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Narrative, nomos, world(s)

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> In this fable, as in all fables, one identifies in order to disidentify.[1]
>
> Complicity cannot be avoided, one chooses, as Derrida writes in Of the Spirit, in order to avoid the worst.[2]

1 Introduction

Although I have identified, and still do, with an enduring struggle against the violence of the past and present manifested in colonialism, apartheid and coloniality, I must also acknowledge my situatedness, specifically, my position, complicity and entanglement. Cornell[3] distinguishes between position, identity and identification, which she explains as follows:

> For me, the importance of position, with its Marxist overtones, is that there is a materiality to how we are placed in a society, which we cannot simply escape from by attempting to disidentify with who we have been shaped to be, particularly through certain kinds of privileges that accrue not only to race but also to class. For example, I may disidentify with the idea of whiteness, but I am positioned in society as a white woman, and that disidentification does not free me from that position. In fact, I have argued that the opposite is the case: it is necessary for white women, as part of the aspiration of ethical feminism, to recognize the position of privilege that accrues to them as white women, even when they struggle to disavow those privileges. Secondly – and this follows from an argument I made in Beyond Accommodation – a symbolic order has a materiality to it, as well as a history, and therefore there are certain identities that are formed over time, and which leave their imprint on all of us. Identifications are of course rooted in a psychoanalytic understanding of how this imprinting can never fully capture us, and therefore there is always a fluidity that leaves open the space for disidentification as well as resymbolization and reidentification.

1 M Sanders *Complicities* (2002) 3.
2 Sanders (n 1) 201.
3 D Cornell 'Revisiting beyond accommodation after twenty years' (2011) *feminists@law* 5.

Sanders notes:[4] 'Complicity, in this convergence of act and responsibility, is thus at one with the basic folded-together-ness of being, of self and other.' Nuttal[5] defines entanglement as 'a condition of being twisted together or entwined, involved with; it speaks of an intimacy gained, even if it was resisted, or ignored or uninvited'. I write this chapter, and engaged with this project because I experience something of what these authors describe as position, identification, complicity, responsibility and entanglement, with the past, present and future.

My late father was a scientist – he obtained a PhD in animal genetics at the University of Göttingen in the early 1960s. Before I was born, he worked for a while at the Faculty of Natural Science in the Department of Agriculture at the University of the Free State – an institution that I later joined and subsequently left. He later moved on from academia to work in the area of economic development, among other areas, the economic development of what was called in apartheid terms 'homelands'. Growing up, I was taught in my home that all people had to be treated equally, their dignity respected. Since doing history at school in the 1980s I had to confront the fact that a large part of my father's work was aimed at making 'homelands'/Bantustans economically viable in terms of industry and agriculture. By doing this, was he not explicitly and consciously supporting a system that denied people the very values of equality and dignity? How did this work relate to the values that were embedded in the everyday life of my home and upbringing?

I did not grow up in the Free State and never lived in Bloemfontein until 2019, but I remember the names Qwa Qwa, Botshabelo, Thaba 'Nchu – places my father frequently visited as part of his work. When I arrived in Bloemfontein and started to work at the University of the Free State, I experienced the complicity and responsibility that Sanders describes, not only theoretically, but also personally, to engage with this specific aspect of the past, the extent to which – and here it is specifically apartheid and 'separate development' – spatial planning and forced removals endure. These past policies and practices are present as spectres haunting all attempts to respond and transform.

4 Sanders, M *Complicities: The intellectual and apartheid* (2002) 11.
5 S Nuttal *Entanglements. Literary and cultural reflections on post-apartheid* (2009) 1.

In the description of the project, we state that the aim of the project is to investigate and reflect on the endurance of inequality as it pertains to race, property and spatiality in Bloemfontein, in particular to obtain an understanding of how apartheid conceptions of property based on racial division manifest in both conceptions and arrangements of space. We want to ask whether the stark inequalities so characteristic of apartheid spatial development are still present today or if they have been adapted or transformed. Like all South African cities, Mangaung carries the legacy of apartheid history and spatial planning. The main research questions of the project are, first, to focus on the long-term spatial inequalities created by apartheid coupled with an investigation of how ordinary people deal with these historical injustices; second, to ask how historical dispossessions of land influence people's perceptions of property and property rights; and, third, how current property rights create continued exclusion. By relying on a number of interviews conducted, we aimed at getting a sense of not only how property functions as exclusionary force, but also if alternative conceptions of property can be unearthed. We are interested in the narratives of people about their experience of removals and resettlements. The other authors in this volume engage more directly with the interviews, and I refer in the concluding part of the chapter to the main findings.

