

Going Against the Grain – Justice Froneman as Subversive (Legal) Historian

K van Marle*

Online ISSN
1727-3781

P·E·R

Pioneer in peer-reviewed,
open access online law publications

Author

Karin van Marle

Affiliation

University of Western Cape,
South Africa

Email

kvanmarle@uwc.ac.za

Date Submitted

27 September 2023

Date Revised

18 January 2024

Date Accepted

18 January 2024

Date Published

11 June 2024

Guest Editor

Prof E du Plessis

Journal Editor

Prof C Rautenbach

How to cite this contribution

Van Marle K "Going Against the Grain – Justice Froneman as Subversive (Legal) Historian" *PER* / *PELJ* 2024(27) - DOI <http://dx.doi.org/10.17159/1727-3781/2024/v27i0a16936>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2024/v27i0a16936>

Abstract

My tentative argument in this piece is that Justice Johan Froneman's engagement with history can be read as "subversive" and that this very subversiveness holds the possibility to destabilise legal culture and disclose possibilities for a "rewriting", a "re-orientation" of jurisprudence, and of law. I explore to what extent the way in which legal scholars, professionals and in particular judges invoke history and memory influences legal culture, and accordingly how we understand and do law.

Keywords

History; memory; legal culture; jurisprudence.

.....

1 Introduction

My tentative argument in this piece is that Justice Johan Froneman's engagement with history can be read as "subversive" and that this very subversiveness holds the possibility to destabilise legal culture and disclose possibilities for a "rewriting", a "re-orientation" of jurisprudence, and of law. To make this argument I revisit Danie Visser's 1989 essay on "The Legal Historian as Subversive", in which he distinguishes and describes the two main approaches to legal history at the time, namely "teleological pragmatism" and the Feenstra school.¹ Visser calls for history not to be used in the guise of functionalism to affirm a (false or maybe over-simplified) coherence and stability but rather for it to destabilise and disclose possibilities for alternative ways of understanding and doing law. I also recall Andre van der Walt's 2006 piece, which like Visser's is addressed to legal historians, this time on legal culture and the way in which legal culture can prohibit change.² The way legal scholars, practitioners and judges engage with and employ history is part and parcel of legal culture. Following on the views of Visser and Van der Walt on legal history and legal culture, I take three short detours, firstly by considering the relation between history and memory, secondly the relation between history/memory and nostalgia and thirdly between monumental and memorial memory. For Pierre Nora history, in particular institutional history, exists only because of the loss of memory.³ Concerning nostalgia, I invoke Svetlana Boym's distinction between restorative and reflective nostalgia, the former a longing for a past that often never even existed, the latter a critical engagement with the past from the perspective of the present.⁴ I recall the distinction between memorial and monumental memory related to the *Constitution of the Republic of South Africa*, 1996 (the Constitution) by the late Lourens du Plessis.⁵ I aim to bring all of this – history, memory, nostalgia – to bear on the jurisprudence of Froneman. My sense is that for Froneman history does not unfold in a straight line, in a linear or chronological way, but is as layered, as a palimpsest. To engage history as layered rather than linear could make room for a more complex and nuanced take on history, law and jurisprudence.

* Karin van Marle. BLC LLB (UP) LLM LLD (Unisa). Research Chair in Gender Transformation and World-making, University of the Western Cape, South Africa. Email: kvanmarle@uwc.ac.za. ORCID: <https://orcid.org/0000-0002-7798-0962>

1 Visser "The Legal Historian as Subversive" 1.

2 Van der Walt 2006 *Fundamina* 1.

3 Nora 1989 *Representations* 7.

4 Boym *Future of Nostalgia* 41.

5 Du Plessis 2000 *Stell LR* 385.

I start off by considering Froneman's engagement with history in four judgments, namely *Daniels v Scribanti*,⁶ *City of Tshwane v Afriforum*,⁷ *AfriForum v University of the Free State*⁸ and *Albutt v Centre for the Study of Violence and Reconciliation*.⁹ I have written about the *Tshwane* case before and expand here on my previous engagement.¹⁰ I have been struggling with the minority judgment of Froneman (with Cameron) in the *Tshwane* street name case since the decision came out, trying to make sense of the dissent. I was a resident of Tshwane at the time and I supported and still support the change of street names. I did not, however, read the judgment by Froneman and Cameron as standing in the guise of protecting enduring racism or white culture, or supporting a neutral take on issues of race.¹¹ Similarly, the minority decision in the University of the Free State language case troubled me. As an academic at the University of Pretoria I actively participated in the call for and ultimately supported the change in language policy that entailed changes similar to that at the University of the Free State. Having worked at the latter university for a while I believe that the policy of having English as the only official language of tuition makes sense. But then, why am I not simply dismissing Froneman's minority judgements as poor, or conservative judgments? Froneman's separate judgment in *Albutt*, in particular his reliance on the notion of "participatory living" as underscored by Wessel le Roux, helps me to make sense of the two minority judgments. It provides a frame through which I read and consider the other two judgments. In the light of *Albutt* (and Le Roux's exposition) I consider Froneman as emphasising the need for layered histories, for the possibility of living together and as per Le Roux for "living differently under the law".¹²

I conclude the piece with reference to Iain Louw's call for a "rewriting of nomos", which I relate to Froneman's engagement with history, that for me holds the possibilities of disrupting the current legal culture and ultimately leading to a rewriting or a re-orientation (as per Philippopoulos-Mihalopoulos)¹³ of law.¹⁴

⁶ *Daniels v Scribante* 2017 4 SA 341 (CC) (hereafter *Daniels*).

⁷ *City of Tshwane Metropolitan Municipality v Afriforum* 2016 6 SA 279 (CC) (hereafter *City of Tshwane*).

⁸ *AfriForum v University of the Free State* 2018 2 SA 185 (CC) (hereafter *AfriForum*).

⁹ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC).

¹⁰ Van Marle "Unlearning, (Un)naming, Cohabiting" 84-102.

