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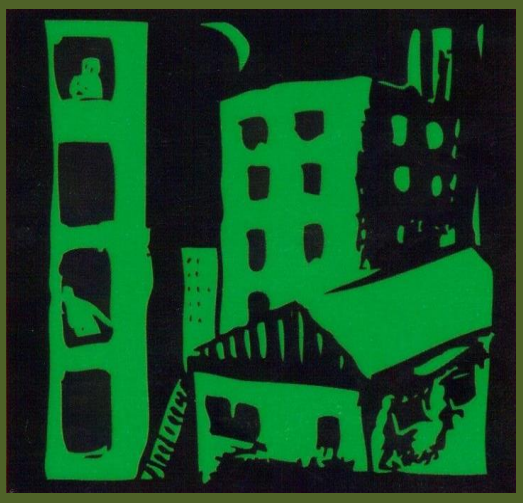

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Hold onto critical jurisprudence

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ABSTRACT

The main aim of this article is to reflect tentatively on the importance of a continuing critical jurisprudence. By thinking about the lives and legacies of the late Nelson Rolihlahla Mandela and his second wife, Winnie Madikizela Mandela, I want to reconsider a specific kind of critical jurisprudence, with particular attention to the issue of constitutionalism. I argue for a critical jurisprudence that responds to the many complexities that South African society faces , with nuance - not broad strokes and generalizations ; with care, neither aggressive nor defensive; and with thought, not strategic or calculated. I am of the view that this third position also has an important, albeit minor, place in legal scholarship and legal education and most pertinently in the LLB curriculum.

Keywords: Critical Jurisprudence; Constitution As Living Document; LLB Curriculum; Arendt; Derrida; Nelson Mandela; Winnie Mandela

> "Standing there on the embankment staring into the current I realized that – in spite of all the risks involved – a thing in motion will always be better than a thing at rest: that change will always be a nobler thing than permanence; that that which is static will degenerate and decay, turn to ash, while that which is in motion is able to last for all eternity." (Olga Tokarczuk, *Flights* at 9.)

1 INTRODUCTION

My thoughts in this brief reflection were prompted by the Conference on "Mandela and the Law" held during 2018 at the University of the Western Cape to remember Nelson Mandela's 100th birthday, where in my presentation I relied mainly on a piece published previously but which I wanted to take further.[1] In writing this piece I had the opportunity to revisit my previous writing, to reconsider some of the claims made and conclusions reached and to take them further. The main aim of this article is to reflect tentatively on the importance of a continuing critical jurisprudence. I admit, before I go any further and without any hesitation, that I accept that critique, critical theory and critical jurisprudence come in many forms and guises.[2]

By thinking about the lives and legacies of the late Nelson Rolihlahla Mandela and his second wife, Winnie Madikizela Mandela, I want to reconsider a specific kind of critical jurisprudence, with specific attention to the issue of constitutionalism. Four positions on constitutionalism have been described:[3] first, a conservative position, which insists that the South African Constitution (Constitution) should protect existing rights and affirm the *status quo* , and believes that transformation is an ideology; secondly, a constitutional optimism that subscribes to the transforming success of the Constitution; thirdly, a critical position that since the early 1990s cautioned against an over-optimistic or over-romanticised vision of the Constitution, but that has nevertheless not rejected the ideal of constitutionalism and has continued to push for radical change by re-interpreting the law, the Constitution and jurisprudence; and fourthly, the position that argues for the Constitution to be abolished, for a delinking, holding that the Constitution not only furthers past legacies, but as such manifests much if not all of the fraught past.

[1] Van Marle K "Post-1994 jurisprudence and South African coming of age stories" (2015) 12 *No Foundations* at 45.

[2] The present onslaught on critique tends to group all critical engagements together. Whether this is a strategic move or born from mere ignorance is unclear. See for example Gravett W "Of 'deconstruction' and 'destruction' – why critical legal theory cannot be the cornerstone of the LLB curriculum" (2018) 135 *South African Law Journal* at 285.

[3] By Joel Modiri during a panel discussion on the Constitution, September 2018, at the University of Pretoria.

I have always found and still find myself situated in the third position described above. I do not understand, have not been persuaded by, and thus do not agree with, the attempt to collapse positions two and three, by coupling them together under an umbrella of Western allegiance, or Liberal consensus. Similarly, I do not think that positions three and four could and should be regarded as the same. My concern is that the third position, which I regard as an important albeit minor critique[4], will disappear, and that the few who have been part of this position will side either with the second or the fourth position. What I want to do in this piece is to argue for a critical jurisprudence that responds to the many complexities that South African society faces, with nuance - not broad strokes and generalizations - and care,[5] neither aggressive nor defensive; and with thought, not strategic or calculated. I am of the view that this third position has an important place also in legal scholarship and legal education and most pertinently in the LLB curriculum.

