

TRANSFORMATIVE CONSTITUTIONALISM AS/ AND CRITIQUE

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“So, the very idea of transformative adjudication seems out-of-place within liberal legalism”.¹

“The point is that the constraint or bindingness of the legal materials is an *experience* or *interpretation* of them, not an innate (i.e., uninterpreted) property of the materials themselves that we can know objectively”.²

“Denial is a general phenomenon, but arguably additional considerations arise in the context of the new South Africa”.³

“Legal culture has a powerful steering or filtering effect on interpretive practices, therefore on adjudication, and therefore on substantive legal development”.⁴

1 Introduction

On 8 August 2008, some South African scholars gathered to reflect on the notion of transformative constitutionalism introduced by Karl Klare ten years ago.⁵ For Karl Klare, transformative constitutionalism entails

“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.”⁶

This notion has been adopted by many South African scholars, and Klare’s article on the Constitution of the Republic of South Africa, 1996 (“the Constitution”) is probably the article most frequently quoted by South African legal scholars in the field of constitutional law.

I was invited by the organisers of “Transformative Constitutionalism after Ten Years” to present a paper.⁷ After my presentation, during question time, Judge Dennis Davis criticised me for what he called the “lack of clarity” and “relevance” of my paper. Although a few comments from the floor created the impression that not all colleagues present shared his sentiments, others

* I would like to thank the Stellenbosch Institute for Advanced Studies (STIAS) for providing a creative space for me during the months of August and September 2008 during which this paper was written. My thanks to colleagues who participated in a(nother) reading of Karl Klare’s paper: Brenna Bhandar, Henk Botha, Danie Brand, Stewart Motha and André van der Walt. Thanks also to Jaco Barnard, Tshepo Madlingozi and Isolde de Villiers for comments and to Dennis Davis for being critical. A special thanks to Karl Klare.

¹ Klare “Legal Culture and Transformative Constitutionalism” 1998 *SAJHR* 146 157.

² 160.

³ 166.

⁴ 168.

⁵ The theme was “Transformative Constitutionalism after Ten Years” and it was organised by Andre van der Walt and Sandy Liebenberg of the University of Stellenbosch.

⁶ Klare 1998 *SAJHR* 150.

⁷ The paper I presented was entitled *The Time and Space of Transformative Constitutionalism*.

underscored Davis's comments by asking why I did not explicitly refer to South African scholars and their contribution to the debate about transformative constitutionalism in order to make my argument clearer. In light of these comments, I considered writing a shorter and hopefully clearer article on the theme of transformative constitutionalism. The fact that, after a short discussion with Davis during teatime, he said that he then actually understood what I was getting at, made me think about this harder. What pushed me further to do so is the significance of Klare's article, his observations about South African legal culture and his suggestion of transformative constitutionalism – a contribution that deserves a lucid engagement. However, what really convinced me is Klare's sincerity and humility – rare qualities in our current academic environment. In what follows I present the sub-text of the paper that I presented, the one that went unheard.⁸

I must emphasise that my reflection on transformative constitutionalism is limited to how legal scholars and specifically some legal academics have engaged with the notion of transformative constitutionalism in their writing. Klare's article was addressed to judges, but indirectly and on a general level was also aimed at legal scholars in a broad sense.

Below I first briefly highlight a few aspects of Klare's 1998 paper. I do not provide a full summary, because I write on the assumption that most South African scholars have read his article and have reread it often. Where my assumption is misplaced, I urge readers to read the article. I am not saying that the aspects which I highlight will necessarily be the most important aspects for others. 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.

Thereafter I refer to an earlier reflection on transformative constitutionalism of my own in which I strongly relied on a "limits of the law" type of argument.⁹ I then proceed to draw a tentative distinction between two broad approaches to transformative constitutionalism. In doing so I am not denying the existence of other angles or other engagements with transformative constitutionalism not represented by these approaches. However, I limit my own reflection to two strands that I tentatively call "instrumental/functionalist" on the one hand and "critical" on the other. I then repeat observations made by Achille Mbembe and Sarah Nuttall on trends in historiographical studies that I relied on also in the paper that I presented.¹⁰ However, this time I explicitly draw the lines (make the connections) between their observations and approaches in transformative constitutionalism. I conclude by explaining why I prefer the critical take on transformative constitutionalism and why I think this approach could take us deeper (although not necessarily further).

⁸ This is not the first time that I have been criticised for my style of writing/reading papers. See for example Woolman "On Rights, Rules and Relationships: a Reply to Van Marle's 'Jurisprudence of Generosity'" 2007 *Stell LR* 508. Usually my insistence on a convergence of form and substance will prevent me from bringing the seemingly unheard/unseen to the fore. In this article, I will attempt to be clearer without compromising the integrity of my text.

⁹ Van Marle "Revisiting the Politics of Post-Apartheid Constitutional Interpretation" 2003 *TSAR* 549.

¹⁰ "Writing the World from an African Metropolis" 2004 *Public Culture* 347.

Let me show some candour from the start: I conceive of the notion of transformative constitutionalism as a critical one. Critical, of course, has many meanings, and I ask a few pertinent questions concerning critical theory and critique below. What I mean by transformative constitutionalism as critique, for the moment, is an approach to the Constitution and law in general that is committed to transforming political, social, socio-economic and legal practices in such a way that it will radically alter existing assumptions about law, politics, economics and society in general.¹¹ I distinguish this approach from other approaches aimed at change, for example those which pursue substantive equality or socio-economic rights which are premised on a liberal politics and liberal approaches to law.¹² Although transformative constitutionalism by its nature is a project rooted in law, I do not regard it as limited to law and legal enquiry. What makes it “transformative” is precisely a break with what Klare calls traditional accounts of the rule of law thereby reaching amongst other disciplines to philosophy, political theory and sociology.

