²⁷ Scherer, KR (Ed), *Justice Interdisciplinary Perspectives* : Cambridge University Press (1992) p 129.

²⁸ Scherer, KR (Ed), *Justice Interdisciplinary Perspectives* : Cambridge University Press (1992) p 129.

someone else. This is particularly important within the South African historical context. The establishment of a truly equal society as well as the provision of basic socio-economic rights to all forms an integral part of the process of transformation.²⁹ One must therefore concede that the concept of “justice” is relative to the specific individual, group or entity seeking justice.

Bell also concedes that there may be defects in the way a legal system operates.³⁰ This might be due to the fact that legal needs may not be assessed correctly or met by the legal profession, alternatively access to the Courts may be practically impossible. The legal way, alternatively legal way of reasoning and interpreting situations may differ from the way in which society might reason and interpret a certain situation. Bell suggests that a process of translation needs to take place in order to identify the needs which must be met by law.³¹ I have a slightly different take on Bells’ assertion in that I am of the opinion that we need to “translate” society’s interests and needs by way of a process of dialogue between memory and promise. We need to return to a memory of wholeness, but also look to the future with promise.

The notion of access to justice therefore also entail an alternative conceptualization of the nature of rights and the attainment and enhancement of such rights by and on behalf of members of society in general. In the previous chapter I highlighted the fact that Sen posits this idea of justice as a framework for developing a civil justice system not based only on “ideal institutions” but also on the facilitated behaviours and interactions of parties in the pursuit of what they deem to be justice.³² For me, this aspect touches on the question of responsibility for transformation and reconciliation. It is not reasonable to expect the courts (civil litigation system) alone to be responsible for widespread transformation of economic and social conditions. However, the late justice Langa rightly pointed out that it is only when our judicial commitment is combined with legislative reform and appropriate executive action that the vast existing

²⁹ Langa, P *Transformative Constitutionalism* STELL LR (2006) 3 p 353.

³⁰ Scherer, KR (Ed), *Justice Interdisciplinary Perspectives* : Cambridge University Press (1992) p 129.

³¹ Scherer, KR (Ed), *Justice Interdisciplinary Perspectives* : Cambridge University Press (1992) p 130.

³² Sen, A *The idea of Justice* : Harvard University Press (2009) p 367.

disparities in South Africa will be able to be eradicated.³³ It is not only in the courtroom, parliament and government departments that transformation must take place, even though our civil justice system must be responsive to social needs and ensure substantive justice within our society. The structures created to entrench and safeguard our constitutional democracy, for instance the Constitutional Court, the inclusion of chapter 2 (the Bill of Rights) in the Constitution as well as the establishment of Chapter 9 institutions are not enough to secure meaningful transformation. Social transformation through a process of reconciliation and forgiveness are necessary in an effort to heal the nation.³⁴ It is however clear that we cannot legislate or order reconciliation and forgiveness. Within the context of our civil litigation system it is necessary for us to approach litigious and non-litigious matters with a different mind-set. This is true for presiding officers, lawyers representing parties and the parties themselves. A lot of matters that end up in our judicial system relates to difficult circumstances that citizens are faced with today whilst trying to recover from the fallout of the apartheid regime. A sense of justice is attained when citizens not only feel empowered, but in fact are empowered. All parties concerned therefore needs to take responsibility and approach these matters with the necessary sensitivity and sensibility that it requires. This correlates with the fact that our Constitution makes mention of concepts such as social rights, substantive justice, participatory governance, multi-culturalism and historical consciousness.

The approach followed by Sen has a strong “capability perspective” which ground the notion of justice to the extent to which people (society in general) have the capability to do things they have reason to value. Capability in turn is linked to the opportunity dimension of freedom. Sen argues the ethical affirmation of the need to pay appropriate attention to the significance of freedoms incorporated in the formulation of [human] rights. He reiterates that the importance of freedoms provides a foundational reason not only for affirming our own rights and liberties, but also for taking an interest in the freedoms and rights of others.³⁵ He confirms that there must be some “threshold conditions” of relevance, including the importance of the freedom and the possibility

³³ Langa, P *Transformative Constitutionalism* STELL LR (2006) 3 p 353.

³⁴ Langa, P *Transformative Constitutionalism* STELL LR (2006) 3 p 353.

³⁵ Sen, A *The idea of Justice* : Harvard University Press (2009) p 367.

of influencing its realization, for it to plausibly figure within the spectrum of [human] rights.³⁶ Within the South African context I have identified yet another dimension in that our memory of wholeness, our historical consciousness has been compromised to a large extent. This has a direct impact on the way in which we conceptualize the nature of rights and we realize the attainment and enhancement of such rights by and on behalf of members of society in general. I will discuss the possibility of justice within the African context at a later stage in this chapter.

In the previous chapter I indicated that in our quest for a general jurisprudence and the expansion of our [legal] knowledge base we need to take a critical approach to the notion of transformative constitutionalism. With this I mean that we must never stop questioning the meaning and purpose of transformative constitutionalism within the constitutional context as it derives its presence from our Constitution itself. As pointed out above, Rapatsa highlights the fact that transformative constitutionalism is essential in three ways; namely, it addresses the true meaning of democracy; enriches the human rights discourse and reshapes social welfare in the country. It is driven by a project committed to transform the country's social, political, economic and legal culture.³⁷ What struck me when I read the article of Rapatsa is the fact that he emphasises both strong normative as well as institutional frameworks. Ironically he then proceeds to discuss at length the importance of the institutional establishment. This highlighted the fact that even though we as legal scholars may realize that there is a need to develop a civil justice system not based only on "ideal institutions" we are still unable or hesitant to move away from the safety of a strict contractarian approach. In chapter three I discuss legal culture as an obstacle to transformative constitutionalism.

If one considers that transformative constitutionalism might be utilized as a tool to transform political, social, economic and legal culture in such a manner that it will alter radically existing assumptions about law, politics, economics and society in general;

³⁶ Sen, A *The idea of Justice* : Harvard University Press (2009) p 367.

³⁷ Rapatsa, M *Transformative Constitutionalism in South Africa : 20 Years of Democracy* Mediterranean Journal of Social Science Vol 5 No 27 Dec 2014 p 889.

it may very well be utilized to assist with the alternative conceptualization of the nature of rights and their attainment, in other words that transformative constitutionalism can contribute to access to justice as such. Theunis Roux refers to a broader notion of acting “in the spirit of a community of principle”.³⁸ He is of the opinion that it provides a viable way of reconceiving the project of transformative constitutionalism. He does not claim that it is an ideological / political project, in the sense of how Duncan Kennedy as someone associated with US CLS might understand it. For Roux, transformative constitutionalism should be viewed and applied as an open-ended project of constitutional imagining, experimentation and debate to which all South Africans committed to the ideal of constitutional democracy should be allowed to contribute.³⁹ To this I will add a project embracing constitutionalism as a culture of dialogue, translation and participation.

I identified the fact that there currently seems to be a disconnect between transformative constitutionalism on the one hand and access to justice on the other hand. It becomes apparent that even though we are more than twenty years down the line in a new democratic society we are still stuck in a static repetition of the essence of law, legislation and processes. We are not constituting new social relationships and gaining knowledge from the lived experiences of traditionally marginalized people. In order for this disconnect to dissipate we need to come to a deeper understanding with regards to the notion of justice (and by implication access to justice). Such a deeper understanding of the notion of justice could serve as the alleviating measure for the tension between the ideals strived for by and within the Constitution and how they are realised.

Given the emphasis that I place on a broader notion of justice, I deem it necessary to explore the notion of justice further in general.

³⁸ Roux, T *Transformative Constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?* STELL LR (2009) p 283.

³⁹ Roux, T *Transformative Constitutionalism and the best interpretation of the South African constitution: Distinction without a difference?* STELL LR (2009) p 283.

2.3 The idea of justice

John Bell and Erik Schokkaert describes justice as a measure of the acceptability of certain outcomes of human relationships or situations.⁴⁰ They emphasize two important elements. Justice concerns interpersonal relationships; for instance the way we organize our communities (society in general). Moreover justice gives rise to rights and duties. It can therefore also be seen as an important feature of certain social relationships; -for instance the relationship between citizen and the state; employer and employee, consumer and business etcetera. According to Bell and Schokkaert notions of love and respect are more appropriate standards for family relationships and friendships.⁴¹ They tend to view the legal process as very formalistic and not able to deal with emotional needs and wants of participants. To them these concepts are not relevant or of an important enough standing when a judicial determination in a certain instance needs to be made. I am of the view that this is a very limited way of reasoning. Perceptions and notions of love, passion, compassion, equanimity and respect in my view forms part and parcel of the way in which we need to formulate a broader notion of justice. Within the South African context transformative constitutionalism can be summarized as a permanent ideal of openness with the main purpose of healing the nation. It is our duty as legal scholars and practitioners to facilitate a climate for purposes of reconciliation to take place. The focus must not only be on a narrow political reconciliation between victim and perpetrator, but also on a broader and long lasting social reconciliation of the entire nation.⁴²

As discussed in the previous paragraph a permanent ideal of openness entails the perpetual “translation” of society’s interests and needs by way of a process of dialogue between memory and promise. Perspectives and notions of love, passion, compassion, equanimity and respect (to name but a few) is necessary for our communication process, our process of dialogue between memory and promise (the past and the future), to flow without impediment and by doing so creating a shift in

⁴⁰ Scherer, KR (Ed), *Justice Interdisciplinary Perspectives* : Cambridge University Press (2009), p 235.

⁴¹ Scherer, KR (Ed), *Justice Interdisciplinary Perspectives* : Cambridge University Press (2009), p 235.

⁴² Langa, P *Transformative Constitutionalism* STELL LR (2006) 3 p 359.

consciousness. We can only heal the nation and restore the fallout as a result of the violent encounter with Western modernity by returning to a memory of wholeness as point of departure. This memory of wholeness includes and encapsulates a sense of community and moral self-identity as human beings. The healing and restoration of family relationships and friendships therefore forms an integral part of healing the nation. The faux pas therefore lies in the mere fact that family relationships and friendships are regarded as social relationships not worthy of being incorporated in rights and duties (as well as freedoms) that forms part of the idea of justice. In my view it forms part of a broader notion of justice and involves an alternative conceptualization of the nature of rights and the attainment of such rights by members of society in general.

I begin my discussion on a general notion of justice by taking a look at the Platonian idea of justice.

2.3.1 Plato's idea of justice

In his philosophy Plato gives a prominent place to the idea of justice. Plato's *Republic* provides the dramatic setting for his investigation into the question of justice.⁴³ In many ways the situation of the Athenian democracy was not dissimilar to what we are faced with today within our own constitutional democracy. In fact it is not dissimilar to problems and challenges experienced by new democracies the world over.⁴⁴ Plato rejects and criticizes the conventional theories of justice as presented slightly differently by Cephalus, Polymarchus, Thrasymachus and Glaucon. It seems that Plato also supported a broader notion of justice. He makes use of the term "Dikaisyne"

⁴³ Bhandari, DR *Plato's concept of justice : an analysis* <https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm> accessed on 23 August 2016 p 2.

⁴⁴ Plato was highly dissatisfied with the prevailing degeneration of the Athenian democracy which was on the verge of ruin and ultimately responsible for the death of Socrates. Excessive individualism induced citizens to capture the office of the State for their own selfish purposes and eventually Athens was divided into two hostile camps of rich and poor; oppressor and oppressed. See Bhandari, DR *Plato's concept of justice : an analysis* <https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm> accessed on 23 August 2016 p 1.

for justice.⁴⁵ It is therefore quite insightful to study Plato's view pertaining to the question of justice.

Cephalus established the traditional theory of justice.⁴⁶ According to Cephalus justice entails speaking the truth and paying one's debt. It is therefore focussed on the conduct of the individual and he identifies justice with correct conduct. Polymarchus mainly holds the same view with a slight alteration.⁴⁷ He sees justice as "giving to one what is proper to him". In essence this entails doing good to friends and harm to enemies. This point of view is not different from the traditional maxim of Greek morality. Plato criticizes Cephalus on the ground that there might be instances where his formula may result in the violation of the spirit of right. For instance one cannot restore deadly weapons to a man who has gone mad. He condemns Polymarchus's views on the basis that it is inconsistent with the most elementary conception of morality to do evil to anybody, even one's enemy. This conception of justice by Cephalus and Polymarchus regulate relations between individuals on the basis of individualistic principles and therefore ignore society as a whole.

Thrasymachus represents the new and critical view.⁴⁸ He argues that justice has no moral basis as it is merely an expression of the political will to power, and as such it is able to assume many different forms in political society. It is merely an ideological construct that is aimed at concealing the selfish interests of the powerful ruler of the day.⁴⁹ He defines justice as "the interest of the stronger". For Thrasymachus laws are made by the ruling party in its own interest. Those who violate these laws are punished

⁴⁵ The Greek word "Dikaisyne" can be associated with "morality" or "righteousness". See Bhandari, DR *Plato's concept of justice : an analysis* <https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm> accessed on 23 August 2016 p 1.

⁴⁶Bhandari, DR *Plato's concept of justice : an analysis* <https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm> accessed on 23 August 2016 p 2 .

⁴⁷Bhandari, DR *Plato's concept of justice : an analysis* <https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm> accessed on 23 August 2016 p 2. Also refer to Santas, G *Goodness and Justice : Plato, Aristotle, and the Moderns* Blackwell Publishers Ltd (2001), pp 58 – 62.

⁴⁸Bhandari, DR *Plato's concept of justice : an analysis* <https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm> accessed on 23 August 2016 p 2.

⁴⁹Cloete, M *Plato and the modern African State: Some thoughts on the question of justice* Phronimon, Vol 9 (1) (2008) p 89.

as they are in violation of justice. Thrasymarchus concludes that morality and justice cannot be accounted for on normative grounds.

Plato follows Socrates' point of departure when he challenges the "conventional" and "natural" view of justice, in pursuit of a normative foundation for justice in society, is an explication of the "natural" needs of the individual within the broader context of community. It is only when the individual is placed within the broader context of community that the question of justice ultimately makes moral sense. He provides us with his own theory of justice according to which, individually, justice is a human virtue that results into a person being self-consistent and good. Socially, justice can be seen as a social consciousness that results in a society becoming internally harmonious and good. Plato views justice as a sort of specialization.⁵⁰

Glaucon states a new point of view when he puts forward a form of social contract theory.⁵¹ He argues that we are only moral because it pays us or we have to be. In other words if there is some form of reward be it of a material or immaterial kind that in essence comes down to a reason to stay faithful to the terms of the social contract. He argues that when society was in a primitive stage, without law or government, man was free to do as he pleased. This resulted in the stronger few enjoying life at the sufferance of the weaker many. The weaker, realizing that they suffered injustice, came to an agreement and instituted law and government through a form of social contract and preached the philosophy of justice. Plato's Socrates is focused on rebutting the thesis that justice is an expression of the will to power and therefore a mere product of convention.⁵² He is of the view that any attempt to assess human nature must of necessity start with an account of the individual's socializing with

⁵⁰ Cloete, M *Plato and the modern African State: Some thoughts on the question of justice* Phronimon, Vol 9 (1)(2008) pp 85 – 86.

⁵¹ Bhandari, DR *Plato's concept of justice : an analysis* <https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm> accessed on 23 August 2016 p 3.

⁵² Cloete, M *Plato and the modern African State: Some thoughts on the question of justice* Phronimon, Vol 9 (1)(2008) p 89.

others, within the general context of principles inspired by community, such as: mutuality, reciprocity and interdependence.⁵³

Plato comes to the realization that all theories propounded by Cephalus, Thrasymachus and Glaucon contained one common element; namely: all of them treated justice as something external. For Plato it is something internal as it resides in the human soul. It is therefore not born from weakness, but the desire of the human soul to do a duty according to its inherent nature. Santas highlights the importance of the notion of goodness in Platonian justice.⁵⁴ Without a society that is inherently good, there can be no prospect of justice. Plato attacks the current state of affairs in the form of the construction of an ideal society in which justice reigns supreme. He views justice as the remedy for curing all these evils.

For Plato, true justice on the one hand is part of human virtue and on the other hand the bond, which joins man together in society. It is not mere strength, but harmonious strength. It is not to be seen as the right of the stronger, but the effective harmony of the whole. For him all moral conceptions revolve around the good of the whole, be it on an individual level or in a social context.⁵⁵ Within the South African context this is an important insight as we need to reach the effective harmony of the whole. We need to return to the memory of wholeness as point of departure in order to enable us to look to the future. As stated above this memory of wholeness includes and encapsulates a sense of community and moral self-identity as human beings. Plato also place emphasis on the notion of happiness on an individual level, but also within the societal construct. He views it as an important ingredient for purposes of reaching harmonious strength.

⁵³ Cloete, M *Plato and the modern African State: Some thoughts on the question of justice* Phronimon, Vol 9 (1)(2008) p 90. Cloete quotes the following :” [s]ociety originates ... because the individual is not self-sufficient, but has many needs which he can't supply himself' (*Republic 369*)”.

⁵⁴ Santas, G *Goodness and Justice : Plato, Aristotle, and the Moderns* Blackwell Publishers Ltd 2001, pp 58 – 62.

⁵⁵ Cloete, M *Plato and the modern African State: Some thoughts on the question of justice* Phronimon, Vol 9 (1) (2008) p 90.

It becomes clear that knowledge of justice depends on knowledge of the good.⁵⁶ This is due to the fact that knowledge of the good on individual and societal level, could provide the answer to what would be perceived and understood as being just and fair. A just and fair “being in the world” would promote a sense of community and moral self-identity leading to a state of harmonious strength. We need to affirm the humanity in one another.

Michael Cloete points out that leading modernists such as Jürgen Habermas, construes modernity as an exclusively “European phenomenon”.⁵⁷ The status and validity of reason within the context of a post-traditional modern world is assumed to be inaccessible to the mystical irrationalism of the “African mind” which is trapped in the dogmatic slumbers of the “closed” traditional society.⁵⁸

It is perspectives such as these which distorted and subverted the Platonic idea of affirming the humanity of the “other”, in and through the potential for the “divine” and subsequently the rational in the “other” for purposes of accommodating certain racist theories that aims to restrict Africa’s presence in the world. Jacques Derrida referred to these metaphysical frameworks of binary oppositional-thinking seeking to justify core racist assumptions as “white mythology”.⁵⁹ It seems to imply a process of assembling and reflection of Western culture and knowledge and the subsequent application of it as the universal measure of reason. In doing so, the humanity of the “other”, the potential for the “divine” in the “other” is therefore simply ignored and denied.

Within the South African context it becomes clear that we are struggling to communicate with each other. We need to engage in constant dialogue with one

⁵⁶ Santas, G *Goodness and Justice : Plato, Aristotle, and the Moderns* Blackwell Publishers Ltd (2001) pp 65 – 66.

⁵⁷ Cloete, M *Plato and the modern African State: Some thoughts on the question of justice* Phronimon, Vol 9 (1) (2008) p 90.

⁵⁸ Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) p 92.

⁵⁹ Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) p 92. Also refer to Derrida, J *Margins of Philosophy*. Chicago: University of Chicago Press 1982 pp 207 – 271.

another in which all parties are encouraged to participate. It is only through this process of dialogue and translation that we would be able to obtain knowledge of the good. Not only on an individualistic level but also a knowledge of the good when it comes to what we perceive to be the “other”.

Cloete points out that from the Western metaphysical tradition “Africa” becomes a European construct of radical “otherness”, in which the African person’s moral claim to humanity becomes a subject of radical doubt.⁶⁰ The Western metaphysical tradition’s founding metaphor of reason is seen as an expression of “white” civilization. It is very similar to the way in which Greek philosophers prided themselves on having been born human (and not a beast), alternatively being born male (and not female). Western modernity prided itself on being born European (and not African), civilized (not primitive) given the alleged exclusive, superior presence in the “White man’s mind”.⁶¹ The Western project of modernity is therefore based on a philosophical denial of the humanity of the African. A denial of the goodness within the “other”.

