

# Memory, space and gender: Re-imagining the law

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## 1 Introduction

The overall focus of this piece is the intricate and complex relation between memory, space, gender and law within the context of what may be called post-apartheid.<sup>1</sup> Our claim is that the understanding and meaning of law in the setting conceived of as post-apartheid should be altered, transformed and given the current state of disenchantment, re-imagined.<sup>2</sup> Our view is that new understandings and meanings could disclose alternative ways for the application and functioning of law. Many perspectives have been given on the nature, meaning and working of post-apartheid law. Our concern in this article is to highlight the significance of memory, space and gender for post-apartheid law and the becoming of post-apartheid jurisprudence.

The reflection takes place against a number of broader discourses on law, jurisprudence and legal theory. We mention and briefly discuss three of these: firstly, the call of Costas, Douzinas and Adam Gearey for a return to a general jurisprudence; secondly, what Wessel le Roux has called 'the aesthetic turn in post-apartheid constitutional rights discourse'; and thirdly, Drucilla Cornell's assertion that the South African legal order underwent a 'substantive revolution'.<sup>3</sup> All three of these

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<sup>1</sup>For a consideration of the meaning of post-apartheid see Du Bois and Du Bois-Pedain *Justice and reconciliation in post-apartheid South Africa* (2009); See also Van Marle 'Reflections on post-apartheid being and becoming in the aftermath of amnesty: *Du Toit v Minister of Safety and Security*' (2010) *Constitutional Court Review* 347.

<sup>2</sup>See Antaki 'The turn to imagination in legal theory: The re-enchantment of the world' (2012) *Law and critique* 1.

<sup>3</sup>Douzinas and Gearey *Critical jurisprudence*; Le Roux 'The aesthetic turn in the post-apartheid constitutional rights discourse' (2006) *J of South African L* 1 at 101; Cornell 'Bridging the span

perspectives connect with our specific focus on the relation between memory, space and gender and provide a foundation/background for the call for re-imagining and re-enchantment as ways to challenge not only legal formalism but also the social scientification of law/legal managerialism.

We consider three questions: firstly, what is the relation between law and memory; secondly, what role do space and spatiality play within this relation; and thirdly, to what extent are these spaces marked by gender, the traces and memories of gender? In our tentative explorations we reflect on two works, one aesthetic and one literary. Our aim is not to set up a tension between these works and law but rather to expose through these works how post-apartheid law (as a specific instantiation of law) is a constant negotiating, weaving and un-weaving of the gendered spaces, memories and futures that make up life in all its multiple forms.<sup>4</sup>

In the art gallery of the Constitutional Court, among many other artworks, is *The Blue Dress*, one part of a triptych by South African artist, Judith Mason.<sup>5</sup> Mason made this dress after hearing South African poet and writer, Antjie Krog, telling the story of the torture and eventual murder of a female political activist – Phila Ndwande by security police under apartheid.<sup>6</sup> The woman, after being sexually violated and raped and left in the veldt, found scatterings of blue plastic that she used to cover herself. Mason dedicated this work of art to this woman and to every other woman who suffers because of violence. South African legal scholar Wessel le Roux has argued that *The Blue Dress* could be seen as the symbol/metaphor for the new constitutional order, that post-apartheid jurisprudence as such could be captured by Mason's work.<sup>7</sup> For him the work 'introduces the moment of alterity into our jurisprudence and thus instantiates an ethics of responsibility'.<sup>8</sup>

In conjunction with Mason's *The Blue Dress* we turn to a novel by Achmat Dangor, *Bitter Fruit* that tells the story of a family grappling with life in South Africa in the aftermath of apartheid.<sup>9</sup> Dangor tells the story of Silas, Lydia and their son Mikey and how their lives are affected by the memory of the rape of Lydia by a white security policeman under apartheid. Multiple memories reveal the existence of plural truths as well as the gendered nature of memory. The space and time of the novel (the novel starts in 1998 against the background of the workings of the South African Truth and Reconciliation Commission, and the family's home is in Berea, Johannesburg) provide an important frame for the play of memory. The novel, like the art work referred to above, discloses many possibilities from which

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toward justice: Laurie Ackerman and the ongoing architectonic of dignity jurisprudence' in Barnard-Naude, Cornell and Du Bois *Dignity, freedom and the post-apartheid legal order* (2008) 18.

<sup>4</sup>See Douzinas and Nead *Law and the image: The authority of art and the aesthetics of law* (1999).

<sup>5</sup>Refer to <http://concourt.artvault.co.za> for a virtual tour of the artworks of the Constitutional Court.

<sup>6</sup>Krog *Country of my skull* (1998).

<sup>7</sup>Le Roux 'Directory provisions, section 39(2) of the Constitution and the ontology of statutory law' (2006) 21 *SAPR/PL* 382.

<sup>8</sup>*Ibid.*

<sup>9</sup>Dangor *Bitter Fruit* (1998).

to reflect on the complexity and difficulties of South African law and how it is intertwined with memory, space and gender.