In the initial stages of the project, I was particularly interested to see if the narratives generated by the interviews would reveal other sources of law, in support of legal pluralism. The main or overarching aim, however, is given the extent of the role of law in constructing and maintaining spatial inequalities, to ask if 'lawful relations'[6] could be sought in the aftermath of apartheid. I reflect on these issues in light of or against a number of theoretical gestures: first, the work of Cover[7] that discloses the possibility of narratives as sources of law, the notion of redemption and utopian jurisdiction making. Second, I turn to work by Dorsett and McVeigh[8] on jurisdiction, which they define as a concern 'with how to live with law

6 S McVeigh 'Conditions of carriage. Finding a place' (2017) 21 *Law, text, culture* 165.

7 R Cover 'The Supreme Court 1982 term. Foreword: Nomos and narrative' (1982) 97 *Harvard Law Review* 4; R Cover 'The folktales of justice: Tales of jurisdiction' (1985) 14 *Capital University Law Review* 179; R Cover 'Violence and the word' (1986) 95 *Yale Law Journal* 1601.

8 S Dorsett & S McVeigh, S *Jurisdiction* (2012) 4.

and how to create and engage lawful relations'. I then draw on McVeigh and his question of what it might be to be a lawful jurisprudent. I was interested in if and how the interviews with inhabitants of the chosen sites on their understanding of home and property reveal their sense of law. Apartheid law in general, in particular property law, thwarted every possibility of lawful relation. Relying on Van der Walt's[9] suggestions on how property should be made sense of in a constitutional era, as a third theoretical angle, I ask if his suggestions of property as relation could perhaps open the possibility for lawful relations.

I end the chapter by reflecting on the project of which this volume and my chapter is an outcome, as an interdisciplinary project. Academia so often invokes the term, academics and researchers often claim to be doing interdisciplinary work. I want to reflect on what it means or could mean when we invoke that we are doing interdisciplinary work. I subscribe to law as a humanities discipline which displaces the idea of the autonomy of law as discipline and discloses possibilities for pluralism or, as Motha[10] will have it, 'heteronomy'. I am also mindful of Constable's[11] warning about how US legal theory has become sociolegal to the detriment of justice. I wonder, what is the relation/difference between questions asked when doing fieldwork and narratives? How does one engage with the stories of others in an ethical way? What about the many others whose stories are not heard, or included? Is there a place for what Hartman[12] calls 'fabulation' and with it the crossing of, maybe rather refusal of, being disciplined to a specific genre? What kind of worlds are we building, how to change them, and by changing them, what worlds do we make, destroy, re-make?

9 AJ van der Walt 'Dancing with codes – Protecting, developing, limiting and deconstructing property rights in the constitutional state' (2001) 118 *South African Law Journal* 258.

10 S Motha 'My story, whose memory: Notes on the autonomy and heteronomy of law' (2002) 87 *Studies in Law, Politics, and Society* 1.

11 M Constable 'Genealogy and jurisprudence: Nietzsche, nihilism and the social scientification of law' (1994) 19 *Law and Social Inquiry* 551.

12 S Hartman *Wayward live, beautiful experiments* (2021).

2 Nomos and narrative

Cover[13] famously asserted the extent to which we create law and live a life of law through our narratives. He insisted that what law teachers mostly tell students about law – 'rules and principles of justice, the formal institutions of the law, and the conventions of a social order' – provides only a partial account of the 'normative universe that claims our attention'.[14] He underscored that no law or legal institution exists in isolation from the narratives within which it is situated and its meaning created and declared: 'For every constitution there is an epic, for each decalogue a scripture.'[15] Law, thus, is not simply a system of rules that should be followed, 'but a world in which we live'.[16] Cover noted the extent to which legal interpretation, legal hermeneutics, the question of 'meaning' in law are often associated with a specific problem on which an official must decide. However, he urges us to see this also differently, and acknowledge that 'the normative universe is held together by the force of interpretive commitments' and that these commitments ultimately decide the meaning and existence of law.[17] For him, legal orders and principles are 'signs by which each of us communicates with others'.[18]

