

ON RIGHTS, RULES, RELATIONSHIPS AND REFUSALS: A REPLY TO VAN MARLE'S "JURISPRUDENCE OF GENEROSITY"*

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1 Introduction

The varied pleasures of reading a Van Marle article – peppered with references to favourite philosophers (Arendt), movie directors (Eastwood), and authors (Auster) – work a spell that generally suppresses this reader's bemusement with her often aphoristic, sometimes kaleidoscopic prose. And so it is with her most recent work, "Laughter, Refusal, Friendship: Thoughts on a 'Jurisprudence of Generosity'".¹ Given that such pleasures qualify as decadent by the standards of your average law review article, it might make *any* criticism of "Jurisprudence of Generosity" seem almost churlish.

However, even such gifted, generous writers as Van Marle offer "observations" that demand a response. Indeed, the need for this particular response has less, I think, to do with the observations offered and more to do with the presentation – the lack of precision, the absence of clear annunciation – of her primary aims. What do I mean?

Well, as I have already noted, Van Marle resolutely refuses to write in a standard – dry – academic style. No plodding, pedantic prose here. She is, in manner, more like Seurat, or his contemporary, Chuck Close. Dots of paint which, upon extended inspection and reflection, ultimately (one hopes) cohere into a clear picture of her object.

However, in the instant matter, this preferred style serves to mask important issues of substance. Upon extended inspection of and reflection upon this work, and after conversation with, and interrogation of, Van Marle herself, I believe I have a clearer grasp of her purpose. I believe her "ethics of refusal" – my description, not exactly hers – marks a new beginning in South African jurisprudence. But like all beginnings, this "ethics of refusal" carries both the baggage of the past and the uncertainty of the future. Indeed, it is because Van Marle describes her work in such terms as a "jurisprudence of generosity", that the truly novel aim of her paper – to describe an "ethics of refusal" – gets

* I would like to thank the referees of this article for pressing me to make my argument both more generous and more precise. I would also like to thank Professor Van Marle for taking the time to reflect upon her own work and mine: our ongoing conversation has led to a greater, and I hope more nuanced, appreciation for her philosophical project.

¹ 2007 *Stell LR* 194.

a bit lost in the shuffle. What I hope to do then, in the limited number of pages that follow, is to suggest: why her kaleidoscopic prose makes her objects less than transparent; why the surface meaning of her work evokes such visceral responses; what her essay's aims actually are; and, finally, where reasonable grounds for disagreement remain.

With the aim of providing greater clarity about the nature of Van Marle's work, and why her article has drawn me into conversation with her on this new project, I have broken the reply down into four discrete sections. In section 2, I take issue with what appears, *upon first glance*, to be Van Marle's reflexive, and almost hackneyed, dismissal of human rights and law as vehicles for transformation. Our differences in response to human rights discourse are not as stark as they might appear. However, Van Marle and I continue to have different beliefs about how law, or approaches to law, can advance similar sets of ends. In section 3, I contend that Van Marle's critique of the maleness of Western philosophy indulges, *at least on its surface*, in a form of superficial essentialism that Van Marle generally eschews. My view is that the actual sex of philosophers in the Western tradition has far less to do with Van Marle's concerns than the actual content of the philosophy that most (male) philosophers have produced and that Van Marle herself fits into a school of philosophical thought almost as old as Western philosophy itself. In section 4, I note that Van Marle, having found the male-dominated tradition of Western philosophy wanting, finds solace in Clint Eastwood's recent oeuvre of movies. Her marginalia on Eastwood has its virtues: it locates a small spot on Eastwood's stage where an "ethics of refusal" breaks, ever so fleetingly, into view. But that does not mean that Eastwood's work is particularly well-suited to carrying Van Marle's metaphysical load. In section 5, I suggest that Van Marle and I tend to work in different guilds. However, I never for a moment suggest a hierarchy of such guilds – quite the opposite. I spend the vast majority of my time slaving away as a constitutional law academic attempting to make doctrinal sense of the morass of case-law produced by our courts. I would prefer to work primarily as a legal philosopher (had I the talent), but that is not the ox to which I am currently yoked. Van Marle enjoys – from the lowly perspective of a constitutional law scholar – the freedom to work ideas at an enviable level of abstraction and sophistication. However, just as I think my work as a constitutional law academic has been vastly improved by Van Marle and other legal philosophers who regularly attempt to wake me from my dogmatic slumber, Van Marle's work would benefit from paying greater attention to the close readings of the law produced by the better academics in my guild. Van Marle's "ethic of refusal" – and the new form of legal critique it promises – would improve significantly were it to reflect a more sustained engagement with a full breadth of the Constitutional Court's jurisprudence. Van Marle signals that her "jurisprudence of generosity" shares a family resemblance to recent Constitutional Court judgments such as *Khosa*² and *Dikoko*³. However, my continued inspection and reflection upon her work,

² *Khosa v Minister of Social Development* 2004 6 SA 505 (CC), 2004 5 BCLR 569 (CC).

³ *Dikoko v Mokhatla* 2006 6 SA 235 (CC), 2007 1 BCLR 1 (CC).

as well as *my* conversations with the author, suggest that Van Marle's "ethics of refusal" marks a significant break with the more "generous" jurisprudential views offered by several Constitutional Court Judges. When it comes to the "ethics of refusal", it is clear that Van Marle is anything but trendy. No glib, impenetrable post-modernism here. Her "ethics of refusal" is genuinely path-breaking. That said, Van Marle's invocation of other well-respected post-modern and feminist commentators and her use of recent Constitutional Court decisions is apt to confuse readers. It leaves her, at least partially, and I assume, only momentarily, on the hook for some of the more troubling turns evident in recent South African human rights discourse, (and, at the very least, uncertainty over where she stands).

2 Human rights: friend, not enemy

Given her later affair with Eastwood, its not surprising that Van Marle comes out with guns blazing. In her introduction, she writes:

"In South Africa it seems as if transformation, socio-economic reparation and other social problems like poverty, violence and disease are addressed mostly through law and human rights. But, as is often argued and exposed, law and human rights are lacking in the capacity to effect real change."⁴

This remark is not a stand-alone comment that can be cavalierly dismissed. Several pages later Van Marle⁵ writes:

"I have previously relied upon Arendt and Kristeva to illuminate one danger of a society overtaken by law, human rights and constitutional discourse, namely the result of a complacent society where political action, thought, eternal questioning and contestation are absent and replaced by an understanding of freedom as calculated and instrumental."

These sweeping claims about human rights discourse and constitutional law suffer from a number of different disabilities.