¹¹ *City of Tshwane* para 164; Modiri 2019 *De Jure* 27-46.

¹² Le Roux 2011 *CCR* 51.

¹³ Philippopoulos-Mihalopoulos *Spatial Justice* 3.

¹⁴ Louw "Rewriting Type" 227.

2 Living differently together

As I have indicated above, I consider four cases, but my concern is mainly with the engagement with history in these cases. In the case of *Daniels*, Ms Daniels, who had been living on Chardonne Farm for 16 years had to go to court numerous times in response to attempts by the manager of the farm, Mr Scribante, to get rid of her. In short: the first time was when Scribante tampered with the door to her home and cut the electricity, upon which occasion she obtained an interim order for the restoration and undisturbed occupation on the farm. The second time she had to approach the court to declare that she was an occupier in terms of the *Extension of Security of Tenure Act 62 of 1997 (ESTA)*, and that her home had to be maintained so as to protect her right to dignity. The third time, the case in question was when Scribante prohibited her from making improvements to her home. This time she approached the Constitutional Court after both the Magistrate and the Land Claims Court rejected her claim based on sections 5 and 6 of ESTA. Justice Madlanga for the majority upheld the appeal, set the orders of the Stellenbosch Magistrate's Court and Land Claims Court aside and found that Ms Daniels was entitled to make certain improvements to her dwelling. He also ordered that the parties should engage meaningfully about some practical issues. The decision underscores Ms Daniels' right to dignity and that the lack of relief would have caused her "to live in conditions that are accepted by all to violate her dignity."¹⁵ Froneman wrote a concurring judgment. He starts off by saying that his reading of the main judgment was "accompanied by a sense of shame."¹⁶ With reference to Hermann Giliomee he underscores the necessity but at the same time the failure of history to help us to understand the past practices and policies of discrimination. He makes three important observations about the Constitution and its relation to the past, present and future: 1) that it provides for all of us to partake in the building of a society where justice together with dignity, freedom and equal treatment of all inhabitants can be addressed; 2) that this can be done only if the injustice of the past is acknowledged; and 3) that "the values of the Constitution are not aimed solely at the past and present, but also the future."¹⁷ He comments on the extent to which basic conveniences are denied and continued to be denied in particular to black farm workers, which he regards as a form of racial discrimination prohibited by the Constitution. However, he argues that for the ideals of the Constitution to be realised three things need to happen:

- a) an honest and deep recognition of past injustice;

¹⁵ *Daniels* para 67.

¹⁶ *Daniels* para 109.

¹⁷ *Daniels* para 137.

- b) a re-appraisal of our conception of the nature of ownership and property; and
- c) an acceptance, rather than avoidance or obfuscation, of the consequences of constitutional change.¹⁸

He reflects on the absence of any self-reflection amongst whites about the "difference in dignified-living" between farmers and workers and all other who inhabited farms. He draws on multiple sources – historical, literary and sociological – to recount how the poor white question was addressed at the time, to the detriment of black people. Froneman's close reading of these texts assists him to see "a picture of an often, recurrent interwovenness" which he believes can assist in "bind[ing] us to a common future."¹⁹ With reference to Sachs in the *Port Elizabeth Municipality* case and also to the writing of Van der Walt he highlights the "social boundedness" of property. He invokes the latter's insight into the need for the very foundations of property law to be questioned and transformed, which affirms the need to go deeper than the redressing of past injustice, and also to respond to and care about bringing about a different future.

In the *Tshwane* case the court had to decide on a restraining order that was granted to Afriforum against the municipality to prevent them from removing the old street names in the city and to bring back those that had been removed. The majority judgment delivered by Chief Justice Mogoeng set aside the restraining order, allowing the City to proceed with changing street names. Mogoeng CJ starts his judgment by recalling South Africa's historical past as reflected in the preamble of the Constitution. He says that he was prompted by Afriforum's reliance on the preamble of the Constitution. The gist of his narrative is how apartheid as a system of institutionalised oppression based on an irrational differentiation between black and white that rendered black people as intellectually inferior and lesser beings resulted in a situation where there was hardly any city, town, street or institution named after black people's historical leaders. He notes that virtually all recognition and honour was given to white people and the history of white people and that this situation endures. The chief justice remarks that "South Africa still looks very much like Europe away from Europe."²⁰ Afriforum's main argument ironically rested on the infringement of their sense of belonging by the removal of the old street name signs. The Chief Justice challenges Afriforum's reliance on belonging by invoking the sense of belonging of black South Africans living in Tshwane. I have remarked previously how the majority judgment speaks to how epistemic violence coincided with spatial injustice.²¹ Black people in Pretoria were not

¹⁸ *Daniels* para 115.

¹⁹ *Daniels* para 131.

²⁰ Mogoeng CJ in *City of Tshwane* para 120.

²¹ Van Marle "Unlearning, (Un)naming, Cohabiting" 87-89.

only forcibly evicted from their houses and given space only on the outskirts of the city, but their history and memories and humanity were denied. Following spatial theorist Henri Lefebvre one can say that they were not only forcibly denied habitat (access to housing as such) but also inhabitation (which encompasses how one lives).²² In a previous reflection on the case I argue that the minority judgment invites deeper thinking and a consideration of what Hannah Arendt calls cohabitation.²³ Lefebvre lamented the shift from inhabitation to the functionalist concept of habitat, which to him was central to modernism, in particular technological modernism.²⁴ Habitat in this notion was focussed only on "economical and technical questions of housing provision."²⁵ Inhabitation, on the other hand, captures far more and is focussed on active and meaningful participation in social life. Inhabitation invokes the struggle for home and for belonging as manifested in the street name issue. The question that comes to the fore here is whether inhabitation extends to all who live in a city – how do we respond to a colonial, apartheid, racist past in a way that discloses new ways of engagement and not mere repetitions, which connects with the notion of unlearning? Lefebvre famously distinguished between perceived, conceived and lived space, which Edward Soja has reconfigured as first, second and third space.²⁶ My sense is that the call for inhabitation and not mere habitat relates to the notion of lived or third space. In my previous engagement I gesture to the majority judgment as allowing the possibility of inhabitation. However, after further reflection I think it possible that the minority judgment at least also, maybe even instead, allows for the inhabitation of all by insisting on the need to heed multiple and layered histories, memories and narratives.

