

Contemplating a Post-Apartheid Feminist Jurisprudence

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This research is dedicated to my grandmother

Hetta Jooste

1938/02/25-2008/08/23

Lolla

daar was 'n girl wat elke dag langs die verkeerslig
in Voortrekkerweg gestaan het sy't houtbeeldjies verkoop
haar art was befok
haar gap was groovy
'n grasgroen jersey met 'n Namakwa-daisy op en groovy bell-bottom
jeans
met AC/DC en KISS patches
ek't gedink sy rock
haar hare was lank en blond en sy't mooidag blou oë gehad
ek het altyd gewens 'n snobby art dealer spot haar en maak
haar famous som mense moet famous wees
omdat hulle weirdness totally unrehearsed is

Lolla het onder kartonbokse in 'n betonpyp geslaap
niemand het geweet waar sy haar hout en tools vandaan kry nie
een ding was seker sy was talented
Lolla was my eerste hero

Ek't gehuil toe ek in die koerant lees
dat sy verkrag en vermoor is*

* *There was a girl that every day stood beside the road/ in Vootrekkers way she sold little wooden sculptures/ her art was cool/ her gap was groovy/ a grass green jersey with a Namakwa-daisy and groovy bellbottom/ jeans/ with ACDC and KISS patches/ I thought she rocked/ her hair was long and she had beautiful blue eyes/ I always wished a snobby art dealer would spot her and make/ her famous some people should be famous/ because their weirdness is totally unrehearsed/ Lolla slept under boxes in a cement pipe/ nobody knew where she got her wood and tools from/ one thing was for sure she was talented/ Lolla was my first hero/ I cried when I read in the paper that she had been raped and murdered. Rondelda S Kamfer "Lolla" in Noudat Slapende Honde 2008.*

Summary

This dissertation involves contemplations and reflections on a post-apartheid feminist jurisprudence. My contemplation of a feminist jurisprudence takes place within the broader search for a post-apartheid jurisprudence. Post-apartheid jurisprudence provides a critical context for the contemplation. Within this research I illustrate the existence of a masculine symbolic order in South Africa. I suggest that this order contributes to the marginalisation of women and as such problematisation of this order is required. I submit within this dissertation that although the post-apartheid jurisprudential context may be described as critical, challenge to the masculine symbolic order has not been sufficient.

From this perspective, I consider the possibility of a post-apartheid feminist jurisprudence. The reflections on a feminist jurisprudence depart from ethical feminism as originally formulated by Drucilla Cornell. The heterogeneity and plurality of the South African society requires an approach that is sensitive to difference and diversity. Ethical feminism seeks to address marginality and the masculine symbolic order by making use of critical and deconstructive insights. It suggests a way of interpreting 'the feminine' as a means of bringing about transformation and openness to difference. I submit within this research that ethical feminism as an approach is suitable to the South African context and that it may contribute to post-apartheid jurisprudence's critical search for approaches to law.

Ethical feminism suggests using the feminine affirmatively and allegorically. Along these lines I explore certain myths and narratives, amongst them, retellings of the Greek myths of *Ariadne* and *Penelope*, the testimony of a mother before the Truth and Reconciliation Commission and William Shakespeare's character *Ophelia*. In attempting an interpretation of the feminine, I explore the theme of 'refusal'. Refusal discloses new possibilities, options and alternatives. It also signifies a feminist jurisprudence that is continuous, transformative and unafraid of embracing uncertainty and humility.

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Chapter 1

Introduction

1.1 Introduction

The aim of this dissertation is to contemplate a post-apartheid feminist jurisprudence. The contemplation takes place against the background of a South African masculine symbolic order. It is my suggestion that this order or cultural sphere contributes to the effective marginalisation of women. As such, my contemplation attempts to engage with the masculine cultural order in an effort to move closer to addressing the position of women. I also situate the contemplation within the search for a post-apartheid jurisprudence. Ever since the South African turn towards democracy, legal scholars have attempted to re-write, re-think and re-imagine established ideas and notions around and related to law. The search for a post-apartheid jurisprudence may be described as a critical one. The contemplation of a feminist jurisprudence takes place along these critical lines. It is against the masculine symbolic order and within the critical development of post-apartheid jurisprudence that I engage in tentative reflections on a feminist jurisprudence.

The main theoretical point of departure for the contemplation is ethical feminism. Ethical feminism suggests a positive programme for addressing the realities of women whilst staying true to critical and deconstructive feminist insights. I suggest that this approach is suitable for the diverse South African context and that it may trigger transformative possibilities. I further propose a possible way of interpreting 'the feminine'. Post-apartheid jurisprudential thought and ethical feminism discloses an interpretation of the feminine that may beckon other possibilities than that of the masculine symbolic and denotes a feminist jurisprudence that encompasses allegory and narrative as a critical means of attending to the plight of women. The project of contemplating a post-apartheid feminist jurisprudence does not involve the development of unified themes, nor

do I presume to render any answers or solutions. The contemplation rather entails reflections and considerations. It is fragile, tentative and partial. This research wants to serve as a beginning or opening-up for the exploration of a jurisprudence that does not essentialise in its effort to affirm and address the particular interests and concerns of women.

1.2 Background

The sketching of the background involves identifying the South African cultural order as masculine. In order to identify the South African symbolic as such, I rely in chapter two on a feminist reading of the processes of reconciliation.¹ I also equate the dominant Western symbolic order with the South African symbolic as way of indicating the masculinity of the symbolic sphere. My illustration of the background serves as a way of explaining the marginalisation of women in general. The suggestion is that in order to address the marginalisation of women, the symbolic order within which marginalisation takes place must be addressed. Identifying the South African cultural order as one that is sanctioned by male ideologies and concerns implies that the feminist contemplation will continuously attempt to be mindful of the overarching symbolic paradigm. I attempt throughout the dissertation to involve and also engage with the masculine symbolic order.

1.3 Context

I situate the contemplation of a post-apartheid feminist jurisprudence within the context of post-apartheid jurisprudential thought. South African legal scholars have been and are committed to formulating and searching for a post-apartheid jurisprudence. In confronting the shift from authoritarianism to democracy, parliamentary sovereignty to constitutional supremacy and inequality and discrimination to equality, as well as, facing the failures of positivist and natural law approaches of the past, legal academics attempt to search for a jurisprudence adequate to the needs of the South African society.²

¹ Du Toit A *Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* 2009 9-32.

² See Le Roux & van Marle (eds) *Post-Apartheid Fragments: Law, Politics and Critique* 2007 xi.

In order to illustrate the post-apartheid jurisprudential context, I identify three themes in chapter three of this dissertation. The themes are: Transformative Constitutionalism, Reparation and Transformation and The Aesthetic Turn and Critique. These themes are in no way representative of post-apartheid jurisprudence, but are nevertheless part of certain trends in post-apartheid jurisprudence's search for adequate approaches to law. As the contemplation is situated within the development of post-apartheid jurisprudence, it will be marked by some of the tendencies that may be observed in post-apartheid jurisprudential thought.³ The post-apartheid jurisprudential context provides a critical foundation for the reflections on a feminist jurisprudence and informs the contemplation. I argue that these themes managed to expose the marginalisation of women thereby disclosing the way for further challenge and development. I suggest that given the background sketched in the second chapter, engagement with the masculine symbolic is needed in order to address the specific plight of women. I also suggest that such engagement may serve, in some instances, to benefit post-apartheid jurisprudence's continuous search for new ways of approaching law. The contemplation for a feminist jurisprudence is therefore situated along the lines of the critical development of post-apartheid jurisprudence.

1.4 Problem Statement

My primary aim is to ask the question of how we can move closer to taking responsibility for the particular interests and marginalisation of women. Contemplating a feminist jurisprudence serves as an attempt to move closer to addressing women's needs and concerns.

The research unfolds in four stages:

³ Influences of American Critical Legal Studies as well as deconstructive insights may be found within post-apartheid jurisprudential thought. Symbolic and aesthetic engagements may also be observed. I elaborate on these tendencies in section 1.5 (Underlying Theory, Assumptions, Delineation and Limitation) of this chapter and illustrate in chapter 3 the type of critical engagement characteristic of post-apartheid jurisprudence.

- Firstly, I argue that the South African symbolic order is masculine.⁴ I will explain that this order contributes to the effective marginalisation of women. This may be regarded as the first problem of the research. I argue that the masculine symbolic order has not been sufficiently challenged within the critical development of post-apartheid jurisprudence. My tentative reflections on a post-apartheid feminist jurisprudence and attempt to problematise the masculine symbolic order take off from here.
- Part of the problematisation involves an interpretation of the feminine within the masculine symbolic. This may be regarded as the second problem within the research, namely, the question of how the feminine should be interpreted within the South African context. Formulated differently, this problem involves the search for a feminist approach suitable to the South African environment.
- From this perspective the main theoretical starting point for my contemplation is ethical feminism originally formulated by Drucilla Cornell.⁵ Ethical feminism highlights the ways in which the feminine suffers within masculine discourse and the dominant Western symbolic. It suggests a way of interpreting the feminine so as to serve as a locus for change. I propose that ethical feminism is suitable to the South African society and that it may support post-apartheid jurisprudence's critical search.
- Finally, I explore a possible further interpretation of the feminine within the South African context, relying on myths and other narratives in order to illustrate the interpretation. This interpretation of the feminine may also be regarded as a further contemplation of a post-apartheid feminist jurisprudence.

⁴ See the discussion in section 2.2 below. It should be mentioned at this stage that the discussion on ethical feminism in chapter two will serve, amongst other things, to describe the dominant Western symbolic in more detail. This discussion includes the exploration of the tendencies of the Western order as it pertains to gender. This will serve to further demonstrate the marginalisation of women in general.

⁵ Cornell "The Doubly-Prized World: Myth, Allegory and the Feminine" *CNLLR* 1990 644.

1.5 Underlying Theory, Assumptions, Delineation and Limitation

The first ideological foundation of the research may be described as feminist legal theory. This may be construed as a broad statement, but my analysis of ethical feminism in chapter three will undoubtedly relay the type of feminist commitment adhered to. The focus in ethical feminism is on language, psychoanalysis and deconstruction.⁶ The challenge is to affirm the feminine without relying on an essentialist account of woman. This approach seeks a different way of being and focuses on the redefinition of all our fundamental concepts.⁷ It attempts to be sensitive not only to the differences between men and women, but also to the differences between women.

Part of the feminist legal project is the admittance of the limited ability of legal change to radically transform the lives of women as well as radically transforming gender relations.⁸ This includes the awareness of the law as a masculine and conservative system.⁹ Yet, the immense social power of law renders a feminist engagement with it necessary.¹⁰ This research attempts to form part of such an engagement.

The second underlying theory that may be found in the research is critical theory. Given the post-apartheid jurisprudential context within which the research takes place, the scholars chosen to sketch the context will unquestionably influence this research. I perceive the post-apartheid jurisprudential context as critical in its pursuit to re-imagine certain fundamental concepts around and related to law. The discussion of the context in chapter three as well as the discussion in chapter five of the notion of Refusal as used in post-apartheid jurisprudence will

⁶ For a brief explanation of deconstruction see the subsequent page. I elaborate fully on this notion in chapter 4 of the dissertation.

⁷ Van Marle & Bonthuys "Feminist Theories and Concepts" in Bonthuys (ed) *Gender, Law and Justice* 2007 38-37.

⁸ *Idem* 46.

⁹ *Ibid.*

¹⁰ *Ibid.*

hopefully illustrate the type of critical engagement found in post-apartheid jurisprudential thought and therefore the type of critical theory underlying this research.¹¹ At this stage it may be mentioned that the critical theory relied upon by post-apartheid legal scholars have been diverse and interdisciplinary. Influences of American Critical Legal Studies may be found as well as aesthetic and symbolic engagements influenced by continental philosophy. The first, broadly construed, focus on the indeterminacy of legal texts, insists on law's historical, political and social contingency and attempts to debunk notions of neutrality and objectivity within legal text and thought.¹² This invites candour about the limits of the law. The latter refers to the use of various art and art forms where legal terminology fails in its descriptive capacity. It is, amongst other things, an attempt to move away from the formalism and mechanical tendencies in law and legal discourse.¹³ Related to the aesthetic engagements is the philosophy of deconstruction. Deconstruction can *inter alia* be understood as the process of undermining existing symbolic categories.¹⁴ It may also be understood as the analysis of conceptual oppositions and paradoxes as a method of ideological critique.¹⁵ In chapter four I elaborate on aspects of deconstruction.¹⁶

The post-apartheid jurisprudential context connects with a limitation within the research. It should be mentioned that I sketch the context by relying on a small group of scholars that I perceive as being at the core of post-apartheid jurisprudence. It would be impossible to give a full description of these scholars' various and creative contributions. I therefore take recourse in discussing some general tendencies and directions in post-apartheid jurisprudence in the concluding part of chapter three as well as in section 5.3 and 5.4 of chapter five.

¹¹ See chapter 3 as well as section 5.3 below.

¹² For a discussion on Critical Legal Studies or CLS see Roederer & Moellendorf (eds) *Jurisprudence* 2004 246-266.

¹³ Le Roux "The Aesthetic Turn in Constitutional Rights Discourse" *TSAR* 2006 101. As mentioned above, the aesthetic turn in post-apartheid jurisprudence will be discussed in chapter 3. See section 3.3 below.

¹⁴ See in general Derrida *Of Grammatology* 1967, *Writing and Difference* 1967 and *Speech and Phenomena* 1967.

¹⁵ Bonthuys (ed) 2007 38.

¹⁶ See sections 4.2 and 4.3.2 below.

Finally, it is necessary to mention Carol Smart's objections against the formulation of a feminist jurisprudence.¹⁷ Smart's main arguments against such development are the following: Smart contends that the quest for a feminist jurisprudence might be a false quest as it might fall into the trap of what is called the "androcentric standard".¹⁸ Hereby feminists enter into a game whose rules are predetermined by masculine requirements and a positivistic tradition.¹⁹ Further, Smart mentions the idea of feminist jurisprudence as "grand theorizing".²⁰ Feminists have criticised the construction of abstract, universal theories and have gone further to show that what is "universal" is really "male".²¹ Feminist analysis has increasingly fallen into the category of deconstruction which challenges naturalistic and over generalised assumptions about the social world and the lives of people.²² The concept of jurisprudence presumes an identifiable unity of law, hence basic principles of justice, rights and equality are presumed to underpin all aspects of law.²³ Jurisprudence seeks to identify the source of these principles and make generally applicable statements about the nature of law.²⁴ Thus, the search for a feminist jurisprudence runs counter to deconstructive insights.²⁵ Moreover, the quest for a feminist jurisprudence does not de-centre law, but rather preserve law's place in the hierarchy of discourses which maintains that law has access to truth and justice.²⁶ This also runs counter to feminist analysis which assumes critical thinking when considering the existing hierarchies of knowledge.²⁷ Smart claims that to turn to the development of a jurisprudence "fetishizes" law rather than deconstructing it.²⁸ She asserts: "The

¹⁷ Smart *Feminism and the Power of Law* 1989 66 -89.

¹⁸ *Idem* 67-68.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Idem* 68.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Idem* 69.

²⁶ *Idem* 89.

²⁷ *Idem* 71.

²⁸ *Idem* 89.

search for a feminist jurisprudence is generated by a feminist challenge to the power of law as it is presently constituted, but it ends in the celebration of positivistic, scientific feminism which seeks to replace one hierarchy of truth with another”.²⁹

As I contemplate a post-apartheid feminist jurisprudence, in the light of Smart’s arguments I render some tentative contestations. Firstly, the research does not propose a development or creation of a feminist jurisprudence. I contemplate some possibilities against the background of the South African masculine symbolic. Further, the context in which the contemplation for a feminist jurisprudence takes place does not allow for grand theorizing or instrumental approaches to knowledge. The research takes place within the development of a post-apartheid jurisprudence which indicates a critical, deconstructive and reflective foundation.³⁰ Within the dissertation I also consider postmodern feminist legal theory and ethical feminism.³¹ These approaches are disruptive of positivistic and traditional notions of language, thought and knowledge. These theories are also critical of law’s imperiousness as well as its ability to radically alter the lives of people. I will seek to deconstruct truths and dogmatic certainties rather than adding to the existing hierarchies of knowledge. I strive to be true to the complexities of the South African transformative society, rather than giving over generalised or simplified accounts. Further, as mentioned I will not presume to render any answers or solutions. I engage in reflections, contemplations and thoughts as a beginning or opening-up rather than as closure or solution.

1.6 Chapter Overview

This dissertation consists of six chapters. After this introductory chapter, I proceed in chapter two to sketch the background against which the contemplation takes place. As mentioned, the discussion on the background serves to illustrate the reality of a masculine symbolic sphere. The masculine

²⁹ *Ibid.*

³⁰ See section 3.5 below.

³¹ See sections 4.2 and 4.3 below.

symbolic order is demonstrated by relying on a feminist reading by Louise du Toit of the Truth and Reconciliation Hearings. I also equate the South African symbolic with the dominant Western masculine symbolic order. The background not only provides a concrete example of the marginalisation of South African women, but also serves to explain women's marginalisation in general.

In chapter three I explain the context within which the contemplation takes place. In order to illustrate the context I identify three themes within post-apartheid jurisprudence. The first is Transformative Constitutionalism where I discuss Karl Klare's well-known article titled "Transformative Constitutionalism and Legal Culture".³² I also refer to some scholarly engagements with the notion of transformative constitutionalism. The second theme is Reparation and Social Transformation where some direct and political engagements with the issues of social justice and reparation will be explored. I rely on Tsepo Madlingozi's critique of the processes of reconciliation to take social justice into account and render some general thoughts on transformation by, amongst others, Achille Mbembe.³³ The third theme is The Aesthetic Turn and Critique which includes a general discussion on the aesthetic turn in post-apartheid jurisprudence as described by Wessel Le Roux as well as an explanation of the significance of postmodern theory for South African legal thought by Patrick Lenta.³⁴ From there I move on to discuss monumental and memorial constitutionalism as formulated by Lourens du Plessis, as well as attempts by Karin van Marle to deepen and broaden these notions as examples of the aesthetic turn.³⁵ Chapter five's discussion on the notion of Refusal as it is found in post-apartheid jurisprudential thought may be

³² Klare "Transformative Constitutionalism and Legal Culture" *SAJHR* 14 1998 146.

³³ Madlingozi "Good Victim, Bad victim: Apartheid's Beneficiaries, Victims and the Struggle for Social Justice" in Le Roux & van Marle (eds) *Law, Memory and the Legacy of Apartheid* 2007 107, Mbembe "Passages to Freedom: The Politics of Racial Reconciliation in South Africa" *Public Culture* 2008 5.

³⁴ Le Roux *TSAR* 2006 101. Lenta "Just Gaming? The Case for Postmodernism in South African Legal Theory" *SAJHR* 2001 173 at 206-208.

³⁵ Du Plessis "The South African Constitution as Memory and Promise" *Stell LR* 2000 385, Van Marle "The Spectacle of Post-Apartheid Constitutionalism" *Griffith Law Review* 2007 411, Van Marle "Lives of Action, Thinking and Revolt: A Feminist Call for Politics and Becoming in Post-Apartheid South Africa" in van Marle (ed) *Post-Apartheid Fragments-Law, Politics and Critique* 2007 34.

read together with chapter three as an illustration of the context of the research.³⁶ In the concluding part of chapter three I discuss post-apartheid jurisprudence more generally in order to situate the contemplation for a feminist jurisprudence.

In chapter four I discuss ethical feminism as the main theoretical point of departure. As mentioned, ethical feminism entails the exploration of how the feminine suffers within a masculine symbolic and of how it may be interpreted to serve as a locus for change. In the first part of chapter four, postmodern feminism and aspects of deconstruction will be discussed as an introduction to ethical feminism. Thereafter, I discuss Drucilla Cornell's original formulation of ethical feminism and move on to draw attention to some of her main arguments.³⁷ In the concluding part of chapter four I consider ethical feminism's significance for the South African environment and jurisprudential context.

In chapter five I attempt an exercise in using the feminine metaphorically. Directed by ethical feminism I reflect on some narratives and myths in order to further contemplate a feminist jurisprudence. I engage with the notion of refusal in interpreting the feminine from where I move on to discuss the theme of Refusal as it is formulated within post-apartheid jurisprudence.³⁸ Some of the narratives that are explored include the story of Notrose Konile, a mother who testified before the South African Truth and Reconciliation Commission as well as the story of Phila Ndwande that inspired an artwork that is included in the constitutional court's art collection. The exploration also includes re-readings of the Greek myths of Ariadne and Penelope and further invokes characters in Lindsey Collen's *The Rape of Sita*. I also call upon William Shakespeare's Ophelia in the exploration of narratives.

I conclude in chapter six. Chapter six entails a summary of the contemplation. I discuss the important considerations discovered in the previous five chapters and

³⁶ Section 5.2 below.

³⁷ Cornell *CNLLR* 1990 644.

³⁸ Van Marle (ed) 2007.

trace the vision revealed in the reflections on a post-apartheid feminist jurisprudence.

Chapter 2

The Symbolic Background

2.1 Introduction

In this chapter I illustrate the background for the contemplation of a feminist jurisprudence. My main contention is that the South African symbolic order is primarily a hegemonic cultural order sanctioned by male ideologies and concerns, in other words, a masculine symbolic order. This cultural order not only includes language as its basic social institution, but refers to all cultural practices. This, of course, includes law, legal reasoning and legal discourse.

In order to indicate a masculine South African symbolic order, I rely on an argument by Louise du Toit in her feminist analysis of the processes of reconciliation.³⁹ I firstly equate the South African symbolic order with the dominant Western symbolic order. Thereafter, I draw attention to Du Toit's exploration of rape and the politics of reconciliation. Although Du Toit's philosophical analysis focuses on the phenomenon of rape, her argument also sheds light on the broader aspect of women's subjectivity and selfhood within a masculine symbolic order. Du Toit's analysis may be seen as a concrete example of the marginalisation of women. I draw on her work to identify a masculine cultural order that contributes to the effective marginalisation of women.

2.2 Harms to Women and the Dominant Western Symbolic

Within what is called "the feminine turn of twentieth century European philosophy", the dominant Western symbolic order is identified as masculine and patriarchal.⁴⁰ This order is described as a system that dichotomises female sexuality and agency.⁴¹ It is also identified as an order of gender hierarchy where

³⁹ Du Toit 2009 9-32.

⁴⁰ *Idem* 3-7.

⁴¹ *Ibid.*

the feminine is excluded and therefore subordinate and other.⁴² The exclusion of the feminine from the Western symbolic results, *inter alia*, in the feminine's invisibility.⁴³ This renders harms to women unseen and keeps them in a marginalised position.⁴⁴

It is important to note that the marginalisation of women as well as harms committed against women, such as rape and other forms of sexual violence, are located by feminist sources as the product of a one-sided or masculine symbolic order.⁴⁵ Therefore, in order to address the marginalisation of women, the larger cultural order should be addressed.⁴⁶ Questions on the marginalisation of women automatically render questions of women's subjectivity and selfhood within a masculine symbolic. It is important to mention that I will elaborate on and explain this line of thinking more fully in the fourth chapter of this dissertation.⁴⁷ At this stage, in order to illustrate the background, it should suffice to describe the Western symbolic as a gender specific order, where the privileging of the masculine result in the effective marginalisation of women.

South Africa's longstanding history of interaction with the West, its predominantly Western legal system, its place in the global economy and the historical

⁴² *Idem* 5.

⁴³ *Idem* 3 & 220. Du Toit explains that the political fate of women, conceived in its broadest sense, can be meaningfully distinguished, but not meaningfully separated from the fate of "the feminine" or "the female" within the dominant Western masculine symbolic order.

⁴⁴ *Ibid.* Philosophers and theorists that have engaged with this line of thought include Jacques Lacan, Jacques Derrida, Luce Irigaray, Julia Kristeva and Hélène Cixous. See for example Irigaray *Speculum of the Other Woman* 1985, Kristeva *Desire in Language* 1980, Lacan *Ecrits* 1966, Derrida *Writing and Difference* 1967.

⁴⁵ *Ibid.*

⁴⁶ See in general feminist sources such as Pateman *The Sexual Contract* 1988 and Irigaray *The Sex Which is Not One* 1985.

⁴⁷ See section 4.3.1 and section 4.3.2 below. In chapter four I discuss Drucilla Cornell's formulation of ethical feminism. Cornell uses the deconstructive theories of Jacques Derrida as well as the psychoanalytical theories of Jacques Lacan in order to formulate an interpretation of the feminine. Derrida described the phallogocentric and logocentric characteristics of Western reason. These characteristics results in feminine invisibility. See in general Derrida *Of Grammatology* 1967, *Speech and Phenomena* 1967. With the insights of Derrida, Cornell highlights the way in which the feminine suffers within masculine discourse and the dominant masculine symbolic. See Cornell "The Doubly-Prized World: Myth, allegory and the Feminine" *CNLLR* 1990 644.

collaboration between African and Western social systems indicate that the equation of the masculine Western symbolic order with that of the South African symbolic order is not only appropriate but necessary.⁴⁸ Moreover, Du Toit explains that the argument is well taken from various feminist sources that the feminine and women occupy a subordinate position within traditional Western metaphysics of which currently dominant liberal political theories is a consequence.⁴⁹ This includes those theories underlying South Africa's progressive constitution.⁵⁰ She aptly notes that although Western metaphysics are evidently Western in origin, "the economic and military dominion of the West has ensured that virtually no spot on earth remains fully outside the orbit of, and thus untouched by, the symbolic orders, 'meaningful universes' and master narratives of western modernity".⁵¹ Therefore, the western symbolic, as the currently globally dominant cultural order, leaves no single so called "non-western" culture intact.⁵²

2.3 Rape and the Politics of Reconciliation

In her analysis of the philosophical meaning of rape, Du Toit explores the South African political transition and the concomitant discourses of reconciliation and forgiveness.⁵³ She explores these discourses from the perspective of women, especially focussing on political or struggle rape victims. This includes women that were raped by apartheid security forces during interrogation as well as women raped by professed struggle soldiers. I subjectively highlight, in the

⁴⁸ Du Toit 2009 4.

⁴⁹ *Idem* 220.

⁵⁰ The Constitution of South Africa, 1996. The South African constitution that has the familiar features of a liberal democracy also contains a more substantive vision of democratic inclusion, participation and accountability. It envisions the redistribution of the country's resources and benefits as well as the reconstruction of our society along egalitarian lines.

⁵¹ *Ibid.* A major contingent of Australian feminists has come to the same insight. See for example Pateman & Gross (eds) *Feminist Challenges: Social and Political Theory* 1987. Western modernity is characterised by its persistence on the masculine specific as universal.

⁵² Du Toit 2009 4. Du Toit mentions that the feminist critiques of the colonial era illustrated that dominant African symbolic frames collaborated with Western ones, at least insofar as both were patriarchal and one-sidedly masculine and both possibly became more so as a result of their interaction.

⁵³ Du Toit 2009 5.

discussion that follows below, some of Du Toit's arguments as it informs the existence of a South African masculine symbolic.

The new democratic South Africa was born in 1994 after extended negotiations, mainly between the African National Congress and the National Party. The Truth and Reconciliation Commission (hereafter, the TRC) was established by the Promotion of National Unity and Reconciliation Act as part of the political settlement that was reached.⁵⁴ The TRC was given the task of dealing with the issues of transition, reconciliation and forgiveness. The TRC's assignment included addressing the trauma of the past, repairing trust and restoring humanity, building a moral basis and new values for the South African society and legitimising the new dispensation.⁵⁵ The Truth and Reconciliation hearings were established as part of the mandate of the TRC to get as complete a picture as possible of the causes, extent and nature of politically motivated gross violations of human rights.⁵⁶

Du Toit argues that the TRC established or contributed to the establishment of a patriarchal and masculine symbolic order.⁵⁷ In her reading, the TRC entrenched a single-sex model of politics in which masculine agency and victimhood pose as the universal.⁵⁸ In this the TRC reiterated and imitated the strategy of the larger Western symbolic order to dichotomise female sexuality and agency.⁵⁹

I detect from Du Toit's reading the following main reasons for the TRC's establishment of a masculine symbolic order: Firstly, the TRC did not take women seriously as first-order victims.⁶⁰ Secondly, the TRC repressed the issue

⁵⁴ Act 34 of 1995.

⁵⁵ Du Toit 2009 9.

⁵⁶ Acts of torture, killing, abduction and severe ill-treatment qualified as gross human rights violations. See Chapter 1, Definition 1(ix) of the Act.

⁵⁷ Du Toit 2009 12.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Idem* 11.

of rape in its dealings with struggle rape victims.⁶¹ Thirdly and importantly, historically and traditionally within the South African context, women have been excluded from definitions of the political through highly patriarchal cultures and social institutions.⁶² The TRC failed to conceive the possibility of the need for political reconciliation between the sexes or for political transformation and transition on the level of sexual difference, sexual politics and sexual oppression.⁶³

Another reason determined is the failure of the TRC to recognise rape as a political instrument.⁶⁴ Du Toit contends that rape, locating it within a masculine symbolic, functions as a way of grounding and maintaining the political space as masculine.⁶⁵ Struggle rape victims were never asked to forgive rape as an attempt to erase female sexual difference.⁶⁶ This connects with the third reason mentioned above, that sexual difference was not conceived of as a political issue. Lastly, the TRC modelled victimhood and political agency on masculine presuppositions by failing to recognise the masculine political context within which the hearings took place.⁶⁷

In discussing women as first-order victims, Du Toit explains, that women were given a prominent place in the process and in the performance of public

⁶¹ *Ibid.* It is mentioned above that struggle rape victims refer to women that were raped by apartheid security forces in the course of interrogation as well as women that were rape by so-called struggle soldiers.

⁶² *Idem* 20.

⁶³ *Ibid.*

⁶⁴ *Idem* 9.

