



Reflections on legacy, complicity, and legal education

Karin van Marle

Prof. K van Marle, Dept of Jurisprudence, Faculty of Law, University of Pretoria, Private Bag X20, Hatfield, Pretoria 0002; E-mail: karin.vanmarle@up.ac.za

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I reflect on the relation between complicity and the legacy of South African jurisprudence and law, and tentatively consider continuances between the civil law tradition (Roman-Dutch common law) as well as present human rights and constitutional law. I also raise notions on reconfiliation, frailty and complex writing as possible alternatives. My aim is to think with students and colleagues and to re-imagine a legal culture and legal education that could be different from the present one.

Mark Sanders in a work titled *Complicities: The intellectual and apartheid* (2002) notes the following:

After apartheid, the question of complicity is unavoidable – not simply because it is necessary to know whose resources gave apartheid life, nourished and defended it, but also because apartheid, by its very nature, occasions a questioning of and thinking about complicity itself. As a variegated set of policies and practices, apartheid may have been and still be, exemplary for provoking a response from the intellectual that could not simply be of opposition. This idea is twofold. If apartheid was a system of enforced social separation, its proponents were never able to realize the essential apartness they proclaimed as their brainchild's archē and télos, its originary law and ultimate end. When, in diverse ways, its opponents affirmed an essential human joinedness against apartheid, they thus proclaimed not only the evil of this thinking but also its untruth. At the same time, like its dissenting adherents, opponents found themselves

implicated willy-nilly in its thinking and practices and shaped their responsibility accordingly (Sanders 2002: 1).

My aim in this contribution is to reflect tentatively on the relation between complicity and the legacy of South African jurisprudence and law; how all participants in legal scholarship, law and legal culture could be regarded as complicit to the past (apartheid and legal scholarship, law and legal culture under apartheid), present and future, and how this could be reflected on in legal education.¹ Unless there is substantive, or even radical or revolutionary change or transformation this 'this' will continue. 'This' designates the way in which legal scholarship and legal education, law and legal culture affirm, confirm and re-affirm the *status quo*, keep things in their place, continue 'business as usual'. Commentators on the South African transformation have described it as a 'substantive revolution', designating that following Hans Kelsen a change in the fundamental principle (*Grundnorm*) underlying the South African legal system has changed (Ackerman 2004: 633, Cornell 2008: 18). If the new *Grundnorm* is the Constitution and the value framework that accompanies it, one could ask: What was the previous one?

However, one should also not be too quick to accept the new value framework as one that reflects a radical or revolutionary break. What and more pertinently whose framework, perspectives and voices were again excluded, suppressed and ignored with a shift from parliamentary sovereignty to constitutional supremacy, from authoritarianism to seeming transparency, racism, sexism and other discrimination to seeming equality (Ramosé 2012: 20, Mureinik 1994: 31, Klare 1998: 146).

Engagements with the notion of post-apartheid have exposed the tension and paradox involved in even evoking the prefix 'post' in front of apartheid, given the continuance of apartheid on so many levels of society, the economy and, of course, law and jurisprudence (Du Bois 2009, Van Marle 2010: 347). The metaphor

1 I would like to thank a number of people whose collegiality, friendship, support, academic rigour and commitment to the life of the mind and the idea of the university in conjunction with a concern for political and social justice make it possible to continue in a context of ever-increasing instrumentality and hostility. All of you have contributed to the ideas developed in this article. In the Dept of Jurisprudence: Isolde de Villiers, Lorette Arendse, Tshupo Madlingozi, Joel Modiri, Alfred Moraka, Emile Zitske. Other UP colleagues: Ulrike Kistner, Dirk Human and Stephan de Beer. Colleagues who have been supportive for many years: Andre van der Walt, Johan van der Walt, Wessel le Roux, Henk Botha, Louise du Toit, Stewart Motha and Danie Brand. Also Drucilla Cornell, Costas Douzinas and other colleagues at Birkbeck. Former students and now colleagues Jaco-Barnard-Naudé, Yvonne Jooste, Jan-Harm de Villiers, Lizelle le Roux, Nico Buitendag. All mistakes are my own.

of the palimpsest was used, among others, by the architects working on the construction of Constitutional Hill and the Constitutional Court:

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 (Johannesburg Development Agency *Number Four: The Making of Constitutional Hill* 2006: 116).