President Jacob Zuma's announcement in early 2012 of a revision of the decisions taken by the Constitutional Court can be regarded as an example of a certain engagement with law and memory. The underlying reason for this revision as stated by government is the extent to which the Constitutional Court prevents the government's programme of transformation. Closely related to this process is a statement by President Zuma on his discomfort with the notion that the outcome of a court case can have multiple judgements. In other words, in the view of the President each case should lead to only one answer. Our sense is that at least one aspect at play in this call for a revision is the role of memory, different takes on memory, engagements with memory and multiple memories in law, legal discourse and politics. The President's search for one version of the truth stands in contrast to the acceptance of multiple memories, leading to various narratives and plural truths. We do not respond explicitly to this call for revision but want to ask to what extent the President's concern is of a substantive nature – the role of the law and the Constitutional Court in the lack of social justice in present South Africa – or to what extent he wants to affirm the Constitutional Court as a mere instrument, or functionary of the state thereby denying the possibility of re-imagination.

## 2 A general jurisprudence: The aesthetic turn and the substantive revolution

Douzinis and Gearey seek a return to what they call a 'general jurisprudence'.<sup>10</sup> They lament the shift from general jurisprudence to restricted jurisprudence, a process by which jurisprudence has been preoccupied with the question 'What is law?', 'an endless interrogation of the essence or substance of law'.<sup>11</sup> For them the result of such a restricted jurisprudence was that the enquiry of jurisprudence, what is considered relevant is limited to a small number of institutions, practices and actors, with many excluded. A general jurisprudence encompasses a wider concern, examines a greater number of aspects, it is 'concerned not just with posited law, but also with what can be called the law of the law'.<sup>12</sup> General jurisprudence has a much wider concept of legality, which includes issues such as social being and social existence: '[G]eneral jurisprudence examines ways in which subjectivity is created as a site of freedom and of subjection'.<sup>13</sup> It is our contention that post-apartheid jurisprudence should situate itself within general jurisprudence. Douzinis and Gearey emphasise the double meaning of jurisprudence, which simultaneously refers to law's consciousness, the prudence,

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<sup>10</sup>Douzinis and Gearey *Critical jurisprudence* (2005) 10.

<sup>11</sup>*Ibid.*

<sup>12</sup>*Ibid.*

<sup>13</sup>*Ibid.*

wisdom and pronesis of law, and its conscience, the explorations of law's justice, the ideal law.<sup>14</sup> Post-apartheid jurisprudence, the jurisprudence in the aftermath of an authoritarian and violent past cannot only be the consciousness of law, but must also involve a deep and continuous exploration of law's conscience. Our reflections in this article on the relation between law and memory, memory and space, and gendered spaces stand in the guise of a general rather than restricted jurisprudence. The 'aesthetic turn' discussed below is an attempt by scholars to engage with exactly the notion of a general and restricted jurisprudence in the aftermath of apartheid.

Wessel le Roux, in a 2006 publication, identifies one of the most notable features of post-apartheid constitutional discourse is the extent to which legal scholars rely on aesthetic examples.<sup>15</sup> He regards this 'aesthetic turn' as one of the ways in which scholars reject attempts to continue the legal formalism of apartheid law to constitutional discourse on the basis of legal science. Those who engage with aesthetic examples in contrast to legal formalists are concerned with 'substantive constitutionalism' that involves for example a 'reconfiguration of the public sphere as a republican sphere of deliberative (or communicative) interaction'.<sup>16</sup> Le Roux notes examples of writers whose reliance on the arts is to highlight the limits of law including constitutionalism. In contrast to the redemptive aim of the former examples, these writers emphasise the paradoxical or aporetic nature of these reconfigured spaces. We doubt that it is possible to distinguish so neatly between redemption and paradox as does Le Roux. Our reliance on aesthetic examples – Mason's *The Blue Dress* and Dangor's *Bitter Fruit* – is a way to raise questions concerning law, memory, space and gender that could trouble the formalism, false optimism and managerialism of the new order. The latter also stands in contrast to the notion of a 'substantive revolution' – that South African law has undergone a substantive revolution by which the foundation of apartheid law was replaced by something new.

Drucilla Cornell, following the writings of Laurie Ackerman and his reliance on the works of Immanuel Kant and Hans Kelsen, describes the new South Africa as a *Rechtsstaat* meaning a state where the realms of external and internal freedom are tied together.<sup>17</sup> The intricate details of the Kantian description of the 'Kingdom of Ends' and the two legislations are beyond the scope of our argument and focus in this article. It is of importance, however, to underscore the idea of a substantive revolution, namely, that the foundational order of apartheid was replaced by the values of freedom and dignity. This means that the apartheid order and the grounding of this order have been replaced (by way of a substantive revolution) by

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<sup>14</sup>*Id* 13.

<sup>15</sup>Le Roux 'The aesthetic turn in the post-apartheid constitutional rights discourse' (2006) *J of South African L* 101.

<sup>16</sup>*Id* 103.

<sup>17</sup>Cornell (n 3) 21.

a *Rechtsstaat*, based on the *Grundnorm* of freedom and dignity. One important point is that the 'Kingdom of Ends' in Kant must remain as an 'aspirational ideal', 'an ethical realm that has never existed and will certainly never exist in some kind of institutional form'.<sup>18</sup> We accept this point and in conjunction with the arguments on a general jurisprudence and the aesthetic turn mentioned above it forms an important background for the questions that we raise and tentatively explore below.

