

# Post-1994 Jurisprudence and South African Coming of Age Stories

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## 1. Introduction

The aim of the article is to explore tentatively the idea that there are many directions or paths for jurisprudential discourse in South Africa in the aftermath of apartheid. I focus for purposes of this piece on two possible ways to read the narratives of a post 1994 South Africa by reflecting on the life stories of two prominent South Africans, namely former president Nelson Rohihlala Mandela and his first wife Winnie Madikizela-Mandela. These two figures represent possible different and contesting versions of a 'new' South Africa.

As I subscribe to what Douzinas and Gearey have called a 'general jurisprudence' (2005, 10), the investigation of jurisprudence encompasses questions on identity, the social bond and nation, among others. Douzinas has described a general jurisprudence as follows:

A general jurisprudence brings back to the centre the aesthetic, ethical and material aspects of legality. It reminds us that poets and artists have legislated, while philosophers and lawyers operate an aesthetics of life in order to bring together the main ingredients of life, the biological, the social, the unconscious. General jurisprudence includes the political economy of law; the legal constructions of subjectivity; and the ways in which gender, race or sexuality create forms of identity, both disciplining bodies and offering sites of resistance. (Douzinas 2014,189.)

By reflecting on the life stories of Nelson and Winnie Mandela I want to highlight the notion of 'an aesthetics of life' as invoked above. How is a jurisprudence that is concerned with politics, economics, subjectivity and identity formed in a context of change, of aftermath? Have these struggle icons—and for my purposes by implication jurisprudential discourse—been 'disciplined' and co-opted by discourses of 'formation' and settlement or have they been able to offer resistance?

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The changes that were initiated since the early 1990's in South Africa have taken many forms. One that has taken centre stage is the adoption of a supreme constitution with an entrenched bill of rights. Commentators have relied on the notion of a 'legal revolution' in order to refer to not only the shift from a system of parliamentary sovereignty to constitutional supremacy but also changes related to politics, society, culture and identity. One way and probably until recently the most pervasive response to the adoption of constitutional supremacy and human rights in post-1994 South Africa has been to read this as a culmination of many years of struggle into something to be celebrated. This way tends to follow a linear chronological and fairly simple idea of progress. Commentators describing the shift in natural law theories have warned about the limits and possible dangers of tracing shifts from natural law to natural right to human rights in this way (Douzinas 2000).

Many metaphors have been invoked as ways to reflect on the past, present and future of South African law. Wessel le Roux (2006) has noted the extent to which South African scholars have relied on aesthetic examples to reflect on approaches to constitutionalism that could counter past formalist approaches. The South African constitution has been described for example as a 'monument' and a 'memorial' (Snyman 1998, 312; Du Plessis 2000, 385). The Constitution as monument represents the grand narrative, the big promise of how the Constitution will bring about the change from an authoritarian, unequal, racist, sexist and undemocratic past to a better future, where the Constitution as memorial is the restrained constitution, aware of limits and inevitable failure. The memorial approach to the constitution recognises that the constitution is only one of many processes and institutions needed to address the multiple problems that the country is faced with. The notions of monument and memorial have been used also in the vein of authorship and narration; that the monumental constitution stands in the vein of authorship and the memorial one in that of narration.<sup>1</sup> To my mind to think about the constitution as either writing the story of a new nation as author, or telling the story as narration captures something about the nature of political power as represented by the Constitution.

I have also looked at post 1994 jurisprudence as a 'becoming', following Deleuze's notion of 'becoming minor' (Deleuze 1995) and Peter Goodrich's work on a 'minor jurisprudence' (Goodrich 1996). My argument is that transformation should be central to jurisprudence in the aftermath of apartheid, but more than that, it should entail what South African author Njabulo Ndebele has named 'a giving up of certitude' (Ndebele 2007).

I have attempted above to provide a glimpse on some of the ideas that have surfaced since the promulgation of the 1996 Constitution that might be significant

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<sup>1</sup> I have tentatively thought about this distinction in light of the debate between Hans Kelsen and Carl Schmitt on constituted and constitutive power (Van Marle forthcoming). My sense is that this debate that is so widely discussed elsewhere has not attracted as much attention in the South African context. Aspects of the debate have been raised in a seminar and later in a special edition on the theme of constitution-making in the *South African Journal on Human Rights*.

to the tentative reflection in this piece. I want to explore the notion of the 'book' that Mark Antaki has referred to as the South African constitution's 'most neglected metaphor' (Antaki 2013, 49). Antaki, relying on the work of André van der Walt (2001) and Antjie Krog (2009) reconfigures a notion of transformation, and transformative constitutionalism, that relies on a questioning of the concept of 'formation' (Bildung). The concept transformation is somewhat paradoxical as it captures both the idea of change and that of stability. Antaki's argument is that much of the transformation discourse in South Africa rests on the confirmation of the status quo rather than changing it. He sees in the work of Krog and Van der Walt the opening of the possibility for a change, a continuous transformation that could challenge the status quo. I want to connect Antaki's argument with the notion of the constitution as narration and constitutive power. As I expand on below Antaki questions the use of a bildungsroman or traditional coming of age story as motive for transformation in post 1994 South Africa. In the same vein I rely also on George Pavlich's reflection on what he calls a 'dissociative grammar' for constitutionalism (Pavlich 2013, 31).

I focus on the life stories of two prominent activists as possible examples of the different readings of the South African change. Former president Nelson Rohihlahla Mandela's life, his 'long walk to freedom' has been read as being true to the features of the traditional bildungsroman (Roux 2014, 205). Nelson Mandela has also been described as someone who has exposed a certain kind of modernity (Hyslop 2008, 119; Barnard 2014, 7). And, of course, he has been placed within and reflected on as a man of the law (Derrida 1986, 26; Le Roux 2006; Sitze 2014, 134). Winnie Madikizela-Mandela fits less comfortably with these notions (see Madikizela-Mandela 2013; Du Preez Bezdrob 2003). Unlike the life story of Nelson the life of Winnie thwarts the traditional features of the bildungsroman. Her life story is one of contingency, rupture and what Gillian Rose called 'double equivocation' (Rose 1992). My interest here is to consider the potential that Winnie's story holds for a jurisprudence post 1994, post official apartheid.