2.1 Rights as transformative

The first, and perhaps the most trivial, problem is that Van Marle cites no South African cases in support of these two complex propositions – and no published South African writing to boot.⁶ Instead, she grounds these two claims in the myriad writings found in a well-worn American anthology: Kairys (ed) *The Politics of Law* 2 ed (1998), but largely unchanged from Kairys (ed) *The Politics of Law* 1 ed (1987); the well-respected works of European critical legal scholars: Fitzpatrick & Hunt (eds) *Critical Legal Studies* (1987) and Douzinas *The End of Human Rights* (2000); and her own previously published interventions. The "double-edged sword of human rights discourse" – as Douzinas famously puts it – makes for a catchy bumper sticker. However, the above broadsides require more evidence, more sustained argument, than Van Marle offers here.

⁴ Van Marle 2007 *Stell LR* 194.

⁵ 2007 *Stell LR* 196.

⁶ An unpublished paper by Tshepo Madlingozi is the only South African work that rates a mention in support of these propositions.

The second, and more pressing problem, is that I tend to read South African case law as transformative in the many, sundry ways that Van Marle *appears* to deny. I am quite aware, painfully aware, that no copious catalogue of citations could count as evidence against the real, and quite profound, gravamen of Van Marle's complex and nuanced complaint: that the human rights discourse only gets us so far, and that is not nearly far enough; that struggle politics finds itself co-opted when the struggle ends (for the moment) and representational politics and rule of law and rights-based democracy begins; and that even revolutionary politics does not reach or speak to essential parts of the human condition. That is, I think, the intended arc of her thinking and I shall return to it in a moment. But the black mark placed so starkly, and (largely) unconditionally, against human rights and constitutional law as vehicles for transformation, deserves at least a spirited rejoinder from someone who believes that rights still possess the potential to liberate many of our fellow South Africans from the shackles that currently bind them.

I would have thought the successful challenge of Mrs Bhe and her daughters to the rule of male primogeniture in customary law and in the law of succession constituted real court-initiated change.⁷ I would have thought the successful challenge of the Treatment Action Campaign⁸ to secure Nevirapine for pregnant women and their children constituted real court-initiated change. I would have thought that the transformation wrought by the Court's sexual orientation case law constituted real court-initiated change. No? Look again. Our courts began slowly, dispatching laws proscribing sodomy as a violation of intimate or private space.⁹ The courts go on to reject laws that impair the ability of same-sex partners to live – private lives – within South Africa.¹⁰ They then abolish laws that refuse to extend “public” benefits to the surviving same-sex life partner of a judicial officer.¹¹ Until finally, the dignity of same-sex partners is understood to be as important a public matter as it is private, and the public institution of marriage sanctions heterosexual and homosexual unions alike.¹² Indeed, the public recognition of same-sex life partnerships as marriages takes dignity beyond the merely restitutive, and articulates a fundamentally transformative vision of our politics. That the holding in *Minister of Home Affairs v Fourie; Lesbian*

⁷ *Bhe v Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC), 2005 1 BCLR 1 (CC): Customary rule of male primogeniture violates right to dignity and right to equality.

⁸ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC), 2002 10 BCLR 1033 (CC): Government failure to provide pregnant women with Niverapine found to be an unreasonable and unjustifiable infringement of the right to access to health.

⁹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 3 SA 173 (CC), 1998 12 BCLR 1517 (CC): Common law and statutory law proscribing sodomy found to be unconstitutional.

¹⁰ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC), 2000 1 BCLR 39 (CC): Residence requirements denying same-sex life partners the same privileges as spouses held to be unconstitutional.

¹¹ *Satchwell v Republic of South Africa* 2002 6 SA 1 (CC), 2002 12 BCLR 1284 (CC) (*Satchwell I*); *Satchwell v Republic of South Africa* 2003 4 SA 266 (CC), 2004 1 BCLR 1 (CC) (*Satchwell II*): Judges' benefits scheme found to violate rights of same-sex life partners.

¹² *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC), 2006 3 BCLR 355 (CC): Failure of law to recognise that same-sex life partners are entitled to all the trappings and benefits of marriage enjoyed by opposite sex life partners found to be unconstitutional.

and *Gay Equality Project v Minister of Home Affairs*¹³ is fundamentally transformative, and not merely reactive, can be understood through the prism of the State's response to the various challenges mounted against anti-gay and anti-lesbian enactments. The early challenges to sodomy laws and immigration laws met with little resistance. However, as the challenges to the law required public recognition of the equality of gays and lesbians – as opposed to mere sufferance of the homosexuals in our midst – the State's resistance stiffened. After *Satchwell v Republic of South Africa (I)*,¹⁴ parliament balked with respect to providing spousal benefits to the survivors of same-sex life partnerships. In *Satchwell v Republic of South Africa (II)*,¹⁵ the Constitutional Court had to take the unusual and uncomfortable step of invalidating a piece of legislation virtually identical to the legislation that it had found unconstitutional in the *Satchwell I* case. It is hard to read parliament's response to the *Satchwell I* case as anything but a refusal to recognise that same-sex partnerships are entitled to equal concern and equal respect. In the *Fourie* case, the State actively sought to block the recognition of same-sex unions as marriages. Again, it is hard to read the State's response as anything other than a refusal to accord same-sex life partnerships the same public recognition as opposite-sex life partnerships. The Constitutional Court has reached beyond mere transactional forms of justice to a transformative vision of justice that forces *all* South Africans to reconsider their previous understandings of marriage. This new vision forces *all* South Africans to acknowledge, publicly, the variety of legitimate and valuable life partnerships within our society.

These legal battles were hard fought, and the victories hard won. I do not, in fact, believe that Van Marle would care to deny that. Moreover, I believe that she would agree that these decisions – and many others like them – mark real and profound change (for the better). That she may then contend that taken as a whole they still leave us short of the kind of polity that she envisages for South Africa, is another question entirely. And I shall return to the objects of that decidedly unique vision in due course. But as we have already noted, the objects of an “ethic of refusal” are not the objects of constitutional law. Nothing is to be gained, therefore, by clearing the space of politics occupied by constitutional law, so that we might better understand the demands of an “ethics of refusal”. The two have different aims, and make substantially different claims upon us.

2 2 Rights and disease

As I have already noted above, whether the issue has been access to ARVs in the *TAC* case or, as importantly, a finding of unfair discrimination and the instatement of a person living with HIV/AIDS as an air steward in *Hoffmann*

¹³ 2006 1 SA 524 (CC), 2006 3 BCLR 355 (CC).

¹⁴ 2002 6 SA 1 (CC), 2002 12 BCLR 1284 (CC).