I have previously contemplated post-1994 jurisprudence by looking at the lives of Nelson Mandela and Winnie Mandela.[6] In part 1 of this article, I re-visit my previous reflection, explicate my previous view and take it further.[7] A central theme in the previous take was the idea of the coming-of-age novel, the *Bildungsroman* , that in a way matches Nelson's life, but not Winnie's. I want to revisit and question some of the stark lines or divisions drawn in my previous piece and, in doing that, underscore the need for complexity. Drawing on two books published after the recent death of Winnie Mandela and a review of the two books, I argue that Nelson might have been treated too simplistically and Winnie not with enough attention to her role in past violence.[8] What stands out for me is the extent to which the everyday lives of ordinary people were affected by a figure like Winnie Mandela. It is this aspect that troubles my previous view of her as someone whose life disclosed possibilities for critique. Of course, her life manifested itself as one of resistance against the manifold oppressions of colonialism and apartheid, but at the same time it is more complex. It is this complexity that for me is significant when holding a critical position.

In part 2 I recall the writings of Hannah Arendt and Jacques Derrida on the American Declaration of Independence, and Bonnie Honig's attempt to reconcile what seems to be

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[4] Goodrich P *Law in the courts of love: Literature and other minor Jurisprudence* London and New York: Routledge (1996). See also Tomlins, C "Law As IV… Minor jurisprudence in historical key. An introduction" (2017) 21 *Law Text Culture* at 1.

[5] Van Marle K "Reflections on post-apartheid being and becoming in the aftermath of amnesty: Du Toit v Minister of Safety and Security" (2010) 3 *Constitutional Court Review* 347. See also Cornell D & Van Marle K "Ubuntu-feminism – tentative reflections" (2015) 36(2) *Verbum et Ecclesia* 1 .

[6] Van Marle (2015) at 45.

[7] Van Marle (2015) at 45.

[8] Bridgland F *Truth, lies and alibis: A Winnie Mandela story* Cape Town: Tafelberg (2018);

Msimang S *The resurrection of Winnie Mandela* Johannesburg: Jonathan Ball Publisher (2018); Van der Westhuizen, C "'Mother' of 'mugger' van die nasie?" available at https://www.netwerk24.com/Vermaak/Boke/mother-of-mugger-van-die-nasie-2019125#loggedin (accessed 31 October 2019).

an impasse between Arendt and Derrida.[9] My argument is that Honig's reconciliation between the two discloses important ideas on constitutionalism that could be of value for a critical constitutional jurisprudence. An underlying idea in both accounts is that of continuance. However, I find also in Arendt's view on how "self-evident" truths should be heeded and her embrace of political action something important for thinking about teaching law, constitutionalism and jurisprudence in our time. I find in Honig's reading of, and engagement with, Arendt and Derrida a potentially valuable approach for the reading of, and engagement with, texts and positions in legal education, as it shows a careful reflection of both positions, a critical engagement with, and integration of, potentially conflicting and starkly divided views.

In part 3 I conclude by taking Justice Froneman's formulation and call for the Constitution to be seen to be a living document, as an important backdrop against which South African law can and should be taught.[10] I regard the idea of the Constitution as a caring and a living document as critical interpretations of, and potentially critical interventions in, what Karl Klare so eloquently describes as a conservative legal culture.[11] If my experience of discussions on the recent review of the LLB curriculum prompted by the Council of Higher Education showed one thing, then it was an affirmation of exactly that, the conservative and formalist and mostly unreflective nature of legal culture.[12] Ultimately my sense is that critique and critical positions often come with small moves rather than grand gestures; in our current contexts, for me this includes a refusal not to become part of the general discourse of the day - be it affirming existing privilege, liberal optimism or Afro-pessimism.

2 NELSON, WINNIE AND THE POSSIBILITIES OF A CRITICAL JURISPRUDENCE

In this part I briefly recall my previous argument before I slightly disrupt it in an attempt to take it further.[13] In my previous reflection, I drew on Douzinas and Gearey's invocation of "an aesthetics of life" in their call for a return to a general jurisprudence.[14] I repeat my allegiance to a general jurisprudence and not a restricted one – the former embracing the notion that jurisprudence includes and should include "the aesthetic, ethical and material aspects of legality"; the latter reducing law to rules, and legal education to professional training. The crux of my previous contemplation was to clothe

[9] Honig, B "Declarations of independence: Arendt and Derrida on the problem of founding a republic" (1991) 85(1) *The American Political Science Review* 97 at 113; Arendt H *On revolution* New York: Penguin Books)1963); Derrida J "Declarations of independence" (1986) 15 *New Political Science* 7 at 15.