This idea has also been followed by legal scholars reflecting on the state of 'post-apartheid' law and jurisprudence. What does this metaphor mean for rethinking jurisprudence in our current context? Like the above quote states, a palimpsest carries the traces of past writings on it – even though they have been erased, they have not been erased totally. Linking this notion with the idea of an archive and even the Constitution's reference to the past, what Klare calls its "historical self-consciousness", underscores the need for everyone to remember, to recall in every act of law-making (whether by parliament or the courts), legal interpretation (for example, by legal scholars and legal practice) and legal writing (all of the above) the past, the history of injustice, exclusion and violence. I have previously argued for an understanding of the Constitution as archive, not archive in a traditional sense, but a re-configured archive, as a way to recall and underscore the past in every move as it were (Hamilton 2002, Van Marle 2007). However, I concede that the notion of post-apartheid jurisprudence as palimpsest may carry a preserving meaning, a concession to the continuance of the past into the present and future (Ramose 2012: 20).

I want to critically reflect on a specific legacy in South African law, namely the legacy of Roman-Dutch law (the civil-law tradition), its role during apartheid, and its continued role in post-apartheid law and jurisprudence. One could ask what is Roman-Dutch law's complicity with the racism, patriarchy and economic exploitation integral to apartheid? As I expand on below, "an overriding concern for external orderly arrangement and fit [rather than] concerns for justice" was and still is a central feature of the civil law tradition in South Africa (Van der Merwe 1989: 59). But what is the relation between such formalism and conservative politics, in the past and in the present? And what is the space for critique? At the same time, as alluded to earlier, we should enquire after the promise of a constitutional order with an entrenched Bill of Rights. In his article (1998) and later with Davis (2010), Klare suggested a project of transformative constitutionalism as a response to the legacy of South African private law (based on Roman Dutch law) and as a way to develop the private law doctrine in light of the Constitution in such a way as to address issues of substantive and social justice.

I start off with a brief reflection on the main approach to law under apartheid and the limited examples of critical responses to this at the time. Next, I draw on work done by Van der Walt putting civil law ‘on trial’ and his suggestions on how to develop the civil law in light of the Constitution, making its substantive norms, principles and values central to any and every application of law. However, given what could be regarded as a shared history of the civil law and human rights/constitutional law tradition, we should also ask critical questions about the embrace of constitutionalism and human rights in a post-apartheid context. Space does not allow me to develop this argument fully. It will remain tentative and suggestive and will tie in with other perspectives on the limits of the South African Constitution and dominant understandings of human rights raised in this special edition.² I would like to connect my caution to an optimistic embrace of the Constitution with a notion of worldliness, world-making *vis-à-vis* social engineering and tentatively link civil law and the human rights/constitutional law tradition with the latter.³ Concerning worldliness, the question on how to be in this world, I consider Mogobe Ramose’s view on ‘reconciliation’ and his critique of an order based on a falsely assumed reconciliation. I end by raising questions about legal education – how should we address the issue of complicity, the link between complicity and legacy; how should we engage memory, the past and legal history in the present? How do we start to think with our students, to re-imagine a legal culture, legal scholarship and law that are different from what we know?

1. Approaches to law in the time of apartheid

Let me start with the main jurisprudential approaches that played a role during apartheid.⁴ Corder & Davis (1988: 2) draw comparisons between South African jurisprudential models and debates of the late 1980s and the approaches followed by German lawyers in the 1930s in the “uncritical acceptance of a ‘scientific’ approach” to law. This approach claimed to have “some kind of value-freedom” and adhered to a separation between law and “things ‘political’” and resulted in an inability to see law in a social context and thus the role that law played in the political crisis of the time. The authors note that legal science in South Africa at the time meant a specific process based on order, principle and a system inherited from Western Europe and their forebears that shifted away from English law (Corder & Davis 1988: 3). This shift should be understood against the background of the aftermath of a period of British colonialisation and the Anglo-Boer wars – in other words, the adoption of the legal science of Western

2 See, for example, Kistner, Delpont and Van Niekerk in this volume.

3 My gratitude to the reviewer for highlighting this aspect.

4 I draw from the introduction in Van Marle & Motha (eds) *Genres of critique* (2013).

Europe was simultaneously 'anti-English'. Quite ironically, this approach once again negated the majority of people living in South Africa and was beneficial only to South Africans classified as white. The "fetish" with Western European doctrine "assumed a life of its own". By separating law from morality, this scientific approach failed to provide any guidance concerning the "suitability or correctness" of a rule. Instead, whether a rule fits into some greater abstract theory and the logical development thereof, or whether it could be correctly traced to its historical roots, were of significance (Corder & Davis 1988: 3). Corder and Davis note that jurisprudence or legal philosophy at the time focused on the main philosophers through the ages (the Greeks, the Romans, Augustine, Aquinas, Grotius, Hobbes, Locke, Calvin, Austin, and so on), with little or no attempt to ask how these theories might be relevant to the South African legal system.