### 3 The relation between law and memory

The notion of memory is inscribed in the constitutional text itself. The epilogue of the interim Constitution of 1993 under the heading 'National unity and reconciliation' starts as follows:

The constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful-existence and development of opportunities for all South Africans, irrespective of colour, race, class, belief or sex.<sup>19</sup>

The preamble of the 1996 final Constitution similarly states the past and the aim to redress:

We, the people of South Africa, recognise the injustices of our past, honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country and believe that South Africa belongs to all who live in it, united in our diversity.<sup>20</sup>

Many scholars have engaged with these themes. Karl Klare, for example, in putting forward a project he describes as 'transformative constitutionalism', views the South African constitution as post-liberal, and one of the reasons for viewing it as post-liberal is the 'historical self-consciousness' of the Constitution.<sup>21</sup>

South African philosopher, Johan Snyman, draws on examples from post-war Germany to make a distinction between two ways of remembering, one monumental, the other memorial.<sup>22</sup> The former celebrates victory in grand fashion, the latter memorialises the losses and victims of war/struggle. Inspired by Snyman, South African legal scholar Lourens du Plessis, applied this distinction to the South African Constitution and described the South African Constitution by drawing on both monumental and memorial aspects.<sup>23</sup> The excerpts from both the 1994 and 1996 Constitutions above illustrate that the South African constitutional endeavour is, as Du Plessis remarked, 'hardly modest', and claims among other

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<sup>18</sup> *Id* 20.

<sup>19</sup> Constitution of the Republic of South Africa, 200 of 1993.

<sup>20</sup> Constitution of the Republic of South Africa, 1996.

<sup>21</sup> Klare 'Legal culture and transformative constitutionalism' (1998) *SAJHR* 146.

<sup>22</sup> Snyman 'Interpretation and the politics of memory' (1998) *Acta Juridica* 312.

<sup>23</sup> Du Plessis 'The South African Constitution as memory and promise' (2000) *Stell LR* 385.

things the achievement of a 'peaceful transition' and a 'non-racial democracy'.<sup>24</sup> Du Plessis describes the entrenchment of the values of dignity, equality and freedom as 'monumental flair'.<sup>25</sup> The writings by Snyman and Du Plessis provided the opportunity for other legal scholars to take these initial reflections further, to argue for example for memorial constitutionalism/counter-monumental constitutionalism.<sup>26</sup> At the heart of these reflections is memory, how we remember our past, engage with our past and live with our past.

One way to engage with memory is to connect it with the difference between abstract and material recollection/memory. Martin Hall in an engagement with the life of Kabbo, a Khoi man who was captured by philologist William Bleek, illustrates their different takes on memory.<sup>27</sup> Through Hall's reading, Bleek is concerned with language, with monument, with that which can be captured in order to signify timelessness. Kabbo on the other hand cares for his material surroundings, and accepts that things mean different things to different people. The latter approach could be connected with an approach of slowness, of slow reflection through which attention could be given to particularities and multiple and opposing realities.<sup>28</sup> Another way to think about this is to phrase it as reflective/tentative thoroughness that captures what lies at the heart of memorial constitutionalism.

An interesting take on the notion of memorial/counter-monumental constitutionalism was developed with reference to the site and building of the Constitutional Court. The Constitutional Court was built on the site of the old Fort where, through the years, various prisoners including political opponents of the apartheid regime were held. The site itself reveals a rich history that encapsulates multiple memories. Le Roux reflects on the 'architectural expression' of the notion of transformative constitutionalism.<sup>29</sup> Adding to the metaphors of bridge and clearing, he also suggests the notion of a 'labyrinth'. He relies on the story by Franz Kafka, *Before the Law*, as read by Jacques Derrida.<sup>30</sup> In the fable a man from the country arrives at a building where the court is located. The building has many gates and each visitor has a special gate just for him/her to enter. However,

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> Van Marle 'Lives of action, thinking and revolt: A feminist call for politics and becoming in post-apartheid South Africa' (2004) 19/3 *SAPR/PL* 605-628; Le Roux 'War memorials, the architecture of the Constitutional Court building and counter-monumental constitutionalism' in Le Roux and Van Marle *Law, memory and legacy of apartheid* (2007) 84.

<sup>27</sup> Hall 'Earth and stone: Archaeology as memory' in Nuttal and Coetzee *The making of memory in South Africa* (1998) 193.

<sup>28</sup> Van Marle 'Law's time, particularity and slowness' (2003) 19/2 *SAJHR* 239-255; 'The spectacle of post-apartheid constitutionalism' (2007) 16/2 *Griffiths LR* 411-429.

<sup>29</sup> Le Roux 'Bridges, clearings and labyrinths: The architectural framing of post-apartheid constitutionalism' in Le Roux and Van Marle *Post-apartheid fragments: Law, politica and critique* (2007) 59.