[10] *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E).

[11] Klare "Legal culture and transformative constitutionalism" 1998 *SAJHR* at 146.

[12] At least as I experienced it at the Faculty of Law at the University of Pretoria.

[13] Van Marle (2015).

[14] Douzinas C & Gearey *A Critical jurisprudence: The political philosophy of justice* Oxford: Hart Publishing (2005).

Nelson's story with a certain modernity and cosmopolitanism, to read it according to the traditional *Bildungsroman* as one of transformation and growth. The jurisprudence associated with this story is one that treats history in a linear fashion, one that is symbolized maybe by Etienne Mureinik's notion of the Constitution as a bridge that will bring us from the bad past to a better future.[15] In this version, one might say that we have left the past behind and have transformed almost fully to a democratic society. I described this story as underpinned by a modern idea of progress and an optimistic embrace of the Constitution and human rights. Tentatively - because my argument in this piece rests on complexity and care to avoid drawing stark divisions and categories – let us say that this version of Nelson's life can be coupled with the second position on the Constitution described above.

My reading of Winnie's story in the previous piece is of a person whose life thwarted the linear path of a *Bildungsroman*, someone who fitted comfortably neither in a certain modernity nor in the law. Her position was one of marginalization, representing excess, that which cannot be stilled or contained by a modern legal order. Drawing on two perspectives on constitutionalism by Mark Antaki and George Pavlich I attempted to describe a jurisprudence that could resist the pervasiveness of formation, settlement and transformation as *Bildung*.[16] I was interested in how, and to what extent, Winnie's story could disclose alternative and critical possibilities. Authors have engaged with her through the notion of "refusal", drawing on Njabulo Ndebele's careful and insightful novel.[17] I have also reflected on the notion of "disassociation", following Pavlich, as a metaphor for Winnie's life and possibly a critical jurisprudence. If Nelson's life in my previous piece reflected the second position, then Winnie's reflected the third. In my reconsideration of my previous thoughts I question Winnie's potential for the third position, but also Nelson's coupling with the second. At the very least I am of the view that the complexities and nuances of their lives underscore the difficulty of easy pairings and may even ask us to reconsider the four positions set out above, or at least prompt us to redraw the lines constantly.

[15] Mureinik E "A bridge to where? Introducing the interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* at 31; Van der Walt "Dancing with codes – protecting, developing and deconstructing property rights in a constitutional state" (2001) 118 *South African Law Journal* 258 at 311; Le Roux WB "Bridges, clearings and labyrinths: The architectural framing of post-apartheid constitutionalism" (2004) 19 *South African Public Law* at 629-634.

[16] Van Marle (2015); Antaki M "From the bridge to the book: An examination of South Africa's transformative constitutionalism's neglected metaphor" in Van Marle K & Motha S (eds) *Genres of critique: Law, aesthetics and liminality* Stellenbosch: Sun Press (2013) at 43; Pavlich G "Dissociative grammar of constitutional discourse?" in Van Marle K & Motha S (eds) *Genres of critique: Law, aesthetics and liminality* Stellenbosch: Sun Press (2013) at 31.

[17] Ndebele N *The cry of Winnie Mandela* Oxfordshire: Ayebia (2003); Botha H "Refusal, post-apartheid constitutionalism and the cry of Winnie Mandela" in Van Marle K (ed) *Refusal, transition and post-apartheid law* Stellenbosch: Sun Press (2007) at 29.

I reconsider my readings of both Nelson and Winnie not to reject previous arguments, but in the guise of continuous reading and interpretation to re-evaluate the possibilities of both of these stories for a critical jurisprudence. Christi van der Westhuizen, in a media piece written on Winnie's 80th birthday in 2016, asked: "What does it mean to die before your death?"[18] By asking this question she draws on Ndebele's work, in which a fictional Winnie reflects: "I'm just grateful for the many lives I'm supposed to have. I hope they're right. It's good to know I can die many times and stay alive. I'm intrigued, though, by the idea of dying before death."[19] Van der Westhuizen reflects on how Winnie's life is a manifestation of the damage of apartheid. And, as she rightly notes, it is damage so vast that not even the notion of "crime against humanity" can capture it. Significant for my argument on a critical jurisprudence is Van der Westhuizen's observation that the damage of apartheid goes beyond the "grand" crimes of institutionalized racism and its accompanying violence on many levels – that the damage of apartheid is also that of the daily destruction of everyday lives. Reading this I was reminded of Mahmood Mamdani's critique of the TRC, that it paid too much attention to the grand narratives of apartheid destruction, to the detriment of the everyday violence.[20] Van der Westhuizen also notes how a continued resistance against colonialism and its dehumanization is part of the South African fabric, but, with this, also the possibility of imagining something different, the possibility of living together with dignity. For her, Winnie's life displays all of these facets – the continued resistance against injustice and the continued violence that comes with this resistance. Could this logic be resisted? How could Winnie have resisted it, "what does it mean to die before your death?" Van der Westhuizen quotes from Winnie's prison diary[21] where she writes about het 491 days in isolated detention: "You are reduced to a nobody, a non-value. It is like killing you alive."[22] A consequence of the violence and dehumanized treatment and of her overcoming it, is that Winnie becomes a symbol, "mother of the nation".