Below I recall two takes on doing history, that of Visser and that of Van der Walt, both of which resist the notion of history's being used in a narrow functionalist guise in the service of a specific outcome. When re-reading the majority in *Tshwane* via teleological pragmatism as expanded on below, one could ask if the majority's reliance on history is painted with a slightly too broad brush and too readily in the service of an all-too-tight grand narrative that disallows alternative versions or experiences and layers of history. And taking it further in regard to legal culture, one might ask what the relation is between a certain kind of approach to history and the continuance of a conservative legal culture. A final remark on Froneman's minority decision is the extent to which they take the need for participation seriously in their consideration of the issue in *Tshwane*. It is exactly the notion of participation

²² Van Marle "Unlearning, (Un)naming, Cohabiting" 89.

²³ Van Marle "Unlearning, (Un)naming, Cohabiting" 85; Arendt *Eichman in Jerusalem* 279.

²⁴ Butler *Spatial Justice* 105.

²⁵ Butler *Spatial Justice* 115-116.

²⁶ Lefebvre *Writings on Cities*; Soja *Seeking Spatial Justice*.

that was at issue also in the case of *Albutt*, but I first turn to the University of Free State language case.

The matter concerned a leave to appeal application brought by AfriForum on the grounds that deciding the language policy of the University constituted administrative action, and alternatively that the decision to adopt a new policy was inconsistent with the Constitution. The majority decision refused leave to appeal, concluding that the University had not acted in an unfair manner; that they had adopted a "flexible, pragmatic and reasonable approach" and that the use of Afrikaans as a second language of tuition "frustrated racial integration and generated racial tension."²⁷ Writing for the minority Froneman differed from the majority judgment, arguing that it would have been "wiser" and "in the interest of justice" if the appeal had been granted. He argued that granting the appeal "would have enhanced the legitimacy of the outcome" and added that "Nothing would have been lost and much would have been gained."²⁸ Maybe in response to the majority's insistence on neutrality, Froneman places his own situatedness on the table, noting that he is an Afrikaans mother tongue speaker. He describes the main question to be asked as what circumstances would justify someone's being prevented from receiving tuition in their language of choice? Addressing this question involves considering two issues, namely the interpretation of section 29(2) of the Constitution and the role played by the ministerial policy when language policy at educational institutions is formulated. As in the *Daniels* case discussed above, he draws on a writer of fiction, here JRR Tolkien, who of course was born in Bloemfontein, who reminded us that it is the speakers of languages rather than the languages themselves that become enemies. He says that the burden of the sins of past Afrikaans speakers should not necessarily be carried by a new generation. However, as in the *Tshwane* case, he is firm about the responsibility or neglect of Afrikaans by the present generation. Froneman notes that the main judgment focusses largely on how Afrikaans was used as an instrument of oppression by a previous racist and nationalist government, but that it doesn't attend to the duty that rests on a government to further the other official languages. He reads the ministerial policy is with more depth than the majority. He focusses on the extent to which English was forced on other language speakers and quotes Sachs, who said that: "In a sense, all language rights are rights against English."²⁹ Froneman indicates that he agrees with the majority that context is important but adds that "an incomplete and partial rendering of that context may skew what follows."³⁰ For him an important question that had to be considered was if

²⁷ *AfriForum* para 78.

²⁸ *AfriForum* para 82.

²⁹ *AfriForum* para 93.

³⁰ *AfriForum* para 95.

the mere exercise of a right to choose a language in the context of university education constitutes discrimination? The crux of the judgment is that leave to appeal should have been granted, or at least that a summary hearing should have taken place so that the court could have had the opportunity to hear from all parties before making its decision. Froneman invokes the *Albutt* case and Ngcobo J's reference to the "'unfinished business' of nation-building" and argues that the matter raised in the case also concerns "unfinished business". As in *Daniels* he writes a section of the decision in Afrikaans, that he translates into English. He raises the question if all is lost for Afrikaans? He recalls the words of Hein Willemse describing an example of "Afrikaans in resistance ... an example of a counter narrative unknown to those outside the sphere of Afrikaans speakers. There are many such tales in the distant past and even close to our time."³¹ Froneman concludes the decision by talking strongly to AfriForum and the way in which they brought the case, neglecting to recognise the complexity of the issue, the unequal treatment of oppressed people and the endurance of historic privilege. In the same vein as in *Daniels* he laments the extent to which the case confirms the "caricature of Afrikaners [farmers in Daniels] as intransigent and insensitive to the needs of others."³² He asks the applicants to consider if the way in which they protect their language rights might be more harmful to Afrikaans than in support of it?³³

In *Albutt v Centre for the Study of Violence and Reconciliation* the Constitutional Court had to decide on an appeal against an interim interdict preventing President Zuma from pardoning apartheid criminals before the victims had the right to make presentations. The background to the case was President Mbeki's deciding to deal with the "unfinished business" of the Truth and Reconciliation Commission (TRC) by pardoning all apartheid prisoners who failed to apply for amnesty during the TRC process. Mbeki initiated a process by which a multi-party parliamentary reference group would consider all applications for pardon. As noted by Le Roux, in appointing this group President Mbeki adhered to the "deeper deliberative nature of post-apartheid constitutional democracy."³⁴ Le Roux argues that Froneman, in his separate judgment adheres, to another version of democracy by underscoring the value of "participatory living".³⁵ In being confronted with a choice between representative and participatory democracy Froneman supports the latter as giving the best account of the meaning of the TRC for the future of democracy in South Africa. Le Roux recalls the distinction between first order and second order participation:

³¹ *AfriForum* para 132.

³² *AfriForum* para 134.

³³ *AfriForum* para 134.

³⁴ Le Roux 2011 CCR 55

³⁵ Le Roux 2011 CCR 62.