What is at stake for me when we reflect on and debate this notion is the possibility of critical thought and critical approaches in the current South African context. In other words, I wonder to what extent a liberal legalist could honestly engage with and follow Klare’s notion, without either radically questioning her own liberal legalist premise or actively ignoring the critical premise of the notion of transformative constitutionalism itself. This brings me to Klare’s text.

2 “Legal culture and transformative constitutionalism”

I highlight three aspects raised by Klare that I find particularly important and suggestive for thinking about, writing on, and applying legal theory and law in a post-apartheid context. I start by referring to his exposure and description of the tension between freedom and constraint – what we know as the indeterminacy thesis. Secondly, I discuss his framing of South African legal culture as conservative and our treatment of this culture as normal – what we know as the exposure of false consciousness. Thirdly, I briefly recall his re-figuring of the Constitution as a post-liberal document.

In Part II of his article Klare observes:

“In all traditional accounts, the rule-of-law ideal is premised on a radical disjunction between law and politics and a sharp role-differentiation between what judges do and what politicians and political theorists do. *So, the very idea of transformative adjudication seems out-of-place within liberal legalism.*”¹³

Klare addresses his project mainly to judges; his focus is adjudication and more pertinently, adjudication as a site of law-making. He explains why adju-

¹¹ Cornell *Transformations* (1993) distinguishes between evolution and transformation, the former referring to certain changes within a system and the latter to a radical break from the system itself. Some engagements with the notion of transformative constitutionalism have also developed in this way. See for example Van der Walt “Legal History, Legal Culture and Transformation in a Constitutional Democracy” 2006 *Fundamina* 1.

¹² Liebenberg “Needs, Rights and Transformation: Adjudicating Social Rights” 2006 *Stell LR* 5; Albertson & Goldblatt “Facing the Challenges of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” 1998 *SAJHR* 248.

¹³ 1998 *SAJHR* 157 (my emphasis).

dication could be a law-making activity. Judges, like all legal scholars (and indeed all readers of the Constitution), are caught up in a tension between freedom and constraint. Of course judges, because of the reality of constraint, will follow the Constitutional text and legal precedent as closely as possible. However, because of the impossibility of language to convey clear meaning in the sense of producing single neutral and objective truths, any text – also the Constitutional text – will be open for interpretation and the generation of different plausible interpretations. When interpreting, judges cannot but be guided by extra legal factors:

“As everyone knows, of course, adjudication runs head-long into the problems of interpretive difficulty and the indeterminacy of legal texts. Legal texts do not self-generate their meanings; they must be *interpreted* through legal work. Legal texts, particularly constitutions, are shot through with apparent and actual gaps (unanswered questions), conflicting provisions, ambiguities and obscurities. Indeed, it is frequently debated what the relevant text *is*, with respect to a particular legal problem, e.g., where multiple legal sources (drafting history, prior lines of interpretation, foreign authorities, etc.) are referenced, or where a document is sought to be elucidated or trumped by other cultural artifacts (e.g., customs, accounts of popular morality, historical narratives, etc.). In the face of gaps, conflicts, and ambiguities in the available legal materials, what’s a decisionmaker to do? Apart from abdication, there seems no option but to invoke sources of understanding and value external to the texts and other legal materials.”¹⁴

When adjudicating, judges are thus confronted with choices, and many or at least some of their choices are guided by extra-legal factors. Law and politics in other words – in contrast to what the liberal legalist believes – are not separate. Klare refers to some of the attempts by legal theorists to constrain the choices that judges make. Of course he does not go into a full discussion of any of these theorists – he does not need to prove his knowledge of these theorists by engaging in laborious and detailed discussions or filling pages with footnotes full of references. However, he does observe:

“The common framing of the issues in traditional legal theory has the great weakness of insisting too sharply on a separation between law and politics and between professionally constrained legal practices and strategic pursuit of political and moral projects. By hypothesis, *professional practices* and *strategic pursuits* are treated as mutually exclusive. From this starting point, one can never come to grips with the basic dilemma of liberal legalism (viz., how to square interpretive difficulty with the norm of fidelity to and constraint by text).”¹⁵

Klare describes the critical approach – with reference to Duncan Kennedy¹⁶ – as follows:

“The idea of the critical approach is ‘to propose an understanding of [legal] rules that dispose ideological stakes as products of the interaction between the legal materials ... and the ideological projects of judges. The rule choices that emerge from the interaction should be understood neither as simply the implications of [legal] authority nor as the implications of the ideological projects, but as a compromise’ shaped by the distinctive set of social practices comprising legal work, including the accepted repertoire of argumentation within a particular legal culture.”¹⁷

He wants scholars to avoid the stock distinction between a traditional account of law and a critical one, the former being a legal one and the latter

¹⁴ 157.

¹⁵ 159.

¹⁶ *A Critique of Adjudication [Fin de Siècle]* (1997).

¹⁷ 1998 *SAJHR* 159.

a political one. Klare explains why both interpretations are legal, and both interpretations are political.¹⁸ Of course our training and background, the prevailing legal culture in which we operate, will determine how we conceive of all of this.

