

CHAPTER ONE

INTRODUCING A JURISPRUDENCE OF CARE

“I speak ‘only for myself’ ... in the sense that I intend my words to express only my understanding of the world. I expect that some wimmin will find that what I say is more or less true for them and that some will find that it is false, distorted, or irrelevant. The latter sort of case may hurt because I often want what I say to be accepted by wimmin I respect and love. But it is more important to me to acknowledge plenty of spaces for differences.”¹

1.1 The problem: Silenced voices

“And when their eloquence escapes you
Their logic ties you up and rapes you”²

The underlying premise explored in this thesis is that if the right to gender equality is interpreted and imposed within the confines of dominant western ideologies of liberal legalism that silence different voices and reduce the search for justice to the “refinement of technique”, there would exist little if no space for meeting the particular needs of (South) African women and men who wish to live out their dreams and desires differently.³

Peter Goodrich reminds us that lawyers love legal texts.⁴ These texts, codes and precedents serve as legal metanarratives reflecting that which is *posited* to be the neutral, abstract and objective Truth harbouring an Authority believed to pre-exist and outlive any criticism.⁵ The legal text, as hegemonic, thus represents order and

¹ Trebilcot “Dyke methods” in Allen (ed.) *Lesbian philosophies and cultures* 1990 at 18.

² “De Do Do Do De Da Da Da” by The Police from the album *Zenyatta Mandatta* released in 1980.

³ Berkowitz *The gift of science* 2005 at 14. Berkowitz studies the unreturnable gift of science to law in the form of positive law and legal codification and concludes that “[t]he scientific cure for law ... has failed to restore law’s once vibrant bond with justice” (ibid).

⁴ “Maladies of the legal soul: Psychoanalysis and the interpretation of law”
<http://www.wlu.edu/-lawrev/text/543/Goodrich.htm> at 6-7.

⁵ Goodrich “Maladies of the legal soul” at 6.

certainty and silences voices of dissent and difference. The hegemony can best be described as:

“... that order of signs and practices, relations and distinctions, images and epistemologies – drawn from a historically situated cultural field – that come to be taken-for-granted as the natural and received shape of the world ... This is why its power has so often been seen to lie in what it silences, what it prevents people from thinking and saying, what it puts beyond the limits of the rational”.⁶

The abstract, scientific approach to law – drawn from a historically situated cultural field - tends to result in a refusal to address the lived substance of cases, and rules are applied to facts in a predominantly mechanical or technical manner.⁷ In addition, this orthodoxy posits the ‘rational’ and universally abstracted individual as legal subject.

The focus on the rational individual as an atomistic being led to the birth of the first generation of civil and political human rights.⁸ It is this enlightenment vision of Man as free and equal and *unencumbered* that is problematic. An atomistic account of individualism is indeed implausible, as an awareness of self requires the contextual reality of other selves from whom we learn to differentiate and situate ourselves. The atomistic account also reflects discrimination as a societal aberration that can be addressed relatively easily by the law and, particularly, human rights law. This in turn results in a formal vision of equality and distributive justice where likes are treated alike.⁹ Such a narrow liberal view of equality ignores

⁶ Comaroff and Comaroff *Of revelation and revolution: Christianity, colonialism and consciousness in South Africa (Vol. 1)* 1991 at 23.

⁷ This can be seen as liberal legalism in its purest form, which is an exercise of power and a circulation of texts rather than an exercise of judgement as art. See Goodrich “Maladies of the legal soul” at 14.

⁸ See Douzinas *The end of human rights* 2000. In describing the genealogy of human rights Douzinas emphasises the international turn to universal rights since the Second World War (see chapter 6). In analysing this legal ‘progress’ and the ‘triumph’ of liberalism in the second half of the twentieth century, he has the following to say:

“Human rights treaties and codes are a new type of positive law, the last and most safe haven of a *sui generis* positivism.” (at 118).

In order to counteract the hegemony of western liberal conceptions of human rights, Douzinas encourages us to be wary of declaring the end of ideology, history or utopia as these declarations mark the end of human rights as “[t]he end of human rights comes when they lose their utopian end” (at 380).

⁹ Aristotle *Nicomachean Ethics* 5.3.7.

the complex reality of life-with-others and the inherent worth of every person. Under the guise of a singular understanding of neutrality, rationality and objectivity, this abstract atomistic discourse succeeds in creating hierarchical dichotomies such as male/female, reason/affection, justice/care, and so on. By the very nature of these dichotomies, the former is considered to be of more value than the latter.¹⁰ Thus western law perpetuates the alienation of self from other and the consequent subordination and silencing of others in a fixed and immutable hierarchy. Once we manage to move beyond exclusionary dichotomous thinking, it would not seem radical or even strange to suggest that it is possible to find alternatives to western legal narratives by re-valuing different ways of being and becoming previously considered 'inferior'.¹¹

Notwithstanding the frequently articulated critiques outlined above, the advent of a 'culture' of universal human rights has been hailed and celebrated by many as the fulfilment of the enlightenment promise of emancipation through reason and self-realisation. This unquestioning faith in the redemptive nature of human rights results in a sense of complacency where we forget that the discourse of abstract, universal human rights is "an indeterminate discourse of legitimation or of rebellion that has little purchase as a descriptive tool of society and its bond".¹²

In chapter two I outline the nature of, and problems with, western liberal legalism and its accompanying positivistic and formalistic approaches to the law and human rights discourses. Although the liberal spirit of the twentieth century has been celebrated in many quarters and appeals have been made to conserve this spirit,

¹⁰ See Cixous "Sorties: Out and out: Attacks/ways out/forays" in Belsey and Moore (eds.) *The feminist reader: Essays in gender and the politics of literary criticism* 1989. Cixous draws our attention to the fact that thought has always worked through opposition and then she plays the binary system against itself in search of the "new" (at 101-102).

¹¹ In the western philosophical tradition Kierkegaard is known for his views on transformative thinking and his theories of movement. His heroes are those who leap, dance and take journeys in the continuous process of *becoming*. See Carlisle *Kierkegaard's philosophy of becoming: Movement and positions* 2005. It is this notion of journeying towards the 'as if' that informs my own thinking on the nature of the ethical and transformative utopianism. The same sense of fluidity as 'unfolding' can be found in *ubuntu* philosophy. See in general Ramose *African philosophy through ubuntu* 2002.

¹² Douzinas and Warrington *Justice miscarried: Ethics, aesthetics and the law* 1994 at 148. The authors point out that the universality of human rights "hinders the passage to the concrete human being" (at 227).

global trends should serve to remind us that our jealously guarded freedoms and individual rights have not brought us any lasting peace or sustenance. In fact, the zealous pursuit of freedom has produced or permitted massive income inequalities and the hegemonic and war-like search for freedom on behalf of others.

In my view, as a participant in life, traditional liberal interpretations of the right to gender equality, which centre the atomistic individual and lead to endless arguments surrounding the sameness/difference dichotomy, fall short of the utopian possibilities open to us in Africa.¹³ We should rather re-imagine new ways of living together in a post-*apartheid* society by severing the thrall of positivism. Of particular importance to my argument, expanded upon in chapter three, is the recognition of the values of care and compassion, informed by ethical feminism and *ubuntu*-thinking, within the public domain – values that have traditionally played a minor role (if any) in western legal decision-making processes.¹⁴

It is thus of tremendous importance for legal theorists to think beyond the caricatures of law and human rights and to resist the pull of the comfortable and the known. In fact, failing to test the *limits* of the law¹⁵ inhibits our search for imaginative and creative alternatives to the current system.¹⁶

¹³ Van Marle “In support of a revival of utopian thinking, the imaginary domain and ethical interpretation” 2002 *TSAR* 501. In her development of an ethical interpretation of equality, Van Marle supports Douzinas in his search for utopian hope within the domain of human rights:

“The utopian and aporetic moments of the promise [of the Constitution] must be recalled” (at 501).

¹⁴ In this thesis I encourage processes of re-valuing and even honouring different views of the world, the law and human rights. *Ubuntu* and/or care could be seen as such a ‘different views’, which encourage collective conversations in which differences and disagreements can be voiced. Minow *Not only for myself: Identity, politics and the law* 1997 highlights the importance of creating spaces for conversations of healing:

“Imagining the range of people who share the future requires some actual knowledge of people, and ideally, actual conversations with them” (at 157).

¹⁵ For an analysis of the founding violence of the law see Davies “Derrida and law: Legitimate fictions” in Cohen (ed.) *Jacques Derrida and the humanities: A critical reader* 2001 at 213. In her analysis of “Force of law: The mystical foundations of authority” 1990 (11) *Cardoza Law Review* 919, Davies reminds us that the very existence of the law as a separate structure reiterates the founding violence of textual law as authority. It is assumed that we cannot escape this legal violence, but the very recognition of the founding violence of law as limit creates the spaces necessary to resist this violation and exclusion.

¹⁶ Ramose addresses the problematic of western conceptions of rationalism from an African perspective. He claims that the belief that “man is a rational animal” was not spoken of the African,

Indeed, if we can put aside the law books for a while to look into the suffering faces of others *and take responsibility*, we may find ourselves living in a world made new – a home without a Master.

South African law-in-transition

“Against repetition is a time that remains open to future possibility.”¹⁷

South Africans were officially introduced to the discourse of human rights on 27 April 1994. The ‘interim’ Constitution of the Republic of South Africa¹⁸ contained a comprehensive Bill of Rights in chapter three. The ‘final’ Constitution¹⁹ contains the new Bill of Rights, which aims at achieving equality.²⁰ This sentiment is reflected in section 9 of the Constitution (the equality clause). Section 9(3) provides that no one may be discriminated against based on sex or gender. Other categories are mentioned, but since I am concerned with the development of a new jurisprudence of gender equality, I do not discuss the other categories in any detail. However, it should be remembered that the stated ‘categories’ cannot be

the Amerindian and the Australasian and that this Aristotelian definition of man was “deeply inscribed in the social ethos of those communities and societies which undertook the so-called [sic] voyages of discovery...” (2002 at 1). It has been recorded that these voyages of discovery driven by an ‘innocent curiosity’ led to the colonisation of Africa and Africans. This process of colonisation was dependent upon a need to control and reduce difference and to ‘teach’ Africans about western scientific rationality. This historical perspective is powerfully brought to the fore in a ‘praise’ poem performed by *imbongi* Mqhayi for the Prince of Whales on his visit to South Africa in 1925:

“Ah, Britain! Great Britain!
Great Britain of the endless sunshine!
She hath conquered the oceans and laid them low;
She hath drained the little rivers and lapped them dry;
She hath swept the little nations and wiped them away;
And now she is making for the open skies.
She sent us the preacher, she sent us the bottle;
She sent us the Bible, and barrels of brandy;
She sent us the breechloader, she sent us the cannon;
O, Roaring Britain! Which must we embrace?
You sent us the truth, denied us the truth;
You sent us life, deprived us of life;
You sent us the light, we sit in the dark,
Shivering, benighted in the noonday sun.”

See Opland *The dassie and the hunter: A South African meeting* 2005 at 7-8.

¹⁷ Gearey “‘Tell the truth, but tell it slant’: A poetics of truth and reconciliation” 2004 (31:1) *Journal of Law and Society* 38 at 58.

¹⁸ Act 200 of 1993.

¹⁹ Act 108 of 1996.

²⁰ Section 1.

understood to be free-standing as they all overlap to a greater or lesser degree. In fact, *apartheid's* express denial of interstitial zones was one of the most violent of its many brutal policies.

Section 9(2) of the final Constitution provides, in addition, that, in order to promote (gender) equality, legislative and other measures may be taken by the state to advance persons or groups of persons who have previously been disadvantaged by unfair discrimination. Legislative steps were subsequently taken and the result was the promulgation of the Promotion of Equality and Prevention of Unfair Discrimination.²¹ This Act, as discussed in chapter five, appears to be an endeavour to facilitate the transformation of South Africa into a democratic society, united by diversity and “marked by human relations that are *caring and compassionate*”.²² In order to ensure that legal transformation is value-guided, this Act provides for the creation of equality courts in section 16, presided over by officers with a proven commitment to equality and human rights.²³ The functioning of these specialised courts will be directly influenced by the equality jurisprudence developed by the Constitutional Court. The realisation of the promises and potentials held by these courts is thus dependent upon how far the Constitutional Court is prepared to go in recognising ‘plenty of spaces for difference’.

Thus far, the Constitutional Court has not fully developed a jurisprudence of equality far enough removed from the western liberal concept of equality alluded to above. The general approach followed by the Court has been one where the right to equality is equated with the rights and values of freedom and human dignity. In the cases of *President of the Republic of South Africa v Hugo*,²⁴ *Harksen v Lane*²⁵ and *The City Council of Pretoria v Walker*²⁶ the right to equality is predominantly

²¹ Act 4 of 2000 passed on 4 February 2000. Hereinafter referred to as the Equality Act.

²² My emphasis. See the Preamble to the Equality Act.

²³ Section 31.

²⁴ 1997 4 SA 1 (CC).

²⁵ 1998 1 SA 300 (CC).

²⁶ 1998 3 BCLR 257 (CC).

placed within a traditional liberalist/individualist discourse where individual dignity overshadows the social and historical stories of the individual-within-her-context. This narrow interpretation merely serves to further entrench oppressive social and institutional practices which in turn continue to entrench unacceptable and damaging (gender) stereotypes resulting in yet further silencing.²⁷

As mentioned above, current constitutional interpretations of the right to equality are sure to have far-reaching effects as they directly influence the interpretation(s) of the right and value of equality in other courts and, in particular, the equality courts. For this reason, it is necessary to critically analyse South African constitutional equality jurisprudence in order to expose the limits and weaknesses of a system which seeks once more to institutionalise rights and reduce differences.

1.2 Approaching the problem of silencing

Karl Klare has argued that the South African Constitution is a document of transformative constitutionalism or what he terms a “post-liberal” document.²⁸ This approach rejects the fiction that the political community is stagnant. He interprets the Constitution as a transformative document that requires continuous re-interpretation to make sense of the changing world and country we inhabit.²⁹ In this sense, the Constitution and the right to (gender) equality need to be continuously re-evaluated and re-interpreted in order to ensure transformation in line with the underlying values of amongst others, dignity, equality and freedom.

²⁷ Details of the effects of the Constitutional Court’s gender equality jurisprudence are discussed in subsequent chapters.

²⁸ Klare “Legal culture and transformative constitutionalism” 1998 (14) *SAJHR* 146.

²⁹ Klare 1998 at 155. See also Pieterse “What do we mean when we talk about transformative constitutionalism?” 2005 (20) *SAPL* 155. Pieterse endorses Klare’s reading of the Constitution as ‘post-liberal’ and adds that

“[a]ll in all, the Constitution would seem to require a rather radical departure from the assumptions underlying South African legal culture and accordingly to compel the transformation of this culture and of the manner in which lawyers and judges conceive of their role in society” (at 166).

Pieterse’s vision of transformative constitutionalism encompasses, amongst others, visions of substantive equality jurisprudence informed by attempts to address social and economic disadvantages (at 160). This approach is dealt with in more detail in chapter five below.

This transformative vision thus entails a rejection of the Constitution as a liberal document and the right to equality as a concept based on sameness and similar treatment in accordance with the enlightenment principles of rational individuality discussed above.

Klare's submissions render it possible to strive towards the not-yet of post-liberal discourse and to seek creative alternatives to the here-and-now. It remains to be seen whether the Constitutional Court is ready to adopt this radical stance 'against repetition'.

The limits of current equality discourse

In response to the tendency of the Court to conflate the values and rights of equality and dignity, Beth Goldblatt and Cathi Albertyn argue that issues of equality should be dealt with substantively and not formally.³⁰ This means that courts should examine the actual economic, social and political context of the litigants in order to determine whether or not unfair discrimination has taken place. In the constitutional case of *Brink v Kitshoff NO*³¹ the court indicated that this contextual approach entails two tests: the reading of the Constitutional text as an integrated whole and taking into consideration the historical and social context of the individual or group effected. This remedial approach requires the focus to be on the *impact* of discrimination as well as the remedial measures recommended by the court. This implies that provisions aimed at breaking down structural discrimination – such as affirmative action – would pass constitutional muster.

As recounted in chapters three, four and five, in the past few years the Constitutional Court has taken to heart the need for the recognition of substantive equality and this trend has been particularly evident in the constitutional enforcement of socio-economic rights.³² Authors such as Pierre de Vos and

³⁰ "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality" 1998 *SAJHR* 248.

³¹ 1996 4 SA 197 (CC).

³² See in general Jagwanth and Kalula (eds.) *Equality law: Reflections from South Africa and elsewhere* 2001 (hereinafter referred to as *Equality law* 2001).

Justice Zak Yacoob have welcomed this approach where the right to equality co-exists hand-in-hand with socio-economic rights and where previous disadvantage serves as a *requirement* for the protection of individuals and groups from unfair discrimination.³³ However noble this approach may be, the celebration of this development may be premature as general rules may once more be adopted at the expense of *specific* stories and *specific* contexts.³⁴ To illustrate the problems with this approach, I critically evaluate four cases in chapter four where the courts were faced with claims to gender equality. It is clear from a careful (re)reading of these cases that the courts are reluctant to engage with an ethical politics which is non-essentialist and fluid. In *Hugo*,³⁵ for example, the unquestioning reliance on a substantive interpretation of equality led to a father's exclusion from the sphere of care. *Mthembu*,³⁶ *Carmichele*³⁷ and *Jordan*³⁸ similarly reflect judgments committed to "the institutionally sanctified and entrenched version of what we regard as normal and therefore right as a matter of course".³⁹ These decisions therefore indicate a tendency to resist change and avoid challenging conventional legal discourses.

I argue against the grain that there exists an *ethical* demand to respond to the different voices and life stories of others. Relying upon the law to respond should, however, be approached circumspectly, as it is legal discourse itself that leads to silencing with its reliance on seminal texts and abstract rules. In fact, the way in which voices become the texts, the 'official accounts' is problematic.⁴⁰ This is a

³³ See De Vos "Substantive equality after *Grootboom*: The emergence of social and economic context as a guiding value in equality jurisprudence" in *Equality Law* 2001 at 52 and Yacoob "Some perspectives on the movement towards and the struggle for equality in our context" in *Equality Law* 2001 at 1.

³⁴ This aspect is discussed in more detail in chapters three and four.

³⁵ *Hugo* supra.

³⁶ *Mthembu v Letsela* 1997 2 SA 936 (T); 1998 2 SA 675 (T) and 2000 3 SA 867 (SCA).

³⁷ *Carmichele v Minister of Safety and Security and Another* 2001 1 SA 489 (SCA) and CCT 48/00.

³⁸ *Jordan and Others v The State and Others* (TPD (not reportable) and 2002 11 BCLR 1117 (CC).

³⁹ Van der Walt "Resisting orthodoxy – again: Thoughts on the development of post-apartheid law" 2002 (17) *SAPL* 258 at 259.

⁴⁰ Gearey 2004 argues that the sublime voice cannot easily be archived. By sublime he means "a way of speaking" which transports us with wonder (at 48).

dilemma recognised by Karin van Marle⁴¹ who has brought to South African soil the seeds of Drucilla Cornell's work on ethical feminism and the philosophy of the limit.⁴² Van Marle succeeds in enriching local equality jurisprudence precisely through voicing her concerns about our inability to truly escape legal orthodoxy and violence:

“We cannot and should not expect present public and legal processes to provide us with new understandings of sex and gender. Taking the limits of the law and all institutions into account we cannot even hope for an endless openness. We could hope for a less rigid approach – at the very least an approach that will engage with the values of freedom, dignity and equality for all the sexes and genders. An ethics of difference recalls the violence that every act of generalisation, exclusion, stereotyping and limiting does to women (and men).”⁴³

Embarking upon a powerful criticism of the substantive interpretations of equality currently birthed and nurtured by the Constitutional Court, Van Marle draws our attention to the dangers of assimilating differences in the name of acceptable or ‘logical’ interpretations of gender equality.⁴⁴ Adopting an aesthetic approach she argues that an ethical interpretation of equality requires attention to detail – to lived experiences, stories, responsibilities, relationships and the impact of judg(e)ments on real people. This approach requires of us to keep alive future possibilities of other-worlds, which remain utopian and thus open to challenge and change.

⁴¹ See *inter alia* Van Marle *Towards an ethical interpretation of equality* LLD Thesis 2000; “Equality: An ethical interpretation” 2000 *THRHR* 595; “An ‘ethical’ interpretation of equality and the Truth and Reconciliation Commission” 2000 *De Jure* 248 and “To revolt against present sex and gender images: Feminist theory, Feminist ethics and a literary reference” 2004 (15:2) *Stellenbosch Law Review* 247.

⁴² See in particular Cornell *Beyond Accommodation: Ethical feminism, deconstruction, and the law* 1999. Cornell urges us to always be “ethically humble before our own efforts to articulate and defend programs of legal reform, and configure an ethics of social arrangement that would significantly be more than just the one we have now” (at xii). Cornell brings this vision into her work on *ubuntu* within the (South) African context – she is imagining and not describing what could be a new, enriched constitutional jurisprudence informed by *ubuntu* thinking, justice and care. See “A call for a more nuanced constitutional jurisprudence: Ubuntu, dignity, and reconciliation” 2004 (19) *SAPL* 661. Cornell's concern with thinking beyond the inherent individualism of western liberal social contract theory is reflected in an essay where she bears witness to the dignity of her mother's death. In “Who bears the right to die?” sourced at <http://www.ssc.upenn.edu/polisci/programs/theory/cornell.pdf> Cornell highlights the importance of the need to “narrate and imagine for ourselves the significance of our death” (at 9). She re-thinks the moral need for the right to die in terms of the reality that “we are always already dying together” (at 16). Here she shifts emphasis from the right to die as a negative freedom and places it within the context of being for/with the other (at 15). Her forays into finding a richer conception of the social bond are carried through into her current work on *ubuntu*.

⁴³ Van Marle 2004 at 266.

We are faced in post-*apartheid* South Africa with a unique situation and opportunity – an ever-changing space of law-in-transition - to unsettle existing discourses and to listen to previously untold stories. The idea is that law's violence can be tempered by an ethics which is 'open' and 'beyond'. In supporting this call for an openness to difference, I submit that in order to displace metanarratives which restrict legal access to those who 'conform', we should encourage the creation of public spaces which allow a proliferation of voices and stories which constantly destabilise our belief in One Law.

Chapter three contains theories in support of the narrative and storytelling approach to law situated within the context of transformative constitutionalism in South Africa. Positive contributions to a reconstructed theory of (gender) equality are explored. In particular, the work of Carol Gilligan is interpreted in a non-essential way to highlight the powerful transformative potential of the recognition of an 'ethic of care' in the public domain.⁴⁵

The exploration in chapter three highlights the possibilities inherent in what I have chosen to name a 'jurisprudence of care'. I draw from the inspirational work of Drucilla Cornell,⁴⁶ and Karin van Marle⁴⁷ on the development of an ethical interpretation of gender equality. In addition I attempt to illustrate and broaden the indigenous context within which this research is located. Consequently the

⁴⁴ See also Van Marle 2002 and her critique of the judgment in *Hugo*.

⁴⁵ *In a different voice* 1982. I do not follow the more traditional 'cultural' feminist interpretations of the ethic of care in this thesis. These interpretations reflect a continuation of the justice/care dichotomy and the idea that women are solely suited to and responsible for caring, a view Gilligan herself finds problematic. This care-biased approach can be found in, amongst others, Ruddick *Maternal thinking: Toward a politics of peace* 1989; Tronto *Moral boundaries: A political argument for the ethic of care* 1993 and the anthology edited by Held *Justice and care: Essential readings in feminist ethics* 1995. It would be unwise, perhaps, to reject out of hand this type of thinking, as the essentialist/anti-essentialist debate is in and of itself a complex one (see Schor and Weed (eds.) *The essential difference* 1994). Be that as it may, I choose to follow an approach that places less emphasis on caring as an exclusively feminine practice and rather encourage a broader conception of caring and compassion in the public sphere.

⁴⁶ See *inter alia* Cornell *At the heart of freedom: Feminism, sex and equality* 1998; *Beyond accommodation: Ethical feminism, deconstruction, and the law* 1999 and *Just cause: Freedom, identity, and rights* 2000.

⁴⁷ See *inter alia* Van Marle *Towards an ethical interpretation of equality* LLD Thesis 2000; "Equality: An ethical interpretation" 2000 *THRHR* 595; and "An 'ethical' interpretation of equality and the Truth and Reconciliation Commission" 2000 *De iure* 248.

possibility of including *ubuntu* as a constitutional value/ideal that could guide the courts in their interpretation and implementation of the right to gender equality is explored. This would hopefully allow for the recognition and acceptance of an indigenous orally transmitted philosophy that endorses care and concern for others and that could enrich (South) African constitutional jurisprudence as argued by Yvonne Mokgoro.⁴⁸ An openness to the African ideals of mutual sustenance and solidarity may indeed enable care to be re-imagined as a kind of disposition to the world and our place in it. The *imbongi* (praise poet) David Yali-Manisi expresses through his lyrical Xhosa poem entitled “*Ubuntu*” this kind of disposition to the world:

“Love other people
and you will be loved;
you are what you are
through loving others.

Welcome your guests,
entertain friends;
you are what you are
through welcoming others.

Give, don't be stingy
While you have larders;
You are what you are
Through giving to others.

Don't fly off the handle
as if nipped by ants;
you open yourself
through talking to others.”⁴⁹

Justice, care and other ‘paradoxes’

In attempting to develop a jurisprudence of care, I recall Carol Gilligan’s insights into the need for a re-insertion of the ethic of care into the public domain, a space where the ethic of justice and the ethic of care could “converge in the realisation

⁴⁸ “Ubuntu and the law in South Africa” 1998 *Buffalo Human Rights Law Review* 20. The text can also be downloaded at <http://www.puk.ac.za/lawper/tydskrif/1998vl.html>.

⁴⁹ See the complete poem in Opland 2005 at 60-61. Opland writes about his friendship with Yali-Manisi during the 1970’s and 1980’s. During the course of this friendship, Opland learned much from Yali-Manisi as he recorded, transcribed and translated his spontaneous oral poetry which reflects a re-writing of South African history and a glimpse into the genius and power of the performed art of *bonga* (praise singing). It should be noted that this poem is not written in the usual tradition of *izibongo* as it contains Xhosa rhyming couplets.

that just as inequality adversely effects both parties in an unequal relationship, so too violence is destructive for everyone involved".⁵⁰

Many things of value are lost by downgrading or degrading the experiences and perspectives of women and others who do not speak the 'language of the law'. Gilligan attempts to address this deficiency by presenting us with an alternative ethic associated with otherness.

Gilligan has had a phenomenal impact on feminist theory and critique since the publication of her refutation of Lawrence Kohlberg's theory of moral development.⁵¹ Her initial concern was that Kohlberg's six stage process of moral development did not create adequate space for the different life experiences of women and thus it was that women scored lower than men on this purportedly universal scale of 'human' moral development. In her own empirical research Gilligan found that women seem to be more concerned with relationships and issues of interdependence and care. She named this tendency the 'ethic of care' and concluded that women speak 'in a different voice'. Men, on the other hand, were discovered to be more concerned with abstract justice when faced with moral dilemmas and Gilligan named this tendency the 'ethic of justice'. According to these analyses, 'masculinity' is defined through the achievement of separation, while 'femininity' is defined through the maintenance of attraction, attention to contextual detail and interpersonal emotional responsiveness. Perhaps most importantly, Gilligan *honoured* what she presented as women's moral reasoning.⁵² In expressing her concerns for a new moral orientation, she manages to move caring to centre-stage and highlights the moral importance of caring practices which are informed by an attentiveness to others in all their unique particularity.

Putting aside, for the time being, the critique of essentialism, I wish to assert here that the value of Gilligan's contribution lies in the fact that she has brought to our

⁵⁰ Gilligan 1982 at 174. Clement *Care, autonomy and justice: Feminism and the ethic of care* 1998 provides an analysis of the conversion of both ethics.

⁵¹ See Kohlberg *The philosophy of moral development* 1981.

⁵² Friedman "Feminism in ethics: Conceptions of autonomy" in Fricker and Hornsby (eds.) *The Cambridge companion to feminism in philosophy* 2000 at 204.

attention the (unique) idea that the ethic of care in moral reasoning is of *equal value* to the ethic of justice and that it is necessary to listen to different voices when making judg(e)ments. If one interprets the ethic of care as an approach to problems, which emphasises the importance of contextuality and our social webs of interdependence, it can be seen as an important critique of liberalist tendencies towards atomistic self-interest and abstract reasoning as reflected in the ethic of justice. Mary Joe Frug refers to this interpretation of Gilligan as “progressive”⁵³ and Susan J. Hekman refers to it as a “radical” interpretation.⁵⁴ These alternative interpretations of the ethic of care expanded upon in subsequent chapters inform my attempts to develop a new jurisprudence of equality, which is not necessarily based upon a closed, fixed, or even gendered, dichotomy of justice/care.⁵⁵ Thus the pressing responsibility for others is characteristic of an ethics of care that begins with, but also perhaps goes *beyond*, Gilligan in the formulation of a ‘caring justice’.

Inspired by Gilligan’s groundbreaking work, so-called ‘cultural’ feminists have argued that legal – and constitutional – interpretation and adjudication should not rely solely on textual rules, principles and precedents - hence relying on conflicting theories of interpretation – but rather on diverse social discourses and re-thought avenues of care and compassion. Such feminists have argued that legal decision-making should focus on a sensitivity towards various conflicting *stories* situated in various conflicting *contexts*.⁵⁶ Thus, we should focus not so much on conflicting

⁵³ Frug *Postmodern legal feminism* 1992. This brilliant study was published before completion following her untimely murder.

⁵⁴ Hekman *Moral voices, moral selves: Carol Gilligan and feminist moral theory* 1995.

⁵⁵ In *Beyond accommodation* 1999 Cornell defends Gilligan against MacKinnon’s virulent attacks by highlighting the redemptive character of Gilligan’s ethical affirmation of women’s experiences (at 136-137). MacKinnon’s writing appears on the surface to be an act of revenge, whereas Gilligan’s writing strives for something more, something beyond current systems of silencing and oppression – it represents a struggle *for* justice and not a struggle against all men. See MacKinnon *Feminism unmodified: Discourses on life and law* 1987 and *Toward a feminist theory of the state* 1989. Cornell argues for an affirmation of the feminine in its *retelling* which would assist us in disrupting gender hierarchies (1999 at 186).

⁵⁶ West *Caring for justice* 1997 at 205-206.

texts requiring Herculean solutions⁵⁷ but on conflicting stories which require resolutions based on an awareness of the need to affirm the well-being of individuals who yearn to live in a community *both* caring *and* just. This requires of us to reside in a space/time where we no longer discredit or disregard narratives, vocabularies and life-ways different from our own. It also requires of us a recognition of “the scream of living, the pain of knowing”,⁵⁸ where our current certainties are constantly put to the test.

This latter trend in thinking endorses an approach whereby gender equality issues are resolved in such a way as to preserve or restore to the greatest possible degree harmonious relations between parties. This would be preferable to scaling a mountain of legal principles and then pronouncing the victorious interpretation along with the victorious litigant. Emphasis should be placed on the knowledge we gain from the heart and from immersing ourselves in the *stories of others*. The argument is thus that there should be an expansion of the narrative voice in law and legal scholarship,⁵⁹ a method already utilised to great effect by Critical Race Feminists.⁶⁰

An obvious affinity exists between human rights, the right to gender equality and feminism. They operate as ideals containing utopian elements as a result of their commitments to social change.⁶¹ Douzinas describes the nature of utopianism as “the name for the great power of imagination which finds the future latent in every

⁵⁷ Here I am referring to Dworkin’s fictitious Hercules J who is able, in all his perfection, to find the only correct solution to any legal problem, no matter how complex. Hercules made his first appearance in “Hard cases” 1975 (88) *Harvard Law Review* 1057.

⁵⁸ From Breytenbach’s *die ysterkoei moet sweet* (The iron cow must sweat) 1964 as quoted in Krog *A change of tongue* 2003 at 97.

⁵⁹ West 1997 at 207.

⁶⁰ See as an example of this type of passionate re-writing of the world Williams “On being the object of property” in Bartlett and Kennedy (eds.) *Feminist legal theory: Readings in law and gender* 1991 at 165.

⁶¹ Palmer “Feminism and the promise of human rights: Possibilities and paradoxes” in James and Palmer (eds.) *Visible Women: Essays on feminist legal theory and political philosophy* 2002 at 91. In *The end of human rights* 2000 Douzinas argues that human rights have lost their critical edge.

cultural product”.⁶² Human rights have the potential to serve as powerful tools of transformation as they hold the promise of a world where individuals and groups are no longer oppressed, dominated or degraded. However, feminist engagement with current human rights discourse raises questions about the *space* within legal discourse for feminist or other dissenting voices.⁶³ We should thus remain wary of an uncritical acceptance of human rights discourse, as “justice miscarries when it denies the other”.⁶⁴ But, at the same time, we should recognise the symbolic power of such rights:

“These new rights may enable feminists to seek access to law without being silenced by it. Perhaps rights discourse could be viewed as an ongoing conversation rather than as closure.”⁶⁵

It seems unavoidable to assert here for further emphasis, that, In order to be effective, feminism must maintain its critical stance and keep in mind the dangers of excluding other voices, interpretations and choices.

One of the theses supported in the next few chapters is that our courts need to understand the value that a broadened conception of care contributes to equality jurisprudence. It is through compassionately listening to the stories told by women

⁶² Douzinas “Human rights and postmodern utopia” 2000 *Law and Critique* 200 at 226. I refer often in this text to utopian possibilities. These references should be understood against the backdrop of Douzinas’s contributions to critical legal theory and specifically his critique on the instrumentalisation of human rights in *The end of human rights* 2000. Similarly, Cornell envisions utopianism as tied to the imagination and visions of the truly new, “[a] world in which we can all share in life’s glories would be one radically different from our own society” (Cornell 1998 at 186). In spite of the fact that U-topia carries the negative meaning of no-place, it can also be said that humanism ‘grew up’ in utopia. Derrida maintains that the very existence of the dream proves that what is dreamt of “is there” (“Of an apocalyptic tone recently developed in philosophy” 1982 *SEMIA* at 94). Van Marle analyses this utopian turn in human rights discourse in South Africa’s constitutional promise of an open and democratic society based on dignity, equality and freedom. She reminds us that “[l]ike all utopias, this promise will also be deferred” (see “In support of a revival of utopian thinking, the imaginary domain and ethical interpretation” 2002 *TSAR* 501 at 501-502).

⁶³ Early liberal feminists aimed to achieve equality through the admission of women to those spheres of public life from which they had been excluded – including the legal world. It was assumed that the inclusion of women would transform the existing structures. However, in order for women to be included within legal discourse, it was in terms of sameness and not difference. Equality for women came to mean equality *with* men.

⁶⁴ Douzinas and Warrington 1994 at 309.

⁶⁵ Palmer 2002 at 98.

and others who suffer unfair discrimination that we can develop a (possible) understanding of their suffering and seek new ways to respond less violently and more appropriately. Crucial to this shift in emphasis is the recognition of the vulnerability of women (and men) who in the process of unfolding their human potential depend upon others who enfold them within their communities.⁶⁶ It is therefore our task as lawyers and thinkers to always strive to realise the possibility of responding to previously unheard voices and re-storying our belief in justice.⁶⁷

This is, for all its uncertainty and disillusionment a time of great opportunity in the 'new' South Africa for glimpsing new ways of thinking about ourselves and new ways of living with others.⁶⁸ It is a time of hope where we can start afresh if we choose to think the law afresh.

1.3 Methodologies of work

“Advancing toward the other is not carried out, for all that, in a blind and mute immediacy. It requires a different way of speaking than the one that we currently know.”⁶⁹

Stories serve to address psychic as well as physical suffering, the pain of loss and confusion.⁷⁰ Kearney describes storytelling or narrative as highlighting the complex relationship between imagination and reality, which never ceases to fascinate and

⁶⁶ Ramose 2002. Ramose maintains that *ubuntu* is concerned with cosmic harmony and that “peace through the concrete reality of justice is the fundamental law of ubuntu philosophy” (at 51-52).

⁶⁷ Achebe *Home and exile* 2003. Achebe attempts to re-awaken in us a new respect for the vibrancy and dignity of African ways of being where there is hope beyond assumptions of western superiority:

“To those who believe that Europe and North America have already invented a universal civilisation and all the rest of us have to do is hurry up and enrol, what I am proposing will appear unnecessary if not downright foolish. But for others who may believe with me that a universal civilisation is nowhere yet in sight, the task will be now to enter the preliminary conversation” (at 104).

⁶⁸ See Anderson (ed.) *The Fontana Postmodern Reader* 1995 at 11.

⁶⁹ Irigaray *The way of love* Bostic and Pluhacek (trans.) 2004 at 57. A number of assertions made in this thesis are influenced by the thinking of Irigaray. Irigaray rejects most feminist ‘politics of equality’ where women seek to reverse power relations in favour of a feminism of difference. See Hirsch and Olsen “Je – Luce Irigaray: A meeting with Luce Irigaray” sourced at <http://www.cas.usf.edu/JAC/163/irigaray.html> Hirsch and Brulotte (trans.). Irigaray, as a philosopher of the new, calls attention to the re-thinking of transcendence as horizontal (between two) and her critique of the monopoly of a single, masculine subject in western tradition is valuable to the project enfolded in and unfolding within these pages.

⁷⁰ Kearney *On stories* 2002 at 6.

enchant, and hence his wager that “postmodernism does not spell the end of the story but the opening up of alternative possibilities of narration”.⁷¹ It is these “alternative possibilities” that inform the explorations in this thesis and my search for more poetic and ethical responsiveness to the stories of those who stand before the law. The call is for attempts to be made at re-establishing cultural resonance for marginal narratives within the limits of the legal where we may be expected to learn to speak anew. This also presupposes a willingness to be surprised or held captive by what we hear. The reader is meant to experience the voice as a mark of a desire not to be silenced or defeated:

“If the subaltern could speak – that is, speak in a way that really *matters* to us, that we would feel compelled to listen to, then it would not be subaltern ... One of the things being subaltern means is not mattering, not being worth listening to, or not being understood when one is ‘heard’...”⁷²

As alluded to above, enlightenment rationality presents a view of the world that excludes and marginalises other ways of knowing. In fact, developing the law in ways that preserves its integrity, internal consistency and historical trajectory is an essentially conservative process which silences creativity and protects the *status quo*’s disconnection from spirituality and social and cultural practices.

In developing a new jurisprudence of gender equality I seek to emphasise the importance of listening to stories in order to ensure that the domain of legal and constitutional interpretation remains flexible and responsive to the complex needs of others. It is simply about speaking in one’s own voice of one’s own law and learning from other voices and the stories they tell.

I wish therefore to encourage social and legal contestation, which relies on the recognition and development of critical political perspectives without lapsing into essentialism and foundationalism. It is not a gregarious tolerance for the way things are, but rather an encounter with ethical feminism and, to a lesser extent,

⁷¹ 2002 at 13.

⁷² Beverley “Testimonio, subalternity, and narrative authority” in Denzin and Lincoln (eds.) *Handbook of qualitative research (2nd edition)* 2000 at 559ff.

postmodernism.⁷³ Claims to universal Truth are not made and it is never assumed that the truth is ‘out there’ to be discovered. I do not claim to speak for all women and merely wish to open legal minds to new ways of thinking gender equality that may contribute to the possibility of (a) better future(s) for (South) Africans.

A narrative style is employed in the writing of this thesis as the importance of stories and narratives themselves are a theme throughout the chapters. In addition, I endorse Adriana Cavarero’s thesis that *who we are* is embodied in our desire for narratability – to have our story told. Cavarero is concerned with the *who* and not the *what* disclosed through the tale of a life story. Unlike philosophy, which demands the form of a definitory knowledge that regards the universality of Man, narration or storytelling has the form of a biographical knowledge that regards the “unrepeatable identity of someone”.⁷⁴

This jurisprudential journey is self-reflective, open-ended and yet to be discovered, as I remain, always and already, paradoxically embedded in a text I wish to escape.

1.4 The path ahead

“Rather than salvation, the accidental needs care. To tell the story that every existence leaves behind itself is perhaps the oldest act of such care.”⁷⁵

⁷³ See Fraser and Nicholson “Social criticism without philosophy: Encounters between feminism and postmodernism” in Nicholson (ed.) *Feminism/Postmodernism* 1990. The authors advocate what could be called a marriage of convenience between feminist theory and postmodernism. Postmodernists can learn from the positive political activism of feminists and in turn feminists can learn to avoid the traps of essentialism and foundationalism, which inevitable lead to the exclusion of those who are deemed different.

⁷⁴ Cavarero *Relating narratives: Storytelling and selfhood* 2000 at 13. Cavarero, an Italian feminist thinker, presents us with a new account of the relationship between selfhood and narration. She describes narration as a ‘feminine art’, but also implies that the feminine cannot be reduced to any of the figurations within the male/female dichotomy. In this sense narration-as-feminine designates possibilities that exceed oppositions and allow us to glimpse the uniqueness of *who* the other is. In her most recent project Cavarero takes this thesis even further. In *For more than one voice: Toward a philosophy of vocal expression* Kottmann (trans.) 2005 she continues her support of a politics of voices (*una politica delle voci*) through presenting powerful arguments against mind/body logocentrism. In defending an ethics of plurality and relation and placing “the embodied singularity of a unique being” as central to action and politics, Cavarero manages to transcend the rigidity of codes of language and texts and presents to us the possibility of imagining “another story for the community of lovers who neither want to be separated nor to die” (at 241).

⁷⁵ Cavarero 2000 at 53.

In the paragraphs above, I have emphasised the undesirability of continuing to adhere to a discourse of western legal liberalism to achieve (gender) equality. As with Iris Young, my “personal passion begins with feminism” and a situated interest in justice.⁷⁶ I acknowledge that it is a dangerously totalitarian tendency to insist on the development of comprehensive theories in an incomprehensible world. Rather, there is a need to ask questions differently and to question differences. My aim is to present to the reader a narrative critique of a liberal or quasi-liberal understanding of gender equality in particular and I can only do this from my perspective as a (South) African woman. It is unavoidable that my own particular contexts affect my analyses and evaluations, as do my own stories.

The theoretical approaches referred to throughout this intellectual journey should not be seen as a totality which must be accepted or rejected in its entirety, but as useful tools for critique and transformative discourse. It is at its very core a search and plea for the recognition of public manifestations of care, especially within the ambit of gender equality jurisprudence.

My position is also informed by Drucilla Cornell's deconstruction of the justice/care dichotomy and her express belief in different destinies, including destinies that could be recollected from the ‘archives’ of *ubuntuism*.⁷⁷ Her dream of Other-Love is informed by multiple voices engaging one another in dialogue, which may be like “asking for the moon, but through asking for the moon we speak and write.”⁷⁸

This ‘asking for the moon’ – surely lunacy? - entails a turning towards the future where the future is not a repetition of the same old story of the suppression of the language and culture of others, but represents an openness to the new, the fresh,

⁷⁶ *Justice and the politics of difference* 1990 at 14.

⁷⁷ Cornell and Van Marle “Exploring Ubuntu – Tentative reflections” 2005 an unpublished paper in my possession. In this discussion paper the authors introduce a new metaphor for the constitution based upon a reading of Derrida's *Archive fever: A Freudian impression* Prenowitz (trans.) 1996. In reconfiguring the South African constitution as archive in the Derridian sense, it is seen as a document of struggle where “things commence, the place from which order is given and the place that contains memory” (Cornell and Van Marle 2005 at 6). This metaphor brings to the fore the figure of constitution as both moral memory and future struggle (ibid) and allows space for engaging values and ideals such as *ubuntu* and equality.

⁷⁸ Cornell 1999 at 205.

the enchanting. Luce Irigaray expresses this commitment to openness and Other-Love as follows:

“The act of love is neither an explosion nor an implosion but an indwelling. Dwelling with the self, and with the other – while letting the other go. Remembering while letting the other be, and with the world.”⁷⁹

It needs to be stressed here that we cannot merely go about our jurisprudential “business as usual” if we are to take the project of transformative constitutionalism seriously.⁸⁰ We need to transform our hearts and our minds in order to ensure that we continue our journey towards the ideal of social justice unhindered. It should be noted from the outset that this thesis does not provide or proclaim closure.⁸¹ The aspiration of this particular text is to provoke critical thought, to introduce alternative discourses and to encourage readers to explore new ways of being and becoming within and outside the law. It is necessary for us to assert our dense particularities, our lived and imagined differences as renegotiating dominant discourses and marginal positions is a process of critical engagement.

Keeping in mind that *real* people are seeking ways in which to live their lives (and laws) as creatively and imaginatively as possible, we must acknowledge that we cannot possess others – we cannot become one with (an)other - but we can, to a certain extent, learn from the different stories that are told by embracing a jurisprudence of care. For stories, after all, open up spaces for possibilities, variety and challenge – new ways of *becoming* equal and responsible and, perhaps most importantly, they allow us to resist the assumption that silence gives the proper grace to those we deem to be different from ourselves.⁸²

⁷⁹ Irigaray *An ethics of sexual difference* Burke and Gill (trans.) 1993 at 212.

⁸⁰ See in general Davis *Democracy and deliberation: Transformation and the South African legal order* 1999.

⁸¹ Closure would in fact be contrary to the spirit of utopian hope. I follow here Adorno's belief that utopianism is the “only philosophy which can be responsibly practised in the face of despair”, keeping in mind that it is also an “utterly impossible thing” (see Adorno *Minima Moralia: Reflections from damaged life* 1991 at 247).

⁸² Cavarero 2000 describes this as the “ethic of the gift” (at 3) and describes storytelling as conferring upon identity its expressive, contextual and relational status (at 28). Cornell utilises Cavarero's theory of narratable identity to great effect in her analysis of the ethics of transnational adoption (see chapter 7 in *Defending ideals: War, democracy and political studies* 2004). Kearney *On stories* 2002 also illustrates this point powerfully. He reminds us that the art of storytelling is

The constitution should provide a home or a dwelling for the other *as she is*:

“Care for the homeless,
comfort the rootless
engaging others
will lift you in life.”⁸³

what gives us a shareable world. When haphazard happenings are transformed into stories – and made *memorable* – then we become agents (narratable selves) of our past, present and future. The recounting of stories transforms our present “human condition” into memory and future anticipation through imagination. Narrative understood as communication allows us to dream of possibilities previously unknown to us, something Tolkien refers to as the “glimpsing of Other-worlds” (see “On fairy-stories” *The Tolkien reader* 1968). The possibilities of communities re-created and re-told bring us to the level of collective humanity. We have thus neither reached the end of history or the end of the story itself. Rather, as Kearney argues we now have the opportunity of opening up alternative possibilities of narration and thus life.

⁸³ Yali-Manisi quoted in Opland 2005 at 61.

CHAPTER TWO

WESTERN LEGALISM AND ITS DISCONTENTS

Keepers of the law

the judge
is dressed
in red and white

the assessors
in black and white
the prosecutor
in a hostage smile

and I
in the borrowed robes
of my grandmother's wisdom

corn she said
cannot expect justice
from a court
composed of chickens...¹

2.1 The pathway(s) of this chapter

This chapter focuses on the need for legal and constitutional transformation and for the identification and utilisation of sites of resistance and subversion within (and outside/without) the law. This is an acknowledgement that just as the founding violence persists in law, so does the founding *dream* that things could be otherwise, different – be thought anew.² This dreaming tends to be concealed and suppressed by injunctions to accept things as they are and to give up beliefs in the

¹ wa mogale *Prison poems* 1992 at 11. wa mogale was arrested in November 1983 and held in solitary confinement until he was charged with treason and terrorism. He was found guilty of furthering the aims of the African National Congress and carrying out *umkhonto we sizwe* guerilla operations, and was sentenced to ten years imprisonment.

