AN [UN]MAKING OF THE WORLD:[1] A POSTCOLONIALIST RESPONSE TO TRANSFORMATIVE CONSTITUTIONALISM

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> 'The power to re-enchant the world is not ours. We no longer believe in dragons because dragons no longer appear to us.'[2]
>
> 'The world at present is full of angry self-centred groups, each incapable of viewing human life as a whole, each willing to destroy civilisation rather than to yield an inch.'[3]

1 Introduction

In this paper we critically engage with transformative constitutionalism as a project of imagination and a response to disenchantment. Drawing on post-colonialist feminist conceptions of the law, we explore the promise of the 'legal imagination' and its ability to re-enchant our understanding of equality and redefine universal standards employed by the law. The critique of disenchantment is two-fold. First, the formal application of rules mandated by the law allows for the absence of thought and by extension, the absence of judgement. Hannah Arendt understands the employment of 'pure' scientific knowledge as possessing the means to destroy the world.[4] Similarly, a legal tradition founded on formalism possesses the means to destroy the society it claims to protect. Second, the law's commitment to disenchantment has entrenched a universal standard that privileges the masculine and disparages the feminine 'other'. Indeed Drucilla Cornell argues that no known society has successfully escaped 'symbolic traces of an ideological masculinity'.[5] In a postcolonial context disenchantment is further entrenched by the colonial relationship that serves to marginalise all that is in conflict with the western universal. Reference will be made to Hélène Cixous' work on dualist thinking which not only results in

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1 E Scarry *The body in pain* (1985).
2 M Antaki 'The return to imagination in legal theory: the re-enchantment of the world?' (2012) 23 *Law and Critique* 17.
3 B Russell *In praise of idleness* (1976) 36.
4 J Kohn (ed) 'Introduction' in H Arendt *The promise of politics* (2005) xxii.
5 D Cornell *At the heart of freedom* (1998) 15.

separating one element from another but also in arranging them in terms of an implied hierarchy which renders the one element as subordinate to the other.[6] This hierarchal structure and the perspective that the weaker element is passive, uncivilised, colonised and female will serve as the crux of disenchantment in the community and the legal culture for the purposes of this essay. Disenchantment itself can be understood as symptomatic of a masculine tradition.

Specific focus is given to the possibility of the legal imagination to respond successfully to the identified problem and re-enchant not only the legal sphere but also the broader South African community. In doing so, each of the four legal imaginations proposed by Mark Antaki will be considered and critiqued according to its ability to displace the hierarchal structure and attribute value to the views of those who are presently oppressed.

This critique of imagination begins by us evaluating the strength of the law as a system that can realise its own transformation. In doing so we first assess Ronald Dworkin's interpretation of law as a theoretical imagination, and argue that 'integrity' in a post-apartheid context nurtures the system's fundamental injustices.[7] We show that Dworkin's project ultimately entrenches privilege and neglects transformative opportunity. Dworkin's theory of legal interpretation will ultimately be rejected on the basis of its uncompromising striving towards one single truth that is ascertainable only by a masculine force greater than human reason.

Thereafter transformative constitutionalism is considered as a possible hope for reform. It is evaluated as a project of enchantment in terms of both the progressive and transformative imaginations. First, an attempt is made to understand the progressive imagination as a possible project of *ubuntu*. The critique of this project is based on its inability to deconstruct the law and its failure to expose the violent tradition of rationality that has infiltrated the law's interpretive community.

Karl Klare's project of transformative constitutionalism[8] is analysed with regard to the content of the transformative imagination. The critique of Klare's project involves his understanding of the tensions of law and his failure to deconstruct the constitutional values that inform his entire project. In light of the emphasis Klare places on the 'conscientious judge', Albie Sachs' understanding of the function of a judge and particularly the

6 H Cixous 'Contemporary philosophy' in S Atkinson (ed) *The philosophy book* (2011) 322.

7 E Christodoulidis '"End of history" jurisprudence: Dworkin in South Africa' (2004) *Acta Juridica* 64.

8 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 146.

importance that he attributes to persuasion is evaluated. The potential ascribed to the institution of the law and a 'post-liberal' constitution to effect transformation of the community and the law itself is questioned and consequently faulted due to its inability to recognise that the law is limited. The transformative imagination is also critiqued for using the imagination to discover and invent unchartered territories as opposed to identifying the value of reflecting on the past in the pursuit of reconciliation.

The nostalgic imagination is discussed as a means of remembering the past and (re)examining the particular. Reference is made to Arendt's insistence that the past remains alive in the reproductive imagination. In our analysis of her theory of judgement we focus on the importance she ascribes to the activity of thinking and her rejection of the universal standard. In this argument we rely on Arendt's emphasis on the particular to identify the ability of her project to overcome the obstacles of disenchantment. In a colonial relationship a 'parallel relationship' is drawn between the relationship of men and women and the relationship between the colonisers and the colonised.[9] Much like Arendt postcolonial feminist theorists draw on the past to understand the oppression of women in the modern world.[10] Their aim is to address oppression that occurs not only between men and women, but oppression that occurs on basis of race and class as well in order to avoid 'totalising strategies' which result in the thoughtless perception that all women are equally oppressed.[11]

Finally, we attempt to extend Arendt's concern with the particular beyond the activity of judgement. In doing so, we explore Cornell's conception of the 'imaginary domain' in order to read her project as complimentary to the nostalgic imagination.

