

**INVESTIGATING THE GAP BETWEEN LAW'S PROMISES AND RURAL
WOMEN'S LIVED REALITY: A CASE FOR NARRATIVES**

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SUMMARY

In a country cumbered with a legacy of strife, authoritarianism, repression and injustice, the right to be vindicated and assert your rights is extremely important. Karl Klare described our constitution as a transformative one which has the potential to ensure social change for the benefit of those previously advantaged if a purposive approach to its interpretation is adopted. Under our constitutional democracy all are equal under the law and further are inherently imbued with the rights to dignity and freedom (from violence).

However, despite the constitutional guarantee of amongst others access to justice, in the wide sense, exercised mainly through the courts, it is a truism that in South Africa this right remains inaccessible to most especially those in the rural areas. One particularly vulnerable group I submit is rural women. In post-apartheid South Africa they are burdened with the legacy of discrimination on the basis of race, sex and class. In the face of an already exclusive legal culture these factors combine together to ensure that accessing the constitutional promises remains particularly difficult. Issues such as language, proximity to the courts, poverty and complex procedures persist to the detriment of rural women. I submit that our adversarial and retributive justice system is foreign, formal and thus inaccessible to rural women and there is a need, in light of our constitutions promises to make justice more accessible.

I argue therefore that we need to be conscious of the manner in which our privilege excludes certain groups from the full enjoyment of the law. We need to learn to listen to the voice of the unfamiliar other if law is ever to move from the ideological to the practical realm in the lives of these women. I argue further that this is possible through the use of narratives as a tool of critique and a vehicle for consciousness.

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To my family, biological and surrogate, whose unwavering support and prayers kept me going words cannot describe my gratitude, I LOVE YOU.

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To my friends, for keeping me sane and agreeable (arguably), LIVE LONG AND PROSPER, but it's not over.....

Dedicated to my brother Bernard Opondo Oyieke: Gone but not forgotten.

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CHAPTER 1

INTRODUCTION

“Freedom cannot be achieved unless women have been emancipated from all forms of oppression. Unless we see in visible and practical terms that the condition of the women of our country has radically changed for the better and that they have been empowered to intervene in all aspects of life as equals with any other member of society.”¹

1.1 THESIS STATEMENT

For all the time and money put into the betterment of the lives of rural women in South Africa and across Africa, they remain cumbered by poverty and its resultant burdens. In this dissertation I investigate the manner in which law, and the formal culture in which it is steeped exclude rural women in South Africa from enjoying the full benefits of its protection from *inter alia*, sexual violence due to their poverty. This goes against our Constitutions transformative aspirations and in response I attempt to develop a post-apartheid narrative method grounded in *ubuntu* and informed by various critical theories. I hope with this method to imbue a sense of consciousness when dealing with the law by first injecting the voices of rural women in the law and further by using this method as a tool for disseminating the law.

1.2 ASSUMPTIONS

In this dissertation I deal primarily with poverty and how it affects rural women's ability to access justice and enforce their constitutional rights to dignity, equality and freedom. I especially look at the prevalence of sexual violence and to what extent it can be linked to the poverty experienced by them.

There are many laws available for the protection of South Africa's rural women including the Constitution and the promises contained therein and other legislative enactments

¹ Mandela N, during the opening of South Africa's first democratically elected parliament, May 1994 as cited by Vasintha V, 'Women in South Africa; Challenges and Aspirations in the New Millennium,' (2006) *Women in Welfare Education* 1.

promulgated in response to these promises. However despite the existence of these laws and the *de facto* promises they offer all, rural women in South Africa do not enjoy the full protection thereof. I attribute this gap to a democratic order attempting to extend the protection of the law to all in the face of an exclusive, elitist and formal legal culture. Further still, many of these women do not know of the remedies and protection available to them and when they do can seldom enforce them due to the procedural aspects of this exclusive culture.² This is against our democratic goals and does not aid in the transformation towards a society based on substantive equality and social justice for all. I am therefore proceeding with the realisation that law can serve as a sight for both liberation and oppression.³

To this end I believe the use of narratives could be one of, but certainly not the only, means through which the law can be made accessible to South Africa's rural women. Their potential for change is best realised as a tool for consciousness where all, but especially rural women, actively engage with the law to ensure it is developed to the point where its promises are easily accessible to all. It can also be used as a medium through which the law can be made more accessible by injecting the voice of rural women in the drafting phase. It can also act as a means of communicating existing laws and finally as a tool for inclusion during the implementation phase.

I submit that this process must occur through the prism of *ubuntu* a philosophy that calls on us to realise our humanity through realising the humanity of others.⁴ This is in direct response to the call for consciousness which asks us to realise the manner in which our privileged legal culture excludes certain people, rural women, from the full protection of the law. Only when we attempt to include rural women's lived reality in the dominant legal discourse in an attempt to realise their humanity, can we realise our own humanity.

² Klare K, 'Legal Culture and Transformative Constitutionalism,' (1998) 14 *SAJHR* 146; Hunt M, 'The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession,' (1999) 26 *Journal of Law and Society* 86; Van Marle K, 'Transformative Constitutionalism as/and Critique,' (2009) *Stell LR* 286.

³ Albertyn C, 'Defending and Securing Rights through Law: Feminism, Law and the Courts in South Africa,' (2005) 32 *Politikon* 217.

⁴ Nussbaum B, 'African Culture and *Ubuntu*: Reflections of a South African in America,' (2003) 17 *Perspectives* 1.

This call for consciousness manifests itself in South Africa as the Black consciousness movement spear headed by Steve Biko. Although it was mainly aimed at psychological liberation from white supremacy as a platform for national liberation, it also influenced black South Africans in other ways. Relevant to this study is the Black Consciousness call to revert to more indigenous ways of being when dealing with the law and the people it seeks to protect.⁵

Although there is no generally accepted definition of rural women, they can generally be defined as those residing in the rural areas.⁶ In South Africa I understand this to mean those who reside in areas outside of metropolitan areas but further than that, those who live under the jurisdiction of traditional authority and are thus subject to customary law or its practices in one form or another.

In this dissertation I argue that the failure of law to be truly effective in the lives of rural women in South Africa is mainly due to an exclusive and elitist legal culture that enacts laws from their position of privilege. They therefore fail to take into account the lived experiences of the unfamiliar other or the constitutional lofty promises that aspire to substantive transformation and equality for all. I however readily accept that the constitution as a product of this legal culture can be called to the fore and its effectiveness/objectivity questioned. It ideally serves as a manifestation of our democratic aspirations however it can be faulted on the same grounds on which we criticize legal culture and its resultant legislative enactments. True as this may be I believe that as Klare argued, the intention with which the constitution was adopted is paramount and must thus be kept in mind when interpreting or attempting to enforce it.⁷

The issues facing rural women in South Africa are vast, however for purposes of this study I have narrowed it down to poverty and as a consequence thereof the perpetuation of violence. Violence has several facets; I have however chosen to look at domestic violence manifest primarily as physical, sexual, economic abuse, as well as

⁵ Biko S, *I Write what I Like: A Selection of his Writings*, (2004) 29.

⁶ *Socio-Demographic Profiles of Saskatchewan Women: Rural Women*, (2009) Saskatchewan Ministry of Advanced Education, Employment and Labour, <http://www.socialservices.gov.sk.ca/rural-women.pdf> [Accessed 18 January 2012].

⁷ Klare K (1998) 148.

emotional, verbal and psychological abuse.⁸ These are not by all means the only aspects of domestic violence which may affect rural women as it can also take other forms. For purposes of my study however I felt it necessary to limit the scope and aptly deal with the issues highlighted, chosen purely on interest and preference. The other forms may be mentioned if and when relevant but are not primarily dealt with.

I investigate the Bill of Rights and its potential to benefit the rural woman. I however only focus on the rights that have a direct bearing on the two identified issues. The rights discussed are therefore by no means exhaustive but for purposes of this study are limited to the ones listed. I also look at the Promotion of Equality and Prevention of Unfair Discrimination Act, the Domestic Violence Act and The Criminal Law (Sexual Offences and Related Matters) Amendment Act as the pieces of legislation relevant for my study. As the enactment of solid legislative pieces goes, South Africa is extremely progressive. There are therefore several other Acts I may include in my study but I chose to focus on these three as direct responses to the constitutional demands for equality, dignity and freedom from violence.

Within these Acts however I do not focus on all the aspects therein. The Domestic Violence Act specifically makes reference to various forms of such violence, as previously mentioned, I however select only a few which I deem relevant and linked directly with my research focus. The Criminal Law (Sexual Offences and Related Matters) Amendment Act goes into great detail in defining what constitutes a sexual offence and the different kinds of ways in which such offences manifest. I however will focus on rape and compelled rape, sexual assault and compelled sexual assault as forms of abuse against women.

A firsthand account of the issues facing rural women would be best, to this end interviews and personal contact would be ideal. However I chose to go an alternative route, lacking the skills necessary to conduct a meaningful and informative interview I choose to rely on such information as documented by those better qualified. I shall

⁸ In as much as it contributes towards such women's state of hopelessness and despair.

therefore be relying on desk research conducted by perusing through other peoples interactions with such women.

It must also be noted that the aim of this piece is not to propose that narratives can solve all the problems facing rural women in South Africa. However I believe that narratives can go some way in assisting rural women with accessing and understanding the rights available to them. I realise that the inaccessibility of law is influenced by a variety of deep-seated elements, and there are other interlocking factors such as patriarchy and fear of victimisation that may also work to the detriment of rural women in South Africa. Although I suggest that narratives may also be useful in educating women on such issues, I concede that narratives on their own cannot serve as the ultimate relief from poverty and violence for rural women. I merely hope to open up a space for dialogue on new ways of thinking and being with the unfamiliar other. The ultimate aim of my study is therefore to develop a post-apartheid narrative as/and critique method that puts rural women at the centre of all discussions on laws designed to their purported benefit, including the Constitution.

Although the aim of the method I put forward is to open up the law and demystify it, I accept that it will not speak to all rural women as certain power structures amongst rural women themselves may exclude some from engaging with this method.⁹ As previously mentioned narratives are meant to provide a space in which all can interact with each other and in this instance, with the law and therefore should be considered for its potential to bring to light certain issues that can be taken up and dealt with further by other methods.

In an attempt to open up a space for dialogue where women become active citizens and contribute towards the development of the law through their engagement with it, I may be guilty of the same thing I am accusing legal culture of, speaking on their behalf. I

⁹ In this regard see Spivak GC, 'Can the Subaltern Speak?' in Nelson C and Grossberg L (eds), *Marxism and the Interpretation of Culture*, (1988) 24, who argues that society is structured in a certain way to ensure that certain voices, especially those of the oppressed and marginalized (the subaltern), even though presented with the opportunity to voice themselves may not be able to do so. Relying on theories put forward by French philosophers Foucault and Deleuze the author states that if given the chance, 'on the way to solidarity through alliance politics,' the oppressed (subaltern) can speak and know their conditions but questions whether they can really speak. What the author suggests here is the idea of 'permission to speak' where these marginalized voices are given a platform to be heard by taking their history and context into account when attempting to familiarize with them.

firmly believe however that this is a worthwhile exercise as their voices are lacking from the dominant narrative of the law at the moment with regards to poverty as a form of discrimination and how that affects their ability to exercise their right to be free from all forms of violence. I do not hope to impose my theory on rural women but rather leave it as an option worth considering when contemplating the stark contrast between laws promises and their actual lived reality.

1.3 RESEARCH QUESTIONS

In light of the above my research questions are in the first instance to investigate how poverty affects rural women's ability to enforce their rights to dignity, equality and freedom from all forms of violence. Despite being worded in female friendly terms, highly progressive and seemingly inclusive and ideologically astute, laws still remain inaccessible to rural women. I focus on the Bill of Rights in the South African Constitution as well as three other legislative enactments dealing with equality and freedom from violence. I critically question to what extent these laws meet our democratic aspirations as embodied in the Constitution.

In the second instance I investigate laws unfulfilled promises and question how the exclusive legal culture in which our constitutional democracy is steeped, contributes to the failure of law to transform the lives of rural women. Elitist and formal our legal culture necessarily favours one way of being over another and I therefore explore how privilege defines our dominant legal narrative. I investigate further what this means for our constitutional aspirations and the promises offered by law.

Finally I investigate to what extent narrative method can be applied as a form of critique and a new way of approaching the law to make it more relevant in the lives of rural women. I submit that narratives are useful in bringing the law closer to women in a more practical way by including their marginalised voices in the drafting of laws, by explaining and presenting existing laws to them in a medium that is easy to identify with and finally by including their lives experiences when considering best practices to employ in the enforcement of law.

I hope to coin a theory or model through which the law and narratives can interact to the benefit of the rural woman. The issues facing the rural African woman are common but merely find alternate translations based on varying cultural considerations. What I propose here is a model, with South Africa as a case study, which can be adjusted to suit the various factors and elements composite of whichever target society. I hope eventually to ascertain to what extent social justice can be extended to rural women through the use of narratives as a method of critique and a vehicle for consciousness.

1.4 MOTIVATION

On a recent visit to a small rural town in Limpopo, I had the pleasure of meeting a woman by the name Miriam. She was a young mother of two struggling to make ends meet since her husband callously abandoned her leaving her to fend for herself and her young children. Married very young, she was denied the opportunity to further her education or hone any skills, she had very basic education and finding any form of employment was proving fruitless. Further she was facing difficulties accessing maintenance for her and the children as she was unfamiliar with the law, its processes and further still did not have the money to enforce this right.

The plight of this brave woman exposed me to the troubles facing the rural woman in South Africa and the rest of Africa. Burdened by poverty and its resultant disadvantages her plight is known, but often ignored in favour of more pressing issues. This prompted me to delve into an investigation of how emancipation of South Africa's rural women and by extension, Africa's rural women, can be achieved within the framework of existing legislation.

While the very definition of poverty implies the inability to meet basic needs such as food, clothing or shelter, being poor also implies the absence of choice, denial of opportunity, the inability to achieve life goals and ultimately the loss of hope.¹⁰ People residing in rural areas in Southern Africa are especially vulnerable because of the

¹⁰Thibos M, Lavin-Loucks D & Martin M, 'The Feminisation of Poverty,' (2007) www.ywcadallas.org/documents/advocacy/FeminizationofPoverty.pdf [Accessed 22 February 2011].

interrelatedness of forces that lock them in a cycle of poverty this includes the intersection of discriminatory factors such as race, class and gender.

Millions of rand are raised and spent in the name of alleviating the plight of poor black women in rural South Africa.¹¹ However for all the time, money and effort put into such programmes, one has to wonder why the results we see are always the opposite of the desired outcome. As time passes in democratic South Africa, studies and reports repeatedly release fresh findings about an unchanging tale, the plight of the rural woman remains the same.¹²

Like many other societies, the South African economy is biased in such a way as to place most of the paid jobs in the hands of men. For this reason in South Africa as elsewhere the degree of poverty is far higher amongst female-headed households than those headed by men. African rural women are at the bottom of the economic pyramid in this country because of the added problem of insufficiency of resources and the prevalence of rigid sexist practices in these areas. Poverty under any circumstance is bad enough but the special twist given to it by the sexist laws and practices of the state in South Africa makes the position of black women grindingly hard to endure.¹³

According to Wilson and Ramphela, the wealth of this country was accumulated at the expense of rural areas, in terms of both human and other resources. The policy of 'rural differentiation' ensured the perpetuation of poverty in these areas through the creation of a rural bourgeoisie, employed largely by the state, which has everything to benefit from the maintenance of the status quo. Masses of people in these areas are therefore side-lined and overwhelmed by the misery of poverty.¹⁴

The story of rural women in South Africa therefore continues to be the story of households marginalized from society and struggling each day to get by. It is a story of rising levels of poverty and escalating levels of violence, a disproportionately high

¹¹ Farouk F, 'Rural Women and Land Reform. When will we move beyond the Rhetoric,' (2009) <http://www.sacsis.org.za/site/article/161.1> [Accessed 2 March 2010].

¹² Farouk F (2008) 2.

¹³ Wilson F & Ramphela M, *Uprooting Poverty, the South African Challenge*, (1989) 173.

¹⁴ Ibid.

prevalence of HIV and of the lack of access to economic opportunities.¹⁵ A 2008 Amnesty International report about HIV prevalence amongst South Africa's rural women (where it is high) concisely captures the defining characteristic of these women in its title: 'I am at the lowest end of all.'¹⁶ This is how rural women described themselves in the South Africa of 2008.

Violence can be seen as the point where various aspects of women's disempowerment intersect. These aspects include unemployment and lack of access to education, both generally and in terms of awareness of rights and the legal options available to enforce them.¹⁷

Violence against women (VAW) is defined as:

*"Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women– including threats of such acts, coercion or arbitrary deprivation of liberty, whether in public or in private life."*¹⁸

It is argued that statistics generally underestimate the extent of domestic and sexual violence in South Africa. Some women may not reveal abuse for fear of further abuse or as a result of social taboos which prohibit speaking out about domestic violence. Some women also fear other people's reactions to them, should they disclose being abused, which may also keep them silent.¹⁹ Further barriers that exist against the effective dealing with domestic violence include insufficient outrage about it and a lack of public support for abused women. Reasons such as these ensure they continue to stay silent about what is happening to them and do not access any support/ relief services.²⁰ Due to their position of economic disadvantage women often find themselves dependant on

¹⁵ Farouk F (2008) 2.

¹⁶ Amnesty International Report on HIV prevalence amongst South Africa's Rural Women, (2008) www.amnesty.org/en/library/asset/AFR53/001/2008 [Accessed 13 August 2010].

¹⁷ Combrink H, 'The dark side of the rainbow: Violence against women in South Africa after Ten years of Democracy,' in Murray C & O'Sullivan M (eds), *Advancing women's rights: the first decade of democracy*, (2005) 197.

¹⁸ Article 2 of the United Nations Declaration on the Elimination of Violence against Women.

¹⁹ *Violence Against Women in South Africa: A resource for journalists*, (1999) Soul City Institute for Health and Development Communication.

²⁰ *Ibid.*

abusive partners for access to housing and other basic needs.²¹ Anecdotal evidence from a shelter for battered women in Cape Town suggests that women often return to abusive and violent conditions because they literally have nowhere else to go.²² Although there have been a number of positive developments in the area of violence against women, the reality of continued violence is indicative of a system that is still not functioning properly.

*“In South Africa this disappointment, the distance between the law’s humanistic promise and its workday betrayals, has been particularly stark over the last four decades.”*²³

The question is whether we can change this today and how. Although much ground has been covered in the setting out of foundational norms and values within which violence against women should be considered, more must be done to provide equal access to effective judicial protection.²⁴ The following comment made by the United Nations Special Rapporteur on Violence against Women, is equally applicable to the South African context:

*“If the first decade emphasized standard setting and awareness-raising, the second decade must focus on effective implementation and development of innovative strategies to ensure that the prohibition against violence is a tangible reality for the world’s women.”*²⁵

No single strategy against poverty is ever likely to be wholly effective. Its many dimensions and its interlocking causes require a multiple strategy attack which in the South African context puts power at the centre. Without it those who are poor remain vulnerable to an ongoing process of impoverishment.²⁶ According to Vasintha, women themselves must be at the heart of initiating, mobilizing and campaigning for change. Otherwise little will be accomplished to get rid of gender and class imbalances in their

²¹ Combrink H (2005) 197.

²² Personal Communication with Ilze Pedro, as cited by Combrink H (2005) 197.

²³ Dyzenhaus D, *Truth reconciliation and the Apartheid legal order*, (1998) vii.

²⁴ Combrink H (2005) 119.

²⁵ Report of the Special Rapporteur on Violence against Women its Causes and Consequences E/CN.4/2003/75 at paras 78-79.

²⁶ Vasintha V (2006) 3.

lives.²⁷ Women's voluntary activism is therefore a demonstration of their determination to break the cycle of oppression and to rise above class, gender and racial barriers.²⁸ Genuine development work is that which empowers people and rural women should therefore be involved in ongoing development initiatives.²⁹ Development is not an isolated activity as it implies a progress from a lower state to a higher and preferred one. It is a process by which people are awakened to opportunities within their reach and therefore, starts with the people and progresses through them.³⁰

The path to equality is a long and tedious one and tackling race, class and gender issues means confronting the ways in which they exclude rather than include and thus weaken, rather than strengthen equality.³¹ In order to allow the rural woman an opportunity to be the engineer of her own liberation, government has an active and supportive role to play in this regard. Success of this exercise is also dependent on the removal of certain structural barriers to facilitate women's participation at all levels, which is only possible with governments input.³² Members of the legal fraternity are also invited to realise that legal culture is exclusive and elitist and they must take steps to try and develop laws and procedures that are more inclusive and useful. What is clear is that this is an exercise that involves all members of society, including rural women, who need to embrace the potential of law to offer some sort of protection.

The vision of law as an agent of social change is well established however, the expectation that courts and legislatures will have a creative role in improving the law is one that has lost much of its vigour.³³ Bottomley raises the question of whether the very core of law, the means by which law is differentiated from other forms of knowledge, is gendered.³⁴ There have also been other critiques levelled against the tools of legal method which have been presumed to be neutral. These include the criticism of law for

²⁷Vasitha V (2006) 6.

²⁸Farouk F (2008) 4.

²⁹Wilson F & Ramphela M (1989) 258.

³⁰Kongolo M, Bamgose OO, 'Participation of Rural Women in Development,' (2002) 4 *Journal of International Studies* 79.

³¹Vasitha V (2006) 9.

³²Ibid.

³³Kok A, 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Court-Driven of Legislature-Driven Societal Transformation,' (2008) *Stell LR* 122.

³⁴As cited in Smart C, *Feminism and the Power of Law*, (1989) 20.

excluding women, the criticism of the content of legislation or the criticism of the specific practices of law.³⁵

One response in the face of growing cynicism about laws power to effect true social change is to turn to other disciplines. According to Smart it is important to think of non-legal strategies and discourage a resort to law as if it holds the only key to unlock (women's) oppression.³⁶ Not to suggest that the law can simply be abolished but rather resisting the move towards more law and the 'creeping hegemony' of the legal order.³⁷ This move is mainly due to the fact that law and legal method are inherently flawed being subject to human development and application.

Another response is to develop new strategies for social change within the context of the legal system with one such being the integration of human stories in law reform efforts.³⁸ Critical race and feminist legal theorists have long recognized that stories are an incredibly powerful tool to persuade people to revisit long-held beliefs.³⁹ In the 1980s critical theorists in the legal academy began to tell counter stories to question and resist the established norm. Stories thus became not just the dominant discourse, but also a tool of resistance and liberation.⁴⁰ These theorists argued that stories are one of the primary ways that humans understand situations. They highlight various perspectives, evoke empathic understanding; their vivid details engage people in ways that sterile legal arguments do not.⁴¹ They challenge the view that truth is singular and recognize that lived experiences have many truths. Stories insist on acknowledging differences in perspective and voice, and in racial, cultural, economic, and ethnic backgrounds.⁴²

These theorists engaged further in the attempt to demystify the positivist mentality of neutrality in the law, by arguing that law cannot be 'apolitical or amoral' because it is

³⁵ Smart C (1989) 21.

³⁶ Smart C (1989) 5.

³⁷ Smart C (1989) 5.

³⁸ Murphy JC, 'Lawyering for Social Change: The Power of Narrative in Domestic Violence Law Reform,' (1993) 24 *Hofstra Law Review* 1243 at 1245.

³⁹ Levit N, 'Legal Storytelling: The Theory and the Practice -Reflective Writing across the Curriculum,' (2009) 15 *Journal of the Legal Writing Institute* 259 at 262.

⁴⁰ Adonis C, 'Book Review,' (2010) 4 *International Journal of Transitional Justice* 1.

⁴¹ Delgado R, 'Storytelling for Oppositionists and others: A Plea for Narrative,' (1989) 87 *Michigan Law Review* 2411.

⁴² Levit N (2009) 263.

influenced by and therefore clearly represents a dominant view.⁴³ They are all tied together because they challenge the status quo or the dominant narrative by introducing a new or alternative narrative to law and society's narrative. Narrative can be understood as a story or the literature pertaining to a specific topic.⁴⁴ Critical legal studies challenges the dominant narrative by exposing the indeterminacy of the law, critical race theory goes a step further by seeking to introduce voices of colour which had been previously excluded; and feminist theories seek to include the voices of women who had also been excluded from the dominant narrative.⁴⁵ As a means of critique, the narrative method offers an alternative understanding of law and attacks its claim to objectivity, and ultimately serves as a means of injecting minority voices previously excluded from the dominant story of the law.⁴⁶

Critical race and feminist legal scholars have made efforts to develop the narrative as a legitimate and powerful form of scholarship as evidenced during a campaign in Maryland to reform domestic violence laws. This exercise served as a challenge to both scholars and practitioners to recognise the essential role that storytelling can play in law reform. It encouraged them further to develop the use of storytelling as a critical tool in future campaigns to highlight the potential of law as vital instrument of social change.⁴⁷

According to Thomas,

*"[N]o set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning. To try to understand law in the context of the narratives that give it meaning is to try to reconstruct the cultural narratives that grant the law its authority. One way to accomplish this task is to compare a culture's law with its literature since literature in a much more obvious way than law reveals the stories that a culture tells about itself."*⁴⁸

⁴³ Davies M, *Delimiting the Law, Postmodernism and the Politics of Law*, (1996) 2.

⁴⁴ Minda G, *Post-Modern Legal Movement: Law and Jurisprudence*, (1995) 115.

⁴⁵ Delgado R & Stefancic J (eds), *Critical Race Theory: The Cutting Edge Theory*, (2000) 45.

⁴⁶ Johnson AM Jr, 'Defending the Use of Narrative and Giving Content to the Voice of Colour,' (1993) 79 *Iowa Law Review* 813, see also Delgado R (1989) 2440.

⁴⁷ Murphy JC (1993) 1293.

⁴⁸ Thomas B, *Cross examination of law and literature*, (1991) 5.

In 1833, a devout believer in the sacredness of law, Rufus Choate, argued that whereas law appeals to the rational faculties in man, literature speaks directly to the heart of the affections and imaginations of people.⁴⁹ He added further that since man is both rational and emotional, the diverse people (of America) would be truly united only when the nation's laws were complemented by a unifying literature. This is a theory that may be directly translated to the South African context and it can therefore be suggested that this national literature would make the country forget its hyped differences and rebuild the people of South Africa as one.

What we are ultimately trying to investigate is whether a sense of social justice can be achieved for rural women. They continue to experience disadvantage due to the influence of poverty in their lives more must therefore be done to ensure that such justice is extended to them. Justice in this sense is substantive and includes alleviation from material want and the ability to exercise their legal rights as contemplated in the constitution.⁵⁰ I believe that this can be done with and through the law despite its obvious limitations if only an alternative approach, grounded in indigenous values and sensitive to the voice of the unfamiliar other is injected into the law. Causing all to become more conscious of the way privilege informs legislation and its processes and responding with a post-apartheid narrative method to bridge the gap between what law promises and rural women's lived reality.

⁴⁹ As cited in Thomas B (1991) 5.

⁵⁰ See Mamdani M, *When does Reconciliation Turn into a Denial of Justice*, (1998). The author argues that this kind of reconciliation is more lasting and in line with our constitutions transformative aspirations, as opposed to the more formal or political justice extended to all at the advent of democracy in our country. He states that this kind of justice is symbolic and not lasting as it does not speak to the heart of the majority, which one must do to ensure longevity after a post-conflict or authoritarian era. He therefore puts forward the idea of substantive justice, focusing on poverty as a driver for other social burdens. In order to forge a truly integrated and democratic state, poverty must therefore be addressed as a matter of urgency.

1.5 CHAPTER OUTLINE

This work is divided into three substantive chapters, over and above the introduction and the conclusion. My first substantive chapter, Chapter Two, highlights the problems that rural women face in South Africa, presented through the use of three narratives. The third chapter focuses on a critical analysis of the laws available for the protection of South Africa's rural women with regards to poverty and violence. The fourth then argues a case for narratives as a means of critique and a vehicle for consciousness by presenting a post-apartheid narrative method grounded in *ubuntu*, and/as critique. I end with a short conclusion consolidating all the chapters and highlighting my findings. What follows is a more detailed synopsis of each chapter.

The second chapter, *Rural Women's Lived Reality*, outlines rural women's daily struggles with regards to poverty and how this affects their ability to enforce their rights to equality, dignity and freedom from violence. I discuss these issues as highlighted by three narratives which ultimately illustrate the intrinsic diversity and legitimacy of narratives and the need to give each one voice. These narratives deal with the issues highlighted above but are also very critical of judicial processes and their ability to deliver justice in light of the Constitution's demands. Although critical in their approach they are ultimately educational on the possibilities available for women when attempting to engage with the law.

Hearing visions, Seeing voices,⁵¹ narrates the author's struggle with, amongst others, poverty and violence and how she eventually managed to realise success in her own right. It journeys her quest for healing and forgiveness through sharing her personal experience with domestic violence and highlights the eventual realisation of her true self and restoration of her dignity through this process. It is a story of self-empowerment that if shared may help to illustrate to other women in the same situation the possibilities of finding voice, tapping into an inner strength, claiming your rights and exercising them for one's own emancipation and empowerment.

⁵¹ Motsei M, *Hearing Visions, Seeing Voices*, (2004).

The Kanga and the Kangaroo Court: Reflections of the Jacob Zuma rape trial,⁵² identifies various themes which arose from the trial in which President Zuma was the defendant. These include inaccessibility of the courts and judicial processes for female victims of sexual crimes, accountability of political leaders and patriarchy in South Africa. She gives a clear illustration of how certain cultural, social, political practices and beliefs work to the detriment of women especially as regards the prevalence of sexual violence against them and goes further to criticise political leadership for not leading by example and failing to listen to the voices of the people they serve. She also applauds the accuser and describes her as a brave young woman who stood firm against criticism and threat and fought for the right to be heard and vindicated and sought to attain justice for a prevalent crime despite the consequences.

There was this Goat,⁵³ was derived from the testimony of Notrose Nobomvu Konile's testimony at the TRC, which was odd for its apparent lack of coherence. The book illustrates the existence of local narratives that demand legitimacy and assert their right to be taken seriously in a racist and classist society. The authors praise Mrs Konile for resisting the imposition of a framework that she was neither familiar nor comfortable with and which did not accommodate her existential reality.⁵⁴ The authors realise that part of the sense of incoherence they felt while listening to Mrs Konile's testimony was due to the different material conditions in which they were anchored. Her story was found to be highly rational and logical if examined within a framework that was culturally embedded.⁵⁵ As suggested by Spivak, only upon entering her kind of poverty do they realise that Mrs Konile's testimony within her own context made perfect sense.

I discuss the narratives above in two main sections the first, *Confronting Violence and Poverty in South Africa*, highlights the extent to which rural women in South Africa are disadvantaged by poverty and violence. In this section I also discuss the need to imbue a sense of consciousness when dealing with the law in order to be aware of the manner

⁵² Motsei M, *The Kanga and the Kangaroo Court: Reflections on the Jacob Zuma Rape Trial*, (2007).

⁵³ Krog A, Mpolweni N, Ratele K, *There was this Goat: Investigating the Truth Commission Testimony of Notrose Nobomvu Konile*, (2009).

⁵⁴ According to Adonis C (2010) 2, it is argued that acceptance of a grand construction of history results in overlooking the impact it has on ordinary people, whose simple lives are often consigned to the margins when it comes to the construction of a collective understanding of the past.

⁵⁵ Adonis C (2010) 3.

in which the unfamiliar other is excluded from the benefit of the law. The second section, Contemplating Transformation of/through the Law, highlights what needs to be done to make the law relevant to rural women in line with our constitutions aspirations. In this section I discuss further, the possibility of a post-apartheid narrative method grounded in *ubuntu*, as part of the transformational project contemplated by the constitution and the call for consciousness.

The three narratives mentioned above all tackle issues that pertain to the exclusive nature of our legal culture and suggest that more is needed, to ensure that these ideals and promises find practical translation in the lives of rural women. The ultimate aim of this section is to highlight the manner in which law and narratives can interact to the benefit of rural women by presenting legal issues in a medium that is easy to understand.

Narratives also serve as a means of critique highlighting the indeterminacy of law as it is a social construct based on the narrative of the dominant group at the time. As a means of critique they can therefore be employed as a vehicle through which consciousness can be achieved by demystifying the law and questioning the manner in which it favours one way of being over another. They can be used to imbue a sense of consciousness about this exclusive nature of our legal culture to allow room for transformation and the realisation of substantive equality and social justice for rural women.

Chapter Three, Laws Unfulfilled Promises, highlights the protection offered by law with respect to the issues listed in the previous chapter and especially in response to our constitutions transformational aspirations. Our constitution contemplates social justice and substantive rights and hopes to be a transition from a discriminatory dispensation to one founded on the democratic principles of dignity and freedom and most of all equality.⁵⁶ To this end our Bill of Rights provides for certain rights that must be respected, protected, promoted and fulfilled by the state.

In response to this transformational directive certain legislative enactments were promulgated. The Promotion of Equality and Prevention of Unfair Discrimination Act

⁵⁶ Mureinik E, 'A Bridge to Where? Introducing the Interim Bill of Rights,' (1994) 10 *SAJHR* 31.

expressly provides that all are equal under the law. The Domestic Violence Act recognizes domestic violence as a social evil with a high prevalence in South Africa and thus its purpose is to afford victims of domestic violence maximum protection under the law. The Criminal Law (Sexual Offences and Related Matters) Amendment Act recognises the gravity of the occurrence of sexual offences and the particular vulnerability of women and children and attempts to offer the best protection under the law.

This chapter is divided into three main sections the first, Transformation and/through the Law, continues from where the last chapter left of, highlighting our constitutions transformational aspirations as described by Karl Klare.⁵⁷ In this section I discuss the potential for substantive change as contemplated under our transformative constitution. In line with the call for consciousness when dealing with the law, in the second section, I highlight the manner in which our legal culture goes against our democratic aspirations due to its elitist and exclusive nature. The final section, Laws Unfulfilled Promises, deals with the legislative enactments previously mentioned as examples of products of this culture. Despite being worded in female friendly terms they fail to take cognisance of the lived reality of the majority in South Africa and are therefore far removed and difficult to access and enforce.⁵⁸

Chapter Four, A Case for Narratives, puts forward my post-apartheid narrative method in three main sections. First is A Critical Reflection on Law which is a direct response to laws unfulfilled promises in light of rural women's lived reality in South Africa. In this section I rely on certain critical theories to assess laws failure in consideration of the possibilities for paving a sustainable way forward. The second section, Finding Common Ground: *Ubuntu* and the Law, reflects on our young democracy's transformative aspirations through the prism of *ubuntu* in an attempt to ground this process in an indigenous but flexible value system.⁵⁹ In the final section, Contemplating Consciousness in South Africa: A Case for Narratives, I take this critique a step further by applying the narrative method, common to these schools of thought, to my critique.

⁵⁷ Klare K (1998) 146.

⁵⁸ Williams P, *The Alchemy of Race and Rights*, (1991).

⁵⁹ Bohler-Muller N, 'The Story of an African Value,' (2005) 20 *SAPR/PL* 266.

Narrative method is relevant in that outside of tying all the above theories together by introducing an alternative conception of law, it challenges the grand narrative of law and seeks to introduce alternative narratives by women, people of colour and the non-elite.⁶⁰

The final section of this chapter is discussed in two sections. The first, Black Consciousness: A Defiant Legacy highlights the call for narratives, and consciousness in the law based on the teachings of Steve Biko.⁶¹ Ultimately it is a discussion of the extent to which this movement can be applied in the journey towards substantive equality for rural women in South Africa. The second section Narrative Theory and Legal Culture is a summary of the post-apartheid contemplation of substantive equality under the law for rural women.

The aim of this dissertation is to attempt to bridge the gap between laws promises and rural women's actual reality by grounding the law in a uniquely South African post-apartheid narrative method. This method calls for the realisation of our own humanity by realising the humanity of (rural women) others. It is in response to the Black Consciousness call to revert to more indigenous ways of being and living and interacting with the unfamiliar other in the contemplation of a truly integrated and democratic society. This call for consciousness demands that we realise that the dominant narrative of law and legal culture is told by the voice of privilege. This therefore affects our ability to engage with the voice of the unfamiliar other, the voice of poverty borne by rural women in South Africa.