This denial, is indicative of a striking and ironic indifference with regards to our fellow human beings when we take into consideration that the theme of humanity, of “the human being in the world” has occupied such a central place in the history of Western philosophy. Plato argues that the satisfaction of the most basic human needs is the first step toward the realization of justice in society. For Plato, the political must coincide with the rational for justice in order for it to emerge in society. If this is true perspectives and notions of love, passion, compassion, equanimity and respect (to name but a few) are necessary for our process of dialogue between memory and promise. Transformation as a notion which denotes “change” would only be achievable in the instance where we are able to understand and grasp the significance and origin of a problem. We need to obtain the proper objective vision and insight in order to promote understanding and sympathy for one another. In order to create a

⁶⁰ Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) p 92.

⁶¹ Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) p 92.

new way of “being” in the world we need to recognise the goodness in what we perceive to be the “other”.

This brings us to what Cloete refers to as modernity’s less than “noble lie”, namely that the presence of Western reason determines the humanity of “the other”. He points out that if we rely on writers such as Hegel, who informed his reader that “the only thought which philosophy brings with it, is the simple idea of reason – the idea that reason governs the world and that world history is therefore a rational process”, we negate the possibility of reason beyond the philosophical discourses of (Western) modernity.⁶²

Cloete is of the opinion that we need to enquire further into the normative grounds for the possibility of African justice in the world. We need to realize that a meaningful convergence of our historical paths, in a non-violent dialogue with each other, can only be attained on the basis of a mutually inspired acknowledgement of both the “beast” and the “divine” as the moral potential for all humankind.⁶³ I might also add that with this comes a reciprocal responsibility to constantly engage in dialogue with one another, to translate for one another and to listen to one another with the purpose of understanding one another. The focus must be to recognise the goodness in one another in order to reach a state of harmonious strength.

Cloete emphasizes that the search for justice in an African context must presuppose the possibility of invoking a commonly shared “humanity in the world”, not as a metaphysical metanarrative or a “noble lie”, but as a moral truth that is self-evident.⁶⁴ The pursuit of justice in the African state can therefore not disregard the precolonial traditions of African moral-political thoughts as point of departure. This co-insides with what I refer to as a memory of wholeness. It must however not be seen as a romantic attempt to reclaim or regain a precolonial past of historical innocence and African

⁶² Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) p 93.

⁶³ Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) pp 93 – 94.

⁶⁴ Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) pp 93 – 94.

authenticity, but rather as a moral-practical means of collectively coming to terms with Africa's violent dehumanisation in the world. African justice can therefore not be "blind" and ignore its own history.⁶⁵

Cloete states that given arguments such as those of Kwame Nkrumah, one may even controversially claim that African philosophy may variously be viewed as a conceptual reaction, an interpretation, a hypothesis, a speculation, a creation, a gesture, a sign or even a silence.⁶⁶ It is this universalising voices and languages of reason that speaks to our historical "being in the world".

With reference to Cloete, justice may therefore be interpreted as an expression of the "divine" in the "other", as a respected member of the "human-all-to-human" political community. A recognition of the "goodness" in the "other" reaching for a permanent ideal of openness through the perpetual "translation" of society's interests and needs by way of a process of dialogue between memory and promise.

In the next paragraph I discuss the possibility of justice within the African (South African) context bearing in mind its violent encounter with Western modernity.

2.3.2 The possibility of justice within the African context

Cloete interestingly points out that the common theme pervading the writings of modern African political thinkers point to a direction of precolonial indigenous traditions of humanism as the normative foundation of the possibility of justice in the African

⁶⁵ Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) pp 94 – 95.

⁶⁶ "Our philosophy must find its weapons in the environment and living conditions of the African people. It is from these conditions that the intellectual content of our philosophy must be created. The emancipation of the African continent is the emancipation of man. This requires two aims: first, the restitution of the egalitarianism of human society, and, second, the logistic mobilisation of all our resources towards the attainment of that restitution." Nkrumah, K *Consciencism* London: Heinemann (1964) p 78.

state.⁶⁷ To me this phenomenon is not strange as I already previously indicated that I am of the opinion that true healing can only start with the memory of wholeness as point of departure.

Ideas such as “negritude”, “conciencism”, “ujamaa” or “a return to the source” can be traced back to the indigenous ethical systems of Africa.⁶⁸ The significance and value of human life is commonly understood to be rooted in the moral life of the community. It is from the ethical perspective of a common humanity, whose origins can be traced to the “divine”, that African moral thinking can connect with other major spiritual / religious traditions of humanistic thinking the world over. This includes the Platonic humanist tradition.

An argument can therefore be made out that it is the tradition of humanism that provides the normative-moral foundation of African political thought in a general sense. This is why the African moral-political engagement with the present is inseparable from the collective knowledge and memory of past experience. With collective knowledge in the strict historical sense, one would refer to indigenous knowledge. In the introductory chapter of this dissertation I have mentioned that it is a reality that our

⁶⁷ ⁶⁷ Cloete, M *Plato and the modern African State: Some thoughts on the question of justice* Phronimon, Vol 9 (1) (2008) p 96.

⁶⁸ Cloete, M *Plato and the modern African State: Some thoughts on the question of justice* Phronimon, Vol 9 (1) (2008) p 96. The term “negritude” refers to a literary and ideological philosophy developed by francophone African intellectuals, writers and politicians as a form of protest against French colonial rule and policies of assimilation during the 1930’s. It pertains to the self-affirmation of black peoples, or the affirmation of the values of a civilization of what is referred to as “the black world” in answer to the question “what are we in this white world?” Stanford Encyclopaedia of Philosophy, <http://plato.stanford.edu/entries/negritude>, accessed 27 August 2016. The term “conciencism” can be described as the personal philosophy of Kwame Nkrumah. He describes it as the map in intellectual terms of the disposition of forces which will enable African society to digest the Western, Islamic and Euro-Christian elements in Africa in order to develop them in such a way that they fit in with the African personality. (Decolonialism), Nkrumah, K *Consciencism* London : Heinemann, 1964 p 79. The term “ujamaa” is a Swahili word meaning “extended family”; “brotherhood”; “socialism”. President Nyerere pointed out in his development blueprint entitled the Arusha Declaration during 1967, that there is a need for an African model of development based on African socialism. As a political concept the term “ujamaa” asserts that a person becomes a person through people or the community. Wikipedia, The Free Encyclopedia, <http://en.wikipedia.org/wiki/Ujamaa>, accessed 28 August 2016. The phrase “return to the source” refers to a selection of speeches by the late Cabral. He discusses “returning to the source” as a political process rather than a cultural event. He furthermore emphasize the fact that returning to the source is of no historical importance unless it involves not only a contest against foreign culture, but also complete participation in the mass struggle against foreign political and social economic domain. Cabral, A : *Return to the source : Selected Speeches*. Edited by African Information Service. New York : Monthly Review Press (1973), p 12.

institutional structures and systems do not take into account experiences and memories of traditionally marginalized individuals. Cloete emphasizes that it is through the critical appropriation of traditional cultural values that the community can sustain itself in the present.⁶⁹ This in my opinion is also true for legal culture and the advancement of rights in our current litigation system. In chapter four I discuss the way in which endogenous knowledge might be of value in assisting us with developing a broader knowledge base and in doing so, fulfilling a memory of promise looking to the future.

Cloete warns that traditional sources and conditions of life in the community have been seriously challenged as a result of the violent encounter with Western modernity. This encounter therefore needs to be understood and articulated from a collective sense of moral outrage. It is a given fact that Africa's moral self-identity as human beings, together with its material and political forms of livelihood have been seriously undermined and impoverished by European projects of slavery and colonialism in the past as well as neoliberal economic policies of global capitalism in the present.

According to Cloete, justice as a moral idea in Africa, must begin with a universal acknowledgement of the denied, deferred humanity of Africa's "human-being-in-the-modern-world".⁷⁰ Justice as a political ideal, must assume the concrete form of redistribution of African land, as well as other dispossessed material resources.

As Plato would surely agree, the construction of the modern African state must take its orientation from the humanist legacy of traditional African society. This would provide a normative framework for asserting the African experience of wholeness and coherence in the world. This must form part of a moral reaction to the cultural-historical fragmentation and rupture associated with Africa's violent encounter with Western modernity.

⁶⁹ Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) p 96.

⁷⁰ Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) pp 96 – 97.

Cloete emphasizes that it is within this metaphysical context of the priority of the moral African community (the goodness of the “other”), in which the values of the past “precede” the political community of the present. It is within this context that the question of justice must be raised as a historical possibility in Africa. (Returning to the memory of wholeness). The devastating rupture of precolonial Africa can only be effectively overcome by first of all re-remembering the spiritual sources of human solidarity. It is this spiritual source of human solidarity that once dictated the African sense of identity in the hope of restoring the “moral foundations” of the African community.⁷¹

The question of justice within the African context can once again be posed within the normative context of African metaphysical thinking. In doing so, it stands in contrast with the modern African state. According to Plato, individually, justice is a human virtue that results in a person being self-consistent and good. Socially, justice can be seen as a social consciousness that results in a society becoming internally harmonious and good. We should therefore not be fooled into thinking that democracy is an exclusively “western” idea. Democracy can be seen as a universal idea and its development in any society should allow for referral to the entire human experience.

Cloete is of the opinion that the possibility of justice within an authentic democratic political community cannot be detached from its engagement with world history. It must not be regarded as a passive conduit of Western modernity, but serve as a dialogue partner capable of contributing towards the development of a more humane world order. It is not necessary to learn the lessons of the past more than once. Cloete emphasizes that to be able to attain justice in any society; it must resonate with the potentially universalisable moral consciousness of ordinary human beings across all human societies.⁷²

⁷¹ Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) p 97.

⁷² Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) p 98.

I have indicated above that there is a difference in perception with regards to the notion of justice (and by implication access to justice). I am of the view that it is this difference in perception that serves as the catalyst for the tension between the ideals strived for by and within the Constitution on the one hand and society's interests and needs on the other hand. I have also indicated that access to justice in a broader sense must involve an alternative conceptualization of the nature of rights. This is due to the fact that the attainment and enhancement of such rights as a permanent ideal of openness entails the perpetual "translation" of society's interests and needs by way of a process of dialogue between memory and promise. Perceptions and notions of love, passion, compassion, equanimity and respect in my view forms part and parcel of the way in which we need to formulate a broader notion of justice.

In the next section I turn to the necessity of an alternative conceptualization of the nature of rights in order to advance and enhance access to justice within the South African context.

2.4 Access to justice and an alternative conceptualization of the nature of rights

In the preceding sections I have indicated that I refer to a broader notion of justice. I argue that we need to move away from a strict contractarian approach where the focus is on "just institutions" to what Amartya Sen refers to as the behaviours, freedoms, choices and interactions of people in ordering their lives.⁷³ In my view active participation is necessary to regain a sense of self-identity as well as wholeness within the community.

⁷³ Sen, A *The idea of justice* : Harvard University press (2009) p 390.

Sen views open-minded engagement in public reasoning as central to the pursuit of justice.⁷⁴ In Sen's view there is a strong case to be made for the replacement of what he describes as transcendental institutionalism. Firstly by focussing questions of justice on assessments of social realizations and secondly on comparative issues of enhancement of justice.⁷⁵ Sen's approach is much influenced by the tradition of social choice theory.⁷⁶

John Rawls applies the idea of a hypothetical social agreement (not dissimilar to the traditional idea of Glaucon as described above) to argue for principles of justice. He applies these principles in the first instance to decide the justice of institutions that constitute the basic structure of society. Individuals and their actions are just insofar as they conform to the demand of just institutions. (This viewpoint also reminds of what was stated with regards to the traditional view of Thrasymachus herein above). For Rawls the way in which these institutions are specified and integrated into a social system deeply affects people's characters, desires and plans as well as their prospects for the future. It can even influence the kind of persons they aspire to become. Rawls argues that the basic structure of society is the primary subject of justice due to the profound effects these institutions have on the kinds of people we are.⁷⁷

Sen criticizes Rawls in his attempt at getting to a perfectly just society with a combination of ideal institutions and corresponding ideal behaviour. He points out that where those extremely demanding behavioural assumptions do not hold, the institutional choices made will tend not to deliver the kind of society that would have claims to being perfectly just.⁷⁸

⁷⁴ Sen, A *The idea of justice* : Harvard University press (2009) p 390.

⁷⁵ Sen, A *The idea of justice* : Harvard University press (2009) p 410.

⁷⁶ Social choice theory was initiated by Condorcet during the eighteenth century. In general, social choice theory as a discipline is concerned with arriving at overall judgments for social choice based on a diversity of perspectives and priorities.

⁷⁷ Sen, A *The idea of justice* : Harvard University press (2009) p 67.

⁷⁸ Sen, A *The idea of justice* : Harvard University press (2009) p 412.

According to Sen, social choice can make a significant contribution in addition to the aspect of social realization as mentioned above towards a framework for reasoning. Sen argues that the most important contribution towards a theory of justice is its concern with comparative assessments. This relational, rather than transcendental framework concentrates on the practical reason behind what is to be chosen and which decisions should be taken, rather on speculating on what a perfectly just society would look like.⁷⁹ Similarly John Bell and Erik Schokkaert also point out that there is a richness of ideas about justice, which have been proposed by different disciplines.⁸⁰ Central to this stands a difference in world view and differences in methodical requirements and presuppositions (not to say sheer ignorance or arrogance as is demonstrated with what is described by Cloete as modernity's less than "noble lie" above).⁸¹

Social choice theory gives considerable recognition to the plurality of competing principles. These principles demand our attention when issues of social justice are considered and they may even at times be in conflict with each other. Sen emphasizes the fact that plurality is inescapable and may or may not lead to a result of impossibility. We however need to take note of durable conflicts of non-eliminable principles which can be quite important in developing a theory of justice.⁸²

Another important feature of social choice theory is the way in which it has persistently made room for reassessment and further scrutiny. In the context of transformative constitutionalism this can be beneficial as it allows for new ways of "being" to be explored and created, alternatively accepted and rejected on a continued basis. Similarly social choice theory allows for the possibility of partial resolutions. Sen is of the view that this theory of justice must make room for two kinds of incompleteness, namely, assertive and tentative. Tentative incompleteness may reflect operational difficulties rather than a deeper valuational deadlock. Assertive incompleteness on the other hand may relate to limitation of knowledge, complexity of calculation or other

⁷⁹ Sen, A *The idea of justice* : Harvard University press (2009) p 106.

⁸⁰ Scherer, KR (Ed), *Justice Interdisciplinary Perspectives* : Cambridge University Press (1992) pp 252 – 253.

⁸¹ Scherer, KR (Ed), *Justice Interdisciplinary Perspectives* : Cambridge University Press (1992) pp 252 – 253.

⁸² Sen, A *The idea of justice* : Harvard University press (2009) p 106.

practical barriers.⁸³ The formal structure of social choice theory often takes the form of exploring functional connections. These functional connections are guided by sets of axioms between individual priorities on the one hand and social conclusions on the other hand. The formal structure of social choice theory is therefore perfectly suited to assist with the alternative conceptualization of the nature of rights. According to the Platonian idea of justice it is only when the individual is placed within the broader context of community that the question of justice ultimately makes moral sense.

Sen points out that there has been considerable interest within the discipline in the distinction between the aggregations of individual needs and that of individual judgments. For instance, a person's voice may be relevant either because her interests are involved, alternatively because her reasoning and judgment may enlighten a discussion or she might be one of the parties directly involved.⁸⁴ He refers to the scenario where a person has direct involvement as "membership entitlement".⁸⁵ Where a person is not directly involved, but the person's perspective and reasons behind it brings with it important insights and discernment into an evaluation, there is a clear case for listening to the assessment. He refers to the scenario where the person is not directly involved, but can bring with him / her a positive contribution as "enlightenment relevance".⁸⁶ It seems that "membership entitlement" is prominent in Rawls' universe of justice as fairness on a political level. In contrast with his approach is the approach of Adam Smith. Smith invokes the "impartial spectator" to which distant voices may be given an important place for purposes of enlightenment relevance. This can for instance be used to avoid parochialism of local perspectives and assist to return to the memory of wholeness as point of departure. In chapter four I also discuss how the utilization of endogenous knowledge may enhance our knowledge and understanding of local perspectives. Being from a certain perspective some of us will only be able to function as "impartial spectators" in certain instances. It does however not mean that we (being of a Western tradition) do not have any positive contribution to make. We must take note of the relationship between the

⁸³ Sen, A *The idea of justice* : Harvard University press (2009) p 108.

⁸⁴ Sen, A *The idea of justice* : Harvard University press (2009) pp 108 – 109.

⁸⁵ Sen, A *The idea of justice* : Harvard University press (2009) pp 108 – 109.

⁸⁶ Sen, A *The idea of justice* : Harvard University press (2009) pp 108 – 109.

Western perspective and European expansionism of the past and the continuing present. Strong objectivity (being an impartial spectator) will entail that we take a critical look at conceptual schemes. We must realize that our own social location can be utilized to make a distinctive contribution to the way we think. We cannot and should not escape our collective history.

It is also true that “individual” rankings and priorities might also be seen not as those of distinct persons, but rather of different approaches followed by the same person to decisional issues involved. Sen furthermore mentions the possibility that “individual” rankings and possibilities might not even relate to those of individual preferences at all. This scenario is usually the *de facto* position assumed by mainstream social choice theorists in that it refers to diverse rankings yielded by different types of reasoning. The demands that are linked with the pursuit of justice (even access to justice considerations) in public discussion, and even in theories of justice, often leaves a lot of room for clearer configuration and a more fuller defence. Sen underscores the fact that the emphasis on precise articulation and reasoning within social choice theory in and of itself can be a contribution towards the idea of justice.

I have previously indicated that the approach followed by Sen has a strong “capability perspective” which grounds the notion of justice on the extent to which people (society in general) have the capability to do things they have reason to value. Capability in turn is linked to the opportunity dimension of freedom. Within the South African context I am of the opinion that enabling society to participate not only adheres to what is prescribed in our Constitution, but also creates a sense of belonging. It provides ordinary citizens with an opportunity to regain their voice and restore dignity. Returning to a memory of wholeness when they had a say so in their ordinary day to day life within the community.

I have also indicated that Sen places great emphasis on the significance of freedoms incorporated in the formulation of rights. It is important not only for purposes of

affirming our own rights and liberties as individuals, but also for taking an interest in the freedoms and rights of others (the community as a whole).

Social choice theory plays an integral part in the interactive process between the nature of human values and social reasoning in the formulation of rights as freedoms. Sen acknowledges the fact that it may often be very difficult to capture these concepts in precise axiomatic terms.⁸⁷ Social choice theory can be closely associated with the championing of public reason.⁸⁸ I discuss this aspect in greater detail in chapter four which deals with the concept of endogenous knowledge.

I am of the opinion that a broader notion of justice which incorporates the behaviours, freedoms, choices and interaction of people in ordering their lives necessitates an alternative conceptualization of the nature of rights. For this purpose social choice theory can be utilized as an interactive device for purposes of incorporating freedoms into the formulation of rights. Through this interactive process of public reasoning and participation an alternative conceptualisation of the nature of rights and their attainment will become possible. It is however important to note that this interactive process must be seen as a supplement to enhance the advancement of rights and not as a substitution of institutions and processes as predicated by the Constitution.

In utilizing this supplementary interactive process we will be able to enhance our social consciousness which will result in a society becoming internally harmonious and good. This co-insides with Cloete's view that to be able to attain justice in any society, it must resonate with the potentially universalisable moral consciousness of ordinary human beings across all human societies.⁸⁹

⁸⁷ Sen, A *The idea of justice* : Harvard University press (2009) p 110.

⁸⁸ James Buchanan has made a big contribution in clarifying the role and importance of public reasoning. He can be seen as the pioneer of the school of "Public Choice".

⁸⁹ Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) p 98.

I have previously alluded to the fact that the advancement of rights revolves around normative standards, remedial procedural avenues and institutional structures.⁹⁰ In the next section I discuss the way in which disputes and processes within the civil litigation system influence the advancement of rights.