I start the article by putting forward readings that have associated Nelson Mandela's life with the bildungsroman and that have placed him within modernity. My sense is that this reading of his life represents something about the linear reading of South Africa's acceptance of constitutional supremacy as the culmination of struggle that will bring salvation. Thereafter I turn to the views of Antaki and Pavlich, referred to above, that trouble the former reading. I aim to connect these takes with Winnie Mandela's life story—one that represents contestation and equivocation but also a certain kind of relationality. I recall writings that have constructed Winnie in a specific relationality and interconnectedness with other women (Ndebele 2003; Krog 2009). I take these notions further with reference to Krog's latest volume of poetry, titled *Synapse* (2014), in which she, following Paul Celan, attempts to create a language that could engage with the challenge and inevitable failure of interconnectedness. I ask if this volume by Krog might be an example of what Pavlich has called a 'dissociative grammar' (Pavlich 2013). However, I return to the

notion of narration invoked earlier with reference to the constitution as narrating the story of the nation and recall Adriana Cavarero's engagement with a story told by Karen Blixen, which, although not confirming any notion of formation, holds onto a certain kind of 'unity' that was not foreseen but simply happened without any preconceived plan, design or project (Cavarero 2000, 1).

## **2. Life story as bildung: Nelson Mandela's long walk**

John Hyslop, in his reflection on Mandela and Ghandi, starts with recalling a bookshop known as Vanguard Booksellers, owned by Russian immigrant, Fanny Klennerman (Hyslop 2008, 119). Klennerman, according to Hyslop perceived herself as part of a cultural avant-garde and part of a certain modernist movement. Klennerman, Hyslop tells us, was the first person to import Joyce's *Ulysses* to South Africa, a book exemplary of a certain modernism that at the time was banned in the English world. Hyslop is interested in how Johannesburg is part of the story of modernity and modernist culture. He discusses the politics of Johannesburg and its influence on Ghandi and Mandela against the background of Joyce's *Ulysses*.

Hyslop describes Johannesburg as instantiation of a form of modernity, as a place of simultaneously 'uncertainty and disintegration' and a place that allowed the 'search for the possibilities of freedom', 'a city of ideas' (Hyslop 2008, 12). An important element of the city that he highlights is the capability to go 'beyond its immediate confines' (Ibid., 12). He observes certain features of the Johannesburg of the early 1930's: With a population of half a million and immigrants coming from everywhere it hosted a plurality of people and perspectives. The buildings in the city for example exhibited a range of different styles, from Victorian to Edwardian to Chicago steel frame construction. There were also extreme social inequalities amongst the inhabitants that often gave rise to conflict and uncertainty. However for Hyslop 'this very extremity [...] made its experience of modernity productive of modernist cultural and political creativity' (Ibid., 122). The absence of stability, living in the maelstrom made it possible for people to make themselves at home, to find new paths. The fact that individuals were uprooted produced new forms of intellectuality and generated new ideas (Ibid., 122-23).

It is in this vein that Hyslop places Fanny Kellerman within the frame of modernity, pursuing a modernist project. And it is exactly within the context of such a modernist project that he situates the development of the political thought of Ghandi and Mandela. He notes that to situate Ghandi and Mandela within the Afromodern that Johannesburg offered highlights the problem of the tension between the metropolis and nationalism. Hyslop contends that both Ghandi and Mandela, although they started out from narrow nationalism famously managed to transcend this to approaches that were inclusive, that embraced humanistic values and that had international relevance (Hyslop 2008, 123). His argument is that their approaches of inclusive nationalism founded on universalist values can be traced to their experience with the metropolitanism and cosmopolitanism of Johannesburg. Hyslop recalls how Mandela, although starting out as a dedicated follower of Anton

Lembede's firm African nationalism ended up putting forward a vision for a unified and reconciled country that includes a plurality of perspectives (Ibid., 131). For him it was Mandela's 'metropolitan experience' that nurtured his striving for personal freedom of the metropolis.

Rita Barnard similarly describes Mandela as modern: 'Mandela [...] is a man of the twentieth century, viewed in its global complexity as an era of a radically incomplete and uneven modernity' (Barnard 2014, 5). She recalls the view of Anthony Sampson, author of Mandela's official biography who described him as both premodern and postmodern (Ibid., 4-5). Mandela as premodern confirms his loyalty to his Xhosa roots and culture where Mandela as postmodern responds to him becoming a celebrity, 'mixing politics with showbiz' with a certain comfort (Ibid., 5). With reference to Frederic Jameson she describes the 'modern experience' as 'one of disjuncture, of living in many worlds and marching to many different beats' (Id.). Barnard continues to say that those who excelled in being modern were those who understood this ambivalence, indeterminacy and contradict between 'tradition and innovation, stagnation and progress' best: 'It is therefore not fanciful to propose that the quintessential modern subject might well be someone like Mandela; a black South African, born in a rural and tribal world, coming into manhood and political consciousness in a vibrant, materialistic colonial city, and ending up as a citizen of the world, a deft participant in the contemporary culture of the medial spectacle' (Id.).

Below I turn to a reflection by Magobe More on how activists have been portrayed by scholars, analysts and journalists (More 2004). More's reading of Mandela could be regarded as a challenge to the readings by Hyslop and Barnard, and, as I elaborate on below, also that of Daniel Roux (2014), that situate him comfortably within a certain notion of modernity. Magobe More comments on Albert Luthuli, Steve Biko and Nelson Mandela as examples of political figures who were all produced by 'colonialist violence of an unprecedented nature in the history of colonialism' (More 2004, 207). Both Luthuli and Mandela were honoured with the Nobel Peace Prize. However, More is interested in unearthing the revolutionary impulse of South African liberation leaders in order to challenge what he sees as a 'misrepresentation' of them as pacifist (Ibid., 208). He explains that the question of revolutionary violence in Africa is often placed in one of two traditions, either in Ghandi's philosophy of non-violence or Fanon's support of violence when necessary. Luthuli was a dedicated follower of Ghandi's non-violence as well as a 'Christian liberal "realist"' (Ibid.). Biko, on the other hand, is often placed in a Fanonian tradition (Ibid., 213).