This call for consciousness requires of us to contextualise the law grounding it in principles that respond to these excluded voices. Only when we do this can we realise the humanity of these voices and by extension our own humanity as called for by *ubuntu*. We are therefore striving for the extension of social and substantive justice and not merely the formal and political justice currently noted in South Africa. This aspiration is in line with our constitutions demands geared towards facilitating the existence of a substantively equal society where all are able to experience and access the full protection and enjoyment of laws promises as a lived reality.

⁶⁰ Delgado R (1989) 2438.

⁶¹ Biko S (2004).

CHAPTER 2

RURAL WOMEN'S LIVED REALITY

*“We live immersed in narrative, recounting and reassessing the meaning of our past actions, anticipating the outcome of our future projects, situating ourselves at the intersection of several stories not yet completed.”*⁶²

2.1 INTRODUCTION

In this chapter I rely primarily on three works, Mmatshilo Motsei’s *Hearing Visions, Seeing Voices*,⁶³ *The Kanga and the Kangaroo Court: Reflections of the Zuma Rape Trial*,⁶⁴ as well as Antjie Krog *et al*, *There was this Goat*.⁶⁵ These three narratives highlight the issues women face when approaching the courts in an attempt to access justice and enforce their rights to dignity, equality and freedom (from violence). Through them I therefore highlight rural women's lived reality with respect to poverty and its resultant burdens.

I also use these narratives to put forward a call for consciousness by suggesting that the legal fraternity, as privileged members of an elitist system, must realise the ways in which they exclude certain groups from enjoying the full benefit of the law. This is mainly due to the formal culture in which legal processes are grounded, which fails to meet our transformational and democratic aspirations. In response to this I suggest the reliance on narrative method as a form of critique grounded in the principle of *ubuntu* to allow us all to realise our humanity by making the hope of social justice for rural women come alive.

⁶² ThinkExist.com Quotations. “Peter Brooks quotes”. http://en.thinkexist.com/quotes/peter_brooks/ [Accessed 19 Sep. 2011].

⁶³ Motsei M (2004).

⁶⁴ Motsei M (2007).

⁶⁵ Krog A *et al* (2008).

2.2 CONFRONTING POVERTY AND VIOLENCE IN SOUTH AFRICA

Several years after the advent of democracy in South Africa, the majority of people still live in poverty and experience living conditions that permanently threaten their well-being. Although equal access to resources and opportunities is provided for and protected by South Africa's constitutional and legislative dispensation, it is still far from the lived reality. The Constitution guarantees further the promise and delivery of socio-economic rights however the realisation and enforcement of these rights remain limited for various reasons such as incapacity of and inaccessibility to these rights.⁶⁶

The disadvantaged position in any given society is based on relations of class, race and gender-based access to social resources and opportunities which also defines women's unequal access to resources and opportunities.⁶⁷ Majority of the poor in South Africa are therefore disproportionately found in rural areas and the standard of living and therefore poverty and inequality are closely related to race, class and gender.⁶⁸

Poverty is generally defined as the inability to attain a minimum standard of living, which according to the World Bank, is measured in terms of basic consumption needs and the income required to satisfy those needs.⁶⁹ Poverty in its narrow definition can be understood as the inability of individuals, households or entire communities to "command sufficient resources to satisfy a socially acceptable minimum standard of living."⁷⁰ Access to employment and income generation have also been identified as determinants of people living below or above the poverty line.⁷¹

Statistics reveal that 52% of South Africa's total population is women and of that number, almost half (47%) are living in rural areas with 57% of that being African

⁶⁶ Kehler J, 'Women and Poverty: the South African Experience,' (2001) < <http://www.bridgew.edu/soas/jiws/fall01/kehler.pdf> > [Accessed 28 August 2001]; see also Albertyn C (2005) 222; generally Brand DJF, *Courts, Socio-Economic Rights and Transformative Politics*, (2009) LLD Thesis.

⁶⁷ Carter M R and May J, 'Poverty, Livelihood and Class in Rural South Africa,' (1999) 27 *World Development* 1.

⁶⁸ Kehler J (2001) 1.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Kehler J (2001) 1, see also Mubangizi J & Mubangizi B, 'Poverty, Human Rights law and Socio-Economic Realities in South Africa,' (2005) 22 *Development Southern Africa* 277, who accept that although poverty is one of those terms that elude static definition, put forward that in our context it can be understood as a state of not having and not being able to get life's necessities.

women. The unemployment rate amongst rural women amounts to 53% for all population groups compared to 37% amongst rural men. Further still the unemployment rate is 56% for African rural women against 21% amongst rural Coloured women and 5% amongst rural White women. It is evident therefore that the face of the poor rural woman in South Africa is largely black.⁷²

These statistics indicate further that the majority of these black women continue to live under extremely poor conditions in these areas characterised by a lack of socio-economic development and infrastructure. There is also a noted lack of opportunities for employment and income generation as well as being faced with limited access to education and skills training which contributes further to a life below the poverty line.⁷³ According to Kehler the above mentioned social indicators still fail to offer an adequate expression of people's lives in poverty or their need to improve living conditions and their attitudes towards and perceptions of their living circumstances.⁷⁴

South Africa is in the midst of transformation and is struggling to overcome the burden of race, class and gender-based inequality, a legacy inherited from colonialism and apartheid. The main goals of such transformation should include facilitation of socio-economic development and growth as well as the enhancement of the standard of living and empowerment of the historically disadvantaged.⁷⁵ Despite this, (rural) women's realities in South Africa are still determined by race class and gender-based access to resources and opportunities, suggesting that these factors are still determinants for current political and socio-economic inequalities. They therefore experience immense poverty as their access to resources, opportunities, growth and wealth of the country is severely limited and, are faced with a greater lack of access to resources and wealth.⁷⁶

⁷² Kehler J (2001) 3, see also Carter MR & May J (1999) 2.

⁷³ Mubangizi J & Mubangizi B (2005) 278.

⁷⁴ Kehler J (2001) 3.

⁷⁵ Kehler J (2001) 3, see also Palmer I, 'Rural Women and the Basic-needs Approach to Development,' (1997) 115 *International Labour Review* 97, who argues that there needs to be a feminisation of the development process to ensure that it is meaningful in the lives of (rural) women.

⁷⁶ Kehler J (2001) 5, see also Delius P & Schirmer S, 'Towards a Workable Rural Development Strategy,' (2001) *Trade and Industry Working Paper* 3, who explore the indicators of rural poverty, the key dynamics of Rural South Africa as it affects women and the burden of poverty, as well as suggestions on the way forward when dealing with these issues in line with the suggestions offered by Kehler.

The above clearly indicates why African rural women are the poorest of the poor, why they experience poverty and inequality different to men and why socio-economic changes impact them differently. Their lack of access to resources and basic services combines with unequal rights in family structures, and unequal access to family resources, to ensure their continued disadvantage. Thus for as long as access to resources and opportunities remain determined by race, class and gender, rural women will continue to bear the brunt of the burden of inequality and poverty in South Africa.⁷⁷

It is said that the wealth of this country was accumulated at the expense of rural areas with the policy of rural differentiation employed in the creation of a rural bourgeoisie.⁷⁸ Masses of people in these areas were thus marginalised and overwhelmed by the misery of poverty. This served to ensure the perpetuation of the cycle of poverty through the entrenchment of subjugation of some to the benefit of the state which has/had everything to benefit from the status quo.⁷⁹

For majority of women in South Africa existing rights as guaranteed in the constitution therefore still remain inaccessible resulting in the perpetuation and increase of poverty. Especially for rural women for whom such constitutional guarantees remain merely theoretical rights with no practical implementation.⁸⁰ South Africa's progressive constitution and legislature provide the legal framework for equality and non-discrimination, but the challenge remains to disseminate these provisions and implement them to their fullest potential in order to improve the standard of living of the historically disadvantaged, especially poor rural women.⁸¹

It has been argued further that women living in poverty are discriminated against on the mere basis of their poverty and are therefore excluded from access to justice, protection under the law and even certain services on this basis. In some countries discrimination

⁷⁷ Kehler J (2001) 6.

⁷⁸ Wilson F & Ramphele M (1989) 173, according to the Longman online dictionary bourgeoisie is a word of French origin meaning middle class or the ruling class of two basic classes (bourgeoisie and proletariat) of capitalist society consisting of capitalist, manufacturers, bankers and other employers. They own the most important of the means of productions through which they exploit the working class. See <http://www.ldoceonline.com/dictionary/bourgeoisie> [Accessed 16 November 2011]; see also Carter M R & May J (1999) 4.

⁷⁹ Wilson F & Ramphele M (1989) 173.

⁸⁰ Kehler J (2001) 6.

⁸¹ Kehler J (2001) 6.

is built into the laws, while in other countries, it persists despite equality laws.⁸² This is especially the case in South Africa which has formally abolished discrimination from the statute books but through its legal culture and its resultant processes continues to exclude rural women.

The many dimensions of poverty and its interlocking causes require a multiple strategy attack, with the restoration of power at its centre. Without it those who are poor remain vulnerable to an ongoing process of impoverishment. To this end, there is no single strategy against poverty that is ever likely to be wholly effective.⁸³ What must remain paramount is the idea that rural women must be involved in the fight against poverty in order to ensure that the results thereof are relevant and long-lasting. Genuine development work is that which empowers people and makes them self-reliant. Effective policies related to gender equality and poverty alleviation have to acknowledge women's multiple roles in society and the importance of their social, economic and informal contributions to the country's growth. Only then, will the cycle of poverty break and rural women's socio-economic empowerment begin towards a lasting sense of substantive relief and equality.⁸⁴

According to Amnesty International, education has been noted as a possible escape route from the shackles of poverty and its resultant burdens. It can open up the possibility of economic independence increasing women's choices of how to live their lives. Lack of education not only reduces women's chances of economic independence but also reduces the possibility of them learning about their rights. It is argued that when women know about their rights, they will claim them despite all the obstacles they face.⁸⁵ Raising their consciousness to embrace the potential of law in their lives is therefore one aspect of this transformational project. Equality and substantive rights can only be achieved when women actively participate in political processes and when their

⁸² Amnesty International Report, 'Women, Violence and Poverty: Breaking out of the Gender Trap' <http://www.amnesty.org/en/news-and-updates/feature-stories/women-violence> [Accessed 23 March 2011].

⁸³ Kehler J (2001) 8.

⁸⁴ Kehler J (2001) & Wilson F & Ramphela M (1989) 258.

⁸⁵ Kehler J (2001) 8.

voices are heard. This is the only way to ensure that transformation of/through the law is contextual and thus lasting.⁸⁶

Violence is both a cause and consequence of poverty, it keeps women poor and keeps poor women exposed to it.⁸⁷ Women who suffer from violence may lose their income and their capacity to earn a wage. A woman who is economically dependent on her abusive partner may see no way to support herself and her children if she leaves. Further the means available to enforce ones right to be free from violence require money for various things such as transportation, representation and other procedural costs. Violence and poverty therefore often combine to trap women in difficult situations.⁸⁸

Violence against women is complex and has been one of the most prominent features of post-apartheid South Africa. While estimates of the extent of violence vary, the issue has dominated public debates and “galvanised” community-based activism and NGO intervention.⁸⁹ It is both an individual and social problem and is embedded within and emerges from our history and current unequal social, economic and cultural relations.

The discrimination women face is linked to the violence perpetuated against them. It shapes the forms of violence that they experience and makes some women more likely to be targeted for certain forms of violence. This could be because they have less social status than other women and because perpetrators know such women are less likely to report abuse or seek assistance.⁹⁰ The economic dimensions of violence show how gender-based violence arises from women's economic dependence and the impact of poverty. Although feminists differ as to the actual impact of economic inequality and

⁸⁶ Amnesty International Report, ‘Women violence and poverty-breaking out of the gender trap’ <http://www.amnesty.org/en/news-and-updates/feature-stories/women-violence> [Accessed 23 March 2011].

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Vetten L, ‘Addressing Domestic Violence in South Africa: Reflections on Strategy and Practice,’ (2005) Expert paper for UN Division for the Advancement of Women. See also, *The problem of violence against women in South Africa. Working with men against violence series*, www.sarpn.org.za/documents/.../Gender-based_violence_problems.pdf [Accessed 22 July 2011].

⁹⁰ Amnesty International Report, ‘Women violence and poverty-breaking out of the gender trap’ <http://www.amnesty.org/en/news-and-updates/feature-stories/women-violence> [Accessed 23 March 2011].

poverty on the levels of violence there is consensus that violence against women is prevalent in all areas of South African society and exists across all divides.⁹¹

The United Nations Declaration on the Elimination of Violence Against Women defines violence against women (VAW) as: "Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women – including threats of such acts, coercion or arbitrary deprivation of liberty, whether in public or in private life."⁹²

Abuse within relationships is extremely underreported because violence in families is often hidden from view. This is because domination of and violence towards women is often embedded in the tradition of family relationships in South Africa.⁹³ It is thus difficult to judge accurately the full extent of the phenomenon. Statistics available generally underestimate the extent of domestic violence and other forms of abuse against women, especially rural women, in South Africa due to the reporting and enforcement mechanisms in place. However as a broad indication of the incidence of domestic violence, it is estimated that one in six South African women is battered by a male partner.⁹⁴

There are various intersecting factors that influence the nature and extent of violence against women in South Africa and the manner in which they seek relief from this problem; if they do at all.⁹⁵ Some women's fear of other people's reactions to them, should they disclose being abused, may keep them silent. It is suggested further that abused women continue to remain silent due to barriers such as societal reinforcement of gender roles that expect men to be in control and the head of the household and the few or no support services (such as counselling, shelters, legal support or public

⁹¹ Radical feminists would argue that violence exists evenly across society, whereas others suggest that poverty and inequality foster and exacerbate the incidence and effects of interpersonal violence, see *The problem of violence against women in South Africa*, Working with men against violence series, www.sarpn.org.za/documents/.../Gender-based_violence_problems.pdf [Accessed 22 July 2011].

⁹² In Article 2.

⁹³ Van Der Hoven A, 'Domestic Violence in South Africa,' (2001) 14 *Acta Criminologica* 13.

⁹⁴ Government Gazette No. 18166, 08/08/97:73.

⁹⁵ *Violence Against Women in South Africa: A resource for journalists* (1999) Soul City Institute for Health and Development Communication.

education) available.⁹⁶ Despite the constitutional right of access to social welfare for those in need, there is limited to non-existent financial assistance for women who are financially dependent upon their partners. Even when they have left their partners, the limited effectiveness of the current Maintenance Act often keeps women poor, or still subject to their partner's control.⁹⁷

Although the above are written in relation to domestic violence, these can be extended to include all forms of violence against women. Further still it has been mentioned how poverty contributes to the perpetuation of this evil because the cost of enforcing ones rights under legislation dealing with violence against women through the courts is high. This therefore casts an added burden on rural women in South Africa. Thought must therefore be given on the possibilities that can be exercised within the confines of the law, to ensure that rural women embrace are able to enforce their constitutional and legislative promises.

In light of the above, I attempt to investigate how a narrative method, as an element of a multiple strategy attack, can be employed in a bid to make the law more accessible to rural women and ensure that it has more of an impact in their lives. I employ it in response to the call by Biko to elevate the consciousness of the oppressor and the oppressed in a bid to create a truly integrated society as envisioned by Klare in his transformative constitutionalism project.⁹⁸ They can be used to understand the necessity of considering an alternative forum for justice that is personal, relevant and contextual in the quest for true equality, transformation and integration. This is done in an attempt to extend the constitutional principles of freedom and dignity to all, to rural women especially, in a democratic state that ensures participation and accountability by all, for all.

What I mean by narrative is the sharing of personal experiences in the form of stories, by either literary or oral means. According to Delgado, stories humanize and emphasize differences in ways that can ultimately bring people together as hearing stories invites

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ See generally Biko S (2004) and Klare K (1998).

those listening to participate.⁹⁹ This challenges their assumptions, lifts their spirits and lowers their defences, a process which is essential in a plural society such as South Africa, recovering from an era of systemic prejudice.¹⁰⁰ If true transformation is to occur and if justice is to be easily accessible to all and equality substantive, we must learn to hear the voices of the strange other. But more than that, we must embrace the legitimacy of their experiences, and reconcile them with the dominant discourse of law.¹⁰¹

Based on the above, the potential of narratives is obvious, especially for rural women, who under the guise of culture (indigenous, legal and others) have been silenced for so long and effectively excluded from the dominant narrative of law. I attempt to illustrate that narratives such as the ones discussed below can help achieve what Delgado suggests, to invite those listening to challenge their assumptions about the law and how it can impact their lives, lower their defences against this seemingly foreign system of justice and jar their complacency as regards poverty and violence in their lives.¹⁰²

Narrative method as/and critique can be useful when dealing with all phases of the law. At enactment, I suggest that hearing the voices of rural women, through the use of narratives, may be useful in ensuring that laws promulgated are relevant in their lives. Women's experiences are not homogenous and therefore an effort must be made to hear the voices of all women in order to come up with laws that are useful to as many women as possible.¹⁰³ Accepting that the law cannot be everything to every woman but making an attempt to be as accommodating to as many experiences of as many women as possible.

Narrative method can also be employed during the communication phase. This pertains especially to laws that have already been promulgated. It is futile having a series of comprehensive legislative enactments if the people they are meant to assist do not know about them. Narratives can therefore be used in this stage to explain the laws

⁹⁹Delgado R (1989) 2440.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Greenbaum B, 'An Elaboration of the Themes and Contentions in Mmatshilo Motsei's Book *The Kanga and the Kangaroo Court, Reflections on the Rape Trial of Jacob Zuma*,' (2008) 1 SACJ 81.

available to rural women in a medium that is easy to understand and identify with. There is a wealth of legislation that can be employed in the lives of rural women in a bid to better their lives, however due to factors such as language barriers, these laws have failed because they remain out of reach. I believe using narrative method to explain these laws can make them more accessible and therefore assist rural women to engage with them claim their rights and exercise their resultant duties, to encourage an active and inclusive legal community. This is the phase on which I focus as part of the consciousness approach to the law. I believe that making rural women aware of their rights can go a long way in encouraging development of the law through active engagement and participation.

During the implementation phase it is assumed that laws have been enacted and women know about them. At this stage I suggest that when implementing law i.e. exercising the practicalities of the law in order to afford some sense of justice, it is still necessary to hear the voices of rural women. The enforcement mechanisms adopted by many legislative enactments are exclusive of rural women and it is therefore necessary to engage with them to pave a way forward within the available systems to ensure that legislative justice is enforced.¹⁰⁴ This may include reverting to another forum other than the courts to implement the law as provided for by the constitution.

What is clear in all the above mentioned instances is that including the narrative of the rural woman is paramount if law is to move from the ideological to the practical realm in their lives. This rings true in all the phases of any piece of legislation. It must be noted however, that narrative method is not only employed as a method of catharsis for rural women, but is useful for both the listener and the speaker. Narratives can be useful in raising the consciousness of legislation drafters, causing them to be more aware of the varied experiences of women in South Africa, hopefully resulting in more informed and inclusive pieces of legislation.¹⁰⁵ I therefore submit that the terms listener and speaker are fluid and all actors, rural women and drafters, will move between these categories easily. This fluidity is paramount in ensuring that there is a constant process of growth

¹⁰⁴ Greenbaum B (2008) 98.

¹⁰⁵ Delgado R (1989) 2435, Greenbaum B (2008) 98.

and development for all parties involved. By constantly putting yourself in the shoes of the other, the process remains real and personal and therefore more meaningful and resulting hopefully in laws that are easily accessible and applicable.¹⁰⁶

True transformation is ideally continual in order to ensure that law continues to change to meet society's evolving demands and in that manner continues to remain relevant. Ultimately what we hope to achieve is a gradual transformation of all spheres of society to a point where access to justice, equality and dignity as enshrined in the constitution, shall be a lived reality for rural women. Leading eventually to a scenario where all actors especially those in the legal sphere realise the value of including the voices of all citizens in the dominant discourse.¹⁰⁷

What follows is a discussion of three narratives, all chosen first for their potential to enlighten women on their inherent power and therefore ignite some sort of mental release from shackles that inhibit their interaction with the law. I believe that only when this is done can rural women then listen to stories about the law in order to make the remedies available to them known. Only after this can rural women speak about and share their experiences of poverty and violence, in order to inject a human element in the law and ensure a truly just and equal system.

These books also serve as a critique of legal culture by highlighting the means in which it is exclusive of certain people, especially rural women. They therefore call for actors within this culture to be aware of the manner in which their privilege excludes them from hearing the voices of the unfamiliar other. They are a call for consciousness as envisioned by the critical theorists, for us to learn to hear the marginalized voice of the unfamiliar other.¹⁰⁸ They also highlight the potential of narratives as a means of communicating the law and thus rendering it more accessible. They all involve some sort of engagement with the law and the notions of transformation and reconciliation

¹⁰⁶ In this regard see also Delgado R (1989) 2435, who argues that stories invite readers to alienate themselves from the events described and enter the mental state of the teller, whose view is different from their own. The reader thus moves back and forth between two worlds: the speakers, which they occupy vicariously to the extent that the story is well-told and rings true, and their own which they return to and re-evaluate in light of the stories message. See also Kane N, 'Frantz Fanon's Theory of Racialization: Implications for Globalization,' (2007) *Human Architecture: Journal of the Sociology of Self-Knowledge* 353 and Fanon F, *Wretched of the Earth*, (1963).

¹⁰⁷ Langa P, 'Transformative Constitutionalism,' (2006) *Stell LR* 351.

¹⁰⁸ Minda G (1995).

under the law and can thus be used to explain how the law operates and further still how the barriers to its accessibility can be overcome.

2.2.1 A Story of Consciousness

Mmatshilo Motsei in her book *Hearing Visions, Seeing Voices*, deals aptly with the notion of overcoming past circumstance and finding healing through an acceptance of oneself.¹⁰⁹ She outlines an intricate life journey in which societies expectations caused tension with her many selves: nurse, mother, wife, traditional healer. Until she accepted that all these roles are reconcilable and once she developed the courage, through introspection, to confront her true self did she manage to embrace the courage to heal and live in spirit. It is an intimate journal highlighting a spiritual journey to an ultimate destination of emancipation and self-validation and if shared may be useful in causing the same to those who hear it and are willing to embrace its message.

The Kanga and the Kangaroo Court: Reflections on the Rape Trial of Jacob Zuma, is also authored by Motsei.¹¹⁰ As the title suggests it is a piece that deals with various issues that arose out of the rape trial in which now President Jacob Zuma was the defendant. She brazenly tackles issues such as accountability (or lack thereof) of leadership when attempting to deal with issues surrounding sexual violence against women especially, in South Africa. She also investigates the influence of culture and religion in our constitutional dispensation and the manner in which people commonly veil behind these issues to escape culpability for sexual crimes against women. It is a reflective piece that outlines women's difficulties when attempting to seek justice under our current legal system and ultimately contemplates ways in which the lessons that can be learned from this trial can be reconciled with our larger transformational project, equality for all.

¹⁰⁹ Motsei M (2004).

¹¹⁰ Motsei M (2007); see also Greenbaum B (2008) for a general discussion on the main themes in Motsei M, *The Kanga and the Kangaroo Court*, (2007) when it comes to the interaction between the criminal justice system and indigenous values/system.

The final primary text is, *There was this Goat: Investigating the Truth Commission Testimony of Notrose Nobomvu Konile*, a book co-authored by Krog A, Mpolweni N and Ratele K.¹¹¹ This book investigates the Truth Commission testimony of Notrose Nobomvu Konile, a mother of one of the Gugulethu seven. Her testimony stood out for its apparent lack of coherence and its failure to conform to the narrative established by the other Gugulethu seven mothers and the TRC as a whole. The authors sensed that this testimony, despite its strangeness and non-conformity, was important and could serve as a possible source of enlightenment when relating to the unfamiliar other. The authors argue that the plurality of our society necessarily results in a multitude of narratives, all of which are legitimate and as important as each other. This book is explicit in its message which is, the cultural context of all those coming before the court to share their narratives and thus seek relief must be taken into account. Only when this was done, did Mrs Konile's seemingly incoherent testimony gain legitimacy.

*"This is a time for a collective healing of a wounded womanhood...only then can we reclaim and embrace both our womanhood and femininity in a world that has been largely defined by manhood and masculinity."*¹¹²

The burden of apartheid means that rural women continue to experience prejudice despite the existence of formal equality under the law. During this time they experienced double oppression on the basis of race and gender. As a result they continue to face prejudice under a third category, class.¹¹³ In order to overcome this history of oppression and subjugation on the above fronts, there must be some form of mental catharsis. I believe the levels of oppression are so insidious and ingrained that rural women may not be able to hear stories of hope and relief; much less from this mystic 'legal system' that has not yet been of any substantive benefit.¹¹⁴ As marginalised

¹¹¹ Krog *et al* (2008).

¹¹² Motsei M (2004) 37.

¹¹³ Seekings J & Natrass N, *Class, Race and Inequality in South Africa*, (2005).

¹¹⁴ See Spivak GC (1998) 24 who questions to what extent the oppressed can really speak due to the nature of the forces that combine to keep them subjugated. See also Fanon F (1963) 40; Biko S, *I write what I Like: A selection of his Writings*, (2004) who argue that in order for any struggle towards liberation to be truly effective and lasting then the minds of the oppressed need to be freed first. This is because years of subjugation and oppression has led to what Wing, termed spirit injury, see Wing AK, 'A Critical Race Feminist Conceptualisation of Violence; South Africa and Palestine,' (1997) 60 *Albany Law Review* 943; the basic tenet of this argument is that a sense of apathy and despair has developed amongst the oppressed and therefore their broken spirits must be uplifted in order for them to

group, rural women's needs do not feature prominently in the dominant legal discourse and despite the end of apartheid and the ushering in of this promising constitutional dispensation, rural women's lived reality has not changed much. Their equality, dignity and freedom are guaranteed and yet their poverty continues to ensure that they cannot fully experience these guarantees. Coming from such a background, how possible is it to hear the voice of promise contained in the law? What benefit accrues to try and engage with a system that has failed in the past and continues to fail these women?

The three books highlighted may be put forward in an attempt to answer these questions. They all touch on the necessity of healing for those previously oppressed, much like Delgado does, in order for a pathway to transformation of social relations and the laws that govern them to be opened.¹¹⁵ They all illustrate the necessity of overcoming the negativity of one's past, in order to claim the promises of the future. In this context, I believe it is worthwhile for rural women to learn to hear the voice of hope in the law, that is its potential to change their lives, but can only do this when they let go of the burden of the past; a past riddled with oppression under the very same law which now seeks to bring them relief.¹¹⁶

"[I]t was on waking up to the headline 'Burn the Bitch' as Jacob Zuma's rape trial on International Women's Day, 8 March 2006, twelve years into South Africa's new democracy, ten years after the implementation of the new Constitution and fifty years after women marched to the union buildings to demand their rights, that the pervasive disrespect for women and women's rights was brought home."¹¹⁷

It is evident from the above quote that although contemporary world culture condemns the exploitation and denigration of others on the basis of race, class and religion, women remain the only group exploited and discriminated against. More so in South Africa where the face of poverty is overwhelmingly female and statistics that indicate women still bear the brunt of sexual and domestic violence. Further still, we have a

embrace the freedom message and claim their rights as active citizens and stimulate development of the law towards the favour of the previously disadvantaged.

¹¹⁵ Delgado R (1989) 2439.

¹¹⁶ Albertyn C (2005) 220.

¹¹⁷ Motsei M (2007) 18.

supreme Constitution that entrenches the principles of equality and dignity and despite all the formal promises contained therein, women continue to suffer prejudice and oppression.¹¹⁸

In both her books, the resounding theme put forward by Motsei is one of reconciliation. By reconciliation the author is not merely referring to the abolition of racially discriminative laws, but true assimilation of all South Africans. She posits that apartheid did more than just cause oppression of women on the basis of race it also caused a disjunction and dehumanisation within black people, with women being subordinated to men.¹¹⁹ To reconcile society in a way that all, experience more than just formal equality, she argues that the mere reliance on law is not sufficient. She argues that for a truly egalitarian society as envisioned by the constitution to thrive, all the chains that oppress women must be broken.¹²⁰ To this end, eradicating racial discrimination is not enough when other forms of discrimination in the pervasive ideological notions of patriarchy and sexism, continue to burden women.¹²¹ What we need therefore is a large scale transformational project, such as suggested by Klare which calls on all those who engage with the law to embrace the constitutions potential for change and react accordingly.¹²²

In order to reconcile the constitutional promises with women's lived reality, it is necessary to formulate policies that are in line with the above mentioned principles. But more than that, such policies must be aware of these lived realities and take them into account in order to be truly relevant and be the cause of change in women's lives. According to Motsei, in South Africa the pursuit of transformational politics and policies demands a restoration of consciousness.¹²³ Transformation by definition suggests a

¹¹⁸ See Chapter 3 below; 3.4 Laws Unfulfilled Promises.

¹¹⁹ Motsei M (2004) 38; see also Ramphele M, 'The Challenges of Transformation,' in Ramphele M, *Laying Ghosts to Rest*, (2008) 13. The author describes some of the challenges that face post-apartheid South Africa in the journey towards transformation. Highlighting the magnitude of the task at hand she touches on the need for psychological liberation as a stimulant for substantive change but argues further that we must take note of our differences and use the combined strengths of our diversity to steer the country on a positive, democratic and sustainable trajectory.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² See generally Klare K (1998).

¹²³ Motsei M (2007) 8, This can also be linked to the race-consciousness movement of the critical race scholars and the consciousness raising school of the feminist movement, see Minda G (1995) in this regard; as well as the Black

shift from one state of being to the becoming of another. In this instance the required shift that must occur is in the negative and oppressive perceptions of women, sex and power reflected in our laws and legal culture, in contrast to our constitutional democracy that guarantees gender equality.¹²⁴

She suggests that in order to achieve this kind of consciousness and transformation, the principles contained in the philosophy of *ubuntu* must be kept in mind. *Ubuntu* is an ancient philosophy grounded in the notion of communalism and driven by attributes such as truth, justice and compassion.¹²⁵ It does not discriminate on grounds of race, economic affluence, social status or gender and it therefore seeks to create a balance between the self and others as well as between the external and internal. It is a philosophy that could assist in rebuilding unity within and amongst different communities. She argues that care for the self through caring for others, has always been part of the make up of black Africans in South Africa.¹²⁶

According to Motsei, for true reconciliation to occur the heart has to be involved because it is from the heart that both the oppressed and the oppressor can let go of a devastating past, based on the illusion of superiority and face a future based on the reality of peaceful co-existence and interdependence.¹²⁷ It is with the strength that

Consciousness movement of South Africa, which cumulatively call for the oppressed to realise that they are human and that their experiences are legitimate and therefore deserve recognition under the law, See Biko S (2004).

¹²⁴ Motsei M (2007) 91, Ramphele M (2008) 13.

¹²⁵ See Ramose MB, *African Philosophy Through Ubuntu*, (1999); Ramose MB, 'An African Perspective on Justice and Race,' (2001) *Forum for International Philosophy* <http://them.polylog.org/3/frm-en.htm> [Accessed 25 April 2012]; Battle M, *Reconciliation; The Ubuntu Theology of Desmond Tutu*, (1997); Desmond Tutu on Ubuntu, 'Semester at sea, Spring 08' <http://www.youtube.com/watch?v=fkjd00fTzbk> [Accessed 25 April 2012]; Impressions from South Africa; Justice A Sachs in Conversation with Judy Hecker <http://www.youtube.com/watch?v=X51vFjB6UDU> [Accessed 25 April 2012]; Cornell D, 'A Call for a Nuanced Constitutional Jurisprudence: *Ubuntu*, Dignity and Reconciliation,' (2004) 19 *SAPR/PL* 666; generally Bohler-Muller N (2005); Nussbaum B (2003) 6.

¹²⁶ Motsei M (2004) 32; see also Van Marle K, 'An "ethical" Interpretation of Equality and the Truth and Reconciliation Commission,' (2000) *De Jure* 248, who argues that an ethical interpretation of equality, a foundational norm of our constitutional democracy, entails employing an ethics of care, especially in the realm of women's rights. Part of the transformation of individuals in South Africa was to restore the humanity of all and this was done by providing a space where all can share their stories of oppression and suffering as a form of catharsis on our journey towards transformation, equality (substantive) and social justice.

¹²⁷ Motsei M (2004) 112; see generally also Cornell D (1993) who argues that transformation takes place on two levels. The first level entails the transformation of a system and the second refers to transformation of the individuals themselves. It can be argued that in South Africa the first took place at the advent of democracy with the change of political power. The second is yet to occur with noted levels of dissent noted amongst the people indicating that the individual transformation has not taken place yet. See generally Mamdani M (1998); see also the

comes from the heart we can all save ourselves from drowning in a sea of apathy and despair and we can open ourselves up to the miracle of forgiveness and transformation.¹²⁸

*“We must forgive ourselves for not becoming what we dreamt we could be and for our failure to live up to the pressure of properly defending our families, our communities, even our country, and continent. And more, we also have to forgive ourselves for failing ourselves.”*¹²⁹

Rather than being an act of weak surrender, Motsei says that forgiveness can become a means to reclaim our power and freedom from a yesterday that has kept us captive for decades: In a shift away from apathy towards consciousness in an attempt to embrace laws potential for change. Ultimately forgiveness allows one to open up to the present without forgetting the past.¹³⁰ This is a reiteration of the power of narratives according to Delgado, who states that stories have the ability to emphasize differences in a way that may ultimately bring us closer together.¹³¹

How does one then go about involving the heart in this transformational context? Motsei stresses the importance of introspection in healing personal wounds and overcoming negative mindsets before any transformational project can be embraced. She states,

*“I ventured out to fix the world, yet I have come to realise that this mission will be accomplished only when we all realise that the world cannot change unless we focus on changing ourselves first.”*¹³²

Only upon healing of the oppressed mental, physical and spiritual self can true change and transformation begin to realise itself in South Africa, more so for rural women. For them to truly engage with the law, and claim its potential for change, they must accept in

Dinokeng Scenarios: 3 Futures for South Africa, <http://www.dinokengscenarios.co.za> [Accessed 23 September 2011].

¹²⁸ Motsei M (2004) 112; see also Ramphele M (2008) 15.

¹²⁹ See generally Krog A *et al* (2009).

¹³⁰ Motsei M (2004) 114, Ramphele M (2008) 15.

¹³¹ Delgado R (1989) 2440.

¹³² Motsei M (2004) 111.

their hearts of hearts the transformational power of the law by confronting their oppressed inner selves.¹³³

*“It takes the most oppressed, the poorest of the poor and those who have suffered extreme physical and psychological battering to teach the lessons of nobility, freedom, spiritual wealth, abundance, love and peace.”*¹³⁴

A statement that clearly focuses on the aspect of hope that should be highlighted in the lives of this marginalised group of women and an indication of the power they wield. The powers to, through their experiences, pave the way forward as regards the issues highlighted. The greatest challenge is to show women how internalised oppression (racism and sexism) controls their oppressed sense of self and identity. Often the oppressed internalise and come to believe the oppressors negative view of themselves explaining it as ‘this is how black people are’ or ‘this is how women are.’¹³⁵ Although it is true that people who have overcome difficult circumstances may succeed in what they do, the real challenge comes with being able to let go of being the victim, including blaming others for obstacles they encounter in life.¹³⁶

Having grown up and worked extensively with rural women, Motsei describes them as abundant in spiritual wealth, with an inherent sense of dignity and worth. Often perceived as voiceless and silent and mistakenly labelled as uninformed and uneducated, due to their lack of formal education, the author argues that their previously mentioned qualities make them strong and passionate, although not publicly demonstrated.¹³⁷ What is clear from the above is that although silenced and

¹³³ See generally Cornell D (1993).

¹³⁴ Motsei M (2004) 118.

¹³⁵ Motsei M (2007) 30, this sense of apathy has also been noted by Fanon and Biko who argue that years of oppression and subjugation takes its toll on the minds of the oppressed and any revolutionary strategies must be geared at elevating the consciousness of these people to allow them to realise their intrinsic self-worth. This was highlighted in the Black Consciousness motto of ‘black man you are your own!’ which called for Black people to revert to more indigenous ways of being see Ojo-Ade F, ‘Review: Steven Biko: Black Consciousness, Black Struggle, Black Survival,’ (1989) 19 *Journal of Modern African Studies* 539; see also Fanon F (1963) 206; Biko S (1994); Pityana BN *et al* (eds), *Bounds of Possibility: The Legacy of Steve Biko and Black Consciousness*, (1991); Ranuga TK, ‘Frantz Fanon and Black Consciousness in Azania (South Africa),’ (1986) 47 *Phyllon* 182; Gibson N, *Black Consciousness 1977-1987; The Dialectics of Liberation in South Africa* (2004) Centre for Civil Society Research Report No. 18, Durban, South Africa.