<sup>30</sup> *Id* 93. See also Derrida 'Before the law' in Attridge (ed) *Jacques Derrida: Acts of literature* (1992) 181-220.

these gates are guarded by a security officer, a gatekeeper who tells the man that he cannot enter yet, he should wait. When the man peeps through the gate he sees inside the building a network of more gates, a labyrinthine network of gates and hallways, each guarded by a gatekeeper. The man waits his whole life and at the end of his life when he passes away his gate is shut. Le Roux recalls Derrida's reading and his description of the 'quasi-transcendental conditions of law: the condition of the normative possibility of law is the impossibility of ever gaining final access to the norms of the law'.<sup>31</sup> Respect for the law means that it can never be under total human control, law's possibility hangs on the impossibility of grasping its origin and its place: 'For law to be law, law must become fictional or mystical'.<sup>32</sup> However, this does not mean that law is disembodied or empty. It is a place of 'constant dislocation. The discourse of the law does not say "no", but says indefinitely "not yet"'.<sup>33</sup> Turning to the architecture of the court, Le Roux argues that the foyer of the building does not only symbolise a clearing in a forest ready for a post-apartheid community to gather in (the logo of the Constitutional Court is justice under a tree). It is also a rehabilitated prison site that carries the traces/the memories of the 'trauma and exclusion' of the past. In the foyer of the court amongst the pillars of the court symbolising the trees we also find the original staircase of the awaiting-trial prison. For Le Roux this staircase could serve as a reminder of a time that should never be repeated. However, there is another meaning – one which 'cuts across boundaries of time and place' and leaves one with a sense of ambivalence, problematising any 'fixed boundaries between past and present, inside and outside, up and down, forward and backward, margin and centre, inclusion and exclusion, law and power'.<sup>34</sup>

The Constitutional Court as symbol of a constitutional order and a constitutional community is also a space of memory, of how we remember and imagine pasts and futures. *The Blue Dress* hanging in the art gallery of the court recalls the past and present violence – psychic, traumatic and material – against women, but beyond women against all vulnerable people who live precarious lives on the margins and in the centres of society. *Bitter Fruit*, written within the context of a new South Africa and particularly the working of the Truth and Reconciliation Commission, in which one character works as a civil servant in the Department of Justice, and the other character is a victim of a political rape who refuses to testify at the TRC, similarly underscores law's memory/memories as well as the laws of memory. In the rest of the article we reflect on the relation between law, memory and space and the gendered traces of these relations/spaces.

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<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Id* 96.

## 4 Law's spatial memory

Constitutional Hill is a palimpsest. A palimpsest is a surface on which the original writing has been erased to make way for new writing, but upon which traces of the old writing remain visible.<sup>35</sup>

This is how the proposal of the media firm Ochre Communication explained the memorialisation of various layers of history on the site of the Constitutional Court.<sup>36</sup> In this sense the new space is always haunted by the old and carries with it and within it the sedimentary narratives of the past. The designers explicitly inscribed the 'exclusion and trauma' of the past in the site of the Constitutional Court in order to draw the viewer's attention to history's footprints in the site itself, but also to be a symbol to remind us of how legal writing remains visible on other South African spaces, even where (perhaps particularly where) attention is not consciously drawn to it.

South Africa's history is marked by spatial regulation, segregation, allocation and in particular the organisation of spaces through law. Judge Albie Sachs refers to this as a 'cluster of statutes ... that gave a legal/administrative imprimatur to usurpation and forced removal'. He goes on to state that '[f]or all black people, and for Africans in particular, dispossession was nine-tenths of the law'.<sup>37</sup> The geographical and built-environment stories of South Africa are stories of social control through segregation along racial and linguistic lines. In the *PE Municipality* case Justice Sachs specifically refers to the Prevention of Illegal Squatting Act passed in 1951.<sup>38</sup> By referring to the cluster of statutes he invokes the ghosts of a carefully crafted web of space-regulating legislation. If we were to give content to Sachs's cluster, we can start with the Natives Land Act of 1913. The year 2013 will mark the commemoration of the centenary of this Act, one of the foundational pieces of legislation in the project of spatial division. Before 1913, the 1905 General Pass Regulations Bill and the Asiatic Registration Act of 1906 inaugurated the notorious pass system and set the tone for social control. The journey from 1913 to the National Party's victory in 1948 includes the following legislative landmarks: the Natives in Urban Areas Bill of 1918 that introduced forced removals to 'locations', the 1923 Urban Areas Act that brought about residential segregation and the Native Administration Act of 1927 that

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<sup>35</sup> Johannesburg Development Agency *Number four: The making of Constitutional Hill* (2006) 116.

<sup>36</sup> Ochre Communications was part of the consortium that submitted the winning design for Constitutional Hill.

<sup>37</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 9.