Klare describes legal culture as the “professional sensibilities, habits of mind, and intellectual reflexes” of judges, lawyers and legal academics.¹⁹ He explains how participants in a particular culture perceive this culture as normal, without realising that it is situated within a certain context. Klare observes that the South African legal culture is conservative – not in a political sense but in terms of “traditions of analysis.”²⁰ He observes that in contrast to American lawyers, South African lawyers display a

“relatively strong faith in the precision, determinacy and self-revealingness of words and texts. Legal interpretation in South Africa tends to be more highly structured, technicist, literal and rule-bound [than in the United States].”²¹

South African lawyers still believe in the logic of deduction in order to reach specific conclusions from general and abstract premises.²² Klare notes that this is of course quite paradoxical, having politically progressive lawyers and judges steeped in conservatism. American lawyers reveal a similar but contrasting paradox, by being politically conservative but – because of the influence of Realism – more open to other styles of argument. There is thus no “*necessary* correlation between judicial style and interpretive method, on the one hand, and political ideology on the other.”²³

Why is this important? Why should lawyers, judges and legal scholars firstly be conscious of their conservative style, and secondly be able to challenge it and consider other approaches? Klare’s answer is succinct and clear:

“[conservatism] reduces the transparency of the legal process, thereby undermining its contribution to deepening democratic culture.”²⁴

Some might say that democracy and democratic culture is not a concern of judges, lawyers and legal scholars.²⁵ But there is a further reason:

“jurisprudential conservatism ... may induce a kind of intellectual caution that discourages appropriate constitutional innovation and leads to less generous or innovative interpretations and applications of the Constitution.”²⁶

¹⁸ 152. See also 160-165.

¹⁹ 166.

²⁰ 168.

²¹ 168.

²² 168. See also in this regard Hohfeld’s exposure of the illogicality of the use of deduction in the liberal account of rights, as described in Singer “The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld” 1982 *Wisconsin Law Review* 979.

²³ Klare 1998 *SAJHR* 170.

²⁴ 171.

²⁵ See Brand “Writing the Law Democratically: a Response to Theunis Roux” in Woolman & Bishop (eds) *Constitutional Conversations* (2008) 97 (identifying and criticising this type of approach in aspects of the Constitutional Court’s jurisprudence on democracy, and in academic writing about democracy in constitutional law).

²⁶ Klare 1998 *SAJHR* 171. See also Van Marle “Laughter, Refusal, Friendship: Thoughts on a ‘Jurisprudence of Generosity’” 2007 *Stell LR* 194 in which I put forward an argument for a “jurisprudence of generosity” following Patricia Williams *The Alchemy of Race and Rights* (1991) 10. See also Woolman 2007 *Stell LR* 508 who interpreted my use of generosity as a call for a non-theoretical, non-reflective approach.

Klare uses the word “cautious” to describe the approach followed by South African lawyers, and explains that caution does not mean an unwillingness to take bold steps, but rather signifies

“[a] reluctance to press legal materials toward the limits of their pliability, a tendency to underestimate the plasticity of the legal materials, and an exaggerated concern to give the appearance of conforming to traditional canons of interpretive fidelity.”²⁷

Klare ends his section on legal culture by posing a challenge to South African judges: future generations will not judge the Constitutional Court by how closely it followed traditional strategies of analysis, but rather by the extent to which it contributed to the many issues of social and political transformation – equality, social justice, democracy, multiracialism and dignity.²⁸ I have previously also referred to this challenge posed by Klare, but before I come to that, a short reference to Klare’s re-figuring of the Constitution as post-liberal is called for.

In part I of his article, Klare indicates his ambivalence about the phrase post-liberal.²⁹ He nevertheless continues to use it because he feels that it captures “certain essential features” of the South African constitutional project.³⁰ He argues that the aim of his article is to initiate a dialogue on the nature of legal interpretation, urging readers to re-think the claim that a specific legal interpretation is “correct.” Stating the current response in legal culture to perceive a traditional liberal reading as a “legal” one and a post-liberal (critical) reading as a “political” one, he urges for an acceptance of the fact that both readings are legal readings and at the same time political readings.³¹ He refers here to the paradox that he discusses further in the article – the issue of legal culture and the tension that arises as a result of the fact that South African lawyers are politically progressive but legally conservative. There is of course another paradox, the one between the vision embraced by the Constitution (a post-liberal one) and the cautious tradition of analysis followed by South African lawyers. I attempted to capture this paradox in the paper that I presented with reference to an article that focused on the reconstructive attempts in Brazil, showing the tension between the ideal, the dream and the reality.

“Flying into Brasília is the best way to appreciate the city’s shape, and with it, the symbolic weight it bears. ... It is the moment when the mythology of utopia, as it echoes in the observer’s mind flying above, is brought together with the reality of a utopian project as it features on the ground.”³²

²⁷ 1998 *SAJHR* 171. I have recently completed a paper entitled *The Risk of Law* (July 2008) prepared for a meeting of the RSCL Working Group on Gender and Law in Milan in which, following on an argument for refusal made previously (2007 *Stell LR* 194), I tentatively formulated a notion of a risking law. This is an approach to law that refuses the “cautious traditions of analysis” and takes risks, experiments, goes further in order to address the position of a concrete embodied person and which is not concerned with being faithful to some analytical notion of theoretical analysis, often (to my mind wrongly) conceived as one of rigour.

²⁸ Klare 1998 *SAJHR* 172.

²⁹ 151. In the paper delivered at the seminar on “Transformative Constitutionalism: After Ten Years” Klare again raised the fact that he still feels ambivalent about the phrase “post-liberal”.

³⁰ 151. Klare mentions certain features of the South African Constitution that support the argument for a “post-liberal” reading: the inclusion of social rights and a substantive conception of equality; affirmative state duties; horizontality; participatory governance; multi-culturalism; historical self-consciousness.

³¹ 152. See also the explanation of the ongoing tension and interaction between art and law, the law of art and the art of law in Douzinas & Nead (eds) *Law and the Image* (1999) 1.

³² Philippopoulos-Mihalopoulos “Brasilia. Utopia postponed” in Philippopoulos-Mihalopoulos (ed) *Law and the City* (2007) 239.