Van der Westuhuizen underscores that what should never be forgotten when reflecting on Winnie's life is the inferior position of women in politics at the time, the similarities between Afrikaner nationalism and African nationalism that had limited space for the role and influence of women. At the time when Nelson Mandela, as father of the nation, started conversations with the apartheid regime, Winnie's experience of resisting detention, house arrest and banning to Brandfort prompted her to declare:

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[18] Van der Westhuizen C "Winnie Mandela: 'N lewe van sterftes" available at https://www.netwerk24.com/Stemme?Aktueel?winnie-mandela-n-lewe-van-sterftes-2016925 (accessed 31 October 2019).

[19] Ndebele (2003); Van der Westhuizen C "Winnie Mandela: 'N lewe van sterftes" available at https://www.netwerk24.com/Stemme?Aktueel?winnie-mandela-n-lewe-van-sterftes-2016925 (accessed 31 October 2019).

[20] Mamdani M *When does reconciliation turn into a denial of justice?* Pretoria: Human Sciences Research Council (1998).

[21] *Madikizela-Mandela W 491 days. Prisoner number 1323/ 69* Johannesburg: Picador (2013).

[22] Van der Westhuizen C "Winnie Mandela: 'N lewe van sterftes" available at https://www.netwerk24.com/Stemme?Aktueel?winnie-mandela-n-lewe-van-sterftes-2016925 (accessed 31 October 2019).

"Together, hand-in-hand, with our boxes of matches and our necklaces, we shall liberate this country."[23] Van der Westhuizen observes that with Winnie's deaths come also many lives. Even though she resigned from many African National Congress (ANC) positions, she is elected as President of the ANC Women's League in 1993. The Truth and Reconciliation Commission (TRC) found that she was involved in attacks, abductions and murder. Her term as deputy-minister is short because of allegations of misadministration of funds. Interestingly, however, Winnie always comes back, seemingly as survivor. We remember Archbishop Desmond Tutu's plea during the TRC: "If you were able to say 'something went wrong' … and say 'I'm sorry, I'm sorry, for my part in what went wrong'. I beg you, I beg you … Your greatness will be enhanced if you said, 'sorry, things went horribly wrong'." Van der Westhuizen ends her 2016 piece by suggesting that it is time for us to release Winnie from the burden that she carries as symbol and rather remember how her life became one of many deaths.

After Winnie's death, two books on her life were released: *Truth, lies and alibis: A Winnie Mandela story* by Fred Bridgeland[24] and *The resurrection of Winnie Mandela* by Sisonke Msimang.[25] Van der Westhuizen, in a review of these two books observes how the two books also reflect a certain division on how Winnie should be remembered.[26] She is critical of Msimang's version that, according to her, is not only factually incorrect, but also does not include all the relevant facts; whereas Bridgeland's version portrays a detailed and accurate telling of Winnie's involvement with the "football club". Van der Westhuizen is wary of Msimang's uncritical engagement with Winnie and her flat portrayal of Nelson. She notes how Msimang's description of Nelson as "tamed", uncomfortably reflects a colonial representation of black people as uncivil and therefore "wild". Van der Westhuizen recalls her 2016 view of Winnie as someone who portrayed a certain kind of resistance, but she is in the later piece more cautious about a "nostalgic wishful thinking for a true revolution", in which the lives of many innocent people were destroyed. Bridgeland's book reveals information about Nelson's hand in protecting Winnie that troubles the one-dimensional portrayal of him as a "sell-out."

How to view their lives and what to draw from them for a critical jurisprudence? In my previous piece, I recall Maboge More writing of a pre-Robben Island Mandela, a radical Mandela.[27] However, I think that also to view a post-Robben island Mandela purely through the frame of reconciliation should be rethought. Nelson had to make

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[23] Van der Westhuizen C "Winnie Mandela: 'N lewe van sterftes" available at https://www.netwerk24.com/Stemme?Aktueel?winnie-mandela-n-lewe-van-sterftes-2016925 (accessed 31 October 2019).

[24] Bridgland (2018).

[25] Bridgland (2018).