More refers to the description of Mandela as 'humanist pacifist' and being placed amongst leaders such as Ghandi and Martin Luther King (More 2004, 210). 'Mandela personifies suffering under the most severe conditions and moral courage against an evil of a unique kind—apartheid' (Ibid.). However, according to More one should distinguish between a pre-Robben island and a post-Robben island Mandela. He questions the fact that Mandela is often regarded only in terms of the post-Robben island era, as being 'a man of peace and reconciliation who preferred

non-violence and negotiation as instruments of political liberation to revolutionary violence' (Id.) For More the pre-Robben island Mandela 'was a radical' (Id.) He argues that Mandela's commitment to justice and respect for the notion of the rule of law guided him in realising that even though peace might be desirable, humanistic principles such as justice, equality and dignity guided his actions that ultimately lead to accepting violence if there is no possible alternative (Id.). He remarks that for Mandela non-violence was more than a moral principle but sometimes 'a tactic to be used [...] a practical necessity' (Id.). In 1961 Mandela argued in support of violence saying that 'violence is the only language that the government understands' (Ibid., 211). He argues that the post-Robben island Mandela was a radically different person from the pre-Robben island Mandela and urges that the latter should not be forgotten. More's reading of at least the pre-Robben island Mandela troubles the notion of his life story as one of traditional *bildung*, or a linear progress and unearths a radicalness ignored by the mainstream acceptance and embrace of Mandela.

Daniel Roux, in a chapter titled 'Mandela writing/ writing Mandela' recalls Elleke Boehmer's description of Mandela's story as 'the collective many-voiced story of a nation coming into being' (quoted in Roux 2014, 205). Roux's interest lies in the phenomenon that the question of *who* Mandela is always becomes a question of what Mandela *represents*. For him Mandela's representations always 'become identical to his life', which he interprets to mean that Mandela's life is 'always already an instrument in the service of some larger narrative' (Roux 2014, 207). Roux argues that Mandela's autobiography and in a sense, then, Mandela's life story, could be read as a coming of age novel, a *bildungsroman*. As mentioned above Roux seems to be going along with the views of Hyslop and Barnard. However it should be noted that Roux insists on Mandela's own role in constructing and inventing this story as *bildungsroman*. To relate this to More's reflection, one could argue that maybe Mandela himself gave up on the pre-Robben island Mandela. Roux considers Mandela's description of himself as a gardener and the role of the garden throughout his life, from the garden of Reverend Harris at Clarkebury, the college that he attended as a young man to his imprisonment at Robben Island. Roux comments on a photo taken of Mandela on the island, titled 'Prisoner in the garden'. He refers to Boehmer who linked gardening here with Mandela's writing of the nation: 'Here we see the political prisoner laying claim to his patch of ground, his island rock, a piece of his nation, making it fruitful' (Roux 2014, 216). Roux then states his main understanding of Mandela, namely the fact that he could attract praise from people coming from different places and perspectives across South Africa was because of the 'polyvalent, ambiguous nature of his signs and performances' (Ibid., 216).

For Roux *Long Walk to Freedom* is about growth and education. Two features of a *bildungsroman* as identified by Joseph Slaughter (2007) and highlighted by Roux are firstly that this genre traces the narrative of someone who at the end turns out to be the person he or she has 'always already been' (Roux 2014, 217). Secondly, there is a strong social aspect, a realization of social responsibility in the *bildungsroman*. Roux highlights the following from the final pages of *Long Walk to Freedom*: It starts

with what Roux calls 'Mandela's bildungs-motiv': 'I was not born with a hunger to be free, I was born free'. Initially 'I wanted freedom only for myself', but that developed into a social awareness: 'I saw that it was not just my freedom that was curtailed, but the freedom of everyone who looked like I did' (quoted in Roux 2014, 218). Roux connects Mandela's telling of his life story as a bildungsroman with the notion of human rights. He realizes that he is a rights-bearing individual and regards this as a 'natural outcome of, and expression of, his personality' (Roux 2014, 221). His life story reflects the tension between individualism and social responsibility within the South African political context but is also 'eminently global', speaking to contexts beyond South Africa (Ibid., 221). Tracing Mandela from Qunu to Johannesburg to Pretoria could be seen as representing different moments in his life story. However, although Mandela's struggle is linked to a particular community it is also linked to something beyond that—to a particularly deterritorialized modernist ideal' (Ibid., 221). Roux argues that Mandela constructed his life story in such a way that it allows a rainbow nation that aimed at including different kinds of people.