2.5 Disputes and processes and their influence on the advancement of rights and access to justice

Even though transformative constitutionalism introduced changes in political, constitutional and administrative notions of justice, it did not affect any changes with regards to court processes as such.

In many respects the traditional (Western) perspective is still prevalent in our court processes today. The importance on the one hand, of the notion of transformative constitutionalism and the advancement of rights, on the other hand cannot be underestimated within the context of dated and often anachronistic processes. It is these processes and techniques which must be utilized in the day to day practice of law and the advancement of rights, and ultimately access to justice.

In accordance with the traditional (Western) perspective it is preferred to conceptualize public policy as “the science of muddling through” instead of it entailing a process geared towards justice. Policy changes on a broad scale and a so-called “big bang” implementation is not preferred. The preferred term used is the “public policy cycle” which needs to be implemented in an incremental fashion.⁹¹

⁹⁰ Boule, L *Promoting rights through Court-based ADR (A paper presented at the Access to Justice Conference, Office of the Chief Justice, 8 – 10 July Sandton)* (2012) 28 SAJHR p 1.

⁹¹ Zuckerman, AAS & Cranston, R (Ed) *Reform of Civil Procedure : Essays on “Access to Justice”* Calendon Press, Oxford (1995) p 31.

In this context Cranston points out that the formulation of public policy is not an exact science.⁹² The fact that individuals and organizations (entities) can change their responses as soon as change is effected should be remembered. By changing these responses, the whole object of the change are undermined. He emphasizes that incrementalism is all that is possible in most circumstances. This is due to resource constraints, a clash of interests and lack of consensus in values. According to Cranston social research and monitoring has not been prominent features in the social justice system, for instance when it is compared to disciplines such as criminology. It is however important to remember that research outcomes are dependent on the questions asked.⁹³

Bell and Schokkaert in their discussion of interdisciplinary research emphasized the fact that interdisciplinary contacts have been rare and seldom fruitful.⁹⁴ This is due to the fact that there are differences in world view, differences in methodological requirements and presuppositions as well as terminological confusion. This being said, they are of the opinion that more interdisciplinary contacts are possible and even necessary.⁹⁵ Later on in this dissertation I discuss the idea of rather having conversations across disciplinary borders. It should furthermore be emphasized that cross field appropriation is an important element of how knowledge advances.

The link between disputes and processes can by no means be regarded as mechanical in nature. This is evident from the fact that the handling of a dispute in a certain manner can have a direct effect on the dispute itself. In many respects the aims and objectives of the civil justice system can be viewed as contradictory in nature.

Two broad schools of thought as to the nature of civil proceedings can be distinguished; namely the first school of thought is of the view that disputes are essentially private matters, whilst the second school of thought are sometimes viewed

⁹² Scherer, KR (Ed), *Justice Interdisciplinary Perspectives* : Cambridge University Press (1992) p 252.

⁹³ Scherer, KR (Ed), *Justice Interdisciplinary Perspectives* : Cambridge University Press (1992) p 252.

⁹⁴ Scherer, KR (Ed), *Justice Interdisciplinary Perspectives* : Cambridge University Press (1992) p 252.

⁹⁵ Scherer, KR (Ed), *Justice Interdisciplinary Perspectives* : Cambridge University Press (1992) p 252.

as a Continental invention.⁹⁶ For the first school of thought; law and mechanisms provided by the state are for supporting the enforcement, alternatively the application of the law, are reluctantly engaged with. These scholars are of the opinion that the civil justice system should aim to bring cases to finality with speed and as affordable as possible.⁹⁷

For the Continental invention in its modern form it can be linked to influential publications and draft legislation by the turn of the century jurist Franz Klein.⁹⁸ In his work Klein focusses on the social function of court procedure. According to Klein every court case must be seen as a “social emergency” and it is the duty of the Judge to see to it that the emergency should come to an end as soon as possible.⁹⁹ He is of the belief that the powers of the judge (similarly to the powers of other state organs) should be placed in service of the law, the common weal and to the advancement of social peace.

According to Klein:

“Court proceedings will become rational and consonant with the modern conception of the state only when legal protection is indeed the provision of government assistance, not just with effect from the passing of judgment, but from the first step in the proceedings onwards.”¹⁰⁰

It is clear that these two schools of thought evolved from different political and legal points of view when it comes to aspects such as- the nature of law; the place and function of law in society; and the nature of the State itself. These different perspectives are of great importance when we need to identify why we approach legal proceedings with a certain mind-set. For instance it is clear that these aspects are deeply muddy issues for a judge who is of the opinion that his/her job is to merely

⁹⁶ Zuckerman, AAS & Cranston, R (Ed) *Essays on “Access to Justice”* Calendon Press – Oxford (1995) p 29.

⁹⁷ Zuckerman, AAS & Cranston, R (Ed) *Essays on “Access to Justice”* Calendon Press – Oxford (1995) p 29.

⁹⁸ Zuckerman, AAS & Cranston, R (Ed) *Essays on “Access to Justice”* Calendon Press – Oxford (1995) p 29.

⁹⁹ Zuckerman, AAS & Cranston, R (Ed) *Essays on “Access to Justice”* Calendon Press – Oxford (1995) p 29.

¹⁰⁰ Zuckerman, AAS & Cranston, R (Ed) *Essays on “Access to Justice”* Calendon Press – Oxford (1995) p 30 footnote 92.

faithfully adjudicate according to law as well as for the practicing lawyer who endeavours to make a daily living by way of appearing in litigious matters.

Empirical research monitoring case flow management in the United Kingdom in 1995 with access to justice in mind, found that the link between formal process and lawyer behaviour is weak. The emphasis fell on the importance of informal relationships between all parties. Research tended to move away from the court and focussed on the court in the context of its environment.¹⁰¹ Researchers identified factors such as the ways in which colleagues accommodated each other to the detriment of the finalization of a case; the ways in which lawyers gave preference to certain cases in their offices; and the ways in which a lawyer's expectation of the outcome of a case influenced the way in which he / she approached the case. These factors seem to serve as impediments on access to justice and the advancement of rights.

Neutrality and impartiality seem to be features of all rights regimes. In my view the emphasis on neutrality and impartiality enhances a conservative and formalistic legal culture. In turn it is this conservative and formalistic legal culture that serves as a structural impediment to transformative constitutionalism and the advancement of rights. We need to be able to accommodate an alternative conceptualization of the nature of rights when we approach legal proceedings. This will enable us to adapt our mind-set for purposes of having greater sensitivity when we approach legal proceedings within a certain historical context.

A broader notion of the idea of justice (and by implication access to justice and the advancement of rights) is based on social choice principles. These principles potentially allow for direct and comprehensive participation by the parties themselves. These principles are less restrictive than technical procedures, formal rules and the ancient traditions and privileges associated with the adversarial system. Participation

¹⁰¹ Zuckerman, AAS & Cranston, R (Ed) *Essays on "Access to Justice"* Calendon Press – Oxford (1995) p 4.

can be seen as the countervailing principle to those values associated with the adversarial legal and judicial cultures.

The third important factor is to take note of the principle of “self-determination”, which may be styled as “party autonomy”. The principle of “engagement” has emerged in a number of socio-economic rights cases. For instance this principle was applied in the case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*, where it was held that a court must take into account whether meaningful engagement before granting an order for eviction of people from their homes.¹⁰² In the subsequent two chapters I discuss similar case law in greater detail when I highlight legal culture as an obstacle and endogenous knowledge as a possible resource for purposes of enhancing a sense of justice.

It is important to note that the Court stated in the abovementioned case that engagement has the potential to contribute towards the resolution of disputes and also promote increased understanding and sympathy if both parties are willing to participate in the process. In my view the ability (freedom) to participate will also increase a person’s sense of justice.

Boulle points out that there are only a few steps to be taken from meaningful engagement in relation to life and dignity and meaningful engagement in civil litigation. Notions of justice and the attainment of rights are flexible and adaptable to varied circumstances. These concepts are therefore extremely important as it interacts with the concept of transformative constitutionalism on an ongoing basis.

2.6 Conclusion

¹⁰² [2008] ZACC 1. Also refer to Boulle, L *Promoting rights through Court-based ADR (A paper presented at the Access to Justice Conference, Office of the Chief Justice, 8 – 10 July Sandton)* (2012) 28 SAJHR p 16. Yacoob J emphasized that in accordance with Section 26(2) of the Constitution it is mandatory for municipalities to engage meaningfully before ejecting people from their homes in the event that they become homeless after the eviction.

As stated in the introduction, this chapter focuses on the current civil litigation system and how and to what extent it fails to live up to the transformative ideals of the South African constitution with specific emphasis on access to justice and the advancement of rights. I discuss the fact that even though transformative constitutionalism introduced changes in political, constitutional and administrative notions of justice, it did not affect any changes with regards to court processes as such. It therefore fails to live up to the transformative ideals of the South African constitution in the sense that the civil litigation system is still based on a dated and often conservative (anachronistic) legal knowledge, legal culture and legal practice. This results in a tension between normative standards, remedial procedural avenues and certain institutional structures.

The advancement of rights revolves around normative standards, remedial procedural avenues and institutional structures and therefore the resulting tension acts as an obstacle in the advancement of rights within our civil litigation system. It therefore becomes apparent that developments in the civil litigation system should be consistent with an alternative conception of justice and rights. With reference to Sen's concept of justice and rights there should be a movement from "ideal institutions" to a situated focus on behaviours, interactions and choices for individuals within the context of the civil litigation system. Even though there might be serious reservations about raw "bargaining" when it comes to socio-economic rights, it might within the context of court supervision, be appropriate in certain circumstances.

As discussed, I pause in chapter three on the aspect of the prevailing legal culture within the South African context as an obstacle to the realisation of access to justice considerations and the advancement of rights in that South African jurists are hesitant to move away from traditional ways of legal thinking and interpretive techniques.

3 Legal culture as obstacle

3.1 Introduction

As stated previously the main research problem of this study is to expose and address some of the current problems in the civil litigation system within the South African context. In my study I specifically refer to the issue of access to justice. In the previous chapter I focus on how and to what extent the advancement of rights and access to justice considerations fail to live up to the transformative ideals of the South African constitution.

I come to the conclusion that even though transformative constitutionalism introduced changes in political, constitutional and administrative notions of justice, it did not affect any changes with regards to court processes as such. I highlight the fact that our civil litigation system is still based on dated and often conservative (anachronistic) legal knowledge, legal culture and legal practice. The current state of affairs results in a tension between normative standards, remedial procedural avenues and certain institutional structures.

The aim of this chapter is to pause on the aspect of legal culture and the way in which it serves as an obstacle towards the comprehensive realisation of the ideals strived for by and within the Constitution. The research question to be addressed in this chapter is therefore to what extent the prevailing legal culture is an obstacle in the way of addressing current problems in the civil litigation system. Added to that it should be considered to what extent the civil litigation system is influenced by traditional ways of thinking and interpretive techniques.

I firstly analyse Karl Klare's argument on legal culture being that transformative constitutionalism can only be attained in instances where the judiciary are not scared or unwilling to move away from traditional ways of legal thinking.

I then go on to discuss the apparent contradiction between the notions of transformation within a constitutional perspective. I highlight the fact that there is a perpetual confrontation between tradition and transformation and pause on the fact that legal culture serves not only as a major source of stability, but also as a force of resistance to change.

In doing so I discuss recent trends in case law where transformative legislation seem to fail (at least partially) and ponder on how this might be overcome by adapting our way of thinking. I am of the opinion that there is a need for the integration of knowledge and techniques used by different disciplines in an effort to alleviate the so-called “tension” between normative standards, remedial procedural avenues and certain institutional structures.¹⁰³ I highlight the fact that this process of re-remembering, re-thinking, and reformulation will enable us to reach an expanded vision and higher level of awareness, ultimately resulting in an experience of powerful transformation.

I now proceed to touch on Klare’s argument on legal culture, being that transformative constitutionalism can only be attained in instances where the judiciary are not scared or unwilling to move away from traditional ways of legal thinking.

3.2 Klare’s argument on legal culture

The term “culture” is derived directly from the Latin term “cultura” which can be associated with the terms “growing” or “cultivation”. The verb is derived from the obsolete French term “culturer” or medieval Latin term “culturare”. Both terms are based on the Latin term “colere” which can be associated with the terms “tend” or “cultivate”. In late Middle English it was understood in the sense of “cultivation of the

¹⁰³ Boule, L *Promoting rights through Court-based ADR (A paper presented at the Access to Justice Conference, Office of the Chief Justice, 8 – 10 July, Sandton)* (2012) 28 SAJHR pp 1 – 2.

soil” and from the early 19th century the connection was also made with reference to “cultivation of the mind, faculties or manners”.¹⁰⁴

The terms “tend” and “cultivate” within the context of “culture” can be associated with notions such as “to take care of something or somebody” and “to develop an attitude, a way of thinking or behaving”.¹⁰⁵ In general terms it can refer to the beliefs and attitudes towards something within a particular group or organization. For instance a certain political- or legal culture. It can also refer to customs and beliefs, art, way of life and social organization of a particular country or group.¹⁰⁶ De Villiers refers to culture as a celebration of ritual that relies strongly on legacies of previous contributors to the culture. She also identifies the fact that language plays an integral part in culture and hierarchy and hegemony are considered to be significant to the functioning of culture.¹⁰⁷

With legal culture we therefore refer to a certain group, namely the legal “fraternity” consisting mainly of judges, lawyers and legal academics. According to Klare it also entails the “professional sensibilities, habits of mind, and intellectual reflexes” within this particular group.¹⁰⁸ Professional sensibilities, habits of mind and intellectual reflexes points to a celebration of ritual that strongly relies on previous contributions to legal culture. The fact that we as the legal fraternity are still heavily invested in the ritualistic nature of our legal culture in its most basic form is evident from the way we dress and address the Court during Court proceedings on a daily basis.

In a broader sense it can be said that legal culture determines the way in which the Constitution is interpreted, how the law is applied and practiced as well as how it

¹⁰⁴ Oxford Learners Dictionary accessed online at <http://www.oxfordlearnersdictionaries.com> on 23 August 2016.

¹⁰⁵ Oxford Learners Dictionary accessed online at <http://www.oxfordlearnersdictionaries.com> on 23 August 2016.

¹⁰⁶ Oxford Learners Dictionary accessed online at <http://www.oxfordlearnersdictionaries.com> on 23 August 2016.

¹⁰⁷De Villiers, I *South African Legal Culture in a Transformative Context*, LLM Thesis (UP), June 2009 p 6. Also refer to footnote 17 on the same page.

¹⁰⁸ Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAJHR 14 p 146.

subsequently influence developments in the country. It therefore becomes apparent why the notion of legal culture can be utilized as a device to directly influence traditional ways of legal thinking and interpretive techniques.

In my opinion two aspects become evident from the definitions as set out above: in the first place the emphasis on group or social organization and secondly a sense of preservation and nurturing. In other words we connect with legal culture a strong sense of conservation within a group or specific societal construct. It is therefore insightful when Van der Walt identifies legal culture as a major source of stability as well as a force of resistance to change.¹⁰⁹ Stability is enhanced through the continuation of ritualistic legacies of previous contributors. Ironically it is also this need for stability that creates a strong force of resistance to transformative constitutionalism. Klare's description of the concept of legal culture can therefore be closely associated with the concept or notion of legal tradition.

In this respect Klare refers to "rhetorical" and "argumentative strategies".¹¹⁰ Similarly De Villiers refers to the notion that legal culture determines the validity of arguments. It furthermore sets the criteria for the acceptability of rhetorical devices. Legal culture is formed and reinforced in a certain manner by identifying "valid arguments" which features repetitively within the legal discourse.¹¹¹ It therefore presuppose a process of behavioural learning. I discuss this aspect in greater depth in the course of chapter four.

Klare refers to the case of *Du Plessis v De Klerk* in which Justice Kriegler describes legal culture as "the ingrained inarticulate premises" that inform "professional discourse and outlook".¹¹² De Villiers points out that legal culture can therefore be understood as an underlying point of departure.¹¹³ In my view this is an extremely

¹⁰⁹ Van der Walt, AJ *Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 5.

¹¹⁰ Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAJHR 14 p 146.

¹¹¹ De Villiers, I *South African Legal Culture in a Transformative Context*, LLM Thesis (UP), June 2009 p 7.

¹¹² 1996 (5) BCLR 658 (CC) par 119.

¹¹³ De Villiers, I *South African Legal Culture in a Transformative Context*, LLM Dissertation (UP), June 2009 p 7.

important observation within the context of the South African civil litigation system. It emphasizes the important role legal culture has to play within the civil litigation system in that it influences the mind set with which civil proceedings are approached. Not only from the perspective of the presiding officer, but also from the perspective of lawyers within the Courtroom setting. Klare refers to Duncan Kennedy and emphasizes the fact that presiding officers (judges) and the lawyers (advocates) who needs to persuade them with their legal argument almost always generate a particular rhetorical effect, the generated effect being that of the legal necessity of their solutions without regard to ideology.¹¹⁴ This generated rhetorical effect in my view enhances the current static nature of our legal culture.

Within the context of our civil litigation system the seemingly uninterrupted existence or “succession” of our legal tradition (legal culture) therefore becomes evident. One might even argue that there seems to have been an overemphasis on the content of law in relation to the context of law. In my view, one of the techniques that we need to employ for purposes of addressing the problem of legal culture as an obstacle to transformation within the civil justice system is the process of contextualization. I would frame it as a process of “interactive translation” within the constitutional culture of dialogue.

The fact that we are struggling to constitute new social relations and gain knowledge from the lived experiences of traditionally marginalized groups and individuals within our civil litigation system, might not necessarily be due to an unwillingness to do so. It must be considered that it might be due to the fact that there is a cacophony of ongoing dialogic interaction which leads to a state of “being lost in translation”. We are “Constitutionally speaking over and against one another” and not listening to one another.

¹¹⁴ Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAJHR 14 p 166.

The question which therefore becomes relevant here is how transformation of existing social relations can be achieved and how we can be empowered to gain knowledge from the lived experiences of traditionally marginalised groups and individuals.

In chapter two of this dissertation I briefly discuss the two broad schools as to the nature of civil proceedings.¹¹⁵ Van der Walt points out that within the South African context there was a group of lawyers (especially within the field of private law) that argued that transformation would best be served by restoration of objectivity of the law and purging it of all political influences. Their proposal relied on the assumption that apartheid was an ill-conceived political ideology that merely tainted the law superficially and that the problem could be solved by way of surgically removing all apartheid laws from the legal system in a clinical manner. In doing so, we can merely continue to benefit from the intellectual and moral superiority of the (purified) Roman-Dutch common-law tradition.¹¹⁶

Once again this point of view reminds me strongly of the traditional Western perspective in which it is preferred to “muddle through” instead of engaging in a process that is geared towards the promotion of justice. Van der Walt also criticizes this point of view (and rightly so in my opinion) in that it highlights in the first instance that this argument assumes the authority of sources of law and the validity of the methods that we use when we interpret and apply them are completely or inevitably culturally contingent.¹¹⁷ It is illustrative of the project of Western modernity which is based on a philosophical denial of the humanity of the “other”, the superior presence in the “white man’s mind” and a denial of the potential of goodness within the “other”.

Secondly it assumes that there is a core of stable, acontextual and apolitical meaning inherent in the common law tradition, inclusive of a set of legal rules and principles as well as a set of conceptual and analytic tools with which to interpret and apply them.

¹¹⁵ Refer to chapter two of this dissertation pp 38 – 39.

¹¹⁶ This point of view reminds of the first school of thought as described in chapter two of this dissertation.

¹¹⁷ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 7.