⁶⁵ *Ibid.* Rape and sexual violence is seen as a way of securing and maintaining the social and political sphere as a masculine space as well as being seen as the result of a society that denigrates women. See for example Radford and Stanko "Violence Against Women and Children: The Contradictions of Crime Control Under Patriarchy" in Hester, Kelly & Radford (eds) *Women, Violence and Male Power: Feminism, Activism, Research and Practice* 1996 65 80.

⁶⁶ *Idem* 11.

⁶⁷ *Idem* 12 & 20. Du Toit explains that the nature of the harm inflicted and violation of rape is not and has not been obvious. This is because of the fact that symbolic orders dominated or heavily influenced by the history of Western ideas have a blind spot when it comes to acknowledging rape as a political and sex-specific crime.

forgiveness.⁶⁸ Hundreds of women publically forgave on behalf of others.⁶⁹ The typical scenario during the hearings was that women were asked to forgive gross human rights violations perpetrated against their male family members, usually their husbands, brothers, fathers and sons.⁷⁰ They were thus asked to forgive on behalf of those who were recognisable as political agents on both sides of the struggle.⁷¹ Women were however almost never asked to forgive on behalf of themselves.⁷² This leads Du Toit to declare that women were not taken seriously as first-order victims.

Du Toit explains further that during 1996 when the hearings was well underway, and when it became clear that women were doing most of the public forgiving on behalf of others who were framed as the “real” victims of apartheid, the Centre for Applied Legal Studies at the University of Witwatersrand made a submission to the TRC.⁷³ The Centre perceived a lack of sensitivity when it came to gender issues.⁷⁴ The TRC’s response to the submission was the establishment of the Special Women’s Hearings or Gender Hearings.⁷⁵ These hearings were conducted separately from the other hearings and were also separately reported on.⁷⁶ They were grouped together with the special hearings of children and military conscripts.⁷⁷

Du Toit contends that by making women into a special case and by dealing with their victimhood on the side, the TRC avoided the issue of the masculinity of the political sphere and also avoided the instances of rape.⁷⁸ These issues were contained outside of the main processes of reconciliation and further served to

⁶⁸ *Idem* 11.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Idem* 12.

⁷⁴ *Ibid.*

⁷⁵ *Idem* 13.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

affirm the marginality of women.⁷⁹ This leads Du Toit to argue that rape was overshadowed by other forms of oppression and violation where men were the vast majority of victims.⁸⁰ The suppression of the issue of rape took place when the official version of the liberation struggle was forged during the TRC hearings as well as in subsequent report writing.⁸¹ Du Toit states:

Framing the struggle in terms of men's struggles, leaving women on the roadside of history, the TRC contributed to the disappearance of rape and women's particularities – including women's history, and their role in the liberation struggle – from the political and public consciousness and agendas after 1994.⁸²

Du Toit mentions that during the struggle the rape of women were politically justified. Rape was used as a weapon of terror, an instrument of torture and even as reward for soldiery acts.⁸³ Women's sexuality was thus activated through rapist torture and used to strip away their political identity and dignity.⁸⁴ Du Toit explains how there were deliberate attempts to shame women morally and sexually as well as attempts to tap into their sense of responsibility for dependent others.⁸⁵ In many cases women's bond with their children was exploited to expose their sexual identity as vulnerable.⁸⁶ On both sides of the struggle certain women were reduced to unpaid prostitution which created a "license" for sexual

⁷⁹ *Ibid.* Du Toit further asserts that the marginality of women in the processes of reconciliation should have been seen as a structural necessity for the process of masculine reconciliation. She contends that it remains a superficial gesture to ask whether women are included or excluded in a particular symbolic order or paradigm. Women or the feminine serves to guarantee or uphold the borders, boundaries and logic of a symbolic order or paradigm. With reference to Lyotard (Lyotard "One of the Things at Stake in Women's Struggles" in Benjamin (ed) *The Lyotard Reader* 1989 114-115), Du Toit explains that the feminine is at the very heart or centre of the Western political paradigm. The feminine constitutes its borders. It constitutes the limits of the rational, thinkable and political. Although women in this paradigm are endowed with activity, in the sense that the feminine is the condition for the existence of the paradigm, the feminine is still repressed and silenced without a voice of her own.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Idem* 17.

⁸³ *Idem* 16.

⁸⁴ *Idem* 19.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

abuse by the police, interrogators and soldiers.⁸⁷ Du Toit mentions that in the African National Congress camps abroad women comrades were raped and used as concubines.⁸⁸ Their role in the struggle was therefore reduced to a sexual function. Du Toit identifies a paradox at the heart of the struggle: In terms of the struggle, women were portrayed as the ultimate reason for it whilst at the same time being fundamentally foreign to it in the sense that they were marginal and exploited.⁸⁹ Women were therefore associated with what essentially lies outside reality, politics and war, but also associated with that which is being fought over, namely, land, home, family and humane existence.⁹⁰

Further, Du Toit mentions Antjie Krog as support for her feminist readings of the TRC.⁹¹ It becomes clear from Krog's reports on the Special Women's Hearings that one of the most common ways in which women militants were "broken" in jail, was by communicating to them that "real" women should be kept out of politics and should rather stay home to see to the responsibilities of looking after their families.⁹² The message relayed was that responsible and proper women are apolitical, purely private creatures whom do not have an autonomous political identity, but merely a supportive one.⁹³ They therefore cannot be women in the sense of political agency or sexual specificity. Women, who attempted to be both, were sexually exploited. By entering into the political sphere, which is masculine territory, some women silently agreed to have their sexuality made into a publicly available commodity in the service of the struggle.⁹⁴ Whether women were imprisoned in freedom fighter camps or incarcerated in apartheid prisons, they were likely, on Krog's reports, to be notified that their presence there meant that they had made the choice to make their sexuality available.⁹⁵ In this way the

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Idem* 16.

⁹¹ Krog *Country of my Skull* 1998 as cited by Du Toit.

⁹² Du Toit 2009 18-19.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

feminine or female sexuality was put up against political agency and the simultaneous incorporation of both was made logically impossible.⁹⁶

Du Toit describes how women as a group experienced great difficulty during the hearings to account for their political role as well as their sex-specific suffering.⁹⁷ She attributes this to the difficulty of explaining their sex-specific suffering in a language that would be understood in the context of the TRC which perpetuated a masculine understanding of the political.⁹⁸ Women were expected to translate their oppression into neutral terms, whilst these terms were in actuality masculine universal terms.⁹⁹ Therefore, the terms and conditions the TRC adopted, were already strongly biased against the stories of women.¹⁰⁰ For Du Toit, this resulted in the effective silencing of women's voices.¹⁰¹ Du Toit contends that it is therefore not surprising that many women chose to remain silent about their rape when it came to the TRC.¹⁰² Several women simply and profoundly testified that they were raped during the struggle, but could not testify about this before the TRC.¹⁰³ Du Toit purports that these women chose to draw attention to the multiple ways in which they were being silenced rather than being silenced again by exposing their suffering and having it not heard in the constraints of the context.¹⁰⁴

As mentioned above, the TRC had the mandate to get a complete a picture as possible of the nature, causes and extent of politically motivated gross human rights violations. These violations included acts of torture, killing, abduction and

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Idem* 20.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

severe ill-treatment.¹⁰⁵ The list of gross human rights violations did not include rape.

Du Toit argues that rape and sexual violence that are currently committed against women in South Africa should be understood against the background of the TRC processes that repressed the issue of rape.¹⁰⁶ Du Toit mentions that South African rape figures are contested, but that there still remains a wide consensus over the fact that South Africa either has the highest or one of the highest rates of rape *per capita* in the world.¹⁰⁷ There are an estimated 1.7 million rapes per year, whilst 41% of victims are under the age of 12.¹⁰⁸

The TRC attempted to establish closure on a violent and illegitimate past. One of the results of this closure is the existence of a vacuum when it comes to gross human rights violations at the moment.¹⁰⁹ At present the rape of women and children is seen as private matters against the backdrop of a perceived morally sanitised and legitimised political sphere.¹¹⁰ Violence against women and children has therefore been successfully domesticated or “privatised”.¹¹¹ It is removed from the political sphere and political attention.¹¹² Du Toit illustrates another paradox, this time at the heart of the political transition: During the previous dispensation, rape was justified, to a large extent, by the legitimacy of the struggle.¹¹³ The very same acts of rape can presently no longer be viewed as political actions, as this would undermine the new dispensation’s claim to

¹⁰⁵ Chapter 1, Definition 1(ix) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

¹⁰⁶ Du Toit 2009 11.

¹⁰⁷ *Idem* 2.

¹⁰⁸ *Ibid.* Moreover, rape figures have remained fairly constant from the political transition to the present, meaning that democratisation and a bill of rights that ensures gender equality has had little or no impact on the rape of women and children in South Africa.

¹⁰⁹ *Idem* 16.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

legitimacy. In this manner rape comes to be treated as a purely personal criminal action.¹¹⁴

In Du Toit's reading, the failure of the TRC to do justice to women rape victims as well as its failure to take women seriously as first-order victims was not a simple oversight, but is rather constitutive of the patriarchal symbolic order dominating in South Africa.¹¹⁵ By not creating the space for a truly sexually differentiated politics and symbolic order, the TRC inadvertently reiterated and imitated the strategy of the larger Western symbolic.¹¹⁶ The TRC failed to forge a vocabulary and space within which to address the fundamental and structural marginalisation of women in politics.¹¹⁷ Thus, the failure of the TRC to recognise the masculine context within which the processes of reconciliation took place means that the new dispensation was built, as it was before, on masculine presumptions and ideologies. The processes of reconciliation seen as an integral historical, political and social South African turning point, resulted, *inter alia*, in the continuance of a patriarchal political and masculine symbolic.

2.4 Conclusion

In light of the discussion above, I submit that the indication of a masculine symbolic order that contributes to the marginalisation of women may be argued in the following ways: Firstly, the equation of the dominant Western symbolic with the South African symbolic order serves as one way.¹¹⁸ The arguments made by Du Toit in her discussion of women as first-order victims, political rape victims and the failure of the TRC to realise a need for reconciliation between the sexes, serve as another way.¹¹⁹ Finally, I submit, that if rape is the product of a one-sided or masculine symbolic order, as argued by feminists, the South African

¹¹⁴ *Ibid.*

¹¹⁵ *Idem* 6.

¹¹⁶ *Ibid.*

¹¹⁷ *Idem* 12.

¹¹⁸ See section 2.2 above.

¹¹⁹ See section 2.3 above.

rape statistics subsequently serve as yet another way of demonstrating the reality of a masculine symbolic order.¹²⁰

It is against this background that I will contemplate and reflect on a post-apartheid feminist jurisprudence. My reflections in the remaining chapters will therefore constantly attempt to be mindful of masculine symbolic dominance as I sketched it in this chapter. I mentioned in the introduction of this dissertation that the research takes place within the context of post-apartheid jurisprudential thought. It is from here that I move on, in the chapter that follows below, to explore post-apartheid jurisprudence.

¹²⁰ See section 2.2 as well as section 2.3. above.

Chapter 3

The Post-Apartheid Jurisprudential Context

3.1 Introduction

In attempting to reflect on the place and nature of law in post-apartheid South Africa, many legal scholars have been and are committed to formulating and searching for a post-apartheid jurisprudence. These engagements have attempted to rethink, re-write and re-imagine established ideas around and related to law and politics.

In order to illustrate the context within which the contemplation for a feminist jurisprudence takes place, I identify, as mentioned, three themes within post-apartheid jurisprudence: Transformative Constitutionalism, Reparation and Transformation and The Aesthetic Turn and Critique. These themes are in no way representative, but are nevertheless examples of the search for a post-apartheid jurisprudence. They may be seen as part of the larger and ongoing debate concerning the place and nature of law in South Africa and should be looked upon as being in conversation with each other. Apart from the three themes identified in this chapter, the themes of Truth and Reconciliation and Memory and Legal Interpretation could also have easily been identified in order to sketch the post-apartheid jurisprudential context. Numerous scholars have written about the role of memory in our new constitutional dispensation¹²¹ and writings on the Truth and Reconciliation Commission have become an “academic mini-industry”.¹²² Tshepo Madlingozi’s article discussed in the second part of this chapter will touch on the theme of Truth and Reconciliation, whilst Lourens du

¹²¹ Scholars that have written on memory and legal interpretation include Johan Snyman, Karin van Marle, Lourens du Plessis, Wessel Le Roux and Michael Bishop. See for example the contributions in Part 1 of Le Roux & van Marle (eds) *Law, Memory and the Legacy of Apartheid: Ten years after AZAPO v President of South Africa* 2007.

¹²² Madlingozi mentions that in 2001 Savage *et al.* produced a bibliography of writings on the TRC that ran to 113 pages. See Savage *et al.* “Truth Commissions and Transitional Justice: A Select Bibliography of the South African Truth and Reconciliation Commission Debate” *Journal of Law and Religion* 2001 69 as cited by Madlingozi in Le Roux & van Marle (eds) 2007 107.

Plessis' discussion on monumental and memorial constitutionalism, in the third part, may serve as an example of dealing with Memory and Legal Interpretation. Another theme that I could have outlined is the theme of Refusal.¹²³ I will however, in the fifth chapter of this dissertation, discuss and elaborate on this notion more fully.¹²⁴ My aim in the fifth chapter is to align narratives and myths with the notion of Refusal that may be found in post-apartheid jurisprudential thought. The discussion on the notion of Refusal as it is used within post-apartheid jurisprudence may therefore be read together with this chapter as a further illustration of the context within which the research takes place.

After discussing the three themes identified above, I move on, in the concluding part of this chapter, to discuss the post-apartheid jurisprudential context more generally. My intention is to illustrate some tendencies in order to situate the contemplation for a feminist jurisprudence. In the concluding part of this chapter, I argue that post-apartheid jurisprudence has not been sufficient in challenging the masculine symbolic order.

3.2 Transformative Constitutionalism

The term “transformative constitutionalism” was introduced by Karl Klare in his now renowned article titled: “Transformative Constitutionalism and Legal Culture”.¹²⁵ Ever since the first mentioning of the term 12 years ago, South African legal scholars have interpreted and applied the notion in order to attempt to explain the role of law and the new constitution in our transformative society.¹²⁶ Klare's article is probably the most frequently referred to article in the field of constitutional law and references to

¹²³ See van Marle (ed) 2009. Scholars that have engaged with this notion include Henk Botha, Jaco Barnard-Naudé, Pierre de Vos, Drucilla Cornell, André van der Walt, Karin van Marle and Patrick Hanafin.

¹²⁴ See section 5.2 below.

¹²⁵ Klare *SAJHR* 1998 146-188.

¹²⁶ The Constitution of the Republic of South Africa, 1996.

the term “transformative constitutionalism” are abundant.¹²⁷ In some instances the term is used as a prelude to analysing a particular field of law or when adopting a particular line of theoretical inquiry, others simply refer to the term in order to support the proposition that the constitution of South Africa should be read as a transformative constitution.¹²⁸

Marius Pieterse states that the term is usually understood as a social-democratic concept.¹²⁹ This refers to the attainment of substantive equality, the realisation of social justice, the infusion of the private sphere with human rights standards and the cultivation of a culture of justification in public law interactions.¹³⁰ He also notes however, that the holding forth of a uni-dimensional theory of transformative constitutionalism by insisting that it conforms to a particular and preconceived political model and by rigidly dictating that it should achieve certain outcomes (as well as dictating what those outcomes should be and how they should be accomplished) runs the risk of limiting the potential of transformative constitutionalism.¹³¹

In what follows, I revisit “Transformative Constitutionalism and Legal Culture”. As mentioned, the references to and discussions on Klare’s essay are legion. I therefore do not propose to analyse the full impact of Klare’s essay on South African legal theory. I merely purport to draw attention to his vision whilst along the way referring to some scholarly engagements with the notion of transformative constitutionalism.

¹²⁷ Van Marle “Transformative Constitutionalism as/and Critique” *Stell LR* 2009 286-301 at 286. See for example: Moseneke “Fourth Bram Fischer Memorial Lecture: Transformative Adjudication” 2002 *SAJHR* 309, Botha “Metaphoric Reasoning and Transformative Constitutionalism (Part 1)” 2002 *TSAR* 612, Froneman “Legal Reasoning and Legal Culture: Our ‘Vision’ of Law” 2005 *Stell LR* 3, Pieterse “What do we mean when we talk about Transformative Constitutionalism?” 2005 *SAPL* 155, Van der Walt “Transformative Constitutionalism and the Development of South African Property Law (Part 2)” 2006 *TSAR* 1, Liebenberg “Needs, Rights and Transformation: Adjudicating Social Rights” 2006 *Stell LR* 5, De Vos “Substantive Equality after *Grootboom*: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence 2001 *AJ* 52.

¹²⁸ Roux “Transformative Constitutionalism and the Best Interpretation of the South African Constitution: A Distinction without Difference?” 2009 *Stell LR* 258-285 at 258.

¹²⁹ Pieterse “What Do We Mean When We Talk About Transformative Constitutionalism” *SAPR/PL* 2005 155-166 at 156-157.

¹³⁰ *Ibid.*

¹³¹ *Idem* 157.

3.2.1 A Post-Liberal Constitution

In his essay, Klare focuses on constitutional adjudication in South Africa. With the adoption of a new constitution that includes a justifiable bill of rights, the question that arises for Klare is whether transformative constitutionalism is a viable project for South African lawyers and judges.¹³² By transformative constitutionalism Klare means:

[A] long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.¹³³

For Klare, transformative constitutionalism entails an enterprise of inducing large-scale social change through non-violent political processes grounded in law.¹³⁴ This transformation should be vast enough to be captured by the phrase “reform”, but something just short of a “revolution”.¹³⁵ Klare envisages a highly egalitarian, caring, multicultural community that is governed through participatory and democratic processes in not only the polity, but also in what is called the “private sphere”.¹³⁶ It is thus the collective project of legally driven social change that Klare calls transformative constitutionalism.¹³⁷ The question underlying Klare's essay is whether it is at all possible to achieve dramatic social change through law-grounded processes.¹³⁸ He attempts to explore some pieces of the puzzle and from here sketches the case for a post-liberal reading of the constitution.

¹³² Klare *SAJHR* 1998 150.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.* With reference to the preamble of the constitution it would seem as if South African constitutionalism attempts to transform our society from one deeply divided by the legacy of a racist and unequal past to or into one based on democracy, social justice, freedom and equality. See Pieterse *SAPR/PL* 2005 158.

¹³⁷ Roux *Stell LR* 2009 260.

¹³⁸ Klare *SAJHR* 1998 150.

A post-liberal constitution is one that, according to Klare, is not only open to but, committed to large-scale, egalitarian social transformation.¹³⁹ Klare purports that the South African constitution is post-liberal because of the fact that it does not only have aspirations of equality, redistribution and social security, but it also strives to realise multiculturalism, pays close attention to gender and sexual identity, has an emphasis on participation and governmental transparency, recognises the importance of environmentalism and extends democratic ideals into the private sphere.¹⁴⁰

Klare further submits that the South African constitution intends an unmistakable departure from liberalism (as contemplated in classic liberal documents such as the constitution of the United States).¹⁴¹ It rather strives towards an “empowered model of democracy”.¹⁴² In support of a post-liberal reading, Klare highlights that the South African constitution, in sharp contrast to the classical liberal documents, is “*social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural and self-conscious* about its historical setting and transformative role and mission”.¹⁴³ The constitution, according to Klare, embraces a vision of collective self-determination parallel to its strong vision of individual self-determination.¹⁴⁴ Klare quotes from constitutional court judgments and discusses essential features of the South African constitution so as to further state the case for a post-liberal reading of the constitution.¹⁴⁵ These essential features include social rights and a substantive conception of equality.¹⁴⁶ Klare mentions that the constitution recognises that political freedom and socio-economic justice are inextricably intertwined and intends to achieve a kind of society in which people actually have the social resources they need to

¹³⁹ *Idem* 151.

¹⁴⁰ *Ibid.*

¹⁴¹ *Idem* 152.

¹⁴² *Ibid.*

¹⁴³ *Idem* 153 (Emphasis on the original text).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Inter alia: State v Makwanyane* 1995 (6) BCLR 665 (CC) at par 262 and *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at par 126.

¹⁴⁶ Klare *SAJHR* 1998 153.

meaningfully exercise their political rights.¹⁴⁷ The preamble announces that the Republic of South Africa is founded on *achieving* equality and Klare brings up the constitution's overriding commitment to a substantive and redistributive and not just a formal conception of equality.¹⁴⁸

It has been mentioned that in order to achieve transformative constitutionalism a very particular conception of the right to equality is needed.¹⁴⁹ Firstly, a rejection of the traditional liberal conception of equality based on the notion of sameness and similar treatment is required.¹⁵⁰ The liberal notion that all humans are born free and equal and that discrimination is situated in the failure of the government to treat all humans equally becomes untenable within the paradigm of transformative constitutionalism.¹⁵¹ Pierre de Vos notes that the constitutional court has accepted this much.¹⁵² The court has rather adopted a “contextual approach” to equality in which the actual impact of an alleged violation on the individual within and outside of different social relevant groups is examined.¹⁵³ This examination therefore includes considering the social, political and economic circumstances within which complainants find themselves.¹⁵⁴ De Vos contends however that this is not the full picture of the constitutional court's approach to equality. He mentions that it has been argued that the constitutional court has not fully embraced the transformative nature of the right to equality because it has insisted that at its core the equality guarantee protects the value of human dignity.¹⁵⁵ De Vos states:

If this should mean that the Court is less interested in evaluating the ongoing structural social and economic inequality in our society and the

¹⁴⁷ *Ibid.*

¹⁴⁸ *Idem* 153-154 (Emphasis on the original text).

¹⁴⁹ De Vos “Substantive Equality after *Grootboom*: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence” *AJ* 2001 59.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Idem* 61.

concomitant patterns of disadvantage and harm, and is rather more interested in focussing on the human dignity of the individual, the concept of human dignity as employed in equality jurisprudence could become a stumbling block in the project of transformative constitutionalism.¹⁵⁶

It is De Vos' contention therefore that equality jurisprudence that focuses mainly on individual human dignity could become an obstacle rather than a vehicle for transformation.¹⁵⁷ He argues that the constitutional court has often failed to recognise the specific social or economic context in which the action had to be judged.¹⁵⁸ It failed to acknowledge the negative impact on a complainant because it failed to take into account the social and economic situation in which the complainant had to operate, and that put the complainant in a disadvantaged position.¹⁵⁹ De Vos' concerns echoes those of Henk Botha.¹⁶⁰ Botha mentions that the constitutional court articulates its equality jurisprudence as premised on substantive equality and purports to be sensitive to context and past patterns of discrimination.¹⁶¹ Botha however contends that the emancipatory potential of the court's general approach is not always reflected in its judgments.¹⁶² The reasoning in some of the judgments strikes Botha as formalistic and uncritical of existing power relations.¹⁶³

In this regard Botha calls for a "complex equality" that requires a better understanding of the relation between the moral, political and material dimensions of equality.¹⁶⁴ This involves exploring the ways in which economic disadvantage, political invisibility and moral stigma intersect to constitute relations of domination, as well as the ways in which patterns of subordination

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ *Idem* 63.

¹⁵⁹ *Ibid.*

¹⁶⁰ Botha "Equality, Dignity and the Politics of Interpretation" in Le Roux & van Marle (eds) *Post-Apartheid Fragments: Law, Politics and Critique* 2007 148 at 148.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Idem* 170.

such as racism, sexism and poverty intersect.¹⁶⁵ Such an approach is needed in order to achieve the transformative constitutionalism that Klare envisages.

Another essential feature that Klare mentions is affirmative state duties.¹⁶⁶ This means that the Bill of Rights does more than place negative restraint on governmental interference with freedom - it also imposes positive or affirmative duties on state to combat poverty; promote social welfare; assist people in authentically exercising their constitutional rights and to facilitate and support individual self-realization.¹⁶⁷ Further essential features that Klare discuss are: the horizontal application of the constitution, participatory governance, multiculturalism and the constitution's historical self-consciousness.¹⁶⁸ Pieterse has mentioned that the historical self-consciousness of the constitution establishes a departure from the liberal depictions of constitutions as representing a view of the state and society that is fixed in time and preserved for future generations.¹⁶⁹ The South African constitution is rather forward and backward looking, historically self-conscious whilst simultaneously embodying an "as yet unrealised future ideal".¹⁷⁰ As De Vos states, the project of transformative constitutionalism rejects the fiction of the political community as founded at a magical moment that freezes its meaning forever, but rather embraces the constitution as a transformative document, one that requires continual reinvention in order to make sense of the world and country which we live in.¹⁷¹

Extending democratic ideals into the private sphere is central to the constitution.¹⁷² With regards to the constitution's vision of achieving substantive equality, Pieterse has mentioned that addressing imbalances in private power

¹⁶⁵ *Ibid.*

¹⁶⁶ Klare *SAJHR* 1998 153.

¹⁶⁷ *Idem* 154.

¹⁶⁸ *Idem* 155.

¹⁶⁹ Pieterse *SAPR/PL* 2005 157-158.

¹⁷⁰ *Ibid.*

¹⁷¹ De Vos *AJ* 2001 58-59.

¹⁷² Klare *SAJHR* 1998 155.

relations is integral to the project of transformative constitutionalism.¹⁷³ He explains how substantive inequality is rooted in private interrelations.¹⁷⁴ The consequences of racism through the wielding of private power have been as destructive as that occasioned by public structures.¹⁷⁵ Further, the patriarchal undertones of family or private relations have contributed tangibly and concretely to women's vulnerability to physical and sexual violence as well as their experience of economic and social dependency and hardship.¹⁷⁶ Pieterse therefore contends that the private sphere, traditionally sacrosanct from public interference, where oppression is often at its most pervasive, cannot be left unchallenged as this would reinforce socially structured patterns of domination and would undermine the creation of a substantively equal society.¹⁷⁷

South African constitutional transformation therefore does not only include the dismantling of the formal structures of apartheid, but also the targeting and eradication of public and private social structures that cause and reinforce inequality.¹⁷⁸ It further requires the redistribution of social capital along egalitarian lines, engagement with social vulnerability in all legislative, judicial and executive interaction and the empowerment of the poor and historically marginalised sectors of society through pro-active and context sensitive measures.¹⁷⁹

Klare, after his analysis of the constitution as post-liberal, submits that the evidence of the substantively post-liberal and transformative aspirations of the constitution strongly implies that the constitution "invites a new imagination and self-reflection about legal methods, analysis and reasoning consistent with its transformative goals".¹⁸⁰ New conceptions of judicial role and responsibility should therefore be contemplated and because of the fact that judicial mindset

¹⁷³ Pieterse *SAPR/PL* 2005 160-161.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *Idem* 159.

¹⁷⁹ *Ibid.*

¹⁸⁰ Klare *SAJHR* 1998 156.

and methodology are part of law, they must also be examined and revised in order to promote equality, a culture of democracy and transparent governance.¹⁸¹

According to Klare, drafters cannot have intended to dramatically alter constitutional foundations in order for them to be interpreted through the lens of classical legalist methods.¹⁸² The constitution has lofty ambitions and drafters cannot have assumed that it would be interpreted according to (and therefore constrained by) the intellectual instincts and habits of mind of lawyers trained and socialised during the apartheid era.¹⁸³ According to Klare, the constitution necessitates a transformative conception of adjudicative process and method.¹⁸⁴ The constitution thus requires a particular interpretive method consistent with its commitment to social transformation through law. This brings Klare to the second part of his argument: Constitutional adjudication, in the interest of transparency, should be more frank about its political character.¹⁸⁵

3.2.2 A Critical Interpretive Method

Klare states that the very idea of transformative adjudication seems out of place within liberal legalism.¹⁸⁶ Transformative adjudication here means the politically engaged and politically transparent method of constitutional interpretation.¹⁸⁷ The liberalist rule-of-law ideal requires judges to check their politics at the courthouse door as they are appointed neutrally to enforce laws that are set down by others and not to engage in politics.¹⁸⁸ Judges are supposed to provide legal interpretations of texts, which mean they should filter out their personal and subjective views or political values and ideological preconceptions.¹⁸⁹ In all traditional accounts, the rule-of-law ideal is based on a sharp distinction between

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Idem* 151.

¹⁸⁶ *Idem* 157.

¹⁸⁷ Roux *Stell LR* 2009 266.

¹⁸⁸ Klare *SAJHR* 1998 157.

¹⁸⁹ *Ibid.*

law and politics and a sharp role-differentiation between what judges do and what politicians do.¹⁹⁰ Klare reminds, however, that adjudication runs into the problems of interpretive fidelity and the indeterminacy of legal texts.¹⁹¹ Legal texts do not self-generate meanings, they must be interpreted and texts, particularly constitutions, are shot through with gaps, conflicting provisions, ambiguities and obscurities.¹⁹²

In the face of these gaps and ambiguities, Klare mentions that the only option available to a decision maker is to invoke sources of understanding and values that are external to the legal materials and texts.¹⁹³ A standard response to this argument will be that the external considerations that judges take into account should be values that are embraced by, contemplated in, or underlying the text.¹⁹⁴ The values should be legal and not personal or political.¹⁹⁵ Klare notes a remark by Justice Kriegler in *S v Makwanyane*: “the judicial process, especially in the field of constitutional adjudication, calls for value judgements in which extra-legal considerations may loom large”.¹⁹⁶ Further, Klare mentions that the breach of the norm of interpretive fidelity is an unsettling prospect for mainstream thinking about adjudication and that the liberal legalists’ attachment to the law/politics distinction does not allow for a strategic pursuit of political and moral projects.¹⁹⁷

The strategic pursuit for Klare is the project of transformative constitutionalism or, put differently, reading the constitution in a particular ideological way.¹⁹⁸ In

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Idem* 158.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.* 1995 (6) BCLR 665 (CC) at par 207.