First order participation protects the right to participation in the legislative process and in institutional spaces. Second order participation goes wider and also protects political participation through constitutional review and litigation. The latter also allows for "active citizen participation in a vibrant public sphere."³⁶ For Le Roux, Froneman understands that active citizenship should be strengthened, in particular after the TRC. He notes that the question of how active citizenship should be understood is complex and tentatively unpacks the possibilities. The first option entails that civil society can participate politically "within the constitutional matrix" where the second option involves the "tensions between politics and the constitutional matrix." Le Roux regards the latter as participation "in the name of a life in politics not limited or restricted to constitutional activities ... driven by the attempt to think and bear witness to the political and activating the *Differend*."³⁷ Le Roux reads Froneman to be invoking not only institutional politics but also a more "agonistic and institutional understanding" by the invocation of Sen's notion of participatory living. This view of participation is not interested in constitutional democracy but rather in "democracy in the sense of the demand for participatory living" that is linked to the idea of justice beyond the constitution, an idea that is well aware of the limits of the constitution. I support Le Roux's reading of Froneman's decision in *Albutt* and as indicated take this also as a frame through which to make sense of his judgments in the street name and language cases.

In contrast to the majority in both cases, and the concurring judgment in *Tshwane*, Froneman does not base his judgment exclusively on the Constitution. Because he is aware of the limits of the Constitution, he turns to other sources to base his understanding of history, belonging and participation. I now turn to two engagements with history, legal culture and memory.

3 Subversive v pragmatic doing of history

Visser starts off his 1989 article by noting the failure of South African private law to "add" the "words of peasants and classes" to its narrative.³⁸ He describes this as a one-sided version of history that is a product of colonialism and not grounded in the South African experience. He unpacks the two main approaches to legal history at the time, teleological pragmatism and the Feenstra school. "Teleological pragmatism" is the name given by a Dutch historian, Hoetink, to the approach to history that comes down to the "productive misunderstanding" of it so that it serves a functional aim in the present. This way of doing history is associated already with the glossators, who apparently "misunderstood" the *Corpus Iuris Civilis*.

³⁶ Le Roux 2011 CCR 63.

³⁷ Le Roux 2011 CCR 64.

³⁸ Visser "The Legal Historian as Subversive" 1.

Visser explains that the glossators, having no understanding of history, took no account of the historical background, which allowed them to apply Roman law in their own time. He unpacks how this very approach was used by scholars of delict at the time of his writing an article on their commentary on the *actio legis Aquiliae*, which I will not elaborate on. The point of my argument is that the work of the glossators exemplifies "the manipulation of the past to achieve some desired end."³⁹ Visser notes how this practice is relied on, on "a grand scale", by writers and judges. He concedes that given the intertwining of history and law it was probably inevitable that "lawyers writing history" would be partisan.⁴⁰ However, relying on Macaulay he warns that this "partisanship must be kept in check. If we allow our concerns for the coherence of the legal system to determine all the goals of legal history, we prevent history from being written."⁴¹

The second approach to history followed at the time developed by Dutch scholar, Robert Feenstra, can be seen as the total opposite of teleological pragmatism. Feenstra insisted that a legal historian should immerse him/herself "in the conceptual world of the time with which he or she is dealing."⁴² This means that "non-Roman" concepts of the law, but also political, social, economic and cultural aspects, should be heeded. Feenstra importantly notes that legal history need not be "useful". Instead the conclusions reached should be "intelligible". They need not stand "in the service of dogmatism".⁴³ Visser refers to a number of South Africans who completed their doctoral theses with Feenstra and who applied his method to their work. He elaborates on the work of Dutch historian Hoetink, which he thinks has not received the attention it deserves. Hoetink emphasises that history will never be done in an impartial manner and that all the certainty involved will always be relative.⁴⁴ He questions the false distinction between "fact" and "theory" and underscores the extent to which facts "are the product of intellectual effort".⁴⁵ He also highlights the influence of place, time and class on the historian's selection of facts. "Objectivity" in the work of historians can never mean "representing things as they really are."⁴⁶

Visser relates these insights to the work of Critical Legal Scholar Roberto Unger. An important feature of Critical Legal Studies is to expose the "disharmonies" and the tensions in the law as well as the ideological and material issues underpinning them.⁴⁷ Visser sees an opportunity for legal

³⁹ Visser "The Legal Historian as Subversive" 7.

⁴⁰ Visser "The Legal Historian as Subversive" 8.

⁴¹ Visser "The Legal Historian as Subversive" 8.

⁴² Visser "The Legal Historian as Subversive" 8.

⁴³ Visser "The Legal Historian as Subversive" 8.

⁴⁴ Visser "The Legal Historian as Subversive" 12.

⁴⁵ Visser "The Legal Historian as Subversive" 12.

⁴⁶ Visser "The Legal Historian as Subversive" 13.

⁴⁷ Visser "The Legal Historian as Subversive" 20.

historians that I want to expand to legal professionals, scholars and judges to "destabilise current certainties by reimagining the notions and structures of the legal system in terms of the categories of other times and other 'interpretative communities' to remake the current interpretative community itself by investigating alternative historical manifestations of such communities."⁴⁸ His view is that history should not be used merely to justify the status quo but rather to unearth alternative approaches and to break down "artificial barriers".⁴⁹ He boldly states that "South African legal history must again become subversive."⁵⁰ How should history be practised in a subversive way? Visser suggests a two-fold approach: firstly, he says history should not only be influenced by intellectual views but should "recast" history by making the relation of law to sociolegal factors central and by recognising the ideology at play. Secondly, he advocates the writing of comparative legal history in order to broaden possibilities. He supports an approach to history that moves beyond the lawyer's view to include other societal influences. This approach could add value to the current understanding because it could highlight class issues that otherwise remain ignored. It could also provide the opportunity to bring law's relation to the economy and ideology to the fore.⁵¹ Visser observes very aptly that ideology not only reproduces societal relations but also performs a certain hegemony by organising and excluding certain beliefs, values and (we can add) histories and narratives. Legal history itself as well as the reliance on history in law could help to bring uncertainty not only to law but to the assertion of all grand narratives. For me the implication of Visser's view is that not only the performance of legal history but also the way in which we rely on history could be done in a subversive way that ultimately could disclose possibilities for change.