² Cixous *Three steps on the ladder of writing* Cornell and Sellers (trans.) 1993 writes on the novelty of dreams and dreaming:

“Like plants, dreams have enemies, plant lice that devour them. The dream's enemy is *interpretation* ... We must let ourselves be carried on the dream's mane and must not wake up – something all dreamers know – while the dream is dictating the world to us” (at 107).

possibility that there exists something better. Ultimately then, the revolutionary or radical beyond of the law could be seen to be contained within, and our task is to attach ourselves to law (as we consider our very detachment from the letter of the law) through a belief in the dream rather than through a perverse enjoyment of its founding violence. I call here for the recognition of new *ethical* interpretations of the law, human rights and gender equality, which reach beyond the hierarchical dichotomies of the enlightenment³ in order to embrace diversity and different views of reality within the South African context. In pursuit of a new style of thinking, I seek to re-figure and ethically re-interpret the right to gender equality whilst keeping in mind the tension between the violence and the dream of law as “[c]entral to a critical enquiry in law is the paradox or tension between law’s potential and law’s limits.”⁴

I open the critique in this chapter by addressing the problems inherent in western, positivistic jurisprudential thought. Objective and abstract styles of legal reasoning are challenged and re-thought and an argument is forwarded for the transformation of the legal system, which in turn would force us to confront the ethical considerations of the law’s violent dealings with actual human beings. It is

³ Liberal dualisms or opposing pairs are hierarchical where the first part of the dichotomy is privileged over the second. Often the dualisms are sexualised in that the first part is identified with the ‘superior’ male and the second part with the ‘inferior’ female. The law is also usually identified with the dominant male side of the opposing pair. This leads to the privileging of male attributes, although this privileging is often obscured as it is accompanied by the romanticisation of ‘womanliness’. Examples are rational/irrational; active/passive; thought/feeling; reason/emotion; culture/nature; power/sensitivity; objective/subjective; abstract/contextual; principled/personal and so on. Feminist legal theorists either argue for the rejection of gender dualisms, where they accept the validity of the binary system and its hierarchical structure but do not accept the coupling of women with the inferior side of the binary (the so-called liberal ‘reformists’) or they reject the hierarchical structure of the dualisms (the so-called ‘difference’ feminists) or they wish to transcend the oppositions altogether. The latter feminists would prefer androgyny to the current system of gender identifications. If we argue for the transcendence of liberal dichotomies, we then need to consider the role of the law under a non-dichotomous perception of reality. This is one of the considerations in this thesis. See in general Olsen “The sex of law” in Kairys (ed.) *The politics of law: A progressive critique* 1990 at 453-467.

⁴ Van Marle “Gender mainstreaming – An ethical feminist consideration” 2005 at 12 (an unpublished manuscript in my possession). Van Marle rightly places emphasis on the need to ‘call things into question’. Throughout this journey I keep in mind the dangers of “incorporationism” which Scales describes as a process through which marginal voices are *made to believe* that they now have a place within the existing system (see Scales “The emergence of a feminist jurisprudence: An essay” 1986 *Yale Law Journal* 1382).

thus not a naïve endorsement of the law and its capacity, but a reminder of the violent limits positive law imposes on the future of a justice yet-to-come.⁵

Placing the critique in context, I turn to the legal utopianism of Costas Douzinas and outline his (ethical) postmodern response to enlightenment thinking in the human rights domain. According to Douzinas, human rights should comprise a critique of positive law and institutionalised systems of rights, but unfortunately:

“Legal thinking has abandoned transcendence, has condemned natural law to the history of ideas, has tamed justice and has become an accountancy of rules.”⁶

In the face of this loss described by Douzinas and the necessity for transformation, I turn to an exploration of the nature of the South African Constitution, Act 108 of 1996 – widely believed to be transformatory in its nature - and in particular the interpretation(s) of the right to gender equality.⁷ The failure of the Constitutional Court to fully embrace ethical interpretations of equality raises a number of concerns I address in detail here and in subsequent chapters. In particular I analyse post-*apartheid* transformative constitutionalism and the possibilities inherent in post-liberal human rights and equality discourse.⁸

Having established that the Constitutional Court has abandoned formal interpretations of gender equality in favour of substantive interpretations, I proceed to introduce the idea that this approach does not have far-reaching enough effects.

⁵ Van Marle “Lives of action, thinking and revolt – A feminist call for politics and becoming in post-apartheid South Africa” 2004 (19) *SAPL* 605 at 607.

⁶ Douzinas *The end of human rights* 2000 at 374. See also Douzinas “Human rights and postmodern utopia” 2000 *Law and Critique* 200 and Van Marle “In support of a revival of utopian thinking, the imaginary domain and ethical interpretation” 2002 *TSAR* 501.

⁷ Davies understands transformation as follows:

“Transformation which is based on the continuing evaluation and modification of a complex material and ideological environment cannot be reduced to a scientific theory of change, like those of evolution or the half-life of radioactive substances ... practical change occurs within a climate of serious reflection, and diversity of opinion is in my view absolutely essential as a stimulus to theory.”

See *Asking the law question: The dissolution of legal theory* 2002 at 205.

⁸ Van Marle 2004 at 605 draws our attention to the dilemma that the enthusiastic embracing of human rights contributes to “an absence of action, thinking and revolt” (at 606). I submit in this chapter that this may indeed be so, but that we should also, somehow, hold onto the dream of a better future promised by human rights, whilst at the same time not closing off spaces for “continuous contestation and questioning” (at 606).

Ultimately I argue that this fundamental right should be interpreted *ethically* along the lines of submissions made by Drucilla Cornell and Karin van Marle.

In moving towards the development of an utopian and ethical jurisprudence of care it is necessary to recognise from the outset that western law has evangelical, hegemonic and patriarchal tendencies which impact negatively on those who do not fit the 'ideal' of the law of western men. Accordingly, in order to listen to and respond to the different voices of others, there is a need for ethical spaces of openness to difference, care and compassion. These latter submissions are based upon the work of Carol Gilligan as read in a (non) essentialist or strategic manner and embroidered upon in the latter parts of this chapter.

The final section of this chapter suggests a way forward, a path which could lead to less exclusions and, hopefully, the prising open of spaces in which the courts and lawyers would be convinced to take responsibility when faced with the suffering of the concrete other.⁹ Should the pivotal points change, adjudicators may no longer feel comfortable hiding behind legal texts and tests, and may begin to understand the importance of a "politics of becoming"¹⁰ which requires of us to abandon the dictates of an already existing language or world and to experience the wonderment of listening-to and being-with others.¹¹

2.2 A critique of dominant legal narratives

And their judges spoke with one dialect,

⁹ Benhabib *Situating the self: Gender, community and postmodernism in contemporary ethics* 1992 is critical of the belief that moral (and legal) subjects are isolated beings who are essentially context-free. She envisages a relationship between the generalised and the concrete other along a continuum. In the first place, there is the universalistic commitment to the consideration of every human individual as being equally worthy of moral and legal respect (at 10). This is an example of the recognition of civil, legal and political rights. On the other hand, the standpoint of the concrete other requires one to think from the context of the ethical relationship of, for example, a spouse, sister, mother and so on. If these standpoints exist along a continuum, extending from universal respect at the one end to care at the other, then the privileging of traditional theories of universalism in the legal domain, as elsewhere, need to be re-thought. People should be dealt with as they are - always already immersed in the life-world.

¹⁰ Van Marle 2004 at 606.

¹¹ See Irigaray *The way of love* Bostic and Pluhacek (trans.) 2002 at x-xi.

But the condemned spoke with many voices.
And the prisons were full of many voices,
But never the dialect of the judges.

And the judges said:
'No one is above the Law.'¹²

In this section, I raise some concerns about the unquestioning adherence to the dominant legal theories of legalism, formalism and positivism. At the risk of discarding altogether 'conceptual pureness', I concentrate on the interrelations between these theories and their combined tendency to silence that which does not conform to pre-determined rules within the closed system of a legal 'reality'. It is not possible in this restrictive space to reflect upon *all* the criticisms of these 'modernist' legal theories, and it is not my intention to do so as I describe, by means of conversation, the ethical limits of the latter form of legal discourse.

Legalism represents the 'official version' (metanarrative) of the law – law's explanation of itself. Marinos Diamantides describes legalism as follows:

"'Law' has a *life of its own* and ... it arrives at a judgement by means of an almost mechanical process. It claims the closure of legal meaning which it purports to be contained in the stillness of the letter of the law that is universally applicable."¹³

Related to this metanarrative, and supported by it, is the belief that the law is a closed logical system. Such an approach is supposed to protect the domain of law and its objectivity and independence. This approach, labelled as formalism, is again related to the idea of the existence of a legal science and so lays claim to the possibility of the objective determination of disputes. Following this line of thinking, other perspectives and other worldviews are simply excluded. Differences are not only ridiculed, but also simply not heard as they do not 'fit' into the dominant, objective version of Legal Truth.

¹² Leonard *Situations theoretical and contemporary* quoted in Maley "Beyond the law: The justice of deconstruction" 1999 (10/1) *Law and Critique* 49 at 59-60.

¹³ "Ethics in law: Death marks on a still life: A vision of judgement as vegetating" 195 *Law and Critique* 209 at 209. It is suggested that lawyers find an alternative to traditional legal theory as the precepts of determinacy, objectivity and neutrality have failed us and, in the light of this failure, we need to imagine new ways to live together. See Singer "The player and the cards: Nihilism and legal theory" 1984 *Yale LJ* 1 at 9. Singer submits that "[w]e cannot answer our question of how to live together by applying a non-controversial rational method. We will have to take responsibility for making up our minds" (at 66).

Similarly, the doctrine of legal positivism formulates law as a determinable and empirical science. This entails an outright rejection of the law having a metaphysical or natural existence. In this sense, positivism merely reinforces the legal status quo by placing unquestionable faith in the legal canon.

I submit here that legalism, formalism and positivism serve the same end, namely to legitimise the authority of law in such a way as to render transformation impossible. Law, like science, is seen to be objective, neutral and certain. What is not acknowledged is that this is merely another perspective or way of seeing and being in the world. Thus legal and scientific truth is constructed within a particular context. Once this view is accepted, alternative interpretations become possible.

To illustrate, if we continue to understand the law in terms of legalism, formalism and positivism, we continue to ignore the process of becoming. DH Lawrence expresses this using the metaphor of the “regulation cabbage”:

“... we are like the hide-bound cabbage going rotten at the heart ... we hang back, we dare not even peep forth, but, safely shut up in bud, safely and darkly and snugly enclosed, like the regulation cabbage, we remain secure till our hearts go rotten, saying all the while how safe we are”.¹⁴

Although Lawrence’s poetic assertions could be read as wholly anarchist in nature, it is also possible to read his text ethically as reflecting a concern about state power and authority and a certain understanding of the law. If we were able to “peep forth” from our place “shut up in a bud” we may be able to imagine law’s becoming.

In practice, legalism, formalism and positivism remain the dominant language(s) of the western world and the typical outlook of most legal professionals and academics. Here we encounter another relation, that with western liberalism. Legal positivism in particular is perceived to be fundamental to the constitution of

¹⁴ Lawrence *Study of Thomas Hardy and other essays* 1985 at 11. Lawrence here is interestingly targeting the laws proposed by the suffragettes. Although he sees their struggle for emancipation and empowerment to be a worthy one, he also maintains that they are missing the point. Something *other* than increased regulation should be attempted. See also Davies 2002 at 24-25.

western legal thought. Positivist jurisprudence is congenial to those who seek to defend rightist economic liberalism as positivism is the ultimate guarantor of the 'free' market and as it is perceived to be removed from the arena of politics, morality and ethics. It is the key reason why lawyers come to accept the 'official' story of law as legal reality and why they tend not to question the nature and purpose of law, but take it as a given. It also helps to explain why the law comes to assume the status of objectivity and why judges become the seekers of universal (western?) Truth in the Platonic sense of the word.¹⁵

It is submitted that these dominant doctrines leave legal theory and the 'practice' of law itself impoverished. The unwillingness on the part of lawyers to address the social, moral and political components of law is problematic as it leads to an uncritical acceptance of the functioning of law within any given society thereby perpetuating the *status quo*, which may be anything but ideal. The formal requirements of valid law are seen as all-important and, for the largest part, its *content* is ignored. Positivism may also be seen to legitimate the refusal of most judges to consider the extent to which their particular worldviews inform their decisions. This lends support to the formalist position that what is dispensed in courts as a politically and culturally *neutral* caricature of justice.

Consequently, lawyers need to seek alternatives to traditional legal theory, as the precepts of determinacy, objectivity and neutrality (the superior sides of modernist dichotomies) have failed us and, in the light of this failure, we should imagine new ways of living together as equals:¹⁶

[B]y recognising the impossibility of easy, logical answers we can free ourselves to think about the questions in a more constructive and imaginative manner. Law cannot be successfully separated from politics, morals, and the rest of human activities, which is an integral part of the web of social life.¹⁷

¹⁵ Cavarero *For more than one voice: Toward a philosophy of vocal expression* Kottmann (trans.) 2005 places in question the tradition of metaphysics since Plato which has posited a philosophical affinity for "an abstract and bodiless universality" where the word "does not come out of any throat of flesh" (at 8). This programmatic lack of attention to the uniqueness of the voice, is, according to Cavarero a way of preserving the canonical text at the expense of understanding the act of speaking as relational (at 13).

¹⁶ Singer 1984 at 9.

¹⁷ Olsen "Feminism and critical legal theory: An American perspective" in Olsen (ed.) *Feminist legal theory vol. 1* 1995 at 473 (originally published in 1990 *International Journal of Sociology of Law* 199).

The overlapping and interwoven problems outlined above tend to convince that we need to move beyond western liberalism and legal positivism if we hope to embrace the diversity within and around us as legal subjects and lawyers. It is also important to move beyond these unstated norms, as the continued application of the law 'as it is' contributes to the continued oppression of women and other marginalised groups and individuals.¹⁸

Legalist/formalist/positivist jurisprudence also relies on a liberal and closed textual interpretation of human rights discourse. The problems with this particular aspect of the vernacular are discussed in more detail in the following paragraphs.

2.3 The text of the law and human rights

Western liberal legalism constructs the unitary subject (atomistic individual) of the law and human rights discourse where this subject is in conflict with others, and yet, formally equal to them. Freedom and autonomy as the values of western legalism spring from feelings of vulnerability and the fear that the existence of an other could lead to the annihilation of the self. Therefore, emphasis is placed on *enforcing* human rights *against* others, and consequently duties and responsibilities take a back seat. The 'holders' and 'enforcers' of rights are reduced to the generalised white, middle-class male who determine when and how harm is done and to whom. This reductionist approach to law renders women and other 'outsider' groups and individuals, as well as the subversives, subalterns and subterraneans amongst us, silent.¹⁹

¹⁸ Young identifies the five faces of oppression as exploitation, marginalisation, powerlessness, cultural imperialism and violence. See *Justice and the politics of difference* 1990 at 48-63. To illustrate the fact that the discourse of oppression makes sense of much of our social experience, Young analyses oppression as a social construction. She opens her chapter entitled "Five faces of oppression" by quoting from Weil:

"Rape is a terrible caricature of love from which consent is absent. After rape, oppression is the second horror of human existence. It is a terrible caricature of obedience" (at 39).

¹⁹ See for example Lacey *Unspeakable subjects: Feminist essays in legal and social theory* 1998. She argues that we must try to alter law so as to make it more receptive to the arguments of the powerless (at 44). She also supports the transformation of law for it to become more "polyphonous" and inclusive (at 193).

In an attempt to decentre the centre, the underlying thesis developed here and in subsequent chapters is that community, compassion and care – valued traditionally in the private domain - need to be (re)introduced into legal and human rights discourse in order to break the silence. A privileging of uncertainty and fluidity is needed in order to re-imagine and reconstruct the legal domain.²⁰ If this is achieved, there would no longer be clear boundaries between self and other or subject and object. This new way of thinking has the potential to lead us to connection(s) – the flowing and blending of boundaries that separate *and* connect us.

However, as mentioned previously, the 'body' of law is textual. Generally speaking (if this is possible), legal authority is exercised at the expense of the fleshiness of everyday lived experiences, and particularly the experiences of women who are perceived as *lacking* and necessarily subordinate to the Law of the Father. The multiplicity of the feminine experience has thus been rendered marginal by the monotheistic, monovocal and paternalistic nature of the law.

Should the others of the law, such as women, wish to be heard they must speak the language of their oppressors. In this way, unique voices are drowned out or dismissed in favour of traditional legal texts and rules – denominations, classifications and categories.²¹ The concern addressed below is that the monovocality of the law as it is can only lead to injustice.

On the other hand, perspectival social reality can be (re)constructed through a network of multiple stories hitherto unheard.²² For this reason, the postmodern initiative convinces

²⁰ Irigaray *Thinking the difference* Montin (trans.) 1994 makes a speculative appeal for the development of separate rights or women's laws in order to unsettle the legal system as a whole. She relies on the notion of 'femininity' as a condition of disorder and disruption (at 78) and thus centralises sexual difference in her thinking on rights. These rhetorical arguments have been a part of Irigaray's work for many years and culminates in her conception of *écriture féminine* which seeks to recover the repressed feminine, the unacknowledged body and give them a place within language. Her work in this area is particularly provocative. See also *An ethics of sexual difference* Burke and Gill (trans.) 1993.

²¹ See Goodrich "Maladies of the legal soul: Psychoanalysis and the interpretation of law" <http://www.wlu.edu/-lawrev/text/543/Goodrich.htm>.

²² See Benhabib "Sexual difference and collective identities: The new global constellation" in James and Palmer (eds.) *Visible women: Essays on feminist legal theory and political philosophy* 2002 at 137 where she states the following with regard to perspectival reality:

that the enlightenment project - which holds that the world's diverse communities have to see things the same way, the rational way, the *correct* way - must be reconsidered.²³ Should we choose to declare the victory of western liberalism and the end of history²⁴ we choose also closure and what Costas Douzinas refers to as the end of the utopian and transformative possibilities of a human rights culture.²⁵

Following this Douzinasian utopianism, instead of declaring the wholesale victory of western liberalism after *apartheid*, it is essential to (re)interpret human rights and the right to gender equality within the 'new' South African context, taking into account difference(s), and the need to care responsibly for, with and towards others.

"Others are not just the subject matters of my story: they are also tellers of their own stories which compete with my own, unsettle my self-understanding, spoil my attempts to mastermind my own narrative. Narratives cannot have closure precisely because they are always aspects of the narratives of others, the sense that I create for myself is always immersed in a fragile 'web of stories' that I as well as others spin" (at 149).

²³ It is important to note that relinquishing the universal Truth does not mean that we are left with nothing: "[r]ather postmodernism promotes social criticism: from a postmodern perspective everything is open to challenge, including postmodernism" (Anderson *Conversation, language and possibilities* 1996 at 37). Postmodernism is not against other schools of thought. It only challenges their attitudes to alternative truths. As Gergen argues: "(W)e do not ask of Verdi or Mozart whether their operatic arias, duets and choruses are true, but whether they can move us to ecstasy, sadness or laughter" (Gergen "The postmodern adventure" 1992 *Networker* 55 at 57). Similarly we need not ask if a metanarrative is true to us, but rather whether it can move us to accommodate those who differ from us. The necessity for a careful reconsideration of that which is universally *correct* has become even more urgent in the light of GW Bush's totalitarian attitudes and actions. His belief that "you are either with us or against us" boils down to the fact that if you are not 'with us' you are a terrorist, the friend of terrorists, or might as well be.

²⁴ Fukuyama *The end of history and the last man* 1992 The danger of declaring the victory of liberalism and liberal human rights is reflected in Fukuyama's statement that the purpose of history has come to an end:

"... today, we have trouble imagining a world that is radically better than our own, or a future that is not essentially democratic and capitalist. We cannot picture to ourselves a world that is essentially different from the present one, and at the same time better" (at 46).

Kearney *On stories* 2002 warns that this belief that 'the end' has finally come is a dangerously totalitarian attitude. In his response to the nihilistic postmodern claim that we are at the 'end of storytelling', Kearney argues that what we need at this very time is an alternative model of narrative where we recognise and respond to the identity of the *who* addressing us. Kearney relies on the work of Ricoeur in coming to his conclusions (see Ricoeur *Time and narrative vol. 3* 1988 and *Oneself as another* 1992). Although Kearney does not mention Cavarero's contribution towards a theory of narratable identity, his thoughts on the subject reflect, albeit from a critical hermeneutic tradition, similar concerns about stories as relational and unique:

"The story told by a self about itself tells about the action of the 'who' in question: and the identity of this 'who' is a narrative one" (at 152).

²⁵ See in general Douzinas *The end of human rights* 2000.

2.4 *The South African Constitution(s) and the end of apartheid*

“We cannot stop criticising the present and we cannot do that without adopting the position of the future; but similarly, we can never remove ourselves sufficiently from our here and now to adopt the redemptive position.”²⁶

The post-*apartheid* South African Constitution(s)²⁷ require lawyers to abandon the formalism, objectivism and reductionism, which characterised the law under the previous regime.²⁸ These Constitutions and their Bills of Rights have been hailed as bridges from the past to the future – a triumph of human rights. However, in reclaiming the both past and present it is necessary to re-think the world and our place in it in terms of a future-directedness.

In his insightful discussion of the notion of a transition to a constitutional democracy Andre van der Walt analyses the metaphor of the South African Constitution as a bridge between the past of unfair discrimination and the future of constitutionalism.²⁹ The ‘Post-amble’ to the 1993 interim Constitution introduces the metaphor of a bridge as follows:

“This Constitution provides a *historic bridge* between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”³⁰

The late Wits Law Professor, Ettienne Mureinik, extends this conception of the interim Constitution as a bridge that facilitates the transition from a culture of authority to a culture of justification, entrenching the image of the Constitution as a bridge that spans the abyss of potentially violent transition.³¹ This interpretation of

²⁶ Douzinas “Human rights and postmodern utopia” 2000 *Law and Critique* 200 at 238.

²⁷ Act 108 of 1996.

²⁸ See Botha “Metaphoric reasoning and transformative constitutionalism (Part 2)” 2003 (1) *TSAR* 20.

²⁹ Van der Walt “Dancing with codes – Protecting, developing and deconstructing property rights in a constitutional state” 2001 (118:2) *SALJ* 258..

³⁰ Constitution of the Republic of South Africa, Act 200 of 1993. My emphasis.

³¹ See Mureinik “A bridge to where? Introducing the interim Bill of Rights” 1994 (10) *SAJHR* 31 at 31-32. For an analysis of Murienik’s notion of the switch from a culture of authoritarianism to the constitutional culture of justification, see Van der Walt and Botha “Democracy and rights in South

the bridge metaphor has become established in South African constitutional discourse and in popular consciousness as a powerful image for social, political and legal transformation and progress. The bridge is thus seen as “an instrument of escape and liberation, of linear movement from old to new, from inside to outside...”.³² Regarded in this way, the bridge metaphor is the expression of a wish to break away from a violent and divided past and to complete the transition, once crossed. The point of the exercise is to cross the bridge – make the transition and get it over and done with. It is a process of *forgetting*.

Although many constitutional theorists subscribe to this interpretation of the bridge metaphor as crossing from old to new and not looking back, Van der Walt argues that this metaphor places a particular theoretical spin on the discourse of constitutional transformation. This theoretical spin denies and suppresses other (utopian) interpretations of, and discourses about, transition and constitutionalism.³³ Van der Walt thus deconstructs this dominant metaphor of transformative constitutionalism by establishing that the image of *apartheid* land law and of transformative land law as two stationary positions on either side of the bridge is unsuitable. He introduces a new metaphor – that of dancing/movement:³⁴

“However, even when we trade the static imagery of position, standing, for the more complex imagery of dancing, we still have to resist the temptation to see transformation as linear movement or progress – from authoritarianism to justification, from one dancing code to another, or from volkspele jurisprudence to toyi-toyi jurisprudence... I suggest that we should not only switch to a more complex metaphorical code such as dancing when discussing transformation, but that we should also deconstruct the codes we dance to; pause to reflect upon the language in terms of which we think and talk and reason about constitutionalism, about rights, and about transformation, and recognize the liberating and the captivating potential of the codes shaping and shaped by that language.”³⁵

Van der Walt convinces that we should “continually dare to imagine alternatives” and to “open our imagination to the possibility that things can be different.”³⁶ In

Africa: Beyond a constitutional culture of justification” 2000 (7) *Constellations* 341 sections II and III.

³² Van der Walt 2001 at 260.

³³ Van der Walt 2001 at 261.

³⁴ Van der Walt 2001 at 262. Here Van der Walt makes reference to the popular ‘madiba jive’.

³⁵ Van der Walt 2001 at 262-263.

this sense he endorses the understanding of human rights as instruments of ethics. Human rights should thus reflect ethical concerns for the other and the duty to respect the singular and unique experiences of the other. A human rights society in this sense would always look to re-definitions and re-conceptualisations and to new possibilities and subjectivities:

“[t]he time of such societies is the future because their principle is always-still to be declared and met. But a society of human rights operates also a (non-essential) theory of the good, and becomes a community of obligation to the singular, unique other and her concrete needs”.³⁷

The (im)possible justice of human rights is therefore based upon a position of proximity and not disinterested detachment, on concern and closeness and not abstract universality. The concrete needs of the other are what must come first according to this interpretation.³⁸

Human rights as utopian resistance create new values and meanings and make space for novel situations and stories rather than seeing transformation as something which has already taken place by crossing the metaphorical bridge.

What follows is a closer analysis of the Constitutional Court’s interpretation of the right to equality in order to establish whether this court has moved beyond (masculinist) western jurisprudence and the tendency to forget. The ensuing discussion is not exhaustive and forms the background for a continued analysis later in this thesis.

³⁶ Van der Walt 2001 at 263. As he states “[o]nce clear meanings are out of the house, we can allow language to dance on the table” (ibid). This approach may then allow us to speak to the other in the language of the other – that is, without naming and appropriating with words but by turning to a language which creates new meanings. Irigaray also concentrates on the need for a ‘new’ language in *The way of love* Bostic and Pluhacek (trans.) 2004. In this work she proposes ways of preparing a place of proximity and nurturing ways to nearness which are dependent on the transformation of speech and speaking-positions and related to the experience of listening-to (at ix).

³⁷ Ibid.

³⁸ Douzinas 2000 at 380.

The Constitutional Court's equality jurisprudence revisited

In *President of the Republic of South Africa v Hugo*,³⁹ Richard Goldstone J introduced the concept of “equal dignity” to the interpretation of equality rights.⁴⁰ He explains that the purpose of the prohibition on unfair discrimination is to create a society in which the inherent dignity of individuals is protected:

“The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect, regardless of their membership of particular groups.”⁴¹

As a result of this focus on the dignity of the individual, the majority of the Constitutional Court in *Hugo* found that the imprisoned father had not been unfairly discriminated against as his dignity had not been impaired when only mothers of children under the age of twelve years were released from prison under a presidential pardon. The far-reaching consequences of this interpretation of gender equality, and the decision of the court, are discussed in detail in chapter four.

Hugo was followed by *Prinsloo v Van der Linde*⁴² and *Harksen v Lane*⁴³ where the Court adopted a similar approach to the one articulated by Goldstone. As Warren Freedman puts it, the latter decisions appear to reconfirm a more formal and

³⁹ 1997 6 BCLR 708 (CC).

⁴⁰ *Hugo* at para. 40-41.

⁴¹ Goldstone J in *Hugo* at para 41. The Justice adopted this view from the equality jurisprudence of the Canadian Supreme Court in *Egan v Canada* (1995) 124 DLR (4th) 609; (1995) 29 CRR (2d) 79. See also the judgment of L'Heureux-Dube J in *Egan v Canada* supra at 106 as well as the judgment in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) at para. 27.

⁴² 1997 6 BCLR 759 (CC).

⁴³ 1997 11 BCLR 1489 (CC), 1998 1 SA 300 (CC).

individualistic approach to equality by once again placing dignity at the centre of the enquiry into unfair discrimination.⁴⁴

The problem with a formal interpretation of the right to (gender) equality has been acknowledged by South African jurists and for this reason there have been strong arguments to recognise a substantive interpretation of equality which does not focus on individual dignity.⁴⁵ Such an interpretation of the right to equality requires contextual adjudication where historical disadvantage forms a central concern. Concrete needs and circumstances are granted legal importance and post-liberal philosophies influence to a limited extent the interpretation of this right.

A substantive vision of equality

Cathi Albertyn and Beth Goldblatt argue that the objective of equality is not to recognise the inherent dignity of each individual, but to provide individuals with the (equal) opportunity to advance and develop their human potential and social, economic and legal interests.⁴⁶

⁴⁴ “Formal versus substantive equality and the jurisprudence of the Constitutional Court *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517; 1999 1 SA 6 (CC)” 2000 *THRHR* 314 at 318. See also Davis’s criticism of the connection between the rights of equality and dignity in “Equality: The majesty of legoland jurisprudence” 1999 (116) *SALJ* 396.

⁴⁵ See Albertyn and Goldblatt “Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality” 1998 (14) *SAJHR* 248.

⁴⁶ See Albertyn and Goldblatt 1998 at 254 where they maintain that the Constitutional Court has sought to define equality by placing the value of dignity at the center of the equality right. The authors do not agree with this approach and argue for the right to substantive equality to be given a meaning independent of the value of dignity. The authors’ interpretation of equality promotes and protects the ability of each human being to develop to his or her full human potential and to forge mutually supportive human relationships. This approach appears to be in line with Nussbaum’s capabilities approach. According to Nussbaum, capabilities should be pursued for each and every person, treating each person as an end and not as a tool for the ends of others. She maintains that there is a close relationship between human capabilities and fundamental human rights. Thus women in a particular country such as South Africa cannot be seen to have the right to gender equality just because the right exists on paper. They only have such a right if there are effective measures taken to make such women truly capable of equality. Therefore thinking in terms of human capabilities provides a benchmark as we consider what it means to secure a right to someone. This approach could lead us beyond the recognition of formal equality to the achievement of substantive equality. See Nussbaum *Women and human development: The capabilities approach* 2000. Nussbaum’s current list of capabilities include life; bodily integrity; bodily health; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one’s environment. I submit, however, that Nussbaum’s attempts to establish minimum requirements for human dignity is a flawed process as dignity is an inherent human quality and cannot be ‘taken away’ or reduced to a list.

“The challenge of achieving equality within this transformation project involves the eradication of systemic forms of discrimination and material disadvantage based on race, gender, class and other forms of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.”⁴⁷

They therefore offer the following as an alternative equality test:⁴⁸

- The equal protection subsection of the clause must be interpreted substantively in the light of a more integrated approach of the clause as a whole.
- Discrimination must not be presumed but must be given its proper connotation of harm and prejudice. Unlisted groups must be considered on the basis of harm caused to the individual due to his or her membership of a group rather than with reference to the value of dignity.
- The court should consider the location of the complainant within his/her social group and the interests affected by the impugned act when considering whether the impact of the act has resulted in (personal and/or group) disadvantage.
- The court should look at whether the discrimination was permissible (fair) or impermissible (unfair) by focussing on disadvantage rather than on dignity. This stage of the enquiry should be based on moral and political values underlying the equality right. If the act is found to be unfair the limitations clause should then be used to consider whether the act is justifiable for important social ends.⁴⁹

Here the authors place less emphasis on liberal human rights discourse and more emphasis on the need to determine the right to equality within social and relational contexts. Their theoretical stance is underpinned by the belief that societal stereotypes and patriarchal attitudes need to be addressed and transformed. The historical location and societal context of the individual are thus highly relevant, and group disadvantage an integral part of this alternative, value-laden equality

⁴⁷ Albertyn and Goldblatt 1998 at 249.

⁴⁸ 1998 at 273.

⁴⁹ Section 36 of the final Constitution Act 108 of 1996 and the previous s33 of the interim Constitution.

test. The individual before the law should not be seen as atomistic, but situated, unique, concrete and interdependent.

Following these criticisms of the Constitutional Court's equality jurisprudence, the question of whether the Court should adopt a substantive or formal interpretation of equality was again raised in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.⁵⁰ The Court found in the latter case that the common law and statutory offences of sodomy discriminated unfairly against gay men on the basis of both gender and sexual orientation and could not be justified in terms of the limitation clause of the final Constitution.

In an *amicus curiae* submission the Centre for Applied Legal Studies (CALs) argued that by focussing on dignity, the Constitutional Court had not given enough weight to the concept of substantive equality. It was further argued that the Court should adopt a new interpretation of section 9, since its interpretation of section 8 of the interim Constitution had failed to recognise substantive equality (as argued above). Justices Laurie Ackermann and Albie Sachs rejected the *amicus curiae* argument. Ackermann held that the Court has recognised that the purpose of the equality clause is a remedial or restitutionary one⁵¹ and Sachs J argued that the Court should continue to emphasise respect for dignity when faced with equality infringements.⁵²

In this latter case, therefore, the Court remains reluctant to embrace equality as a right in its own right. This leads to a situation where the concept of equality has no unique and independent meaning. It is submitted that the approach of protecting individual dignity is not a practicable one if systemic forms of discrimination are not dealt with initially. However the *National Coalition* case may also be perceived to be a move in the right direction, especially in view of the following comment by Ackermann, on behalf of the majority of the Court:

⁵⁰ 1998 12 BCLR 1517 (CC); 1999 1 SA 6 (CC).

⁵¹ See *National Coalition* at paras. 60 and 61.

⁵² See *National Coalition* at paras. 126 and 129.

[In] the final analysis, it is the *impact* of the discrimination on the complainant or the members of the affected group that is the determining factor regarding the unfairness of the discrimination'.⁵³

Pierre De Vos maintains that the Court's recognition of the centrality of human dignity is an open-ended rhetorical device used as a guiding light and "catch-all phrase to capture the idea of humans as equally capable and equally deserving of concern, respect and consideration".⁵⁴ This argument is unconvincing and will be addressed later in this text.

The right and value of equality as recognised in our Bill of Rights is a complex one, as illustrated above. The question remains: What does it mean to legally guarantee equality for all? Does substantive equality go far enough beyond formalism? These questions are addressed below against the backdrop of Drucilla Cornell's conviction that human rights law should reside within the domain of the *ethical*.

2.5 Ethical Interpretations of the right to (gender) equality

"Feminism demands the enlarged mentality that allows the imagination to run free".⁵⁵

Cornell maintains that all human beings should be considered to be of equal and unique worth.⁵⁶ Her configuration of the "imaginary domain" as a right encourages us to grant each individual the chance to live a uniquely self-created life - an essential right of personality.⁵⁷ The aesthetic idea(I) of the imaginary domain

⁵³ See *National Coalition* at para. 19.

⁵⁴ De Vos "Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court" 2000 *THRHR* 62 at 66.

⁵⁵ Cornell *Just cause: Freedom, identity, and rights* 2000 at 7.

⁵⁶ See in particular Cornell *At the heart of freedom: Feminism, sex, and equality* 1998 and *The imaginary domain: Abortion, pornography and sexual harassment* 1995.

⁵⁷ *Ibid.* Cornell's use of the term "imaginary domain" is interesting. In the archaic sense of the word, a domain constitutes "landed property which one has in his [sic] own right". It is thus an indicator of possession or ownership. It is also an indicator of control over something, a realm of human control or a mathematical aggregate. See *Webster's Third New International Dictionary of the English*

denotes the psychic and moral space in which women as “sexed creatures who care deeply about matters of the heart” are able to re-imagine who they are.⁵⁸

For Cornell the imaginary domain is the space of the ‘as if’ in which beings imagine who they may be if they made themselves their own end.⁵⁹ This imaginary domain is the political and ethical basis of the self-representation of one’s (sexuate) being. This links up with the Kantian ideal that the most precious of rights is the right to freedom, but that individuals may be legally coerced to harmonise their freedom with that of others.⁶⁰ This subjective account of rights has possibly been the most controversial in traditional human rights discourse because it may be perceived to threaten the ideal of community by replacing it with a western capitalist notion of the possessive and defensive individual.⁶¹ Cornell, however, explains that the recognition of the imaginary domain does not necessarily go hand-in-hand with a subjective conception of right. She acknowledges the importance of community and of close personal relationships and argues that the right to represent one’s own (sexuate) being allows intimate associations that have historically been prohibited by law.⁶²

In her discussion of human rights, Cornell addresses the question as to whether the imaginary domain is a western, liberal concept based on imperialist principles and the central value of the individual.⁶³ Her argument in defence of the imaginary domain returns us to what John Rawls would call a philosophical conception of our equal worth as persons/individuals.⁶⁴ Women (and men) must be “imagined and

Language Unabridged. Using “imaginary” in conjunction with “domain” thus presents us with what could be interpreted as an understanding of utopia. The imaginary domain is thus according to this reading an imaginary but specific ‘place’ or ‘right to a place’ which cannot be found on a cartesian map.

⁵⁸ Cornell *At the heart of freedom* 1998 at x.

⁵⁹ Cornell *At the heart of freedom* 1998 at 8.

⁶⁰ Kant’s *Critique of Practical Reason* 1956 is one of the foundations of modern jurisprudence according to which the moral will is free because it finds all its determinations in itself.

⁶¹ Cornell *At the heart of freedom* 1998 at 159.

⁶² Cornell *At the heart of freedom* 1998 at 167.

⁶³ Cornell *At the heart of freedom* 1998 at 151ff.

evaluated as free persons” and for this reason all forms of egalitarian legislation must be tailored so as to be consistent with their freedom.⁶⁵

The imaginary domain is thus a utopian ideal - a vision of something truly new, “a world in which we all share in life’s glories”.⁶⁶ Cornell reminds us that it is the dream itself that proves the possibility of change.⁶⁷ She thus argues that controversial legal and human rights issues should be understood in the light of her imaginary domain which is the projected bodily integrity and sexual *imago* that the psychoanalytic Lacanian “mirror stage” installs in each of us early in life:⁶⁸

“The imaginary domain recognises that literal space cannot be conflated with psychic space and reveals that our sense of freedom is intimately tied to the renewal of the imagination as we come to terms with who we are and who we wish to be as sexuate beings. Since, psychoanalytically, the imaginary is inseparable from one’s sexual imago, it demands that no-one be forced to have another’s imaginary imposed upon herself or himself in such a way as to rob him or her of respect for his or her sexuate being.”⁶⁹

⁶⁴ See *A theory of justice* 1972 wherein Rawls constructs the fiction of natural man contracting behind a ‘veil of ignorance’ that conceals all individualising characteristics from the contractants. Rawls thus seeks to express his concept of justice by concentrating on what people would agree to if they were free to make that choice. Rawls has been criticised for the liberal individualism inherent in this theory. See Benhabib 1992 at 166-168 where she states that Rawlsian agents behind the veil of ignorance are disembodied and disembedded selves, who are expected to reason from the standpoint of everyone else in the *same position*. She adds that “[n]either the concreteness nor the otherness of the “concrete other” can be known in the absence of the *voice* of the other” (at 168 emphasis in the original).

⁶⁵ Cornell *At the heart of freedom* 1998 at 159.

⁶⁶ Cornell *At the heart of freedom* 1998 at 186.

⁶⁷ Ibid.

⁶⁸ See Lacan’s *The ethics of psychoanalysis* 1992. According to Freud’s Oedipal structure, the subject comes into existence through the intervention of the father who disrupts the mother-child dyad by prohibiting the child’s desire for the mother (see Freud “Totem and taboo” in *The origins of religion* 1985). Lacan reads this primary repression in linguistic terms. According to him the primal union between mother and child is broken and the subject comes into being by entering the symbolic order, typically a combination of language and law. The symbolic separates baby from mother – something termed symbolic ‘castration’ – and this separation causes loss, absence and lack within the self. This lack is however partially addressed through the baby’s identification with signifiers, words and images. In the famous ‘mirror stage’ the child between six and eighteen months experiences a sense of jubilation (*jouissance*) when she first recognises her own image in a mirror or in the gaze of her (m)other and, through the reflection, comes to identify with a whole and complete bodily existence. But this image is external to the body and different from the child’s sensual experience of a disjointed body. Thus identity and bodily integrity are not a given, but are constructed through a mirroring process and the repeated recognition of self by the other who appears to be complete.

⁶⁹ Cornell *The imaginary domain* 1995 at 8.

Furthermore, Cornell's imaginary domain is a space of limited legal intervention. This is useful in explaining the right to (sexual) respect and integrity. No legal intervention is allowed which would impinge on the imaginary domain of an individual which domain is necessary for identity formation. However, a universal position on these issues is impossible and a uniform response to different and conflicting imaginary domains is morally questionable.

In the South African context, Karin van Marle supports Drucilla Cornell's theory of the imaginary domain, equivalent rights and ethical feminism, which, she believes, provides the best insight for the processes of reconstruction and constitutional transformation in South Africa.⁷⁰ Her theory provides for the affirmation of the feminine (and feminine difference) without being essentialist. In other words, ethical feminism is sensitive towards difference, not only between men and women, but also among women themselves. Ethical feminism is, according to Van Marle, sensitive to the multiple contexts, stories and needs of our heterogeneous and historically divided society.

Ethical feminism, as described by Van Marle, relies on deconstruction's insights into language, justice and democracy. It focuses on women as beyond our current systems of representation. This type of feminism seeks to problematise and displace current stereotypical understandings of 'woman' and the 'feminine'. 'Woman' or the 'feminine' should remain other to the system and should expose the flaws in the present system from a marginal 'ethical' position. Thus, the feminine in law should act as a utopian, disruptive and critical force – a site of resistance:

"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. Yet all accounts of the feminine seem to reset the trap of rigid gender identities, deny the real differences among women (white women have certainly been reminded of this danger by women of colour), and reflect the history of oppression and discrimination rather than an ideal to which we ought to aspire. To solve this dilemma we must return to the significance of the feminine".⁷¹

⁷⁰ See *inter alia* Van Marle "Some perspectives on sex, gender, difference and equality" 2000 *South African Public Law Journal* 461 and her doctoral thesis entitled *Towards an ethical interpretation of equality* 2000.

Cornell argues that the other side of the essentialist version of the feminine is the liberal reaction that insists that women should be recognised as individuals and as legal persons and not reduced to a specified gender identity. This approach maintains that there are no shared female identities, only individuals who happen to be women. The ‘ethical’ feminist reaction to this approach is that this strategy to join forces with the dominant discourse undermines the possibility of recognising the unnoticed/silent suffering of women.

But how can the feminine (or any cultural difference for that matter) be affirmed without relying on essentialist stereotypes? Cornell supports the psychoanalytic approach that describes the feminine as a disruptive force.⁷² According to this approach the feminine is not celebrated because it is the feminine, but because it stands for the heterogeneity that undermines the “logic of identify”.⁷³ She claims that this position demonstrates how the feminine is produced within a particular system of gender representation. The feminine acts as a disruptive force, a promise that remains to be fulfilled. A journey to a u-topia, a place which does not exist and yet a journey worth embarking upon.⁷⁴

Ethically speaking, therefore, we need to be reminded that there is more to the story(ies) of woman or other outsiders than meets the eye, and that there is more than one dance. Therefore we should not attempt to introduce a new monovocal way of representing women to replace previous ones. Because there is no Ultimate Representation of Woman, the ‘truth’ of woman as absence or lack should also be problematised. The feminine should act as a disruptive force of the

⁷¹ Cornell “The doubly-prized world: Myth, allegory and the feminine” 1990 (75) *Cornell LR* 644 at 645.

⁷² Cornell 1990 at 659.

⁷³ See in general Adorno. *Negative dialectics* 1973 for an analysis of this meta-logic.

⁷⁴ The Xhosa proverb *Kukude e-Bhakhuba* is an indigenous illustration of this journey. Directly translated it means “it is a great distance to Bhakubha”. *Bhakhuba* is a metaphoric expression of a place both anywhere and nowhere – an imaginary place which suggests a great distance from a longed-for place. See Calana *Xhosa proverbs* 2002 at 42.

current system, and at the same time open a space for a future where women's stories can be heard with attentiveness and responsiveness.⁷⁵

I do, however, feel some discomfort when faced with concepts such as the "imaginary domain" which could be seen as allowing no representation of the self whatsoever. I would like to continue to believe that representations – narratives if I may - are possible, but that these representations are not, or should not be, universal, passive or unchanging. Movement and fluidity must be present. Masks are donned and/or discarded as the journey continues.

Be that as it may, I now turn to the influence of Carol Gilligan's ethic of care on the possible re-interpretation of the right to gender equality. In conjunction with this exploration, Karin van Marle's ethical interpretation of gender equality will be further expanded upon below.

2.6 The possibilities of care

If we interpret the constitutional right to gender equality as the right to be treated as a genderless individual, are we addressing differences or denying them? The latter seems to be the obvious answer. But how do we recognise and affirm gender or femininity without falling into the essentialist trap?

To find an answer to this 'gender problem', we need to understand the meaning of the postmodern accusation of essentialism. If we adopt the dictionary definition of essential - "that which we cannot do without" - the affirmation of women and the feminine is unproblematic.⁷⁶ However, when we perceive gender as a universal or metanarrative, problems may arise as differences among women may fall through the cracks.

⁷⁵ Cavarero 2005 explains that western systems of patriarchy have been restrictive in their theorising of the voice "in general" at the expense of the body (at 12):

"For a radical rethinking of the classical connection between speech and politics, especially from a feminist perspective, recuperating the theme of the voice is therefore an obligatory strategic gesture" (at 207).

⁷⁶ "Necessary, indispensable" in Elliot (ed.) *Oxford English Dictionary and Thesaurus* 1997.

Keeping in mind the critique of essentialism,⁷⁷ I now turn to the more radical and utopian possibilities posed by the work of Carol Gilligan.

In order to move beyond a rigid belief in abstract rules and their objective and neutral application to the lives of those we are ultimately responsible for, it is necessary to re-consider the abstract, objective and neutral application of the law as it is posited in western liberal theory. One of the ways we can do this is to respond compassionately to the life stories and lived experiences of women and others who have been unable and/or afraid to speak up to now.⁷⁸ How do we achieve this objective? Carol Gilligan points us in the right direction.

A (non)essential exploration of Gilligan

As far back as 1982 Gilligan published an empirical and interpretative analysis of the moral decision-making processes of a sample of girls and young women confronted with both hypothetical and real life dilemmas.⁷⁹ Gilligan, a Harvard psychologist who specialises in moral development theory, challenged the influential approach of her colleague Lawrence Kohlberg.⁸⁰ Gilligan argued that Kohlberg's six-stage theory of moral development ignores and/or silences the 'different voice' of women and girls.⁸¹ Kohlberg's studies have concluded that

⁷⁷ The debates surrounding the essentialist/anti-essentialist dichotomy are complex and multifaceted and cannot be exhausted here. Suffice to say that I find value in Spivak's thoughts on essentialism. In an interview explaining her use of the term "strategic essentialism" in relation to subaltern studies she has the following to share:

“... let me also emphasize the importance of who it is that uses the strategy ... A strategy suits a situation; a strategy is not a theory”.

See Spivak with Rooney “In a word. *Interview*” in Schor and Weed (eds.) *The essential difference* 1994 151 at 154. Spivak acknowledges that essences are so useful that they can become dangerous. Keeping a critical distance is thus 'essential' (at 156).

⁷⁸ See Berns *To speak as a judge: Difference, voice and power* 1999. Berns is interested in “questions of voice, of presence and absence, of the possibility of the feminine in or as judgment” (at 1). Her theory predominantly centers on the speaking of judges. I would add that the listening of judges is equally important.

⁷⁹ 1982. Gilligan bases much of her work on the philosophy of Chodorow. See *The reproduction of mothering* 1978 and *Femininities, masculinities, sexualities: Freud and beyond* 1994.

⁸⁰ *The philosophy of moral development* 1981.

⁸¹ Kohlberg's six stages occur in a linear, hierarchical pattern and are divided into three levels: The pre-conventional in which behaviour is punishment and obedience oriented, the conventional, in which maintaining good relations is paramount, and the post-conventional, in which individual

women generally cluster at an inferior stage of moral development. In order to avoid the 'distortion' created by these female subjects, Kohlberg concluded his studies using primarily male subjects. In reaction hereto, Gilligan attempted to define an equal moral sphere for the different voice(s) she found amongst women.