¹⁵ 2003 4 SA 266 (CC), 2004 1 BCLR 1 (CC).

v SAA,¹⁶ the courts have not treated the ill or disabled as lepers. Courts have taken our difference – our illness or disability – seriously.¹⁷

I would be less than candid if I did not admit that Van Marle's assertion (regarding the impotence and the complacency of human rights) struck a nerve. I have had a disability – going on 13 years now – that cost me my first academic post and a decade of productive (and pain-free) life. Had it not been for two bodies of law – one American and one South African – it is unlikely that I would ever have been in a position to regain some of what was lost and sufficient cognitive capacity to discharge, in however diminished a fashion, my current responsibilities as an academic. The law's recognition of my disability and its commitment to providing (some of) the resources necessary to manage my illness, constitutes "real change". And not a day goes by when I do not thank the law – constitutional law and the struggle for human rights – for being on my side.

2 3 Rights and politics

In the process of ignoring what rights can do, Van Marle sets up a false dichotomy between law and politics. It is worth quoting her again in full:

"In South Africa it seems as if transformation, socio-economic reparation and other social problems like poverty, violence and disease are addressed mostly through law and human rights. But, as is often argued and exposed, law and human rights are lacking in the capacity to effect real change."¹⁸

I am not sure that I know any constitutional lawyer or academic who believes that "transformation, socio-economic reparation and other social problems like poverty, violence and disease are addressed mostly through law and human rights". Van Marle's human rights lawyer is your archetypal straw-person. When I want to know what South Africa is doing to speed transformation I read the Minister of Finance's budget speech and pay close attention to the finer details of BEE charters in various sectors. If I want to know about violence in Gauteng, I listen to Gauteng MEC Firoz Cachalia on the radio. And if I really care about the AIDS pandemic and extreme multi-resistant forms of tuberculosis, I read the critical literature and conduct my own field research. No constitutional lawyer I know thinks that the 25 cases the Constitutional Court hears a year have a more fundamental influence on macro-economic policy and poverty alleviation than the RDP, the GEAR and the newer ASGISA.

However, no constitutional lawyer worth her salt would concede that law cannot be used effectively as one of many tools in a kit to advance a transformative politics.¹⁹ The Treatment Action Campaign has operated on multiple fronts – lobbying, media presentations, international conferences, academic

¹⁶ 2001 1 SA 1 (CC), 2000 11 BCLR 1211 (CC).

¹⁷ *IMATU v City of Cape Town* 2005 10 BLLR 1084 (LC): Law enforcement officer asked to be transferred to the position of fire fighter. His application was denied on the grounds that he was an insulin-dependent diabetic and might become ill while under pressure. The Labour Court found unfair discrimination on the ground of disability in terms of the Employment Equity Act.

¹⁸ 2007 *Stell LR* 194.

¹⁹ Klare "Legal Culture and Transformative Constitutionalism" 1998 14 *SAJHR* 146.

research, public protest and, yes, litigation – to ensure that South Africa has a free, universal, and sustainable ART programme.

A similar multipronged effort has yielded fruit in housing. Although many housing analysts and human rights lawyers have expressed some dismay at the disarray in the housing sector, many would argue that *Grootboom*²⁰ forced the Department of Housing to reconsider its programmes. The Department's subsequent policy document – *Breaking New Ground*²¹ – has the Court's fingerprints all over it. Whether the State possesses the operational capacity to make good on this new policy document does nothing to undercut the proposition that the law – and fundamental rights such as the right of access to adequate housing – has provided some of the impetus required to change the party political line. There might be some who expect more of the law – but even advocates of the minimum core approach to socio-economic rights understand the law's limits as tool for radical social transformation.²²

It pays to be regularly reminded of the limits of law as a mechanism for social change, and thus the limits of law as a form of politics. (And it would pay Van Marle to remember that law is but one form of politics, but one form of rhetoric.) But the proposition that the law is an inherently limited tool for social change is substantially weaker than the claim, endorsed by Van Marle, that human rights is both the cure and the disease.²³

2 4 An ethics of refusal

The real gravamen of Van Marle's complaint with South African law, or with South African politics for that matter, is not that they have chosen the incorrect objects of consideration, or that they do not pay sufficiently slow and careful attention to the objects of consideration. It is rather that law and politics claim to exhaust the space for meaningful action.

That there exists this other space for meaningful action (or inaction) is made apparent, though hardly transparent, in Van Marle's ruminations about Penelope's weaving and unweaving in the *Odyssey*; the static, frustrating, unresolved separation of Sean from his wife Laura in *Mystic River*; and the unexpected desire of a hermit for some degree of connection in *Auggie Wren*. What these characters – in three discrete works of fiction – have in common is not immediately obvious. They have no legal brief to discharge, and no overtly political agenda.

What they do seem to have in common is *resistance*. What they each share is a *refusal* to go along with the *status quo* and even, more importantly, a

²⁰ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC).

²¹ See McLean *Housing* in Woolman, Roux & Bishop (eds) *Constitutional Law of South Africa* 2 ed OS (2006) ch 55.

²² Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007), *Health* in Woolman et al (eds) *Constitutional Law of South Africa* ch 56A; Liebenberg "The Value of Human Dignity in Interpreting Socio-Economic Rights" 2005 *SAJHR* 1, "Needs, Rights and Transformation: Adjudicating Social Rights" 2006 *Stell LR* 5, *The Interpretation of Socio-Economic Rights* in Woolman et al (eds) *Constitutional Law of South Africa* ch 33. Cf Davis "Adjudicating the Socio-economic Rights in the South African Constitution: Towards 'Deference Lite'?" 2006 *SAJHR* 301.

²³ Douzinas *The End of Human Rights* (2000).

refusal to enter the fray, the arena (legal or political) in which the *status quo* is altered (or persists). I could be very wrong about these conclusions, but re-readings of Van Marle – and illuminating conversations with her – would seem to bear out this initial thesis.

The full blown theory – if left to me to reconstruct – goes something like this: that the human rights discourse only gets us so far, and that is not nearly far enough; that struggle politics finds itself co-opted when the struggle ends (for the moment) and representational politics and rights-based democracy begins; and that even revolutionary politics does not reach or speak to essential parts of the human condition. For Van Marle, there is a moral salience to everyday life – in the domain of small, intimate relationships where most of life happens – that cannot be captured in any theory of law or politics. Life *really* happens here, Van Marle seems to be saying, and we ignore the power of these spaces for real emancipation if we limit our vision to the domain of law, or politics, or even revolution.

