



The inoperative community of law students: rethinking the foundations of legal culture

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In this article I contemplate the possibility of a relationship between democracy and the democracy to come experienced from within an inoperative community of law students. The reason for this contemplation is to ascertain to what extent law students can contribute to transformation or transformative constitutionalism as referred to by Karl Klare and Dennis Davis in their 2010 work. I investigate the radical and transcendental nature of human rights and democracy and their relationship with legal culture as a community of lawyers which also confirms the *status quo* and denies the radical nature of human rights and democracy. I argue that law students as an inoperative community can create human rights and democracy discourse which can promote transformation.

It goes without saying that the Constitution (1996), its supremacy, laudable ideals and the Bill of Rights feature prominently in what is taught to law students studying in post-1994 South Africa.¹ In contrast to the celebratory view of the Constitution presented to law students, it is, however, becoming quite clear that an increasing number of ordinary people are viewing the Constitution as a

1 This article is based on the paper with the same title delivered at the South African Law Teachers Conference on 14 January 2014 at the University of the Witwatersrand, as well as the author's LLM dissertation entitled "n Tentatiewe gemeenskap en die demokrasie wat moet kom – 'n regsfilosofiese ondersoek", November 2011, University of Pretoria. <upetd.up.ac.za/thesis/available/etd-05252012-143540>. I wish to thank Prof Karin van Marle for her guidance, support and insight. I however take full responsibility for any errors.

negotiated revolution or historical compromise that merely represents the balance of interests at the time of the political transition (Froneman 2014: 2, Hendricks et al. 2013: 36). It makes one wonder whether transformation (and land reform in the context of Justice Froneman's argument, to which I shall refer later) can take place within the framework of the rule of law represented by the Constitution. It also begs the question as to whether law students and even lawyers can contribute to transformation – especially if law students are only taught to view the Constitution in terms of its exalted celebratory status, somewhat isolated from the rest of the law.

Initially, I considered the answer to the above questions to be located in a community-oriented approach to be taken by law students to ensure context-sensitive and relevant interpretation of the law – in line with what the Constitution asks of us. However, taking into account the divergent views on the Constitution alluded to earlier, it becomes quite clear that we cannot give meaning to our context or community without excluding a possible other context or community. The same is true of human rights and democracy as protected by the Constitution. We, therefore, have to view 'community' in a new manner.

The post-apartheid landscape is fraught with diverse views and needs. Legal interpretation, however, aims to find final meaning, which effectively extinguishes alternate meanings and possibilities. The latter aspect can be detrimental to the project of transformation in South Africa. If law students and lawyers are to promote this project in doing legal work, as I ultimately hope, then legal education should make law students aware of the impact of legal interpretation in the post-apartheid context.

In this article, I will, by means of a jurisprudential inquiry, suggest that law students should engage in legal interpretation as part of what I would call, drawing on Nancy, an inoperative community of law students, in response to the *status quo* established and confirmed in the form of legal culture by tertiary education.

I will present my suggestion in four parts. First, the context within which legal interpretation should take place, with specific reference to how we understand democracy and human rights, will be exposed with reference to the inherent inability of the institution of democracy to acknowledge the various experiences thereof, thereby denying the democracy to come. A further layer of complexity is added by the nature of human rights, which enables adoption by different ideological persuasions, creating different meanings, or no meaning at all.

Secondly, law students and lawyers are obviously also situated within a specific context, namely legal culture. I will, therefore, briefly allude to some of the problematic characteristics of the South African legal culture, such as the

context of its creation and the fact that it constitutes community in an exclusive and traditional sense. These characteristics require that legal culture in itself must be transformed or differently approached. Legal culture does, however, also provide us with an opportunity to rethink community.

Thirdly, I will explain the suggestion of an inoperative community of law students by responding to the issues identified in the first two parts and by making use of Nancy's notion of an inoperative community. This notion refers to a community that can never be, in the true sense of the word, but which is aware of this limitation. I then propose an inoperative community of law students as a reaction to the *status quo* confirmed by legal culture.

Finally, I will briefly share my thoughts on how this notion of an inoperative community can be applied to teaching or understanding 'property' in post-apartheid South Africa.

1. Context

1.1 Post-apartheid South Africa, human rights and democracy

Twenty years into 'the new South Africa', the question still (now maybe more than before) begs: What do the ideal of democracy and human rights really mean for people living in post-apartheid South Africa? To answer this question, we cannot only take these ideals at face value. I provide a more abstract contemplation below in an attempt to not once again reduce rights and democracy to what we want them to be. I will show that the very nature of these concepts makes them susceptible to misuse, abuse and to being reduced to words on a list of 'politically correct things to promote'. We will, however, find that this nature also holds potential for embracing tentative, context-sensitive meaning.

I make use of Cornell's (1993: 2) notion of transformation, understood in the radical sense of a system that can alter itself so as not to confirm its own identity, but rather question the said identity, thereby opening up the opportunity for discourse on alternate meanings.² Transformation understood in this sense also relates to the notion of deconstruction and the welcoming of the democracy

2 Barnard-Naudé (2010: 18) also refers to this notion of transformation in his discussion of fraternity and friendship as understood by Derrida and Nancy. I will discuss these notions later in this article. Late Chief Justice Pius Langa (2006: 352) viewed transformative constitutionalism, which I regard as part of the larger project of transformation, as the duty to change, but to constantly ask how the community should look like on the other side (as a result) of transformation.

to come, which is envisaged by Derrida (1990) as a manner of questioning and deferring meaning – ideas I will engage with in formulating my argument.

1.1.1 Democracy

There is no definition of ‘democracy’ in our Constitution (Currie & De Waal 2005). However, the Constitution does include a number of references to the fact that the governing of the country should take place in terms of the will of the people (Currie & De Waal 2005: 14). The latter conception is most commonly held as the meaning of democracy. The idea of democracy can, however, not be equated to the notion that collective decisions will be taken by majority vote (Roux 2008). Roux (2008: 83) shows that the principle of democracy in South African constitutional law is “something more nuanced [...] including at the very least the notion that the people’s will may be trumped by individual rights where this serves the democratic values of ‘human dignity, equality and freedom’”.³ Clearly, the ideal of democracy is not and ought not to be one dimensional and will not be perceived in the same manner by all.