In an article titled “Brasília. Utopia postponed”, Andreas Philippopoulos-Mihalopoulos reflects on the Brazilian capital by drawing our attention to the failed utopian project, to the tension or the gap between “the world’s imagination of what utopia is and looks like” and “the reality of a utopia found, grounded, lived, and inevitably, discredited.”³³ His explanation of the city is focused on what he refers to as the “umbilical cord”, the line that links the country with its past, the link that divides concrete materiality from the collective consciousness. The Brazilian project failed:

“the Brazilian fallen angel shows how the line can never forget the other side of what it demarcates and inaugurates, nor can it avoid creating shadows while it only aimed at the light.”³⁴

I find his interest in “the line that distinguishes the aesthetics of the light from that of its shadow, the architecturally beautiful from the urbanistically operable, the dream from its analysis”³⁵ suggestive for a reflection on the South African post-apartheid project, or experiment of transformative constitutionalism. By drawing on this article I am by no means discrediting Klare’s notion of transformative constitutionalism. Klare is well aware of the challenge facing South Africans and, closer to our context, South African lawyers, and he is well aware of the paradox between the ideal, the dream, the aspirations of the Constitution and the reality.³⁶

Philippopoulos-Mihalopoulos describes the desire, the modernist experiment, the constitutional promise of Brazil – the development of a new urbanism that would cross the line of the collective consciousness and leave the past behind. On one side of the line, *before* the line, one finds

“the existing urban centres and the coastal pseudo-civilisation, the colonial influence and the historically unburdened past, social stratification and mushrooming favelas.”³⁷

On the other side, there is

“[a] new unified Brazil, with its confident city centre, luminous cultural and national architectural heritage, an attractive economy, a new democratic society.”³⁸

The author explains the burden of the expectation, the modernist dream – the line had to be crossed, the line that divided the nation into two “self-contained chunks: society before Brasília – impoverished, colonized, dependent, disintegrated, chaotic – and society after Brasília – modernist, progressive, unified, proud, orderly.”³⁹ The plan was the creation of a “utopian democratic community” in which all members would share similar domestic comforts and public access, irrespective of social position. However, the project of social integration failed. Philippopoulos-Mihalopoulos reflects on the consequences of this failure and aptly observes that “it is bad enough being a figure in a utopian architectural model; it is even worse being a victim of a failed social

³³ 240.

³⁴ 240.

³⁵ 241

³⁶ Klare 1998 *SAJHR* 150.

³⁷ “Brasília” in *Law and the City* 242.

³⁸ 242.

³⁹ 243.

experiment.”⁴⁰ Like Karl Klare, we should all take these words seriously. There are already examples of failure in the South Africa transformative project.⁴¹ Philippopoulos-Mihalopoulos describes how the modernist reconstruction of Brasília attempted to hide the shadows.⁴² The reconstruction was aimed to be “monumental” and “grandiose”, and “a society of spectacle” was erected.⁴³ South African authors have commented on the monumental aspects of our constitutional endeavour and called also for a restrained Constitution, for memorial constitutionalism.⁴⁴ The failure of Brasília shows many things, including the need to approach transformation and particularly transforming law with a high degree of modesty and humility, with a specific concern with ordinary lives, with a continual consciousness of failure/fallibility.⁴⁵ In saying this, I am by no means rejecting the notion or even the dream of “transformative constitutionalism”, but rather endorsing Klare’s insistence on the need for “a new imagination”⁴⁶ and what I call a critical account of the notion itself in contrast to an instrumental/functionalist account. I elaborate on this distinction below.

3 Two trends in engagements with transformative constitutionalism

In an earlier reflection on post-apartheid constitutional interpretation, and the extent to which courts have embraced the notion of transformative constitutionalism given the prevailing legal culture of conservatism, I relied on an argument that emphasised the limits of the law and law’s consequent incapacity to contain politics and political community.⁴⁷ According to this approach, Klare’s notion of transformative constitutionalism, the project of “large scale social change through non-violent political processes grounded in law”⁴⁸, will not be possible, because legal rules function as “exclusionary reasons” and political considerations, balancing and reflexivity will not be possible within the limits of the law.⁴⁹ Following that argument, I

⁴⁰ 245.

⁴¹ See for example Madlingozi “Post-Apartheid Social Movements and the Quest for the Illusive ‘New’ South Africa” in Motha (ed) *Democracy’s Empire: Sovereignty, Law, and Violence* (2007) 77. See also Mamdani “When does Reconciliation turn into a Denial of Justice?” in Nolutshungu (ed) *Memorial Lectures* (1998) 1.

⁴² See also William Kentridge’s engagement with shadows in *Black Box/Chambre Noire* (2005) 43.

⁴³ Van Marle “The Spectacle of Post-Apartheid Constitutionalism” 2007 *GLR* 411.

⁴⁴ Snyman “Interpretation and the Politics of Memory” 1998 *AJ* 312; Du Plessis “The South African Constitution as Memory and Promise” in Villa-Vicencio (ed) *Transcending a Century of Injustice* (2000) 63; Van Marle “Lives of Action, Thinking and Revolt – a Feminist Call for Politics and Becoming in Post-Apartheid South Africa” 2004 *SAPL* 605; Le Roux “War Memorials, the Architecture of the Constitutional Court Building and Counter-Memorial Constitutionalism” in Le Roux & Van Marle (eds) *Law, Memory and the Legacy of Apartheid: Ten years after AZAPO v President of South Africa* (2007) 65.

⁴⁵ I have previously drawn on Njabulo Ndebele’s description of South African society under apartheid as one of spectacle and his call for “the rediscovery of the ordinary”. See Ndebele “The Rediscovery of the Ordinary” 1986 *Journal of South African Studies* 143; Van Marle 2007 *GLR* 411.

⁴⁶ Klare 1998 *SAJHR* 156. I am grateful to Andre van der Walt for highlighting that specific phrase in a recent reading group.

⁴⁷ Van Marle 2003 *TSAR* 549 relying on Christodoulidis *Law and Reflexive Politics* (1998).

⁴⁸ Klare 1998 *SAJHR* 150.