4 Legal culture and history

In a 2006 article directed at legal historians van der Walt reflects on the relationship between legal culture, legal history and transformation. The immediate context to which he responds is important, namely the climate or atmosphere of the time in which albeit the inevitability of change was realised, various positions were caught up in a stark tension between "continuity and change" on the one hand and "discontinuity and change" on the other.⁵² From the perspective of many white South Africans the concern was how to ensure that change took place without effecting legal and economic stability and primarily to keep white privilege in place.⁵³ Van der

⁴⁸ Visser "The Legal Historian as Subversive" 20.

⁴⁹ Visser "The Legal Historian as Subversive" 18.

⁵⁰ Visser "The Legal Historian as Subversive" 21.

⁵¹ Visser "The Legal Historian as Subversive" 27.

⁵² Van der Walt 2006 *Fundamina* 4.

⁵³ Van der Walt 2006 *Fundamina* 3.

Walt is interested in the role played by legal culture in this tension, legal culture being of course not only an important tool for use in entrenching stability but also in mobilising "resistance to change".⁵⁴ Van der Walt asks: "What are the links between legal history, legal tradition and legal culture, and what is the position of legal history in a period of transformation?"⁵⁵ He lists the sources of law and the interpretive tools as two aspects of legal culture that could obstruct new approaches. He reflects critically on the use of the phrase "The Law" and the role it plays in the establishment and maintenance of a specific legal culture. His observation that the "deeply entrenched attitudes towards and thinking about what the 'The Law' is, how it works and its function" is the actual culprit standing in the way of transformation.⁵⁶

Van der Walt distinguishes between two responses to the question of how much change of the legal system was needed to bring about the necessary social and economic change. One view coming from mostly lawyers in a private law context was that a "restoration of the scientific objectivity of the law" was needed. This view of course relies on a sharp distinction between law and politics. The argument was that if law could only be purified from apartheid influences, business as usual could continue.⁵⁷ The way in which change should occur according to this view was by way of incremental change and mostly by way of legislation. Van der Walt notes how this approach would not only be too slow, but also that it would not do anything to change and destabilise law itself because "it is driven by the logic of doctrinal development".⁵⁸ If this was the only way in which law could deal with change, we would be left with the impression that the only way in which change could take place would be by way of revolutionary change.⁵⁹ Van der Walt believes that this view is informed by pre-realist thinking that insists on a simple distinction between politics and law. If we accept, however, that law is "an intellectual and cultural artifact" created also through interpretation there is another option. He turns to case law to show the difference between cases where courts engaged with apartheid history in the context of eviction law and where not. Examples of a thorough account of history led to more progressive and just outcomes. He refers to *Port Elizabeth Municipality v Various Occupiers*,⁶⁰ where the point was made that anti-eviction law can be made sense of only by taking account of apartheid history.⁶¹ Three pertinent points are made by Van der Walt based on his

⁵⁴ Van der Walt 2006 *Fundamina* 5.

⁵⁵ Van der Walt 2006 *Fundamina* 5.

⁵⁶ Van der Walt 2006 *Fundamina* 6.

⁵⁷ Van der Walt 2006 *Fundamina* 7.

⁵⁸ Van der Walt 2006 *Fundamina* 9.

⁵⁹ Van der Walt 2006 *Fundamina* 10.

⁶⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

⁶¹ Van der Walt 2006 *Fundamina* 15.

assessment of the example of eviction laws: 1) law cannot be isolated from politics; 2) interpretation matters - even the most progressive laws will not have the envisioned result if interpreted in a technical manner; 3) the application of laws comes down to a choice between upholding or changing the existing legal tradition. The analysis of eviction law brings him to Karl Klare's observation on how legal culture can limit and obstruct efforts at transformation.⁶²

As early as in 1998 Klare commented on South African legal culture as a "conservative" - meaning a formalist - one.⁶³ As a critical scholar he exposed the extent to which participants in a particular culture, including lawyers and legal scholars, tend to regard their culture as normal. Van der Walt relates Klare's notion of legal culture to that of legal tradition. He explains how "because of the hegemonic force of such a legal tradition new perspectives, alternative views and different arguments or ways of thinking are routinely or easily excluded or rejected and creative, alternative and unconventional solutions become difficult if not inconceivable to conceive, promote or defend."⁶⁴ "Cultural coding" restricts the kind of questions we can ask but at the same time also the kind of argument we can make and the possible answers. Van der Walt, like Visser, invokes the "interpretive turn" and the significance it has for alternative takes on legal interpretation. For social sciences in general it has meant that truth claims had to be revised, admitting that all truth is contextual, contingent and limited.⁶⁵ Similarly lawyers had to come to terms with the fact that meaning is not something to be found. Van der Walt turns to work by Derek van der Merwe on the Ramist method,⁶⁶ which was a set of mental habits that had an important influence on the development of legal science in the 16th century that are still present today. The influence of this method for my argument is its enduring influence on how history is dealt with, because of the belief in the possibility of achieving one version of self-evident knowledge.⁶⁷ As per Van der Walt, "In the postrealist world we live in, we can no longer pretend that legal certainty in the sense of true and certain knowledge is attainable by deductive reasoning from axiomatic principles."⁶⁸ Van der Walt refers to the reliance on the idea of an "unbroken thread" in the context of Roman-Dutch legal history mainly for pragmatic reasons and to serve current interests. What is

⁶² Van der Walt 2006 *Fundamina* 16.

⁶³ Klare 1998 *SAJHR* 166.

⁶⁴ Van der Walt 2006 *Fundamina* 18.

⁶⁵ Van der Walt 2006 *Fundamina* 22.