¹⁹⁷ *Idem* 159. Here Klare also purports that the basic dilemma of liberal legalism is the problem of squaring interpretive difficulty with the norm of fidelity to and constraint by text.

¹⁹⁸ Roux *Stell LR* 2009 267. The sense of strategy is drawn from Duncan Kennedy’s work where judges are seen as political actors, strategising how best to write their ideological projects into law. See Kennedy “Strategizing Strategic Behavior in Legal Interpretation” 1996 *Utah Law Review* 785.

traditional legal theory professional practices, i.e. the professional legal role of a judge and the strategic pursuit of political and moral projects, are mutually exclusive.¹⁹⁹ Klare opts for a more critical approach that requires a softening of the bright line between law and politics or the professional and the strategic.²⁰⁰ This suggestion is consistent with the view that the substantive vision of law acknowledges the inevitability of interplay of law and politics.²⁰¹ Klare proposes an understanding of legal rules that dispose ideological stakes as products of the interaction between legal materials and the ideological projects of judges.²⁰² Klare quotes Duncan Kennedy:

The rule choices that emerge from the interaction should be understood neither as simply the implications of [legal] authority nor as the implications of the ideological projects, but as a compromise.²⁰³

Klare purports that the exclusions called for by the traditional rule-of-law ideal are simply impossible.²⁰⁴ A judge's political and personal values cannot be excluded from adjudication and interpretive processes, nor can the intercession of external values be restricted to "special" cases.²⁰⁵ No neutral decision procedures, in other words, procedures that do not involve interpretive work, are available to determine whether a given case is a "special" case.²⁰⁶ Judges' political and moral values play a routine, normal and ineradicable role in adjudication.²⁰⁷ Klare goes further and states that because of the fact that judges (as well as advocates, academics and parties who influence their thinking) make value-laden choices in the routine course of legal interpretation, they are responsible for the social and

¹⁹⁹ Klare *SAJHR* 1998 159.

²⁰⁰ *Ibid.* This approach may be associated with the methodology and political commitments of the Critical Legal Studies movement (CLS) in the United States. For a general introduction to CLS see Roederer & Moellendorf (eds) 2004 246-271.

²⁰¹ See Froneman "Legal Reasoning and Legal Culture: Our "Vision of Law" *Stell LR* 2005 1 at 4.

²⁰² Klare *SAJHR* 1998 159.

²⁰³ *Ibid.* Kennedy *Critique of Adjudication* 1997 2.

²⁰⁴ *Idem* 163.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

distributive consequences that result from their choices.²⁰⁸ Klare wants the legal community to be more candid with itself and the community at large about the politics of adjudication and to accept forthrightly the responsibility for constructing social order through adjudicative practices:

[...] there is nothing legal practitioners can do but acknowledge their political and moral responsibility in adjudication and share the secret with their publics in the interests of transparency [...] Such candor would empower publics to examine, discuss and criticize the now often hidden political and moral assumptions that steer adjudication.²⁰⁹

Within the context of transformative constitutionalism, Van der Walt contends that pretence of objectivity and neutrality will inevitably favour tradition and frustrate or limit transformation.²¹⁰ Van der Walt illustrates, by using anti-eviction laws, that law cannot be isolated from politics in more than a very superficial and incomplete manner.²¹¹ Referring to the forced removals under the apartheid government, Van der Walt makes the point that to pretend that forced removals were free of apartheid land politics is sophistry.²¹² The very political nature of forced removals explain and justify the overtly political nature of every eviction case during the post-apartheid constitutional era, regardless of whether it is adjudicated in terms of the common law or land-reform legislation of the constitution.²¹³ Further, section 26(3) of the constitution as well as anti-eviction land-reform laws make an explicitly political ruling with a clear political purpose, namely to overturn and reverse the legacy of the apartheid government's land

²⁰⁸ *Idem* 164.

²⁰⁹ *Ibid.*

²¹⁰ Van der Walt "Legal History, Legal Culture and Transformation in a Constitutional Democracy" *Fundamina* 2006 1 at 15-16.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.* See for instance *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) and *Joubert and Others v van Rensburg and Others* 2001 1 SA 753 (W).

politics.²¹⁴ The eviction cases show that judicial application and interpretation of the reform laws inescapably involve a choice between upholding or changing the existing legal tradition and either promoting or frustrating the goals of transformation and transformative constitutionalism.²¹⁵

Fictions of politically and morally neutral adjudication and of the impersonal rule of law may legitimise the status quo and obscure the possibility for the kind of social change that the constitution envisages.²¹⁶ In order to realise the full transformative potential of the constitution a particular interpretive method is required. This method entails politically engaged and politically transparent constitutional interpretation. Such interpretation is necessitated by a post-liberal reading of the constitution and should be similar in ethos to the essential features of the constitution.²¹⁷

Botha contends that the “neutral” dignity-based approach adopted by the constitutional court in its equality jurisprudence is based on the fear of judicial subjectivity.²¹⁸ Botha’s view is that so-called neutral methods of adjudication both over-estimates and under-estimates the politics of interpretation.²¹⁹ He calls for a more overtly political approach that will require judicial candour and willingness to explain the reasons for decisions as fully as possible.²²⁰ Such an approach openly acknowledges the ubiquity of power and is willing to confront the ways in which the discourses are themselves shaped by power relations.²²¹

²¹⁴ *Ibid.* Apartheid land law allowed evictions and forced removals that uprooted millions of black South Africans and left them socially, politically and economically marginalised. The anti-eviction provisions in section 26(3) of the constitution and the land-reform laws, Van der Walt illustrates, were promulgated with the explicit purpose of stopping and reversing this process by subjecting evictions to rigorous due-process controls and justification.

²¹⁵ *Ibid.*

²¹⁶ *Idem* 166.

²¹⁷ *Idem* 154-155. The essential features as identified by Klare and discussed above. See section 2.2.

²¹⁸ Botha in Le Roux and van Marle (eds) 2007 174.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*

Klare moves his discussion from the individual to the cultural or socio-psychological dimension. Belief in the law/politics distinction as well as neutral adjudication is sustained by legal culture. In the third part of his article, he discusses South African legal culture and its potential effect on substantive constitutional development.

3.2.3 Legal Culture

For the purposes of his discussion, Klare defines legal culture as “professional sensibilities, habits of mind, and intellectual reflexes”.²²² In other words, “what are the characteristic rhetorical strategies deployed by participants in a given legal setting?”, “what is their repertoire of recurring argumentative moves?”, “what counts as a persuasive legal argument?”, “what enduring political and ethical commitments influence professional discourse?” and “what inarticulate premises are culturally and historically ingrained in the professional discourse and outlook?”.²²³

Klare states that a defining characteristic of legal cultures is that its participants accept its intellectual sensibilities as normal.²²⁴ Participants therefore do not perceive the cultural specificity of their ideas about legal argument.²²⁵ Participants in legal culture are often unaware or only partially attentive to its power in shaping their ideas and reactions to legal problems.²²⁶ As Klare notes, human practices, including legal practice, are situated and therefore only occur in the context and through the medium of culturally available understandings and symbols.²²⁷ Our perceptions, thoughts and feelings are orientated by the collectively created structures of meaning and recognition that shape our imagination and beliefs.²²⁸ Meaning systems are contingent products of human

²²² Klare *SAJHR* 1998 166.

²²³ *Idem* 166-167.

²²⁴ *Idem* 167.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

action, but, in the absence of critique and self-reflection they may appear natural and fixed.²²⁹

The fact that participants are unaware of how legal culture shapes their professional beliefs and practices affects the substantial development of law.²³⁰ If cultural coding limits the types of questions lawyers ask and the types of arguments they deem persuasive, then it can surely limit the kind of answers legal culture can generate.²³¹ Because of the fact that legal culture has a powerful influence on interpretive practices, it also has an effect on adjudication and therefore the substantive development of law.²³² Klare finds it important to realise that:

Un-self-conscious and unreflective reliance on the culturally available tools and instincts handed down from earlier times may exercise a drag on constitutional interpretation. Weighing it down and limiting its ambition and achievements in democratic transformation.²³³

At the time of writing the article, Klare purported that South Africa particularly runs this risk.²³⁴ According to Klare, critical examination of the legal culture and its multifaceted influences in interpretive practices is a constitutional duty.²³⁵ He is of the opinion that South African lawyers are conservative, not politically, but rather in the sense that they have a strong faith in the precision, determinacy and the self-revealingness of words and texts.²³⁶ For Klare, legal interpretation in South Africa seems to be more highly structured, technician, literal and rule-bound than in the United States where legal culture is more policy orientated and

²²⁹ *Ibid.*

²³⁰ *Idem* 168.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ *Ibid.*

consequentialist.²³⁷ South African lawyers are more prepared to deduce specific conclusions from general and abstract premises than their US counterparts.²³⁸

Klare claims that policy argumentation is jurisprudentially more progressive because of the fact that it pushes on the law/politics boundary and invites reference to social realities outside of legal practise.²³⁹ He does not however purport to state that it is more progressive in the sense of political ideology.²⁴⁰

Klare observes the disconnection between the constitution's substantively progressive aspirations and the traditionalism of South African legal culture.²⁴¹

Klare purports that this should be a matter of both academic and normative concern.²⁴² The conventions of South African legal culture make it uncomfortable for lawyers to acknowledge their political discretion and power in adjudication.²⁴³

Klare purports that the faith in the constraining power of legal texts and the insistence on the law/politics boundary obscures the choices judges and advocates make in their interpretive work which in turn reduces the transparency of the legal process which thereby undermines its contribution to deepening democratic culture.²⁴⁴

For Klare the danger lies in the fact that jurisprudential conservatism may induce intellectual caution that discourages constitutional innovation and less generous

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Idem* 169.

²⁴⁰ *Ibid.*

²⁴¹ *Idem* 170.

²⁴² *Ibid.*

²⁴³ *Idem* 171.

²⁴⁴ *Ibid.* Van der Walt explains that in a legal tradition that conceives of the law as a science, the meaning systems established by traditionally accepted sources of law, methods of interpretation and styles of argumentation easily acquire a sense of universality, of being natural and fixed. Because of the hegemonic force of such a tradition new perspectives and alternative views or different ways of thinking are routinely rejected or excluded. Alternative and unconventional solutions become impossible to defend or promote. The cultural hegemony of a legal culture that is dominated by liberalist views of society and positivist views of law will inevitably exclude certain phenomena from being recognised or taken seriously as legal problems, just as it will exclude certain ways of reasoning and thinking as valid approaches. Van der Walt *Fundamina* 2006 18.

interpretations of the constitution.²⁴⁵ Klare argues that with the adoption of the new constitution, South Africans authorised a new, transformed legal culture.²⁴⁶ But, it is very hard to develop and elaborate a new legal culture with the tools and habits of mind of earlier times.²⁴⁷ It is Klare's opinion that South African judges should examine their discursive practices and ask whether the project of democratic transition does not afford them more scope for interpretive creativity and innovation so as to promote the democratic and egalitarian values enshrined in the constitution.²⁴⁸

Klare calls for critical and self-reflective constitutional interpretation. As he aptly states:

Future generations will judge the constitutional court by the contribution it makes to achieving equality, advancing social justice and deepening the culture of democracy, multiculturalism, and respect for human dignity. How tightly the Court squares its arguments with textbook canons and maxims will be far less important at the end of the day.²⁴⁹

Klare identifies the progressive and substantively transformative features and tenets of the South African constitution in his post-liberal reading. If transformative constitutionalism is to be a viable project for South African judges and lawyers, and if they wish to stay true to the values and promises enshrined in the constitution, brave and new interpretive method is essential. Political transparency and political engagement in the interpretive process becomes necessary if the constitution is to reach its full transformative potential. Klare calls for nothing less than critical and self-reflective adjudication in order to not only embrace the new legal culture demanded by our progressive constitution, but also to answer its transformative call.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

3.3 Reparation and Transformation

In illustrating this theme, I discuss engagements with the issues of social justice and socio-economic reparation. I rely on Tshepo Madlingozi's critique on the failure of the processes of reconciliation to take social justice into account and in the process render some general thoughts by, amongst others, Achille Mbembe on the issues of transformation and reparation.²⁵⁰

3.3.1 Good Victim, Bad Victim and Transformation

Tshepo Madlingozi criticises the TRC's neglect to critically examine issues of social injustice produced by apartheid and colonialism.²⁵¹ For Madlingozi, this neglect still continues today.²⁵² The failure of the TRC to put social justice on the agenda has had important implications, especially given the fact that the gravest legacy that apartheid bequeathed to South Africa was one of systemic poverty, structural unemployment and inequality.²⁵³ After sixteen years of apartheid there still remains an unacceptable socio-economic gulf between black and white South Africans. Madlingozi criticises the narrow conception of "victim" and "perpetrator" determined during the processes of reconciliation by the Human Rights Committee and he further uses the metaphor of a "bad victim" in order to illustrate the failure to achieve social justice and socio-economic reparation.

The TRC's determination of whether someone qualified as a "victim" was a highly technical and legalised process.²⁵⁴ The Human Rights Committee declared someone a "victim" only if, in the opinion of the Committee, he or she suffered gross violation of human rights in the form of killing, abduction, torture or sever ill-treatment.²⁵⁵ This resulted in just over 20 000 people being certified as "victims"

²⁵⁰ Le Roux & van Marle (eds) 2007 107.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Idem* 108.

²⁵⁴ *Idem* 109.

²⁵⁵ *Ibid.*

of apartheid.²⁵⁶ Madlingozi purports that in the period between 1960 and 1994 there had to be more than 20 000 victims.²⁵⁷ First of all, the victimisation of one individual does not only affect that individual, but also his or her family and community, and therefore several indirect or secondary victims may be identified.²⁵⁸ The secondary victims became direct victims themselves if they were harassed by the members of security forces in order to extract information from them.²⁵⁹ Further, the manipulation of pre-existing inter-community rivalries by the state led to the mislabelled “black-on-black” violence in numerous communities where thousands of people were killed between 1990 and 1991.²⁶⁰ In this case whole communities can be identified in the category of “victim”.²⁶¹ Lastly, Madlingozi states that the majority of South Africans that suffered under apartheid policies of forced removal, the migrant labour system, racial classification, job reservation and so forth can also be added to the category of “victim”.²⁶²

The TRC relied to a large extent on people identifying themselves as victims in order to make a determination.²⁶³ Potential victims refused to come forward to testify before the TRC as they felt that they fought for the liberation struggle and do not want to associate themselves with the notion of victimhood.²⁶⁴ This meant that these people would not receive reparations. However, Madlingozi points out that they were mostly individuals who were members of political organisations that expected (and most had their expectation met) compensation in other ways.²⁶⁵ This compensation, as Madlingozi explains, included being incorporated in the National Defence Force, assuming positions of influence in either government, business or civil society or through the Special Pension Fund which

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ *Idem* 110.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Idem* 111.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

compensates those people who “in the establishment of a democratic constitutional order, made sacrifices or served the public interest; and the dependants of those persons”.²⁶⁶ In contrast those who came before the TRC were mostly ordinary and often poor township residents and not political activists.²⁶⁷ This leads Madlingozi to note the split being made between victims who continue to claim and struggle for reparations and social justice and those who argue that the past must be put behind us and that the struggle was not about money.²⁶⁸ He quotes the then Minister of Justice and Constitutional Development, Dullah Omar on the issue:

We will also bear in mind that our gallant sons and daughters did not participate in the struggle and did not sacrifice their lives for monetary compensation [...] We must not reduce the victims of apartheid tyranny to beggars pleading for a hand-out of mercy.²⁶⁹

This view was also powerfully presented by the then Deputy-President Thabo Mbeki:

Surely all of us must agree that reparations will be offered to those who fought for freedom by ensuring that monuments are built to pay tribute to these to whom we owe our liberty [...] We must however also make the point that no genuine fighter for the liberation of our people ever engaged in struggle for personal gain [...] We must not insult them and demean the heroic contribution they made to our emancipation by turning them into mercenaries whose sacrifices we can compensate with money.²⁷⁰

Madlingozi purports that according to this logic, those who continue to campaign for reparations and other forms of compensation for the victims of apartheid are turning into beggars as they did not participate in the struggle to be

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Idem* 112.

²⁷⁰ *Idem* 113.

compensated.²⁷¹ For Madlingozi, this argument misses the point that the majority of those who came before the TRC and in respect of whom the TRC duly recommended compensation were very poor people, usually township residents.²⁷² Further, these types of arguments conveniently ignores the fact that many political activists, especially the ones aligned to the ruling party, continue to receive monetary compensation in the form of government appointments as well as through the state-supervised Black Economic Empowerment Programme.²⁷³ The splitting of victims into “good victims” and “bad victims” is not unique to South Africa. Madlingozi explains that this tendency pervades all post-conflict societies, especially those where the oppressed did not win the struggle through military force, but where an elite compromise was reached which ensures that previous material and social privileges are maintained:

Bad victims are a thorn in the side of the new government because, by continuing to campaign for social justice, they expose the poverty of this elite compromise, which involves maintaining the ill-gotten gains provided that a section of the new elite is placed in positions of economic power and privilege.²⁷⁴

For Madlingozi, “bad victims” are said to be insulting and demeaning liberation fighters by turning them into mercenaries.²⁷⁵ Implicit in this is the view that those who do not demand reparations and social justice are “good victims” and those who do are “bad victims”.²⁷⁶ “Good victims” are the quintessential victims in the eyes of dominant human rights discourse.²⁷⁷ Madlingozi refers to Mutua: “The metaphor of the victim is the giant engine that drives the human rights movement”.²⁷⁸ In the South African context Robert Meister argues:

²⁷¹ *Idem* 112.

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ *Ibid.*

²⁷⁵ *Idem* 113.

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.* Mutua *Human Rights: A Political and Cultural Critique* 2002 27.

Distributive justice is, thus, largely off the agenda of societies with new human rights cultures, except to the extent that redistribution can be divorced from retribution and recast as ‘reparation’ – which in South Africa, for example, consisted less in remedies for past suffering than in symbolic acknowledgement.²⁷⁹

Madlingozi therefore criticises the TRC as it was influenced by the dominant discourse of human rights, thereby neglecting social justice. The influence of this discourse also resulted in a sharp distinction being drawn between perpetrators and beneficiaries.²⁸⁰ This distinction served to reduce the problem of apartheid to the case of a few “overzealous and trigger-happy state security officials”.²⁸¹ What is more, an implicit objective of this distinction was the abandoning of issues of benefits and advantages from the agenda, delinking the connection between black poverty and white privilege.²⁸²

Mamdani contends that the greatest achievement of the TRC was to discredit the apartheid regime in the eyes of beneficiaries.²⁸³ For Mamdani, this is no small achievement as history tells us that the political requisite for every successful revolution is the driving of a wedge between perpetrators and beneficiaries.²⁸⁴ In its eagerness to reinforce the new order, however, the TRC created a diminished truth that wrote the vast majority of the victims of apartheid out of its version of history.²⁸⁵ For Mamdani, the TRC, in its attempt to define truth pragmatically, failed to open up space for social debate on the possible futures for a post-apartheid South Africa.²⁸⁶

²⁷⁹ *Ibid.* Meister “Human Rights and the Politics of Victimhood” *Ethics and International Affairs* 2002 91 95.

²⁸⁰ *Idem* 119.

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ Mamdani “A Diminished Truth” *Siyaya!* 1998 37-39.

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

Achille Mbembe, in discussing the politics of racial reconciliation, purports that a large section of the white South African population can no longer see the advantages they gained from apartheid arrangements.²⁸⁷ In opposing transformation many need to mentally erase the past and forget the element of brutality that it took to maintain white privilege.²⁸⁸ For Mbembe, one of the many ironies of the negotiated settlement is the large number of white South Africans that simultaneously stigmatise the project of transformation and continue to feel entitled to their privileged position in society²⁸⁹. Many are willing to fight for their constitutional rights, but are not ready to contemplate and deal with the accumulated atrocities on which these privileges rest.²⁹⁰ The introduction of the pass system, the institutionalisation of cheap labour and the exclusion from property ownership were all tactical and instrumental accumulation of wealth, land and power amongst whites, on the one hand, and the development of patterns of dispossession amongst blacks, on the other.²⁹¹ Mbembe mentions that not all white South Africans think alike and he laments the fact that those whites who are most committed to achieving genuine racial equality are not recognised and hardly ever heard.²⁹² He states that the new ruling black elites, keen to protect their newly gained positions against challenges fail to tap into the immense reservoir of goodwill and talent amongst white professionals eager to fully exercise their citizenship and contribute to the building of a non-racial society.²⁹³

For Madlingozi, in order to return to the politics of redistribution, that was centre in the 1980's, we need to reject the dominant human rights discourse found in redistributive politics and also challenge the government's embrace of neo-

²⁸⁷ Mbembe *Public Culture* 2008 13.

²⁸⁸ *Ibid.*

²⁸⁹ *Idem* 12.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*

²⁹² *Idem* 9.

²⁹³ *Ibid.*

liberalism.²⁹⁴ Madlingozi is of the opinion that post-apartheid social movements present an ideal vehicle for this endeavour.²⁹⁵ He refers to the Khulumani Support Group as one such movement. A membership-based, non-governmental organisation which is at the forefront of demanding social justice for victims of apartheid and which struggled against attempts by the government and others to marginalise and silence it.²⁹⁶ Khulumani declares as follows:

The transformation that we seek is one characterised by social and economic justice - one that overcomes the growing chasm between those who are comfortable and those who remain materially impoverished; a transformation that addresses the socio-economic crimes of the past.²⁹⁷

Mamphela Ramphela notes that one of the challenges facing transformation stems from the elite pact that led to our transition.²⁹⁸ It was inevitable that compromises needed to be struck. Attention to the socio-economic rights of the majority of the population was judged to pose a risk to the delicate balance on which the political settlement process rested.²⁹⁹ The TRC was confined to examine gross human rights violations, leaving the socio-economic violations unaddressed.³⁰⁰ Ramphela explains that the needed closure on the socio-economic front was left to the Reconstruction and Development Programme of the post-apartheid government.³⁰¹ But, more than fifteen years of experience with redressing socio-economic inequities suggests that the challenge was grossly underestimated.³⁰² Socio-economic transformation is a demanding task anywhere in the world. In South Africa, Ramphela purports, the challenge is compounded by the inadequate capacity of the post-apartheid government and

²⁹⁴ Le Roux & van Marle (eds) 2007 119.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ *Idem* 126.

²⁹⁸ Ramphela *Laying Ghosts to Rest; Dilemmas of the Transformation in South Africa* 2008 24.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

the ever-moving targets for performance as expectations rise amongst those at the bottom of the socio-economic pyramid.³⁰³

For Ramphele, persistent inequalities are an inevitable outcome of the elite pact: “The dilemma is how to acknowledge this reality without intensifying the tensions between the haves and the have-nots”.³⁰⁴ After all, as Ramphele aptly reminds via Raymond Aaron: “the existence of too great a degree of inequality makes human community impossible”.³⁰⁵

Mbembe argues that the question of what to do with the inequalities that have resulted from the unfair policies applied over centuries is both ethical and pragmatic.³⁰⁶ He states that in order to achieve a modicum of social justice, South Africa must dismantle the barriers that were erected against full justice for all and attend to distributional inequalities.³⁰⁷ For black South Africans in particular, freedom must be translated into an expanded control over their labour and lives. It should be the goal of transformation, Mbembe purports, to galvanise them as they struggle to stop the violence that preyed on their vulnerabilities during the years of racial oppression.³⁰⁸ But, the project of transformation cannot be confined to a largely managerial, bureaucratic or quantitative exercise with the primary concern of ensuring that adequate numbers of blacks find places in government, higher education, commerce and industry in general.³⁰⁹ Mbembe purports that we should not simply replicate the old *Afrikaner* model of filling state corporations, civil service and the universities with incompetent citizens while using state patronage to promote dubious business ventures.³¹⁰ The project of transformation, if devoid of any ethical consideration, can be

³⁰³ *Ibid.*

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ Mbembe *Public Culture* 2008 5 15.

³⁰⁷ *Ibid.*

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

catastrophic in terms of its costs and consequences.³¹¹ For Mbembe, opponents of transformation are right when they point to loss of efficiency, especially when unqualified black persons are chosen over more qualified whites.³¹² The transformation project can easily turn into “social quackery” and Mbembe purports that the morality of the project of transformation should be judged by the extent to which it fosters equality and restores capabilities to those who were deprived of these during apartheid.³¹³

Instead of equality meaning equal treatment of everyone, it means the same weight to everyone.³¹⁴ Mbembe refers to the fact that transformation currently requires that when two individuals possess the same qualifications, preference should be given to the “formerly disadvantaged” individual.³¹⁵ This objectively introduces a degree of inequality in the very process by which it aims at reaching the goal of equality.³¹⁶ This type of process means that not everyone has the same weight. For Mbembe, this in itself poses a serious risk for the ethical consensus among equals that is the essence of democracy.³¹⁷ He refers to the *Afrikaner Reddingsdaad* whereby white people in South Africa mobilised their capital in order to emerge from the weight of oligopolistic English political and economic domination.³¹⁸ Mbembe purports, using the *Reddingsdaad* as example, that there needs to be a pooling of financial resources, the regaining of control over savings, labour and buying power, whilst promoting empowerment at various different levels, including language, culture and politics.³¹⁹ This is how a transformation of ownership in the domestic economy may be achieved.³²⁰

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ *Idem* 16.

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

If used as expediency, transformation may lead to moral corruption. It risks codifying within the law and in the psyche of its beneficiaries the very powerlessness it aims to redress.³²¹ Mbembe argues that it can socially stigmatise black people by turning their past injuries into lucrative assets and entitlements and furthermore runs the risk of turning victimhood into an affect as well as a social position.³²² For Mbembe the removal of immaterial barriers, such as racist ethos written in the life of institutions, the public mind and popular culture are some of the hardest challenges to tackle.³²³ These barriers' removal depends on new forms of cultural creativity and imagination, a realm whose power is, for Mbembe, thoroughly misunderstood by the current government.³²⁴ The task facing South Africa is the rebuilding of a cross-racial ethical consensus around the project of transformation which includes addressing socio-economic reparation.³²⁵

3.4 The Aesthetic Turn and Critique

Wessel le Roux draws attention to the frequent use of aesthetic metaphors and images in South African human rights discourse.³²⁶ These metaphors and images include carvings, sculptures, architecture, films, plays, novels and even references to the punk rock movement of the late 1970's.³²⁷ Le Roux mentions the fact that the turn towards aesthetics is not new or unique to post-apartheid jurisprudence.³²⁸ He refers to law and aesthetic scholarship in Britain which served as an attempt to revive critical legal thought.³²⁹ Le Roux purports however, that it would be highly misleading to describe the aesthetic turn in South Africa as a faddish reproduction of North-Atlantic scholarship or to dismiss

³²¹ *Idem* 17.

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ *Idem* 16.

³²⁶ Le Roux *TSAR* 2006 101 at 101.

³²⁷ *Ibid.*

³²⁸ Le Roux *TSAR* 2006 102.

³²⁹ *Ibid.*

the multifaceted South African turn as nothing but the latest postmodernist fad to have blown to African legal shores.³³⁰

According to Le Roux, the South Africa aesthetic turn is unique in the way that it is tied to discussions of specific artworks which are mostly South African.³³¹ This means that it therefore lacks the specific theoretical pretensions associated with the use of the term aesthetics in the psychoanalytical theory of law which is prominent in contemporary British critical legal theory.³³² For the same reason, the South African aesthetic turn has in general been narrower in scope than the recent attempt to uncover aesthetics in American law.³³³

Le Roux therefore purports that the aesthetic turn in post-apartheid jurisprudence should not be treated as an academic fad, or as an uncritical reproduction of insights already generated elsewhere.³³⁴ It should rather be seen as an important and even decisive counter-movement to drive towards the formalisation of the South African constitution.³³⁵ The formalisation of the South African constitution refers to the “tendency to replace substantive value-based reasoning in constitutional adjudication with conversation curbing formal reasons”.³³⁶ The use of aesthetics in post-apartheid jurisprudential thought is thus seen as an attempt to resist the privatisation of constitutional rights.³³⁷ Privatisation includes the application of rights in a scientific, mechanical and formalistic manner. It is an attempt to move away from the formalism that is found in law and legal discourse.³³⁸ The suggestion is that approaches confidently rooted in positivism and formalism, are too limited to achieve transformative politics and ideals.

³³⁰ *Ibid.* In this regard Le Roux mentions Davis. Davis “Duncan Kennedy’s Critique of Adjudication: A Challenge to the ‘Business as Usual’ Approach of South African Lawyers” *SALJ* 2000 697.

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Ibid.*

³³⁴ *Ibid.*

³³⁵ *Ibid.*

³³⁶ *Idem* 103.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

Le Roux further identifies a tension within the South African aesthetic turn. There are two main tendencies. The first is the belief that rights can be a medium for politics and the second is an approach that relies on the paradox between the private and the public to which constitutional rights are inevitably confined.³³⁹

Rather than attempting to reconcile this tension, Le Roux uses it to illustrate the richness and diversity of the post-apartheid jurisprudential aesthetic turn.

It is further important to note that aesthetics are often used alongside particular critical engagement. In this regard postmodern and post-structuralist devices are utilised in order to critique.³⁴⁰ A number of post-apartheid jurisprudential contributions use postmodern and deconstructive insights, not only to expose the limits of the law in effecting societal change, but also in an effort to make legal standards as least reductionist and exclusionary as possible.³⁴¹ Patrick Lenta aptly illustrates how the use of post-modern theory may benefit South African legal theory and in this way demonstrates the commitments of scholars that rely on post-modern critique.³⁴²

- Postmodernism offers accounts of law's complicity in multiform injustices which exist unnoticed beneath the modern liberal constitutionalism's veneer of respectability. Michel Foucault's depiction of the legal system of modernity as a "negative utopia", a seemingly humane but ultimately

³³⁹ *ibid.* With regards to the second stream, Le Roux describes these writers as having focussed on the inherent limitation of substantial constitutional reasoning as a means of capturing the non-reciprocal ethical obligation to the Other which is implicit in the idea of the public sphere as a sphere of human plurality. As examples of the first tendency, Le Roux refers to Stu Woolman, Lourens du Plessis and Narnia Bohler-Müller. The second line of thought includes scholars such as Karin van Marle and Johan van der Walt. Le Roux further purports that the tension may be better understood within the Kantian aesthetic tradition. Specifically the way in which Kant's model of aesthetic judgement has been employed by writers such as Arendt and Michelman. See for example Arendt *Lectures on Kant's Political Philosophy* 1982 and Michelman "Traces of Self-Government" 1986 *Law Review Harvard* 4.