[26] Van der Westhuizen, C "'Mother' of 'mugger' van die nasie?" available at https://www.netwerk24.com/Vermaak/Boke/mother-of-mugger-van-die-nasie-2019125#loggedin (accessed 31 October 2019).

[27] Van Marle (2015).

difficult decisions, many of which entailed compromise, making one's hands dirty, and maybe, most importantly, compromising a position of "purity" that from a later perspective could be rejected as mere selling-out. My view is that by elevating both Nelson and Winnie to monuments, their critical potential is thwarted. Also, maybe now is exactly the time to memorialise Nelson Mandela; but my hope is that Winnie's time to be memorialised will come soon.[28]

Below I recall Hannah Arendt's insistence on "world making", and her argument that with the rise of modernity comes the end of absolutes, which in turn creates the possibility for political action. Political action is a way of being part of the world, of engaging in the world in all its multiplicity and complexity. Important here is to insist on the distinction between politics and the political, the former reflecting the notion of partisan politics, the latter, as articulated by Jean Luc Nancy and Philippe Lacoue-Labarthe, calling for a retreat from partisan politics in order to reflect on the meaning of politics.[29] This distinction is crucial for an understanding of the relation between law and politics, also when teaching law to students. At the heart of a critical jurisprudence lies the awareness of the need to retreat from partisan politics and to embrace a continuous rethinking of the political.

I turn below to two seemingly contrasting readings of constitutionalism and in my view a successful attempt in bridging the two positions. My reason for turning to these readings is because I think that there is critical potential in the arguments, but also in the approach to the readings examined.

3 AUGMENTATION, TRANSLATION AND RESISTIBILITY

Honig's bridging of two different takes on the American Declaration of Independence - that of Hannah Arendt and of Jacques Derrida - opens up for me an interesting reading and engagement to be considered concerning constitutionalism as such, but in particular the South African Constitution. In order to get to this reading, I need to recall Honig's account , first, of Arendt's take on the Declaration and then that of Derrida. According to Honig, a central question for Arendt in her political thought is the problem of politics in modernity, in other words the problem of founding a republic.[30]

[28] I draw here on the distinction made by Johan Snyman between monuments and memorial and Lourens du Plessis's translation of this distinction to constitutionalism. See Du Plessis L "The South African Constitution as memory and promise" in Villa-Vicencio, C (ed) *Transcending a century of injustice* Cape Town: Institute for Justice and Reconciliation (2000). A monument approach celebrates and remembers a victory whereas a memorial approach often remembers defeat and the loss of lives. Du Plessis argues that the South African Constitution contains both monument and memorial moments. My sense is that a memorialization of the lives and memories of both Nelson and Winnie Mandela could allow not only a complex reading of their lives but also one that is aware of its incompleteness and the impossibility to give a full account.

[29] Nancy JL & Lacoue-Labarthe P *Retreating the political* London: Routledge (1997).

[30] Honig (1991) at 97-113

With modernity of course came the rise of secularism and a decline in commonly held and publicly powerful instruments of legitimation.[31] Honig notes that Arendt can be regarded as being nostalgic for a lost past, mourning the "loss of tradition", but in her view Arendt can be understood to mourn and to celebrate it. Arendt seeks a replacement for the loss of authority, and she finds it in a "fabulist rendering of the American Revolution and founding".[32] She celebrates the disappearance of authority in modernity, because it marks the restoration of the world to humanity, the recovery of human worldliness, which opens new possibilities for action.[33] She simultaneously mourns it because it also leaves the modern world without tradition, religion and authority. Arendt is clear that without authority it would be impossible to maintain lasting institutions. This concern with authority and how to maintain lasting institutions is, for me, pertinent in the current context. How to develop a continuous critical position on this issue? For me, Arendt assists in answering this question.

Her concern is how to establish lasting foundations without appealing to gods or a foundationalist ground or an absolute. She wonders how it could be possible to have a politics of foundation in a world where there are none of the traditional features of stability, legitimacy and authority.[34] Central to Arendt is that human action can and should not be based on "an absolute". Honig quotes her view on what an absolute entails: "a truth that needs no agreement, since, because of its self-evidence, it compels without argumentative demonstration or political persuasion".[35] Exactly because of this non-deliberative nature of an absolute, it is anti-political. For Arendt, the uniquely political action lies in the purely performative, and she reads the American Declaration of Independence (Declaration) as being exactly that. However, Honig notes that Arendt must admit that there are also appeals to self-evident truths in the Declaration.[36] For example, in the Preamble we find two appeals to "a transcendent source of authority", an appeal to nature's god and an appeal to self-evident truths. But Honig explains that for Arendt the sentence "We hold these truths to be self-evident" is partly performative. She explains that Jefferson could have said "These truths are self-evident", but did not. The "We hold" is the performative part of the phrase, because it does not refer to self-evident truths but to a free coming together.[37] Honig refers to *The human condition* where Arendt argues that politics should not be held to standards external to it.[38] Forgiving and promising for her arise directly from the will to live together with others by acting and speaking. Honig explains that Arendt wants to celebrate the Declaration as a purely performative speech act, and in order to do this she must deny and dismiss