¹³⁶ Motsei M (2007) 87; Ramphele M (2008) 16.

¹³⁷ Motsei M (2004) 16.

marginalised, rural women have an innate power and dignity and can therefore contribute meaningfully to the development of law if only their stories are sought and listened to and legitimized within the dominant legal discourse.

It is indicated further that they exhibit subtle but powerful ways of resistance and independent thinking related to matters of family reconstruction and gender relations. This is a clear indication that the lives of rural women rather than being eternally miserable and hopeless as is constantly conveyed, are filled with immense strength, wit and courage in confronting oppression both in the public and private sphere.¹³⁸ They thus have the ability to define their own truths free from the negative perceptions that weigh them down, if only a forum for such realisation is provided for. I argue this is not available within the courtroom setting and thus suggest the need to seek indigenous forums fashioned on customary law and practice as a manifestation of the living law in the rural areas.¹³⁹

The insidious nature of the forces locking rural women in cycles of poverty and violence cannot be overcome overnight. The process of realising their rights will therefore be a long and arduous one with the possibility of failure in some aspects. Motsei however suggests that failure can signify progress, depending on how you look at your path.¹⁴⁰ These are encouraging words especially in light of a seemingly impossible task. Patriarchy and sexism are so steeped in culture, both traditional and legal, that the thought of rural women rising up in refusal of these systems to claim their place and make their voices heard seems highly utopian and unachievable. However Motsei calls for a shift in perception which equates failure to progress depending on your mind set. We should rather learn to see victory in a broader context, therefore regardless of how small or insignificant they may seem we must realise that we are engaged in a

¹³⁸ Motsei M (2004) 90.

¹³⁹ Greenbaum B (2008) 88. This can also be described as engaging in a politics of recognition as argued by Nancy Fraser. She puts forward that women are not a homogenous group and that they have intrinsic varied experiences and it is therefore necessary to realise the varied experiences of women. Further still these differences must be acknowledged within the dominant discourse of law and the legal fraternity must respond in light of these differences, Fraser N, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation,' (1996) *The Tanner Lectures on Human Values*, Stanford University, USA.

¹⁴⁰ Motsei M (2004) 123.

process.¹⁴¹ Transformation is not an event; the cumulative effect of all these small victories may have a lasting effect potentially securing more than mere formal equality for South Africa's present and future rural women.¹⁴²

It is important to form some sort of group solidarity if such transformation is to be lasting. Delgado highlights the community building function of stories; according to him they build consensus and a common culture of shared understandings.¹⁴³ The Zuma rape trial revealed that by the time the complainant was fifteen, she had already been raped three times. A painful truth but an important revelation in that it serves to the power of sharing narratives. Motsei says that upon hearing this testimony, many other hidden wounds of rape in exile were re-opened. Women who had been secretly nursing their sexual wounds could relate to her experiences achieving some sort of comfort in the fact that their experience is not unique clearly demonstrating the uniting function of stories as previously highlighted.¹⁴⁴

The complainant, in the Zuma rape trial was constantly referred to as Lucifer, suggesting therefore that she had engaged in the biblical betrayal of a supreme being by daring to question the defendant's authority and invoking his criminal culpability. Motsei asserts that although the name Lucifer was meant as an insult, it was not far from the truth if considered through a different lens. The true meaning of the word Lucifer is bearer of light and the complainant was indeed a bearer of light.¹⁴⁵ Light tends to reveal our deeply buried secrets, forces us to face our fears, addictions and other negative emotions. There is no doubt that the rape trial presented a crisis for the nation.¹⁴⁶ However, if it reviewed critically this crisis has the potential to take us to a place of new discoveries. Discoveries that cause us to challenge our truths about amongst others, custom and culture, about political leadership and their role for shaping a society and the experiences of sexually violated women in our adversarial court

¹⁴¹ Motsei M (2004) 105.

¹⁴² Motsei M (2004) 123, Ramphela M (2008) 19, see also Cornell D (1993) and Langa P (2006) who argue that transformation should not be viewed as a means to an end but rather a value that must continually inform our post-apartheid society. This is discussed in detail in 3.2, Transformation and/through the Law, below.

¹⁴³ Delgado R (1989) 2415, see also Motsei M (2007) 74-75.

¹⁴⁴ Motsei M (2007) 74-75, see also Krog *et al* (2009).

¹⁴⁵ Motsei M (2007) 90.

¹⁴⁶ Motsei (2007) 51.

system.¹⁴⁷ Just as failure can be interpreted in a more positive mode as evidenced earlier, so too can the use of this attempted insult.

*“If we are willing, crises can teach us new lessons that take us beyond the point of confusion and stagnation.”*¹⁴⁸

The ultimate lesson to be learned from the rape trial is how the complainant refused to be buried in a heap of apathy and hopelessness despite the trial indicating to her that abuse of sexual power does not seem to have any consequences. She chose to focus on the good, the future. Despite the ugliness that emerged during the trial, exhibited in the pitting of women against men and women against women in defence of the inviolable reputation of one man, she calls us to focus instead on the future.¹⁴⁹ This can be used to highlight to rural women the necessity of looking forward, not forgetting the trials of the past. This must be done with some introspection and a realisation that their situation is not of their own making. Further still they must accept that their reality is not inevitable, they have the power to shape a better future. They can also realise that although law had failed them before a new constitutional promise provides a platform for change if their voices and experiences are included and this can only be achieved if they release themselves from the shackles of mental oppression and embrace this promise.¹⁵⁰

As far as the substance of the law is concerned, there are limitations to what it can do. It is a retributive system that can only bestow on women certain rights and impose appropriate forms of punishment if these rights are violated.¹⁵¹ Even the very constitution we rely on for relief, despite its transformational aspirations, as a product of the legal culture, is limited in substantive reach. Motsei therefore calls for an attitude change from custodians of the law, such as judicial officers, the police and other members of society; otherwise the impact of new legislation will remain limited. Alongside the promulgation of legislative enactments, she calls for the widespread legal

¹⁴⁷ Ibid.

¹⁴⁸ Motsei M (2007) 90.

¹⁴⁹ Motsei M (2007) 194.

¹⁵⁰ Ramphela M, (2008) 16, see also Fanon F (1963) 225, Biko S (2004) 97, Wing AK (1997) 950.

¹⁵¹ Kok A (2008) 135, the author highlights the limited scope of court orders especially with regards to equality, which are often difficult to enforce. See also Albertyn C (2005) 223.

education of women. Such an education should include a comprehensive public awareness campaign that eliminates the socio-cultural myths that perpetuate rape and other forms of violence against women in our society.¹⁵²

The nature of rape and other forms of sexual violence against women in South Africa is so innate that ending these phenomena goes far beyond legislation.¹⁵³ It requires a change in societal attitudes through comprehensive community education campaigns on gender violence and its impact on women, families and communities.¹⁵⁴ This serves as an indication of the need to employ an alternative approach to dealing with rape and sexual violence.

Although appropriate gender institutions are in place, policies have been formulated and legislation has been passed, thousands of women remain prisoners of war in their own homes and the country.¹⁵⁵ This is a clear indication on the pervasiveness of the issues facing women and the inadequacy of the law to legislate a better existence for women. As suggested earlier, a multiple strategy attack is needed in order to ensure that rural women's lives are improved.¹⁵⁶ Something more needs to be done to ensure that true substantive relief under the law is attained as the mere reliance on law alone is not sufficient to ensure true transformation under the constitution.

She argues that violence against women is founded on a false belief that they are men's property. To overcome this, it is therefore necessary to dismantle the socio-economic and political tools such as the system of patriarchy, designed to perpetually oppress women.¹⁵⁷ For this to happen, women must be at the centre of any transformational projects that seek to bring equality. Starting with deep introspection, women can be free from these apparatus when they tap into their inner courage and call to the fore the negative impact of these apparatus in their lives.

¹⁵² Motsei M (2007) 25.

¹⁵³ The Preambles of the Domestic Violence Act 116 of 1998 and the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 both realise the insidious nature of violence against women, sexual and otherwise. They also realise further the shortcomings of the law this far and the limited ability of law to truly regulate these issues. However they appreciate that an attempt must be made to respond to these issues despite these shortcomings.

¹⁵⁴ Motsei M (2007) 24.

¹⁵⁵ Ibid.

¹⁵⁶ Vasintha V (2006) 3.

¹⁵⁷ Motsei M (2004) 147.

Motsei argues that there is tension emanating from race and class privilege between white and black women in South Africa and that has not been adequately addressed within the context of violence against women in South Africa.¹⁵⁸ In many ways white women still operate as the originators of theory and practice for many organizations working in the arena of violence against women in particular. She attributes this to their access to quality education and resources which has positioned them better than black women activists and thus situated them better to influence policies, legislation, programmes and strategies geared towards addressing violence against women. The agenda of addressing and responding to gender violence in black communities still does not lie in the hands of black women and men.¹⁵⁹

This is not to take away from the importance of the strides achieved in this regard however black women are at a vantage point when it comes to dealing with issues of poverty and violence against them.¹⁶⁰ It is therefore imperative that their voices and experiences must be included in any anti-poverty or violence measures to ensure that these measures are relevant and efficient. This is something that is lacking in most legislative enactments attempting to deal with poverty and violence especially. They do not take into account the varied experiences of black women and because of this the gap between laws promise and their lived reality is stark.¹⁶¹

One method of doing this is reliance on the concept of *ubuntu* which when loosely translated means “I am therefore you are.”¹⁶² According to this philosophy, our humanity is intrinsically linked to the humanity of others and therefore how you relate to those around you is a direct reflection on the state of your humanity.¹⁶³ Captured in the idea of humanity is a notion of dignity, equality and respect. Therefore your dignity, equality and

¹⁵⁸ Motsei M (2007) 163.

¹⁵⁹ Motsei M (2007) 163-164; this corresponds further with Biko’s arguments about white liberals in South Africa. He suggested that they had been speaking for too long to Black people on issues that affect them instead of focusing this energy on freeing the mind of their oppressive white counterparts. Biko therefore put forward through black consciousness a call aimed at black people to cause them to realise the part they had to play in the realisation of freedom, in their own voices and on their own terms. He argued that this was the only way to make change lasting in South Africa. See Biko S (2004).

¹⁶⁰ See Gqola PD, ‘*Ufanele Uqakile: Blackwomen, Feminsims and Postcoloniality in Africa*,’ (2001) 50 *Agenda* 11.

¹⁶¹ Greenbaum B (2008) 88.

¹⁶² Cornell D & Muvangua N (eds), *Ubuntu in the law of South Africa*, (2010).

¹⁶³ *Ibid.*

respect are only fully realised in the dignity, respect and equality you exercise to those around you. It takes into account our differences and calls for us to embrace the things that differentiate us and show some humanity to those around us, different or not, in order to attain humanity ourselves.¹⁶⁴

To illustrate this aspect, the author describes an encounter with a Norwegian man named Dr Tom Andersen. As they spoke they reflected on all the things that made them different, amongst other things their gender and race. Yet for all that what stood out the most for her was what they had in common, their humanity. That they came from one source and that in that moment there was a call for a celebration of both their sameness and diversity.¹⁶⁵

Dismantling patriarchal thinking and all its resultant practices goes beyond a female empowerment strategy that only focuses on putting women in powerful positions. It involves confronting the culture of patriarchal thinking that can be found in both men and women.¹⁶⁶ The greatest weapon therefore is organizing and recruiting women, men and entire communities to be part of a struggle that exposes the links between sexism and racism. Drawing therefore on the previously mentioned notion of *ubuntu* but also taking account of the pervasiveness of the levels of women's disempowerment, especially rural women in this regard who face disadvantage on the basis of race, sex and class.¹⁶⁷

There is a prevailing tendency to blame the oppressed for the consequences of their oppression. According to the author, for a woman accusing a man of rape, the same principle applies - she is blamed for something beyond her control.¹⁶⁸ However a woman, who chose to press charges of rape against the Deputy President, has to be a woman of steel. Blaming women is rooted in a precise patriarchal discourse that views women as inferior, evil, dangerous and a menace to society. Societal responses to

¹⁶⁴ Bohler-Muller N (2005) 270, Nussbaum B (2003) 4.

¹⁶⁵ Motsei M (2004) 112.

¹⁶⁶ Motsei M (2007) 31.

¹⁶⁷ Motsei M (2007) 25, Ramphele M (2008) 16.

¹⁶⁸ Motsei M (2007) 147.

sexual violence are influenced by myths, beliefs and stereotypes that stem from such thinking.¹⁶⁹

Krog *et al* point out that the burden of change is always shoved on the oppressed. In post-apartheid South Africa, the burden of forgiveness and self-introspection for the sake of peace and transformation was shoved onto black people. They ask why it is that the oppressor is never called to change.¹⁷⁰ Rural women have been marginalized, more often than not their issues are set aside for more pressing matters and when they are addressed, the voices of these women are seldom ever taken into account. Why is it then, as is commonly done that they are called on to embrace this emancipation by healing past wounds and overcoming their own mental oppression.

To this, the answer is in the words of an imagined conversation between two black people as put forward by the authors;

*“We should not stop trying. If we do, we are headed for another bruising. The healing place that we need to get to is one where we forgive ourselves before we can be truly free. We must forgive ourselves for not being what we could have been, were it not for a past that we couldn’t prevent from happening.”*¹⁷¹

Motsei posits that rape as an exhibition of power is also a message from one man to another and in many ways it is not regarded as a crime against a woman but rather a violation of the honour of the man who owns her.¹⁷² Rape goes further than a man penetrating a woman’s vagina with this penis; it is according to Kalamu Ya Salaam an act of denying women the “autonomy of self-determination” in the same way that the imperialists “appropriated the sovereignty of colonised nations.”¹⁷³ Reiterating these words the author says that for her, it is important that rape is not narrowly defined as the

¹⁶⁹ Ibid.

¹⁷⁰ Krog A *et al* (2009) 35.

¹⁷¹ Ibid.

¹⁷² Motsei M (2007) 108.

¹⁷³ Ya Salaam K, ‘Rape: A radical analysis from an African-American perspective.’ *ChickenBones: A Journal for Literary and Artistic African-American Themes*. www.nathanielturner.com/raperadicalanalysis.htm [Accessed 05 May 2006], see also Motsei M (2007) 24.

penetration of an individual woman's vagina, but the definition should be expanded to include broader and systematic violence against people and nations across the world.¹⁷⁴

Motsei narrates her experience on a visit to Mogadishu in Somalia. The squalor and desperation of the people of this war torn country was evident from the moment she got off the plane. According to her, the most painful part of the stay in Mogadishu was listening to women's accounts of rape during war. At first they were reluctant to speak because they were not really aware of how widespread a phenomenon it was and many of these women seemed to think that their experience of rape was unique. However once they started to open up words and tears flowed abundantly, she says.¹⁷⁵ They were deeply shocked to learn that other women had gone through similar experiences. It is common to keep silent thinking you are the only one in your situation but talking can lead to healing through shared experiences.¹⁷⁶

She also shares how she survived a physically abusive relationship and became a spokesperson for physically abused women. Through all of this she still survived the odds. It was necessary for her to admit to this dark time in her life saying that in no way did it mean that she deserved the violence; it was however necessary for her to accept and embrace the darkness. No matter how difficult and painful the process was, she had to go through it, or she would never have opened up to embrace her healing.¹⁷⁷

Talking from personal experience she says that when a woman leaves an abusive relationship, she takes her mind with her.¹⁷⁸ Leaving an abusive relationship is not the end but the beginning of a painful healing process; she chose to leave the relationship. In explaining her journey to healing from that point she states that although she had left she took her wounds with her and it was sometime before she could accept that even though she had left she was still being abused.¹⁷⁹ This abuse was not at the hands of another but rather at her own, because she had become an expert at self-abuse and self-sabotage. She shares that only when she took responsibility for her own healing

¹⁷⁴ Motsei M (2007) 56.

¹⁷⁵ Motsei M (2007) 97.

¹⁷⁶ Ibid.

¹⁷⁷ Motsei M (2004) 145.

¹⁷⁸ Motsei M (2004) 146.

¹⁷⁹ Ibid.

and liberation as a woman did the futility of expecting someone else responsible for her happiness become clear.¹⁸⁰

Having worked in the domestic violence sphere, Motsei argues that the main challenge faced in the eradication of this vice was finding solutions that were culturally relevant and acceptable and also effective in reducing the prevalence of domestic violence.¹⁸¹ According to her, it is not only the lot of the poor and the unemployed as is commonly believed. She explains that women across all sectors are vulnerable to this form of violence.¹⁸² Another instance in which a narrative can be used to bind rural women together in realising that their experiences are not unique and further still that there is reprieve. They can also be used to contextualise and humanise the law in the three instances previously mentioned; the drafting, dissemination and implementation phases of law to ensure that the law remains relevant and easily applicable and accessible.

*“Political freedom without economic empowerment is a hollow victory. However, economic empowerment without spiritual emancipation is deadly.”*¹⁸³

Personal healing and liberation are good and beneficial but need to be supported by something more in order for real change in (rural) women's lives. Motsei suggests the need for this personal journey to be supported by external corrective measures such as poverty alleviation, improvement in the criminal justice system as well as access to resources such as education.¹⁸⁴

I believe the first step in the journey towards substantive change, is for women to embrace this notion of personal healing and open their minds to the potential of law to cause change in their lives. This I submit can be done through the reliance of narratives which can also serve to make members of the legal fraternity aware of the manner in which law does not hear the voices of the unfamiliar other. The second aspect, although seemingly simple but potentially effective I believe, is to explain to women the rights and

¹⁸⁰ Ibid.

¹⁸¹ Motsei M (2004) 91, see also Greenbaum B (2008) 82.

¹⁸² Motsei M (2004) 91.

¹⁸³ Motsei M (2007) 33; Ramphele M (2008) 21.

¹⁸⁴ Motsei M (2004) 148, taking heed to make sure that these measures are contextual and take into account the varied experiences of women in that particular context, Fraser N (1996) 23.

remedies they have under current legislation. Once they begin to test these remedies the flaws and benefits can be highlighted to ensure that law has a more active role to play in rural women's lives.

*“It is clear from the rape trial that in the 21st century a woman who decides to lay a charge of rape still faces overwhelming challenges, as evidenced by those faced by the complainant.”*¹⁸⁵

Currently African women’s strategies that are geared towards creating peace in their lives and those of their families only depend on western strategies, such as the court systems, which have failed many an abused woman and child.¹⁸⁶ This could be attributed to the fact that, *inter alia*, the South African system is based on the superiority of European law, evidenced in the heavy reliance on Roman-Dutch common law culture in South Africa.¹⁸⁷ It fails to take into account the role that indigenous justice could play in addressing the moral break down and high levels of crime in the country. Motsei illustrates this by the fact that during the trial, Zuma testified in his native language, and although the judge attempted to engage the defendant in his native tongue, the outcome of the trial was largely influenced by technical evidence provided by western-trained experts.¹⁸⁸

Accepting that while there is no doubt that the professionals have an important role to play in helping legal practitioners solve criminal cases, their expertise is based on the dominant power of western science which is never questioned.¹⁸⁹ She states further that, it is assumed that because experts have a qualification that shows extensive educational and professional experience, they are well equipped to make pronouncements on behaviour that may have moral or cultural root. It is often not taken into account that they may not speak the defendant’s language or be sensitive to their cultural norms.¹⁹⁰

¹⁸⁵ Motsei M (2007) 34.

¹⁸⁶ Motsei M (2007) 165.

¹⁸⁷ Bohler-Muller N (2005) 277.

¹⁸⁸ Motsei M (2007) 183.

¹⁸⁹ Motsei M (2007) 182.

¹⁹⁰ Motsei M (2007) 183; Greenbaum B (2008) 88.

“As far as administrative justice is concerned, common practice still remains one that upholds ideas that reflect the classic western approach with its sole focus on retributive justice, as opposed to the African approach that concerns itself with restorative justice. This means that Africans are still judged on the basis of laws that are not in harmony with the ways in which their communities are structured.”¹⁹¹

Motsei also argues that despite Zuma’s remarks about culture and sex throughout the trial, an African elder was never consulted to verify his statements. This information was perceived to be of no importance for the case.¹⁹² By raising the cultural defence within the law, Zuma took advantage of the cultural pluralism that exists in South Africa; the fear that many have of engaging with what is perceived as traditional practice and law. His intention was to negate the unlawfulness of his act by relying on an argument that is seldom tested, the influence of culture.¹⁹³

South African law is described as one based on Western law rooted in a European world view characterised by hierarchy. It is adversarial in nature and guided by written laws that limit decision-making powers to very few people.¹⁹⁴ In this system, two parties are brought into the same room as adversaries to determine the guilt or lack thereof, of the defendant.¹⁹⁵ How then can such a system bring about healing of individuals, families and communities when questions of justice are relegated to legal institutions while those of morality, forgiveness and reconciliation are left to religion and philosophy?¹⁹⁶

Indigenous law, on the other hand, sees the human being as holistically integrated into all sectors of society. Justice is therefore based on a holistic philosophy founded in a

¹⁹¹ Motsei M (2007) 188.

¹⁹² Motsei M (2007) 185.

¹⁹³ Ibid.

¹⁹⁴ Motsei M (2007) 188.

¹⁹⁵ Motsei M (2007) 188, the author further outlines how Advocate Kemp J. Kemp was more than delighted to produce a private manuscript acquired through dubious means as evidence to show that the complainant was an unreliable witness, yet he refused the state’s request for permission to use the material acquired from the raids of Zuma’s office and other properties. He deemed it acceptable and unquestionable to use individuals named in the private unpublished manuscript as witnesses against the complainant. Of particular interest is that Kemp J. Kemp refused to view this invasion of private emotional space in the same serious light as the invasion of physical space. Because the overall objective of western justice is not to remedy the problem but to punish the offender, the truth is not reached voluntarily and willingly.

¹⁹⁶ Motsei M (2007) 188.

circle of healing for which the main goal is connecting those affected by a specific crime.¹⁹⁷ In the indigenous realm, law cannot be separated from morality and spirituality. This system instead focuses on the victim in order to encourage healing on the physical, emotional, mental and spiritual levels. In this instance however, the complainant was essentially alone. The adversarial nature of our legal system ensured that she was alienated, put on trial for daring to bring to fore issue that are deemed private and left to deal with the aftermath on her own.

“Her voice is almost erased in our hearts as we become like the citizens of Hamelin following the piper from one rendition of umshini wam to another.”¹⁹⁸

It is evident that the justice system as it currently exists has had no impact on awakening the nation from its moral and spiritual stupor which is reflected in the alarming levels of violence against women and the continued ignorance of the overwhelmingly female face of poverty.¹⁹⁹ According to Motsei, it is therefore crucial to counter the cruelty of our times by reverting to the principles of *ubuntu* which asks that we honour the spiritual connection between one human being and another, and realise

¹⁹⁷ Motsei M (2007) 190, she goes further to give an example of Australia where the Murri court has been formally inducted as part of Australian legal process, which serves offenders of Aboriginal or Torres Saint Island descent, see further Hennessy A, ‘Indigenous Sentencing Practice in Australia,’ International Society for Reform of Criminal Law Conference, Brisbane, July 2006 as cited by Motsei M (2007) 191-192. This court comprises community justice groups, partially funded by the state with its members taken from the local community, the elders committee and the community corrections office. According to one magistrate this positive interaction between participants represents a holistic approach to a historically difficult problem characterized by the representation of aboriginal people as offenders and white Australians as those who decide the fate of the offenders. It is provided further that, the aim of the elders of this court is to condemn the offending behaviour in the strongest terms as well as teach the community about indigenous philosophies and justice. The acknowledgment of their authority as moral guardians over society is critical for the healing of a community suffering from years of racial oppression and cultural repression. The courts work is not just about finalizing a case but encompasses the reintegration of restorative ideas into existing western justice procedures.

¹⁹⁸ The Pied Piper of Hamelin is a legendary character who is said to have caused the departure of many children from the town of Hamelin. The town was infested by rats and the town decided to hire the piper to lure rats away with his magic pipe. When they refused to pay him, he turned his magic on their children, leading them away from town, like the rats, never to be seen again. See *The Encyclopædia Britannica: A Dictionary of Arts, Sciences, Literature and General Information* Page 876, At the University press, 1910 Original from the University of Virginia—Digitized July 3, 2007. <Accessed via Google Books October 18, 2011...> symbolically the pied piper represents a charismatic person who attracts followers much like the defendant at the time. The authors likening of Jacob Zuma to the pied piper is very apt as was evidenced in the trial, where he had a mass of supporters. Male and female who seemed to be lead by some blind and magical pull to rally behind a man whose behaviour was against the spirit of the constitution and inappropriate for someone in a position of such power.

¹⁹⁹ Motsei M (2007) 194.

our humanity by realising the humanity of others.²⁰⁰ In this instance we must realise the humanity of rural women, realise their rights to bodily integrity, freedom from all forms of violence and their right to equal treatment under the law. This speaks to the ultimate call of the consciousness project, those in a position of privilege should realise their humanity by realising the humanity of rural women. Then only can we truly claim to be part of a democratic state that realises the humanity of all especially for rural women who will also have the benefit of experiencing substantive equality and the full benefit and protection of the law.

2.3 CONTEMPLATING TRANSFORMATION OF/THROUGH THE LAW

We need to bear in mind that frequently, in judicial and quasi-judicial processes such as the TRC, there are testimonies/narratives that do not and will not fit the general framework/discourse.²⁰¹ Often these processes are grounded in a foreign system with a different conception of justice and are therefore out of place for majority of the population who still live under customary law and practice. These systems are exclusive and elitist and therefore designed to service a small section of society who due to their position of privilege can readily access these forums. Intentional or not, this the reality of our judicial system and therefore a more inclusive forum grounded in rural women's reality must be explored.²⁰²

Krog *et al* note that the testimonies of the other mothers were articulate and fit within the general scheme of the commission and it is within this sphere that Mrs Konile had to make her contribution.²⁰³ Her story is relevant because the legacy of apartheid in South Africa means that her story is a common one, one of pain and trauma, of loss and desperation, of perpetual poverty despite the advent of a democracy that purported to bring equality for all. Mrs Konile reminds us that this legacy is still a reality for majority of

²⁰⁰ Ibid.

²⁰¹ Krog A *et al* (2009); see also Van Marle K (2000) 255; Slabbert M, 'In Search of (Uncoveyable) Truth: The Truth and Reconciliation Commission's Notion of Narrative Truth and a Victimary Hypothesis,' (2004) *Stell LR* 103.

²⁰² Krog A *et al* (2009) 19, Motsei M (2007) 194.

²⁰³ Krog A *et al* (2009) 43.

the population despite the apparent strides that have been made in reversing the effects of Apartheid. It is necessary to remember to ensure that we do not fall into the same authoritarian practices of before that excluded certain groups on the basis of various grounds of discrimination. The aim of our democratic constitutional order was to ensure the inclusion of all under the realm of law and we must therefore revisit the legal culture in which this order is steeped to challenge its exclusivity when attempting to enforce ones rights.

The authors note that as they worked together on understanding the truth put forward by Mrs Konile's testimony, they realised that the dominant discourse at the Truth Commission had no way of hearing her. Her narrative challenged all the elements that made narratives audible within what was considered to be the "dominant discursive framework operative at the hearings."²⁰⁴ With at least two of them able to negotiate culture and language in order to move freely in and out of both the dominant Western-orientated and the dominant Indigenous discourse, the authors managed to "re-code" Mrs Konile's narrative from the incomprehensible into a new space that valued her resistance to the master narrative.²⁰⁵

*"We became deeply influenced in our own listening to one another as cultural psychological work was happening in ourselves too. Mrs Konile had made us hear her, and through her we believe we have started to hear one another."*²⁰⁶

The authors note that the economic inequality between themselves and Mrs Konile was stark. That although under the law all people are equal and should not face discrimination, Mrs Konile experienced prejudice in a form that people seldom recognize, poverty.²⁰⁷ Therefore within the context of Indwe, Mrs Konile was completely coherent as the visit made it clear that she was a witness of another truth, that of poverty.²⁰⁸

²⁰⁴ Krog A *et al* (2009) 47.

²⁰⁵ Krog A *et al* (2009) 42.

²⁰⁶ Krog A *et al* (2009) 47.

²⁰⁷ Krog A *et al* (2009) 171.

²⁰⁸ Krog A *et al* (2009) 177.

“Mrs Konile did not see the news broadcast because she did not own a television set; her poverty and isolation rendered her doubly deprived. So how could she effectively bring her suffering in rural isolation across to this commission audience?.. How could she convey that her life had become part of the margin itself?”²⁰⁹

It is noted that Mrs Konile, unlike the other mothers was not recorded as having implicitly forgiven the perpetrators responsible for her son’s death. The authors argue that maybe the difficulty Mrs Konile had in forgiving, lay in the fact that because of her impoverished and marginalised position, she could not recognise any part of herself, or her life, as being part of another person.²¹⁰ This links with Motsei’s argument that all healing as suggested by Motsei must be accompanied by some sort of economic relief.

Poverty speaks another language and excludes rural women from the enjoyment of their rights to equality, dignity and freedom.²¹¹ How can one be truly equal when they cannot feed themselves or their families, and how is one’s dignity reflected in the inability to make a living for oneself due to factors beyond your control? How can one be truly free, free from violence (which has been proven to be linked with poverty), free also to realise your dreams and aspirations when your station in life necessarily precludes you from doing just that?

It was clear how difficult it was for the full extent of the devastating poverty and deprivation that characterised Mrs Konile’s life after the death of her son, to enter readily into the framework of the TRC and its audience in Cape Town. The dominant discourse at the commission was one designed to find ‘heroes, victims and perpetrators,’ and to offer compensation with reparations or amnesty. The commission was not equipped to understand the way in which narratives like those of Mrs Konile could contribute to a greater understanding of the systemic injustice and lingering effects of apartheid. It did not realise further how such a story could serve as an example of the endured prejudice and suffering especially in the attempt to access

²⁰⁹ Krog A *et al* (2009) 88.

²¹⁰ Krog A *et al* (2009) 199.

²¹¹ See generally Motsei M (2007) and Ramphele M (2008) 20.

justice before the courts.²¹² Mrs Konile did not fit the dominant narrative set out for the TRC and for this reason her testimony was deemed incoherent without due consideration for the possible lessons to be gleaned from her narrative.

Krog *et al*, therefore highlight that it is important to reread/rehear these incoherent/unfamiliar testimonies/narratives in particular ways, in order to arrive at a fuller knowledge of who we are as individuals.²¹³ Only when we do this can we then can we begin to say that we know one another as we attempt to realise our total humanity but ensuring all experience humaneness. Through Mrs Konile we are taught to advocate for or accommodate that which is strange in order to contribute to the spaces, “articulating nuanced South Africanness,” that speak of tolerance and diversity.²¹⁴

According to the authors, the official transcripts removed the extent of Mrs Konile’s poverty and her subsequent vulnerability (with the death of her son) from the narrative.²¹⁵ Unlike the other mothers, she suffered extreme poverty and despair, but these could only be picked up in her rural references, at the points in her testimony when she cried and the cultural remarks she made. Instead of conveying her material poverty, she was rendered incoherent.²¹⁶ To fully understand her testimony the authors chose to not rely merely on the official transcripts but consulted the original Xhosa version for a more informed understanding.

The authors also posit a possible conversation between two black people, surrounding the same issues. One specifically states that in order to truly hear Mrs Konile’s truth, and the truth of most of the black people who testified at the Truth Commission hearings, “you have to work hard to understand it; you have to gain our trust.”²¹⁷ I believe this is true for most people who come before the court system, especially for rural women for whom this adversarial system of justice is so foreign. In order to make it so that there is a way in which such people engage with the law and seek to enforce their rights, and accept the resultant duties, we must engage with their truth and work

²¹² Krog A *et al* (2009) 176.

²¹³ Krog A *et al* (2009) 43.

²¹⁴ Krog A *et al* (2009) 102, Cornell D (2004) 670.

²¹⁵ *Ibid*.

²¹⁶ Krog A *et al* (2009) 95.

²¹⁷ Krog A *et al* (2009) 32.

hard to understand such truth and most importantly to place it in context to realise its legitimacy and importance.

Many things of value are lost by devaluing the experiences and perspectives of those who do not speak the dominant language of the law. Bohler-Muller explores the power of stories to find ways to counteract the continued exclusion and oppression of the voices of those who do not fit the universal legal categories of “personhood and subjectivity.”²¹⁸ It is for this reason that the authors suspected Mrs Konile’s testimony was important, precisely because it was different from the others and considered the possibility that perhaps you needed other tools to make sense of it.²¹⁹

It is true that rural women are in a position that is not of their own doing, and is not perpetuated by their laziness as is commonly misconstrued. A series of historical events have collaborated to place them in a position of disadvantage and in order to see a future free from this, with the possible albeit limited help of the law, they need to get to a healing place, as mentioned, where they release themselves from that burden and embrace the possibility of freedom.²²⁰ To a large extent, the TRC had already been given parts of a grand narrative by the other Gugulethu Seven mothers before they got to Mrs Konile. However, it did not get this kind of narrative from her.²²¹ According to the authors, the Truth Commission hearings were meant to deal specifically with ‘telling’ and its therapeutic effect but the commissioners appeared unprepared for and uneasy about Mrs Konile; it was as if her story was resisting the imposed framework of the hearings, “as if her mind resisted easy readings.”²²²

It is said that we tell stories so that we do not die of truth. But we also tell stories to know who we are and to make sense of the world. We constitute our social identities through narrative and, although life is much more than stories, stories also try to create

²¹⁸ Bohler-Muller N, *Developing a new Jurisprudence of Gender Equality in South Africa*, (2006) LLD Thesis.

²¹⁹ Krog A *et al* (2009) 39.

²²⁰ Ramphela M (2008) 16.

²²¹ This narrative was one of a brutal regime, stoic struggle by the human spirit for truth and freedom and an eventual triumph over evil. Mrs Konile and the other family members of the Gugulethu seven were supposed to show how resilient and eventually how forgiving they were, see Krog A *et al* (2009) 56.

²²² Krog A *et al* (2009) 56.

order in the chaos of our lives. Stories in their widest sense can be used to bring order, or tell about chaos.²²³

We often assume that a story by someone who looks and speaks like we do will be easier to understand than a story by someone from a different culture. This is not always true, as evidenced by the experience of the co-authors of the book who, although Xhosa still had to rely on more tools to fully comprehend Mrs Konile's testimony.²²⁴ The authors suggest therefore that culture on its own does not imply understanding and we therefore need to find other ways to examine the truth of testimonies.²²⁵ We therefore listen to one another's stories so that we share the burden of carrying the truth. But we also listen in order to become, for one brief moment, somebody else, "to be somewhere we have not been before."²²⁶ We listen to stories in order to be changed and hope that in the end we are not the same person as the one who started listening.

The authors state that at the TRC hearings, Mrs Konile constituted an identity for herself at that moment in that particular context she was not the only one narrating.²²⁷ Narratives have a benefit to both the listener and the teller, listening to her testimony; you could start "relocating yourself within other broader public narratives while re-adapting smaller personal narratives to empathize with the speaker- all the time being aware that no one is a static entity with a fixed core."²²⁸ Engaging in what Delgado

²²³ Krog A *et al* (2009) 19, see also Delgado R (1989) 2440.

²²⁴ Krog A *et al* (2009) 99, see also 4.2 below, A Critical Reflection on Law, which discusses the varied experiences of women. There is therefore no common lived experience for 'women.' In the same vein there may be an argument made that there is therefore no common understanding of rural women's lived reality, however relying on statistical evidence as highlighted in 2.2 above, majority of women in rural areas are burdened by poverty. For a further discussion of the relativity of 'women' based on various conceptions of, inter alia, race, culture, sexual orientation, see Wing AK (1997), Hooks B, *Aint I a Woman? Black Women and Feminism*, (1991), Hooks B, *Feminism is for Everybody: Passionate Politics*, (2000), Williams P (1991), Fraser N, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation,' (1996) *The Tanner Lectures on Human Values*, Stanford University, USA, who all show that women's experiences are different and argue further that these varied experiences must be taken into account when attempting to extend laws protection to all.