In our attempts to understand democracy, can we reconcile the ideals of democracy as taken up in the Constitution with the actual experience of democracy in South Africa? If we consider Derrida’s view of democracy as a symbolic order and Goosen’s (1998: 56) interpretation of Derrida’s notion of deconstruction, we will find that the concept of democracy will only allow those perceptions that accord with the *status quo*.

Deconstruction, to a large extent, pursues justice, also in the context of law and legal interpretation (Derrida 1990).⁴ Law (in a broad sense, therefore, including both content and system) is a necessary pre-condition for justice to prevail, but cannot be equated to justice (Briggs 2001: 2). Whereas law will be upheld every time a good legal rule is applied, justice is, as Derrida (1990: 947) describes it, “... the experience of the impossible ...”, meaning that we are unable to truly experience justice. We are, therefore, reminded of our inability to incorporate true justice into law (Cornell 1992: 2). In every effort to allocate meaning to justice (or any

3 As authority for his statement, Roux (2008: 83) refers to section 19(3)(a) of the Constitution which provides the right to vote to every adult citizen – a clear intention of the Constitution to protect this right against majority override, as this is necessary to safeguard the conditions necessary for democracy. However, Roux (2008: 83) also notes that any right can obviously be limited in terms of section 36 of the Constitution, but such a limitation will comply with the principle of democracy only if the law of general application referred to in section 36 serves the democratic values of human dignity, equality and freedom.

4 See Derrida (1990), in general, in this regard.

concept, for that matter), we will have to immediately deny such a meaning as a result of the limitation experienced (Derrida 1990: 971). For Derrida (1990: 945), deconstruction is in itself justice and, by reminding us of these limits, we are also made aware of the potential for transformation – in the radical sense, as I have referred to it previously.

We should think of democracy in the same manner. The institution democracy, as one of the many symbolic orders in our society (Goosen 1998: 56) provides order and protects us against the unforeseeable eventualities of life or Events (Goosen 1998: 56). These unforeseeable eventualities or alternate conceptions of our society threaten the way we, or the *status quo* prefer(s) our society to be structured. These Events are denied their true nature, singularity and uniqueness, constituting an injustice, except if each and every interpretation given to these Events is immediately denied (Goosen 1998: 56). The structural nature of democracy, therefore, results in its inability to welcome a better unimaginable version of itself or the democracy to come (Cornell 1992: 1-2, Derrida 1990: 969 & 1997).⁵

The current South African democracy will inevitably structure itself in terms of inclusionary and exclusionary strategies, which form part of modern democratic systems (Goosen 1998: 59). Goosen (1998: 59) is, however, of the opinion that Derrida would welcome the current institution of democracy in South Africa as a means to prevent chaos.

The question then follows: If we acknowledge the limitations as described earlier, how should we approach democracy in the pursuit of real transformation? Barnard-Naudé (2010: 6) refers to a comment by Derrida that being hospitable towards the democracy to come provides an opportunity for political action in the form of negotiation between the present and some future ideal of our society.⁶ I wish to put forward that this openness or negotiation can be transformation in itself, as it creates opportunity for the questioning of what we think we know by trying to imagine what we can never know.

As I do not wish to mention a great deal about what the democracy to come can mean, I wish to focus on the interplay between democracy and the democracy to come as providing a space for the temporary coming together of interpreters, aware of both the limitations of their experiences and the opportunity to pursue the democracy to come or a better, more just society. I will expand this notion of a temporary coming together further in this article as an approach to legal interpretation.

5 See Derrida (1997), in general, in respect of the notion of the democracy to come.

6 Barnard-Naudé (2010: 36) refers to a comment made by Derrida (2002: 179-80) in an interview concerned with the topic of politics and friendship.

1.1.2 Human rights

The promotion of democracy in the Constitution goes hand in hand with the promotion of basic human rights such as human dignity, equality and freedom (Roux 2008: 83). In a way, the acknowledgement of human rights in post-apartheid South Africa provided the potential for the acknowledgement of those marginalised by apartheid.

However, an uncritical devotion to human rights will not and has not serve(d) us or the vulnerable sections of our society well. We have to be candid about how far we can stretch the notion of human rights to serve as solution to all our problems. I will attempt to show that it is also quite possible that human rights may mean more than one thing – a fact that probably leaves most legal scholars ill at ease.

In his work on the paradoxical nature of human rights, Douzinas (2007) shows how human rights can be understood in terms of such a variety of ideologies or discourses that it can be compared to an onion. Each layer of the onion represents a different understanding of human rights.⁷ He also makes the astonishing statement that “there is nothing at the core of the onion, no centre or kernel that gives human rights their overall shape [...] human rights are nothing more than the various perspectives on them” (Douzinas 2007: 14).

Schroeder (2008: 7) reiterates Douzinas’s view that the promotion of human rights has had the opposite result as what was hoped for. Human rights have, in a global context and as a result of their paradoxical nature, been used as tools of empire by developed nations in the name of establishing free trade, democracy and capitalism in developing nations – resulting in war and conflict, rather than acknowledging developing nations’ citizens as “humans” entitled to human rights (Douzinas 2007: 8, Schroeder 2008: 7). This kind of understanding of human rights, to a certain extent, requires deconstructing human rights so as to “save” human rights (Douzinas et al. 1991, Lenta 2001).⁸ The deconstructability of human rights should, however, not result in a nihilistic attitude, but rather a realisation

7 See Douzinas (2007), in general, in this regard. See also Douzinas (2000) where he first entertains the notion that human rights have nothing to offer but paradoxes, and Schroeder (2008) for a review of Douzinas (2007).