This move is rather remarkable. For the standard gambit of critical legal theorists is to demonstrate that law and politics are invariably forms of cooption, or mystification, foisted upon us by elites. Revolution remains an option (Marx always waits in the wings), but even here critical legal theorists have a tendency towards quietism when it comes to starting up the engine – violence – required for radical reform. In any event, that is not the direction in which Van Marle wishes to take us.

Her first move is to remind us of the emancipatory potential of everyday life: that the revolution is more likely to be found in the remaking of our face-to-face interactions. As an immigrant to and resident of South Africa for some fourteen years, I can testify to the power and the acuity of this line of thought and action. But Van Marle is still not content to leave things there.

Imminent in Van Marle's account – her ethics of refusal – is another powerful response to the standard ways of doing things: law, politics and revolution. Van Marle, in her ethics of refusal, identifies solitude as an essential form of resistance. Invoking in spirit, if not name, writers and philosophers such as McCarthy, Dillard and Thoreau, Van Marle is willing to say our efforts to remake ourselves in terms of law, politics and revolution have left everything largely as it is, and “I have had enough”. Her ethics of refusal shouts “Basta!” And it identifies “solitude” as an appropriate response to every other philosophy of action that promises radical reform – and fails to deliver it.

Now, it is important to note that the above gloss on Van Marle's “ethic of refusal” is my gloss, though I am confident that she agrees – to some degree – with this partial and quite limited account. The problem with this gloss is that it has to be extracted from her “jurisprudence of generosity”. Indeed, as I mentioned at the outset, the difficulties with her article flow, primarily, from a tension between her “jurisprudence of generosity” and an “ethic of refusal”. Nowhere is this tension more evident than in her concluding two paragraphs. She writes:

“I have previously referred to ... *Khosa* ... as an example of a jurisprudence that reflects something beyond the confines of traditional law, maybe the beginning of a jurisprudence of generosity. The same might be said of ... *Dikoko*. Sachs argues that the almost exclusive preoccupation with monetary awards in defamation cases is unsuitable to restore the damage to a person's reputation. He suggests

a development of defamation law that would encourage apology with the aim of reparation rather than punishment. ...He further refers to the constitutional value of ubuntu and proposes that the key features of ubuntu – encounter, reparation, reintegration and participation – will contribute to resolve disputes and reconcile parties in a face-to-face public encounter that will contribute to restoration. However, following critical responses on the impossibility of being responsible to the (unknown) other, on law's 'reductive violence' (its incapacity to be generous?) and the notion of the inoperative community, one might regard Sachs J as being overoptimistic about law's ability to restore and reconcile. For this reason, refusal must be placed at the centre of a 'jurisprudence of generosity'.²⁴

The truth of the matter – as far as I can tell – is that Van Marle has previously been concerned with the reconceptualisation of South African law and politics – whether that might require “slowness”²⁵ or “ubuntu”.²⁶ But this article, for the most part, is not concerned with convincing Constitutional Court Judges that there might be a better way of judging, or constitutional academics that there might be a better way of critiquing decisions and reconstructing doctrines. The power of Van Marle's “ethics of refusal” is that it turns its back on law and politics as it is currently practised and makes no effort to convince us that law and politics might be better served through some form of supplementation or reorientation.

The two paragraphs quoted above reflect, in my view, a transition – and, ultimately, a break. For the primary points made in the preceding pages of her article have little to do with coaxing more out of the Constitutional Court than the *Khosa* and *Dikoko* cases can offer. Her “ethics of refusal” does not simply make the claim that we should not expect the Court to deliver on a “jurisprudence of generosity” – whatever hints (and cause for hope) there might be here or there in its judgments. Her “ethics of refusal” makes a bolder, two-fold claim. First, genuine reformation is more likely to be found in the day-to-day interactions and relationships that take place beyond the law, beyond normal politics and beyond revolution. Secondly, it is a perfectly reasonable response to the world as it is to turn away from law, politics and revolution – because they have failed to deliver – and to embrace “solitude” – and a refusal to give the processes of law, politics and revolution our tacit imprimatur of approval.

If this article signals a break from Van Marle's previous writing, (and I stand to be corrected by Van Marle herself), then there still remains the problem – at the very least – of nomenclature. By suggesting that an “ethics of refusal” must be placed at the heart of any “jurisprudence of generosity”, Van Marle is pouring new wine into old bottles. Her “ethics of refusal” is not merely the most recent vintage of a “jurisprudence of generosity” – it is a tonic of a different, and substantially more bracing, kind.

3 Rights and relationships: men and women

This tension between these two lines of thought explains, for me, other tensions that appear in this article. For example, I had previously read Van Marle as a rather non-essentialist feminist. But it is sometimes difficult to read her passages contrasting traditional Western philosophy and an “ethics

²⁴ “Laughter, Refusal, Friendship: Thoughts on a ‘Jurisprudence of Generosity’” 2007 *Stell LR* 194 206.

²⁵ Van Marle “Law's Time, Particularity and Slowness” 2003 *SAJHR* 239.

²⁶ Cornell & Van Marle “Exploring Ubuntu: Tentative Reflections” 2005 *African Human Rights LJ* 195.

of refusal” and not come away with the impression that she is flirting with a more essentialist line. Van Marle²⁷ writes:

“I want to think about ... [a] refusal of western’s philosophy’s association with death as it is challenged and resisted by Arendt’s notion of birth and life and taken further by Kristeva, Cavarero and Rose ... [a] refusal of western philosophy’s association with mind and with a life devoid of hands. . . [a] refusal of a patriarchal assignment of confined and predetermined oppressive spaces to women, in particular spaces that could be associated with a politics of refusal... For Odysseus as Greek male hero, death and adventure are what marks being. For Penelope, birth and rootedness are what matters. Cavarero recalls western philosophy’s insistence on the untying of the soul from the body, of which death is the best example – while living, pure thought could assist in untying the soul from the body. This results in the principle of “living for death” that Arendt rejects by insisting on birth. The duality between soul and body, men’s association with the former and women’s association with the latter, establishes men’s claim to gender neutrality.”

As a man literally grounded by my body everyday, for whom a moment rarely passes when my body does not remind me that it is inextricably yoked to my incorporeal soul, and for whom the soul is a fiction that provides little comfort, I find the stale binary opposition of male/female to be disconcerting and unilluminating. That Western philosophy has been, until the 20th century, a largely male domain is a contingent, uninteresting fact. If it is worth remarking on Plato’s arid commitment to “the forms” – of which Van Marle makes much in her discussion of Cavarero’s *In Spite of Plato*²⁸ – then where is the justice, the fairness, in ignoring Aristotle’s rejection of abstract ideals and his embrace of virtues tied directly to action, character and very specific ways of being *in* the world? Raphael vividly captures this difference in *The School of Athens*: Plato points up towards the heavens; Aristotle points down towards the earth. Indeed, the omissions – or the binary opposition – are somewhat remarkable given Van Marle’s embrace of Hannah Arendt – and the unequivocally Aristotelian framework of Arendt’s politics, and, in particular, *The Human Condition* (1958).²⁹ Aristotle, Arendt, Nussbaum and Van Marle are all Western philosophers who embrace – or share – a very specific understanding of politics: but given the Aristotelian framework within which all four have worked, that hardly makes them all phallogocentric.