Cover is also a theorist of jurisdiction and refers, for example, to the role of jurisdiction to construct meaning in our normative world. With reference to *Marbury v Madison*, he remarks that '[e]very denial of jurisdiction on the part of a court is an assertion of the power to determine jurisdiction and thus to constitute a norm'.[19] He stresses the important role of legal tradition, which includes language and myth and is 'part and parcel of a complex normative world'.[20] Cover[21] in more than one place described the law as a 'system of tension or a bridge' that has the task of connecting 'reality' with 'an imagined alternative'. South African legal scholar, the late Etienne Mureinik, famously unpacked the idea of the South African Constitution as a bridge. In his case, the bridge was

13 Cover (1982) (n 7) 4-68.
14 Cover (1982) (n 7) 4.
15 As above.
16 Cover (1982) (n 7) 5.
17 Cover (1982) (n 7) 7.
18 Cover (1982) (n 7) 8.
19 As above; *Marbury v Madison* 5 US (1 Cranch) 137 (1803).
20 Cover (1982) (n 7) 9.
21 As above; Cover (1985) n 7) 181.

the metaphor that illustrated the possible move from an undemocratic and discriminatory past to a better future. This specific notion of the Constitution as bridge has been challenged in South African critical legal discourse. Cover's notion of the bridge, however, was not as reference to a move form past to present, but to underscore the extent to which reality is often perceived as unredeemed. He wanted to counter it by the belief that law can bring about transformation.

Cover worked with a number of important and related distinctions in his engagement with law: two versions of nomos, the insular and the redemptive, and two ways of interpreting law, jurisgenerative and jurispathic; and two patterns/communities, paideic and imperial. However, first his insistence on 'jurisgenesis', the creation of legal meaning, should be noted which he describes as being collective or social.[22] He distinguishes between 'a social basis for jurigenesis' and one that is jurispathic, that 'destroys legal meaning'.[23] The corresponding patterns are paideic and imperial. Paideic is a 'world-creating' pattern that corresponds with redemptive interpretation and requires three things, namely, (i) a common narrative; (ii) a common personal education; and (iii) the possibility for transformation. The imperial pattern corresponding with insular interpretation and which is world-maintaining insists that norms are 'universal and enforced by institutions'.[24] Cover explains that one will never find a model that is totally paideic or imperial. All versions of law, *nomos*, need to carry predictable and non-predictable behaviour. However, the very notion of 'jurispotence', the ideal of a paideic order, is threatening. Multiplicity of meaning that is created by jurisgenesis often leads to the assertion of imperial virtues and world maintenance. He reminds us also that 'legal interpretation takes place in a field of pain and death'.[25] Because of violence, courts are often 'jurispathic' rather than 'jurisgenerative'. Jurispathic courts then often define the problem not 'as one of too much law, but as one of *unclear* law'.[26] By asserting the problem as unclear, law courts work on the assumption that there is one correct or superior interpretation or form of law. On the other hand, to understand the problem as too much law is to acknowledge multiple

22 Cover (1982) (n 7) 11.
23 As above.
24 Cover (1982) (n 7) 42.
25 Cover (1986) (n 7) 1601.
26 Cover (1982) (n 7) 42.

and plural versions of law emanating from different communities and experiences.

Coming to jurisdiction, Cover[27] regards judges as 'people of violence' who, because of this violence, 'do not create law, but kill it'. They take up their office (I elaborate on the idea of 'office' below) as 'the jurispathic office'. In his words, '[c]onfronting the luxuriant growth of a hundred legal traditions, they assert this one is law and destroy or try to destroy the rest'.[28] This description of Cover is very close to how decolonial scholars explain epistemicide, the wiping out, or attempt to wipe out all local epistemologies and ontologies. However, Cover concedes that judges are also 'people of peace' who try to regulate life rather than violence. The way in which they use their force not as 'a naked jurispathic act' is by the 'elaboration of the institutional privilege' which is jurisdiction. However, Cover holds on to the hope that resistance might be possible, specifically resistance to jurispathic approaches, so that the law can grow and transform. He notes that '[l]egal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence. We ought to stop circumscribing the *nomos*; we should invite new worlds.'[29]

