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"Meeting the World Halfway"—The Limits of Legal Transformation

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"MEETING THE WORLD HALFWAY" — THE LIMITS OF LEGAL TRANSFORMATION

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I. INTRODUCTION

Some time ago I attended a public lecture by South African artist William Kentridge, which he titled "In celebration of doubt, against reason."[1] In his address he focused on art as interpretation, on art as a way of meeting the world halfway. I found his themes suggestive for my own reflection on law and legal transformation — of how all attempts of reconstruction could never exceed a meeting of the world halfway, how approaches confidently rooted in reason are much too limited to achieve transformative politics and ideals fully.

This Article encompasses three related moments. Firstly, I consider the limits of the law, particularly transformative legal attempts. I highlight some features of these transformative legal attempts. I recall a number of critical responses to the emphasis placed on law and human rights in the creation of a new society as well as some contemplations on the limits of the law to fully address an unjust past and equality fully. Secondly, I turn

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1. *See generally* WILLIAM KENTRIDGE, DRAWINGS FOR PROJECTION (1992); CAROLYN CHRISTOV-BAKARGIEV, WILLIAM KENTRIDGE (1998); JOHANS BORMAN & WARREN SIEBERTS, ASPECTS OF SOUTH AFRICAN ART 1903-1999 (2001).

to one legislative attempt to redress past inequality in South Africa, the South African Employment Equity Act, and consider a problematic interpretation and misuse of the term "designated group" as defined in the act.[2] I also include Duncan Kennedy's discussion of what he calls "colour blind meritocratic fundamentalism" and argue that this mindset is also found in South African legal academia.[3] Thirdly, I look at how aesthetic portrayals could assist in contemplating the paradoxes of past and present, traditional and transgressive encountered in any process of transformation.

After discussing these aesthetic portrayals, I recall an argument against incorporationism: how the mainstream, or patriarchy, would protect its pervasive power by including only those outsiders who would continue things as they are without challenge or subversion. I turn to aesthetic images also to continue my reflection on transformation. These images assist me in contemplating cases where the nature of the discrimination is difficult to pinpoint — where the particularity reaches beyond sex, race, or class and also involves more subtle aspects. I make a few tentative remarks by way of conclusion.

The main contentions that I put forward amount to the following: the first is a repetition of the limits of the law argument, but also of law's paradox — its aim to transform that is hampered by its structural limits, its structural limits constantly challenged by its own transformative aims. The second and third contentions follow from the first and are somewhat more tentative. I argue that a limited reading of the South African Employment Equity Act that avoids taking past and present context into account would result in a mere continuance of the status quo. Following from that I contend that any act of transformation must take particularity into account, and that it is precisely that kind of particularity that is mostly violated by legal categories and consciously negated and excluded by institutions reinforcing present politics and ideology.

II. POLITICAL AND LEGAL TRANSFORMATION IN SOUTH AFRICA

A. *Substantive Change, Beyond Formal Change*

Mainstream discourse on the South African political, legal and social transformation describes our transformation as a shift that aims to go *beyond* mere *formal* changes and to encompass *substantive* changes. Many writers have described the South African constitution as moving beyond

2. Employment Equity Act 55 of 1998 § 1(e).

3. DUNCAN KENNEDY, SEXY DRESSING ETC: ESSAYS ON THE POWER AND POLITICS OF CULTURAL IDENTITY 34 (1993).

typical liberal constitutions. The South African constitution has been described as postliberal, postauthoritarian, and transformative.[4] Karl Klare lists the following features as indications of the South African constitution's "postliberal" or "engaged" nature: it entrenches social rights and duties and a substantive conception of equality; it imposes a range of affirmative as opposed to negative state duties; it allows for the horizontal application of constitutional duties; it envisions participatory governance; it protects and advances multiculturalism; and it is historically self-conscious.[5]

It is widely agreed that the protection of equality and prevention of discrimination in section 9 of the South African Constitution also entails more than mere formal equality and protects substantive equality.[6] Such an approach requires material and concrete contexts to be taken into account in determining legal equality challenges. Section 9(2) of the Constitution makes explicit a provision for the creation of legislative and other measures to promote the achievement of equality for persons or categories of persons disadvantaged by unfair discrimination. In light of section 9(2), the Employment Equity Act was promulgated as one such measure to promote the achievement of substantive equality. The argument that I elaborate on below holds that the Employment Equity Act must be interpreted and applied in light of the substantive aim of the South African political and legal transformation.