2 The disenchanted state of the South African legal culture

The concept of disenchantment is explored in Antaki's piece on the potential of the legal imagination to effect re-enchantment.[12] Disenchantment is described as a state where the western world stresses only the knowledge which is related to the economic aspect of the community, the economic system in question being capitalist in nature.[13] Scientific advancement has resulted in rationality and

9 Viljoen 'Postcolonialism and recent women's writing in Afrikaans' *World Literature Today* 70 (1996) 65.
10 E Bonthuys & K van Marle 'Feminist theories and concepts' in E Bonthuys & C Albertyn (eds) *Gender, law and justice* (2007).
11 As above.
12 Antaki (n 2 above) 1.
13 Russell (n 3 above) 28.

systematic method taking a front seat, resulting in the prevailing mentality that all views need to be justified in terms of an established empirical method.[14] In keeping with this tradition, individual economic rights and liberty are deemed to be of more value than communal sharing and being bound to one's community, as the practical value of the latter has not been established in terms of a capitalist, empirical and imperial method. Although the law has not single-handedly rid the modern world of its enchantment, it has also been affected by and does support and maintain these modernist ideals. This is evident in the laws which promote modernity and the approach taken in understanding the nature and process of adjudication.

Apartheid assisted in entrenching disenchantment as it found legitimacy in the comfort of positivism and consistency. Such a tradition has been woven into our understanding and interpretation of the law and threatens the passing of a utopian ideal. Carol Smart writes that '[i]n attempting to transform law, feminists are not simply challenging legal discourse but also naturalistic assumptions about masculinity'.[15] The entrenchment of disenchantment raises a moral demand that we turn away from the law as it *is* and contemplate it as it *ought to be*. It is only through the deployment of the imagination that the conception of justice can be realised.

The emphasis placed on rationality, on calculative reasoning and weighing up terms with already established meaning in terms of a systematic method is characteristic of disenchantment.[16] Due to this approach of calculative reasoning and the contribution of capitalism, a perception has developed that 'useful knowledge' is that which can effect something practical and of economic worth.[17] Law, an institution of a modern society, is also approached as a tool of practical use to man.[18] In order to make law more capable to fulfil this purpose, it has been codified and its language has been 'simplified' to make it more certain and less cumbersome to employ.[19] Legal positivists argue that words and legal terms which describe things that we can't experience in the material world make for an inconsistent application of the law.[20] In the modern world, concepts like 'community' and 'character' are not highly valued as such values cannot be reduced to anything tangible or practical.[21] This desire for consistency is akin to the modern scientific method where certain values are always fixed.

14 Antaki (n 2 above) 2.
15 C Smart *Feminism and the power of law* (1989) 86-87.
16 Antaki (n 2 above) 4.
17 Russell (n 3 above) 28-29; Antaki (n 2 above) 6.
18 Antaki (n 2 above) 4.
19 As above.
20 Antaki (n 2 above) 7.
21 Antaki (n 2 above) 14.

South African law is composed in part of codified sources of law such as numerous pieces of legislation, the Constitution and reported case law which creates precedent.[22] Although a case can be made for the underlying values of some of these sources, which aim to promote post-liberalist values,[23] the codification of law remains a modern western institution, which has been imposed due to the colonisation of South Africa. In keeping with the legal positivist tradition, the South African legal culture has strong faith in the 'precision and determinacy' of legal terms.[24] Legal interpretation in South Africa takes a very structured and technical approach.[25]

This legal positivist approach had resulted in some moral outcomes during the apartheid era, due to the fact that judges did not have to substantiate their judgements in terms of the underlying political ideal they wished to advance, but could instead cling to the literal interpretation of the term in question to justify the conclusion they reached.[26] Despite the fact that the positivist tradition does not always have entirely detrimental effects, it should not be regarded as an approach that does not maintain a hierarchal structure in terms of which certain groups are oppressed and others are advantaged. Positivist judges fail to acknowledge the discretionary power that adjudication offers them and that they do indeed take a political stance when deciding the outcome of a matter.[27] By claiming that the law constrains one to interpret a term in a specific manner, a judge can deny an opportunity for necessary change and still come to a 'sound' conclusion.[28] Even judges aiming to incorporate the ideals of the post-liberalist South African Constitution find themselves unable to move away from the positivist tradition in their interpretation of the law. [29]

A trend in modern thinking is the tendency to group elements into oppositional pairs such as man and nature; science and language; rationality and emotion; white and black and male and female.[30] These oppositional pairs are ranked according to a hierarchy, where one element is perceived as dominant and the other subordinate.[31] The dominant element is always associated with the western male (coloniser) who actively imposes his will unto nature and his subordinates; in contrast the weaker element is associated with the passive objects upon which he exercises his will (the indigenous and

22 D Kleyn & F Viljoen *Beginner's guide for law students* 39.
23 Klare (n 8 above) 150.
24 Klare (n 8 above) 168.
25 As above.
26 Klare (n 8 above) 170.
27 Klare (n 8 above) 171.
28 As above.
29 As above.
30 Cixous (n 6 above) 322.
31 As above.

the female).[32] Disenchantment is the warped perspective that calculative reasoning and individual rights are superior to emotion, literature and being connected to one's community.[33] Oppression is also perpetuated by the distorted perspective that maleness and domination are superior to femaleness and passivity. What should be sought is the reconciliation of the oppositional pairs in order to escape our distorted view and see humanity as a whole.[34]

Roberto Unger identifies oppositional pairs which are hierarchically structured within the law.[35] The dominant element maintains the state of affairs whereas the subordinate element, in certain cases, allows us to criticise it.[36] Due to the indeterminate nature of the law, either element of the pair can be preferred in making a judgement.[37] In order to demonstrate this, Unger analysed the doctrine of contract law: first he considered it from an individualistic perspective by which great value was given to the principle of the 'freedom to contract'.[38] Upon considering the doctrine from a communitarian outlook, Unger argues that the 'counter-principle' of 'fairness of contract' became more relevant.[39] Precedent for supporting either side of the oppositional pair can be found in the law, illustrating that the law is not determinate, contrary to the positivists claim that it is.[40]

These points of contention within in the law serve to reflect conflicting views within society — in the above instance the political systems of individualism and socialism.[41] This shows that the law is not separate from the contrasting political ideologies in society, its standards are not clear and certain and it is not merely a tool that can be employed uncritically to effect justice. The law is both an active contributory cause to oppressive hierarchies as well as a passive recipient influenced by its dominance in our modern times. The possibility of the legal imagination addressing these concerns within the law is explored by considering whether the proposed alternatives they offer sufficiently escape the confines of modernity and the oppressive hierarchal structure.