³⁴⁰ See section 4.2 and 4.3.2 below for a discussion on postmodernism. Post-structuralism refers to the work of, amongst others, Jacques Derrida, Julia Kristeva and Jean-Francois Lyotard. I discuss certain aspects of Derrida and Lyotard's work in the fourth chapter. See in general Lyotard *Just Gaming* 1985, Derrida "The force of law: The Mystical Foundations of Authority" *Cardozo Law Review* 1990 921-1045.

³⁴¹ See for example the contributions in Le Roux & van Marle (eds) *Post-Apartheid Fragments: Law, Politics and Critique* 2007.

³⁴² Lenta "Just Gaming? The Case for Postmodernism in South African Legal Theory" *SAJHR* 2001 173 at 206-208.

coercive product of the Enlightenment rationality gone awry, lends itself to application in the South African context to uncover injustices of apartheid law and the post-apartheid legal system.³⁴³

- The postmodernists Jean-Francois Lyotard and Jacques Derrida offer a formulation of substantive justice which is an ethics of radical alterity which is suitable to the heterogeneous context of South African life. This ethics of radical alterity is an acknowledgement of the duty to respond to the call of the marginalised or excluded as “Other”.³⁴⁴ There is therefore an ethical responsibility on practitioners and theorists to narrow the gap between positive law and justice even though this can never be completely achieved.
- Derrida also sets out guidelines for deconstructive adjudication.³⁴⁵ That is at the moment of decision-making (madness), the calculable and finite rules of positive law (legislation, precedent and so on) must be reinterpreted in accordance with the incalculable and infinite demands of justice. The rules of law are general whereas justice requires attending to the particular circumstances of the litigants. The judgment violently and prematurely halts the play of meaning and so must be justified.
- Postmodernism also provides strategies for intervening in legal texts in order to reveal unjust privileging within these texts, which are not evident if the “ordinary meanings” approach to interpretation, suggested by HLA Hart and other positivists, is employed.³⁴⁶
- Finally, postmodernism offers methods of constitutional interpretation which are both politically engaged and transformative. Drucilla Cornell

³⁴³ See for example Foucault in Gordon (trans & ed) *Power/Knowledge: Selected Interviews and Other Writings* 1980 as cited in Bohler-Muller “Other Possibilities? Postmodern feminist Legal Theory in South Africa” *SAJHR* 614 at 617.

³⁴⁴ See for example Levinas (Lingis trans) *Totality and Infinity: An Essay on Exteriority* 1969, *Otherwise than Being or Beyond Essence* 1991. Levinas defends a theory of alterity whereby we are continually expected to hear the call of the Other and to respond to this call even though it remains impossible to ever adequately respond. See Bohler-Muller *SAJHR* 2002 617.

³⁴⁵ See for example Derrida “Force of Law: The Mystical Foundations of Authority” *Cardozo Law Review* 1990 921-1045.

³⁴⁶ See for example Fagan “Delivering Positivism from Evil” in Dyzenhaus (ed) *Recrafting the Rule of Law: The Limits of Legal Order* 1999 81 as cited in Bohler-Muller *SAHJR* 2002 618.

suggests that constitutional interpretation which pays attention to the insights of deconstruction has significant transformative potential.³⁴⁷

Bohler-Muller explains that Lenta attempts to counter and correct criticisms of obscurantism, political nihilism and neo-positivism levelled against post-modern writers in South Africa.³⁴⁸ Lenta therefore highlights the transformative potential of postmodernism for South African legal theory. There is ultimately much to be said for theory which reveals and analyses the power exerted and pain inflicted by legal processes.

In the section that follows below, I explore the notion of monumental and memorial constitutionalism as an example of the aesthetic turn. Johan Snyman was the first to discuss the idea of creating a constitution and making memorials in relation to the politics of memory.³⁴⁹ Lourens du Plessis followed by formulating the distinction between monumental and memorial constitutionalism which was taken up by a number of different scholars.³⁵⁰ I discuss Du Plessis' article titled "The South African Constitution as Memory and Promise" and refer to some attempts by Karin van Marle to broaden and deepen the notion of monumental and memorial constitutionalism.³⁵¹ The discussion on monumental and memorial constitutionalism not only provides an aesthetic example, but also unfolds some bits and pieces of the critical tenets that may be found in post-apartheid jurisprudential thought.

³⁴⁷ Cornell *The Philosophy of the Limit* 1992 115. In chapter four I make the case for Cornell's formulation of ethical feminism. The suggestion is that such an approach may be sensitive to the differences between South African women. I also elaborate on aspects of postmodernism and deconstruction. See sections 4.2 and 4.3 below.

³⁴⁸ Bohler-Muller *SAJHR* 2002 618.

³⁴⁹ Snyman "Interpretation and the Politics of Memory" *Acta Juridica* 1998 312 at 317-321.

³⁵⁰ Du Plessis *Stell LR* 2000 385.

³⁵¹ Van Marle *Griffith Law Review* 2007 411, Van Marle in van Marle (ed) 2007 34.

3.4.1 Monumental and Memorial Constitutionalism

The Constitution as Promise

Du Plessis states that monuments and memorials are aesthetic creations and that there is no reason why the South African constitution cannot be the same.³⁵² He explains that a constitution both narrates and authors a nation's history.³⁵³ It can mould the politics of memory and simultaneously shape the politics of the day.³⁵⁴ But neither the memorial nor the auctorial role of the constitution is all-encompassing or absolute. It rather serves as a co-determinant of a nation's history.³⁵⁵ It is from here that Du Plessis claims:

[T]he promise(s) which a constitution holds can only emerge from contradictory modes of dealing with that constitution as memory. In other words, the manner in which we deal with the constitution as memory predetermines the fulfilment of the constitution as pledge.³⁵⁶

For Du Plessis, the constitution as memory is both monumental and memorial at the same time and a constitution as delivered promise can be both a monument as well as a memorial if both modes of memory are duly and simultaneously acknowledged and honoured.³⁵⁷ Du Plessis explains that monuments and memorials both have memory in common, but they differ significantly in the way in which they remember.³⁵⁸ A monument celebrates, whilst a memorial commemorates. For example, after a war was won, a monument will be erected, celebrating heroes and achievements.³⁵⁹ Memorials on the other hand

³⁵² Du Plessis *Stell LR* 2000 385 at 386. For a detailed discussion on the difference between monuments and memorials see Snyman "Interpretation and the Politics of Memory" *Acta Juridica* 1998 312 at 317-321.

³⁵³ Du Plessis *Stell LR* 2000 158.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

³⁵⁹ Van Marle *Griffith Law Review* 2007 419.

commemorate the dead.³⁶⁰ Monuments are bold and celebratory. Memorials can indicate failure, anti-heroes and mistakes.

In discussing the constitution as monument, Du Plessis states that the constitution can “hardly be called a modest text”.³⁶¹ The same goes for the interim constitution.³⁶² Both constitutions refer to its achievements of a “peaceful transition”, “a non-racial democracy”, “the recognition of the injustices of our past” and it honours “those who suffered for justice and freedom in our land”.³⁶³ The constitutions further reiterate the need for “healing the divisions of the past” and for “building a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations”.³⁶⁴ Du Plessis calls these references “monumental flare” which he argues is also manifested in the constitution’s affluent enactment of the values of democracy and a constitutional state.³⁶⁵ Section 1, for example, proclaims that the values of human dignity, equality and freedom are at the core of South African constitutionalism.³⁶⁶ Du Plessis further refers to numerous other sections of the constitution as well as a number of landmark constitutional court cases in order to show the monumentalities that are evident in the South African constitution.³⁶⁷

In discussing the constitution as memorial, Du Plessis purports that a good democratic constitutionalist, remembering the injustice of the past, cannot be cynical about the monumental achievements under both constitutions.³⁶⁸ But, we should not wallow in them. This is the constitution as memorial:

³⁶⁰ *Ibid.*

³⁶¹ Du Plessis *Stell LR* 2000 386.

³⁶² *Ibid.*

³⁶³ *Idem* 387.

³⁶⁴ *Ibid.*

³⁶⁵ *Ibid.*

³⁶⁶ *Ibid.*

³⁶⁷ *Ibid.*

³⁶⁸ *Idem* 388.

[A] written law-text that does not profess to constitute the moral high ground of justice all by itself; instead it reminds us of our pledge to achieve social justice.³⁶⁹

The memorial constitution reminds us that the human obligation to do justice cannot be assigned to any law-text, not even the constitution.³⁷⁰ The memorial constitution is a reminder that we should relentlessly strive towards the justice the constitution envisages.

Du Plessis uses the notion of subsidiarity or constitutional constraint as an example of how the constitution can operate as memorial.³⁷¹ He refers to “an open community of interpreters” that includes those who exercise public power, but also those individuals, groups and organisations that are active on different playing fields of civil society.³⁷² This community should take part in the fulfilment of the constitution as promise.³⁷³

The constitution as monument should not overpower the constitution as memorial and the constitution as memorial should not enervate the constitution as monument.³⁷⁴ For Du Plessis a nation that only celebrates tend to become oblivious of how meticulous it should guard against the mistakes of the past and a nation that only commemorates tends to underplay its memorable achievements and thereby deny itself the inspiration it needs to come to terms with an undecided future.³⁷⁵

The constitution as promise is therefore as much reliant on the constitution as memorial as it is on the monumental constitution.

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ *Idem* 389.

³⁷² *Ibid.*

³⁷³ *Ibid.*

³⁷⁴ *Idem* 390.

³⁷⁵ *Ibid.*

The Spectacle of Post-Apartheid Constitutionalism

In discussing constitutionalism, law and politics in the reconstruction of the South African state, Karin van Marle links Du Plessis' notion of monumental constitutionalism with "the spectacle", "social justice" and "shadows".³⁷⁶ Memorial constitutionalism is linked with "the rediscovery of the ordinary", "political justice" and the "modernist project of enlightenment".³⁷⁷

In focussing on the embrace of constitutional supremacy and human rights discourse in the sphere of law and politics, van Marle employs the notions of memorial and monumental constitutionalism in order to warn against law and constitutionalism overtaking politics as a form of resistance.³⁷⁸ One of the questions underlying Van Marle's essay is: "[T]o what extent should the politics of the everyday as well as the memories and imaginings of our pasts and futures sway before the grand narrative of the law or the project of constitutionalism?".³⁷⁹

The notions of the spectacle and a rediscovery of the ordinary originate from an essay by Njabulo Ndebele.³⁸⁰ The spectacle is associated with monumental constitutionalism as a celebratory and overtly optimistic approach. As Van Marle explains, Ndebele, in the context of 1984, describes black South African literature as "largely [...] the history of the representation [of spectacle]".³⁸¹ A highly dramatic and demonstrative form of literary representation developed because of the visible symbols of an overwhelmingly oppressive South African formation.³⁸² Although Ndebele finds the literary representations understandable (as violence and brutality were at the order of the day) he laments the fact that the imaginations of black writers were overtaken by the spectacle of apartheid

³⁷⁶ Van Marle *Griffith Law Review* 2007 411-412.

³⁷⁷ *Ibid.*

³⁷⁸ *Idem* 412.

³⁷⁹ *Ibid.*

³⁸⁰ Ndebele "The Rediscovery of the Ordinary" *Journal of Southern African Studies* 1968 143.

³⁸¹ Van Marle *Griffith Law Review* 2007 421.

³⁸² *Ibid.*

society.³⁸³ The focus on the development of a monstrous war machine, mass shootings and killings, mass economic exploitation, mass removals of people, draconian laws passed by parliament, the luxurious lifestyle of whites and the poverty of blacks manifested in the spectacle.³⁸⁴ Ndebele criticises the spectacle and what he sees as a waste of intellectual energy and the barrenness of thought.³⁸⁵ As Van Marle further explains, Ndebele criticises a society where fears are suppressed and the spectacle of group survival seems more important than the dreams of hope, compassion, newness and justice.³⁸⁶ A sloganeering society that is totally heroic does not recognise thought and feeling, the sobering power of contemplation, close analysis, weakness, limitation and the acceptance of failure.³⁸⁷ Ndebele traces in the writing of certain black South Africans a rediscovery of the ordinary.³⁸⁸ As mentioned above, the rediscovery of the ordinary is associated with memorial constitutionalism. The rediscovery of the ordinary, with its focus on detail, challenges imagination consumed by the spectacle, and may remind again that the problems of South Africa are complex and all-embracing and cannot therefore be reduced to a simple single formation.³⁸⁹ As van Marle elucidates:

For him (in the context of 1984), a new society can only be brought about if we show concern with the way people actually live that encompasses complex ethical issues related to human relations and human relations with nature and society in general.³⁹⁰

Van Marle, by relying on Ndebele, illustrates the continuance of spectacle in our present society. The law, human rights and constitutionalism seem to permeate

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ *Ibid.*

³⁸⁶ *Idem* 422.

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

all walks of South African life.³⁹¹ The complexities of life, the way people actually live and the detail inscribed in our different narratives are consumed by human rights discourse and the grand narrative of constitutionalism. Politics are consumed by law and the memorial (the mistakes and failures of the constitution in dramatically altering people's lives) are consumed by the monumental (its achievements, celebrations and optimism). This concern is echoed in Le Roux's aesthetic analysis of the architecture of the constitutional court.³⁹² The constitutional court's "logo" is a tree, providing shelter to all in the community.³⁹³ In Le Roux's account the logo captures the sense of law as organic and dialogic, facilitating relations between people.³⁹⁴ People gather around and under trees for shelter. The law as a tree embodies a sense of unforced relation and plurality.³⁹⁵ But as Le Roux notes, the language of this dialogic is rights, and judges perceive themselves to be the guardians of a legalised politics.³⁹⁶ Here politics sway before the project of constitutionalism and other languages sway before the language of rights.

Van Marle also associates monumental constitutionalism with the "modernist project of light" and memorial constitutionalism with "shadows". In discussing artist William Kentridge's *Black Box*, Van Marle notes Kentridge's interest in shadows.³⁹⁷ Kentridge describes lights as "an infinite series of projections aimed toward us", "the sun as an infinitely promiscuous source".³⁹⁸ He draws attention to shadows and of how shadows make us conscious of seeing.³⁹⁹ In relation to another project of Kentridge, a staging of Mozart's opera of *The Magic Flute*, Van Marle explains how colonialism is seen as a project of enlightenment, bringing

³⁹¹ *Idem* 412.

³⁹² Le Roux "Bridges, Clearings and Labyrinths: The Architectural Framing of Post-Apartheid Constitutionalism" in Le Roux and van Marle (eds) 2007 59-79. See also Stewart Motha's discussion of Le Roux's contribution on 183.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

³⁹⁷ Van Marle *Griffith Law Review* 2007 413.

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

the light of the Western world with force to the African continent.⁴⁰⁰ Here, Kentridge recalls Plato's Cave story of how the prisoners in the cave had to be brought to light by force to learn the truth.⁴⁰¹ Here, again, shadows have a role to play for Kentridge: The "extraordinary violence" of colonialism as an enlightenment project could be illuminated by looking at the shadows.⁴⁰² Kentridge's critique of the enlightenment is significant for Van Marle. She purports that constitutionalism and human rights discourse are post-apartheid South Africa's "embrace of the light of the Western world".⁴⁰³ With regard to the enlightenment project, Magobe Ramose contends that the superiority complex of Western Europe rested on its appropriation of "reason", claiming it as its sole and exclusive possession.⁴⁰⁴ This appropriation of reason was fertile ground for racism which survived decolonisation and continues its precarious but injurious existence in our time.⁴⁰⁵ A bill of rights, Ramose contends, will not abolish racism as the morality and political legitimacy of right to reason or what he terms the "right to conquest" remains uncontested.⁴⁰⁶

Van Marle shares Kentridge's interest in shadows and their ability to illuminate continuing violence and exclusion.⁴⁰⁷ The private lives of people that take place in the shadows may be illuminated by memorial constitutionalism. If monumental constitutionalism or the spectacle of constitutionalism overtake the ordinary lives of people, thus the memorial, the strive for social justice will be neglected.⁴⁰⁸

Social justice is therefore reflective of the memorial constitution. This leads political justice to be reflective of monumental constitutionalism. Relying on Mahmood Mamdani, Van Marle associates social justice with the memorial and

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Idem* 414.

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*

⁴⁰⁴ Ramosa "In Memoriam: Sovereignty and the 'New' South Africa" *Griffith Law Review* 2007 310 at 313.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Idem* 320.

⁴⁰⁷ Van Marle *Griffith Law Review* 2007 414.

⁴⁰⁸ *Idem* 417.

political justice with the monumental.⁴⁰⁹ Mamdani, in his critical reflection of the South African Truth and Reconciliation Commission, argues that political reconciliation has, to a certain extent, been achieved in South Africa.⁴¹⁰ He notes however that the big challenge we are faced with is the question of how to make this reconciliation durable.⁴¹¹ Van Marle explains how Mamdani is concerned with how the difference between perpetrator and beneficiary has become obscure in the South African reconciliation process.⁴¹² The “truth” sought and the reconciliation “achieved” were to the benefit of the minority and thus to the exclusion of the majority of people who suffered under apartheid.⁴¹³ The minority in this context includes perpetrators, people who were part of or closely connected to the previous regime and those political activists who were directly involved in the struggle and persecuted by apartheid officials.⁴¹⁴ The majority refers to white and black South Africans that were not necessarily directly involved in the institutional workings of the apartheid regime or the struggle against it.⁴¹⁵ But the majority of white South Africans nevertheless benefited, whilst the majority of black South Africans nevertheless suffered under apartheid’s systemic oppression and discrimination.⁴¹⁶

Mamdani calls for a shift from perpetrators to beneficiaries and from activists to victims so that social justice and social reconciliation can be addressed.⁴¹⁷ This shift, as Van Marle explains, will expose apartheid as a system of white privilege.⁴¹⁸ People who suffered systemic violations during apartheid and who remain anonymous will benefit from this shift as their suffering currently remains

⁴⁰⁹ *Idem* 425. Mamdani “When does Reconciliation Turn into a Denial of Justice?” in *Sam Nolutshungu Memorial Lectures* 1998 1.

⁴¹⁰ *Idem* 424.

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.*

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

unnoticed.⁴¹⁹ This shift would require a shift in logic: Perpetrators are personally and individually guilty whilst beneficiaries are not necessarily linked to individual agency. In order to truly challenge the continuance of past privilege and oppression, the question of individual agency should not be used to negate responsibility and thereby stand in the way of redress.⁴²⁰ Our focus should shift from perpetrators and activists, the minority, to beneficiaries and victims, the majority. Mamdani critiques the political bargaining that was at the heart of the processes of reconciliation and asks whether reconciliation is an inevitable outcome of truth telling and, more importantly, whose truth was told?⁴²¹ Mamdani serves a warning: Political reconciliation will not prove durable without social reconciliation.⁴²²

Van Marle does not attempt to negate the moments and instances where constitutionalism and human rights have, and are having, positive results. The concern is rather with its ability to radically alter post-apartheid lives. By considering the memorial, the ordinary, shadows and social reconciliation we may problematise the monumental, the spectacle, enlightenment and political reconciliation. This problematisation may expose the limits of the law, human rights and constitutionalism. In invoking the limits of the law, human rights and constitutionalism, Van Marle is putting forth the question of whether there is not something about the structure of law that is inherently reductionist and exclusionary and therefore cannot recognise radical difference. Through critical engagement with the limits of the law, we might be able to remain open to the call of a radical politics or a politics that resist efforts to contain it within legal bounds.⁴²³ Through the engagement with memorial constitutionalism we might allow for the emergence of different or excluded voices and concerns.

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid.*

⁴²¹ *Ibid.*

⁴²² *Ibid.*

⁴²³ See also Botha “Equality, Plurality and Structural Power” *SAJHR* 2009 1 at 6.

3.5 Conclusion

It is not surprising that South African legal scholars have invoked the notion of transformative constitutionalism frequently. In considering our violent past of oppression, the idea of inducing large-scale social change through law becomes a reminder of and inspiration for the necessary search for a post-apartheid jurisprudence. Klare's article in many ways opened the door for revisiting the manner in which American critical legal scholars exposed the politics of law and the politics of interpretation.⁴²⁴ This is echoed in post-apartheid jurisprudence's critical concern with the relationship between law and politics in the context of democracy and constitutional rights discourse. The moral and political project of transformative constitutionalism revolves around substantive equality, social justice, transparent governance and the extension of democratic ideals into the private sphere. It invites politically transparent adjudication and the establishment of a legal culture that is unafraid of embracing the constitution's transformative potential.

The issue of socio-economic reparation directly invokes questions on the lack of social justice and substantive equality. A too great a degree of socio-economic inequality demonstrates what remains to be done in order to truly achieve substantive equality and the type of social change that Klare envisions. The master narrative of apartheid overshadows the remaining socio-economic gulf between the minority and the majority of South Africans. It becomes clear that transformation is a complex task that involves ethical consensus around the project of establishing the type of community idealised in the constitution. Memorial constitutionalism reminds us of this fact. The strife for social justice is continuous and never-ending. Although we have a lot to celebrate, our task is far from over. Memorial constitutionalism shows a concern with the fact that the

⁴²⁴ Theunis Roux has mentioned that if Klare's article is to be reduced to a single sentence, it is that the interpretive method typically associated with the methodology and political commitments of the American Critical Legal Studies movement is required in order for the constitution to reach its full transformative potential. See Roux *Stell* LR 259. See section 1.5 above for a brief explanation of American CLS.

grand narrative of constitutionalism and human rights eclipse the material and concrete contexts within which people in South Africa live. The aesthetic turn is an attempt to move away from formal legal reasoning towards substantive constitutional adjudication. One might therefore say it attempts to move closer to transformative constitutionalism. The aesthetic turn suggests that formal, mechanical and positivist approaches will do little to achieve social transformation.

It is through the use of postmodern intellectual devices and critique that some scholars emphasise the law's multiple and continual injustices. This involves the exposure of exclusionary discourses and assumptions that shapes law and legal interpretation. It also involves commitment to ethical responses in order to make the law and legal discourse as open as possible to difference, plurality and the needs of a heterogeneous society.

In contemplating a feminist jurisprudence, the post-apartheid jurisprudential context discloses important considerations. It presents the following tentative reflections for my contemplation: Firstly, the ideal of transformative constitutionalism has much to offer in the politically transformative possibilities that it may hold. As mentioned, its commitment to substantive equality entails judicial sensitivity to context and past patterns of discrimination and subordination.⁴²⁵ Such sensitivity will therefore include sensitivity towards the historical exclusion and structural disadvantage of South African women by highly patriarchal cultures and social institutions. In considering the background sketched in the second chapter of this dissertation, I submit that contextual sensitivity should include the recognition of a masculine cultural symbolic and the marginalisation of women within this symbolic. From this perspective judicial sensitivity will involve the open acknowledgement of the masculine political context that shape legal discourse. The project of transformative constitutionalism further entails the extension of democratic ideals into the private

⁴²⁵ See section 3.2.2 above.

sphere. Pieterse, as mentioned, explains how substantive inequality is rooted in private interrelations.⁴²⁶ The wielding of private power has contributed concretely to women's vulnerability to physical and sexual violence. Transformative constitutionalism requires that the private sphere cannot be left unchallenged if we are to achieve substantive equality. Such an approach may therefore contribute to the exposure of the oppression and continual gender marginalisation that takes place in the pervasive private sphere.

From a feminist perspective I contend that the issues of social justice and socio-economic reparation must absorb consciousness of the fact that women still remain the poorest of the poor. The complex task of socio-economic reparation cannot be removed from the traditional economic hardship and dependency of women. The struggle for social justice must therefore recognise how poverty, racial inequality and sexism intersect.

The development of memorial constitutionalism serves as a form of critique against the overt celebration of the adoption of human rights and constitutionalism. Although a constitution with gender equality marks an achievement in itself, memorial constitutionalism, from a feminist perspective, helps to ask the question of the law's capability in radically altering the lives of women. This dilemma is never felt more as when considering the South African rape statistics. As I mentioned in the second chapter, South Africa has either the highest or one of the highest rates of rape *per capita* in the world.⁴²⁷ These statistics has had little or no effect since the adoption of a constitution that protects gender equality, human dignity and freedom.⁴²⁸

I noted that the use of aesthetics and postmodern critique seek to emphasise the law's multiple ongoing injustices. Troubling legal assumptions and discourses are exposed. In reflecting on a feminist jurisprudence this commitment of certain

⁴²⁶ See section 3.2.2 above.

⁴²⁷ See section 1.2 above.

⁴²⁸ *Ibid.*

scholars can allow for the disclosure of the masculine assumptions and ideologies that shape and pervade law. Scholars, in this regard, attempt to make law and legal discourse as open as possible to difference and it may therefore include realising openness to the difference that constitutes women.

In considering post-apartheid jurisprudence generally, it challenges traditional concepts of democracy and traditional ways of thinking and doing law. Prevalent ideas around transformation are also re-imagined. Human rights are thought beyond their traditional liberal confines.⁴²⁹ I perceive many of the contributions as inhabiting the awkward space between the possibilities and limits of the law. These contributions seek to emphasise the constitution as an egalitarian text that is open to the complexity of social identities and relations, whilst pointing to the inadequacy of legislative and judicial efforts to realise the constitution's promise.⁴³⁰ Many contributions entail scepticism towards the uncritical embrace of constitutionalism. The goal is to remain open to alternatives.

Most notably, post-apartheid jurisprudence entails critical thought, whether that critique is made through invoking the ideal of transformative constitutionalism, or by utilising aesthetics and postmodern theory, or simply by reminding of people's material conditions. The focus is on continual marginalisation and legal exclusion. Post-apartheid jurisprudence therefore entails counter-hegemonic action. It seeks to counter the hegemony of dominant liberalist views of society and positivist views of law. Critique and counter-action serve to open up the space for voices and concerns that are excluded or get marginalised. From this perspective one might say that the post-apartheid jurisprudential context is conducive to feminist contemplation and reflections. The project of searching for a post-apartheid jurisprudence has aptly been described as "the *becoming* of post-apartheid

⁴²⁹ This refers to viewing constitutional human rights as something inherently political and contested, rather than seeing rights as pre-political bounded spaces of individual freedom. Le Roux & Van Marle (eds) 2007 xi.

⁴³⁰ See Botha *SAJHR* 2009 31.

jurisprudence”.⁴³¹ This hints to the fact that the search is never finished. It also denotes continuous questioning and thought and shows willingness to be critical and self-reflective.

I have mentioned that the post-apartheid jurisprudential context informs the contemplation for a feminist jurisprudence. My contemplation will thus be animated by some of post-apartheid jurisprudence’s tendencies. The context firstly served to disclose some important considerations and reflections that are discussed above. Secondly, it provides a critical foundation for the rest of my contemplation. In the last instance, the context provides the necessary foundation for the contention that as it pertains to the position of women, further development is required. As mentioned within the introductory chapter, challenge to the masculine symbolic order has not been sufficient within the critical development of post-apartheid jurisprudence. It is not only the critical and self-reflective nature of post-apartheid jurisprudence that allows for this disputation, but I contend that given the background sketched in the first chapter of this dissertation; a *direct engagement* with the masculine symbolic is needed in order to take responsibility for the specific marginalisation of women. I propose that such engagement is not only necessary in order to address the particular interests of South African women, but that the discussion on ethical feminism in the chapter that follows below may also prove to assist post-apartheid jurisprudence in its critical search for adequate approaches to law. This occasion allows for the contemplation of a post-apartheid feminist jurisprudence. The question arises: How should the feminine be interpreted within the South African context?

At this juncture, against the background of a masculine symbolic and within the critical development of post-apartheid jurisprudence, I explore ethical feminism formulated by Drucilla Cornell.

⁴³¹ See Le Roux & Van Marle (eds) 2007 x. My own emphasis.

Chapter 4

Ethical Feminism

4.1 Introduction

Ethical feminism highlights the way in which the feminine suffers within masculine discourse and the dominant Western symbolic. It suggests a way of how the feminine may be seen and interpreted within and against a masculine symbolic order so as to serve as a locus for change and transformation.

In the first part of this chapter, I discuss postmodern feminism and aspects of deconstruction as an introduction to ethical feminism. Ethical feminism was originally formulated by Drucilla Cornell in her article titled: “The Doubly-Prized World: Myth, Allegory and the Feminine”.⁴³² I outline Cornell’s main arguments of how the feminine may be interpreted and conclude by considering the significance of ethical feminism for the post-apartheid legal context. The suggestion is that ethical feminism may meet the particular needs of women against the background sketched in the first chapter and that it may be seen as an approach that takes seriously the possibility of transformation.

4.2 Postmodernism, Feminism and Law

At the foundation of postmodern philosophy is the aim to unsettle modes of transcendental, fixed, or essentialist thought.⁴³³ Postmodern thought rejects

⁴³² Cornell *CNLLR* 1990 664. It should be mentioned that the aim is not to give a full description of Cornell’s work. Even without the limitations of this dissertation such a task would be impossible. The following has been mentioned in this regard: “Drucilla Cornell’s work encompasses landscapes of disciplines, imaginations and desires that forever will escape attempts of description, systematisation or application. Any project which aims to do that will reduce the wide span of her imagination, creativity and activism and will fail even before it begins.” Van Marle “No Last Word: Reflections on the Imaginary Domain, Dignity and Intrinsic Worth” *Stell LR* 2002 300. Regarding Cornell’s work see in general: *At the Heart of Freedom* 1998, *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* 1991, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* 1995, “Rethinking Legal Ideals After Deconstruction” in Sarat (ed) *Laws Madness* 2006, *Transformations, Recollective Imagination and Sexual Difference* 1993.