Another significant essay on the state of jurisprudence during apartheid is Dugard's 1971 challenge of the judiciary and their uncritical employment of positivism in the form of Benthamian command theory. Drawing on American Realism, Dugard (1971: 189) exposed the "inarticulate premise" of judges and the way in which the seeming intention of the legislator was found to justify legislation that limited individual freedom. Dugard observed an important tension between the ways in which judges approach private law and public law matters. Guided in the former by the legal scientific method described earlier, they were willing to develop the private law to ensure a better fit with science. In the case of public law matters, judges were overtaken by executive-mindedness, uncritically following the decisions of the apartheid government.

Very broadly and tentatively, the main approaches to law during apartheid can thus be identified as, first, the scientific approach (legal formalism) adopted from a certain historical moment in Western Europe and, secondly, the legal positivist approach of Bentham and Austin. I have noted Dugard's reliance on the insights of American Realism in exposing the ideology and indeterminacy of decisions taken by the apartheid judiciary. There are a few examples of legal scholars in the early 1990s who explicitly called for, or drew on CLS method and theory to challenge aspects of the apartheid legal order.⁵

In 1994, South African society underwent a major political and legal change that disclosed new possibilities for critique. Lourens du Plessis, following the work of Johan Snyman, identified two possible approaches to the Constitution and constitutionalism as such, namely Constitution as monument and Constitution as memorial (Du Plessis 2000: 63). The monumental Constitution celebrates its achievements underscoring the protection of, for example, the right to equality,

5 For example, John van Doren, CRM Dlamini, André van der Walt and Dennis Davis.

dignity and freedom. The memorial Constitution is conscious of its limits and shows concern with the past. Le Roux (2002: 25), in a chapter on natural law theories, echoes this distinction in his description of two responses to the shifts in the natural law tradition within a post-apartheid society. The two ways suggested by Le Roux, as a response to the natural law tradition, illustrate something broader about the state of jurisprudence and critique in post-apartheid South Africa. The first response to the tradition identified by Le Roux (2002: 28) is to regard the promulgation of the Constitution and the entrenchment of human rights as the “highest culmination of the Western natural law tradition”. From this perspective, the ‘new’ constitutional order is something to be optimistic about and to celebrate as the final triumph of modern natural law thinking and liberal ideals. A second response, however, is less triumphant and more cautionary about the “universalisation of liberal democracy” (Le Roux 2002: 28). Writers sharing this perspective are concerned about the possibility of a liberal rights paradigm becoming dominant in post-apartheid South Africa. Broadly speaking, most responses to the new political and legal order may be divided into those that are mainly optimistic about the constitutional project and support liberal politics and notions of rights, and those that are sceptical about this project and liberalism. In the latter group, some try and challenge the constitutional project from within, pushing for the broadest and most progressive reading and application possible, while others reject the Constitution and its accompanying processes as such. One could place Klare and his project of transformative constitutionalism emphasising the development of the civil law in light of the Constitution in the former. I turn below to the work of Ramose as example of the latter. But let us first look at the legacy of civil law.

2. Civil law on trial

Van der Walt (1995: 169) writes as follows: “The inevitability of change [in the early to mid-nineties] evoked questions about the future of the old legal order. To the horror of many traditionally-minded lawyers arguments were forwarded for the abolition of the civil-law tradition”. He continues by explaining the main arguments raised against this tradition, namely “that the Western-European values of the civil-law tradition are not shared by the majority of people in the country, that civil law sources are obscure and inaccessible and that the civil-law tradition of equality and freedom did not do much to assist those most affected by apartheid laws” (Van der Walt 1995: 169). He notes that the proposal that the civil-law tradition should come to a similar end as apartheid incited white academics mostly in the field of private law to come up with arguments for its retention (Van der Walt 1995: 170). These arguments included the following: that wider access to the old Roman-Dutch sources could be arranged; that because of

the abolition of apartheid legislation the Roman-Dutch sources could be 'purified'; that the rules of the civil-law tradition can be simplified; that indigenous African law should be given attention; that "politics and ideology should be removed from private law together with apartheid and kept out" and that transformation of the civil-law tradition should take place along the lines of a democratic society (Van der Walt 1995: 170).

A main feature relied on as a reason for the retention of the civil-law tradition was what its supporters perceived as its "inherent strengths – adaptability, pliability and security of the scientific method" (Van der Walt 1995: 171). Van der Walt observes that the

pleas for the 'cleansing' from the civil-law tradition of political influences are based on the understanding that the original, 'pure' civil-law tradition is built upon a scientific method which can provide good, rational results if it is allowed to function without the abstractions and deviations caused by untoward political interferences (Van der Walt 1995: 171).