B. *Critique on Legal Fetishism*

Arguments that play a critical role in this contemplation are those bringing attention to the limits of the law and human rights in the transformation of societies. Richard Wilson, in a work that focuses on the South African Truth and Reconciliation Commission (TRC), focuses on the kind of "procedural liberalism" that dominated most transitions from authoritarian to post-authoritarian societies.[7] Human rights based legislation became a central component in the establishment of the rule of law. The author stands critical towards the fact that in these transformations human rights are detached from their "strictly legal foundations" and become a "generalized moral and political discourse."[8]

4. Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RIGHTS 146 (1998); Henk Botha, *Democracy and Rights: Constitutional Interpretation in a Postrealist World*, 63 TYDSKRIF VIR DIE HEDENDAAGSE ROMEINS HOLLANDSE REG 561 (2000).

5. Klare, *supra* note 4, at 153-55.

6. S. AFR. CONST. Act 108.

7. RICHARD WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA (2001).

8. *Id.* at xv.

He quite correctly exposes how justice in transition serves projects of hegemonic nation-building and state formation and draws attention to how new regimes use human rights to "re-imagine the nation by constructing new official histories."[9] His argument critiques the abstract nature of transitional truth and justice and supports an examining of how these notions of truth and justice are central to state strategies for creating a new hegemony. A crucial point of his critique occurs when he draws attention to the construction of "the present moment as post-authoritarian when it includes many elements of the past."[10]

Wilson's reflections on the TRC, that highlight as main functions of the TRC truth-telling about the apartheid past and the reconciliation of the nation, give significant insight into the relationship between the past, present, and future and the limited role of the law. The author argues that the TRC's account of the past was constrained by its excessive legalism and positivist methodology, which obstructed the writing of a coherent sociopolitical history of apartheid. He categorizes the various local responses to the TRC's language of reconciliation as follows: adductive affinities (where local values and human rights overlap and reinforce one another); pragmatic proceduralism (where survivors participate in human rights procedures to pursue their own agendas, without necessarily taking on human rights values); and relational discontinuities (where local actors are resistant to a restorative vision of human rights and assert a more retributive model of justice). A main aim of his argument is to show that human rights institutions and discourse in the "new" South Africa often have been flawed in connecting local minorities and justice institutions and ultimately in transforming society.[11]

Wilson views the South African transition as another example of the triumph of liberalism leading to the demise of socialist ideologies and the rise of laissez faire economics similar to the transition in Central and Eastern Europe. He is of the opinion that human rights are best conceptualized as narrow legal instruments, which protect frail individuals from powerful state and societal institutions. Human rights can play a vital role in establishing accountability and the rule of law. However, it is wrong to "fetishize rights and treat them as a full-blown political and ethical philosophy."[12] The author draws our attention to the limits of the law and repeats the argument made also by others that the law and the legal system is too narrow to contain our aspirations for politics and community.

9. *Id.* at xvi.
10. *Id.*
11. *Id.* at xxi.
12. WILSON, *supra* note 7, at 224.

Emilios Christodoulidis raises similar arguments in his critique on what he calls "the suspect intimacies" between law, politics, citizenship, and community.[13] He questions the ability of the law and the desirability of wanting the law to be the vessel for political contestation, social change, and the negotiation of the past. In response to the South African TRC he question law's (and thus a legal structure's) ability to reconcile, to give mercy.[14]

He locates mercy in the space between law (law's justice) and particularity. The crux of the mercy/justice distinction lies in the notion of concrete particularity.[15] To reduce the complexity of his argument, the main claim that he makes that is relevant to my argument here is that particularity in law is "abstracted, more-or-less fixed and reduced to role and rule."[16]

He explains this reduction with reference to Joseph Razz's notion of exclusionary reason.[17] Razz makes a distinction between first-order and second-order reasons. The former are reasons to perform an act, the latter are reasons to act for a reason. Second order reasons may be positive or negative. Razz names negative secondary reasons exclusionary — "an exclusionary reason provides a reason for not acting on the basis of a reason."[18]

What this amounts to is that in exclusionary reasons like legal rules and legal systems "balancing of first-order reasons is blocked: an exclusionary reason stands in for the back-ground arguments that justify it, and moreover prevents recourse to those arguments."[19] In other words, law and legal rules prevent reflexivity and revisability and are based on a generality that precludes particularity: "Law generalizes expectations so that interaction, conflict, contestation, negotiation, etc., will be accommodated at the level of what is expected of one institutionally."[20] Law will always reduce the complexity of the particular.