⁴³³ Clark “Deconstruction, Feminism and Law: Cornell and Mackinnon on Female Subjectivity and Resistance” *DUKEJGLP* 2005 107.

notions of foundational truth or essence.⁴³⁴ Claims to truth or meaning are neither pre-existing nor certain.⁴³⁵ They are rather constructed through language and action.⁴³⁶ The subject is viewed as a product of culture, history, language, social practice and law and identities produced are seen as always shifting, changing and unstable.⁴³⁷ Indeterminacy, diversity, plurality of identity and subjectivity are stressed in this line of thinking.⁴³⁸

In postmodern feminism “women” as a homogenous or universal category is rejected because of the fact that this idea is neither stable nor fixed and cannot be described in terms of “common” experiences.⁴³⁹ Notions such as “essentialism” or “universalism” are undermined since gender difference is seen as contingent upon context and ever-changing social practices.⁴⁴⁰ The multi-faceted nature of the “self” and the complex and fragmented nature of identity means that gender is but one component of identity.⁴⁴¹

Postmodern feminists have continuously critiqued what may be called “Enlightenment thinking”.⁴⁴² Modern European civilisation is seen as a product of the Enlightenment which is a cultural phenomenon that began somewhere towards the end of the 17th century.⁴⁴³ Philosophers like René Descartes claimed that it is our reason that makes us human and if we appeal to the rational

⁴³⁴ Roederer & Moellendorf (eds) 2004 313.

⁴³⁵ *Ibid.*

⁴³⁶ *Ibid.*

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.* See in general: Smart *Feminism and the power of law* 1989, Butler *Gender Trouble: Feminism and the Subversion of Identity* 1990.

⁴⁴⁰ *Ibid.* Essentialism has been rigorously discredited by postmodern and post-colonial feminist theory. During the 1980’s feminism came under severe criticism by critical race feminists for ignoring the experience of black women. Charges of essentialising and universalising the experience of certain groups of women, especially white middle-class women, were made. Cornell describes essentialism as “mapping the feminine onto femaleness.” Essentialism may also be described as the notion that “a unitary, ‘essential’ women’s experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.” See Harris “Race and Essentialism in Feminist Legal Theory” *STANLR* 1990 585.

⁴⁴¹ *Ibid.*

⁴⁴² See Bohler-Muller *SAJHR* 2002 614 at 615.

⁴⁴³ *Ibid.*

autonomy of individuals we can create a virtually perfect political society.⁴⁴⁴ The Enlightenment and all of its connected theories of knowledge, ethics, law and politics are founded on an unshakeable belief in reason or logic.⁴⁴⁵ Bohler-Muller notes however that logic and classification both originate from our need to control and dominate the world.⁴⁴⁶ She quotes Nietzsche: “But this prevailing tendency to treat the similar at once as identical, is an illogical tendency - for nothing is identical - which first created all foundations of logic”.⁴⁴⁷ Postmodern feminists revisit and attempt to reconstruct the legal subject as it is traditionally understood. The autonomous individual found in liberal theory and therefore human rights is criticised as too competitive, individualistic and indeterminate.⁴⁴⁸ Feminists have attempted to subvert the traditional subject by focussing on intersubjectivity, empathy, caring, sexuality and desire.⁴⁴⁹

The view that identity is fractured in nature resulted in postmodern feminists’ problematisation and destabilisation of the category of “women” altogether.⁴⁵⁰ This indeterminacy results in charges of imploding the category of women, leaving little to sustain a feminist legal or political project.⁴⁵¹ Overcoming the tension between essentialism and indeterminacy has been one of the key contemporary debates within feminist approaches to law.⁴⁵² The question asked is how can feminism describe the suffering of women, as well as the triumphs and strengths of women without essentialising “Woman”, and how can a movement be build around the commonalities of women, without ignoring the

⁴⁴⁴ *Idem* 616.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.* See Nietzsche “The Gay Science” 1882 Section III in Hollingdale (ed & trans) *A Nietzsche Reader* 1977 61.

⁴⁴⁸ *Ibid.*

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ Roederer & Moellendorf (eds) 2004 318.

⁴⁵² *Ibid.*

diversity between women? ⁴⁵³ Put differently, how can the danger of essentialism be avoided without abandoning the feminine altogether?

Cornell attempts to present a way out of this dilemma with ethical feminism which will be discussed later in this chapter. ⁴⁵⁴ Cornell further thoughtfully engages with deconstruction which we will turn to briefly.

In 1967, Jacques Derrida published three philosophical works that altered the philosophical and critical landscape of the twentieth century. ⁴⁵⁵ In these works, Derrida attempted to rethink the very fabric of thinking itself. ⁴⁵⁶ He aimed at displacing a mode of reasoning that he argued intrinsically requires dominance as condition for its operation. ⁴⁵⁷ In brief, he argues that Western philosophy, and by inference Western modes of rationality and being, are based on a desire; the desire to suppress difference in the name of identity. ⁴⁵⁸ Thus, for Derrida, reason is a form of desire intimately linked with perpetual violence. ⁴⁵⁹ Derrida's investigations undermine the idea of reason as a neutral mechanism that could lead us to true and universal conclusions. ⁴⁶⁰ Derrida shows that Western thought is based upon a logical hierarchy and rather than discovering value-free conceptual terms that can be applied without bias; we discover that bias is part of their very structure. ⁴⁶¹

⁴⁵³ Williams "Review Essay: Utopianism, Epistemology, and Feminist Theory" *YJLF* 1993 289 & Wong "The Anti-essentialist v Essentialist Debate in Feminist Legal Theory: The Debate and Beyond" *WMMJWL* 1999 273.

⁴⁵⁴ Section 4.3 below.

⁴⁵⁵ Clark *DUKEJGLP* 2005 107. The works are: *Of Grammatology* 1967, *Speech and Phenomena* 1967 and *Writing and Difference* 1967.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

⁴⁶⁰ *Ibid.*

⁴⁶¹ *Ibid.*

For Derrida, concepts are things that are as tactile in their effect as earth and water.⁴⁶² They are as restrictive as chains and yet invisible.⁴⁶³ His project attempted to make the invisible structures of thought, inquiry and self-identity visible by showing that that which we often hold to be a condition of freedom in fact turns out to be that which enslaves us.⁴⁶⁴ This insight is at the foundation of postmodern philosophy: The critical strategy with the goal to unsettle all modes of fixed, transcendental or essentialist thought called deconstruction.⁴⁶⁵ Deconstruction is a kind of social, critical and philosophical practice aimed at rethinking the world.⁴⁶⁶ Although any attempt to define deconstruction would itself be subject to deconstruction, I risk the following brief explanations. Deconstruction has been defined as a philosophical position, an intellectual or political strategy, a mode of reading or a technique of literary criticism.⁴⁶⁷ In deconstruction, a text is analysed and examined in order to expose its contradictions and gaps.⁴⁶⁸

Christopher Norris states that “deconstruction is the vigilant seeking out of those ‘aporias’, blindspots or moments of self-contradiction where a text involuntarily betrays the tension between rhetoric and logic, between what it manifestly *means to say* and what it is nonetheless *constrained to mean*”.⁴⁶⁹ This technique identifies that which is suppressed or excluded by a text or a philosophy and it shows that the hegemony of the text or philosophy relies on that exclusion.⁴⁷⁰ Jonathan Culler purports: “Derridean deconstruction exposes the limit of any

⁴⁶² *Ibid.*

⁴⁶³ *Ibid.*

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Idem* 109.

⁴⁶⁶ *Ibid.*

⁴⁶⁷ Williams *YJLF* 1993 295, Culler *On Deconstruction: Theory and Criticism after Structuralism* 1982 85, Norris *Derrida* 1978 18 asserting that according to Derrida deconstruction is neither a method, technique nor a type of critique.

⁴⁶⁸ Williams *YJLF* 1993 295.

⁴⁶⁹ Norris 1978 19 quoted in Williams *YJLF* 1993 295 (Emphasis on the original text).

⁴⁷⁰ Williams *YJLF* 1993 295.

system of ideality established as reality, whether that limit be evoked as the supplement, the margin [...] or indeed as *Woman*".⁴⁷¹

Michael Clark contests that because of the fact that deconstruction may be seen as a means of exposing the structurally embedded power relations that inhere in the deepest tissue of people's daily lives, it may be deeply threatening to some.⁴⁷² However, it is also a way of reinventing the world and is thus in its essence deeply utopian as well as deeply radical in the sense that it rethinks the very foundations of thought and not merely its surface manifestations.⁴⁷³ It follows that many feminists has found it attractive. Especially those that see universalist, egalitarian and liberal-democratic thought as a troubling distortion of the experiences of women.⁴⁷⁴

As mentioned above, Cornell engages with deconstruction. In the following section, I firstly outline her initial article and from there move on to discuss some of her engagements with deconstruction as well as her general contentions made with regards to ethical feminism.

4.3 Ethical Feminism, Myth and Allegory

4.3.1 An Outline of the "World Doubly-Prized"⁴⁷⁵

Susan Williams explains how ethical feminism relays a tale about feminism's search for the nature of the feminine and how the feminine can be used to construct not only a critique of existing social and legal institutions, but also a positive program that can address the realities of women.⁴⁷⁶ How is this task to be completed without relying on an essentialising theory of "Woman"? Cornell's stated goal in the article is to show how we can use the implicit normative claim,

⁴⁷¹ Culler 1982 85 as cited by Williams *YJLF* 1993 295.

⁴⁷² Clark *DUKEJGLP* 2005 108-109.

⁴⁷³ *Ibid.*

⁴⁷⁴ *Ibid.*

⁴⁷⁵ Cornell *CNLLR* 1990 644.

⁴⁷⁶ Williams "Feminism's Search for the Feminine: Essentialism, Utopianism and Community" *CNLLR* 1990 700.

what she terms the “should be” in accounts of the feminine to shape “a new choreography of sexual difference”.⁴⁷⁷ She remarks that this attempt has taken two forms that she finds troubling: Some writers have defined the feminine with reference to a naturalistic or essentialist description of Woman and others have defined the feminine by reifying the experience of actual women.⁴⁷⁸ The problem with the first mentioned definition is that essentialism has been historically used as one of the most effective tools for the justification of the exclusion and the restriction of women.⁴⁷⁹ The problem with the second is that the experience of women is extremely diverse and the experience of some women (often poorer women and women of colour) has been excluded.⁴⁸⁰

Cornell analyses the work of Robin West and Julia Kristeva and argues that both finds the feminine either in biology, specifically the experience of motherhood or the potential for motherhood, where Woman is collapsed into her biology or in the actual experience of women as described by a privileged category of women.⁴⁸¹ Although Cornell recognises the dangers inherent in the search for the feminine, she refuses to abandon the search. Cornell also rejects the position of Catharine Mackinnon which supposes that the celebration of the feminine is to contribute and perpetuate the oppression of women.⁴⁸² Cornell remarks that this position is based on the assumption that the feminine is entirely and inescapably bound up with reality “as it is seen and constructed through the male gaze”.⁴⁸³ The assumption is rejected by Cornell for two main reasons: Firstly, reality can never be reduced to only one view of it. Alternative visions are always possible. We

⁴⁷⁷ Cornell *CNLLR* 1990 644-647.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Idem* 645 & 672. See also Williams *CNLLR* 1990 700.

⁴⁸¹ *Idem* 659-660 & 667-668. See in general Kristeva “Woman Can Never Be Defined” in Marks & de Courtivron (eds) *New French Feminisms* 1980, Kristeva “Women’s Time” in Moi (ed) *The Kristeva Reader* 1986, West “The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory” *WWLR* 1987 3, West “Jurisprudence and Gender” *UCHILR* 1988 55 as cited by Cornell *CNLLR* 1990 699.

⁴⁸² *Idem* 686. See Mackinnon *Feminism Unmodified: Discourses on Life and Law* 1987.

⁴⁸³ *Ibid.*

construct reality and deconstruct it through the use of visions.⁴⁸⁴ Secondly, the particular view of reality that Mackinnon suggests is very much a male view of reality.⁴⁸⁵ It is male in the sense that the view of the inherent oppressiveness of being feminine rests on an image of the self as maintaining clearly defined boundaries against the world.⁴⁸⁶ When one insists on defending the boundaries of the self against all others, you lose the opportunity for other more feminine perspectives; perspectives of openness.⁴⁸⁷

Here, the point is reached where we find ourselves unable to either abandon the feminine and the search for the feminine or to define the feminine in a manner that falls in the trap of essentialism.⁴⁸⁸ The way out of this dilemma, for Cornell, is ethical feminism.⁴⁸⁹

Cornell argues that we do not need to result to an essentialist account of Woman to achieve the deconstructive and critical goals of feminism.⁴⁹⁰ Instead, the only necessary account is an account of what is excluded from our present legal and social systems.⁴⁹¹ She states that we can show that the present social definition of women results in the invisibility of certain harms to women.⁴⁹² The deconstructionist notion of the *differend*, as formulated by Lyotard, can describe what is made culturally invisible.⁴⁹³ Women's joy and harms to women are the *differend*.⁴⁹⁴ As Cornell explains it: "The *differend* is that which has been shut out of traditional legal discourse and the social conventions of meaning".⁴⁹⁵ The suffering of women can be understood as the *differend*. Harm to women cannot

⁴⁸⁴ *Ibid*

⁴⁸⁵ *Ibid*. Also see Williams *CNLLR* 1990 701.

⁴⁸⁶ *Ibid*.

⁴⁸⁷ *Idem* 689-692.

⁴⁸⁸ Williams *CNLLR* 1990 701.

⁴⁸⁹ Cornell *CNLLR* 1990 645.

⁴⁹⁰ *Idem* 669-670.

⁴⁹¹ *Ibid*.

⁴⁹² *Idem* 669.

⁴⁹³ *Ibid*. See Lyotard *The Postmodern Condition: A Report on Human Knowledge* 1979.

⁴⁹⁴ *Ibid*.

⁴⁹⁵ *Ibid*.

be represented as harm within law and therefore harm to women literally disappears. The “truth” of the experience of women cannot be discovered in the current system of gender representation: “[T]he truth of our experience awaits the discourse in which it can be expressed”.⁴⁹⁶

In writing differently, women, in some sense, are creating their own experience. In the area of law, in order to avoid the danger of analogising women’s experience to that of men and in order to find legal redress, it is necessary to attempt to give expression to the *differend*.⁴⁹⁷ For Cornell, feminist jurisprudence demands a new idiom: “We cannot give expression to the *differend* simply by turning women into ‘a litigant’ if such transformation demands that women’s suffering be translated into the prevailing norms of the system which cannot express adequately, if at all, the suffering of women”.⁴⁹⁸ If women cannot express their reality in the legal system, then their reality disappears.⁴⁹⁹

If the content of this excluded account of the feminine experience were to become too definite, too permanent, it could also result in an essentialist definition of Woman.⁵⁰⁰ Cornell tries to avoid this danger by arguing that the account of Woman as the *differend* is so full of meaning, like the experience of actual women, that it can give rise to multiple interpretations.⁵⁰¹ The space for diversity and difference which is so central to postmodernism and feminism becomes assured, because in the absence of an outside referent like nature or biology, no one interpretation can claim exclusivity based on correspondence with an absolute truth.⁵⁰²

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Idem* 675. See also Williams CNLLR 1990 702.

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.*

From this analysis, Cornell reaches the necessity in using myth. Myth is a part of our culture, culture that we can after all never entirely escape.⁵⁰³ But it is also constructed by metaphoric language. Metaphoric language contains a surplus of meaning and can therefore not be captured by a single interpretation.⁵⁰⁴ Myth, transformed by new interpretation, from the perspective of the *differend*, can become a vehicle of representation of that which cannot be represented.⁵⁰⁵ It can therefore function not only as a denunciation of the system in which the interpretation is inexpressible, but also as a vision of a “new choreography of sexual difference” in which expression is possible.⁵⁰⁶

Williams puts it differently: by identifying a particular view of women within a particular system of legal definition and by looking at how gender hierarchy is produced and represented in the law, we can avoid relying on the “consensus of women’s felt experience as the basis for expanding legal definitions” and at the same time destabilise the system of gender hierarchy in the name of a “new choreography of sexual difference that is beyond the mere application of what is”.⁵⁰⁷

Thus for Cornell, we depend on the performative power of language and in particular poetic signification to bring the feminine “reality” into view.⁵⁰⁸ It is necessary to re-tell myths of the feminine in order to expand the current discourse so as to discover women’s reality.⁵⁰⁹ Myths function within metaphors and as metaphors they have a surplus of meaning which may allow the creation of a new feminine reality.⁵¹⁰

⁵⁰³ *Idem* 696-698.

⁵⁰⁴ *Ibid.* See Williams *CNLLR* 1990 703.

⁵⁰⁵ Williams *CNLLR* 1990 703.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ Williams *CNLLR* 1990 703-704.

⁵⁰⁸ Cornell *CNLLR* 1990 696-698.

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

The shift in the representation of feminine reality can have important legal and political implications.⁵¹¹ Certain types of behaviour that were previously out of the scope or parameters of the legal system can be seen as harms to women.⁵¹²

The question arises: If the myths of Woman, like women themselves, are subject to a surplus of interpretations, how are we to choose between the various interpretations?⁵¹³ Because of the fact that Cornell rejects the possibility of an ultimate objective truth about women, either drawn from nature of biology, no interpretation is truer than another.⁵¹⁴ However, we judge interpretations not on truth, but on an ethical and political standard:

Instead, the criteria for judgement are both ethical and political. Do one interpretation rather than another expand and enhance the way Woman is 'seen', so as to lift the stereotypes that justify the continuing oppression of women? The language of the feminine is how we typically operate to displace the stereotypes associated with gender difference - by using the feminine affirmatively.⁵¹⁵

4.3.2 Ethical Feminism and Deconstruction

Clark explains that one of the fundamental premises of Derrida's deconstructive theory rests upon his powerful assertion: "There is nothing outside the text".⁵¹⁶ This idea supposes that human experience is available to us only in the form of some kind of narrative.⁵¹⁷ For Derrida, human experience is itself a form of narrative.⁵¹⁸ This narrative's origins are irretrievable and the end is similarly

⁵¹¹ *Ibid.*

⁵¹² *Ibid.*

⁵¹³ *Ibid.*

⁵¹⁴ *Idem* 681. Also see Williams *CNLLR* 1990 703.

⁵¹⁵ *Idem* 682.

⁵¹⁶ Derrida *Of Grammatology* 1967 158 quoted in Clark *DUKEJGLP* 2005 117.

⁵¹⁷ Clark *DUKEJGLP* 2005 118.

⁵¹⁸ *Ibid.*

unreachable.⁵¹⁹ Narrating all human life in its infinite capacity for difference is a goal beyond our reach.⁵²⁰

Derridean deconstruction, because of its open-ended nature, has been attacked as being nihilist for its absence of universally recognised or essentialist human goals.⁵²¹ Derrida's response to such attacks is a powerful endorsement of a philosophical principle of difference: "He claims that the very purpose of deconstruction is to free systems of thought from the unnamed and imperceptible conditions that restrict the freeplay of thought".⁵²² These limiting conditions pervade Western thought and the most prominent instances of this he terms as "phallogocentric" and "logocentric" characteristics of all Western reason.⁵²³

Clark further explains that logocentrism is a tendency in thought which valorises identity over difference.⁵²⁴ Derrida claimed that Western thought illustrates the extent to which all divergent and digressive philosophical impulses are relegated to the field of error.⁵²⁵ The very nature of reason, thus inherent in reason, is an attempt to restrain and restrict an entire field of human experience - that of "otherness".⁵²⁶ Western thought requires intellectual violence, which ultimately is tied to emotional and physical violence, to exist. Derrida states:

It has always been thought that the center, which is by definition unique, constituted the very thing within a structure which while governing the structure, escapes structurality. This is why classical thought concerning structure could say that the center is, paradoxically, within the structure and outside it. The center is at the center of the totality, and yet, since the center

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid.*

⁵²¹ *Ibid.*

⁵²² *Ibid.*

⁵²³ *Ibid.*

⁵²⁴ *Ibid.*

⁵²⁵ *Ibid.*

⁵²⁶ *Ibid.*

does not belong to the totality (is not part of the totality), the totality has its center elsewhere. The center is not the center.⁵²⁷

Clark illustrates how if the word “Man” or “masculine” is substituted for the word “center” then we are able to see the ways in which thought has been imbued with violence as well as the ways in which a gendered notion of reason has come to be accepted as the norm.⁵²⁸ For Derrida, Man is the entity, uniquely so, which governs the structure of thinking and yet which somehow escapes the scrutiny of that thinking.⁵²⁹ Man is at the heart of Western thought, life and law and at the same time he is somehow outside it.⁵³⁰ Derrida further suggests that Reason is not neutral.⁵³¹ It is rather an expression of masculine desire.⁵³² The sense of coherence that we draw from Western reason is itself a kind of masculine violence that organises the disparate according to the principle of masculine identity.⁵³³ The violence of reason is one of the most prominent features of Derridean thinking and he suggests that logocentric violence is most readily apparent in what he calls “binary oppositions”: This is the pairing of terms in such a way that the prior holds a hegemonic position in relation to the second, for example: inside/outside, good/evil, true/false and man/woman.⁵³⁴

Clark illustrates how Western thought has, for Derrida, another characteristic that participates in gender quality: phallogentrism.⁵³⁵ Phallogentrism of reason finds its rootedness in a male, masculine economy of images.⁵³⁶ The man/woman binary is the most glaring example of this dynamic.⁵³⁷ In addition phallogentrism is the foundational principle upon which Western reason is built and its primary symbol

⁵²⁷ Derrida *Writing and Difference* 1967 279 quoted in Clark *DUKEJGLP* 2005 118.

⁵²⁸ Clark *DUKEJGLP* 2005 119.

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*

⁵³¹ *Ibid.*

⁵³² *Ibid.*

⁵³³ *Ibid.*

⁵³⁴ *Ibid.*

⁵³⁵ *Idem* 120.

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.*

is the phallus itself.⁵³⁸ Power, authority and certainty are all linked to a symbolic order that is phallogocentric.⁵³⁹

This conflation of reason (logos) with the phallus (the authoritarian origin of a decidedly male symbolic order) has led to phallogocentrism as being characterised as the foundational feature of Western thought.⁵⁴⁰ Here we find reason and narrative brought together in a gendered unity.⁵⁴¹ The combination of a logocentric system of exclusion and inclusion and a phallic symbolic order results in the exclusion of woman from the narrative of Western thought and it also results in feminine invisibility.⁵⁴² Clark explains this in simple terms: To be a meaningful member of the societal order is to be phallogocentric.⁵⁴³ Cornell articulates, with the insights of postmodern and Derridean theory, the dilemma of feminism in general:

If there is to be a feminism at all, as a movement unique to women, we must rely on a feminine voice and a feminine 'reality' that can be identified as such and correlated with the lives of actual women; and yet all accounts of the Feminine seem to reset the trap of rigid gender identities, deny the real difference among women (white heterosexual women have repeatedly been reminded of this danger by women of color and lesbians), and reflect the history of oppression and discrimination rather than an ideal or an ethical position to the Other to which we can aspire.⁵⁴⁴

She suggests that the most useful means in describing women's suffering and in securing a new vision that escapes the phallogocentrism of dominant discourse, lies in the deconstruction of essentialism.⁵⁴⁵ She invokes the philosophical argument that has been with the West since Plato: "the contrast between a

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

⁵⁴⁰ *Ibid.*

⁵⁴¹ *Ibid.*

⁵⁴² *Idem* 121.

⁵⁴³ *Ibid.*

⁵⁴⁴ Cornell *CNLLR* 1991 132-133.

⁵⁴⁵ Clark *DUKEJGLP* 2005 121.

thinking that is essentially revelation, where the thinking subject reveals her intrinsic powers and characteristics; and invention, where the subject attempts to forge new models of personhood through the process of thinking ‘otherwise’.⁵⁴⁶ For Cornell, the latter is the only option out of the binary divide of male/female and all its oppressive consequences.⁵⁴⁷ She therefore suggests the deconstruction of the gendered opposition that pervades Western reason in order to reinvent the model of the legal subject.⁵⁴⁸

Cornell agrees with many other feminists that the experience of women should be expressed, but we cannot rely on some natural, essential “Woman” to ground this experience. Such a foundation is unavailable if we realise that language is not a mirror reflecting a given reality, but it is itself a social artefact, created in part by the language we use to describe it.⁵⁴⁹ Thus, the interpretation that is an inevitable part of knowledge formation is deeply encoded by the cultural values and concepts in the language through which that knowledge is expressed.⁵⁵⁰ If essentialism requires that we reach behind language to some or other pre-existing essential reality about women, then it rests on a view that according to Cornell has been discredited.⁵⁵¹

At the essence of deconstructive thought lies the belief that bipolar structures of Western thought (man/woman, friend/foe, good/evil) distort the reality of lived experience.⁵⁵² Access to the world around us is inextricably linked and intertwined with our ability to describe that world. Therefore, the ways in which we represent the world, accomplished largely through the use of language, have an enormous impact on what the world is.⁵⁵³ Derrida’s famous assertion mentioned above, “There is nothing outside the text”, does not mean that the world is one

⁵⁴⁶ *Idem* 121-122.

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Idem* 122.

⁵⁴⁹ Cornell *CNLLR* 1991 29. See also Williams *YJLF* 5 1993 291.

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid.*

⁵⁵² Clark *DUKEJGLP* 2005 126.

⁵⁵³ *Ibid.*

big textual fantasy.⁵⁵⁴ It rather means that the world is a product of an enormously intricate interaction between imagination, material conditions and desire.⁵⁵⁵

Cornell focuses on the issue of “metaphoric transference” which is one of the central critical motifs in deconstructive theory.⁵⁵⁶ Clark explains that in this analytical model, the question of how we represent things is elevated above the question of what we represent when we say something. It is done in this manner because humans have no access to the “essence” of a thing.⁵⁵⁷ Derrida argues that the very idea of “essence” is a human invention aimed at reducing the particularity of each individual for the sake of generating mastery over the subject in question.⁵⁵⁸

The following example has been used to explain this distinction: When a person is asked to tell about her or himself, they will often begin by reciting different attributes.⁵⁵⁹ For example: “I am a lawyer and a mother”. This list can obviously go on and on. At a certain point the person that asked the question may interrupt because he or she is satisfied. But the question is analytically impossible to complete, because our access to ourselves is always no greater than the sum of discursive utterances we can master.⁵⁶⁰ The questioner may say: “Is that it then? You are a lawyer, a mother, a gardener and a lover of Bach?” Clearly, these do not complete the “essence” of the speaker. There may always be another gesture or utterance to add to the essence of what the speaker is.

Thus, although we construct visions of our essential selves by means of metaphorical constructs or what Cornell calls “metaphorical transference of

⁵⁵⁴ *Ibid.*

⁵⁵⁵ Clark *DUKEJGLP* 2005 126-127.

⁵⁵⁶ Clark *DUKEJGLP* 2005 122. See Cornell *CNLLR* 1991 148-150.

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Clark *DUKEJGLP* 2005 122. See Cornell *CNLLR* 1991 143.

⁵⁵⁹ Clark *DUKEJGLP* 2005 122.

⁵⁶⁰ *Ibid.*

properties”, we are never really able to find or get to the essential.⁵⁶¹ Cornell even asserts that this is a classically masculine approach to thinking about personhood and as such it must be avoided if women are to be able to reinvent themselves.⁵⁶² Cornell states:

We prescribe these properties as the essence of the thing because that is how we know the thing, or more precisely how we think the thing should be. If we cannot know the form of the thing through purified expression, we are always prescribing its properties. It is this moment of prescription in metaphorical transference which assigns the proper that makes Derrida himself suspicious of the metaphor.⁵⁶³

Law as such is a form of prescription which disguises its claims as truth: “We cannot separate our actual existing legal system from the law of replication of existing gender identity. In other words, if we are to challenge the situational sexism women endure within our legal system, we must also challenge the current gender divide as it is implicated in the limits we have experienced on the possibilities of the legal reform and transformation”.⁵⁶⁴

This suggests a problem because of the character of the law itself. The fact that the trial of descriptive metaphor never ends is incompatible with the dynamics of law.⁵⁶⁵ Cornell suggests that the essential myth of legal thinking is exactly that the metaphoric trail can be completed.⁵⁶⁶ Law is therefore inherently prescriptive and it also participates in an active forgetting of this fact; law and all models of representation depend on the fact that the prescriptive moment must be erased or forgotten.⁵⁶⁷ It needs to suggest that legal pronouncements have captured the

⁵⁶¹ Cornell 1991 100-101. See Clark *DUKEJGLP* 2005 122.

⁵⁶² *Idem* 31.

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Idem* 33. See Clark *DUKEJGLP* 2005 123.

⁵⁶⁶ *Ibid.*

⁵⁶⁷ *Ibid.*

point in question.⁵⁶⁸ In this way, law lays claim to a quasi-transcendental notion of truth:

[W]hat one is really doing when one states the essence of Woman is reinstating her in her proper place. But the proper place, so defined through her essential properties of what women can be, ends by shutting them in once again in that proper place. In this special sense, the appeal to essence of Woman, since it cannot be separated completely from the prescription of properties to her, reinforces the stereotypes that limit our possibilities.⁵⁶⁹

This analytical move, for Cornell, enchains women once again in a masculine discourse. Cornell uses Luce Irigaray to describe this as “dereliction”.⁵⁷⁰ This is the notion that feminine difference cannot be expressed except as signified within a structure of representation constructed by the masculine imaginary symbolic.⁵⁷¹ In such an order the feminine is always subordinate and other.