Let me offer this same observation somewhat more generously. Van Marle’s conscious role reversal – of allowing female philosophers to occupy centre stage, while pushing male philosophers off into the wings – has its charms. Moreover, it has its point: men still control the levers of power, and women, especially in countries such as South Africa, lack the degree of agency that men accept as their birthright. No one I know would deny this point. But is this point scored against the academic disciplines of law and philosophy, or is this point scored against the patriarchal structures that dominate political and economic life in both modern and traditional communities?

²⁷ 2007 *Stell LR* 198.

²⁸ Cavarero *In Spite of Plato: A Feminist Rewriting of Ancient Philosophy* (1995).

²⁹ Mill’s contributions to the Western canon of philosophy are well-established: and yet no there is no apparent space for the recognition of *On the Subjugation of Women* (1869) or his marriage to the suffragette and his co-author, Harriet Taylor. While the debt to Aristotle is clear, Arendt’s relationship to Mill is less obvious. But Mill’s commitment to “experiments in living” resonate profoundly with the kind of active, challenging and even heroic life endorsed by Arendt. See Anderson “John Stuart Mill and Experiments in Living” 1991 102(1) *Ethics* 4.

That Van Marle³⁰ is committed to the possibility of a more egalitarian set of relationships between women and men is reflected in her attempt to retrieve from the recent work of Clint Eastwood a flicker of recognition of “men’s role in the creation of a space where women can be seen and treated in ways that would refuse patriarchy”. That Eastwood is associated most strongly with the Dirty Harry of his youth does not *necessarily* undercut Van Marle’s or Berkowitz & Cornell’s reading³¹ of the late Eastwood – of films from *Unforgiven* (1992), *A Perfect World* (1993), *In the Line of Fire* (1993), *Absolute Power* (1997), *True Crime* (1999), *Blood Work* (2002), *Mystic River* (2003), *Million Dollar Baby* (2004) and *Flags of Our Fathers* (2006) to *Letters from Iwo Jima* (2006). He is, however, a decidedly odd choice for the role of reclamer of space for women, or as a proponent of a radical and more egalitarian understanding of maleness.

Eastwood’s recent concerns are predominantly about the fragility of masculinity, the emptiness of (epic) heroic models and, “well just spit it out”, death. The rather small, intimate canvass upon which Eastwood has chosen to work these themes has established him as one of Hollywood’s leading directors. But where are the women? The relationship between Laura and Sean is, at best, a tiny side-bar in *Mystic River*, and one must ask whether – in face of the scene-chewing performance of Sean Penn as Jimmy – sufficient space really exists for this separated couple to “refus[e] the law laid down by masculinity and patriarchy, [and] create a glimpse of a possibility of reconciliation between, and of transformation of sex and gender relations”.³² What we see again and again in Eastwood’s last decade’s worth of work are studies in humility, in the virtues of friendship (between men), in acts of heroism (that deny any grand claim on history) and a weary recognition that a .357 Magnum (however lucky one might feel) cannot forestall the inevitable.³³ Solace, if any, may be found in a slice of key lime pie, in a place where the failures of a life – especially one’s relationships with women (two daughters) – are shrouded in silence, in solitude.³⁴ Quiet time, as it were, before *death*. Here again, in her reading of Eastwood, is the tension between her previous work – in which she strives to supplant or to overcome existing frameworks with something better – and the imminent commitment in this article to an ethics of refusal, to a philosophy of solitude, in which one’s *quiet* resistance to the dominant forms of life *is* the new and bracing form of politics.

Eastwood is no feminist: nor does he seem at all interested in overcoming dominant forms of being in the world. But he does embrace solitude and he consistently rejects the hypocrisy of ordinary law and the cant of party

³⁰ 2007 *Stell LR* 201.

³¹ Berkowitz & Cornell “Parables of Revenge and Masculinity in Clint Eastwood’s *Mystic River*” 2005 *Law, Culture and the Humanities* 316.

³² Van Marle 2007 *Stell LR* 203.

³³ Indeed, Van Marle’s title for the subsection, “humility of friendship”, captures, for me, the essence of Eastwood’s later work. It is the connection between individuals – but most especially between average men (the solidarity between the grunts who put up the flag at Iwo Jima, or those holed up in tunnels below) – that transforms the ordinary into something precious: that precious something is being present for, and loyal to, another real human being. Cf Eastwood *Flags of Our Fathers* (2006), *Letters from Iwo Jima* (2006).

³⁴ Eastwood *Million Dollar Baby* (2005).

politics. And in these two important ways, Eastwood and Van Marle may well be kindred spirits.

4 From rules to restoration

So Eastwood, for all my initial doubts, may have important lessons to teach us about the rapprochement between men and women in a genuinely egalitarian society and he may have even more important lessons to teach us about responding to the hypocrisy of ordinary law and the cant of party politics. What fascinates me, as a constitutional lawyer here in South Africa, is the quiet revolution going on in the Constitutional Court. As I have written elsewhere,³⁵ the recent jurisprudence of the Court suggests a not-so-subtle shift from reasoned, rule-based decisions to outcome-based decisions that demonstrate little concern for the kinds of abstraction that dominate Western, and especially Anglo-American, modes of legal reasoning.

My initial take on three decisions – *Barkhuizen v Napier*,³⁶ *Masiya v Director of Public Prosecutions*³⁷ and *NM v Smith*³⁸ – was that all three majority decisions reach spurious legal conclusions through rather tendentious reasoning. Van Marle and other commentators on South African legal culture have not altered my opinion of the outcomes or the route each majority took to reach those outcomes. However, Van Marle's writing does suggest that if one shifts the prism through which one analyses this troika of cases, then one may arrive at a greater appreciation for the motivations that lay behind each decision.