In a piece titled 'The folktales of justice' Cover responds to the way in which positivism has attempted 'to strip ... law' from other meanings by noting that 'the sacred narratives of our world doom the positivist enterprise to failure, or, at best to, to only imperfect success'.[30] He expands on his understanding of law as a bridge by saying that 'law is a bridge in normative space connecting our understanding of the world that-is ... with our projections of the world-that-might-be'.[31] He explains that law should never be understood as either the present state of affairs or as the imagined alternatives. For him, law is the bridge, 'the committed social behavior which constitutes a new reality with a bridge out of social behavior'.[32] Cover states that he is not trying to define law but rather urging us all to widen what we regard as law and to deny the state the sole ability to claim law. At the heart of this understanding of law is to acknowledge the sacred narratives as materials used by communities to

27 Cover (1982) (n 7) 53.
28 As above.
29 Cover (1982) (n 7) 68.
30 Cover (1985) (n 7) 180.
31 Cover (1985) (n 7) 181.
32 Cover (1986) (n 7) 181.

build bridges. 'To claim a law is a claim as well to an understanding of a literature and a tradition.'[33] He elaborates on the sacred narratives of jurisdiction as follows:[34]

> It is possible to conceive of a natural law of jurisdiction ... in elaborating such a law ... a judge might appeal to narratives of judicial resistance ... [they] might thus defend [their] own authority to sit in judgement over those who exercise extra-legal violence in the name of the state. In a truly violent authoritarian situation, nothing is more revolutionary than the insistence of a judge that [they] exercises such a 'jurisdiction' – but only if that jurisdiction implies the articulation of legal principle according to an independent hermeneutic – such a hermeneutic of jurisdiction [texts], however, is risky. *It entails commitment to a struggle, the outcome of which - moral and physical – is always uncertain.*

Cover relies on myth and history in his work and comments on the respective place of each of these in the building of law. The role of myth is to help us to remember what it is that we want to create, remember so that we can 're-enact'.[35] History bring us back to reality. Where myth is 'personal and committed; history is objective and prudent'. 'Only myth tells us who we would become; only history can tell us how hard it will really be to become that.'[36]

He recalls an example of 'utopian jurisdiction-making'. During the Vietnam war, official courts in the US were confronted with a variety of challenges to the war based on Nuremberg principles. The courts, in Cover's words, 'refused to challenge power with law' and played 'deference games'.[37] In 1967, Jean Paul Sartre and Bertrand Russel set up their own 'International War Crimes Tribunal' in Stockholm after the French government had refused some participants visas to enter France. De Gaulle, in denying them the right to hold a tribunal in France, stated that 'I have no need to tell you that justice of any sort, in principle as in execution, emanates from the state'.[38] Cover describes the Russel/Sartre tribunal as 'a philosopher's realisation of an ideal type' as 'utopian jurisdiction-making'. For Cover, redeeming law is possible only when we realise that what is presented as what is, can be challenged.

33 Cover (1985) (n 7) 182.
34 Cover (1985) (n 7) 183.
35 Cover (1986) (n 7) 190.
36 Cover (1986) (n 7) 190.
37 Cover (1986) (n 7) 200.
38 Cover (1986) (n 7) 201.

3 Jurisdiction, lawful relations, the office of the jurisprudent

Dorsett and McVeigh define jurisdictional thinking as that which 'gives legal form to life and life to law'.[39] Drawing on the poet Seamus Heaney, they argue that 'jurisdiction of form' is as important as 'forms of jurisdiction'.[40] For them, 'jurisdictional knowledge' is 'the practical knowledge of how to do things with law … it takes an importance in daily life. It tells us how to do things with and against law [and importantly it is] concerned with how to live with law and how to engage lawful relations.'[41] They note that jurisdiction does not merely describe but also produces.[42] The first questions to be raised are not those generally invoked, namely, what is law or what is justice, but rather 'under which law?', 'who will decide?', 'who will interpret?' in order to get to the questions of 'how do we live with law?' and 'how do we live justly with law?' Jurisdiction captures questions of lawfulness but also of belonging. The central question that runs through their engagement with jurisdiction that is also central to my reflection is 'how do we create and maintain lawful relations?'[43] They rely on Cover's engagement with jurisdiction – which involves the making of normative worlds and creating meaning for the future.[44] Cover's writing on the Russel tribunal also referred to above is recalled as an example of how 'truth can speak to power'. At the heart of Dorsett and McVeigh's engagement is to shift from a concern with legitimate forms of subordination to 'forms of legal community and lawful conduct'.[45] They define their approach as 'an ethic of responsibility'. Relying on Weber's 'Politics as vocation', they describe jurisdiction's work as 'the responsibility of the office of the jurist and the jurisprudent'.[46] It is important to note that they work with a clear sense of the limits of the law and, thus, of critical legal work, but they nevertheless take up the responsibility for lawful responsibility.