Drucilla Cornell, in her call for the protection of the imaginary domain, also acknowledges the limits of the law to fully ensure equality, freedom,

13. Emilios A. Christodouilidis, *The Suspect Intimacy Between Law and Political Community*, 1 ARCHIV FÜR RECHTS – UND SOZIAL PHILOSOPHIE (1994).

14. Emilios A. Christodoulidis, *The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular*, 18 L. & PHIL. 215-41 (1999).

15. *Id.* at 218.

16. *Id.* at 225.

17. JOSEPH RAZZ, PRACTICAL REASON AND NORMS (1975).

18. *Id.* at 225.

19. *Id.* at 225-26.

20. *Id.* at 235.

and, in particular, dignity.[21] Central to her ethical feminism is the notion of difference that must be acknowledged. However, she argues for a non-essentialist starting point and seeks new ways of articulating "the feminine within sexual difference."[22] Cornell's insights are crucial to my argument, because of her careful consideration of the person. Integral to her concept of the imaginary domain is that a person is always part of a project of becoming. A person is thus understood as a possibility, an aspiration.

Through the development of a psychoanalytical framework, Cornell argues that the freedom to become a person is dependent on minimum conditions of individuation that serve as a prior set of conditions. In other words, the freedom that a person must have to become a person demands the appropriate space for renewing the imagination and re-imagining "who one is and who one seeks to become."[23] The importance of this for my argument is that although formal equality and other legislative protections have achieved some gains, most societies still continue to impose and reinforce rigid gender identities upon their citizens. Cornell demands recognition of the moral space necessary for equivalent evaluation of women's sexual difference as free and equal persons.[24] The demand for the imaginary domain must be met prior to the formulation of a broader egalitarian and social justice theory.

In an earlier work Cornell provides an explanation of transformation that I find suggestive for the kind of transformation that I think we should strive for:

> By transformation I mean change radical enough to so dramatically restructure any system — political, legal, or social — that the "identity" of the system is itself altered. The second meaning, defined broadly as possible, turns to the question of what kind of individuals we would have to become in order to open ourselves to new worlds.[25]

If the change encompasses nothing more than the transformation of the system by the system, the change amounts to evolution in contrast to transformation as defined above. The crucial question, however, coming

21. *See* DRUCILLA CORNELL, BETWEEN WOMEN AND GENERATIONS: LEGACIES OF DIGNITY (2000).

22. DRUCILLA CORNELL, BEYOND ACCOMMODATION (1991); DRUCILLA CORNELL, THE IMAGINARY DOMAIN. ABORTION, PORNOGRAPHY AND SEXUAL HARASSMENT (1995); DRUCILLA CORNELL, AT THE HEART OF FREEDOM (1998).

23. CORNELL, THE IMAGINARY DOMAIN, *supra* note 22, at 5.

24. CORNELL, AT THE HEART OF FREEDOM, *supra* note 22, at 11-14.

25. DRUCILLA CORNELL, TRANSFORMATIONS 1 (1993).

back to Christodoulidis, is if law as a system can experience the radical transformation that Cornell defines?

In present South Africa, there are many legal attempts to bring about much needed political and social transformation. Amongst many others,[26] the Promotion of Equality and Unfair Discrimination Act and the Employment Equity Act are examples.[27] Of course these legal attempts have had some success but at the same time they also continue oppression instead of breaking with the past. Examples of this are reform efforts in terms of which existing leasehold rights of township residents are transformed to full property rights. These reforms have benefitted black South Africans generally, because they acquire property rights to their homes. However, the benefits have accrued mostly to black men and not black women because the underlying leasehold rights were mostly in the hands of men. This is an example of only a superficial engagement with the past and no real negotiation of the past, of evolution and not radical transformation.

III. EMPLOYMENT EQUITY

A. *Designated Group*

This Article is to a large extent an outcome of frustrations that I have with the promotion and application of employment equity in my own law school but I could add many South African faculties of law or law schools.[28] My contention is that in many appointments the aims and objectives of employment equity are evaded. Although I focus here on the neglect to promote employment equity my concern goes further than employment equity and are elaborated on in the next section.