These points are, of course, quite problematic and could be countered from a multiple of critical viewpoints. Van der Walt (1995: 171), however, is of the opinion that will "miss the point completely". He (Van der Walt 1995: 171) argues that the crucial aspect of raising the question of the abolition of the civil law was that it disclosed the opportunity for critique: "By questioning the legitimacy and continued existence of the old legal order, by putting tradition itself on trial, lawyers were actually highlighting an important aspect of the new legal order, namely its critical potential". For Van der Walt (1995: 171-2), these questions placed "the spirit of critical theory and practice" firmly at the roots of a new order and could counter both the "complacency about [the civil law's] supposed virtues" and complacency about directions taken in the new order that could pose dangers – we should continuously ask questions about the legitimacy of both the old and new orders.

With reference to case law within the field of property law, Van der Walt identifies features of the civil-law tradition that might stifle much needed transformation and redress under a new order. He relies on cases that involved access to land and property right. The specific question was whether white residents could obtain an interdict to prevent the administrator to develop a specific area of land to provide cheap accommodation to a group of squatters. To obtain an interdict in South African law an applicant must prove three things, namely a clear right, unlawful interference and the absence of any other effective remedy. Van der Walt observes that the first and third requirement could have been met easily, but the second posed a more complex question. The court in this

instance found that there was unlawful interference. This decision is exemplary of a 'strict privatist' approach according to which any state action would be regarded as unlawful. This would stand in the way of any programme the government might create to regulate the environment, health, town planning, land use, and so on (Van der Walt 1995: 175). In the appeal court this decision was overturned, however, as Van der Walt argues, for the wrong reasons. The court found that it would have been impossible for the administrator to continue with the development without some interference, thereby continuing the logic of the court of first instance.

Van der Walt (1995: 175) exposes the civil-law methodology behind the liberal privatist argument of the court, a methodology that "consists largely of a strict deductive and syllogistic logic which is applied within a conceptualist framework". He adds that this methodology has been perceived as neutral and objective, scientific and certain. Grotius is generally regarded as the person who laid the foundations for this methodology that forms the basis of much of Western European private law. He set out a system of rights, within which each right is explained with reference to a specific concept and all of them relate to one another. This system of rights had to provide the basis for a scientific legal methodology (Van der Walt 1995: 176). Van der Walt mentions the influence of the natural sciences in the sixteenth and seventeenth century on the development of law as a science. Of significance is that the tradition that gave rise to this approach to law and legal method also provided the foundation of what we currently know as human rights. According to the system of rights derived by Grotius, ownership came to the fore as the one category that could dominate all other rights. As Van der Walt (1995: 177) states: "Ownership and only ownership, is conceived in terms of the traditional definition of *dominium*". The system of rights of Grotius was taken further by the German Pandectists who added a strong subjectivist element to the system of private-law rights deriving from the work of Von Savigny and Kant (Van der Walt 1995: 177). Needless to say that the understanding of ownership and rights in general in South Africa is understood within the framework of subjective rights. In view of this theory, the court's decision in the *Diepsloot* cases becomes clear: private-law cases must be adjudicated by following a strict privatist methodology, that is by addressing it in terms of "abstract, essential content of the rights claimed by each of the parties" (Van der Walt 1995: 179). Ownership will also trump other weaker rights in such a scenario; as Van der Walt (1995: 179) states: "The squatters must lose, because they have no rights at all".

What the *Diepsloot* cases also reveal is the strict distinction between private and public law that is central to this privatist methodology. Questions that arise from following this method are, for example, whether the dispute is between the property owners and the squatters, or between the owners and the state; is it a

private or public law matter or even more pertinently is it a legal or a political one? (Van der Walt 1995: 180) Of course, according to the privatist method, all questions of politics should be kept separate from law. This is where Klare's description of the South African legal culture as formalist is prevalent – this kind of distinction between private and public, law and politics can be attained because of a formalist legal culture that, since the change in 1994 and since Klare's observation in 1998, still has not changed – partly or maybe mainly because our legal education has not transformed, or at least transformed sufficiently.

The law of delict (tort) goes to the core of the privatist method. A strong feature of the law of delict is the reliance on the "so-called boni mores – a juridical yardstick which gives expression to the prevailing convictions of the community regarding rights and wrong" (Van der Walt 1995: 184). This has given rise to the acceptance of a set of assumed (largely unstated) private-law values that are embedded in the structure of South African law. These values in conjunction with a strict private/public and law/politics distinction leave us with a system of law in which individual rights can trump all other rights and, in fact, insulate them from all state action.