The facts and the outcome of the *Masiya* case are clear enough. Mr Masiya had been convicted in a regional magistrate's court of the anal rape of a nine-year-old girl. However, as the law stood prior to conviction, the non-consensual anal penetration only satisfied the requirements for a conviction of indecent assault. The majority of the Constitutional Court extended the definition of rape to include non-consensual anal penetration of women. What commentators such as myself find particularly irksome is the majority's wilful refusal to follow the two-step process for Bill of Rights challenges and its constitutional incapacity to recognise that absolutely *no* good reasons exist for its unwillingness to extend the definition of rape to include non-consensual anal penetration of men. However, if the sole concern of the majority is that justice be restored in terms of the facts of this particular case, then the outcome is somewhat easier to understand. The most important aspect of the decision would appear to be that the harm done to the individual girl is recognised and in being so recognised that justice is restored to the community as a whole. The direct application of rights to equality and to dignity and to security of the person to the challenged law and the extension of the law's protection to some abstract class of men then become, for the Court, subsidiary concerns.

The *Barkhuizen* case takes a similar shape. *Barkhuizen* had insured his new BMW with a syndicate of Lloyds Underwriters. Shortly thereafter, his vehicle

³⁵ Woolman "The Amazing, Vanishing Bill of Rights" 2007 124 *SALJ* 762.

³⁶ CCT 72/05 (4 April 2007).

³⁷ CCT 54/06 (10 May 2007).

³⁸ CCT 69/05 (4 April 2007).

was involved in an accident. He informed the insurer timeously of the incident. Lloyds later rejected his claim on the grounds that a clause in the policy required the plaintiff to issue summons in such a case within 90 days. Barkhuizen issued summons two years later. In defending the claim, the insurer relied on the insurance contract's 90 day time-bar. The Pretoria High Court upheld Barkhuizen's claim on the grounds that the clause in question violated section 34 of the Constitution – the right of access to courts. The Constitutional Court overturned the High Court's judgment: but it did not do so in terms of Barkhuizen's equality, dignity or access to court challenges. Instead, the majority dispatches his claim on the grounds that these two contracting parties were equals in all ways that mattered and that justice required that each party accept responsibility for a contract freely and willingly entered. Once again, it matters little (to the majority) that the analysis ought to have taken place in terms of the direct application of several substantive provisions of the Bill of Rights to the law of contract (or to conduct taken in terms thereof). Nor does it appear to matter that these substantive provisions of the Bill of Rights might have something to say about "contractual freedom" in other matters. What does matter, it seems, is that justice be done to the parties before the court and that an appropriate sense of justice is thereby restored to the community as a whole.

The *NM* case may be the most disturbing of the troika from the perspective of analytical rigour. The applicants claimed that the respondents had violated their rights to privacy and dignity by publishing their names and HIV status in a biography of Ms De Lille. The High Court held that the disclosure of the applicants' names in the book was not unlawful: Ms Smith, the author, and Ms De Lille were not negligent in assuming that consent had been given by the applicants to the University of Pretoria, and did not act with the requisite *intent* to reveal private medical facts. Madala J, writing for the majority in the Constitutional Court, set aside the High Court decision. Contrary to the evidentiary record, the majority held that the respondents were aware that the applicants had not given their express consent, that such awareness satisfied the factual predicate necessary for *intent* and that all the elements of the *actio iniuriarum* had been satisfied. Such publication violated the Bill of Rights' spirit, purport and objects, and in particular, the Bill's commitment to privacy and to dignity. The Court awarded R35,000 in damages, plus pre-trial costs, to be paid by the three respondents to each of the applicants.³⁹

³⁹ The dissents of Langa CJ and O'Regan J make clear that the record could *in no way* support a factual finding that the respondents had acted intentionally to harm the privacy and the dignity interests of the applicants. Moreover, the current law of delict, married to the facts, could not support a legal finding of liability. Langa CJ wrote a judgment agreeing in part and dissenting in part with the judgment of Madala J. He found that the respondents did not act intentionally. He agreed with O'Regan J that the common law must be developed with regard to media defendants, and would develop it to replace the current requirement of intention with that of negligence. Langa CJ held that the first and third respondents would qualify as media defendants, and as the Strauss Report cannot be regarded as a public document, they had acted negligently. Agreeing with Madala J's assessment of damages, he held that the applicants were attempting to vindicate constitutional rights and should get all their costs. In a dissenting judgment, O'Regan J held that the right to privacy protects citizens from the publication of private medical information without consent and that this right had to be balanced with the right to freedom of expression. On the facts of the case, O'Regan J found that the publication of the applicants' names and HIV status was *neither intentional nor negligent*.

How then does one go about explaining that a majority of the Constitutional Court neither allowed themselves to be detained by the law or the facts, nor committed themselves to a re-writing of the common law in light of the dictates of the right to privacy and the right to dignity? Although section 39(2) of the Constitution does not contemplate the fashioning of remedies designed to make the persons “harmed” whole when neither the law nor the facts support a finding of unconstitutional conduct, the majority employs section 39(2) to just such an end. The decision of the majority turns, it would appear, neither on solid legal analysis, nor on the need to engage in rigorous constitutional analysis of the content of the rights invoked, nor on the legal system’s commitment to the development of the law in a manner that allows all individuals to conform their future behaviour to a well-defined legal standard (the hallmark of a system based upon the rule of law). Rather, the decision appears to rest upon a deeply-felt offence to the majority’s moral sensibility about how vulnerable persons in our society ought to be treated. The award of R35,000 recognises the “hurt” experienced by the three applicants and seeks to restore “the dignity” of our society as a whole.

The three majority decisions manage to make bad law out of easy cases. They are, for worse, not better, direct extensions of the kind of adjudication reflected in the *Dikoko* case and they speak in the vernacular of the “jurisprudence of generosity” endorsed by Van Marle. It is a jurisprudence concerned far less with coherence and far more with compassion. This jurisprudence of generosity is virtually uninhibited by rules and doctrine and appears on its face committed to both the individuation of each case and the renewed solidarity of the community upon each dispute’s resolution.

5 Conclusion

5.1 Reconciling rules and restoration

I have grave doubts about the corpus of constitutional law that such outcome-based decision-making produces. Moreover, this particular body of eleven elders cannot sit in judgment over all of the myriad disputes that inevitably arise among the 45 million members of our society. The Republic of South Africa is not the Paris Commune, Rousseau’s idealised Geneva or Aristotle’s Athens.

But this new binary opposition – rules-based jurisprudence versus restorative, outcome-based decision-making – is, as Richard Bernstein⁴⁰ might put it, simply one of those Cartesian either/ors that plague modernity. It is, I would suggest, an either/or that can be overcome – but not by choosing relativism over realism, or restoration over rules.⁴¹

⁴⁰ *Beyond Objectivism and Relativism* (1985).