In her research, Gilligan observes a shift in moral perspective in male and female reasoning. The former attempts to solve a moral dilemma by determining "what is right or just" whereas the latter is more concerned with "how to respond".⁸²

According to this formulation, the ethic of justice or rights proceeds in an essentially legalistic way. It formulates rules which structure the values at issue in a hierarchical way and then applies these rules to the facts. The ethic of care/responsibility, on the other hand, takes a more holistic approach to moral or legal questions by exploring the context and relationships as well as the values involved and produces a more complex but less conclusive result.

It is submitted that relationships of justice are not all there is. They do not exhaust the moral, ethical and legal domain. Ethical and legal life encompasses much more than the liberal relationships of rights-bearing atomistic and formally equal individuals to one another.

In law - as in other domains of power - there has been an overwhelming tendency to remove the ethic of care from the sphere of justice. This is clear public/private dichotomy traditionally valued by our courts. The sphere of justice from Hobbes⁸³

principles of conscience are paramount. On the other hand, Gilligan proposes three stages of moral development, which includes an emphasis on the world of relationships, awareness of connections between people, recognition of responsibilities and a perception of the need for communication and response.

⁸² Gilligan 1982 at 35. For example, as a problem of justice, the abortion dilemma is cast as a conflict of rights or in terms of respect for human life. The claims of the foetus and of the pregnant woman are balanced or placed in opposition (Gilligan 1982 at 35-36). Framed as a problem of care, the dilemma posed by abortion shifts. The *connection* between the foetus and the pregnant woman becomes the focus of attention and the question becomes whether it is responsible, caring or careless, to extend or to end this connection. In the latter construction, the abortion dilemma arises because there is no way *not* to act, and no way of acting that does not alter the connection between self and others. To ask what actions constitute care or are more caring directs attention to the parameters of connection and the costs of detachment, which become subjects of moral concern. In other words, abortion is not merely about the enforcement of abstract rights in respect of the mother or foetus, but about interconnectedness and situational analysis.

⁸³ See *Leviathan* (1651) Tuck (ed.) 1996.

through Locke⁸⁴ and Kant⁸⁵ is regarded as the domain where independent, male heads of households transact with one another, while the domestic-intimate sphere is put beyond the pale of justice and restricted to the reproductive and affective needs of the paterfamilias.

For Rawls⁸⁶ and Kohlberg⁸⁷ the autonomous subject (of the law) is disembodied and disembodied – moral (and legal) impartiality is thus learning to recognise the claims of the other who is just like oneself: fairness is public justice; a public system of rights and duties is the best way to arbitrate conflict, to distribute awards and to establish claims. Yet, as Seyla Benhabib insists, this is a strange world, a world where neither mother nor sister nor wife exists.⁸⁸ Woman is what Man is not – women are not autonomous moral and legal subjects, they do not belong in the public sphere. The world of the feminine is thus constituted by a series of negations. She is the opposite of He.

This dichotomous reasoning, as described earlier, leads to oppression and unfair discrimination. Once women are inserted into the picture, if only to live on the edges of the narrative, established paradigms are unsettled:

“Women discover difference where previously sameness had prevailed; they sense dissonance and contradiction where formerly uniformity had reigned; they note the double meaning of words where formerly the signification of terms had been taken for granted; and they establish the persistence of injustice, inequality and regression in processes that were formerly characterized as just, egalitarian and progressive.”⁸⁹

The reality is that, not only as children, but also as concrete embodied adults, we spend our lives in the web of human affairs or in networks of care and

⁸⁴ See *Essays on the State of Nature* Van Layden (trans.) 1954.

⁸⁵ See *The metaphysical elements of justice* Ladd (trans.) 1965.

⁸⁶ See *A theory of justice* 1972.

⁸⁷ See *Essays on moral development vol. 2: The psychology of moral development* 1984.

⁸⁸ Benhabib 1992 at 156-157. Here she argues that the Law was established to reestablish the authority of the father (at 156).

⁸⁹ Benhabib 1992 at 179.

dependence. Modern moral and legal philosophy and particularly universal theories of justice, have emphasised our dignity and worth as moral and legal subjects at the cost of forgetting and repressing our vulnerability and dependence as bodily selves. Such networks of dependence and webs of connection cannot easily be left behind.⁹⁰ They are the ties that bind us and influence our visions of the good life. For these reasons Gilligan formulates the interdependence of justice and care as follows:

“Theoretically, the distinction between justice and care cuts across the familiar divisions between thinking and feeling, egoism and altruism, theoretical and practical reasoning. It calls attention to the fact that all human relationships, both public and private, can be characterised both in terms of equality and in terms of attachment, and that both inequality and detachment constitute grounds for moral concern. Since everyone is vulnerable both to oppression and to abandonment, two moral visions – one of justice, and one of care – recur in human experience. The moral injunctions, not to act unfairly toward others, and not to turn away from someone in need, captures these different concerns.”⁹¹

The continuing challenge posed by Gilligan is: how are we to acknowledge the centrality of justice as well as care in human lives and how are we to expand the moral and legal domains to include considerations of care? This entails a rejection of the idea of gender neutrality without endorsing compulsory heterosexuality and the stereotypical image of the ‘good girl’. It is an approach that requires both caring *and* letting be.⁹²

It could be argued, in a spirit of generosity, that Gilligan’s efforts have revolutionised moral theory and hold promise for feminist legal theory. For instance, Susan Hekman maintains that Gilligan has contributed towards the deconstruction of the rational, abstract, autonomous enlightenment subject: Man.⁹³

⁹⁰ Similar ideas are found in the African philosophy of *ubuntu* discussed in chapter three.

⁹¹ Gilligan ‘Moral orientation and moral development’ in Kittay and Meyers (eds.) *Women and moral theory* 1987 at 20.

⁹² This can be illustrated by a re-reading of *Jordan v The State* 2002 11 BCLR 1117 (CC). In this case, prostitutes were condemned for not choosing to enter into ‘caring’ relationships. This has led to a renewed criticism of the ethic of care as exclusionary and ‘harsh’ in judging those who choose *not* to care (if this is indeed the reality of the situation). My understanding and critique of the case rests on the supposition that no care was shown towards the sex workers themselves (who they are and not what they are) – their voices were silenced and they were denied the possibility of not only being but also of becoming. See chapter four.

⁹³ Hekman *Moral voices, moral selves: Carol Gilligan and feminist moral theory* 1995 at 2.

Recently there has been a movement towards the recognition of a situated, embedded and discursively constituted subject and Gilligan's work could be interpreted as a reflection of such a movement.

Admittedly, Gilligan does not explicitly attack the subject of modernist thought, yet her work may be interpreted as contributing significantly towards the deconstruction of the modern (legal) subject.⁹⁴ She articulates a *relational subject* that is the product of discursive experiences, a subject that undermines the very possibility of the isolated, autonomous, self-legislating agent.⁹⁵ Her approach can be seen to foster an image of moral and legal judgment, which is plural and non-hierarchical in nature.

In a different voice, Gilligan ties her redefinition of the moral realm to a concept of the self that challenges the self of the masculinist moral tradition. However, another question remains: how is Hekman able to credit Gilligan with the art of deconstruction when she has consistently been accused by postmodernists of the 'sin' of essentialism and the reaffirmation of traditionally unwanted 'feminine' stereotypes?⁹⁶

Perhaps an answer lies in the fact that Gilligan defines a 'relational self' that is formed through patterns/relationships with others – some kind of social web. We are thus not individuals existing in isolation, but are defined by our interactions with others. Following the psychological approach of object relations theory, she describes the way in which girls, because they are not encouraged to separate

⁹⁴ As Hekman does.

⁹⁵ See Clement *Care, autonomy and justice: Feminism and the ethic of care* 1993. Clement theorises the ethic of care as a necessary precondition of autonomy.

⁹⁶ See *inter alia* MacKinnon "Difference and dominance: On sex discrimination" in Bartlett and Kennedy (eds.) *Feminist legal theory: Readings in law and gender* 1991. MacKinnon is known as one of Gilligan's more vociferous critics. She expresses her problems with Gilligan's ethic of care as follows:

"For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness ... women think in relational terms because our existence is determined in relation to men" (at 86).

Admittedly, we should not affirm existing gender stereotypes, but MacKinnon's critique of Gilligan merely endorses new stereotypes of women as victims and "fuckees". Cornell has, for this reason, labeled MacKinnon's work as a reductionist and essentialist critique. See *Beyond accommodation* 1999 at 126.

from their mothers, develop a sense of self in which relationships are primary. Boys, by contrast, because they succeed in separating from their mothers, develop a sense of self as separate and autonomous.

Her emphasis is on narrative, listening and voices and it is this emphasis which is of particular interest to feminist legal theory. It is true that theorists such as Kohlberg listen to women's stories, but because they employ the interpretative framework of separate selves, they are forced to classify these stories as deficient and those who tell them as lacking the qualities for moral agency.⁹⁷ What Gilligan proposes is an alternative framework in which women's stories are interpreted as genuine and valuable moral statements. According to Hekman, implicit in Gilligan's articulation of the different voice is the assumption that what we, as listeners, hear is the function of the interpretative framework we impose. What Gilligan is proposing is a different interpretation of the same moral experiences.

The use of the term 'stories' is also significant here. Kohlberg does not claim to be telling a 'story' about moral development. The word story connotes elements of 'fiction', whereas Kohlberg claims to be discovering an antecedently given truth. 'Stories' suggest multiplicity, invention, and interpretation: Kohlberg is searching for scientifically verifiable facts and evidence. By claiming that she is listening to women's 'stories', Gilligan on the other hand is advancing, according to Hekman, two key theses:

- We need to alter our interpretative framework in order to hear these stories; and
- Women, and men, make sense of their lives by telling stories about themselves.

Gilligan's account can best be described as dialogic as she proposes that women's relational, caring voice be *added* to the voice of the separate self. There should thus be a "dialogue between fairness and care".⁹⁸

⁹⁷ Hekman 1995 at 7.

There are, of course, many problems with this formulation, problems that Gilligan pays attention to in her subsequent work. One of the problems is the relationship between voice and gender. Throughout her work, she claims that the different voice is identified by theme and not by gender. Yet, in her descriptions, it is exclusively women who speak in a different voice.

In an attempt to counter this exclusive tendency, Gilligan has more recently moved away from the concept of dialogue towards the use of musical metaphors and begins to articulate the relationship between justice and care by employing these metaphors.⁹⁹ The terms ‘counterpoint’, ‘harmony’ and ‘double fugue’ provide her with a means of re-describing the moral realm that departs radically from that of the modernist tradition. She therefore moves towards a non-oppositional understanding of justice and care:

“My argument, therefore, about better voice/different voice is that you really are going to have a new understanding of both attachment *and* equality. They’re both vitally important. Attachment and equality will always be with us. They’re built into human experience.”¹⁰⁰

Gilligan defines her goal as an attempt to return to an awareness of voice and the recognition that stories can be told from more than one point of view.¹⁰¹ One ‘reads’ stories/narratives in that they are interpreted from a certain perspective. One therefore should *listen* to women’s voices and try to sort out the narrative being told. Gilligan’s research may thus be interpreted to mean (and I agree with Hekman here) that there are a multiplicity of voices and not just one or even two voices.¹⁰²

⁹⁸ Gilligan 1982 at 174.

⁹⁹ Gilligan, Rogers and Brown *Making connections* 1990.

¹⁰⁰ Gilligan in Marcus and Spiegleman (eds.) 1985 at 61.

¹⁰¹ Gilligan, Brown and Rogers 1990 at 89.

¹⁰² Irigaray *To be two* Rhodes and Cocito-Monoc (trans.) 2001 offers a possibly controversial account of difference or alterity as ‘being two’. This theory is based upon the experience of being part of a heterosexual relationship – a relationship with an irreducible other – and should come up against severe anti-essentialist criticism. Nevertheless, I maintain here that Irigaray continues to surprise and to offer fresh insights into the fluid nature of relationships.

It is clear from a postmodern perspective, that the intersections or interstices of class, race, culture, sexual orientation and so on should also be explored and it is arguable that Gilligan's work has opened the door to just such an exploration:

"She has allowed us to hear silenced voices. To this I can only add: 'let many voices be heard'"¹⁰³

This marks a return to metaphors of hearing, listening, speech and voices - a contextual approach, which is a move beyond abstract principles and the masculine voice of justice/law (as described above).

There are indeed several potential problems and paradoxes that we face as we try to decentre legal discourses. What would become of predictability, of stability, and of universality? Will this new path lead to chaos, and even worse, relativism? There are no easy answers, but it cannot be denied that difference theory has much to offer the law and lawyers concerned about transformation and justice. Feminists need to do more that expose the failures of the legal system. Insights about gender discrimination, marginality and exclusion, relationships and difference, co-operation, values of care, listening, and responsibility, can inform legal practice and jurisprudence to move us closer to new visions of democracy, justice and equality. Human *needs* should receive more focus and it should be acknowledged that when it comes to human relationships there are no easy answers - yet answers well worth seeking.

Accordingly, Leslie Bender pleads for larger transformative efforts to shift the underlying paradigms of the law. She envisions the following:

"Law can redefine who counts as parties to controversies, reconsider what counts as relevant information, imagine new kinds of remedies to redress injuries, fulfil needs, and promote equality. Learning from feminist critiques, law can become more humble and self-critical. It can question its biases and exclusionary practices; and it can respond to what it learns by making concrete changes in perspectives, substance and methods. Law can reformulate its understandings about power and privilege and restructure its role in eliminating hierarchy and domination."¹⁰⁴

¹⁰³ Hekman 1995 at 21.

¹⁰⁴ Bender "From gender difference to feminist solidarity: Using Carol Gilligan and an ethic of care in law" 1990 *Vermont Law Review* 1.at 10.

In her view, the transformation of law and its domain is made possible by Gilligan's work. Bender highlights three things that have happened as a result of Gilligan's contributions:¹⁰⁵

- Gilligan's writings have been used as shorthand for the idea of gender difference and the necessity to rethink the exclusionary practices that have generated existing disciplinary models;
- They have served as a symbol of the validation of women's differences; and
- The values of care and relational theories have provided important methodological precepts for rethinking disciplines and institutions in general and law in particular.

These developments bring to the fore the centrality of care, compassion and co-operation and give us the space in which to manoeuvre for the transformation of the legal regime – for contextualised equality analyses and new insights into power, privilege and diversity. What is envisioned is a system based on excess and plurality – a system that is limitless in scope, fluid in practice, ever-changing and ever-expanding.

Embracing difference requires a return to the ethical without losing sight of the importance of *care and compassion* in our search for an (un)knowable justice.

2.7 A return to the call of the ethical

Historically, the struggle for human rights and (gender) equality has been the central focus of liberation movements. Recently, however, doubts have arisen about the theoretical and practical implication of these rights.

¹⁰⁵ Bender 1990 at 13ff.

Rights have been declared to be overly abstract, atomistic and conflictual; they obscure male dominance and/or are bound up in the socio-linguistic hierarchies of gender and with the outdated patriarchal vision of the unitary self. I argue, however, that we can interpret rights differently without resorting to meta-foundations for these theories. It is in fact important for us to expose, by the process of deconstruction (a careful re-reading in this instance), the illusions immanent in the modernist project as explained earlier in this chapter. But I also submit that it is just as important for feminists to engage in some kind of *reconstruction* in order to continue the struggle for political and legal transformation. The task therefore is for critical and feminist legal scholars to (re)establish some form of ethics. We need to re-think justice.

Karin van Marle is an exponent of an ethical interpretation of gender equality¹⁰⁶ based upon an understanding of Drucilla Cornell's idea(I) of ethical feminism. She explains the significance of the intersection between public space, equality and justice, and submits that an "ethical approach to equality needs a 'slowness', a 'strategy of delay', a careful reading".¹⁰⁷ Van Marle understands the ethical as an "openness to difference and the acceptance of the impossibility of ever fully knowing each other's differences".¹⁰⁸ In her view, the ethical imperative demands that we seek the least exclusionary or reductionist interpretation of equality, in theory and in practice.

Van Marle's challenge

Van Marle believes that the substantive approach to equality does not go far enough. I agree with this view. This substantive approach, endorsed by Albertyn and Goldblatt,¹⁰⁹ is indeed an improvement on the formal approach to equality where the law treats all individuals as *if* they were the same, but it does not go far enough in its recognition of difference and dialogue. Substantive interpretations of

¹⁰⁶ See Van Marle's LLD thesis 2000.

¹⁰⁷ Van Marle LLD thesis 2000 at 161.

¹⁰⁸ *Ibid.*

¹⁰⁹ 1998.

equality may also easily become formalised and instrumentalised again and may in this way once again reduce difference. An alternative to both formal and substantive equality is an *ethical interpretation of equality*. This interpretation does not seek to reduce or violate difference, but urges us always to strive for an unknowable equality and an impossible justice. This does not invalidate our search for equality and justice, but prevents the complacency and conformism that Douzinas warns us against.

Once we have embraced the ethical, we have a duty to make wise and responsible choices taking into account at all times the concrete situatedness of the other appearing before the law. This will take us beyond the classical legal conceptualisation of a dual system where things are divided into contrasting spheres or polar opposites, such as rational/emotional where the first is privileged over the second. The aim should be to transcend dichotomies, but a reconciled whole holds the danger of reducing otherness and thereby forecloses the possibility of an ethical relationship. We therefore need to continue to play out our gender roles differently and this may be a way of transcending the hierarchical dichotomies we have inherited.

The value of Van Marle's contributions to South African jurisprudential thought cannot be underestimated and in the next chapter I continue to explore the promise(s) it holds.

It is my submission that this interpretation of equality has much in common with the jurisprudence of care where I argue that the ethic of care be inserted into the law. In the following chapter I shall continue to explore these overlaps and apply them to the South African context. I use the following as central premises to my argument:

- Listening to the other (before the law) and embracing her differences;
- Considering the social context (the position) of the individual or group (before the law); and
- Moving beyond an ethic of justice in order to embrace an ethic of care.

This alternative legal theory encourages legal and social responsibility when faced the other, when making legal/moral judgments, and when interpreting, critiquing and transforming the law. This (indefinite?) responsibility should not lead to ethical and political quietism, but requires an understanding of each person as a unique being among other unique beings. To move beyond the long-standing tension between theory and activism/praxis, it is simply enough to accept that *both* are necessary. To illustrate, gender has to be acknowledged, but the ego can never be reduced to a gender. In order to acknowledge *who* I am I need to acknowledge my situation and position as a woman, but I cannot be reduced to that position or situation.

2.8 Retracing the way

To reiterate, the path we traverse together begins with a critique of enlightenment values and western legalism/formalism/positivism which leave no spaces for the voices of those who do not fit safely, comfortably and easily into current legal categories or predetermined meanings and definitions. Related to this is the historical adoption of formal interpretations of equality which ignore social, political, economic and cultural situatedness dependent on relations of power and the devaluation of the ethic of care. I have thus offered up for inspection feminist challenges to dominant legal conventions and argued that traditional methods of legal reasoning may systematically silence the voices of those who do not speak the abstract, neutral and objective language of the law. It is ultimately an appeal for an openness to that which is still to be said and a reflection on the dangers of complacency.¹¹⁰

Since 1994 the South African constitutional dispensation has offered us promises of something better to come. In line with this more open approach to the law and human rights discourse, the Constitutional Court has turned to a more contextual understanding of the *impact* of laws on human well being, resulting in the adoption of a substantive interpretation of equality. It is submitted above that this approach

¹¹⁰ Van Marle 2004 issues a warning against the tendency of the law and human rights discourse to “capture” life and mourns the absence of contestation in post-*apartheid* constitutionalism (at 621).

does not reach far enough beyond the *status quo*. For this reason, I support an ethical interpretation of gender equality which focuses on utopian possibilities that open up the horizons of continued transformative and relational thought.

Current western, masculine jurisprudential thought must be questioned in order to encourage transformative thought and the careful consideration of new possibilities which allow us to hear the call of the other and to face our endless and complex responsibilities in law and in life.¹¹¹ To allow, thus, for a blossoming of becoming:

“To become enraptured in a language already there signifies an exile with regard to an approach of the near. More than the adequation of the thing to the word, of the word to the thing, such a path demands forgetting words previously defined, progressing beyond their frontiers and asking language itself how it can allow acceding to proximity”.¹¹²

This blossoming would be dependent on a sense of wonder and hope. Once we have acknowledged our anger and discomfort at unfair discrimination and the silencing of those in pain, we are able then to approach others with a sense of wonderment. We wonder when we are moved by that which we face. Wonder is thus “the motivating force behind mobility in all its dimensions” and energises the hope of transformation, and the will for politics.¹¹³ Wonder and hope open up spaces for the theory and politics of transformation and keeps something open which may be unimaginable in the present. Sara Ahmed expresses the workings of the passions of anger, wonder and hope as follows:

“Through the work of listening to others, of hearing the force of their pain and energy of their anger, of learning to be surprised by all that one feels oneself to be against; through all of this ... an attachment is made.”¹¹⁴

¹¹¹ As Goodwin “Poetic Reflections in Law, Race and Society” 2001 (10:2) *Griffith Law Review* 195 reminds us, stories tell us about the myriad ways in which people live and allow those who are legally and socially silenced to find their voices. The call of the other can thus be heard *via* the media of oral history, journal entries, poetry, music (such as jazz) and novels (at 195-196). See chapter three below for a more detailed discussion of the value of storytelling in law.

¹¹² Irigaray 2002 at 57.

¹¹³ Irigaray 1993 at 73.

¹¹⁴ Ahmed *The cultural politics of emotion* 2004 at 188. Ahmed’s discussions about wonder and hope are reminiscent of Cornell’s emphasis on the ‘not yet’.

The simplest way to begin this process is with storytelling, as stories move us beyond rigid, written and non-negotiable rules and enable us to (re)tell what happens in life. The storytelling approach, explored in detail in the next chapter, acknowledges that life is comprised of relationships as they develop, climax, are sustained or disintegrate. Positivism, as we have seen, consists largely of the suppression of the sensory and the negotiable in favour of the rational and the jural despite all rhetoric about 'equality'. This includes a privileging of the written word over direct, physical interaction, the body and other forms of communication. Public stories have traditionally been concerned with rights and rules, and private stories with relationships and love. I argue below that it is precisely these 'private' stories of care that should find space in the law. For Adriana Cavarero, the art of storytelling allows us to imagine the possibility of a relational politics that is attentive to difference:

“Narration, it is well known, is a delicate art – narration ‘reveals the meaning without committing the error of defining it’. Unlike philosophy, which for millennia has persisted in capturing the universal in the trap of definition, narration reveals the finite in its fragile uniqueness, and sings its glory.”¹¹⁵

This chapter and these 'concluding' remarks, merely marks the moment of more-to-come.

¹¹⁵ Cavarero 2000 at 3 (footnote omitted).

CHAPTER THREE

BEYOND LEGAL METANARRATIVES

And then after a few moments he pushed the law book aside and said:
“Perhaps we should do this a different way...”

And there was a different way, involving people paying a little more attention to Miss Robinson. It wasn't perfect, and not everyone was happy, but it worked.¹

3.1 Introductory remarks

In the previous chapter the shortcomings of western liberal legalism are exposed, including the tendency of this ideological approach to exclude and silence the voices of others – those residing on (or outside) the borders of legal constructs of power. After highlighting the problems with legal liberalism, formalism and positivism, focus was placed on the transformative potential of recognising the ethical and a broader conception of care in law and human rights discourse, which creates the basis for further exploration below.

Crucial to the development of the argument(s) in this chapter, are Adriana Cavarero's thoughts on the classic role of storytelling rooted in ancient oral traditions.² She argues that being exposed to others allows us to come to know our own unique story, which is not necessarily dependent on the contents of the story but upon the mere fact that human beings are *narratable* selves and not

¹ Pratchett *The free wee men* 2003 at 239.

² *Relating narratives: Storytelling and selfhood* Kottman (trans.) 2000. Cavarero relates and explores the narratives of Oedipus, Ulysses and Scheherazade to illustrate the theoretical underpinnings of her understanding of the 'narratable self'. In "Who bears the right to die?" sourced at <http://www.ssc.upenn.edu/polisci/programs/theory/cornell.pdf> Cornell appears to endorse Cavarero's theory. Rather than prescribing a "careful description" of the right to die (at 3), Cornell bears witness to her mother's decision to take her own life and to determine for herself the 'terminality' of her illness. She thus also bears witness to her mother's narrative of her own death – "all we in the end know are the stories of the dying, of how and who they imagined themselves to be as they demised" (at 17). In working through her role as witness to this moral right, Cornell describes the death her mother staged and states that "only the witness can tell the story" (at 18). Cavarero describes this process as follows:

"The beginning of the narratable self and the beginning of her story are always tales told by others" (2000 at 39).

merely speaking subjects. What defines *who we are* is our desire for narratability – to have our story told. Cavarero is concerned with the *who* and not the *what* disclosed through the tale of a life story:³

“... the who of saying precedes, generates, and exceeds verbal communication ... Who speaks, as a unique being, is above all open to the uniqueness of another; he or she has nothing in common with the sovereign, self-mastering subject of the philosophical tradition.”⁴

Unlike traditional conceptions of philosophy, which demand a definitory knowledge that posits the universality of Man, narration or storytelling has the form of a biographical knowledge that regards the “unrepeatable identity of someone”:⁵

What remains for us is the duty to care for the narratives of others and to protect a community of shared particularities. This community is fragile, but from it springs the beginning of a caring that cannot be reduced to a will to power and a singularity that cannot be reduced to atomistic individualism.

In order to move beyond traditional legal discourse and to open up spaces for the telling of stories in/by/with different voices, it is necessary to re-imagine ourselves as (legal) subjects and to re-imagine the role of law(s) in our lives. According to Cavarero, the recognition of the self (subject) as narratable allows us to move beyond universal abstracts to the recognition of uniqueness-within-community,⁶ an approach reminiscent of African orality and the philosophy of *ubuntu* explored below. This should not be seen as an attempt at assimilating the other or at attaining ‘full knowledge’ of her, but rather requires a response to the call of others

³ Cavarero 2000 at 38ff.

⁴ Cavarero 2005 at 30.

⁵ Cavarero 2000 at 13.

⁶ Cavarero 2000 at 9 where she stresses the “living singularity of each one” in the context of life-with-others. Cavarero continues this project in *For more than one voice: Toward a politics of vocal expression* Kottmann (trans.) 2005 where she encourages us to rethink the “devocalisation of logos” and wherein she questions Levinas’s privileging of the visual over the vocal where the one before us is defined by her face (at 27). In the privileging of the face, and of the rules of textual language, she argues that we forget the rhythm of breath and “the ideal dimension, the transcendental principle, of politics” (at 201). See also in general Peperzak, Critchley and Bernasconi (eds.) *Emmanuel Levinas: Basic Philosophical Writings* 1996.

and the making of responsible (but always difficult, unavoidable and uncertain) choices and judg(e)ments.

Our legal system as it is does not adequately accommodate and facilitate the telling of stories or narratives and there is not a serious enough consideration of the ethical responsibility which underlies the making of wise and responsible judg(e)ments. In this chapter, I consider the (intertwined) roles of *ubuntu*, storytelling and care within the context of post-*apartheid* constitutional imperatives in an attempt to 'do this a different way'.

I argue below for the adoption of what I have chosen to name a 'jurisprudence of care' which holds the promise of shifting the emphasis towards context and away from concerns about the creation of precedents of universal application. The tendency should be to pay more attention to life stories before the courts. A jurisprudence of care demands that all circumstances be considered and all voices be heard before reaching an inescapable conclusion that is the least harmful to the most vulnerable person or group. This approach to legal/moral judgment allows us to situate others and ourselves and to ensure that rights and values such as equality do not merely continue to exist as abstract rules or rigid legal formulations, but constitute a reminder of the possibility of a better future.

3.2 Storytelling within the (South) African context

"We are voices in a chorus that transforms lived life into narrated life, and then returns narrative to life, not in order to reflect life, but rather to add something else, not a copy but a new measure of life; to add, with each novel, something new, something more, to life."⁷

Chinua Achebe calls for the balancing of stories in order to reconstruct or revive history. In his view, this would entail a reclaiming and a re-imagining of African oral traditions and storytelling.⁸ To emphasise this point, Achebe refers to a proverb – until the lions produce their own history, the story of the hunt will glorify only the hunter.⁹ In other words, the west's metanarrative of the world needs challenging.

⁷ Fuentes as quoted in Anderson *Conversations, language and possibilities* 1996 at 211.

⁸ Achebe *Home and exile* 2003.

⁹ Achebe 2003 at 73.

He argues convincingly that the curative power of stories can move us into new futures where we realise what it means to be open to learning from one another.¹⁰ Mogobe Ramose also places emphasis on “the road to learning on both sides” which requires a willingness on the part of westerners in particular to challenge their beliefs in themselves as the self-appointed teachers of the world.¹¹

Achebe maintains that in order to arrive at a place on Ramose’s ‘road to learning’, we need an awareness of being alone together in our suffering as differently-situated but equal. When we resort to abstractions such as justice, law and moral codes or western interpretations of *ubuntu*, we are merely attempting to fortify our own positions of power and beliefs. This tendency allows binary oppositions to multiply and denigrates the position of the other. What is needed to heal is “direct interchange with the other”.¹² In this way we learn to be less righteous and to respect different worldviews and life stories of human beings involved in the flow of be-ing and becoming. In other words, our search for new networks of affinity requires *enabling* stories as well as the urge to bring to light hitherto untold stories along with new ways of telling them.¹³

Richard Kearney, another proponent of storytelling, similarly encourages direct interchange with others through the telling of life-stories that reveal *who* is speaking.¹⁴ Our interest in stories, according to Kearney, is “essentially ethical in that what we consider *communicable* and *memorable* is also what we consider *valuable*”.¹⁵

¹⁰ Achebe 2003 at 83.

¹¹ Ramose *African philosophy through ubuntu* 2002. at 37.

¹² Ibid.

¹³ In telling the story of the Feast of the New Yam, Achebe uses the metaphor of new yams to support his vision of ‘newness’ and ‘becoming’:

“The new year must begin with tasty, fresh yams and not the shrivelled and fibrous crop of the previous year” (*Things fall apart* 1986 at 26).

This feast begins in the Igbo community every year before the first harvest to honour the earth goddess and ancestral spirits of the clan. New yams cannot be eaten until some have been offered to these powers.

¹⁴ Kearney *On stories* 2002 at 152.

¹⁵ Kearney 2002 at 154 (emphasis in the original).

“... stories make possible the ethical sharing of a common world with others...”¹⁶

This is why narrative remains an open-ended invitation to ethical and poetic responsiveness where we are called to an awareness that an untold life is not worth living.¹⁷

In articulating the need for the balancing of stories in adjudication, Stuart Woolman recommends that South African courts should consider a storytelling approach to constitutional limitation analysis and interpretation.¹⁸ Thus, instead of a sterile head-to-head balancing of rights against rights and values against values he submits that we should adopt a narrative approach because “human beings value a vast array of goods. And we value each good in our own and its own particular way”.¹⁹ As with other goods such as friendship, intimacy, work, beauty, nature and money, the relationship between constitutional rights is complex.

This approach offers us a new way of comparing incommensurate goods, such as equality and culture, freedom or dignity. Alternative methods such storytelling, demand of us a careful consideration of the situated selves before us, and their

¹⁶ Kearney 2002 at 150.

¹⁷ Kearney 2002 at 156. Kearney writes about the role of storytelling in the aftermath of Auschwitz and attempts to respond to Lyotard's conviction that the *Shoah* devours images and words and marks the end of language (see Lyotard *Heidegger and the 'Jews'* 1988). In a sense, the calamity of the Holocaust does indeed mark the end of rational language, but if we follow Cavarero 2005, it does not mark the end of the vocality of speech – the scream, the sigh, the sob, the stammer. For this reason, Spielberg's archives of visual testimony to human suffering serve as a powerful reminder of the ethical role of storytelling post-holocaust. Our collective and singular legacies and futures therefore depend upon a recognition of the particular and the 'irrepresentable' such as *Auschwitz/apartheid* that both depict in different and similar ways the absolute absence of human language. In the *Shoah* camera testimonies we are shown how we can to a certain extent recover and recollect the broken narratives and voices of the voiceless. Spielberg awakens us to the narration of silence and listening and the reality of *both* unspeakability *and* the absolute necessity of speaking. In addition, he awakens us to the impossibility of writing and translation and the irreplaceability of the voice. The power of his project lies in the so-called “little” narratives of the survivors of the holocaust and the need to acknowledge the dead. It is an ongoing process of mourning and an ethical demand to be heard. In this archive the past is both represented and re-invented for the future. The same can be said about the stories told at the Truth and Reconciliation hearings in South Africa, discussed below.

¹⁸ “Out of order? Out of balance? The limitation clause of the final Constitution” 1997 *SAJHR* 102. See also Van Niekerk “Indigenous law and narrative: Rethinking methodology” 1999 *CILSA* 208.

¹⁹ Woolman 1999 at 114.

particular socio-economic, cultural and political needs. As Woolman argues, when different general principles or values conflict with one another, often such conflicts can only be justly settled with attention to context. Following this approach, a just person is one whose judg(e)ments arise out of close attention to contextual details revealed in the telling of stories. Thus, in deciding which principles or values are relevant and what priority to give them, full attention to context is necessary, which is discoverable by allowing storytelling its rightful place in the process of deciding the outcome of a case.

Woolman identifies two benefits to be gained from the storytelling or narrative approach:²⁰

- The requirements of storytelling may force adjudicators to consider a range of possibilities that would otherwise not have occurred to them; and
- Storytelling justifications for hard cases are more persuasive than cryptic justifications, and the more persuasive the decision, the more legitimate it will be deemed to be.

However, storytelling may sometimes serve to hide, rather than open, the complexity of the legal dispute at hand. Woolman argues that *in spite* of these limitations, it is no option to return to so-called ‘hard law’ and rid adjudication of all narrative elements. The task is rather to “develop stories which capture the irreducible complexity of life: stories which sometimes make it *more difficult* to do justice”.²¹

The (untold) story of Mama Mthembu,²² related in chapter four, is a poignant reminder that courts remain reluctant to engage with the complexity of narration, and are thus unable to balance stories by considering a range of possibilities previously un contemplated in/by law. In a rather clumsy and unimaginative way, the court chose to ignore constitutional demands, made no mention of values and

²⁰ Woolman 1999 at 121.

²¹ Woolman 1999 at 113.

²² *Mthembu v Letsela* 1997 2 SA 936 (T); 1998 2 SA 675; and 2000 3 SA 867 (SCA).

dismissed the matter before them on technicalities without allowing a space for stories to be told. Caverero explains that this non-response of an *addressee* is a denial of embodied existences and life stories. This is tragic as “no matter how much she exposes herself, her uniqueness appears to no-one”.²³ This formalistic response to a complex situation dealing with gender equality and customary rules led to disturbing consequences as illustrated later in this text.

When adjudicating legal disputes and so-called ‘hard cases’ (such as *Mthembu*) the storytelling approach is offered as one of the more imaginative alternatives to western liberal legalism, which could facilitate our journey beyond legal metanarratives.²⁴ I assert here that acknowledging the existence of different voices and different stories enables us to hold on to the possibility of dreaming different and better futures. The power of stories and storytelling is explored in this chapter in order to find ways to counteract the continued oppression and exclusion of those who do not ‘fit’ into universal legal categories/metanarratives of personhood and subjectivity. The narratives of people who live lives different from our own serve to challenge our predominantly western (legal) equality discourse. Although narratives are more than oral communication, it is the verbal communications

²³ Cavarero 2000 at 113.

²⁴ In *Law, fact and narrative coherence* 1991 Jackson argues, in structural semiotic terms, for the abandonment of the reification of law as an object to study and the substitution of a discursive framework (Preface at 1). This would lead to an appreciation of the multiplicity and complexity of signifying practices within what we traditionally call a “legal system”. Jackson reminds us that narrative is a major (perhaps *the* major) form of cultural communication of common sense notions. It is the mode in which many of our value judgments are stored and transmitted - rather than being conceptualised or communicated in analytic discourse (at 61). Stories in court thus lead to value judgements and we should be aware of this process when judging. In fact, a significant factor affecting the plausibility of a newly-communicated story is the degree to which it fits a narrative (stock story) which already exists within this stock of social knowledge (at 62). In addition, those who are more familiar with the formal languages of institutions may have an advantage over those who rely upon ‘normal’ public language, with its more fragmented accounts, and its greater reliance upon context and upon tonal, gestural, kinesthetic and other such factors (at 65). Legal philosophers commonly account for the application of law in terms of the ‘normative syllogism’ (at 89). The major premise states the legal rule: in all cases p, consequence q ought to follow. The minor premise is a categorisation of the facts of the particular case being adjudicated: this is the case of p. The conclusion therefore follows: consequence q ought here to be applied. Jackson rejects this model of legal adjudication (at 89). The relationship between the general rule and the particular case is one of inter-discursivity, not the application of a consequence to one particular referent, which the general rule states ought to be applied to all such referents. Deductive knowledge is not applicable (ibid). One story does not stand in a relationship of logical entailment to another. The relationship is one of greater or lesser proximity, in terms of human experience. The syllogistic form is possible only if we abstract from the story and make of it either a rule or a case.

before the courts that could form a starting point of an enquiry into the living law, or the law as it is lived. People should be afforded the opportunity to speak for and about their lives and experiences under/before the law and thus to fulfil their desire for narratability.

In “Telling one another stories: Towards a theology of reconciliation”, Charles Villa-Vincencio maintains that we can indeed move towards a new understanding of one another in South Africa by listening to each other’s stories of oppression and discrimination, as was done at the Truth and Reconciliation Commission’s hearings.²⁵ He points out that when we are sharing our stories – telling them and listening to them – we need more than empathy. We need a hermeneutic relocation whereby we see, hear and understand in different ways and recognise that the anguish of our stories and their passion and meaning are often a code which points to things of the spirit by which people live.²⁶ James Cone suggests in a similar vein that it is only by sharing our stories with one another that we can hope to transcend the boundaries of our past and reach towards a shared future:

“Every people have a story to tell, something to say to themselves, their children and the world about how they think and live, as they determine their reason for being... When people can no longer listen to the other people’s stories, they become enclosed within their own social context... And then they feel they must destroy other people’s stories.”²⁷

Stories (on a continent with an acknowledged oral tradition) are spoken and unspoken, written and oral, and some are so deeply rooted that they cannot be adequately articulated. In placing emphasis on such stories as resistance and *stimuli* for transformation, we need only consider the story of Sarah Baartman to be faced with what *could* be possible, even under the most disturbing and degrading of circumstances.

²⁵ Villa-Vincencio and Niehaus (eds.) *Many cultures, one nation: Festschrift for Beyers Naude* 1995 at 105.

²⁶ Villa-Vincencio and Niehaus 1995 at 111.

²⁷ *God of the oppressed* 1975 at 102-103.

In 1809, an Englishman, Hendrik Cezar, took Sarah, a Khoekhoe woman from the Gamtoos Valley, into exile.²⁸ Cezar first tried to sell her as a freak exhibit but, failing to do so, used her as a sexual exhibit for his own financial gain. These exhibits eventually led to a court case in 1810. The trial put an end to the exhibition of her body in London, but Sarah was transferred soon thereafter to a new master in Paris where she became a curiosity once again. She was examined by scientists in 1815 and died at the age of twenty-eight.

As Yvette Abrahams notes, despite her exile, exploitation and treatment as a mere curiosity in the eyes of westerners, 'Auntie Sarah' was a dancer and an artist. Her art was a form of communication, storytelling and resistance.²⁹ The dramas she enacted told of slavery, resistance, violence and pain, and through this medium she got her "recalcitrant message" across:

"Cezar, no doubt, was trying to play on British sentiments about the African as beast, as uncontrollable, through the contrivance of the cage. Auntie Baartman challenged his control, because she took the props and subverted them into a narrative about being forced against her will to perform".³⁰

By understanding Sarah's life or 'performance' as art, and her story as a strategy of resistance, her dignity and her humanity become central to the story and she no longer occupies the narrative as a victim. Although her story will never be complete, the recollection of her story may be the path to transformation, as it is our responsibility to listen and to stand in as her compassionate audience:³¹

"If Auntie Sarah could resist, there are none of us so alone, so isolated, or so traumatised that we cannot resist. Her story teaches us to keep trying, even when we fail at first, at second and even at third try. That she succeeded in getting her message across, through time and space and by the hands of strangers, was surely a great achievement. The artist who is silenced cannot live. By living, Auntie Sarah created the story I have to tell. Given the constraints under which she had to practise her art, the negation and silencing of her self-hood which she overcame, her speech deserves due honour, love and respect."³²

²⁸ For an analysis of this story see Abrahams "Colonialism, dysfunction and disjuncture: Sarah Baartman's resistance (Remix)" 2003 (58) *Agenda* 12 at 13-14.

²⁹ Abrahams 2003 at 18.

³⁰ Abrahams 2003 at 19.

³¹ Abrahams 2003 states that "[t]hrough communication, by telling the story of the violence in her life, she found her true humanity" (at 21).

³² Abrahams 2003 at 24.

In calling for her return to South African soil, the story of Sarah Baartman was (re)told as "...no-one has a life worthy of consideration about which one cannot tell a story".³³ Her burial was a ritual designed to acknowledge her dignity and her ability to live a story of resistance worth telling. As this narrative illustrates, there is a wealth of healing power and memory in storytelling and although, because of our past, we are reluctant to tell our stories, the more we listen the more we encounter the hidden lives and dreams of others.

In (re)claiming her own identity as a storyteller and an African woman, Ellen Kuzwayo mytho-poetically describes the African way of life as rooted in an oral tradition where narration serves the purpose of allowing us to learn from one another and to for-give:

"I am an African woman. I've tried to share my soul, my way of seeing things, the way I understand life. I hope you understand... Africa is a place of storytelling. We need more stories, never mind how painful the exercise might be. This is how we will learn to love one another. Stories help us to understand, to forgive and to see things through someone else's eyes."³⁴

At the heart of the traditional African society described by Kuzwayo is the notion of *ubuntu*, which gives expression to the individual within community, and storytelling is central to this interactive I-Thou relationship. *Ubuntu* is concerned with allowing individuals to achieve their full humanity in relation to others, as Sarah Baartman was able to do against all odds when her people reclaimed her story and her place within their community. It encourages a move away from the paradigmatic 'I think therefore I am' towards 'I *participate* therefore I am'. Life-together is about telling stories and listening to them in order to shift boundaries and discover new affinities.

³³ Cavarero 2000 at 129.

³⁴ Kuzwayo as quoted in Villa-Vincencio and Niehaus 1995 at 111.

3.3 The recurring themes of *ubuntu*, storytelling and care

“I think as long as one remains aware that it is a very problematic field, there is some hope.”³⁵

African jurisprudence has only recently received (some limited) attention in South African legal and constitutional discourse. A key concept in this jurisprudence is *ubuntu*.³⁶ Like life and love, *ubuntu* is a difficult word or concept to define – especially within current categorisations of ideals, values and rights. Very loosely defined, *ubuntu* is a multi-layered and complex concept denoting both a traditional African form of life and a communal or communitarian ethic, which appears to provide alternatives to liberal legalism and western individualism.

An insistence on responsibility rests at the heart of *ubuntu* as a philosophy. It demands both the exercise of claiming belonging and performing duties as an ethical being. It is thus a state of being or doing which embraces the need for compassion towards others. Archbishop Emeritus Desmond Tutu, chairperson of the Truth and Reconciliation Commission (TRC), defines the ‘essence’ of *ubuntu* as follows:

“Africans have a thing called ubuntu; it is about the essence of being human, it is part of the gift that Africa is going to give to the world. It embraces hospitality, caring about others, being willing to go that extra mile for the sake of another. We believe that a person is a person through other persons; that my humanity is caught up, bound up and inextricably in yours ... When I dehumanise you, I inexorably dehumanise myself. The solitary human being is a contradiction in terms. Therefore you seek to work for the common good because your humanity comes into its own in community, in belonging.”³⁷

This interpretation sees *ubuntu* as embracing a law of being-with-others and inspires us to learn of others as we learn of ourselves (as encouraged by both Achebe and Ramose) and to respect both difference(s) and common humanity. It is an age-old custom, which abounds with values and idea(l)s that have the

³⁵ Spivak *The post-colonial critic: Interviews, strategies, dialogues* Harasym (ed.) 1990 at 63.

³⁶ Johnson, Pete and Du Plessis *Jurisprudence: A South African perspective* 2001 at 206. See also Pieterse “‘Traditional’ African Jurisprudence” in Roederer and Moellendorf (eds.) *Jurisprudence* 2004 at 438ff.

³⁷ Tutu *No future without forgiveness* 1999 at 34-35. See also Battle *Reconciliation: The ubuntu theology of Desmond Tutu* 1997.

potential of shaping ‘new’ South African jurisprudence. Thus, *ubuntu* could be utilised to promote a different set of ideals for interpreting the Bill of Rights – ideals not rooted in eurocentric thinking where individuals are perceived to exist within a legal wasteland where nothing is connected to nothing. In fact, an individual is unique and different not because she is ‘free’ from others but because her relations with others make her unique – the who-I-am is always already exposed to an-other and shaped by a freedom dependent on the freedom of others.

Ubuntu is also a foundationless basis for reconciliation as the TRC’s approach to reconciliation, ‘truth-telling; and amnesty illustrates. In the spaces created by the TRC for stories to be told, it became apparent that ubuntu primarily owes its existence to unique stories about lived experiences. What I wish to express here is that ubuntu is discoverable through opening our minds and hearts to the possibilities of other ways of be-ing and becoming which reveal to us modes of life and spirituality previously rendered silent and invisible by colonial social-scientific and western anthropological constructs.³⁸

How do we articulate or even begin to understand, within the parameters of western logic, the forgiveness shown to a policeman who played an active role in the brutal killing of the Guguletu Seven? Of the twenty-five policemen involved in this tragic incident, only two sought amnesty though the telling of their respective stories, namely Bellingham and Mbelo.³⁹ When interviewed, Mbelo denied that his experience was the same as “a white man’s story”. Mbelo was accused by his own community of selling his blood for money and he bears the scars to prove this, unlike Bellingham. When he finally met with the mothers of the seven boys he had assisted in killing to beg for their forgiveness, television footage showed the

³⁸ Cornell and Van Marle “Exploring ubuntu: tentative reflections” 2005, an unpublished discussion paper in my possession, illustrate that the ‘recording’ of African philosophy originates with anthropological testimony about it:

“There is a central problem with this testimonial as to how African rituals, practices, and social encounters are described, namely that the “impression” made by the “natives” on the anthropologists are given expression and articulation in terms of Western epistemological schemas” (at 3)

The authors thus suggest that Derrida’s thinking on the archive (see *Archive fever: A Freudian impression* Prenowitz (trans.) 1997) opens up our understanding of the past by reminding us that the archive keeps safe and shelters the impression of the past as well as preserving a promise for the future – for those to come (Cornell and Van Marle 2005 at 4).

³⁹ Despite their very different stories, both men were granted amnesty.

mothers questioning him as to how he felt. After silently listening to his responses to their questions, and accepting his insistence on addressing them as ‘mama’, they chose to forgive him. One of the women went so far as to tell him that she felt compassion for him, and wished him a productive life in a non-violent environment.⁴⁰ This response can perhaps only be understood by thinking through the notion of ubuntu understood as a form of self-gathering. The mothers, when faced with ‘one of their own’ who murdered their sons, did not forget their obligations and duties to rescue the harmony of their community, and they did not deny Mbelo his place within this community. Rather, their response to Mbelo’s story, and his plea for forgiveness, reflects an understanding that their own survival in the community depended also paradoxically on the survival of the very man who caused them unmentionable pain – the ultimate other. Obligation, duty and responsibility in this sense go far beyond a recognition of the ‘rights’ of Mbelo, the mothers or their sons. It relies on notions of human interdependence, reconciliation and social harmony. Theirs is an ethical and future-orientated response, difficult to reconcile with western conceptions of individual rights.