The following question has been formulated in this regard: “How do we escape the inescapable? How do women, or for that matter, how does anyone reinvent themselves in a discursive regime that permits fundamental eccentricity? Most of all, how can law – that region of human activity most committed to the promulgation of rules – ever come to respect the difference that constitutes women?”⁵⁷²

For Cornell the answer is, as mentioned above, a “new choreography of sexual difference” and in this process she asks that we rethink the very notion of utopian thinking itself.

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Idem* 31.

⁵⁷⁰ *Idem* 7-8. Clark *DUKEJGLP* 2005 123. See Irigaray *The Sex Which Is Not One* 1985 112- 113 (trans Porter C) and *Speculum of the Other Woman* 1985 239 (trans Gill GC).

⁵⁷¹ *Ibid.*

⁵⁷² Clark *DUKEJGLP* 2005 123-124.

In Cornell's view, the feminine is the source of a utopian alterity.⁵⁷³ The feminine is a way of imagining the world otherwise. It is so precisely because it suffers in light of masculine discourse.⁵⁷⁴ Instead of understanding the feminine as a lack, Cornell asks, that it be understood as a highly mediated social formation, one which gains its power by being other to the dominant masculine paradigm.⁵⁷⁵

4.3.3 Lacan: Woman as Lack

As mentioned above, Cornell challenges the idea of naturalist or essentialist theories of Woman's difference but at the same time states that the refusal to affirm the feminine may spark accusations of participating in the "traditional repression and the disparagement of the feminine".⁵⁷⁶ She argues that a response to this charge is to focus on the feminine as a psychoanalytical category that is produced in such a manner that it also serves as a disruptive force of the very gender system in which it is given meaning.⁵⁷⁷ In this way the feminine is celebrated not simply because it is the feminine, but because it "stands in for the heterogeneity that undermines the logic of identity".⁵⁷⁸ This position, it is suggested, has appeal because it does not claim to show what women's nature or essence actually is, but rather it shows how the feminine is produced within a particular system of gender representation so as to be disruptive of gender hierarchy and identity.⁵⁷⁹ Within the dichotomous system of gender identity in which the masculine is privileged as the norm, the feminine is a critical heuristic device.⁵⁸⁰

Cornell explains that in Lacanian psychoanalysis the moment when the infant recognises itself as having an identity separate from the mother, it experiences

⁵⁷³ *Ibid.*

⁵⁷⁴ Cornell 1991 141.

⁵⁷⁵ Clark *DUKEJGLP* 2005 127.

⁵⁷⁶ Cornell *CNLLR* 1990 658.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ *Ibid.*

⁵⁷⁹ Cornell *CNLLR* 1990 659-662.

⁵⁸⁰ *Ibid.*

loss and pain.⁵⁸¹ The pain and loss results in a repression that buries the memory of the relationship with the mother in the unconscious and simultaneously the infant enters the Symbolic realm so as to fulfil its desire for the Other. Once the infant is projected into language, the primary identification with the mother is projected only as lack.⁵⁸² The phallic mother and what she represents cannot be expressed in language.⁵⁸³ Lacan appropriates signification in general with the masculine.⁵⁸⁴ Woman as a result, in Lacanian psychoanalysis, is identified only by her lack of the phallus. As Cornell asserts:

She is different from the phallus. She can know herself only as this difference, as the lack. As lack, she cannot speak of herself directly. As Lacan remarks, 'there is no woman but excluded from the value of words.' She is only as a hole in the system of linguistic representation. She is that which cannot be represented in the realm of the symbolic. This is the basis of Lacan's infamous assertion that Woman does not exist, which is one way of saying that the phallic Mother and women's repressed relationship with Her cannot be represented.⁵⁸⁵

Lacan, therefore, also insists that women cannot tell the experience of Woman, because it is this universal experience that is beyond representation.⁵⁸⁶ In terms

⁵⁸¹ *Ibid.* See in general Minsky (ed) *Psychoanalysis and Gender: An Introductory Reader* 1996 137-177. According to Freud's Oedipal structure, the subject comes into existence through the intervention of the father who disrupts the mother-child relationship by prohibiting the child's desire for the mother. Lacan reads this primary repression in linguistic terms. According to Lacan, the primary bond between mother and child is broken and the subject comes into being by entering into the symbolic order. Typically this order is a combination of language and law. The symbolic separates child and mother, what is termed symbolic castration and this separation causes loss, absence and lack within the self. This lack is partially addressed through the baby's identification with words, images and signifiers. During the famous mirror-stage this child between six and eight months experiences a sense of jubilation or *jouissance* when she first recognises her own image in the mirror or in the gaze of her mother and through the reflection she comes to identify with a whole and complete bodily existence. This image is external to the body and different from the child's sensual experience of a disjointed body. Identity and bodily integrity thus, are not given, but are constructed through a mirroring process and the repeated recognition of self by the Other who appears to be complete.

⁵⁸² Cornell *CNLLR* 1990 659-662.

⁵⁸³ *Ibid.*

⁵⁸⁴ Cornell *CNLLR* 659.

⁵⁸⁵ *Idem* 662.

⁵⁸⁶ *Ibid.*

of Lacanian psychoanalysis, all attempts to tell us what Woman is, are undermined. She is for Lacan the beyond, but at the same time she is “there” as the absence, as the lack.⁵⁸⁷ But, as Cornell asserts, to say that she is unknowable, is not to say that she is not felt. On the contrary, Woman as lack, constitutes gender subjectivity.⁵⁸⁸ Women, ultimately, are shut out of the Symbolic, except as represented in male fantasy.⁵⁸⁹ Woman cannot find themselves in the representations of the feminine that appear in masculine fantasy, because these fantasies represent the male loss of the Mother.⁵⁹⁰

Cornell further explains that, within the Lacanian framework, myths of women are about the quest to ground male subjectivity and as a result these myths cannot serve to tell us anything of Her mystery.⁵⁹¹ These myths tell us about masculine subjectivity, not about Woman, and finally:

As women, we are cut off from the myths that could give Feminine meaning and, therefore, in Lacan’s sense, we are silenced before the mystery of the ground of our own identity. The feminine is only given meaning in the symbolic order that belies Her existence as ‘real’. The feminine is imaginary, represented only in the contents of masculine fantasy. As a result, women cannot knowingly engage the Feminine in order to gain identity. They are, instead, appropriated by the imaginary Feminine as it informs male fantasy. But the ‘truth’ of this fantasy is rooted in a primordial desire for the Other that cannot be destroyed and continues to threaten the order of the symbolic. *In this sense, the Feminine remains a subversive force in Lacanian psychoanalysis.*⁵⁹²

As mentioned above, in terms of Lacanian psychoanalysis, the feminine is identified by her lack of the phallus. Lacan, in this way, finds the place of Woman

⁵⁸⁷ *Ibid.*

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Idem* 665.

⁵⁹⁰ *Ibid.*

⁵⁹¹ *Idem* 662-663.

⁵⁹² Cornell 1990 *CNLLR* 662 (Own emphasis).

and gives her, her proper place as the “hole”.⁵⁹³ Cornell reminds via Derrida that Woman as the lack and the absence of the phallic mother is precisely what cannot be given a proper place.⁵⁹⁴ Woman disrupts the very notion of proper place, even then Lacan’s designation of her as the lack of the phallus.⁵⁹⁵ Lacan’s own analysis of the feminine is that which is Other or that remains beyond any system.⁵⁹⁶ There can be no definitive locale for women, but yet he locates her as truth, as the fact of the lack of the phallus.⁵⁹⁷ Lacan creates in spite of his own analysis the place of woman as opposition, in the sense that she is defined by her lack of the phallus.⁵⁹⁸ Derrida deconstructs Lacan’s insistence on the separation of the Truth of Woman as castration from the fictions that surround and inhabit her.⁵⁹⁹ Cornell translates Derrida here into the sphere of feminist politics and it is necessary to quote her at length:

Derrida recognizes the need to ‘describe’ the referent Woman as it has been played with on the historical stage and as it has trapped, oppressed and subordinated actual women. But he is also saying that such ‘descriptions’ are never pure explanations, as if Woman could be separated from the texts in which she has been told. Our oppression is not a fiction, nor is it all a reality, a site, indeed, a prison from which escape is impossible. If escape were impossible, it would also be impossible to avoid replicating the very structure of rigid gender identity which has imprisoned women and made the dance of the maverick feminist so difficult to keep up.

⁵⁹³ *Idem* 673-674.

⁵⁹⁴ *Ibid.*

⁵⁹⁵ *Ibid.*

⁵⁹⁶ *Ibid.* What appeals to feminist psychoanalysts in Lacan’s development is the way his work overtly opens up the possibility of thinking about sexuality and identity within the sphere of language and thought where desire and the unconscious becomes accessible. The very process of thought itself is discovered to be gendered and oppressive because in the patriarchal Symbolic order, man is the self and women the, or his, other, having her existence only in relation to him and meaningless without him. But as Lacan himself makes clear that the meanings of language are always potentially vulnerable to the unconscious disruption made possible by the presence of desire, so that meanings and identities, including those of “man” and “woman” are never fixed and change is always possible. See Minsky (ed) 1996 179.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

⁵⁹⁹ *Ibid.*

Yet, this being said, these fictions as representations are still there for us. Indeed, it is only through these metaphors, representations and fictions that we attempt to reach Woman. We cannot separate the ‘Truth’ of Woman from the fictions in which she is represented and through which she portrays herself. In this sense, she becomes veiled. Therefore, we cannot know once and for all who or what She is, because the fictions in which we confront Her always carry within the possibility of multiple interpretations, and there is no outside referent, such as nature of biology, in which this process of interpretation comes to an end. As a result, we cannot ‘discover’ the ground of feminine identity which would allow us to grasp her Truth once and for all. Yet, Woman is not reduced to lack just because the metaphors of Her produce an always shifting reality.⁶⁰⁰

Derrida’s emphasis on the possibility of breaking beyond the identification of the feminine as opposition is, for Cornell, inherently ethical and political in Derrida.⁶⁰¹ What is important is Cornell’s reminder that the need to break beyond the limit of the “reality” of Woman as defined by the lack of the phallus and the insistence that Woman cannot be separated from the metaphors in which she is represented and in which she veils herself, does not mean that there “is” no reality to women’s oppression.⁶⁰² Cornell notes that Derrida understands the importance of bringing this into line with “the revolution” that seeks to end the practical reality of women’s subordination.⁶⁰³

Derrida bows to the idea of the feminine as that which is determined to escape the confines of the given stereotypes of the feminine.⁶⁰⁴ The feminine also opens up the space where “the productive power of metaphors of the Feminine can operate to enhance and expand our reality”.⁶⁰⁵ Cornell asserts:

⁶⁰⁰ *Ibid.*

⁶⁰¹ *Idem* 677.

⁶⁰² *Ibid.*

⁶⁰³ *Ibid.*

⁶⁰⁴ *Idem* 678-679.

⁶⁰⁵ *Ibid.*

Put very simply, we are not stuck with the way things are 'now', because the way things 'are' 'now' carries within the beyond to the current system of gender representation.⁶⁰⁶

It is clear that deconstruction has implications for Lacanian theory. Lacan sees Woman as the representation of lack or loss, the way the symbolic order has made her. But in fact, Woman disrupts that order and can never be fully captured by it.⁶⁰⁷ Woman is thus deeply subversive of the symbolic order. For Cornell the feminine is a door through which the unspoken, unspeakable and repressed can rise up to challenge the order.

4.3.4 Closing remarks

To conclude, I return to the question asked a few times in the beginning of this chapter: How can we avoid the danger of essentialism and avoid abandoning the feminine altogether? It becomes clear that the answer for Cornell lies in deconstruction. It recognises the unfinished and disruptive elements in all linguistic and conceptual systems.⁶⁰⁸ It therefore opens up the possibility for a feminine writing that challenges the present system of gender relations on the basis of an ethic of justice and a new choreography for sexual difference.⁶⁰⁹

In the context of Cornell's argument, deconstruction helps us to see that however rich our symbolic system and however powerful the institutions that support it might be, we are never completely captured by it. Williams explains that our salvation lays in the fact that language, and in particular metaphorical language, contains a surplus of meaning through which prescription and interpretation enter.⁶¹⁰ To apply a conceptual category to something, in other words to assert that it belongs in a certain place, is to make a prescriptive claim about it.⁶¹¹ That

⁶⁰⁶ *Idem* 680-682.

⁶⁰⁷ *Ibid.*

⁶⁰⁸ Williams *YJLF* 1993 295.

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.*

⁶¹¹ *Idem* 296. See Cornell 1991 18.

claim has normative implications and assumptions in many cases.⁶¹² Deconstruction shows that language is constantly open to reinterpretation and normative challenge.⁶¹³

It is not possible to resolve normative and interpretive clashes by referring to some reality behind and independent of language, like nature or biology.⁶¹⁴ Cornell via Derrida asserts that there is only context and that nothing exists outside context, but also that the limit or border of the context always contains a clause of non-closure.⁶¹⁵

Thus, knowledge is a human activity which takes place in social and conceptual systems. We can therefore never step outside of those systems to acquire some knowledge that is truer or transcendent or universal.⁶¹⁶ However, we are never totally captured by the systems we inhabit because every system has a limit or border in time or space beyond which other systems and contexts apply.⁶¹⁷ Therefore, these systems are subject to invasion and transformation.⁶¹⁸ There is nothing outside of culture, but no single culture can capture the universe and make itself immune to disruption.⁶¹⁹

When considering, in this context, Lacanian theory that sees Woman as lack or loss, we are reminded that “She” is exactly that which cannot be fully captured by the symbolic order. She disrupts the order and is deeply subversive of the order and in this way opens up the space for the repressed and unspeakable.

⁶¹² *Ibid.* Williams uses the example of the claim: “[M]an is a rational animal”. This claim assumes among other things it is both meaningful and desirable to distinguish reason from emotion; that reason is the most important characteristic that distinguishes man from other animals and that women are somehow less than men.

⁶¹³ *Ibid.* Cornell 1991 31.

⁶¹⁴ *Ibid.* Cornell 1991 83.

⁶¹⁵ *Idem* 296. Cornell 1991 170.

⁶¹⁶ *Ibid.*

⁶¹⁷ *Ibid.*

⁶¹⁸ *Ibid.*

⁶¹⁹ *Ibid.*

The claim then is that nothing exists outside symbolic systems, but these systems are always open for disruption and reinterpretation. Is reality then whatever we create it to be with our interpretations and reinterpretations? In other words can we eliminate gender oppression by reinterpreting our situation?⁶²⁰ Cornell asserts: “Our oppression is not a fiction”, but it is also not all of reality.⁶²¹ Reference does not completely disappear. It must be tied to our interpretations of reality.⁶²²

Whilst Derrida dreams of an understanding of non-sexual difference, Cornell argues that we must begin from the present situation of sexual difference and affirm the feminine.⁶²³ For her, a gender-neutral approach will be ineffective because no gender-neutral position is available within our current system of gender identity.⁶²⁴ The present system is one of hierarchy and therefore it must be challenged.⁶²⁵ This cannot be done if we ignore gender categories altogether and therefore the challenges and reinterpretations of the feminine must include an affirmation of the feminine.⁶²⁶ In Cornell’s view the great value in deconstruction lies in the fact that this approach rests ultimately on an ethical insight that points to a utopian ideal.⁶²⁷ This insight is that justice involves recognising the claims of those who are excluded by the categories of our present symbolic system.⁶²⁸ Justice is bringing those who have been left outside in. Therefore, using deconstruction, understood as the process of undermining existing symbolic categories by bringing to the surface the excluded and suppressed, is doing justice and justice is the ethical force behind

⁶²⁰ *Idem* 297. See also Cornell 1991 82.

⁶²¹ Cornell 1991 82.

⁶²² *Ibid.*

⁶²³ Williams *YJLF* 1993 279. Cornell 1991 99-100.

⁶²⁴ Cornell 1991 93.

⁶²⁵ *Ibid.*

⁶²⁶ *Idem* 93-96. Cornell recognises that this phase is structural rather than temporal. We will never be able to pass out of this stage completely, because gender hierarchy will continually assert itself, but we can move beyond it in our theorising.

⁶²⁷ Cornell 1991 109. See also Williams *YJLF* 1993 297.

⁶²⁸ *Ibid.*

deconstruction.⁶²⁹ When we see it from this perspective, the denial of new possibilities and new interpretations is a moral and political act, an unjust act, rather than simply an epistemological position.⁶³⁰ Deconstruction is utopian, because it points to the inevitable beyond, the “not yet of the never has been” through which justice is gradually, imperfectly actualised.⁶³¹ In this regard, Cornell has termed deconstruction the “philosophy of the limit”.⁶³² Deconstruction allows us to imagine a beyond to the limit and therefore allows us to examine that which exists beyond the limits of the law or any paradigm.⁶³³ Deconstruction in this way helps us to imagine how justice may be achieved as well as allowing us to seek utopian possibilities as the existence of the limit enables us to seek ways to transcend it.⁶³⁴ The utopian element is needed in feminism if it is to be more than a mere reversal of gender hierarchy.⁶³⁵

This utopian ideal can be incorporated in feminism through a type of feminine writing.⁶³⁶ The feminine here is not biology or sociology or psychology, but rather a matter of symbolism and interpretation. This type of writing explicitly affirms the feminine rather than seeking a gender-neutral standard or ideal.⁶³⁷ It is in the deconstructive sense utopian, because it challenges the present system of gender identity by reinterpreting gender and imagining it in a new way, a way that brings to the fore the excluded and suppressed.⁶³⁸ This type of writing is often created in the reinterpretation and retelling of myths that speak of the significance of Woman.⁶³⁹ These myths are part of the symbolic order which we find ourselves

⁶²⁹ *Idem* 111-115. See also Williams *YJLF* 1993 298.

⁶³⁰ *Idem* 109.

⁶³¹ *Idem* 112.

⁶³² Bohler-Muller *Developing a New Jurisprudence of Gender Equality in South Africa* LLD Thesis, University of Pretoria 2006.

⁶³³ *Ibid.*

⁶³⁴ *Ibid.*

⁶³⁵ Cornell 1991 112-116. See also Williams *YJLF* 1993 298.

⁶³⁶ *Idem* 107. See also Williams *YJLF* 1993 298.

⁶³⁷ *Ibid.*

⁶³⁸ *Ibid.*

⁶³⁹ *Ibid.*

in, but they are metaphors that offer a foothold for transformation and that is why we should “think of the feminine as allegory”.⁶⁴⁰

As Williams explains, the feminine must reject accommodation of the existing symbolic order, since feminism is about utopian reimagining.⁶⁴¹ Repudiating the feminine is part of the symbolic order, indeed, the devaluation of what is defined as feminine is one of the few constants across human cultures within gender hierarchy.⁶⁴² If we repudiate the feminine, we will succumb to dereliction once again.⁶⁴³ The feminine should be embraced, not as an essentialist category, but as a doorway or an opening to otherness and justice.⁶⁴⁴

4.4 Conclusion

By using the deconstructionist notion of the *differend* as well as Derridean assertions in general, Cornell illustrates how the feminine is subordinate and other within a masculine symbolic and male discourse.⁶⁴⁵ The Derridean identification of the phallogentric and logocentric characteristics of Western reason demonstrates the exclusion of the feminine from the Western symbolic and Western thought.⁶⁴⁶ The feminine suffers in the light of masculine discourse, and in the dichotomous system of gender identity the masculine is privileged as the norm. In Lacanian psychoanalysis, the feminine can only be represented as lack.⁶⁴⁷ Woman is effectively shut out of the symbolic, except as represented in male fantasy. Cornell reminds via Derrida that women can however never fully be captured by the symbolic order and is in fact deeply subversive of that order.⁶⁴⁸ It is from this perspective that we may see the feminine as a disruptive force.

⁶⁴⁰ *Ibid.*

⁶⁴¹ *Idem* 9 & 204-205. See Williams *YJLF* 1993 298.

⁶⁴² *Idem* 9.

⁶⁴³ Williams *YJLF* 1993 298.

⁶⁴⁴ Cornell 1991 173-178 & 204-205.

⁶⁴⁵ See section 4.3 above.

⁶⁴⁶ See section 4.2 above.

⁶⁴⁷ See section 4.3 above.

⁶⁴⁸ *Ibid.*

Within a symbolic where the feminine is shut out of the social conventions of meaning and subordinate and other, Cornell asserts that the feminine gains its power exactly by being other to the dominant masculine paradigm. She asks that the feminine be looked upon as a critical heuristic device. The feminine should act from an ethical marginal position, continuously disrupting the dominant paradigm. The feminine can be used to disrupt existing symbolic categories by bringing to the fore the excluded and suppressed. We bring the excluded to the fore by using the feminine as allegory. The re-telling of myths that affirm the feminine becomes an essential foothold for transformation. We judge these myths on ethical and political grounds and whether they lift the stereotypes that justify the continuing oppression of women.

I submit that ethical feminism as an approach may serve well in addressing the South African context and the particular needs of South African women. In the heterogeneous South African society where there are vast cultural, religious, ethnic and socio-economic differences between women, we cannot rely on an essentialist approach in order to address the particular position of women. Our experiences are too diverse. Approaches of essentialism and universalism have been rigorously discredited by postmodern and postcolonial feminists.⁶⁴⁹ If we resort to an essentialist account of women, we run the risk of further excluding or marginalising certain groups of women. Any interpretation of the feminine should be sensitive to the differences between women and should not seek to reduce women to a social category or as having a shared identity.

Ethical feminism, relying on Derridean deconstruction, achieves the critical goals of feminism whilst suggesting a positive program to address the realities of women. The space for diversity and difference central to postmodern and postcolonial feminisms becomes assured without having to abandon a feminist political or legal project.

⁶⁴⁹ See section 4.2 above.

Against the background sketched it is important to note that ethical feminism takes account of a masculine symbolic order or paradigm and suggests a way of disrupting any framework or paradigm in a manner that seeks to bring about change. In this way, feminism becomes the ethical and political fight against hegemonic meanings and institutions that exclude; marginalise or suppress certain groups of peoples.⁶⁵⁰ From this perspective, ethical feminism is sensitive to multiple stories, contexts and the need of a heterogeneous society. In the realm of legal interpretation and judgment an ethical feminist approach may result in openness to transformation and difference. One will not rely on legal assumptions of universality or generality which exclude or reduce difference.

In this regard, Van Marle has mentioned that ethical feminism provides a better understanding of current sex and gender relations because of the fact that it focuses on women as beyond the current systems of stereotypical representations.⁶⁵¹ With reference to legal theory, Van Marle contends that the feminine can become a site of resistance.⁶⁵² Women can use their marginalised voices as representations of difference, plurality and human diversity.⁶⁵³ From the perspective of ethical feminism, Van Marle has formulated a powerful critique of substantive interpretations of equality. Here, Van Marle contests that most laws

⁶⁵⁰ See Cornell "Rethinking Ethical Feminism through Ubuntu" 2010 1-3. Copy on file with author. Cornell explains that ethical feminist struggles are not only against the subordination of women, but more broadly construed feminism is both an ethical and political struggle against meanings and institutions that deny the being of anyone as fully human. This expands the reach of feminism to fight alongside all others who are dropped below the bar of humanity by the pumped up notion of "Man" as the civilised as well as the civiliser. There is no feminist struggle without the battle against racism, neo-colonialism and continuing forms of imperial domination. Even the most sophisticated psychoanalytical justifications for why civilisation demands that women be barred from full humanity are inseparable from the idea that "Man" must reign. Here Man is the very definition of what it means to be civilised and thus to be human. Cornell reminds that Frantz Fanon (*Black Skins, White Masks* 1967) and many others have asserted that Man is always imagined as white: "So-called 'civilization' then sets up the bar against others, who make Man what he purportedly stands for, precisely by marking his difference from these others. Thus feminism is always against this "othering" which takes some beyond the reach of humanity and registers them as less than human".

⁶⁵¹ Van Marle "'The Capabilities Approach', 'The Imaginary Domain' and 'Asymmetrical Reciprocity': Perspectives of Equality and Justice" *Feminist Legal Studies* 2003 255 at 277. See also Van Marle *Towards an Ethical Interpretation of Equality* LLD Thesis, UNISA 1999.

⁶⁵² *Ibid.*

⁶⁵³ *Ibid.*

and legal reforms continue to reflect universal thought in the form of stereotypical meta-narratives.⁶⁵⁴ In cases of gender equality, for example, women are regarded as a certain group of human beings. In an effort to address material conditions, we may violate and harm once again by not truly regarding difference and otherness.⁶⁵⁵ An ethical feminist approach, rather than universalising, attempts to be sensitive to difference and open to otherness.

The feminine, that has not only been associated with the political fate of women, but also with the political fate of marginalised peoples in general (this includes people living under pressing socio-economic conditions, people with HIV and AIDS, children and minority groups as it pertains to religion, race, nationality and sexuality)⁶⁵⁶ can disrupt the existing symbolic order and thus become a vehicle for bringing the reality of those in the margins into view. It suggests how any hegemonic or dominant paradigm (whether that paradigm be the law or the cultural symbolic order) may be countered by making use of deconstruction. Ethical feminism thus seeks to address marginalisation as such. I therefore further submit that an interpretation of the feminine as suggested by ethical feminism may prove to assist post-apartheid jurisprudence in its development. Ethical feminism revolves around issues of difference, exclusion and marginalisation. The post-apartheid jurisprudential context, as mentioned, seeks to make legal standards as open as possible to difference and plurality, its project focusing on marginality and legal exclusion. It thus shares some of the same commitments and further shares the same critical and deconstructive tendencies. Consequently, it is my contention that as the feminine represents marginality, interpretation of the feminine may render ways of bringing to the fore the voices of those that post-apartheid jurisprudence seeks to address.

⁶⁵⁴ *Ibid.*

⁶⁵⁵ *Ibid.*

⁶⁵⁶ See Minsky (ed) *Psychoanalysis and Gender: An Introductory Reader* 1996 210. The psychoanalytical destructive cultural response to difference is seen to be evident in the patriarchal masculine response not only to gender but to sexual orientation, race, class, ethnicity and nation.

By interpreting and re-interpreting the feminine, ethical feminism seeks to affirm different ways of being as well as to disclose the concerns of women marginalised by the masculine symbolic. The allegorical feminine points to a utopian ideal, the “not yet of the never has been”. This allows women to imagine transcending their current position, thereby taking seriously the possibility of transformation.

My discussion on ethical feminism directs an interpretation of the feminine in the subsequent chapter. I therefore attempt an exercise in using the feminine affirmatively and allegorically as suggested by ethical feminism. The feminine is used in an effort to reveal some of the spaces and frameworks that women are forced to occupy. One of the questions that arise is what narratives and myths may we tell and re-tell in the South African context in order to lift stereotypes? The narratives serve as further contemplation for a feminist jurisprudence. I have mentioned that the post-apartheid jurisprudential context informs the contemplation for a feminist jurisprudence, that it provides a critical foundation for the reflection and that the contemplation is situated within this context. It is along these lines that I explore the notion of Refusal as used within post-apartheid jurisprudential thought. I align the narratives and myths with this notion. Following ethical feminism as theoretical starting point and informed by post-apartheid jurisprudence, I interpret the feminine as refusal.

Chapter 5

Stories of Refusal

5.1 Introduction

In the previous chapter, I put forward ethical feminism as a theoretical guide to interpreting the feminine. Against the context of post-apartheid jurisprudence and ethical feminism discussed previously, in this chapter I consider an interpretation of the feminine as refusal and reflect on the feminine as allegory. The question that arises is whether the feminine may be seen as that which refuses, especially as it pertains to the refusal of the masculine symbolic order, frameworks and spaces that women are forced to occupy. The narratives discussed in the first part of this chapter are illustrative of the feminine as refusal. In the second part, I discuss Refusal as it is found within the post-apartheid jurisprudential context. The narratives are also representative of a twist towards aesthetics utilised in the spirit of The Aesthetic Turn.⁶⁵⁷ The engagement with refusal will therefore mark a metaphorical analysis as opposed to the more scholarly analyses of the previous chapters. In the concluding part of the chapter I discuss the significance of refusal for the contemplation of a feminist jurisprudence.

5.2 The Feminine as Refusal

5.2.1 Mrs Konile's Story

The first story that I explore is a true one. It is the story of Notrose Konile who testified before the Truth and Reconciliation Commission. She was the mother of one of the Gugulethu Seven. The Gugulethu Seven incident was one of the better known killings in the mid 1980's that involved the murder of seven young

⁶⁵⁷ See section 3.4 above.

ANC activists.⁶⁵⁸ Most of the mothers testifying before the TRC showed an extraordinary spirit of forgiveness. Mrs Ngewu responded to the question of a lengthy prison sentence for her son's murderers in the following way:

I do not agree with this view. We do not want to see people suffer in the same way we did suffer. We do not want to return the suffering that was imposed on us [...] We would like to see peace in this country [...] I think all South Africans should be committed to the idea of reaccepting these people back into the community. We do not want to return the evil that the perpetrators committed to the nation. We want to demonstrate humanness towards them, so that they in turn may restore their humanity.⁶⁵⁹

Krog *et al* mentions that in identifying and calling the mothers of the Gugulethu Seven to give testimony, the TRC was looking for a certain kind of story: "that of a brutal regime, stoic struggle by the human spirit for truth and freedom and an eventual triumph over evil".⁶⁶⁰ Mrs Konile and the other family members of the Gugulethu Seven who testified were supposed to show how resilient and eventually how forgiving they were.⁶⁶¹ The Commission had already been given parts of this grand narrative by the other women, but they did not get it from Mrs Konile.