<sup>38</sup> 'In the pre-democratic era, the response of the law to a situation like the present would have been simple and drastic. In terms of the Prevention of Illegal Squatting Act 52 of 1951 (PISA), the only question for decision would have been whether the occupation of the land was unlawful. Expulsion from land of people referred to as squatters was, accordingly, accomplished through the criminal and not the civil courts, and as a matter of *public rather than of private law*'. *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 8.

complemented the Native Lands Act. The Asiatic Land Tenure Bill of 1946 banned any land sales to Indians. This cluster represents more than just names and dates. If we view the post-apartheid society as a palimpsest, our spatial memory has many layers of foundations and these acts all contributed to the encoding of a particular socio-spatial memory. The National Party's success in the whites-only 1948 election was the beginning of a deepened process of racial segregation and spatial determination.<sup>39</sup> At the core of this intensified project were the Population Registration Act and the Group Areas Act, both passed in 1950. This era also saw the passing of the 1953 Separate Amenities Act, which changed public spaces such as beaches and parks into exclusive spaces for 'whites only'.

Shane Graham explains that the 'National Party, and the British Union administration before it, refused to accept the ephemerality of collective or national memory'.<sup>40</sup> He argues that this disregard for the fleetingness of memory brought about the tireless attempts of these bodies to 'impose their own narratives onto the landscape and people around them'.<sup>41</sup> Based on this complex intertwining of law and space, our call for re-imagining the law by re-membering resonates with what Graham calls 'mapping loss'. He recalls the testimony at the TRC of Duma Kumalo, who had been wrongfully convicted as one of the Sharpeville Six.<sup>42</sup> Kumalo was sentenced to death, but after four years of awaiting his end, his execution was stayed only hours before the scheduled time. Through this story Graham illustrates how the TRC exhibited not only a collective sense of mourning and loss, but also a 'sense of disorientation amid rapid change in the physical and social landscape'.<sup>43</sup>

The notion of mapping loss entails the literal and figurative re-mapping of place, space and memory. It is a process of taking ownership of conceptual landscapes, of excavating and reclaiming the memory of social spaces. The importance and power of mapping is a familiar theme in post-colonial discourse, but is also valuable to contemplate the constant negotiating, weaving and unweaving of the spaces and memories in post-apartheid law. The apocryphal story of a small sovereign state admitted as a member of the United Nations in the 1970s illustrates the hegemonic effect of mapping.<sup>44</sup> Within the UN the formal position is that, regardless of the influence of a state, each sovereign state has

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<sup>39</sup> For a broader discussion of the legislation passed by the National Party, see Graham *South African literature after the Truth Commission* (2009) 4-8.

<sup>40</sup> *Id* 5.

<sup>41</sup> *Ibid*.

<sup>42</sup> 'There are a lot of things that I may tell you, but I do not know where to start. I think I would stop here'. Kumalo ends his testimony with this circular statement. This end was indeed a beginning as subsequent to the TRC hearings, Kumalo published his story by coauthoring and starring in two plays and also describing his life while incarcerated for a documentary interview. See Graham (n 39) 1.

<sup>43</sup> *Ibid*.

<sup>44</sup> For one version of this story see Mansell, Meteyard and Thompson *A critical introduction to law* (2004) 1.

one vote. The reality is that there is a definite hierarchy based on the affluence and influence of states. According to the story the newly elected representative of the small sovereign state, oblivious of the fact that the equality of the states was only supposed to be formal, spoke at length on every topic, which irritated the larger and more powerful states. A representative of one of the more important states then took it upon himself to educate the new delegate and explained his position to him by showing him a map and pointing out the large areas covered by states such as the US, Canada, Ghana and even New Zealand, upon which the new delegate's response was the obvious question: 'Who drew that map?'. Mapping loss as a process of re-mapping, and re-imagining is then a challenge to and refusal of these hegemonic forces that drew the maps and legislated the spaces in the first place.

Many of the policies in the cluster of land legislation have been repealed, abolished or amended. Remapping has started to take place in a literal sense – notably the new provinces, changes to streetnames, names of towns and even calls for redrawing the 'new' provincial borders. In 1993 the Commission of Demarcation of Regions used the boundaries of the nine planning regions established by the Development Bank (1982-1988) to increase the number of provinces from 4 to 9. One month was allowed for public input and three months for planning. There are still disputed areas between the provinces. A similar situation is playing out with regard to the contentious Traditional Courts Bill. The drafting of the Bill commenced in 2008 as an attempt to address the inadequacies of the out-dated Black Administration Act of 1927. One line of critique against the bill is the close connection with the Traditional Leadership and Governance Framework Act of 2003, which shares close ties with the 1951 Bantu Authorities Act. Because of this, the jurisdictional boundaries of the courts envisioned in the Traditional Courts Bill are the same as those of the Traditional Leadership and Governance Framework Act and as a result a map drawn of the areas of the traditional councils is similar to a 1986 map of the homelands.<sup>45</sup> In this sense the lines that were drawn during apartheid still haunt a post-apartheid South Africa in a very concrete manner and, as Graham states: 'the racial legacy of apartheid is perpetuated by the remains of its built environments'.<sup>46</sup>

Dangor's novel grapples with this spatial continuation of the past in the face of attempted amnesia. Lydia and Silas's Berea house, 'a survivor of Berea's grander days', is juxtaposed with the township house of Lydia's sister, with 'walls built of ash brick ... [that] breathe the wrong way, [that] suck air out of the house'.<sup>47</sup> Both these houses are described as palimpsests. Lydia's house has 'high ceilings made of pressed steel that a succession of less ostentatious, or simply

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<sup>45</sup>Weeks 'Traditional Courts Bill: Process, substance and implications' presentation delivered at a Human Sciences Research Council panel discussion on 2012-05-08.