8 Douzinas’s views of human rights have been criticised. See Morss (2003) in his work aptly named *Saving human rights from its friends: A critique of the imaginary justice of Costas Douzinas* and Motha & Zartadoulides (2003). Morss argues that Douzinas’s approach towards human rights is distasteful in a democratic society. Motha & Zartadoulides, however, argue that Douzinas is taking a too positive view of human rights. The conflicting commentary evoked by Douzinas’s approach is indicative of the paradoxical nature of human rights.

of the responsibility towards the Other, therefore providing an opportunity to be seized by those interpreting human rights (Derrida 1987).⁹

Douzinas (2007: 9) refers to the fact that the various discourses on human rights have their origin in very different schools of thought. There is no single theory providing the content and meaning of human rights (Douzinas 2007: 9). This becomes clear when one views the variety of institutions, including constitutional, legal, judicial, academic, political and cultural institutions, among others, that have contributed to human rights discourse (Douzinas 2007: 9).

The semantic composition of the word 'human rights' is also indicative of its paradoxical nature (Douzinas 2007: 9). The word 'rights' refers to the Western notion of rights that is afforded in terms of a legal system, which effectively confirms the *status quo* (Douzinas 2007: 9). For instance, if we take a real right that confirms the ownership of a thing, it does not make provision for considering the historical context within which ownership has been obtained (Douzinas 2007: 9). This characteristic also brings the interpretation of human rights within the parameters of the legal work of lawyers, on the precondition that this concept behaves like any other Western right. This aspect is obviously problematic, especially in the light of our own history.

The word 'human', on the other hand, refers to the connection with the humanitarian tradition relating to morality (Douzinas 2007: 9). Human rights are, therefore, regarded as legal rights classified in a subcategory as a result of the valuable principles such as dignity, freedom and equality that are being protected (Douzinas 2007: 9).

Douzinas (2007: 10) considers the origins of human rights as a way in which to explain human rights. At present, at least in a post-apartheid context, it is accepted that human rights have their origin in humanitarian conventions and legislation such as the Constitution. This acceptance results in disregarding any ideological or religious connection with human rights so as not to question the universality or the exalted status of human rights (Douzinas 2007: 12).

Whereas the universal nature of human rights should, in fact, mean that they exist for various different cultures, it actually assumes a liberalist, capitalist and individualist notion of human rights which will obviously be in conflict with values other than Western values (Douzinas 2007: 12). In a post-modernist society, a universal notion can, therefore, be problematic, as new facets of humanity and human nature are discovered on a regular basis – not to even mention the impact

9 Lenta (2001: 199) refers to Balkin (1987: 743, 782) who notes that the deconstructive reading of legal texts can be a working tool for both more conservative thinkers and more liberal thinkers.

of various cultural viewpoints and experiences of humanity (Douzinas 2007: 11).¹⁰ But, as Douzinas (2007: 12) also shows, groups with more socialist aspirations can also claim human rights. Can it then be argued that human rights are, in fact, quite special, as anyone, irrespective of her convictions or place in society, can depend on human rights? Or does this merely confirm Douzinas's (2007: 11) view that human rights are really meaningless and can be utilised as a tool to rationalise the use of power by any ideology?

In the final instance, Douzinas (2007: 11) does, however, acknowledge that history shows that human rights, or the claiming of human rights, have been used in subversive manners to question the *status quo* and to put an end to dictatorships or unjust regimes. From our own history we can attest to the fact that human rights are more than confirmatory legal rights and can serve as claims of those not acknowledged by the current order, thereby undermining the *status quo* (Douzinas 2007: 9).¹¹ In this respect, human rights can serve as the antithesis of rights in a legal technical sense by placing emphasis on the injustices experienced by the Other (Douzinas 2007: 10).

Douzinas (2007: 8) is certainly not suggesting that the paradoxical nature of human rights should be "fixed", as he is of the opinion that the paradoxical nature of human rights is most probably the characteristic that provides it with meaning. It creates the opportunity for various perceptions of human rights to exist contemporaneously (Douzinas 2007: 14) and it is this very aspect of human rights that creates potential for transformation. As Douzinas (2007: 10) puts it, the true potential in human rights may lie in its rhetorical ambiguity and oscillation between the actual position of human rights in our specific society and the desired state of human rights (and not necessarily in an absolute universal meaning). We therefore find a type of hovering between the certain and uncertain aspects of human rights, which reminds me of the interplay between democracy and the democracy to come. This tentative positioning (because there can be no finality) emphasises the limitations of human rights as well as the possible exclusionary effect that allocating final meaning can have. However, it also creates the space

10 See also Lenta (2001: 176) who discusses the abandonment of the idea that values have their origin in positivism and natural law: "(T)here is growing scepticism regarding traditional natural law as a source of values: the claim that there are a small number of fundamental principles, universals, ideals or standards that every legal system ought to include. Classical teleology has become historically exhausted and religious transcendence today fails to command widespread or uniform acceptance".

11 In this regard, see also Heyns (2001: 171) who equates human rights to legitimate struggle. Van Marle (2004: 606) shows that the equating of human rights to legitimate struggle, in fact, reduces human rights and places limitations on the thoughts and politics regarding this transformative concept.

for interpreters of human rights to contest absolute meaning by considering alternate meanings.

The viability of the positioning I suggest will depend, however, on how lawyers traditionally view legal interpretation. In my opinion, there are generally two types of aspects that will determine this traditional view, namely the cultural aspects (legal culture) and the structural aspects of the law. Whereas the latter refers to the institutions, form and letter of law, legal culture refers to the community of lawyers and their shared sentiments. I am not suggesting that there is a clear distinction between the cultural and structural aspects of the law (I do think that these aspects inform each other), but I will mainly focus on current legal culture and its (in)ability to promote transformation.

2. South African legal culture and legal interpretation

If the nation's intention to transform is confirmed by the Constitution, as Justice Dikgang Moseneke (2002: 315) views it, the project of transformative constitutionalism confirms a South African lawyer's duty in respect of transformation. Klare (1998: 150) describes transformative constitutionalism as the project in terms of which lawyers, by engaging in their legal work – specifically the interpretation of the Constitution – bring about social transformation. Justice Pius Langa (2006: 353) refers to Mureinik's (1994) description of transformative constitutionalism as a bridge facilitating migration from a culture of authoritarianism to a culture of justification or, in other words, a culture of acceptance to a culture of critical reflection.¹² However, due to the nature of a bridge, migration back over the bridge remains a possibility. This implies that in our pursuit of transformation, we also regress from time to time.