3. Compromised foundations and possible reconfiliation

I have alluded to a shared tradition of Grotius's civil law and that of human rights/constitutionalism in the seventeenth century. Present-day human rights and constitutionalism can fit in this framework. This is also Le Roux's (2002: 28) concern and insight when he describes the view that regards the promulgation of the Constitution and the entrenchment of human rights as the "highest culmination of the Western law tradition". One possible result of this is "a reactionary jurisprudence" (Van der Walt 1995: 185) that will render the Constitution and Bill of Human Rights to be nothing but a 'Hobbesian pact' between white and black South Africans (Mamdani 1998). A number of scholars, notably Van der Walt, have argued strongly against such an approach and have done work within specific fields of law to open alternative visions and implications of the Constitution and interpretation of the protected rights. My own take is slightly more pessimistic about the success of these alternative visions of the Constitution and its accompanying institutions and processes, and it is here where we may turn to critical theory emanating from the humanities, for some direction.⁶

Let's start with Antjie Krog in *Country of my skull* quoting the comment of a witness who commented in one of the hearings: "It is easy for Mandela and Tutu to forgive [...] they lead vindicated lives. In my life nothing, not a single thing has

6 See also De Villiers, Delpont, Kistner, Heyns, and Modiri in this volume.

changed since my son was burnt by barbarians [...] nothing. Therefore I cannot forgive". Krog continues:

The dictionary definition of 'reconciliation' has an underlay of restoration, of re-establishing things in their original state. The Oxford says, to make friendly again after an estrangement; make resigned; harmonize; make compatible, able to coexist. The Afrikaans dictionary says: *weer tot vriendskap bring* [to restore to friendship], accept; not resist. But in this country, there is nothing to go back to, no previous state or relationship one would wish to restore. In these stark circumstances, 'reconciliation' does not even seem like the right word, but rather 'conciliation' (Krog 1998: 109).

Mamdani (1998), commenting on the TRC, has made the point that even though South Africans opted for restorative rather than criminal justice, they continued to follow the logic of criminal justice by focusing solely on perpetrators and political activists, whom he calls victims in the minority, and neglecting beneficiaries and the majority of ordinary black people who suffered under apartheid, victims in the majority. Mamdani argued that for reconciliation to endure, a shift should take place from focusing solely on perpetrators to beneficiaries. In this vein, he warned that to prevent the Constitution and Bill of Rights being nothing but a Hobbesian pact, a broad interpretation of rights must be followed according to which individual rights, the rights of the minority, will have to be breached in order to redress the rights of the majority.

Ramose asks why it is that there was a law aimed at reconciliation in the 'new' South Africa, but not in any other country in Africa after colonialisation. He notes that even though the word 'truth' is not part of the official name of the act promulgated to address reconciliation (The Promotion of National Unity and Reconciliation Act), in the popular name of the commission, 'truth' is the first concept. One possible explanation is that the act makes provision for amnesty to be granted if 'full disclosure' about criminal acts is given. Ramose (2012: 21) recalls Soyinka's critique that to place truth within the "framework of law [...] was itself a restraint on the liberation of truth". In the words of Soyinka (Ramose 2012: 21): "The problem with the South African choice is therefore its implicit, *a priori* exclusion of criminality and, thus responsibility. Justice assigns responsibility, and few will deny that justice is an essential ingredient of social cohesion". Ramose (2012: 21) refers to the prominent role 'justice' played in the struggle and also in previous commissions, for example, the Commission of Justice and Reconciliation led by the South African Council of Churches. He argues as follows:

the omission of justice virtually abolished justice – specifically in the substantive form of sovereign title to territory; the land – as

the vital issue of the liberation struggle. Perhaps inadvertently, the omission attempts to erase in advance the quest for justice in the very process of the reconciliation itself. [...] The omission of justice and the attempt, be it inadvertent or mere cunning, to erase it in advance from the very process of reconciliation are an impermissible travesty of natural and historical justice.

Ramose (2012: 21) explains the internal and external dimensions of justice, the former for him means "Truthfulness [...] that] obliges one to recognize and accept that it is impossible to jump one's own shadow". Justice in this dimension demands of the individual to be truthful and honest "to the extent of putting one's own survival, one's life at risk". This should be extended to others, to one's relations with others to fulfil the external dimension of justice.

Ramose (2012: 24) raises the question of what issues are to be reconciled in South Africa. For him, the answer lies in the issues of "fundamental natural and historical justice". To be precise, it is the fundamental conflict over territory that constitutes the need for national unity and reconciliation in South Africa. Ramose turns to the *AZAPO* judgement, the case where families of deceased anti-apartheid activists challenged the amnesty provision in the National Unity and Reconciliation Act.

