

**DEVELOPING A NEW
JURISPRUDENCE OF GENDER
EQUALITY IN SOUTH AFRICA**

by

NARNIA BOHLER-MULLER

Submitted in partial fulfillment of the requirements for the degree

DOCTOR LEGUM

In the Faculty of Law

At the

University of Pretoria

SUPERVISOR

PROFESSOR KARIN VAN MARLE

November 2005

This research is dedicated to my father
HARLAND KEITH BOHLER
05/10/1927 – 24/9/2003

ACKNOWLEDGMENTS

With gratitude to:

KARIN for inspiration and guidance.

DAVID for caring ...

My loving mother **ARINA**, for patiently believing that I can do this.

RUEHL for showing us the promise of a better future.

NAN for poetic mentoring.

NADIA, MIEMIE and **SIPHO** for support and friendship.

The **NATIONAL RESEARCH FOUNDATION** (NRF, South Africa) for the financial assistance towards this research. Opinions expressed and conclusions arrived at, are those of myself, the author, and are not necessarily to be attributed to the National Research Foundation.

TABLE OF CONTENTS

SUMMARY	i
OPSOMMING	iii
CHAPTER ONE	
INTRODUCING A JURISPRUDENCE OF CARE	1
1.1 The problem: Silenced voices	1
<i>South African law-in-transition</i>	5
1.2 Approaching the problem of silencing	7
<i>The limits of current equality discourse</i>	8
<i>Justice, care and other ‘paradoxes’</i>	13
1.3 Methodologies of work	17
1.4 The path ahead	19
CHAPTER TWO	
WESTERN LEGALISM AND ITS DISCONTENTS	23
2.1 The pathway(s) of this chapter	23
2.2 A critique of dominant legal narratives	26
2.3 The text of the law and human rights	30
2.4 The South African Constitution(s) and the end of apartheid	33
<i>The Constitutional Court’s equality jurisprudence revisited</i>	36
<i>A substantive vision of equality</i>	37
2.5 Ethical Interpretations of the right to (gender) equality	40
2.6 The possibilities of care	45
<i>A (non)essential exploration of Gilligan</i>	46
2.7 A return to the call of the ethical	54
<i>Van Marle’s challenge</i>	55
2.8 Retracing the way	57
CHAPTER THREE	
BEYOND LEGAL METANARRATIVES	60
3.1 Introductory remarks	60
3.2 Storytelling within the (South) African context	62
3.3 The recurring themes of ubuntu, storytelling and care	70
<i>Re-thinking ubuntu and/as care</i>	79
3.4 Beyond opposition(s) and domination	89
3.5 Caring about others before the law	97
<i>Searching for the golden thread</i>	100
3.6 Concluding this narrative with another	103

CHAPTER FOUR		
FOUR STORIES		107
4.1	Introduction	107
4.2	STORY ONE: The story of an imprisoned father	110
	<i>Gender equality and gender stereotyping</i>	113
4.3	STORY TWO: The story of a woman seeking caring justice	116
	<i>Finding solace?</i>	118
4.4	STORY THREE: The story of a mother and daughter trapped in culture	124
	<i>The story continues for anyone to hear</i>	128
	<i>A legal decision both fair and tragic</i>	132
4.5	STORY FOUR: The story of dangerous bodies and judicial Avoidance	137
	<i>Sex work and social justice</i>	140
	<i>Responding to an unresponsive court</i>	143
4.6	“Conclusion(s)”	145
CHAPTER FIVE		
THE PROMISE OF EQUALITY COURTS		148
5.1	Introductory remarks	148
5.2	Introducing the Equality Act and its courts	150
	<i>Some innovative aspects of the Equality Act and its courts</i>	153
	<i>Courts of love</i>	159
5.3	Moving beyond substantive interpretations of gender equality	163
5.4	Paying careful attention to stories of unfair discrimination	169
5.5	That which is yet to be...	175
CHAPTER SIX		
THE WAY(S) FORWARD		179
6.1	Looking back	179
6.2	Revisiting Gilligan’s ethic of care	183
6.3	The role of the ethical	189
6.4	Looking forward to herstory	193
BIBLIOGRAPHY		198
A.	Academic Articles, Books and Internet sources	198
B.	Table of Statutes	215
C.	Table of Cases	216

SUMMARY

The underlying premise explored is whether the right to gender equality as interpreted and imposed within the confines of dominant western ideologies of liberal legalism could create the space for meeting the particular needs of (South) African women and men who wish to live out their dreams and desires differently.

Modernist discourses mask the political, social and economic power of law and are crucial for the maintenance of the status quo. This adherence to formal rules, extant legal texts and a legalistic culture is violently exclusionary and thus it is necessary to enter into critical discourses that lead to transformative jurisprudence and thought. Different voices have been silenced by these ideologies and it is essential that the stories of women and other outsiders are listened to in order to (re)introduce new futures and new possibilities to South Africans struggling to find a home for themselves in the post-apartheid context.

The recognition of more ethical approaches to law creates the space to move beyond liberal legalism to post-liberal interpretations of the law, the Constitution and the right to gender equality. I therefore focus on exploring the inter-relationships between the ethic of care, ethical feminism, ubuntu, and storytelling, which may render judg(e)ments less rigid and exclusionary, and make it more possible to ensure that we can 'do things a different, a better, way'.