The notion of transformative constitutionalism is, however, in itself paradoxical, as Van der Walt (2006: 4, 5) also shows. Transformation requires change, but constitutionalism assumes stability (Van der Walt 2006: 4-5). With the aim to ensure both change and stability, it was decided during the transition era to implement transformation by means of the implementation of a constitutional democracy based on human dignity, equality and freedom – what has become known as a negotiated revolution or historical compromise (Van der Walt 2006: 127, Froneman 2014: 3 paragraph 2). A legal scholar cannot ignore the challenge represented and presented by the notion of transformative constitutionalism.

12 See also the following for more information on transformative constitutionalism: Roux (2009) and Albertyn & Goldblatt (1998). Quinot (2012: 129) discusses transformative constitutionalism and its implications for legal education. He also describes transformative constitutionalism as opening up engagement with substantive values in justifying legal outcomes (Quinot 2012: 414).

I make use of Klare's (1998: 166–7, Klare & Davis 2010) definition of legal culture, which refers to the thinking methods of lawyers in formulating arguments and in considering whether arguments carry authority or not. Therefore, it both refers to the shared sentiments of lawyers in a given context and educated under a given system and determines the extent to which political and ethical commitments influence professional discourse (Klare & Davis 2010: 406). Klare and Davis (2010: 406) also describe legal culture as giving content and providing constraints to legal imagination. The way in which lawyers will approach transformative constitutionalism and the challenge it poses will, therefore, be determined by legal culture, to a large extent.

On a certain level, my enquiry, in this instance, entails investigating the relationship between the transformative concepts of human rights and democracy, on the one hand and legal culture on the other, in order to find a type of relationship between these concepts that will encourage transformation. This enquiry can, however, not overlook two aspects of legal culture – to which Klare also alludes – that may stand in the way of transformative constitutionalism, namely the conservative nature of legal culture and the fact that legal culture is also a community in the traditional sense of the word. I will now briefly discuss these issues.

2.1 Conservative legal culture

Klare & Davis (2010) investigate the South African judiciary's response over the past 20 years to its constitutional mandate in terms of section 39(2) of the Constitution to promote the values of the Constitution in the development of the common law. They compare South African lawyers – or legal culture – to American lawyers to show that the South African legal culture is more conservative (Klare & Davis 2010: 402). Traces of this conservatism can be found in the way South African lawyers are generally more confident that words have self-revealing meanings and the tendency to favour literal and rule-bound approaches which leads to very technical and clinical interpretations (Klare & Davis 2010: 407, Botha 2004). In addition, under South African lawyers, there is a greater faith that legal reasoning can be isolated from politics (Klare & Davis 2010: 407). The latter aspects are problematic if we consider the post-liberal nature of the Constitution (Klare 1998: 153), which does not presuppose a strict separation of the legal and the political and necessarily involves considering socio-economic issues.

We have to acknowledge the fact that our legal culture may be more conservative, as legal culture determines the manner in which legal scholars view their role in society and to which extent they can, in doing their law work, consider aspects that may traditionally not be regarded as issues of law – exactly what transformative constitutionalism expects of us (Klare 1998: 150, Van der Walt 2006: 5).

Legal culture determines legal constraint in legal interpretation and whether a legal scholar will acknowledge the uncertainty of the law (Van der Walt 2006: 6, Klare 1998: 165).¹³ Klare (1998: 165) notes that the South African legal culture has created the notion that an unqualified acknowledgement of the uncertainty of the law will lead to anarchy. I can attest to the fact that this notion was also relayed to us as students, and especially favoured in practice. If legal constraint of a text is accepted blindly, a lawyer will also accept that the legal text only has so many meanings (Klare 1998: 165). This creates legal certainty. Critical analysis will show, however, that legal constraint may in fact allow more than we think, frustrating the so-called certainty favoured by lawyers (Klare 1998: 165). The legal culture's denial of legal uncertainty causes legal culture to lose its self-consciousness, specifically in respect of its position and responsibility in society (Klare 1998: 165). If we acknowledge that a concept such as human rights can mean different things for different people, a stubborn and technical manner of interpretation will extinguish the relevance of human rights and deny the opportunity presented for transformation.

In his first work on transformative constitutionalism in South Africa, Klare (1998) warns that the South African legal culture will not promote transformative constitutionalism. His work, in collaboration with Davis in 2010 – over 10 years after the initial work – indicates that progress has been made, but that South African legal culture has not transformed itself yet to be able to really give effect to the values of the Constitution (Klare & Davis 2010: 408).¹⁴

In order to transform legal culture, it is necessary to first understand the origin of our legal culture as a reason for such conservatism. Chanock (2001) shows how the South African legal culture developed contemporaneously with the South African state after 1902. According to him, this parallel development contributed to the conservative nature of South African legal culture. Legal formalism is, therefore, the result of practices in the past, as political circumstances required strict separation of the legal and the political, leading to a very technical approach to legal interpretation (Chanock 2001: 511). Since 1950, judges had to promote the apartheid government's policies in their legal work (Chanock 2001: 518-9). In spite of the obvious flaws of the system, the general (White) public viewed the law as liberal, neutral and objective, but it only protected White supremacy (Chanock 2001: 522). Therefore, the exalted status of the law, not to be subjected to critical evaluation, was confirmed, leaving the majority of South African citizens with

13 In this regard, see also Kennedy (1996).

14 See also Van der Walt (2006) regarding the conservative South African legal culture, and Modiri (2013) who discusses the problematic consequences of the South African legal culture for legal education.

no faith in the legal system – resulting in their revolt. The fact that the law must be exalted, to some extent, in order to have force cannot be denied. However, if it cannot be subjected to critical contestation, it will be very difficult to create a culture of justification, as Mureinik (1994: 31-32) aspired to.