[C]ommitted to a transition towards a more just, defensible and democratic political order based on the protection of fundamental human rights. It was wisely appreciated by those involved in the preceding negotiations that the task of building such a new democratic order was a very difficult task because of the previous history and the deep emotions and indefensible inequities it had generated; and that this could not be achieved without a firm and generous commitment to reconciliation and national unity. It was realized that much of the unjust consequences of the past could not ever be fully reversed. It might be necessary in crucial areas to close the book on that past (CCT 17/96, 2, Ramose 2012: 25).

Ramose (2012: 26) raises four objections to the judgement. First, he questions the negotiations that took place, mentioning that they should have taken place outside of South Africa on "neutral" ground. Referring to the PAC walking out of the negotiations, he criticises the ANC for continuing the negotiations. The Constitution of South Africa as the final outcome of the negotiations is, for him, evidence of the fact that everyone at the negotiations together with those who were not even present did not come to an agreement over the terms, specifically concerning the deliberation over natural and historical justice. With reference to the Freedom Charter, he raises the call for "economic freedom in our lifetime". He (Ramose 2012: 26-7) recalls Mandela's statement during the

Rivonia trial, commenting that the Freedom Charter called for “redistribution but not nationalization, of land [that the] ANC has never at any period of its history advocated a revolutionary change in the economic structure of the country, nor has it, to the best of my recollection, ever condemned capitalist society”. He contests whether this was necessarily the correct interpretation of the charter, but notes that, whatever the criticism on the ANC government’s adoption of neo-liberal policies may be, the ANC at the ‘negotiations’ was consistent with Mandela’s understanding of the ANC not condemning capitalist society. Secondly, Ramose questions the judge’s call for a closing of the book on the past, saying that this would preserve the unjust outcomes of the past. Thirdly, he argues that the intended establishment of a democratic political order should not be allowed to trump the right to life of those who suffered under colonialism and apartheid. In the fourth place, he criticises the reliance on *Ubuntu* in the judgement.

Ramose also refers to Mamdani’s comment on the TRC and comes to the conclusion that the TRC, instead of promoting social cohesion, contributed to the polarised and fractured nature of post-apartheid society. He (Ramose 2012: 35) turns to the notion of reconfiliation, following Obinna, as a possible better model to follow. The first part of the word, ‘re-con’ designates to bring together. The second part relates to the words ‘filial’ and ‘affnate’, the sense of belonging to a family of a boy *filius* or a girl *filia*. For Ramose, the “word ‘reconfiliation’ with verb forms reaffiliate, confiliate and reconfiliate describes and defines the fact of granting, effecting, regaining, and reclaiming the right of sonship and daughtership in a family fellowship with other sons and daughters of the family” (Ramose 2012: 35). He argues that, although reconfiliation is closely related to reconciliation, it brings an extra dimension, because it highlights the equal dignity of all persons who need to be reconciled. Ramose mentions three virtues of reconfiliation: it captures the necessity for the restoration of fellowship or community; it endorses the equal dignity of all human beings, and it is gender sensitive.

Ramose (2012: 35) states that there are “multiple causes of the everyday living reality of reconfiliation in South Africa”. He draws on the example of poverty and how this results in people living together beyond the category of race. For him a sense of social cohesion is to be found in the living experience of reconfiliation. He gives depth to this idea with reference to a number of philosophical notions. With reference to Levinas, Ramose (2012: 36) invokes the notion of the “epiphany of the face” and argues how in present circumstances, confronted with dire poverty the face is often invisible or “glimpsed at with studied indifference”. He then turns to Dussel’s thesis that “philosophy is about the non-philosophical”.⁷ For Ramose (2012: 36) thus, “reconfiliation is the marginalized domain of the non-philosophical.

7 See also Delpont in this volume.

It is the already written and continually being written philosophical text". Ramose (2012: 36) finally recalls Merleau-Ponty's notion of 'disturbance' as the hallmark of philosophy and argues that philosophy as disturbance is unsettling "because of its acute and insightful sensitivity to change as the principle of be-ing". One might also refer, in this instance, to Foucault's notion of 'an ethics of discomfort' that he developed following Merleau-Ponty. Law and legal projects as a form of social engineering, whether in civil law, human rights and constitutional law, including possibly also Klare's project of transformative constitutionalism, holds the danger of ignoring or evading the disturbance or discomfort and accepting too quickly or too easily legal 'solutions' that bring false comfort and complacency. The notions of reconfiguration and frailty situated within a philosophy of disturbance and discomfort could disclose alternative ways for law and legal education, not projects to pursue or programmes to follow, but alternative ways of being.