Brenna Munro refers to Mandela's 'authoritative, yet emotive masculinity' and 'his adoptive embrace' (Munro 2014, 92). She also follows the sentiments raised above of him displaying 'a series of distinctively modern ways' throughout his life. Although he can hardly be called an 'egalitarian husband', 'his embrace of a secular humanism' was evident in his view that marriage should be based on 'freely chosen partnership' and that his three different wives all had strong personalities (Ibid., 93). Munro's reflection on Mandela, in particular his forging of a new, modern black masculinity also follows the guise of transformation and bildung. She notes the transplantation from the rural to the city, with the latter representing a 'space of self-invention' (Id.). Munro recalls the 'Sophiatown Renaissance' that was marked by a 'defiant cosmopolitan modernity that refused identification with "tribal culture"' forced upon black South Africans by the apartheid government (Id.). Munro, like many others before, pays attention to his sense of style and describes him as 'dashing, well-dressed', projecting 'a masculinity that underscored the ability of black men to be "civilized"' (Ibid., 94). One image that challenges this modern cosmopolitan look of Mandela is when he gave his first television interview in 1961 wearing a workman's jacket, has a beard and looks 'slightly unkempt' (Id.). Munro notes that this version of Mandela was used on many posters, pamphlets, badges and T-shirts and paradoxically used by activists and the apartheid government. Of interest also is the poem authored by Nigerian author and poet Wole Soyinka, 'No, he said' presenting Mandela as the example of a 'heroic masculinity, resistance itself personified' (Ibid., 97). However the Mandela who walked out of prison in 1990 portrayed a different story. Whilst in prison he came out in support of peace, negotiation, forgiveness and reconciliation (Ibid., 98). It is significant to note the difference between Mandela as father and grandfather in his personal life and the Mandela as father/grandfather of the nation. It is however the latter one, the constructed and imagined one that prevails in the public image and memory.

As explained in the introduction my aim in this piece is to reflect on the

becoming(s) of a post-1994 jurisprudence against the life stories, albeit constructed, of Nelson Mandela and Winnie Madikizela Mandela. In this section I briefly recalled some of the writings on Mandela that situated him within a certain modernity and cosmopolitanism, that traces his life story as a bildungsroman, as one of transformation and growth. I argue that this is a prevalent way to portray the development of the South African transformation, the 'birth' of a new nation and closer to my specific purpose, the development of a post-1994 approach to law, constitutionalism and jurisprudence. In this version the South African nation has managed to leave an unjust past behind and to transform to a democratic society. This story is underpinned by a modern idea of progress and an optimistic embrace of the possibilities seemingly held by constitutionalism and human rights. In the section below I consider two engagements that put forward alternative visions of constitutional transformation; visions that disrupt the clean linear notions of coming of age, bildung and formation. Instead of one story, these versions put forward multiple and ever incomplete notions of law, constitution and change.

### **3. Bildung thwarted: Winnie Mandela's cry**

Munro, in her reflection on Nelson and Winnie Madikizela notes that Winnie is a 'contradictory ... figure', 'the "mother" of the struggle who fell from grace' (Munro 2014, 92). Like Nelson, Winnie also came to the city of Johannesburg in search of the new. Many visuals of the time show her just as elegantly dressed as Nelson and Munro tells us that she was asked by photographers for *Drum* to pose for them (Ibid., 93). As a couple they represented 'black African glamour and desirability' (Ibid., 94). They had only two years of married life together—in 1960 Nelson Mandela went underground. Winnie from early on played an active part in the struggle. She publicly supported Nelson Mandela and the ANC without reservation, a position that paradoxically was authorized in a conventional manner by her position as the loyal wife (Ibid., 95). Munro remarks that Winnie in her defiance of white power resembled Steve Biko far more than Nelson Mandela. Winnie transformed her symbolic role as 'mother of the nation' into the role of an activist and a revolutionary (Ibid, 96). She was detained and placed in solitary confinement for thirteen months, an experience that seems to have damaged her beyond comprehension. The apartheid state and how it treated her had profound effects on the rest of her life (Ibid., 102).

A troubled and dark side of Winnie's story is when she formed the Mandela United Football Club after she returned to Soweto in the mid-1980's after being sent to exile in Brandfort. Munro described how the Club was organised as a family with Winnie as the revolutionary, authoritarian and disciplinary mother. During her trial for kidnapping and accessory to assault a deeply problematic anti-gay stance came to the fore.<sup>2</sup> A famous photograph of the time was held by one of her supporters that

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<sup>2</sup> Winnie Mandela was formally charged with four counts of kidnapping, assault and with seven others for the murder of 14 year old Stompie Moeketsi. During the trial allegations related to homosexual conduct between the youths were made. Winnie Mandela and her supporters condemned homosexuality as anti-African.

read 'homosex is not in black culture', a sentiment unfortunately still prevalent in aspects of African nationalism today (Munro 2014, 104). Winnie was found guilty and sentenced to five years in prison, but after an appeal the sentence was reduced to a fine.

Winnie's appearance at the Truth and Reconciliation Commission where she was asked to respond to charges of her role in a number of murders and other serious crimes is another reflection of what can be seen as her refusal of and dissociation from the political reconciliation that resulted from the negotiated compromise of the early 1990's between mainly the outgoing apartheid government and the African National Congress. She denied everything that she was accused of. Munro compares what she calls the 'spectacle of Winnie's female misrule' with Mandela's 'saintliness' (Ibid.,107).

A few themes emerge from the epilogue of Winnie Madikizela-Mandela's prison diary: The first one is the extent to which race and gender played a role in how she was treated by the authorities. Women activists who participated in the TRC hearings had similar experiences. Winnie recalls: 'They honestly believed that it was impossible for a black woman to have this kind of stamina, to be this stubborn. Because they were meant to break us and they could not believe that anyone would resist them like that?' (Madikizela-Mandela 2013, 234). She adds 'When I was told that most of my torturers were dead, I was so heartbroken. I wanted them to see the dawn of freedom. I wanted them to see how they lost their battle with all they did to us, that we survived. We are the survivors who made history' (Ibid., 234). This could be read as a kind of overcoming of obstacles in the vein of the bildungsroman. However, I read this differently. Winnie did not overcome obstacles in any traditional way. She overcame by resistance. Unlike Nelson who after years imprisoned on Robben island walked out of prison and stepped into the role of the Father of the Nation who embraced constitutionalism, human rights, and reconciliation, Winnie refused reconciliation. Later in the epilogue she notes how their struggle was not aimed at becoming president, but fighting for freedom. And she shows her concerns on how present day leaders are mirroring the oppressors of the past.

A second theme is her care for her children and how that was her main concern while she was detained—her remembering of her detention stands in contrast to that of Nelson Mandela and the other male prisoners on Robben island.