However, what does it mean 'to take responsibility for the conduct of a lawful life'? In an essay honouring the late Tutu, I take him as a

39 Dorsett & McVeigh (n 8) 1.
40 Dorsett & McVeigh (n 8) 3.
41 Dorsett & McVeigh (n 8) 4.
42 Dorsett & McVeigh (n 8) 5.
43 Dorsett & McVeigh (n 8) 7.
44 Dorsett & McVeigh (n 8) 19; Cover 1986) (n 7) 176.
45 Dorsett & McVeigh (n 8) 27.
46 As above.

stellar example of someone who took up the responsibility of office, his office being that of a theologian, a priest, an archbishop. Following Dorsett and McVeigh, lawful does not refer to law in a positivist sense as law as rules, but rather in the sense of law as what is morally right. McVeigh[47] takes up this question in a piece in which he focuses on how someone acting in the office of the jurisprudent in London can take responsibility for the conduct of a lawful life. He situates this question within a framework of 'minor jurisprudence'. Taking up office for a jurisprudent means the assumptions of duties, rights and the privileges of public life, and McVeigh[48] rightly notes that there are different views on both the responsibilities and training of the jurist and jurisprudent. A minor jurisprudence offers a different way to take up office by addressing specifically 'aspects of conduct that mark thresholds and transformations of various kinds'.[49] Relying on cultural theory, minor jurisprudence relates taking up office to humanist training and asserts that public institutions are sources of relations. With reference to the minor jurisprudence of Minkkinen, McVeigh[50] notes the importance of the desire for justice as well as 'holding justice and truth in relation to one another', which is a paradoxical activity. Although justice is strived for, human desire cannot achieve it. The jurisprudent, in Minkkinen's view, plays the role of philosopher jurist. The jurisprudent should find a way of 'living with the (tragic) limits of office'.[51] For Goodrich, the training offered by minor jurisprudence includes the 'arts of association and amity (and enmity) and those of interpretation and transmission'.[52] McVeigh includes also the minor jurisprudence as practised by Andreas Philippopoulos-Mihalopoulos, which involves an engagement with spatial justice as well as the 'material and spatial ordering of a "lawscape"'.[53] An interesting aspect of spatial justice as supported by Philippopoulos-Mihalopoulos is his notion of 'withdrawal', which McVeigh[54] describes as 'embodied (spatio-temporal) and strategic'. The suggestion is a withdrawal from human judgment and to keep up clarity of judgment. They support

47 McVeigh (n 6) 165.
48 McVeigh (n 6) 168.
49 McVeigh (n 6) 169.
50 McVeigh (n 6) 173.
51 McVeigh (n 6) 174.
52 McVeigh (n 6) 175.
53 As above.
54 McVeigh (n 6) 176-177.

also a public teaching of law, either through philosophy, philology and allegory, or mindfulness of affect.[55] They all share the idea that 'training in personality involves a cultivated withdrawal from the everyday forms of technical and material life in order to effect a transformation in relation to the self and to conduct of office. What is taught ... are exercises for the cultivation of the experience of new thresholds of law and life.'[56] Theorists of a minor jurisprudence incorporate persona and place in the training of the jurisprudent. They attend to either the connection between university and community, allegiance and friendship of the city, or a cosmopolitan ethos.