Cloete reminds us that the traditional sources and conditions of life within the traditional African community has been seriously challenged as a result of its violent encounter with Western modernity.¹¹⁸ He reiterates that justice as a moral idea in Africa, must begin with a universal acknowledgement of the denied, deferred humanity of Africa's "human-being-in-the-modern-world".¹¹⁹

In the third instance that, this core is either free or is able to be freed from political or ideological baggage or cultural coding. It has been clearly illustrated during the course of this study that the birth of the Constitution necessitated a transition from a formal vision of law to a substantive vision of law. As stated above justice as a moral idea in Africa, must begin with a universal acknowledgement of the denied, deferred humanity of Africa's "human-being-in-the world". As a political idea it must assume the concrete form of redistribution of African land, as well as other dispossessed material resources. This therefore implies the underlying point of departure from which we as members of the legal "fraternity" must approach our processes of legal reasoning and legal thinking. It is however important to highlight the fact that Cloete emphasizes that the possibility of justice within an authentic democratic political community cannot be detached from its engagement with world history. It does not mean that it has to be regarded as a passive conduit for Western modernity, but rather as a dialogue partner capable of contributing towards the development of a more human world order.¹²⁰

Van der Walt notes that the claim that legal reform had to be based on renewed scientific objectivity and cleansing of the law from political influence is also accompanied by support for the transformation process that would change the law incrementally and in a step-by-step manner.¹²¹ This school of thought tend to favour development of the common law through limited judicial activity. They argue that

¹¹⁸ Refer to chapter two of this dissertation, pp 28 – 29.

¹¹⁹ Refer to chapter two of this dissertation, p 29.

¹²⁰ Refer to chapter two of this dissertation, pp 29 – 30.

¹²¹ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 7.

larger changes that would affect vested and acquired rights are not within the jurisdiction of the courts and should be introduced by way of legislation.

Van der Walt views the notion that development of the law has to be accomplished in an incremental, step-by-step, interstitial development of the common law doctrine – supplemented where necessary, by larger legislative interventions as problematic.¹²² This is due to the reality of the urgency for meaningful and significant transformation. Van der Walt argues that if we accept the premise that meaningful transformation requires significant and visible changes in the existing distribution of wealth and privilege, the incremental judicial process of interstitial development may be too slow and protracted. This is as a result of the fact that such a process would be one which is driven by the logic of doctrinal development and not by the need for change.¹²³ In such an instance it would rather be a question of doctrinal “fit” rather than social and political necessity.

Van der Walt points out that one is left with the impression that significant changes must by necessity be of a revolutionary nature due to the fact that they are only possible in a state of direct confrontation with tradition.¹²⁴ However, if one reflects upon the reasons for the notion of incremental change it seems that we do not necessarily have to accept this assumption. Van der Walt highlights the fact that the idea that judges can and should only make small changes to the law while substantial changes should be left to the democratic legislature is informed by a pre-realist way of thinking and a tacit denial (alternatively an attempt to evade) in respect of the interpretive aspect of the judicial function.¹²⁵ The pre-realist way of thinking promotes and even demands that we clearly distinguish between law and politics; the jurisdiction of judges and democratic legislators and between the application and the making of

¹²² Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 9.

¹²³ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 9.

¹²⁴ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 10.

¹²⁵ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 3.

the law. He touches on the counter-majoritarian dilemma and refers to writers such as Botha who argues that the dilemma cannot be resolved and should remain in place as a source of creative tension that inspires further critical reflection and debate in perpetuity.¹²⁶ I will discuss this notion later on in my study in the course of chapter four.

The reality is however that we cannot shy away from the fact that both the common law as well as legislation are interpreted whilst in the process of being applied. The process of interpretation therefore interrupts whichever source of the law is being applied and the subsequent realisation of transformative goals. It can therefore not be assumed that the law, both in its common law and legislative format is autonomous and self-executing.

Van der Walt highlights the problems with the notion of incremental development of the common law by what he describes as the paradigmatic transformation issue for purposes of South African property law, specifically with reference to eviction cases.¹²⁷ He brings to the forefront the contrast in cases where the courts ignored the historical background of apartheid evictions and cases in which the conflict between the traditional strong protection of ownership and the reformist restrictions upon evictions was treated with historical and contextual sensitivity. For purposes of this dissertation it is not necessary to review a large contingent of legislation and case law with reference to property law, but I do deem it prudent to highlight the worst and the best example of cases mentioned by Van der Walt in order to accentuate the difference and contrast in approach.

¹²⁶ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 10. Also refer to footnote 20 on p 10 of his article. The countermajoritarian dilemma is a perceived problem encountered within the context of Constitutional theory. The problem relates to the legitimacy of the institution of judicial review. For instance the fact that unelected judges can utilize their power to nullify the actions of elected executives or legislatures.

¹²⁷ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 11.

The judgment of *Joubert and Others v Van Rensburg and Others* can be used to illustrate one of the worst examples pertaining to historical and contextual sensitivity.¹²⁸ An order of eviction was granted by the trial Court in this instance with the reasoning that it was upholding existing land rights against the threat of land invasion and lawlessness which the Court associated with land reform. The method of interpretation of the reform laws was restrictive and the common law was applied. It is therefore not surprising that the decision was overturned by the Court of Appeal.

The best example according to Van der Walt, of a judgment delivered where the necessary historical and contextual sensitivity was applied is the judgment of *Port Elizabeth Municipality v Various Occupiers*.¹²⁹ In this judgment the Constitutional Court situated the adjudication of eviction cases within its proper context. The Court emphasized that apartheid land law was politically motivated and legislatively sanctioned. Eviction procedures stood central to this. The Court furthermore emphasized that Section 26(3) of the Constitution and the statutory eviction provisions must be understood within the context of an explicit effort to reverse the history of unjust apartheid evictions. With this approach anti-eviction laws must be understood and applied “within a defined and carefully calibrated constitutional matrix”. It should reflect the fact that land rights and rights of access to housing (including the right not to be arbitrarily evicted) are closely interlinked with one another. Van der Walt points out that the most significant feature of the anti-eviction laws when compared to the situation in the common law, is that they place an obligation on the courts to consider all circumstances, including the personal circumstances of the unlawful occupiers in certain instances before granting the eviction order.¹³⁰

Van der Walt proceeds and highlights three important aspects with reference to the examples of eviction laws and procedures. Firstly it shows us that law cannot be

¹²⁸ 2001 1 SA 753 (W).

¹²⁹ 2005 1 SA 217 (CC).

¹³⁰ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 12 at footnote 28.

isolated from politics.¹³¹ The political nature of forced removals during the apartheid era explains and even justifies the political nature of every eviction case during the constitutional era. The question if it is adjudicated in terms of the common law or land-reform legislation therefore becomes irrelevant. Section 26(3) of the Constitution in conjunction with anti-eviction land-reform legislation makes for an explicitly political ruling with a clearly political purpose.¹³² The purpose is to overturn the legacy of the apartheid government's land politics. In doing so, all eviction cases are therefore projected into a very particular interpretive framework. Secondly it shows that even clearly mandated reform laws with the aim to transform existing law are not self-executing. Their transformative purpose cannot be reached without the appropriate judicial interpretation and application thereof.¹³³ In the third place, the eviction cases shows that judicial application of reform laws inescapably involves a choice between upholding or changing the existing legal tradition (legal culture).¹³⁴

It therefore becomes abundantly clear that legislation cannot bring about transformation in and of itself. Judges are tasked with the interpretation of legislation and in doing so, they have the discretion to take cognisance of the transformative purpose of the legislation or not. Van der Walt points out that pretence of objectivity and neutrality will inevitably favour tradition and frustrate or limit transformation.¹³⁵ In chapter two of this dissertation I highlight the fact that I am of the opinion that emphasis on neutrality and impartiality enhances the conservative and formalistic nature of legal culture. In turn it is this conservative and formalistic legal culture that serves as an obstacle to transformative constitutionalism and the advancement of rights within the context of civil justice system. I emphasize the idea of a broader notion of justice (and by implication access to justice) as well as the fact that principles of social choice

¹³¹ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 15.

¹³² Section 26(3) of the Constitution states: “No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

¹³³ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 16.

¹³⁴ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 16.

¹³⁵ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 16.

theory may be utilized to allow for direct and comprehensive participation in the civil litigation process by the parties themselves.

Van der Walt's analysis of eviction law under the auspices of the new Constitution shows that Klare's assumption that, in the absence of "searching and critical examination of legal culture" and its influences on interpretive practices, lawyers will become deeply embedded in their prevailing legal culture, as to be correct.¹³⁶ It furthermore becomes clear that transformative constitutionalism can only be attained in instances where the judiciary are not scared or unwilling to move away from traditional ways of legal thinking. This being said, one must take cognisance of the fact that legal culture serves as both a major source of stability as well as a force of resistance to change. This leads me to the next section in which I consider if legal culture must necessarily be removed for transformational purposes or is there merely a need for confrontational change.

3.3 Legal culture: a force to be reckoned with - or not?

Van der Walt points out that the prospect of political change elicited two apparently contradicting sets of reactions that, between them, set the agenda for the debate around transformation.¹³⁷ For one group the transformation debate centred on the need for continued security, whilst for traditionally marginalized groups it centred on how the apartheid system could be abolished with maximum speed and efficiency.

Generally speaking the answer that provided a broad framework within which conflicting aspirations and concerns about transformation had to be (and still are) accommodated was: through transformation in a constitutional democracy based on

¹³⁶ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 16.

¹³⁷ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 3.

human dignity, equality and freedom.¹³⁸ Van der Walt however points out that this answer merely embodies a different tension that postpones or displaces the remaining question of the apparent contradiction of transformation within a constitutional democracy.

If we return to what I discussed in the first two chapters of this study about what is understood under the notion of transformative constitutionalism we must concede that transformation denotes change. It becomes clear that the notion of transformation which cannot be severed from the concept of change stands directly oppositional to the notion of constitutionalism which is strongly associated with stability.¹³⁹

The confrontation between the concept of transformation and constitutional democracy lies in the fact that it seems that our democratic constitution entrenches existing privilege and power whilst there is a need for urgent and radical transformation within political, social, economic and legal spheres. Van der Walt asks the question if a democratic constitution that clearly demands and legitimises large-scale social transformation can really deliver on its promise of stability and continuity.¹⁴⁰ I attempt to respond to Van der Walt's question in the concluding remarks to this study in chapter five of this dissertation.

In light of the confrontational relationship between the notion of transformation and the notion of democracy it becomes clear why Klare argues that legal culture is a restraining force which resists transformation. It boils down to a legal tradition that is embedded in a relatively uncritical acceptance of doing things the way they are usually done, because they have been done so for a very long time.¹⁴¹ As discussed herein above legal culture can be seen as the underlying point of departure for the reason

¹³⁸ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 4.

¹³⁹ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 5. Also refer to footnote 10 on p 5 of his article.

¹⁴⁰ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 5.

¹⁴¹ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 18.

why we as legal practitioners and academics think the way we do and practice law in the manner we do. Within the context of our civil litigation system the seemingly uninterrupted existence of “succession” of our legal tradition (legal culture) creates a generated rhetorical effect that enhances the static nature thereof.

It is for this reason that developments in the civil litigation system should be consistent with an alternative conceptualization of justice and rights. I have previously indicated that the advancement of rights revolves around normative standards, remedial procedural avenues and institutional structures. I have also indicated that our civil litigation system is still based on a dated and often anachronistic hierarchy of legal knowledge, legal culture and legal practice. This results in a tension between normative standards, remedial procedural avenues and certain institutional structures. In my view these anomalies is an indication of the existing and ongoing tension between tradition and transformation.

I therefore tend to agree with Klare’s argument that we as members of the legal fraternity must not be scared or unwilling to move away from traditional ways of thinking. However in doing so, we must adapt an explicitly activist transformative approach entailing a duty to approach civil proceedings and legal thinking in the general sense with the necessary historical and contextual sensitivity it deserves. This would entail a paradigm shift in the way we think about legal problems, legal issues as well as the nature of law in general. In order to bring about this paradigm shift we need to actively participate in the perpetual constitutional dialogue of memory and promise. The notion of a dialogue presupposes the fact that we must be able to observe and listen in order to form a greater understanding and awareness as to the nature of rights and needs pertaining to the advancement thereof within the transformative perspective. I previously indicated that I would frame it as a process of “interactive translation”. In chapter four of this dissertation I endeavour to discuss the way in which endogenous knowledge may be of assistance in this process.

Du Plessis identifies the fact that constitutionalism can be regarded as one of many possible cultures of dialogue.¹⁴² It is sometimes understood in a narrow sense as the idea that government should derive its powers from a written constitution and subsequently such powers should also be limited to what is set out in the Constitution.¹⁴³ However a broader value-laden notion is also possible. Du Plessis affirms that it is this broader value-laden notion of constitutionalism that instantiates a distinctive culture of dialogue which manifests in a plurality of dialogic events.

According to Du Plessis “Constitution-speak” is not a monologue, nor is it a form of ventriloquial power that speaks for and on behalf of the powers that be.¹⁴⁴ Du Plessis re-iterates that a constitution’s voice can be discerned most clearly and credibly be discerned through a process of dialogue. More precisely this process would entail a virtually inestimable plurality of dialogic events, not only in the life of a nation but also increasingly within a global perspective.¹⁴⁵ Even though he states that what he writes will apply to any constitution, he is honest in acknowledging that a particular dialogic Constitution has permeated Du Plessis’ own experience of constitutional dialogue.

In the previous chapter I refer to the notion of the Constitution as memory and promise in dialogue. Du Plessis refers to the Constitution as memory as both a triumphant monument and an admonitory memorial.¹⁴⁶ For Du Plessis, the Constitution as monument is visible in the often efflorescent wording of the written text. Moreover it also asserts its presence in constitutional jurisprudence. As an example Du Plessis refers to the judgement of *S v Makwanyane*.¹⁴⁷ In this judgment the Constitutional

¹⁴² Du Plessis, L *Constitutional dialogue and the dialogic constitution (or: Constitutionalism as a culture of dialogue)* (2010) 25 SAPL pp 690 – 691.

¹⁴³ Du Plessis, L *Constitutional dialogue and the dialogic constitution (or: Constitutionalism as a culture of dialogue)* (2010) 25 SAPL p 691. Also refer to Currie and De Waal *The bill of rights handbook* (2005) (5th ed) p 8. In chapter one of this dissertation I highlighted the term transformative constitutionalism as a key concept that serves to ground the research problem. In chapter two above I also explain what is understood under the term constitutionalism.

¹⁴⁴ Du Plessis, L *Constitutional dialogue and the dialogic constitution (or: Constitutionalism as a culture of dialogue)* (2010) 25 SAPL p 683.

¹⁴⁵ Du Plessis, L *Constitutional dialogue and the dialogic constitution (or: Constitutionalism as a culture of dialogue)* (2010) 25 SAPL p 683.

¹⁴⁶ Du Plessis, L *Constitutional dialogue and the dialogic constitution (or: Constitutionalism as a culture of dialogue)* (2010) 25 SAPL p 684.

¹⁴⁷ 1995 6 BCLR 665 (CC), 1995 3 SA 391 (CC), 1995 2 SACR 1 (CC).

Court contrary to public opinion, unanimously declared capital punishment unconstitutional. Du Plessis does however point out that even though the Constitution is the supreme law of the country, it is not overarching, all-encompassing or a super law capable of achieving justice on its own.¹⁴⁸ The Constitution as a memorial has paved the way for human dignity as a value to gain an upper hand within the constitutional project. It is especially true for the Constitutional Court in its efforts to vindicate traditionally marginalised sections of the population. Du Plessis reiterates that constitutionalism as culture of dialogue is an ongoing dialogic process of interaction that prevents the Constitution as monument from overwhelming the Constitution as memorial and *vice versa*.¹⁴⁹

In my view, the fact that Van der Walt makes use of the term confrontation instead of a “tension” must not go unnoticed. The term “confrontation” (with someone) or (between A and B) refers to a situation in which there is an angry disagreement between people or groups who have different opinions.¹⁵⁰ If one further considers the term “confront” or “confront something” or “confront someone”; it refers to “a difficult situation, to appear and need to be dealt with somebody” or “to deal with a problem or difficult situation” or “to face somebody so they cannot avoid seeing and hearing you, especially in an unfriendly / dangerous situation”.¹⁵¹ To “be confronted with something” refers to “having something in front of you that you have to deal with or react to”.¹⁵²

“Tension” (between A and B) refers to “a situation in which people do not trust each other” or “feels unfriendly to each other”. It refers to “a situation in which the fact that

¹⁴⁸ Du Plessis, L *Constitutional dialogue and the dialogic constitution (or: Constitutionalism as a culture of dialogue)* (2010) 25 SAPL p 684.

¹⁴⁹Du Plessis, L *Constitutional dialogue and the dialogic constitution (or: Constitutionalism as a culture of dialogue)* (2010) 25 SAPL p 685.

¹⁵⁰ Oxford Learners Dictionary accessed online at <http://www.oxfordlearnersdictionaries.com> on 23 August 2016.

¹⁵¹ Oxford Learners Dictionary accessed online at <http://www.oxfordlearnersdictionaries.com> on 23 August 2016.

¹⁵² Oxford Learners Dictionary accessed online at <http://www.oxfordlearnersdictionaries.com> on 23 August 2016.

there are different interests and needs causes difficulties” or “a state of being stretched tight; to the extent to which something is stretched tight”.¹⁵³

I am of the opinion that the use of the term “confrontation” instead of “tension” suggests a sense of urgency and a need for an assertive approach with the intention to find an acceptable solution to a problem.¹⁵⁴ In an effort to resolve the confrontation between tradition and transformation; between two opposing debates centred in different reactions to the notion of transformation, we need to face one another in a manner that we cannot avoid to see or hear each other. In essence the need for a culture of constitutional dialogue is brought to the forefront. In my view, it may even incorporate something more. I previously discussed the need for contextualization in an effort to address the problem of legal culture as an obstacle to transformation within the civil justice system. I furthermore referred to a process which I termed “interactive translation” within the constitutional culture of dialogue.

In chapter two I discuss the fact that one of the ways in which our current civil litigation system is failing is the fact that it does not necessarily promote the formulation of new social relations. It is therefore not necessarily geared towards gaining knowledge from the lived experiences of traditionally marginalized people and the enhancement of a sense of justice. I also came to the conclusion that in order for this disconnect to dissipate we need to come to a deeper understanding with regards to the notion of justice (and by implication the notion of access to justice).

In this section I considered if legal culture must necessarily be removed for transformational purposes or is there merely a need for confrontational change. The most important observation to be made as a result of the aforesaid is the fact that Van der Walt came to the conclusion that the example of eviction cases showed us that judicial application of reform laws inescapably involves a choice between upholding or

¹⁵³ Oxford Learners Dictionary accessed online at <http://www.oxfordlearnersdictionaries.com> on 23 August 2016

¹⁵⁴ The term “resolve” refers to “an issue / dispute / conflict / a crisis – to find an acceptable solution to a problem or difficulty”. Also refer to Oxford Learners Dictionary accessed online at <http://www.oxfordlearnersdictionaries.com> on 23 August 2016.

changing the existing legal tradition (legal culture). The implication for the civil litigation process therefore seems to be that the notion of legal tradition (legal culture) cannot be removed for transformational purposes. This is due to the fact it inescapably forms part of the “professional sensibilities, habits of mind, and intellectual reflexes” of judges, lawyers and legal academics alike.

The second aspect which I considered in this section entail the question if there is merely a need for confrontational change. This aspect reminds me of the second school of thought with regards to the civil litigation process as described in chapter two of this dissertation. According to Klein, every court case must be seen as a “social emergency” and it is the duty of the Judge to see to it that the emergency must come to an end as soon as possible.

Van der Walt’s example of eviction cases show us that judicial application of reform laws inescapably involves a choice between upholding or changing the existing legal tradition (legal culture).¹⁵⁵ He is however silent on the aspect of cases or judgments which does not necessarily pertain to reform laws specifically. In my view cases relating to reform laws would amount to what Klein referred to as “social emergencies”. In these cases the confrontation between tradition and transformation would be of a higher intensity. Legal culture in these specific instances would be a force to be reckoned with by judges. They must approach these cases with an activist mind-set and in a heightened state of historical and contextual sensitivity.