⁶⁶ Petrus Ramus was a scholar in the humanist tradition who taught logic at the University of Paris in the mid sixteenth century. Van der Merwe "Ramus, Mental Habits and Legal Science" 32 discusses the influence of Ramus on legal science. The Ramist method relied mainly on a "set of mental habits" and a certain state of mind.

⁶⁷ Van der Walt 2006 *Fundamina* 24.

⁶⁸ Van der Walt 2006 *Fundamina* 26.

clear from his analysis is that hegemony is part and parcel of a certain legal tradition, and that this tradition stands in the way of meaningful transformation.

Relying on Rosemary Coombe, Van der Walt explains that in order to resist hegemony we should be constantly aware of the way in which legal culture restricts transformation, especially because of its insistence on one version of truth. "[L]egal interpretation always affirms the legitimacy of one understanding while suppressing another; it always embodies the outcome of a political struggle in which one experience of the law wins and another loses."⁶⁹ Van der Walt calls for "the dynamic potential for transformation inherent in the other, often marginal, experiences and interpretations of the law that are traditionally and routinely excluded or sidelined ... Normality is not fixed; it just seems that way."⁷⁰ Van der Walt turns to Visser's essay and his call for a subversive engagement with history, which I discuss above. History should not be relied on "as a source of inherent authority, not as a source of inherently valid or superior logic or analytical methodology, but as a rich source of narratives of discontinuity and transformation."⁷¹ Legal history and the invocation of it should not be only about continuity and consensus but also about discontinuity and dissent. History should be invoked and manipulated to serve a functionalist outcome. Van der Walt believes that in order to achieve this we need "a deconstruction of legal history or a critical study of legal histories."⁷²

I argue tentatively that the judgments of or jurisprudence of Froneman, in particular the way in which he engages history, could be read in this light. If Van der Walt argues that legal history, instead of seeking consensus or harmony, should rather open opportunities for dissent and disharmony and "make peace with the interpretative turn", Froneman might be doing exactly that.

I now consider the relation between history, memory, nostalgia and narration.

5 History, memory, nostalgia, authorship and narration

In this section I turn briefly to the work of Nora, which I relate to Boym's writing on nostalgia. Nora referred to the idea of "the acceleration of history", which he describes as the displacement of experience, tradition, custom and the ancestral by historical sensibility.⁷³ I want to relate his understanding of history to the teleological pragmatism described by Visser

⁶⁹ Van der Walt 2006 *Fundamina* 31.

⁷⁰ Van der Walt 2006 *Fundamina* 31.

⁷¹ Van der Walt 2006 *Fundamina* 37.

⁷² Van der Walt 2006 *Fundamina* 37.

⁷³ Nora 1989 *Representations* 8.

as a way of making history instrumental and useful. For Nora the "acceleration of history" brings a distinction between "real memory" and history: "Memory is life, borne by living societies founded in its name. ... a perpetually actual phenomenon, a bond tying us to the eternal present."⁷⁴ "History, on the other hand, is the reconstruction, always problematic and incomplete, of what is no longer. ... history is a representation of the past."⁷⁵ Memory is "affective and magical"; history "intellectual and secular".⁷⁶ Nora's contemplation is focussed on the extent to which sites of memory are constructed in modern times, which for him exist only because there are no longer "real environments of history".⁷⁷ Sites of memory are produced by a "push and pull" of on the one hand deliberately creating places of memory and by others retreating from memory – "moments of history torn away from the movement of history, then returned; no longer quite life, not yet death, like shells on the shore when the sea of living memory has receded."⁷⁸ Memory in current times is nothing but "the search for one's history".⁷⁹ This understanding and distinction between history and memory is of value for how it comes to the fore in legal history. To what extent is memory in the sense of tradition and custom displaced by historical sensibility? To what extent is the distinction between memory and history of importance for legal history, or the reliance on it for scholars of law?

Different takes on nostalgia come to the fore in the engagement with the past. Svetlana Boym's distinction between restorative and reflective nostalgia assists in making sense of engagements with the past. It relates also to Nora's distinction between memory and history. She recalls the meaning of nostalgia as "a longing for a home that no longer exists or has never existed ... a sentiment of loss and displacement ... a romance with one's own fantasy."⁸⁰ Nostalgia has a utopian dimension, sometimes not directed to the past or the future but "sideways". It is often used with a negative connotation. It is a longing for a different place and a different time and linked to the latter maybe "a rebellion against the modern idea of time, the time of history and the time of progress."⁸¹ Nora's distinction between memory and history relates to nostalgia to the extent that the time of history and progress is distinguished from memory. It is important to remember that nostalgia can also be prospective, and in this sense can impact on the future, which urges a responsibility.⁸² Boym suggests an approach which

⁷⁴ Nora 1989 *Representations* 8.

⁷⁵ Nora 1989 *Representations* 8.

⁷⁶ Nora 1989 *Representations* 7.

⁷⁷ Nora 1989 *Representations* 7.

⁷⁸ Nora 1989 *Representations* 12.

⁷⁹ Nora 1989 *Representations* 13.

⁸⁰ Boym *Future of Nostalgia* xiii.

⁸¹ Boym *Future of Nostalgia* xv.

⁸² Boym *Future of Nostalgia* xvi.

she calls "off-modern" – a reflection critical of the new and the old. She explains that "In the off-modern tradition, reflection and longing, estrangement and affection go together."⁸³

The distinction between restorative and reflective distinction is valuable for how judges engage with history and memory. To add another related concept, Klare's reference to the "historical consciousness" as a feature of the Constitution should be brought into the picture.⁸⁴ Restorative nostalgia is aimed at restoring a home/tradition that was lost in an attempt to protect an absolute truth. Reflective nostalgia, and this is how I understand historical self-consciousness, is focussed more on the longing itself. It explores multiple ways of living, places and times, "it presents an ethical and creative challenge".⁸⁵ Boym's notion of "off-modern" in the context of this piece relates for me to the notion of the subversive, as a notion out to disrupt all attempts to exclude other narratives and other versions of history, but also of the present. Hamlet's phrase, "the time is out of joint" has been relied on often in critical legal discourse.⁸⁶ Boym refers to "time-out-of-time" that allows for another angle on time to be considered when history is invoked.