4 From private law science to property as relation

The late AJ van der Walt[57] in his many works on constitutional property law set the path for a different reading and application of constitutional rights, namely, that of a 'public (or non-privatised) constitutional rights discourse'. Van der Walt[58] argued that modern legal science prevented participation in public life because it regards rights (property) paradigmatically in terms of a subjective power to exclude others. Questions in terms of exclusion (harm, pain, eviction law) were reduced to mere technicality and administration. At work here, of course, is legal formalism: 'premised on the assumption that the purpose of law was to reduce moral argument or substantive reasoning to a syllogism based on the established conceptual relations within an over-all scheme or hierarchy of subjective rights'.[59] This is the legacy of modern legal science and the shift that occurred from natural law to natural rights as developed by Hobbes, Locke and Grotius culminating in the embrace of the right to property and ownership. Critical responses to the liberal tradition expose that the notion that private property contributes to public good was false. The logic behind the welfare state similarly reduces the public/political crisis to increasing administrative

55 McVeigh (n 6) 177.
56 As above.
57 See, eg, AJ van der Walt *Property and constitution* (2012).
58 AJ van der Walt 'Un-doing things with words: The colonisation of the public sphere by private property discourse' 1998 *Acta Juridica* 235; see also WB le Roux 'The aesthetic turn in post-apartheid constitutional rights discourse' (2006) 1 *Journal of South African Law* 101.
59 Le Roux (n 58) 106.

technicalities. Van der Walt[60] noted that in South Africa the same was happening concerning property and land. He called for a radical break with the privatising tendency of modern law and supported the idea of a public/non-privatised constitutional rights discourse that could allow a meaningful participation in public life.

In a piece in which he reflected on the early steps taken by the government in terms of land reform, Van der Walt[61] relies on two cultural dancing codes to explain his view on the similarity, continuance and overlap between apartheid property and land law and the reform attempts of the mid to late 1990s. Central to *volkspele*, a traditional Afrikaner dance reminiscent of the Great Trek and the *Voortrekkers*, is the wagon wheel dance that entails dancers to move around in a circle, which, for Van der Walt,[62] 'is a metaphorically rich sign for the enclosing, excluding and essentially static circling movement of apartheid's ultimate wagon laager'.

He attributes the same features to apartheid land law, which he calls 'volkspele jurisprudence', and argues that it 'can also be portrayed as a stationary, circling dance, enclosing and excluding, around and around its axis'.[63] This description, for me, relates to what Cover calls jurispathic approaches, killing law and preventing any further development. Crucial in his analysis is how apartheid ideology was deeply entrenched in Roman-Dutch law as practised in South Africa, and that it would be impossible to remove the apartheid ideology with a pure Roman-Dutch law remaining.

Toyi-toyi jurisprudence, in turn, is the code he uses to describe the legislative reform that followed the non-violent change in South Africa in the 1990s. The *toyi-toyi* is a protest dance, with military origins, but Van der Walt observes the extent to which it is 'essentially non-violent, playfully enacting an informal black opposition politics of demonstration and protest'.

He reads *toyi-toyi* as, although a code of demanding, being also one of 'waiting and not of taking ...a code of confronting the other and demanding action from him, but not of acting unilaterally'.[64] For Van

60 Van der Walt (n 58).
61 Van der Walt (n 9).
62 Van der Walt (n 9) 265.
63 Van der Walt (n 9).
64 Van der Walt (n 9) 281.

der Walt, *toyi-toyi* serves as a metaphor for how the legislative reform of property and land law played out since the mid-1990s. It is important to note that he is not arguing that the reforms did not make any change to better the lives of people. His concern is the extent to which the reform does not break with the way in which opposition in the struggle was framed. He finds a possible break and hope for alternatives in legislation and case law that could show care to those who are excluded/marginalised, which could bring a radical break with both *volkspele* and *toyi-toyi* jurisprudence. He is concerned about the extent to which legal reform still adheres to previous forms of power. His main aim is to invite ways of thinking that could destabilise and undermine present codes and that could open alternative ways.

In a work titled *Property in the margins*,[65] he developed an understanding of and approach to property that breaks with traditional mainstream property law. This view of property law stands in contrast to traditional takes on property because it does not take the position of the owner, or the bearer of property rights, as the starting point or central figure. Van der Walt describes the traditional notion of property as an approach that views property rights in a narrow manner that establishes a specific hierarchy and binary opposition between rights. Property rights in this understanding is associated with ownership, which is the most encompassing right to property. Because of the absolute nature of property, it is very difficult to acknowledge other types or categories of property rights. Another consequence of this understanding is that it constructs a syllogistic relationship between rights and remedies. In other words, a right to property in an abstract/scientific sense without any context taken into account can be asserted against someone else. This means that a right to property will always be able to trump any other right. In a similar fashion, those with stronger rights in property will be able to trump any other right to property. He argued that the right to property should be conceptualised rather as a bundle of rights which is a clear move away from legal science to a public inspired substantive understanding of and approach to constitutional rights. Van der Walt's suggestion stands in the guise of a jurisgenerative approach and could also open possibilities for lawful relations.