⁴⁹ Van Marle 2003 *TSAR* 555-556; Christodoulidis *Law and Reflexive Politics* 227-233.

asked how legal scholars who accept the critical theses like indeterminacy, fundamental contradiction, false consciousness, the reification of rights, and who realise the limits of the law (in a radical sense, not in the sense that all lawyers to a certain extent concede the fact that law is a limited structure),⁵⁰ but who are committed to legal transformation, social change and also social and political change through law, should go about the work that they believe should be done. With reference to certain scholars, I described an approach that realises this tension and seeks to “play with both hands”. This means that, while being aware of the ethical limit of the law to fully address the position of others, it at the same time attempts to broaden the law, doing the groundwork for more generous approaches by judges.⁵¹ I noted the following:

“While playing with both hands a scholar experiencing this tension and living this paradox would say to the constitutional court that they haven’t lived up to Karl Klare’s challenge while knowing that they never really can.”⁵²

I want to distinguish roughly between two strands in engagements with transformative constitutionalism – as mentioned above, an “instrumental/functionalist” approach and a “critical” approach.⁵³ These two approaches could both be linked to the reception of Realism in South Africa. As we know, American Realism of the 1930s delivered a radical critique on Langdellian formalism, exposing the politics of law and the way in which all legal decisions are influenced by ideology.⁵⁴ Realism after the 1930s diverged into at least two streams.

One stream, Critical Legal Studies (CLS), followed the initial insights of Realism but used those insights to engage in a more radical critique of law and politics.⁵⁵ There is, of course, no unified critical approach. Broadly speaking, it could include perspectives like American CLS approaches, certain strands

⁵⁰ See for example Woolman 2007 *Stell LR* 508.

⁵¹ Van Marle 2003 *TSAR* 557.

⁵² 557. I subsequently shifted to a more sceptical view about the “limits of the law” type of argument to the extent that it allows for the continuation of the *status quo*; the possible, albeit unconscious, alliance between legal positivism and proclaiming the limits of the law. This is also illustrated by Klare’s argument on legal culture: a “limits of the law” type of argument could come with a radical politics but a conservative approach to law that does not encourage constitutional transformation and development and could in fact prevent it.

⁵³ I have previously referred to this distinction in “Haunting (In)Equalities” in Hunter (ed) *Rethinking Equality Projects in Law: Feminist Challenges* (2008) 125.

⁵⁴ See for example Holmes “The Path of the Law” 1897 *Harvard LR* 457; Cohen “Transcendental Nonsense and the Functional Approach” 1935 *Columbia LR* 809; Cohen “The Problem of a Functionalist Approach” 1937 *Modern LR* 5; Grey “Holmes and Legal Pragmatism” 1989 *Stanford LR* 787; Singer “Legal Realism now” 1988 *California LR* 467; and Horwitz *The Transformation of American Law, 1870-1960* (1992).

⁵⁵ See for example Kennedy “Form and Substance in Private Law Adjudication” 1976 *Harvard LR* 1685; Tushnet “Truth, Justice, and the American way: an Interpretation” 1979 *Texas LR* 1307; Tushnet “Anti-Formalism in recent Constitutional Theory” 1985 *Michigan LR* 1502; Unger “The Critical Legal Studies Movement” 1983 *Harvard LR* 561; Gabel “The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves” 1984 *Texas LR* 1563; Gordon “Critical Legal Histories” 1984 *Stanford LR* 57. See also Minda *Postmodern Legal Movements* (1995) 28-30; 106-127 who refers to the two strands of realist thought as “radical legal realism” and “progressive legal realism”.

in feminist theory⁵⁶, critical race theory and identity politics,⁵⁷ and Brit Crits drawing on continental philosophy and post-structuralism.⁵⁸

A second stream accepted the realist distinction between law and morality, and ended up as free market positivists with, amongst other things, a strong interest in policy-making and a focus on the institutional relationship between the judiciary and other organs of state. Approaches like Law and Economics, certain social-legal work and Legal Pragmatism resulted from this development.⁵⁹ In South Africa, both these streams are present – also in their engagements with the notion of transformative constitutionalism.⁶⁰ I have already mentioned the distinction between a critical and instrumental/functionalist approach to transformative constitutionalism. Tentatively, I situate the critical approach closer to the first mentioned stream, and the instrumental/functionalist approach closer to the second one. Before I elaborate, I refer to comments made on historiographical studies by Achille Mbembe and Sarah Nuttall that could be useful also in comparison to engagements with, and applications of, transformation and transformative constitutionalism.⁶¹

The authors separate historiographical studies in three categories. The first category investigates the spatial dislocation, the class differentiation, and the racist polarisation imprinted on the urban landscape by the policies of the apartheid state. Attention is given to geographies of poverty, forced removals and racially-based poverty. Mbembe and Nuttall note that studies in this category *fail to analyse the city in a way that opens possibilities of*

⁵⁶ For examples of critical feminist legal theories, see Frug “A Postmodern Legal Manifesto (an unfinished draft)” 1992 *Harvard LR* 1045; Frug *Postmodern Legal Feminism* (1992); Nedelsky “Reconceiving Autonomy: Sources, Thoughts and Possibilities” 1989 *Yale Journal of Law and Feminism* 7; Nedelsky “Law, Boundaries and the Bounded Self” 1990 *Representations* 162; Smart *Feminism and the Power of Law* (1989); Cornell *Beyond Accommodation* (1991); Cornell *The Imaginary Domain* (1995); Cornell *At the Heart of Freedom* (1998); Cornell *Between Women and Generations: Legacies of Dignity* (2002); Hunter “Law’s (Masculine) Violence: Reshaping Jurisprudence” 2006 *Law and Critique* 27; Drakopoulou “Feminism and the Siren” 2007 *Law and Critique* 331.

⁵⁷ See for example Williams *Race and Rights*; Williams *The Rooster’s Egg* (1995); Tuit *Race, Law, Resistance* (2004); Ferreira Da Silva *Toward a Global Idea of Race* (2007).