[31] Honig (1991) at 97.
[32] Honig (1991) at 97.
[33] Honig (1991) at 97.
[34] Honig (1991) at 98.
[35] Honig (1991) at 99.
[36] Honig (1991) at 99.
[37] Honig (1991) at 100.
[38] Arendt *The human condition* Chicago: The University of Chicago Press (1958).

the constative moments in the Declaration. She needs to see it as a uniquely political act by human beings, as an example of human power and worldliness. The "We hold" is for Arendt a promise and a declaration, which requires no appeal to a source of authority beyond itself.[39]

However, Honig argues that Arendt's notion of action without a beginning is misleading.[40] Her performative politics presupposes a pre-existing community of promisers. Promising is a practice, but Arendt gives no account of the conditions of promising. A paradox exists in her thinking - promising is simultaneously contingent, risky, unpredictable, and a source of reassurance and stability.[41] There must be something external to action's purely performative speech act. Honig turns here to Derrida who, unlike Arendt, is attentive to both constative and performative utterances in the Declaration.

As we have seen above, for Arendt the "We hold" is a source of authority, it is purely performative. The "We" is a source of stability. However, if this is a new beginning, there can be no "We" that exists prior to the Declaration. "How can the *We* stand as the guarantor of its own performance? How can it function as the sole source of stability for the republic?"[42] Honig explains that Derrida assists by noting that "The signature invents the signifier".[43] The signer does not have the authority to sign until he/she has signed. For Derrida, the Americans appealed to a constative, "because they did not overestimate its power"; they realised that they needed "another subjectivity", that "there are only countersignatures".[44] Founding, promising, signing cannot occur out of nothing. "For this Declaration to have a meaning and an effect there must be a last instance."[45]

What is the point of the difference between these two readings, for constitutionalism and in particular for a critical approach to constitutional jurisprudence in South Africa? The difference turns on the possibility for politics and the capacity of a constitution/the Constitution to make politics possible. If the Constitution is based on an absolute/self-evident truth, then for Arendt it closes down all possibilities for political action. Therefor she needs to ignore the constative/absolute moments in the Declaration. Derrida, on the other hand, concedes that there are both performatives and constatives, but for him this is not only something to be found in the Declaration but in all systems (linguistic,cultural, political). However, Honig argues that it is exactly the tension in the Declaration between absolutes and performatives that opens up possibilities for politics.

[39] Honig (1991) at 101.
[40] Honig (1991) at 103.
[41] Honig (1991) at 104.
[42] Honig (1991) at 104.
[43] Honig (1991) at 104; See Derrida (1986) at 10.
[44] Honig (1991) at 105; Derrida (1986) at 11.
[45] Honig (1991) at 105.

For Honig the constative moments in the Declaration can be treated as an invitation for intervention.[46] She urges us not to deny the constative moments, but rather to see them as opportunities for intervention, for resistibility. Honig finds that the notion of resistibility lies at the centre of Arendt's new conception of authority for modernity. An absolute (God, self-evident truth, natural law) is illicit because it is irresistible, does not persuade to agreement, and is anti-political.[47] Derrida also supports resistibility, "refuses to allow the law of laws to be put unproblematically, above man; but he recognises, more deeply than does Arendt, that the law will always resist this resistance".[48] Honig explains that Arendt's theory of authority draws on the connection in Roman thought between the concept of authority and a practice of augmentation.[49] The crucial point here is that "republics do not rest on one world-building act of foundation but are manifestly committed to augmentation, to the continual preservation and amendment of their foundation".[50]

Within current debates and views on the Constitution I find Honig's reading and reconciliation of the two views encouraging. What is crucial is the centrality of resistibility in both accounts that keeps possibilities for politics, and with it world making, open. Honig holds that for Arendt the commitment to augmentation maintains a republic and its revolutionary spirit; keeping the beginning always present.[51] Derrida calls this "survivance"; a kind of preservation through augmentation. "Survival is not produced by the maintenance of a present into a future in the way that a fixed moment seeks to preserve the presence of what is past."[52] Maintenance is an augmentation that takes place by way of translation. The Constitution thus calls out to be amended, text calls out to be translated. However, this is not translation in an ordinary sense.