<sup>46</sup>Graham (n 39) 4.

<sup>47</sup>Dangor (n 9) 70 and 75.

much poorer, inhabitants had painted over in plain white until elaborate floral patterns faded, becoming gloomy reminders of lives left behind' and Gloria ponders 'the history of their sojourn here, preserved within these walls. An archive you browsed through with your nose'.<sup>48</sup> This blurring between Township and Suburb can be detected in Mikey's response to where he lives: 'I live in Berea. The township in the suburbs'.<sup>49</sup>

In the novel, home becomes the symbol of change and of transformation. Silas expresses this as he drives back from the hospital, having just refused medical treatment after a nervous fit. As he drives through the morning traffic he thinks of how things have changed and reflects that 'the lanes were clogged with people like him, black and white, travelling in contradictory directions, just like a normal city anywhere in the world. But ten years ago, he would have been one of the few black people driving on his own in a sedan like this, going home to a place in the suburbs'.<sup>50</sup> Kate, Silas's white, lesbian, MK colleague is sceptical of this use of personal space as a symbol of transformation. Searching for the bedroom in Silas's house, she finds four doors and hopes that the guest room 'had not yet been turned into a study ... So many of her black friends sacrificed this "extra" space the moment they moved out of the township, in order to create small havens of intellectual privacy. The ultimate symbol of their new-found freedom ... The anti-utilitarian instinct of people deprived of Lebensraum for so long'.<sup>51</sup>

Lydia and Silas remember differently and also express themselves differently in their spaces. Mikey explains her favourite space in the house as 'her "bureau", as she calls it, in the alcove between her bedroom and the door to the balcony, a haven created by an architectural miscalculation' and Julian, Silas's friend, explains to Kate where he found the whisky: 'In Silas's study, where else do you think you'll find whisky but in the man's den'.<sup>52</sup> Their spaces are connected to their memory and both their remembering and spatial engagement are gendered.

## 5 Gendered spaces of the legal memory

Historical memory. It is a term that seems illogical and contradictory to Mikey; after all, history is memory. Yet, it has an air of inevitability, solemn and compelling ... It explains everything, the violence periodically sweeping the country, the crime rate, even the strange 'upsurge' of brutality against women. It is as if history has a remembering process of its own, one that gives life to its imaginary monsters.<sup>53</sup>

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<sup>48</sup> *Ibid.*

<sup>49</sup> *Id* 28.

<sup>50</sup> *Id* 88.

<sup>51</sup> *Id* 91.

<sup>52</sup> *Id* 29 and 62.

<sup>53</sup> *Id* 32.

Periods in history that are marked by violence (not necessarily physical or emotional, but violence that affected the consciousness, the mind and the imagination) and oppression give birth to spaces. These spaces tend to capture certain groups of people like birds in a cage and even when the cage door is opened, the birds will not take flight to their new found freedom. Antaki refers to the concept of 're-imagination' and, following Gordon, describes it as the first step one can take to overcome the constraints of 'reified social meaning'.<sup>54</sup>

When one revisits memories of the past, one can trace the law in every memory – it is legislation that enforces dislocation, that (re)creates the sons and fathers that continually enforce a patriarchal system, and that creates the spaces for women to create a life in. Silence was one characteristic of these spaces or spheres that constrained women. During the apartheid era women did not speak of the atrocities that were done to them and when they did, they were silenced by the state and marked as liars or unsupported by family as their confessions brought shame to the family name. The silence of women and daughters also influenced the voices of all those oppressed around them.

In *Bitter Fruit*, Kate, one of Silas's comrades has a brief sexual affair with his son and when she realises that his parents might find out about the affair she states:

We'll learn, all of us, to live in spheres of silence, not saying the unsayable, denying everyone the pleasure of seeing us suffer the divine virtue of the brave new country: truth. We have to learn to become ordinary, learn how to lie to ourselves, and to others, if it means keeping the peace, avoiding discord and strife, like ordinary people everywhere in the world.<sup>55</sup>

In spite of the pervasive silence of women's spaces, there is also a silence amongst women – the tendency to not share their experiences with other women. Drucilla Cornell<sup>56</sup> refers to the 'privatisation of the ways of the heart'<sup>57</sup> – a process whereby women are determined not to become the 1950s spinster. They would rather break their friendship ties, than give inadequate attention to their husbands and children.<sup>58</sup> Cornell urges women to associate themselves with affinity groups – a group that will ensure personal development and support. Law has created a path, a memory in the minds of women to be silenced and withdraw themselves from the outspoken public to a space where their silence belongs.

Experiences that are unique to being a woman such as rape can only be truly appreciated and shared among other women. One should not limit the idea of these affinity groups to solidarity groups – a community that one is physically associated with – but include the idea of imagined affinity groups. When one thinks of *The Blue Dress*, a community exists in one's mind of a group of women that suffered sexual

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<sup>54</sup>See Antaki (n 2) 11.