⁵⁸ See for example Douzinas & Warrington *Postmodern Jurisprudence* (1991); Fitzpatrick *The Mythology of Modern Law* (1992); Douzinas & Warrington *Justice Miscarried: Ethics, Aesthetics and the Law* (1994); Douzinas, Goodrich & Hachamovitch *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (1994); Minkinen “The Expressionless: Law, Ethics, and the Image of Suffering” 2008 *Law and Critique* 65; Godden “The Invention of Tradition: Property Law as a Knowledge Space for the Appropriation of the South” 2007 *GLR* 375.

⁵⁹ This stream is described by Minda *Postmodern Legal Movements* 29 as “progressive legal realism”. See also 30-43 for a description of what he calls “modern conceptual jurisprudence”:

“Progressive legal realists thus devoted their efforts to the goal of reconstructing public and private law so that law might better achieve the interests of society. The reconstructive effort of progressive legal realism served to meld the older legal formalisms with a new-policy instrumentalism.” (31)

For examples of early Law and Economics scholarship, see Calabresi *The Cost of Accidents: a Legal and Economic Analysis* (1970) and Posner *Economic Analysis of Law* (1973).

⁶⁰ For examples of the critical stream in South African scholarship, see generally Van der Merwe & Bradford (eds) *Meaning in Legal Interpretation* (1998); Botha, Van der Walt & Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003); and Van der Walt *Law and Sacrifice* (2005). For examples of the pragmatist/institutionalist stream, see in particular Roux “Principle and Pragmatism on the Constitutional Court of South Africa” 2009 *ICON* 106; Roux “Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court” 2003 *Democratisation* 92; Kok “The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-driven or Legislature-driven Societal Transformation?” 2008 *Stell LR* 89.

⁶¹ 2004 *Public Culture* 356.

comparison with other studies. The city is not seen as an aesthetic project, but as a space of division: emphasis is placed on marginality, and far less attention is paid to the “imbrication” of city and township.⁶²

The second category, referred to by the authors as post-apartheid studies, focuses on the extent to which cities are changing in *institutional governance, service provision and local politics*. Post-apartheid studies see the city as *a problem to be solved and respond in an unambiguous, prescriptive manner*. This approach is instrumental and functionalist and preoccupied with issues of social justice, social cohesion, equity and efficiency. It seeks to redress the inequality of the past through a better distribution of public goods and is preoccupied with the description of needs. Adopting this focus does not leave much time and space for other aspects of city life and city forms.⁶³

A third category is concerned only with the *spatial restructuring* of the city and focuses on issues such as barricading, the construction of office complexes and upper class residences, and the polarisation of the city by income, occupation and race. These studies resonate with trends in post-apartheid legal writing and in particular, with responses to the notion of transformative constitutionalism. At least three sub-categories could be identified in this regard: First, a sub-category of writings which focus on the question of substantive equality and which therefore reflect a concern with what would be called concrete, material realities.⁶⁴ Secondly, a sub-category which focuses on generating concrete change for the poor manifested, for example, by calls for a minimum core content in the field of socio-economic rights.⁶⁵ A third category reflects approaches of an institutional nature, occupied with analyses of transformation from the perspective of relations between different branches of government and the working of the court.⁶⁶

Mbembe and Nuttall approach the city from a different vantage point:

“[A] city is not simply a string of infrastructures, technologies, and legal entities, however networked these are. It also comprises actual people, images and architectural forms, footprints and memories; the city is a place of manifold rhythms, a world of sounds, private freedom, pleasures and sensations.”⁶⁷

They aim to capture these rhythms through the notion of the metropolis. To my mind, some of the critical engagements with the notion of transformative constitutionalism have heeded this complexity, particularly by articulating the

⁶² 357.

⁶³ 358.

⁶⁴ See, for example, Albertyn & Goldblatt 1998 *SAJHR* 248; De Vos “Grootboom, the Rights of Access to Housing and Substantive Equality as Contextual Fairness” 2001 *SAJHR* 258; Pieterse “What do we mean when we talk about Transformative Constitutionalism” 2005 *SAPL* 155; Liebenberg & Goldblatt “The Interrelationship between Equality Rights and Socio-Economic Rights under South Africa’s Transformative Constitution” 2007 *SAJHR* 335.

⁶⁵ See, for example, Bilchitz “Giving Socio-Economic Rights Teeth: the Minimum Core and its Importance” 2002 *SALJ* 484; Liebenberg “South Africa’s Evolving Jurisprudence on Socio-Economic Rights: an Effective Tool in challenging Poverty?” 2002 *Law, Democracy and Development* 159.

⁶⁶ See, for example, Roux 2003 *Democratisation* 92; Kok 2008 *Stell LR* 89.

⁶⁷ 2004 *Public Culture* 360.

tensions of transformation, a transformative law, and transformative constitutionalism, but also the limits of law, law's incapacity.⁶⁸

Mbembe and Nuttall then describe some of the writings that engage with the city as emphasising

“the spatial and temporal openness of the city as a place of manifold rhythms forged through daily encounters and multiple experiences of time and space; the city as a series of imprints from the past, the daily tracks of movement across, and links beyond, the city itself.”⁶⁹

However, quite pertinently they note that these writings neglect the extent to which the openness and flow depend on a series of rules, conventions, regulation and control – much of city life is about the engineering of certainty. They argue that these writings also need to engage with cities in the context of Africa and not merely on an abstract level. The same critique is sometimes leveled against some of the more theoretical and philosophical engagements with law in the South African context – these writings are often criticised for a neglect of sufficient engagement with case law and legislation and for over-aestheticising, theorising and philosophising.⁷⁰