Facing the traumatic events in South Africa's past as opposed to wishing them away could result in citizens gaining more insight into the current troubles we face. In Arendt's discussion of judgment and validity she rejects the view that opinions should be measured by a

32 As above.
33 Antaki (n 2 above) 2.
34 Antaki (n 2 above) 8.
35 S Veitch *et al Jurisprudence* (2007) 116.
36 Veitch *et al* (n 35 above) 117.
37 As above.
38 Veitch *et al* (n 35 above) 117.
39 As above.
40 As above
41 Veitch *et al* (n 35 above) 118.

'standard of truth' and suggests that opinions should arise out of collective deliberation where a proponent of a view should persuade others and develop the Kantian idea of an 'enlarged mentality'. This idea ultimately serves to reject law as a tool to better society and looks towards the entire community and not only the legal fraternity to provide a platform on which to incorporate the views of others.

3 Dworkin's theoretical imagination

Central to the theoretical imagination is the deployment of Hegelian dialectic.[42] Dworkin argues that a proper understanding of the relationship between the *concepts* of jurisprudence and the subjects' — specifically the judges' — *conception* of those concepts is indispensible in constitutional construction.[43] His reliance on the 'aesthetic hypothesis' fosters his appreciation of the law as literature.[44] In turning to 'creative interpretation', Dworkin refuses to abandon the ideal of the rule of law and promotes the exercise of the *Herculean imagination* in order to reach a legally correct answer.[45] A critique of Dworkin's legal reasoning will be based on his understanding of *interpretation* and *integrity* as independent principles that constitute the foundation of his project.

For Dworkin the law must be understood as the interpretation of a practice that exists within a particular community. As such the meaning of law can only be retrieved from within a shared context.[46] Such a community will emerge through the coherent interpretation of past practices and the combined participation of its members.[47] In this way Dworkin understands legal interpretation as a contribution to a chain-novel where the interpreter becomes a co-author bound to ensure that her contribution allows the novel read as a coherent *whole*.[48] The role of a legal participant is therefore merely to see the law in its *best light* and subsequently restructure it in terms of that meaning.[49] In other words, to interpret means only 'to apply an intention'[50] and must not be understood as a law-making opportunity. Dworkin's construction of interpretation fails to grapple with the indeterminacy of the law. Unger accuses Dworkin's project of being a liberal attempt to separate the law from politics and propagate the conception of legal neutrality.[51] This attempt to depoliticise the law

42 Antaki (n 2 above) 9.
43 Veitch *et al* (n 35 above) 114-115.
44 Antaki (n 2 above) 8.
45 Veitch *et al* (n 35 above) 114.
46 Veitch *et al* (n 35 above) 113. The authors further explain that the law cannot be identified outside of what the community holds as its practice of law.
47 Christodoulidis (n 7 above) 65.
48 Veitch *et al* (n 35 above) 116.
49 Christodoulidis (n 7 above) 66.
50 R Dworkin *Law's empire* (1986) 47.
51 Veitch *et al* (n 35 above) 120.

fails to engage critically with the current distribution of power and privilege that informs the legal order. Further, the value that Dworkin ascribes to understanding the law as a coherent whole remains unconvincing. Cornell calls for the redefining of equality so as to serve freedom.[52] Deconstructing the law's normative standards offers greater hope of finding the forgotten values tainted by apartheid and displacing the power structures that underpin Dworkin's chain-novel.

In the context of Dworkin's understanding of interpretation and the purpose of the legal participant he offers the *Herculean imagination* as a means of reaching a legally correct answer.[53] The use of this mythological figure as a proposed solution serves to illustrate the functioning of the hierarchal structure: reasoning is valued so highly that it transcends the human body and the use of a masculine western figure to enlighten the world marginalises the non-western and the female. Such an answer requires deploying those principles that carry the most weight within a legal order and those best able to rationalise rules and decisions into a single coherent scheme of justice.[54] This insistence for the right answer informs Dworkin's legal theory of 'law as *integrity*', which requires retrieving a principle from precedent and consistently applying it.[55] *Integrity* therefore serves to sustain unity within a community and provide a consistent understanding of legal practice.[56] Drawing on Etienne Mureinik, Emilios Christodoulidis applies the logic of *integrity* to argue that once an iniquity has substantially infiltrated a legal system, the system will yield to its fundamental injustice and assist its entrenchment throughout the legal landscape.[57] In a post-apartheid context *integrity* will merely reaffirm the present distribution of power together with its accompanying hierarchies. Mureinik notes that under *integrity*, iniquity becomes 'cancerous'.[58] Although legal interpretation will now take place in a post-apartheid context, Mureinik's concern is that apartheid laws have infiltrated the interpretative principles and values of the legal system with the weight necessary to nurture the iniquity and allow for its perpetual entrenchment.[59] As *integrity* requires loyalty to that which has been entrenched as 'institutional record' the principle rejects transformation in a post-apartheid context as it allows the injustice of the past to proliferate under its own momentum.[60]

52 Cornell (n 5 above) xiii.
53 Veitch *et al* (n 35 above) 116.
54 Veitch *et al* (n 35 above) 114.
55 Christodoulidis (n 7 above) 66.
56 Veitch *et al* (n 35 above) 116.
57 Christodoulidis (n 7 above) 64.
58 Christodoulidis (n 7 above) 68.
59 Christodoulidis (n 7 above) 69.
60 Christodoulidis (n 7 above) 64, 69.