I want to recall Du Plessis's view that the potential of the Constitution to fulfill its promise depends greatly on how we deal with the Constitution as memory. In this vein he followed the distinction made by Snyman between monument and memorial, the former being aimed at celebrating heroes, the latter commemorating loss.⁸⁷ For Du Plessis the South African Constitution exemplifies both of these notions, the triumphant grand gestures and the instances of self-consciousness concerning limits. He wants the interpreters of the Constitution to embrace and live with these contradictory elements.⁸⁸ Going back to the case law discussed above, I read Froneman's engagement with history in *Tshwane* and the *University of the Free State* case as a memorial engagement, whereas Mogoeng draws on history in a monumental manner in both cases, invoking one linear view told as a grand (or as Walker will have it "master")⁸⁹ narrative.

These texts and ideas are far too complex and ambiguous to give rise to simple or forced connections. Tentatively I suggest that connections can be drawn between institutionalised history, restorative nostalgia and monumental constitutionalism. Albeit not something that one can get away from, the danger of standing in service of a grand narrative and

⁸³ Boym *Future of Nostalgia* xvii.

⁸⁴ Klare 1998 *SAJHR* 155.

⁸⁵ Boym *Future of Nostalgia* xviii.

⁸⁶ Barnard-Naudé "Overcoming Hamlet" 1.

⁸⁷ Snyman 1998 *Acta Juridica* 312.

⁸⁸ Du Plessis 2000 *Stell LR* 394.

⁸⁹ Walker *Land-marked* 11.

functionalism should be heeded. Memory, reflective nostalgia and memorial constitutionalism have a better chance (albeit not guaranteed) of succeeding in playing a subversive role that could prevent the reification of one version of the past and could keep the possibility of listening to multiple voices open. It is this notion of the politics of memory that could assist to destabilise current legal culture.

6 Froneman as subversive legal historian, "re-writing" law

The argument that I am making in this article is that how one approaches history relates to legal culture and that, as Klare points out, legal culture affects the direction in which law develops, or not. In a few cases Froneman has approached history in a careful way, being aware of the complexity of each of the contexts and the claims involved. In my view in each of these judgments Froneman disclosed ways in which law can be re-oriented, maybe even re-written. In the section above I considered notions like reflective nostalgia and memorial constitutionalism as critical, possibly subversive ways of engaging with history. I turn here to a piece by Iain Louw, in which he explains what a re-writing of *nomos* may entail.⁹⁰ Against the background of South African cities as colonial constructs Louw considers what it may mean for architects to read and to carry responsibility for a different engagement law. Relying on the tropes of "rewriting architectural type" and "writing the city" he calls for a "becoming" that entails "writing the city into being otherwise" and "writing the city otherwise into being."⁹¹ He explains that these notions "imply a fundamental, transformative rewriting" that entails not only a different city but also imagines a different city, which for him means not only practising architecture differently but also doing it differently, or "otherwise". This doing "otherwise" is geared in particular to those who have been excluded over the years. Louw observes the extent to which the problem of land has been dealt with by way of redistributive justice. He is concerned, however, about the "absence of any conceptualisation of the potential of a radical reconfiguration of the spatial order of settlement."⁹² The main feature of many of the recent building projects is "radical privatisation" that comes with "a loss of the public realm".⁹³ His evaluation of recent architecture is that to a great extent the form of the past is being continued instead of re-written. He asks "what might inform form?"⁹⁴ I highlight two suggestions made by Louw that I think are important for doing law, and that I think Froneman has been doing in the judgements I discuss above. Firstly, he calls for the "human imaginary", for architects to embrace the imagination and the possible. Architects (or

⁹⁰ Louw "Rewriting Type" 227.

⁹¹ Louw "Rewriting Type" 229.

⁹² Louw "Rewriting Type" 230.

⁹³ Louw "Rewriting Type" 230.

⁹⁴ Louw "Rewriting Type" 233.

judges) should go beyond the "rational programmatic, the economic utilitarian and any recently evolved new normatives."⁹⁵ This would entail speculation, postulation and taking risks. In our context, he argues, this would mean venturing into the unknown, embracing Otherness and reflecting critically. Secondly, he raises the value of a narrative method as a way of being attentive to the many differences that keep divides into place.⁹⁶ He mentions that the task of re-writing is "an onerous one". This is true for spatial transformation but it is true also for the transformation of law and legal culture.

7 Conclusion

What I explore in this article is the extent to which and how legal scholars, professionals and in particular judges invoke history and memory, how this influences legal culture, how we understand and do law, and how this could possibly create opportunities to "re-write". Andreas Philippopoulos-Mihalopoulos has argued in the context of spatial theory that "spatial justice emerges as withdrawal, namely a body's moving away from its desire to carry on with the comfort offered by supposedly free choices, power structures or even by fate."⁹⁷ In this view spatial justice goes beyond distributive justice or notions of regional democracy and is an "embodied desire that presents itself ontologically."⁹⁸ Thus spatial justice is not a solution but rather "a process of legal reorientation".⁹⁹ Louw notes that it is "only by acting differently [that we can] begin to produce the critical difference on which writing *nomos* otherwise depends."¹⁰⁰

In the discussion of *Albutt* Le Roux recalls a piece by Aletta Norval on the memory work of the TRC, in which she relies on the distinction between pre-national, national and post-national forms of remembering.¹⁰¹ He focusses on the difference between the latter two: national memories are concerned with unity and continuity and rely on the public archive and public monuments as preservation, whereas post-national memories move away from such institutional spaces to embrace the everyday as lived out in civic-spaces. Norval called for the TRC to be seen as opening the possibility of a post-national political identity. In comparing the TRC to the German memorial against fascism in Hamburg, she highlights three similar features: 1) the complex-layering of the transition rather than a radical break; 2) the central role of ordinary citizens to participate; and 3) that the time of the TRC

⁹⁵ Louw "Rewriting Type" 233.