²²⁵ Krog A *et al* (2009) 99.

²²⁶ Krog A *et al* (2009) 19, see also Delgado R (1989) 2440.

²²⁷ Ibid.

²²⁸ Ibid.

described as, jarring ones complacency and allowing yourself to engage with the unfamiliar other.²²⁹

*'Her story is supposed to impact on my relationship with her so that I can start living a caring and empathetic life in this country. But how am I ever to become a participant in her testimony? I feel like it's my duty to listen to her but how can I be taught by her? By this garbled narration? I want to be taught by her because this will help me to see her and others as human beings and stop us from hurting each other. But how do I do this?'*²³⁰

According to Krog *et al*, the deeper they analysed and understood the original Xhosa testimony, the more they saw that Mrs Konile was not only narrating coherently within particular frameworks, but was also resisting the imposition of other frameworks on her.²³¹ In a country such as ours, some narratives such as that of Mrs Konile are likely to reproduce old cultural, racial and geographical divisions. To overcome that as well as inevitable interpretation and transcription mistakes, we must work collaboratively within a "communally-orientated, human-centred methodology."²³² What this basically calls for is a method that involves communities, and calls on them to engage with the law, to ensure that women are able to claim their humanity and enforce their rights within a system that has previously been out of their reach.

*"I thought that the public narration of trauma could form a bridge between our disparate historical experiences, because with the testimony of the other three mothers, I was there! I felt that through my empathy and careful listening I could form a kind of cross-cultural solidarity that could enable us to create a new community. But Mrs Konile's story was just one big barrier! She made it impossible for me to hear her as a fellow human being."*²³³

²²⁹ Krog A *et al* (2009) 26, Delgado (1989) 2440.

²³⁰ Krog A *et al* (2009) 24.

²³¹ Krog A *et al* (2009) 46.

²³² Ibid.

²³³ Krog A *et al* (2009) 25.

The authors give an example of what a conversation between two white people, around the issues of identifying with the unfamiliar other, and reconciliation in South Africa could possibly sound like.

“As a white person who grew up under apartheid, I do not know black people. I hear and understand their aspirations but I don’t really know on a personal level the ways in which they are just like me and not like me. We are still living very much apart ... it’s a problem: how then do white people ‘hear’ black people? But then again, do black people care to be heard by whites?”²³⁴

The authors argue that what this conversations is meant to show is that because of our segregated past and because of the way in which narration about and from south Africa is structured, it is impossible for the voice of privilege to hear a person like Mrs Konile. Although testimonies do not take place I solitude and thus Mrs Konile must have been speaking to someone, society is so structured that one can question whether she will ever truly be able to speak and be heard by privileged.²³⁵

‘As such it is precisely because we cannot understand the self-in-community (I am because we are here) and the unity-of-the-world (we are all inter-connected, even if we don’t always know in what ways exactly) that make a person like Mrs Konile sound incoherent. Indeed, what racism, apartheid and colonialism did was (and still is) to destroy those specific values, because it is often incomprehensible that a person lives for others.’²³⁶

²³⁴ Krog A *et al* (2009) 20, Spivak GC (1988) 26.

²³⁵ Krog A *et al* (2009) 24, Spivak GC (1988) 26.

²³⁶ Krog A *et al* (2009) 61.

2.3.1 *Ubuntu* and the Narrative Call for Consciousness

In supporting this call for openness to difference Bohler-Muller suggests the creation of public spaces to displace grand narratives that restrict legal access to those who fit the accepted mould. This is done to allow the proliferation of voices and stories of voices and stories which destabilize our belief in “one objective law.”²³⁷

What Krog *et al* suggest, like Motsei, is the reliance on *ubuntu* as a prevailing principle that must be kept in mind when learning to engage with the voice of the marginalised other.²³⁸ They use this principle to analyze Mrs Konile’s testimony in order to make sense of it. They argue that within a post-apartheid context, a woman such as Mrs Konile may appear incoherent because of suffering or further still that they may seem unintelligible because of oppression when in fact they are neither. They found that within her indigenous framework, within her existence as a rural woman, she was extremely logical and “resilient in her knowledge of her loss and its devastating consequences in her life.”²³⁹ The authors provide further that her narrative made sense but the forum in which it was presented and the way the official version of her narrative was arrived at, made it very hard for her to convey the depth of her devastation.²⁴⁰

This clearly highlights the difficulties women like Mrs Konile may face when attempting to claim their rights under a system that fails to take into account their lived reality. It is therefore important to provide a forum through which such women may find it easier to enforce their rights. Although ultimately it is desired that the law develops to such an extent that justice and relief are easily accessible regardless of which forum one approaches; we must accept that this is a long journey and will thus take a while. In the meantime I therefore suggest that maybe it is time to rely on another forum which is more accommodating to the cultural contexts and lived realities of women such as Mrs Konile. One that is less formal grounded in the philosophy of *ubuntu* and therefore aims for restoration rather than retribution. One that takes language into account that values

²³⁷ Bohler-Muller N (2006) 11.

²³⁸ Krog A, *Begging to be Black*, (2009).

²³⁹ Krog A *et al* (2009) 63.

²⁴⁰ Ibid.

the importance of narratives and hearing each other and that does not rely on a complex infrastructure to ensure its accessibility.

Krog *et al* highlight the importance of all narratives being given voice and highlight the value of this exercise to both the teller and the listener. But how does one go about this? “How do we hear one another in a country where the past is still so present amongst us?” they ask. How much of what we hear can we translate into finding ways of living together? And further still, “how do we overcome a divided past in such a way that the other becomes us?”²⁴¹ The authors suggest to this end the need to make use of indigenous languages and knowledge systems, rooted in African values such as *ubuntu*, which promote reconciliation over retribution, to access greater understanding and respect for one another. “Bit by bit we learned how to better hear one another from different cultures and personal backgrounds.”²⁴²

People often do not appreciate the value of language and being able to properly communicate and be communicated to, especially when attempting to engage with judicial processes. Courtrooms being adversarial in nature are an extremely daunting environment for anyone how much more so someone who does not enjoy the benefits accrued due to their position of privilege. The importance of language is further indicated by Krog *et al* who state that being able to effectively communicate under a system from which you are trying to obtain justice is important. The authors provide that language is not a “by-the-way issue here.”²⁴³ Neither is it a side issue in any communication. For them language changes reality, constructs what is true, what we see and fail to see, our identities and the universe itself. It shapes us and our world and one must understand this even before you start talking of the truth commission or of Mrs Konile.²⁴⁴

Language excludes rural women from the law outside of the courtroom because often laws are drafted in complex legal jargon and styled in a formal grammatical manner which calls for a certain level of education to be able to effectively decipher the meaning

²⁴¹ Krog A *et al* (2009) 47.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Krog A *et al* (2009) 31.

behind such enactments. Further still the mediums in which these laws are presented also calls for a certain level of privilege which allows one to access internet services or libraries to be able to get hold of these enactments. These are but some of the issues pertaining to language which may serve as a hindrance to the equal enjoyment of laws benefit by rural women in South Africa.²⁴⁵

Motsei argues that educating the public about their legal rights cannot be limited only to the written word in a language that not everyone understands and in mediums that not everyone has access to.²⁴⁶ According to her, about three million adults in South Africa are completely illiterate, between five and eight million are functionally illiterate and ten million are alliterate, such an educational campaign should occur within a context that is culturally relevant for the target population.²⁴⁷

The authors met and spoke with Mrs Konile during the process of compiling the book. During their interview with her, which was conducted in Xhosa, her native tongue, Krog expressed feelings of exclusion being the only non-Xhosa speaker present. Within the language a new hierarchy was established, and she was nobody. Although she arrived with them, she says she had no power or control, “and to both my delight and anger, neither of my colleagues even once tried to interpret anything or include me in the discussion.”²⁴⁸ This indicates clearly the importance of language in all spheres of life as it is imperative to understand and to be understood. Our current system prefers English or Afrikaans over other languages for most legal processes including the publication of law. If one must speak in their mother tongue, there are issues with translation and transcription which have been highlighted by the authors.²⁴⁹

It is therefore of paramount importance that language should be addressed as a hindering factor in the access of justice. Although it may be argued that the provision of translators curbs this issue, the discrepancies between the transcribed translated

²⁴⁵ Discussed further below 3.3, Law and Legal Culture as Exclusive.

²⁴⁶ Motsei M (2007) 25.

²⁴⁷ Complete illiteracy-being unable to read or write, functional illiteracy-being unable to function in a modern world due to poor reading and writing skills, aliteracy- being able to read but choosing not to. Sisulu E, ‘The culture of reading and the Book Chain: How do we achieve a quantum Leap?’ Keynote address; Symposium on the Cost of a Culture for Reading, Centre for the Book, Cape Town, 16-17 September 2004. As cited by Motsei M (2007) 25.

²⁴⁸ Krog A *et al* (2009) 132.

²⁴⁹ *Ibid.*

version of Mrs Konile's testimony and the original Xhosa one indicate that this provision is not sufficient.²⁵⁰ Although this setting occurred in a quasi-judicial setting, the same principles can be extended to any judicial process where one must engage the audience in their native tongue. There should be a space where, accepting the diversities of or cultures as in the constitution, people should be able to access justice through a process that is familiar, in a tongue that is familiar.²⁵¹ To this end I suggest as previously mentioned, the reliance on another forum as provided for by the constitution. I firmly believe that within customary and cultural systems such measures are available.

When it comes to the place of culture in today's democratic discourse Motsei is very clear, culture is something to be embraced and not excluded, as the form in which it currently exists is not how it was originally practiced. She says that over time, the unquestioned influence of missionaries has caused culture and its practices to come under attack for their "pagan" nature.²⁵² This according to the author amounts to years of a significant amount of psychological battering in the form of constant attack of indigenous belief systems and thus the souls of those who subscribe to this system is broken as suggested by Biko and Fanon; "the collective consciousness of the oppressed has taken a beating."²⁵³ This she says has led to their sense of pride being torn into pieces.²⁵⁴

Motsei argues for the necessity of infusing traditional cultural practices in contemporary discourse, although the example she gives is of medicine, the comments she makes can be translated into the legal sphere. She states that rather than the constant reliance on hi-tech methods and procedures, simpler, natural and more cost effective ways of saving lives should be sought.²⁵⁵ I believe this aspect can be beneficial in the legal sphere, cumbered with a load of complex procedures and intricate legal documents, the court system as a means of attaining justice is not culturally relevant for majority of women who happen to be rural. It may be more meaningful to explore and develop

²⁵⁰ See generally Krog A *et al* (2009).

²⁵¹ Se generally Van Marle K (2000), Ramphele M (2008).

²⁵² Motsei M (2004) 132.

²⁵³ Biko S (2004) 69, Fanon F (1963) 219.

²⁵⁴ Motsei M (2004) 133.

²⁵⁵ *Ibid.*

simpler, yet effective alternative means that are more culturally grounded, within the confines of existing systems, to ensure that rural women are able to access justice.²⁵⁶

The tendency for people to exploit tradition for a particular purpose is common place in modern society.²⁵⁷ The author also illustrates the influence of religion in shaping the perceptions of women in society and the need to also call to fore some of the discriminatory practices experienced under the guise of religion.²⁵⁸ This is a necessary aspect to consider as has been previously highlighted, spirituality and religion play a big role in rural women's lives and therefore in attempting to reconcile the law with their everyday lives, these issues must also be discussed and reconciled with the law. She states that "just as one of the steps towards the emancipation of women lies in providing a critique of the political, economic and socio-cultural sectors, we are compelled to do the same with religion."²⁵⁹

African women theologians challenge the colonial and missionary interpretations of African religion and culture and support initiatives to integrate African culture with conventional theological reflections and practice. Calling to fore the indeterminate nature of religion and religious practices which have been canonised in much of the same way the law and traditional African practice has.²⁶⁰ They warn that if treated as static, African culture has the power to further oppress women; it must therefore be recognized for what it is a social construct and must be developed to be in line with the prevailing societal norms, in South Africa this is represented by the constitutional imperatives of equality and dignity.²⁶¹

²⁵⁶ See the notion of refusal and return to the ordinary discussed below at 3.3; Ndebele N, 'The Rediscovery of the Ordinary,' (1986) 12 *Journal of Southern African Studies* 143; Van Marle K, 'The Spectacle of Post-Apartheid Constitutionalism,' (2007) 16 *Griffith Law Review* 411; De Villiers I, *South African Legal Culture in a Transformative Context*, (2009) LLM Dissertation.

²⁵⁷ Motsei M (2007) 28.

²⁵⁸ Motsei M (2007) 92, Ramphele M (2008) 20.

²⁵⁹ Motsei M (2007) 92.

²⁶⁰ Motsei M (2007) 103.

²⁶¹ Motsei M (2007) 103; see also in this regard *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) in which the respondent challenged the applicant right to succeed to the title of Chief after the death of her Uncle who had become chief due to the operation of the male primogeniture rule in terms of which only the first born male heir was entitled to inherit (succeed) to the throne as chief. The court decided that the issue was not primarily about gender equality but rather about a community's authority to promote gender equality in their daily political agenda. The decision by the Valoyi Royal Council to promote the development of customary law along democratic lines and return the chieftainship

This development should be contextual and should therefore be based on indigenous/customary law and principles. As was noted by the rural women's movement who were amicus curiae in the *Shilubana v Nwamitwa* case, living customary law does not develop in the same manner that Anglo-American lawyers are used to. Customary law is a flexible system that constantly changes to meet society's dynamic demands. It is not rigid, formal and rule-based, like the common law and caution should be taken when attempting to glean the contents thereof from written records from the colonial past. It is a necessarily flexible system and therefore should be given room to respond as and when necessary.²⁶²

Cornell argues that at the turn of democracy, South Africa went through a substantive revolution. In our context this constitutes a complete overturn of apartheid, where the majority were denied their dignity and their humanity. Instead the respect for the dignity and humanity of others has been made the *Grundnorm* (prevailing principle) of the constitution and our democratic state.²⁶³ Therefore the actions of the Valoyi council was a bout of constitutional fervour based on an understanding that the substantive revolution in South Africa demands a recognition of and correction of the past (gender) discrimination.²⁶⁴ This therefore highlights the importance of bringing custom in line with the constitution, based on a true and contextual understanding of its fluidity and ability for change. As opposed to trying to make it conform to the strict formal processes usually laid out for the common law which is based on Anglo-American ways of knowing.

back to the original heir, Ms Nwamitwa was therefore upheld. See also Ntlama N, '“Equality” Misplice in the Development of the Customary Law of Succession: Lessons from *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC),' (2009) *Stell LR* 333; Mailula D, 'Abdication of Judicial Responsibility, Cultural Self-Determination and the Development of Customary Law: Lessons from Shilubana,' (2008) 23 *SAPR/L* 215; Bekker JC & Boonzaier CC, 'Succession of Women to Traditional Leadership: Is the Judgment in *Shilubana v Nwamitwa* based on Sound Legal Principles?' (2008) XL *CILSA* 449.

²⁶² *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) at para 22, Motsei M (2007) 103.

²⁶³ Cornell D, 'The Significance of the Living Customary Law for and Understanding of Law: Does Custom allow for a Woman to be Chief?' (2009) 2 *Constitutional Court Review* 395. According to the author this is a term used by Hans Kelsen to describe a transfer of legal power where the reigning government hands over the entirety of their political power. This is what happened in South Africa when the National Party handed over power to the African National Congress.

²⁶⁴ Cornell D (2010) 8.

Despite the divisions in feminist and women's theologies, challenging the sexist nature of mainstream Christian religion and the depiction of women in the bible is an issue common to all.²⁶⁵ Western religion brought with it a foreign education, language, culture and civilisation with missionaries at the forefront of the process of 'enlightenment.'²⁶⁶ We must therefore make an attempt to return to traditional conceptions of justice and religion because they are more contextual in order to allow the development of law and its processes to be more inclusive.

According to Motsei, as she researched with rural elders on traditional measures of resolving conflict in the home, she found that many of them combined their interpretation of what measures culture provide with that of the bible. In some instances the teachings of African culture were either married to or combined with scripture. Such fusion is inevitable because of the legacy of colonisation and Christianity with close links between the two and thus many colonised Africans are influenced by Christian theory and practice.²⁶⁷

One aspect of culture that has been severely distorted is the role of women in society. *"Drawing women from the fringes and back into the centre of African civilisation will go a long way towards restoring the facts distorted first by those who came to colonise and later by African historians who seem happy to rewrite history as if there have never been any women in Africa."*²⁶⁸

Societal perceptions of a woman's sexuality are to a large extent, based on the interpretation of the story of Adam and Eve, which is in turn focused on the evil power of the woman as opposed to a man's ability to take responsibility for his actions.²⁶⁹ Motsei states that it is this view of a woman as the ultimate temptress that made it easy for Zuma's advocate to find an army of African men socialised by patriarchal religion to make moral pronouncements about women's tendencies to prey upon men's precious, God-given status or power. It was also not so difficult for a court of law to collaborate

²⁶⁵ Motsei M (2007) 103.

²⁶⁶ Motsei M (2007) 113; see also Biko S (2004) 23, Fanon F (1963) 233, Bohler-Muller N (2005) 275.

²⁶⁷ Motsei M (2007) 109, 110; see also Ramphele M (2008) 19.

²⁶⁸ Motsei M (2004) 87.

²⁶⁹ Motsei M (2007) 100.

with the church by delivering judgment on a woman's sexual conduct in this case.²⁷⁰ This calls to fore the place and effect of religion in women's lives, especially rural women, as culture and religion are linked. Although both law and religion are social constructs they have come to be viewed as infallible and unquestionable, even when some of their practices clearly discriminate against those who do not fit the heterosexual white male mould. Some attempts have been made to bring customary practice in line with the constitutional principles of equality and dignity; however its intrinsic link to religion makes the task of further development arduous.²⁷¹ Measures designed to bring relief to rural women should thus take into account the influence of culture and religion. Although the significance of African traditional knowledge is often glossed over because some people feel it has no relevance to modern life, for rural women however, it is a lived reality.

“Employing a process of miseducation, colonisers established schools that used pedagogy and curriculum that deliberately excludes, misrepresents and belittles the role of African people in and their seminal contributions to world history and culture.”²⁷²

Motsei thus challenges the dominance of western originated systems of knowledge and argues that there is a space for traditional knowledge to permeate all areas of law; as a constitutionally recognized system of law in South Africa and as a system of law relevant in the lives of majority of women in South Africa.²⁷³ As a country that recognizes diversity as part of its constitutional dispensation, South Africa does not do enough to engage other systems of knowledge that do not fit the norm. This poses a challenge in fully engaging people such as rural women who live under customary law and traditional practice.²⁷⁴

²⁷⁰ Ibid.

²⁷¹ There have been some cases that have attempted to reconcile customary law with our constitutional principles of dignity, equality and freedom. Although most of them deal with inheritance they are still an indication of the need to develop customary law and practice in line with our democratic endeavours. See *Bhe and Others v Magistrate Khayalitsha* 2005 (1) BCLR 1 (CC); *Mthembu v Letsele* 1997 (2) SA 936 (T), 2000 (3) SA 867 (SCA).

²⁷² Motsei M (2007) 111, see also Biko S (2004) 29-35, Fanon F (1963) 230, 231.

²⁷³ Motsei M (2007) 179, 180.

²⁷⁴ Motsei M (2007) 181.

“Culture not only expresses ideas differently but also shapes concepts and texts differently.”²⁷⁵ Our constitution gives full recognition to customary law and guarantees every person the right to participate in cultural life of their choice. This inclusive constitution calls for a re-negotiation of old relationships and an emergence of new ones.²⁷⁶ According to Nhlapo African customary law is twice as vulnerable because it is not only required to re-negotiate its content but must also re-negotiate the political relationship between itself and the rest of the legal system. This, he argues, occurs against the backdrop of a dominant legal system and a dominant culture whose relationship with African culture has been negative in the past.²⁷⁷

“One of the specific tasks of the TRC was to begin restoring the personal dignity of victims.”²⁷⁸ The authors state that they try to reconstitute the sensibility of one witness, because it seems easy to misrepresent her in ways that perpetuate cultural and racial stereotypes of black rural women in South Africa.²⁷⁹ A first step towards the restoration and reconstitution of personal dignity started when people were allowed to testify in their mother tongues, thereby drawing on and accessing the dignity and wisdom of their own cultures. But restoration could only begin when the testimonies were truly heard and understood, especially those that fell outside the norm.²⁸⁰

It is impossible to try and achieve some sense of justice for rural women without considering their cultural background. Therefore a judicial system such as ours which fails to adequately take issues such as these into account can seldom bring relief to such women in its current state. More must be done to accommodate rural women within this system, culture and its practices so common in these women’s lives must be integrated to ensure that justice is more accessible to them.

²⁷⁵ Krog A *et al* (2009) 53.

²⁷⁶ Motsei M (2007) 187, see generally also Klare K (1998).

²⁷⁷ Nhlapo T, ‘The Judicial Function of Traditional Leaders: A contribution to restorative justice?’ Paper presented at the Conference of the Association of Law Reform Agencies of Eastern and Southern Africa. Vineyard Hotel, Cape Town 14-17 March 2005. As cited by Motsei M (2007) 188. See also Mmusinyane B, ‘The Role of Traditional Authorities in Developing Customary Laws in Accordance with the Constitution: *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC)’ (2009) 12 *PER/PELJ* 136, who also argues for the pressing need to develop customary law in the same manner that common law has been and continues to be developed along democratic lines.

²⁷⁸ Van Marle K (2000) 254.

²⁷⁹ Krog A *et al* (2009) 63.

²⁸⁰ *Ibid.*

“Talking about Mrs Konile as if her rootedness in Xhosa culture were irrelevant would be unhelpful when trying to understand her.”²⁸¹ What was meant by this is that every narrative is rooted and in order to really hear a story that means, to understand it fully, we have to take its ‘rootedness’ into account; especially in light of our past. By ignoring the context of her narrative would be cutting Mrs Konile from her roots as well as from larger humanity. We would therefore be trying to interpret her without taking into account all that makes her herself.²⁸² Because of its emphasis on our common humanity and the ethical call to “embody our communal responsiveness in the world,” *ubuntu* offers an alternative way to re-create a world that works for and is accepting of all. Simply put it encourages people to re-learn how to live together with respect, compassion and dignity and justice and to re-organize resources accordingly.²⁸³

Ubuntu is the capacity in African culture to show compassion, reciprocity, dignity, harmony and humanity in the interests of building and maintaining community with justice and mutual caring. It is consciousness of our natural desire to affirm our fellow human beings and to work and act towards each other constantly bearing in mind the good of the community.²⁸⁴ A person is a person in the community and through the others of their community. This implies a culture of mutual help, of caring for and sharing with each other which is practiced by talking to each other.²⁸⁵

*“Ubuntu calls upon us to believe and feel that: Your pain is my pain, My wealth is your wealth, Your salvation is my salvation.”*²⁸⁶

Because it embraces and requires justice, it inspires and therefore creates a firm foundation for our common humanity. Its underlying value seeks to honour the dignity of each person and is concerned with the development and maintenance of mutually

²⁸¹ Krog A *et al* (2009) 44, Greenbaum B (2008) 88.

²⁸² Krog A *et al* (2009) 46.

²⁸³ Nussbaum B (2003) 3.

²⁸⁴ *Ibid.*

²⁸⁵ Kimmerle H, ‘Ubuntu and Communalism in African Philosophy and Art,’ in Van den Heuvel H (et al), ‘Prophecies and Protest,’ (2006) *Ubuntu in Global Management*.

Available at <http://rozenbergquarterly.com/2011/07/04ubuntu-and-communalism-in-african-philosophy-and-art/> [Accessed 09 March 2012].

²⁸⁶ Nussbaum B (2003) 2.

affirming and enhancing relationships.²⁸⁷ It is not a concept easily confined to one methodological procedure but is rather described as the foundation of a specific lifestyle that seeks to honour human relationships as primary in any activity.²⁸⁸ Essentially providing that no one can be self-sufficient and that interdependence is a reality for all.

Ubuntu therefore embraces a law of “being-with-others and inspires us to learn of others as we learn of ourselves and respect both our differences and our common humanity.”²⁸⁹ Thus it could be used to promote a different approach to law and the promotion of human rights by focusing on communitarian principles as opposed to individualistic ideals rooted in Eurocentric thinking. She provides further that an individual is unique and different not because they are free from others but because their relations with others make them unique, the “who I am,” is always already exposed to another.²⁹⁰

It therefore introduces citizens to a more “sweeping sense” of responsibility and solidarity and 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.”²⁹¹

“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. Ramose points out that the law as a continually lived experience cannot reach a point of finality and that the law can thus always be called into question. As such ubuntu (law) is a future-oriented exercise as ‘it is the living who law down norms and rules as specific responses to particular experiences.’”²⁹²

²⁸⁷ Ibid.

²⁸⁸ Bohler-Muller N (2005) 268, Nussbaum B (2003) 2.

²⁸⁹ Bohler-Muller N (2005) 268.

²⁹⁰ Bohler-Muller N (2005) 268, see also Motsei M (2007) who also suggests *ubuntu* as a new approach to law and the need to steer away from western influenced forums for justice which do not take into account African values which necessarily focus on communitarianism and reconciliation as opposed to individualism and retribution.

²⁹¹ Bohler-Muller N (2005) 269.

²⁹² Bohler-Muller N (2005) 270, see also Mokgoro Y, ‘Ubuntu and the Law in South Africa,’ (1998) <http://www.puk.ac.za/lawpaper/1998-1/mokgorab.html> [Accessed 29 February 2012], Mokgoro submits that if *ubuntu* is ‘consciously and conscientiously harnessed,’ it can become central to a new constitutional jurisprudence to the revival of sustainable African values as part of the broader process of the African Renaissance.

Despite criticism levelled against the reliance on *ubuntu* as a guiding principle in interpretation of the constitution, it can still be useful. According to Marius Pieterse just because *ubuntu* thinking does not fit comfortably within the dominant legal discourse does not mean that it has nothing to offer.²⁹³ In *S v Makwanyane* the concept of *ubuntu* was embraced as a constitutional value and a method of voicing the marginalised other. It is argued that this marked the concept as a site of resistance and re-introduced the “subjugated knowledge” of the colonized into legal theory.²⁹⁴

On a more practical level when struggling towards the experience of justice we should utilise the theoretical tools at our disposal. “The feminine, care, compassion, storytelling, *ubuntu*,” to continue the process of transformation and to make politically progressive judgments, as “the end of apartheid is also the beginning of all things: I hope therefore I am.”²⁹⁵ 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 ought to address the actual conditions of human life; life with and through others.²⁹⁶

It ultimately leads us to the acceptance of what has been coined as a refusal of the spectacle of transformation and democracy. Our democratic state was founded on the spectacle of a progressive and liberal constitution that aimed to transform our society to one based on inclusion and substantive enjoyment of rights. Karl Klare posed a challenge to us through his description of our constitution as transformative.²⁹⁷ This refusal of the spectacle of democracy and constitutional promises implies that in the

²⁹³ “‘Traditional’ African jurisprudence’ in Roederer (ed) *Jurisprudence* (2004) 438 as cited by Bohler-Muller N (2005) 273. According to the author these criticisms include the fact that with the conceptualization of *ubuntu* as a constitutional principle comes the possibility of confining it to one strict definition therefore running the risk of reinforcing the myth that there is one African culture defined by this concept. Lenta P as cited by Bohler-Muller N (2005) 272 states that this homogenization of the *ubuntu* experience in African culture has the potential to ‘normalize, elicit consensus and exclude through rhetorical and other violence,’ English R as cited by Bohler-Muller N (2005) 272, also expresses some concerns with the reliance on *ubuntu* in the conceptualization of human rights. She notes with concern that the implications of this concept have not been explored more fully in cases where the rights of the individual conflict with the interests of society.

²⁹⁴ Bohler-Muller N (2005) 272.

²⁹⁵ Bohler-Muller N (2005) 275.

²⁹⁶ Bohler-Muller N (2005) 271.

²⁹⁷ See Klare K (1998) 150, although I describe this in detail in the following chapter, what is envisioned through this term is ‘a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction. See generally also De Villiers I (2009), Ndebele N (1986) and Van Marle K (2007).

lives of ordinary (rural women) people, more simple and grounded processes and ways of being and interacting with the law should be explored in line with our democratic aspirations and despite our exclusive legal culture.

2.4 CONCLUSION

*“An empowerment that does not guarantee complete physical, psychological, economic and spiritual health will do nothing for us...the black consciousness philosophy posed a threat simply because it called for self-love and self-pride. Revolutionary feminism calls for the very same thing.”*²⁹⁸

The three narratives chosen all clearly highlight the necessity of healing before any sort of change in the lives of rural women is to be noted. This is a personal exercise that allows rural women to realise that the legacy of the past, which contributes to their present situation, was not of their making. Further still the narratives help to bring to life Delgado’s words, that narratives can help jar ones complacency and realise that reality is not set in stone. It is a fluid and social construct capable of changing for the better. The narratives above demonstrate the relevance of engaging in this consciousness raising project as put forward by critical race theorists and feminists. They call rural women to realise that they are relevant and that their experiences are legitimate and calls on them to love themselves, as suggested by Biko, before embarking on any transformational project. I believe that the law can be of assistance, accepting its limitations, in bringing about the sort of transformation envisioned by Klare.

Klare challenges all to embrace the promises entrenched in the constitution and calls further for all those involved in bringing these promises to life to exercise value judgments and detract from the mechanical application of the law in order to ensure laws development.²⁹⁹ Narratives can be useful in this regard, for those who draft and enforce the law, it is necessary to learn to hear the voices of rural women through their narratives and realise that there are other dominant factors in their lives which make it

²⁹⁸ Motsei M (2004) 101.

²⁹⁹ Klare K (1998) 150.

difficult to interact with law in its current state. It is paramount to take all these issues into account when drafting laws and setting up enforcement mechanisms. In the first instance dissemination of these laws to rural areas has not taken place, especially because there has been a failure to take into account the legacy of apartheid which means that a lot of rural women remain illiterate and engagement with the mediums in which these laws are published is limited. Further still, if women do know about these laws, access to relief and justice through the courts is difficult for rural women. Proximity to these structures, their adversarial nature, intricate procedures and language of instruction all serve to ensure that this group of women cannot engage with these legal procedures.

The authors above have all highlighted the importance of the concept of *ubuntu* in this regard. Only when all, including rural women, are able to substantively realise their humanity can we also claim our own humanity as we are all linked by our humanness. To this end it is necessary to ensure in the first instance that rural women know about their rights. Narrative method can be employed in this regard, to present the law in a medium that is easy to understand. The authors both refer to judicial processes in their works and in that regard can be useful to enlighten rural women on the possibility of engaging with these processes. However the authors also highlight the failure of these processes to effect change in the lives of rural women and call for a more culturally relevant means of dispensing justice.

Taking the above into account I explore the manner in which laws unfulfilled promises, enacted in response to our transformational and democratic aspirations to better peoples (rural women's) lived reality, are perpetuated by our exclusive legal culture.

CHAPTER 3

LAWS UNFULFILLED PROMISES

“In South Africa, preservation of patriarchal power may have many cultural specific forms, but ultimately violence against women – or the threat thereof – is the prevailing form of social control. It keeps women off the streets at night, restricted at home and silenced. My research saw the grip of kinship and other social structures as only one component of the total complex of violence against women and social controls. The research illustrated a widely accepted sentiment by gender advocates that violence keeps women in conditions of poverty and fear of poverty keeps women trapped in violent situations. For abused women, lack of economic access dictates their physical mobility, their access to education, recreation as well as access to each other.”³⁰⁰

3.1 INTRODUCTION

This chapter critically explores laws unfulfilled promises. This exposition and critique is undertaken in light of the notion of transformative constitutionalism put forward by Karl Klare, which calls for the perpetual consideration of the constitutional principles of dignity, equality and freedom when dealing with the law in whatever sphere.³⁰¹ This is necessary in light of our formal and thus exclusive legal culture which operates to the detriment of rural women in South Africa by the reliance on difficult and inaccessible language and complicated litigation processes.

Having previously outlined how poverty and its consequences affect rural women, I argue further how this perpetuated disadvantage is a continued violation of their constitutional rights and thus not in accordance with what we hope to attain for all citizens under our transforming/transformational democracy.³⁰² In light of this I consider

³⁰⁰ Artz L as cited in, *The problem of violence against women in South Africa. Working with men against violence series*,

www.sarpn.org.za/documents/.../Gender-based_violence_problems.pdf [Accessed 22 July 2011].

³⁰¹ Klare K (1998) 152.

³⁰² See Chapter 2 above at 2.2, Rural Women's Lived Reality.

some pieces of legislation which, although coined in female friendly terms, still fail to impact positively in the lives of rural women in South Africa. The next chapter then focuses on a critique of these laws and the culture that supports them and suggests an alternative approach to dealing with the law influenced by the notion of consciousness-raising to ensure that it attains some sort of practicability.

3.2 TRANSFORMATION AND/THROUGH THE LAW

At the heart of our new democratic and constitutional order lies a commitment to change our society from an exclusive one to an inclusive one based on the principles of dignity, equality, reconciliation and transformation.³⁰³ Yet emphasis in this respect seems to be focused on and to the benefit of the privileged while the lived reality of the majority remains ignored.³⁰⁴

In a critique of the Truth and Reconciliation process in South Africa, Mahmood Mamdani argued that to some extent, this process facilitated only political reconciliation and not social cohesion. Therefore the challenge facing post-apartheid South Africa is how to make this reconciliation durable.³⁰⁵ Part of the commissions mandate was to restore the dignity of the victims by “granting them an opportunity to relate their own accounts of the violations of which they were victims.”³⁰⁶ Mamdani argues that this is particularly relevant as it was vital to create a common society and forge new identities where victims and perpetrators could live together post-apartheid. However, the truth seeking and reconciliation process at the advent of democracy was exclusive of the majority of the people who suffered under apartheid.³⁰⁷ He therefore calls for a shift of focus from “perpetrators to beneficiaries and from activists to victims,” to expose apartheid as a

³⁰³ Langa P (2006) 354.

³⁰⁴ Van Marle K (2007) 425.

³⁰⁵ See in general Mamdani M (1998).

³⁰⁶ S 3 (c) of the Promotion of National Unity and Reconciliation Act 34 of 1995.

³⁰⁷ For example Mrs Konile as highlighted above at 2.3, Krog A *et al* (2009), see also Krog A, *Country of My Skull*, (2002) for a further description of various testimonies presented during the authors coverage of the TRC proceedings. What is evident upon consideration of these texts is the varying degree of testimonies that came before the TRC.

system of privilege in order to ultimately address social reconciliation and justice towards attaining a truly egalitarian society.³⁰⁸

Although transformation is a contested concept it can be understood to mean the total reconstruction of the society, political and social, including therefore an equal redistribution of power and resources. It is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible.³⁰⁹ It is a state in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea thereof is constant. This is a perspective that sees the constitution as transformative because it envisions a society that will always be open to change, one that will always be defined by transformation.³¹⁰

According to Cornell, the constitution is often seen as a tool to achieving transformation as opposed to a dynamic component of the ongoing process of transformation. She argues that this constitutes evolution and not transformation because it realises systemic change but perpetuates the privileges of the present.³¹¹ Therefore transformation itself should be promoted and sustained rather than viewing it merely as a means of constructing a new society.³¹² The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality.³¹³

The constitution contains a comprehensive and superseding commitment to equality, specifically realizing a substantive and not merely formal conception of equality “crossing the existential space of the social world” and not just within the legal

³⁰⁸ Mamdani M (1998) 15, the author is concerned with how the difference between perpetrator and beneficiary has become obscured in the South African reconciliation process. His critique of the Truth and Reconciliation Commission’s focus on perpetrators and activists, and its lack of engagement with beneficiaries and victims in the majority, resonates with Ndebele’s description of the spectacle and the ordinary this shift called for will therefore be of benefit to the majority who suffered systemic discrimination and violations and who remained anonymous with their suffering seemingly circumstantial, as their suffering (the ordinary) still remains unnoticed, see Van Marle K (2007) 424, 425.

³⁰⁹ Ramphele M (2008) 21; see also Van Der Walt AJ, ‘Legal History, Legal Culture and Transformation in a Constitutional Democracy,’ (2006) 12 *Fundamina* 1.

³¹⁰ Langa P (2006) 354.

³¹¹ See in general Cornell D (1993).

³¹² Langa P (2006) 354.