As legal scholars and maybe specifically law students, we may still be subjected to these outdated ways. My concern is whether law students are ever provided with the opportunity to question why they think about the law in a certain way. Do we operate under the impression that the implementation of the Constitution miraculously wiped out these outdated notions? Are we even able to recognise the outdated notions and incompatibility with transformative constitutionalism? To my mind, the latter capability is required before we can even consider pursuing transformative constitutionalism. I will, however, first briefly describe another limiting characteristic of legal culture.

2.2 Legal culture as a community

Breytenbach (2009: 7) very aptly describes the problematic nature of any culture by defining culture as being

the receptacle of the riches of received (or stolen) certainties. Certainty, as we know, easily slides into Orthodoxy (with a nudge or two from those with vested interests), and this Security is customarily hoisted on a pedestal as Truth. Truth, strangely enough, even when enshrining the expression of shared convictions [...] must be only and One to survive [...] Diversity is not Truth's favourite lover [...] It is very difficult for Truth's power to imagine being divided or shared. Hence the potential – indeed, the predisposition – for conflict and the glorification of the manly virtues of combativeness and possession.

Certainties (or fixed meaning) provide security to the members of a culture and are easily regarded as the ultimate truth, serving as a supposed shared identity for the members (Breytenbach 2009: 7). This seemingly shared identity provides a guarantee of similarity and a shared origin, lessening the need for critical contemplation of meaning (Breytenbach 2009: 7). The same applies to legal culture.

Klare (1998: 167) refers to the fact that legal culture creates a cultural code or a system of meaning and he emphasises that this meaning creation is inevitable in any instance where a community is created. Legal culture is, therefore, faced with the problematic aspects of 'community' irrespective of our otherwise complex post-apartheid context.

This cultural code will guide members of the specific system as to how they should act and interpret their surroundings. It may also protect us against total chaos or legal disorder (Goosen 1998: 59). The formation of some kind of legal culture or a cultural code is, therefore, not only inevitable, but probably also necessary. In the light of the radical call for change, how do we then approach the necessary evil of legal culture?

In his discussion of Africa's role in a global context, specifically in terms of arts and culture, Breytenbach (2009: 15) suggests emphasis on the *cultivation* of values or meanings rather than on the meanings or cultural code itself. It is a call for deliberation of the system of meaning and critical reflection on its impact, instead of placing the meanings created on a pedestal. This describes a type of tentative system of meaning – effectively deferring final meaning so as to avoid injustice (Derrida 1981, 1982).

Breytenbach's proposition leads me to believe that legal culture can provide something other than a platform for confirmation of meaning. The unleashing of this potential will require the transformation of legal culture itself. However, legal culture is not an autonomous animal operating independently of its members. Whereas its creation is probably inevitable, it still entails our thinking about it. Therefore, the potential, in this regard, lies in our approach to legal culture.

Klare (1998, 2010) and Van der Walt (2006) focus on the manifestation of legal culture in the work of the judiciary and its impact on transformative constitutionalism, but these 'judicial' moments are not the only places where legal culture is founded or confirmed.

3. An inoperative community of law students

3.1 Law students as a turning point for legal culture

I have alluded to the fact that our current legal culture has its origin – and partially its foundation – in a previous regime. The continuous confirmation of this legal culture, however, occurs when a law student is introduced to the law for the first time: legal education.

Kennedy, a critical legal scholar, (1990: 38-58) alludes to the fact that legal education creates the opportunity for confirmation of the hierarchy of the legal profession, thereby creating a stagnant conservative legal culture. He (1990: 54) is of the view that law students only follow the ways set out by the institution that is the legal profession and thereby only serve to live out the ideals of this institution. Critical thinking and evaluation of the law is not promoted. The role of a lawyer

in society is firmly nestled with law students so as to preclude the opportunity for contesting the supposed destiny of every law student (that makes the cut at least). Legal education confirms the principle that the law's veil of mystery will be lifted only if it is practised under the hand of an experienced practitioner – thereby establishing and confirming the hierarchy of the law (Kennedy 1990: 60).

I believe Kennedy confirms my point that legal education serves as the founding or affirmation of not only the hierarchy of the legal profession, but also legal culture. The latter manifests in the way law teachers teach the law (Quinot 2012: 416). As Modiri (2013: 456) puts it, traditional legal education “affirms and entrench(es) these formalist, legalist and liberalist understandings of the law”.¹⁵ I also agree with Modiri's (2013: 456) view that legal education, or teaching law, is in itself a political act with implications for transformation and legal culture.

In no way is it my intention to place all the blame for the general inadequate interpretations provided for transformational concepts at the doorstep of legal education. The transformation of legal culture will certainly also depend on the wider legal profession being critical of their own ways. The nature of my engagement with legal education is also not necessarily focused on the content of the syllabus or teaching methods.¹⁶ Whereas the latter aspects must certainly be evaluated in the light of our need to transform, I would like us to first pause and reflect on how we approach meaning and the relaying of meaning by teaching law and human rights. Students should be made aware of the fact that only one version of the ‘legal reality’ is being presented to them – one judge's decision, one author's analysis, one teacher's interpretation.

The need for structures of meaning or cultural codes (or certainty!) in any educational plan cannot be denied. If law students are, however, enabled to acknowledge the impact of these structures and question them, it may result in critical reflection on our limited experience of the law, alternate interpretations of the law and the impact on our experience of human rights and the institution of democracy. I also view law students as ideal for this approach. Legal culture is founded or affirmed during legal education, the community of law students is already constituted and law students (other than legal practitioners) still have the opportunity to actually consider tentative meaning, as they are not required to make final decisions. I see this as the cultivation of values and engendering

15 Modiri (2013: 256) mentions the fact that law teachers do not only teach the law, but also a type of jurisprudence. He refers to Bohler-Muller's (2007) work, which indicates that traditional legal education reduces law and rights to the “economic, instrumental and functional application of rules [...] that prevent the possibility of questioning, resistance and transgression”.

16 See Quinot (2012) who discusses legal education with regard to transformative constitutionalism, and Modiri (2013) who deliberates about post-modernism in a post-apartheid South Africa.

self-consciousness among law students, which will in turn encourage a moral responsibility to promote the ideals of transformation.

This acknowledgement, or moment of contemplation, constitutes a turning point for legal culture.