In the TRC’s final report, we learn that the process of narration or storytelling plays an important role in creating what is referred to as “personal or narrative truth”.⁴¹

⁴⁰ This footage is from an SABC 2 documentary “Long night’s journey into day (2000)” aired on 24 April 2004 and produced by Reid and Hoffman for the *Iris Films Feminist Collective Inc.*

⁴¹ See the *Truth and Reconciliation Commission Report I 1998* (hereinafter referred to as the *TRC Report 1998*). See also Slabbert “In search of (unconveyable) truth: The Truth and Reconciliation Commission’s notion of narrative truth and a victimary hypothesis” 2004 (15:1) *Stellenbosch Law Review* 103 warns that we should remember that ‘victims’ may find it difficult or even impossible to translate their experiences of suffering into the truth as, in the words of Krog, the truth “trips the tongue” (quoted in Slabbert 2004 at 105). It is indeed ‘true’ that closure is impossible and that we should avoid resorting to a metanarrative of our *apartheid* past. But it is also submitted that we should continue to be snatched from the “death of forgetfulness” (Krog *Country of my skull* 1998 at 27) by constantly being reminded that “pieces of her feet were gone” (a story of horror related at a TRC hearing as related by Krog 1998 at 141). Kearney 2002 echoes the belief that the *mytho-mimesis* Aristotelian nature of narrative (See Aristotle *Poetics* Heath (trans.) 1996) allows for self-invention and catharsis in the sense that narratives allow us to let go of the emotions of pity and fear. In other words, stories as healing and transformative keep the lines of communication – however tenuous – open. Kearney’s understanding of the mimetic presents us with the potentiality of discovering and uncovering new ways of being. *Mimesis* within this context invites us to see the world as otherwise – resistant to the *status quo* of civilisation, progress, western liberalism, imperialism, neo-colonialism, capitalism, war and intolerance. We are able, following Kearney, to experience catharsis through the telling of (hi)stories, as was done at the TRC hearings.

The Commission in its report attaches not only a healing function to storytelling, but also a reconciliatory one, namely by ensuring that:

“the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless”.⁴²

In addition to extending this invitation to people to tell their stories in what could be seen as a process of both communal and individual restoration, there was also a response to a demand for amnesty. In *AZAPO and Others v President of the Republic of South Africa and Others*⁴³ it was held that the amnesty provisions of the TRC’s founding statute⁴⁴ were justified in their violation to have justiciable disputes settled in a court of law as per section 22 of the interim Constitution.⁴⁵ A unanimous Court invoked the epilogue’s vision of ‘ubuntu instead of victimisation’ to justify the clearly political compromise that amnesty should be granted to certain human rights perpetrators of the *apartheid* regime.⁴⁶

Mohamed DP emphasises in *AZAPO* the reasons why those who negotiated the Constitution deliberately included ideas such as *ubuntu* over those of victimisation;

“If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly and insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, ubuntu over victimisation.”⁴⁷

⁴² *TRC Report* 1998 at 112.

⁴³ 1996 4 SA 671 (CC).

⁴⁴ Section 20 of the Promotion of National Unity and Reconciliation Act 34 of 1995.

⁴⁵ Act 200 of 1993.

⁴⁶ See *AZAPO and Others v President of the Republic of South Africa and Others* 1996 4 SA 671 (CC) at paras. 19 and 48.

⁴⁷ *AZAPO* at para. 20. Mohamed J in *Makwanyane* at para. 263 describes the need for ubuntu as follows:

“The need for ubuntu expresses the ethos of an instinctive capacity for an enjoyment of love towards our fellow man and woman: the joy and fulfilment involved in recognizing the innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.”

From the above it is clear that in fulfilling its mandate, the TRC gave some body to the promises to be found in the interactive and reconciliatory aspects of *ubuntu* as illustrated in the story of Mbelo related above. Whilst acknowledging that it is virtually impossible to respond to the pain of those who spoke in the public hearings before the commission, it may be possible, when drawing on notions of narration as 'patchwork' or 'jigsaw puzzle', to compose and recompose pieces differently and in doing so, to provide for an openness which is nevertheless haunted by uncertainty and doubt.⁴⁸ This enables us to avoid being mesmerised by an 'institutional voice', a voice which chooses to speak for others, a voice with a mandate.⁴⁹ In describing the role of personal or narrative truth, Desmond Tutu describes this individual truth - as revealed in stories - as allowing for an approach to the past, a particular expression of memory, and an oral tradition attempting to recover stories which have been officially ignored in the national archives.⁵⁰ Adam Gearey explains this process as follows:

"It is the undoing of silence, and the recognition of voices that have not been given a chance to enter into the archive and the record. It is, by its very nature, complex and messy ... Personal and narrative truth thus appears to exist in these excessive forms, resisting reduction to a simple thematic."⁵¹

Although the TRC admitted that personal or narrative truth does not fulfil legal requirements, I am of the opinion that such truths revealed in stories are able to disrupt law's institutional logic and serve as a reminder of the violence of the law and its limits. In Gearey's untranslatable words, "if the voice speaks from the

⁴⁸ Van Marle "The literary imagination, recollective imagination and justice" 2003 (19:2) *SAPL* 137.

⁴⁹ In his discussion of Van Marle's work on the TRC, Gearey "Tell all the truth but tell it slant': A poetics of truth and reconciliation" 2004 (31) *Journal of Law and Society* 38 points out that the commission was well aware of the difficulties of the truth with which it was dealing and that there was a degree of reflexivity in its understanding of the truth. This is illustrated by the fact that the commission recognised four 'categories' of truth, namely, factual or forensic truth; personal or narrative truth; social or 'dialogue' truth; and healing and restorative truth. It is personal or narrative truth that interests me most in the context of this research.

⁵⁰ Gearey 2004 at 53.

⁵¹ *Ibid.*

foreword, which is both within and outside of the law, what possibilities existing within the law might it whisper?"⁵²

Karin van Marle points out in her discussion of the significance of the TRC's hearings that the struggle to make stories public is a struggle for justice.⁵³ Van Marle introduces a reconstructed and transformed vision of public space, which acknowledge the realities of difference, plurality and heterogeneity. This vision of public space inspires and directs an ethical approach to equality and the role of the courts in 'enforcing' the right to equality:

"A 'deconstructive' public that continuously undermines its own self-presence nurtures an approach to equality that is open for the event and for the coming of the other. The intersection between the public and equality is aimed at the future, waiting for a democracy to come, equality to come, justice to come. An ethical interpretation of equality is situated where public space intersects with equality."⁵⁴

Van Marle then introduces the final intersection: stories heard, told and experienced.⁵⁵ She proposes that there is an ethical intersection between public space, equality and justice, which is integral to an argument for the ethical interpretation of equality. Unlike substantive interpretations of equality, an ethical interpretation of equality takes aspects of public space, equality and justice into account. Van Marle uses the TRC as an illustration of this ethical intersection. The TRC was a public event, a public space provided for humans to act, and where they were treated with equal worth and respect, although not treated the same. Concrete contexts and circumstances were taken into account as the people at the public hearings told their personal and communal stories of brutal discrimination and suffering. One of the aims of the TRC was to assist in the achievement of equality for all in South Africa. The aim was that we, as South Africans, should move closer to the possibility of achieving equality. In this regard the feature of equality is connected to the feature of justice.⁵⁶

⁵² Gearey 2004 at 59.

⁵³ See Van Marle "An ethical interpretation of equality and the Truth and Reconciliation Commission" 2000 *De Jure* 248 and *Towards an ethical interpretation of equality* LLD thesis 2000.

⁵⁴ Van Marle LLD thesis 2000 at 290.

⁵⁵ Van Marle LLD thesis 2000 Part 3 "... landscapes of justice".

⁵⁶ Van Marle LLD thesis 2000 at 295.

What is of particular interest here is that Van Marle awaits a 'landscape of *care*' in South Africa and argues that such a landscape is glimpsed in the conduct of the TRC:

"Where justice is an ideal that should be strived for, care is something that can daily be encompassed, recognised and employed in our actions. The various responses to the TRC can also be analysed in terms of their emphasis, whether the authors take a care perspective or a justice perspective. In a care perspective the other is perceived as concrete other with specific, concrete needs. In the justice perspective the other is seen as a generalised other with general universal needs. The stories told in the public space of the TRC were told by concrete people. It is necessary not to see their experiences as one general universal "grand" narrative."⁵⁷

The glimpsing of a landscape of care in this regard indicates that the Commission's task is one of radical incompleteness where there exists both openness and irresolution that nevertheless provides a mark of what could still come to be. Silenced voices must come to be heard in public spaces. This is a precondition for ethical interpretations of equality and the possibility of justice. This brings us back once more to the importance of stories and storytelling and a just and non-violent response to such stories. I sense here glimmerings of yet another intersection, that of *ubuntu*, storytelling and care, which is more carefully considered in the next section.

Against a Kantian background,⁵⁸ Drucilla Cornell identifies *ubuntu* as being a friend to myself "because others in my community have already been friends to me".⁵⁹ It is only through my participation-with-others that I am able to survive and be gathered together as a person and have my story told to me as is my desire.

⁵⁷ Van Marle LLD thesis 2000 at 305-306. Of course the stories told before our courts are told by real and concrete people whose experiences cannot and should not be dealt with as 'general' narratives and reduced to passing or failing a specific test of equality.

⁵⁸ In her attempts to reconfigure the relationship between dignity and *ubuntu*, Cornell "A call for a nuanced constitutional jurisprudence: Ubuntu, dignity, and reconciliation" 2004 (19) *SAPL* 661 returns us to the Kantian conception of dignity where we are seen as creatures subject to the categorical imperative and yet legislators of the moral law and the moral right. It is only within the realm of morality that we find our freedom, and as free we are of infinite worth. See generally Kant *Groundwork on the metaphysics of morals* 1998. Cornell's broader understanding of Kantian dignity presupposes that "[d]ignity lies in our struggle to remain true to our moral vision, and even in our wavering from it" (at 662).

⁵⁹ Cornell 2004 at 663-664.

Ubuntu thus introduces us to a more “sweeping sense of responsibility”, solidarity and mutual sustenance.⁶⁰ This potentially provides us with a new way of thinking about the “law of Law” in such a way that we become aware that I cannot be what I ought to be until you are what you ought to be. The mothers of the Guguletu Seven realised this in showing compassion to someone that westerners would generally consider unworthy of compassion. If understood in the *ubuntu*-language of *seriti*, we are diminished if we cannot live up to the demands imposed on us for care and responsibility. This entails of us the willingness to make sacrifices for group interests and solidarity as these mothers chose to do when setting aside their personal pain and extending wishes for a better future to the man who killed their sons.

In contrast to liberal western jurisprudence, more emphasis is placed upon the harmony of the collectivity, the principle of spiritual forces superior to the human, and transformation. In other words, a path is opened for contradictory ways of thinking in a ‘both-and’ ethical attitude, which allows a search for harmony and unity without rationalisation.⁶¹ The spirit of *ubuntu* accordingly allows us to value human interdependence as it is associated with *seriti*, which names the life force by which a community of persons are connected to each other:

“In constant interchange of personhood and community, *seriti* becomes indistinguishable from *ubuntu* in that the unity of the life-force depends on the individual’s unity with the community.”⁶²

The concept of *seriti* as a force-field (a type of magnetism) that shapes who we *can* be, demands of us both to care and to be responsible. If we do not live caringly and responsibly, we are diminished as persons. It can thus be seen as a constant striving towards the ‘as if’.

The African philosopher, Mogobe Ramose similarly highlights the spiritual dimensions of this ‘parallel’ law.⁶³ For him, *Ubu-ntu* defines how the be-ing of an

⁶⁰ Cornell 2004 at 665.

⁶¹ Cornell 2004 at 669.

⁶² Ibid.

African is anchored in the cosmos. This is primarily expressed by the prefix *ubu-* which contains the being as enfolded, while the stem *-ntu* means the unfolding of the being by means of a concrete manifestation through particular modes and forms of being. This process of unfolding includes the emergence (becoming) of the speaking and knowing human being.⁶⁴ Therefore, African conceptions of the universe – and of the position of the human being in it – are premised on movement or motion and consequently ‘order’ cannot be established and fixed for all time. The living soul, cultural practices and spiritual values are rendered fluid and there is a tension here between the enfolded and the unfolding which has not received much attention in jurisprudential circles in South Africa, although the Postamble to the interim Constitution⁶⁵ explicitly recognises the concept of *ubuntu*:

“The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.”

The final Constitution,⁶⁶ on the other hand, makes no mention of *ubuntu*. To date, the most written about utilisation of the complex philosophy of *ubuntu* is found in the case of *S v Makwanyane*,⁶⁷ where the Constitutional Court found the death penalty to be unconstitutional contrary to the wishes of the majority of South Africans.⁶⁸ This case, although controversial, has lent much legal weight to *ubuntu* as a constitutional value although subsequently courts have seemed reluctant to further contemplate and interrogate this value.

⁶³ *African philosophy through ubuntu* 2002.

⁶⁴ Ramose 2002 at 41-43.

⁶⁵ Act 200 of 1993.

⁶⁶ Act 108 of 1996.

⁶⁷ *S v Makwanyane* 1995 3 SA 931 (C); 1995 6 BCLR 665 (CC); and 1995 2 SACR 1 (CC).

⁶⁸ The rationale of the judges can possibly be summarised in the words of Donne “Meditation XVII”:
“Any man’s death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls; it tolls for thee.”

Re-thinking ubuntu and/as care

Justice Yvonne Mokgoro, who contributes to the decision reached in *Makwanyane* by utilising her own understanding of the African philosophy of *ubuntu* within the constitutional context, is of the view that constitutional law reform can harness the spirit of *ubuntu(ism)*, with its key values of human dignity, respect, inclusivity, compassion, concern for others and honesty.⁶⁹ She mentions the following as examples of ways in which South African jurisprudence could be transformed in order to align itself with these renaissance values:

- law should be transformed to the extent that it is no longer conceived as a tool for personal defence;
- communalism should place more emphasis on group solidarity and interests;
- the *conciliatory* character of the judicial process should be developed in order to restore peace and harmony between members, rather than placing overdue reliance on the adversarial approach which emphasises retribution and seems repressive;
- the importance of public ritual and ceremony should be given due recognition;
- the idea that law, experienced by an individual within the group, is bound to individual *duty* as opposed to individual rights or entitlement should be advanced; and
- the importance of sacrifice for every advantage or benefit, which has significant implications for *reciprocity and caring within the communal entity* should also be advanced.

As Mokgoro so eloquently puts it:

“Quite obviously, the complete dignification of South African law and jurisprudence would require considerable re-alignment of the present state of our value systems. We will thus have to be ingenious in finding or creating law reform programmes,

⁶⁹ Mokgoro “Ubuntu and the law in South Africa” <http://www.puk.ac.za/lawper/1998-1/mokgorab.html> refers to *ubuntu* as the “one shared value that runs like a golden thread across cultural lines” (*Makwanyane* at 307-8) and equates this African concept with the English word ‘humanity’ and the Afrikaans word *menswaardigheid* (*Makwanyane* at 308)

methods, approaches and strategies that will enhance adaptation to such unprecedented change.”⁷⁰

Mokgoro clearly does not want to limit the use of *ubuntu* to a vague spirit that pervades the Constitution, but to use *ubuntu* as an ideal, which is made explicit in actual legal decisions. Having noted this, it is therefore surprising that she does not explicitly refer to *ubuntu* in the *Khosa* case.⁷¹ Nowhere in her judgment does she give voice to her need to operationalise *ubuntu* as a constitutional value, although it seems that her understanding of *ubuntu* implicitly informs her legal opinion and constitutional arguments to extend the payment of social grants to non-citizens residing in South Africa.

In *Khosa* the Constitutional Court was faced with a challenge to the Social Assistance Act.⁷² The applicants were Mozambiquan citizens who were permanent residents in South Africa. The first applicant, a mother of two children, applied for a child support grant and a care dependency grant for a child suffering from diabetes. The second applicant applied for an old age grant. Both applicants had been denied their grants as they were not citizens of South Africa. In the Constitutional Court, Mokgoro upheld a decision of the High Court that it was the court’s responsibility to read the words “permanent resident” into the challenged provisions of the Social Assistance Act. The applicants argued that sections 26, 27 and 28 of the final Constitution use the word “everyone” in the first two sections and “every child” in the third, and that it would be unconstitutional to limit access to social grants to citizens alone.

Drucilla Cornell and Karin van Marle critically analyse this case and the underlying assumptions in Mokgoro’s judgment. They argue convincingly that Mokgoro’s reasoning reveals a certain politics and ethics at play.⁷³ There is a deep sense that the humanity and dignity of these applicants should not be denied as the

⁷⁰ Mokgoro 1998 at 6.

⁷¹ *Khosa and Others v Minister of Social Development and Others* CCT 13/03.

⁷² Act 59 of 1992.

⁷³ Cornell and Van Marle 2005 at 14. This politics and ethics seems to be telling us that no one – including the state – is allowed to say “you do not interest me” (ibid).

purposive nature of the South African Constitution is rooted in the promotion of a just community. Although Mokgoro does not use the word *ubuntu* in this case, her insistence that everyone is responsible for ensuring the well-being of persons within their community appears to reflect such thinking. She is therefore not only promoting a fair community, but a *caring* one. In her view, there is a connection between a just and caring community:

“Through careful immigration policies it can ensure that those admitted for the purpose of becoming permanent residents are persons who will profit, and not be a burden to, the state. If a mistake is made in this regard, and the permanent residents become a burden, that may be a cost we have to pay for the constitutional commitment to developing a caring society, and granting access to socio-economic rights to all who have homes here. Immigration can be controlled in ways other than allowing immigrants to make their permanent homes here, and then abandoning them to destitution if they fall upon hard times.”⁷⁴

Echoing Mokgoro’s concerns with the development of a caring society, Albie Sachs makes explicit reference to *ubuntu* in *Port Elizabeth Municipality v Various Occupiers*⁷⁵ in justifying his refusal to uphold an eviction order which would result in the homelessness of a large number of squatters. He highlights in his judgment the constitutional requirement that everyone must be treated with “care and concern” within a society based on the values of human dignity, equality and freedom. He also reminds us that the Constitution places a demand upon us to decide cases, not on generalities, but in the light of their own particular circumstances:⁷⁶

“The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.”⁷⁷

Justices Mokgoro and Sachs thus argue, albeit in different ways, that *ubuntu/botho* can become central to a new constitutional jurisprudence (of care) and to the revival of sustainable African values as part of the broader process of the African

⁷⁴ *Khosa* para. 65.

⁷⁵ CCT 53/03.

⁷⁶ CCT 53/03 at para. 31.

⁷⁷ CCT 53/03 at para. 37.

renaissance. It is of course trite that these values, as any others, would be required to surmount a threshold of constitutional scrutiny and must be consistent with the text, spirit and values of the final Constitution.⁷⁸

As reflected upon above, adherence to the value of *ubuntu* demands that we deal with individuals in the context of their historical and current disadvantage. and that equality issues must address *the actual conditions of human life*, for example life as a non-citizen or a squatter, but nevertheless life with and through others.

Despite increasing indications of an apparent commitment to the operationalisation of *ubuntu* in constitutional interpretation and adjudication, the Constitutional Court remains mostly reluctant to rely on this ‘value’ in reaching its decisions. In *NK v Minister of Safety and Security*⁷⁹ Ms K was gang-raped by three on-duty policemen who offered to take her home after she had had an argument with her boyfriend at a shebeen in the early hours of the morning. In deciding whether the case raised a constitutional issue, Justice Kate O’Regan held that the protection of Ms K’s right to security of her person, dignity, privacy and substantive equality are of profound constitutional importance.⁸⁰ Quoting from its earlier decision in *Carmichele*⁸¹ the Court reiterated that “few things can be more important to women than freedom from the threat of sexual violence” as this goes to the core of women’s unequal position in society and “is the single greatest threat to self-determination of South African women”.⁸² With these sentiments in mind, the Court accepted that the Minister of Safety and Security is vicariously liable for the wrongful conduct of the policemen, both for the rape and for failing to protect Ms K.

⁷⁸ See Sachs J in *S v Makwanyane* at 374, 516E.

⁷⁹ CCT 52/04 decided on 13 June 2005.

⁸⁰ *NK* at paras. 14 and 18.

⁸¹ 2001 4 SA 938 (CC); 2001 10 BCLR 995 (CC). This case is analysed in detail in chapter four.

⁸² *NK* at para. 15.

In relying on the constitutional values of dignity, equality and freedom, there is no mention made of *ubuntu* in this judgment, although it could have served as a powerful argument in reaching this outcome. If O'Regan had considered the importance of the 'common good', hospitality, caring about others, and being willing to go that extra mile for the sake of another, the court could have added to the debate about the 'usefulness' of an African jurisprudence. Ms K asked for assistance and placed her trust in these men. Surely, their actions should be condemned precisely because their inhumane conduct affects the humanity of us all. This manner of thinking could move us beyond the need to place emphasis on the fact that they were uniformed policemen on duty (an aspect discussed in detail by the court), towards a more concrete concern about the treatment of women in our society and the duty of the state to protect them. The effects that fears of sexual violence have on the ability of members of our community to participate fully in a process of blossoming and becoming need careful and serious consideration. Life is dependent on interactions with others in a process of 'unfolding' and 'enfolding', in the words of Ramose, and it is submitted that the Constitution should facilitate a sense of responsibility towards others since "our togetherness is actually part of our creative force that comes into being as we form ourselves with each other".⁸³

It has been said, however, that it would be dangerous to merely embrace *ubuntu* as a 'universal' value without some reflection. Postmodern critiques of essentialism, foundationalism and metanarratives have taught that rendering concepts stable and static only leads to further oppression and exclusion as those who do not 'fit in' are once again silenced and excluded. Narayan's warnings against cultural essentialism, discussed below, should also be heeded when 'labelling' groups as exclusively good or bad.⁸⁴ These totalitarian tendencies must be avoided as we continue to search for alternative and better ways of living law(s).

⁸³ Cornell and Van Marle 2005 at 8.

⁸⁴ Roy *The algebra of infinite justice* 2002 refers in general to the dangerous tendency in India to value only what is dictated as 'truly' Indian culture. This form of extremist nationalism has led to the exclusion, oppression and genocide of Moslems and Christians living in India.

In the words of Costas Douzinas, *ubuntu* could be understood as the “image of a prefigured beautiful future which, however, will never come to be”.⁸⁵ This always already allows us the hope of something better without closure. Cornell articulates this as follows:

“Utopianism has always been tied to the imagination, to visions of what is truly new. A world in which we could all share in life’s glories would be one radically different ... At last it is up to us to turn yesterday’s utopia into a new sense of reality.”⁸⁶

In his (postmodern) discussion of *ubuntu*, Patrick Lenta points out that the recognition of *ubuntu* as a constitutional value has been heralded in South Africa as an indication that we now share a substantive, inclusivist vision of the law and justice.⁸⁷ He cautions us against declaring this victory:

“On the other hand there is a danger that indulging in nostalgia about African colonial cultures will reinforce the myth that there is a single African culture and that the continent lack diversity... *Ubuntu* has the potential to homogenise, normalise, elicit consensus and exclude through rhetorical and other violence.”⁸⁸

As mentioned above, in *S v Makwanyane* the concept of *ubuntu* was embraced as a constitutional value and a method of voicing the marginalised other. This marks the concept as a site of resistance where the subjugated knowledge of the colonised is re-introduced into legal theory. However, the Constitutional Court’s resort to *ubuntu* as a value can also be seen as providing cover for the operations of power in the case.⁸⁹

According to Lenta’s deconstructive reading of this case:

“... although the Court’s resort to *ubuntu* seems to contain ethically laudable sentiments – the valorisation of excluded identity, tradition and forms of community – on a Foucauldian reading, its political effect is to substitute long prison sentences in the place of execution, which Foucault perceives as a new form of domination”.⁹⁰

⁸⁵ Douzinas *The end of human rights* 2000 at 338.

⁸⁶ Cornell *At the heart of freedom: Feminism, sex and equality* 1998 at 186.

⁸⁷ Lenta “Just gaming? The case for postmodernism in South African legal theory” 2001 (17) *SAJHR* 173 at 189.

⁸⁸ *Ibid.*

⁸⁹ Lenta 2001 at 190.

Lenta points out that when a value is legally entrenched, the other can easily be turned into the same and the site of resistance obliterated. This means that the nature of the value, and its interpretation and application, is no longer questioned as it is entrenched as yet another aspect of a greater legal/constitutional narrative. What is of importance here is that we must remain vigilant when judging and examining emergent truths. What is demanded of us in this context is the recognition of the other on the other's terms, even though this demand is "incalculable", excessive and infinite and thus incapable of (final and complete) fulfilment.⁹¹

Adopting an even more critical stance towards the attempts by the Constitutional Court in *Makwanyane* to 'legalise' the value of *ubuntu*, Rosalind English expresses concern over the contradictory nature, meaning and implications of adopting *ubuntu* as a specific conception of human rights.⁹² She states that:

"If ubuntu is a serious proposal ... it is a pity that the implications of the idea have not been explored more fully in cases where the interests of the individual conflict with those of society."⁹³

It is no doubt true that more needs to be said about *ubuntu* as a constitutional value and, in order for it to be taken seriously, this must be done. Here I have no disagreement with English. I do not, however, share the same concern about the rights of individuals within the community and the impression created that *ubuntu* thinking would in effect *always* place societal interests over and above that of the individual. In fact, the opposite result was reached in *Makwanyane* where every opinion poll showed an overwhelming support for the death penalty at the cost of individual lives. A possible answer to her concern about individual rights (although not in the liberal or universal sense) can be found in the sentiments expressed by

⁹⁰ Lenta 2001 at 191.

⁹¹ Lenta 2001 at 196.

⁹² English "Ubuntu: The quest for an indigenous jurisprudence" 1996 (12) *SAJHR* 641.

⁹³ English 1996 at 643.

Justice Edwin Cameron when deliberating on the equal right to sexual orientation.⁹⁴

Cameron supports an approach to equality which is informed by the African philosophy of *ubuntu*. He relies on Langa J's description of *ubuntu* as the recognition of another's status as a human being worthy of respect. This recognition has a converse in that "... the person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community".⁹⁵ Rather than attacking *ubuntu* as a patriarchal, exclusionary and conservative value, Cameron praises this indigenous concept as an *inclusive concept of humanity* that encourages the extension of human rights protection to the socially vulnerable, such as gays and lesbians (or non-citizens and squatters).⁹⁶ He states that *ubuntu* finds practical value by providing constitutional protection to those we deem to be different from ourselves and by allowing us to build our future on respect and tolerance and "delight in our diversity".⁹⁷

From the above, it is clear that Cameron, an HIV/AIDS activist, is *not* of the view that adopting *ubuntu* as a constitutional value would lead to the oppression and marginalisation of the gay and lesbian community. In fact, he expresses the opposite view, that *ubuntu* thinking encourages inclusivity, even of those deemed to be 'different'.

Marius Pieterse also encourages the use of *ubuntu* on condition that it is utilised as a multi-dimensional value within the sphere of legal interpretation.⁹⁸ Pieterse argues that it is precisely the treatment of *ubuntu* as a *unidimensional* concept that renders the ideal problematic.⁹⁹ He submits that it is useful to perceive *ubuntu* as a

⁹⁴ In a speech delivered in Windhoek, Namibia during Human Rights Awareness Week 2001 and sourced from Sister NAMIBIA ©.

⁹⁵ Cameron 2001 at 2.

⁹⁶ *Ibid.*

⁹⁷ Cameron 2001 at 3. Cameron thus holds that the value of *ubuntu* encourages the unconditional acceptance of the gay and lesbian community.

⁹⁸ "Traditional' African Jurisprudence" in Roederer and Moellendorf (eds.) *Jurisprudence* 2004 at 438.

⁹⁹ Pieterse 2004 at 442.

philosophy that has at its core the facilitation of the balancing of forces (or stories?). As a manifestation of African humanism, this philosophy should be studied in context and not merely used “as a magical word that can be appropriated to lend legitimacy to any judicial observation.”¹⁰⁰ Turning to the criticisms raised by English, Pieterse asks whether *ubuntu* is of any use in constitutional jurisprudence.¹⁰¹ He begins answering his own question by stating that the fact that *ubuntu* thinking does not fit comfortably into legal discourse, does not mean that it has nothing to offer us.¹⁰² On the contrary, it is a rich philosophy that holds much promise in assisting us in developing a constitutional jurisprudence that is not merely a mirror of most ‘western’ democracies, but moves us beyond aggressive individualism and neo-colonial imperialism. *Ubuntu* could be seen as a form of “groupcentered individualism” in that it acknowledges the importance of individual interests, but always contextualises these interests by emphasising the effects of these interests on the group.¹⁰³

In his cautious analysis, Pieterse stresses that much of African jurisprudence is aimed at the achievement of harmony and equilibrium within society and that an important element of this harmony is the safeguarding of human dignity.¹⁰⁴ It has been said that there is an overlap here between African and western jurisprudence in the emphasis placed on the value of human dignity. He thus maintains that the link between individual and communal dignity in African jurisprudence has much to offer us in the interpretation of the constitutional right and value of dignity. In his

¹⁰⁰ Pieterse 2004 at 447. He submits that the Court in *Makwanyane supra*, *AZAPO supra* and *Hoffman* 2000 2 SA 1 (CC) fails to interact with *ubuntu* as the intricate philosophy it is meant to be.

¹⁰¹ English 1996 states that the Court seems to be “resurrecting indigenous values that have fallen into disuetude” (at 648). She submits that constitutional adjudication is about conflict and not harmony and that “if ubuntu is to be a useful addition to constitutional discourse, we have to get rid of the idea that it is in some way a balm for the conflict at the heart of society” (ibid). She also warns that “if you are delving in the archives for the fragmentary accounts of a legal system which has largely gone unrecorded, in search of practices that support your particular argument (whatever it is) you are bound to find exactly what you are looking for” (at 644).

¹⁰² Pieterse 2004 at 448.

¹⁰³ Pieterse 2004 at 460. He comes to this conclusion after analysing the provisions of the African Charter on Human and Peoples Rights that place an emphasis on social justice and development. These ‘communitarian’ values are reflected in the African Charter articles 27-29 where reciprocal duties are stressed.

¹⁰⁴ Pieterse 2004 at 461.

opinion, this approach may also justify the centrality of this value in the equality jurisprudence of the Constitutional Court, which has been criticised for shifting the right to equality away from the eradication of group-based inequality.¹⁰⁵

Understanding *ubuntu* as the recognition of human dignity and freedom-with-others, as Cornell encourages us to do, is not problematic, but I also wish to underline the importance of this philosophy in assisting us in developing a new jurisprudence of gender equality within the South African context. My challenge is for us to give voice to *ubuntu* as an Ideal/value standing apart from other western values, *as well as* informing our understanding of constitutional rights and values within the (South) African context. *Ubuntu* calls upon us to respond to concrete experiences and to remain open to the musical rhythm of Africa and the cosmos.¹⁰⁶ This is part of an ongoing project that is dependent on our ability to live with some intellectual discomfort for some time to come.

To summarise, when applauding *ubuntu* as a constitutional value or ideal, we need to keep in mind that it remains a ‘problematic concept’ as Lenta warns us, while simultaneously heeding Cornell’s call for us to follow two directions in supporting this interactive ethic:

- The conversion of *ubuntu* into a constitutional principle; and
- The re-imagining of *ubuntu* from within the practices within the customary law, as they are engaged in by women themselves.¹⁰⁷

In following these directions we may discover new ways of being with(in) the law. The strategy of using *ubuntu* to enrich human rights and constitutional discourse should be seen as having both political and ethical dimensions that take us beyond strategy to a future-oriented utopianism encompassing the imaginative possibilities of other-love free from the Impulse to dominate.

¹⁰⁵ Ibid. See *inter alia* Albertyn and Goldblatt 1998.

¹⁰⁶ See Ramose 2002 at 93-94.

¹⁰⁷ Cornell 2004 at 666.

3.4 Beyond opposition(s) and domination

In paying closer attention to Yvonne Mokgoro's vision of a just and caring community, as supported by Albie Sachs, we could, through the mediation of *ubuntu* thinking, be placed in a position to move beyond justice/care oppositions.¹⁰⁸ Consequently, in displacing and decentering dominant conceptions of western liberal legalism and individualism, and by introducing new, unique and creative ways of solving legal disputes, we would be empowered to move beyond the exclusionary tendencies of the law and western discourses of human rights.

In *Khosa*, Mokgoro further develops her vision as expressed originally in the *Makwanyane* case, namely that of caring within the communal context, a vision that is shared by other constitutional commentators, although from different and varied perspectives. In attempting to find a new constitutionalism along these lines, Kenneth Karst suggests that women's concern for a 'web of connection' might result in a more *inclusive* reading and interpretation of constitutional and human rights law.¹⁰⁹ He suggests that constitutions traditionally derive from a 'male' conception of freedom that is expressed in terms of (negative) freedom from the interference of others and separation from government. The emphasis is thus on individual liberties rather than on collective or group rights. Karst suggests that the voice of care and connection may lead to doctrinal changes in the state's duty to assist all members to fully participate in the community.¹¹⁰ Thus a concept of *responsibility and/or relationships* can supplement - or radically displace - our notion of individual or constitutional rights. The justice of a society would then be judged on a more *deeply human* level, always with an awareness of the tension and tragedy of living in a democracy still marked by unacceptably high levels of inequality.

¹⁰⁸ Gilligan herself has acknowledged the interaction of these two ethics in her later works. See *inter alia* Gilligan and Attanucci "Two moral orientations: Gender differences and similarities" 1988 (34:3) *Merill-Palmer Quarterly* 223.

¹⁰⁹ "Women's Constitution" 1984 *Duke LJ* 477.

Arguments for a more compassionate, caring and context-based concept of justice and rights such as those offered to us by Karst are convincing. However, as pointed out earlier, objections have been raised against the use of the ‘feminine’ to support these arguments. Gilligan, for example, has been severely criticised for placing too much emphasis upon the *essential* nature of being a caring and nurturing woman.¹¹¹ In reality, not all women are nurturing or maternal or self-sacrificial, and even if the majority of women in her studies show these characteristics, they are not innate, but socially constructed to keep women in their place in the social hierarchy.

In defence of Gilligan, Annette Baier submits that her work should be interpreted as highlighting differences in moral (legal) decision-making which are *symbolically* male as reflected in the ethic of justice or *symbolically* female as reflected in the ethic of care.¹¹² The ideal thus would be that the voices and stories of *all* are heard, especially historically silenced voices.

Such a jurisprudence of care, which facilitates legal transformation, may be just the legal theory we need in Africa, a continent which treasures the community, relationships within the community, restorative justice and the powerful tradition of storytelling:

¹¹⁰ Karst 1984 at 493. For an encouragement to seek a new sensitivity and compassionate justice, see also L’Heureux-Dube “Making a difference: The pursuit of equality and a compassionate justice” 1997 *SAJHR* 335.

¹¹¹ MacKinnon “Feminist discourse, moral values and the law – a conversation; The 1984 James MacCormick Mitchell lecture” 1985 *Buffalo Law Review* 34 is especially sceptical about Gilligan’s contribution to feminist theory:

“what is infuriating about it, ... and this is a political infuriation, is that it neglects the explanatory level. She also has found the voice of the victim ... but I am troubled by the possibility of women identifying with what is a positively valued stereotype. It is the ‘feminine’” (at 73-74).

¹¹⁶ Baier “The need for more than justice [1987]” in Held (ed.) *Justice and care: Essential readings in feminist ethics* 1995 at 47. Jackson *Making sense of law* 1995 also maintains that we should not use ‘justice’ and ‘care’ as overarching principles to which all else should be reduced (at 318). While there may be a close correlation between rule-based adjudication and ‘justice’ on the one hand, and consequentialist, relational or holistic adjudication and ‘care’ on the other hand, these are not exclusive correlations. Rule-based adjudication may take into account relationships and relational adjudication may take account of ‘rights’ if they are defined in relational terms. Again, the issue ought not to be restricted to whether these two perspectives represent - or are perceived to represent - gender differences, but rather on the kind of legal system we want to have (Jackson at 319). Gender becomes important, however, if one approach is accorded some privilege over the other because of its perceived gender associations.

“ ... human survival may depend less on formal agreement than on *human connection*”.¹¹³

Following Gilligan, Carrie Menkel-Meadow offers us some ideas of how an ethic of care could affect court structures and procedures in order to modify the *harshness* of the adversarial process. She presents us with ways of broadening the kinds of solutions available in order to respond to the varied needs of the parties and to cause the least harm or violence:¹¹⁴

- Mediation as an alternative to the adversarial process would ensure that the procedure is less of a game and more of a process of communication;¹¹⁵
- Inclusive procedures would ensure participation by those who might be effected by the dispute;¹¹⁶
- The utilisation of pairs of presiding officers - one male and one female - where both perspectives (justice and care) are considered;¹¹⁷
- Increased activity by the bench in settling disputes;¹¹⁸
- The creation of a jury where many perspectives may be considered by a group of peers; and¹¹⁹
- A re-thinking of the conceptions of relevance and admissibility of evidence in deciding a dispute.¹²⁰

These recommendations deserve serious consideration and attention in order for cases to be dealt with in a constitutional, contextual and concrete manner without

¹¹³ Gilligan *In a different voice* 1982 at 45 (my emphasis).

¹¹⁴ “Portia in a different voice: Speculations on a woman’s lawyering process” 1985 (1) *Berkeley Women’s Law Journal* 39.

¹¹⁵ Menkel-Meadow 1985 at 52. The author rejects the inquisitorial process as an alternative as these procedures are also justice- or male-centred. See section 20(3)(a) of the Equality Act where provision is made for the referral of cases for alternative dispute resolution.

¹¹⁶ *Ibid.* Menkel-Meadow refers to this as the “ethic of inclusion”.

¹¹⁷ Menkel-Meadow 1985 at 52.

¹¹⁸ Menkel-Meadow 1985 at 53.

¹¹⁹ Menkel-Meadow 1985 at 54.

¹²⁰ Menkel-Meadow 1985 at 58.

resorting to rigid rules or universal Truths. Attempts are made in chapters four and five to highlight the benefits of this more caring approach to legal decision-making.

The ethic of care's emphasis on the social embeddedness of the self allows us to understand the extent to which our needs are inseparable from those of others. Let us consider once again the *Khosa* case and Mokgoro's reasoning as a concrete example of an attempt to protect the applicants from manifestations of technical, juristic violence. In this case, Mokgoro encourages us to carefully consider the stories of the applicants and the plight of children and the aged who would be left to suffer even more if not assisted. Our response to these stories defines who we are and our visions of the type of community we wish to be part of.

Our courts, now more than ever as institutions operating in a constitutional and transitional democracy, have an opportunity to open up spaces in which individuals and groups can be heard, perhaps for the first time. This approach to legal/moral judgment allows us to situate others and ourselves in our respective societal contexts and to ensure that equality becomes a reality and does not merely continue to exist as an abstract rule or legal formulation.

Despite the promises of a world made new in South Africa, Karin van Marle remains cautiously sceptical and correctly, in my view, problematises the Constitutional Court's continued reliance on neutral and objective affirmations of stereotypes – including depictions of women as caregivers, nurturers and mothers.¹²¹ She questions the judicial reliance *inter alia* on the rigid role of woman/mother as primary caregiver (*Hugo*¹²²), financially dependent (*Harksen*¹²³) and procreator (*Jordan*¹²⁴). She challenges this unfortunate tendency to generalise and argues for the recognition of an ethics of difference consisting of:

“differences that are not fixed, given and essentialised, differences that themselves can be challenged and displaced”.¹²⁵

¹²¹ “To revolt against present sex and gender images: Feminist theory, feminist ethics and a literary reference” 2004 (15:2) *Stellenbosch Law Review* 247.

¹²² 1997 4 SA 1 (CC).

¹²³ 1998 1 SA 300 (CC)

¹²⁴ 2002 11 BCLR 117 (CC).

In a provocative essay, Van Marle cautions against a hasty acceptance of gynocentric feminism and ‘classifies’ Gilligan’s work on the ethic of care as gynocentric. I have no argument with Van Marle’s reminder to be cautious, but wish to address some of her concerns about the use of Gilligan’s ethic of care in transformatory discourse. Van Marle herself indicates support for the argument that values of care should be given higher regard and that they should be incorporated into public discourse and life, and into political and legal decisions.¹²⁶ However, she opposes an essentialised affirmation of women as more caring and nurturing as this would ultimately strengthen current masculinist and exclusionary stereotypes and merely lead to the continued silencing and oppression of women and men. Again, I cannot argue with this approach. I do, however, in Van Marle’s own words, argue for dominant readings of Gilligan’s ethic of care to be “challenged and displaced”.¹²⁷

As mentioned, Gilligan herself has pointed out that care and justice cannot merely be placed in opposition to one another. It is indeed the case that Gilligan has often been read and interpreted (without much care and generosity) as offering us a rigid conception of justice and care as oppositional ethics, and that her work has been (mis)used to a large extent by cultural feminists to support the views that women are indeed more nurturing or caring than men. I wish, however, to offer a re-reading of her contribution to moral and ethical discourse. It is suggested that Gilligan has led (some of) us to the realisation that there are different voices in this world clambering for attention and that it remains our ethical responsibility to listen - and respond with care - to the stories these voices attempt to bring to our attention.

Upon this understanding, Gilligan’s work does not conflict with Drucilla Cornell’s call for “ethical attunement” where we are called upon to “tune in” to these different demands made upon us. Cornell asks of us that we take into consideration the

¹²⁵ Van Marle 2004 at 265.

¹²⁶ Van Marle 2004 at 253.

¹²⁷ Van Marle 2004 at 260.

complexities of actual relationships in our contemplations on care.¹²⁸ She thus convinces, through her own stories of being a daughter and mother, that attention should be paid to the “struggles of caring relationships”.¹²⁹ Van Marle reads this in opposition to the “passivity” of Gilligan’s ethic of care and affirms Cornell’s appeal that justice and care intersect with one another “in unforeseeable ways”.¹³⁰ I wish to submit here that care and justice are indeed complex values, which at their most interactive allow us to revolt against the traditional and given in ways that allow for becoming and a recognition of differences so central to Van Marle’s work.

The best way of supporting this point of view is by considering the judgment reached by the Constitutional Court in the *Jordan* case.¹³¹ The approach of the court in this case – one of four cases discussed in chapter four - has conventionally been interpreted as further entrenching perceptions of female sexual intercourse as caring, with the aim of procreation in mind.¹³² Along these lines, it has been argued that the court, in alluding to this understanding of the ethic of care, chose to condemn sex workers for their inability to maintain ‘caring’ and intimate relationships and for using sex as an economic tool divorced from emotion. Implicit in the court’s deliberations, sex should take place within the realm of safe and secure relationships where women can fulfil their roles as mothers. Be this as it may, I am unconvinced that the court understood the complexities of public manifestations of care and the need to consider carefully the needs and stories of the sex workers themselves. The court’s approach in this case, and its misrepresentation of the ethic of care, *perpetuates* the silence and invisibility of women who work in the sex industry. In my reading this is a *denial* of the ethic of care. In a caring and just community, informed by the ideal of *ubuntu*, we would be expected to recognise the humanity, equality and dignity of those who, unlike ourselves, choose (if they are indeed in a position to choose) alternate ways of being. We would be expected to provide constitutional protection to the socially

¹²⁸ Cornell *Between women and generations: Legacies of dignity* 2002 at 67.

¹²⁹ 2002 at 68.

¹³⁰ Cornell 2002 at 68 as quoted in Van Marle 2004 at 259.

¹³¹ *Jordan v S* 2002 6 SA 642 (CC).

¹³² See for example Van Marle 2004 at 247-248.

vulnerable as reflected in the *Khosa* case where Mokgoro draws our attention to the responsibility of creating, within constitutional imperatives, a community both just and caring and a morality of social concern. This recognition of a plurality of choices and a community of differences constitutes a continued struggle with difficult choices. Here care is perceived as a kind of *disposition* towards the world and to equally valued ways of being in the world.

In addressing to a certain extent Van Marle's plea for an ethics of difference, Ofelia Schutte maintains that, in order to achieve a breakthrough in communication, we need to combine the notions of the other as different from the self *and* the decentering of the self that results from the acknowledgement that such differences cannot be denied or assimilated.¹³³ Nevertheless she deviates somewhat from Van Marle's concerns by suggesting that this self-realisation then creates an ethical moment in which social interaction, narration and caring *may* become a possibility.¹³⁴

One of the ways in which we could create moments wherein we glimpse the other, is to recognise the incommensurability within. An ethics of alterity in this sense points to ways of knowing, far deeper than the type of thinking of dominant cultural speakers (men/white women) who perceive themselves to be the epistemic and moral centre of the universe, spreading their influence outwards. According to the ethic of alterity the self should find the time, the space and the opportunity to appreciate the stranger or foreigner within and without.¹³⁵

Schutte's explanation, however, fails to recognise the postmodern tragedy that the Other is not conceived within community and is a relation-without-relation where communication is *impossible*. The Levinasian philosophy of alterity¹³⁶ is open to

¹³³ "Cultural alterity: Cross-cultural communication and feminist theory in North-South contexts" 1998 (13:2) *Hypatia (Border crossing)* 43 at 47.

¹³⁴ Ibid.

¹³⁵ Schutte 1998 at 55. In order to face the stranger without, it is necessary for us to come to grips with the multiplicity within.

¹³⁶ See in general *Totality and infinity: An essay on exteriority* Lingis (trans.) 1969 and *Otherwise than being and beyond essence* Lingis (trans.) 1991.

complication as a result of the fact that the orientation towards the Other is valued precisely through being irreducible to the “concrete particularity of another who is visible only through the figures who stalk his text”.¹³⁷ Engagement with concrete others cannot therefore be figured within the philosophy of the Other as the latter is an abstraction – the *image* of the face and not the face itself. It is for this reason that I do not adopt, as Schutte does, the ethic of alterity and accordingly, I do not refer to the capitalised and ‘unattainable’ Other. I prefer to subscribe to the view that “sociality already marks the body of an-other to whom I am obligated”.¹³⁸

I wish to stress here that it is our ethical duty to remain sensitive to the demands made upon us whilst at the same time acknowledging the limits of the law and theory to fully respond. Be that as it may, we cannot comfortably escape the reality of our life-with-others and the effects these relationships have on our own humanity. The erasure of others – our refusal to care - marks the beginning of our own demise and the limitation of our own sense of freedom and belonging.

The style of thinking I endorse here entails an understanding of life-with-others informed by a sense of justice and a need for care. In addition, it is informed by an infinite (or indefinite at the very least) ethic of responsibility, where the creative power of the individual is both deepened and enhanced by being part of a community that takes support for people to heart. The idea is that in a just and caring community the sharing of forces will realise a shared humanity, which is a benefit beyond price.¹³⁹

¹³⁷ Ahmed *Differences that matter: Feminist theory and postmodernism* 1998 at 61. Despite criticisms levelled against Levinas, his contribution to continental philosophy cannot be dismissed out of hand and we need to heed his call when he reminds us that “[t]he Other (*Autrui*) is the end, and me, I am a hostage” (“Substitution (1968)” in Peperzak, Critchley and Bernasconi (eds.) *Emmanuel Levinas: Basic philosophical writings* 1996 at 94).

¹³⁸ Ahmed 1998 at 65.

¹³⁹ Cornell and Van Marle 2005 at 13.

3.5 Caring about others before the law

As explained above, the power of stories have transformative potential, but we need to take care that we are not laying a foundation for a new metanarrative to displace the old. In recent decades, postmodern and critical race feminists have stressed the need to think about issues of gender in conjunction with issues of race, class, disability, sexual orientation, and so on. We are warned to avoid the trap of generalising about the lives of women and thus contributing to an exclusionary feminist metanarrative. This critique of gender essentialism does not merely charge that essentialist claims about women are over-generalisations, but points out that these generalisations are hegemonic in that they represent only some (privileged) women's stories and problems as paradigmatic – thus once again leading to the exclusion of the narratives of marginalised others.