> "Translation augments, necessarily. It does not merely copy or reproduce; it is a new linguistic event, it produces new textual bodies. It does not simply preserve an original in a practice of mere repetition, it dislodges the constative yearnings of the original and finds there the point of departure for a new way of life."[53]

The crux (for Arendt and also Machiavelli ,says Honig) is a beginning which is too firmly rooted in the past, becoming reified and foundational. What we see here is a call for dereification, for augmentation and amendment that makes beginning our own construction and performative. Honig invokes Leo Straus: "Foundation is, as it were,

[46] Honig (1991) at 108.
[47] Honig (1991) at 108.
[48] Honig (1991) at 108.
[49] Honig (1991) at 108.
[50] Honig (1991) at 109.
[51] Honig (1991) at 110.
[52] Honig (1991) at 110.
[53] Honig (1991) at 110.

continuous foundation."[54] What could this mean for our present discourse on the Constitution? I think the possibilities are manifold and my main aim here is not to unpack them fully. At the very least, it troubles any reading of the Constitution that regards it as grounded only in absolutes and that regards its historical moment or beginning as one that is fixed; it places translation and amendment at the heart of it.

The founding moments of South African constitutionalism and South African democracy should be seen as being open for translation, and the Constitution for augmentation. Resistibility and undecidability should be underscored. To the extent that the lives of Nelson and Winnie Mandela are part of the founding moments of this republic the same elements of undecidability, resistance and translation (as something that is not present yet, but that "calls out to be translated") should be heeded.

4 THE CONSTITUTION AS A LIVING DOCUMENT

In the section above I drew on Honig's reading of Arendt and Derrida's reflection on the Declaration , and underscored their insistence on the importance of resistibility, augmentation and translation. How could or do these notions feature in South African constitutional discourse? To my mind the description of, or regarding of, the Constitution as "a living document" is one way of thinking about it as an open and ever-changing document. Froneman J in *Qozeleni v Minister of Law and Order* calls for the "Rubicon … to be crossed not only intellectually, but also emotionally before the interpretation and application of the present Constitution is fully to come into its own right …". He further argues for the Constitution "to become … a living document …".[55] Can the Constitution as a living document be seen as something to be augmented continuously, but maybe even more as something to be translated, in the sense of not being present yet? In the same way that at least the full stories of both Nelson and Winnie have not been told yet, and will never be told finally? For me, it is this notion of continuance that is part and parcel of a critical jurisprudence. As was argued above, augmentation captures the idea that beginning is always present; in other words, we are not confronted with fixed or reified notions of authority, contained in an absolute.

I referred above to Karl Klare's observation in 1998 that the dominant legal culture in South Africa is a "conservative" one - and he explains that with "conservative" he means formalist. The Council on Higher Education (CHE) placed the notion of "transformative constitutionalism" at the heart of the LLB curriculum review. A lot of lip service has been paid to rubber-stamp curricula by including this notion recently in lengthy documents, reports and even study guides, seemingly to confirm that the CHE's request has been met. However, in my experience of the review of the LLB curriculum, so far there has been very little, if any, attention to and comprehension of Klare's

[54] Honig (1991) at 111.

[55] 1994 (3) SA 625 (E).

explicit call for a "revised, perhaps somewhat more politicized, understanding of the rule of law and adjudication that can consist with and support transformative hopes …"[56]. He asks for legal scholars and everyone in the legal community to think about an "account of rule of law suitable to the political challenges South Africa has set for itself …".[57] The notion of "transformative constitutionalism" is inextricably linked to this call for an alternative understanding of rule of law, as is his insistence that we should move away from the view that mainstream, traditional interpretations of law are "legal" and post-liberal ones "political". A proper understanding of the idea of transformative constitutionalism is that both these readings are legal and political.[58] The other part of this puzzle is legal culture, about which Klare argues that anyone with "an interest in transformative constitutionalism" has to realise that the role of legal culture will have to be rethought and legal interpretation radically transformed. What exactly this alternative account of rule of law entails in my view has not received enough attention in conversations and plans concerning the revised LLB curriculum. Neither has Klare's call for a "softening [of] the 'bright-line' distinction between law and politics and between the professional and the strategic".[59] These are the features of legal culture, those beliefs in what the law is, the attempt to preserve and protects law's "autonomy" – one of the loudest opinions voiced in conversations about the review of the LLB curriculum was that "law is not a humanities discipline", for example. In the same breath as seemingly adhering to transformative constitutionalism, people working in law faculties continue to separate law from everything else: "law is not politics", "law is not philosophy", "law is not history" , with the result of what Douzinas and Gearey so aptly call an "impoverished" concept of law and jurisprudence. With the law as autonomous arguments come all the claims of teaching reading and writing competencies in such a way that they are reduced also to language, reading, writing and problem-solving skills for law students. The strangest is that the latter would be dressed up in the guise of "critical thinking". Of course, Klare reminds us that these views are nothing but a reflection of a conservative legal culture, of "inarticulate premises [that] [are] culturally and historically ingrained in the professional discourse and outlook".[60] Often in conversations and debates about the law curriculum, those who come with a strong theoretical position are dismissed as not being sufficiently practical, of being too philosophical, "unlawyerly". Again, I find the persistence of this peculiar when it is voiced in the same breath as transformative constitutionalism. Klare makes it very clear that a conservative legal culture stifles transformation in a very practical manner; that a conservative legal culture is a "burden", that "an opening to transformation" that could