First of all, Mrs Konile's testimony was one of the most incoherent testimonies that came before the TRC.⁶⁶² She did not relay the events leading up to and after her son's death chronologically. She talked for a long time about a dream she had of a talking goat and of being trapped under a rock. She jumped from the

⁶⁵⁸ Krog, Mpolweni & Ratele *There was this Goat: Investigating the Truth Commission Testimony of Notrose Nobomvu Konile* 2009 5. An estimated 30 000 people attended the funeral of these young activists. Krog *et al.* asserts that this underlined the perception that the tide against the apartheid system could no longer be stemmed. According to Krog *et al.* the Gugulethu Seven killings "showcased" like few others the fatal mix in the townships of poverty, anger, unemployment, dreams of taking up arms, change and liberation which were all fuelled and manipulated by operations of the police and security forces.

⁶⁵⁹ *Idem* 11.

⁶⁶⁰ *Idem* 56.

⁶⁶¹ *Ibid.*

⁶⁶² *Ibid.* See pp 6-17 for a detailed account of Mrs Konile's testimony.

realm of dreams to reality and back again to her dreams. She mixed up spaces and places. I quote from Krog, Mpolweni and Ratele:

Mrs Konile began her testimony by sighing heavily six times within five rather short sentences, as if she were saying: 'I am so tired - I am so tired even before this process of which I already despair begins.' While the Truth Commission hearings were meant to deal precisely with 'telling' its cathartic effect and thus forgiveness, the Commissioners appeared unprepared for and uneasy about Mrs Konile - they addressed relatively few questions to her. On the video footage the discomfort of the other mothers with her testimony is also clearly visible. It was as if her story resisted the imposed framework of the hearings, as if her mind resisted easy readings. She seemed to say 'mine is not part of what you want to hear. I will tell you of my dreams, my miserable life. I want to do my own kind of accounting'.⁶⁶³

Her response to the question on forgiving her son's murders was the following:

I wouldn't be able to talk to them, it is their fault that now I am in this misery, now I wouldn't know what to do with them [...] I can never tell them what to do. I have just given up everything.⁶⁶⁴

In a subsequent interview many years later, she stated:

I do not want to lie [...] I did not forgive them.⁶⁶⁵

The all-forgiving black mother is usually symbolically portrayed as the basis of reconciliation.⁶⁶⁶ Notrose Konile refused to embrace this symbolic space. She did not forgive her son's murderers and chose to tell her personal story in a particular

⁶⁶³ *Ibid.*

⁶⁶⁴ *Idem* 17.

⁶⁶⁵ *Idem* 145.

⁶⁶⁶ *Idem* 86. Krog *et al* asserts that the mothers of the Gugulethu Seven were supposed to become "the custodian[s] of the collective memory of the fallen hero".

cultural and metaphoric way.⁶⁶⁷ The words of the fictional Winnie Mandela in Njabulo Ndebele's novel *The Cry of Winne Mandela* has been quoted many times in the context of law and reconciliation. Considering Mrs Konile's story it seems again appropriate:

I give you my heaven as possibly the single element of consistency in my political life: My distrust of reconciliation [...] I will not be an instrument for validating the politics of reconciliation. For me, reconciliation demands my annihilation.⁶⁶⁸

In the context of forgiveness, two more instances of refusal may be evoked. In his work on mourning, refusal and forgiveness, Jaco Barnard-Naudé recalls the murder of Vuyani and Madoda Papiyana.⁶⁶⁹ Vuyani and Madoda were brothers that went out to celebrate on the evening of 27th April 1994.⁶⁷⁰ They celebrated because they had just cast their votes in South Africa's first democratic elections.⁶⁷¹ Later that evening Vuyani was killed and Madoda was found injured and in a state of shock.⁶⁷² The brothers were the victims of a racist drive-by shooting.⁶⁷³ Their attackers were James Wheeler and Cornelius Pyper, who were supporters of the AWB.⁶⁷⁴ The AWB, or the *Afrikaner Weerstandsbeweging*, is the well-known white rightwing organisation that in the run-up to the elections called on its members to militantly oppose the transition to a democratic South Africa.⁶⁷⁵ Both Wheeler and Pyper were found guilty and sentenced to 15 years' imprisonment. Zenam Papiyana, the father of Vuyani and Madoda, received a letter stating that Pyper was willing to pay Vuyani's funeral costs and indicated that he wished to see Mr Papiyana face to face in order to apologise to him and

⁶⁶⁷ *Ibid.*

⁶⁶⁸ Ndebele *The Cry of Winnie Mandela* 2003 112-113.

⁶⁶⁹ Barnard-Naudé "The Work of Mourning, Refusal, Forgiveness" in van Marle (ed) 2009 103 at 103.

⁶⁷⁰ *Ibid.*

⁶⁷¹ *Ibid.*

⁶⁷² *Ibid.*

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.*

⁶⁷⁵ *Ibid.*

his family.⁶⁷⁶ Mr Papiyana agreed to meet Pyper and stated that the meeting helped him to overcome some of the emotional problems he had as a result of his son's death.⁶⁷⁷ He declared the meeting with Pyper to be "the best thing I could ever have done".⁶⁷⁸ Mrs Papiyana declined or rather *refused* to meet Pyper, stating that she would not be able to face the murdered of her son.⁶⁷⁹

The other instance brought up by Barnard-Naudé is words of the character Joyce Mtimkhulu.⁶⁸⁰ When asked by the TRC whether she will forgive those responsible for her son's death, she replied: "Not today".⁶⁸¹

5.2.2 Myths and Narratives

I associate Mrs Konile's refusal (as well as the refusal of Mrs Papiyana and Joyce Mtimkhulu) with that of Ophelia in East-German playwright Heiner Müller's *Hamletmachine*. Müller rewrote Shakespeare's *Hamlet* in 8 pages and considered Ophelia the main character. In this play, Ophelia turns her body into vehement revolt by stating:

This is Electra speaking. In the heart of Darkness. Under the sun of torture. To the capitals of the world. In the name of the victims. I eject all sperm I have received. I turn the milk of my breasts into lethal poison. I take back the world I gave birth to. I choke between my thighs the world I gave birth to. I bury it in my womb. Down with the happiness of submission. Long live hate and contempt, rebellion and death. When she walks through your bedrooms with butcher knives you'll know the truth.⁶⁸²

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Ibid.*

⁶⁷⁸ *Ibid.*

⁶⁷⁹ *Ibid.* Joyce Mtimkhulu is a character in Michael Lessac's musical play *Truth in Translation*. The character is modelled on the real Joyce Mtimkhulu who testified before the TRC about the disappearance of her son Siphiso Mtimkhulu.

⁶⁸⁰ *Idem* 119.

⁶⁸¹ *Ibid.*

⁶⁸² Heiner Müller *Hamletmachine* at Théâtre Gérard Philipe in Saint-Denis 1979. See Hirvonen "Desiring Body in Revolt: Transgression in Ophelia" 2010 copy on file with author.

Ophelia refuses the Lacanian designation of her as an object of male desire; revolting against her place in the symbolic order.⁶⁸³ In this way Mrs Konile's resistance against the imposed framework created by the processes of reconciliation links with the larger symbolic order that women are forced to embrace. Ophelia's words pertaining to her breasts, womb and birth, especially her ruthless submission that "[she] chokes between [her] thighs the world [she] gave birth to" reminds of the character Sethe in Toni Morrisons' *Beloved*.⁶⁸⁴ Sethe does the unthinkable and murders her infant child. Infanticide can be seen as an act of resistance. Maria Aristodemou mentions that the murderous mother, in refusing motherhood, threatens to undermine a society's fundamental structures.⁶⁸⁵ By murdering her child she points to the failures as well as the oppressiveness of those structures.⁶⁸⁶ As mentioned above, Notrose Konile told her story in a particular cultural and metaphoric way, relaying events and her life in her own unique language. Mrs Konile's use of language connects with the different languages of Ariadne as re-told by Aristodemou.⁶⁸⁷ Mrs Konile and the other mother's refusal may also be associated with the refusal to submit to the law. Ariadne, rather submitting to the law, submits to literature.

⁶⁸³ See the discussion of Lacan in section 4.3 above.

⁶⁸⁴ Morrison *Beloved* 1988. Ophelia's anger also brings to mind the anger of the complainant in Jacob Zuma's rape trial. Zuma was found not guilty by Judge van der Merwe. The complainant made the following submission in an interview after the hearing: "I haven't spoken out before because I did not want to be part of the game I saw happening through the media. I see myself being described and defined by others, the media, the defence, the judge. I have heard the things said by members of various structures and parties. I see analysis and judgement from all sides... Now I am angry and ready to speak. It is anger with direction. I am ready to use it to take on the huge battle we have in our society when it comes to how women are viewed and treated and the kind of roles men play to keep women in these positions. I am not mad. I am not incapable of understanding the difference between consensual and non-consensual sex. The fact that I have been raped multiple times does not make me mad. It means there is something very wrong with our world and our society." See Cavanagh & Mabele "I Was Raped and I Am Sane" *City Press* 14 May 2006 as cited in Motsei *The Kanga and the Kangaroo Court: Reflections on the Rape Trial of Jacob Zuma* 2007 150.

⁶⁸⁵ Aristodemou *Law and Literature: Journeys from Her to Eternity* 2000 222.

⁶⁸⁶ *Ibid.*

⁶⁸⁷ *Idem* 271-295.

Aristodemou retells the ancient Greek myth of the Minotaur.⁶⁸⁸ In discussing the project of law and literature, Aristodemou examines the law-making qualities of fiction in order to explore the fictionality of law. Staying true to postmodernist insights throughout, Aristodemou revisits the Minotaur myth and retells the story from the viewpoint of Ariadne.⁶⁸⁹ Ariadne, as a woman, refusing to submit to the language of law, in the end successfully negotiates the law's acceptance of her different languages.⁶⁹⁰ The Greek Minotaur myth tells the story of Ariadne who gave Theseus a ball of string to find his way out of the Cretan Labyrinth.⁶⁹¹ Ariadne's help enabled to future Athenian legislator to emerge victorious from his encounter with the Minotaur. On Theseus' return journey he abandons Ariadne asleep in Naxos or, in other versions of the myth, pregnant in Cyprus. Theseus forgets to change the colour of his ship's sails from black to white wrongly signalling to his father Aegeus that he has been killed by the Minotaur. Aegeus, overcome by grief and despair commits suicide by throwing himself in what was thereafter know as the Aegean Sea.

Abandon Ariadne enters the Labyrinth and finds the Minotaur for herself.⁶⁹² In Aristodemou's reading of Ariadne, the Minotaur and his labyrinth become representations of the law, modernism, knowledge, reason, masculine ideals and discourse as well as truth. Ariadne becomes representative of literature, poetry and other art forms. She also serves to denote the feminine.

Ariadne ridicules and laughs at the Minotaur.⁶⁹³ His labyrinth confuses him as much as it confuses others and he has left himself with only one hole (reason), only one language (abstraction) and only one faculty (mind).⁶⁹⁴

⁶⁸⁸ Regarding the Minotaur Myth see in general: Wilson *Encyclopedia of Ancient Greece* 2006, Trzaskoma, Smith & Brunet *Anthology of Classical Myth: Primary Sources in Translation* 2004.

⁶⁸⁹ Aristodemou 2000 271-270.

⁶⁹⁰ *Idem* 25.

⁶⁹¹ *Idem* 273-274.

⁶⁹² *Idem* 273-295.

⁶⁹³ *Idem* 279.

⁶⁹⁴ *Ibid.*

Ariadne wants to maintain mystery. She opens up more paths and keeps the story going.⁶⁹⁵ She prefers to maintain the multiplicity of the labyrinth with its infinite twists and turns.⁶⁹⁶ No closures, just more paths, more unending stories, other pasts and other futures.⁶⁹⁷

Aristodemou highlights creatively through numerous works of fiction, philosophy and myths that any attempt to understand the world by means of language (in law, in literature or in philosophy) imposes an artificial order.⁶⁹⁸ In emphasising the theme of artificiality, she refuses to bolster law and literature as distinct disciplines.

Aristodemou begins her first chapter by asking: “What is the ontological status of law and of literature?”⁶⁹⁹ She answers by saying that although we can agree that law deals in the material world of life and death, both law and literature are in the very first instance signs on a page.⁷⁰⁰ Both law and literature depend for their existence on words, on language. Both law and literature are constructed by language, and words create alternative fictional worlds which can appear to be inevitable.⁷⁰¹ Both law and literature are artificial constructs, like time or identity, aiming to create, and especially in law’s case, impose order out of chaos.⁷⁰² The artist however, Aristodemou explains, admits and sometimes even draws attention to the contingency and artificiality of her constructions; legal language on the other hand aims to conceal its artificial origins.⁷⁰³ While the artist confesses to the fact that her creations are arbitrary, incomplete, provisional and hypothetical, the lawyer and the law persists that the law is natural, inevitable and

⁶⁹⁵ *Idem* 296-297.

⁶⁹⁶ *Ibid.*

⁶⁹⁷ *Idem* 297.

⁶⁹⁸ The works explored by Aristodemou includes Gabriel Garcia Marquez’s *Chronicle of a Death Foretold* 1982, Emily Brontë’s *Wuthering Heights* 1874, Albert Camus’ *The Outsider* 1942 and William Shakespeare’s *Measure for Measure*.

⁶⁹⁹ Aristodemou 2000 1.

⁷⁰⁰ *Ibid.*

⁷⁰¹ *Ibid.*

⁷⁰² *Idem* 1-2.

⁷⁰³ *Idem* 2.

cannot only provide all the answers but all the right answers.⁷⁰⁴ Aristodemou quotes Peter Goodrich:

Law is a literature that denies its literary qualities. It is a play of words which asserts an absolute seriousness; it is a genre of rhetoric which represses its moments of intervention or of fiction; it is a language which hides its indeterminacy in the justificatory discourse of judgement; it is procedure based on analogy, metaphor and repetition and yet it lays claim to being a cold disembodied prose, a science without poetry or desire; it is a narrative which assumes the epic proportions of truth; it is in short, a speech or writing which forgets the violence of the word and the terror or jurisdiction of the text.⁷⁰⁵

For Aristodemou, attempts to keep law separate from literature and to maintain it as a superior discourse are doomed, since law cannot escape language.⁷⁰⁶ It relies for its own definition and existence on language.⁷⁰⁷ Aristodemou, relying on Derrida's critique of foundationalism in philosophy, explains that philosophy, political theory and of course law, function in the same way as literature.⁷⁰⁸ Philosophy's dependence on language, as law's dependence on language means that it is no more privileged than any other discipline.⁷⁰⁹ Aristodemou, through emphasis on deconstructive and psychoanalytical readings reminds that the divisions we make between different ways of reading, writing and learning and between different disciplines are cultural rather than natural, constructed rather than given.⁷¹⁰ This may be associated with Klare's discussion on legal culture in the third chapter.⁷¹¹ As Klare notes, human practices, including legal

⁷⁰⁴ *Ibid.*

⁷⁰⁵ *Idem* 8. Goodrich *Law in the Courts of Love: Literature and Other Minor Jurisprudences* 1996 112 as cited by Aristodemou.

⁷⁰⁶ *Ibid.*

⁷⁰⁷ *Ibid.*

⁷⁰⁸ *Ibid.* Derrida *Writing and Difference* 1978 27 as cited by Aristodemou.

⁷⁰⁹ *Ibid.*

⁷¹⁰ *Idem* 262. Like everything else our identities "man". "woman", are not timeless, universal or natural, but contingent and provincial, because it is through language that we come to recognise ourselves and the external world.

⁷¹¹ See section 3.2.3 above.

practice, are situated and therefore only occur in the context and through the medium of culturally available understandings and symbols. Meaning systems are contingent products of human action, but, in the absence of critique and self-reflection they may appear natural and fixed. Moreover, such divisions are hierarchal and made by those with an interest in presenting their version of the truth as superior to that of other peoples'.⁷¹² The law and literature project shares the contemporary disbelief in the ability of any one method, story, discipline or theory to find out the "truth", not least because "truth" may be an illusion masking power struggles over the right to define the world.⁷¹³

All the way through her book Aristodemou illustrates that because of the fluidity of language, no one or single meaning is possible. No single discipline can escape language and can therefore purport to reveal truth. Viewed from a linguistic perspective, law and reason has no imperiousness.⁷¹⁴ Language is not a transparent mediator between experience and reality but rather provides the terms by which reality is constituted.⁷¹⁵ It is through language that we come to understand and constitute ourselves as subjects and language shapes our understanding of ourselves and the world.⁷¹⁶ It imposes straitjackets on our thinking, our ability to express dreams and our capacity to envisage reform.⁷¹⁷

Aristodemou asserts that postmodern theorists' denunciation of the illusion of unitary truths cannot be separated from the dismissal of the idea of meaning as being either static or controllable.⁷¹⁸ The Enlightenment ideal in ordering the world relies on a view of language where signs reflect the real world. Signs, however, do not mean anything in themselves, but they derive their meaning

⁷¹² Aristodemou 2000 4.

⁷¹³ *Ibid.*

⁷¹⁴ *Ibid.*

⁷¹⁵ *Idem* 11.

⁷¹⁶ *Ibid.*

⁷¹⁷ *Ibid.*

⁷¹⁸ *Ibid.*

from the context (political, social and historical) in which they are used.⁷¹⁹ A text's meaning depends instead on its relation to other elements. The insight that meaning is not inherent in signs challenges the view that there is a one to one correspondence between linguistic proportions and reality.⁷²⁰ But instead of a single, physical reality reflected by our language, what we have is a reality constructed by language.⁷²¹ As we come to know ourselves through language, language also constructs human subjectivity and the suggestion is that the ideologies inscribed in language must be challenged in language and it is thus also the space where change may take place.⁷²² Our thoughts, speech and writing are produced within a specific language and a specific discourse.⁷²³ It is through language that the subject comes to recognise herself as a unified subject and takes her place in the family, law and society, accepting the subjectivity ascribed to her in the existing symbolic as obvious and natural.⁷²⁴ But by deconstructing the subject it is pointed out that the subject conceived by reason and history was the heterosexual man.⁷²⁵

Aristodemou contends that legal theorists are generally concerned with legal language and the legal subject. The creation of human subjectivity is however not limited to the legal realm, nor is legal language divorced from a society's use of language in other spheres.⁷²⁶ Successive critical theories in law have not achieved the radical changes they hoped to achieve in the form or content of law.⁷²⁷ For Aristodemou, we must turn our attention to the wider realm of language and culture.⁷²⁸ Language is a key category for understanding how human subjectivity is created and sustained and a major instrument for prompting

⁷¹⁹ *Idem* 12.

⁷²⁰ *Ibid.*

⁷²¹ *Ibid.*

⁷²² *Idem* 13.

⁷²³ *Idem* 12.

⁷²⁴ *Ibid.*

⁷²⁵ *Ibid.*

⁷²⁶ *Ibid.*

⁷²⁷ *Ibid.*

⁷²⁸ *Idem* 14.

change.⁷²⁹ Two groups that have paid great attention to language are feminist theorists and post-colonial theorists.⁷³⁰ Language has in many ways become the focus of their struggle.⁷³¹ Aristodemou purports that to contest the view that human nature and language are not fixed, is not to deny these concepts, but to expand them.⁷³² To argue that meaning is not stable is not to deny meaning but to expand it.⁷³³ Such expansion may allow us to discover unspoken dreams and possibilities in literature, but also in law.⁷³⁴ Further, it will allow opening up oneself to difference, particularly gender difference.⁷³⁵

Aristodemou mentions that for Julia Kristeva, literature is a prime location for questioning, because in artistic play the pre-Oedipal articulations of the semiotic can intrude into, disturb and unsettle the language of the masculine symbolic.⁷³⁶ Hélène Cixous goes further to claim that rupture and subversion is more akin to female sexuality and female writing. Women's writing eschews masculinist binary oppositions, linearity and hierarchal divisions that may encourage new ways of seeing and being and can serve as a springboard for transforming social and cultural meanings and values.⁷³⁷

⁷²⁹ *Ibid.*

⁷³⁰ *Ibid.*

⁷³¹ *Ibid.*

⁷³² *Ibid.*

⁷³³ *Idem* 18.

⁷³⁴ *Idem* 14.

⁷³⁵ *Idem* 20.

⁷³⁶ *Ibid.* Kristeva *Revolution in Poetic Language* 1984 50-1 as cited by Aristodemou. Kristeva takes the view that women are part of a wider group consisting of those in society who become cultural scapegoats. She grounds this in her concept of the "abject" that is an unconscious sense of disgust which harks back to the baby's pre-Oedipal experience of its own and its mother's bodily products. Only later with the onset of the castration complex and the discovery of sexual difference does this disgust become translated into a connection with the feminine as the abject. For Kristeva the abject comes to represent what is marginalised and repressed in society in the pre-Oedipal stage she calls the "semiotic". She contrasts the semiotic with the Symbolic of the post-Oedipal stage, arguing that male-dominated thought rests on the repression of the semiotic and the pre-Oedipal unidentified mother. See Minsky (ed) 1996 182.

⁷³⁷ *Ibid.* Sellers (ed) *The Hélène Cixous Reader* 1994 as cited by Aristodemou. French feminist writers such as Cixous suggest that unconscious desire, associated with the mother and imprisoned between rational, binary categories of language, can be freed from patriarchal control through the use of specifically poetic language, which because of its close involvement with the unconscious, must always challenge the arbitrary, male-defined categories of thought through which we experience the world. See Minsky (ed) 1996 179.

Attempts to disregard poetic language and literature, Aristodemou contests, are attempts to exclude women from the legal labyrinth.⁷³⁸ It is an attempt to deny difference and in particular gender difference so as to guard an essential and unchanging masculine identity.⁷³⁹ For women to enter the legal fortress, they need not only different laws, but a different language that acknowledges their different aspirations, dreams and journeys.⁷⁴⁰ Ariadne insists not on one path, but many paths; not on one truth, but many truths.

In Aristodemou's reading, Woman and the feminine can reveal the production and contingency of societal constructs that deny their own artificiality and re-open the gap between representation and reality.⁷⁴¹ Ariadne's refusal of the law, her constant insistence on the law's artificiality as well as her laughter in ridiculing the Minotaur, connect with Foucault's laughter upon discovering the Chinese encyclopaedia in the fiction of Borges.⁷⁴² Borges writes about a certain Chinese encyclopaedia in which animals are classified in the following way: "(a) as belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification (i) frenzied, (j) innumerable, (k) drawn with a very fine camel brush, (l) etcetera, (m) having just broken the waterpitcher, (n) that from a long way of look like flies".⁷⁴³ Foucault mentions that his book, *The Order of Things: An Archaeology of the Human Sciences*, first arose out of this passage in the fiction of Borges and "out of the laughter that shattered, as I read the passage, all the familiar landmarks of my thought - of *our* thought, the thought that bears the stamp of our age and our

⁷³⁸ *Ibid.*

⁷³⁹ *Ibid.*

⁷⁴⁰ *Ibid.*

⁷⁴¹ *Ibid.*

⁷⁴² Foucault *The Order of Things: An Archaeology of the Human Sciences* (trans. Sheridan) 1970 xv, Borges "The Analytical Language of John Wilkins" in *Other Inquisitions 1937-1952* (trans. Simms) 1964 as cited in Aristodemou 2000 263.

⁷⁴³ *Ibid.*

geography - breaking up all the ordered surfaces and all the planes with which we are accustomed to tame the wild profusion of existing things”.⁷⁴⁴

Karin van Marle, in the context of post-apartheid jurisprudential thought, has linked the notion of refusal with laughter.⁷⁴⁵ Van Marle discusses Cavarero who draws on a certain passage from Plato.⁷⁴⁶ The passage is as follows:

While looking at the sky and scrutinizing the stars, Thales fell into a well. Then a quick and graceful maidservant from Thrace laughed and told him that he was far too eager to find out about everything in the heavens, while things around him, at his feet, were hidden from his eyes.⁷⁴⁷

Van Marle mentions Cavarero’s response to this passage:

I am not sure that she was a servant or that she came from Thrace, but some woman laughed at the philosophers. A quick smile can often be seen on the faces of women as they observe the self-absorption of brainy intellectual men. Philosophers have put this down to biased ignorance, not realizing that it is the expression of a kind of detachment that locates the roots and meaning of female existence elsewhere.⁷⁴⁸

Van Marle puts laughter and detachment forward as ways of resisting and refusing patriarchy. With laughter and detachment women can seek to create their own spaces from where to engage in political ways of living. Van Marle

⁷⁴⁴ *Ibid.* Foucault ties the limitations of thought to the limitations of freedom. In any culture there are things you are unable to think and acts you are not permitted to carry out. Each reinforces the other, so that ultimately power shapes truth. See in general Morton “Knowledge” in Papineau (ed) *Philosophy* 2009 88.

⁷⁴⁵ Van Marle “Laughter, Refusal, Friendship: Thoughts on a ‘Jurisprudence of Generosity’” *Stell LR* 2006 194-206.

⁷⁴⁶ *Idem* 197-198. Cavarero *In Spite of Plato: A Feminist Rewriting of Ancient Philosophy* 1995 31 as cited by Van Marle.

⁷⁴⁷ *Ibid.*

⁷⁴⁸ *Ibid.*

regards laughter “as a response of refusal, neither active nor passive, but a refusal nevertheless”.⁷⁴⁹

Cavarero’s mention of “detachment that locates the roots and meaning of female existence elsewhere” denotes an alternative outside of the masculine symbolic universe. The maidservant’s laughter may be linked with the laughter of Sibyl and Alexsina whose laughter illustrates an alternative vocabulary that women may already be empowered with.⁷⁵⁰ Louise du Toit recalls a story told in Lindsey Collen’s *The Rape of Sita* which illustrates that, the refusal of the phallus as the centre of the symbolic order renders rape intrinsically nonsensical.⁷⁵¹ The story is that of Sibyl and Alexsina. It begins with Sita, the protagonist in Collen’s novel, that resists the humiliation of rape by asserting her own sexuality.⁷⁵² In the story, Sita is trapped in Rowan’s flat and she felt sure that Rowan wanted to rape her. She considered many plans for physical escape from the situation, but none were practical and she also realistically feared for her life. Within this situation, she decided to resist the rapist and her strategy for doing so was inspired by her realisation that she was threatened by rape because she was a woman.⁷⁵³ She thus placed her predicament within the context of the dominant masculine symbolical order and she also placed her individual position within a maternal genealogy.⁷⁵⁴ She thought of “the rape of centuries against women”, felt solidarity with this group and understood that it was patriarchy that made her a victim as well as understanding that “only in patriarchy is rape a weapon”.⁷⁵⁵

On the one hand, Sita could see her similarity with a group of women all of whom were sexually oppressed, but at the same time she thought of her individual position and her responsibility to turn a place of despair into a place of resistance

⁷⁴⁹ *Ibid.*

⁷⁵⁰ Du Toit 2009 183 & 217.

⁷⁵¹ *Ibid.* Collen *The Rape of Sita* 1993 86 as cited by Du Toit.

⁷⁵² *Idem* 212.

⁷⁵³ *Ibid.*

⁷⁵⁴ *Ibid.*

⁷⁵⁵ *Ibid.*

and transformation.⁷⁵⁶ This possibility for resistance and transformation is born out of the knowledge that there is an alternative or outside to the symbolic universe which has the potential to disarm the rapist.⁷⁵⁷ Sita's immediate response to being threatened with rape is further inspired by her acquaintance with two individual women from the "matriarchal world of Chagos" which is the matriarchal islands of Mauritius.⁷⁵⁸ It is from the rape story of these two women that Sita draws most of her inspiration to resist her attack in a particular way.⁷⁵⁹ The women were called Sibyl and Alexsina and their account of their rape story opened up with long, loud and clear laughter, laughter that is victorious.⁷⁶⁰ The story of the two women is as follows: After taking part in a political demonstration, they were stopped along the road by four policemen in a jeep and ordered into the jeep.⁷⁶¹ They were deceived into thinking that they were being arrested because of their participation in the demonstration, but then the policemen started to assault them, threatening rape.⁷⁶² The policemen were holding the regime of the masculine universal and were going to teach them a lesson.⁷⁶³ The women responded to the threat in the following manner.

They stood up in the back of the jeep, half way up to Montayn Sinnyo, and started to tear their own clothes off. Both of them. At the same time. They just tore their clothes off, and shouted: You all bloody-well try. Men. You think you're so goddamned special. See what you can do, you little shrimp-heads. Men. Bah! Brainless creatures. Think you can scare us with the threat of rape. You show us, then, smart alocs. Show us. Give a demonstration. Show us what's so special about you. Come on. Get going. What's the delay. Goodfornothings.⁷⁶⁴

⁷⁵⁶ *Ibid.*

⁷⁵⁷ *Ibid.*

⁷⁵⁸ *Idem* 213.

⁷⁵⁹ *Ibid.*

⁷⁶⁰ *Ibid.*

⁷⁶¹ *Ibid.*

⁷⁶² *Ibid.*

⁷⁶³ *Ibid.*

⁷⁶⁴ *Idem* 214.

The policemen giggled, got scared, lost their nerve and took the women back into the city.⁷⁶⁵ Du Toit analyses this scenario in the context of her philosophical analysis and gives numerous reasons why this rape scene played out the way it did. In the context of a dominant masculine symbolic she, *inter alia*, asserts that the women refused to be silenced.⁷⁶⁶ They screamed and shouted and it is difficult to reduce someone to an object who resolutely affirms her subjectivity through her voice.⁷⁶⁷

Further, the women were together and acted in solidarity with each other and they drew attention to the fact that they were women and the men were men.⁷⁶⁸ In other words, they sexually differentiated themselves and put themselves and the men in a sexually specific place.⁷⁶⁹ Moreover, the women had torn of their own clothes, asserting themselves as agents and sexual subjects.⁷⁷⁰ They drew attention to the men's sexuality and challenged them to a performance which they will be judging.⁷⁷¹ Sita did the same as the women of Chagos, tearing of her clothes and asserting her body, sexuality and subjectivity.⁷⁷² Although Rowan, Sita's attacker, also grew scared, shameful and disgraced he raped her anyway as Du Toit asserts he is a male prisoner of a patriarchal system that offered him no way out.⁷⁷³ Although Sita was raped, Du Toit asserts, she retained her female dignity.⁷⁷⁴

Sibyl and Alexsina's unexpected resounding laughter tells us that rape's totalising aim can be thwarted in the knowledge that there is a reality outside of patriarchal symbolic which may break into the apparent totalising reality like the loud

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Ibid.*

⁷⁶⁷ *Ibid.*

⁷⁶⁸ *Ibid.*

⁷⁶⁹ *Ibid.*

⁷⁷⁰ *Ibid.*

⁷⁷¹ *Idem* 215.