3.2 A community of law students

The South African legal culture traditionally enforces a classic liberal approach to legal interpretation with a strong preference for the strict distinction between law and politics (Klare 1998: 153). The Constitution, however, has many characteristics such as its commitment to the promotion of socio-economic rights, which require a post-liberal approach (Klare 1998: 153). The nature of democracy and human rights, as referred to earlier, also supports the fact that the Constitution cannot be approached in a classic liberal manner, promoting individual-centred values at the expense of communal values. In order to do justice to the aspirations of the Constitution, we require an approach that invites temporary meaning, acknowledging the fact that both values may be different for different contexts or communities and that our transformational goals cannot be stagnant.

My initial thoughts on law students' role in transformation were that law students should direct their thinking towards the needs of the community – pursuing context sensitive views of the law as opposed to following an individualistic liberalist approach that regards the rights of the individual as absolute.

Community-based or contextual approaches are often associated with civic-republican/communitarian thinking. The comparison between a communitarian/civic-republican approach and a liberal approach in the context of judicial review has been the topic of a great deal of literature.¹⁷ For the purposes of the argument at hand, I wish to only briefly note the different approaches of classic liberalism and civic-republicanism/communitarianism towards human rights and democracy – the two main transformational concepts discussed in this article.

In this regard, in an attempt to determine which of the above two ideologies provides better justification for constitutional revision and resolving the counter majoritarian dilemma, Botha (2000: 562) indicates that classic liberalism views rights as boundaries and measures to prevent state intervention with a great emphasis on the separation between the public and the private sphere. Rights are regarded as pre-political; the meaning of rights does, therefore, not originate from deliberation and politics (Botha 2000: 564-7). This results in placing emphasis on the apparent universality of rights and leaves no room for considering alternate

17 See, among others, Michelman (1988) and Botha (2000).

meaning. The problem with the strict differentiation between the private and public sphere is the fact that, in a modern democratic society, this distinction is somewhat of a sham, as any part of our “private” lives is regulated in some way (Botha 2000: 564). The true power relations in society are, therefore, not apparent, prohibiting marginalised groups from entering the public sphere (Botha 2000: 567).¹⁸

From a liberal perspective, judges are also regarded as able to act independently from their own convictions (Botha 2000: 562). It is obvious that this notion can also be criticised from a realist perspective, as the realist movement shows the impossibility of an absolutely objective judge (Botha 2000: 566). For the mentioned reasons and some others not discussed in this instance, Botha (2000: 565) concludes that a classic liberalist approach results in a diluted concept of democracy.

A civic-republican approach to human rights views rights as relational and, therefore, acquiring meaning in the context of the community of interpretation in which it is being enforced (Botha 2000: 570). Meaning is not centred on the needs of the individual.¹⁹ Greater emphasis is placed on deliberation, which Botha (2000: 572) views as pluralism: a radical commitment to challenge orthodox ideas and the deference of final decisions on controversial matters having great impact on society. Rights are, therefore, not pre-political and can be compared to a cultivation of values referred to earlier (Botha 2000: 568, Breytenbach 2009: 15). Meaning allocated is tentative, as it depends on the context. A communitarian or civic-republican approach, therefore, may create the potential for a deeper understanding of democracy and rights in general (Botha 2000: 569).²⁰

The notion of ‘community’ remains problematic. In spite of the civic-republican ideal to approach rights as relational, community is still created around pre-determined values, providing a platform for inclusion and exclusion and fixing meaning to a specific place and time. The ideal of real community may, in any event, not be possible. This is what Nancy suggests with his concept of inoperative community or being-in-common that I borrow for my suggestion of an inoperative community of law students. As Norris (2000: 274) explains, Nancy views our humanness or being-human as originating from community and this community is not constituted by previously independent singularities.

18 Botha also refers to Young (1987).

19 Botha also refers to Michelman (1986), Nedelsky (1993, 1989) and Minow (1987).

20 Botha (2000: 578) concludes that neither civic-republicanism nor classic liberalism truly provides justification for constitutional review. As mentioned earlier, I am not proposing civic-republicanism/communitarianism as a solution for interpreting human rights and democracy. Engaging with the latter ideologies, however, opens up the notion of community, and the potential of community to bring forth tentative and relational meaning.

Our being human is being-in-common (Norris 2000: 274). Community does not represent an identity in itself, as this will result in its members having to eliminate any ideas in conflict with the pre-determined identity of the community – which will be the end of political action (Norris 2000: 275, 277). Being-in-common – in contrast with the essence of community – will be void of time and place and its identity will rather refer to the absence of a shared identity (Norris 2000: 277). The emphasis is, therefore, on the being-in-common and not in the having-in-common (Norris 2000: 277).²¹ This being-in-common, the incomplete community or absence of community is, therefore, the inoperative community or the community to come (Norris 2000: 278). I wish to promote this latter type of understanding of community in order to rethink the notion of community and the values treasured by community – in the sense of both legal culture as a community and also the community at large within which law students and lawyers have to operate.

Whereas the idea of community centred on pre-determined values should be refused, it can also be embraced for the potential that lies within the notion of a coming together of law students.²² In this instance, it is interesting to note Derrida's and Nancy's conflicting perceptions on deconstruction in respect of the concept fraternity (Barnard-Naudé 2010: 23-42). Barnard-Naudé refers us to a sculpture by artist Jane Alexander called *The Butcher boys* to explain how the seeming absence of community between the figures forming part of the sculpture can refer to the community that is coming. Barnard-Naudé (2010: 26) concludes that *The Butcher boys* represents a form of fraternity that does not embrace the ideals of political action and friendship. According to Derrida (1997), the concept of fraternity cannot be retained and must be struck through (Barnard-Naudé 2010: 31).²³ Nancy (1993) also advocates the striking out of 'fraternity', but retains it by envisioning a different version of fraternity.