Of course at the mere mention of 'women' or 'femininity', the accusation of essentialism looms large – an accusation often levelled at Gilligan's attempts to voice the need for more relational thinking. Without analysing in any real detail the merits of what has been termed "strategic essentialism" which has a political function,¹⁴⁰ I wish to propose an alternative and powerful argument as put forward by Uma Narayan. She cautions anti-essentialists not to fall into yet another theoretical and practical trap, that of *cultural* essentialism:

“ ... I believe that this feminist injunction to attend to 'differences among women' sometimes takes questionable forms ... feminist efforts to avoid gender essentialism sometimes result in pictures of cultural differences among women that constitute ... 'cultural essentialism'”.¹⁴¹

Essentialist notions or stories of culture may lead to particular problems for 'third world' feminists, as the oppositional dichotomy between first and third world

¹⁴⁰ Spivak uses the term "strategic essentialism" in her famous and intellectually provocative essay "Can the subaltern speak?" in Nelson and Grossberg (eds.) *Marxism and the interpretation of culture* 1988 at 271. Spivak subsequently sums up the dilemma well in her understanding of concepts and theoretical principles not as rules but as tools and weapons of struggle. For an in-depth analysis of Spivak's complicated and uncomfortable relationship with essentialism, see Spivak with Rooney "In a word: *Interview*" in Schor and Weed (eds.) *The essential difference* 1994 at 157-184.

cultures leads once more to exclusion and oppression. In other words, the recent feminist project of attending to differences *among* women could easily develop into a project which endorses and replicates problematic and colonialist assumptions about the cultural differences between western and 'non-western' cultures and the women who inhabit them. Seemingly universal essentialist generalisations about women are displaced by culture-specific essentialist generalisations that depend on totalising concepts such as 'Western culture', 'non-Western culture', and so on. Numerous examples of such generalisations are also critiqued by postcolonial feminist, Chandra Talpade Mohanty, who points out that such texts assume that:

"women' have a coherent group identity within the different cultures discussed, prior to their entry into social relations. Thus Onivedt can talk about 'Indian women' while referring to a particular group of women in the State of Maharashtra, Cutrufelli about 'women of Africa', and Minces about 'Arab women', as if these groups of women have some sort of obvious cultural coherence".¹⁴²

New binaries thus replace the old and the cycle of violence and exclusion continues. Both gender essentialist and cultural essentialist discourses about differences often conceal their role in the production and reproduction of such differences, presenting these differences as something pre-given and pre-discursively 'real'.¹⁴³

While gender essentialism often conflates socially dominant norms of femininity with the problems, interests and locations of actual, particular women, cultural essentialism often conflates socially dominant cultural norms with the actual values and practices of a culture. *Internal* historical (and current) cultural criticisms and challenges need to be acknowledged. As Narayan puts it:

"[f]ailing to see that 'cultural imperialism' can involve both sorts of problems, attempts to avoid the Scylla of 'Sameness' often result in moves that leave one foundering on the Charybdis of 'Difference'".¹⁴⁴

¹⁴¹ Narayan "Essence of culture and a sense of history: A feminist critique of cultural essentialism" in Narayan and Harding (eds.) *Decentering the center: Philosophy for a multicultural, post-colonial and feminist world* 2000 at 81.

¹⁴² Mohanty "Under western eyes: Feminist scholarship and colonial discourses" in Mohanty, Russo and Torres (eds.) *Third world women and the politics of feminism* 1991 at 70.

¹⁴³ Narayan 2000 at 82.

¹⁴⁴ Narayan 2000 at 83.

In order to understand the dangers of cultural imperialism, we must consider the historical attitudes of colonialists towards life-giving forces such as *ubuntu*. The colonial encounter depended largely on a fear of difference – on sharp, virtually absolute contrasts between western and other cultures that did not assimilate easily. Achebe uses examples of colonialist writing to illustrate the damaging myths and fantasies about Africa which have developed into forms of universal truths about the inhabitants of our continent.¹⁴⁵ To illustrate, an English ship captain, John Lok wrote the following after his encounters with ‘negroes’:

“a people of beastly living, without a God, lawe, religion ... whose women are common for they contract no matromonie, neither have respect to chastitie ... whose inhabitants dwell in caves and dennes: for these are their houses, and the flesh of serpents their meat as writeth Plinie and Diodorus Siculus. They have no speech, but rather a grinning and chattering. There are also people without heads, having their eyes and mouths in their breasts,”¹⁴⁶

Achebe notes that Lok’s voyage to West Africa in 1561 provided an early model of what unfortunately, but almost inevitably, became a powerful and enduring narrative of the ‘native’.¹⁴⁷ Perhaps, from an anthropological viewpoint, this is the reason for the misconceptions surrounding the complexities of the African philosophy of *ubuntu*. What indeed could these “people of beastly living” teach rational and civilised men from the west such as Lok? During the brutal period of colonisation, indigenous knowledge systems and ways of life were considered inferior or even useless, and for this reason Achebe calls for a restorying of Africa, history and the world.

When embarking on a process of ‘restorying’ and re-imagining the past, we need to investigate how the meaning of values and ideals arise out of an engagement

¹⁴⁵ *Home and exile* 2003.

¹⁴⁶ Hammond and Jablow *The Africa that never was* 1992 at 20.

¹⁴⁷ Achebe 2003 at 46. Of course, the creation of metanarratives about barbarians was crucial to the need for westerners to assert their own superiority. As Cavafy (1904) states in his poem entitled “Waiting for the barbarians”:

“And now what shall become of us without any barbarians/These people were some kind of solution”.

with the past and how this engagement relates to the configuration of such values and ideals:

“Instead of seeing the centrality of particular values, traditions or practices to any particular culture as *given*, we need to trace the historical and political processes by which these values, traditions, or practices have *come to be deemed* central constitutive components of a particular culture.”¹⁴⁸

Cultures are fluid and change over time but persons (mostly men) in positions of social power construct them as static. Accordingly, social criticism is always necessary and there can never be reason to exclude critique or sites of resistance, even when dreaming of new ways of living the law. In giving expression to a longing for a jurisprudence rich enough for our constitutional democracy, we need to recollect and re-imagine *ubuntu* and other such ideals and values in African legal and ethical philosophy. This constitutes a long and arduous journey towards a democratic community of friendship which always remains yet to come – a “nuanced jurisprudence”¹⁴⁹ sadly far from being realised, even and especially within these pages.

Searching for the golden thread

hoe lank duur dit?
hoe lank vir 'n stem
om 'n ander te bereik¹⁵⁰

The story thus far has been a complex one, difficult to reduce to the textual requirements of this thesis. To (re)turn to the beginning we need to acknowledge the realities of domination and oppression. The dyadic nature of positivism (legal and otherwise) ensures that there is a dominant side of the dyad and a

¹⁴⁸ Narayan 2000 at 87.

¹⁴⁹ Cornell 2004.

¹⁵⁰ Excerpt from Krog “Land van genade en verdriet” in *Kleur kom nooit alleen nie* 2000 at 37. The translation of this poem can be found in Krog “Country of grief and grace” in *Down to my last skin: Poems* 2001 at 95 and the above excerpt reads as follows:

how long does it take
for a voice
to reach another

Krog refers in this poem of our country “held bleeding between us”. For this very reason the voices of others are straining to be heard.

subordinate side. Historically, the first part of the dyad is identified with superior 'masculinity' and the second part with inferior 'femininity' - the other of the white, middle-class male.

Traditionally, power, law and philosophy have silenced and excluded the different and the other and have subjected the singular to the universal and the event to the laws of necessity. It is submitted that uniqueness should be returned to its dignity, as the law is at its most imperialistic when it loses its specificity. In this returning we can reach a place where there is a continuous dialogue between legal texts and non-legal contexts which creates fertile ground for alternative jurisprudential thinking where we are reminded that legal judgments have an impact on our world. It is unavoidable that theories and laws have to be applied, but every application reduces the uniqueness of the other into an instance of a concept or a case or a norm. We could say then, that justice dwells in law but also challenges the law since the law must never forget the singularity of others who seek justice. Both inside and outside, justice is the horizon against which the law will itself be judged for its failings and for its forgetting of justice. This is the ethical, the limit, and also, paradoxically, the very opening we seek in order to listen with care to the stories of the oppressed and to embrace difference. Cornell has encouraged this type of thinking through theorising a philosophy of 'the limit' where she argues that the restrictions we face open up the possibilities for transgression and the *politics* of utopianism.¹⁵¹

As mentioned, stories and storytelling are powerful resources. It is nonetheless important to keep in mind that we cannot - and should not - speak *for* others, but we can create spaces in which the other can speak for herself and receive the attention she deserves. Listening to the complex narratives of others may provide new perspectives and may lead to the opening of our minds. Once minds have

¹⁵¹ In her argument for a transcendental jurisprudence, Cornell pays close attention to the call of the other. In terms of this construction, any ethical relation indicates the aspiration to a non-violent relationship with the Other. In *Justice miscarried* 1994, Douzinas and Warrington analyse Cornell's intervention into legal interpretation, where she emphasises the necessity of the 'beyond' and an honest commitment to the good (see Cornell *The philosophy of the limit* 1992). The authors point out that Cornell's positive suggestions for legal transformation are "at times, simply and depressingly positivistic" (at 205). Cornell, however, escapes orthodoxy in her understanding of 'the good' as a disruptive force where there is a reawakening of the ethical and a sense of justice, an approach clearly evident in her interactions with the philosophy of *ubuntu*.

been opened, we can reach a point where we no longer believe in the absolute Truth of our existing legal metanarratives. These metanarratives could in fact be displaced altogether by specific and located stories of unfair discrimination.

As I see it, our current legal system is predominantly reliant on an ethic of justice, which ethic requires objective, neutral and rational legal judgment. In order to achieve the 'correct' results, our courts have over the years developed procedures, which have succeeded in banishing subjectivity, dialogue, context, passion and emotion. The established language of the law requires (legal) speech to conform to the rules and there is little space for the particularities of the stories of others. If we accept the equal importance of care, not only in the private sphere, but also in public spaces, such as our courts, we could in this way enhance transformation. Through this transformation we could open up spaces for the telling of stories and the recognition of the differences reflected in and by these stories. As Van Marle maintains, the perspectives of equality best suited to the South African situation are those perspectives which "accept the fact of difference and recognise the significance of relationships and public space for equality".¹⁵²

An ethical relationship or ethic of relationships, embraced in the philosophy of *ubuntu*, demands that we listen to the other without preconceptions and without attempting to assimilate her otherness. Listening to one another in a "spirit of wonderment" – at the irreducible differences between us and, at the same time, at our sameness as *equal subjects in dialogue* – creates the promise of reconciliation and the hope of a truly different future.¹⁵³ Ultimately our ethical duty consists of paying close attention to others, without resorting to preconceived ideas of who the other is:

"Attention consists in suspending thought, leaving it available, empty and ready to be entered by its object ... thought must be empty, waiting, seeking nothing, but ready to receive in its naked truth the object that is about to penetrate it."¹⁵⁴

¹⁵² Van Marle LLD thesis 2000 at 392.

¹⁵³ See Irigaray "Questions to Emmanuel Levinas: On the divinity of love" in Whitford (ed. and trans.) *The Irigaray Reader* Whitford 1991 at 178.

¹⁵⁵ Weil as quoted in Tronto *Moral boundaries: a political argument for an ethic of care* 1996 at 128. See also Weil *Gravity and grace* 1952 and *Oppression and liberty* 1955. It is interesting to note that Weil utilises a masculine metaphor in her text – the 'penetration' of the object of attention.

We need to think afresh about who we are, what we want, and if we are willing to undertake the mammoth task of creating a world anew – a world where we have a sense of a shared community committed to the ideals of humanity and compassion.

3.6 Concluding this narrative with another

“... storytelling is indeed an art as lawful, and as vital, as eating.”¹⁵⁵

In his novel, *The Diamond Age* the science fantasy author Neal Stephenson explores, as a part of his story about neo-Victorianism in a future technological age, the nature of judgment.¹⁵⁶ I use this narrative here to illustrate the benefits of *ubuntu*, storytelling and care in adjudication:

"Judge Fang switched back to English. "Your case is very serious," he said to the boy. "We will go and consult the ancient authorities. You will remain here until we return."

"Yes, sir," said the defendant, abjectly terrified. This was not the abstract fear of a first time delinquent; he was sweating and shaking. He had been caned before.

The House of the Venerable and Inscrutable Colonel was what they called it when they were speaking Chinese. Venerable because of his goatee, white as the dogwood blossom, a badge of unimpeachable credibility in Confucian eyes. Inscrutable because he had gone to his grave without divulging the Secret of the Eleven Herbs and Spices. It had been the first fast-food franchise established on the Bund, many decades earlier. Judge Fang had what amounted to a private table in the corner. He had once reduced Chang to a state of catalepsy by describing an avenue in Brooklyn that was lined with fried chicken establishments for miles, all of them ripoffs of Kentucky Fried Chicken, Miss Pao, who had grown up in Austin, Texas, was less impressed by these legends. Word of their arrival preceded them; their bucket already rested upon the table. The small plastic cups of gravy, coleslaw, potatoes, and so on had been carefully arranged. As usual, the bucket was placed squarely in front of Chang's seat, for he would be responsible for consumption of most of it. They ate in silence for a few minutes, communicating through eye contact and other subtleties, then spent several minutes exchanging polite formal chatter.

"Something struck a cord in my memory," Judge Fang said, when the time was right to discuss business. "The name Tequila - the mother of the suspect and of the little girl."

"The name has come before our court twice before," Miss Pao said and refreshed his memory of two previous cases: one, almost five years ago, in which the woman's lover had been executed, and the second only a few months ago, quite similar to this one.

¹⁵⁵ Kearney 2002 at 150.

¹⁵⁶ Stephenson 1995 at 102-105.

"Ah, yes," Judge Fang said, "I recall the second case. This boy and his friends beat a man severely. But nothing was stolen. He would not give a justification for his actions. I sentenced him to three strokes of the cane and released him."

"There is reason to suspect that the victim in that case had molested the boy's sister," Chang put in, "as he has a previous record of such accomplishments." Judge Fang fished a drumstick out of the bucket, arranged it on his napkin, folded his hands, and sighed. "Does the boy have any filial relationships whatsoever?"

"None," said Miss Pao.

"Would anyone care to advise me?" Judge Fang frequently asked this question; he considered it his duty to teach his subordinates.

Miss Pao spoke, using just the right degree of cautiousness. "The Master says, 'The superior man bends his attention to what is radical. That being established, all practical courses naturally grow up. Filial piety and fraternal submission! - are they not the root of all benevolent actions?'"

"How do you apply the Master's wisdom in this instance?"

"The boy has no father - his only possible filial relationship is with the State. You, Judge Fang, are the only representative of the state he is likely to encounter. It is your duty to punish the boy firmly - say with six strokes of the cane. This will help to establish his filial piety."

"But the Master also said, 'If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishments, but have no sense of shame. Whereas, if they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good.'

"So you are advocating leniency in this case?" Miss Pao said, somewhat sceptically.

Chang chimed in "Mang Wu asked what filial piety was. The Master said, 'Parents are anxious lest their children should be sick'. But the Master said nothing about caning."

Miss Pao said, "The Master also said, 'Rotten wood cannot be carved'. And 'There are only the wise of the highest class, and the stupid of the lowest class, who cannot be changed'."

"So the question before us is: Is the boy rotten wood? His father certainly was. I am not certain about the boy, yet."

"With utmost respect, I would direct your attention to the girl," said Chang, "who should be the true subject of our discussions. The boy may be lost; the girl can be saved."

"Who will save her?" Miss Pao said. "We have the power to punish; we are not given the power to raise children."

"This is the essential dilemma of my position," Judge Fang said. "The Mao Dynasty lacked a real judicial system. When the Coastal Republic arose, a judicial system was built upon the only model the Middle Kingdom had ever known, that being the Confucian. But such a system cannot truly function in a larger society that does not adhere to Confucian precepts. 'From the Son of Heaven down to the mass of the people, all must consider the cultivation of the person the root of everything besides.' Yet how am I to cultivate the persons of the barbarians for whom I have perversely been given responsibility?"

Chang was ready for this opening and exploited it quickly. "The Master stated in his Great Learning that the extension of knowledge was the root of all other virtues."

"I cannot send the boy to school, Chang."

"Think instead of the girl," Chang said, "the girl and her book."

Judge Fang contemplated this for a few moments, though he could see that Miss Pao badly wanted to say something.

"The superior man is correctly firm, and not firm merely," Judge Fang said. "Since the victim has not contacted the police seeking return of his property, I will allow the girl to keep the book for her own edification - as the Master said, 'In teaching there should be no distinction of classes.' I will sentence the boy to six strokes of the cane. But I will suspend all but one of those strokes, since he has displayed

the beginnings of fraternal responsibility by giving the book to his sister. This is correctly firm."

Stephenson's Judge Fang and his associates use (Confucian) values in the adjudication of the case before them. In determining the legal fate of the boy before them, they consider his context: historical, economic and social. Judge Fang is an adjudicator who takes his responsibilities towards the boy before him seriously and he takes into careful account the life story of the young defendant. After contemplation over a bucket of Kentucky Fried Chicken, and taking into account the perspectives of his colleagues, Fang comes to the (ethical) conclusion that the boy is not 'rotten wood' as he looks after the education of his sister.

Stephenson presents us here with an imaginative alternative to liberal legalism and in his narrative seeks and finds the intersections between public space, the ethical and justice. The route of least violence is followed and the boy is not dismissed as useless to the community – a piece of rotten wood. This is the restorative moment in the narrative.¹⁵⁷

Confucianism, as illustrated in the narrative above, is concerned with the relations of individuals to one other. Indeed Confucianism, like *ubuntuism*, gives preference to moral cultivation and consensual social rituals over legal compulsion as a way of dealing with human problems. What the west could well learn from Confucianism is the concept of 'personalism' or selfhood, which is not the same as atomistic individualism but aims at a sense of self-fulfilment *within* society. Personalism expresses the worth and dignity of the person, not as an abstraction, but as self shaped and formed in the context of a given cultural tradition, its social community and its natural environment. A space inhabited and given shape and meaning by life stories and virtuous rituals.

The plurality, multiplicity and polyphony inherent in storytelling, described so well by Achebe, suggest a willingness to hear and consider others in relationship with

¹⁵⁷ De Bary, a scholar of Confucianism and human rights, also warns us that human rights should never be treated primarily as questions of law and order and the upholding of state authority. If this occurs, the individual is belittled and the community degraded. De Bary maintains that traditional Asian values should be developed as they hold tremendous value in human rights discourse. See

us. Keeping in mind the promises inherent in the art of storytelling, and the art of paying attention to connection, four court cases are critically analysed (deconstructed if you will) in the next chapter. These cases all deal with stories of unfair discrimination and illustrate the disturbing tendency of the courts to shirk responsibility and to overlook the personal and communal *impact* of their decisions when deciding on who deserves equality protection. The premise is that the denial of *storytelling* – a process that Cavarero refers to as “self-showing” - is the denial of the self, whose personal identity is intertwined with her life-story.¹⁵⁸

The theories alluded to and developed in this chapter form the basis of the analysis in chapter four. The underlying objective is to acknowledge and accept the potential of (re)birthing an indigenous jurisprudence of care in post-*apartheid* (South) Africa. We constantly need to find new ways to hear multiple, divergent and even discordant voices. In order to do so, we need to retrain ourselves to feel and heed the cacophony in new ways and their underlying (African) rhythms.

“In the distance the drums continued to beat.”¹⁵⁹

De Bary *Asian values and human rights* 1998. In the same vein, Mokgoro 1998 has urged us to explore the African value of *ubuntu* within the sphere of human rights.

¹⁵⁸ Cavarero 2000 at 23.

¹⁵⁹ Achebe *Things fall apart* 1986 at 32.

CHAPTER FOUR

FOUR STORIES

(Or listening, well-being and the future beyond substantive equality)

“The ... stories I share here are not important in themselves. We all have a thousand stories, and my life has had no more or fewer than others. But stories, carefully chosen and shaped by both the teller and the listener, can open gateways into our interior landscape, can reveal the meaning in our lives enfolded in the details and unfolded in their telling and conscious contemplation.”¹

4.1 Introduction

As highlighted in previous chapters, if we recognise the utopian possibilities inherent in the 'culture' of human rights we would be able to prevent the liberal, western discourse of rights from further excluding the marginalised and oppressed. This understanding of utopianism allows for continual change and transformation, which is seen by some critical thinkers to be the agenda of the South African Constitution.² The idea is that when we capture or conceptualise or over-define rights, we render them ineffective and static as they merely once again become part of a system (a new orthodoxy to replace the old) which continues to prescribe who is protected and who is left out.

Recognising the need to move beyond formal equality, South African courts have generally interpreted the equality provisions in section 8 of the interim Constitution³ and section 9 of the final Constitution⁴ to mean something more than just treating

¹ Oriah Mountain Dreamer *The invitation* 1999 at 6.

² See Van der Walt “Resisting orthodoxy – again: Thoughts on the development of post-apartheid South African law” 2002 (17:2) *SAPL* 258. In analysing two court decisions, Van der Walt concludes that these decisions reflect a tendency by courts to privilege “stability over change, security over novelty and normality over deviation” (at 268). He submits that these attempts to construct a new orthodoxy are not in keeping with the transformative spirit of the constitution or law-in-transition.

³ Act 200 of 1993.

⁴ Act 108 of 1996.

likes alike in the context of post-*apartheid* South Africa. Our courts have therefore interpreted the right to equality as the protection of the equal worth or dignity of the person.⁵ This led to the now famous concerns raised by Albertyn and Goldblatt where the authors put forward a strong argument in favour of an indigenous interpretation of the right to equality which is historically and socio-economically contextual and group-based.⁶ Since this critique, the Constitutional Court appears to have accepted this more 'indigenous' interpretation of substantive equality.⁷

In this chapter and the next, the aim is to challenge the current interpretation(s) of (gender) equality and to raise arguments in favour of an *ethical* interpretation of the right to gender equality in South Africa. Drucilla Cornell's understanding of equality as equivalence and her re-definition of feminism as ethical⁸ have been cultivated and brought into the South African context by Karin van Marle, who argues for an ethical interpretation of the right to equality.⁹ This thesis seeks to further enhance and develop this interpretation.

⁵ See *inter alia* the cases of *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC); *Harksen v Lane NO* 1998 1 SA 300 (CC) and *Pretoria City Council v Walker* 1998 2 SA 363 (CC).

⁶ "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality" 1998 SAJHR 248.

⁷ This development is critically evaluated in chapter five.

⁸ See *inter alia* *Transformations: Recollective imagination and sexual difference* 1993 and *At the heart of freedom: feminism, sex and equality* 1998. Cornell defends feminism as an ego ideal whereby we envision ourselves through real or imagined others. We imagine either that we have reached that ideal or that the ideal holds out a possibility of what we could become;

"Feminism envisions how we might be as free and equal persons in our day-to-day lives. As an ego ideal, it cannot be imposed. Nor can we say that one must act or be a certain way in order to be a feminist ... to understand feminism psychically is to defend its spirit of generosity because each man and each woman will internalise it as an ideal in her or his own way" (Cornell "Autonomy re-imagined" 2003 (8.1) *Journal for the psychoanalysis of culture and society* 144-145).

⁹ See Van Marle *Towards an ethical interpretation of equality* LLD thesis 2000 and "Some perspectives on sex, gender, difference and equality" 2000 (15:1) *SAPL* 461. In her most recent work, Van Marle poses questions as to whether the law and its systems are in fact *able* to accommodate or even recognise an ethics of difference. See "From law's republic to the heterogeneous public: On containment, the ethics of difference and reflexive politics" 2002 (17) *SAPL* 394. Van Marle's concern is the limits of the law and the fact that lawyers still cling to formalist and positivist approaches from the past. She explains that this occurs as the law itself cannot contain "that much contestation, disorder and difference" (2002 at 402). I would like to add here that it is precisely this limit that allows for contestation and struggle.

Four cases are critically evaluated below in order to expose the role of the courts in perpetuating gender stereotypes and metanarratives. If, as is illustrated, the stories of those before the law are dismissed in a relatively formal manner without compassion we are denying the relation between a life and the story of that life – which is a dismissal of life itself.¹⁰

I begin with the story of an imprisoned father in *President of the Republic of South Africa v Hugo*.¹¹ In this case, a prisoner and single parent, Hugo, challenged a presidential pardon by Nelson Mandela, which allowed the release from prison of all mothers with children under the age of twelve years. Hugo was the single father of a boy and his challenge was based on the fact that the pardon unfairly discriminated against him on the basis that he was a man and a father. The second case deals with sexual assault. *Carmichele v Minister of Safety and Security and Another*¹² is an undeniably complex case and in this discussion I concentrate on the court's pronouncements on the right to gender equality in the context of the stories related by the women living in Noetzie. The third case(s) touch on gender and culture and have been debated widely in academic circles. The trilogy of *Mthembu v Letsela cases*¹³ deals with the right to 'customary' intestate succession of women and girls. The subsequent failure of the courts to face this story led to homelessness and further gender oppression. In the last case, I turn to the plight of sex workers and their rights to gender equality. In the recent case of *Jordan v The State and Others*¹⁴ the majority of the court pronounced in a rather stereotypical manner that prostitutes are not unfairly discriminated against and that the criminalisation of prostitution is constitutional.

Four very different cases with one common denominator: the courts did not face their responsibility and did not listen carefully to the stories before them. As I have

¹⁰ Cavarero *Relating narratives: Storytelling and selfhood* Kottman (trans.) 2000 at 123.

¹¹ *Supra*.

¹² *Carmichele v Minister of Safety and Security and Another* 2001 1 SA 489 (SCA) and *Carmichele v Minister of Safety and Security and Another* CCT 48/00.

¹³ *Mthembu v Letsela and Another* 1997 2 SA 936 (TPD); 1998 2 SA 675 (TPD) and 2000 3 SA 867 (SCA).

¹⁴ *Jordan v The State and Others* 2002 11 BCLR 1117 (CC).

emphasised above, if we are to find moments of justice we need to recognise the value of listening to different voices and to move beyond our belief in - and reliance upon - metanarratives and stock stories about people we deem to be different from ourselves.

What should be remembered is that other is *always* other and inappropriable by I - you remain and therefore so do I. The art is to welcome the stranger by retaining the self. In this way, domination and control are not needed, but we learn to embrace that which does not automatically appeal to our Western logic and reason:

“It is when we do not know the other, or when we accept that the other remains unknowable to us, that the other illuminates us in some way, but with a light that enlightens us without our being able to comprehend it, or analyze it. To make it ours. The totality of the other, like that of springtime, like that of the surrounding world sometimes, touches us beyond all knowledge, all judgment, all reduction to ourselves, to our own, to what is in some manner proper to us.”¹⁵

I now turn to these stories In an attempt to uncover the ‘cover stories’ of law that obscure context, fade out subtexts and protect the texts of the powerful.

4.2 STORY ONE: The story of an imprisoned father

This is a story illustrating the legal shaping of parenthood – absent fathers and nurturing mothers. In *President of the Republic v Hugo*¹⁶ the interpretation of the constitutional right to gender equality failed as gender stereotypes were merely enforced by the Constitutional Court.

On 27 June 1994, President Nelson Mandela, and his two Executive Deputy Presidents, signed the Presidential Act No 17, in terms of which a special remission of sentence was granted to certain categories of prisoner, including all mothers in prison with minor children under the age of twelve years. Hugo was a male prisoner who was the father of a son under the age of twelve years. The mother of his child died while he was in prison. He sought an order declaring the

¹⁵ Irigaray *Between east and west: From singularity to community* Pluhacek (trans.) 2002 at 123-124.

¹⁶ 1997 (6) BCLR 708 (CC).

Presidential Act to be unconstitutional and directing the presidents to amend it in accordance with the provisions of the interim Constitution. He alleged that the Act violated sections 8(1) and (2) of the interim Constitution in that it unfairly discriminated against him on the grounds of sex or gender, and indirectly against his son in terms of section 8(2) because his imprisoned parent was not a woman.¹⁷

It was held by the Constitutional Court that Hugo had in fact been discriminated against as a man, but that this discrimination is *fair*.¹⁸ The fairness of the discrimination is premised on the fact that Hugo, as a man and father, did not belong to a historically disadvantaged group and because releasing fathers would be pragmatically impossible and would lead to a public outcry.¹⁹

In this case, Justice Richard Goldstone introduced the concept of 'equal dignity' to the right to equality, which resulted in Hugo being unsuccessful in his attempts as, according to the learned judge, his dignity had not been impaired.²⁰ Goldstone explained that the purpose of the prohibition on unfair discrimination is to create a society in which the inherent dignity of individuals is protected:

“The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect, regardless of their membership of particular groups.”²¹

However, Johan Kriegler, in his dissenting judgment, noted that the majority of the Court sought to reinforce gender stereotyping. He warns that perpetuating the notion that women are the primary caregivers of young children “is a root cause of

¹⁷ *Hugo supra*.

¹⁸ See Goldstone J in *Hugo* at para. 40-1.

¹⁹ Goldstone J in *Hugo* at para. 46.

²⁰ For diverse critical discussions of this case see Albertyn and Goldblatt 1998; Davis “Equality: The majesty of legoland jurisprudence” 1999 *SALJ* 398; and Fagan “Dignity and unfair discrimination: A value misplaced and a right misunderstood” 1998 *SAJHR* 220;

²¹ Goldstone J in *Hugo* at para 41. Goldstone adapted this view from the equality jurisprudence of the Canadian Supreme Court in *Egan v Canada* (1995) 124 DLR (4th) 609; (1995) 29 CRR (2d) 79.

women's inequality in our society".²² He further states that relying on this generalisation "is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely."²³

However, it is not only the freedom of choosing one's own identity that is of importance here. What is (of equal) importance is that Hugo was a single parent and the only parent of his son. In formulating their judgment, the majority of the Court did not seem to consider with any real care the complexities of the lives of Hugo and his son. In addition, there was no real contemplation of the vulnerability of women living under a patriarchal system of public/private dichotomies, where women are solely responsible for 'domestic' matters such as the nurturing of children.²⁴

Goldstone in fact admitted that the appellants relied on a generalisation (or stereotypical metanarrative) in the Act, namely that women are the primary caregivers of minor children, and that it would often be unfair for discrimination to be based on this particular generalisation. He then added that the court follows a substantive approach to equality by focussing on the difference between the genders:

"We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting on identical treatment in all circumstances before the goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality. A classification which is unfair in one context may not necessarily be unfair in a different context."²⁵

²² *Hugo* at para. 80.

²³ *Ibid.*

²⁴ *Hugo* was followed by *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) and *Harksen v Lane*.1997 (11) BCLR 1489 (CC), 1998 (1) SA 300 (CC). As Freedman "Formal versus substantive equality and the jurisprudence of the Constitutional Court" 2000 *THRHR* 314 puts it, both of the latter Constitutional Court decisions appear to reconfirm a more formal and individualistic approach to equality by once again placing dignity at the centre of the enquiry into unfair discrimination.

²⁵ *Hugo* at 729.

In reaching its conclusions, the Court stated that the President had acted in good faith and did not intend to discriminate unfairly as he had in mind the best interests of the children involved. It was however noted that this fact was not enough to show that the discrimination was fair. The following factors should also be considered: the group who has been disadvantaged, the nature of the power in terms of which the discrimination was effected, and the nature of the interests which have been affected by the discrimination.

In its reasoning the court considered the presidential pardon to be in the public interest. It argued that the release of a large number of male prisoners would cause a public outcry. It would have been unacceptable and impossible for the President to release fathers on the same terms as mothers. It argued that the rights of fathers were not restricted or limited in a permanent manner. Their rights were curtailed as a result of their conviction and not as a result of the Presidential Act. This meant to the court that Hugo's right to dignity or his sense of equal worth was not impaired. The court concluded that the impact on fathers was not unfair and that the respondent himself had no legally justified complaint.

There are a number of problems with the reasoning and the decision of the Constitutional Court in the above case. I follow Karin van Marle's ethical reading in my critique of the case.²⁶

Gender equality and gender stereotyping

In this case, the court reinforces a harmful stereotype on the grounds of addressing previous disadvantages and subscribing to a substantive interpretation of equality. There is a clear political aspiration in this case to address past inequalities and in this way future consequences are lost sight of. According to Van Marle, the court does not "experience, realise or take account of radical alterity or radical difference which is impossible to know and define and address".²⁷ The court thus "adheres to a comfortable difference".²⁸

²⁶ Van Marle LLD thesis 2000 at 249.

²⁷ Ibid.

²⁸ Ibid.

Johan Kriegler, in his dissenting judgment, is the only judge who seems to be aware of some of the difficulties of difference and the harmful effects of relying on generalisations. He addresses the case before him as well as its implications on our broader society. The majority, however, reinforce current stereotypes, albeit in order to be 'pragmatic'.

The Constitutional Court in this case did not allow us even the slightest glimpse of justice. In addition to Van Marle's reading, I submit that the application of a 'jurisprudence of care' would allow us to feel more vindicated - whatever the final outcome. It would be dangerous to assume that different thought processes would render a different, or better, outcome. But we would feel more comfortable with the choices made by the Court if these choices were premised on a more compassionate, transformative and future-oriented search for justice.

Hugo is a single father. Would it not be to the benefit of his son to have a parent present in his life? If we really *listen* to the stories of both father and son, how can we possibly turn our backs on the pain of separation? Perhaps we can do so in the name of the Law, where we generalise in an objective and neutral manner about the fate of others. But if we choose rather to care for Hugo, his son and their plight, and to understand the necessity of encouraging caring relationships between fathers and their children, we may have a more difficult time making our decision(s). Bringing the ethic of care into the public domain means that we would take seriously the responsibilities resting on both women and men to share the burden of caring and would encourage Hugo's attempts to fulfil his role as a father. This latter approach is more likely to avoid violence being done to this particular relationship as well as the many other different and complex relationships we encounter in day-to-day life.

Elsje Bonthuys uses the Namibian case of *Muller v President of the Republic of Namibia and Another*²⁹ to illustrate the benefits inherent in the type of contextual

²⁹ 2000 (6) BCLR 655 (Nm).

judgment I am referring to.³⁰ The *Muller* case is relevant here as it raises similar questions to those explored in the *Hugo* case, and the approach is similar to that taken by the South African Constitutional Court in the latter case. It thus faces up to a similar critique.

In the *Muller* case the court dealt with Namibian Legislation which allows women, upon marriage, to assume the surnames of their husbands without having to comply with any formalities.³¹ No such provision is made for men to informally adopt the surnames of their wives. *In casu*, a German man, who had married a Namibian citizen, wanted to adopt her surname. His reasons were that he was working in a jewelry business established by his wife and wanted his surname to reflect this connection. A child born from the marriage was also registered under her mother's surname and the husband wanted to have the same surname as his child.

His main challenge to the legislation was that it discriminated against him on the basis of sex, prohibited by article 10 of the Namibian Constitution. The court dismissed the application as the discrimination against Mr. Muller was considered by the court to be fair.

It was held that the male applicant (Muller) was not a member of an oppressed or previously disadvantaged group and his dignity, or that of his group, was not impaired by the legislation.³² Moreover, in the view of the court, the legislation fulfilled the important function of ensuring legal certainty about people's names. It reflected a long-standing tradition of married women assuming the surnames of their husbands. The applicant could, by following the formal procedures, set out in the Act, change his surname.³³

³⁰ "Equal choices for women and other disadvantaged groups" in Jagwanth and Kalula (eds.) *Equality Law: Reflections from South Africa and elsewhere* 2001 at 39.

³¹ Similar to South African legislation in this respect.

³² *Muller* at 668A-C.

³³ *Muller* at 668C-H.

Here we encounter similarities with Hugo's story. Hugo's constitutional challenge also failed for pragmatic reasons as well as on the basis that he did not belong to a previously disadvantaged group. It could be argued convincingly that Muller's story should have been listened to attentively and his choice *commended* in the light of future possibilities. Most men would not freely choose the surnames of their wives for a number of stereotypical reasons. Surely a move to make such an unusual choice should not be legally discouraged.

Both the *Hugo and Muller* cases reflect an adherence to substantive notions of equality. But herein lie the weaknesses of the judgments. On the above analyses, both men failed in their attempts to shatter gender stereotypes for so-called pragmatic and contextual reasons. From an ethical feminist viewpoint, violence was done in both cases and the current gender stereotypes of nurturing mothers and submissive wives were merely perpetuated, leaving no space for creativity and future possibilities. Both courts appeared to be in search of legal certainty, and in their efforts they rendered static the here-and-now at the expense of the 'as if' of caring fathers and husbands.

4.3 STORY TWO: The story of a woman seeking caring justice

The story surrounding the extended legal battle of Alix Jean Carmichele is a long and complex one.³⁴ This discussion is limited to a critical analysis of the three judgments and the gender implications thereof. The constitutional development of the common law test for wrongfulness is not discussed in any detail, and neither are the rules relating to the law of bail. The focus rests on the prevalence of sexual violence in South Africa, the legitimate fears of Carmichele and other women faced with the unrelenting threat of sexual violence, and the need for courts to consider life stories, rather than to hide behind rigid rules and sterile legal texts and tests.³⁵

³⁴ See *Carmichele* CCT supra. The Supreme Court of Appeal (formerly the Appellate Division) finally found in favour of Carmichele on 14 November 2003.

³⁵ See Goodrich "Maladies of the Legal Soul: Psychoanalysis and the Interpretation of Law" <http://www.wlu.edu/-lawrev/text/543/Goodrich.htm>.

After Francois Coetzee attacked Alix Carmichele in the village of Noetzie, near Knysna, she instituted proceedings for delictual damages in the High Court against the Ministers of Safety and Security and Justice and Constitutional Development.³⁶ Chetty J found that there was no evidence upon which a court could reasonably find that the police or prosecutors had acted wrongfully based on common law interpretations of wrongfulness. Carmichele's appeal to the Supreme Court was similarly dismissed.³⁷ Finally, she turned to the Constitutional Court for assistance.

Constitutional justices Laurie Ackermann and Richard Goldstone held that the *Carmichele* case was primarily concerned with the constitutional development of the common law delictual duty to act and went on to consider the facts of the case before them that emerged from evidence adduced in the previous two cases.³⁸

It appears uncontested that Coetzee had problems of a sexual nature from an early age and molested his niece when he was in his early teens.³⁹ In 1993 he committed an act of indecent assault on Beverley Claassen, an acquaintance, and was convicted. Less than six months later Coetzee attempted to rape and murder Eurona Terblanche, a seventeen year old school friend.

In his note to the prosecutor at the latter trial, the investigating officer stated that there was no reason to deny Coetzee bail, and recommended that he be released on warning. After his release, Coetzee, a three-time sexual offender, returned to Noetzie where he lived with his mother. It is clear from the facts that his return was a matter of great concern to the women of the small seaside community who believed that he would probably "do it again".⁴⁰

³⁶ *Carmichele* CCT at para. 2.

³⁷ *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA).

³⁸ *Carmichele* CCT at para 4.

³⁹ The facts as summarised here can be found in paras. 5ff of the Constitutional Court judgment.

⁴⁰ *Carmichele* CCT at para 14.

Later, upon his return from observation at Valkenberg Hospital, Coetzee again appeared in the Knysna magistrate's court. The case was postponed and he was released back into the secluded community.

Sometime at the end of June 1995, Carmichele saw Coetzee snooping around her friend Julie Gosling's home. As a result of this incident, Gosling reported their concerns to the Knysna police and was referred to prosecutor Dian Louw. According to her evidence Gosling told Louw:

“ ... Dian you've got to do something about this guy, there must be some law to protect society, not necessarily me or people at Noetzie and she said to me there was nothing she could do.”⁴¹

Carmichele and Gosling raised the matter once more with Louw who claimed that she was powerless to do anything about their fears and concerns. On Sunday 6 August 1995 Francois Coetzee brutally attacked Alix Carmichele at Julie Gosling's home.

The above story lead to Carmichele's constitutional battle.

Finding solace?

It is interesting to note at this point that the High Court and Supreme Court based their arguments on a strict distinction between law on the one hand, and politics and morality on the other. Carmichele was unsuccessful in her claim in these courts because it was held that there was no legal duty to protect her in terms of existing common law principles (formal legal texts and precedents). This approach is reflective of a positivistic approach to the law and legal decision-making. A positivistic approach, as contrasted with an ethical approach, determines that legal reasoning excludes moral or normative elements. In other words, judges are required to concentrate on structural and procedural rules and there is no room for serious considerations of the *social impact* of the judgment.

⁴¹ *Carmichele* CCT at para. 22.

It is strongly suggested here that the experiences of Carmichele and the women living in Noetzie were rendered invisible in the decisions of the High Court and Supreme Court, where the law and its rules overshadowed their pleas for a more caring justice. On a close reading of these judgments, the courts relied on *existing rules* and showed no understanding of the need for a transformative and future-oriented justice. When faced with the story of Alix Jean Carmichele, they chose to cling to the common law in determining that the police and prosecutors do not have a legal duty to protect her, and thus did not act wrongfully. When turning a blind eye to the fears expressed by Carmichele and the other women at Noetzie, the courts failed in their responsibility towards many women who lack the freedom to develop their human potential because of the limiting power of fear.⁴²

These cases are therefore fundamentally about the continued subordination of women and the failure of our legal system to take the predicament of women seriously – to really *listen* to them. Coetzee was a sexually violent man. In his own admission he was not able to control his sexual impulses and rushed home to masturbate after seeing a woman in a bikini. Over and above this, he was involved in three previous recorded incidents of sexual violence. The women of Noetzie, including his mother, were concerned about his presence within the small community and voiced these concerns to the police and prosecutors in their area. Faced with these stories, the latter chose to do nothing.

In her particulars of claim to the Constitutional Court, Carmichele contended that the members of the South African Police Services and the prosecutors owed her a legal duty to:

“... ensure that she enjoyed her constitutional rights of inter alia the right to life, the right to respect for and protection of her dignity, the right to freedom and security, the right to personal privacy and the right to freedom of movement.”⁴³

⁴² Ensler, the author of *The vagina monologues* 2001, believes that “[i]n order for the human race to continue, women must be safe and empowered. It is an obvious idea, but like a vagina, it needs great attention and love in order to be revealed”. (at xxxvi, emphasis in original). According to Ensler, women should call upon the state not only to *listen* to their voices of pain, not only to *hear* their voices, but also to take *action* when faced with pleas for safety and respect.

⁴³ *Carmichele* CCT at para 27.

In addition, Carmichele submitted that both the High Court and the Supreme Court erred in not applying the relevant provisions of the Constitution in determining whether the police or the prosecutors had a legal duty to protect her and the other women in the community. In particular, she relied on the constitutional obligation to “develop the common law” with due regard to the spirit, purport and objectives of the Bill of Rights.⁴⁴ More specific to this analysis, it was submitted that the interim Constitution imposed a particular duty on the state to protect women against violent crime in general and sexual abuse in particular.⁴⁵ The court was referred to the following statement in *S v Chapman*:⁴⁶

“Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights.”

Taking into consideration the protection of women and children against sexual violence, the Constitutional Court recommended that the net of unlawfulness in delict should be cast wider.⁴⁷ In reaching this conclusion, the court emphasised that few things could be more important to women than to be free from the threat of sexual violence – arguably a precondition to the attainment of gender equality.⁴⁸

In their judgment Ackermann and Goldstone make particular mention of the fact that there were very few women living in the seclusion of Noetzie and that these

⁴⁴ Section 35(3) of the interim Constitution makes provision for the development of the common law when promoting the ‘spirit, purpose and objects’ of the Bill of Rights.

⁴⁵ In *Osman v UK* (2002) 29 EHRR 245 the court held that in order to show a violation of a positive state obligation, the applicant must establish that the authorities failed to do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. In the *Osman* case the facts were quite extreme. It concerned the alleged failure by the police to protect the applicants and their families from an obsessed schoolteacher. The European Court found that there was no violation despite a number of varying signals and the half-hearted efforts of the police to exercise control over the schoolteacher. See the partly dissenting opinion in the commission decision of Trecshsel at 293.

⁴⁶ 1997 (3) SA 341 (A) at 344j–345B as per Mohamed CJ, Van Heerden JA and Olivier JA.

⁴⁷ *Carmichele* CCT at para 57.

⁴⁸ *S v Chapman* 1997 (3) SA 341 (A) at 345C-D.

women were concerned about their safety as it was known that Coetzee tended to choose victims familiar to him.⁴⁹

Critics of feminist readings of this case maintain that the rights and values of dignity and equality encompassed in the Constitution belong to both women and men and that men too deserve protection from violence. There is of course no doubt that men also deserve protection, but the realities of lives in this country reflect that women and children are far more vulnerable to the threat of sexual violence, as illustrated by extracts from the following poem:

Once again it is not safe to be a girl
Much less a woman
on a street late at night
or at any time of day
...
And if it is my body,
Broken in the street,
Will you care?
And then,
What will you do?⁵⁰

Formal equality requires that we treat men and women the same, but the theory of substantive equality creates the space for taking into account the social, political and economic realities of our lives – the reality of sexual assault for instance. However, Karin van Marle argues that theories of substantive equality as adopted in the final *Carmichele* judgment still do not go far enough.⁵¹

We can no longer render insignificant the suffering of those who face us, and for this reason the stagnant and universal application of legal rules is not enough, as is evidenced from Carmichele's original efforts to be heard. Admittedly, the approach of the Constitutional Court in *Carmichele* is an improvement on the traditional positivistic approach of the High Court and Supreme Court. But the Constitutional Court did not go far enough as it was once again bound to its adopted jurisprudence and the idea of substantive **equality. If we cast wider the**

⁴⁹ *Carmichele* CCT at para. 63.

⁵⁰ Pearson "A Libation for Sakia" 2003 (58) *Agenda* 27ff.

⁵¹ See, amongst others, Van Marle LLD thesis 2000 ; "An "ethical" interpretation of equality and the Truth and Reconciliation Commission" 2000 *De Iure* 248 and "Equality: An ethical interpretation" 2000 *THRHR* 595.

legal test for wrongfulness, all that we are doing is to replace one objective, neutral and universal rule or truth with another, and in this way we are led to believe that we have achieved what is necessary to solve the problem. What is preferable is a continuous search for ethical equality, which would entail a realisation that the attainment of justice is necessary but *always already postponed*.

The legal and ethical affirmation of this near limitless responsibility and the recognition of an overtly public duty of care may create a sense of discomfort. But in learning to live with this discomfort and uncertainty there also lies a valuable lesson: learning to really *listen* to stories of fear and vulnerability may lead us along a path to justice. In fact, the literary and verbal imaginings of individuals may be all that we have to go on as we undertake our journey and (re)consider our choices and responsibilities within our communities.

The women in Noetzie were fearful of their safety and voiced this only to be told that the law has no space for their concerns. If we heed Drucilla Cornell's call for a more nuanced constitutional jurisprudence in South Africa, we would not be able to ignore these fears.⁵² We would rather be placed in a position were we long for a society in which all women are rendered capable of realising their full humanity in and through their interactions with others.⁵³ Turning to *ubuntu* thinking, the

⁵² Cornell "A call for a nuanced constitutional jurisprudence: Ubuntu, dignity, and reconciliation" 2004 (19) *SAPL* 661.

⁵³ Ahmed *The cultural politics of emotion* 2004 writes about the effects of the production of feminine bodies as fearful:

"Fear works to contain bodies within social space through the way it shrinks the body, or constitutes the bodily surface through an expectant withdrawal from a world that might yet present itself as dangerous ... such feelings of vulnerability and fear hence shape women's bodies as well as how bodies inhabit space" (at 70).