⁹⁶ Louw "Rewriting Type" 234.

⁹⁷ Philippopoulos-Mihalopoulos *Spatial Justice* 2.

⁹⁸ Philippopoulos-Mihalopoulos *Spatial Justice* 3.

⁹⁹ Philippopoulos-Mihalopoulos *Spatial Justice* 3.

¹⁰⁰ Louw "Rewriting Type" 256.

¹⁰¹ Le Roux 2011 *CCR* 69; Norval 1998 *Constellations* 250.

was limited by legislation preventing it from becoming permanent or fixed.¹⁰² Norval relates the TRC to the dual nature of counter-monuments, namely that they remember but at the same time also realise that the remembering will continue, that the act of remembering remains incomplete. Le Roux invokes the notion of a "palimpsest of traces" that "is a writing that immediately draws attention to its own future erasure."¹⁰³ In the same vein Le Roux reads Froneman's view of participation as one that is counter-democratic or counter-constitutional, which by invoking another dual meaning discloses that we could not only live under a different law but live differently under the law.¹⁰⁴

The imagining of what both a different law and living differently under the law could be, has been neglected. Legal scholars, professionals and judges generally have continued the form of the past when practising, whether teaching, theorising, or applying the law. Justice Froneman might just be an exception because he imagined, speculated and most definitely took risks by going against the grain.

Bibliography

Literature

Arendt *Eichman in Jerusalem*

Arendt H *Eichman in Jerusalem. A Report on the Banality of Evil* (Penguin New York 1994)

Barnard-Naudé "Overcoming Hamlet"

Barnard-Naudé AJ "Overcoming Hamlet – Notes for a Future" in Barnard-Naudé AJ *Decolonising the Neoliberal University* (Routledge London 2022) 1-26

Boym *Future of Nostalgia*

Boym S *The Future of Nostalgia* (Basic Books New York 2001)

Butler *Spatial Justice*

Butler C *Spatial Justice. Body, Lawscape, Atmosphere* (Routledge London 2015)

Du Plessis 2000 *Stell LR*

Du Plessis LM "The South African Constitution as Memory and Promise" 2000 *Stell LR* 385-394

¹⁰² Le Roux 2011 *CCR* 70.

¹⁰³ Le Roux 2011 *CCR* 72.

¹⁰⁴ Le Roux 2011 *CCR* 72.

Klare 1998 *SAJHR*

Klare K "Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146-188

Le Roux 2011 *CCR*

Le Roux W "The Democratic Turn and (the Limits of) Constitutional Patriotism After the Truth and Reconciliation Commission: *Albutt v CSV*" 2011 *CCR* 51-72

Lefebvre *Writings on Cities*

Lefebvre H *Writings on Cities* (Kofman E and Lebas E (transl, eds)) (Blackwell Oxford 1996)

Louw "Rewriting Type"

Louw I "Rewriting Type: Writing Nomos Otherwise" in Barnard-Naudé AJ and Chryssostalis J (eds) *Spatial Justice After Apartheid: Nomos in the Postcolony* (Routledge London 2022) 227-258

Modiri 2019 *De Jure*

Modiri JM "Race, History, Irresolution: Reflections on *City of Tshwane Metropolitan Municipality v Afrifroum* and the Limits of 'Post'-Apartheid Constitutionalism" 2019 *De Jure* 27-46

Nora 1989 *Representations*

Nora P "Between Memory and History: *Les Lieux de Mémoire*" 1989 *Representations* 7-24

Norval 1998 *Constellations*

Norval A "Memory, Identity and the (Im)possibility of Reconciliation: The Work of the Truth and Reconciliation Commission in South Africa" 1998 *Constellations* 250-265

Philippopoulos-Mihalopoulos *Spatial Justice*

Philippopoulos-Mihalopoulos A *Spatial Justice: Body, Landscape, Atmosphere* (Routledge London 2015)

Snyman 1998 *Acta Juridica*

Snyman J "Interpretation and the Politics of Memory" 1998 *Acta Juridica* 312-337

Soja *Seeking Spatial Justice*

Soja E *Seeking Spatial Justice* (University of Minnesota Press Minneapolis 2010)

Van der Merwe "Ramus, Mental Habits and Legal Science"

Van der Merwe D "Ramus, Mental Habits and Legal Science" in Visser D (ed) *Essays on the History of Law* (Cape Town Juta 1989) 32-59

Van der Walt 2006 *Fundamina*

Van der Walt AJ "Legal History, Legal Culture and Transformation in a Constitutional Democracy" 2006 *Fundamina* 1-47

Van Marle "Unlearning, (Un)naming, Cohabiting"

Van Marle K "Unlearning, (Un)naming, Cohabiting" in Barnard-Naudé AJ and Chrystostalis J (eds) *Spatial Justice After Apartheid: Nomos in the Postcolony* (Routledge London 2022) 84-102

Visser "The Legal Historian as Subversive"

Visser D "The Legal Historian as Subversive or Killing the Capitoline Geese" in Visser D (ed) *Essays on the History of Law* (Cape Town Juta 1989) 1-31/

Walker *Land-marked*

Walker C *Land-marked: Land Claims and Land Restitution* (Jacana Johannesburg 2008)

Case law

AfriForum v University of the Free State 2018 2 SA 185 (CC)

Albutt v Centre for the Study of Violence and Reconciliation 2010 3 SA 293 (CC)

City of Tshwane Metropolitan Municipality v Afriforum 2016 6 SA 279 (CC)

Daniels v Scribante 2017 4 SA 341 (CC)

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC)

Legislation

Constitution of the Republic of South Africa, 1996

Extension of Security of Tenure Act 62 of 1997

List of Abbreviations

CCR	Constitutional Court Review
ESTA	Extension of Security of Tenure Act 62 of 1997
SAJHR	South African Journal of Human Rights
Stell LR	Stellenbosch Law Review
TRC	Truth and Reconciliation Commission