Antaki criticises the theoretical imagination as being symptomatic of disenchantment.[61] Dworkin's demand that the limits of reason be overcome by the imagination is merely a revised commitment to disenchantment in light of man's limitations.[62] The insistence on a legally correct answer reaffirms the modern's desire for certainty and her infatuation with calculative reasoning. Dworkin proposes overcoming the restrictions of the human and her finite reason, by transcending the body and entering a faculty that can master in a more effective way. In doing so Dworkin seeks to invoke a masculine conception of the imagination. Claudia Springer notes that the desire to transcend beyond the body and its material limitations is rooted in a masculine tradition.[63] The desire to access the *Herculean imagination* acknowledges the body as an obstacle that must be overcome in order to better realise the aspirations of modernity. Dworkin's proposal of the transformative imagination cannot emancipate the law from disenchantment as it remains trapped in the 'iron cage of modernity'.

4 Walking over the bridge: transformative constitutionalism

Transformative constitutionalism must be understood as a project that facilitates a democratic transition from an authoritarian past to a new culture of constitutional justification.[64] Transformative constitutionalism calls for the realisation of human rights and the remembrance of values stifled by the formalism of the apartheid culture. In light of these objectives, transformation can be understood to invoke either a progressive or transformative imagination.

4.1 Transforming the progressive imagination into a project of ubuntu

Martha Nussbaum argues that the imagination is an 'essential bridge to social justice'.[65] Central to her understanding of the progressive imagination is the 'fostering of a psychological identification with the other'.[66] It is through this identification that one is able to appreciate

61 Antaki (n 2 above) 8.
62 Antaki (n 2 above) 8-9.
63 C Springer 'The pleasure of interface' in P D Hopkins (ed) *Sex/machine: reading in culture, gender, and technology* (1998) 484.
64 Klare (n 8 above) 147.
65 Antaki (n 2 above) 9.
66 As above.

the autonomy of the individual and understand the social contract as rooted in the respect for all human beings.[67] In this way, the progressive imagination can find an ally in the African jurisprudence of *ubuntu*, insofar as both philosophical concepts seek to understand the commonality between human beings. Similarly to the progressive imagination, *ubuntu* adopts an ethical identity rooted in moralism and understands that human beings are intertwined in a world of ethical relations.[68] Although each concept was born in different traditions of philosophical thought, *ubuntu* can inform the progressive imagination to render it particular to South African jurisprudence as both projects rely on a common understanding of the importance of empathy. Indeed, *ubuntu* directly relies on empathy in its call for *sympathetic impartiality* as it understands the progressive requirement of 'psychological identification' as an imperative for fostering an ethical understanding of both the other and ourselves.[69] Cornell and Fuller explain that this connection to the other is possible precisely because we are intertwined in an ethical relationship with others.[70] In this way, *ubuntu* goes beyond the progressive imagination by requiring the judge to step into an ethical domain of interpretation.

Although not expressly provided for in the Constitution, Yvonne Mokgoro argues that the values of the new Constitution coincide with the key values of *ubuntu*-ism.[71] In *S v Makwanyane* Mokgoro J explained that in its fundamental sense *ubuntu* denotes morality that is concerned with compassion, dignity, and the respect for others.[72] Chief Justice Ismail Mahomed follows Mokgoro by stating that '[the cultural] maturity [of Africa] expresses itself through collectivist [emotion] of communal caring and humanism, and of reciprocity and caring'.[73] Although the progressive imagination and *ubuntu* belong to different legal traditions they share the same underlying philosophy and goal. The progressive imagination is present in *ubuntu* insofar as it appreciates empathy as a necessary concern for justice.

In his critique of the progressive imagination Antaki argues that progressives celebrate modernity and support the systematic theorising of ethics.[74] In this regard it becomes necessary to examine the philosophical traditions that gave rise to the progressive imagination and *ubuntu* respectively. As western jurisprudence has been largely influenced by the Enlightenment ideals of logic and methodology, a western understanding of the progressive imagination

67 As above.
68 D Cornell & S Fuller (eds) *Ubuntu and the law of South Africa* (2012) 1, 3.
69 Cornell & Fuller (n 68 above) 4.
70 As above.
71 Y Mokgoro 'The development of ubuntu jurisprudence' in Cornell & Fuller (n 68 above) 320.
72 *S v Makwnayane & another* 1995 6 BCLR 665 (CC).
73 Mokgoro (n 71 above) 322.
74 Antaki (n 2 above) 9.

believes that a neat separation of morality and immorality is possible.[75] In terms of this understanding the ethical relationship between people can only occur in the imagination, therefore rendering a modern understanding of morality necessary. In contrast, *ubuntu* avoids this criticism as it does not conceive the social bond as an imaginary experiment but as a relationship into which one is born.[76] As such the progressive imagination's reliance on modernity must be understood in light of the community that fostered its development and must not in itself cause the rejection of the imagination as a possible project of *ubuntu*. Antaki's second point of critique is that the progressive imagination runs the risk of allowing too much discretion and questions whether the approach will necessarily relieve the disenfranchised groups.[77] *Ubuntu* transcends this concern by requiring an ethical domain of interpretation. Such a requirement can be accepted as providing the necessary discretion against which Antaki warns. *Ubuntu* can save the progressive's ideal of 'psychological identification' from modernity by re-interpreting it from an African jurisprudential position.