I am furthermore of the opinion that with regards to the aspect of civil litigation in a broader sense, where reform laws do not necessarily need to be applied, a certain mind-set would still be required from our judges. This is due to the fact that transformative constitutionalism can be associated with social reform and change on a large scale. It derives its presence from the Constitution which serves as a guide to the nation in providing a true meaning of democracy, enriching the human rights

¹⁵⁵ Van der Walt, AJ *Legal History, Legal Culture and Transformation in a Constitutional Democracy* 2006 (12 – 1) *Fundamina* p 16.

discourse and reshaping social welfare within the country. It is with this mind-set of awareness that we must approach civil proceedings in general. Our mind-set in general needs to shift from a strict contractarian approach to a focus on the behaviours, freedoms, choices and interactions of people in ordering their lives. It therefore implies a mind-set of awareness with regards to an alternative conceptualization of the nature of rights and the enhancement thereof within our civil litigation system. In our approach we need to strive for the alleviation of the tension between normative standards, remedial procedural avenues and certain institutional structures. For me, the notion of awareness implies a certain level of social consciousness.

In my opinion, a deeper understanding of the notion of justice will serve as an alleviating measure for the tension between the ideals strived for by and within the Constitution and how they are realised within the context of access to justice considerations. In order to obtain a deeper understanding of the notion of justice we need to obtain an expanded vision in order to reach a higher level of awareness.

In conclusion I have identified the fact that there is not merely a need for confrontational change. It is with a mind-set of awareness that we must approach civil proceedings in general. Certain cases may however be defined as “social emergency cases” which will require a more robust activist approach. In the next section I shall turn to the aspect of legal culture and the need for an expanded vision in order to achieve a heightened state of awareness.

3.4 Legal culture and the need for an expanded vision in order to achieve a heightened state of awareness

Cockrell indicated that the birth of the Constitution would consequently entail a transition from a formal vision of law to a substantive vision of law.¹⁵⁶ This resulted in

¹⁵⁶ Cockrell, *A Rainbow Jurisprudence* (1996) 12 SAJHR p 3.

the fact that judges who were accustomed to dealing with formal reasoning now had to engage with substantive reasoning based on moral and political values.¹⁵⁷ Transformative constitutionalism therefore suggests an invitation to judges to attain certain political goals within the course and scope of their duties. A clear and definite division between law, politics, professional ethics and strategies have faded.

Van Marle re-iterates the fact that Klare frames South African legal culture as conservative and it seems that our treatment of this culture as “normal” is often based on a sense of “false consciousness”.¹⁵⁸ Lawyers become so deeply embedded in their legal culture that they are “unaware or only partially attentive” to the power that is cultural code in the shaping of their ideas and how it steers their reactions to particular legal problems.¹⁵⁹ This is due to the fact that our intellectual sensibilities and assumptions of what is perceived as “normal” is the result of trained and socialized behaviour. Van Marle places emphasis on the fact that legal scholars and practitioners should be aware of their conservative style. This is so because it tends to reduce the transparency of the legal process and as a result thereof undermines its contribution to a deepening democratic culture.¹⁶⁰

I am of the opinion that a higher level of awareness is necessary due to the fact that it lays the foundation for new possibilities of creative problem solving. For me, awareness is not a synonym for rational thinking or reasoning. It entails something more. The complexity of the world makes it impossible for us to rationally calculate all the possibilities for a given situation. In a certain sense we need to apply a certain amount of intuition.

¹⁵⁷ Cockrell, A *Rainbow Jurisprudence* (1996) 12 SAJHR p 3.

¹⁵⁸ Van Marle, K *Transformative Constitutionalism as / and critique* p 288.

¹⁵⁹ Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAJHR 14 p 167.

¹⁶⁰ Van Marle, K *Transformative Constitutionalism as / and critique* p 290. Also refer to Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAJHR 14 p 171.

In fact, as members of the legal fraternity we need to reach a state of heightened awareness in order to attain a higher level of social consciousness.¹⁶¹ With reference to the Platonian idea of justice as highlighted in chapter two of this study; social justice can be seen as a social consciousness that results in a society becoming internally harmonious and good. It is therefore my opinion that it is through a perpetual state of heightened awareness that the political commitment of the legal profession to broad social change would ultimately be able to transform within the constitutional context.

Brickhill and Van Leeve identify two dimensions of legal culture that are of interest in relation to transformative constitutionalism.¹⁶² The first aspect is of a socio-legal nature, namely what modes of legal reasoning are dominant in South Africa and how they have changed. The second aspect is political in nature, namely what political commitment to social change is to be found within the legal profession.¹⁶³

With regards to the first dimension it becomes evident that much has already been written about the shift in focus from predominantly formal legal reasoning which characterized the apartheid legal system, to substantive reasoning.

I have previously referred to the fact that Klare frames the South African legal culture as formalistic and conservative in nature. It is this formalistic and conservative nature that forms an obstacle to the comprehensive realisation of the ideals strived for by and within the Constitution. The confrontation between tradition and transformation can

¹⁶¹ It reminds of what Simone Weil described as attention. She is of the view that we need to try to cure our faults through attention and not by will. We do not have to necessarily understand new things, but through patience, effort and method we can come to understand with our whole soul the truth which is self-evident. She re-iterates that if we turn our minds towards the good, it is an impossibility that the whole soul will not be attracted to it little by little despite itself. According to Weil, extreme attention is what constitutes the creative faculty in man and the amount of creative genius within a specific period of time is proportionate to the amount of extreme attention. Refer to Weil, *S Attention and Will from Gravity and Grace*, translated by Emma Craufurd Routledge and Kegan Paul London, 1952. [Originally published as *La Pesanteur et la Grace*, Plon, Paris, 1947] and electronically accessed during November 2016 at <http://www.rd.slavepianos.org/ut/rttc-text/Weil1952d.pdf>

¹⁶² Brickhill, J and Van Leeve, Y *Transformative Constitutionalism – Guiding light or empty slogan?* Acta Juridica (2015) p 163.

¹⁶³ Brickhill, J and Van Leeve, Y *Transformative Constitutionalism – Guiding light or empty slogan?* Acta Juridica (2015) p 163.

be illustrated in the case of *Shilubana & Others v Nwamitwa*.¹⁶⁴ In his judgment Justice van der Westhuizen re-iterates that when considering a legal position with regards to customary law, the Court has to take into consideration the traditions and history of a community as well as the current practices of a community. In the event that new developments have taken place in a community the Court must strive to give effect to such new developments within the context of section 39(2) of the Constitution.¹⁶⁵ It is however of importance that in paragraph 74 of his judgement he states: “This power should be exercised judiciously and sensitively, in an incremental fashion.” This statement confirms the formalist and conservative nature inherent to our legal culture. It is furthermore indicative of the fact that the traditional (Western) perspective is still prevalent in our court processes today.

Birchill and Van Leeve however touch on the fact that increasingly in practice it is insufficient to resort to precedent or statutory language alone in the pursuit of justice. A mere justification of a legal conclusion is insufficient and requires more from the Courts.¹⁶⁶ They refer to the judgment of *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* as an example of a more comprehensive approach.¹⁶⁷ This is a judgment that followed on a decision based on merits in which the Court declared the award of a tender as invalid. The consequences of the said order would however affect the lives of millions of citizens dependant on social security grants from the state. The majority of the beneficiaries were children. The issue at hand therefore had to be considered beyond its “one dimensional range” and public interest therefore weighed heavily in the determination of a just and equitable remedy. This is consistent with what is required by the Constitution.¹⁶⁸

¹⁶⁴ CCT 03/07 [2008] ZACC p 9.

¹⁶⁵ Section 39(2) of the Constitution states: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.

¹⁶⁶ Birchill, J and Van Leeve, Y *Transformative Constitutionalism – Guiding light or empty slogan?* Acta Juridica (2015) p 164.

¹⁶⁷ 2014 (4) SA 179 (CC) par 32. Also refer to Birchill, J and Van Leeve, Y *Transformative Constitutionalism – Guiding light or empty slogan?* Acta Juridica (2015) p 164.

¹⁶⁸ Section 172(1)(b) of the Constitution.

Section 172(1)(b) of the Constitution states:

“When deciding a constitutional matter within its power, a court –

(b) may make any order that is just and equitable, including –

- (i) an order limiting the retrospective effect of the declaration of invalidity; and
- (ii) an order suspending the invalidity for any period and on any conditions, to allow for the competent authority to correct the defect.”

In my discussion of access to justice and the advancement of rights within the transformative context I make it clear that I refer to a broader notion of justice. This case is indicative of the fact that the powers of the judge (similarly to the powers of other state organs) should be placed in service of the law, the common weal and to the advancement of social peace and cohesion. It is also an example of the fact that there is a reciprocal responsibility on all parties concerned to constantly engage in a constitutional culture of dialogue for purposes of “interactive translation”.

The second dimension of legal culture identified by Brickhill and Van Leeve is the political commitment of the legal profession to broad social change.¹⁶⁹ They highlight the fact that although a commitment to transformation (at least rhetorically) has been made it lacks coherence. Ironically they do not elaborate much further on the subject and merely refer to the rendering of pro-bono legal services and the need for some form of structural intervention within the legal profession.¹⁷⁰

In chapter two of this study I highlight the current disconnect between transformative constitutionalism and access to justice. I have previously indicated that access to justice in a broader sense involve an alternative conceptualization of the nature of rights as well as the attainment and enhancement of such rights within the

¹⁶⁹ Brickhill, J and Van Leeve, Y *Transformative Constitutionalism – Guiding light or empty slogan?* Acta Juridica (2015) p 164.

¹⁷⁰ Brickhill, J and Van Leeve, Y *Transformative Constitutionalism – Guiding light or empty slogan?* Acta Juridica (2015) p 164.

transformative perspective. The political commitment of the legal profession to broad social change will therefore not merely entail enabling access to the Courts on a *pro bono* basis or structural intervention within the legal profession. Even though I am of the opinion that these aspects would form part of the process, I am of the opinion that a more robust approach is needed.

I referred above to recent trends in case law where transformative legislation was the subject of dispute. I identified the fact that we need to adapt our way of legal thinking in order to enable us to increase our knowledge base and improve techniques and interpretive tools which is relevant to the process of adjudication. Such a process of re-remembering, re-thinking and reformulation would assist us in our search for a deeper sense of our own professional sensibilities, habits of mind and intellectual reflexes. I have highlighted the fact that scholars such as Van Marle points out that we should practice law with an awareness of our conservative style in order to promote the transparency of the legal process and further our contribution to a deepening democratic culture.

An expanded vision and heightened level of awareness will be achieved through a perpetual process of re-remembering, rethinking and reformulation in conjunction with an “interactive translation” within a multidimensional culture of constitutionalist dialogue. This would entail a paradigm shift in the way we think about legal problems, legal issues as well as the nature of law and the notion of justice in general. This will assist us in reaching a higher level of social consciousness resulting in a deeper level of understanding. This deeper level of awareness will enable us to recognize the “goodness” in the “other” during the quest for a permanent ideal of openness by way of a process of dialogue between memory and promise.

According to Cloete, the starting point of an expanded vision within the South African context would be a universal acknowledgement of the denied, deferred humanity of Africa’s “human-being-in-the-modern-world”.¹⁷¹ I previously indicated that Cloete

¹⁷¹ Refer to chapter two of this dissertation, pp 28 – 29.

emphasizes the fact that it is through critical appropriation of traditional cultural values that the community can sustain itself in the present. I also elude to the fact that I am of the opinion that this phenomenon is also true for the notion of legal culture. This process would entail a virtually inestimable plurality of dialogic events, not only in the life of a nation, but also increasingly within the global perspective. We therefore need to “return to the source” as a point of departure in a *Dialogo continua!*

In the next section I touch on the way in which we may be able to return to the source of this *Dialogo continua* in our attempt to broaden our current knowledge base and techniques in an effort to fulfil a memory of promise in looking to the future.

3.5 Returning to the source - a process of re-remembering, re-thinking and reformulation within the context of interactive dialogic translation

Legal culture as an underlying point of departure inevitably influences the way we think and the way in which we practice law. This fact serves to emphasize the argument that it is necessary to move away from traditional ways of legal thinking and interpretation. Scholars such as Klare opened our eyes to the fact that South African legal culture is still formalist and conservative in nature.¹⁷² Not necessarily with regards to political ideology, but rather with reference to the apparent unwillingness of South African legal practitioners and scholars to part with traditional techniques and forms of interpretation. It is interesting to note that he found this to be true no matter what the political or moral conviction of the scholar or practitioner. It can therefore be argued that this is due to the way we as legal practitioners and scholars are educated, trained and the prevailing legal culture that is cultivated as a result of the aforesaid.

Van der Walt identifies sources of law, interpretive as well as analytical tools with which we interpret sources of law as particular stressors in the tension between tradition and

¹⁷² Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAJHR 14 pp 146 – 151.

transformation.¹⁷³ He is furthermore of the opinion that the aspect of legal culture that creates tension with transformation is not so much the historical sources of law or the traditional interpretation of the said sources, but rather the deeply entrenched attitudes and methods of thinking about the notion of “The Law”. I cannot wholeheartedly agree with Van der Walt as I am of the opinion that all of these aspects are interconnected and equally important. I expand on this aspect in chapter four.

I have previously highlighted the fact that the Constitution stand in stark contrast with other classical liberal documents as it makes mention of concepts such as social rights, substantive justice, participatory governance, multi-culturalism and historical consciousness. In our legal culture of traditional liberal views there is an assumption that legal interpretation pertains to “legally correct” interpretation, whilst postliberal reading pertains to politics and not to legal interpretation.¹⁷⁴ In the above-mentioned passages I have indicated that both traditional ways of interpretation as well as postliberal reading can be viewed as political and interpretive in nature.¹⁷⁵ This in my opinion is due to the fact that the process of fragmentation and reconstruction during interpretation has a cultural as well as a psychological dimension.

The confrontation between tradition and transformation is further illustrated by the fact that jurists are still limited within the process of interpretation, but there is no neutral decision making process. In chapter two I highlight the fact that neutrality and impartiality are features of all rights regimes. I also point out that the emphasis on neutrality and impartiality enhances the conservative and formalistic nature of legal culture. Klare confronts us with the question if transformative constitutionalism is an attainable goal within the context of a postliberal interpretation of the “rule of law” principle.¹⁷⁶ He comes to the conclusion that transformative constitutionalism can only be attained in instances where the judiciary are not scared or unwilling to move away from traditional ways of thinking and interpretation.

¹⁷³Van der Walt, AJ *Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 5.

¹⁷⁴ Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAJHR 14 pp 151 – 157.

¹⁷⁵ Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAJHR 14 pp 151 – 157.

¹⁷⁶ Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAJHR 14 pp 151 – 157.

I have already indicated that legal culture as an underlying point of departure in the way we think and the way we practice law has an immeasurable influence on the advancement of rights and the attainment of such rights within a transformative perspective. It not merely influences the way we think, but also has a direct implication on knowledge production. Knowledge production in my view in turn; has a direct implication on substantive legal development. This results in a need for a general jurisprudence and the expansion of our current knowledge base and techniques. In our quest for a general integrated jurisprudence and the expansion of our [legal] knowledge base we need to take a critical approach to the notion of transformative constitutionalism.¹⁷⁷ This process of critical appropriation will entail re-remembering, re-thinking and reformulation in conjunction with an “interactive translation” within a multidimensional culture of constitutionalist dialogue. This would entail a paradigm shift in the way we think about legal problems, legal issues as well as the nature of law and the notion of justice in general.

In chapter four I look at endogenous knowledge as a device that might be of assistance with the expansion of our current knowledge base and techniques.

3.6 Conclusion

Up to this point in the study I have identified the fact that legal culture serves as an obstacle to the comprehensive realisation of the ideals strived for by and within the Constitution. Central to this problem is a legal culture that is still formalist and conservative in nature.

I have indicated above that Van der Walt identifies legal culture as a major source of stability as well as a force of resistance to change. Legal culture therefore emerge as a confrontation between tradition and transformation that it seems that our democratic

¹⁷⁷ Van Marle, K *Transformative Constitutionalism as / and critique* STELL LR (2009) p 287.

constitution entrenches existing privilege and power whilst there is a need for urgent and radical transformation within political, social, economic and legal spheres.

As a result of this observation I then considered if legal culture must necessarily be removed for transformational purposes or is there merely a need for confrontational change. I concluded that the implication for the civil litigation process seems to be that the notion of legal tradition (legal culture) cannot be removed for transformational purposes. This was due to the fact that Van der Walt's example of eviction cases showed us that judicial application of reform laws inescapably involves a choice between upholding or changing the existing legal tradition (legal culture).¹⁷⁸ I however identified the fact that there is not merely a need for confrontational change. It is with a mind-set of awareness that we must approach civil proceedings in general. Certain cases may however be defined as "social emergency cases" which will require a more robust activist approach.

Transformative constitutionalism can be associated with social reform and change on a large scale. It derives its presence from the Constitution which serves as a guide to the nation in providing a true meaning of democracy, enriching the human rights discourse and reshaping social welfare within the country.

The Constitution places a moral and political responsibility on us as legal practitioners and legal scholars alike to do introspection and self-examination which needs to be accompanied by honesty and integrity within the judiciary. This must be done in pursuit of a higher state of awareness in order to enable us to hone our creative problem solving abilities. This process would entail a virtually inestimable plurality of dialogic events, not only in the life of a nation, but also increasingly within the global perspective. We therefore need to "return to the source" as a point of departure in a *Dialogo continua!* In doing so, we must however be mindful of the challenge as posed by Klare, namely that future generations will not judge our Constitutional Court by how

¹⁷⁸ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 16.

closely it followed traditional strategies of analysis. It would rather be judged to the extent to which the Court contributed to many issues of social and political transformation including equality, social justice, democracy, multiculturalism and dignity.¹⁷⁹

4 Channelling endogenous knowledge - a process of “interactive translation”

4.1 Introduction

In chapter two to three above I focussed on the issue of access to justice and the advancement of rights within the context of a legal culture that seems to stand as an obstacle to the comprehensive realisation of rights and a broader sense of justice in order to highlight some of the problems within our civil litigation system.

My sense is that the notion of legal culture (legal tradition) cannot be removed for transformational purposes. There is not always a need for radical change. I am furthermore of the opinion that civil proceedings in general needs to be approached with a mind-set of constant awareness.

I argue that there is a tension between the ideals strived for by and within the Constitution and how they are realised within the context of access to justice considerations and the subsequent advancement of rights. In this chapter I study endogenous knowledge as an approach that could expand the current knowledge base, legal culture and practices linked to the civil litigation system. The research question that needs to be addressed in the course of this chapter is therefore how and to what extent endogenous knowledge may be utilized as an approach to curtail the

¹⁷⁹ Klare, K *Legal Culture and Transformative Constitutionalism* (1998) SAJHR 14 p 172.

prevailing formalist legal culture and techniques in an attempt to alleviate the tension as mentioned above.

I address this question by firstly relying on Douzinas and Gearey's support of a notion of a general jurisprudence. They note that a number of great philosophers from Plato to Hobbes, Kant, Hegel, Marx and Weber either studied law or in the alternative had a very good understanding and grasp of the law. For instance quite a number of early thinkers contemplated the organisation of society as well as the relationship between authority and citizens within the societal construct. In order to understand these constructs and relationships they more often than not turned to the discipline of law. It is furthermore noteworthy that this took place before the creation of various other disciplines.¹⁸⁰ Illustrative of this phenomenon is the fact that in Plato's *Republic*, Aristotle's *Ethics*, as well as Hegel's *Philosophy of Right* they all attempted to understand the relationship between the law and the social bond. I then proceed to highlight the need for a broader approach in respect of jurisprudence, but highlight some of the challenges that might be associated with such an endeavour. William Twining refers to a need for a "revived" general jurisprudence.¹⁸¹ It seems to refer to a broader notion of jurisprudence and reminds of a time when jurists as different as Bentham, Austin, Maine, Holland and followers of Natural Law were all conceived as pursuing different aspects of jurisprudence.

In the second instance I ponder on approaches that might be conducive to the promotion of a general integrated jurisprudence within the context of a legal culture that is still formalist and conservative in nature with reference to the way we think and make use of interpretive techniques. I highlight that there is a need for the integration of knowledge and techniques within different disciplines in an effort to implement the transformative ideals inherent to our Constitution in a fast and effective manner.