Transformative constitutionalism as a critical project lies within a liminal space and time, a precarious and uncomfortable space and time or, following Gillian Rose, a space of double anxiety and sustained equivocation, a broken middle.⁷¹ It must be a site of active political action and struggle, of active engagement with law; a site that entails an unsettled and unsettling approach. Rose shares the criticism of the notion of utopia raised at the beginning of the paper – for her, the search is not utopian, a search for a non-place, but rather aporetic, one without a path that will push us to engage in an active politics.⁷²

Legal scholars face the difficult challenge of writing and thinking about law and living in tension. This space of tension is created by dichotomies of all sorts: law's potential and law's limits; constraint and freedom; doctrine and theory; analysis and critique; the social sciences and the humanities; metaphysics and empiricism, to name a few. I have previously referred to

⁶⁸ See for example Du Plessis “The South African Constitution as Memory and Promise” in *Transcending a Century of Injustice* 63; Van der Walt “Dancing with Codes: protecting, developing and deconstructing Property Rights in a Constitutional State” 2001 *SALJ* 258; Botha “Metaphoric Reasoning and Transformative Constitutionalism (Part 1)” 2002 *TSAR* 612; Botha “Metaphoric Reasoning and Transformative Constitutionalism (Part 2)” 2003 *TSAR* 20; Le Roux “Bridges, Clearings and Labyrinths: the Architectural Framing of Post-Apartheid Constitutionalism” in Le Roux & Van Marle (eds) *Post-Apartheid Fragments: Law, Politics & Critique* (2007) 59; Le Roux “War Memorials, the Architecture of the Constitutional Court Building and Counter-Monumental Constitutionalism?” in *Law, Memory and the Legacy of Apartheid* 65; Van der Walt 2006 *Fundamina* 1; Van Marle 2007 *GLR* 411.

⁶⁹ 2004 *Public Culture* 361.

⁷⁰ See for example Davis *Democracy and Deliberation: Transformation and the South African Legal Order* (1999) 178; Davis “Duncan Kennedy’s *A Critique of Adjudication*: a Challenge to the ‘Business As Usual’ Approach of South African Lawyers” 2000 *SALJ* 697 responding to, amongst others, Van der Walt “The Language of Jurisprudence from Hobbes to Derrida (the Latter’s Quest for an Impossible Poem)” 1998 *AJ* 61. See in turn Van der Walt “The Quest for the Impossible, the Beginning of Politics: a Reply to Dennis Davis” 2001 *SALJ* 463. See also Woolman 2007 *SALJ* 640 and Woolman 2007 *Stell LR* 508 for a review of Van der Walt *Law and Sacrifice*.

⁷¹ *The Broken Middle* (1992).

⁷² *The Broken Middle: Mourning becomes the Law* (1996).

the notion of weaving,⁷³ as described by Adriana Cavarero,⁷⁴ as suggestive of a way to think about mediating different strands. Such a weaving could be useful for contemplating the tensions disclosed by transformative constitutionalism as critique. In the paper presented at “Transformative Constitutionalism after Ten Years”, I recalled Mbembe and Nuttall’s⁷⁵ engagement with Michel de Certeau’s walker.⁷⁶ Mbembe and Nuttall observe that De Certeau’s walker, in contrast to the “operations of walking [that] can be traced in city maps in such a way as to transcribe their paths” that merely refer to “the absence of what has passed by”, “actualizes ... possibilities” making them “exist as well as emerge.”⁷⁷ I find these two metaphors, the metaphors of weaving and walking, suggestive for transformative constitutionalism. The weaving invokes a certain rhythm, a certain action of engaging the various tensions without lifting the tension, solving the tension or reaching any new synthesis. It is a continuous weaving within a liminal space. Transformative constitutionalism as critique, like De Certeau’s walking, is a notion that could create possibilities continuously, and is not merely about tracing what has been done.

4 Concluding remarks

My aim in this short note is not to be prescriptive in terms of how we should respond to and engage with transformative constitutionalism, or what an approach to transformative constitutionalism should look like. In the paper I presented at “Transformative Constitutionalism after Ten Years”, I referred to Njabulo Ndebele’s phrase, “to have an angle of approach” instead of a detailed one “that would chew away at your options.”⁷⁸ More than that we could not and should not have, precisely because, following Klare’s initial insight, we want to open a space for dialogue and reflection. To come back to a moment of honesty in the introduction of this short piece, I understand Klare’s project as a critical one. His explanation of the project of, and not necessarily the phrase, transformative constitutionalism, and the theoretical, ideological and political underpinnings of that project, reflects critical insights, specifically the theses of American CLS, or what Klare in his paper presented at the seminar referred to as “Critical Realism”.

What an emphasis on transformative constitutionalism could do is to open questions about critique, critical theory and politics: What do we mean when we refer to theory? How is theoretical work different from doctrinal work? What makes something critical, or political? My aim here is not to provide a definition or guideline of what critique is, not only because I do not presume to know the answers, but because any such attempt will go against the grain

⁷³ Van Marle 2007 *Stell LR* 199.

⁷⁴ *In spite of Plato* (1995); *Relating Narratives: Storytelling and Selfhood* (2000).

⁷⁵ 2004 *Public Culture* 361.

⁷⁶ See De Certeau *The Practice of Everyday Life* (1984) 91-110.

⁷⁷ 98. Mbembe and Nuttall 2004 *Public Culture* 361.

⁷⁸ Ndebele *The Cry of Winnie Mandela* (2003) 82. See also Botha *Refusal, The Cry of Winnie Mandela and Post-Apartheid Constitutionalism* (2007) unpublished paper delivered at Berlin Law and Society Conference, July 2007.

of any critical project. This does not mean that anything goes as critique. Many people might respond to these questions saying that there is too much work to be done to waste time on these seemingly abstract kinds of questions. To my mind, these questions are part of the work that must be done, reflections and engagements that cannot be separated from “actual” work. Like Klare’s persuasive arguments pertaining to the law/politics divide, questions on the nature of critique and critical thought cannot be separated from critical work.