Although escaping the traditional opposition suffered by progressives, *ubuntu* nevertheless fails to appreciate the extent to which the apartheid tradition of disenchantment has infiltrated our interpretive community. *Ubuntu* merely requires an evaluation of our participation in an ethical community and does not demand a deconstruction of the law, therefore failing to expose the normalised positions inherent in legislative approaches.[78] The event of the Truth and Reconciliation Commission (TRC) illustrated the law's inability to sever itself from a disenchanted tradition even against the backdrop of a progressive imagination informed by *ubuntu*. Quoted by Karin van Marle, Antjie Krog criticised the amnesty process for favouring a commitment to judicial procedure above 'moral' outcomes.[79] Van Marle notes that the legalised process employed by the TRC prevented it from meeting its goals of 'reconciliation and healing'.[80] In seeking to realise the values of *ubuntu* the TRC was unable to escape the rational approach mandated by a disenchanted tradition. The progressive imagination's failure to engage critically with the normalised positions employed by the law will ultimately result in its own failure.

75 Antaki (n 2 above) 10.
76 Cornell & Fuller (n 68 above) 42.
77 Antaki (n 2 above) 10.
78 K van Marle 'Law's time, particularity and slowness' (2003) 19 *South African Journal of Human Rights* 250.
79 Van Marle (n 78 above) 244.
80 As above.

4.2 Transformative constitutionalism as a transformative imagination

The transformative imagination must be considered in light of the ideologies present in and strengthened through the application of the law.[81] The transformative imagination demands that ideology be recognised as an active element of the social world that operates through the language of the law.[82] Structural hierarchies are so deeply entrenched that they perpetuate a nihilistic acceptance of the world as it *is* and frustrates the possibility of imagining the world as it *ought* to be.[83] The purpose of the transformative imagination is therefore to overcome the constraints imposed by ideology and persuade society that the possibility of change is achievable.[84] In other words, the transformative imagination understands society as something that is created and not given.[85] In this understanding, the imagination allows for the opportunity to 're-invent the future' and construct a social world that is based on the ideals of justice and equality.[86] Pierre De Vos identifies the transformative vision of the Constitution as the creation of a society in which all people can live their lives in dignity irrespective of their social difference.[87] Rising from authoritarian atrocity, the Constitution represents the realisation of the transformative imagination as it re-invents an unjust social order by attempting to create an egalitarian community founded on the values of freedom and human dignity.

For Klare the Constitution represents a post-liberal document that embraces an 'empowered model of democracy'.[88] He recognises the necessity of employing a transformative conception of the adjudicative process to allow the Constitution the ability to realise its transformative aspirations.[89] He defines his project of transformative constitutionalism as:[90]

> a long term project of constitutional enactment, interpretation, and enforcement committed […] to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.

It can be asserted that the Constitution breaks away from the modern understanding of liberation. The values echoed in the Constitution are

81 Antaki (n 2 above) 11.
82 As above.
83 As above.
84 As above.
85 Antaki (n 2 above) 12.
86 As above.
87 P De Vos '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal of Human Rights* 265.
88 Klare (n 8 above) 152.
89 Klare (n 8 above) 156.
90 Klare (n 8 above) 150.

reflective of being conscious about its historical context by embracing various cultures and promoting the participation of all its citizens.[91] It also expressly provides for gender equality and respect for cultural tradition.[92] As Klare aptly explains, it holds a 'vision of collective self-determination'.[93] This would then be in direct contrast to the modern inclination to employ 'individual self-determination'.[94] In doing so, the Constitution aims to address the hierarchal structure that advantages certain individuals at the expense of others. Nevertheless, the concept of a Constitution, of codified law legitimising other laws and practices, is a purely western invention.

Klare focuses his project on adjudication and the tensions that challenge the 'conscientious judge' under South Africa's new constitutional dispensation. He understands the adjudicator as performing her work through a medium that is simultaneously constraining and malleable.[95] In this way Klare argues that the 'conscientious judge' in the new South Africa will be constrained by her duty to promote and fulfil the democratic values at the heart of the Constitution.[96] It is in light of this tension between the indeterminacy of law and the inevitable constraints experienced during interpretation that Klare's understands the success of his project. Under the Constitution, the 'conscientious judge' is expected to promote the values of an egalitarian community.[97] The legal constraints that demand interpretive fidelity, that would ordinarily flaw a legal order, have the opposite effect in a constitutional State as they function within the limits of freedom, equality and human dignity.

Although the South African legal culture has come to accept the conduct of the latter to be the norm, the judge is nevertheless subscribing to a political stance — she is choosing to ignore an opportunity to effect social change.[98] The former approach may not always yield results which are in line with the values in the Constitution either, as there is no guarantee that judges' political views will coincide with it. As there are many principles and precedents which are aligned with the hierarchal view that renders certain elements inferior to others, the very values in the Constitution can be limited or even ignored to see a contrary view flourish. Klare argues that the legal profession must accept its responsibility for constructing the social order envisioned by the Constitution and its role in realising the constitutional vision of transformation.[99]

91 Klare (n 8 above) 153.
92 Klare (n 8 above) 155.
93 Klare (n 8 above) 153.
94 As above.
95 Klare (n 8 above) 160.
96 Klare (n 8 above) 148-149.
97 Klare (n 8 above) 149.
98 Klare (n 8 above) 162.