³¹³ Albertyn C & Goldblatt B (1998) 249.

process.³¹⁴ Implicit therein is an understanding that foundational law is not and cannot be neutral with respect to the distribution of social and economic power and of opportunities for people to experience self-realization.³¹⁵ This is a statement that requires positive action and steps that can help people realise their full potential and make the law come alive in their lives. The constitution thus comprehends that the law must thus be interpreted and exercised in a way that allows everyone to realise the full protection thereof. In this case therefore the transformational aspect of the constitution is called to fore especially in rural women's lives and their ability to exercise their rights to be free from, *inter alia*, violence.

Equality as a value and a right is central to the task of transformation. As a value it gives substance to the vision of the constitution and as a right it provides the mechanism for achieving substantive equality, legally entitling groups and persons to claim the promise of the fundamental value and providing the means to achieving this.³¹⁶ What was envisioned upon the advent of democracy was a social and economic revolution which puts at its centre the levelling of playing fields that were so drastically skewed by apartheid.³¹⁷ Therefore our new society is one ideally based on substantive equality. A commitment to substantive equality involves examining the context of an alleged rights violation and its relationship to systemic forms of domination within a society. It addresses structural and entrenched disadvantage and at the same time aspires to maximise human development.³¹⁸

Democratic transition in South Africa was meant to be “a bridge from authoritarian rule to a culture of justification in which every exercise of power is to be vindicated.”³¹⁹ This transition, grounded in the supremacy of the Constitution and the rule of law, was to realise substantive equality for all by providing a space through which previously disadvantaged groups could realise their full potential. Further through the Bill of Rights

³¹⁴ Ibid.

³¹⁵ Klare K (1998) 154.

³¹⁶ Albertyn C & Goldblatt B (1998) 249.

³¹⁷ Ramphela M (2008), Albertyn C & Goldblatt B (1998) 250.

³¹⁸ Albertyn C & Goldblatt B (1998) 250.

³¹⁹ Mureinik E (1994) 32.

the protection of the law was meant to be extended to those who had been previously excluded from the benefit of some of the advantages it accrues.

The Constitution was meant to serve as the political and legal foundation for this transition towards democracy. It articulated the vision of a new society and invited us to engage actively with the rights and values contained therein to build our society.³²⁰ To this end the preamble of the constitution is explicit:

“The object of the constitution is to serve as a historic bridge between the past of a deeply divided society characterised 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.”³²¹

Our constitution has been described as post-liberal, meaning that it can be understood to be committed to large-scale, egalitarian social transformation.³²² The question for consideration is whether it is possible to achieve this change through law grounded processes?³²³

The existence of a liberal constitution is only a precondition for legal and other changes. The constitutional and legal foundations have provided a framework for some possibilities to transform or in the least change women's lives for the better. However it must be accepted that it cannot overturn the deep structural inequalities that face women in South Africa today, it may however force the powers that be to not ignore these inequalities.³²⁴ The constitution has been further described as a self-conscious instrument committed to social transformation and reconstruction. It enshrines the understanding that legal and political institutions are chosen, not given, and that democracy must be periodically reinvented and further that the constitution itself is the

³²⁰ Albertyn C & Goldblatt B (1998) 250.

³²¹ Epilogue of the Constitution of the Republic of South Africa Act 200 of 1993.

³²² Klare K (1998) 151.

³²³ Klare K (1998) 150.

³²⁴ Andrews PE, ‘Imagine all the Women: Gender and the Transformative Possibilities of the South African Constitution,’ in Ndalo M and Grieco M (eds), *Power, Gender and Social Change*, (2009) <http://ssrn.com/abstract=1493500> [Accessed 28 September 2011] at 22, 23.

contingent (even fragile) product of human agency.³²⁵ It thus invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. According to Klare, it suggests not only the desirability, but legal necessity of a transformative conception of adjudicative process and method.³²⁶ Transformation in this context therefore does not only involve the fulfilment of socio-economic rights but also the provision of greater access to education and opportunities.³²⁷

According to former Chief Justice Langa, the ultimate goal for the constitution is to heal the wounds of the past and guide us to a better future. This implies that our constitution is not merely reactionary but transformational in its objects and is thus a transformative constitution. The core idea of transformative constitutionalism is that there must be change; the ultimate question is how such change should occur and how possible it is within the limits of the law.³²⁸

Karl Klare describes this notion of transformative constitutionalism as:

*“A long-term project of constitutional enactment, interpretation and enforcement committed, in a historical context of conducive political developments, to transforming a country’s political and social institutions and power relationships in a democratic, participatory and egalitarian direction. It connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.”*³²⁹

According to Van Marle, transformative constitutionalism as a concept can also serve as a means of critique. Meaning that there should be an approach to the constitution and law in general that is committed to transforming “political, social, socio-economic and legal practices” in such a way to radically alter existing assumptions about law, politics, economics and society in general.³³⁰ Although this idea is by its nature rooted in law she does not regard it as limited to law and legal inquiry. What makes this notion truly

³²⁵ Klare K (1998) 155.

³²⁶ Klare K (1998) 156.

³²⁷ Langa P (2006) 352.

³²⁸ Ibid.

³²⁹ Klare K (1998) 150.

³³⁰ Van Marle K (2009) 301.

transformative is the break with traditional accounts of the rule of law, thus reaching to other disciplines such as philosophy and sociology.³³¹

Despite these lofty aspirations, the gap between the expansive provisions in South Africa's constitution, and other laws, and the lived reality of the majority of South Africa's women raises troubling questions regarding the possibilities of real change in the face of "extra-legal structural impediments" to women's equality.³³² Democracy has a very important symbolic value in South Africa but it is not moving beyond this symbolic nature and proceeding further than a spectacle.³³³

Women's access to resources and their economic empowerment is integrally linked to the legal, political and social conditions that create the possibilities for such access and empowerment.³³⁴ For women, therefore especially black rural women, the constitution's incorporation of a host of socio-economic rights and particularly its transformative potential is an important antidote to the axis of gender subordination: namely poverty, violence and custom.³³⁵

Ndebele in an article written in 1986 envisioned a new South African society, in which the law and legal culture are concerned with the way in which people actually live; what he calls a "return to the ordinary."³³⁶ De Villiers emphasises that what is meant in this context is "going beyond the symbolic to investigate if and how the Constitution can change the way people actually live."³³⁷ This then calls for an ordinary approach to constitutionalism which acknowledges the inability/limits of the law to establish this kind of change and also "peeks at the problematic nature of law controlling the way people actually live."³³⁸

³³¹ Van Marle K (2009) 288.

³³² Andrews PE (2009) 20.

³³³ De Villiers I (2009) 60.

³³⁴ Andrews PE (2009) 20.

³³⁵ Andrews PE (2009) 3.

³³⁶ Ndebele N (1986) 150; the author uses three stories, all situated in the period after the Sharpeville massacre of 1976, to introduce this notion of a 'rediscovery of the ordinary.' He states that the stories should serve as a reminder that 'the ordinary day to day lives of the people should be the direct focus of political interest because they constitute the very content of the struggle, for the struggle involves people, not abstractions.' Therefore if we seek to bring about a new society in South Africa, it should be based on a 'direct concern' with the way people live.

³³⁷ De Villiers I (2009) 88.

³³⁸ Ibid.

“The ordinary is sobering reality; it is the enforcing of attention on necessary detail. Paying attention to the ordinary and its methods will result in a significant growth in consciousness.”³³⁹

A rediscovery of the ordinary therefore opens up a space because it defies the obvious and therefore opens up possibilities because it “refuses the obvious.”³⁴⁰ An engagement with everyday life therefore involves an acknowledgment of the complexity and complicatedness of ordinary life a fact which laws ‘reductive force and spectacular simplification’ tries to deny.³⁴¹

Klare is well aware of the challenge facing South African lawyers especially the paradox between the ideal, the dream, the aspirations of the Constitution and the reality.³⁴² Despite this it is argued further that, ‘a more politically self-conscious and candid legal process would surely be faithful to the constitutions democratic ethos and would in particular comply with and give meaning to the command under s 41(1)(c) which calls on all organs of state at all levels to provide transparent, accountable and coherent government.’³⁴³ This calls to the potential of law to effect change. Members of the legal fraternity need to realise that law should be more than just the formal and exclusive processes; that law is political. Its culture must be reconciled with its promises to ensure that it is contextual and accessible. We must realise further it as an instrument of exclusion and taking this into account realise and embrace its potential to cause change despite these shortcomings.

There is therefore a need to approach transformation of the law especially with a “high degree of modesty and humility,” with an explicit concern for ordinary lives and a continual “consciousness of failure/fallibility.”³⁴⁴ In saying this Van Marle is not rejecting

³³⁹ Ndebele N (1986) 154; the consciousness referred to here is similar to that alluded to by critical theorists (Critical Legal Scholars, Critical Race Scholars, Feminist Scholars). They call on members of the legal fraternity to be conscious of the manner in which our dominant legal discourse excludes the voices of the marginalized other that is the poor, blacks and women respectively. They therefore argue for a call to consciousness to open up a space where such voices can be given a platform for substantive engagement.

³⁴⁰ De Villiers I (2009) 89.

³⁴¹ De Villiers I (2009) 92.

³⁴² Van Marle K (2009) 292.

³⁴³ Klare K (1998) 165.

³⁴⁴ Van Marle K (2009) 293.

the idea of transformative constitutionalism but rather arguing for a “new imagination” and a critical description of the concept itself.³⁴⁵

Critical theorists argue that the law must see human beings as rooted in their social context of concrete inequality and disadvantage. The law should recognize the unequal life chances occasioned by race, gender, socio-economic status and a host of other factors, which affect a person’s ability to compete on equal footing.³⁴⁶ Sensitivity to context also requires sensitivity to the intricate and compounding nature of disadvantage. The intersectional nature of disadvantage is complex, creating different and multiple forms of inequality which cannot be explained or understood simply by reference to one of the grounds such as gender.³⁴⁷

If this is not done, there is a danger “that law, monumental constitutionalism and human rights will embody another spectacle that could yet again take over South African imagination to the detriment of the ordinary, the way people actually live and more pertinently the complexities of life.”³⁴⁸

What is evident therefore is that we must realise that despite the lofty promises contained therein, the constitution and subsequent legislative enactments, are not enough to cause change due to the insidious and systemic nature of the forces that combine to the detriment of rural women especially. As products of and grounded in a formal legal culture they lack the capacity to wholly affect the everyday lives of these women and is limited in that sense. Supplementary means must therefore be sought to attempt to bridge the gap between these promises and reality. Our constitutional and legal framework must thus be improved by an “overarching” vision that seeks to

³⁴⁵ Van Marle K (2009) 293: this is in line with the authors arguments on reclaiming the ordinary and the refusal of the spectacle of democracy and constitutionalism which has seemed to sweep south African society. This argument is drawn from Njabulo Ndebele’s argument on the discovery of the ordinary in ‘The Rediscovery of the Ordinary,’ (1986) as previously cited; see generally also Van Marle K (2007).

³⁴⁶ Albertyn C & Goldblatt B (1998) 251.

³⁴⁷ Albertyn C & Goldblatt B (1998) 253.

³⁴⁸ Van Marle K (2007) 411, the author’s contention is that the spectacle that is constitutionalism in post-apartheid South Africa may detract from our main democratic aspirations. This is not to negate the instances in which such transformation through the constitution might have or has had positive results, but rather to consider the manner in which this movement can radically alter post-apartheid lives. She aims rather to consider the ordinary, the memorial and social reconciliation as guiding principles when considering post-apartheid constitutional transformation.

transform institutions, laws and practices that subjugate women.³⁴⁹ In addition it must also be “supplanted by a cultural shift across all sectors of society,” a shift that substantively takes on the need to eradicate gender inequality in the social, political and economic spheres.³⁵⁰

3.3 LAW AND LEGAL CULTURE AS EXCLUSIVE

“A transformative constitution is one that that tries to change something fundamental in the constitutional or legal culture in which it is enacted, -to make life different in the future, to remake some part of the culture.”³⁵¹

There is a noted disconnection between the constitutions aspirations and the conservative nature of the South African legal culture which alongside socialization “constrains legal outcomes irrespective of the substantive mandates entrenched in the constitution and legislation.”³⁵² The shift from authoritarian to democratic rule in the country resulted in an ideological shift of the nature of the laws enacted in the republic from draconian to a more egalitarian culture whose founding principles are those of dignity, equality and freedom. However the legal culture through which these lofty ideals were to be exercised remained the same, formal, elitist and exclusive.³⁵³ In order to address the gap between laws promises and rural women's lived reality it is necessary to consider how legal culture influences the drafting of laws and planning of enforcement mechanisms and how this in turn excludes rural women from the full enjoyment of the protection law offers.

Our prevailing legal culture remains attached to highly traditional methods of legal analysis. It is often very formal, preferring to take refuge in the familiarity of well known rules and interpretive approaches than to engage with the illuminating debates which

³⁴⁹ Andrews PE (2009) 23.

³⁵⁰ Ibid.

³⁵¹ Wendell A, ‘Justice and Transformation: Examining the Value of Socio-Economic Rights in Transformative Constitutions,’ (2009) 4 *SALJ* 1.

³⁵² Klare K (1998) 151.

³⁵³ Van Marle K (2009) 301.

have long been emanating from the legal academy challenging received views about the determinacy of legal texts and the contingency of meaning.³⁵⁴

Karl Klare defines legal culture as,

*“[P]rofessional sensibilities, habits of mind and intellectual reflexes, the characteristic rhetorical strategies deployed by participants of a given legal setting; the enduring political and ethical commitments which influence professional discourse; inarticulate premises that are culturally and historically ingrained in the professional discourse and outlook.”*³⁵⁵

Legal culture can therefore be described as the sum total of legal processes influenced by prevailing norms, developed and cemented over time. The prevailing norms are determined by the dominant group who in South Africa are the white, male, Christian, heterosexual group.³⁵⁶ Any person who falls outside this group is thus the unfamiliar other and when laws are being drafted it is usually to their exclusion. Although several critical theories have highlighted the various forms in which this exclusion takes place evidently the exclusion persists to the continued exclusion of the unfamiliar other, South Africa's rural woman.³⁵⁷

³⁵⁴ Hunt M, ‘The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession,’ (1999) 26 *Journal of Law and Society* 86. Although this argument is made with relation to the United Kingdom I firmly believe that this applies in South Africa as well. This article was written in light of the enactment of the human Rights Act in the United Kingdom which much like our Constitutional Bill of rights seeks to infuse a culture of human rights in that country. He argues that the formal and exclusive legal culture in the United Kingdom is not conducive to a true realization of a culture of Human Rights and argues further that much needs to be changed in that culture to allow this to happen. The unarticulated cultural premises he talks about include the continued reliance on formal modes of interpretation of the law. He describes it as a positivist approach to the law refusing to include any morals. He also mentions the strict distinction between private and public law with the focus being on private law which tends to obscure the wider issues which are often at stake in litigation involving human rights. He states further that apart from any vested class interest which members of the legal profession may have in preserving the prevailing legal culture, there are a number of different pressures at work on practicing lawyers that contain the extent to which challenges to the prevailing legal culture can be made. The changes required to be made include a change in methodology of interpretation in line with the aspirations of a human rights order. There should also be an expansion of the role of the judiciary to develop truly inclusive and transformative human rights jurisprudence. Finally there must be a degree of horizontality of Human Rights with these rights being enforced between individuals and not merely by the state and individuals.

³⁵⁵ Klare K (1998) 166.

³⁵⁶ Fedler J & Ocklers I (eds), *Ideological Virgins and Other Myths*, (2001) 63.

³⁵⁷ Critical Legal Theory which highlights the exclusion of the law on the basis of class, Critical Race Theory which highlights the manner in which the law excludes people on the basis of race and Feminism which outlines the way in which the law is exclusive of women. See Minda G (1995), Van Blerk AE, ‘Critical legal studies in South Africa,’

*“The collectively created structures of meaning and recognition in and through which we have experience orient our perceptions, thoughts and feelings and shape our imagination and beliefs. Although these meaning systems are contingent products of human action, they will in the absence of critical reflection and/or transformative experience, appear to be natural and fixed.”*³⁵⁸

Legal culture has also been described as an “aggregate level phenomenon,” a sum total of behaviours cemented over time. Friedman introduced the concept of legal culture as a means of emphasizing the fact that law was best understood and described as a system, a “product of social forces and itself a conduit of those same forces.”³⁵⁹ Klare suggests further that they are human practices and are thus situated and can occur only in the context and through the medium of culturally available symbols and understandings.³⁶⁰ This property of legal culture, the fact that it is contingent on prevailing norms at the time and thus subject to change and further that participants are often unaware of how it shapes their professional beliefs and practices, affects the substantive development of law.³⁶¹ Culture is not a coherent, logical and autonomous system of symbols but a diverse collection of resources that are deployed in the performance of action.³⁶²

“Domination always appears natural to those who possess it, and the law insidiously transforms the fact of domination into a legal right,’ inequality permeates some of our most cherished and long-standing laws and institutions. Our obligation therefore is to reconsider our assumptions, re-examine our institutions and re-visit our laws, always

(1996) 113 *SALJ* 86, Johnson D, Pete S & Du Plessis M, *Jurisprudence; A South African Perspective*, (2001), Douzinas C & Geary A, *Critical Jurisprudence; The Political Philosophy of Justice*, (2005), Delgado K & Stefanic J (2000), Crenshaw K *et al* (eds) (1995).

³⁵⁸ Klare K (1998) 167.

³⁵⁹ Silbey SS (2001) 8624.

³⁶⁰ Klare K (1998) 167.

³⁶¹ Klare K (1998) 167, see also Van Marle K, ‘Art, Democracy and Resistance: A Response to Professor Heyns,’ (2005) *PULP Fictions Disasters of Peace: An Exchange*, Pretoria University Law Press, Pretoria 15, who agrees with the argument put forward by Klare that false consciousness results in the perception of your own culture as natural which in turn causes the continuation in the conservative legal culture which stifles transformation.

³⁶² Silbey SS (2001) 8624.

*keeping in mind the reality experienced by those whom nature did not place in a dominant position.*³⁶³

According to Van Marle there is a noted contradiction between the vision embraced by the Constitution and the guarded practice of analysis followed by South African Lawyers. There is also a further paradox between the issue of legal culture and the tension that arises as a result of the fact that South African lawyers are politically progressive but legally conservative.³⁶⁴

In an attempt towards this society envisioned by Ndebele and Van Marle, more sensitivity must be paid to the ways in which this legal culture that we continue to subscribe to excludes from the enjoyment of constitutional promises those who are less placed in society. This implies making members of this elite group conscious of the manner in which their privilege excludes some from the enjoyment of the full protection of the law. Members of the legal fraternity must realise that they are responsible for the social and distributive consequences that result from these choices and should be judged accordingly.³⁶⁵

Research conducted in the Southern Cape, amongst poor rural black communities revealed several obstacles that women face when seeking to enforce their rights in court as provided for by the Domestic Violence Act.³⁶⁶ Many of these women burdened by poverty were struggling to pay for basic necessities and especially things such as travel and accommodation to the nearest court. The large distances to public services and the limited or no availability of transportation was also a serious issue, with what does exist being expensive, this casts an added burden on these women who must extend their already meagre resources to exercise something which is *de facto* theirs, their constitutional right to be free from all forms of violence, physical or otherwise. The added cost and distance of travel meant that often child care must be sought further

³⁶³ L'Heureux-Dube C, 'Making a Difference: The Pursuit of Equality and a Compassionate Justice,' (1997) 13 *SAJHR*, 335 at 338.

³⁶⁴ Van Marle K (2009) 291.

³⁶⁵ Klare K (1998) 164; in this regard see also Silbey SS (2001) 8624, who argues that this phenomenon can be described as legal consciousness which refers to micro level social action, specifically the ways in which individuals interpret and mobilize legal meanings and signs.

³⁶⁶ As cited in Vetten L, 'Addressing domestic violence in South Africa: Reflections on Strategy and Practice,' (2005) 1.

still, slow response times by the police and ambulance services and poor and expensive telecommunication services made it particularly difficult and somewhat futile for these women to seek assistance in emergency situations resulting from domestic abuse, as there was no trust in the services that are supposed to offer immediate relief. Finally there were few support services or alternative safe accommodation for abused women if they need to leave their homes.³⁶⁷

The same research above indicated further that interviews conducted with women who had obtained protection orders under the Act, highlighted police negligence and impotence as a deterrent from approaching the court for future protection. They also pointed out issues such as finding the money for documents to be served on respondents and a lack of information regarding the due court process as an added burden to an already desperate situation.³⁶⁸ Some women withdrew their applications because they experienced the process as too overwhelming and others experienced the courts as being understaffed and thus unable to cope with the administrative requirements of the Act.³⁶⁹

It was also noted that while South Africa has eleven official languages, the application forms for the protection order are available in only two of these languages. Further still, the reading and completion of the application forms challenged these women with varying degrees of literacy due to the complex nature of the wording. The forms were also not available in Braille, and sign language interpreters for deaf women were not readily available at courts.³⁷⁰ In theory the clerks of the court should be available to assist women to complete application forms but this was not the case. The Department of Justice is aware of its staff shortages,³⁷¹ they however did not appear to consider how, for example, the broader definition of domestic violence, as well as a more

³⁶⁷ Ibid.

³⁶⁸ Vetten L (2005) 6.

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ Vetten L (2005) 6; Data from the Department of Justice indicates a decline in the overall number of administrative officers and clerks from 6897 to 4101 between 1996 and 2000. Further, in its briefing on budget 2001 to the portfolio committee, the department stated that the implementation of new legislation such as the Domestic Violence Act has placed 'severe pressure' on its offices. The department went on to say that the 2001/02 budget for personnel appears to be less than that required for the number of approved posts; fewer persons can therefore be employed.

inclusive understanding of family and domestic relationships, was going to impact upon the courts.³⁷²

As the discussion above shows, poor and/or rural women experience greater barriers in accessing legal protection than other women do. Although it is not possible to design laws or policies that can be all things to women, nor can all women's needs be addressed in any one piece of legislation. The law is then a powerful but limited tool.³⁷³

Although the above mentioned problems are in relation to domestic violence, they are indicative of a general and insidious problem that cannot be fixed by the mere enactment of more legislative pieces. The law and the culture in which it is entrenched is the problem because it is exclusive of some of the voices of the people it seeks to assist and seems to steer its remedies and protection toward the benefit of those who are already in a privileged position. The law and its remedies seem to be based on principles that these privileged groups subscribe to with a lack of consideration for the necessity of contextualizing rights and their applicability to ensure that equality extends beyond the formal and becomes substantive. This is especially true for the disadvantaged, who continue to suffer under a system, and democratic order which ensured and promised better for all and not just the privileged few.

Kok argues that poor people do not often access the justice system as it cannot offer them something meaningful.³⁷⁴ The institutional nature of courts causes other disadvantages which also serve to exclude poor people. According to him, legal representatives serve the haves and not the have-nots. The law is beneficial to those with resources and therefore have something to lose; those who have lost everything or never had anything to begin with are therefore slow to approach the courts because they offer little assistance.³⁷⁵

³⁷² To provide one illustration, according to Vetten L (2005) 7, Alberton court in Gauteng received 374 applications in 1999 for interdicts in terms of the Prevention of Family Violence Act. In 2000, the first year of the Domestic Violence Act implementation, 1696 applications were received for protection orders yet the court received no corresponding increase in staff. As a consequence of such understaffing, NGO's have stepped in to provide such services which are either provided on a voluntary basis or funded by foreign donors.

³⁷³ Vetten L (2005) 7.

³⁷⁴ Kok A (2008) 135.

³⁷⁵ Ibid.

According to Kok the representation of the legal fraternity is of particular concern in South Africa where the profession is dominated by certain groups and therefore begs one to question whether it is possible to remove personal biases.³⁷⁶ This is an issue that has been raised by Klare who argues that participants are often unaware of how their legal culture shapes their beliefs and practices.³⁷⁷ Further the remedies offered cannot always satisfactorily address the nature and extent of the disadvantage suffered and try as they may courts are limited in their impact, and cannot for example eliminate disparities between classes or guarantee jobs with their orders.³⁷⁸

The number of courts available, their locations and the processes that one must follow to enforce ones rights make it clear that when certain laws were being drafted, no consideration was given to the accessibility thereof by people outside urban areas. People in these areas enjoy the privilege of better infrastructure and higher incomes which necessarily eases their ability to engage with the courts and their legal processes to the disadvantage of those in rural areas. In most instances they have had better access to education and are therefore better placed to engage with the law and the formal judicial processes.

South Africa has its own unique problems when it comes to accessing justice. In the face of high levels of crime the criminal justice system faces a serious challenge to ensure that victims have the satisfaction of knowing that those who harmed them or their loved ones are brought to justice.³⁷⁹ Yet in South Africa the justice system is riddled with the legacy of a highly exclusive legal culture that through language, and complex processes ensures that people such as rural women are unable to access their

³⁷⁶ Ibid.

³⁷⁷ Klare K (1998) 167.

³⁷⁸ Kok A (2008) 136.

³⁷⁹ In a UNDP Access to Justice Practice Note, UN Secretary General at the time Kofi Annan said the following about the necessity of protecting the rule of law and access to justice, ‘the rule of law is not a luxury and access to justice is not a side issue. It has been seen that people lose faith in peace processes when they do not feel safe from crime; without credible machinery to enforce the law and resolve disputes, people resorted to violence and illegal means; elections held when the rule of law is too fragile seldom lead to lasting democratic governance. We have learned that the rule of law delayed is lasting peace denied and that justice is a handmaiden of true peace. We must take a comprehensive approach to Justice and the Rule of Law. It should encompass the entire criminal justice chain, not only police but lawyers, prosecutors, judges and prison officers as well as many issues beyond the criminal justice system. But a ‘one-size-fits-all’ does not work. See United Nations Development Program *Access to Justice: Practice Note* (2004) 2.

right to be protected from violence under the law. Equal justice means that the fruits thereof are there for all to enjoy; the provision of equal access to justice is therefore a priority if we are to experience substantive change in South Africa.³⁸⁰ It is therefore necessary to realise the ways in which our legal culture may act as a hindrance to transformation in South Africa in order to react accordingly and ensure that alternative methods are employed when attempting to extend the enjoyment of the benefits of the law to all.

Despite provisions for their guaranteed equality and theoretical ability to access various rights such as rights to be free from violence and the right to equality, rural women are marginalized and the laws promises are exclusive of and insensitive to their plight. I submit that this exclusive culture is responsible for ensuring that the voices of rural women remain unheard despite the fact that legislation and various initiatives have been set out for their purported benefit. Listening to the voices of these women means actively applying ones mind to what they are saying and taking all factors that they present into account when drafting any laws that are deemed to be to their benefit. This is the only way to ensure that the law is contextually based and thus has greater potential to be meaningful and have an impact in the daily lives of these women.

The point here is that there is a continuation of South Africa's exclusive legal culture, not only the apartheid legal culture but also a culture of law in general and as a patriarchal institution.³⁸¹ This is not inline with our democratic aspirations and the legal profession therefore needs to develop its own expertise and learn about a 'new and different approach to litigation' analogous to a transformative approach.³⁸²

As suggested by Van Marle there must be a refusal of the spectacle that is constitutionalism grounded in the rule of law and its resultant burdens.³⁸³ This spectacle causes the transformation envisioned by this process to be removed from those it aims to assist. What is suggested, in the same manner critical theorists do, is a realization of

³⁸⁰ Langa P (2006) 355.

³⁸¹ According to De Villiers I (2009) 79, this feminist concept of patriarchy also relates nowadays not only to equality between men and women but also to law as a system primarily obsessed with rationality and abstract notions of reasonableness and justice.

³⁸² Albertyn C & Goldblatt B (1998) 274.

³⁸³ See in general Van Marle K (2007).

the ordinary or a change in consciousnesses to a state of awareness of the manner in which our beliefs/legal culture excludes some from its ambit. Very importantly, refusal in this context also encompasses a refusal “of the pervasiveness of the economical or instrumental, calculated mindsets that aim to prevent amongst other things any form of questioning, opposition or resistance.”³⁸⁴

3.4 LAWS UNFULFILLED PROMISES

As previously mentioned, the Constitution guarantees everyone the right to equality, dignity and freedom. Under the right to freedom one can read in the right to be free from all forms of violence. Also mentioned is the way in which poverty, as a burden experienced acutely by rural women, excludes them from realising their constitutional promise, to be free from all forms of violence, through the courts.³⁸⁵ Pursuant to the enactment of the Constitution several other statutes were promulgated in an attempt to bridge the gap between the constitutions lofty promises and women's lived realities as pertains to violence against them. These include but are not limited to, The Promotion of Equality and Prevention of Unfair Discrimination Act, The Criminal Law (Sexual Offences and Related Matters) Amendment Act and The Domestic Violence Act.

According to De Villiers, the text of the constitution does not contain humble aspirations or provisions and is by no means a modest text.³⁸⁶ She argues further based on Martin Chanok’s arguments on “neo-formalism and new-constitutionalism” that the arrival of the constitution did not necessarily mean the eradication of formalism. Neo-formalism in the South African context is evidenced in the perpetuation of habits of old shrouded under a new “democratic” guise.³⁸⁷

“Just as formalism relies solely on legal texts and views them as neutral, neo-formalism occurs when only the constitutional text is used and no other outside factors outside the

³⁸⁴ Van Marle K (2007) 423.

³⁸⁵ As previously discussed under 2.2 above.

³⁸⁶ De Villiers I (2009) 54.

³⁸⁷ Ibid.

*text are taken into account. It pretends to depart from what is conventionally known as formalism in the sense that it is relying on the constitution but it is the over-reliance that constitutes formalism.*³⁸⁸

The constitution imposes positive duties on the state to combat poverty and promote social welfare to assist people in authentically exercising and enjoying their constitutional rights, and to facilitate and support individual self-realization.³⁸⁹ It also celebrates multiculturalism and diversity within a framework of national reconciliation and *ubuntu* and expressly promotes gender justice and rights for vulnerable and victimized groups and identities. It also protects language diversity and respect for cultural tradition.³⁹⁰

The preamble of the South African Constitution specifically recognises the injustices of the past and the need to correct such injustices, through law and any other means, in order to build a democratic and open society that ensures equality for all under the law.³⁹¹ Our constitution is therefore transformational in nature and was intended to instil a new social order based on freedom, dignity and equality.

It goes further to provide in Chapter Two a Bill of Rights which ensures that certain rights must be respected, protected, promoted and fulfilled by the state. Section 9 of the Bill of Rights, the Equality clause, provides that all are equal under the law; equality in this context includes the full enjoyment of all rights and freedoms.³⁹² In order to promote this right, the constitution provides that legislative and other measures designed to protect or advance persons or categories of people disadvantaged by unfair discrimination may be taken. To this end some legislative enactments discussed below, have been enacted in furtherance of this mandate such as the Promotion of Equality and Prevention of Unfair Discrimination Act. This section prohibits direct and/or indirect discrimination by the state or any person on any one or more grounds which include, amongst others, race, gender, sex and culture.

³⁸⁸ Ibid.

³⁸⁹ Klare K (1998) 154.

³⁹⁰ Klare K (1998) 155.

³⁹¹ Preamble of the Constitution of South Africa Act 108 of 1996.

³⁹² Section 9(2).

Section 10 provides that all have inherent dignity which is non-derogable in its entirety and have the right to have such dignity respected and protected. I submit that the extreme levels of poverty to which rural women are subject are a serious affront to their right to dignity. Violence in any form is also an affront to one's dignity, meaning that in rural women's case, this right is violated threefold; extreme poverty, violent acts against them and the inability to seek justice as a result of their poverty.

The non-derogable right to life³⁹³ and the right to freedom and security of the person³⁹⁴ are also included. An argument can be made for the ways in which the burden of poverty and the resultant inability to protect oneself from violence may be an affront, or a threat thereof, to rural women's right to life. The continued perpetuation of these issues have an effect on the quality of ones life , further still there are reports of violent situations that have turned fatal. Had these women been able to enforce their rights, perhaps they may have still been alive.

Freedom and security of the person includes the right to be free from all forms of violence from either public or private sources³⁹⁵ as well as the right to not be treated (or punished) in a cruel, inhuman or degrading way.³⁹⁶ Further still everyone has the right to bodily and psychological integrity which includes the right to security in and control over their body.³⁹⁷ These provisions are manifest in the Domestic Violence Act and the Criminal Law (Sexual Offences and other Related Matters) Act as legislatures attempt to make the constitution come alive in this regard. The constitution is very clear on the contents of this right yet; rural women remain excluded from enjoying the full benefit of this sections protection primarily because they are poor and cannot afford to approach an appropriate forum.

It is also pertinent to include the right to education which ensures that all have the right to basic education, including basic adult education, and the right to further education which must be made progressively available and accessible, by the state, through

³⁹³ Section 11.

³⁹⁴ See section 12; this is a right which also includes the right to be free from all forms of violence from either public or private sources, and the freedom not to be treated or punished in cruel, inhuman or degrading way.

³⁹⁵ Section 12 (1)(c).

³⁹⁶ Section 12 (1)(e).

³⁹⁷ Section 12 (2)(b).

reasonable measures.³⁹⁸ This right is particularly important because I firmly believe that one of the reasons law fails to have an impact on the lives of rural women is due to their levels of illiteracy. I submit that the first step in ensuring that law has a positive impact in the lives of rural women is to educate them about the rights available to them. Further still their literacy levels need to be elevated to ensure that they are able to engage with these legislative documents and fully comprehend the full extent of their protection. This also allows them to understand the limits of the law contained in legislation and explore the possibility of filling these gaps with non-legal solutions, possibly through customary law and indigenous practice.

The Bill of Rights also provides that everyone has the right to use the language of their choice and also participate in the cultural life of their choice but only in a manner that is consistent with the constitution.³⁹⁹ Further, people belonging to a cultural or linguistic community may not be denied the right, with other members of their community to enjoy their culture and use their language⁴⁰⁰ and to form, join and maintain cultural and linguistic associations and other organs of civil society in a manner that is consistent with the constitution.⁴⁰¹ This right is particularly important when trying to identify the manner in which the gap between laws promises and the lived reality of rural women can be bridged. The problem with law at the moment is that it is not contextual. Many of the remedies and methods/forums of enforcement are foreign to the every day experiences of rural women and there is a need to revert back to systems that they are familiar with, as Motsei suggests.⁴⁰² It is necessary to take various cultural considerations into account and listen to the voices and take heed of rural women's daily experiences to ensure that it is easy to identify with and thus apply and fight to enforce remedies available to you.

The right of access to courts provides that everyone has the right to have any dispute that can be resolved through application of the law decided in a fair public hearing

³⁹⁸ Section 29 (1).

³⁹⁹ Section 30.

⁴⁰⁰ Section 13 (1)(a).

⁴⁰¹ Section 31(1)(b); 31 (2).

⁴⁰² Motsei M (2007) as discussed at 2.2.1 above.

before a court, or where appropriate an independent and impartial tribunal or forum.⁴⁰³ In theory therefore rural women should be able to approach a court to exercise their right to be free from violence. However, factually, the high costs of litigation and court costs exclude rural women from the full enjoyment of this right. This aspect was clearly illustrated by Motsei and Krog *et al* who clearly showed the adversarial nature of judicial and quasi-judicial processes in their narratives and highlighted further other obstacles faced by women attempting to enforce their rights.⁴⁰⁴

Despite the fact that this right promotes the use of forums outside of courts as possible forums for justice, there is still a tendency towards the reliance on courts as the primary means through which one can enforce ones rights. Greenbaum and Motsei argue for the necessity of infusing customary law and practice in the everyday legal discourse.⁴⁰⁵ This may also include making space for and relying on their dispute resolution forums as a possible alternative to the judiciary.⁴⁰⁶

Section 36 provides that the rights in the bill of rights can only be limited by a law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.⁴⁰⁷

Finally, section 38 allows persons to approach a court alleging that any right in the bill of rights has been infringed or threatened, and that the court may grant appropriate relief including a declaration of rights. When interpreting the bill of rights a court, tribunal or forum must amongst others promote the values that underlie an open and democratic society based on human dignity, equality and freedom.⁴⁰⁸

⁴⁰³ Section 34.

⁴⁰⁴ Motsei M (2007), Krog A *et al* (2009) as discussed at 2.2.1 above.

⁴⁰⁵ Greenbaum B (2008) 88, in general Motsei M (2007).