65 AJ van der Walt *Property in the margins* (2009).

In a chapter in honour of the late André van der Walt, Bandhar notes how the 'colonial order of things imposes a way of seeing' that 'is spatial and material [that] structures the way individuals and communities inhabit'.[66] She raises, as one of the most challenging and fundamental questions of the transition, the question of whether law and a transformative constitution can bring about a new political order. Van der Walt, in his meticulous analysis of private property, exposed the extent to which it is 'capable of being interpreted, constructed and lived very differently'.[67] Bandhar, drawing on Van der Walt, argues that '"[p]rovincialising' European (Dutch and Roman to be more specific) legal concepts of property ownership in the context of indigenous and multiracial South Africa has immense potential for transforming existing relations of power'.[68] Van der Walt argued for a radical shift in the understanding of property law, namely, for a shift to the perspectives of those in the margins.[69]

5 Concluding remarks

'Responsibility unites with a will not to be complicit in an injustice. It thus emerges from a sense of complicity'.[70]

This project came about because of having success in applying for an interdisciplinary grant. As I engaged in the project, I asked myself, between which disciplines does this project stand? The participants come from disciplines knows as humanities, the social sciences and law; the method of employing fieldwork by conducting interviews relate to sociology or anthropology. What does interdisciplinary work entail? Who decides about the boundaries of disciplines? Foucault[71] long ago noted the power of knowledge. How can we escape to be disciplined by the demarcations of discipline? Hartman[72] is a good example of someone who refuses this kind of disciplining. Her work displaces disciplines and

66 B Bandhar 'Fault-lines in the settler colony: On the margins of settled law' in G Muller and others (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 402.
67 Bandhar (n 66) 405.
68 Bandhar (n 66) 407.
69 Van der Walt (n 65).
70 Sanders (n 1) 4.
71 M Foucault *Power/Knowledge: Selected interviews and other writings 1972-1977* C Gordon (ed) (1972).
72 S Hartman *Wayward live, beautiful experiments* (2021).

crosses genres. By fabulating the stories of women excluded from the archive, she recreates their lives and worlds. I am reminded again also of Douzinas and Gearey's writing[73] on the rise of the modern university and how it led to the creation of disciplines, to the detriment of legal study.

It may be important to explain what I mean with law; what law means for me, or what it does not. I do not subscribe and am, therefore, not informed by an understanding of law as legal science. As a young person studying law in the late 1980s, I was quite disenchanted by my first law lectures, and if I was prompted to study law during the states of emergency of the mid-1980s with the aspiration that law might offer a way of resistance, those first lectures thwarted that hope. As the late Andre van der Walt observed, legal science with its emphasis on deductive and syllogistic reasoning obfuscates the violence, pain and woundedness of realities such as homelessness and evictions and the role of apartheid law inflicting it. I also do not subscribe to law as a social science. The projects of both grand and petty apartheid are perfect displays of law as social science in action. For me, law is and must be understood as and made sense of and applied, as a humanities discipline, and it is by way of law as part of the humanities that I have been interested in notions of space, spatial theory, spatial justice and the city/city life. In my doctoral thesis, completed more than two decades ago, I reflected on the importance of a vibrant public sphere, but more than that, the necessity of a public-orientated interpretation of the Constitution and rights in the aftermath of 1994. I focused on equality and was concerned about how the much-celebrated notion of substantive equality might fail to address radical difference. Following Hannah Arendt, my argument was that the right to equality should be made sense of in a public spatial orientation. City life, following Iris Marion Young, and later also Henri Lefevbre, for me is a metaphor/symbol for difference and heterogeneity, but also as a space for resistance and politics. The making of cities mirrors world making and, thus, represent possibilities for re-worlding and the re-imagining of the world. My theoretical approach is embedded in ethical feminism following the work of the late Drucilla Cornell[74] which entails the

73 C Douzinas & A Gearey *Critical jurisprudence. The political philosophy of justice* (2005).

74 See, eg, D Cornell *Beyond accommodation. Ethical feminism, deconstruction, and the law* (1999).

aspiration to a non-violent relationship to the Other and to others in the widest possible sense. It involves a struggle against the appropriation of the Other into a system of meaning that would deny her difference and singularity. At the heart of this approach is the question of how I should change as a person so that an ethical relation to the Other is possible. Ethical feminists aim to see the world differently, to re-imagine different forms of life. I work in jurisprudence, and have been trying to reflect on what cohabitance, living together might mean in the aftermath of 1994 and, in doing so, I engage with multiple sources.