Carmichele's body was contained and constrained by fear, and it is our full responsibility to ensure that the stunting effects of fear do not continue to bind her. Ahmed's argument, however, takes a different turn in her analysis of the global economics of fear since 11 September 2001. She notes that the very naming of "terrorism" has moved the world at large into a state of insecurity and that this fear of the Other and love of the same has resulted in a revival of concepts of community and solidarity (at 72). It is indeed true that the new insistence on being 'with us' against the Other (the terrorist) can be seen as an exclusionary community of vulnerability and fear. I would submit here that the community of care envisioned in *ubuntu* philosophy is not necessarily a defensive clustering-together in order to jealously guard against otherness - not a huddling together in fear - but rather an open community encouraging interaction and *exposure* to others. In fact, later in her book, Ahmed does describe a different conception of being-together "[t]hrough the work of listening to others, of hearing their pain and the energy of their anger, of learning to be surprised ... through all of this, a 'we' is formed, an attachment is made" (at 188).

promise of justice offered to us by the Constitution consists of a promise of a kind of community that allows for the freeing of human potential. This is a kind of community committed to both justice and care, where we sustain one another. This leads to the conclusion that society as a whole is demeaned when women such as Carmichele are told that their stories and fears do not matter. If such an approach were adopted by the Constitutional Court, it would assist in adding to new and creative interpretations of the right to equality that cannot be (re)solved by liberal human rights discourse. Emphasising the connections between individuals and the community encourages an understanding of *ubuntu* as an ethical ideal and would remove feelings of legal ambivalence when responding to the concerns of women living under threat.

As argued in chapter three, our courts have been reluctant to embrace *ubuntu* as a constitutional value/ideal. This is once more illustrated in the case of *NK v Minister of Safety and Security*⁵⁴ where the Constitutional Court confirmed its approach in *Carmichele* when determining that women are entitled to live in a society uninhibited by fear. In the latter case, the court endorses a substantive interpretation of equality in concluding that Ms K was entitled to protection from sexual violence.⁵⁵ In justifying her conclusions Justice Kate O'Regan emphasised that uniformed policemen owe members of society a special duty of care. Once again, I do not believe the court went far enough in fulfilling its transformative mandate. Faced with Ms K's story of abduction and rape, the court needs to stress the constitution's requirement that everyone must be treated with care and concern within a democratic society based on the values of dignity, equality and freedom. The need for human interdependence, respect and concern is a crucial consideration and ethical directive which cannot be ignored or reduced to technical legal discussions as to whether policemen are wearing uniforms or not or on duty or not when raping women. These issues are peripheral to the attainment of a more sweeping sense of responsibility.

⁵⁴ CCT 52/04 decided on 13 June 2005.

⁵⁵ *NK* at paras. 14-16.

In engaging with the interactive ethics of *ubuntu* and in our search for different views of the past and the future, the stories of Alix Jean Carmichele and Mrs K should serve as reminders of many similar - and different - journeys in a landscape of blood and tears.

4.4 STORY THREE: The story of a mother and daughter trapped in culture

“If only your ears were not so formless, so clogged with meaning(s), that they are closed to what does not in some way echo the already heard.”⁵⁶

When Mama Mthembu approached the courts to consider her dilemma, she was ‘listened’ to through the sound baffles of legal technicalities and precedent.⁵⁷ Not once was her story acknowledged. In fact, in attempting to escape the complexities of this story, the adjudicators tended to resort to a form of cultural relativism which failed to adequately address her particular circumstances – as sound as their intentions may have been. They remained caught in the dichotomous trap of gender equality versus cultural recognition where one excludes the other.

In the cases of *Mthembu v Letsela* the adjudicators were clearly reluctant to comment on the validity of customary laws of succession which exclude women from intestate inheritance. Due to this reluctance, Mama Mthembu and her young daughter, Thembi, were expelled from their family home by Thembi’s paternal grandparents and left homeless.⁵⁸

There has been much-heated debate in South Africa recently concerning the apparent conflict that arises between the right to culture and the right to equality.⁵⁹

⁵⁶ Irigaray *This sex which is not one* Porter and Burke (trans.) 1985 at 112-113.

⁵⁷ *Mthembu v Letsela* (a trilogy).

⁵⁸ *Sunday Times* newspaper 13/08/2000.

⁵⁹ See, amongst others, Kerr “Inheritance in Customary Law under the Interim Constitution and under the present Constitution” 1998 *SALJ* 262 and Maithufi “The constitutionality of the rule of primogeniture in customary law of succession: *Mthembu v Letsela* 1997 2 SA 936 (T)” 1998 *THRHR* 142. The right to equality is entrenched in section 9(4) of the final Constitution (Act 108 of 1996) and the Constitution itself commits South Africa and its people to the values of unity, human

Since 1994, our courts have been under a constitutional mandate, not only to observe customary law and apply it where necessary, but also to develop it in accordance with constitutional imperatives. It is submitted that in following their mandate to develop laws, courts should recognise the non-static nature of customs as social phenomena and the impact which customs have on individuals and their communities. This could have been achieved in the *Mthembu v Letsela* cases, but the adjudicators in all three cases clutched at technical straws and, in my view, failed to do justice to the stories told.

In these cases, Mthembu and her lawyers chose, quite bravely, to launch a full frontal attack on the African customary law of intestate succession, and in particular the rule of primogeniture, whereby the intestate estate devolves to the eldest son or male relative upon death. Mthembu argued that the rule unfairly discriminates against her daughter on the basis of gender, and further that the court should find the customary law of primogeniture unenforceable for violating public policy. Failing this, she requested the court to order the first respondent to carry out his duty of support and to allow her and her child to continue living in the family home. Letsela contested the application by maintaining that he was the rightful heir to the intestate estate of his son, and further alleging that customary law did not require the heir to maintain the applicant and her daughter, as there was no valid customary law marriage in this case.

In Mthembu's first attempt,⁶⁰ the court found, after taking into account and balancing the provisions of section 8,⁶¹ section 31⁶² and section 33⁶³ of the interim Constitution, that it is "difficult to equate this form of differentiation between men and women with the concept of 'unfair discrimination'", for a duty to provide

dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism. (The right to equality was previously entrenched in section 8 of the Interim Constitution, Act 200 of 1993). Both the right to equality and the right to culture are protected in the final Constitution. The latter is entrenched in section 211(3) that enjoins all courts to apply indigenous law as far as it is applicable subject to the Constitution and existing legislation.

⁶⁰ *Mthembu v Letsela* 1997 SA 936 (T).

⁶¹ The right to equality.

⁶² The right to language and cultural life.

sustenance and shelter is a corollary of the system of primogeniture.⁶⁴ In this case the court relied on the constitutional entrenchment of the right to participate in a cultural life of one's own and concluded that the customary law of intestate succession passes constitutional muster.⁶⁵

The court further held that one cannot find in favour of the allegation that the rules of intestate customary succession violate the right to gender equality, because the concomitant duty to support refutes the presumption of *prima facie* unconstitutionality contained in the equality clause. The judge, however, felt himself unable to make a final decision on the matter, as he was unsure on the 'papers' as to whether Mthembu has been married to the deceased by customary law, or that she had lived with him as a putative spouse. The matter was subsequently postponed in order for oral evidence to be heard on the issue.

In a second attempt, both applicant and respondent chose, in a somewhat risky move, *not* to adduce oral evidence.⁶⁶ The matter was to be determined on the basis that there had been no valid customary law marriage and that Thembi had been born out of wedlock (despite the fact that part of the *lobolo* had already been paid).⁶⁷

Mama Mthembu once again invited the court to develop the customary rule of intestate succession to include women and children other than the eldest son in terms of section 35(3) of the interim Constitution. It was argued that the value of equality lies at the heart of our new constitutional dispensation and that this right must be protected.⁶⁸ It was further submitted that the customary rules of intestate succession are profoundly out of keeping with the spirit, purport and objects of the Bill of Rights as a result of the fact that they are founded upon stereotypical

⁶³ The limitation clause.

⁶⁴ *Mthembu* (1) at 945H.

⁶⁵ Section 31 of the interim Constitution and s30 of the final Constitution.

⁶⁶ *Mthembu v Letsela* 1998 2 SA 675 (T).

⁶⁷ *Mthembu* (2) at 677H.

⁶⁸ *Mthembu* (2) at 684G-I.

societal attitudes which relegate women to subservient (social and economic) roles within their communities and families.⁶⁹

The court generously agreed that gender stereotypes should not remain unchallenged, but also held that the rule of primogeniture should not be considered in isolation. This rule is an integral part of the greater indigenous family law system and it carries with it a concomitant duty to support the widow and her children. It was held that Thembi's disqualification is based on the 'fact' of her illegitimacy, and not the fact that she is a girl-child. The adjudicator in the second *Mthembu* case thus also declined the invitation to develop the customary rule of succession. He concluded that such development should be left in the hands of Parliament, or, if necessary, be dealt with on a case-by-case basis.⁷⁰ The court unfortunately did not expand upon this latter contention.

In addition, the court held that it could not accede to the invitation to declare the rule invalid based on principles of 'public policy' as this would be applying western norms to a system still adhered to and applied by many African people.⁷¹

The case then went on appeal and the constitutional challenge once again failed.⁷² In this third attempt, it was again argued that the courts should develop the rules of customary intestate succession in terms of s 35(3) of the interim Constitution. Once again the court held that it would not entertain an invitation to develop the rule as Thembi may ultimately have rights of succession in her mother's family. The court also declined to accept the invitation to declare the indigenous law rule of male primogeniture repugnant to public policy and the principles of natural justice.⁷³ Lastly, the court found itself ill-equipped to deal with the case owing to a "lack of information".⁷⁴

⁶⁹ *Mthembu* (2) at 680H-I.

⁷⁰ *Mthembu* (2) at 686H-I.

⁷¹ *Mthembu* (2) at 688C-D.

⁷² *Mthembu v Letsela* 2000 3 SA 867 (SCA).

⁷³ *Mthembu* (3) at para. 43-44.

⁷⁴ *Mthembu* (3) at para. 40-43.

The story continues for anyone to hear

“ ... the Constitution should assist us in creating a home for the other as (s)he is.”⁷⁵

That is the end of the story. Or is it? Was the story ever told or heard? Here three different courts were faced with Mama Mthembu's dilemma, and not one of them engaged with her in dialogue as to *why* she experienced the rule of primogeniture as gender oppressive or as unfair gender discrimination. The courts tended rather to adopt a 'hands off' approach to customary law and refused to stare for too long into the abyss. Perhaps the adjudicators needed to be reminded that, not only does customary law now enjoy constitutional recognition on par with common law, but that the Constitution also places a mandate on the courts to apply and *develop* customary law. This mandate must be taken as seriously as the mandate to develop the principles that underlie the common law, as was eventually confirmed by the Constitutional Court in the case of *Carmichele*.⁷⁶ Both systems are thus recognised, but neither is beyond constitutional, social or political critique. Both systems should therefore be engaged with on a critical level in order to determine whether their respective rules lend themselves to the continued oppression of socially marginalised groups such as Black women.

It is contended here that the 'living' customary law attaches more importance to the interests of the dependants than to the rights of the heir (something the court did not do).⁷⁷ Issues such as who needs the property should accordingly guide and influence the court's decision. The *impact* of the decisions was, however, harmful to both mother and child as a result of the way the enquiry was conducted and because of the lack of 'evidence'.

Lawyers of course cannot escape the metaphysical difficulties of such cases and continue with a 'business as usual' attitude. It is true that any call for the

⁷⁵ Du Plessis "Legal and Constitutional means designed to facilitate the integration of diverse cultures in South Africa: A provisional assessment" 2002 (3) *Stellenbosch Law Review* 367 at 386.

⁷⁶ See case discussion and critique in section 4.3 above.

⁷⁷ See in general Mbatha "Reforming the Customary Law of Succession" 2002 (18) *SAJHR* 259.

development of the law should be cautiously dealt with and that community values should be considered so that the development of law remains in harmony with these underlying values. The submission here is that these values may be discovered by listening to the narratives of people who live by these values and not merely by referring to stock stories.⁷⁸

Gardiol Van Niekerk illustrates the importance of deviating from formal, inflexible court proceedings by referring to first two *Mthembu v Letsela* judgments.⁷⁹ She asks whether the court would have come to the same conclusion if it had heard the story of Thembi and her mother, and whether the real stories would have put the written material into proper perspective. In these cases, the issues were swamped by legal technicalities unfamiliar to indigenous law. *Reconciliation or the restoration of harmony* is at the heart of African adjudication, which is an informal and relaxed process, which has as its aim the restoration of harmony within the community.⁸⁰ Van Niekerk thus questions the use of application proceedings where indigenous law is at issue. In application proceedings the court must rely on written documents without affording an opportunity to the parties to tell their stories. The possibility of hearing counter-stories, which may challenge stock stories, is reduced to a minimum. The courts should rather encourage the recounting of personal stories.

Hayden White further submits that in order to understand another culture, one needs to listen to the stories of individuals who live by those customs and traditions.⁸¹ *The values underlying indigenous law* should be taken into account when reforming the law to bring it into line with constitutional norms. Traditional

⁷⁸ In the second and third *Mthembu* cases the court called upon the Legislature to reform the indigenous law of succession. The Amendment of Customary Law of Succession Bill B108-198 has been drafted and, should it become law, will amend the indigenous law of succession to conform more to the values underlying the Constitution. In the process of drafting the Bill, consultations were held with traditional and religious leaders and rural women's movements within a period of less than one year. Some commentators have argued that, although the Bill is set to ensure greater gender equality in the customary law of succession, the legal reforms have the potential to infringe upon the 'communitarian ideals' of indigenous family law. See Van Niekerk "Indigenous law, public policy and narratives in the court" 2000 *THRHR* 403 at 413.

⁷⁹ "Indigenous law and narrative: Rethinking methodology" 1999 *CILSA* 208.

⁸⁰ Allot "African Law" in Derrett (ed) *Introduction to Legal Systems* 1986 at 145.

law is an oral, living law which has been reduced to writing by colonialists and thus been distorted. As a result, the literatures on customary law reflect a western perception of the law, and in the process stock stories about indigenous law do not correctly reflect the living law as practised within communities.

Accordingly, Van Niekerk submits that one of the ways in which to change these existing stock stories in order to reflect realities, is simply to listen to the untold stories of the women and children who have been marginalised in indigenous law. In this manner, the telling of counter-stories challenges the present understanding and application of indigenous law. Lisa Sarmas submits that

“the telling of counter-stories [,] is seen as a means of challenging dominant legal stories...thereby transforming the legal system so that it is more inclusive, and responsive to the needs of outsider groups”.⁸²

Returning to the cases of *Mthembu v Letsele*, Van Niekerk agrees with the court that the indigenous law of succession should not be interfered with by applying western norms to indigenous law, but she also submits that the development of customary law rules should lie in the hands of the courts and not in the hands of the Legislature or Parliament. Each case should be judged on its own merits, taking into account the specific circumstances of the case and the needs of the parties involved. General reform by the Legislature cannot cater for individual needs and specific circumstances.⁸³

According to some critical legal scholars, human rights do not exist prior to, or independently of, the political process and public dialogue.⁸⁴ Rights could thus be interpreted as the expression of human connectedness and not as means to protect us from others. We need, as the Constitution requires of us, to subject our

⁸¹ *The content of form, narrative discourse and historical representation* 1987 at 1.

⁸² Sarmas “Storytelling and the law: A case study of *Louth v Diprose*” 1994 *Melbourne University LR* 701 at 703 (my emphasis).

⁸³ See Van Niekerk 1999 at 226 where she criticises the Amendment of Customary Law of Succession Bill B109-98 which provides that if a person in a customary law marriage dies without a will, succession takes place in accordance with the general (western) rules which regulate intestate succession. The Intestate Succession Act 81 of 1987 is made applicable with some minor adaptations. This legislative amendment would, in her opinion, have far-reaching consequences for millions of people in South Africa.

traditional assumptions to a transformative critique. Judges must justify the choices they make and outline the imaginative processes that underlie the making of such choices. Therefore, for example, if the right to a particular culture is to be preferred to the rights of those women affected by its practice, adjudicators must take care to justify their conclusions in making such hard choices. The answer is not to avoid the call for justice altogether in the name of the Law of the Father.

All three of the above judgments intimate a readiness to recognise the customary law of intestate succession based on the principles of primogeniture and heir responsibility. Lourens Du Plessis states that these judgments lean towards a trusting recognition rather than a critical questioning of customary law, “lest traditionalist lifestyles be dismissed in a high-handed, condescending manner”.⁸⁵ The central problem with the judgments, however, is that the court failed to fully acknowledge the plight of mother and daughter.

Most disturbing about this is the fate of Thembi, and the fact that she and her mother were left homeless as a direct result of the failure of the adjudicators to make informed and responsible choices. In fact, the adjudicators were at times quite glib about the right to gender equality. In the first judgment, Le Roux J intimated that the customary law of intestate succession, insofar as it encroaches on the rights of women (and children born out of wedlock) to equality, may be seen as a constitutionally passable limitation to the said right in terms of the general limitation clause in the Bill of Rights.⁸⁶

This is his somewhat surprising explanation:

“There are other instances where a rule differentiates between men and women, but which no right-minded person considers to be unfairly discriminatory, for example the provision of separate toilet facilities”.⁸⁷

⁸⁴ See in general Douzinas *The end of human rights* 2000.

⁸⁵ Du Plessis 2002 at 367.

⁸⁶ Section 33 of the Interim Constitution.

⁸⁷ *Mthembu* (1) at 946B.

In reality, hardest hit by the judgment was a girl child who had no choice in the matter but to be subjected to customary law. Thus this “over-recognition” of the customary law of intestate succession did the law, the community and the individuals no good.⁸⁸ The three judgments present us with an either/or situation intimating that customary law would cease to exist if tested against the underlying values of the Constitution, and should thus be left to its own devices - as should the people who 'choose' to subject themselves to such laws.

In her discussion of these cases, Likhapha Mbatha draws our attention to the fact that our courts do not always see the creation of a place of well being (a home) for the other as (s)he is as their constitutional duty.⁸⁹ In essence, the unwillingness of our courts to push the boundaries of the existing law can and will lead to negative effects on the lives of real people.⁹⁰ By ignoring the consequences of the law they choose to apply on people's lives, the courts cause harm and the impact of their decisions remain violent – and thus unethical - in nature.

Subsequent to the *Mthembu* tragedy, the Constitutional Court was finally faced with the issue of male primogeniture in *Bhe v Magistrate, Khayelitsha and others*.⁹¹ In this case the majority of the Court held that this rule of customary intestate succession is unconstitutional and thus should be “struck down”. In my analysis of this judgment, I remain unconvinced that the Court managed to fully endorse a jurisprudence of ethical care.

A legal decision both fair and tragic

“The promotion of a democratic community of friendship that always remains to come, even as we seek to bring it into being today, brings a nuanced jurisprudence that entails a complex reconciliation of the inevitable tensions that makes it

⁸⁸ Du Plessis 2002 at 376.

⁸⁹ Mbatha 2002 at 265. See also Moseneke “The fourth Braam Fischer memorial lecture: Transformative Adjudication” 2002 (18) *SAJHR* 309.

⁹⁰ *Ibid.*

⁹¹ *Bhe and Others v Magistrate, Khayelitsha* CCT49/03; *Shibi v Sitholi and Others* CCT69/03 and *South African Human Rights Commission and Another v President of the Republic of South Africa* CCT50/03 (hereinafter referred to as the *Bhe* case). These cases were heard together and the full text can be found at <http://www.constitutionalcourt.org.za>.

stronger, between customary law and the Western ideas of liberalism, all of which inform the constitution.”⁹²

In *Bhe* one of the issues to be decided by the court was the constitutional validity of the male primogeniture rule in the context of the customary law of intestate succession. As I have commented above, the court(s) in the *Mthembu v Letsela* cases were reluctant to enter into any form of constitutional or socio-legal debate or dialogue and the constitutional role of *ubuntu* did not form any part of these judgments. In *Bhe*, however, attempts were made to address the experiences of Black women *living* under customary law, and it is perhaps this difference in approach which left Mama Mthembu and her daughter homeless but which affirmed the claims of the women in the *Bhe* case.

Pius Langa DCJ for the majority adopted the approach that, although customary law is protected by the Constitution – and rightly so – the rule of primogeniture itself unfairly discriminates against women and children born out of wedlock and is thus unconstitutional and invalid.⁹³ In his decision he declines the option of developing the rule to bring it into line with constitutional values.

On the other hand, Sandile Ngcobo J, for the minority, argued for the *development* of the rule of primogeniture in terms of section 39(2) of the Constitution. Ngcobo highlights the dynamic nature of customary law “which is continually evolving to meet the changing circumstances of the community in which it operates”.⁹⁴ He suggests that the rule should be developed to allow members of a particular community to reach an agreement as to whether the rule should be applied under the particular circumstances. Should there be a dispute, the Magistrates’ Court having jurisdiction must resolve this.⁹⁵ The court must then have regard to what is fair, just and equitable, especially towards minor children and other dependents.⁹⁶

⁹² Cornell 2004 at 670.

⁹³ *Bhe* at para. 97.

⁹⁴ *Bhe* at para. 153.

⁹⁵ *Bhe* at para 240.

⁹⁶ *Ibid.*

What is of interest to me in the context of this evaluation are the references made to *ubuntu* in both majority and minority judgments and the way in which the value is interpreted and used to rationalise two very different approaches and outcomes.

In deciding to declare the rule of primogeniture unconstitutional and thus invalid, Langa refers to the valuable aspects of customary law and applauds the fact that this law has received constitutional protection:

“Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*.”⁹⁷

Having referred to *ubuntu* only once in his judgment, Langa eventually reaches the conclusion that *despite* the fact that customary law demands that the male heir has a duty to support the family, changing social conditions have distorted some aspects of customary law in such a way as to emphasise its patriarchal features and minimise its communitarian features.⁹⁸ Subsequently, Langa finds the primogeniture rule to be inconsistent with the equality provisions of the Constitution as well as the value of human dignity.⁹⁹

Whilst agreeing with Langa with respect to the application of section 23 of the Black Administration Act,¹⁰⁰ Ngcobo J rather supports the development of the customary rule of primogeniture. He does not at any stage of his reasoning deny the fact that the rule unfairly discriminates against women.¹⁰¹

In the development of his argument, emphasises that in traditional African societies the family unit is the focus of social concern and that there is an

⁹⁷ *Bhe* at para. 45.

⁹⁸ *Bhe* at para. 89.

⁹⁹ *Bhe* at para. 97.

¹⁰⁰ Act 38 of 1927.

¹⁰¹ *Bhe* at para. 209.

emphasis on duties and obligations. He further mentions that *ubuntu* is a dominant value in African traditional culture:

“This concept encapsulates communality and the inter-dependence of the members of a community.”¹⁰²

He goes on to explain that it is this system of reciprocal duties and obligations that ensures that every family member has access to the basic necessities of life, such as food, clothing, shelter and health care.¹⁰³

Unlike Langa, therefore, Ngcobo supports the constitutional development of the customary rule of primogeniture and argues that pending the enactment of new legislation, *both* indigenous law *and* the Intestate Succession Act should apply.¹⁰⁴ He raises the following factors that militate against the application of the Intestate Succession Act only:

- The Intestate Succession Act is premised on a nuclear family system whereas indigenous law is premised on the extended family system;
- The primary objective of indigenous law is the preservation and perpetuation of the extended family unit; and
- The Intestate Succession Act does not take sufficient account of indigenous law as part and parcel of the law of the land.¹⁰⁵

In fact, Ngcobo argues that the application of the Intestate Succession Act may well lead to the disintegration of the family unit that customary law seeks to preserve, protect and perpetuate in the name of *ubuntu*.

The moment of uncertainty in this case is created by the fact that, as laudable as the humanitarian ideals of *ubuntu* are, there are some aspects that are

¹⁰² *Bhe* at para. 163.

¹⁰³ *Bhe* at para. 163.

¹⁰⁴ Section 39(2) read with s173.

¹⁰⁵ *Bhe* at paras. 229-230.

bothersome to feminists and human rights activists. One such aspect is illustrated in the *Bhe* case, that is the aspect of *subsidiariti*. *Subsidiariti* carries with it a benevolent paternalism that has often allowed the treatment of women as minors under the care of their husbands and sons. Thus, according to customary law succession, the heir succeeds in status as ‘patriarch’ and is then held responsible for the family and its well being. Ngcobo explains this in detail when he discusses the difference between inheritance and succession.¹⁰⁶

The judgments in the *Bhe* case illustrate that *ubuntu* has no fixed meaning, and for this very reason it can be *both* subversive *and* conservative in nature. Although Langa does not explain his understanding of *ubuntu* in the context of the case, he does briefly describe its merits. He does not, however, explain why the rule of primogeniture is contrary to the philosophy of *ubuntu*. Rather, it is Ngcobo who maintains that it is *because of ubuntu* that we should develop customary rules of succession to be more reflective of care and responsibility within the context of an interactive community. To put it this way, if the ideal/value of *ubuntu* is reawakened, and even operationalised, communities would be empowered to decide for themselves how they wish to live their law(s) in a responsible manner. Consequently, his argument reflects a nuanced understanding of *ubuntu* as a multifaceted philosophy which, if properly understood, could assist in the constitutional transformation of customary law. Rather than settling for formal western intervention, Ngcobo justifies his controversial dissent by calling for a recognition of the interdependence of human beings which is not based on the conception of negative freedom. I submit that Cornell’s “conversion principle” is applicable to this (re)construction:

“By a conversion principle, I mean an act of recollective imagination which not only recalls the past as it remembers the future, but also projects forward as an ideal the very principles that read into the past, that is, in this case, ubuntu. A conversion principle generally both converts the way we understand the past, and converts or translates any current practice of interpretation as we attempt to realise it in the reconstruction of law and legal principle.”¹⁰⁷

¹⁰⁶ *Bhe* at paras.158-160.

¹⁰⁷ Cornell 2004 at 666.

What Ngcobo may be doing here, if read generously, is to demand of us a recollection as well as a re-imagining of ubuntu to bring it into accord with the constitutional values of dignity, equality and freedom. I read him contextually as asking of us to give ubuntu ‘another chance’ by developing both this ideal and customary law in such a way as to reflect a new understanding of what it means to live in a just (and caring) community.

4.5 STORY FOUR: The story of dangerous bodies and judicial avoidance

Sex workers live on the margins of society. In the case of *Ellen Jordan and Others v The State*¹⁰⁸ an attempt was made to provide a space for sex-workers within our legal framework. The criminalisation of prostitution was attacked on a number of constitutional grounds but the attacks failed.¹⁰⁹ In the discussion below, the gender equality implications of the criminalisation of sex work are explored. The issues of keeping a brothel and the rights of dignity, economic activity and privacy fall outside the scope of this critical evaluation of the *Jordan* case.

In the High Court of South Africa,¹¹⁰ Spoelstra J considered the constitutionality of section 20(1)(aA) of the Sexual Offences Act of 1957 (the prostitution provision)¹¹¹ in that the third appellant, Christine Louise Jacobs, had unlawful carnal sexual intercourse or committed an act of indecency with a man for reward. Appellants one and two challenged the constitutionality of section 2 (the brothel provision). I concentrate below on the constitutionality of the prostitution provision.

¹⁰⁸ 2002 6 SA 642 (CC); 2002 11 BCLR 1117 (CC).

¹⁰⁹ See s20(1)(aA) of the Sexual Offences Act 43 of 1957. It should be remembered that the Sexual Offences Act was borne out of the Immorality Act 43 of 1957, a particularly vicious piece of *apartheid* legislation.

¹¹⁰ Decided on 2 August 2001 in *Jordan and Others v The State* TPD – not reportable A227/99 and A296/97 and *S v Jordan and Others* 2001 10 BCLR 1055 (T).

¹¹¹ Section 20 Persons living on the earnings of prostitution or committing or assisting the commission of indecent acts –
(1) Any person who –
(aA) has unlawful carnal intercourse or commits an act of indecency with any other person for reward
shall be guilty of an offence.

On the facts of the case, a police officer entered a brothel owned by the first appellant in Pretoria on 20 August 1996, paid R250 to second appellant, a salaried employee, and received a pelvic massage from the third appellant, a prostitute or sex worker.

Spoelstra J found that the prostitution provision unfairly and unjustifiably discriminates against prostitutes, but upheld the validity of section 2 as it amounts to sexual and commercial exploitation and the trafficking of human beings. The first and second appellants then appealed to the Constitutional Court and the matter of the unconstitutionality and invalidity of section 20(1)(aA) was referred to the same court for confirmation.

In an unexpected turn, the Constitutional Court unanimously upheld the High Court finding that the brothel provisions are valid but divided six to five in holding the prostitution provision valid. Both judgments make it clear that the decision as to how to regulate prostitution is a matter for the Legislature.¹¹² All the judges conclude that the prostitution provision does not infringe the rights to human dignity and economic activity and that if it does limit the right to privacy, such limitation is justifiable. They differ, however, on the question of whether the prostitution provision constitutes unfair gender discrimination. It is this aspect of the case that I address in detail below.

In considering whether the prostitution provision discriminates unfairly against women, Sandile Ngcobo found that this was not the case. He based his reasoning on a gender neutral interpretation of the provision and stated that:

“In my view, a gender neutral provision which differentiates between the dealer and the customer ... and which is justifiable having regard to the qualitative difference between the conduct of the dealer and that of the customer, and which operates in a legal framework that punishes both the customer and dealer ... cannot be said to be discriminating on the basis of gender simply because the majority of those who violate such a statute happen to be women.”¹¹³

¹¹² See Ngcobo J at para. 25 and O'Regan and Sachs JJ at para. 128.

¹¹³ Ngcobo J at para. 18.

In the minority decision, delivered by Justices Kate O'Regan and Albie Sachs, they argue for a constitutionally 'correct' interpretation of the prostitution provision. Relying on the test for unfair discrimination as articulated by the Court in *Harksen v Lane NO and Others*,¹¹⁴ they reached the conclusion that the differentiation in the prostitution provision is between prostitutes and patrons and that this differentiation discriminates indirectly on the grounds of sex and/or gender.¹¹⁵ The Justices maintain that the effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping which is in conflict with the principle and value of gender equality.¹¹⁶

"The difference between being a principal offender and an accomplice or co-conspirator [in terms of the common law and s18(2) of the Riotous Assemblies Act] may have little impact in formal legal terms. It does, however, carry a difference in social stigma and impact."¹¹⁷

O'Regan and Sachs agree that prostitution perpetuates and reinforces the sexual double standards prevalent in our society and argue that this stigma is prejudicial and harmful to women as it "runs along the fault lines of archetypal presuppositions about male and female behaviour, hereby fostering gender inequality".¹¹⁸ These societal prejudices against women are reflected and reinforced by the legal provision and have the potential to impair the fundamental dignity and personhood of women.¹¹⁹

The Justices endorse in their judgment a substantive interpretation of equality – in other words, discrimination should be viewed in its social, economic and political context and not as a legal abstraction.¹²⁰ Contextually, the 'reality' of the economic

¹¹⁴ 1998 1 SA 300 (CC); 1997 11 BCLR 1489 (CC) at para 53.

¹¹⁵ For a discussion of indirect discrimination and its impact see *Pretoria City Council v Walker* 1998 2 SA 363 (CC); 1998 3 BCLR 257 (CC). See also O'Regan and Sachs in *Jordan* at para. 59.

¹¹⁶ *Jordan* at para. 60.

¹¹⁷ *Jordan* at para. 63.

¹¹⁸ *Jordan* at para. 65.

¹¹⁹ *Ibid.* Prostitutes are indeed a marginalised and vulnerable group although the justices do admit in moralistic mode that this vulnerability is due, in some part, to the conduct of sex workers themselves. See O'Regan and Sachs at para. 66.

dependence and vulnerability of sex workers should be considered. According to this reading, it would be illogical to consider them more blameworthy than their patrons:

“The Constitution itself makes plain that the law must further the values of the Constitution. It is no answer then to a constitutional complaint to say that the constitutional problem lies not in the law [as per Ngcobo J] but in social values, when the law serves to foster these values. Where, although neutral on its face, its substantive effect is to undermine the values of the Constitution, it will be susceptible to constitutional challenge”.¹²¹

They then go on to state that this unfair discrimination is not justifiable in an open and democratic society based on the values of dignity, equality and freedom.¹²²

Without adding any further comments on this matter, they conclude that a careful study and careful consideration is needed as a number of interests must be considered and balanced. The law needs to be developed to deal with social stigmas and the violence often suffered by sex workers,¹²³ but it remains the duty of Parliament to deal with sex work and its varied implications.¹²⁴

Sex work and social justice

Although noble in their attempts to argue for the equal protection of sex workers under the law, O'Regan and Sachs still do not manage to escape the dangers of gender stereotyping. In failing to recognise the complexities of difference, the justices comment that the right to privacy of prostitutes cannot be protected as the infringement is justifiable.¹²⁵ Their reasoning is based upon the 'fact' that sexual intercourse in exchange for money does not fall within the realm of the 'private':¹²⁶ As Van Marle points out, implicit in the court's deliberations is an understanding of

¹²⁰ See Albertyn and Goldblatt 1998.

¹²¹ O'Regan and Sachs at para. 72.

¹²² As per s33 of the 1993 Constitution and s36 of the 1996 Constitution.

¹²³ *Jordan* at para. 124.

¹²⁴ *Jordan* at para. 128. The convictions in the Magistrate's Court thus stand.

¹²⁵ *Jordan* at paras. 82-86.

¹²⁶ *Jordan* at paras. 82-84.

women's sexuality as 'proper' to the private role of procreation and nurturing.¹²⁷ Even in the 'better' minority judgment, this thinking can be glimpsed and undoes to a large extent their reasoning on equality.

In both judgments, the negative moral judgment of prostitution resulted in the court sending out a message that it did not care to any great extent about the lived experiences of sex workers. The voices were there in the form of submissions made by SWEAT, the Commission for Gender Equality and brother owners, but they were not heard. The constraints that affect sex workers were left unacknowledged and when it came to the crunch, the court passed the buck to Parliament. Prostitution according to the court is 'bad' – it is an example of 'dangerous' sexuality and for this reason the rights of sex workers deserve no protection.

Historically, the profession of the sex worker has been shaped by the perception that female sexuality is dangerous and needs careful regulation, and that male sexuality is rapacious and needs a 'safe' outlet. Sex outside recognised avenues of intimacy is dirty and degrading and that only a degraded woman (a Whore as opposed to a Madonna) is an appropriate sex object.¹²⁸ Consequently sex workers have not traditionally been treated with the respect or the dignity that one might think proper to a fellow human being. But what does it say of us when we choose to deny others a safe space within which to flourish?

Generalising about the social ills of prostitution tends to mask the lived experiences and life stories of sex workers. Denying these women (and men) their rights tends to mask our complicity in excluding members of our community from enjoying the protection and promises of the constitution. As discussed in the

¹²⁷ Van Marle 2004 at 248 fn 3.

¹²⁸ This view is endorsed in Miller's *The anatomy of disgust* 1997 Ch. 6. See also Dworkin "Prostitution and male supremacy" in *Life and death* 1997 at 139. In *Promiscuities: A secret history of female desire* 1998 Wolf investigates the stereotypical phenomenon of the slut. In the west there has been a tendency to link sex to female defilement, the most common example being the madonna/whore complex or dyad. In *Witches* 1997 Jong explores the mythology of the witch and the presumptions of evil surrounding female sexuality, autonomy and power and the "projection of masculine sexual panic onto woman, The Other" (at 170).

previous chapter, Yvonne Mokgoro challenges us to view the imperatives of the Constitution as demanding of us to be responsible towards *all* members of our community (including permanent residents) in a caring and just manner.¹²⁹ Our freedom and well being is dependent upon our communal interactions, attitudes towards, and relations with others. This is a recognition of the constitutional importance of care, connectivity and the protection of vulnerable members of our society. Justice Edwin Cameron echoes these views in discussing the constitutional protection of vulnerable members of the community who are perceived to be sexually different, namely gays and lesbians.¹³⁰ So why treat sex workers differently?

If we accept that our humanness is shaped by our interactions with others and that we are diminished by our violent interactions with others, including the violent actions of the state, we also have to accept that our indifferent dismissal of sex workers diminishes us as persons.¹³¹ Cornell and Van Marle remind us that there can never “be a reason to deny anyone their inclusion in the idea of humanity”.¹³²

A more inclusive approach would acknowledge differences and allow sex workers to voice their opinions and concerns about their lives and the diversity of their trade. However, the court in *Jordan* in perpetuating sex and gender stereotypes left little if no room for transformation and continued to silence women relegated to once again living as outlaws.

¹²⁹ *Khosa and Others v Minister of Social Development and Others* CCT 13/03.

¹³⁰ Cameron in a speech delivered in Windhoek, Namibia during Human Rights Awareness Week 2001 and sourced from Sister NAMIBIA ©.

¹³¹ Cornell and Van Marle “Exploring ubuntu – Tentative reflections” 2005 an unpublished paper in my possession at 9.

¹³² *Ibid.*

Responding to an unresponsive court

This decision of the Constitutional Court has been met, unsurprisingly, with a multitude of reactions. The Commission for Gender Equality, one of the *amici curiae* arguing before the eleven judges, has stated in the media that it will continue to advocate for change to the Sexual Offences Act as it discriminates against women.¹³³ In contrast, another organisation, Doctors for Life International (DFL), has stated that it was ‘delighted’ with the judgment upholding the law against prostitution. DFL gave evidence for the State in *Jordan* to the effect that prostitution is degrading to women, as it is conducive to the violent abuse of prostitutes both by customers and pimps. Ironically in denying these women their rights we continue to turn a blind eye to this kind of abuse. They also maintain that prostitution encourages the international trafficking in women, leads to child prostitution, intensifies the spread of STD’s and HIV/AIDS and often leads to high levels of drug abuse.¹³⁴

It is clear from the above reactions that there are a number of interests which need to be balanced when considering the legalisation of prostitution. When in the process of ‘balancing’ all these interests, we need to move beyond metanarratives about sex work towards a realisation that these are people who have stories to tell and that these stories, although considered repugnant by some, must be heard and not silenced. We need to face this difference in order to do things differently.¹³⁵

¹³³ *Daily Mail and Guardian* 10/10/2002. According to the Women’s Legal Education and Action Fund (LEAF): “Women must get their stories into court to develop a body of evidence about women’s poverty, physical vulnerability and social and legal inequality in order to force the courts to respond” Leaf Equality Symposium (1992) 5 *Leaf Lines* 3.

¹³⁴ See the list of ‘cons’ in para. 86 of the minority judgement.

¹³⁵ In her autobiography *Rachel: Woman of the night* 2003, Lindsay, writes a narrative of her own experiences as a sex worker in Cape Town. The book is written with understanding and compassion towards her ex colleagues and friends and gives an insider’s view of a world often treated with scorn and misunderstanding. In her after-word she mentions the issue of the decriminalisation or legalisation of prostitution. She states: “for various reasons, I am of the firm opinion that although there will always be negative aspects to the oldest profession – which will never be stamped out – the time has come to work with it instead of against it” (at 247).

One can only wonder why the views of an organisation such as Doctors for Life would be considered above the stories of sex workers themselves. Drucilla Cornell has argued for the legal recognition of what she has named the “imaginary domain”.¹³⁶ This domain is a symbolic space within which all persons would be free to live out their sexuality creatively. The Constitutional Court in this case closed off the possibilities offered by the recognition of Cornell’s imaginary domain and failed to listen to the stories of those (women in particular) who live the experiences of sex work. It is clear that the decision of the majority of the court continues the cycle of violence and the impact of this approach ignores the possibilities of creating a world anew.

Linking up with the outline of debates surrounding the justiciability of *ubuntu* in chapter three and the possibility of developing an indigenous (South) African jurisprudence, the words of Steve “Bantu” Biko should be heeded:

“We believe that in the long run the special contribution to the world by Africa will be in the field of human relationships. The great powers of the world may have done wonders in giving the world an industrial and military look, but the great gift still has to come from Africa – giving the world a more human face.”¹³⁷

In terms of Biko’s Black consciousness thinking, Africa has much to teach us, and one of these lessons is that we need to engender a passion for people as people “with all [their] ramifications”.¹³⁸ Sex workers will always be amongst us, with us, and so will the ramifications of rejecting their life stories and denying these women (and men) the chance of sharing in all of life’s glories.

Having been exposed to the stories as related above, it hopefully becomes clear that the acceptance of a jurisprudence of care is not only needed, but necessary to bring about contextual adjudication that leads us to a place where the law becomes less forceful and more caring and just. This narrative approach is dependent upon an understanding of narration as relational and a recognition that

¹³⁶ See Cornell *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* 1995.

¹³⁷ Biko “Some African cultural concepts” in *An introduction to African philosophy* 1995 UNISA at 535.

¹³⁸ *Ibid.*

people seeking justice are collectively and individually embedded in social and cultural (con)texts. Choosing narrative is thus a deliberate attempt at rejecting the appearance of neutral, objective and abstract reasoning typically found in master-narratives such as law. Our identity is shaped with and by others such as Hugo, Mthembu, Carmichele and Jordan who (still) await our response.

4.6 “Conclusion(s)”

(Or the irresistible lure of stories)

At every turning point, stories may be other than what they seem, and because they shape the law in unexpected ways, future stories may have the power to shape the law in ways that surprise us. I wish to propose here that the heart of transformation lies in stories, real and imagined, that shimmer in the mind’s eye and that shape lives in different ways:

There was silence for a while and then Malicia said, ‘You know, in many ways I don’t think this adventure has been properly organized.’

‘Oh, really?’ said Keith.

‘This is not how people should be tied up.’

‘Malicia, do you understand? This isn’t a story,’ said Keith, as patiently as he could. ‘That’s what I’m trying to tell you. Real life isn’t a story. There isn’t some kind of... of magic that keeps you safe and makes crooks look the other way and not hit you too hard and tie you up to a handy knife and not kill you. Do you understand?’

There was some more dark silence.

‘My granny and my great-aunt were very famous story-tellers, you know,’ said Malicia eventually, in a strained little voice. ‘Agoniza and Eviscera Grim.’

‘You said,’ said Keith.

‘My mother would have been a good story-teller, too, but my father doesn’t like stories. That’s why I’ve changed my name to Grim for professional purposes.’

‘Really...’

‘I used to get beaten when I was small for telling stories,’ Malicia went on.

‘Beaten?’ said Keith.

‘All right, then, smacked,’ said Malicia. ‘On the leg. But it did hurt. My father says you can’t run a city on stories. He says you have to be practical.’

‘Oh.’

...

‘The calm voice infuriated Malicia. ‘Well, I’ll tell you something,’ she said. ‘If you don’t turn your life into a story, you just become a part of someone else’s story.’

‘And what if your story doesn’t work?’

‘You keep changing it until you find one that does.’¹³⁹

As Malicia points out, stories have creative and transformative potential. They can provide us with new ways of being and becoming. Thus, narrative judgment is always already inescapable and always on the verge of ambiguity. The

undecidability of law is inescapable, as are the multiple stories that give meaning and shape to our lives before the law and our relationships with others. Stories have the potential to illuminate double standards in the law or in life. If differences and particularity are not explored, oppression remains.

What do an imprisoned father, a tenacious woman, a homeless mother and a sex worker have in common? Their humanity. They all have different but valuable (legal) stories to tell, and the jurisprudence of care demands that we pay close attention to them and face the consequences of our responses to these narratives.¹⁴⁰ The adjudicators, however, found themselves bound by the “stillness of the letter of the law” that is universally applicable and the richness of the stories remained unexplored.¹⁴¹ On the other hand, empowering others through a jurisprudence of care is a transformative process that allows us to make new connections, shatter boundaries of sense, map rare sources of sensibility, embody the other and unsettle regimes of truth.

In the following chapter I offer tentative ‘celebratory’ remarks about the creation of equality courts in South Africa. It is this development in our law that could open up spaces for the telling of stories and allow us to escape (if only for a moment) the Universal Truth which eclipses the uniqueness of each and every human being who leaves behind a story.

¹³⁹ Pratchett *The Amazing Maurice and his educated rodents* 2001 at 147-148 (my emphasis).

¹⁴⁰ In “Law’s time, particularity and slowness” 2003 (19) *SAJHR* 239, Van Marle explores the importance of slowness and attentiveness in legal interpretation. She explains this as follows:

“I am investigating and tentatively suggesting other ways of or attitudes to legal reading and interpretation, always keeping the limits and the violence of the law in mind: The limits of the law refers to law’s incapacity to encompass politics, ethics and justice. The violence (and reductive nature) refers to law’s tendency to make the particular general and the concrete abstract. Law, because of its rule-bound nature, and judgments, because of their over-emphasis on calculation, exclude the needs of the particular and following Douzinas and Warrington’s employment of Kafka, ‘close[s] the door of the law’” (at 242 excluding footnotes).

Van Marle uses Weil’s argument for attention as a moral value, which has also been adopted by ethic of care feminists. See Weil as utilised in the work of Tronto *Moral boundaries: A political argument for an ethic of care* 1996.

¹⁴¹ Diamantides “Death marks on a still life: A vision of judgment as vegetating” 1995 *Law and Critique* 209 at 209.

“Many voices of this country were long silent, unheard, often unheeded before they spoke... The voices of ordinary people have entered the public discourse and shaped the passage of history. They speak here to all who care to listen.”¹⁴²

¹⁴² Krog *Country of my Skull* 1998 x. Although Krog is referring here to the work of the Truth and Reconciliation Commission, I believe that her comments would apply equally to the operation of our courts.

CHAPTER FIVE

THE PROMISE OF EQUALITY COURTS

“We need courts, and judges, who are at home with difference, who recognise that wisdom comes in many different forms. What is critical in adjudication is not simply the procedures and the rituals, but the hearing and retelling of stories, the engagement between past and future, between what we are and what we hope to become.”¹

5.1 Introductory remarks

The argument advanced in this chapter is for the opening up of public (legal) spaces where enforced silences are broken and voice is given to the stories of others - where these stories are neither rejected nor considered worthless. It is ultimately an argument in favour of resisting the silencing and exclusionary effects of the legal system as illustrated in the previous chapter. Whilst acknowledging the force of law and its authority (and thus the limits of the law), the aim here is to work within the relational spaces the law *does* at times make available to us. As indicated, such spaces may be found in the form of equality courts, provided for in section 16 of the Promotion of Equality and Prevention of Unfair Discrimination Act.²

I focus below on the creation of the equality courts in South Africa and the *promise* they hold for furthering a jurisprudence of care as introduced and outlined in the preceding chapters.³ The Equality Act aims to eradicate the legacy of inequality South Africans experience and posits the equality courts as a key mechanism in achieving this aim. In fact, section 5(2) contains an “override clause”, proclaiming

¹ Berns *To speak as a judge: Difference, voice and power* 1999 at 228.

² Act 4 of 2000 as amended by the Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002. Hereinafter referred to as the Equality Act.

³ Promises are, by their very nature, “non-fulfillable”. This means that there always exists a possibility that a promise cannot or will not be realised. Derrida refers to this as “the *unbelievable*, and comical, aspect of every promise” (see *Memoires: For Paul de Man* Lindsay, Culler and Cadava (trans.) 1986 at 94 emphasis in the original). The promise of equality courts thus rests in the future, waiting to be fulfilled.

that the provisions of the Equality Act take precedence over any other Act except the Constitution. This is clearly an illustration of the primacy of the right and value of equality in our new politico-legal dispensation and the centrality of transformation in implementing the Equality Act and its “quasi-constitutional” provisions.⁴

In addition to outlining the operation of the equality courts below, I concentrate on the emphasis placed upon a substantive understanding of equality as developed and endorsed by the Constitutional Court, the Equality Act and its supporters. This move away from formal equality jurisprudence is to be welcomed, but remains problematic. In light of the insistence on the *ethical* in current feminist equality thinking, the argument is that ethical feminism and an ethical understanding of equality are more suitable to the multiple contexts and stories of our historically divided society. This approach may take us closer to a sense of justice than substantive equality thinking would as our *responses* as ethical beings to those before the law tend to open up current systems of power to challenge:

“For a collective struggle *supplemented* by the impossibility of full ethical engagement – not in the rationalist sense of “doing the right thing”, but in this more familiar sense of the impossibility of “love” in the one-on-one way for each human being – the future is always around the corner; there is no victory, but only victories that are also warnings.”⁵

In writing of rights such as equality, there exists a “call to remembrance” – a call to strive and struggle for justice whilst at the same time recalling (remembering) that the system itself comes up against its own limits.⁶ In other words, whilst utilising the equality courts as vehicles for transformation, we must simultaneously always already remind ourselves that justice has not yet been achieved – it is the beyond to what *is* law. Ultimately, the creation of the equality courts in South Africa

⁴ Jagwanth contends that the Equality Act has a quasi-constitutional character and that “the rules of constitutional interpretation, rather than the rules of ordinary interpretation must apply to them.” See “The constitutional rules and responsibilities of lower courts” 2002 (13) *SAJHR* 201 at 212.