⁴⁰⁶ *Ibid.*

⁴⁰⁷ Section 36 (1) These factors include the nature of the rights; the importance and purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose, section 36(2) provides that but for the reasons above; no law may limit the rights contained in the Bill of Rights.

⁴⁰⁸ Section 39 (1) (a) The persons who may approach a court are: anyone who is acting in their own interest, anyone acting on behalf of another who cannot act in their own name, anyone acting as a member of, or in the interest of, a group or class of persons, anyone acting in the public interest, and any association acting in the interest of its members.

When interpreting any legislation and when developing customary law, every court tribunal or forum must promote the spirit purport and objects of the Bill of Rights. The Bill of Rights does not deny the existence of any other rights or freedoms recognized or conferred by customary law or legislation to the extent that they are consistent with the Bill of Rights.⁴⁰⁹ Therefore the possibility of exploring forums outside of the court room should be considered as this may assist in making the law and its protection more relevant and accessible to people such as those in the rural areas.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 was enacted in direct response to the constitutional provision for equality in section 9 of the bill of rights. To this end the Act endeavours to facilitate the transition to a democratic society guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.⁴¹⁰ The preamble of the Act recognizes that in order to strengthen democracy in South Africa, social and economic inequalities must be eradicated, especially systemic ones entrenched through a history of colonialism, apartheid and patriarchy which caused pain and suffering to the majority.

The objects of the act include amongst others; to give effect to the letter and spirit of the constitution, in particular the equal enjoyment of all rights and freedoms by every person,⁴¹¹ the promotion of equality,⁴¹² the values of non-racism and non-sexism,⁴¹³ the prevention of unfair discrimination and protection of human dignity as contemplated in s 9 and 10 of the constitution.⁴¹⁴ It also aims to provide for measures to facilitate the eradication of amongst others, unfair discrimination on the grounds of race and gender;⁴¹⁵ to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination⁴¹⁶ and to provide remedies for

⁴⁰⁹ Section 39 (2), section 39 (3).

⁴¹⁰ Long title of Act 4 of 2000.

⁴¹¹ Section 2(b) (i).

⁴¹² Section 2(b) (ii).

⁴¹³ Section 2(b) (iii).

⁴¹⁴ Section 2(b) (iv).

⁴¹⁵ Section 2(c).

⁴¹⁶ Section 2(e).

victims of unfair discrimination and persons whose rights to equality have been infringed.⁴¹⁷

Discrimination is defined as any act or omission, including a policy, law, rule or practice which directly or indirectly; imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.⁴¹⁸ These prohibited grounds are *inter alia*, race, gender, sex, ethnic or social origin, colour, conscience, belief, culture, language; or any other ground where discrimination causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner.⁴¹⁹

Chapter 2 provides that neither the state nor any person may unfairly discriminate against any person,⁴²⁰ on the ground of race⁴²¹ or gender.⁴²² Chapter 4 of the Act establishes Equality Courts designed to hear all disputes arising from the contents of the Act, and subject to section 31, deems every Magistrate and High Court Equality Courts for the area of their jurisdiction.⁴²³ Chapter 5 bestows the general responsibility to promote equality on both the state and all persons. Section 25(1) provides that the state must, amongst others and where necessary; take measures to develop and

⁴¹⁷ Section 2(f) of Act 4 of 2000.

⁴¹⁸ Section 1 (viii) of Act 4 of 2000.

⁴¹⁹ Section 1 (xxii) of Act 4 of 2000.

⁴²⁰ Section 6 of Act 4 of 2000.

⁴²¹ Section 7 of Act 4 of 2000, this section is subject to section 6 and goes further to provide the following instances in which discrimination is prohibited; The dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person including incitement to , or any participation in, any form of racial violence
The engagement in any activity which is intended to promote, or has the effect of promoting exclusivity, based on race;
The exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;
The denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps reasonably accommodate the needs of such persons.

⁴²² Section 8 of Act 4 of 2000, which is also subject to section 6 and also further provides for the following instances in which discrimination is prohibited; Gender-based violence; Female genital mutilation; The system of preventing women from inheriting family property; any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines the equality between men and women, including the undermining of the dignity and well-being of the girl child; Any policy or conduct that unfairly limits access of women to land rights, finance and other resources; Discrimination on the ground of pregnancy; Limiting women's access to social services or benefits, such as health, education and social security; The denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration or failing to take steps to reasonably accommodate the needs of such persons; Systemic inequality of access to opportunities by women as a result of the sexual division of labour.

⁴²³ Section 16(1) (a).

implement programmes in order to promote equality; provide assistance, advice and training on issues of equality and develop appropriate internal mechanisms to deal with complaints of unfair discrimination.

I contend that there is a continual violation of this prohibition albeit indirect in that certain systemic factors serve in the perpetual discrimination against rural women. As previously mentioned their poverty excludes them from the full enjoyment of any legal promises, constitutional and otherwise. This is directly linked to a history of discrimination under apartheid, perpetuated post-apartheid through the reification of certain legal structures and institutions designed to be to the *de jure* exclusion of rural women despite being factually available to all.

The reliance on courts as the means through which the rights, in this and other acts, can be enforced serves as a perpetuation of the very discrimination it seeks to prohibit.⁴²⁴ As previously mentioned the institutional nature of this forum makes it difficult for certain people to access especially the poor, majority of who are rural women. Further the adversarial courtroom process with its formal procedures and complex substantive bases serves as a further means of exclusion. This sets the tone for our dominant legal discourse and is the reason why our dominant legal narratives continue to be influenced by privilege and therefore do not recognize or hear the voice of the unfamiliar other.⁴²⁵

Section 28 provides that special measures should be taken to promote equality with regards to amongst others, gender and race. In (3) (a) the state, institutions performing public functions and all persons, are given particular duties and responsibilities with regards to the above including the express requirement to eliminate discrimination the above grounds and to promote equality in respect thereof.⁴²⁶ To what extent this right

⁴²⁴ Alibertyn C (2005) 225.

⁴²⁵ Motsei M (2007) and Krog A *et al* (2009) who give examples of this through the narration of the experiences of Mrs Notrose Nobomvu Konile under the TRC and of Khwezi the brave woman who was the complainant in the infamous Zuma Rape Trial.

⁴²⁶ Section 28(3) (b) states further that in carrying out the duties and responsibilities referred to in paragraph (a) the state, institutions performing public functions and where appropriate and relevant, juristic and non-juristic entities must, audit laws, policies and practices with a view to eliminating all discriminatory aspects thereof; Enact appropriate laws, develop progressive policies and initiate codes of practice in order to eliminate discrimination on the grounds of race, gender and disability; Adopt viable action plans for the promotion and achievement of equality

has been realised in the lives of rural women is questionable with measures designed in this regard being largely ineffective because they fail to take the context in which they are intended to apply into context.⁴²⁷

Tacit in the right to equality is the ability to realise the full protection offered by law, this includes the right to be free from the burden of poverty which includes further the right to be free from all forms of violence as contemplated in the constitution. The preamble of the Criminal Law (Sexual Offences and Other Related Matters) Act 32 of 2007 recognizes the gravity of the occurrence of sexual offences and the particular vulnerability of women and children to such acts. It is further stated that although the prevalence of the commission of such sexual offences is primarily a social phenomenon, “reflective of an intrinsic, systemic dysfunction in society,” legal mechanisms are still necessary in the control of such phenomena “despite these laws being limited and reactive in nature.”⁴²⁸

Violence against women and its cultural underpinnings are an obstacle to economic development overall and specifically to the capacity of women to enjoy the benefits promised in the constitution.⁴²⁹ Further still, despite solid steps taken by the South African government to improve the plight of women, including the improved access to education and other social and economic benefits, it is obvious something is still lacking. Further steps in reversing the legacy of apartheid and its disproportionate impact on black women need to be taken, and the answer may lie outside of the legislature and the enactment of more laws.⁴³⁰

The Sexual Offences Act acknowledges that the South African common and statutory laws do not deal adequately, effectively and in a non-discriminatory manner with many aspects relating to or associated with the commission of sexual offences. Therefore in too many instances, there is a failure to provide adequate and effective protection to the

in respect of race, gender and disability Give priority to the elimination of unfair discrimination and the promotion of equality in respect of race, gender and disability.

⁴²⁷ Greenbaum B (2008) 89.

⁴²⁸ Preamble of Act no. 32 of 2007.

⁴²⁹ Andrews PE (2009) 22.

⁴³⁰ Andrews PE (2009) 23.

victims of this evil thus intensifying their troubles through, for example, secondary victimisation and trauma.⁴³¹

The Bill of Rights enshrines the rights of all people in the Republic of South Africa to equality, privacy, dignity, freedom and security of the person; which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of vulnerable persons to have their best interests considered to be of paramount importance.⁴³² Although violence against women cuts across all spheres, rural women are particularly vulnerable due to the intersection of race, class and gender in their lives and the resultant systemic discrimination.

Section 2 of the Act clearly sets out its objects, which are to give complainants of sexual offences the maximum and least traumatising protection that law can provide. It includes also the need to introduce measures which seek to enable relevant state organs to give effect to the provisions of the Act and to combat and ultimately eradicate the high incidence of sexual offences committed in South Africa.⁴³³

To this end the Act extends the definitions of the words rape and sexual assault, and includes the crimes of compelled rape and compelled sexual assault and declares all the above statutory crimes therefore imposing a duty on the state to ensure compliance. The Act also criminalises any attempt, conspiracy or incitement to commit any sexual offence removing the requirement of physical contact. The jurisdiction of courts has also been extended to allow them to hear extra-territorial matters relating to the commission of sexual offences.

Rape is now defined as the unlawful and intentional commission of an act of sexual penetration⁴³⁴ by any person with a complainant⁴³⁵ without their consent.⁴³⁶ Compelled rape is defined in the Act as the unlawful and intentional compulsion of a third person by

⁴³¹ Preamble of Act no. 32 of 2007.

⁴³² Ibid.

⁴³³ Section 2 of Act 32 of 2007.

⁴³⁴ This is defined in section 1 as any act which cause penetration to any extent whatsoever by; The genital organs of one person into or beyond the genital organs, anus or mouth of another person; Any other part of the body of one person, any object including any part of the body of an animal into or beyond the genital organs, or anus of another person or; The genital organs of an animal into or beyond the mouth of another person.

⁴³⁵ Defined in section 1 of the act as the alleged victim of a sexual offence.

⁴³⁶ Section 3 of Act 32 of 2007.

any person without their consent, to commit an act of sexual penetration with a complainant without their consent.⁴³⁷

Sexual assault is now defined in the act as, the unlawful and intentional sexual violation⁴³⁸ by any person of a complainant without their consent⁴³⁹ or unlawfully and intentionally inspiring the belief in a complainant that they will be sexually violated by any person.⁴⁴⁰ This act also extends the types of sexual of assault that one can experience to include compelled sexual assault⁴⁴¹ and compelled self-sexual assault.⁴⁴²

These extended definitions worded in gender neutral terms seem all inclusive and easily accessible, and unlike the right to equality are not specifically enforceable through the courts. However it is a truism that this act is subject to the criminal justice system which ordinarily operates in the formal courtroom sphere and is therefore cumbered with the previously highlighted issues as discussed by Motsei.⁴⁴³ In her book the *Kanga and the Kangaroo Court* her main contention was that despite the seeming progression made

⁴³⁷ Section 4 of Act 32 of 2007.

⁴³⁸ This is defined in section 1 of the act as, any act which causes direct or indirect contact between the; genital organs or anus of one person and in the case of a female her breasts and any part of the body of another person or an animal, or any object including any object resembling or representing the genital organs or anus of a person or animal; [Mouth of one person and (a) the genital organs or anus of another person or in the case of a female her breasts (b) the mouth of another person (c) any other part of the body of another person, other than the genital organs or anus of that person or in the case of a female, her breast which could; be used in an act of sexual penetration; cause sexual arousal or stimulation; be sexually aroused or stimulated thereby; or any object resembling the genital organs or anus of a person and in the case of a female her breasts, or an animal; or Mouth of the complainant and the genital organs or anus of an animal; The masturbation of one person by another person or; The insertion of any object resembling or representing the genital organs of a person or animal into or beyond the mouth of another person. But does not include an act of sexual penetration, and 'sexually violates' has a corresponding meaning.

⁴³⁹ Section 5(1) of Act 32 of 2007.

⁴⁴⁰ Section 5(2) of Act 32 of 2007.

⁴⁴¹ This is defined in section 6 as when a person (A) unlawfully and intentionally compels a third person (C) without the consent of C to commit an act of sexual violation with a complainant (B) without the consent of B, this amounts to an offence of compelled sexual assault.

⁴⁴² Section 7 of the Act states that, 'a person (A) who unlawfully and intentionally compels a complainant (B) without the consent of (B) to Engage in Masturbation; Any form of arousal or stimulation of a sexual nature of the female breasts or Sexually suggestive or lewd acts With B himself or herself ;Engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or Cause B to penetrate in any manner whatsoever his or her own genital organs or anus Is guilty of the offence of compelled self-sexual assault.

⁴⁴³ As discussed in Chapter 2 above 2.2.1 A Story of Consciousness.

with respect to the access of justice and women's rights, they still face several issues when attempting to enforce their right to be free from violence.⁴⁴⁴

Most evident in all the legislative enactments discussed in this section is the missing voice of the people for whom these laws were designed to protect. More of an effort should have been made to take into account the varied experiences of women in South Africa when it comes to dealing with sexual violence. The dominant narrative evident in the wording of these legislative enactments and their modes of enforcement as previously argued is one of privilege which reverts to purely legal and formal methods in an attempt to transform the lives of women and society for the better. It has already been mentioned that despite some of its utopian norms law as a system is limited in its ability to effect true change. The reliance on purely legal mechanisms is therefore redundant especially in a country where the majority is excluded from the dominant legal discourse due to a history of systemic discriminatory exclusion.

Justice Sachs writing for the majority in a unanimous judgment in *S v Baloyi* described domestic violence as an issue with a “hidden and repetitive character, a ubiquitous vice cutting across class, race, culture and geographic boundaries, and the deleterious consequences for society of its persistence.”⁴⁴⁵ He characterised domestic violence as a matter of gender equality, noting that because of its gender-specific nature, it mirrored patriarchal domination in a “particularly abhorrent manner.”⁴⁴⁶ The seriousness of and the pervasive nature of violence against women is very evident, and the need to design capable methods of eradicating it is of paramount importance.

⁴⁴⁴ Motsei M (2007) mentions several issues which serve to exclude certain groups of women from the justice system such as the highly formal nature of the courtroom steeped in patriarchy which still favours male ways of knowing and being. This process is therefore adversarial and retributive when in some instances a more reconciliatory approach needs to be taken. She argues that this is in line with indigenous African values to which majority of South African subscribe and in this instance majority of rural women live by. She argues that this rigid system does nothing to foster true transformation as envisioned by our democratic order. It rather fosters anarchy and resentment and favors one way of being over the other, the euro-centric individualistic narrative as opposed to the communitarian and co-habitual African way of being. This is a problem she argues because despite being country founded on the principles of equality despite our diversity our dignity as people is not being realized because it is still a right available to the elite few with majority of the people in this country excluded from the realization of their humanity.

⁴⁴⁵ *S v Baloyi* 2000 (1) BCLR 86 (CC) at para 11.

⁴⁴⁶ *Ibid.*

“One of the few areas where oppressed men can exert some limited expression of their maleness is through oversight of their own women in the private sphere.”⁴⁴⁷ The preamble of the Act therefore recognizes Domestic Violence as a social evil which can take several forms, with a high prevalence and recognises further the vulnerability of certain groups such as women and children. It also recognizes that the remedies previously available were inefficient and it was thus necessary to enact a more comprehensive document ensuring the best protection available under the law for victims of this evil.

The Act extends the definition of Domestic Violence to include a range of behaviours within its scope such as physical,⁴⁴⁸ sexual,⁴⁴⁹ emotional, verbal and psychological abuse;⁴⁵⁰ economic abuse;⁴⁵¹ intimidation;⁴⁵² harassment;⁴⁵³ stalking;⁴⁵⁴ damage to property;⁴⁵⁵ entry into the complainants residence without consent, where the parties do not share the same residence;⁴⁵⁶ and any other controlling or abusive behaviour where

⁴⁴⁷ Wing AK (1997) 966.

⁴⁴⁸ Section 1 (viii)(a) which is defined in the same section as any act or threatened act of physical violence towards a complainant.

⁴⁴⁹ Section 1 (viii)(b) according to the act this is any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of a complainant, see section 1 (xxi).

⁴⁵⁰ Section 1 (viii)(c) which means a pattern of degrading or humiliating conduct toward a complainant including Repeated insults, ridicule or name calling; Repeated threats to cause emotional pain; or The repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant’s privacy, liberty, integrity or security, see section 1 (xi).

⁴⁵¹ Section 1 (viii)(d), the Act goes further to define economic abuse, in section 1 (ix) as The unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence; or The unreasonable disposal of household effects or other property in which the complainant has an interest.

⁴⁵² Section 1 (viii)(e), Intimidation is defined as uttering or conveying a threat, or causing a complainant to receive a threat which induces fear, see section 1 (xiii).

⁴⁵³ Section 1 (viii)(f) this means according to section 1 (xii), engaging in a pattern of conduct that induces the fear of harm to a complainant including; Repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be; Repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues; Repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or any other objects to the complainant.

⁴⁵⁴ Section 1 (viii)(g) which means repeatedly following, pursuing, or accosting the complainant, see section 1 (xxiii).

⁴⁵⁵ Section 1 (viii)(h) defined as the wilful damage or destruction of property belonging to a complainant or in which the complainant has vested interest according to section 1 (v).

⁴⁵⁶ Section 1 (viii)(i).

such conduct harms, or may cause imminent harm to the safety, health or well-being on the complainant.⁴⁵⁷

The Act is also applicable to a range of relationships⁴⁵⁸ and covers both heterosexual and same sex relationships. Under the Act, a victim of domestic violence may apply for a protection order to stop the abuse and stop the abuser from entering the communal household, the victim's home or place of employment.⁴⁵⁹ The court may also place other conditions on the order, including police seizure of any weapons or victim assistance to help retrieve property from their home.⁴⁶⁰ A Court may also evict an abuser from the home and force him to pay rent for and/or emergency maintenance to the victim.⁴⁶¹ If the court grants an interim or final protection order, it must also issue a suspended warrant for the arrest of such abuser to become active if they violate the order.⁴⁶²

The police also have certain obligations and are now required to inform the complainant of their right to both apply for a protection order as well as to lay criminal charges against an alleged abuser. Where possible this should be provided in the form of a notice which also sets out the steps required to apply for a protection order, explain what the complainant should do in the event of a breach and also sets out the type of relief or protection the complainant may request from the court. Where complainants cannot read, the police should read the notice to them in the language of their choice.⁴⁶³ Police are also obliged to arrest the abuser if he does not obey the protection order.⁴⁶⁴ Failure to comply with these obligations constitutes misconduct.⁴⁶⁵ Police failure to

⁴⁵⁷ Section 1 (viii)(j).

⁴⁵⁸ This includes spousal relationships and domestic partnerships which are clearly defined in the Act to now include as a relationship between a complainant and a respondent in any of the ways stated below:

They are or were married to each other, including marriage according to any law, custom or religion; They (whether they are of the same or opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other; They are the parents of a child or are persons who have or have had parental responsibility for that child (whether or not at the same time); They are family members related by consanguinity, affinity or adoption; They are or were in an engagement, dating or customary relationship including an actual or perceived romantic, intimate or sexual relationship of any duration; or They share or recently shared the same residence.

⁴⁵⁹ Section 4.

⁴⁶⁰ Section 7(2).

⁴⁶¹ Section 7(1)(c),(3) and (4).

⁴⁶² Section 8.

⁴⁶³ Section 2 (b) & (c).

⁴⁶⁴ Section 3.

⁴⁶⁵ Vetten L (2005) 5.

uphold either the Act or its regulations must also be reported to the Independent Complaints Directorate.⁴⁶⁶

All the above legislative enactments are indicative of the good will of the legislature when attempting to deal with the realization of equality, dignity and freedom in South Africa. They are worded in female friendly terms and for this reason should be more readily accessible. They however fail to take into account the plurality of women's experiences in South Africa. For this reason they are still exclusive and out of reach for rural women in this country.

Despite all the above law still has a place to play in the struggle towards the realization of true democracy in South Africa through the vision of our transformative constitution as described by Karl Klare.⁴⁶⁷ What is called for is an active engagement with the law, to tackle head on its limitations and pave a sustainable way forward despite the seeming obstacles. How then is this possible? I attempt to tackle this issue in the next chapter. I do this by arguing for a consciousness approach when dealing with the law, grounded in the principle of Ubuntu with the use of narratives as the vehicle to attain this vision.

The potential for change through law grounded processes despite the noted limitations is evident, what is needed is an alternate approach in our way of thinking about the law that seeks to be inclusive and further the transformation of our society to a more equal one especially for rural women. There must be a change in consciousness in the way we approach the law in order for all actors to work to make this egalitarian document come to life as we move to a future where all have the means to ensure that their rights are not violated and the hindrances that exist to seeking relief where such violation does occur, have been removed.

⁴⁶⁶ The civilian oversight body established in terms of the 1995 South African Police Services Act. Theirs is primarily a monitoring and oversight function with the police obliged to institute disciplinary proceedings against wayward officers, unless they themselves agree otherwise. It is also required to submit reports every six months to parliament recording the number and nature of complaints received against the police and the recommendations made around such complaints.

⁴⁶⁷ See generally Klare K (1998).

There is still a long way to go to reduce the levels of violence against women and poverty. Society's attitude towards women must change but further than that women's own perceptions of and attitudes towards themselves should also change. They should be informed of their rights as many do not even realise they are being victimised. They view abuse as part of their culture and accept their inferior position in society. They should instead learn to become more assertive and demand to be treated equally and learn not to tolerate and endure abuse. At present, violence against women is still ingrained in the very fibre of our society and unless attitudes change regarding the stereotyped ideas of women as inferior beings, it will not be eradicated.⁴⁶⁸

As stated earlier, Greenbaum argues, in the same way that Motsei does for the inclusion of customary law and indigenous practices in the dominant legal discourse surrounding especially gender based violence.⁴⁶⁹ He agrees with Motsei that due to the prevailing influence of culture and indigenous practice in the lives of the majority of South Africa there is a need to be cognisant of and include these values in the dominant narrative of law especially when dealing with sexual violence.⁴⁷⁰ Regrettably South African legislators are not paying heed to the concerns of black African women who want customary interventions addressed in legislation to ensure that formal courts are properly guided when addressing cultural claims put forward by parties to disputes.⁴⁷¹

⁴⁶⁸ Van Der Hoven A (2001) 18.

⁴⁶⁹ See generally Greenbaum B (2008) & Motsei M (2007).

⁴⁷⁰ Motsei dissects the issue of sexual violence in South Africa by investigating class structures, apartheid legacies, the 'supercession' of African Culture and the problematic dominance of white women researches in the gender violence sphere where the majority of victims and offenders are black south Africans, in light of this she argues for legal processes grounded in systems familiar to the majority, indigenous practice and customary law which cuts across all aspects of their lives including religion and 'legal' culture. See Motsei M (2007) 190, Greenbaum B (2008) 82.

⁴⁷¹ Greenbaum B (2008) 86, the author notes further that the exact opposite approach is taken in Canada where the indigenous culture of offenders in that country is taken into account and examined fully in cases of sexual violence. This provides an opportunity for offenders incarcerated for violent sexual offences to reconcile their painful intergenerational colonial experiences with their own indigenous juridical beliefs and practices. It is believed this will assist with victim empowerment and offender accountability. See also Motsei M (2007) 190, who makes reference to Murri courts in Australia which provide a legitimate forum within that country's legal system that relies mainly on custom and indigenous practice when hearing disputes between people subject to it. The lessons that can be gleaned from these countries examples is that cultural interventions must be addressed in the criminal justice system to deal with offenders 'self-hate' and 'anger' in colonized indigenous communities.

“Surely the indigenous black community in South Africa after the trauma of colonialization and apartheid also has distinct cultural and societal concerns that need to be addressed?”⁴⁷²

It would have been helpful if the legislature had taken into account customary practices when drafting the enactments discussed above. In doing this they would have allowed the common law to develop cultural practice in accordance with the constitution and in accordance with the cultural expectations of the majority of South Africans. Without such consideration culture continues to be misappropriated by those that “disfigure its basic tenets” and the criminal justice system continues to alienate a large percentage of the population.⁴⁷³

We must however accept that it will not be easy to attach African cultural values to the criminal justice process due to a presumption of superiority of European law in the South African legal system. With this in mind however, Motsei argues that it remain untenable to continue to judge Africans on the basis of laws that are not in harmony with the ways in which their communities (and life philosophies) are structured.⁴⁷⁴

It is therefore evident that culturally inclusive legal enactments and processes are urgently needed in South Africa to bridge the cultural divide that currently exists when women approach the courts for relief and protection from sexual and other violence.⁴⁷⁵ Without this it is argued that a significant number of women will continue to disregard or withdraw from the formal legal system and rather resort to customary interventions that better address their geographic, race, class and cultural concerns.⁴⁷⁶

⁴⁷²Greenbaum B (2008) 88.

⁴⁷³Greenbaum B (2008) 85.

⁴⁷⁴ Greenbaum B (2008) 98, Motsei M (2007) generally.

⁴⁷⁵ Krog A *et al* (2009) highlight this through their reconsideration of Mrs Konile’s incoherent testimony which made sense when taken out of the structured setting of the TRC and contextually reviewed in her rural lived reality.

⁴⁷⁶ Greenbaum B (2008) 98.

3.5 CONCLUSION

The underlying causes of poverty and violence against women, especially rural women are ingrained in our society and therefore the reliance on only law to transform the current state is a futile exercise. However, the law can be a useful tool in starting the process and to this end must be contextual, friendly and easy to access and implement in order to have an impact on peoples lives.

Section 9 of the Bill of Rights enshrines equality for all, the Promotion of Equality Act takes it a step further by imposing a duty on the state to promote and achieve equality. Although the Domestic Violence Act and the New Sexual Offences Act are theoretically geared towards achievement of such purpose they fail in that a group of women, due to historic reasons, remain excluded from the full effect of their ability to effect change. In my view this is a perpetuation of discrimination against such women and must therefore be addressed.

Transformative constitutionalism is a methodological approach that calls on us to realise our democratic aspirations by becoming conscious of the manner in which our legal culture excludes certain groups of people from the full enjoyment and protection of the law. The infusion of customary law and practice has been suggested a source of immediate relief to the exclusivity of the judicial process of enforcement advocated by most Acts. This is in an attempt to steer away from the spectacle of post-apartheid constitutionalism and embrace the ordinary, meaning a careful consideration of the lived reality of the majority and in this instance especially that of rural women. The continuous nature of transformation implies a constant test of the values that underlie our “democratic” society in our journey towards substantive enjoyment of laws promises.

What is discussed hereafter is the potential of narratives to act as a vehicle and source of critique, to instil the kind of consciousness necessary to ensure that our reconciliatory and transformational ideals of dignity, equality and freedom are attained and sustainable.

CHAPTER 4

A CASE FOR NARRATIVES

“But if thought is to become the possession of many, not the privilege of the few, we must have done with fear. It is fear that holds men back — fear lest their cherished beliefs should prove delusions; fear lest the institutions by which they live should prove harmful, fear lest they themselves should prove less worthy of respect than they have supposed themselves to be.” -Bertrand Russell⁴⁷⁷

“No problem can be solved by the same consciousness that created it. We need to see the world anew.” - Albert Einstein⁴⁷⁸

4.1 INTRODUCTION

The aim of this chapter is to introduce a new way of thinking about the law and an alternative contemplation of how we engage with it and thus how we can learn to enact, apply and enforce it more effectively. I outline various theories that can be employed in a bid to understand laws failure; feminism, critical legal theory and critical race theory.

I put forward the notion of consciousness-raising, central to these critical schools of thought, but take it a step further by introducing Steve Biko’s notion of Black Consciousness as the South African manifestation of this call for consciousness. It beckons black people to realise their self worth and embrace their potential for greatness despite seeming obstacles. It is also a call for consciousness for those in the legal profession to realise the manner in which their professional culture excludes certain groups and is for this reason discriminatory, unconstitutional and undemocratic.

I take this a step further by introducing narrative as a method of critique unique to all these theories. Narrative method can serve a dual function in this regard, as a vehicle

⁴⁷⁷ Bertrand R, *Principles of Social Reconstruction*, (1997) 115.

⁴⁷⁸ThinkExist.com Quotations. “Albert Einstein quotes”. ThinkExist.com Quotations Online http://en.thinkexist.com/quotes/albert_einstein/ [Accessed 13 November 2011].

for consciousness it can act as a method of critique but also as a medium of communication in an attempt to bring the law closer to the hearts of rural women. Only when this is done can true emancipation be attained for all on our journey towards transformation.

4.2 A CRITICAL REFLECTION ON LAW

“Things have and have not changed in South Africa.”⁴⁷⁹

Our old authoritarian rule has been replaced by an egalitarian one based on free-thinking and grounded in the democratic principles of equality, dignity and freedom. In order to reverse the harm caused in this country by the systemic discrimination entrenched during apartheid; imaginative applications of the law are required if we are to ever achieve the lofty ideals set out in the Constitution.⁴⁸⁰

The application of law in a plural society such as ours, always poses a problem, but it is particularly severe when the judiciary and educators are not representative of the majority of the population and are thus insensitive to the ways in which the unfamiliar other engages with the law.⁴⁸¹ The intersecting factors that plague rural women's lives make it difficult for law to be everything to them and if they do subscribe to some sort of “legal system” it may not exist in the form that we know.⁴⁸² Although the above is an indication of the somewhat limited application/reach of law there is still potential to cause change if imaginative methods are employed to ensure its relevance to all despite its limitations.

How then do we embrace laws potential to effect social change within these restrictions? I believe the way forward is a critical analysis of the law in general and a consideration of its relevance in the context in which it applies. Further still, we must critique our legal culture and how it affects various aspects of realising ones rights, for

⁴⁷⁹ Van Blerk AE (1996) 88.

⁴⁸⁰ Ibid.

⁴⁸¹ Kok A (2008) 135.

⁴⁸² Van Blerk AE (1996) 88, the author argues that may rather manifest as customary law and practice as opposed to the more formal common law exercised through the courts.

example its effect on the drafting of legislation and therefore the ease with which remedies therein can be enforced. This critique is to act as a portal to a new understanding and application of law that realises its shortcomings and in light thereof attempts to pave a better way forward.

The critique put forward by critical legal studies, critical race theory and feminism can be useful in opening up the law for growth in order to ground it contextually and make it more useful in the everyday lives of rural women especially. Further, their notion of consciousness-raising manifest as Black Consciousness in South Africa may be useful in opening up a space in law where rural women interact freely and contribute towards its development.

The use of narratives is a method characteristic to all these schools of thought and can be used to give rural women a voice thereby legitimating their stories and restoring their dignity/self-esteem.⁴⁸³ They can therefore serve as the vehicle through which a sense of consciousness can be imbued to rural women in South Africa. Beyond this, narratives can also be used to communicate the law through an accessible medium. Teaching rural women about the law through a narrative/story makes it easy to embrace, understand and apply. This is only but one suggested method, accepting that this is not enough to drastically alter the lives of rural women immediately but believing in the potential to spark a project where these disempowered women freely engage with the law. This is necessary because if substantive change does not occur in the consciousness and circumstances of the larger community then the recent transformation will merely be ideological: One that continues to perpetuate the disadvantages of the past despite the directive towards equality for all.⁴⁸⁴

The critical theories focused on were chosen due to the intersection of race class and sex in rural women's lives in South Africa that serve as grounds for discrimination under

⁴⁸³ See generally Motsei M (2007) who argues that society's perceptions of women still largely influences the manner in which most women see themselves. This can be linked to the notion of spirit injury described by Wing AK (1997) 952, discussed further under 4.3 below. See also Williams P, *The Alchemy of Race and Rights*, (1991), Williams P, *The Roosters Egg: On the Persistence of Prejudice*, (1997), Hooks B, *Aint I a Woman? Black Women and Feminism*, (1991), who all argue about the persistence of prejudice by and against women based on the varying perceptions of women's roles in society.

⁴⁸⁴ Van Blerk AE (1996) 88.

the law. They therefore exclude these women from the full access to and enjoyment of laws promises. These theories all depart from the premise that the law is exclusive of certain people who do not fit the 'norm' or dominant narrative; that is poor, black, women.⁴⁸⁵ Critical Legal Theorists believe that the law perpetuates inequality and oppression by maintaining and promoting the status quo.⁴⁸⁶ Critical Race Theorists focus on the actual experiences of black people and argue that it is time for black voices to be infused in the law and contribute to its development.⁴⁸⁷ Through the reliance on a consciousness form of legal criticism, these theories attempt to achieve infusion of poor black voices in the law.⁴⁸⁸ Feminism seeks to protect women from gender inequality reinforced through the law by developing legal theories that challenge unequal opportunities and the ideologies that legitimate them.⁴⁸⁹

These critical schools of thought all reject the vision of law as having a single correct answer based on a culturally neutral standard arguing that there is no essential concept of race, culture or group identity.⁴⁹⁰ This is a particularly useful basis for critiquing the laws in South Africa such as the ones mentioned in the previous chapter.⁴⁹¹ When laws are designed, the plurality of lived experiences is not always taken into account, how then can such laws be comprehensively beneficial to a rural woman who does not speak English or does not have immediate access to a court to file for relief in terms of the Domestic Violence Act? Because we readily admit that the law cannot be everything to all women it is necessary to seek alternative methods of making law something to all women, one such being the use of narratives.

They believe that their critique will assist in the stimulation of social and political transformation because people will realise that new and fairer social arrangements can

⁴⁸⁵ See Crenshaw K *et al* (1995), Delgado K & Stefanic J (eds) (2000), Douzinas C & Geary A (2005).

⁴⁸⁶ Tushnett M as cited by Johnson D *et al* (2001) 246.

⁴⁸⁷ Minda G (1995) 167.

⁴⁸⁸ Race consciousness characterizes the jurisprudential perspective of minority scholars who emphasize the need for fundamental changes in the way that the law constructs knowledge about race. See Minda G (1995) 167.

⁴⁸⁹ Minda G (1995) 129.

⁴⁹⁰ Minda G (1995) 180.

⁴⁹¹ See 3.4 Laws Unfulfilled Promises as discussed in Chapter Three.

be created.⁴⁹² Critical Legal Theorists claim that if the belief structures which permeate legal and social realization are removed, society can be transformed.⁴⁹³

Feminists place emphasis on the contingent nature of truth believing that there are no grand narratives but that truth is composed of several 'meta narratives' and therefore, many truths exist.⁴⁹⁴ This is particularly useful in the context of rural women due to the reality of indigenous culture/custom in their lives, which often experiences tension with other accepted truths.⁴⁹⁵ Women are not homogenous, evidenced in the existence of several meta-narratives that exist not only in relation to men but also amongst women themselves.⁴⁹⁶ It is therefore necessary to accept that what one believes to be true is

⁴⁹² Van Blerk AE (1996) 94, as previously discussed under 3.3 above, social arrangements are contingent, cultural constructions rather than natural or inevitable conditions; Silbey SS (2001) 8624 argues that the law is a product of social forces therefore a conduit of those same forces; Klare K (1998) 167 argues that legal culture is the sum total of reified human practices contingent on prevailing cultural norms; see generally Van Marle K (2005) who argues that a state of false consciousness causes us to see our culture as normal where it is a contingent construct as argued by Klare, we should therefore take heed to be conscious of this fact and attempt to hear the voices of the unfamiliar others.

⁴⁹³ According to Van Blerk AE (1996), legal feminists argue further that law and culture, and not nature, have put women in a 'private sphere of domesticity,' making them economically dependent on men.

⁴⁹⁴ Johnson D *et al* (2001) 226; see generally also Krog A *et al* (2008) who also argue for the recognition of the existence of several narratives as was painfully evident during the TRC hearings. The continued lack of consideration for the varied experiences of others will mean that law continues to develop out of context which is not in tune with democratic aspirations that require active citizenship and substantive realisation thereof.