The reflections on the limits of the law and its inability to sufficiently address political transformation and a creative and reflective negotiation with the past are central to my deliberation on employment equity in South Africa. The obvious and trite point is that, to achieve real transformation,

26. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

27. Employment Equity Act 55 of 1998.

28. It must be noted that in a few cases where labor courts had to decide on the interpretation of a "designated group," the labor court took South African political history into account. *See* Salstaff on Behalf of Strydom & Spoornet (2002) 23 I.L.J. 25 (ARB); POPCRU on Behalf of KUKKUK v. SA Police Servs. (2001) 22 I.L.J. 2096; Coetzer & Others v. Minister of Safety & Sec. & Another (2003) 24 I.L.J. 163 (LC); Kruger v. SA Police Servs. (2003) 24 I.L.J. 477 (BCA); SA Police Union on Behalf of Venter & SA Police Servs. (2002) 23 I.L.J. 454 (BCA); *see also* Allan Rycroft, *Obstacles to Employment Equity*, 13 INDUS. L.J. 2102 (2001).

representation and diversity more than mere legal attempts will be necessary. As was also argued above, the law can in some cases affirm the status quo instead of making a change. And even more dangerously, it can create the impression of post-authoritarianism while continuing past attitudes.

I focus on the definition of *designated* groups in the Employment Equity Act, and in particular on how in some cases the definition is applied to *continue* a *formal* notion of equality in contrast to *substantive* equality thereby repeating the same mistakes of the past. The Employment Equity Act defines "designated groups" as "black people, women and people with disabilities." The definition is obviously important, because only members of "designated groups" stand to benefit from employment equity efforts in terms of the Act.

In some cases this definition is used very crudely as justification for the appointment of white women instead of black women and men, thereby resisting real transformation. In other words, institutions appoint white women under the guise of complying with the employment equity legislation while in fact they are addressing neither the aim of equitable representation nor the aim of diversity. Institutions do this to evade the racial integration that would follow from appointing black people and to continue the status quo of a primarily white staff, whilst pretending to transform.

My contention is that this happens not only because of conservatism and racism but also because of the firm belief that white women, or at least those that are appointed, will be easier to contain, that they would leave the present culture unchallenged and unchanged. This attitude could also be prevalent when appointing black people, in the sense that only those who would "fit the profile" of the institution would be appointed. I elaborate on this below in my discussion of the aesthetic portrayals.

To return specifically to the interpretation of "designated group" in the employment equity legislation: I argue against a reading and application of "designated group" that treats black women and white women in an equal manner, ignoring concrete past and present contexts. For me this is a cynical continuation of legal formalism that negates not only substantive equality but also the general aim of employment equity — equitable representation. It also contradicts the approach of purposive interpretation.

This approach could be linked with universalist and essentialist feminisms that claim transparency by assuming that "the world can be seen as it really is and that there can be unmediated access to the truth of objects it sees."[29] In contrast to these universalist and essentialist positions

29. ALISON BLUNT & GILLIAN ROSE, WRITING WOMEN AND SPACE: COLONIAL AND POSTCOLONIAL GEOGRAPHIES 5 (1994).

is an approach that focuses on what Adrienne Rich calls a "politics of location" takes concrete historical and materialist positions into account and rejects transparency.[30] "Multiple locations" are opened where identity is perceived as "fragmented, multidimensional, contradictory and provisional."[31] Haraway refers to such a concept of identity as a "geometrics of difference and contradiction" that rejects a portrayal of identity and the self as stable and coherent.[32]

B. *Colorblind Meritocratic Fundamentalism*

Duncan Kennedy bases his argument for affirmative action in legal academia on the ground that law schools are political institutions. From a democratic point of view people should be represented in institutions of power. He also contends that affirmative action and greater cultural diversity would increase the value of legal scholarship. Kennedy employs the concept of "race-consciousness" — to talk about race without being racist or essentialist and to think of groups in a "postmodern" way that acknowledges the "partial, unstable and contradictory character of group existence."[33]

For Kennedy, the dominant way of understanding race and merit in academia amounts to what he calls, "colour-blind meritocratic fundamentalism." I believe this term also to be quite fitting for dominant understandings of employment equity in South African legal academia. He describes it as "a set of ideas about race and merit" that is "no more than one of many fragments out of which people construct their personal philosophies."[34] Fundamentalism comprises a set of tenets, some about knowledge and others about the social value of individuals and their work. A key aspect of fundamentalism is colorblindness. Fundamentalism does not preclude the adoption of affirmative action programs but regards it to be in conflict with merit and as a form of sacrifice, social cost or loss.