⁵ Spivak “Translator’s preface and afterword to Mahasweta Devi, *Imaginary maps* (1994)” in Landry and Maclean (eds.) *The Spivak reader* 1996 at 270.

⁶ Cornell *Beyond accommodation: Ethical feminism, deconstruction and the law* 1999 at 116.

present us with numerous *possibilities*. They do not depict in and of themselves the end of oppression but they *do* provide us with hope for the future.⁷

“We can conclude that justice has the characteristic of a promissory statement. A promise states now something to be performed in the future. Being just is acting justly; it always lies in the future, it is a promise made to the future, a pledge to look into the event and the uniqueness of each situation...”⁸

5.2 Introducing the Equality Act and its courts

“It is the genius of the law to provide a space in which unheard voices can be heard and responded to; it is our task as lawyers to realise this possibility.”⁹

Section 9 of the Bill of Rights provides that no person may be unfairly discriminated against directly or indirectly.¹⁰ Section 9(4) specifically provides that “[n]ational legislation must be enacted to prevent or prohibit unfair discrimination”. This is the historical ‘birthplace’ of the Equality Act.¹¹ The Preamble to this Act provides that it

“... endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are *caring and compassionate*, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom”.

It is worth noting here that the Preamble to the Equality Bill of 1999¹² recognises that the values of equality, social justice and human dignity “originate from the traditional philosophy of ubuntu or botho, which has shaped the fabric of a free and democratic South Africa and has moulded its human relations...”

⁷ Contrary to presenting an argument for legal conformism, this chapter explores the tensions and paradoxes inherent in both the potential and the limits of law.

⁸ Douzinas and Warrington *Justice miscarried: Ethics, aesthetics and the law* 1994 at 185.

⁹ Boyd White *Justice as translation: An essay in cultural and legal criticism* 1990 at 267. If this is indeed the case, then the equality courts could be the very spaces we need.

¹⁰ Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996.

¹¹ Section 9(4) of the Constitution mandates the adoption of legislation which is limited to the prevention or prohibition of discrimination by private people and corporations (as opposed to only the state and its organs) on the grounds specified in s9(3). The Equality Act goes further than the minimum requirements set out in s9(4) in that it:

- Prohibits discrimination by the state as well as private persons;
- Promotes equality; and
- Prohibits hate speech.

¹² As introduced to the National Assembly as a section 75 Bill.

One can only speculate as to why this recognition of the philosophy of *ubuntu* was not included in the preamble to the Act. The mention of *ubuntu/botho* in the preamble to the Bill indicates a willingness to allow this philosophy to inform and enrich equality jurisprudence and *vice versa*. It places the constitutional values of dignity, equality and freedom within an African context – one where we as individuals are said to “share in the fate of others – each bearing the other up”.¹³ The omission of this paragraph is, however, in all probability a reflection of a general reluctance to embrace the ideal of *ubuntu* as a justiciable constitutional value.¹⁴ However, as argued previously, the most empowering aspect of *ubuntu* is that it is an interactive ethic which encourages community participation in attempts to create a ‘new’ (South) Africa. It is thus submitted that this ethic should not be cast aside, but that we should continue to explore the role played by African philosophy in developing a post-liberal constitutional jurisprudence for South Africa via *inter alia* the operation of the equality courts. I return to this issue below.

In their commentary on the Equality Act, Sandra Liebenberg and Michelle O’Sullivan read this new equality legislation within the context of women’s socio-economic inequality.¹⁵ The authors maintain that the legacy of colonialism and *apartheid* has led to the continued vulnerability of the poor in South Africa. Thus, in their view, redressing poverty and inequality lies at the heart of our new constitutional order.¹⁶ Inequality poses a danger to democracy in that it threatens

¹³ Gyekye “Person and community in African thought” in Coetzee and Roux (eds.) *Philosophy from Africa: A text with readings* 1998 at 334.

¹⁴ See amongst others English “Ubuntu: The quest for an indigenous jurisprudence” 1996 (12:4) *SAJHR* 641; Lenta “Just gaming? The case for postmodernism in South African legal theory” 2001 (17) *SAJHR* 173; and Kroeze “Doing things with values II: The case of *ubuntu*” 2002 (2) *Stellenbosch Law Review* 252.

¹⁵ “South Africa’s new equality legislation: A tool for advancing women’s socio-economic equality?” in Jagwanth and Kalula (eds.) *Equality Law: Reflections from South Africa and elsewhere* 2001 at 70.

¹⁶ See also Pieterse “What do we mean when we talk about transformative constitutionalism?” 2005 (20) *SAPL* 155. In this note Pieterse supports a vision of transformative constitutionalism as the “ideal of an egalitarian society and the accompanying value of substantive equality” (at 159). He follows Liebenberg and O’Sullivan’s call for social justice and the alleviation of concrete socio-economic hardships (at 160).

the social and economic fabric of society. Therefore, if the rights to equality and non-discrimination are to have any impact on the causes and consequences of women's socio-economic disadvantage in South Africa, a contextual evaluation of their direct and indirect impact on women's lives is needed. The Equality Act is thus widely regarded as a key piece of legislation for advancing the transformation of all spheres of South African society, and redressing the legacy of *apartheid* in such a manner as to recognise that all human beings are equally deserving of respect and that opportunities must be provided for people to realise their full potential within positive social relationships.¹⁷

According to this view, if the Equality Act is to fulfill its potential as a vehicle to advance equality, it is vital that a jurisprudence of *substantive equality*¹⁸ is fostered in the interpretation of its provisions by the equality courts.¹⁹ The constitutional jurisprudence relating to section 9 of the Constitution is therefore intended to exert a substantial influence on the interpretation of the provisions of the Equality Act.²⁰

In the following sections I analyse the provisions relating to the operation of equality courts and enter into a critique of the Act's emphasis on the substantive interpretation of equality as endorsed by the Constitutional Court and highlighted in previous chapters.²¹ To reiterate, in current constitutional discourse, equality does not mean identical treatment in all circumstances. The court closely examines the *impact* of the discriminatory provision on the complainant in order to ascertain whether it is in fact unfair. Of particular importance is the extent to which

¹⁷ Once again, no mention is made of the role of *ubuntu* here.

¹⁸ The Preamble to the Equality Bill expressly states that the Bill was promulgated in order to "set out measures for the promotion and achievement of substantive equality". This paragraph was also omitted from the preamble to the Act.

¹⁹ Liebenberg and O'Sullivan 2001 at 77.

²⁰ Section 3 of the Equality Act requires that its provisions must be interpreted to give effect to the Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or advance persons disadvantaged by past and present unfair discrimination.

²¹ See in particular *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para. 73. A substantive approach to equality pays particular attention to the context in which a litigant seeks assistance from the courts. The position of a litigant in society, the group to which she belongs, and the history of the disadvantage is taken into account. Emphasis is placed upon ridding society of socio-economic disadvantage.

a measure entrenches or deepens patterns of disadvantage experienced by groups in our society.²²

Some innovative aspects of the Equality Act and its courts

“It is the privileged members of South African society who have been the complainants in the majority of equality cases that have reached the constitutional court. Hopefully the act will lead to a change in the profile of equality disputes.”²³

Section 16 of the Equality Act creates equality courts within the existing High Court and Magistrates Court jurisdictions. During the drafting process, a separate specialist tribunal was proposed as the enforcement forum but this proposal was not adopted because of resource constraints.²⁴ Ideally, equality courts are to operate with innovative and creative procedural and evidentiary rules that aim to maximise access to justice for victims of discrimination. The proposals for a less formal approach to equality adjudication and the potential that it holds are explored in more detail below.

In terms of section 31, no proceedings may be instituted in such a court in terms of the Act unless a presiding officer has been designated by the Minister, taking into careful consideration her training, experience, expertise and *commitment* to the values of equality and human rights.²⁵ Presiding officers are currently appointed

²² *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC) at paras. 50-51 and *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) at para. 44.

²³ Kok “The Promotion of Equality and Prevention of Unfair Discrimination Act: Why the Controversy?” 2001 (2) *TSAR* 294. Kok refers to the constitutional cases that have dealt with equality issues, namely *Brink v Kitshoff* (a constitutional challenge to the Insurance Act 27 of 1943); *President of the Republic of South Africa v Hugo* (a complaint lodged by a male prisoner); *Prinsloo v Van der Linde* (a constitutional challenge to the Forest Act 122 of 1984); *City Council of Pretoria v Walker* (a constitutional challenge brought by “White Pretoria” regarding the flat rates charged for water and electricity provided to Mamelodi residents); *Fraser v Children’s Court Pretoria North* (a natural father challenging s18(4)(d) of the Child Care Act 74 of 1983 which requires only the mother of a child born out of wedlock to consent to the child’s adoption); and *Harksen v Lane* (dealing with the constitutionality of the Insolvency Act 24 of 1936). Kok maintains that an exception to this rule can be found in the case *National Coalition for Gay and Lesbian Equality v Minister of Justice* where the gay community won their rights. Subsequently, prostitutes lost their challenge to the Constitutional Court in *Jordan v S* but black women gained a victory in the *Bhe* case which deals with a constitutional challenge to the male rule of primogeniture in customary succession law.

²⁴ Liebenberg and O’Sullivan 2001 at 100.

²⁵ It is clear from this requirement, that presiding officers would need special training in equality jurisprudence and gender sensitivity as the Constitution has changed the legal landscape in South

after completing a training course offered by the Law, Race and Gender Unit at the University of Cape Town in conjunction with the Justice College in Pretoria. The course covers social context and diversity training as well as training on the unique procedures of the courts.

The rules and procedures for these courts are dealt with in section 19. The latter section provides that the provisions of the Magistrates' Courts Act²⁶ and the Supreme Court Act²⁷ and of the rules made thereunder, as well as the rules made under the Rules Board for Courts of Law Act²⁸ apply to the equality courts with the necessary changes required by the *context* of these courts. It is hoped that detailed rules for Equality Courts will be developed which would facilitate a more inquisitorial approach to the adjudication process, incorporating the principles of flexibility, limited pre-adjudication proceedings, expedited hearings and ease of access for complainants.²⁹ The Act is already drafted in such a manner as to assist unrepresented litigants.³⁰ It is thus vital that accessible and simple rules of court are developed to govern equality proceedings. Section 4 of the Act requires the speedy and informal processing of cases, participation by all parties and access to justice. In addition, it provides that corrective and restorative measures be put in place in conjunction with measures of a deterrent nature and that there be a recognition of the existence of systemic discrimination and inequalities and the need to take measures to eliminate these inequalities.

However, because of the complexity of discrimination cases, it is likely that complainants would still need legal assistance and/or representation. This may affect the envisaged *informality* of the process as formal legal language and texts

Africa quite substantially. Section 22 of the Act makes provision for the appointment of suitable, available and willing persons as assessors. It is presumed that these assessors would also need specialist training.

²⁶ Act 32 of 1944.

²⁷ Act 59 of 1959.

²⁸ Act 107 of 1985.

²⁹ The Equality Act follows s38 of the Constitution, which deals with the enforcement of rights.

³⁰ Liebenberg and O'Sullivan 2001 at 101.

may once more become central to the success of the cases and determine once more who is heard and what wrongs are to be legally recognised.

A presiding officer of an equality court may refer the proceedings before her to “another appropriate institution, body, court, tribunal or other forum, which, in the presiding officer’s opinion, can deal more appropriately with the matter”.³¹ This is usually done in the Directions Hearing where it is to be determined whether the court has jurisdiction. Here there does seem to be a partial recognition that these types of proceedings need to be dealt with in a more inquisitorial manner.³²

In addition, the “Guiding Principles” of the Equality Act provide a clear indication of the envisaged procedures that would enable the equality courts to fulfill their mandates of providing greater access and less formalism in handling disputes arising from the Act. Equality courts are required to “hold an *enquiry*” in determining whether unfair discrimination is established or not - the story must be told, listened to and then decided upon.³³

The holding of an enquiry appears to go beyond the passive role of the presiding officer in strict adversarial adjudication processes, but according to Shadrack Gutto:

“ ... it is not anticipated that the enquiry will be turned into a full inquisitorial process as this may lead to a radical transformation of the legal system that was not intended by the drafters and the legislature”.³⁴

However, the Draft Regulations³⁵ envisage the presiding officer balancing the requirements of formality and substantive justice, which goes beyond the traditional function of courts.³⁶ Along these lines, Saras Jagwanth has stated that:

³¹ Section 20(3)(a).

³² In contradistinction to the adversarial model, the inquisitorial model is more judge-centred. The latter model proceeds from the premises that a trial is not a contest between two opposing parties, but an enquiry to establish the material truth. Section 26(3) of the Small Claims Court Act 61 of 1984 provides that the presiding commissioners must proceed inquisitorially. Although no similar provision exists in the Equality Act, it is submitted that this is the preferable route to follow, as the potential effect would allow the parties to reconcile after the hearing.

³³ Section 21(1) and (4).

“Judicial officers can no longer rely on their traditional roles as neutral arbiters in an adversarial trial who do not descend into the arena, as it is the constitution – the supreme law of the land – which requires courts to promote the object, purport and spirit of the Bill of Rights in all matters before them. This gives judicial officers the additional task of having to identify the constitutional issues at stake, as well as understanding that constitutional issues go beyond the formal, traditional interpretation of fair trial rights as they impact on differently situated people.”³⁷

As unfair discrimination cases are notoriously difficult to prove, the onus traditionally placed on litigants in civil cases to prove their cases on a balance of probabilities has been shifted. The Constitution sets out the onus for discrimination claims, stating that discrimination on one or more grounds listed in section 9(3) is unfair unless it is established that the discrimination is fair. In other words, in terms of the onus, a complainant would have to prove a case of discrimination, whereafter the burden would shift to the respondent to establish that the discrimination was fair. Section 13 of the Equality Act sets out a different burden of proof. This is a lesser onus than the constitutional onus and the complainant is merely required to make out a *prima facie* case of discrimination and not to prove a case of discrimination. If the complainant establishes that the discrimination is based on one of the listed grounds in section 9 of the Constitution, there is a presumption of unfair discrimination, which must be rebutted by the respondent. It is for the latter party to then prove that the discrimination did not take place or that it was fair. If the discrimination alleged is not based on a listed ground, then there is no shift of onus and it is for the complainant to prove that the differentiation is unfair and impairs her dignity and human worth. The respondent then has an opportunity to justify her actions.

It has been argued that extending the reversal of the burden of proof would aid justice and for this reason the Equality Review Committee, established in terms of Chapter Seven of the Equality Act, was given a directive that they must report

³⁴ Gutto *Equality and non-discrimination in South Africa: The political economy of law and law making* 2001 at 195.

³⁵ Chapter III, Regulation 10.

³⁶ Another innovation is that the responsibilities of the adjudicator include:

- the know-how to determine the fairness or unfairness of a differentiation or discrimination; and
- making an appropriate and effective choice of one or more of the remedies.

³⁷ Jagwanth 2002 at 204.

back to Parliament as to their opinion on whether the additional grounds of HIV/AIDS status, nationality, socio-economic status and family responsibility and status should be added to the prohibited grounds in s1(xxii) of the Equality Act.³⁸ This has not yet been done, but there exists no legal impediment to bringing a case on new grounds, although the onus would differ.

Section 21 sets out the powers and functions of the Equality Courts, including a list of orders available to the court. The list of orders is very wide and is intended to address the limitations that courts often face in crafting an appropriate order in a discrimination case. Many of the remedies are also geared towards addressing discrimination at a more systemic level. For example, the court may order the implementation of special measures or direct the reasonable accommodation of a group or class of persons who have suffered discrimination. Court orders of this kind should be directed towards the long-term reform of social structures and institutions as well as the education of offenders.³⁹

The equality courts are such a central feature of this legislation that the effectiveness or otherwise of this law can be judged to the extent and the efficiency with which these courts deliver justice:

"I also believe that equality courts together with appropriate promotional programmes have great promise for the transformation of our society to one which, as Mendes puts it "collectively understand(s) compassion and collectively understand(s) the need for justice to remedy unnecessary suffering"⁴⁰

There is an underlying assumption in the new equality legislation that the judiciary - if transformed – will play a positive and meaningful role in the promotion and protection of the value and the right to equality. Of particular importance, and worth highlighting here, Regulation 10(7) states that "... the interests of justice should, as far as possible, prevail over mere technicalities".

³⁸ Executive Summary Re: Equality Workshop 20 May 2003. The Department has to date not initiated an amendment to the Act to include these grounds.

³⁹ See Trengrove "Judicial remedies for violations of socio-economic rights" 1999 (1) *Economic and Social Rights Review* 8.

⁴⁰ Pityana "The Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (Act No 4/2000)" Joan Church Lecture, Faculty of Law, UNISA, 15 October 2002 (unpublished) at 6.

It can be said that the Equality Act represents a move away from rule-based adversarialism towards a more values-based system that is in line with the ideals of the Constitution. As such the creation of equality courts may represent a very real effort to realise the values underlying the Constitution, including the value of *ubuntu*, and extending these values to all South Africans. In addition, this system of courts may have a radical effect on the rules of precedent and evidentiary procedures usually applied to keep the proceedings ‘under control’ in terms of demands made in the name of legal certainty. Section 4(1)(a) for instance provides that any proceedings instituted under the Act, including the equality courts, should be guided by the principle of “expeditious and informal processing of cases,...”. This serves to confirm that formal rules (including the rules of hearsay and precedent) may play a lesser role than previously encountered in the South African legal system, and that value-based, transformative and responsible adjudication may prevail (we can only hope).⁴¹

From the above it is clear that the equality courts have been imbued with a number of new and interesting mechanisms to deal with unfair discrimination cases and to assist us in transforming the central assumptions underlying South African legal culture. In my view, the promise that they hold lies in the fact that they have been provided with a framework flexible enough to allow for a storytelling or narrative approach in determining whether the right to (gender) equality has been infringed.

The alternative jurisdiction and procedures envisaged by the Equality Act outlined above are however not *terra incognita*. In his historico-legal discussion of Parisian courts of love Peter Goodrich depicts these courts as public spaces of *intimacy and relationships*.⁴² This marks an alternative site and practice of law as part of the relational public sphere. Thus, the judg(e)ments of love passed by these courts – often depicting the war of the sexes – map a novel dimension of sociality where stories about relationships are placed at the center of public discourse. I turn now

⁴¹ We might wish to consider how the laws of evidence frame the discourse of law. Stories are forced to fit into a re-given legal frame by excluding certain aspects that do not fit comfortably into traditional legal discourse.

to a brief analysis of these courts and their poetic practices in order to illustrate that which is indeed possible but escapes the modern legal imagination at every turn.

Courts of love

On St Valentine's day 1400, Charles VI of France promulgated a statute that established a High Court of Love or *Cour Amoureuse* in Paris. This High Court of Love had jurisdiction to determine 'rules of love' and to hear disputes between lovers. It was also a court of last instance to adjudicate appeals from the decisions in first instance courts of love.⁴³

The founding charter of this court suggests that in procedural terms it be organised in a non-hierarchical manner. It was instituted as a women's court and the judges were selected from a panel of women on the basis of the recitation or written presentation of poetry. The condition of judgment within the court was similarly reflective and poetic. The justice of love was an art form utilised in solving disputes ranging from violence between lovers to amorous defamation, from breach of erotic confidences to release from unfair contracts of love.⁴⁴

The Court of Love in Paris is but one instance of an alternative jurisdiction or forum of judgment drawn from the diversities of our legal and literary pasts. The judgments and proceedings are mixed in genre, being variously in the form of poems, narratives, plays, treatises and judicial decisions. They constitute, according to Peter Goodrich, one of the "minor jurisprudence".⁴⁵ He defines a minor jurisprudence as "one which neither aspires to nor pretends to be the only law or universal jurisprudence". Minor jurisprudences represent the strangeness of language, and the possibilities of interpretation as plural forms of knowledge.⁴⁶

⁴² *Law in the courts of love* 1996.

⁴³ Goodrich 1996 at 1.

⁴⁴ *Ibid.*

⁴⁵ Goodrich 1996 at 2.

⁴⁶ *Ibid.*

Sadly, legal scholarship in its traditional form has either forgotten or denied these alternative jurisprudences. This failure has subsequently resulted in the failure to recognise the *possibilities* of history, scholarship and the practice of law.

‘Minor’ jurisprudences are radical and could be seen to pose a threat to the certainties of modern western jurisprudence.⁴⁷ The critical recourse to aesthetics, to literature, to social theory, to philosophy or to ethics is a return to questions of conscience, and more broadly to the politics and casuistic indeterminacies of judgment.⁴⁸ Recourse to other disciplines and to minor jurisprudences aspires to reopen questions of jurisprudence, jurisdiction and the plurality of laws.

In discussing these medieval courts, Goodrich wishes to interrupt the idolatry of One Law or One Text. In his analysis of these courts he attempts to re-establish the relationships between rule and lifestyle, law and emotion. This is a challenge to monistic imagination and the unifying logic of positive law. Goodrich uses a method, called “interruption”, to break or fragment the existing order and continuity.⁴⁹ This interruption troubles the boundaries of an institution, practice or tradition and may be construed as being dangerous as it threatens to disrupt the genre, to mix the foreign and familiar and to pass without warning between the spiritual and the profane.

It is submitted here that we can learn much from such “minor jurisprudences” and “interruptions” as well as the non-hierarchical structuring of these ancient courts. Admittedly, the jurisdiction of these courts was limited to issues of love - and thus fell within the traditional domain of women or ‘women’s law’ - but what is of particular interest here is that these courts of love illustrate the fact that an ethic of care *can* be brought into the public and legal domain through the subversion of, amongst others, the reason/emotion duality.

⁴⁷ Ibid.

⁴⁸ Goodrich 1996 at 4.

⁴⁹ Goodrich 1996 at 5.

As argued in chapter two above, our legal system as *it is* does not adequately accommodate contextual analysis, embeddedness, emotion, compassion, care, and *ubuntu*. The current procedures in courts do not facilitate the telling of stories or narratives and there is not a serious enough consideration of the ethical responsibility which underlies the making of wise and responsible judg(e)ments.

We need, alternatively, to keep in mind that there is more than one Narrative or Truth, even within the limited but powerful domain of the law.⁵⁰ Therefore we should not attempt to introduce new monovocal ways of representing women or marginalised others to replace previous ones. There is no ultimate *representation* of those who bring their suffering to the courts. The premise is that *different voices* should not be appropriated, but should expose the limits of the current (closed) system, in this context the legal system. Multiple stories and narratives seek to challenge our perspectives and certainties continually. Within the African context, for example,:

“[f]olk tales and stories constitute a significant part of historical African tradition and culture, since African customs are often transmitted via the medium of oral tradition ... Further, [they] are narrative turns that are instructive for describing social reality, for analyzing and interpreting the roles of actors in such a reality, and subsequently stimulating the imagination of the hearers and readers in *transforming that reality*”.⁵¹

There are valuable lessons to be learned from the courts of love and the (re)valuing of those aspects of humanity previously excluded from the public domain of the law and relegated to the private domain or ‘women’s spaces’. For this very reason, as I have argued in chapter three, it would be useful to balance an ethics of justice and rights, reflected all too often in ‘legal-speak’, with an ethics

⁵⁰ The power of the metanarrative, however, always remains. As Spivak explains:
“[T]he narrative takes on its own impetus as it were, so that one begins to see reality as non-narrated. One begins to say that it’s not a narrative, it’s the way things are.”
See Spivak *The post-colonial critic: Interviews, strategies, dialogues* 1990 at 19.

⁵¹ Kunnie *Models of Black theology: Issues in class, culture and gender* 1994 at 41-42.

of care and responsibility as outlined by Carol Gilligan⁵² and expanded upon by Carrie Menkel-Meadow.⁵³

In chapter three I illustrate how Menkel-Meadow envisions new structures and procedures of law based on a reconstruction of Carol Gilligan's ethics of care⁵⁴ and how Yvonne Mokgoro argues for a new vision of law and legal procedure based on the African philosophy of *ubuntu*.⁵⁵ Both women provide imaginative and creative alternatives to positivistic legal traditions. Menkel-Meadow places emphasis on inclusive practices and procedures which reflect a more inquisitorial and open approach to the proceedings in order to allow different voices – previously silenced by The Law - to be heard. Mokgoro, in a similar manner argues for an open process that is more *conciliatory* and *communal* in nature. A common thread is found in their insistence on more attention being paid to caring within the community. As Robin West reminds us:

'... the capacity for justice we must exercise, if we are to ascertain and apply the law well, must in turn be informed by our capacity for compassion'.⁵⁶

In following these imaginative alternatives to current orthodoxy, I believe that if the equality courts are to fulfil their promise, care should be taken to adopt a "spirit of generosity" which recognises the need to pay attention to the complexities of lived experiences of unfair discrimination.⁵⁷

⁵² *In a different voice* 1982. Gilligan's work is given partial recognition by Cornell. Utilising her understanding of Lacanian psychoanalysis and Derridian deconstruction, as well as French feminism, Cornell develops her own distinctive feminist jurisprudence. Cornell maintains that Gilligan's work represents "at least a moderate, ethical affirmation of female experience as valuable" (see *Beyond accommodation* 1999 at 137).

⁵³ "Portia in a different voice: Speculations on a woman's lawyering process" 1985 (1) *Berkeley Women's Law Journal* 39 and "Portia redux: Another look at gender, feminism and legal ethics" 1994 (2) *VA Journal of Social Policy and Law* 75.

⁵⁴ See in particular Menkel-Meadow 1985.

⁵⁵ Mokgoro "Ubuntu and the law in South Africa" <http://www.puk.ac.za/lawper/1998-1/mokgorab.html>.

⁵⁶ West *Caring for Justice* 1997 at 48.

⁵⁷ See Cornell 2003 "Autonomy re-imagined" 2003 (8:1) *Journal for the Psychoanalysis of Culture and Society* 144 at 144. Spivak argues along the same lines that our responsibility to others signifies not only an act of response which completes the transaction of speaker and listener, but also the ethical stance of making discursive room for the other to exist. In other words' "ethics are

The Equality Act and its courts have been introduced with the promise of introducing an alternative jurisprudence (and jurisdiction) of care as glimpsed to some extent in the courts of love. It is necessary now to carefully consider the ways in which these courts could interpret the right to gender equality and the jurisprudence it could adopt in order to fulfil their transformative potential.

5.3 Moving beyond substantive interpretations of gender equality

In response to the various criticisms leveled at the early equality jurisprudence of the Constitutional Court, and in particular the centrality of dignity in the equality enquiry, suggestions have been made that (socio-economic) disadvantage should rather be central to the interpretation of the right to equality:

“Conceptually, the replacement of disadvantage with dignity returns us to a liberal and individualised conception of the right. The centrality of disadvantage, vulnerability and harm, and their connotation of groups-based prejudice – the essence of the right – is lost.”⁵⁸

As alluded to above, it has been argued that the underlying purpose of the equality clause is to improve the position of (historically) disadvantaged groups and not to perpetuate the privileged position of relatively advantaged groups.⁵⁹ This substantive interpretation of the right to equality is reflected in the *Hugo* judgment⁶⁰ as *per* O’Regan J:

“There are at least two factors relevant to the determination of unfairness: it is necessary to look at the group or groups which have suffered discrimination in the particular case and at the effect of the discrimination on the interests of those concerned. The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair.”⁶¹

not just a problem of knowledge but a call to relationship” (“Introduction” Landry and Maclean (eds.) *The Spivak Reader* 1996).

⁵⁸ Albertyn and Goldblatt 1998 at 258.

⁵⁹ Liebenberg and O’Sullivan 2001 at 80.

⁶⁰ *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC).

⁶¹ *Hugo* at para. 112. A critique of the court’s finding and reasoning in this case can be found in chapter 4.

The contention is that systemic discrimination and social relationships should *at all times* weigh more than individual personality issues.⁶² According to this view, the Equality Act must be interpreted to give effect to the Constitution, with an emphasis on positive measures designed to protect or advance persons historically disadvantaged by unfair discrimination. This establishes a link between the Act, the constitutional right to equality and socio-economic rights, as well as entrenching the jurisprudence of substantive equality as articulated by the Constitutional Court.⁶³ This link emphasises the focus on “outcomes-based equality claims”, the need for positive measures to be incorporated into our understanding of equality, and for equality claims to address the economic disadvantage of women in particular.⁶⁴

In response to the criticisms leveled against placing the value of human dignity at the center of equality jurisprudence, Pierre de Vos argues that dignity should not be narrowly construed to mean individual personality issues.⁶⁵ Dignity can also be subjected to a substantive interpretation.⁶⁶ Along the same lines, Justice Arthur Chaskalson has described the integral links between equality, human dignity and positive measures in order to realise socio-economic rights as follows:

“The Constitution refers to the “achievement of equality” as a founding value. Ours is an unequal society and the Constitution recognises that positive action is necessary to establish conditions in which there is not only equality of rights but also equality of dignity. To this end the Constitution provides that the state must take action to achieve the progressive realisation of socio-economic rights to housing, health care, food, water and social security”⁶⁷

In his analysis of the role of equality courts, Barney Pityana similarly finds Alibertyn and Goldblatt’s critique of the centrality of dignity, hard to understand.⁶⁸ He argues

⁶² Ibid.

⁶³ Liebenberg and O’Sullivan 2001 at 89.

⁶⁴ Ibid.

⁶⁵ “Substantive equality after *Grootboom*: The emergence of social and economic context as a guiding value in equality jurisprudence in Jagwanth and Kalula (eds.) *Equality Law* 2001 at 52.

⁶⁶ De Vos 2001 at 58-59.

⁶⁷ “The third Braam Fischer lecture: Human dignity as a foundational value of our constitutional order” 2000 (16) *SAJHR* at 203 (my emphasis).

that human dignity is not simply an individualised abstract concern but is foundational to equality. Only when a human being recognises another human being's inherent humanity imbued with the quality of dignity, will she understand that inequality is a contravention of dignity:

“It seems to me that this will not only take us forward in relation to substantive equality measured not only in a formalistic sense but in terms of impact and outcome and opportunities.”⁶⁹

Drucilla Cornell also wishes to extend (or re-configure) the concept of dignity, usually understood with respect to individuals, to be inclusive of family and kinship relationships.⁷⁰ She submits that Lacanian psychoanalytic theory “frees dignity from its overly rationalistic and individualist roots”.⁷¹ In her formulation of the legal recognition of what she calls the “imaginary domain”, Cornell argues that this domain consists of the moral and psychic right to represent and articulate the meaning of our desires and our sexuality “within the ethical framework of respect for the dignity of all others”.⁷² Cornell's vision is of a feminism which allows us to dream of a world where we are all free and equal persons in our day-to-day lives.⁷³ Cornell also submits that the African value/ideal of *ubuntu* is a reflection of this re-configuration of the Kantian ideal of human dignity.⁷⁴

It is clear from the above that there are strong arguments raised in support of the concept of dignity as central to equality jurisprudence. I agree, however, with Van Marle that this jurisprudential turn needs more thought and return once more to this cautionary note below.

⁶⁸ Pityana 2002. Yacoob supports this view in a similar manner in the *Grootboom* case. In his view, the concept of human dignity embraces the socio-economic context of human well being. See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC).

⁶⁹ Pityana 2002 at 2.

⁷⁰ Cornell 2003 at 144.

⁷¹ *Ibid.*

⁷² Cornell 2003 at 144.

⁷³ *Ibid.*

⁷⁴ Cornell 2003 at 145.

Having developed the key elements of a jurisprudence of substantive equality, the Constitutional Court eventually found an opportunity to apply this jurisprudence to claims brought by disadvantaged women seeking the full and equal enjoyment of socio-economic rights in the *Bhe*, *Shibi* and *South African Human Rights Commission* cases.⁷⁵ In these cases, encountered in chapters three and four, the applicants approached the Court to challenge the constitutional validity of the customary rule of primogeniture which only allows men to inherit in terms of the rules of intestate succession. The underlying issues in this case are the need for the financial (socio-economic) independence of women and the need to break – or at the very least rattle - the chains of a patriarchal system.

The majority decision delivered by Justice Pius Langa, confirming the unconstitutionality of the rule of primogeniture, reflects an approach that takes into account the supremacy of the constitutional values of human dignity, equality and freedom. In subscribing to the equality test as laid down in *Harksen v Lane*⁷⁶ Langa has the following to say in defense of his decision to ‘strike down’ the rule of primogeniture:

“Not only is the achievement of equality one of the founding values of the Constitution, section 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all including those who have been subjected to unfair discrimination in the past.”⁷⁷

Whilst granting due acknowledgment to the Court for its concern for the financial independence of women and girl-children, who do not benefit directly from customary rules of intestate succession, it should be kept in mind that a western mindset determined this substantive analysis. On the other hand, the minority judgment of Justice Sandile Ngcobo reflects a far more culturally sensitive approach to the issues at hand. Ngcobo, in effect, encourages an approach that

⁷⁵ *Bhe and Others v Magistrate, Khayelitsha* CCT49/03; *Shibi v Sitholi and Others* CCT69/03 and *South African Human Rights Commission and Another v President of the Republic of South Africa* CCT50/03 (hereinafter referred to as the *Bhe* case). These cases were heard together and the full text can be found at <http://www.constitutionalcourt.org.za>.

⁷⁶ 1998 1 SA 300 (CC).

⁷⁷ *Bhe* at para. 50.

allows for communities to determine *for themselves* the needs of individuals and the group and to respond accordingly. He suggests the rather novel approach of providing a space for communal agreement to be reached as to who is most in need of financial support and then to respond to this need. Ngcobo bases his argument on the African philosophy of *ubuntu*, which encourages co-operation and communal systems of care. Although Ngcobo does not highlight the relationship between the African philosophy of *ubuntu* and the value of human dignity in this case, he does so in the case of *Hoffman v South African Airways*.⁷⁸ In the latter case he holds that HIV/AIDS sufferers should be treated with dignity and respect in accordance with the demands of *ubuntu*.

In a similar vein, Justice Edwin Cameron reminds us that the structures of *apartheid* induced inequalities have left deep marks on our national consciousness and for this reason there is a need for an express and deep commitment to gender, race and other forms of equality.⁷⁹ He relies on Langa's description of *ubuntu* as the recognition of another's status as a human being worthy of respect. This recognition has a converse in that "... the person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community".⁸⁰ Cameron thus utilises *ubuntu* as an *inclusive concept of humanity* that facilitates the building of our future on respect, tolerance and "delight in our diversity".⁸¹

Notwithstanding these sincere attempts made at contextualising the right to equality, it is again submitted that the substantive interpretation of equality as linked with dignity and socio-economic demands, as illustrated in the *Bhe* case, does not go far enough. The substantive approach is indeed an improvement on the formal approach to equality where the law treats all individuals as *if* they were the same, but it does not go far enough in its recognition of the complexity and

⁷⁸ 2000 2 SA 1 (CC).

⁷⁹ See Cameron's Windhoek speech 2001 at 1.

⁸⁰ Cameron 2001 at 2.

⁸¹ Cameron 2001 at 3. Cameron thus holds that the value of *ubuntu* encourages the unconditional acceptance of the gay and lesbian community.

radical nature of difference. Substantive interpretations of equality may also easily become formalised and institutionalised and may in this way reduce and/or assimilate difference. An alternative to both formal and substantive equality is an *ethical interpretation of equality*. This interpretation does not seek to reduce or violate difference, but urges us always to strive for an unknowable equality and an impossible justice. This does not invalidate our search for equality and justice, but prevents the complacency that Costas Douzinas warns us against.⁸²

In furtherance of her interpretation of Cornell's account of ethical feminism, Van Marle questions whether substantive equality *truly* protects and enhances the right and value of equality.⁸³ She shows, through a critical analysis of the Constitutional Court cases of *President of the Republic of South Africa v Hugo*⁸⁴ and *Harksen v Lane*,⁸⁵ that collapsing the protection of dignity with the right to equality allows for the reinforcement of "stereotypical" views of parent-child relationships (in the *Hugo* case) and the marriage relationship (in the *Harksen* case). Referring to Drucilla

⁸² *The end of human rights* 2000.

⁸³ See Van Marle "The capabilities approach', "the imaginary domain', and 'assymmetrical reciprocity': Feminist perspectives on equality and justice" 2003 (II) *Feminist Legal Studies* 255.

⁸⁴ *Supra*.

⁸⁵ *Supra*. It is in this case that the Constitutional Court formulated the substantive "test" for equality. On the facts of the case, the assets of the applicant's husband had been sequestered. In terms of the provisions of the Insolvency Act 24 of 1936, the applicant's separate estate had, upon sequestration of that of her husband, automatically vested in the Master of the Supreme Court. The purpose of these provisions was to prevent an insolvent spouse from 'hiding' assets from creditors in anticipation of sequestration. The applicant challenged these provisions firstly on the basis that they treated her and others in her position unequally. Her second challenge rested upon the assumption that the provisions unfairly discriminated against her and others in her position on the basis of their marital status. This latter allegation was said to affect the human dignity of persons in such a position. The majority of the court held that there was a reasonable connection between the legitimate government purpose of determining whether a solvent spouse's property was indeed his or hers and the impugned provisions. On the face of this conclusion, the equality provisions of the Constitution in s9 had not been violated. The court also held that although the provisions discriminated against solvent spouses, the discrimination was fair, primarily because solvent spouses were not part of a previously disadvantaged group and because the impact of the provisions was thought not to affect their human dignity adversely. Sachs J in his minority judgment found that the provisions do indeed unfairly discriminate against solvent spouses. He shows how even a 'new and improved' substantive interpretation of equality can have negative and stereotypical outcomes. He points out how the majority of the court had disregarded the extent to which they reinforced a "stereotypical view of the marriage relationship which is demeaning to both spouses" (at para. 120). He also notes that the provisions of the Act under scrutiny reinforce an understanding that spouses do not live as free and equal persons within the marriage union.

Cornell's concern with dignity in South African Jurisprudence and the discourse on socio-economic rights, Van Marle argues that:

“We should take heed not to harm the dignity, respect (and right to the imaginary domain) of individuals by defining and approaching them only as “vulnerable”, “most needy”, and so on.”⁸⁶

Following Van Marle's concern with current equality thinking, my contention remains that the ethical demands of us the making of wise and responsible judgments, taking into account the day-to-day experiences of women and others who struggle to change their world(s). I submit that this situatedness is discoverable through listening to the stories of those seeking justice. This approach may take us beyond generalisations, stereotypes and metanarratives and prevent us from once again reducing others into helpless (and hopeless) victims. For this very reason, I support a storytelling or narrative approach to equality jurisprudence, which is rooted in an ethic of care, or more particularly a broadened conception of care.

5.4 Paying careful attention to stories of unfair discrimination

The positivist order of *apartheid* South Africa with its mechanical application of immoral laws led to various injustices. Judges were required to distance themselves from any involvement in the particular stories of the characters before them. Their duty was one of analysing the ‘facts’, identifying the rules, and applying the rules to the facts. This process (or the perception of the process) does not accommodate any attention to the particular as expressed through sympathy, imagination, storytelling or emotion. In this way, adjudicators failed to apply their imaginations to the invitations extended to them to transform the law, and thereby denied the very lives of people attempting to find new ways of living together as equals.⁸⁷ To put it another way, despite the claim that the law ‘hears’ all equally, this hearing is made possible only through the hierarchical ordering or

⁸⁶ Van Marle 2003 at 271.

⁸⁷ Much criticism has been levelled at judges and magistrates who applied unjust *apartheid* laws. See Dyzenhaus *Judging the judges, judging ourselves: Truth, reconciliation and the apartheid legal order* 2003. Dyzenhaus espouses an anti-positivistic philosophy of law in his critical evaluation of the roles of judges, lawyers and law teachers in the years 1960-1994. He argues that a commitment to rules is not the same as the commitment to *legality* which he interprets as the “commitment to a community of free and equal citizens” (at 183). Dyzenhaus in particular laments the fact that more judges did not come forward to testify at the hearings of the Truth and Reconciliation Commission as “the tasks of truth and reconciliation are forward-looking, searching the past to imagine how it happened and how it might have been different” (at 175).

privileging of voices. One must follow strict procedures to be heard and subject oneself to the Authority of the One Law.

To illustrate, in *Minister of the Interior v Lokhat*⁸⁸ it was held that according to legislation, favourable areas in Durban were allocated to white people and poorer areas were made available to the black community. The complainant, Lockhat, argued that the division was unreasonable and discriminatory. In response to this logical submission the then Appellate Division through Holmes JA said that the question was purely legal in nature and that it was not the court's role to decide whether the statute discriminates or not. Even since 1995 the Constitutional Court has at times denied its political and moral responsibility. In *S v Makwanyane*⁸⁹ Kriegler J commented that the interpretative methods to be used are "essentially legal, not moral or philosophical ... The incumbents are judges not sages, their discipline is the law, not ethics or philosophy and certainly not politics".⁹⁰ These words depict a continued reliance on positivist thought where reality is determined by what textual law explicitly prescribes.

The imaginative or narrative perspective could, unlike legal positivism and its processes of exclusion and disempowerment, assist us in acknowledging and accommodating the particularities and nuanced variations in human stories and relationships. However, it can be argued that merely hearing all sides is precisely what positivism does. This may be so, but the 'hearing' of those who stand before the law is a process of rendering their stories legally coherent according to rules and universal standards. The self, on the other hand, is the protagonist of a life's tale that cannot easily (if at all) be captured in the language of law or even rights. But, not to allow the other to speak of her lived experiences is to deny her humanity.⁹¹ The demand to hear the other thus goes further than the traditional positivistic understanding of legal 'hearing'. The latter involves a claim that

⁸⁸ 1961 2 SA 587 (A).

⁸⁹ 1995 6 BCLR 665 (CC) at para. 207.

⁹⁰ Ibid.

⁹¹ Cavarero *Relating narratives: Storytelling and selfhood* Kottman (trans.) 2000.

persons must be judged exclusively according to their classification in broad categories of law and be treated equally in terms of established rules. In claiming legal rights there exists the danger of the process being one of *disempowerment* where “ordinary people are progressively deprived of their authority over their own stories”.⁹² This occurs as a result of the fact that lawyers in legal proceedings take control of the stories told and determine what will or will not be said:

“In law it often seems that where our voices ought to be there is only silence or denial.”⁹³

As illustrated in chapter three, the storytelling approach to adjudication offers us new ways of attempting to compare incommensurate goods, such as the right to equality and the right to culture, freedom, dignity and so on, and would be a suitable approach to adopt in an equality court. Consequently, the dangers of merely continuing to apply positivistic methodologies in these equality courts should be guarded against. The training of presiding officers should thus include, in my view, creating an awareness of alternative methods such as storytelling or narrative approaches to legal decision-making where we carefully consider the situated selves before us, and their particular social and legal needs.⁹⁴ This approach would allow us to cross over from the orthodox reading of law and judgment to the opening of spaces for alternative and creative modes of thought and judgment in law and in life.

Stories and storytellers can in certain circumstances be a threat to repressive power. This is illustrated in Chinua Achebe’s African novel *Anthills of the Savannah* where a schoolteacher, Ikem, tells his pupils that storytellers:

“... threaten all champions of control, they frighten usurpers of the right-to-freedom of the human spirit – in state, in church or mosque, in a party congress, in the university or whatever.”⁹⁵

⁹² Berns 1999 at 5.

⁹³ Berns 1999 at 4.

⁹⁴ The right to equality is currently formulated by the Constitutional Court as the right to non-interference with the dignity of individuals and thus requires a form of personal and legal detachment. See *Hugo* supra as an example of this tendency.

⁹⁵ Achebe 1987 at 142.

Drucilla Cornell also encourages us to listen to the stories of other women in the international or transnational domain.⁹⁶ She illustrates the need to listen by relating a story of the Revolutionary Association of Women in Afghanistan (RAWA). For twenty-five years these women fought internally against the oppression of the Taliban government, and before that, the governments of the warlords and the Soviet Union. Throughout this struggle they requested the support of feminists residing in the United States of America. They were one of the first organisations to condemn the attack on the World Trade Center in 2001. However, they also argued against the US bombing of Afghanistan as retaliation and requested American feminists to assist them in preventing the attack. After the bombing had taken place, George W. Bush declared that the attack on Afghanistan was part of a process seeking to liberate the women of that region. Regardless of the irrationality of this argument, many US feminists supported this approach as a 'humanitarian' intervention. RAWA responded to this by demanding self-reflection on the part of these feminists as the latter did not heed what they had to say. Their argument was based upon the fact that their voices had not been listened to. Cornell maintains, through the telling of this story and many others, that we should "really hear the call of the other" and take into account the particularity of other women.⁹⁷ The ethical, according to Cornell, is less a set of rules than a "mode of being which puts a demand on us to truly respect other women and the lessons they have to teach us".⁹⁸

Both Achebe and Cornell, arguing from differing philosophical perspectives and backgrounds, bring to the fore the idea(l) that a narrative approach assists us in addressing the violent silencing of those who *live* their stories. Silence is violent in the sense that every human existence is a life in search of a narrative and thus the denial of the story is the denial of a unique and irreplaceable life. Achebe attempts to reduce the violence by calling for a re-storying of Africa⁹⁹ and Cornell by calling

⁹⁶ "Ethical feminism and the call of the other (woman)" an unpublished interview with Cornell sourced at http://www.fhk.eur.nl/personal/zuidhof/Hilla_files/interview%20Cornell.doc .

⁹⁷ Cornell Interview at 4.

⁹⁸ Ibid.

⁹⁹ Achebe *Home and exile* 2003.

for a more nuanced (South) African constitutional jurisprudence.¹⁰⁰ Cornell's most recent project embraces this very process of re-storying by proposing the recollected philosophy of *ubuntu* as a constitutional ideal.

It is indeed unfortunate that the preamble to the Equality Act has been re-written to omit the powerful statement originally found in the preamble to the Bill, namely that our constitutional values *originate* from the African philosophy of *ubuntu*. As pointed out in chapters three and four, the concept of *ubuntu* is difficult to express in the English language as it loses much in translation. However difficult westerners find this philosophy, its adoption could do much to further the transformation of the law and the right to equality. This is so as it represents a move away from individualistic liberalism towards a conception of a community both just and caring as envisioned by Justice Yvonne Mokgoro.¹⁰¹ Mokgoro argues that *ubuntu* is a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness, and morality. The fundamental belief is that *motho ke ba batho ba bangwe/ubuntu ngumuntu ngabantu* which, literally translated, means that a person can only be a person through others, which belief facilitates *close and sympathetic social relations* within the group.

The possible impact of this shift in focus can best be illustrated by a re-reading of the *Jordan* case.¹⁰² It is submitted that the decision *might have been different* had the court listened to the stories of the sex workers and not merely dismissed their claims on the basis of an archetypal morality. Their stories of harms inflicted and abuse suffered were ignored to a large extent as the court clung to a metanarrative of sex workers as sexual deviants not deserving of protection or

¹⁰⁰ Cornell "A call for a more nuanced constitutional jurisprudence: Ubuntu, dignity, and reconciliation" 2004 (19) *SAPL* 661.

¹⁰¹ See *Khosa and Others v Minister of Social Development and Others* CCT 13/03. See also Labuschagne and De Kock "Ubuntu as a conceptual directive in realising a culture of human rights" 1999 *THRHR* 114 where the authors argue that constitutional interpretation should be based upon the philosophy of *ubuntu*. The authors state that the spirit that *ubuntu* exudes with its ideas of humaneness, social justice and fairness can be used to make the Bill of Rights "real, effective and practicable" so as to "take hold of the minds of ordinary people". (at 120).