⁴¹ Quine *Word and Object* (1960) 24-25: “Have we so far lowered our sights as to settle for a relativistic account of truth – rating the statement as true for that theory and brooking no higher criticism? Not so. The saving consideration is that we continue to take seriously our own aggregate science, our own particular world-theory, or loose fabric of quasi-theories, whatever they may be. Unlike Descartes, we own and use our beliefs of the moment, even in the midst of philosophizing, until, by what is vaguely called the scientific method, we change them here and there for the better. Within our own total evolving doctrine, we can judge truth as earnestly and absolutely as can be; subject to correction, but that goes without saying.”

Indeed, I would argue that rules and rights are, correctly understood, the embodiment of the democratic impulse to treat all persons as equals and to recognise the capacity of each of us for self-actualisation and self-governance.⁴² (What more could men and women want?) This pre-commitment to the rule of law and to the right to dignity need not displace a simultaneous commitment to recognising difference and to allowing the stories of both the powerful and the vulnerable to shape the rules and the laws our political institutions and courts must generate.⁴³ (And what more could women and men want?) A jurisprudence of generosity is, as Van Marle makes clear here, a natural and necessary corrective to systems of law that make people invisible. However, as cases such as *Barkhuizen*, *Masiya* and *NM* make clear, generosity is no substitute for justice, and an ethics of refusal is no substitute for the equally powerful demand for reasons and justification. The correct path leads neither to arid abstractions nor to stubborn solipsism.

Reconciling rules and restoration, or rules and refusal, first requires that we take the text of the Constitution, the reasoning of cases, the political institutions that govern us, the commentators who contribute to our greater understanding of our field, and a whole range of other quotidian academic considerations – like logic and research – quite seriously. Reconciling rules and restoration requires a pre-commitment to producing commentary about our system of constitutional law that, should we have any talent, makes a modest contribution towards making that system both more coherent and more just.

Reconciling rules and restoration does not, as some who work Van Marle's preferred terrain might fear, require that we renounce our theoretical engagement in disciplines such as philosophy, political science, history, sociology, economics, psychology, and, of course, literature. For example, my preferred take on limitations analysis begins with the Court's own understanding of its institutional role, and asks whether and to what extent a theory of "shared constitutional interpretation" might better mediate the conflicting doctrinal requirements of separation of powers and constitutional supremacy. While "shared constitutional interpretation" provides an institutional framework for limitations analysis, it remains incomplete without a normative theory about how the values said to underlie the limitations clause cohere. This second end requires an explanation of the phrase "open and democratic society based on human dignity, equality and freedom" that coheres with the more general aims of our basic law. However, those two interpretative exercises are insufficient to the task of proving a complete theory of limitations analysis. Because a large percentage of hard cases will throw up instances of value incommensurability during limitations analysis, I have suggested that the Court's conventional approach to limitations analysis must be supplemented by what might be called a "storytelling" approach to judicial opinion writing.⁴⁴ This

⁴² See Woolman *Dignity* in Woolman et al (eds) *Constitutional Law of South Africa* ch 36; Schauer "Rights as Rules" 1987 6 *Law and Philosophy* 115.

⁴³ See Woolman *Community Rights: Language, Culture & Religion* in Woolman et al (eds) *Constitutional Law of South Africa* ch 36.

⁴⁴ See Woolman & Botha *Limitations* in Woolman et al (eds) *Constitutional Law of South Africa* ch 34.

approach does not conflate novels with judicial narratives.⁴⁵ It suggests, in line with much of what Van Marle has written, that storytelling challenges deeply ingrained theoretical assumptions about the world in which we live, and in so doing may create more space for out-groups to pursue their preferred way of being in the world.⁴⁶

Such an approach to limitations analysis reconciles the conflicting dictates of rules and restoration, but at no point demands that we deny the law its autonomy. The discipline of constitutional law demands that we treat the text of our basic law with respect. Moreover, the discipline of constitutional law recognises that the text of our basic law possesses a logic, a power and, most importantly for this reply, a virtue of its own. The general failure – on the part of Van Marle, the Constitutional Court and the others – to appreciate law’s autonomy carries with it the risk of trivialising the laws that govern us and the concerns of those governed by our law.

5.2 Who and what

Let me end with two stories. They are stories about “who” and “what” – and they both have happy endings.

Van Marle⁴⁷ gets a lot of mileage out of contrasting the ostensibly male obsession of the law with “whatness”, and the law’s alleged suppression of, and feminism’s concern with, “whoness”. In more common philosophical parlance, the charge is that the law focuses solely on “types”, while a “jurisprudence of generosity” or a “jurisprudence of care”⁴⁸ emphasises (or reclaims) “tokens”. (Dog is a type. Sachertorte, *my* chocolate black Labrador, is a token (of dogness).)

What makes human beings unique is our extraordinary capacity for developing types (though other animals appear to recognise a limited range of types as well). Indeed, it is our greatest gift and the source of our greatest gifts. As Hofstadter⁴⁹ writes:

“The pressures of daily life require us, force us, to talk about events at the level *on which we directly perceive them*. Access at that level is what our sensory organs, our language and our culture provide us with. From earliest childhood on, we are handed concepts such as ‘milk’, ‘finger’, ‘wall’, ‘mosquito’, ‘sting’, ‘itch’, ‘swat’, and so on, on a silver platter. We perceive the world in terms of such notions, not in terms of microscopic notions like ‘proboscis’ and ‘hair follicle’, let alone ‘cytoplasm’, ‘ribosome’, ‘peptide bond’, or ‘carbon atom’. We can, of course, acquire such notions later, and some of us master them profoundly, but they can never replace the silver platter ones we grew up with. In sum, then, we are victims of our macroscopicness, and cannot escape the trap of using everyday words to describe the events we witness, and perceive as real. . . We mortals are condemned *not* to speak at [the] . . . level of

⁴⁵ My emphasis on the need for storytelling in those hard cases where important incommensurable goods often collide has been *partially* misunderstood as reflecting a theoretical opposition to rule-following when undertaking limitations analysis. See Bohler-Muller “Beyond Legal Meta-narratives: The Interrelationship between Storytelling, Ubuntu and Care” 2007 *Stell LR* 133. Nothing could be further from the truth. Storytelling is not an alternative to rule-following. It supplements rule-following and takes place when the law – and the infinite wisdom of the rules that make it up – run out.

⁴⁶ See, eg, Van Marle “Law’s Time, Particularity and Slowness” 2003 *SAJHR* 239.

⁴⁷ 2007 *Stell LR* 198 citing Cavarero *In Spite of Plato: A Feminist Rewriting of Ancient Philosophy* (1995) 31.