⁴⁹⁵ The tension between customary law and practice has surfaced in several judgments recently that have called to the fore various customary practices in light of our constitutional guarantees for equality as previously discussed above; *Bhe and Others v Magistrate Khayalitsha* 2005 (1) BCLR 1 (CC); *Mthembu v Letsela* 1997 (2) SA 936 (T), 2000 (3) SA 867 (SCA) who all tested the male primogeniture system that favours the male heir in inheritance to the disadvantage of the female first heir.

⁴⁹⁶ The perspective of post-modern feminists is that there is no singular/common female experience but different groups of women experience different lived realities. They therefore argue that feminist theory should bring about the multicultural differences in women's lived experiences by 'deconstructing the unitary quality' and character of gender identity in the law. It is argued that this can lead to a pluralist conception of equality in the law, which respects gender differences without forcing women to analogize their experience to either the male experience or to the hypothetical experience of a particular woman. Although there is some criticism levelled against this strand of feminism, they can be applauded for attempting to develop a form of jurisprudence that is more responsive to the needs of all women. See in this respect Minda G (1995) 144. Fraser N and Nicholson L as cited in Minda G (1995) 144, state that the arguments put forward by this school of thought are too weak to do anything about the structural problems posed by gender hierarchy and believe rather that for true transformation in law and society to come about, feminists must focus on the more dominant narratives such as changes in social organization and ideology or historically and culturally specific sociologies of gender. Lovibond S asks how anyone can be asked to say goodbye to narratives of emancipation when their own emancipation was still such a patchy affair. West R argues that post-modern strategies used by critical legal studies scholars reproduce the same masculine values and interests of modern jurisprudence and there is a need to take the critique a step further and consider women's experiences with the law. Williams P also states that sex discrimination law must allow for the many view points available to any one individual, see Minda G (1995) 145. Despite these divergent views the need to consider different realities is paramount and this school of thought should not be entirely excluded but the useful aspects thereof can be adopted and developed for each context.

not necessarily true for another and take this into account when attempting to reconcile the law and its processes with the lived experiences of rural women.⁴⁹⁷

The grand narrative with which feminists find most criticism is the idea of superiority of men to women.⁴⁹⁸ They use deconstructive strategies to show how modern forms of jurisprudence celebrate masculine ways of knowing and being at the expense of those associated with the different voice of women.⁴⁹⁹ This is not always obvious, and in some instances laws are promulgated with the intention of benefiting women but fail because they do not really consider the voice of women and are not sensitive to the particularities of women's lived experiences.⁵⁰⁰

It is argued that gender oppression is a reality that can only be understood from the many different perspectives of the different women who experience it. Building on women's experiences, post-modern feminists argue that there may be several answers to laws problem of gender inequality. They therefore argue that in order to attain gender equality we must take into account the multiple consciousnesses and experiences of women.⁵⁰¹ What better way to achieve this consciousness and validate all women's experiences than by employing the narrative method which seeks to inject in the discourse of law various conceptions and understandings of excluded groups within the law.⁵⁰²

Critical legal scholars recognize rights and their potential to effect change but argue that formal legal rights, in themselves to not guarantee freedom from social ills and should therefore not be seen as an end in themselves.⁵⁰³ According to them, rights are an embodiment of a promise of a world where one can live freely and safely in association

⁴⁹⁷ Sillbey SS (2001) 8624, Klare K (1998) 167, Van Marle K (2005), Fraser N (1996) 28.

⁴⁹⁸ Johnson D *et al* (2001) 226.

⁴⁹⁹ Minda G (1995) 142; Deconstruction is a theory put forward by Derrida in which he argues that there is nothing outside the text. What this then means is that there is no truly objective or non-textual reference from which interpretation an begin but rather that all references used to interpret a text are texts in themselves. Deconstruction is thus an effort to understand a text through its relationship to various contexts. See Chin-Yi C, 'The Deconstruction Theory of Derrida and Hiedegger- A study,' (2010) 6 *Irwle* 1.

⁵⁰⁰ See discussion under 3.4 above.

⁵⁰¹ Minda G (1995) 144.

⁵⁰² Delgado R (1989) 2440.

⁵⁰³ Johnson D *et al* (2001) 248.

with one another.⁵⁰⁴ But in reality, such rights are only partially realised and there is therefore a need to scrutinize the gap between such promises and the lived reality.⁵⁰⁵ The idea is therefore to find a way to work within the system taking care to challenge its legitimacy in a bid to constantly test the status quo and its effectiveness for society.⁵⁰⁶

Based on this premise, for rural women in South Africa, the promises offered by law with regards to poverty and violence are not nearly reflected in their lived reality. The causes for this are varied, as mentioned previously and include amongst others the language and medium of publication of the law and enforcement mechanisms.⁵⁰⁷ Intentional or not, things such as these, serve to exclude rural women from engaging with the law and embracing those aspects of it that may be useful in their lives.

These schools of thought employ a methodology which focuses on the role and responsibility of legal subjects in the reproduction and maintenance of the “legitimizing rhetorical structures” of legal thought and discussion.⁵⁰⁸ Especially because these processes, as crystallized human practices are not set in stone, there is therefore room for development of new ways of dealing with the law that could make it more accessible.⁵⁰⁹ This can be described as a move towards consciousness which attempts to base critique (and by extension development of the law) on lived experiences; therefore humanising the process of legal critique in a move away from the strict, scientific methods previously exercised.⁵¹⁰

This method has been used to develop new strategies of confronting common beliefs held about minorities/the unfamiliar other in the dominant consciousness/discourse of the law.⁵¹¹ There has been debate amongst the various race scholars for this

⁵⁰⁴ Ibid.

⁵⁰⁵ Ibid.

⁵⁰⁶ Johnson D *et al* (2001) 250.

⁵⁰⁷ In this regard refer to 3.3; Law and Legal Culture, discussed in Chapter Three above.

⁵⁰⁸ Minda G (1995) 126.

⁵⁰⁹ Silbey SS (2001) 8624, Klare K (1998) 167, Van Marle K (2005) as previously cited above.

⁵¹⁰ Minda G (1995) 126.

⁵¹¹ Minda G (1995) 181, Challenging racial hierarchy was linked to the goal of showing how racial identity is socially constructed by the difference of the ‘other.’ Difference is a derivative concept based upon identity: two things are different if they are not identical. Racial identity is not itself foundational to problems of discrimination; discrimination stems from the way racial identity is defined in terms of the privileged relation to the difference of others.

consciousness movement, and those against it.⁵¹² This has raised concerns on issues involving the continuing validity of the common structure of legal method used by traditional legal scholars for analyzing questions of race in the law. This links further with larger intellectual debates concerning the possibility of a neutral law. Is such a law possible? Who would determine neutrality? Is such a law ideal?⁵¹³ Despite these questions the ultimate contribution from these scholars is the exposure of how traditional legal theorists have ignored the importance and significance of race and other consciousnesses in their understanding of law.⁵¹⁴

Although these schools of thought each have varying constitutive elements that differ in methodology, approach and perspective, the central theme is a challenge against traditional attitudes and beliefs. Commonality also exists in the argument for consciousness-raising, which puts forward the sharing of personal experiences in a communal setting in order to explore that which has not been said.⁵¹⁵

⁵¹² In a special colloquy published in the Harvard law review, a number of well respected academics rejected Kennedy's argument and came to the defence of critical race scholars. Ball argued that the debate involved two different world views and 'what is then to be hoped for is not a surrender of standards but translation, the art of making it possible for people inhabiting different worlds to have a genuine and reciprocal impact upon one another.' Barnes complained that the role of the critical race scholar must be understood in terms of the need for cultural diversity: 'in a post-modern world in which we have come to realise that truth is somewhere, if anywhere, in the symphony of experience, the development of solid legal principles that vindicate the rights of all requires a platform for marginalized voices.' The above as cited by Minda G (1995) 176, criticism includes Kennedy D, who claims that race-conscious critiques may have had the undesirable consequence of silencing the important contributions of white race scholars, thus hindering the transformative effort of all individuals interested in eliminating illegitimate racial hierarchies in the law. In his view the problem with 'voice of colour' scholarship is that it derogates the individual's ability to have an impact in the world and further that such strategy could be misused for illicit racial purposes and would lead to the diminished reputation of minority scholars since the field would be regarded by other academics as soft. As cited by Minda G (1995) 175-176.

⁵¹³ See Minda G (1995) 177, the author goes on to state that like the law and literature scholars, critical race scholars question the relationship between interpretive practices and the 'normative perspective.' The racial critiques debate relates to the sameness/difference debate in feminist legal theory movement, who disagree on whether to treat gender as a standing concept for analysing gender hierarchy or whether gender should be no more relevant than eye colour: critical race theorists implicitly create a 'dominance strand of Race Theory that may ultimately require the rejection of what has been characterized as the 'integrationist model of racial equality' focusing rather on the varied racial experiences.

⁵¹⁴ Minda G (1995) 184.

⁵¹⁵ Minda G (1995) 184; this however links further with Van Marle and Ndebele's arguments on the refusal of the spectacle of constitutionalism and the return to the ordinary as discussed under 3.2 above, transformation and/through the law. They argue that we must take heed to be conscious of the manner in which our legal culture fails to listen/hear the voices of the marginalised other which is against the transformational aspirations of our transitional democracy embodied in our constitution. Mention must also be made about the experiential discourse relied on by feminists which is based on the lived experiences of women and their material conditions; an aspect that can employ the narrative as what better was to gain such knowledge than by hearing the stories of women in this regard see which can be enhanced by the use of narratives, Minda G (1995) 131. See also Biko S (2004) 100, who

We must therefore be aware of the continued effect of race, class and sex in our country and further that we must consider that people's experiences with these are not universal or singular.⁵¹⁶ Narrative method is employed as a vehicle for consciousness in a bid to unite divergent views and experiences and also our divergent, although contingent, truths.⁵¹⁷ In South Africa this can validate the lived experiences of rural women by showing the contingency of law and legal culture.

Stories are vehicles for ascertaining knowledge about different cultural worlds.⁵¹⁸ The emphasis on consciousness has stimulated a call for stories/narratives about the lived experiences of people to bring out the social reality of the victims. Delgado emphasizes the use of storytelling and narratives and describes them as a means of understanding the experience of victims of racism (sexism, elitism) in legal thought.⁵¹⁹ This serves as an illustration of how narratives may be used to explain/include experiences previously left out of modern legal discourse.

*“Most feminist narrative scholars start from a few shared premises..a belief that describing events or activities.. from the perspective of a person going through them, conveys a unique vividness of detail that can be instructive to [legal] decision makers.”*⁵²⁰

Feminist legal discourse challenges the ways in which modern legal discourse favours masculine ways of knowing. To this end it relies on narratives based on personal experience to present alternative ways of understanding why various women's interests and ways of knowing are ignored by modern discourse.⁵²¹ The idea of humanizing the

argued that the law and society has to learn to attach value to the voice of the black person and to hear their narratives for inclusion within the dominant discourse of law. See further Few AL, ‘Integrating Black Consciousness and Critical Race Feminism into Family Studies Research,’ (2007) 28 *Journal of Family Issues* 452, who argues for an integration of these schools of thought in studies of family research in order to have a more informed understanding in light of the various aspects of poor, black, women's disempowerment when it comes to their lived experience with inside/outside violence.

⁵¹⁶ Minda G (1995) 144.

⁵¹⁷ Minda G (1995) 173.

⁵¹⁸ Minda G (1995) 173, this is in a similar manner to the narrative jurisprudence associated with the feminist and the law and literature movements. These seek to reveal the ‘human potential’ missing in law with regards to women and like race-conscious narratives are offered to reveal the missing consciousness of legal and social thought.

⁵¹⁹ Delgado R (1989) 2439.

⁵²⁰ Abrams R as cited by Minda G (1995) 132.

⁵²¹ Minda G (1995) 131.

law by infusing the ways of being of previously marginalized groups through the use of narratives holds potential for a conscious development of law. It holds further the potential for healing and unification of a society such as ours burdened with the legacy of a segregated and oppressive past.⁵²²

The market needs to be flooded with authentic stories by women until such time it is realised that men's narrative/story and phenomenological description of law is not the same as women's.⁵²³ This is a notion that can be extended across considerations for class and race as well. Authentic stories of the unfamiliar other need to be infused in the law to dispute the dominant narrative based on the experiences of one group of people in South Africa.⁵²⁴

Feminist theory can be particularly useful in South Africa due to the position of women in society; who still face high levels of violence and a noted failure of the legal system in assisting them in this regard.⁵²⁵ Narratives/stories encourage some form of healing and self-confidence to embrace the potential of law to effect substantive change. They can also cause one to look past the mystery of law and its exclusive legal culture to engage within to encourage development thereof to their benefit.⁵²⁶

“While drawing on a rich tradition of struggle as blacks and as women, there is a need to continually establish and re-establish their priorities and decide for themselves the ‘relative salience of any and all identities and oppressions,’ and the extent to which those features inform their politics”⁵²⁷

Although the complexities and ambiguities that merge a consciousness of race, class and gender oppression make the “emergence and praxis of a multivalent ideology

⁵²² Ibid.

⁵²³ As cited by Minda G (1995) 132.

⁵²⁴ This suggests a return to the ordinary as suggested by Van Marle and Ndebele and discussed under 3.2 in Chapter Three above and a consideration of Fraser's arguments on the politics of recognition when it comes to contemplating development of a feminist equality jurisprudence, see Fraser N (1996) 28.

⁵²⁵ Johnson D *et al* (2001) 229.

⁵²⁶ Chin-Yi C (2010) 5.

⁵²⁷ King DK, ‘Multiple Jeopardy, Multiple Consciousness: The Context of A Black Feminist Ideology,’ (1988) 14 *Signs* 42 at 72, argues that black feminist ideology declares the visibility of black women and acknowledges the fact that being both black and female, constitutes a special status in society. It asserts self-determination as essential and empowers black women with the right to interpret their reality and define their objectives.

problematic,” they also make such a task more necessary if we are to work toward the liberation of poor black women in South Africa.⁵²⁸ In a country riddled with the legacy of a systemic ideology that served to legally segregate the notion of consciousness and conscious law is particularly relevant. Still in a period of transition, South Africans must find a way to move past their troubled history and live and interact together. Accepting that we are different and will therefore view and experience the world differently, we must commit to live alongside each other exercising mutual respect and acceptance.⁵²⁹

It has been shown that the legal system perpetuates the maintenance of power/domination by some, but it is also accepted that legal doctrine contains some utopian norms. For this reason there is a strand of critical thought that prefers to expand these aspects rather than completely overhaul all legal doctrines; until such time that communitarian principles, embodied in philosophies such as *ubuntu*, become dominant.⁵³⁰ Such development should be continual and therefore reflective of the dynamic nature of law in relation to the society it seeks to govern. We can never be so satisfied as to posit the law as completely transformed. The very truths on which law is premised are contingent and therefore it must develop with these truths to remain applicable and relevant.⁵³¹

Taking this a step further, as poor rural women in South Africa by majority are black, we must also accept that prejudice still continues along racial lines, compounded by disadvantage along class and gender lines, albeit indirectly/unintentionally. We must therefore take this into account when developing and enforcing law with regards to poverty and its resultant burdens as experienced by them. True equality is after all not

⁵²⁸ King DK (1988) 72

⁵²⁹ Minda G (1998) 145; see also generally Krog A *et al* (2008) as discussed previously in 2.2.1 above.

⁵³⁰ Van Blerk AE (1996) 94, It is stated further that the Critical Legal Scholar must relentlessly expose the contradictions of law and society in relation to each other in order to make an alternative society possible. These communitarian principles are similar to those embodied in the African philosophy of *ubuntu* where are all are able to realise and exercise their humanity substantively without detriment to any other person, see generally Cornell D & Muvangua N (eds) (2010).

⁵³¹ See Langa P (2006) 354 and in general Cornell D (1993), who argue for the continual nature of transformation and it should thus never be viewed as ever complete to ensure that laws protection continues to remain contextual and relevant.

merely formal but substantive, meaning that social conditions must also be equalised in order for a country to claim that there is indeed equality.⁵³²

4.3 FINDING COMMON GROUND: UBUNTU AND THE LAW

“Are African women voiceless or do we fail to look for their voices where we may find them, in the sites and forums in which they are uttered?”⁵³³

It is argued that no other group has had their identity socialized out of existence as have black women. Hooks submits that they were rarely recognized as a group separate and distinct from black men, or a present part of the larger group of women.⁵³⁴ When black people are talked about the focus tends to be on black men; and when women are talked about, the focus tends to be on white women, no attention is paid to the plight of black women, as is the case in South Africa as well.⁵³⁵

According to Hooks, economically disadvantaged women have not directly contributed to the development of programmes and strategies designed to their benefit had they contributed to the agenda for the feminist movement class struggle may be a central issue on the feminist agenda.⁵³⁶ She argues further that class oppression is still not central on the feminist agenda because their values, behaviours and lifestyles continue to be shaped by privilege.⁵³⁷ This rings true in South Africa as well, rural women remain spoken for in matters that are designed to be to their purported benefit. For this reason the manner in which poverty directly affects their (in) ability to enforce legal rights is seldom considered when designing laws and policies aimed at their uplifting.

This lack of attention to economic issues has significant implications for the participation of black women in feminist discourse. Many of the differences of priorities between

⁵³² See generally Mamdani M (1998) who argues that the political reconciliation that took place at the advent of democracy is not sufficient. What is needed is social reconciliation and social justice for the majority to ensure that our transition is steady, relevant and legitimate as discussed previously in 3.2 above.

⁵³³ Ogundipe-Leslie M as cited by Gqola PD (2001) 11.

⁵³⁴ See generally Hooks B (1981).

⁵³⁵ King D.K (1988) 72.

⁵³⁶ See generally Hooks B (1981).

⁵³⁷ King DK (1988) 61-62.

black and white women are related to class.⁵³⁸ The economic concerns of women from lower income backgrounds are relatively ignored or distorted in the contemporary women's movement. Race and class are more significant contributing factors in black women's impoverishment than gender. This is why law in South Africa and its processes are so far removed from rural women.⁵³⁹ There is a tendency to focus on the reality of an already privileged group therefore speaking on behalf of all women when the plurality of women's experiences does not allow this.

What is needed is a way to give voice to rural women, a platform that allows them to speak and to be truly heard and considered within the normal legal discourse. As long as they are suffering from an inferiority complex, denigration and derision, they will be useless as co-architects of an inclusive society. Hence what is necessary as a prelude to anything, is a grass-roots build-up of (black) consciousness such that they can learn to assert themselves and stake their rightful claim.⁵⁴⁰

Because the problem of violence against rural women is affected by multiple sources the solutions must be multiple as well; Law is only but one facet of problem solving and should thus be employed in conjunction with other strategies.⁵⁴¹ However, it is critically important that women be involved in formulating the solutions as this is the only way to ensure that the strategies deployed are relevant and contextual.⁵⁴²

⁵³⁸ According to King DK (1988) 71, various findings suggest that the conditions that bring black women to feminist consciousness are specific to their social and historical experiences. For them, the circumstances of lower economic life may encourage political and particularly feminist consciousness therefore the basis of their feminist ideology is then rooted in their reality.

⁵³⁹ King DK (1988) 62-63.

⁵⁴⁰ Stubbs A (ed) (1978) 21, see also Wing AK (1997) 952, Spirit injury is a term coined by critical race feminists which contemplates the psychological, spiritual and cultural effects of the multiple assaults on poor black women. It leads to the slow death of the psyche, of the soul and of the identity of the individual. Women come to believe in their own inferiority and that there is justification for the violence against them because a 'fundamental part of themselves and their dignity is dependant upon the uncontrollable, powerful and external forces who constitute society.' if society places a low value on certain members they in turn will perceive themselves as having a lesser worth in that society. Because they are devalued by both the outside society of the oppressor and the inside society of their own culture as well as the intimate inside of their own family, women cannot help but be profoundly silenced and experience a loss of self-actualization. The spirit injury becomes as devastating or as costly and as psychologically obliterating as robbery or assault.

⁵⁴¹ Wing AK (1997) 974, see also Kehler J (2001) 3, Smart C (1989) 5, Vasintha V (2008) 2, as previously discussed under 2.2 above; *Confronting Poverty and Violence in South Africa*.

⁵⁴² Wing AK (1997) 974.

The idea of restoring humanity to a previously oppressed or marginalised group is one of the key tenets of the black consciousness movement, and the critical theories mentioned above and this can be achieved through the use of narrative method/stories.⁵⁴³ Feminists and Critical Race theorists have used storytelling to develop new approaches to law based on personal and imaginative experiences. These legal scholars use story-telling in their work to identify a different voice which they claim is missing in traditional stories told in the law.⁵⁴⁴ Storytelling is said to be capable of describing the personal experiences of discrimination and revealing how legal discourse is blind to the victim's story.⁵⁴⁵ The use of narrative/personal experiences to raise consciousness was also exercised by proponents of the black consciousness movement in the apartheid era. They used these stories to unite black people by talking to them in a language that was their own.⁵⁴⁶

The intersection between racism and sexism bonded feminist legal theory with minority scholars to put forward a new form of critical race theory which also focuses on the use of narratives to humanise the law.⁵⁴⁷ Critical Race Feminism seeks to explore and celebrate the differences and diversity within women of colour and articulate how the law might improve their status. Thus while it is concerned with theoretical frameworks, it is also centred on "praxis," seeking to identify ways to empower women through law and other disciplines.⁵⁴⁸

As outlined in the critical theories above, the law has been exclusive to certain marginalised groups; the poor, blacks and women.⁵⁴⁹ These theories have also been instrumental in demystifying the law by showing that it is not supreme and infallible but rather a contingent, social construct subject to scrutiny, criticism and hopefully development. To this end they have identified law to be as conditional as the truths on which it is founded and reject the notion of a grand-narrative/truth of law and put forward

⁵⁴³ Biko S (2004) 30.

⁵⁴⁴ Minda G (1995) 151 see also Murphy JC, 'Lawyering for Social Change: The Power of the Narrative in Domestic Law Reform,' (1993) 21 *Hofstra Law Review* 1243, Delgado R (1989) 2440.

⁵⁴⁵ Minda G (1995) 151.

⁵⁴⁶ See generally Biko S (2004).

⁵⁴⁷ Minda G (1995) 147.

⁵⁴⁸ Wing AK (1997) 948.

⁵⁴⁹ Minda G (1995) in general, see also Douzinas C & Geary A (2005) and Delgado K & Stefanic J (eds) (2000) for a further discussion on the various critical theories.

various meta-narratives/truths, which should interact freely in a plural democracy such as ours.⁵⁵⁰ All these theories have put forward the use of narrative method to inject these missing voices from the law and it has also been suggested that narratives can help forge group solidarity and instil a sense of healing and acceptance for previously marginalised groups such as women and blacks as contemplated by the Black Consciousness movement.⁵⁵¹

The exclusive nature of law and the intersection of race, class and gender in rural women's lives, serves to make the law irrelevant in their everyday lives. Based on the above theories it is clear that although the laws previously outlined have been designed with the intention of achieving equality and improved social conditions for all, this objective is not effectively translated/realised.⁵⁵² The promulgators of law failed to take into account the lived experiences of women, especially rural women when drafting and for this reason it is difficult for the law to penetrate and become relevant in their lives.

The constitution recognizes the role and importance of traditional institutions and their leaders.⁵⁵³ It should be noted that no provision is made in the above pieces of legislation, except the constitution itself, for an alternative platform to claim and enforce legal rights outside of the rigid court room process. It is recognized further that a court room is not the only platform available to exercise ones constitutional rights, and one must ask why it seems to be the only platform for claiming rights under other legislative enactments. This is so despite the fact that rural women by my definition fall under the authority of traditional leadership, and are therefore in observance of customary law and cultural practice and would thus respond easier to forums that are based on this system of knowledge and being.⁵⁵⁴

It is a fact that in South Africa, in order to validate certain rights under the law, they must approach a platform that is unfamiliar and unaccommodating when less foreign

⁵⁵⁰ Minda G (1995); see also Silbey SS (2001), Klare K (1998) and Van Marle K (2009) as discussed above.

⁵⁵¹ Delgado R (1989) as discussed under 2.2.1 above.

⁵⁵² As discussed under 3.4 above; Laws Unfulfilled Promises.

⁵⁵³ Chapter 12: section 211 and 212 of the Constitution of the Republic of South Africa Act 106 of 1998.

⁵⁵⁴ As highlighted under section 1.2 above, see also *Socio-Demographic Profiles of Saskatchewan Women: Rural Women*, (2009) Saskatchewan Ministry of Advanced Education, Employment and Labour. <http://www.socialservices.gov.sk.ca/rural-women.pdf> [Accessed 18 January 2012] for a definition of rural women and also Van Blerk AE (1996) 88.

platforms exist. This indicates a failure to effectively take the plurality of people's experiences outside the law into account and further still the inability to realise the need of contextualising the law in order to ensure its relevance and efficiency. There is therefore a need to include customary law in legal discourse and include relief and enforcement mechanisms grounded in this constitutionally recognized source of law.⁵⁵⁵

Customary law and traditional practice need to be developed to the point where they interact so freely in the broader legal context, as to afford those who subscribe to them the utmost protection of law. The tension between customary and contemporary legal practice is common cause and it can therefore be argued that causing such disputes to be heard under the veil of customary law could prove problematic due to its patriarchal nature: Therefore a failure to assist rural women in the democratic manner envisioned.⁵⁵⁶

It must be kept in mind that the current form in which culture and customary law is presented is a deviation from the original practices of the living customary law. This has been attributed to the arrival of missionaries who imposed western standards of religion and worship through Christianity which were assimilated and now form part of what we rely on as traditional culture / customary law.⁵⁵⁷

Customary law like any other law is dynamic/fluid in nature because it is contingent and as a result of social interactions. It must be placed in context and amended as necessary and developed to the level that common law has been developed. It is therefore necessary to interact with it, incorporate it in everyday legal discourse and cause it to be subject to scrutiny so that it subscribes to the democratic ideals laid out by the constitution. This is in line with the black consciousness directive for black people to realise the value of their own knowledge systems which were devalued overtime.⁵⁵⁸

This was not due to an inadequacy in these systems, as all ways of knowing and being are as valid as each other and developed over time through human experience, but

⁵⁵⁵ Greenbaum B (2008) 98, see generally also Van Marle K (2007) and Ndebele N (1986) on their arguments on a return to the ordinary as discussed under 3.2.

⁵⁵⁶ The tension between customary law and contemporary legal practice has been highlighted previously above.

⁵⁵⁷ Biko S (2004), see also Motsei M (2007) for a further discussion on the altered state of customary law as previously discussed under 2.2.1; A Story of Consciousness.

⁵⁵⁸ Biko S (2004) 33.

rather a move by colonizers to ensure that the oppressed remained so mentally and thus by extension physically.⁵⁵⁹

When dealing with rural women, the role that customary law plays in their lives cannot be ignored and should have been taken into account when laws were being drafted.⁵⁶⁰ Linked with custom and traditional practice are the deep levels of spirituality people in rural areas exhibit which is not considered in the formal legal discourse.⁵⁶¹ The supplementary inclusion of traditional authority forums, a move mandated by the constitution, may in the long term prove more effective than the mere reliance on the courts because these aspects mentioned above are relevant within these contexts and would therefore make this process more accessible due to its familiarity.⁵⁶²

*“The promotion of a democratic community of friendship brings a nuanced jurisprudence that entails a complex reconciliation of the inevitable tension between customary law and the western ideals of liberalism, all of which should inform the constitution.”*⁵⁶³

Despite all the apparent shortcomings of the law embodied in legislative enactments, and the legal culture in which it is steeped, there are some utopian aspects that can still be useful; if the gap between laws lofty promises and rural women's lived reality is capped. Had the voices/narratives of all women been listened to more attention would have been paid to making sure that the methods of enforcement were relevant, accessible and useful. Although the laws are extremely progressive and coined in female friendly terms they fail to consider the lived experiences of the non-elite. There is therefore a need to be creative in the way we deal with the law as it currently stands through a simple method that can be implemented immediately and at minimal costs. The power of narratives cannot be ignored and should at least be given some

⁵⁵⁹ Ibid.

⁵⁶⁰ See generally Greenbaum B (2008) and Motsei M (2007).

⁵⁶¹ Motsei M (2004), see also Krog A *et al* (2009), where the seemingly incoherent testimony of one rural woman is unpacked, and found to contain elements of spiritual references which are part of her daily existence but foreign to those listening and therefore contributed to the apparent incoherence of her narrative.

⁵⁶² Greenbaum B (2008) 85.

⁵⁶³ Bohler-Muller N (2005) 275, see also Cornell D (2004) 670.

consideration in this regard, accepting they cannot be everything to South Africa's rural women but merely one aspect of the multiple strategy required.⁵⁶⁴

Wing puts forward that South African women can be assisted with their legacies of violence and spirit injury by adopting a "world-travelling" methodology.⁵⁶⁵ This approach allows the identification of our interconnectedness even as we respect the independence of others. We must first see ourselves in our historical context then see ourselves as another might see us. Finally we must learn to see the other within their own cultural context and only then offer humble reflections.⁵⁶⁶

One can extract from our indigenous cultures many positive virtues such as the oneness of community at the heart of indigenous custom/ culture.⁵⁶⁷ Embodied in the philosophy of *ubuntu* this is what is necessary to ensure that there is a space for all, especially those previously disadvantaged to realise their humanity in a substantive manner; the oneness of community and the inclusion of all.

Ubuntu is the capacity in African culture to show compassion, reciprocity, dignity, harmony and humanity in the interests of building and maintaining community with justice through mutual caring. It is a consciousness of our desire to affirm our fellow human beings and to work and act towards each other, constantly bearing in mind the good of the community.⁵⁶⁸ It seeks to honour the dignity of each person and is concerned with the development and maintenance of mutually affirming and enhancing

⁵⁶⁴ See in this regard Delgado R (1989) and Murphy JC (1993) who argue for the use of narratives with Delgado providing a theoretical argument for narratives and Murphy presenting a more practical consideration for narratives.

⁵⁶⁵ Wing AK (1997) 974.

⁵⁶⁶ Wing AK (1997) 974, this argument can be linked with the *ubuntu* call for the realization of our own humanity by realizing the humanity of others as argued by several authors. This can be achieved through recognition of the ordinary, an attempt to place law in the lived reality of the people it seeks to protect, and that is the previously disadvantaged discriminated against on an axis of various grounds. This is more in line with the transformational aspirations of our transition towards democracy. What we must engage in is the refusal of the spectacle of constitutionalism with its lofty ideals and seek to make law relevant, contextual and hopefully therefore more effective. See Van Marle and Ndebele as previously cited which links further with Wings arguments on spirit injury above.

⁵⁶⁷ Stubbs A (ed) (1978) 32.

⁵⁶⁸ Nussbaum B (2003) 2.

relationships. It embraces and requires justice and thus inspires and creates a firm foundation for our common humanity.⁵⁶⁹

Because of its emphasis on our common humanity and the ethical call to “embody our communal responsiveness in the world,” it offers an alternative way to re-create a world that works for and is accepting of all.⁵⁷⁰ According to Bohler-Muller, *ubuntu* embraces a law of “being-with-others” and inspires us to learn about ourselves as we interact with and learn about others, learning to respect both our differences and similarities.⁵⁷¹ It thus offers a different approach to law and the promotion of human rights by focusing on community building as opposed to individualistic ideals rooted in Eurocentric thinking. An individual is unique and different because of their relations with others; “the who I am, is always readily exposed to another.”⁵⁷²

Umuntu Ngumuntu Ngabantu; A person is a person through another person.⁵⁷³ This implies a culture of mutual help, of caring for and sharing with each other which can be practiced by talking to and hearing each other. *Ubuntu* thus introduces citizens to a sense of responsibility and solidarity and potentially provides us with a new way of thinking about the 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.”⁵⁷⁴

“[T]he law as a continually lived experience cannot reach a point of finality and can thus always be called into question. As such Ubuntu (law) is a future-oriented exercise as ‘it

⁵⁶⁹ Ibid.

⁵⁷⁰ Nussbaum B (2003) 3.

⁵⁷¹ Bohler-Muller N (2005) 268, see also Motsei M (2007) 112 on the need to celebrate sameness and difference as she did during her encounter with Dr Andersen as described in the book.

⁵⁷² Bohler-Muller N (2005) 268, see also Motsei M (2007) who also puts forward *ubuntu* as a new approach to law and argues for the need to steer away from the sole reliance on western influenced forums for justice which do not take into account African values which necessarily focus on communitarianism and reconciliation as opposed to individualism and retribution..

⁵⁷³ Kimmerle H, ‘Ubuntu and Communalism in African Philosophy and Art,’ in Van den Heuvel H (et al), ‘Prophecies and Protest,’ (2006) *Ubuntu in Global Management*.
<http://rozenbergquarterly.com/2011/07/04ubuntu-and-communalism-in-african-philosophy-and-art/> [Accessed 09 March 2012].

⁵⁷⁴ Bohler-Muller N (2005) 269.

*is the living that lay down norms and rules as specific responses to particular experiences.*⁵⁷⁵

In the struggle towards social justice we should learn to make the most of the radical theoretical tools at our disposal to continue the process of transformation. The end of apartheid marked the beginning of new things: I hope therefore I am.⁵⁷⁶ I am alive and part of the process of forming the law as practice. But further than that I am because you are and therefore I must be conscious of the manner in which certain privileges distort the voice of the marginalised other.⁵⁷⁷ The realisation that our humanities are intrinsically linked imbues a sense of consciousness when dealing with the law hopefully resulting on more relevant and contextual laws and a more inclusive legal culture.

The openness of the transitional period is likely to be short-lived. As structures are established and processes become increasingly rigid these spaces disappear and the marginalisation of women again becomes entrenched.⁵⁷⁸ The ultimate challenge is to see *ubuntu* as a value which can stand on its own apart from other western values. We should view it as a legal philosophy that calls upon us to respond to concrete experiences and to remain open to transition, change and transformation as an ongoing project.⁵⁷⁹ Adherence to the value of *ubuntu* demands that we deal with individuals in the context of their historical and current disadvantage. It demands further that we realise equality issues ought to address the actual conditions of human life with and through others.⁵⁸⁰

⁵⁷⁵ Bohler-Muller N (2005) 270, this relates to the fluidity of these social structures created and reified over time as argued by Klare K (1998), Silbey SS (2001) above and other critical scholars. They stress the contingency of the truths/values that law is based on and that due to this it can and should be continually tested for their relevance and development as we strive towards transformation (and not transformed). see also Mokgoro Y, 'Ubuntu and the Law in South Africa,' (1998)

<http://www.puk.ac.za/lawpaper/1998-1/mokgorab.html> [Accessed 29 February 2012], who submits that if *ubuntu* is 'consciously and conscientiously harnessed,' it can become central to a new constitutional jurisprudence to the revival of sustainable African values as part of the broader process of the African Renaissance.

⁵⁷⁶ Bohler-Muller N (2005) 275.

⁵⁷⁷ Ibid.

⁵⁷⁸ Hassim S, 'Gender, Social Location and Feminist Politics in South Africa,' (1991) 15 *Transformation* 65 at 67.

⁵⁷⁹ Bohler-Muller N (2005) 280, this relates to the call for context called for by the critical scholars, see Minda G (1995) this relates further to the refusal of the spectacle of constitutionalism and the return to the ordinary as argued by Van Marle K (2007) and Ndebele N (1986).

⁵⁸⁰ Bohler-Muller N (2005) 271.

“[I]t is advisable for South African courts to continue to explore the usefulness of the spirit of ubuntu in a post-apartheid legal landscape, where we need to re-think the role of law in our lives, dependent on our ability to live with discomfort for while. We must however keep in mind that it is a problematic concept but should not abandon its potential for good if we, in response to Cornell’s call, re-imagine it from within the practices of customary law as engaged in by women themselves. In this way we may discover new ways of being with (in) the law. In a similar vein to the (re) affirmation of the feminine, the affirmation of ubuntu- thinking takes us beyond strategy to a future-oriented utopianism.”⁵⁸¹

4.4 CONTEMPLATING ‘CONSCIOUSNESS’ IN SOUTH AFRICA: A CASE FOR NARRATIVES

Some scholars conceptualize consciousness as the ideas and attitudes of individuals that, when taken together determine the form and texture of social life.⁵⁸² If research on legal culture focuses attention on the numerous ways in which law exists within society generally, the study of legal consciousness traces the ways in which law is experienced and interpreted by specific individuals as they engage, avoid, or resist the law and its meanings.⁵⁸³

By focusing on the legitimating functions of law, research describes the ways in which law helps people see their worlds, private and public as both natural and right.⁵⁸⁴ It is important for all members of the legal fraternity to be conscious of their conservative

⁵⁸¹ Bohler-Muller N (2005) 280.