As Barnard-Naudé (2010: 26) explains, the concept of fraternity must, according to Derrida, be struck out due to the fact that the characteristics of the brother will necessarily imply a familial and fraternal configuration of the political. Fraternity, constituted by the coming together of brothers, will constitute a having-in-common and even the notion of the friend will constitute the same type of coming together – only extrapolated to the public sphere (Barnard-Naudé 2010: 26). I will, however, not elaborate on these principles at present. Barnard-Naudé's point is

21 See also, in this regard, Nancy & Connor (1991).

22 Prof Van Marle brought to my attention that my argument at hand reflects the weaving action of Penelope, as interpreted by Cavarero (1995). Penelope weaves and pulls apart her weaving as part of her refusal – a concept also referred to by Van Marle (2001: 198).

23 See also, in general, Thomson (2005) in this regard, as referred to by Barnard-Naudé (2010: 31).

important in this instance, in as far as it deals with fraternity as constituting a type of coming together, which is relevant in the light of my investigation into a coming together of law students. I also wish to apply Nancy's notion of re-envisioning a discarded concept to the concept of community. Whereas the first phase of deconstruction is striking through the concept, Nancy also attempts the second phase, where the concept is re-envisioned (Barnard-Naudé 2010: 36).²⁴ Derrida is not comfortable with this second phase and warns of the risk that the initial metaphysical meaning of 'fraternity' may continue to exist if the second phase is also attempted, turning its back on the democracy to come (Barnard-Naudé 2010: 35). Barnard-Naudé (2010: 37) shows how Nancy (2000) responds to Derrida's concern in this regard. Nancy is of the opinion that singularity cannot exist without plurality and vice versa (Barnard-Naudé 2010: 37). He argues that the origin of singularity and plurality is not separate, but is the being together of all origins (Barnard-Naudé 2010: 37). Although 'fraternity' is applied in modern liberal political theory as a homogeneous identity to confirm equality, Nancy states, as Barnard-Naudé points out, that ontologically speaking, there is no homogeneous origin of 'fraternity' and that we are 'brothers' only as a result of the being-in-common (Barnard-Naudé 2010: 37). By following this second phase, Nancy views fraternity as an uncompleted community, thereby confirming, but also refusing identity (Barnard-Naudé 2010: 38).²⁵

In the coming together of law students, the formation of fraternity or community or culture, in the traditional sense of the word, is inevitable. What I take from the thoughts of Nancy is that this coming together can be denied so as to dismiss the traditional sense or essence of community encompassing inclusionary and exclusionary strategies and the maintaining of a pre-determined cultural code or system of meaning. In the same instance, this community can also represent a better form of community, and the being-in-common in this incompleteness provides openness for the cultivation of values and for political action.

Motha (2005: 19) interprets Nancy's notion of plurality as ontology, refusing to acknowledge the marking of clear boundaries for definitive singularity. The failed attempt to set boundaries to these singularities constitutes community (Motha 2005: 19). Van Marle (2001: 204) refers us to the film *Smoke*, by Paul Auster, that depicts a type of inoperative community of smokers coming together to take a smoke break, whereafter the community disintegrates.

24 See also Morin (2004) in this regard, as referred to by Barnard-Naudé (2010: 36).

25 See also, in this regard, Nancy & Connor (1991).

I would like to propose that the envisaging of a better version of community by acknowledging its incompleteness and, therefore, its tentative nature is compatible with the notion of community as the coming together around the cultivation of values (Breytenbach 2009: 15), rather than as a result of pre-determined and fixed values or meanings. It is therefore also implied that this coming together should not approach human rights and democracy as another new order that is exempt criticism and reconsideration (Chanock 2001: 511-37, Fitzpatrick 2006).²⁶

The coming together of law students is already constituted through legal education. I propose that, instead of serving as confirmation of legal culture as *status quo*, this inoperative community of law students should be a reaction to the tension between what the law proposes to be and the actual experience of the law – similar to the relationship between democracy and democracy to come (Van Marle 2001: 195). It should constitute a moment of rupture in the fibre of the meaning system upheld by, and through legal culture. The “jurisprudence of generosity” proposed by Williams (1991) and referred to by Van Marle (2001: 195) also encapsulates this idea of the interruption of the predictability of the law by the unexpected Other. If human rights and democracy becomes part of the predictability of the law, it will most definitely lose its radical element. The idealistic and uncritical promotion of these ideals will contribute little to transformation (Van Marle 2004: 606). I agree with Van Marle (2001: 10) that a society taken over by rights and constitutionalism will be a society void of political action, critical thinking and revolt – aspects that are crucial for realising our responsibility towards the Other.

This radical departure from the confirmed cultural code is constituted by the coming together of thoughts, but not void of action and revolt (Van Marle 2001: 196). Thinking cannot be isolated from real life. Van Marle (2001: 196) refers to Arendt’s (1959) warning that the privilege of the intellectual life must not be maintained at the cost of the feminine (or the Other). Breytenbach (2009: 5-6) also emphasises the necessity of movement in seeking meaning and understanding, which movement should pre-empt thought to ensure that movement is not controlled by thought – which would result in culture being created. Culture representing the end of movement is a sign that contemplation on identity and values is finalised and no longer open for discussion (Breytenbach 2009: 6-7). Breytenbach (2009: 1) refers to movement in the context of developed nations attempting to comprehend the continent Africa by referring to outdated notions and thereby assuming inertia on the part of the subject under discussion. The subject can, therefore, not be interpreted and engaged with from afar.

26 Chanock (2001) and Fitzpatrick (2006) refer to the new global order constituted by human rights and democracy and the dangers hidden in this notion of falling into the same trap as in the past.

We should also consider tertiary education or university as the act of commencement for its students – therefore marking the acceptance of a student to society as one of ‘us’ (Goodman 1964: 174–5).²⁷ Goodman (1964: 172–3) acknowledges the fact that a university will, to a certain extent, form part of the greater community, which is important to ensure that thinking and movement are in close proximity to each other. He (1964: 167) also points to the fact that the university will in itself constitute a type of community – thereby confirming that a space is created that can be used either to create a fixed system of meaning or for deliberation.