⁴⁸ On the jurisprudence of care, see Bohler-Muller 2007 *Stell LR* 133

⁴⁹ *I am a Strange Loop* (2007) 35.

no information loss. We necessarily simplify, and indeed, vastly so. But that sacrifice is also our glory. Drastic simplification is what allow us to reduce situations to their bare bones, to discover abstract essences, to put our fingers on what really matters, to understand phenomena at amazingly high levels, to survive reliably in this world, and to formulate literature, art, music, and science.”

In the coming months, Van Marle and her daughter Hannah will experience, after months of gentle coaxing, the most profound moment of “whatness” and “whoness” when Hannah utters the word “Mama”. That Hannah’s first word is both token and type, both who and what, and that its whoness is parasitic on its whatness, is something that will surely not be held against her.

From this sublime story, we return to a far more pedestrian one: but no less meaningful for me. In winning my American disability claim, I relied not primarily on whoness, but whatness. My counsel and I understood *what* disability law is, *what* evidence was required, *what* tests had to be taken, *what* kind of testimony was allowed. *Whats* like “major diagnostic criteria”, “minor diagnostic criteria” or “inverted cortisol response” formed core components of our brief and our hearing before an administrative law Judge in the Social Security Administration’s legal system. All these *whats*, and tens of thousands more explicit and implicit *whats*, made it possible to convey my story – my “whoness” – to a Judge “who” didn’t know (and should not have known) “who” I was. I won that case not on the basis of my “whoness”, but on the basis of my “whatness” and the ability to bring all that “whatness” to bear on the telling of my story.

The purpose of these two stories is not to reverse the hierarchy of whoness and whatness, nor is it my desire to undermine the need to tell stories in order for us to recast – in law, as in life – what we understand to be true, good and just. My aim is simply to ensure that the two are appropriately reconciled, and that in our efforts to reclaim various kinds of whoness – say, in the lives of women – we do not place them in some false opposition to the whatness that allows their stories to be told and the law to hear them.

5.3 Fighting on multiple fronts

As I have tried to make clear from the outset of this reply, I believe that Van Marle is fighting on multiple fronts or, in legal parlance, arguing in the alternative. Both fronts, the “jurisprudence of generosity” and the “ethics of refusal”, offer powerful responses to the business-as-usual approach to law and politics often taken by academics such as myself. But as I have also been at pains to point out, I am not certain that “jurisprudence of generosity” and the “ethics of refusal” can be easily reconciled with one another, or that, as Van Marle suggests, that the latter is a subset of the former. It strikes me that they offer independent lines of criticism. Indeed, I believe them to be sufficiently independent that one might view an “ethics of refusal” as an implicit critique of the limitations of a “jurisprudence of generosity”. This independence enables me to endorse some of Van Marle’s conclusions while rejecting others. Thus, while I am not fully convinced that a “jurisprudence of generosity” is consistent with the analytical demands of constitutional discourse – certainly not as deployed by our courts – I am less sceptical of the

more radical claims made on behalf of her “ethics of refusal”. Why? Because I think that a rigorous, analytically sound commitment to constitutionalism conventionally understood holds out more promise for radical transformation than the critique and the call for reform proffered by a “jurisprudence of generosity”. Indeed, a “jurisprudence of generosity” – as our Constitutional Court has come to understand it – has the potential to undermine the project of constitutionalism itself. On the other hand, an “ethics of refusal” remains consistent with conventional constitutionalism. I can remain committed to the transformative potential of the Constitution, at the same time as I recognise the truth of Van Marle’s insight that so much of what is truly transformative of the human condition lies beyond the reach of law, politics and revolution. This commitment to the moral salience of everyday life and its radical promise resonates profoundly with my experience as an immigrant to South Africa. Moreover, I think that the more radical critique of law, politics and revolution imminent in the “ethics of refusal” suggests a reasonable response to the world that refuses to alter the fundamental premises around which it is organised. That Van Marle has offered an ethics that simultaneously allows me to remain committed to making the best possible sense of the constitutional order within which we operate and yet accept the inescapable conclusions proffered by her powerful critique of a law, a politics and a revolution (all South African) that fall short of the mark, is an effort that deserves high praise indeed.

OPSOMMING

Die genot verskaf deur ’n Van Marle-artikel is so bekorend dat dit oor die algemeen die verbystering onderdruk wat teweeggebring word deur haar dikwels aforistiese en soms kaleidoskopiese prosa. So is dit ook met haar mees onlangse werk, “Laughter, Refusal, Friendship: Thoughts on a ‘Jurisprudence of Generosity’” 2007 *Stell LR* 194. Maar, selfs begaafde skrywers soos Van Marle bied “waarnemings” waarop geantwoord moet word. Die behoefte aan so ’n antwoord het inderdaad minder te doen met die waarnemings self as met die aanbiedingswyse – die gebrek aan ’n presiese en duidelike uiteensetting – van haar hoofoogmerke. Van Marle weier botweg om in ’n standaard – droë – akademiese styl te skryf. In die geval van hierdie artikel verberg haar styl egter belangrike inhoudelike kwessies. Dit is jammer, want haar “ethics of refusal” lei ’n nuwe era in Suid-Afrikaanse regsfilosofie in. Ten einde groter duidelikheid te bied oor die aard van Van Marle se werk, het die outeur sy antwoord in vier afsonderlike dele verdeel. In deel 2 knoop die outeur die stryd aan met Van Marle se oënskynlik refleksiewe en bykans holrug geryde afwys van menseregte as ’n medium vir transformasie, alhoewel die verskille uiteindelik nie so groot is as wat dit eers mag voorkom nie. In deel 3 voer die outeur aan dat Van Marle in haar kritiek op die “manlikheid” van Westerse filosofie haar aan ’n vorm van oppervlakkige essensialisme oorgee wat sy gewoonlik vermy. In deel 4 merk die outeur op dat Van Marle, nadat sy op tekortkominge in die mangedomineerde tradisie van Westerse filosofie gewys het, vertroosting in Clint Eastwood se meer onlangse films vind. Haar kantaantekeninge oor Eastwood het wel sekere deugde, maar dit beteken nie dat Eastwood se werk besonder geskik is om Van Marle se metafisiese lading te dra nie. In deel 5 stel die outeur voor dat Van Marle en hy neig om in verskillende gildes te werk. Maar daar word nooit ’n hiërargie van gildes voorgestel nie – intendeel. Net soos die outeur dink dat sy werk oor die grondwetlike reg besonder gebaat het by Van Marle en ander regsfilosowe wat gereeld pogg om hom uit sy dogmatiese sluimer wakker te maak, sal Van Marle se werk baat deur die noulettende lees van die reg soos weerspieël in die werke van die beter akademici in die veld.