As a Constitutional Court Justice, Sachs serves as an example of Klare's 'conscientious judge'. For Sachs the role of a judge is to best express the law in relation to a particular case that occurs in a 'particular moment'.[100] He accepts that the law is indeterminate and therefore rejects the possibility of a legally correct answer; in doing so Sachs breaks away from the modernist desire to achieve certainty.[101] He understands judgement as a persuasive activity that must convince the readers of a judgement that the outcome is just.[102] However, this activity of persuasion must be approached apprehensively as it fails to grapple with the ideologies that functions through the law. Such ideologies can serve a persuasive function as they have been normalised through legal institutions and are therefore easily mistaken for universal truths. In describing the law as indeterminate and concluding that judges do indeed take a political stance when making a judgement, Klare advocates that judges should admit their stance openly and substantiate it in the public view.[103] Although there is merit in this suggestion, it seems highly unlikely that a judge will admit, perhaps even to herself, that she has political views contrary to that of the supreme law when it is currently very comfortable to hide behind a traditionally, 'politically neutral' approach. The indeterminate nature of the law and its dependency on legal agents who not only need to practice transparently but also realign themselves entirely with post-liberalist ideals, limits the law and its hope of achieving transformative change.

The transformative imagination seeks to transform the 'law-abiding citizen into the law-inventing citizen' with the power to re-create and re-structure the social order in which she lives.[104] This transformation of the individual reverts to a modern understanding of the world as something that can be controlled. Similarly, the re-inventing nature of transformative constitutionalism — and Klare's conscientious judge — does not overcome modernity but merely reaffirms the modern desire to master through the imposition of will. The injustice of apartheid cannot be divorced from its disenchanted legal tradition and so the re-enchantment of our legal system and our understanding of justice cannot occur without abandoning modernity.

In addition to their worrying commitment to modernity, transformative theorists look to the future to re-invent their social order.[105] The absence of retrospective contemplation denies the opportunity to deconstruct the values on which transformative constitutionalism relies. The purpose of deconstruction is to draw

99 Klare (n 8 above) 164.
100 A Sachs *The strange alchemy of life and law* (2009) 145.
101 Sachs (n 100 above) 144.
102 Sachs (n 100 above) 141.
103 Klare (n 8 above) 164.
104 Antaki (n 2 above) 12-13.
105 Antaki (n 2 above) 12.

attention to that which is 'unsaid' and expose the open spaces of the text that allow for underlying assumptions and normalised positions.[106] The transformative imagination fails to challenge the normalised positions from which we understand the values of the Constitution. In other words, although our Constitution has allowed for equality to displace discrimination we can only understand equality as the opposite of discrimination and the meaning it held under the apartheid regime. Sachs J concedes that the norms and standards that define the law are continuously evolving.[107] Although the Constitutional Court has attempted to re-interpret fundamental standards it has done so by reverting to unchallenged constitutional values. Sachs offers the 'reasonable man' test as an example of such a re-interpretation. Rejecting the original masculinity of the standard, the Court accepted that the standard should be re-interpreted under the new constitutional dispensation to mean a reasonable person 'deeply sensitive to the values of our Constitution, including the right to equality'.[108] In its re-definition the Court failed to consider that the values of the Constitution, including the right to equality are still understood from a predominantly masculine perspective that is strongly rooted in an appreciation for logic and calculative reasoning.

Would imposing a model of imagination upon the community and reinventing its social structures truly lead to the reconciliation of the present democracy and the occurrences of a colonist past? It is worth considering whether facing the past 'in all its starkness' wouldn't perhaps enable us to understand its unjust consequences better.[109] A society cannot be understood as free and equal if the universal standard informing a legal culture remains unchallenged as it presupposes the colonial-masculine perspective and fails to validate the particularity of the 'other'.

5 A turn to the nostalgic: remembering the past and re-examining the particular

The nostalgic imagination is founded on an appreciation of the past and an understanding of the imagination as more than instrumental in achieving social transformation.[110] Nostalgics insist that the past and its specific meaning remain alive in the reproductive imagination.[111] It is through our historical reality that the future becomes possible

106 Van Marle (n 78 above) 250.
107 Sachs (n 100 above) 150.
108 Sachs (n 100 above) 151.
109 M D'entrèves 'Arendt's theory of judgment' in D Villa (ed) *The Cambridge Companion to Hannah Arendt* (2000) 247.
110 Antaki (n 2 above) 13.
111 Kohn (n 4 above) xxiii.

and symbolises our return to an enchanted world.[112] This coincides with Arendt's conception of judgement which involves understanding occurrences by placing them in the past context within which they originated from.[113] Post-colonial feminism also draws from the past by seeking to understand the position of women in modern society as descending from a history of imperialism.[114]

The nostalgic imagination is characterised by a concern with equality and pursues a 'return to humanity'.[115] Frans Viljoen identifies similarities in the relationship between the colonisers and the colonised and the relationship between men and women.[116] Colonisers have impressed upon themselves the notion that they are liberating the colonised by introducing them to 'civilisation'.[117] The colonisers seek to dominate and use 'civilisation' as a ruse in very much the same way that patriarchy functions to oppress women whilst justifying itself by the idea that it enables men to protect and provide for women. Post-colonial feminists wish then to displace patriarchal and oppressive structures by focussing on those who are marginalised due to their historical disposition.[118] This necessarily involves addressing the past in a way which is not distorted by the very same hierarchal order and prejudicial conceptions that are sought to be eradicated.