[56] Klare (1998) at 150. I read Klare's call not as one for some kind of partisan political engagement, but rather as one that engages the notion of the political. Even though Klare is associated with the CLS line of critique that tends to reduce politics to partisan politics, I understand Klare here as underscoring the need to retreat from partisan politics and engage in an investigation of, and reflection on, how traditional accounts of rule of law could be challenged from the notion of the political. I thank the anonymous reviewer for prompting me to make this point clear.

[57] Klare (1998) at 150.

[58] Klare (1998) at 152.

[59] Klare (1998) at 159.

[60] Klare (1998) at 167.

make material change requires an "updated, politicized account of the rule of law".[61] In other words, that the actual changes in socio-economic circumstances can come only if there is a re-thinking of, and shift in, how we view law; we can do law differently and achieve different outcomes with it only if we view and think about it and teach it differently.

I mentioned above that my reflection on Nelson's and Winnie's life stories in thinking about a post-1994 jurisprudence was situated within a general jurisprudence, one that laments law's impoverishment by the emptying out of everything "not law". In my view Klare's notion of transformative constitutionalism that requires a rethinking of the notion of rule of law and a softening of these distinctions between law and everything else should be read in the guise of a general jurisprudence for its critical potential to be heeded. At the heart of a critical approach to law and to jurisprudence is the continuous openness to re-read, re-think and re-evaluate. Honig's reading of Arendt's and Derrida's views on the Constitution underscores their position on the need to resist any reading or interpretation that is reified, cast in the absolute. This does not mean that we deny the force of the law and legal culture to reify, but it shows also the possibility to augment, to change by way of translation. We can't sustain the vision and hope for democracy and transformation without some sense of "authority" or "foundation", but as we saw above, this could be a "practice of authority [that] turns out to be, paradoxically enough, a practice of deauthorization" and "foundation ... [as] continuous foundation".[62]

The making, but also the maintenance/preservation of care for and sharing of a world is what is at stake when thinking about a critical jurisprudence. Hannah Arendt famously denounced Adolf Eichman for his refusal to share the world with others.[63] Judith Butler has taken up Arendt's notion of "cohabitance" in her writings on Palestine.[64] Stewart Motha in a recent work articulates the question of belonging as central to post-colonial but also post-apartheid being.[65] How do we become belongers? How do belonging and cohabitance relate to notions of founding, augmentation and translation? These are questions that could be part of a critical approach to law and a critical jurisprudence.

My aim in this piece is to argue for a specific kind of critical jurisprudence, albeit not as the only possible one, but as a position that has a contribution to make. My concern is that this position is disappearing. By looking and re-looking at the lives of

[61] Klare (1998) at 188.

[62] See Honig (1991) at 111.

[63] Arendt H *Eichman in Jerusalem. A report on the banality of evil* New York: Penguin Books (1963).

[64] Butler J *Parting ways: Jewishness and the critique of Zionism* New York: Columbia Press (2012).

[65] Motha S *Archiving sovereignty: Law, history, violence* Ann Arbor: Michigan Law Press (2018).

Nelson and Winnie Mandela I considered what a critical engagement with the making of a world entails. The making of worlds inevitably asks for purity to be compromised. The lives of both Nelson and Winnie reflect such messiness. However, my concern is that Nelson is blamed for it while Winnie is lauded uncritically. I ask for Nelson and ultimately also Winnie to be memorialized rather than monumentalized so that we can learn from their struggles in a valuable way. In the same way, the Constitution as a "founding" of a "new" South Africa should be seen in the vein of "continuous foundation" that calls for dereification, augmentation and translation. The LLB curriculum, in order to provide the necessary direction for the much needed transformation should be careful of absolutes, as they are "pre-rational – they inform reason but are not its product – and since their self-evidence puts them beyond disclosure and argument, they are in a sense no less compelling than despotic power and no less absolute than revealed truths of religion or the axiomatic verities of mathematics".[66]

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[66] Arendt *On revolution* (1963) at 192; Honig (1991) at 99.

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