In the paper I presented at the seminar, I referred to Hannah Arendt and particularly her insistence on thought. I argued for transformative constitutionalism to be read as occupying a liminal/marginal/in-between place in space and time and connected this notion of time and space with thinking/thought. I repeat some of these arguments here. Struggling with the task of describing the notion of a “thinking space” in a metaphor, Hannah Arendt suggested the metaphor of the “timeless now.”⁷⁹ She situates thinking in a place between past and future. Thinking, central to her notion of natality or new beginning, could disclose possibilities for the future. Following Heidegger, Arendt argued that “thinking does not endow us directly with the power to act.”⁸⁰ However, thinking is crucial to the existence of an active public sphere, democratic politics and democratic citizenship. For Arendt, the seeds of totalitarianism are to be found in thoughtlessness – the banality of evil exposed by Adolf Eichmann had its roots in the inability to think.⁸¹ She observes that Eichmann was literally at a loss for words in cases where he could not rely on clichés or conventional answers.⁸² Arendt is interested in the occurrence of thoughtless behaviour in everyday life. Reflecting on her insistence on thought, Jeremy Waldron describes Arendt’s view as follows:

“The paraphernalia of thoughtlessness is legion. Clichés and jargon, stock phrases and analogies, dogmatic adherence to established bodies of theory and ideology, the petrification of ideas – these are all devices designed to relieve the mind of the burden of thought, while maintaining an impression of intellectual cultivation.”⁸³

For Arendt, we rely on clichés and stock phrases as a defence against reality, and specifically against the call to thought/thinking.

Significantly, Arendt distinguished thinking from knowledge, good manners, moral codes and even comprehension. Contemplating thought inevitably brings one to the questions: what does it entail to think and what is thinking? Arendt refers to her view on political action set out in *The Human Condition*⁸⁴ and the fact that certain philosophers connect thought with the contemplative life and thus distinguish it starkly from the active life. The contemplative life in this view is one of silence and passivity. Arendt exposes how thought, with the rise

⁷⁹ Young-Bruehl *Hannah Arendt: for Love of the World* 2 ed (2004) 450.

⁸⁰ 1971.

⁸¹ *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963).

⁸² *Arendt Between Past and Future* (1971).

⁸³ Waldron “What would Hannah say” 2007 *The New York Review of Books* 12.

⁸⁴ 1958.

of the modern era, resulted in a form of organised knowledge.⁸⁵ Arendt, well aware of the problematic involved when asking these kinds of questions, notes the response rejecting these questions as metaphysical without any practical value. However, for her, the positivist approach, regarding these questions as without meaning and value is not a reason to worry. What is worrisome is that when the world of thought comes to an end, the world of appearance (and political action) simultaneously reaches an end. She recalls Nietzsche:

“We have abolished the true world. What has remained? The apparent one perhaps? Oh no! With the true world we have also abolished the apparent one.”⁸⁶

And also Heidegger:

“The elimination of the suprasensory also eliminates the merely sensory and thereby the difference between them.”⁸⁷

According to Arendt, our frame of reference disappears when the fine balance between the world of thought and the worlds of appearance is lost with the consequence that nothing else makes sense. Thought means more than applying it as an instrument.

Transformative constitutionalism as critique is a project that entails thought/thinking. This is also true for other notions central to law and life in post-apartheid South Africa, for example the meaning of politics/ the political, equality, dignity, community. Following Arendt, if we do not deal with transformative constitutionalism and other notions on the level of thought, it will also disappear on the level of action/practice and application. It is a notion that involves re-imaginings, re-figurings and re-orientations.⁸⁸ It is a notion that urges an engagement with complexity.⁸⁹

“The problem is that we’re all blind, all dependent on preordained representations, on what we think we’ll see. Most of the time, that is how it is. We don’t experience the world. We experience our expectations of the world. That expecting is really, really complicated.”⁹⁰

SUMMARY

This article reflects on the possibility of conceiving of the notion of transformative constitutionalism as a critical project. Three arguments raised in Karl Klare’s 1998 article, “Legal Culture and Transformative Constitutionalism” 1998 *SAJHR* 146 are highlighted: the discussion of indeterminacy, or, as Klare phrases it, the tension between freedom and constraint; the description of South African legal culture as conservative and the consequences this has for legal reform and development; and the tentative reading of the South African Constitution as a “post-liberal” document. The author

⁸⁵ Arendt *Between Past and Future* 7.

⁸⁶ 11.

⁸⁷ 11.

⁸⁸ De Certau *Everyday Life* 109-110 quotes Aristotle: “[m]etaphor consists in giving the thing a name that belongs to something else” and continues to say that

“metaphor is that which can be dreamed about a place ... To practice space is thus to repeat the joyful and silent experience of childhood; it is, in a place, to be other and to move toward the other.”

⁸⁹ See Cilliers “On the Importance of a Certain Slowness. Stability, Memory and Hysteresis in Complex Systems” in Gershenson, Aerts & Edmonds (eds) *Worldviews, Science and us* (2007) 53; Van Marle “Law’s Time, Particularity and Slowness” 2003 *SAJHR* 239.

⁹⁰ Hustvedt *The Sorrows of an American* (2008) 130-131.

identifies two approaches, amongst others, to the notion of transformative constitutionalism, the one following a more instrumental/functional angle, the other a more critical one. She subscribes to the critical approach, and with reference to an article by Mbembe and Nuttall elaborates on the need for a critical approach to transformative constitutionalism, but also to law and legal theory in general. The metaphors of walking (following De Certeau and Mbembe and Nuttall) and weaving (following Cavarero) are considered as ways to think about transformative constitutionalism. Hannah Arendt, and her insistence on thinking, is evoked to underscore the necessity of a critical and thoughtful engagement with the complexities of law, politics and the social within a transformative context.