¹⁰² *Jordan v The State and Others* 2002 11 *BCLR* 117 (CC).

claims to privacy, dignity and equality.¹⁰³ This harsh response to the legal dilemma of sex workers can be justified simply by adopting the attitude that it is not *our* problem. But this is precisely where *ubuntu*-thinking would differ. *Ubuntu* culture, as an expression of (African) humanism, emphasises what can be interpreted as a sense of social morality which in effect constitutes a consciousness of social responsibility. There is thus a strong emphasis on care, relationships and duties (as reflected in Gilligan's ethic of care) and less reliance on rights as traditionally conceived in the west. Augustine Shutte understands this shift in emphasis to mean that every member of a society should visibly participate in communal life and that no one should disappear in the whole.¹⁰⁴ Vulnerable members of the community, such as sex workers, cannot be made to disappear and their ever-presence thus demands of us the recognition of the humanity of these men and women and our (ethical) responsibilities towards them.

Ultimately, the argument here is that we should respond to the stories of others *because we care*. In the words of the poet Walt Whitman:

"The poet judges not as the judge judges,
but as the sun falling around a helpless thing".¹⁰⁵

¹⁰³ See chapter four for a critical discussion of the majority judgment in the *Jordan* case. The fantasy writer, Pratchett, illustrates in his novel *Witches Abroad* 1991 the power of storytelling (as supported by Achebe) and our ability to subvert metanarratives. In this case the 'grand' narrative is a fairytale. Fairytales traditionally follow a formula that we are familiar with. They begin with "once upon a time" and end with the 'good' characters living "happily ever after". They are about innocent and beautiful princesses, frog-like princes, evil wolves, heroes stealing fire from the gods, wicked stepmothers and so on. Pratchett shows through the telling of what can be seen as his counter-fairytale that we need to be aware that stories have the ability to shape lives:

"Stories don't care who takes part in them. All that matters is that the story gets told, that the story repeats. Or, if you prefer to think of it like this: stories are a parasitical life form, warping lives in the service only of the story itself. It takes a special kind of person to fight back, and become the bicarbonate of history" (at 9).

In this story, Magrat, an inept witch, inherits a magic wand that has the unfortunate tendency to turn everything into pumpkins. Along with this inheritance, she is tasked with the *interruption* of a well-known story-line. Lily, an evil fairy godmother, has arranged the marriage of Ella to a toadish prince. Magrat and her coven of mentors (including the stern Granny Weatherwax and motherly but sex-crazed Nanny Ogg) undertake a journey of epic proportions in order to defeat the evil fairy godmother and the inevitable outcome of the story. Thus, instead of the traditional Happy Ending, this ending, through intervention, is happy precisely *because* Ella does not marry the prince. Ultimately people should not be turned into *characters* but be given the space to change the story. Applied to the law, spaces should be opened up to enable people to challenge metanarratives, stereotypes and understandings of what it means to live as equals.

¹⁰⁴ 1992 unpublished paper in my possession.

¹⁰⁵ Whitman (1819-1892) "Leaves of grass" 1895.

This may be read to mean that a wise judgement should go beyond The Law (as it is written) into a realm where the complexity of human lives is illuminated and where the call of the other is a demand to be met and not merely ignored or denied.

Whatever we choose to name the time we are living in, it is “for all its jangle, complexity and dissonance, a moment of great beauty and opportunity”.¹⁰⁶ It is a time where we may for the first time glimpse new ways of being and becoming and new possibilities for co-existing with others considered to be vastly different from ourselves. This time is confusing but hopeful, a time which enables us to “understand the world in terms of what it is struggling to become”.¹⁰⁷

5.5 That which is yet to be...

“Love is an ethics of differences that thrives on the adventure of otherness. This means that love is an ethical and social responsibility to open personal and public spaces in which otherness and difference can be articulated.”¹⁰⁸

Although there continue to exist numerous challenges, mainly related to resource allocation, in implementing the provisions of the Equality Act, the (theoretical) beauty of introducing equality courts is that their existence does not merely introduce a special room to deal with special cases. Rather, the system of equality courts has the potential to introduce a new way of bringing about greater justice for all South Africans. This development affords us an experimental yet significant opportunity to reshape our society and to move away from traditional liberal legalism to introduce a more compassionate narrativist method of conflict resolution rooted in indigenous thinking.¹⁰⁹ It is hoped that we use this opportunity wisely.

¹⁰⁶ Anderson (ed.) *The Fontana postmodern reader* 1995 at 11.

¹⁰⁷ Ibid. Irigaray *An ethics of sexual difference* Burke and Gill (trans.) 1993 configures angels as mediators of that which has not yet happened, of that which is still to happen, of what is on the horizon (at 15).

¹⁰⁸ Oliver *Witnessing: Beyond recognition* 2001 at 20.

¹⁰⁹ At the time of writing (May 2005) the first “high profile” equality case has been instituted in the East Cape equality court based at the High Court. Four white district magistrates – one woman and three men – are challenging the appointment of two black women magistrates in the regional court

In her development of an ethical interpretation of equality in South Africa, Van Marle argues that the intersection between public space, equality and justice is significant and carries with it a large amount of potential.¹¹⁰ She supports this argument by maintaining that substantive interpretations of equality could at best be a temporary remedial measure and should not be slavishly applied to the extent that it becomes formalised. My submission remains that Van Marle's 'intersection' thesis can facilitate the creation of spaces for the telling of stories and for the celebration of both our common humanity and our differences and that the equality courts should adopt an ethical approach to equality disputes.¹¹¹ Equality courts have the potential to become spaces of the ethical intersection of transformed public space, equality and justice where individuals can actively participate and also become part of a broader public debate on issues such as gender equality.

The ethical dimension of equality lies in the understanding that difference cannot be accommodated or defined or enclosed in a definition or provided for in a specific test, such as the test for substantive equality formulated by the Constitutional Court.¹¹² There should be no assumptions of generality or universality that exclude or reduce difference(s). The ethical is rather an openness towards difference and a strategy of non-violence. Even if a court adopts a more progressive substantive approach to equality, the focus remains on past and present 'realities' and not on the radical 'not-yet' of the future:

on the grounds that the appointments show unfair discrimination and racism. The four magistrates argue that they were best qualified for the positions advertised and question the experience of the successful candidates. Pending the court case, the positions allocated to the two successful candidates have not been filled. Claiming that the Equality Act is aimed at ensuring the promotion of a society in which all people are secure in the knowledge that they are recognised as human beings equally deserving of concern, respect and consideration, the complainants have taken on the appointment process and its outcome. See *The Herald* 18 April 2005. It has been said that this case will test the "credibility" of the equality court. Against the background of arguments raised to adopt and apply substantive equality jurisprudence in these courts, it is highly unlikely that the complainants, who do not come from previously disadvantaged backgrounds, will be successful in their civil claim.

¹¹⁰ "Equality: An ethical interpretation" 2000 (63) *THRHR* 595.

¹¹¹ See in general Van Marle LLD thesis Unisa 2000.

¹¹² See *Harksen v Lane* supra for a detailed reference to this test as discussed in chapters two and three.

“Part of an ethical interpretation of equality will be to challenge the law’s current belief in fixity. The challenge will be to show that an ethical interpretation of equality and, accordingly, an open-ended approach, can have a more substantial effect on the concrete context and specific circumstances of individuals than a formalised approach, and in the end can serve the ideal of justice better.”¹¹³

As alluded to above, formulating a substantive interpretation of (gender) equality based on socio-economic context leads us once more to a reliance on rules, tests and texts. These (transformed) rules may well result in new exclusions as the ethical limits of these legal constructions remain invisible. It is advisable that our search for legal certainty does not lead to closure as witnessed in the stories as related to the reader in the previous chapter.¹¹⁴

It should be emphasised here that the stories I refer to are not cosy conversations but proof of the existence of local narratives which serve to remind us of the fact that the metanarrative or ‘official’ story of the law is not the *only* story.¹¹⁵ It is the transformative potential of these stories that is important in terms of this particular discourse. Drawing on the work of Chinua Achebe, it is submitted that stories are both powerful and dangerous.¹¹⁶ The danger lies in the imperialist (and colonialist) tendency to relate stories that serve to negate the other.¹¹⁷ The power of stories lies in their transformative potential. In an interview with Achebe he describes this as follows:

“Yes – the recognition of the importance of stories. We don’t know one-tenth of the stories knocking about. But if you want to understand a people’s experience, life and society, you must turn to their stories. I am constantly looking for that moment when an old story suddenly reveals a new meaning.”¹¹⁸

¹¹³ Van Marle 2000 at 606-607.

¹¹⁴ It is shown in the previous chapter how Hugo, Mthembu, Carmichele and Jordan were denied legal recourse as a result of the stringent application of legal rules, tests, and technicalities. The argument advanced is that the denial of their stories amounts to a denial of them as persons deserving attention.

¹¹⁵ In a paper delivered at a UNISA symposium *North, South, East, West: Myth and the collision of culture* on 8 June 1994 entitled “Legal meaning and the other: Beyond a mythology of negation”, Botha argues that a turn to community is not unproblematic as the power of the state and its laws is concealed behind appeals to shared understandings. It is for this very reason that he argues for an “outsider” jurisprudence that acknowledges social struggle and dissensus.

¹¹⁶ 2003. He offers us African stories steeped in Igbo philosophy.

¹¹⁷ Botha 1994 at 1.

¹¹⁸ “Talking to the wise man in the woods – Chinua Achebe: No longer at ease in exile” interview by Otchet, UNESCO Courier journalist. Achebe insists that we leave the telling to the “owners” of the

It appears that the Equality Act provides us with a legal framework flexible enough to accommodate difference and storytelling – special training for presiding officers, informal procedures, relaxed rules of evidence, facilitation of easy access, legal assistance in deserving cases, and so on.¹¹⁹ It remains to be seen what this developing jurisprudence can offer us as (South) Africans living in hope of a better future and a re-storying of justice as/and care. As written several decades ago, but still resonant today, “I celebrate the me yet to come”.¹²⁰

story and thus pave the way for the re-storying of the world by allowing everyone a voice. He also insists that no one should speak on behalf of anyone else.

¹¹⁹ It is submitted, as pointed out above, that the Equality Act and its Regulations envisage and encourage a ‘free’ system of evidence, as opposed to a strict system. This allows more space for the telling of stories without an unduly restrictive application of and adherence to legal formalities and technicalities.

¹²⁰ Lassiter (Lyrics) “I sing the body electric” Fame soundtrack 1980 Mercury records. Whitman penned an anti-slavery poem “Song of myself” in 1855 containing the same lines.

CHAPTER SIX

THE WAY(S) FORWARD

“It’s the end of the world as we know it (and I feel fine).”¹

6.1 Looking back...

From the outset, I have argued that western liberal legalism in the guise of positivistic thought and formal equality jurisprudence allows lawyers to continue to rely on abstract and universal rules and texts when dealing with real and complex lives.² As illustrated in previous chapters, the ‘keepers of the law’ determine which stories are legally valid and ‘fit’ legal categories. Law, in its dominant mode, aims to fix narratives within rigid categories such as substantive equality or socio-economic status.³ Juristic ‘science’ as we know it claims to be a cold and

¹ REM from the album *Eponymous* 1988 Capital Records.

² This reliance on texts is discussed in chapter two. Irigaray explores this subject in *To be two* Rhodes and Cocito-Monoc (trans.) 2001. In her analysis of silence she refers us to the way of Buddah and the yogin and yogini (at 64). In this tradition there is a culture of silence. This culture corresponds to the becoming of life thanks to the cultivation of breath. The end of the way is silence, but the “reawakened, aroused practitioner speaks only through compassion” (ibid). Modes of speaking are those which respect the breath, such as poetry, praise and songs. In Western culture, however, the Wise practice a mode of speaking which is logical, abstract, conceptual and “a bit suffocating” (ibid). In the latter tradition the Word is a means of survival in the intellectual sense, rather than “a path of sharing” (at 65). For Irigaray, we can only speak and be heard if we are capable of silence:

“Using the word for sharing requires a defense of silence which respects the life and identity of each person. Beyond the fact that I must be quiet to be attentive to the difference of the other, so that the relationship can grow, silence itself must be cultivated, for instance, in the memory of the alterity of the other-man and in the memory of myself as woman” (ibid).

There is no doubt that there is a time to speak and a time to listen in silence, but there is *never* a time to silence others.

³ In chapter five I critically analyse the latest legal theoretical tendencies to link the right to substantive equality with socio-economic status and historical disadvantage. See for a concise summary of this approach Pieterse “What do we mean when we talk about transformative constitutionalism?” 2005 (20) *SAPL* 155.

disembodied prose, a science without poetry or desire and a metanarrative that assumes the epic proportions of Truth.

As Luce Irigaray mourns:

“We shout, but who listens to us? A variety of worlds separates us: the world of *techné*, the world of calculation, the world of science, the world of culture. *We almost never face each other*. We think that we encounter each other but, most of the time, we are infinitely distant. Separated by the infinite, to be precise.”⁴

If, however, in terms of the ancient legal maxim, to do justice is to follow the heart – *carde creditur ad iustitiam* – then how can justice be achieved through legal means if the law rejects the affective domain and anything associated with connection and particularity? The law, it is written in seminal texts, resides in the rational mind and women (and other ‘outsiders’) are perceived as non-rational beings, subjected to passions of the heart. They are seen as passive victims of the affective mechanisms that govern their inner lives, who “can only ever look at history in terms of little stories, through the wrong end of their opera glasses”.⁵

Yet there is another world hidden from the consciousness of law – the world (historically associated with the ‘feminine’) of care, compassion, stories and values. Part of the project of feminism in its many forms is to reveal the relationship between these two worlds, which we inhabit, and to explore how each of these worlds or worldviews shapes and informs other(s).

For this very reason, we cannot afford to ignore the diverse and concrete experiences of others – the ‘little’ stories – as these experiences inform both feminist theory and praxis. In this way, feminist legal theory has much to offer legal discourse and gender equality jurisprudence. The aim is to learn to embrace the paradoxes of lived experiences and to constantly challenge received and entrenched knowledge systems and legal doctrine. Irigaray thus encourages us to speak differently in order not to disappear altogether:

⁴ Irigaray 2001 at 85.

⁵ Le Doeuff 1989 as quoted in Salecl *The spoils of freedom: Psychoanalysis and feminism after the fall of socialism* 1994 at 115.

“If we continue to speak this sameness, if we speak to each other as men have spoken for centuries, as they have taught us to speak, we will fail each other ... words will pass through our bodies, above our heads, disappear, make us disappear.”⁶

It is clear that in order to be heard, and not to disappear, the social, scientific, metaphysical and legal foundations of patriarchal systems need to be re-thought. The concept of gender equality itself also needs to be reinterpreted and re-imagined so that it no longer implies a measurement according to a given (male) standard. Therefore, in order to avoid a mere slotting into pre-existing patriarchal categories and theoretical spaces, lives, experiences and stories should provide the criteria by which patriarchal (legal) texts can be judged. The insertion of particular perspectives and points of view into legal discourse could result in women becoming subjects of knowledge and not mere objects of the masculine gaze.

In other words, feminist legal theory seeks paths to new ways of being and new ways of judg(e)ing when we finally face one another. In this search, legal metanarratives, such as ‘consistency’, are treated with suspicion and differences embraced. Post-modernism requires us to be wary of (legal) certainty and feminism requires of us to be reactionary and to seek change. Both theories have inherent value and together they could teach us much about difference and acceptance in a country where we paradoxically seek both unity and diversity.

By challenging patriarchal norms (both legal and social) we gain the right to choose and define for ourselves the world and our multiple and diverse ways of being in the world as narratable selves. Feminist theory in this sense seeks *new discursive spaces* that would encourage a proliferation of voices, instead of a hierarchical structure of voices, and plurality of perspectives and stories instead of the monopoly of One.⁷

⁶ Irigaray “When our two lips speak together” 1977 (6) *Signs* 6.

⁷ Storytelling keeps tales in motion and circulation. It assists us in remembering that the one truth is but another story. See Douzinas, Warrington and McVeigh *Postmodern jurisprudence: The law of text in the texts of law* 1991 at 109-110. In addition the authors maintain that with the decline in the reliance on metanarratives, narrative knowledge “seems to make a triumphant comeback” (ibid),

It is against this background that I argue in this thesis for the adoption of a jurisprudence of care, guided by the work of Gilligan, Cornell and Van Marle and informed by an indigenous (South African) perspective, described by Edwin Cameron as follows:

“By recognising our common humanity in all its diversity we make our differences our strengths. That is the challenge that Africa extends to us, and it is a challenge our future demands we accept.”⁸

We do not yet know what the law would look like in a genuinely equal world peopled by relational subjects connected to each other by mutual respect for each other’s irreducible difference. But we do dare imagine what it would be like. It is this theme which I adopt in the development of a new jurisprudence of gender equality, based on the necessity of dislodging current metanarratives and continuing the struggle for the extension of tolerance, respect and empathy for the stories of human beings who live (the law) differently. To illustrate, if we are able to learn from the perspectives of others, we may be able also to open the law to a musical rhythm that would enable us to *live the law* rather than live in or under the law.⁹ Thus, according to Mogobe Ramose we need to turn to *ubuntu* law and metaphysics, which allows for a perpetual exchange of be-ing and a responsiveness to concrete experience and becoming.¹⁰ It is submitted that both justice and law should be judged according to the ideals of *ubuntu/botho*. This demands of us that we act humanely towards others and expect the same from them. The South African Governmental White Paper on Social Welfare¹¹ recognises *ubuntu* as:

“The principle of caring for each other’s well-being and a spirit of mutual support ... Each individual’s humanity is ideally expressed through his or her relationships with others and theirs in turn through a recognition of the individual’s humanity. *Ubuntu* means that people are people through other people. It also acknowledges both the rights and responsibilities of every citizen in promoting individual and societal well-being.”

⁸ Cameron speech 2001 at 3.

⁹ Ramose *African philosophy through ubuntu* 2002 at 93.

¹⁰ Ramose 2002 at 96. Ramose explains that justice demands the restoration of humanity from the standpoint of the *ubuntu* conception of law.

¹¹ White Paper on Social Welfare, August 1997 at para. 24 (Principles) found at <http://www.welfare.gov.za/Documents/1997/wp.htm>.

The latter plea appears to articulate well with much of the ethical feminist theory explored earlier in this thesis. It is a plea for 'just-ness' which can perhaps be figured as ideal and transcendental.

In this, my final chapter, I revisit Gilligan's ethic of care and the role of the ethical in developing a new jurisprudence of gender equality particular to the South African context where, following Kearney, I "throw down the gauntlet and champion the irrepressible art of the story".¹²

6.2 Revisiting Gilligan's ethic of care

"Just take my hand and dance with me."¹³

I begin this 'ending' by returning (inescapably) once more to Carol Gilligan.¹⁴ Traditionally humans are considered to be the individual bearers of rights. This rights-based reasoning is understood to be constructed in ways that are either ethically marked as western, masculine or inimical to women's interests and needs or both. In African jurisprudence, for instance, it has been argued that the law is in service of the community and that individuals are the bearers of duties and responsibilities rather than the enforcers of rights.¹⁵ This emphasis on responsibility to others and the community is also emphasised in Gilligan's work.

Without being too reductive, I submit that in both care and *ubuntu* thinking the concept of (human) rights has been criticised as being too competitive, individualistic and indeterminate. The law consequently needs to develop a capacity to "accommodate particularity" and to avoid violent exclusions.¹⁶ In

¹² Kearney *On stories* 2002 at 128.

¹³ Oriah Mountain Dreamer *The dance* 2001 at 179.

¹⁴ Gilligan's work (see in particular her ground-breaking *In a different voice* 1982) has become an integral part of jurisprudential studies, particularly in the field of feminist theory and her ethic of care has been both embraced and vilified in the field of law and legal theory. See chapters two and three for a more complete discussion of Gilligan's contribution to feminist legal theory.

¹⁵ See Mokgoro "Ubuntu and the law in South Africa" <http://www.puk.ac.za/lawper/1998-1/mokgorab.html>.

¹⁶ Lacey *Unspeakable subjects: Feminist essays in legal and social theory* 1998 at 129.

advancing a strategy of contextualisation we can begin to address the issues of 'law as violence' and the 'ethical spaces in law'. In other words, whilst acknowledging the violence of judg(e)ment – the inevitable closing off of challenge and enquiry – lawyers should also recognise their ethical duty to attend to differences. In other words, to consider *less violent* alternatives to adjudication and interpretations of the right to gender equality.

Gilligan urges us to concentrate on a sense of community and relationship – closely associated with the African philosophy of *ubuntu* - implicit in notions of shared knowledge; orality and direct personal relationships; and speech behaviour as well as the use of imagery, narrative and affective associations.¹⁷ On the other hand, men's associations – closely associated with western philosophy - place emphases on individualism; communication at arm's length; and the use of abstraction, logic and analytic method.¹⁸ It is clear that these are, however, not exclusive associations and that men and women display both characteristics to a greater or lesser extent.

In response to the critique of essentialism, Gilligan and Attanucci offer the following (re)formulation of the care and justice debate:

“A justice perspective draws attention to problems of inequality and oppression and holds up an ideal of reciprocal rights and equal respect for individuals. A care perspective draws attention to problems of detachment or abandonment and holds up an *ideal of attention and response to need*.”¹⁹

In light of the continued skepticism towards Gilligan's body of work I introduce, as a final argument, her latest contributions to moral theory. In *The Birth of Pleasure*,²⁰ she explores the possibilities of breaking through and beyond imprisoning traditions surrounding the relationships between men and women.

¹⁷ See Jackson *Making sense in law* 1995 at 316 where he explores the value of Gilligan's contributions to theories of moral development.

¹⁸ Ibid.

¹⁹ Gilligan and Attanucci "Two moral orientations: Gender differences and similarities" 1988 (34:3) *Merrill-Palmer Quarterly* 223 at 224 (my emphasis).

²⁰ 2002.

This new work expands on her previous studies which show that the theories of human psychology and sociology, based on studies of men, have overlooked and distorted the basic aspects of the human experience such as care and connectivity and focused rather on the *tragedy* of love.²¹

To illustrate her concerns with the focality of tragedy, Gilligan relates the fable of Psyche and Cupid.²² In terms of this tale Psyche was the third and most beautiful daughter of a king and queen. Her beauty was such that she was described as the 'ideal' woman and compared to the goddess of love, Venus. Rather than this title bringing her happiness, she could not find love. Worried about her state of mind, her parents visit the oracle of Apollo who informs them that their daughter will marry a 'monster'. In the meantime, a jealous Venus sends her son Cupid to punish Psyche for her beauty. Upon laying his eyes upon Psyche, Cupid falls in love with her, but places conditions on their love – she may not see him nor speak about their love to anyone. Initially Psyche is happy with these conditions, but eventually convinces Cupid to allow her to tell her sisters of their love. Her sisters, also consumed with jealousy, convince Psyche that her lover does not want her to see him, as he is the monster of her fate. Psyche is curious and sneaks up to Cupid at night while he is sleeping. Bending over him with a candle, the light reveals his beauty to her, but he awakes when candle wax falls onto his shoulder. Angered by this betrayal, Cupid flies back to his mother. Psyche realises her mistake and seeks to be reunited with her lover. Venus commands her to complete three tasks in order to see her son again. Psyche struggles to succeed, failing the final task. But this story has a happy ending – Cupid saves Psyche and Jupiter marries them in an eternal union. In due time they have a daughter who is named Pleasure.

Gilligan sees the myth of Psyche and Cupid as a map of resistance and a story of transformation:

“Set in a landscape of tragedy, this story leads to the birth of pleasure.”²³

²¹ Gilligan 1982 challenges Kohlberg's methodologies and conclusions.

²² This story originally appears in the works of Apuleius, a writer from North Africa.

The fable of Psyche and Cupid is allegorical – the Greek name for butterfly is psyche and the same word means the soul. The butterfly is thus an illustration of the immortality of the soul when she bursts forth from her cocoon to flutter the blaze of day with her brilliant wings. Psyche then is the human soul, which is purified by suffering, tragedy and misfortune and is thus prepared for the enjoyment of happiness and pleasure.

Here Gilligan adopts a utopian approach and re-reads the fable of Psyche and Cupid to illustrate that the birth of pleasure lies ahead, always beckoning us:

“The task of extremist writing is to put through the call for a justice of the future. Henceforth, justice can no longer permit itself to be merely backward looking or bound in servility to sclerotic models and their modifications (their ‘future’). A justice of the future would have to show the will to rupture.”²⁴

In developing her argument, Gilligan illustrates how the liberation movements of the twentieth century have indeed challenged old patriarchal structures, but that the underlying patterns of oppression and discrimination (or tragedy) remain. Along these lines, she expresses an interest in the connection between love and democracy, and the intimate joining of private and public life as illustrated in the fable she relates.²⁵ Although she does not once mention the ‘ethic of care’ expressly, it may be understood by implication that she is referring here to this ethic and its importance to both private and public life. She suggests that both love and democracy depend on *voice* – in other words having a voice and also the *resonance* that makes it possible to speak and be heard:

²³ Gilligan 2002 at 1. Gilligan’s insistence on the “birth” of pleasure is significant in the light of philosophy’s historical privileging of death over birth and life. Cavarero 2005 illustrates this tendency in the work of Levinas. For Levinas the ultimate purpose of breath is met in its final expiration “in the mouth of God” (Deuteronomy 34 v 5). This focus on the passivity and tragedy of death concerns Cavarero:

“Levinas’ attention on the dying breath lets the sonority of the newborn’s first breath, first cry pass unheard. He does not hear the acoustic, inarticulate, fragile yet undeniable revelation that invokes responsibility for a proximate newcomer, for an existence that is beginning” (at 32).

See also Peperzak, Critchley and Bernasconi (eds.) *Emmanuel Levinas: Basic philosophical writings* 1996 where Levinas writes about passivity as “the possibility of death within being ... a gravity without any frivolity, the birth of a meaning in the obtuseness of being, a “being able to die,” submitted to sacrifice” (at 95).

²⁴ Ronell *Crack wars: Literature, addiction, mania* 1992 at 21.

²⁵ Gilligan 2002 at 232.

“Without voice, there is no relationship; without resonance, voice recedes into silence. As the resonances of our common world are changing, as more voices come into the human conversation, we are rewriting our collective story, our history, coming to hear and to see ourselves and one another differently. Thus we step out of a frame.”²⁶

In addition, she points out that we are writing and theorising at a time when our frameworks are continuously shifting and this moves us to what she terms the “edge of possibility”.²⁷ This movement enables us to envision a democracy and a legal system that are not patriarchal in nature and where we can truly find the space to live together as equals.

However, Gilligan also warns that leaving behind patriarchy is risky, as it means giving up power and control.²⁸ Hope can therefore be a dangerous emotion as it leads us to imagine an “escape from tragedy”.²⁹ The hope of the new, and the nakedness of standing without a frame, heightens our awareness of the vulnerabilities of ourselves and others and this may tempt us to (re)turn to the known, no matter the costs involved. Having issued this warning, Gilligan invites us to a new life of creativity as illustrated by Ben Sidran in *Talking Jazz: An Oral History*:

“At the heart of jazz ... is a terrific contradiction; nothing is what it appears to be, but everything is exactly what it is. There are no secrets, and that, of course is the secret. It is the art, then, of circumlocution, of learning to approach the truth from many sides.”³⁰

²⁶ Ibid. See also Cavarero *For more than one voice: Toward a philosophy of vocal expression* Kottman (trans.) 2005 where she writes of a politics of voices (*una politica delle voci*), the communication between singular voices and “the rhythmic cadence of a resonance that links these voices” (at 198).

²⁷ Ibid.

²⁸ Gilligan 2002 at 233.

²⁹ Ibid.

³⁰ As quoted in Gilligan *ibid*. Much as Gilligan has been tackled by postmodern theorists and jurists, her new work, as illustrated above, appears to reflect a ‘postmodernist’ stance and could possibly redeem her in the eyes and ears of her critics. In her use of the jazz metaphor Gilligan also appears to be endorsing a polyphony of voices rather than the total dominance of one voice over another. According to Webster’s *Third New International Dictionary (unabridged)* 1993 polyphony is defined as “musical composition in simultaneous and harmonising but melodically independent and individual parts of voices; multiplicity of sounds as in the reverberations of an echo”.

In learning to approach the truth from many sides, we are reminded of the possibilities of transformation.³¹ The traditional legal person has as yet been denied such transformation - He is disallowed the movement, change, joy and wonder associated with human growth. But Drucilla Cornell reminds us that:

"Transformation is demanded of us precisely because there is no self-enclosed subject who can truly cut herself off from the Other. We are constantly being challenged by otherness, including the otherness which marks the boundaries of the self 'within', such as the unconscious."³²

Many feminists have been persuaded by Gilligan that the male 'ethic of justice' has pervaded legal thought, method and practice at the expense of an 'ethic of care'. The law is at its core, then, *not-feminine*. Catherine MacKinnon has also maintained (as a vehement critic of Gilligan) that when the law appears to be most objective and dispassionate, it is also most male. She has insisted that this does violence to women, but that this violence is masked by existing legal ideologies of formal equality, neutrality and objectivity.³³ These are the self-justifications, which at one moment erase the everyday violence of law as well as its ultimate force. The force of law that, for example, posits the white, adult, heterosexual, middle-class male as *the* legal subject.

Gilligan's appeal to open our lives to the birth of pleasure, leads us back to the role of the ethical in gender equality analysis, a role which takes us beyond the rules

³¹ Standpoint feminists such as Harding *The science question in feminism* 1986 maintain that we have much to learn from those previously silenced and that the lessons we learn can be of tremendous (legal) value. See Hirsch and Olson <http://jac.gsu.edu/starting%from% marginalized lives:A%conversation%with%Sandra%Harding.htm>. In this interview Harding maintains that the dominant traditions of Western science suffer from a *want* of objectivity. As a major exponent of what has been called 'feminist standpoint theory', Harding argues that objectivity is maximised not by *excluding* social factors from the production of knowledge—as western scientific method has purported to do—but precisely by 'starting' the process of inquiry from an *explicitly social* location: the lived experience of those persons who have traditionally been excluded from knowledge production. This methodological innovation turns the traditional standards of science and philosophy against themselves in what Harding describes as a 'deconstructive' strategy. By taking the experience of people of colour and gays and lesbians and working class people and people of various ethnicities as a starting point - rather than as a 'foundation' in the traditional sense - standpoint epistemology seeks to produce a *stronger* objectivity, a more *generally* useful body of knowledge, and a way beyond the impasse between foundationalism on the one hand and relativism, or naive experientialism, on the other.

³² "Convention and critique" in Cornell *Transformations* 1993 at 15.

³³ MacKinnon "Feminism, Marxism, method and the state: an agenda for theory" 1982 (7) *Signs* 515.

and categories of both formal and substantive equality jurisprudence as critiqued in previous chapters.

6.3 The role of the ethical

“The ever prolonged quest for a birth that will never take place, whose due date still and always recedes on the horizon. Life always open to what happens ... [t]o the grace of a future that none can control.”³⁴

There is little space for complacency in a world sexually and culturally divided. What is needed is a commitment to imagination and to think again about legal, political and social transformation and the creative alternatives that would suit our contexts. Our dreams of the past, the future and transformation can be different if we continue to test the limits of the law and to move from the comfort of the centre. Legal positivism is closely associated with legal centralism and state formalism to the extent that should other narratives exist, they are rendered subordinate to the hierarchical ordering of The One Law:

“The fragility of each *one* is thus inevitably sacrificed to the philosophical glories of the One”.³⁵

Against this (dark) background, Drucilla Cornell is concerned with a philosophy of ‘the limit’, which is a philosophy that recognises the inevitable nature of the restrictions we face, yet at the same time takes seriously the possibility of transformation. This notion of the limit allows us to imagine a beyond to the limit and enables us to examine that which exists beyond the limit(s) of the law. This type of thinking allows us to imagine how we are to achieve justice as well as allowing us a politics of utopian possibility as the very existence of the limit enables us to seek new ways to transcend it. Cornell has therefore contributed tremendously to the development of an *ethical* feminism.³⁶ She focuses on techniques of critique and deconstruction in her analysis of law’s specifically

³⁴ Irigaray *An ethics of sexual difference* Burke and Gill (trans.) 1993 at 186.

³⁵ Cavarero 2000 at 38.

³⁶ See for example Cornell *At the heart of freedom: Feminism, sex and equality* 1998 and *Just Cause: Freedom, identity, and rights* 2000.

sexual violence. Karin van Marle builds upon this particular theory in her ethical interpretation of the constitutional right to equality in South Africa.³⁷

For Van Marle, Cornell's concept of ethical feminism provides a "better way" of understanding current and dominant understandings of sex and gender relations as it focuses on women as beyond our current systems of stereotypical representations.³⁸ Ethical feminism does not seek to replace one representation or category with another, but instead seeks to problematise and displace generally accepted gender stereotypes with new ways of being.

In her powerful critique of substantive interpretations of equality Van Marle reminds us that most laws and legal reforms continue to reflect universal thought in the form of stereotypical metanarratives. Law and legal reform is therefore directed at a general level. In cases of gender equality, for example, women are regarded as representative of a certain group or category of human beings. As Van Marle argues:

"... I am concerned that in our attempts to address substantive, material conditions, we harm and violate by not truly regarding difference and otherness, by assuming symmetrical reciprocity, by being presumptuous about our own abilities to understand context, by placing individuals in groups, and ultimately, by ending up doing the very same thing we wanted to break with, namely universalising the experiences and contexts of each other".³⁹

In terms of the Constitutional Court's understanding of substantive equality illustrated in chapters four and five, concrete life experiences are reduced to an analysis as to whether the protagonists 'belong' to a previously disadvantaged

³⁷ See amongst others Van Marle *Towards an Ethical Interpretation of Equality* LLD thesis; Unisa (1999); 'An "Ethical" Interpretation of Equality and the Truth and Reconciliation Commission' (2000) 2 *De Jure* 248 and 'Equality: An Ethical Interpretation' (2000) 63 *THRHR* 595.

³⁸ Van Marle 2000 at 465.

³⁹ Van Marle "'The capabilities approach', 'The imaginary domain', and 'asymmetrical reciprocity': Perspectives of equality and justice" 2003 (II) *Feminist Legal Studies* 255 at 272. Van Marle supports Young's ethical relation of asymmetrical reciprocity. This relation is one where differences are acknowledged but where communication is still possible and necessary (at 265). See Young "Asymmetrical reciprocity: On moral respect, wonder and enlarged thought" 1997 (4) *Constellations* 340.

group of persons. This is particularly clear in the cases of Hugo⁴⁰ and Harksen.⁴¹ Related to this kind of thinking is the tendency of courts to hide behind legal rules and texts of law in determining the fate of those who seek legal recourse. This tendency is also reflected in the cases of Mthembu,⁴² Carmichele⁴³ and Jordan⁴⁴ where the particular stories of the litigants were silenced in the name of the Law.

Surely there are other less violent and more responsible ways of responding to these narratives explored more fully in – chapter four? Surely these stories should encourage us to re-think the place of law in the world? But why should we? Put simply, we should do so because these ‘little’ stories can teach us to recognise new ways of being and to reject the unquestioned belief in metanarratives. As Seyla Benhabib puts it:

“What Carol Gilligan heard are those mutterings, protestations and objections voiced by women who were confronted with ways of posing moral dilemmas which seemed alien to them and who were faced with visions of selfhood which left them cold. Only if we can understand why this voice has been so marginalized in moral theory, and how the dominant ideals of moral autonomy in our culture, as well as the privileged definition of the moral sphere, continue to silence women’s voices, do we have hope for moving to a more integrated vision of ourselves and our fellow humans as generalized as well as ‘concrete others’”⁴⁵

Those silenced must be encouraged to speak out in their own voices in order to re-represent themselves. In a country situated on a continent seeped in an oral tradition, the stories of individuals and groups can act as powerful sites of resistance and rupture.⁴⁶ *But* this cannot be achieved unless we care enough to

⁴⁰ 1997 4 SA 1 (CC).

⁴¹ 1998 1 SA 300 (SA).

⁴² 1997 2 SA 936 (TPD); 1998 2 SA 675 (TPD); and 2000 3 SA 867 (SCA).

⁴³ 2001 1 SA 489 (SCA) and CCT48/00.

⁴⁴ 2002 11 BCLR 1117 (CC).

⁴⁵ Benhabib “The generalized and the concrete other” in Kemp and Squires (eds.) *Feminisms* 1997 212 at 215. First published in Benhabib *Situating the self: Gender, community and postmodernism in contemporary ethics* 1992 at 148-170.

⁴⁶ Achebe writes of the project of re-storying the world and bringing to the fore stories that subvert the metanarratives of colonialist thinking about Africa and Africans. He longs for the time when we are able to celebrate the reclamation of African stories. See *Home and exile* 2003. As he notes, humans are story-making animals. Lives and experiences are matched up with stories in the oral tradition and when dispossessing others, stories are the medium used to do so. Repossession thus

listen attentively and to extricate ourselves - even for a moment - from our comfortable preconceptions, stereotypes and prejudices. Due to the emotional complexity of the human experience, it is submitted that narrative and storytelling combined would allow for a better understanding of the experiences of those who come to the law, what they seek and what they receive in return. This would, hopefully, address concerns over the recognition of differences that Van Marle expresses in her work.

Learning from feminist critiques such as those forwarded by Gilligan, Cornell and van Marle, it becomes possible for those who 'uphold' the law to become more reflexive and self-critical about biases and exclusionary practices. It becomes possible to imagine new ways of promoting equality and of fulfilling the very human need to have unfolding life-stories heard. The message is 'essentially' about giving up the need to only tell one true story, because it is too likely that it will be the story of dominance and oppression. Thus, it is necessary to listen to the "unofficial" stories of unfair discrimination in our quest to make a difference.⁴⁷

I argue in chapter five that the creative and innovative nature of the equality courts holds great promise in terms of opening up spaces in equality law to listen to these unofficial stories of unfair discrimination. It remains to be seen whether this promise is to be realised. Ideally, 'rights' should give us the space to voice our pain and to make choices, spaces where we can speak, be heard, and where there are points of looseness and flux beyond the shadow world of texts and technicalities. The need for judicial officers to have a proper feeling for human

needs *enabling* stories and "the singers and writers to compose them" as an erosion of self-esteem and the stories of others is one of the most common symptoms of dispossession:

"I do not believe that the balance of stories, which I speak and dream of and would wish more than anything else on the twenty-first century, will be facilitated by the eccentricities of that postmodernist stranger, which, I hasten to add, is not to say that I would have somebody pronounce a fatwa on him or his works. As a matter of fact eccentricities such as his can liven up the gathering and may even save it from righteousness and solemnity; but in the final reckoning the people who will advance the universal conversation will not be copycats but those able to bring hitherto untold stories, along with new ways of telling." (at 82-83)

Achebe thus calls for the balancing of stories in order to reconstruct or revive history. This would entail a reclamation of African oral traditions and storytelling.

⁴⁷ Robin West describes this as "... the subterranean, unofficial story of the unrecognised and – at least to liberals – slightly detested subjective craving of lost individuals". See "Jurisprudence and gender" in Barnett *Sourcebook on feminist jurisprudence* 1997 at 231.

relations is a consideration that should be taken seriously. Technicalities and rules should *not* displace human relations and the stories of such relations.⁴⁸

6.4 Looking forward to herstory

“And there upon the rainbow is the answer to our neverending story.”⁴⁹

⁴⁸ In a Constitutional Court case decided on 21 February 2005, this tendency to rely on general rules at the expense of particular stories is (sadly) once again encountered. In the majority decision reached in *Volks NO v Robinson and Others* CCT12/04 (the full text of this judgment can be found at <http://www.constitutionalcourt.org.za>). Skweyiya J held in this case that the Maintenance of Surviving Spouses Act 27 of 1990 was promulgated in order to deal with the perceived unfairness arising from the fact that maintenance obligations of spouses cease upon death. He also held that the distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to the marriage union (para. 39). Whilst there is a reciprocal duty of support between married persons, the law imposes no such duty upon unmarried persons. According to this logic, to extend the provisions of the Act to the estate of a deceased person who was not obligated during his lifetime to maintain his partner would amount to imposing a duty after death where none existed during his lifetime. Therefore, this differentiation in the Act does not amount to unfair discrimination (para. 56). In a dissenting judgment, Sachs J expresses the view that it is socially and legally unfair to leave a woman without a means of subsistence merely because she had no marriage certificate. He suggests rather that one should ask the question as to whether there was a relationship of such proximity and intensity between an intimate life-partnership as to render it unfair to deny her the right to maintenance after death (para.218-219). In a joint dissenting judgment Mokgoro and O'Regan JJ emphasise that the Constitution prohibits unfair discrimination based on marital status. They conclude that where a relationship serves a similar social function to marriage it should be regulated as such. Thus, as s2(1) of the Act only makes provision for maintenance of surviving spouses and not cohabittees, they conclude that it constitutes unfair discrimination on the grounds of marital status (para. 107). They then suggest that the Legislature be given an opportunity to correct this constitutional defect (para. 111). I agree with the judgment delivered by Sachs J as he shifts the emphasis from a general approach to an enquiry into the context and relationship between the partners. It is common cause that Mrs Robinson had been in a permanent life partnership with Mr. Shandling from 1985 until his death in 2001. Her claim in the High Court was indeed upheld as a result of the fact that her relationship with Mr Shandling was a “monogamous permanent partnership” substantially similar to a marriage. Ethel Robinson and Aaron “Archie” Shandling lived together for fifteen years. He was a lawyer and she an artist and journalist. During their partnership she managed the household and domestic matters. When Shandling became terminally ill in 2001, Ethel Robinson was at his bedside when he died. Two days after his death she was asked to leave the home they had shared as “partners, companions, lovers and friends”. After a legal battle lasting three years, the Constitutional court ruled that she does not have a legal right to financial support from Shandling’s estate. Michelle O’Sullivan from the Women’s Legal Centre has described this decision as “a huge blow to the 2.3 million South Africans who described themselves as life partners in the most recent census”. It is also a huge blow to Ethel Robinson whose relationship and story was denied by the country’s highest court. Faced with this story, Skweyiye J acknowledged that women in domestic relationships can become financially dependent on men and are left destitute and suffer hardships on the deaths of their male partners. He also states that this problem was part of a broader social reality that needs to be corrected through empowerment and policy decisions. In this light, he concludes that awarding maintenance to non-married survivors of relationships would merely be a “palliative”. He is essentially saying that it won’t make much of a difference. But tell that to Ethel Robinson who has been selling off her possessions in order to survive. As with Mama Mthembu and her daughter, Robinson has been left vulnerable, unprotected and homeless as a result of the fact that the courts are not willing to engage with her

Since Plato's cave, western philosophers have searched for ultimate justifications, complete explanations and the 'truth out there', but real people live in a fragmented world where there are as many truths as there are voices, stories and narratives 'out there'.⁵⁰ As submitted throughout this thesis, stories have a transformative potential that does not allow us to resort to absolutes and universal abstractions. If we accept that *who we are* is embodied in our desire for narratability – to have our story told – then we become aware of the fact that the inability of the law to *hear* stories told in different voices is also a denial of life itself. According to this narrative approach both a unity and a tension exists between the past, the present and the future through the telling of our stories. People do not only tell stories for interest's sake and entertainment, but life's grain is exposed through these stories. Each story then represents a struggle in the process of our thinking, doing and decision-making. It entails a discovery that our stories are fundamental to our being and becoming human. The narrative or storytelling approach is thus deliberately adopted in this thesis. It is used *deliberately* in the sense that it serves the purpose of unmasking the appearance of neutrality and objectivity embedded in 'master' legal discourses.

Accepting the worldview that identity is shaped by and with others, I argue that narrative identities are relational. Stories – whether chronicles of truth or fancies of fiction – populate our world of being-with-others and shape our understanding of it. New stories could thus lead to the transformation of our world and those who have been subjected to legal metanarratives must now be able to come forward, define themselves and tell their own stories.

In our local context, we should remain open to indigenous ways of being and becoming in the ethical sense and to embrace worldviews such as *ubuntu* which are embedded in orality, the spiritual and the magical. In many ways the continued

story, and, as with Ellen Jordan, she has been left to fend for herself on the streets – a legal outsider.

⁴⁹ Limahl "Never Ending Story" from the Movie Soundtrack *The Neverending Story* Capitol Records 1992.

⁵⁰ The band Green Day's response to the belief in universal truth is provocative "I beg to dream and differ from the hollow lies; this is the dawning of the rest of our lives" on the album *American idiot* 2004 Reprise Records.

oppression of African women rests in a denial of their diverse lived experiences and the alienating and superior notion of western science and knowledge systems.⁵¹ To counter this legal silencing different voices should not be appropriated, but should expose the *limits* of the legal system. In fact, the common basis of all storytelling is experience and the ability (and need) to pass it on to others. In the acknowledgment and respect for difference (different selves, voices and stories) we come to know of otherness and the value of radical listening where we no longer reduce otherness to fit within the norms and categories of a pre-determined world. In theorising this necessity for 'radical listening' Adriana Cavarero encourages us to rethink the classical connection between speech and politics in such a way as to recuperate the theme of the voice as an "obligatory strategic gesture".⁵² The voice is more than revealing, it communicates and "[w]hat it communicates is precisely the true, the vital, and perceptible uniqueness of the one who emits it".⁵³

Hope resides in the realisation of the fact that each encounter with a unique and irreducible other transforms reality. What if there is no absolute truth 'out there' that enables us to solve problems with mathematical precision? What if, in the language of *ubuntu*, I am who I am because you are who you are and we both are because others are? What if we accept that when we speak and listen we both change? If any of this is true, then we are exposed to a new kind of community and a new way of living our law:

"There is then neither a single round dance nor a single play of the world but a constitution of subjectivities that try to dance or play together through – and despite – different unfoldings and refoldings."⁵⁴

⁵¹ In her theoretical discourse Harding 1986 rejects the ideal of a value-free objective science, conducted from a neutral standpoint.

⁵² Cavarero 2005 at 207.

⁵³ Cavarero 2005 at 5.

⁵⁴ Irigaray *The way of love* Pluhacek (trans.) 2004 at 21. Cavarero 2005 refers to relations within community as "a duet, a calling, a responding..." (at 5). Neither of these metaphors is linear.

Knowing that there exists a tension between the violence of the law and the ability of the law to facilitate transformation, the search is on for responsive laws and responsible judgments that open up spaces for us to spend our time listening to stories. We should not be bound to texts, but to bodies, faces and voices – to people with unique lives deserving of wonder and hope.

Rather than clinging to familiar categories and styles of reasoning, the South African Constitution⁵⁵ requires our courts and judges to re-conceive notions such as individual rights, equality, the rule of law and democracy. However, re-imagining the role of the law and human rights discourse within society is an (im)possible dream. Reconceiving the right to gender equality is even more complex in nature.⁵⁶ It is a never-ending utopian project, which will see no finalisation here in our process of *becoming*.⁵⁷ The *future* possibilities exposed by a jurisprudence of care is what matters the most:

“The utopian strategy of contextualisation sets out to tap the resources of the imagination to read and speak against the grain, and hence to make possible the impossible task of thinking beyond the present towards a different future.”⁵⁸

This different future leaves me here with a trembling of joy and hope that accompanies a commitment to opening up the new in the presence of the past,

⁵⁵ Act 108 of 1996.

⁵⁶ As provided for in s9 of the final Constitution.

⁵⁷ I follow here the approach of Douzinas as adopted in *The end of human rights* 2000 where he argues radically that the emancipatory role of human rights will come to an end if we do not re-imagine and re-invent their utopian ideal.

⁵⁸ Lacey “Violence, ethics and law: Feminist reflections on a familiar dilemma” in James and Palmer (eds.) *Visible Women: Essays in feminist legal theory and political philosophy* 2002 at 132.

where different stories and stories of difference receive the recognition, respect and attention they so dearly deserve.

“[A] new practice of philosophy can transform philosophy. And in addition it can in its way *help* in the transformation of the world. Help only ...”⁵⁹

⁵⁹ See Althusser *Lenin and philosophy and other essays* Brewster (trans.) 2001 at 68 (my emphasis) in his discussion of the limits of disciplinary theoretical production.