When I was in detention for all those months, my two children nearly died. When I came out they were so lean; they had such a hard time. They were covered in sores, malnutrition sores. And they wonder why I am like I am. And they have a nerve to say, 'Oh Madiba is such a peaceful person, you know. We wonder why he had such a wife who is so violent?' The leadership on Robben Island was never touched; [they] had no idea what it was like to engage the enemy physically [...] We were the foot soldiers. (Madikizela-Mandela 2013, 234-235.)

Remembering how they operated during the night she remarks: 'We reversed the

hours in the same way we had to reverse the values of society' (Ibid., 235).

A third theme is how, after Nelson's first arrest in 1962, she became known merely as 'Mandela's wife' (Madikizela-Mandela 2013, 236). She remembers 'I could never say anything that was from myself, my own mind [...] I discovered Oh, I have no name now—everything I did as Mandela's wife. I lost my individuality [...] I realised that, my goodness, if you are married you lose your identity completely' (Ibid., 237). However, this is not how she was brought up—in her father's house she was taught to 'walk tall' (Id.). Her coming to Johannesburg, unlike that of Nelson, was not one where she could explore new identities and alternative forms of life, but rather one that fixed her in the position of wife. Her banishment to Brandfort turned out to be fertile ground for the forming of a new identity: '[W]hen the authorities banished me to Brandfort as far as they were concerned that was just the last act to bury me forever, but I was never as active as I was in Brandfort' (Ibid., 238). She reflects on her decision to remain in Soweto after 1994, that she 'fought' for her children to live a 'normal life' 'anywhere,' but that she 'will die in Soweto' (Id.). Critically commenting on the ANC government she notes the problems of repeating past oppression in the present. 'To me, this is exactly what is happening and that is what scares me' (Ibid., 239).

I turn now to a novel that engages with the complexity of Winnie Mandela. The author, Njabulo Ndebele, through the voice of his four female protagonists, simultaneously gives a critical and sympathetic reflection on her life as activist and as wife and former wife of Nelson Mandela. *The Cry of Winnie Mandela* (Ndebele 2003) tells the story of four ordinary black women who waited in various ways and contexts on their men to return to them in the time of apartheid. The author frames them as the descendants of Penelope, who, as the wife of Odysseus, is the classical symbol of a woman who waited. The four women play a game in which they have imaginary conversations with Winnie Mandela who, like them, waited on Nelson to return to her. The novel has received attention in jurisprudential discourse mainly for the prominence given to the 'ordinary': how 'everyday' stories are singled out in contrast to the grand narratives of transition. This has been connected to Mahmood Mamdani's (1998) critique on the extent to which the South African Truth and Reconciliation Commission has overemphasised the role of what he calls perpetrators and victims in the minority to the exclusion of beneficiaries and victims in the majority. A second theme from the novel taken up by legal scholars is that of 'refusal'. Henk Botha (2009), relying on the text has for example focused on the theme of refusal and post-apartheid constitutionalism. He has highlighted that the notion of refusal could offer alternative perspectives on resistance and change, the possibility of a richer conception of politics and a perspective that does not privilege the grand narratives of past injustices and struggles over local histories (Ibid., 33-34).

In the novel Winnie Mandela is singled out as the most famous South African woman who waited on her husband to return. In using the figure of Penelope who, in this novel, has left Odysseus and her home in Greece in exchange for the road, Ndebele challenges traditional notions of home and women's relation to it. The four

women who are the main protagonists in Ndebele's story reflect on how they waited upon their husbands, their men to return, in vain. Mannete Mofolo, one of the main characters in the novel, articulates what she sees as a resistance, a detachment that women should adopt if they want to protect their freedom. Her resistance to what is expected from her and her detachment stand in the guise of refusal.

Antjie Krog, reflecting on the novel notes the centrality of community in the novel and argues that Ndebele 'establish[es] a community of ordinary women' (Krog 2009, 58). She shows how Ndebele breaks with the 'classic narrative' of placing the hero/ heroine in a central space in his telling of an 'ethical story' of community (Ibid., 58). For Krog Ndebele underscores a sense of interconnectedness between Penelope, Sarah Baartman, Winnie and ourselves (Ibid., 59). 'And to be our fullest selves, and have our "giftedness" released, we have to accept one another as part of ourselves. Instead of judging and rejecting one another, women should actively, kindly, remove one another from banishment as aberration—a term and a place that we construct when we refuse to care' (Id.).

Krog (2009, 55-56) notes her 'complete surprise' when, instead of finding Winnie in the first pages of the book, she was introduced to Penelope. A second surprise was when it became clear to her that neither Winnie nor Penelope would be the main protagonist in the story, but rather four women telling their 'own stories' in a non-linear way, without proper beginning or ending (Ibid., 56). Krog notes also an interesting relation between 'real' and 'imaginary'—the four women who are initially presented as "real" and "realistic" moved into the "unreal" company of Winnie and Penelope' (Id.). She describes this shift also as a 'transformation from the physical to the metaphysical sphere' (Ibid., 56-57). Another significant aspect of the story is what Krog calls the 'communal location' that she interprets to mean that Winnie's story on her own makes no sense (Ibid., 57). For Krog, Ndebele is saying that to focus on Winnie as an individual is not the point at all, but rather that 'the story about Winnie is the story about every one of us and is at heart an ethical story' (Id.). Krog quotes the words of an imaginary Winnie saying to the four other women: '*You*, all of you, have to reconcile not with me, but with the meaning of me. For my meaning is the endless search for the right thing to do' (Id.). Krog argues that Ndebele, by choosing not to make Winnie a main character in the conventional way, but rather a community of women makes two points: Firstly, that Winnie is who she is because of all of us: 'she is us, she is like us, she is who she is through us, we made her and she us' (Ibid., 58). Secondly, that the way of telling a story by focussing on a conventional hero, like Odysseus, is not the form that he feels is appropriate to tell the ethical story of his community (Id.). Finally, Krog comments on how Ndebele uses Penelope in his story: She, as a Western character, is not dictating an African story but rather, through Winnie, an alternative route and African framework is created for Penelope (Ibid., 59). For Krog, Ndebele created a shift from Penelope's 'faithfulness' to 'reconciliation': 'My journey follows the path of the unfolding spirit of the world as its consciousness increases; as the world learns to become more and more aware of me not as Odysseus's moral ornament on the mantelpiece, but as

an essential ingredient in the definition of human freedom' (Ibid., 57). This story provides an interesting angle on Winnie Madikizela Mandela: it places her within the realm of the ordinary, it highlights the relation with other women but it also gives us a view on Winnie as her own person, fighting for freedom on her terms.