<sup>55</sup>See Dangor (n 9) 123.

<sup>56</sup>Cornell 'The solace of resonance' (2005) 20/2 *Hypatia* 215-222.

<sup>57</sup>*Id* 219.

<sup>58</sup>*Id* 216.

violence in the apartheid era. One victim of these sexual atrocities is part of the universal suffering, all united by *The Blue Dress*. In *Bitter Fruit*, Lydia criticises the fact that a man, like Archbishop Tutu will never truly appreciate what it is liked to be raped.<sup>59</sup> Albie Sachs commented that the original artwork of *The Blue Dress* was too harsh to be exhibited in the Constitutional Court – but it was merely a portrayal of the reality when one reads the history behind the art.<sup>60</sup>

If comradeship does occur amongst women and experiences are shared (with specific reference to sexual trauma and rape) a unique process of healing occurs, through imagination and re-enchantment of the memory that was created. Coming back to the image of *The Blue Dress*, we read that the artist inscribed on the dress that the victim's silence (and the rubbish that she had to cover herself up with) were her weapons.<sup>61</sup> In *Bitter Fruit*, where Lydia's son, Mikey reads about the night that she was raped in her diary, she states that she will recover from the physical act of rape – as women have the capacity to heal themselves.<sup>62</sup> Both our rape victims took their silent spaces and through imagination and re-enchantment of the atrocious space that apartheid's law created for them, they were able to redefine themselves.

Antaki states that we need to use '... imagination to explore new modes of human possibility and styles of will and to oppose the necessity of what exists on behalf of something radically better that is worth fighting for, and to which humanity is fully entitled. In re-inventing the future, we must re-invent ourselves'.<sup>63</sup>

Law and its history created spaces that have been gendered – women have been placed in a silenced sphere and even when freedom has been granted, the bird is still hesitant to fly. Women have made these silent spaces their own and to force them out of it would simply be an aggressive act toward their 'imaginary domain'.<sup>64</sup> Therefore we need to encourage them to re-think, re-imagine and re-enchant these silent spaces. By using affinity groups, the silent spaces receive an audience, a group that will support and encourage the sharing of one's experience. What the patriarchal world would view as a space filled with silenced women, would actually be an act of women weaving new memories in a history where old memories still exist. Like Penelope, these women would weave new memories in new spaces, re-inventing an ideology that through imagination can become their reality.<sup>65</sup> Antaki states that 'the turn to imagination is not reducible to results, it is a re-turn to our humanity, perhaps even to our belonging to an enchanted world'.<sup>66</sup>

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<sup>59</sup>See Dangor (n 9) 18.

<sup>60</sup>Le Roux (n 26).

<sup>61</sup>*Id* 84.

<sup>62</sup>See Dangor (n 8) 114.

<sup>63</sup>See Antaki (n 2) 12.

<sup>64</sup>Cornell *The imaginary domain: Abortion, pornography and sexual harassment* (1995) 8.

<sup>65</sup>See Van Marle 'Laughter, refusal, friendship: Thoughts on a "jurisprudence of generosity"' (2007) 18/1 *Stell LR* 194.

<sup>66</sup>See Antaki (n 2) at 13.

Law, being linked to public spaces, left women with a memory of inhumaneness – in their silenced sphere, with the law that would not concern itself with the ‘trivial’ matters. We can and should not forget history, but women should start to imagine and re-live a new memory of the possibility that the Constitution can give them – one of equal opportunity, where dignity and safety is guaranteed. Mureinik suggested the Constitution of South Africa as the bridge to new memories and new spaces where ideologies of post-apartheid jurisprudence can be imagined into a reality.<sup>67</sup> However, the bridge is a paradoxical space with multiple meanings – Langa refers to it being the space ‘... between an unstable past and an uncertain future’.<sup>68</sup> Andre van der Walt, using the metaphor of the bridge, contends that this bridge lies between our past and future with no preference for either side.<sup>69</sup> He argues that the value of the bridge lies in moving to and fro on it, constantly going in both directions and moving between past and future.<sup>70</sup> In this vein Michael Rothberg advocates for ‘multidirectional memory’.<sup>71</sup> His work is mainly on the Holocaust and the links between racism and anti-Semitism.

A significant problem with the ‘competitive memory’ model is that it assumes that both the arena of competition, the public sphere, and the subjects of the competition are given in advance. The model of multidirectional memory, on the other hand, supposes that the overlap and interference of memories help constitute the public sphere as well as the various individual and collective subjects that articulate themselves in it.<sup>72</sup>

He argues for moving beyond ‘competitive memory’ and suggests a ‘non-zero sum logic in which memories emerge in the interplay between different pasts and a heterogenous present’.<sup>73</sup> This can be linked with Hall’s engagement with Bleek and Kabbo. Although the first person emphasises that which is monumental and timeless, and the second one relates to things that are associated with slowness and memorial, their overlap is their preservation of that which they consider important. Bleek preserves a language which is linked to an identity, a culture, a manner of expression and a memory and feeling that is created with words. Kabbo, on the other hand preserves those things around him. Iris Marion Young refers to the caring of one’s things as preservation.<sup>74</sup> Preservation is necessary

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<sup>67</sup>Mureinik ‘A bridge to where? Introducing the Interim Bill of Rights’ (1994) 3 *SAJHR*.