¹⁸⁰ Douzinas, C and Geary, A *A Critical Jurisprudence : The Political Philosophy of Justice* (2005) pp 3 – 18.

¹⁸¹ Twining, W *General Jurisprudence* *Anales de la Catedra Francisco Suarez*, 39 (2005), p 655.

I discuss the aspect of interactive dialogic translation and the fact that various sources of knowledge needs to be looked at in an attempt to obtain a deepening democratic understanding. In essence it entails a process that draw on all our senses. We need to be able to observe, listen, internalize and ultimately come to a deeper understanding of one another through a process of interactive translation that will allow for the radical re-thinking of concepts such as: the nature of rights, justice, sovereignty and judgment.

I also look to endogenous knowledge as a body of knowledge encapsulating different sources of knowledge as well as processes and techniques that might be of assistance when obtaining knowledge. I emphasize that by empowering ourselves with a broader knowledge base and vision of the law, we will inevitably be influenced in the way we think and approach legal matters from a vantage point of critical self- reflection and a heightened state of awareness.

I will now turn to the next section of this chapter and discuss the need for a general integrated jurisprudence within the context of a critical approach to transformative constitutionalism.

4.2 The notion of a general jurisprudence - establishing a conduit for heightened awareness

Douzinas and Geary highlighted the fact that whenever classical philosophy focused on the persistence of the social bond it studied the law and evolved into and became the discipline of philosophy.¹⁸² It can therefore be argued that the main source of political philosophy as well as the subsequent disciplines such as sociology, psychology and anthropology emerged in the seventeenth and nineteenth centuries from the discipline of legal philosophy. One might even go further and state that all major philosophers were essentially jurists. *Leviathan* by Thomas Hobbes is an

¹⁸² Douzinas, C and Geary, A *A Critical Jurisprudence : The Political Philosophy of Justice* (2005) pp 3 – 18.

excellent example of an early jurisprudential exercise. Immanuel Kant also wrote extensively on legal issues and near the end of his life he mainly focussed on international law and freedom of rights as subject matter. Scholars such as Durkheim and Weber (considered to be the founding fathers of sociology) made use of types of legality as markers to identify and classify different social systems.

Douzinas and Geary explain that legal theory became characterized by cognitive and moral poverty as a result of a process of decay that took place over a very long period of time.¹⁸³ In this sense one might even argue that jurisprudence seems to have become restrictive in nature and academically peripheral. With reference to cognitive poverty they emphasize that it can almost be regarded as a practical manual to technocratic legalism and a legitimization of the existent.¹⁸⁴ They point out that scholars such as Burke referred to this obsession with reason, rights and codification as metaphysical “speculation”. The deduction can therefore be made that the historical development of jurisprudence can be framed as a movement from a general to a restrictive approach. Legal positivism within normative jurisprudence remained the most dominant and typical modernist approach.¹⁸⁵ This fact can be illustrated by the mere way in which our civil litigation system seems to support an uninterrupted “succession” of legal culture (legal tradition). This is also why there seems to be an overemphasis on content rather than the context of law. I indicate above that I am of the opinion that a process of contextualization may be utilised as a device in altering these perceptions of rights and justice within the content and context of law. I regard it as a process of “interactive translation” within the constitutional culture of dialogue. I discuss the process of “interactive translation” in greater detail below.

Positivists tend to minimise the influence of moral values and principles in law. This is due to cognitive-epistemological and political considerations. Hans Kelsen and Herbert Hart are considered to be the two major influences of continental and Anglo-American positivists. They morphed the study of law into a “science”. Kelsen had a

¹⁸³ Douzinas, C and Geary, A *A Critical Jurisprudence : The Political Philosophy of Justice* (2005) pp 3 – 18.

¹⁸⁴ Douzinas, C and Geary, A *A Critical Jurisprudence : The Political Philosophy of Justice* (2005) p 3.

¹⁸⁵ Douzinas, C and Geary, A *A Critical Jurisprudence : The Political Philosophy of Justice* (2005) p 3.

purist view of the theory of law, whilst Hart followed a seemingly more pragmatic approach. He refers to his *Concept of Law* as both an essay in descriptive sociology as well as an analytical jurisprudence. When Hart however turns to the actual interpretation and application of rules it becomes abundantly clear that a need for the “use of discretion” arise. This seemed to have occurred in instances where terms have a linguistic or motivated indeterminacy. Douzinas and Geary refers to this phenomenon as the so-called “penumbra of doubt”.¹⁸⁶

I am of the opinion that the “penumbra of doubt” within the South African civil litigation context can be framed within two broad dimensions. Firstly within the general context of all civil proceedings and processes and secondly within the specific context of so-called “social emergency cases” as discussed in chapter three above. Within the context of the civil justice system in general we must approach all cases and processes with an expanded vision of law and a heightened state of awareness and sensitivity. In the event of “social emergency cases” we need to adopt an even more activist and robust approach. In both instances the need for the “use of discretion” would arise. Not only with regards to the question if a certain case or subject matter would qualify as a so-called “social emergency case”, but also in the sense that all outcomes in civil proceedings must be conducive to the attainment and enhancement of rights within the constitutional perspective.

The use of discretion implies a certain moral, political and value based decision or choice. Within the positivistic perspective and world view; the notion of law is viewed as the perfect embodiment of reason. Positivists are therefore reluctant to make use of extrinsic non-legal considerations as they are of the opinion that it would result in a loss of legitimacy. The modernistic experience of notions such as relativism, pluralism as well as a possible fear of nihilism must also be considered as factors of consideration. As stated above I am of the opinion that a deeper understanding of the notion of justice will serve as an alleviating measure for the ideals strived for by and within the Constitution and how they are realised within the context of access to justice

¹⁸⁶ Douzinas, C and Geary, A *A Critical Jurisprudence : The Political Philosophy of Justice* (2005) p 3.

considerations. I am of the view that awareness is not a synonym for rational thinking and reasoning, but it entails something more. The complexity of the world does not make it possible for us to rationally calculate all the possibilities and answers to a given situation. We need to apply a certain amount of intuition for purposes of assisting with creative problem solving capabilities. In chapter one of this dissertation I referred to Velthuisen who describes the concept of endogenous knowledge as the product of the creative fusion between knowledge inherent to the social fabric of developing societies and knowledge acquired from “developed” societies.

The introduction of ethics and a new interpretative character with regards to law came about as a result of the literary and hermeneutical turn.¹⁸⁷ Douzinas and Gearey agree that interpretation is the life of the law, but emphasize that two caveats must be applied.¹⁸⁸ In the first instance, the values promoted in a legal system represent the dominant ideology of the said society. This correlates with the norms and standards inherent to our Constitution. They acknowledge that the poor, the underprivileged, the minorities and refugees find little if any solace in rules and principles that merely sustain their subjection. This also re-iterates the fact that a radical paradigm shift needs to take place for purposes of constructing new social relations with the purpose of looking to the promise of the future.

They highlight the fact that the peculiar combination of *logos* (law) and *nomos* (reason) lies at the heart of modern jurisprudence.¹⁸⁹ In their view it is the task of critical jurisprudence to deconstruct this *logonomocentrism*. Not only within legal texts, language and writing, but also within the practical operations of the law. Even though the hermeneutical moral turn may therefore be welcomed, they warn that the moral substance of law must not merely be assumed, but rather be argued and fought for. Just like Klare, we should not be afraid to pose the question if there is a post liberal concept of “*the rule of law*”.

¹⁸⁷ Douzinas, C and Geary, A *A Critical Jurisprudence : The Political Philosophy of Justice* (2005) p 6.

¹⁸⁸ Douzinas, C and Geary, A *A Critical Jurisprudence : The Political Philosophy of Justice* (2005) p 8.

¹⁸⁹ Douzinas, C and Geary, A *A Critical Jurisprudence : The Political Philosophy of Justice* (2005) pp 8 – 10.

In the second instance, they highlight the fact that in order for us to form an understanding of justice, the legal facet of morality, it is important to make the connection between justice and the force of law. This reminds strongly of Van der Walt's observations with regards to the confrontation between tradition and transformation.¹⁹⁰ It is also relevant with regards to the South African culture of constitutional dialogue. It reminds me of what was mentioned by Du Plessis, namely that "Constitution-speak" is not a monologue. It must also not be regarded as a form of ventriloquial power speak for and on behalf of the powers that be, but rather a process of dialogue. This is true not only within the life of a nation, but increasingly within a global perspective.¹⁹¹

Ironically, it seems that a general [critical] jurisprudence aims to return to classical concerns of [legal] philosophy, but adopts a much wider concept of legality. One might say that we have come full circle. We once again are confronted with questions such as: "What is the law?" and "What ought the law to be?", but in posing these questions, we need to make use of a much wider perspective. An expanded vision of law and a higher level of awareness should encapsulate all aspects of economic, political, emotional as well as physical modes of production and reproduction of society. This process will allow for the radical re-thinking of concepts such as: the nature of rights, justice, sovereignty and judgment. For instance, in order for it to be a relevant discipline we need to study concepts such as the political economy of law and other related subject matter. We need to understand and realize the value and relevance of factors such as gender, race and sexuality in the formulation of perceptions of identity and the formation of ideologies.

Douzinas and Geary emphatically states that a necessary precondition for a theory of justice would be to face law's complicity in political oppression, violence and racism before we can even begin to think or speak of a new beginning for legal thought.¹⁹² Similarly, Cloete emphasized the fact that, justice as a moral idea in Africa, must begin

¹⁹⁰ Refer to chapter three of this dissertation, pp 49 – 52.

¹⁹¹ Refer to chapter three of this dissertation, pp 49 – 52.

¹⁹² Douzinas, C and Geary, A *A Critical Jurisprudence : The Political Philosophy of Justice* (2005) pp 8 – 10.

with a universal acknowledgment of the denied, deferred humanity of Africa's "human-being-in-the-modern-world". Justice as a political idea, must assume a more concrete form for instance through the redistribution of land, as well as other dispossessed material resources.¹⁹³

Twining points out that he specifically does not refer to the term "Global Jurisprudence" as he regards the old term "General Jurisprudence" as broader and more flexible. In his view, the use of "general jurisprudence" refers to the theoretical study of two or more legal traditions, cultures, or orders (including ones within the same legal tradition or family) from the micro-comparative to the universal.¹⁹⁴ He highlights the fact that his conception of a general jurisprudence is intended to challenge tendencies (often of a latent nature) to project parochial or ethnocentric preconceptions onto non-Western legal orders, cultures, and traditions.¹⁹⁵

Twining highlights the fact that claims to universality and generality within today's context needs to be treated as problematic.¹⁹⁶ He reiterates that central to a revived general jurisprudence should be questions such as: how far is it meaningful, feasible, and desirable to generalise – conceptually, normatively, empirically, legally, across legal traditions and cultures? We therefore need to identify to what extent legal phenomena are context- and culture specific. He is of the opinion that if we approach the concept of generalization as problematic, the most useful results would be able to be obtained due to this approach's flexibility.

It therefore becomes clear that the necessary approach within the context of a general integrated jurisprudence would entail the establishment of a point of departure from which the generalization of legal phenomena is viewed as problematic. It therefore implies that within the South African context, the establishment of an approach with which we gain a heightened level of awareness and sensitivity, would entail a critical

¹⁹³ Refer to chapter two of this dissertation, pp 29 – 31.

¹⁹⁴ Twining, W *General Jurisprudence* Anales de la Catedra Francisco Suarez, 39 (2005) p 655.

¹⁹⁵ Twining, W *General Jurisprudence* Anales de la Catedra Francisco Suarez, 39 (2005) p 646.

¹⁹⁶ Twining, W *General Jurisprudence* Anales de la Catedra Francisco Suarez, 39 (2005) p 654.

approach with regards to the notion of transformative constitutionalism. In the second instance it would entail an approach where the engagement with all levels of legal ordering, not just on a municipal or public international law would be regarded as necessary. Lastly, it would entail an approach where the phenomena of normative and legal pluralism would be regarded as central to jurisprudence.¹⁹⁷

We need to realize that there is an array of different cultures, recognizing the autonomy of different worldviews and philosophies of life. This implies different sources of knowledge, which might not be deemed to be “scientific knowledge” from a Western worldview. Velthuisen emphasizes the fact that a certain “truth” depicted by one episteme cannot be claimed to be universal or holistic.¹⁹⁸ This correlates with Twining’s observation that we must approach a general jurisprudence with a view that is critical. This is due to the fact that some “truths” can be quite ethnocentric or even biased with regards to certain cultures and civilizations in their attempts to dominate certain modes of knowledge.

In the following paragraph I ponder on approaches that might be conducive to the promotion of a general integrated jurisprudence within the context of a legal culture that is still formalistic with reference to the way we think and make use of interpretive techniques.

4.3 Looking to the future with promise

Velthuisen is of the opinion that we need to follow an ecological approach.¹⁹⁹ With an ecological approach he refers to an approach which is trans-disciplinary in nature. It can be framed as “post hermeneutic” in the sense that it does not only focus on cultural interpretation, but also to a subjects’ manipulation of a culture in the quest for meaning.

¹⁹⁷ Twining, W *General Jurisprudence* Anales de la Catedra Francisco Suarez, 39 (2005) p 655 – 656.

¹⁹⁸ Velthuisen, A *Applying Endogenous Knowledge in the African context : Towards the integrated competence of dispute resolution practitioners* AFRICA INSIGHT Vol 42 (1) June 2012 p 75.

¹⁹⁹ Velthuisen, A *Applying Endogenous Knowledge in the African context : Towards the integrated competence of dispute resolution practitioners* AFRICA INSIGHT Vol 42 (1) June 2012 p 74.

It emphasizes the role of internal competition as endogenous catalysts for cultural stasis and change. Cloete also emphasizes that it is through the critical appropriation of traditional cultural values that the community can sustain itself in the present.²⁰⁰ I alluded to the fact that I am of the opinion that this is also true for the notion of legal culture. Such a process will enable us to rethink existing notions of law, justice and the nature of rights and open up new avenues for purposes of critical self-reflection. During the course of the study in this chapter I shall explore the way in which endogenous knowledge might be of value in assisting us within the development of a broader knowledge base, and in doing so, fulfil a memory of promise in looking to the future.

Scholars such as Sandra Harding criticises the dominant traditions of the western perspective and state that they suffer from a want of objectivity.²⁰¹ As discussed during the course of chapter two, it is perspectives such as these that seem to distort and subvert the Platonic idea of affirming the idea of the humanity, the “goodness” in what we perceive to be “the other”.²⁰² It also touch on aspects highlighted and criticized by Van der Walt, namely that there seems to be an assumption that the authority of sources of law and the validity of the methods that we use when we interpret and apply them are completely or inevitably culturally contingent.²⁰³ He furthermore highlighted and criticized the fact that there seems to be an assumption in the second place, that there is a core of stable, acontextual and apolitical meaning inherent in the common law tradition, inclusive of a set of legal rules and principles as well as a set of conceptual and analytic tools with which to interpret and apply them. Similarly, Cloete reminds us of the fact that we must take into account that the traditional sources and conditions of life within the traditional African community has been seriously challenged as a result of its violent encounter with Western modernity. In this respect it becomes clear why Harding argues that objectivity is maximized if social factors are not excluded from the production of knowledge. The starting point should be from an

²⁰⁰ Refer to chapter two of this dissertation, pp 29 – 31.

²⁰¹ Olson, GO & Hirsch E *Starting from Marginalized lives : A conversation with Sandra Harding* pp 645 – 688.

²⁰² Refer to chapter two of this dissertation, pp 12 – 13.

²⁰³ Refer to chapter three of this dissertation, p 6 at par 4.

explicitly social location in order to gain the perspective of the lived experiences of those who have been traditionally excluded from the process of knowledge production.

Scholars such as Twining concedes:

“My background, experience, and outlook are quite cosmopolitan, but my biases and culture are British, my training is in the common law, and my main language is English. My aim is to develop a vision for general jurisprudence in the early years of this Millenium. A jurist from a different tradition, approaching the same issue from another vantage point, would probably present a significantly different picture. Few of us can break away very far from our intellectual roots.”²⁰⁴

Van Marle also concedes:

“I concede that my reading is already a normative, political one and that my standpoint or jurisprudential angle influences my reading, interpretation and application of the text.”²⁰⁵

Harding also refers to the notion of an “expanded vision” when considering who is speaking from a certain perspective. She re-iterates that all voices cannot be considered to be universal voices and that each voice emerge from a particular historical tradition. Within the Western perspective she highlights the fact that Westerners are ignorant of the fact that they fall within a specific determinate relationship within the scope of a variety of other scientific traditions.

She points out that even though there might be certain universally shared interests and needs versus a pure practical approach, social research does not necessarily require total value neutrality. In this sense it rather requires a commitment by a researcher to certain social values in order to obtain better objectivity. A pre-requisite for “strong objectivity” would be “strong reflexivity”. The process of strong reflexivity

²⁰⁴ Twining, W *General Jurisprudence* Anales de la Catedra Francisco Suarez, 39 (2005) p 646.

²⁰⁵ Van Marle, K *Transformative Constitutionalism as / and critique* p 287.

entails that “dominant groups” need to theorize their own position as socially situated subjects of knowledge. She acknowledges the fact that standpoint theory in and of itself are historically located and derives from a particular science based Western thought and perspective; for example, the Enlightenment by way of Marxism. Even though the audience are therefore limited it can nonetheless create a new and collective subject of knowledge.

Harding is of the opinion that an important issue that has not been addressed is the social location of science.²⁰⁶ We must take note of the relationship between the Western perspective and European expansionism of the past and the continuing present. We need to look back and across as to envision different perspectives for the future. In other words we need to be willing to step outside the conceptual framework in order to see ourselves as others sees us.

We can achieve this by adopting a stronger method of research. For Harding this would be possible if we make use of socially situated knowledge. Strong objectivity would be able to be obtained if we take a critical look at conceptual schemes. She is of the opinion that we can use our social location to make a distinctive contribution towards our way of thinking.

Similarly to Douzinas, Geary and other scholars mentioned previously, Harding emphasizes the fact that we cannot escape our history. In fact she is of the opinion that in an attempt to do so, we will end up accepting much of what we rejected in the first place.

I now turn to the aspect of interactive dialogic translation and the fact that various sources of knowledge need to be considered in an attempt to obtain a deepened democratic understanding. In essence it entails a process that draw on all our senses.

²⁰⁶ Similarly specific cultural locations versus individual locations might be considered. It touch on the need for a paradigm shift with regards to our way of legal thinking.

We need to be able to observe, listen, internalize and ultimately come to a deeper understanding of one another through a process of translation. The very definition of endogenous knowledge as set out in chapter one of this study, highlights the fact that it points to a body of knowledge encapsulating different sources of knowledge as well as processes and techniques that might be of assistance when obtaining knowledge. By empowering ourselves with a broader knowledge base and vision of the law, we will inevitably be influenced in the way we think and approach legal matters from a vantage point of critical self- reflection and heightened state of awareness. This is due to the fact that we will be able to “walk a few miles in another person’s shoes”.

4.4 Endogenous knowledge and the relevance of interactive dialogic translation

The aim of this chapter is to establish how and to what extent endogenous knowledge may be utilized as an approach to curtail the prevailing formalist legal culture, interpretative processes and techniques within our current civil litigation system. I am of the opinion that an adaptation in approach with regards to these aspects would ultimately result in the alleviation of different tensions within the transformational perspective. In order to answer this question it is important to realize that an understanding of the concept of endogenous knowledge stands central to this question. It is furthermore important to approach this subject matter with the realization that a re-alignment of personal values, innovative and creative strategies and a general mind-set of activism needs to be adopted.

Within the context of our current civil litigation system it is important for our legal practitioners to realize that we are in the fortunate position to learn from the experience of previous generations. We are blessed with a diversity of cultural contexts from which we should learn in an innovative way in order to apply creative problem solving abilities within the day-to-day application of law within the civil litigation system.