Being regarded as ‘one of us’, however, inevitably invokes the idea of ‘we’ and ‘you’ as means to demarcate the boundaries of the community – a problematic characteristic of community already referred to, making it incompatible with the ideals of transformation. Clarkson (2005: 455, 2007) shows how linguistic shifters such as ‘us’, ‘we’, ‘you’, ‘I’, ‘here’, ‘now’, and so on can serve as stabilisers rather than confirmations of identity, as is generally believed. In texts where such linguistic shifters are used, they evoke the different relationships that they may represent, and they call to be interpreted in the context in which they are used (Clarkson 2005: 455). In her commentary on certain South African novels depicting the disintegration of communities, Clarkson (2007: 365) shows how a linguistic shifter such as ‘we’ or ‘us’ can, rather than create the idea of a community, point to the lack of community. In the context of a novel these linguistic shifters can – to the exclusion of the reader – refer to the narrator and a third party, but it can also include the reader as part of the ‘us’ to which the narrator is referring. One is thus required to be cautious when drawing inferences as to the membership of the community, once again emphasising the incompleteness or impossibility of true community, but also opening up room for deliberation and critical reflection.

4. Concluding remarks on the inoperative community of law students using the teaching of property law as an example

I have attempted to formulate a way in which to view law students as a community of legal interpreters with the opportunity to transform legal culture and our society. This view or approach acknowledges the incompleteness of any

27 See Goodman (1964: 189) who provides a summary of his analogy of the university as a community of learners: “It is anarchically self-regulating or at least self-governed; animally and civilly unrestrained, yet itself an intramural city with an universal culture; walled from the world; yet active in the world; living in a characteristically planned neighbourhood according to principles of mutual aid; and with its members in oath bound fealty to one another as teachers and students. This community is the institution of the ritual of Commencement, the climax of growing up intellectually”.

community, including a community of law students or legal culture, as a larger community of legal scholars and consequently highlights that the inevitable tentativeness or incompleteness ought to be embraced, as it may be the only way in which to realise the value of human rights and democracy in our society.

I am hesitant to provide concrete examples of how this approach ought to be applied to teaching, as that would go against the nature of what I am proposing. In essence, this approach should create meaning from the bottom-up instead of the traditional trickling down of ideas and culture – which would occur if I were to prescribe its application.

I do, however, wish to briefly share my thoughts, as part of my concluding remarks, on a proposal made by Justice Johan Froneman (2014) as part of his lecture on the (constitutional) problem of property. I will attempt to show how this proposal may relate to what I propose in this article, and what it may mean for teaching law in post-apartheid South Africa by using property law as an example.

The question of having or not having property is a controversial topic in post-apartheid South Africa. Section 25 of the Constitution acknowledges the effect of past discriminatory legislation and makes provision for addressing its consequences. It also provides protection against deprivation of property that does not comply with the requirements set out in section 25. The balance that is attempted by section 25 is one of the most contested issues arising from the “historical compromise” or “negotiated revolution” made in the transition from apartheid to the new South Africa, and is being increasingly scrutinised for standing in the way of land reform (Froneman 2014: 2 paragraph 3).

In determining what kind of secure title of property the Constitution envisions for those deprived by colonial and apartheid dispossession, Froneman (2014: 6 paragraphs 8, 9) asks whether it is possible to forge a coherent common perception of the purpose and value of holding property for all people. The premise on which his argument is based is that the Constitution does accept that there is some value in the holding of property, but that this recognition is subject to equitable redistribution of property taking place to redress our past (Froneman 2014: 12 paragraph 18).

Froneman uses “secure title” in its broadest sense and describes the different ways in which the law deals with black economic empowerment, access to natural resources, land restitution, and so on (as means to secure title to property) (Froneman 2014: 9 paragraph 13). At first glance, it appears that there is no real prospect of coherence arising from these different scenarios (Froneman 2014: 9 paragraph 14), but Froneman (2014: 10 paragraph 15) proceeds to develop a tentative suggestion that there is *potential* for coherence on the

purpose and value of property under the Constitution. He (2014: 16 paragraph 26) suggests that there are at least three different ways in which what he calls “a picture of a ‘living’ law of indigenous people” relates to property: the traditional view of not recognising ownership of property at all; the communal view of property as being owned by the tribe, but also the acknowledgement of individual ownership of property or individual grazing rights. It appears that indigenous law is capable of upholding a conception of property that encompasses traditional, communal and individual aspects, without giving preference to any one of these aspects (Froneman 2014: 16 paragraph 27).

Froneman (2014: 31 paragraph 45) concludes that we should consider the way in which the “‘living’ law of indigenous people” embraces more than one understanding of holding property. Our constitutional framework allows for an understanding of property that acknowledges that different people may value property differently and that it is possible to consider the value of property beyond the traditional restrictive boxes. He (2014: 31 paragraph 54) argues that this type of thinking has the potential to ensure a dignified existence for all by means of holding property in different ways.

As I understand Justice Froneman’s proposal, he is also arguing for more emphasis on the cultivation of values – in this instance how property is valued – in order to ensure that the restoration of rights to property is aimed at restoring the value that was lost and not some pre-determined construct that does not make sense in the relevant context. For lawyers to respond in this way to the question of, for instance, land reform, law students should be enabled to view a construct such as “property” in the way Froneman suggests. I am submitting that, with its emphasis on alternate and tentative meaning, the suggested notion of an inoperative community of law students may be able to view “property” in this way.

It is rather obvious that such an understanding of the concept of property will have a far-reaching impact requiring critical reflection beyond the scope of my argument. It is not my intention to investigate this specific notion in depth at present, but only to show how Justice Froneman’s suggestion possibly relates to the proposal made in this instance.

Froneman’s view on property rights encapsulates the radical and transcendental nature of human rights and democracy in general and points to the potential for real transformation if we, as a community of interpreters, adjust our views of traditional notions such as property rights. The fact that alternate meanings are being embraced undermines legal culture and the *status quo* it confirms and, to my mind, this constitutes transformation – if not of our society at large, then at least of legal culture.

As law teachers and law students, we should ensure that what we teach and what we learn relates to the ordinary people in our country. Only if we ensure this, will the Constitution, human rights and democracy remain relevant in post-apartheid South Africa and will legal scholars be able to make a meaningful contribution to transformation.

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