Political and cultural arguments for affirmative action would argue against the view of affirmative action as "peacemaking," "reparation" or "integration for its own sake."[35] Political and cultural arguments are based on the idea that there should be "a substantial representation of all numerically significant minority communities on American law faculties" and that "cultural diversity and cultural development are good in

30. *Id.* at 7.
31. *Id.*
32. *Id.*
33. KENNEDY, *supra* note 3, at 34.
34. *Id.* at 37.
35. *Id.* at 40.

themselves."[36] Equitable representation and diversity are set up as aims in the South African employment equity legislation, but unfortunately those aims are time and again defeated by so-called appointments made on merit.

Kennedy formulates the "conceptual theme," "if there is one," of his essay as one of "positionality" or "situatedness" and explains it as follows:

> The individual in his or her culture, the individual as a practitioner of an ideology, the individual in relation to his or her own neurotic structures is always somewhere, has always just been somewhere else, and is empowered and limited by being in that spot on the way from some other spot. Communities are like that too, though in a complicated way. One of the things that define a community's position — its situation and the specific possibilities that go with it — is its history of collective accomplishment. Another is its history of crimes against humanity. It seems unlikely that there are communities without such histories.[37]

Kennedy names slavery as a crime in the past of white America. Similarly, apartheid is a crime in the past of white South Africa. His proposal of "a kind of cultural proportional representation in the exercise of ideological power" should be followed within the South African context. However he warns against the limits of legal attempts to bring about such change:

> [T]he minute we imagine it as a government policy applied in a consistent way across the whole range of situations to which it is arguably applicable, it loses most of its appeal. First, none of us local powerholders could do much to bring it about, and second, taking the proposal seriously as state policy might lead to all kinds of disastrous unintended side-effects.[38]

IV. AESTHETIC PORTRAYALS

My reflection on the transformation of South African society and my critique on the legal fetishism preoccupying this transformation is situated against the backdrop of an aesthetic context — against the tension between traditional representations of women and transgressive and subversive

36. *Id.* at 41.
37. *Id.* at 80-81.
38. KENNEDY, *supra* note 3, at 81.

ones: the traditional portrayal of the blinded justitia compared to South African artist, Braam Kruger's, black, naked, seeing justitia; Dutch sculptor Anton van Wouw's portrayal of the Afrikaaner "maiden," long dress, "kappie," head on the chest, compared to contemporary South African sculptor, Angus Taylor's armed, naked maiden.[39] My aim is to remember and imagine these images when contemplating ideas like unfair discrimination and substantive equality.

Although white women also suffered and were marginalized under the patriarchal system of apartheid, their position cannot be placed on par with black women. As Froneman J. said in a Labor Court of Appeal case, in present South Africa the issue is not whether some are more equal than others after the revolution, but that some were more unequal than others before.[40] More than that, present attempts of 'incorporationism' must also be noted — the mainstream accept and draw in women who they think will fit the profile and who will continue the status quo without questioning.

The aesthetic portrayals of women could assist us in our critical reflections on these transformative attempts. The contemporary transgressive images portray a fragmented, multidimensional, contradictory and provisional self in contrast to the traditional portrayals. To truly break with past formalist approaches and create a society where not only materialist differences, but fluid identities are supported, the past, present and future should be investigated in a critical manner, moving beyond universalist and essentialist claims.

In a volume on *Law and Aesthetics* edited by Costas Douzinas and Lynda Nead, Martin Jay tells us that the eyes of the goddess Justitia were not always covered and that it was only at the end of the fifteenth century that a blindfold was placed over the goddess's eyes.[41] The initial negative implication of the blindfold, that "Justice has been robbed of her ability to get things straight"[42] was by 1530 transformed into a positive emblem of impartiality and equality before the law. Jay makes a connection between

39. "Kappie" is an Afrikaans word that translates literally to "bonnet." It refers to the quite elaborate headdress worn by women during the "Groot Trek," the great migration of white farmers from the Cape into the interior of South Africa that took place during the first half of the nineteenth century. The "kappie" and long dress worn by these "Voortrekker" women, covering them literally from head to toe, are powerful symbols of the traditional Afrikaaner ideal of womanhood: strong, yet appropriately modest and in the background.