Since 1994 the Constitutional Court has formulated a substantive test for equality infringements. This approach, although widely supported, continues to ignore the contextuality of situations and narratives. For this reason I submit that ethical feminist discourses and the insistence on attention to minor, marginal and subversive narratives can teach us much about ourselves and those that we deem to be 'different' from ourselves.

Adopting a 'minor' jurisprudence - such as the jurisprudence of care formulated in this thesis - allows us to reconsider what is and to dream of what is yet to be. In such a way, sites of (legal) resistance are created and maintained, where the

'feminine' (as the beyond, and not 'lack') operates as a locus of change. The equality courts created by the Promotion of Equality and Prevention of Unfair Discrimination Act could be utilised as spaces of non-violent and ethical judgment where the other before the law is seen as unique, considered with care, and thus freed from oppression.

The aim of this research is not to conceptualise and categorise a new metanarrative or meta-jurisprudence, but to introduce to the reader other ways of listening, seeing and being - ways which are less violent, less exclusionary, and more accommodating of difference and diverse experiences of oppression and subordination. Furthermore, the aim is to challenge current legal traditions and to develop new thinking around an indigenous and ethical interpretation of gender equality.

KEYWORDS: Jurisprudence; Human Rights; Equality; Feminist Theory; Ethic of Care; Storytelling; Ubuntu; Transformative Constitutionalism

OPSOMMING

Die onderliggende uitgangspunt wat hier ondersoek word is of 'n onbekrompte regsbegrip 'n ruimte kan skep vir die besondere behoeftes van (Suid) Afrikaanse vrouens en mans wat graag hul drome en begeertes anders wil uitleef.

Modernistiese gesprekvoerings verdoesels die politieke, sosiale en ekonomiese gesag van die reg en is van kardinale belang vir die behoud van die *status quo*. Hierdie gehegtheid aan formele regulasies, bestaande wetlike tekste en 'n wetsvererende kultuur is uiters eksklusief en daarom is dit noodsaaklik om kritiese gesprekke te voer wat tot herskeppende regsdenke kan lei. My argument is dat verskillende stemme tot swye gedwing is deur hierdie lewensbeskouing. Om nuwe moontlikhede en 'n nuwe toekoms te herskep moet daar dringend na die stories van vroue en ander buitestaanders geluister word. So sal mense hul tuiste vind in die post-*apartheid* konteks.

Die erkenning van meer etiese benaderings van die reg skep die ruimte en speling nodig om verby die liberale wettiesheid na post-liberale vertolkings van die wet, die konstitusie en die reg op geslagsgelykheid te beweeg. Gevolglik konsentreer ek op navorsing van onderlinge verbandskap tussen die etiek van besorgdheid en omgee, feministiese menings en beginsels, die menslike deernis en erbarming van *ubuntu*, en die verhale van gister en vandag wat oordeel buigsamer en minder eensydig maak. Dan sal dit moontlik wees dat 'dinge op 'n ander, 'n beter, manier gedoen sal word'.

Die Grondwetlike Hof het sedert 1994 'n substantiewe toets vir gelykheidskending saamgestel. Alhoewel hierdie benadering wye ondersteuning geniet, verontagsaam dit nog steeds die samehang van gebeurtenisse, omstandighede en verhale. Om hierdie rede betoog ek vir feministiese diskoerse en die aandrag van aandag op mindere, marginale en ondermynende vertellings sodat ons bewus kan word van wie ons, wat 'hulle wat anders is' beoordeel, werklik is.

Om 'n standpunt van 'ondergeskikte' regsgeleerdheid – soos die regsgeleerdheid van medelydende erbarming en besorgdheid in hierdie proefskrif saamgestel – in te neem, word ons gegun om te heroorweeg dit wat is en om te droom van dit wat die toekoms mag inhou. So skep vroue en andere terreine van verandering en word weerstand gehandhaaf.

Die gelykheidshoue wat deur wetgewing geskep is kan ingespan word as instrumente vir geweldlose en etiese uitsprake waar die 'ander' deur die reg as uniek beskou word, versigtig benader word, en gevolglik bevry word van onderdrukking.

Dit is nie die doel van hierdie navorsing om te klassifiseer en in te deel nie, of om 'n finale denkbeeld van 'n nuwe sienswyse in te vorm nie. Inteendeel, dit is om die leser bekend te stel aan ander maniere van dink, doen, luister en waarneem – om in onself te verander sodat ons bereid sal wees om hulp aan te bied, sonder geweld en uitbuiting en uitsluiting – minder driftig en eensydig, meer insiklik en tegemoetkommend wanneer ons onderdrukking en oorheersing en ondergeskiktheid om ons ervaar. Vervolgens, die strewe is om die huidige wetlike benaderings te bestry en die uitdaging om nuwe denke te ontwikkel in die kwessie van etieke vertolkings van geslagsgelykheid en menseregte.

SLEUTELWOORDE: Regsgeleerdheid; Menseregte; Gelykheid; Feminisme; Etiek van besorgdheid; Verhale; *Ubuntu*; Herskeppende grondwetlikheid