⁷⁷² *Idem* 216.

⁷⁷³ *Ibid.*

⁷⁷⁴ *Idem* 217.

laughter breaks the silence and announces the story.⁷⁷⁵ Du Toit mentions that with their laughter, the women managed to turn the margin as a place of despair into a place of transformation.⁷⁷⁶

Sibyl and Alexsina illustrated their refusal by laughing and shouting. Refusal may however also be seen as the refusal to speak. The story of Phila Ndwande may be recalled in this context. Phila's story inspired artist Judith Mason to create an artwork consisting of two paintings and a dress. The dress is made out of blue plastic bags. The artwork is accordingly called *Blue Dress* and it is included in the constitutional court's art collection.⁷⁷⁷ Mason heard Phila Ndwande's story whilst listening to the TRC hearings over the radio. Ndwande was tortured, raped and kept naked for ten days before being executed in a kneeling position by apartheid security forces. The man testifying about Ndwande's story stated that she was "a brave one".⁷⁷⁸ She kept silent, refusing to tell her interrogators anything. Before she was killed, Ndwande fashioned a pair of blue panties for herself out of a piece of blue plastic bag. Ndwande's body was found in a shallow grave with the piece of blue plastic still covering her private parts.⁷⁷⁹ As Sita, one might say that Ndwande kept her female dignity in this way. Mason's construction of the blue dress can be associated with Penelope's weaving. The private space of the

⁷⁷⁵ *Idem* 213.

⁷⁷⁶ *Ibid.* The turning of a place of marginality into a place of transformation may also be noted in the following words of Mmatshilo Motsei: "As a woman of the 21st century [...] I choose not to throw up my arms in desperation asking the question: *Baba, senzeni na?* (What have we done?) Instead, I choose to raise my arms in gratitude ready to receive divine feminine and feminist opportunities ushered in by the era of the moment: the time for woman. More specifically, the time for African women has finally come. Those who still choose to wallow in a dream world and an illusion of their racial, gender and geographical superiority will catch up in the next lifetime". Motsei *The Kanga and the Kangaroo Court: Reflections on the Rape Trial of Jacob Zuma* 2007 143.

⁷⁷⁷ See in general http://www.judithmason.com/assemblage/5_text.html visited on 25/06/2010.

⁷⁷⁸ *Ibid.*

⁷⁷⁹ *Ibid.* Mason inscribed the following words on the sculpture of the blue dress: "Sister, a plastic bag might not be the whole armour of God, but you were wrestling with flesh and blood, and against powers, against the rulers of darkness, against spiritual wickedness in sordid places. You're weapons were your silence and a piece of rubbish. Finding that bag and wearing it until you were disinterred was such a frugal, common-sensical, house-wifey thing to do, an ordinary act... At some level you shamed your captors and they did not compound their abuse by stripping you a second time. Yet they killed you. We only know your story because a sniggering man remembered how brave you were. Memorials to your courage are everywhere; they blow about in the streets and drift on the tide and cling to thorn-bushes. This dress is made of some of them. *Hamba Kahle. Umkhonto*".

weaving room becomes a political space through Penelope's weaving, as does Mason's private home when she decided to construct the dress whilst listening to the TRC hearings over the radio.

In returning to Van Marle's engagement with Cavarero in discussing the notion of refusal, I turn to the myth of Penelope as it is read by Cavarero.⁷⁸⁰ A space outside of the masculine symbolic and patriarchy may here be noted again. Cavarero, Van Marle explains, retells the narrative of Penelope in which Penelope's act of weaving and unweaving is interpreted as a way of refusing the order that was forced upon her by patriarchal society.⁷⁸¹ In the weaving room, Penelope weaves during the day and unweaves during the night.⁷⁸² Van Marle illustrates that Penelope creates her own rhythm, creating a space for refusal other to the world of men and the world traditionally assigned to women.⁷⁸³ Penelope does not want to be part of Odysseus' world, but she also does not accept the role of women, producing clothes. Cavarero states:

On the contrary, by unravelling and thereby rendering futile what little work she has done, she weaves impenetrable time... by doing and undoing Penelope weaves the threads of a feminine symbolic order from proportionate materials.⁷⁸⁴

The role of all Greek women of Penelope's time is connected to the home. Penelope, by weaving and unweaving refuses the space and role given to her by patriarchy.⁷⁸⁵ Penelope and the other women are engaged in action and speech.⁷⁸⁶ Van Marle explains that the weaving room becomes a public

⁷⁸⁰ Van Marle 2006 *Stell LR* 197-198. Cavarero 1995 14 as cited by van Marle.

⁷⁸¹ *Ibid.*

⁷⁸² *Ibid.*

⁷⁸³ *Ibid.*

⁷⁸⁴ *Ibid.*

⁷⁸⁵ *Ibid.*

⁷⁸⁶ *Ibid.*

space for political action, a space of refusal.⁷⁸⁷ Van Marle purports by using Cavarero that:

According to the conventional standards of men's time as well as women's time, Penelope's time is 'empty' and 'futile' and therefore 'negative', 'a pure denial'. However, when judged against its own standards, this space and time becomes a 'feminine space where women belong to themselves. It displaces the patriarchal order, setting up an impenetrable distance between that order and itself.⁷⁸⁸

Van Marle is one of the scholars who has engaged with the notion of refusal within post-apartheid jurisprudential thought. Before concluding, I turn my attention to refusal in the context of post-apartheid law.

5.3 Refusal and Post-Apartheid Law

In *discussing* the feminine as refusal above, I relied on Van Marle's use of Cavarero in her discussion of the myth of Penelope and the laughter of the maidservant of Thrace.⁷⁸⁹ In the context of post-apartheid refusal, Van Marle has reflected on the possibility of a politics of refusal and ultimately a way of refusing traditional ways of thinking and doing law.⁷⁹⁰ The possibility that may arise from the engagement with refusal is the beckoning of another politics and another law.⁷⁹¹ Van Marle engaged with the notion of generosity.⁷⁹² This idea illustrates the unexpectedness that breaks with the formality and predictability of law.⁷⁹³ For Van Marle, it is this unexpectedness that discloses possibilities for refusal and it

⁷⁸⁷ *Ibid.*

⁷⁸⁸ *Ibid.*

⁷⁸⁹ See section 5.2 above. Other scholars that have engaged with Refusal within the post-apartheid context include Drucilla Cornell, Henk Botha, Jaco Barnard, André van der Walt, Wessel le Roux, Tshepo Madlingozi, Patrick Hanafin and Pierre de Vos. See van Marle (ed) *Refusal, Transition and Post-Apartheid Law* 2009.

⁷⁹⁰ Van Marle "Introduction- Refusal, Risk, Liminality" in van Marle (ed) 2009 1.

⁷⁹¹ *Ibid.* Van Marle followed Patrick Hanafin's engagement with Maurice Blanchot. See Hanafin "The Writer's Refusal and the Law's Malady" *JLS* 2004 3.

⁷⁹² *Ibid.* Regarding a "Jurisprudence of Generosity" see Williams *The Alchemy of Race and Rights* 1991 28.

⁷⁹³ *Ibid.*

could disclose new directions of thinking and doing law.⁷⁹⁴ Van Marle explains that Karl Klare's notion of transformative constitutionalism connects with a "jurisprudence of generosity" as used by Patricia Williams.⁷⁹⁵ She quotes Klare:

Jurisprudential conservatism [...] may induce a kind of intellectual caution that discourages appropriate constitutional innovation and leads to less *generous* or innovative interpretation and applications of the constitution [...] Caution in this context refers to a legal actor's relationship to legal materials and to interpretive work, not her moral courage [...] My fear is that 'caution' of this kind might in some cases discourage a judge or advocate from investing intellectual resources [...] Constitutional transformation might suffer accordingly.⁷⁹⁶

Van Marle laments the fact that in South Africa it would seem as if transformation, socio-economic reparation and other social problems like poverty and violence are addressed mostly through law and human rights.⁷⁹⁷ She reminds however that it has often been argued that the law and human rights are lacking in its capacity to effect real change.⁷⁹⁸ Van Marle relies on Hannah Arendt and Julia Kristeva to illustrate the danger of a society overtaken by law, human rights and constitutional discourse:

[...] namely the result of a society where political action, thought, eternal questioning and contestation are absent and replaced with an understanding of freedom as mere commercial/economic freedom and of thought as calculated and instrumental.⁷⁹⁹

Van Marle calls for what Kristeva refers to as "revolt in the psychic sense" which refers to "a permanent state of questioning, transformation, change, an endless

⁷⁹⁴ *Ibid.*

⁷⁹⁵ *Idem* 2. Williams *The Alchemy of Race and Rights* 1991.

⁷⁹⁶ *Ibid* (Van Marle's emphasis).

⁷⁹⁷ Van Marle 2006 *Stell LR* 194.

⁷⁹⁸ *Ibid.* Van Marle notes that this claim has repeatedly been made by critical legal scholars in the United States.

⁷⁹⁹ *Idem* 195-196. Kristeva *Revolt She Said* 2002. Arendt *The Human Condition* 1985.

probing of appearances”.⁸⁰⁰ Refusal may also be seen as disruption. Hanafin refers to Herman Melville’s character Bartleby.⁸⁰¹ When Bartleby starts a new job and is asked to do certain tasks, he merely states: “I would prefer not to”. He refuses to submit to any requests. Van Marle notes Hanafin’s words in relation to Bartleby: “his not saying, his passivity, his persistent just being there is enough to disrupt”.⁸⁰²

Patrick Hanafin connects Bartleby to Maurice Blanchot as one of the French intellectuals that participated in drafting the *Declaration on the Right to Insubordination in the War in Algeria*.⁸⁰³ The Declaration insisted on the right to refuse to go to war against the Algerian people. The Algerian War of Independence lasted from 1954-1962 and was marked by repeated massacres and torture. The signatories of the Declaration asserted an absolute right of insubordination. It was because of the inability of, *inter alia*, legal institutions to bring the military to account that Blanchot and the other signatories felt themselves compelled to take a public stance on the issue and declare the right to insubordination. Hanafin notes Blanchot’s reply to the criticism that the right to refusal embodied in the Declaration was an ineffective gesture.⁸⁰⁴ Blanchot replied that this criticism misrecognised the force of such a negative affirmation.⁸⁰⁵ It was not a mere negation, but rather a call which at the same time demanded a response.⁸⁰⁶ Blanchot observed that the Declaration and the right to refuse therein, was:

⁸⁰⁰ *Ibid.* Kristeva *Revolt She Said* 2002.

⁸⁰¹ Van Marle *Stell LR* 2006 201-202. Hanafin *JLS* 2004 8.

⁸⁰² *Ibid.*

⁸⁰³ Hanafin regards Blanchot’s involvement as a response to the call to be responsible to the unknown other. Van Marle (ed) 2009 21 & 63. The unknown other refers to Emmanuel Levinas’ conception of the (im)possible ethical responsibility of struggling against the appropriation of the other into any preconceived meaning of his/her difference or singularity. It is an aspiration to a non-violent ethical relationship with the other. See Levinas *Totality and Infinity: An Essay on Exteriority* 1969.

⁸⁰⁴ Van Marle (ed) 2009 155-156.

⁸⁰⁵ *Ibid.*

⁸⁰⁶ *Ibid.*

[...] an act of judgment [...] and intellectual act, which decides firmly, in the actual situation of the Algerian War and of that of the transformation of military power into political power, that which is just and that which is not... When the state provokes or allows an oppressive force to threaten essential liberties, then every citizen has the right to refuse and denounce it. Nothing more. Is this ineffective? Perhaps, even if all the political developments stemming from this simple word demonstrate the contrary... such a word, a word of judgement, owes all its actual efficacy from its refusal to make itself contingent on calculations of political and practical effectiveness... it is necessary that at a certain point it be pronounced, whatever the consequences may be... that is its power; it is a just word... Certainly the ruling order can always... strike at those who speak. But the word as such is beyond grasp. It has been said, and that which it said will remain said... We must all protect this right, protect it because, reaffirmed and maintained, it remains that which it is [...] the power to say No.⁸⁰⁷

Henk Botha highlights the fact that in South Africa the struggles of ordinary people so often remain hidden and absent from public consciousness.⁸⁰⁸ For Botha, refusal may offer the possibility of a richer conception of politics.⁸⁰⁹ Refusal could open a political conception that offers complexity and multiple perspectives.⁸¹⁰ It could challenge traditional conceptions of democracy and open up ways of talking about singularity, solidarity, plurality, equality and difference.⁸¹¹ Botha considers refusal as a possibly appropriate metaphor for critical legal thought by refusing to be overtaken by the monumental approaches to post-apartheid constitutionalism.⁸¹² Van Marle considers the notion of risk or a risking law as an alternative disclosed by refusal.⁸¹³ She asks:

⁸⁰⁷ *Ibid.*

⁸⁰⁸ Van Marle (ed) 2009 10.

⁸⁰⁹ *Ibid.*

⁸¹⁰ *Ibid.*

⁸¹¹ *Ibid.*

⁸¹² *Ibid.* See the discussion on monumental constitutionalism in section 3.3.2 above.

⁸¹³ *Idem* 2.

If the refusal of traditional ways of approaching law can take us to other kinds of approaches to law and even a different law, what will these approaches look like, what kind of law will this be?⁸¹⁴

She tentatively suggests that it might be a risking law in which the notion of risk is central in several aspects.⁸¹⁵ On a general level it merely refers to the possibility of taking the risk in using law, to address or even achieve one or the other aim through law.⁸¹⁶ More pertinently it refers to an approach to law that goes beyond the certainty of predictable approaches and that is candid about the risks involved when engaging law.⁸¹⁷ This raises the question of law's limits, or, its reflexivity.⁸¹⁸ Part of refusal and risk is also the refusal of a certain "Razzian logic of exclusionary reasoning" in order to move towards a generosity of interpretation, a humility with respect to our own analytical reasoning.⁸¹⁹ This could disclose liminal possibilities for law.⁸²⁰ Van Marle explains that refusal and risk may be seen as counter-hegemonic actions, challenging law in its mode of business as usual.⁸²¹ Thought and thinking is central to both refusal and risk⁸²². It is an action imbued with reflection.⁸²³ The act of refusal is also situated at a "limit of an in-between space", meaning that there is always already another place but also time to come.⁸²⁴ Refusal in this way does not close off or end.⁸²⁵ Van Marle purports that this is the reason why refusal is not nihilist, defeatist or passive, it

⁸¹⁴ *Ibid.*

⁸¹⁵ *Ibid.*

⁸¹⁶ *Ibid.*

⁸¹⁷ *Ibid.*

⁸¹⁸ *Ibid.*

⁸¹⁹ *Idem* 3.

⁸²⁰ *Ibid.*

⁸²¹ *Ibid.*

⁸²² *Ibid.* Van Marle refers here to Hannah Arendt's notion of natality or new beginning and her insistence on thought/thinking. For Arendt the seeds of totalitarianism are to be found in thoughtlessness. Arendt mentions that Adolph Eichmann, during his trial, was literally at a loss of words in cases where he could not rely on clichés or conventional answers. This exposed to Arendt the "banality of evil". Arendt is interested in the occurrence of thoughtlessness in everyday life. See van Marle "Transformative Constitutionalism and/as Critique" *Stell LR* 2009 299. See Arendt *Between Past and Future* 1961, revised edition 1968.

⁸²³ *Ibid.*

⁸²⁴ *Ibid.*

⁸²⁵ *Ibid.*

rather beckons alternatives.⁸²⁶ The same is true for risk. To take a risk, Van Marle explains, falls within a tentative and contemplative gesture.⁸²⁷ A risk can be bold, but is not thoughtless. A risk invites movement and is not a static or reified notion.⁸²⁸

Refusal and risk within the post-apartheid context involves the rethinking of prevalent ideas on transformation, transformative constitutionalism and law.⁸²⁹ It is a call for the refusal of instrumental approaches to knowledge.⁸³⁰ Refusal is an action in the limit, imbued with reflection.⁸³¹ For Van Marle, a risking law arises because of the refusal of traditional and unreflective approaches.⁸³² Van Marle states that the engagements with refusal in the post-apartheid context all share a concern with being true to the complexities of law, politics and life⁸³³. The engagements further share a concern with the everyday, the marginalised and with what is going on in the material contexts of suffering and exploitation in the lives of South African people.⁸³⁴

The technisation of law and human rights discourse are challenged and resisted as well as neo-liberalism and modern technology.⁸³⁵ Refusal may be considered as a possible mode of critical thought or theory, but ultimately as a possible alternative approach to law.⁸³⁶ Refusal involves a slow time, the time and place of

⁸²⁶ *Ibid.*

⁸²⁷ *Ibid.*

⁸²⁸ *Ibid.*

⁸²⁹ *Idem* 13.

⁸³⁰ *Ibid.*

⁸³¹ *Ibid.*

⁸³² *Ibid.*

⁸³³ *Ibid.*

⁸³⁴ *Ibid.*

⁸³⁵ *Ibid.*

⁸³⁶ *Ibid.*

refusal is uncertain, unfixed and continuous.⁸³⁷ Refusal takes the risk of thought without the burdens of having to prove immediate success or relevance.⁸³⁸

5.4 Conclusion

The notion of refusal engaged with in post-apartheid jurisprudential thought reiterates the general concerns of post-apartheid jurisprudence discussed in the third chapter. The engagement calls for the refusal of technical and mechanical approaches to law. It marks, as the aesthetic turn does, resistance against legal formalism. Mechanical approaches might hinder the radical transformation heeded by Klare.⁸³⁹ It is the refusal of jurisprudential conservatism in order to move closer to generous interpretations that may bring about transformative constitutionalism.⁸⁴⁰ Refusal challenges traditional concepts of democracy and also represents the rethinking of prevalent ideas. It is the refusal of monumental approaches to law so that memorial approaches may be sought out.⁸⁴¹ Refusal does not only denote the refusal of certain approaches, but denotes the refusal of law as such. Here, again, we are reminded of the limits of the law. Refusal further attempts to resist approaches that seek to reduce particularity, difference and diversity as well as approaches that seek to ignore ongoing material suffering. It is also a counter-hegemonic action and as a mode of critical thought it echoes the broader post-apartheid jurisprudential concern with marginalisation and

⁸³⁷ *Ibid.* With regard to the time of refusal van Marle relies on Paul Cilliers' conception of time within the context of complex system theory. For Cilliers a slower approach is necessary in order to better cope with a complex world. An argument for slowness, Cilliers purports, is not a conservative one, it is neither merely back-looking, nor a glorification of what has been. Slowness shows concern with the historical nature of knowledge and memory, but is simultaneously forward-looking. Slow and fast might not be the correct terms. He argues that terms like mediated and unmediated and reflective and unreflective might be able to better capture the argument. Cilliers refers to novels in which slowness is directly linked to integrity, integrity being more important than a certain kind of success. See Cilliers "On the Importance of a Certain Slowness. Stability, Memory and the Hysteresis in Complex Systems" in Gershenson, Aerts & Edmons *Worldviews, Science and US: Philosophy and Complexity* 2007 53-80 as cited by van Marle in van Marle (ed) 2009 1.

⁸³⁸ *Ibid.*

⁸³⁹ See the discussion on Transformative Constitutionalism in section 3.2 above.

⁸⁴⁰ *Ibid.*

⁸⁴¹ See the discussion on Monumental and Memorial Constitutionalism in section 3.3.2.

exploitation. Refusal calls for reflection and eternal questioning and contestation, thereby instituting itself as part of post-apartheid jurisprudence's development.⁸⁴²

Refusal as it is used in post-apartheid jurisprudence becomes an important consideration in my contemplation for a feminist jurisprudence. Most notably, refusal in post-apartheid jurisprudence indicates a disruptive element that beckons alternatives and other choices. The myths and narratives discussed denote my understanding of the feminine as refusal. Mrs Konile refuses the framework imposed on her by the processes of reconciliation, as does Joyce Mtimkhulu. Mrs Papiyana in the same way refuses to forgive. Bartleby's words: "I would prefer not to" discussed in reference to Hanafin, links with Joyce Mtimkhulu's words: "Not today".⁸⁴³ One might imagine Mrs Konile as saying: "I would prefer not to be the basis of reconciliation". The words "I would prefer not to" and "Not today" immediately render another possibility to forgiveness, namely the possibility to not forgive, or at least not today. Mrs Konile's telling of her story becomes representative of the refusal to allow her particularity and difference to be subsumed by the processes of reconciliation.

Ophelia's acts of revolt and resistance illustrates her refusal to embrace the symbolic order that she is forced to occupy. Ophelia in this way also represents the subversive force that Cornell sees in certain psychoanalytical readings of the feminine.⁸⁴⁴ Penelope's weaving and unweaving allows a space for refusal, a space outside of patriarchy or the masculine symbolic, one that signifies political action. A place or space outside of the masculine symbolic may be what Cornell would describe as "the not yet of the never has been".⁸⁴⁵ It is this utopian ideal that Penelope points toward. The maidservant of Thrace's laughter and detachment symbolises her resistance, whilst Sibyl and Alexsina's refusal to be

⁸⁴² See section 3.4 above.

⁸⁴³ See section 5.2 above for Hanafin's reference to Bartleby.

⁸⁴⁴ See section 4.3.3 above.

⁸⁴⁵ See section 4.3.4 above.

silent as well as their laughter afforded them the opportunity to turn their place of despair into a place of triumph and transformation.

Ariadne's account illustrates her feminist conception of patriarchy as a system that is primarily obsessed with rationality, truth, justice and reasonableness. She refuses this system by insisting on literature and her poetic language. She represents the possibility for change, not in law, but in the wider realm of language, contending that the feminine may reveal the constructed nature of meaning in order to open oneself up to difference. Ariadne echoes the refusal of the law and illustrates with postmodern and deconstructive insights how change may occur. In her account we thus might not begin with law, but with narrative.

In contemplating a feminist jurisprudence we might begin with the story of a mother before the TRC.⁸⁴⁶ However, even in this I might imagine Mrs Konile as saying: "I would prefer not to be the basis of an approach to law". In this way refusal also becomes the resistance of closure and the erasure of boundaries, or rather the refusal of certitudes. Cornell has purported that the only way towards a common humanity is to embrace uncertainty and humility and to give up certitudes. She quotes Ndebele:

What seems to happen in this situation is that, at the point at which you recognise mutual vulnerability between yourself and an adversary that will not go away, you signal a preparedness to recognise that there might be new grounds for a common humanity, whose promise lies in the real

⁸⁴⁶ Mrs Konile as well as Mrs Papiyana and Joyce Mtimkhulu refused, as mothers, to forgive their son's murderers. The portrait of the black African mother is also invoked in former constitutional court judge Albie Sachs' description of how the Truth Commission came about. In 1993 a meeting was held by the Executive Committee of the African National Congress. One particular issue that was raised involved the question of how to deal with ANC comrades that perpetrated human rights violations during the struggle. One participant stood up and asked: "What would my mother say?" After the participant relayed what he thinks his mother would have said, Professor Kader Asmal declared that a Truth Commission is the only option. See *Sachs The Strange Alchemy of Life and Law* 2009 68. This occasion may be directly linked to Du Toit's assertion that women's association with home, care and forgiveness contributed to the framing of the TRC in feminine terms. She asks: "If reconciliation is so closely connected with the feminine, where do women go to reconcile?" See Du Toit "Feminism and the Ethics of Reconciliation" in Veitch (ed) *Law and the Politics of Reconciliation* 2007 185.

possibility that you may have to give up something of what has defined your reality, handed down from a past that cannot entirely meet your best interests now and in the future. It is the humility that arises when you give up certitudes around what was previously uncontested terrain of your value system and unsustainable positions derived from it. It is the willingness to embrace vulnerability of the kind that faces you when you learn to unlearn because there is so much more that is new to learn. Your new sense of comfort comes from the confidence that others, who are on the opposite side, are doing so too, and also experiencing vulnerability. It is about the capacity to abandon certitudes acquired through a history of habit.⁸⁴⁷

Ethical feminism allowed for the interpretation of the feminine which served to open up numerous other reflections for the contemplation of a feminist jurisprudence. Informed by post-apartheid jurisprudence, the feminine as refusal made possible, amongst others, the following reflections for my contemplation: The idea that the feminine may remind of the contingency of societal and legal constructs, that the feminine may expose to the oppressiveness of institutions and structures, that we should consider the wider realm of language in the struggle against marginalisation, that the feminine can turn the place of margin into a place of transformation and that the feminine, shown the way by Ndebele, may be that which gives up certitudes in order to embrace humanity and humility.

Central to post-apartheid jurisprudence's refusal, as mentioned, is that it beckons alternatives and other choices. The suggestion is that it can disclose different ways or other possibilities of approaching, doing and thinking law. In the same way, I regard the feminine as refusal as disclosing other possibilities outside of or other than that of the masculine symbolic order.

I mentioned above that refusal may be read as the resistance of closure and the erasure of boundaries or what Van Marle calls the "uncertain, unfixed and

⁸⁴⁷ Cornell *Clint Eastwood and Issues of American Masculinity* 2009. Ndebele *Fine Lines from the Box: Further Thoughts about our Country* 2007 221 as cited by Cornell.

continuous” nature of refusal.⁸⁴⁸ Along these lines, refusal can signify a feminist jurisprudence that is not essentialised but rather transformative, not one but rather manifold, not unified but rather in process.

⁸⁴⁸ See section 5.3 above.

Chapter 6

Conclusion: Retracing the Way Towards a Post-Apartheid Feminist Jurisprudence

In sketching the background for the contemplation of a post-apartheid feminist jurisprudence in chapter two, I argued that Du Toit's reading of the processes of reconciliation illustrates how women were structurally marginalised during the TRC hearings. This particular instance of marginalisation took place at the South African turning point towards democracy. In Du Toit's reading, the TRC hearings, instead of marking a turn towards a culture of equality, dignity and human freedom, marked the new dispensation as a dispensation built on masculine presumptions and ideologies. Her reading provides one of many explanations for the current marginalisation of South African women. I further argued that the oppression of South African women through rape indicate the reality of a masculine cultural sphere, as does the influence of the dominant Western symbolic order.

Against this background I attempted in the chapters that followed, to be attentive to the larger and overarching cultural order. In exploring the post-apartheid jurisprudential context, I submitted that engagement with the particular marginalisation of women within this order is lacking and that further challenge is therefore required. From this perspective, the main theoretical point of departure was the exploration of ethical feminism that explains the ways in which the feminine suffers within a masculine symbolic or paradigm. I explained that Cornell interprets the feminine as allegory in order for it to serve as a locus for change and transformation. The feminine is looked upon as a doorway to otherness and justice. I contended in chapter four that ethical feminism's sensitivity towards difference makes it an approach that is suitable for the plurality and heterogeneity of the South African society. It was also contended

that through pointing to the utopian, ethical feminism takes seriously the possibility of transformation. It attempts to bring marginalised peoples' reality forth. The concerns of women shut out by the masculine symbolic may be disclosed by using the symbolic feminine as foothold. I noted that ethical feminism may in this way prove to assist post-apartheid jurisprudence in its critical development as this development revolves around voices that are presently marginalised or pushed aside.

In illustrating the context, I described post-apartheid jurisprudence as critical and self-reflective. The exploration of the three themes in illustrating post-apartheid jurisprudence disclosed important initial reflections on a post-apartheid feminist jurisprudence. I mentioned that Transformative Constitutionalism's insistence on substantive equality and large-scale social change may hold politically transformative possibilities for women and that the issues of socio-economic reparation and social justice cannot be removed from the traditional economic hardship and dependency of women. The Aesthetic Turn helped to ask the question of the law's ability to radically alter the lives of women and the discussion of post-apartheid Critique demonstrated its commitment towards making legal standards as open as possible to difference. I made the contention that such difference might include the difference that is women and that post-apartheid jurisprudence as such may be seen as conducive to feminist contemplation and reflection.

From this viewpoint the context presented a critical foundation for the contemplation of a feminist jurisprudence. From there I proceeded to discuss ethical feminism. The discussion on ethical feminism directed and interpretation of the feminine and with the help of post-apartheid jurisprudence, the feminine was interpreted as refusal. The stories illustrated women who refuse the symbolic orders, frameworks and spaces that they are forced to occupy. The feminine as

refusal beckoned other options, possibilities and alternatives. It also brought forth further important considerations. Amongst them was the idea of a feminist jurisprudence that embraces uncertainty and humility. I described Refusal as used in post-apartheid jurisprudential thought as a counter-hegemonic action and a mode of critical thought. Its insistence on questioning and contestation demonstrated it as an important part of the development of post-apartheid jurisprudence.

Ultimately, the question may be asked: What of the possibility of a post-apartheid feminist jurisprudence?

As I have contemplated it within this dissertation, a feminist jurisprudence will involve a jurisprudence that struggles alongside and employs the rich, diverse, critical and self-reflective post-apartheid jurisprudential context. But, it will nevertheless refuse to be co-opted in its specific search to address the particular marginalisation of women within and around the masculine symbolic order. It will involve sensitivity towards the plurality and differences between women, ethically so. Transformative, manifold and in process, it will continue stories that affirm the feminine in an attempt to change for the better the lives and position of South African *women*.

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