40. Dep't of Corr. Servs. v. Van Vuuren (1999) 20 I.L.J. 2297 (LAC).

41. Martin Jay, *Must Justice be Blind? The Challenge of Images to the Law*, *in* LAW AND THE IMAGE; THE AUTHORITY OF ART AND THE AESTHETICS OF LAW 19 (Costas Douzinas & Lynda Nead eds., 1999).

42. *Id.* at 20.

the blindfold of Justitia, and Reformation thought that made much of Augustine's notion of resisting the "lust of the eyes."[43]

The author notes the connection between the impartiality portrayed by the blindfolded Justitia and the new urban, secular bourgeois culture of the early modern period. During this period a shift took place from the personalism of private, feudal justice, and the foundations of modern liberal thought were laid, "the road to the modern cult of the abstract norm in juridical positivism was opened."[44] The law was to be presented in language, and justice was to be achieved by applying general rules and norms. Jay refers to Horkheimer and Adorno who associated the ability to see with freedom, "a freedom that is threatened when justice is reduced to law."[45] He interprets this freedom as the ability of the particular, the unique, the incommensurable to escape law's universalism and the reduction of justice to the law of equivalents.[46]

Another important feature of the thwarting of the gaze is that it is a thwarting of specifically the female gaze. The author notes how the stern portrayals of justitia differ from the maternal images of the forgiving, mediating Madonna for example. A question that arises is why should a female judge in particular be prevented from seeing. The author interprets this with reference to work done by Carol Gilligan, Seyla Benhaib and others, claiming that women account for morality in a different manner, according to an ethics of care, that takes into account the *concrete* other in contrast to an ethics of justice that focuses only on the *generalized* other.[47] In other words, the female gaze must be thwarted in the service of formalist and positivist accounts of justice. The blindfolded Justitia thus must be interpreted as a symbol of male power.

I want us to consider the transgressive power of the black seeing Justitia that appeared on a poster announcing the first conference on human rights organized by the University of Pretoria Centre for Human Rights during the late eighties. In this painting the artist places a woman in the position of Justitia that, in the context of apartheid South Africa, is not only black, but is also a woman that sees, that challenges formalist and positivist accounts of justice, and that disrupts law's universalism by forcing the viewer to acknowledge her particularity. It is this particularity that needs to be taken into account when applying the Employment Equity

43. *Id.* at 21.
44. *Id.* at 25.
45. *Id.*
46. Jay, *supra* note 41, at 26.
47. *Id.* at 27-29; *see generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY THEORY (1992).

Act, by giving an interpretation and application of "designated group" that takes the concrete historical and present contexts into account and not a mere formalist interpretation that ignores the past in favor of protecting the status quo.

To reinforce my argument on the status quo that must be challenged I refer to the statues of South African sculptor Angus Taylor. Taylor works in the tradition of Dutch sculptor Anton van Wouw, portraying women in heavy bronze sculptures. However, Taylor's women differ significantly from the previous portrayals that aimed to enforce the stereotypical image of the Afrikaaner "maiden."[48] Taylor has been described as exploring "a culture in transition: in particular the ending of the forcibly imposed Afrikaaner hegemony, and the liberation of women."[49]

His work has interesting cross-cultural themes. For example, one statue shows a Voortrekker woman holding a "assegaai," which is a traditional African weapon. The notion of "trace" is represented by certain symbols and objects that keep on recurring in all the works. In one work we see a nude Voortrekker woman sitting on an object that also appears in the other works, something that the artist refers to as "Pandora's box," as representing anything one wants it to be, holding a flying object above her head and as one commentator notes, considering to fly.[50] The baggage, which is referred to in the title of the exhibition, is represented by symbols, the traces that carry historical stigmas and that the artist challenges. However, South African women are not totally freed from the restrictions of the past, the present, and the future — even though they have shed the Voortrekker dress, the *kappie* (bonnet) and the apron remain. The artist opens up some historical stigmas in his portrayal of women. His women represent and interact with history and tradition but at the same time challenge it. His view is not an oversimplistic view of life in a new millenium and of life in a "democratic" South Africa.