In chapter one of this study I refer to Andreas Velthuisen's description of the concept of endogenous knowledge as the product of a creative fusion between knowledge inherent to the social fabric of a developing society and knowledge acquired from "developed" societies.²⁰⁷ I also warned that I am very aware of the so-called Western perspective and worldview from which some scholars (including me) might approach certain aspects. Harding explains that we need to be willing to step outside of the conceptual framework in order to see ourselves as others sees us. For Harding this would be possible if we make use of socially situated knowledge which would be able to be obtained through a stronger method of research.

I submit that endogenous knowledge can be regarded as the type of socially situated knowledge referred to by Harding. The approach followed by Velthuisen is an ecological approach.²⁰⁸ With this he means a trans-disciplinary approach that asserts that cultural change can occur internally and independently of social, structural, technological and material change externally. Within the perspective of our current legal culture this is an extremely important observation as it seems to imply that a paradigm shift in the way we think and the way we practice law will enable us as members of the legal profession to fulfil our political commitment to broad social change in a faster and effective manner.

An ecological approach enables us to avoid a dichotomy of a global "us versus them" which merely results in a state of perpetual dualism. It becomes clear that the relevance of such an approach already started to crystalize early on in the study when I hinted at "what we perceive to be the 'other'".²⁰⁹ Cloete indicated that he is of the opinion that there is a need to enquire further into the normative grounds for the possibility of an African justice in the world. It entails a realization that meaningful convergence of our historical paths, in a non-violent dialogue with each other, can only be attained on the basis of a mutually inspired acknowledgement of both the "beast"

²⁰⁷ Refer to chapter one of this dissertation, p 6.

²⁰⁸ Velthuisen, *A Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 74.

²⁰⁹ Refer to chapter two of this dissertation, pp 24 – 27.

and the “divine” as the moral potential for all humankind.²¹⁰ He emphasized that the search for justice within the African context must presuppose the possibility of invoking a commonly shared “humanity in the world”, not as a metaphysical metanarrative or a “noble lie”, but as a moral truth that is self-evident.²¹¹

Velthuizen views the nature of an ecological approach as that of a trans-disciplinary approach in the sense that it is at once between disciplines, across different disciplines and beyond all disciplines.²¹² I have previously discussed the fact that there is a need for the integration of knowledge and techniques used within different disciplines in an effort to alleviate the “tension” between normative standards, remedial procedural avenues and certain institutional structures. I must also once again emphasize that I am of the opinion that one must be very careful not to follow a “copy and paste” approach. I refer above to the fact that there seems to be a recent intellectual trend of “dissolving disciplinary borders”. The view of scholars such as Harding is that it should rather be regarded as a matter of having conversations across disciplinary borders in an effort to advance knowledge from the “inside out”.²¹³ This viewpoint is also consistent with a “general jurisprudence” which refers to the theoretical study of two or more legal traditions, cultures, or orders (including ones within the same legal tradition or family) from the micro-comparative to the universal.²¹⁴

A trans-disciplinary approach place emphasis on the role of internal competition as endogenous catalysts for cultural stasis and change.²¹⁵ I am of the view that part of the problem vests in the fact that we are struggling to constitute new social relations and gain knowledge from the lived experience of traditionally marginalized groups and individuals within our civil litigation system. This might not necessarily be due to an unwillingness to do so, but rather due to the fact that there is a cacophony of ongoing

²¹⁰ Refer to chapter two of this dissertation, pp 24 – 27.

²¹¹ Refer to chapter two of this dissertation, pp 24 – 27.

²¹² Velthuizen, *A Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 74.

²¹³ Refer to chapter one of this dissertation, p 8.

²¹⁴ Refer to paragraph 4.3 of this chapter.

²¹⁵ Velthuizen, *A Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 74.

dialogic interaction which leads to a state of being “lost in translation”.²¹⁶ We are therefore all engaged in an internal competition of dialogue. We are “constitutionally speaking” over and against one another in an attempt to let our voices be heard.

Within the context of the ecological approach, change involves the transformation of ideological and religious thinking into endogenous thinking as a new way of critical self-reflection.²¹⁷ This re-iterates what Harding has observed, namely that we need to look back and across as to envision different perspectives for the future. In other words we need to be willing to step outside the conceptual framework in order to see ourselves as others sees us. In doing so, we will be able to engage in a process of critical self-reflection. The process of critical self-reflection in my opinion, would enable us to identify when our voices are needed and relevant within a certain situation.

In the first place it must begin from a position of being as open minded and impartial as possible. We must be willing to observe as much as we can and listen to whoever has something to say. Smith invokes the image of the “impartial spectator” to which distant voices may be given an important place for purposes of enlightenment relevance. This approach enables us to avoid parochialism of local perspectives and assist us in returning to a memory of wholeness as point of departure.²¹⁸

Secondly, whilst observing, we must also have regard for the context of a specific situation at hand in order to discern whether our voices have a specific relevance. A person’s voice might be relevant either because her interests are directly involved, alternatively because her reasoning and judgment may enlighten a discussion or dialogical perspective.²¹⁹ Sen refers to the situation where a person has a direct involvement as “membership entitlement”. He also points out that there might be the

²¹⁶ Refer to chapter three of this dissertation.

²¹⁷ Velthuisen, A *Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 74.

²¹⁸ Refer to chapter two of this dissertation pp 24 – 30.

²¹⁹ Refer to chapter two of this dissertation pp 24 – 30.

possibility of instances where a person is not directly involved, but the person's perspective and reasons behind it might bring with it important insights and discernment into an evaluation. In these cases of "enlightenment relevance" there would be a clear case for listening to the assessment of such a person.

This for me, implies a process of weighing and analysing a situation without judgment or preconceptions. It seems to refer to a dimension of insight that comes with the process of listening. I need to point out that the process of "listening" in this sense, must not be compared to "hearing" a person's voice. The process of "listening" entails the process of "paying attention to somebody". It therefore implies that we must listen with the intent to truly understand. Even if this is not entirely possible as we are all constrained by the fact that we function from different vantage points. This process does not merely entail a pure practical analysis of the situation, but may also entail a certain amount of intuition. Velthuisen refers to the fact that an ecological approach involves an endogenous explanation that focuses on causal processes focusing within a certain "cultural stream".²²⁰ The cultural processes within this stream includes different perceptions, emotions, meaning making, network building and semiotic manipulation in search of endogenous properties that may lead to innovation and the attainment of almost a "pure awareness". I state above that social choice theory may be utilized as an interactive device for purposes of incorporating freedoms into the formulation of rights. It is through this interactive process of public reasoning and participation that an alternative conceptualisation of the nature of rights and their attainment will become a possibility. It will enable us to create an expanded vision of law and a sense of justice and rights which is flexible to adapt to society's interests and needs.

For me it is important to note that once the relevant voices within a certain dialogic discourse has been discerned we have not come to the end of the process of "channelling". There is also a need for the contextualization or "interactive translation" of these voices within a certain societal construct in order to enable us to "weigh" and

²²⁰ Velthuisen, A *Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 74.

understand the importance of a certain contribution. In a sense it might be referred to as a process of “incubation” during which we need to re-remember, re-think, and reformulate for purposes of gaining insight and enlightenment relevance.

It is only when we have reached this state of an “expanded vision of law” with an almost “pure awareness” and sensitivity to historical and political context that we may start to channel what we have come to know as a sense of social consciousness from a point of centeredness. A broader notion of the idea of justice (and by implication access to justice and the subsequent advancement of rights) will potentially allow for direct and comprehensive participation in the civil litigation system itself. Participation can be seen as the countervailing principle to those values associated with the adversarial legal and justice cultures. The process of “interactive translation” will therefore also entail a dimension of active participation in an attempt to enhance the sense of justice within our civil litigation system. We need to allow different stakeholders and role players within this array of cultural possibilities of dialogue to “tap in” to this channel of heightened awareness and sensitivity in order to ultimately reach for a permanent ideal of openness in this perpetual dialogue of memory and promise.

With this being said, I am also aware of the fact that within this process of interactive translation lies the duty of responsibility. We must all be willing to take responsibility for our own personal growth and insight into different situations and from within different perspectives in an attempt to allow society in general to evolve into a higher state of harmonious strength. Returning to a memory of wholeness where a sense of community and moral self-identity can exist within the context of diverse world views and philosophies of life.

In the next section I look at ways in which endogenous knowledge might assist us as a device to obtain socially situated knowledge in an attempt to learn and form an understanding of the lived experiences from traditionally marginalized groups and individuals. In doing so, it will assist us in the examination and possible modification

of our underlying beliefs and reveal new creative opportunities for growth and expansion of our current understanding of notions of law, justice and rights.

4.5 The importance of “being” at the right place at the right time -

In chapter one of this study I refer to the fact that endogenous knowledge can be regarded as the integration of different concepts, such as: indigenous knowledge, exogenous knowledge, cultural meaning making, learning tools and technical tools. In fact, it can be regarded as a body of knowledge encapsulating sources of knowledge as well as processes and techniques that might be of assistance when obtaining knowledge.

It is a concept that allows for the diffusion of knowledge across cultures. It does not assume that “knowledge” is static in nature. Velthuizen asserts that endogenous knowledge is produced or created by a specific social system and becomes visible in terms of processes, tools, impact on the lives of people, centres and networks of knowledge sharing.²²¹ It studies the ways in which people connect with each other and also with the universe. Although it is a knowledge form which is local, it may be influenced by surrounding factors. These influences might be harmful or have a positive outcome.

Velthuizen refers to the fact that there are both established and emerging networks within what he describes as “peasant and citizen movements” that are capable of generating new and inclusive learning.²²² At this juncture I need to clarify that I am not comfortable to distinguish between “peasant” and “citizen” as I am of the opinion that we are all worthy citizens within the South African and even global perspective. The process of learning is derived from “living campuses” from where people obtain

²²¹ Velthuizen, A *Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 75.

²²² Velthuizen, A *Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 75.

their livelihood. Knowledge and innovations by sociocultural networks are shared among citizens through regular exchanges across regions.

Endogenous knowledge as a foundation of knowledge therefore develops naturally and spontaneously within the demographical circumstances of a particular culture.²²³ It is however also important to remember that indigenous knowledge has a significant role to play with regards to meaning making within the cultural context. This is due to the fact that within the African context knowledge that has been accumulated throughout centuries has always been shared between the people of Africa. Scholars such as Hountondji recognise the fusion between endogenous and exogenous knowledge and reminds us that we cannot ignore what transpires outside of Africa within a global context.²²⁴ He confirms that knowledge sharing and appropriation thereof should therefore take place as a process that co-insides with critical re-appropriation of Africa's own endogenous knowledge.

Velthuisen warns that we should not over emphasize scientific meaning making without values.²²⁵ This is so due to the fact that scientism, which involves scientific explanations that manipulate and dominate thinking can result in false perspectives. The process of cultural meaning making recognises the significance of values within a society. These values might include concepts such as freedom, justice and human rights. For purposes of endogenous meaning making it is therefore important to form an understanding of the worldviews of specific cultures. It is also important to realize that these perceptions might differ and change over time.

Velthuisen highlights the fact that at the foundation of endogenous knowledge lies a holistic worldview.²²⁶ In this respect Velthuisen is of the opinion that not only formal

²²³ Velthuisen, A *Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 75.

²²⁴ Hountondji, PJ *Knowledge of Africa, knowledge of Africans* RCCS Annual Review (1) September (2009) p 10.

²²⁵ Velthuisen, A *Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 75.

²²⁶ Velthuisen, A *Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 77.

analytical knowledge claims must be accepted as part of a valid worldview. A process of “trans-disciplinary interrogation” at different levels and dimensions needs to be employed for purposes of enabling a synthesis of knowledge incorporating analytical, normative as well as empirical knowledge. Endogenous knowledge as a form of knowledge can be described as the result of a process of personal experience and discourse during which people can relate to differing perspectives and their experience and interpretation.²²⁷ In my opinion it is therefore quite suitable for purposes of obtaining socially situated knowledge. The essence of endogenous knowledge is awareness and understanding. Both of these attributes are needed within the transformative constitutionalist perspective. It is especially important for purposes of understanding phenomena within a holistic perspective, transcending “dominant” discourses.

It becomes very clear that the process of “meaning making” which I would equate to what I describe as “interactive translation” within a specific cultural / social context informs endogenous knowledge. We can therefore not shy away from the fact that we are all interconnected. It is what Cloete refers to as “human-being-in-the-modern-world” or what Justice Langa referred to as new ways of “being” in the world.

Knowledge contributions are made within a process of social convergence that needs to take place over a period of time.²²⁸ For instance, Twining observes that if one adopts a global perspective and a long time scale, one can discern certain general tendencies and biases within Western academic legal culture. These tendencies are in the process of being challenged on a sustained basis within the global perspective.²²⁹ All contributions, be it indigenous or from other cultures, may be valid within a specific cultural / societal context when it comes to “meaning making”. I equate the process of “meaning making” to the process of contextualization as discussed previously.

²²⁷ Velthuisen, A *Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 77.

²²⁸ Velthuisen, A *Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 77.

²²⁹ Twining, W *General Jurisprudence* Anales de la Catedra Francisco Suarez, 39 (2005) p 646.

Trans-disciplinary interrogation, alternatively interactive translation, should therefore be informed by empirical observations over a long period of time.²³⁰ It is furthermore extremely important to remember that it needs to take place with the necessary historical and contextual sensitivity in mind. It seems that societal values determines to a large extent the context and importance attached to certain events and phenomena. Therefore it once again becomes apparent that different levels and dimensions of reality are at play within a certain societal construct. This is an extremely important observation with regards to the South African civil litigation system and the notion of justice within the South African context. The desire for self-emancipation, restorative justice, human rights and transformation can all be regarded as variables that has an influence on how citizens view disputes and processes within the South African context.

I want to re-iterate that within this process of interactive translation lies the duty of responsibility for one's own learning process and personal growth. There needs to be a willingness to participate with an open mind, without judgment and preconceived notions of one another. A willingness to truly "be" at the right place at the right time. With this I mean that we need to take an endogenous approach in using knowledge which needs to be sensitive to thoughts, emotions, perceptions, personal relationships, social responsibility, social context, language and moral self-identity. All these different concepts have grown from a fusion of knowledge influences throughout the ages and is still changing and evolving within today's global perspective. An endogenous approach will therefore ultimately result in a truly expanded vision of law and a state of "pure" heightened awareness.

In the next section I turn to a practical example of how an expanded vision of law and a state of heightened awareness could have contributed in a positive manner towards the effective utilization of our civil litigation system within a transformative

²³⁰ Velthuisen, A *Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 77.

constitutionalist perspective. I illustrate how the utilization of endogenous knowledge and the adoption of a critical approach might have been able to contribute towards a more positive long-lasting approach.

4.6 When things fall apart - unheard voices - skeletal remains -

In attending a seminar at the University of Pretoria during the course of this year, I was struck by Manisha Ramnarain's lived experience pertaining to urban narratives and practices more specifically with reference to the manner in which the civil litigation system was used to evict inhabitants of an apartment building in Schubart Park, Pretoria during the year 2011 and the subsequent ruling by the Constitutional Court on 9 October 2012.²³¹ I was struck by her vivid recollection and retelling of a story that reflected an experience by people on ground level far removed from what was heard in Court or portrayed by the media.²³² I could hear the raw emotion in her voice as if it had happened only yesterday. I realised that there was an unheard story behind the story ... a deeper reality behind that which was perceived and portrayed to be the whole truth. It entailed something more than the clinical application of eviction laws, it entailed an array of thoughts, emotions, perceptions, personal relationships, social relationships, social context, language and moral self-identity which is still embedded in the traumatic memories of these people today. I realised that for these people there is no sense of justice, how could there be? It is almost unfathomable that this story played out in the way that it did in light of the particular interpretive framework it should have been approached with.

Van Marle and De Villiers recount different stories and perspectives within this complex but almost everyday situation within the South African context in their article

²³¹ *Schubart Park Resident's Association and others v City of Tshwane Metropolitan Municipality and others* 2013 (1) BCLR 68 CC.

²³² Seminar on Land: Texts, Narratives and Practices : *A multidisciplinary and interdisciplinary conversation on a number of aspects concerning land; identity; poverty; power; sovereignty; complicity; space; time; temporality; myth; mythology; spirituality* – 6 May 2016 (University of Pretoria, Hatfield Campus).

Law and Resistance in the City of Pretoria: Space, History and the Everyday.²³³ They reflect on the relation between law, history and place against the background of the events and resistances that unfolded around Schubart Park, Pretoria. In this dissertation I follow a slightly different approach in that I aim to expose and address some of the current problems within the civil litigation system itself. I am of the opinion that the outcome of cases such as the Schubart Park- case could have been quite different in the event of a willingness to adopt a different interpretive framework and mind-set. This case to me, is a perfect illustration of the different voices which are at play within the perpetual constitutional culture of dialogue culminating in a tension between ideals strived for by and within the Constitution and how they are realised within the context of access to justice considerations.

The Schubart Park case was originally heard on 23 August 2012 in the Constitutional Court of South Africa and the judgment was subsequently handed down on 9 October 2012. It affected more than seven hundred families which were evicted and forcibly removed from their homes. It is inconceivable to me that these families were left literally homeless and without a collective voice for more than a year, and even after they gained access to the Constitutional Court, the whole experience left them without the sense that they have been heard or even that they truly participated in the process. The applicants applied for leave to appeal against the refusal of leave to appeal by both the High Court of South Africa as well as the Supreme Court of Appeal. The Constitutional Court agreed to grant the applicants access to the Court as it considered the matter to be one of “major importance”.²³⁴ In my view this case would therefore qualify as a “social emergency case” which would have required the Court to adopt an explicitly robust activist approach. In their article, Van Marle and De Villiers, highlights the fact that they are interested in how the story of Schubart Park echoes or possibly illustrates aspects like resistance of the everyday and the politics of inhabitation.²³⁵ I focus specifically on the fact that we are faced with a legal culture

²³³ Van Marle, K and De Villiers, I *Law and Resistance in the city of Pretoria: Space, History and the Everyday* (2013) Australian Feminist Law Journal, 38:1, pp 129 – 145.

²³⁴ Van Marle, K and De Villiers, I *Law and Resistance in the city of Pretoria: Space, History and the Everyday* (2013) Australian Feminist Law Journal, 38:1, p 131.

²³⁵ Van Marle, K and De Villiers, I *Law and Resistance in the city of Pretoria: Space, History and the Everyday* (2013) Australian Feminist Law Journal, 38:1, p 131.

which is still formalist and conservative in nature. It serves as an obstacle to the enhancement and attainment of rights within the civil litigation system and access to justice considerations in general. I therefore specifically focus on the aspect of legal culture as a force of resistance to change within the context of the way we think and the way we practice law.

In this respect the absence of the collective voices of the Schubart Park residents are striking within these civil proceedings. The Court's unwillingness to take note of alternative input and information is indicative of the Courts ignorance of the fact that in today's transformative context it is insufficient to resort to precedent or statutory language alone in the pursuit of justice. A mere justification of a legal conclusion is insufficient and something more is clearly required from the Court. A broader historical context needed to be considered other than the series of events leading up to the Court case. Van Marle and De Villiers criticize the fact that references made to history by Justice Froneman in this particular case does not refer to the broader historical context to the conditions in Schubart Park.²³⁶ Van der Walt's example of eviction cases as discussed in chapter three of this study showed us that judicial application of reform laws inescapably involves a choice between upholding or changing the existing legal tradition (culture). These cases of "social emergency" must be approached with an activist mind-set and in a heightened state of historical and contextual sensitivity.

Velthuizen remarks that integrated competence does not only require skills and knowledge.²³⁷ It requires a growing awareness of the existence and consequences of injustice and inequality. The relevance of endogenous knowledge in the promotion of peace processes and the empowerment of local communities in ordering their lives therefore becomes clear. The fact that Eurocentric and other Western models are inadequate in addressing the healing requirements within the African (South African) context is widely recognised. For instance, Van Marle and De Villiers highlight the

²³⁶ Van Marle, K and De Villiers, I *Law and Resistance in the city of Pretoria: Space, History and the Everyday* (2013) *Australian Feminist Law Journal*, 38:1, pp 132.