4. Legal education

I want to reflect finally on legal education in light of the above. In an essay titled 'Absence, presences, remembrance: a theological essay on frailty, the university and the city', De Beer (2013) raises the notion of frailty and the significance of experience and acknowledgement of frailty. He notes how often frailty is hidden away within the context of the university, in theoretical and rational work. We could add, of course, law, legal discourse, human rights, international law, institutional reform and reparation, and for our purposes also legal education. For him, "Because it is in our common experience of suffering or frailty that we might best be able to discover and express our common humanity. It is in our embodiment of frailty, even if by default, that we will find bridges to 'the other'". (line 253-5). This notion of frailty for me relates strongly to Ramose's suggestion of reconfiguration. De Beer takes a closer look at the word re-member and argues for a reading that implies undoing the work of dis-membering. Not in a way that would forget the trauma and pain suffered, but a remembering grounded and marked by frailty, by its scars and brokenness. But the task to remember links with the refusal to forget. He recalls the threefold meaning of memory for Vico, namely memory as remembering; memory as imagination, and memory as invention. Through this threefold meaning, memory could disclose new ways of thinking, new spaces that could go "beyond rational knowledge and invites the transcendental into our spaces of reflection and consideration" (line 376-7). He refers to the social movement *Abahlali* that has located itself on Kennedy Road in Durban with the aim of organising landless people to claim their rights:

Their visible presence became a powerful tool in defying and subverting the intentional displacement to obscurity of the poor.

Their unsettling presence helps to call into memory those who are not immediately present, and also those who are deliberately made to be absent. When they speak of the “university of *Abahlali*” it refers to their visible, physical and disturbing presence that seeks to re-educate academics, activists and non-profit leaders, insisting that those of us who seek to mediate transformation, need to be transformed first by the very real experiences of those living with the violence of poverty, being victims and agents at the same time (line 448-55).

De Beer invokes the notion of a radical hospitality that could open “new inventions of life, new solidarities, new ways of begin human, new ways of being urban, new ways of practising justice and equity” (line 568-9).

How could the notions of reconfiliation and frailty influence or come to bear on our reflections on legal education? How should we respond to the legacy of formalism, to past and present complicity of legal scholarship and legal education? The new LLB degree has been the focus of much discussion for a while. Most often the lack of skills is lamented by academics relying on responses coming from legal practice, for example. The lack of/or poor skills concerning language, writing and citation are raised and repeated; however, it is of concern that these are perceived as mere technical skills that should serve a narrow instrumental purpose. The broad humanities might be able to shed another light and a value of a different kind on language, reading, writing and thinking (Van Marle 2012: 749).⁸

To my mind the broad humanities show us that reading, writing and thinking are members of the same family and, like most if not all families, live together in precarious and sometimes troubling ways.⁹ Writing, without reading and thinking, could end up in one of those over-simplified presentations of family life, falsely portraying the home as a one-dimensional, unreflective, necessarily safe and uncritical entity. The reason for writing that most practising lawyers and probably law teachers will support and that might convince students about the importance of writing is that as future lawyers, future legal scholars, their survival and success will depend on writing and particularly good writing. The lucidity of the office memorandums, letters, heads of argument, contracts and many other legal documents that they will draft will be of the utmost importance. Success or failure might depend on the strength of the legal research and argument, often presented orally, but always accompanied by a written document. Writing, and more pertinently good writing, will be part of, and affect one’s future life as a

8 See Modiri, De Villiers and Bezuidenhout & Karelse in this volume.

9 I draw, in this instance, on a piece written for the *Pretoria Student Law Review*.

lawyer. However, by writing, we should mean something more than to compile legal documents; writing should go beyond mere functionality or economic gain.¹⁰

Caputo (1987: 1) mentions that “we have it from Aristotle that life is hard”. According to Max Weber (1946: 155), we live in a “disenchanted” world. For Deleuze (1995: 176), “What we most lack is a belief in the world, we’ve quite lost the world, it’s been taken from us”. Nietzsche lamented the shift from a world where the ideal played a central role in human reflection to a world where empirical observation occupies a central place. However, as Nietzsche aptly observed, the shift away from the ideal world resulted in the disappearance of both ideal and real. Following Nietzsche, Constable (1994: 511-90) noted a similar shift in US legal theory, how through the years legal theory left a belief and interest in the ideal of justice behind to be replaced by nothing (see also Constable 2012: 58). One reason to start and keep writing is to respond to, and engage with the hardness of life, the disenchantment of the world, the loss of the ideal of justice. By this I am not suggesting writing as a redemptive project, but rather as a way of underscoring the complexities raised by the various philosophical perspectives or as Caputo (1987: 1) states, “restoring life to its original difficulty”.