Munro notes how many South Africans continue to support Winnie, maybe exactly because of her 'defiant outsiderdom' (Munro 2014, 108). The fact that she has made mistakes, suffered and endured pain draws people to her. Munro notes that Winnie's refusal to remain silent may be seen as offering 'psychic relief' in a context where so many women remain silent to their oppression and misconduct towards them. She has been an outsider, on the margin of the ANC for long times and this gives her the position of voicing her dissent.

My interest is to reflect on how the life stories of Nelson Mandela and Winnie Madikizela Mandela symbolise/represent different narratives also of the becoming of a SA nation/law/jurisprudence. Of course both of them and their stories are much more complex and could unfold more perspectives on what I have tentatively noted here. The main point for me is that Nelson Mandela can be explored from a position of being within modernity/various modernities and various readings of law—natural law, the Law of the Law, human rights—, whereas Winnie Madikizela Mandela always already occupies a marginal position—she represents the excess, that which cannot be stilled or contained by a modern legal order.<sup>3</sup>

#### **4. Every day I write a book**

In this section I focus on two critical engagements with constitutionalism and the ideal of transformation within the context of post 1994 South Africa. Mark Antaki focuses on two images relied on in the Epilogue of the 1993 Constitution, namely that of the bridge and the book (Antaki 2013). He notes that although the bridge has been central in a number of reflections,<sup>4</sup> the book has been neglected. George Pavlich (2013) contemplates an approach to constitutional transformation that defies formalism and scientific logic. He proposes a 'dissociative grammar' of critique that supports the uncertainties and dynamism of law.

The epilogue or postamble of the 1994 Constitution invokes the image of the bridge as follows:

This Constitution provides a historical bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

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<sup>3</sup> Following the work of Luce Irigaray one could argue that it is exactly because of sexual difference and law's insistence on sexual indifference that Winnie as a woman has been systematically excluded. I am pursuing this line of inquiry in a different project in which I want to think about the exclusion of African law and jurisprudence along the line of Irigaray's insight on the insistence on one to the exclusion of the plural.

<sup>4</sup> For one of the first writings see Mureinik 1994. For a more critical assessment, see Van der Walt 2001.

The late Etienne Mureinik, in one of the first articles that commented on the 1994 Constitution, relied on this image in explaining that this Constitution provided for a shift from an authoritarian past to a transparent future where the state would be asked to justify its actions (Mureinik 1994). Antaki recalls André van der Walt's critique of the dominant interpretation of the bridge as a linear structure, namely that the constitution could serve as a bridge that could lead South Africa from an authoritarian, racist, sexist, unequal and undemocratic past to a present and future where all these ills and injustices will have been addressed. Van der Walt (2001) problematizes this view by noting soberly that a bridge of course can go in two possible directions, forward and back, and that the constitution could have exactly also any of those two consequences. Antaki connects the critical engagement of Van der Walt with Antje Krog's ethical problem with writing a novel (Antaki 2013, 51). He invokes David Scott's support of tragedy rather than romance as the genre through which to narrate the change from colonial to postcolonial. Antaki explores Van der Walt's response to the dominant writings on the bridge and his invocation of 'codes,' particularly two forms of dancing to problematize the notion of a linear movement from past to future, or bad to good. Central to Van der Walt's take is the continuities at play. As is clear also from Krog's refusal to write a novel at stake here is the refusal to claim 'a wilful imagination [...] a form of imagination as invention' (Ibid., 60). The over-simplistic reading of the bridge relies on a form of imagination that may draw an over optimistic picture of the possibilities of constitutional transformation—one that would fit the story of a nation's coming of age through constitutionalism and human rights. Van der Walt's hope lies at the end with the possibility for things to be 'different' but not necessarily better.

In her 2009 book *Begging to Be Black* Antje Krog observes that she is not writing a novel as a way to explore the question of what it may mean to be black. She declares that for her 'imagination is overrated,' that 'to imagine black at this stage is to insult black' (Krog 2009, 268). She explains that she wants to listen, observe and translate until she might have a better sense (Motha 2010, 300). Antaki interprets her refusal to write a novel as a refusal of 'the fantasy that one can, somehow, know others,' a refusal 'of imagination as a form of mastery in the service of both reason [...] and will' (Antaki 2013, 64). For Antaki 'Krog's refusal is at once the refusal of a novel that allows one to play out the fantasy of "getting" into someone's else's (or even one's own) head or heart, but closer to my argument it is also the refusal of a novel that involves the movement of a protagonist towards a place where he or she arrives at a prefigured unity and maturity' (Ibid., 52). In other words it is the refusal of the traditional bildungsroman, a coming of age story. For Antaki the Epilogue of the 1993 Constitution invokes exactly the idea of South Africa's coming of age. He interprets the Epilogue as reflecting 'a moment of self-recognition, of attainment of maturity ... of a form that allows the protagonist to retrospectively interpret his life story as a formation' (Ibid., 69). However, Antaki notes that there are literary genres, other kind of novels, that differ from employing the imagination as willing, as mastery, as establishing a kind of sovereign authority—such is the notion of a minor literature

for example as written by Kafka, and supported by Deleuze and Guattari (1983). Antaki refers to novels by JM Coetzee<sup>5</sup> and also Marlene Van Niekerk's *Agaat* (2004) as examples. At stake here is if the Constitution is seen as a 'book', what kind of book it is, and even more pertinent that it is a book that is being written continuously, started, re-started everyday again.