Perhaps also disciplines and not only people are entangled and share complicity. Ultimately, I think what is more important than calling a project, or an approach interdisciplinary, is to raise questions, issues on conceptual and material levels that can challenge and disclose and prompt and beckon us to be self-reflexive, accept human-foldedness and act (and write) responsibly and lawfully.

The motivation for writing this chapter and for initiating the project was to engage with apartheid spatial history and the endurance of the inequalities that it created. Inhabitants of Mangaung, Thaba 'Nchu and Botsabelo were interviewed and asked about how it came that they were living in these places, if they feel secure there, and the reasons for it. Property relations in South Africa's past and present are manifestations of violence. Apartheid property law and how it was interpreted is a good example of jurispathic approaches, of politicians and courts killing law's potential to do good. A question that has been raised since the changes in the 1990s is the extent to which a new dispensation that adopted constitutional supremacy can offer the possibility of ethical responsibility and lawful relations. Can a 'single system of law' produce lawful relations? Can interpretations of property and space create jurisgenerative law? Can jurisdiction be re-imagined? Arendt's[75] insistence on the human condition of natality, the possibility to begin anew, might be of value. Her reading of constitutional founding as continuous and that one can always begin again has implications for the jurisgenerative work, the continuous making and re-making of the law.

In the South African context, as in many other societies in the aftermath of colonialism, law can only grow and change if it accepts

75 H Arendt *The human condition* (1958).

the plurality of law, if Cover's notion of nomos and narratives can be heeded. I was hoping to find in the interviews signs of other, plural forms of law. I was struck by how many of the interviewees rely on the security that title/title deed offers. However, the interviews reflect also, to use Cover's term, sacred narratives and folktales in how home is described. Often, in terms of love, people would say 'I love my home'. The idea that a home is someone's home, because they have been living there for their entire life, came out strongly. There is a sense of another understanding of law; where family relations are central. Homes often belonged to a parent/parents, or were given by an uncle or aunt. Similar to the law of the state, these relations are not without violence; the fear that another family member will take the house is often expressed. The reason invoked of why a house will not be sold often is because of family relations and ties. My sense is that if lawful relations are what is sought, there might be something to be found here in the sacred narratives of inhabitants of these places.

I refer above to Cover's discussion on the Russel Tribunal. Dorsett and McVeigh recall the Eichman trial as a trial that underscored the notion of 'universal jurisdiction'.[76] They find Cover's idea of a 'natural jurisdiction' applicable. They invoke also Arendt's remark that the Eichman trial, because of the newness and particularity at stake, required a 'new jurisdiction'. They note: 'For Arendt, what binds the event of the holocaust to law is its articulation within a jurisdiction of universal conscience'.[77] To what extent does apartheid, having been declared as a crime against humanity, urge such a universal conscience? Apartheid law and, in particular, property law, legal spatial arrangements were central to apartheid as a crime against humanity. There lies a particular ethical responsibility to create lawful relations and to respond to the need of redress. The theoretical frameworks that I draw upon to engage with the issue of the endurance of spatial inequality in Mangaung, Botshabelo and Thaba 'Nchu are explicit about the extent to which state law is not the only source of law, that sacred narratives play an important role in what law is; the work on jurisdiction underscore the importance of lawful relations, of ethical responsibility and redress.

76 Dorsett & McVeigh (n 8) 125.
77 As above.

Jurisdiction gives form to a new beginning.[78] All instances of jurisdiction and beginning are simultaneously bound to violence and to justice.[79] Cover described communities as created around normative universes. Jurisdiction is the inauguration of law and the authority of law. Following Arendt, beginnings need not be settled or static; we can always begin again if a plurality of jurisdiction and law is recognised and acted upon from an ethics of responsibility.

78 Arendt (n 75).
79 Douzinas & A Gearey (n 73.)

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