Of course, there is more to writing than the construction of a good sentence, the enumeration of correct headings and the drafting of legal documents, although all of this is important. Not only life is ‘hard’, good writing is hard as well. A certain way of writing could, of course, contribute to the ‘disenchantment’ of and the ‘lack of belief’ in the world, and the loss of justice, on the one hand, but another way of writing, on the other, could respond to it, could open a gap, leave a trace of re-imagining, re-enchantment. In a reflection on what he calls “living in the law”, Kronman (1987: 861-2) argues as follows about what makes a good lawyer:

To achieve competence in the practice of law one must, of course, master a considerable body of doctrine and be familiar with the distinctive forms of argument the law employs. The truly distinguished lawyer, however, the one who is recognized by his or her peers in the profession as an exemplary practitioner and whose work is *marked by subtlety and imagination, possesses more than mere doctrinal knowledge and argumentative skill*. What sets such a lawyers apart and makes him [or her] a model for the profession as a whole is not how much law he [or she] knows or how cleverly he [or she] speaks, but how wisely he [or she] makes the judgments that his [or her] professional task require. When one lawyer wishes to praise the work of another, the compliment he [or she] is most likely to pay him [or her] is to

10 See also Modiri and Bezuidenhout & Karelse in this volume.

say that he [or she] is a person of sound judgment. Nothing counts more among practicing lawyers than this.

Kronman (1987: 876) raises the concern that

beyond a certain point [...] the rationalization of the law is likely to turn us all, those who teach the law as well as those who make and practice it, into bureaucratic functionaries, characterless experts whose work requires knowledge, precision, and fairness, but never judgment [...] The concern with judgement might be one aspect that could shape our writing in such a way that it amounts to lawyers and legal scholars re-imagining and re-enchanting the world, to be more than 'legal vending machines'¹¹ (Sachs 2009: 142, Antaki 2012: 1).¹²

South-African poet and writer, Antje Krog, in *Begging to be black* states that in order for her to understand something she has to write it, and "while writing – writing as it were – I find myself dissolving into, becoming towards what I am trying to understand" (Krog 2009: 92). Following Krog, writing then could assist one in obtaining better understanding.

In a famous interview with Gunter Gaus titled 'What remains? The language remains', Arendt (1994: 3) held the same sentiment:

What is important for me is to understand. For me, writing is a matter of seeking this understanding, part of the process of understanding. [...] Certain things get formulated. If I had a good enough memory to really retain everything that I think I doubt very much that I would have written anything – I know my own laziness. What is important to me is the thought process itself. As long as I have succeeded in expressing my thought process adequately in writing, that satisfies me also.

5. Conclusion

My aim in this article was to reflect on legal education within the context of our complicity with apartheid and its continuance and the legacy of civil law and the formalist approach and legal culture it maintains. I attempted to show that we should be cautious to invoke the notion of constitutionalism and human rights

11 Or 'legal slot machines', see 'Round and 'round the bramble bush: from legal realism to critical legal scholarship' *Harvard Law Review* (1982) 95 7 1669–90.

12 Blanchot's work on the writer as revolutionary could also be invoked. See Blanchot 'Literature and the right to death'. My gratitude to the reviewer for alerting me to this aspect that I will pursue elsewhere.

in an uncritical manner, thereby ignoring the shared foundations of civil law and constitutionalism and human rights. Our task as legal educators cannot be one of merely replacing the one with the other – by which I am not supporting the way in which private law often negates the changes in the mid-1990s, ignores the Constitution or treat it as a nuisance to be added on towards the end of a course. At the same time, constitutionalism and human rights as a continuance of Western domination and colonialism affirming the *status quo* (privileges obtained through colonialism and apartheid) should be recognised. Voices invoking these views should be included in the curriculum.¹³ These issues are linked to the question of what it means to be in the world, to make a world, that is, a question that is different from a concern with a project of social engineering. The complex relationship between the university and the community, between the ivory tower and the city should be raised at the very least. I am aware of the difficulties doing all of this in a limited time, with limited resources and large numbers of students. I have no easy solution, but I am of the view that how we teach ‘technicalities of the trade’ is of importance. What is regarded as the broader humanities is of crucial importance – law and legal education as a humanities discipline should be underscored. The philosophical underpinnings of reconfiliation, frailty, disturbance and discomfort should be haunting the law curriculum as far as substance and approach or method is concerned. We could continue to train students in writing, drafting and citation as if these attributes are neutral, negating that they are part and parcel of a formalist and conservative legal culture that keeps the *status quo* in place. Or we could teach writing, accompanied with reading and conceptual skills that could disclose ways and opportunities for at least bringing the complexities to the fore. The responsibility on us as legal scholars and educators makes this a non-choice.

13 See Zitzke in this volume.

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