Pavlich is interested in thinking about 'an alternative critical grammar' on constitutional transformation that 'operate[s] by relentlessly reaching beyond current orderings' (Pavlich 2013, 33). In the previous section I considered the life story of Winnie Madikizela Mandela and I am interested to relate tentatively aspects of her life with Pavlich's notion of depth grammar:

Existing within an everyday social ethos, participants seldom reflexively examine or challenge the limits that constitute them as particular kinds of contextual beings. The depth grammars through which they come to engage meaningfully, make sense of, and act in a social context remain hidden. Yet, precisely at those moments where limits to particular forms of life are experienced as deeply problematic, subjects inaugurate unusual processes to name aspects of their subjection. (Pavlich 2013, 40.)

For Pavlich critical forms of life start at that moment, as formulated by Foucault, when subjects actively contemplate 'how not to be governed thus' (Ibid., 40). Pavlich unpacks this by saying that Foucault could be interpreted here to refer to a grammar that offers the possibility of imagining the 'dissolution of themselves and their current ways of being, and to consider ways to live outside of what they have come to be' (Id.). He turns to the novel by Ndebele referred to above and invokes a specific theme from the novel, namely that of order. The fictional Winnie in the novel reflects on what she sees as the link between 'housekeeping and order', between the everyday practices and the ordering of the mind (Ibid., 41). Winnie in the novel observes: 'I think this kind of order is one of the central features of whiteness. We were all "civilised" into it' (quoted in Pavlich 2013, 41). Pavlich reads Winnie in the novel to be wanting a 'kind of death that simultaneously opens up to an "instinctual knowledge", [...] an "emptying out of my life. My law of resistance emerged from the gradual emptying out of my life. Here was my law: embrace disruption, and then rage against order instead of longing for it"' (Pavlich 2013). Drawing on Derrida, Pavlich notes that reflective subjects problematizing their own lives 'welcome alternative futures and open up to what may yet come' (Ibid., 42). He notes aptly that such a dissociative critique is not preoccupied with 'specific reflections on limits, immediate calculations of injustice, or even the disordering of an order' (Id.). Order and dissociation remain as 'permanent possibilities', neither of them is 'fixed as a state or a law that cannot be undone' (Id.).

The aim of this section was to draw on the writing of Antaki and Pavlich as examples of views that provide alternatives to the pervasiveness of formation,

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<sup>5</sup> See *Waiting for the Barbarians* (1980) and *Disgrace* (1999).

settlement and transformation as *bildung*. As recalled above the main reading of the life of Nelson Mandela 'fits' this story, although we should heed that this is a constructed (also self-constructed) story, and that there are of course versions that could trouble this one. The life of Winnie could be seen as one that challenges the notion of a bridge crossed in a linear fashion or a book in the guise of a simple coming of age story. Disassociation seems to be an apt metaphor for her life. Thinking about where South Africa and, in particular, South African law and jurisprudence find themselves 21 years after the first democratic elections is a complex matter and one should be careful not to come to any quick conclusions or to make grand statements.

## **5. Concluding remarks on interconnectedness and the story of a stork**

The lives of Nelson Mandela and Winnie Madikizela-Mandela have been described as reflecting 'both trauma and transformation' (Munro 2014, 109). This description is apt also for the becoming of a post-1994 nation and, for my purposes, jurisprudence. By reflecting on the becoming of a post-1994 jurisprudence through the lives of these two figures I want to underscore something about the ambiguity, the contingency and ever-changing nature of law and jurisprudence in these times. I want to conclude with reference to three suggestions: Firstly interconnectedness/relationality as raised by Ndebele and Krog in their reflection on Winnie. I draw briefly on the notion of a relational approach to law (Nedelsky 2011). Secondly, I turn to a new work by Antjie Krog in which she strives to accomplish a kind of interconnectedness by way of language. I read this work in light of what Pavlich calls a dissociative grammar. I end with Adriana Cavarero's engagement with a story told by Karen Blixen as a story of groundless formation, as it were.

Jennifer Nedelsky has developed a relational approach to law and rights based on a relational theory of self and autonomy. She starts off her book that brings together her work on relationality and law by stating the centrality of relationships to people's lives (Nedelsky 2011, 3). Relationships, for her, are at the heart of who we are, what we can do or not do, what we value, suffer, and what we are able to enjoy (Id.). Her project is to show how relationships are central to law. Nedelsky's context is the Anglo-American one where human beings are seen as 'essentially separate' from one another. She argues that her project aims at two levels, firstly to bring about a shift that could make relationship more central to law and political practice; but secondly a shift that is more radical and fundamental in the way people see the world. Her argument is that the Anglo-American conception of law is founded on liberal conceptions of an autonomous self that she regards as 'faulty' (Ibid., 5). Her aim is to suggest a restructuring of the way law, rights and jurisprudence understand autonomy, interdependence and relationship. She insists for example that autonomy is possible because of our connections to others; it is our relations with others that make autonomy possible (Ibid., 118). I find Nedelsky's work suggestive for thinking about a post-1994 jurisprudence in South Africa partly also because it

underscores for me the extent to which South African law and jurisprudence rely on the understanding that Nedelsky articulates as Anglo-American. One would have hoped that South Africa law and jurisprudence would have developed, at least in the past 21 years, in a direction that is much more reflective of local and indigenous ontology, epistemology and practice.<sup>6</sup>

By recalling the stories of Nelson and Winnie it is the story of Winnie, as reflected on by Ndebele and Krog that underscores interconnectedness and relationality. The version of Nelson Mandela's life story, as *bildung*, as coming of age reflects in a way a story of an autonomous self who managed to transcend challenges and obstacles. Nedelsky refers to Nelson Mandela as an example of someone who internalised autonomy to such an extent that he was able to sustain his capacity for autonomy whilst being in prison. For Krog we can make sense of Winnie only to the extent that we interpret her actions and life as one that is interconnected to others. As we've seen, Winnie's life—and to follow the line of argument, her life as one of interconnection and relation—is not an idealised version at all. Nedelsky also makes it clear that relations are not necessarily 'benign' and that they can be bad and destructive (Nedelsky 2011, 32). However, this does not eschew the ontology of interconnection.