Arendt proposes coming to terms with past events in a manner that does not structure them in a hierarchy of relevance or importance.[119] According to Arendt the imagination enables us to place these events in their proper perspective and judge them without 'pre-given' rules.[120] This would involve embracing uncertainty which is foreign to the modern world, a world which has managed to delude itself into believing that established methods; set standards and precedent constitute certainty.[121] A component of this act of judging is thinking, which occurs internally and assists an individual in judging without making use of any pre-established norms.[122] Postcolonial feminism identifies ideologies which dominate society by imposing the view that one aspect is always advantaged and the other oppressed.[123] This implied hierarchy functions because it is not drawn into question, it has pre-established itself amongst all

112 Antaki (n 2 above) 13.
113 D'entrèves (n 109 above) 247.
114 Bonthuys & Van Marle (n 10 above) 39.
115 Antaki (n 2 above) 13.
116 Viljoen (n 9 above) 65.
117 E Said 'Contemporary philosophy' in S Atkinson (ed) *The philosophy book* (2011) 322.
118 Bonthuys & Van Marle (n 10 above) 39.
119 D'entrèves (n 109 above) 247.
120 As above.
121 Antaki (n 2 above) 15
122 Antaki (n 2 above) 23; M Antaki (n 2 above) 249.
123 Bonthuys & Van Marle (n 10 above) 38.

the other pre-established grounds and structures with which moderns approach social life. In law, like many other discourses, the use of masculine pronouns is taken for granted, which in itself is seemingly innocuous but denotes the perspective from which these discourses operate and therefore effectively suppresses the voice of women.[124]

Arendt's theory of judgement developed as an attempt to understand the tragedy of totalitarianism. She relied on the nostalgic imagination to define a faculty of retrospective assessment that would prevent our estrangement from our historical reality.[125] Arendt understands judgement in terms of the universal rule that assists in defining the particular.[126] She argues that the effect of totalitarianism is that it destroys the value of the universal rule, making it impossible to judge the particular.[127] In contrast to Antaki's pessimistic appreciation of re-enchantment, Arendt identifies man's capacity to start anew, and in doing so the ability to formulate new standards and categories of judgement.[128] The travesty of totalitarianism — or in a South African context, apartheid — does not destroy our ability to judge but merely our conventional categories of interpretation.[129] It is in this regard that the imagination becomes important as it provides the distance and the closeness necessary to formulate an impartial judgement.[130] Arendt attempts to understand judgement in conjunction with the activity of thinking.[131]

For Arendt the value of thought is two-fold. First, thinking releases the particular from the grip of the universal.[132] Through this process the individual is able to liberate her judgement from the universal category and conventional standards of behaviour.[133] In her search for the particular, Arendt employs Kant's notion of an 'enlarged mentality' as the capacity to think representatively.[134] In this regard, judgement becomes a political activity insofar as it allows the individual to orient herself in the public realm.[135] Arendt's attraction to Kant's aesthetics lies in its obsession with the particular and provides the individual with the ability to address the particular in its particularity without exposing it to an established universal standard.[136] Instead the particular is used to re-define the universal. Arendt proceeds to identify the conscience as 'by-product' of

124 Bonthuys & van Marle (n 10 above) 38.
125 D'entrèves (n 109 above) 247.
126 As above.
127 D'entrèves (n 109 above) 247.
128 As above.
129 As above.
130 D'entrèves (n 109 above) 248.
131 As above.
132 D'entrèves (n 109 above) 247.
133 As above.
134 D'entrèves (n 109 above)) 250
135 As above.
136 As above.

thought.[137] The conscience represents the notion of acting ethically and the inner check by which we evaluate our actions.[138] As the conscience presupposes the ability to recognise right from wrong, abandoning the universal becomes an imperative. The conscience is not possible while the universal category remains protected, as an invalid universal taints the individual's judgement and her perception of right and wrong. Arendt's understanding of judgement is complimentary to her appreciation of the public realm. She understands the validity of political judgement to correspond with the ability to think representatively as this requires evaluating one's opinion from various perspectives.[139] In this way Arendt's theory of judgement enters the public domain as it is within a public forum that individuals are given the opportunity to exchange and test their opinions.[140]

Arendt's concern with the particular is indicative of her appreciation for difference and the need to give the individual the right to claim who she is through her own representation. Disenchantment relies on legal formalism to apply such a universal standard and in doing so, to assert a position of certainty that maintains a rational and (in)coherent system of law.[141] Such normalised positions are never selected democratically but are imposed by a dominant culture of privilege. In the absence of public participation, representative opinion becomes impossible and universal standard is rendered invalid. Arendt's theory of judgement requires that the individual abandon universal standards and foster a representative thinking to establish ethical relationships within a community. Such an approach requires that the underlying assumptions informing our legal order be deconstructed and reformulated in the particular's image.

It is imperative that 'totalising strategies', such as categorising all 'black women' and 'white women' under the same banner be avoided.[142] These unifying terms are rejected in order to address the differences which exist among women, to make feminists more aware of the true position of women.[143] In South Africa there are many factors to be taken into consideration to establish how oppression functions – class, gender, race and cultural as well as social oppression affect every woman and person differently.[144] Therefore Arendt's notion of 'representative thinking' could pose valuable answers for

137 D'entrèves (n 109 above) 248.
138 D'entrèves (n 109 above) 249.
139 D'entrèves (n 109 above)) 253.
140 D'entrèves (n 109 above) 254.
141 Veitch *et al* (n 35 above) 95.
142 Bonthuys & Van Marle (n 10 above) 40.
143 As above.
144 As above.

post-colonial feminists as the only way one can truly understand the social position of another is by engaging with them.

Arendt does however also attribute value to factual truth as it makes for an accurate account of past events.[145] Facts necessarily involve people — it is concerned with events and circumstances which affected humanity in some way.[146] The opinions explored above will have little merit if they are based on incorrect information.[147] Facts are therefore essential in the formation of sound opinions.[148] In South Africa it is of particular importance to be cognisant of the past, of past atrocities, colonisation and the historical position of women in order to form valid and inclusive opinions. It is not the use and acceptance of established facts which flaws our judgment, but the distorted perception that the facts have already been correctly interpreted and valued. For Arendt it is the imposition of standards, the conditioned belief that there is already an answer which precludes the individual from questioning, from debating with others.[149] This preclusion of communal debate, of uncritical acceptance of manmade standards is symptomatic of disenchantment.