²³⁷ Velthuizen, A *Applying Endogenous Knowledge in the African Context* AFRICA INSIGHT Vol 42(1) – June 2012 p 82.

fact that the Court refers to “residents” throughout without having cognisance of the age, race or gender of these people, creating the impression of a faceless mass.²³⁸ The City used this fact to its advantage in arguing that the buildings were mainly inhabited by vagrants and criminal elements. Van Marle and De Villiers highlight the fact that for the most part this was not the case. Over the years different sub-cultures developed and from different newspaper reports it becomes evident that the residents consisted of a more diverse population than just after completion of construction of the buildings and more complex than what the city argued.²³⁹ This to me is an illustration of how the civil litigation system seems to fail members of society in general when it comes to a broader notion of access to justice. It furthermore identifies the need for authentic endogenous knowledge to be applied within the context of civil litigation in order to ensure fair and just outcomes in civil proceedings.

This untenable situation ultimately led to what Van Marle and De Villiers describe as the “battle” of Schubart Park.²⁴⁰ It was as they describe it, a glorious display of protest and power that took place on 21 September 2011. The buildings were physically attacked and vandalized as a result of a sense of “moral” outrage due to the fact that the so-called Red Ants attempted to evict thirty eight inhabitants from Schubart Park. Manisha described it as a collective sense of hopelessness and frustration in voicing their concerns. This is a striking example of a situation as described by Sen, when he criticizes Rawls in his attempt at getting to a perfectly just society with a combination of ideal institutions and corresponding ideal behaviour.²⁴¹

Not surprisingly, different accounts followed from different perspectives of what transpired on that day, but ultimately the building was declared as unsafe and its residents were evicted. What is of relevance to me with regards to my study is the approach followed by the courts in this process and the ignorance of the devastating

²³⁸ Van Marle, K and De Villiers, I *Law and Resistance in the city of Pretoria: Space, History and the Everyday* (2013) Australian Feminist Law Journal, 38:1, p 138.

²³⁹ Van Marle, K and De Villiers, I *Law and Resistance in the city of Pretoria: Space, History and the Everyday* (2013) Australian Feminist Law Journal, 38:1, p 138.

²⁴⁰ Van Marle, K and De Villiers, I *Law and Resistance in the city of Pretoria: Space, History and the Everyday* (2013) Australian Feminist Law Journal, 38:1, p 141.

²⁴¹ Refer to Chapter two of this dissertation, pp 20 – 21.

aftermath it had. Van Marle and De Villiers highlights the passage of time between the hearing in the High Court and the hearing in the Constitutional Court and the seemingly unwillingness of the court to take note of what transpired within this period of time that had elapsed.²⁴² The court purely made a decision on what was “somehow frozen in the court records”. This approach stands in stark contrast with the decision made in the case of *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* where a more comprehensive approach was followed.²⁴³ In the Schubart Park case, public interest, as in the case of *Allpay Consolidated*, should have weighed heavily in the determination of a just and equitable remedy. We cannot shy away from the fact that this decision left between 3000 to 5000 people either on the streets or in temporary shelters. Families were torn apart and displaced in a manner which is in shocking contradiction with concepts such as social rights, substantive justice, participatory governance, multi-culturism and historical consciousness. The devastating effects of an unwillingness to move away from traditional ways of thinking and techniques cannot be highlighted in a more striking fashion.

In contrast with Western adversarial systems, the restoration of relationships within the African community takes priority. Customary processes seem to be more dualistic in approach and view a dispute as being “owned” by the whole community. It correlates with Sen’s view that open-minded engagement in public reasoning stands quite central to the pursuit of justice. It subsequently also becomes quite clear why the previous residents of Schubart Park feel that they have been denied an opportunity to meaningfully participate within the context of the civil justice system. They have been overwhelmed by a sense that their voices faded into obscurity and fled into the homeless streets of Pretoria which can still be heard in the echoes of poverty and displacement today.

²⁴² Van Marle, K and De Villiers, I *Law and Resistance in the city of Pretoria: Space, History and the Everyday* (2013) *Australian Feminist Law Journal*, 38:1, p 142.

²⁴³ 2014 (4) SA 179 (CC).

In the abovementioned paragraph I have illustrated the devastating effects as a result of a failure to address our formalist and conservative legal culture in instances where it is necessary to do so. This is dramatically illustrated by the ghostlike skeletal remains of the Schubart Park building which till this day forms part of the inner city skyline at sunset every evening.

4.7 Conclusion

The main focus of this chapter is to explore how endogenous knowledge as a body of knowledge might be utilized in an effort to curtail the prevailing formalistic and conservative legal culture within our civil litigation system.

In the first instance I discuss Douzinas and Geary's support for a general jurisprudential approach.²⁴⁴ I affirm this notion and highlight the fact that scholars such as Twining warns that we must be aware of the fact that universality and generality within today's context needs to be treated as problematic. This point of departure would ultimately result in the most flexible and adaptable approach within the transformative constitutionalist perspective. We therefore need to approach all civil matters with a critical perspective to the notion of transformative constitutionalism.

I reflect on approaches that might be conducive to the promotion of a general integrated jurisprudence within the context of a legal culture that is still formalist and conservative in nature with reference to the way we think and make use of interpretive techniques. In doing so, I discussed Velthuizen's views on the nature of an ecological approach as that of a trans-disciplinary approach in the sense that it is at once between disciplines, across different disciplines and beyond all disciplines. I identify and emphasize the need for the integration of endogenous knowledge and techniques in an effort to advance access to justice and enhance the attainment of rights within the context of the South African civil litigation system. The importance of authentic

²⁴⁴ In this sense Douzinas and Geary refers to a more generous and/or inclusive jurisprudence.

endogenous knowledge and an understanding the fact that it is the result of the fusion and integration of several ways of “knowing” on a continued basis is highlighted and emphasized.

I discuss the fact that we need to take responsibility and demonstrate a willingness to truly “be” at the right place at the right time. With this I mean that we need to take an endogenous approach in using knowledge which needs to be sensitive to thoughts, emotions, perceptions, personal relationships, social responsibility, social context, language and moral self-identity. We need to demonstrate in a practical manner that we are willing to adopt an attitude and aptitude to facilitate and promote healing and sustainable restoration of relationships as the primary principles in reaching happiness not only on an individual level but also as an important ingredient for purposes of reaching a level of “pure awareness” and harmonious strength within the context of society as a whole.

5 Conclusion

The main aim of this dissertation is to expose and address some of the current problems in the civil litigation system within the South African context.

I begin the study by focusing on the current civil litigation system and ascertaining how and to what extent it fails to live up to the transformative ideals of the South African Constitution. I highlight the fact that there is a disconnect between the notions of transformative constitutionalism and access to justice. Even though transformative constitutionalism introduced changes in political, constitutional and administrative notions of justice, it did not affect any changes with regards to court processes as such. The civil litigation system is therefore still based on dated and often conservative legal knowledge, legal culture and legal practice. This resulted in a *lacuna* between our legal knowledge base, legal culture and civil litigation on the one hand and developments and reform in the political, economic and social spheres on the other

hand. A need arise for the integration of knowledge and techniques used by different disciplines in an effort to alleviate the tension as mentioned above. Cross boarder conversations with experts from different disciplines is necessary in order to facilitate the paradigm shift needed in order to provide fast and effective implementation of the transformative ideals as envisaged by the Constitution. As legal scholars we should be open minded in order to think new thoughts and ask new questions from a different perspective. Transformative constitutionalism might be utilized as a tool to transform political, social, economic and legal culture in such a manner that it will alter radically existing assumptions about law, politics, economics and society in general.

I subsequently highlight the burning issue that even though transformative constitutionalism is associated with social reform and change on a large scale it does not address the question of access to justice which ultimately leads to a tension between the ideals strived for by and between the Constitution and how they are realised within the context of access to justice considerations. I identified the fact that even though we are more than twenty years down the line in a new democratic society, we are still stuck on a static, rhetoric repetition of the essence of law, legislation and processes.

The advancement of rights revolves around normative standards, remedial procedural avenues and institutional structures. The existing tension acts as an obstacle in the advancement of rights within the civil litigation system. I confirmed Klare's assertion that South African jurists are hesitant to move away from traditional ways of legal thinking and interpretive techniques. Langa points out that there is much to be said for sticking to the rules when they are clear and good, but it is when upholding the word of the law is taken too far when it obscures the true purpose of law, namely to ensure justice.²⁴⁵ This is why developments in the current civil litigation system should also embrace an alternative conceptualization of justice and rights.

²⁴⁵ Langa, P *Transformative Constitutionalism* STELL LR 2006 3 p 357.

In my study I highlight the fact that I support a broader notion of justice. It is due to the fact that there are different perceptions with regards to the notion of justice that there is a tension between the ideals strived for by and within the Constitution on the one hand and society's interests and needs on the other hand. Access to justice in a broader sense must involve an alternative conceptualization as to the nature of rights. This is due to the fact that the attainment and enhancement of such rights as a permanent ideal of openness entails the perpetual interactive translation of society's interests and needs. This process will enable us to constitute new social relations and gain knowledge from the lived experiences of traditionally marginalized groups and individuals. There should be a movement away from the over emphasis on "ideal institutions" to a situated focus on behaviours, interactions and choices for individuals within the civil litigations system. Active participation is necessary to regain a sense of self-identity as well as wholeness within the community.

I identify the fact that social choice theory can be utilized as an interactive device for purposes of incorporating freedoms into the formulation of rights. Through a process of interactive public reasoning, translation and participation an alternative conceptualisation of the nature of rights and their subsequent attainment will become possible. This process must however be seen as a supplement for purposes of the advancement of rights and not a substitution of institutions and processes as predicated by the Constitution.

Through this supplementary interactive process we will be able to enhance our social consciousness which will ideally result in a society that is internally harmonious and good. I proceed to discuss justice as an idea in general by focussing on modernity's take on the idea of justice and Plato's idea of a broader notion of justice. I also ponder on justice as an idea within the African context. According to Cloete we will be able to attain justice in any society when it resonates with the potentially universalisable moral consciousness of ordinary human beings across all human societies.²⁴⁶

²⁴⁶ Cloete, M *Plato and the modern African State : Some thoughts on the question of justice* Phronimon, Vol 9(1) (2008) p 98.

I point out that in many respects the traditional Western perspective is still prevalent in our court processes today. A broader notion of the idea of justice (and by implication access to justice) is based on social choice principles. These principles are less restrictive than technical procedures, formal rules and the ancient traditions and privileges associated with the adversarial system. The principles of participation and self-determination through a process of engagement by the courts serve as a powerful countervailing principle to the strict contractarian approach from yesteryear. In cases such as *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*²⁴⁷ the Court has already conceded that the process of engagement has an important contribution to make towards not only the resolution of disputes, but also to promote an increased sense of understanding and sympathy if both parties are willing to participate. The link between meaningful engagement in relation to life and dignity within the context of civil litigation cannot be denied. In fact the civil litigation system and how it is administered and approached has an important role to play with regards to not only the healing of our nation, but also to the future and the successful execution of the transformative constitutionalist project within the South African context.

One of the problems that we are faced with today is the fact that legal practitioners in general are still hesitant to move away from traditional ways of legal thinking. It therefore becomes very difficult to implement new strategies and techniques as they are not always very receptive to change. There is a perpetual confrontation between tradition and change and it becomes clear that legal culture not only serves as a major source of stability, but also as a force of resistance or obstacle to change. I study Klare's argument on legal culture being that transformative constitutionalism can only be attained in instances where the judiciary are not scared or unwilling to move away from traditional ways of legal thinking.

²⁴⁷ [2008] ZAC 1.

In my study I identify that there is a seemingly uninterrupted existence or “succession” of our legal tradition. This is problematic in that legal culture is an important point of departure and influences the mind-set with which presiding officers and practitioners approach civil proceedings. It becomes apparent that there is an overemphasis on the content of law to the context of law. As highlighted above I emphasize a need for contextualization through a process of interactive translation in an effort to curtail the current static and formalist legal culture that is enhanced by the generated rhetorical effect created in the civil litigation system. Legal culture therefore emerges as a confrontation between tradition and transformation in that it seems that our democratic constitution entrenches existing privilege and power whilst there is a need for urgent and radical transformation within political, social, economic and legal spheres.

I come to the conclusion that the implication for the civil litigation process seems to be that the notion of legal culture cannot be removed for transformational purposes. I highlight this fact by referring to Van der Walt’s example of eviction cases which shows that judicial application of reform laws inescapably involves a choice between upholding or changing the existing legal tradition (legal culture).²⁴⁸ Certain cases which can be defined as “social emergency” cases need a robust activist approach, while it is with a general mind-set of awareness that we must approach civil proceedings in general.

The process of interactive translation enable us to constitute new social relations and gain knowledge of the lived experiences of traditionally marginalized groups and individuals. The Constitution places a moral and political responsibility on us as legal practitioners and legal scholars alike to do introspection and self-examination which needs to be accompanied by honesty and integrity within the judiciary. This must be done in the pursuit of reaching a higher state of awareness in order to enable us to hone our creative problem solving abilities. It would entail a virtually inestimable plurality of dialogic events, not only in the life of a nation, but increasingly within the global perspective. The fact that we are struggling with this process is not necessarily

²⁴⁸ Van der Walt, *AJ Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 16.

due to an unwillingness to participate, but rather that it might be a question of ongoing dialogic interaction that leads to a state of being 'lost in translation'. We therefore need to develop knowledge and techniques in order to become equipped with the necessary skills to enable us to actively participate in the process of transformative constitutionalism.

I specifically refer to the issues of access to justice and the advancement of rights and study endogenous knowledge as an approach that could be used to expand our current knowledge base, [legal] culture and practices which are linked with the civil litigation system. I discuss Douzinas and Geary's support for a general jurisprudential approach. Even though I affirm this notion I highlight the fact that there are scholars such as Twining that warns that we must be careful of notions of universality and generality within today's context. Douzinas and Geary's approach seems to refer to a broader generous and non-exclusive approach rather than a generalization of concepts. Within the South African context the establishment of an approach with which we gain a heightened state of awareness and sensitivity, would entail a critical approach to the notion of transformative constitutionalism, the engagement of all levels of legal ordering, not just on municipal level or public international law and the phenomena of normative and legal pluralism must be regarded as central to jurisprudence. It is therefore with a critical mind-set that the most flexible and adaptable approach would be possible within the context of transformative constitutionalism. We therefore need a generous non-exclusive jurisprudence which is able to embrace the interests and needs of each and every citizen however diverse it might be.

I ponder on different approaches that might be conducive to the promotion of a general integrated jurisprudence within the context of a legal culture that is still formalist and conservative in nature with reference to the way we think and make use of interpretive techniques. I refer to scholars such as Harding who criticises the dominant traditions of the western perspective. True objectivity is maximized if social factors are not excluded from knowledge production. We can achieve true objectivity by adopting stronger methods of research in making use of socially situated knowledge. We need

to acknowledge our past as seen from different perspectives and come to understand each other through a process of interactive dialogic translation. Within the civil litigation system it is important for legal practitioners to realize that we are in fortunate position to learn from the past experiences of previous generations. We need to re-align personal values and develop innovative and creative strategies when adapting a general activist approach.

I identify and emphasize the need for the integration of authentic endogenous knowledge and techniques in an effort to advance access to justice and enhance the attainment of rights within the context of the South African civil litigation system. I view endogenous knowledge as a form of situated knowledge. I discuss Velthuisen's views on the nature of an ecological approach as that of a trans-disciplinary approach in the sense that it is at once between disciplines, across disciplines and beyond all disciplines. A trans-disciplinary approach place great emphasis on the role of internal competition as catalysts for cultural stasis and change. Within the context of an ecological approach, change involves the transformation of ideological and religious thinking into endogenous thinking as a new way of critical self-reflection. An understanding of the fact that endogenous knowledge is the result of the fusion and integration of several ways of "knowing" on a continued basis is important when we use knowledge which needs to be sensitive to thoughts, emotions, perceptions, personal relationships, social responsibility, social context, language and moral self-identity. Various sources of knowledge needs to be looked at in an attempt to obtain a deepening democratic understanding. By empowering ourselves with a broader knowledge base and vision of law, we will inevitably be influenced in the way we think and approach legal matters from a vantage point of critical self-reflection and a heightened state of awareness.

I am of the opinion that a paradigm shift in the way we as legal practitioners and scholars think and practice law needs to take place. Critical thinking and self-reflection must be encouraged not only when it comes to presiding officers and practitioners, but also when it comes to law students. Van Marle and Modiri in their article titled "*What does changing the world entail? Law, critique and Legal Education in the time of post*

apartheid” point out that “the notion of responsibility in complicity / human foldedness is an indispensable ingredient for critical thought”.²⁴⁹ They refer to Sanders who stated that there is a need to take responsibility for the absence of an acknowledgment of complicity by the legal ‘fraternity’ as it raises the danger of producing technocratic legal graduates who serve the dominant / ruling class.²⁵⁰ In this study I do not explore the aspect of legal education as such, but I recognise the important role it has to play with regards to the general mind-shift that needs to take place within the transformative constitutionalist framework. Students should not only be educated with regards to substantive law, but also be given the necessary practical skills in order to be able to successfully utilize new legal methods, ways of reasoning and listening. A theoretical framework needs to be developed which embraces transformative constitutionalism. I agree with scholars such as Quinot who emphasize that change in legal education in South Africa must happen responsibly and therefore it needs to be grounded in theory.²⁵¹ The notion of transformative constitutionalism must be the guiding theory to our discipline. Quinot highlights the fact that the way we go about in teaching law will shape the next generation’s perception of law and its role within the South African context. We need to be conscious of the way we teach in order to enable us to teach with *intention* as to assume an active role in the transformative project.²⁵² We need to show our students the past and we need to enable them to look across to the future.

With regards to the transformative project Van der Walt posed the question if a democratic constitution that clearly demands and legitimises large-scale social transformation can really deliver on its promise of stability and continuity.²⁵³ This question remains to be seen. From this study it is clear however that all members and organizations of society have a responsibility to promote the project of transformative constitutionalism.

²⁴⁹ Van Marle, K and Modiri, J ‘What does changing the world entail?’ *Law, critique and legal education in the time of post-apartheid* SALJ Vol 29 2 (2012) p 214.

²⁵⁰ Van Marle, K and Modiri, J ‘What does changing the world entail?’ *Law, critique and legal education in the time of post-apartheid* SALJ Vol 29 2 (2012) p 214.

²⁵¹ Quinot, G *Transformative Legal Education* Inaugural lecture delivered on 19 Sept 2011 (Stellenbosch University) p 14.

²⁵² Quinot, G *Transformative Legal Education* Inaugural lecture delivered on 19 Sept 2011 (Stellenbosch University) p 14.

²⁵³ Van der Walt, AJ *Legal History, Legal Culture and Transformation in a Constitutional Democracy* (2006) (12 – 1) *Fundamina* p 5.

In this respect I quote the late Justice Langa:

“Then there are the challenges that I see facing transformative constitutionalism: access to equal justice, legal education, legal culture, maintaining separation of powers while ensuring that all arms of Government work together, and reconciliation. Can we overcome these dilemmas? I do not know. But I take solace in the idea that perhaps rather than obstacles, these factors can be viewed as enabling conditions for transformation. For as long as they exist there will be a drive to overcome them, there will be a tension that keeps alive the idea that things can be different. When all these challenges are gone, that is when the real danger arises. That is when we slip into a useless self-congratulatory complacency, a misplaced euphoria that where we are now is the only place to be. That is when we stop dreaming, imagining and planning that things could be different, could be better. That, for me, is the true challenge of transformation.”²⁵⁴

I conclude with this final remark: the prudence of *jus* or the law’s conscience and conscience brings with it a great responsibility to legal scholars and practitioners alike. Because if we are not present, mindful and kind in the way we think or practice law and if we are not aware of the ways in which we produce and attain knowledge we will practice law without taking cognisance of the fact that we are without conscience (in the event that we are).

²⁵⁴ Langa, P *Transformative Constitutionalism* STELL LR (2006) 3 pp 359 – 360.

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