In the volume titled *Synapse* (2014), Krog pursues the theme of co-responsibility, the relation between self and other, co-existence, and also conscience. The Afrikaans title *Medewete*, meaning 'to know with others', draws attention also to what it means to know, to know with others, to have a shared knowledge (Taljaard 2014). In an interview Krog explains that the volume was profoundly influenced by German poet Paul Celan (Esterhuizen 2014). She focused on techniques employed by him to 'break language in the hope of finding something humane in which he could live'. He innovated many neologisms. Krog refers to these as a type of word-knot, to read it as causing a kind of suffocation that urges one's attention, that forces one to try to comprehend, to start something new before you merely continue (Id.). Krog observes that one translates Celan in German whilst reading him in German. 'Translation emerges as an extension and radicalization of conditions inherent in his act of writing, as also in the act of reading him [...] nativity is itself alien to Celan. His work never resides fully or comfortably in any native tongue' (Id.). For

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6 Douzinas and Gearey's invocation of the social bond, their notion of 'a communism of the heart' that underscores their understanding of a general jurisprudence, a jurisprudence that is concerned not only with law's consciousness but also law's conscience (see Douzinas and Gearey 2005), has not been prevalent in post-1994 South African law and jurisprudence. There have been voices calling for the recognition and development of the indigenous value of Ubuntu, that a person is a person through other persons, in South African law. A number of court cases have focused on the value of Ubuntu in the context of socio-economic rights, defamation and most famously finding capital punishment unconstitutional. Drucilla Cornell has convened a project on Ubuntu since 2003 and has done a lot to insist on the importance of developing a notion of constitutionalism that is grounded in Ubuntu (Cornell 2012). Ubuntu, however, is also contested in the South African context and it has been criticised from multiple perspectives. One voice to be noted here is the view of Magobe Ramose (1999 & 2001) who has consistently argued that the African value of Ubuntu is not to be reconciled with the terms in which the South African settlement and adoption of constitutionalism have taken place.

Krog Celan sounds non-conventional, exactly because he uses techniques to cut through language as way to becoming human. She connects his work with that of Levinas in his reliance on the eye that calls the self to become human. Krog exposes the difference between African and European philosophy in the sense that, in the former, the 'you' and the 'I' are multiple and always already interconnected. This volume, on the one hand, strives towards interconnectedness, but, at the same time, is also brutally honest about the impossibility of such interconnection, particularly in a country such as South Africa.

In a segment of the volume titled 'Servants talk', the poet succumbs to the inability of the imagination to overcome the deep differences in South African society (Viljoen 2014). On one page we find firstly a conversation between a husband and wife about their 'servant', secondly conversations between the 'servant' and her family in Xhosa which is translated in a third section in English. We see here that, despite her attempts to overcome the deep cleavages in South African society, the poet is thwarted. This relates for me to Pavlich's notion of disassociation and his search for a dissociative grammar of critique discussed above. Pavlich argues that the recognition of contingency and disruption, the impossibility of inter-connection could invite stronger connections, 'a dissociative critique may disrupt, but that disruption also reorders by installing new grammars and meanings' (Pavlich 2013, 42). Pavlich keeps the ideal of justice alive in the sense that I want to think about the possibility of justice through an unconventional figure like Winnie Madikizela. Winnie's story is one of contingency, equivocation and rupture that open possibilities for a critical jurisprudence. This does not entail a nihilist view. Pavlich, following Adorno states that 'critique is not simply a matter of resisting for the sake of resisting; it is intimately tied to democracy and the never-ending process of thwarting totalitarian socio-political and legal formations' (Ibid., 45).

Should the life story of Winnie Mandela be read only as rupture? I want to conclude with Adriana Cavarero's reflection on the following story told by Karen Blixen:

A man, who lived by a pond, was awakened one night by a great noise. He went out into the night and headed for the pond, but in the darkness, running up and down, back and forth, guided only by the noise, he stumbled and fell repeatedly. At last, he found a leak in the dike, from which water and fish were escaping. He set to work plugging the leak and only when he had finished went back to bed. The next morning, looking out of the window, he saw with surprise that his footprints had traced the figure of a stork on the ground. (Cavarero 2000, 1.)

Cavarero responds to the story by asking if one will be able to see a stork at the end of one's life—is there a design that has a meaning to be recognised? Following Hannah Arendt, Cavarero insists on the importance of *who* someone is rather than *what* someone is (Ibid., 2). *Who* someone is can only be revealed by stories. The tendency in philosophy and, of course, law is to give prominence to the *what* rather than the *who*. A jurisprudence that strives to be attentive to the *who*, might be open to

the possibility of interconnectedness and relations. As Cavarero states, the extent to which a design, meaning could be recognised is not something that can be foreseen, projected or controlled. The man in the story did not intend anything more than to find the reason for the noise and fix it—the design, meaning at the end, the trace of a stork, happened without any preconceived plan, design or project. What possibilities may this hold for the contemplation of a post-1994 jurisprudence? What is envisioned is a jurisprudence that does not follow a preconceived plan or design, one of *bildung*, or progress but rather one that is open to contingency, disruption and equivocation. By being attentive to the story (authored or narrated) to *who* someone is, there is a possibility of meaning to come to the fore, for interconnection and relationality to be recognised. The inevitable failure of the latter in itself could be a way of connecting and disclosing meanings. As Pavlich notes ‘dissociative critique’s promise is to pursue a different life in the name of such noble—if never fully calculable—ideals as justice, equality and democratic patterns of association’ (Pavlich 2013, 45).

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