Arendt's concern with the particular is limited to her understanding of judgement and although it demands re-evaluating the universal category it does not specifically provide the individual with the space to re-evaluate herself. As quoted by Van Marle, Cornell notes that transformation cannot limit itself to transforming the structures of a system but must also provide the individuals within a system the freedom to change.[150] In this assertion Cornell calls for the protection of a psychic and moral space — the imaginary domain — that will allow the individual to evaluate and represent *herself*.[151] The right to self-representation has historically been a right afforded only to men.[152] Indeed the right to the 'imaginary domain' challenges the dominance of the masculine perspective and validates the particularity of the woman. The 'imaginary domain' provides an ethical basis for the protection of the individual's right to self-representation by protecting the right to escape the universal's image.[153] In the absence of this freedom, addressing inequality between men and women becomes an impossible task, especially against a disenchanted backdrop of proceduralist conceptions of

145 D'entrèves (n 109 above) 257.
146 D'entrèves (n 109 above) 257.
147 As above.
148 As above.
149 As above.
150 K van Marle '"No last word" — reflections on the imaginary domain, dignity and intrinsic worth' 13 *Stellenbosch Law Review* (2002) 307.
151 Cornell (n 5 above) x.
152 Cornell (n 5 above) 17.
153 Van Marle (n 150 above) 307.

justice.[154] Cornell explains that 'if we are not evaluated as free persons as an initial matter, we will be unable to fairly correct that definitional inequality.'[155] A response to disenchantment must therefore include the protection of the 'imaginary domain'. All egalitarian legislation must be adjusted so as to be consistent with this freedom.[156]

Similarly to Arendt's nostalgic imagination, the imaginary domain calls for the deconstruction of the universal in search of the particular. In this way both projects seek to disturb the dominant position. For Arendt the danger of the universal is that its systematic application precludes thought and its acceptance as a recognised truth renders public deliberation unnecessary. For Cornell the danger of the universal is more pertinent as it disallows the realisation of equality. For both theorists the imagination is necessary to achieve freedom from the universal. By informing the nostalgic imagination with the notion of the 'imaginary domain' reconciliation of equality and freedom is possible as the project of imagination then extends beyond the limits of the law.

6 Conclusion

In his analysis of the 'legal imagination' Mark Antaki is critical of man's power to re-enchant the world and finds (dis)comfort in his conclusion that man cannot escape Holmes' 'iron cage of modernity'.[157] The challenge to disenchantment cannot be rooted in the law, as such an approach will always demand a measure of certainty and predictability. Dworkin's call for the *Herculean imagination* fails to understand the indeterminacy of law and seeks to overcome disenchantment by employing a masculine imagination to realise the modern desire of certainty. Failing to grapple with the complexities of the law, Dworkin's theory of integrity and judicial interpretation is driven by the value of certainty and worryingly re-affirms man's desire to master.[158] The transformative values in the Constitution cannot in themselves provide re-enchantment as they are understood in terms of a disenchanted interpretive tradition. Although the Constitutional Court has attempted to re-define standards fundamental to the law, such attempts fail insofar as they rely on constitutional values that remain informed by a disenchanted tradition of interpretation. A transformative project must always employ a deconstructive approach in order to disturb the normative assumptions that underpin the legal order.

154 Cornell (n 5 above) 159.
155 Cornell (n 5 above) 20.
156 Cornell (n 5 above) 159.
157 Antaki (n 2 above) 17-18.
158 Antaki (n 2 above) 8-9.

By participating in 'representative thinking' it is possible to reassess that which is deemed to be true as well as the value attributed to all types of knowledge. As opposed to Klare's transformative response where imagination takes on invention, creating entirely new methods by the imposition of imagination, Arendt proposes looking to the past in order to re-establish understanding. This nostalgic approach will enable society to come to terms with the past in a meaningful way, instead of explaining it away by referencing new imposed standards. It would not be possible to take into consideration the views of everyone if you aim to separate their present position from the past which constituted it.

The right to equality must include the right to an ethical space where the individual can realise her freedom of self-evaluation and representation. The nostalgic imagination must be used in conjunction with the imaginary domain to extend the project of imagination beyond the law. In her understanding of judgement, Areendt rejects the formal application of rules as they allow for action in the absence of thought. Her concern with the particular demands that the universal be re-understood and the normative assumptions of judgement be reassessed. Finally Cornell seeks to extend the project of imagination beyond the law's restrictions by requiring that transformation not be limited to structural change but include the individual's freedom to self-representation. Reconciling Arendt's nostalgic imagination and Cornell's imaginary domain challenges disenchantment beyond legal interpretation and introduces re-enchantment into the lives of those already oppressed by the law's commitment to disenchantment and the masculine tradition.

Perhaps in embracing the past, the value of the community will be recognised and the individual will be reconciled with the communal. By basing our opinions on accurate facts but placing due emphasis on our ability to reassess the way in which factual truth is evaluated, we can reconcile the established scientific method with the unexplored. In questioning what we deem to be certain and conclusive we can identify the hierarchal structure, which values certain elements and groups of people higher than others and makes equality a near impossible pursuit. Arguably the most important step for South Africans will be the reconciliation of the past with the present, which can pave the way forward for a truly equal, democratic and humane community.

Indeed the modern lawyer is faced with the herculean task of seeking justice while grappling with the slow death of the law. However, the prospect of realising a utopian society is not lost and although it requires the disruption of the entire social order, the possibility of re-enchantment lingers in our imaginations and contemplation of the world as it *ought to be*.

> Is it then utopian to think that we could share in life's glories? Is it a mere fantasy, or is the presence of the dream *itself* not proof enough that it might be possible? At last it is up to us to turn yesterday's utopia into a new sense of reality.[159]

[159] Cornell (n 5 above) 186.