I connect these arguments with Anne Scales's feminist critique on the legal principle of objective reality.[51] She recalls the myth of Perseus to illustrate how patriarchy informs rationality, objectivity and ultimately the dominant understanding of justice. Perseus was able to slay the female monster Medusa only with the help of Athena. It is important to remember here that Medusa illustrated the image of a free woman. Athena, however, was the patriarchal stereotype of women.[52]

48. *See supra* text accompanying note 39.

49. FIN. MAIL, Oct. 1999, at 15.

50. *Id.*

51. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

52. *Id.* at 1379.

A further contention is one against incorporationism. Scales describes incorporationism as a process through which contradictions are repressed and through which marginal voices are made to believe that they have a place in the existing system. Incorporationism presumes that white male supremacy is simply a random collection of irrationalities — that discrimination, for example, is simply a legal mistake. This could also be linked to South African legal reform and transformation.

Some South African legal scholars regard apartheid, for example, as a political and legal mistake that can be fixed via a new and democratic legal and political order without investigating deeper and more nuanced connections between law and modernity as such and power, racism, sexism, and so on.[53] We see this in arguments in favor of the common law as a system that stayed pure and untouched by the political conservatism of apartheid judges. This has the effect that many scholars would argue for constitutional minimalism or avoidance and reliance on common law principles instead of using the constitution.

Women, black and white, as well as men, who resist to be merely incorporated by current systems, could face acts of discrimination and exclusion. As said in the introduction, a question that arises here is on what grounds this kind of discrimination or exclusion could be based. To prefer the traditional image of the blindfolded justitia to the black seeing justitia, or van Wouw's submissive and shy maiden to Taylor's confident and armed women could be regarded as a gender preference, a preference that can easily lead to unfair discrimination.

Although the concept of gender has its limits, I find it a helpful way of explaining and exposing the type of discrimination where neither sex, race, class or even culture can fully capture the extent of the discrimination. The method of intersectionality as developed by Critical Race Feminists, is of course much more insightful to how the combination/intersection of a person's race, class and sex/gender results in acts of discrimination or exclusion.[54] However, I would like to see an even further concern with particularity that could be opened by turning to gender. Gender is traditionally described as a cultural construction and a gender difference as a culturally constructed difference. My concern here is the

53. *See, e.g.*, DAVID DYZENHAUS, TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER (1998). For a critical perspective on apartheid, see Robert Bernasconi, *Politics Beyond Humanism: Mandela and the Struggle against Apartheid, in* WORKING THROUGH DERRIDA 94-119 (Gary B. Madison ed., 1993); Jacques Derrida, *Racism's Last Word*, 12 CRITICAL INQUIRY 290-99 (1985); Jacques Derrida, *The Laws of Reflection: Nelson Mandela, in Admiration, in* FOR NELSON MANDELA 13-42 (Jacques Derrida & Mustapha Tlili eds., 1987).

54. *See, e.g.*, Kimberlé Crenshaw, *Demarginalizing the intersection Between Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine*, 139 FEMINIST THEORY & ANTIRACIST POL. 139-67 (1989).

discrimination or exclusion that occurs when one does not live up to the expected or stereotyped gender difference. Again we are faced with the limits of the law to be able to include such particularity in its reasonable attempts of reconstruction and transformation as well as law's paradox.

> [T]he particular can be meaningfully invoked but . . . cannot be addressed in legal judgment. . . . the logic of legal judgment is exclusionary in having substituted and entrenched "particular" reasons at a level where its operation can no longer address them. The reason for this, . . . is that the complexity of "the particular" has (always —)already been reduced in law.[55]

V. END REMARKS

To return to the three related moments: the law and legal transformation can but only be a meeting of the world halfway; to follow a narrow and formalist interpretation of designated group will not only be defeating the substantive aim of the South African transformation, but it might be a mere continuation of white male power and patriarchy. My call is for all South African women, black and white, to resist being coerced as Athenas, blindfolded Justitias and shy maidens and to face each other, the past, present and future of our society. To defy rigid and fixed identities forced upon us and to embrace Kentridge's celebration of doubt, against reason.

55. Christodoulidis, *supra* note 14, at 237.