<sup>68</sup>Langa ‘Transformative constitutionalism’ (2006) 3 *Stell LR* 350.

<sup>69</sup>Van der Walt ‘Dancing with codes: Protecting, developing and deconstructing property rights in a constitutional state’ (2001) *SALJ* 258 at 296.

<sup>70</sup>*Ibid.*

<sup>71</sup>See Rothberg *Multidirectional memory* (2009) and, amongst other articles, Rothberg ‘Between Auschwitz and Algeria: Multidirectional memory and the counterpublic witness’ (2006) *Critical Inquiry* 158 and Rothberg ‘Against zero-sum logic: A response to Walter Benn Michaels’ (2006) *American Literary History* 303.

<sup>72</sup>See Rothberg (2006) 162.

<sup>73</sup>*Ibid.*

<sup>74</sup>Young *Intersecting voices* (1997).

as one preserves the identity that is associated with oneself.<sup>75</sup> Those objects that Kabbo surrounds himself with have a memory that he preserves as he cares for it. It might contain a different memory for someone else, but as long as he cares for it, an identity and a culture remains.

The multidirectional memory also comes into play where one asks the question if we are not undermining the sexual memory of men by stating that rape is an experience unique to women. The term as rape as provided for by the Sexual Offences Act<sup>76</sup> has changed to a term that is both gender and anatomically neutral. Statistically the amount of women that are raped (reported and especially, unreported) is higher than that of men. This is as a result of the memory that history created about the act of rape. Louise du Toit refers to a vacuum that has been created by the Truth and Reconciliation Commission (TRC) when they failed to create a platform where women could publicly testify about their rape experiences.<sup>77</sup> Rape was used as a weapon in our South African struggle to demotivate soldiers or insure their position in the struggle. Due to the fact that women were never allowed to confront what happened to them, has lead to the idea or the memory that the rape of women was an act kept in the shadows. We are, however, not in a competitive race as to whose memory of rape is most painful. Rape is not a fight that anybody needs to win, except for the battle to prevent it in totality. Women and men's memory of rape is a heterogeneous one and should not be reduced to mere statistics to determine who is the greater victim. Instead, we need to turn to the potential of re-imagining the law. There must be a radical shift in which we stop being reduced to mere percentages on a sheet and claim back our humanity to create a memory that ensures care and support. Antaki states that we when we turn towards imagination it 'is not reducible to results, it is a re-turn to our humanity, perhaps even to our belonging in the enchanted world'.<sup>78</sup>

At the end of the novel Lydia undertakes a journey through the Karoo to Cape Town – this journey is Lydia's bridge to her transformation. There are many dangers on the road and she is warned about them by the petrol attendant, but a burden is lifted from her as she drives.<sup>79</sup> There are various obstacles in the road to transforming an imagined space, the bridge is not an easy road to follow. There is the possibility of turning back (as Lydia contemplated for a second), but then one would never know how the reality of the imagined space would be. As Antaki states: 'Ideology – and imagination – can no longer be separated from "reality"'.<sup>80</sup>

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<sup>75</sup>*Id* 152.

<sup>76</sup>Sexual Offences and Related Matters Amendment Act 32 of 2007.

<sup>77</sup>'Feminism and the ethics of reconciliation' in Veitch (ed) *Law and the politics of reconciliation* (2007) 192.

<sup>78</sup>See Antaki (n 2) 13.

<sup>79</sup>See Dangor (n 8) 251.

<sup>80</sup>See Antaki (n 2) 11.

## 6 Concluding remarks

Against the background of the call for a general jurisprudence, in the guise of a general aesthetic turn to post-apartheid jurisprudence and in support of the notion of a substantive revolution we reflected on the relationship between law and memory and the importance of this relationship in the spaces created for law-making and in spaces created by law. Lastly we investigated the extent to which there are traces and memories of gender in these spaces.

Our submission is that an exploration of the intricate links between law, memory, space and gender can open up the possibility of re-imagining law and the spaces in which law functions, that law creates, and that create law. Echoing Drucilla Cornell's term of 'recollective imagination' we regard the process of re-imagination itself as a form of remembering.<sup>81</sup> We engaged with two aesthetic examples created in a post-apartheid context, an artwork made by Judith Mason and a novel by Achmat Dangor, that both engage the theme of memory.

We are concerned about the continuance and the re-embrace of formalism in the guise of managerialism as this stands in tension with our support of remembrance and imagination. In Dangor's novel, Mikey's warning against managerialism must be heeded:

Managers run bakeries. And all they can do is bake as much bread as possible and hope that people will buy it. Managers dull the process. They cannot make miracles, because they refuse to believe in them.<sup>82</sup>

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<sup>81</sup>Cornell *The philosophy of the limit* (1992).

<sup>82</sup>Dangor (n 9) at 196.