⁵⁸² Silbey SS (2001) 8626.

⁵⁸³ Silbey SS (2001) 8626, the author highlights a study of legal consciousness of ordinary Americans which constructs three accounts of law that encompass the range of cultural materials with which people produce and experience legality as a structure of social action. In one account the law is remote, objective and impartial and resides in times and a space separate from everyday places and while enacted by legal functionaries, exists apart from the words or deeds of particular persons. In a second account legality is understood to be a game of skill, resource and negotiation. Law in this rendering appears as a defined arena for strategic interactions sometimes engaged seriously and other times playfully but always simultaneously alongside and within everyday life. The third views law as an arbitrary power against which people feel virtually incapacitated. Often the only means of deflecting the legal power is to employ various subterfuges and evasions. These minor forms of resistance typically leave the law unchallenged and unchanged.

⁵⁸⁴ Silbey SS (2001) 8626.

style and be able to challenge it and consider other approaches because ‘conservatism reduces the transparency of the legal process undermining its contribution to deepening democratic culture.’⁵⁸⁵

Without theories and concepts that represent the experiences of black women, the women's movement has and will be ineffectual in making ideological appeals that might mobilize such women. “Often, in fact, this conceptual invisibility has led to actual strategic neglect and physical exclusion or non-participation of black women.”⁵⁸⁶ What we must engage in is a “refusal of the spectacle of constitutionalism” and the rights it accrues, and a “return to the ordinary” where we seek relevant methods in the journey towards transformation.⁵⁸⁷ The notion of refusal in the South African context is an attempt to create spaces for the unknown other- a movement towards ethical jurisprudence.⁵⁸⁸

“Refusal exposes and exhausts the limits of law and shows its frailty. It unsettles, disturbs the machinery of politics and of justice; it is a ‘fading before the law which widens law’s limit point’ and increases the mode of suspension. Refusal happens in and creates an in-between space.’ It is also a way of taking up responsibility to the ‘unknown other.’”⁵⁸⁹

The return to the ordinary is a step back to create some space; a step back out of the rush and drive of the spectacle for a better vantage point and some perspective. It is not a suggested retreat to the past or a celebration of the pervasiveness of law in even the most “ordinary everyday particle of life.”⁵⁹⁰ A rediscovery of the ordinary resists the palpable and therefore opens up possibilities. Ndebele’s suggestion of ordinary creates

⁵⁸⁵ Van Marle K (2009) 291.

⁵⁸⁶ King DK (1988) 58.

⁵⁸⁷ Van Marle K (2007) and Ndebele N (1986).

⁵⁸⁸ De Villiers I (2009) 83; see generally also Bohler-Muller N (2006), where the author makes the argument that *inter alia*, we should learn to place law in context in the lives of the people we are seeking to protect, especially women. Drawing on the communitarian principle of *ubuntu* she argues for an ethics of care when dealing with the law, one that pays attention to the circumstances of its subjects and attempts to help them realise their humanity in light of their lived reality, and therefore by extension realising our own humanity.

⁵⁸⁹ Hanafin P, ‘The Writers Refusal and the Laws Malady,’ (2004) 31 *Journal of Law and Society* 3 at 8.

⁵⁹⁰ De Villiers I (2009) 87.

spaces with opportunity for reflection, understanding and action because it refuses the easy answer.

*“The ordinary is sobering reality; it is the forcing of attention to necessary detail. Paying attention to the ordinary and its methods will result in significant growth of consciousness.”*⁵⁹¹

Below is a discussion of Black Consciousness as the South African manifestation of the critical call for consciousness. Although mainly employed as part of the liberation struggle the message remains relevant due to the pervasiveness of racial and disadvantages in post-apartheid South Africa.

4.4.1 Black-consciousness: A defiant legacy

What is necessary in light of the above issues is a consciousness-raising project as suggested by the critical theories previously described.⁵⁹² In South Africa this was manifest in the Black Consciousness Movement, organized under the leadership of Steven Biko, which advocated the mental liberation of oppressed blacks discouraged by their perpetual and systemic suffering under apartheid.

A brief overview of Biko’s writings stresses the following: Firstly, black people who were confronted daily with evidence of their subordinate position in South African society came to believe in their inferiority.⁵⁹³ Secondly, black people’s culture was denigrated to the point that they developed a hatred for it.⁵⁹⁴ He suggested that these issues be addressed as a matter of urgency but did not identify strategies that could be set up in addressing them. One possible strategy is the use of narratives as a vehicle for delivering the message of consciousness for both rural women and those in the legal

⁵⁹¹ De Villiers I (2009) 89.

⁵⁹² See section 4.2 above; A Critical Reflection on Law.

⁵⁹³ See Williams P (1997); Williams P (1994), Hooks B (1991), Motsei M (2007), Motsei M (2004), Krog A *et al* (2008); who all describe the perpetuation of discrimination against women across race and class and in varying cultural contexts, especially when it comes to the access of laws promises embodied in the rights to freedom, dignity, equality and all the resultant rights.

⁵⁹⁴ Pityana BN, Ramphele M, Mpumwana M, Wilson L (eds), *Bounds of Possibility: The Legacy of Steve Biko and Black Consciousness*, (1991) 134.

fraternity who draft and enforce the laws designed to protect rural women in South Africa.⁵⁹⁵

Black consciousness was not concerned with aligning people on the basis of race, it was rather an attitude of mind or a way of life. The major focus was the psyche of 'blacks' as black was not a matter of pigmentation but a reflection of a mental attitude. It was intended to delineate a social category of people who occupied a subordinate position in a capitalist and racist system. It therefore referred to "all those who were by law or tradition, politically, economically and socially discriminated against as a group in the South African society and who identified themselves as a unit in the struggle towards the realization of their aspirations."⁵⁹⁶

Biko attributed the inferior position of black people in South African society to the mere colour of their skin. They were collectively segregated against on the basis of race and this collective treatment was the basis for calling for group solidarity in the fight against apartheid.⁵⁹⁷ Skin pigmentation determines social situation therefore blacks must realise that their reality is one of a lack of freedom, and they must thus do everything to free themselves.⁵⁹⁸ It therefore aimed to transform the definition of black and make it synonymous with freedom. A definition coined to imbue its followers with spiritual power, transforming 'objects into initiators, inferior beings into equals among peoples and claiming a country and a right to be in the world,'⁵⁹⁹

*"I am a potentiality of something; I am wholly what I am. I do not have to look for the universal. No probability has any place inside me. My Negro consciousness does not hold itself out as black. IT IS. It is its own follower. This is all that we blacks are after, TO BE. This therefore necessitates a self examination and rediscovery of ourselves, blacks can no longer afford to be led by and dominated by non-blacks."*⁶⁰⁰

⁵⁹⁵ Pityana BN *et al* (eds) (1991) 134, the authors however stress the importance of self-reliance in attempting to deal with these issues.

⁵⁹⁶ Ranuga TK (1986) 187.

⁵⁹⁷ Stubbs A (ed) (1978) 25.

⁵⁹⁸ Ojo-Ade F, 'Review: Steven Biko: Black Consciousness, Black Struggle, Black Survival,' (1989) 19 *Journal of Modern African Studies* 539 at 542.

⁵⁹⁹ Serote W as cited by Pityana BN *et al* (eds) (1991) 9.

⁶⁰⁰ Gibson N (2004) 10.

Biko argued that to undertake the demanding task of liberation, blacks had to reject misleading foreign values and be instilled with the new self. They were told to be proud of their origin, history and cultural values. They were called upon to depend on their own initiative and resourcefulness to advance the cause of their own liberation. Hence the new political message and cry of the founders: “Black man you are your own!”⁶⁰¹ This slogan was coined in order to encourage blacks to overcome their overpowering sense of alienation and regain their dignity. He realised that blacks had to strive to accept their blackness and be proud of it if the liberation struggle was to succeed.⁶⁰²

He argued that a go-between in the form of the white liberal was not necessary in the struggle for emancipation/transformation; it was a project that needed to be embraced by blacks themselves if it was to experience success and longevity.⁶⁰³ He rather invited the liberals in favour of black emancipation to educate their fellow whites on the need to rewrite the history of the country in order to create a country where colour will not serve to put any person in a box.⁶⁰⁴ This highlights the necessity of involving all actors in the struggle towards the realisation of substantive rights for rural women. It is not merely up to the people who seek the rights to freedom and equality to ensure that they are realised, but also those who are privileged by an oppressive system. They need to criticize it to allow room for the unfamiliar and excluded other to be heard.⁶⁰⁵

Fanon wrote for social change, a necessary component for theories that aim for critical consciousness and human emancipation.⁶⁰⁶ These thoughts were reflected by Mamdani

⁶⁰¹ Ranuga TK (1986) 187; see also Motsei M (2007) and (2004) as discussed under 2.2.1 and 2.3.1 above, who argues that to be truly equal and legitimately engage as active citizens in our democratic state, alternative and contextual ways of being must be given a platform to engage with the law and develop. See also Krog A *et al* (2009) who noted how Mrs Konile in her own context, culture, and lived reality was perfectly coherent.

⁶⁰² Ranuga TK (1986) 183.

⁶⁰³ Stubbs A (ed) (1978) 25.

⁶⁰⁴ Ibid.

⁶⁰⁵ Stubbs A (ed) (1978) 25; this is in response to our call for consciousness but knowing that focusing on the theoretical is not enough. Something practical and substantive needs to be done to allow the realisation of true transformation, equality, freedom and dignity for rural women under our democratic dispensation. Narratives can be useful in this regard in several instances; as a means of critique it can keep the law relevant. It can also be used as a tool for making the law accessible in the ways discussed under 2.2 above.

⁶⁰⁶ Kane N, ‘Frantz Fanon’s Theory of Racialization: Implications for Globalization,’ (2007) *Human Architecture: Journal Of The Sociology Of Self-Knowledge* 353. See also Fanon F (1963), in this piece he presents the story of colonialization and highlights the manner in which blacks were oppressed and stripped of their dignity. Their knowledge systems and beliefs were branded primitive and rejected in favour of white ways of being or rather civilization. Indigenous values were rejected by whites and eventually blacks themselves, due to years of

who argued that in South Africa social justice is still a missing but very necessary component of our young democracy. What happened at the start of the transition was political justice with power being handed over from the minority to the majority. However social conditions for the majority have not been changed, poverty is still common cause and the lived reality of most in South Africa. This is not justice and is against our vision for transformation embodied in our constitution. Poverty should not continue to exclude people from the full benefit of the law; something must be done to bridge the gap between laws promises and the poor reality of most.⁶⁰⁷

Black consciousness argued that the poor material circumstances associated with the black body is not a natural consequence of a scientific inferiority but a “historico-racial schema.”⁶⁰⁸ If race is culturally and historically situated as opposed to a reified fact of biology then potential for liberation is possible.⁶⁰⁹ Although class and race gain meaning from one another, they are co-constituted and neither are a consequence of the other, rather each is “dialectically co-produced.”⁶¹⁰ Further, while they have materialized in very distinct and different forms, it is possible for individuals to shift between these polarized worlds.⁶¹¹

“Both oppressor and oppressed must travel to the world of the other, for both are unconscious, both are alienated. Because race is relational, the racialized other, cannot become conscious until the colonizer recognizes the colonized, until he moves to the world of the colonized, until he knows the colonized. This can only occur through

subjugation, mental derision and subordination. He therefore argues that in order for liberation and true transformation attempts must be made to free the oppressed and subjugated black psyche which due to years of white supremacy, now believes that the white way of being is the only legitimate one and reject their indigenous values. In the same manner Delgado does, Fanon argues further for a consciousness in society, so that blacks and whites can realise the manner in which history has shaped the dominant discourse of law. He therefore invited the sharing of narratives between the oppressed and the oppressor to foster true understanding and the legitimacy of the black voice previously excluded from legal consideration.

⁶⁰⁷ See Generally Mamdani M (1998).

⁶⁰⁸ Kane N (2007) 356.

⁶⁰⁹ Klare K (1998) 167, Silbey SS (2001) 8624, Van Marle K (2005) 20.

⁶¹⁰ Kane N (2007) 358.

⁶¹¹ Ibid.

*movement to that world for the colonized cannot recognize the colonized until he shifts to this other world.*⁶¹²

True liberation of both the oppressed and the oppressor in South Africa will entail recognition by both parties of the full humanity of each individual regardless of race, class or gender. It is a process requiring all South Africans to claim for themselves and to affirm for others nothing less than full humanity and dignity. Only when people are at peace with themselves, can they appreciate and live with the strengths and weaknesses of their fellow human beings. Psychological liberation, though not the only condition, is a necessary prerequisite for the realisation of true liberty.⁶¹³

Biko knew blacks could not continue to depend on whites for their liberation and what was being sought was not mere black visibility but real black participation.⁶¹⁴ He argued that liberals viewed the oppression of blacks as a problem that needed to be solved. Whereas in oppression blacks experienced a situation from which they couldn't escape at any given moment. There is a reality of constant struggle and not merely the whimsical need to solve a marginal problem as in the case of the liberals. That is why he said that blacks would speak with a greater sense of urgency on the matter of liberation.⁶¹⁵

In our context, a liberal does not only mean white people struggling for the emancipation of blacks from racial discrimination under apartheid. It also includes the collective feminist and advocacy body that has attempted to speak for rural women and theorize on solutions to the issues they face without actual consultation and a first hand appreciation for what is needed to realise their right to self-determination and equality. Liberal therefore means all those in a position of privilege who cannot understand the voice of poverty in rural South Africa and how this affects their ability to enforce their rights.

⁶¹² Ibid.

⁶¹³ Pityana BN *et al* (eds) (1991) 136.

⁶¹⁴ Ojo-Ade F (1989) 542.

⁶¹⁵ Stubbs A (ed) (1978) 22.

*“The liberal must serve as a lubricating material so that as we change the gears in trying to find a better direction for South Africa, there should be no grinding noises of metal against metal but a free and flowing movement which will be characteristic of a well-looked-after vehicle.”*⁶¹⁶

Black consciousness sought to show the black people the value of their own standards and urged black people to judge themselves according to these standards and not to be fooled by white society who made white standards the yardstick by which even black people judge each other.⁶¹⁷ Biko was against what he termed intellectual ignorance of white people who believed that their leadership and values was natural and thus the only legitimate way of being. He was further opposed to such a small group of people controlling the consciousness of the majority by denigrating their beliefs and insisting on the reliance on a foreign value system.⁶¹⁸

This is especially relevant if we are to contextualise the law and its processes. We must cause rural women to be subject to a forum that takes into account their value systems and how these affect their daily lives, and further be willing to actively engage with these systems in a bid to make law more accessible.⁶¹⁹

It takes time to educate the masses and raise their level of consciousness. But there are no short cuts because the struggle towards transformation and social justice does not entail spanning the gap in one stride. It is a painstaking and often protracted process whose victorious conclusion cannot be realised without the continuous support of politically conscious masses. The national struggle can only succeed if the masses are involved fully and consistently meaning they must achieve consciousness based on full knowledge. They believed that the future remained a closed book for as long as consciousness of the people remained flawed, simple and hazy from years of derision and subjugation.⁶²⁰

⁶¹⁶ Stubbs A (ed) (1978) 26.

⁶¹⁷ Stubbs A (ed) (1978) 33, see also Motsei M (2007).

⁶¹⁸ Stubbs A (ed) (1978) 24.

⁶¹⁹ Greenbaum B (2008) 86.

⁶²⁰ Ranuga T.K (1986) 184.

“We try to get blacks conscientised to grapple realistically with their problems and to attempt to find solutions to such problems and to develop a physical awareness of their situation, to be able to analyse it and to provide answers for themselves. The purpose behind it is really to provide some kind of hope; I think the central theme about black society is that it has got elements of a defeated society; people often look like they have given up the struggle. This sense of defeat is what is being fought against; people must not give into the hardship of life, people must develop hope and some form of security to be together and look at their problems and they must in this way build up their humanity.”⁶²¹

The integration envisioned by Biko was one where all members in a society are able to freely express themselves in a democratic society. Such a society takes into account the values and knowledge systems of not only the powerful minority but also takes heed to listen to the voices of and include the narratives of the ideologically marginalised majority. This includes the realisation of the value of indigenous practice and culture as a large component of the majority’s lived existence and creating a space for it in the dominant legal discourse to the inclusion of all other ways of being.⁶²²

Ideally, one does not need to plan for or actively encourage real integration. Once the various groups within a given community have asserted themselves to the point that mutual respect has to be shown then you have the ingredients for true and meaningful integration. At the heart thereof is the provision for each group to attain the envisioned self and attain its style of existence without encroaching on or being thwarted by another. Out of this mutual respect for each other, a realisation of our humanity through the humanity of others as envisioned by *ubuntu*, and complete freedom of self-determination, there will be an authentic fusion of the life-styles of the various groups; this is true integration.⁶²³

⁶²¹ Stubbs A (ed) (1978) 114.

⁶²² Stubbs A (ed) (1978) 24.

⁶²³ Stubbs A (ed) (1978) 24, see in general also Cornell D & Muvangua N (eds) (2010).

“Before it can adopt a positive voice, freedom requires an effort at dis-alientation....superiority? Inferiority? Why not the simple attempt to touch each other, to feel the other, to explain the other to myself?”⁶²⁴

All can become conscious according to Fanon who wanted the world to recognize with him the open door of every consciousness. He was hopeful and envisioned a world where it was possible for whites and blacks to become dis-alienated.⁶²⁵ He envisioned an integrated world where the plurality of culture was taken into account despite varying lived realities. He hoped for a world where each person embraced the ubuntu call for humanity and we are able to each realise our own humanity through the humanity others consciously extend to us. Part of that process was a return to the roots, culturally and spiritually.⁶²⁶

“To take part in the African revolution, it is not enough to write a revolutionary song; you must fashion the revolution with the people, and if you fashion it with the people, the songs welcome by themselves and of themselves.”⁶²⁷

Blacks in all walks of life were affected by the message of Black Consciousness. For the first time in their lives, they were able to walk tall and not feel sub-human or the negatives of a greater humanity represented by whiteness. The profound psychological impact of this realisation cannot be described.⁶²⁸ Thus in all fields, just as black consciousness sought to talk to the black man in a language that was his own we too should learn to speak to rural women in a language that is their own.

Attempts to deny the significance of the impact of Black Consciousness in South Africa are futile. Biko left South Africa a legacy of defiance/refusal which resists attempts to distort it just as he in life defied attempts to brand him, he continues to do so many years after his death.⁶²⁹ How then can we reconcile this notion of consciousness within the law, with the need to inject voices of rural women in the law to ultimately make the

⁶²⁴ Kane N (2007) 358.

⁶²⁵ Kane N (2007) 359.

⁶²⁶ Ojo-Ade F (1989) 543.

⁶²⁷ Stubbs A (ed) (1978) 34,35.

⁶²⁸ Pityana BN *et al* (eds) (1991) 11.

⁶²⁹ *Ibid.*

law more accessible? I submit that we must view this drive for consciousness within the spirit of *ubuntu* that calls us all to realise our humanity through realising the humanity of others. The ability to access freedom substantively can then be encouraged in a lasting manner when rural women actively engage with law and its processes in a forum that is more suited to respond to their lived reality.

4.4.2 Narrative Theory and Legal Culture

As outlined in the previous chapter, there is a plethora of legislative enactments which can be gleaned to have been promulgated with the intention of being beneficial to women in general.⁶³⁰ The supreme law of the land in its Bill of Rights bestows certain rights on all people, including rural women; the enforcement mechanism for realisation of all noted rights is mainly through the courts.⁶³¹ The Promotion of Equality and Prevention of Unfair Discrimination Act goes into great detail to ensure that all people in South Africa do not experience discrimination on any of the listed grounds including race and gender and empowers the High Courts to act as equality courts enforcing this right. The Domestic Violence Act comprehensively describes and prohibits behaviour that constitutes this violence and also empowers the court to act to enforce the rights contained therein. It goes a step further by imposing certain duties on the police to ensure protection of victims of domestic violence.⁶³² The Criminal law (Sexual Offence and Related Matters) Amendment Act responds to the increasing prevalence of sexual violence in South Africa and extends the definition of rape and sexual assault and also outlines the courts as the enforcement mechanism of choice in this regard.⁶³³

It is clear therefore that these laws can be gleaned to have been designed to the benefit of women, especially the last two which recognize specifically in their preambles the rising levels of violence (sexual and others) against women. However, the medium in which these laws are published may not always be accessible to rural women in South

⁶³⁰ As discussed in 3.4 Laws Promises, in Chapter Three above.

⁶³¹ Chapter 2 of the Constitution of South Africa Act 106 of 1998.

⁶³² As discussed in 3.4 Laws Promises, in Chapter three above.

⁶³³ As discussed in 3.4 Laws Promises, in Chapter three above.

Africa. Published in the national gazette which is available on hard-copy at the national printers and on-line, legislative enactments are not easily accessible to rural women. They do not have easy access to computers to access the online documents and further still they do not live in close proximity to institutions such as libraries which would have hard-copies of such documents. Even if they are able to access these documents, they are very dense in that the style and language used is not accommodating. This serves as a clear example of how legal culture is exclusive on the basis of class, and remains exclusive because it fails to realise how privilege makes access to certain forums easier than others. This is the reason why there is a continued reliance on courts as a forum for justice when it is out of reach for majority of the population due to the financial and other burdens.⁶³⁴

The legacy of apartheid is that literacy levels in rural areas are not as high as those experienced in urban areas, reversing this phenomenon is not an easy one, even though the right to education is one guaranteed progressively within available resources, under the Constitution.⁶³⁵ The preferred language of publication is more often than not English, although there are eleven official languages in South Africa. If published in another language, Afrikaans is the preferred one. The reasoning behind this can be understood as for consistencies sake it would be easier to publish an Act with fewer translations as this ensures less room for error. However this poses a problem for people who are not literate enough in the published languages to understand the intricacies of the style and tone used.⁶³⁶ Further still, even if one is able to read, write and speak fluently, as previously mentioned the style and tone used in the language of most acts is complex and more often than not requires a certain level of interpretive prowess to be able to make sense of the contents of these acts.

The Constitution provides that everyone has the right of access to courts if the nature of their dispute warrants it. It however goes on to provide that where appropriate another

⁶³⁴ Due to the voice of privilege being the dominant one in legal discourse therefore determining the forums through which we can access justice to the exclusion of other voices; poor voices which more often than not are female when it comes to enforcing the right to be free from all forms of violence. See Van Marle K (2009) 2 who ascribes this phenomenon due to a state of false consciousness manifest as a non-realization of the dominant voice of privilege and its power of exclusion.

⁶³⁵ See s 29 (1) of the Constitution of the Republic of South Africa Act 108 of 1996.

⁶³⁶ Motsei M (2007) 25.

impartial tribunal or forum can also be approached.⁶³⁷ However the chosen method of enforcement of these acts is through the formal court processes of the Magistrate and High Courts. Accepting that legislative enactments being legal in nature should be enforced by legal methods, there is something to be said for the culture of these institutions that is exclusive and therefore may not be the best method for enforcing these rights especially where immediate relief is sought.⁶³⁸

The infrastructure required to set up a court does not allow there to be easily accessible to women in rural areas. In most instances therefore, rural women must travel long distances to be able to access these services, an aspect which may serve as a deterrent.⁶³⁹ The court process is not accommodating, one must contend with archaic procedures and rules such as how to address the presiding officer, as well as a staggering amount of paperwork, worded in a complex legal style, that must be filled, filled and forwarded to all relevant parties. Outside of this complex dated process, there are also the costs involved. One must acquire legal representation when approaching a court for relief as generally they are the only ones vested with the powers to appear before the court.⁶⁴⁰ Private legal representation is rather costly and state counsels are not nearly enough to deal with the number of clients which means a delay in these processes which is physically and emotionally taxing.

Even in the instance where ordinary citizens are granted the ability to approach the court for relief without representation, they are still subject to the complexities associated with our ingrained legal culture causing this process to be daunting and discouraging. It should also be mentioned that these acts vest certain duties on government officials such as the police or clerks of the court, but no provision is made to train these people on the appropriate way to deal with their vested powers to the absolute benefit of victims.⁶⁴¹

⁶³⁷ See s 34 of the Constitution of the Republic of South Africa Act 108 of 1996.

⁶³⁸ Greenbaum B (2008) 94.

⁶³⁹ See Vetten L (2005) 4, as discussed under 3.3; Law and Legal Culture as Exclusive.

⁶⁴⁰ It must be noted that there are exceptions to this rule provided for within the contents of the various Acts which empower 'any other person' to appear on behalf of complainants under the Domestic Violence Act, so long as they have a material interest in the well-being of the complainant; see section 4 (3) of the Act.

⁶⁴¹ See Vetten L (2005) 7.

Once one gets past the preliminary procedures and appears before a magistrate the courtroom experience can be daunting, especially in cases of domestic or sexual violence where a victim must face the alleged perpetrator and relive the horror of past experience.⁶⁴² Further still if one does manage to get judgment in their favour, enforcing such judgment is often difficult as all the court can do is eventually incarcerate a judgment defaulter only once they are alerted to it which means another experience in the court process.⁶⁴³

These issues are indicative of the exclusion that is law and its culture. In response to the call for consciousness highlighted above; or rather in a return to the ordinary, narratives may be used to counter this exclusivity. As highlighted by the critical theories above, they can be used to humanise the law by injecting the voices of those marginalized groups who remain unheard by the law.⁶⁴⁴ By telling stories based on actual personal experiences or fictional accounts, narrative jurisprudence attempts to expose the universal mind-set of modern jurisprudence, its inherent flaws and the potential of other mind-sets to contribute positively to the development of law. Narrative method is then a critical medium useful in questioning the strict style of interpretation, constantly relied on by legal modernism, by attacking its claim to objectivity.⁶⁴⁵

Throughout the 1980s narrative jurisprudence was used in legal scholarship to expose the fact that law is made by human beings who are ultimately influenced by their own particular experiences and “pathologies” as noted by the theories above.⁶⁴⁶ This movement highlights stories told in the law and compares those stories to other narratives about different social or psychological experiences.

Imaginative forms of narrative jurisprudence use storytelling to depict a common experience with which readers are likely to identify to evoke a deeply unsure experience

⁶⁴² Motsei M (2007) and Krog A *et al* (2008) both highlight the difficulties that women face when engaging with the judiciary in an attempt to enforce their rights. Greenbaum B (2008) 85, describes the phenomenon of secondary victimization when a victim of sexual violence appears before the court in an attempt to seek relief.

⁶⁴³ Kok A (2008) 135.

⁶⁴⁴ See generally Delgado R (1989) and Minda G (1995).

⁶⁴⁵ Minda G (1995) 155.

⁶⁴⁶ *Ibid.*

in the reader.⁶⁴⁷ I believe that this use of narrative may be useful in causing rural women to embrace the law and accept its potential for change in their lives by depicting an experience of the law that they are likely to identify with, as well giving them healing from the negative personal perceptions left by a legacy of exclusion from the operations of law, under apartheid. It is also useful to jar the complacency of members of the legal fraternity and call to fore their failure to recognize the experiences of the unfamiliar other due to their privilege.⁶⁴⁸

Narrative studies have been useful tools for capturing the human element missing in law and became a powerful tool used by feminists and critical race scholars to show how the narrative views of minority groups were excluded or marginalized from mainstream discourse.⁶⁴⁹ The objective of the “outsider storytelling” by minorities, that is women and people of colour, was to bring out the voices of all people left out of the discourse of law.⁶⁵⁰

“The law and literature movement merely offers a different vantage point from which to view a different possibility for jurisprudence in legal studies, one that rejects the vision of law as disciplines rhetoric and neutral rationality divorced from context. Reading literary texts and engaging in literary criticism encourages lawyers and judges to approach law from a multicultural and post-modern perspective.”⁶⁵¹

As outlined by the theories mentioned above, much of social reality is constructed, and such realities are indeterminate and subject to interpretation.⁶⁵² These patterns of perception become habitual causing us to believe that they way things are the best that they can be, in an imperfect world. Alternative conceptions of reality are not explored or if they are, face rejection for being extreme or unlikely in the same manner that Mrs

⁶⁴⁷ Minda G (1995) 156; this ambivalence is particularly useful in order to ensure that we are never comfortable enough to assume that our society is sufficiently transformed. As argued by Langa P (2006) 354 and generally Cornell D (1993) who argue that transformation should be sustained to ensure that our law develops in line with the dynamic demands of our constitutional democracy.

⁶⁴⁸ Delgado R (1989) 2440.

⁶⁴⁹ Minda G (1995) 161, see also Delgado R (1989) 2439, Murphy JC (1993) 1260.

⁶⁵⁰ Minda G (1995) 161.

⁶⁵¹ Minda G (1995) 166.

⁶⁵² As discussed under 4.2 above.

Konile's testimony was rejected by the TRC and branded incoherent because she did not fit within the determined mould.⁶⁵³

Ideology (received wisdom) makes current social arrangements (or the status quo as described by the CLS movement) seem fair and normal and the conduct of those in power does not seem to them like oppression.⁶⁵⁴ One cure put forward for this is storytelling. According to Delgado, stories can shatter complacency and challenge the status quo. He insists further that they build a culture of shared understanding which can open up new windows into reality showing that there are more possibilities to life beyond the ones we currently imagine.⁶⁵⁵ They develop our imagination and teach that by merging elements from the story and reality we may create a world richer than either alone. Their graphic quality can stir imagination in ways which more conventional discourse cannot.⁶⁵⁶

As a means of critique, stories especially in the form of narratives are a powerful means of destroying mindsets as the backdrop against which legal and political discourse takes place.⁶⁵⁷ According to Delgado, most social interactions can divide people along two main lines, those in the out-group and those in the in-group; he provides further that several such groups can exist alongside each other concurrently.⁶⁵⁸

The in-group is the dominant group whose consciousness/lived reality is acceptable and forms what is deemed normal, fair, just and right. The out-group is the group whose consciousness is different than that of the dominant group comprised mainly of those

⁶⁵³ Delgado R (1989) 2414, see also Krog A et al (2008), Van Marle K (2005) 20, Van Blerk A E (1996) 94.

⁶⁵⁴ Van Marle K (2005) 20, who argues that the privileged members of society have a false consciousness about the state of affairs in the country. Blinded by their privilege they see their lived reality as the only way of being failing to realize that there are other realities burdened by hardship and poverty. See also Van Blerk AE (1996) 94 for a further exposition of the notion of false consciousness relied on by critical legal scholars.

⁶⁵⁵ Delgado R (1989) 2414.

⁶⁵⁶ Delgado R (1989) 2415.

⁶⁵⁷ Delgado R (1989) 2418; see generally also Murphy JC (1993) who illustrated how a project run in Maryland on domestic violence relied on the sharing of narratives by victims of this form of violence. The author notes that the initial resistance to change exercised by law reformers faded with the sharing of stories of violence; of difficulty in accessing relief under the law; of continued fear and subjection to this violence or the threat thereof; of disappointment with the law and its unfulfilled promises. The result of this exercise was the raising of the consciousness of the law reformers responsible for domestic violence legislation in Maryland. The new laws were thus more conscious of the lived reality of the women in Maryland who had to try and enforce their right to be free from violence.

⁶⁵⁸ Delgado R (1989) 2415.

whose voices have been suppressed and marginalized.⁶⁵⁹ He identifies this group as the main (but by no means the only) tellers of legal stories in order to create bonds, represent cohesion and develop a shared understanding and meaning of their lived reality.⁶⁶⁰ Stories of the out-group aim to challenge the in-group reality and circulate within the group to create some sort of counter-reality.⁶⁶¹

Subordinated groups have always told stories.⁶⁶² Delgado puts forward that a principal cause of demoralization of marginalized groups is self-condemnation; an internalization of the images society thrusts on them causing them to believe their lowly position is their own fault.⁶⁶³ These stories are recognized as an essential tool for their liberation and survival and can be used as a means of ‘psychic preservation’ and as a means of lessening their own subordination.⁶⁶⁴ He suggests that by becoming acquainted with the facts of their historic oppression these groups may gain healing. Stories may lead to an understanding of how one came to be oppressed and subjugated therefore causing one to stop perpetuating mental violence on oneself.⁶⁶⁵

Stories can also serve a destructive function, likened to the trashing phenomenon in critical legal studies.⁶⁶⁶ They can show what we believe to be ridiculous and show a way out of the trap of “unjustified exclusion” and understand when it is time to relocate

⁶⁵⁹ Ibid.

⁶⁶⁰ Delgado R (1989) 2412.

⁶⁶¹ This group creates its own stories as well, these stories/narratives remind the group of its identity in relation to out-groups and provide it with a form of shared reality in which its own superior position is seen as normal. See Delgado R (1989) 2412.

⁶⁶² Examples are given of how black slaves told stories about their pain and oppression through letters and song; Mexican-Americans composed ballads and stories detailing abuse at the hands of gringo justice, Texas Rangers and ruthless lawyers and developers who cheated them of their land; feminist consciousness-raising consists in part of the sharing of stories, of tales from personal experience on the basis of which the group constructs a shared reality about women’s status *vis-à-vis* men, Delgado R (1989) 2436.

⁶⁶³ Delgado R (1989) 2437; this argument has also been put forward by the Black Consciousness movement who argue that black people have come to internalise their subordination even though they are in that position through no fault of their own, see Biko S (2004) 69. Motsei M (2007) also argues that women have come to be in an inferior position through society’s views about them and their roles therein. See also Wing AK (1997) 952 and her argument on spirit injury.

⁶⁶⁴ Delgado R (1989) 2437.

⁶⁶⁵ Delgado provides further that stories about oppression, victimization and brutalization far from deepening despair of oppressed, may lead to healing, liberation and mental health. They also promote group solidarity, embolden the hearer who may have had the same thoughts and experiences but may have hesitated to give them voice. Having heard another express these thoughts may give the feeling of companionship, and realize they are not alone. See Delgado R (1989) 2437.

⁶⁶⁶ Van Blerk AE (1996) 96.

power.⁶⁶⁷ By this, engaging in what the critical theorists previously mentioned, hope to achieve that is testing the legitimacy of law, exposing the gap between its promises and the lived reality of the majority therefore, sowing seeds for possible transformation.⁶⁶⁸

Members of the in-group should listen to stories of all sorts to enrich their reality, which is not fixed but is rather constructed through conversations and interactions with each other. It is through this process that ‘ethnocentrism’ and the conviction that our way of seeing the world is the only way, when it is for some full of pain and exclusion, is both “petty and major tyranny.”⁶⁶⁹

Stories may also help oppressed groups through their effect on the oppressor. They can help destroy contentment, which is “born of comforting stories” and a major stumbling block to racial progress. “Stories are the oldest, most primordial meeting ground in human experience.”⁶⁷⁰ Their appeal will often provide the most effective means of overcoming “otherness” and forming a new community based on the shared story.⁶⁷¹

Stories enable one to see the world through others eyes, they humanize us and emphasize differences in a way that can ultimately bring people together. A story gives voice to those who were silenced and taught to hide their emotions and affords the hearer an opportunity to challenge their own assumptions, jolt contentment, lift their spirits and lower their defences.⁶⁷²

In light of the above functions of narratives, they can be used in three instances in relation to the law and the exclusive culture in which it is entrenched: when drafting, in raising awareness and in their enforcement. When drafting laws, it would be useful if the narrative of the interested parties were listened to, and if these stories of their lived experiences were taken into account when drafting, causing the laws to be more relevant and therefore allowing them to make more of an impact in the lives of ordinary citizens. It is a failure to do this that has led to the situation outlined below where I

⁶⁶⁷ Delgado R (1989) 2415.

⁶⁶⁸ Minda G (1995), see also Crenshaw K *et al* (eds) (1995); Delgado K & Stefanic J (eds) (2000); Douzinas C & Geary A, (2005); Van Blerk A K (1996) 96.

⁶⁶⁹ Delgado R (1989) 2439.

⁶⁷⁰ Delgado R (1989) 2438.

⁶⁷¹ *Ibid.*

⁶⁷² Delgado R (1989) 2440.

discuss why and how the law fails rural women in particular. Legislative enactments purported to be beneficial to a certain group of people should in the spirit of the constitutions call for equality, dignity and freedom, be as contextual as possible. The only means of achieving this

In relation to the second use of narratives, I submit that one can use narratives to educate rural women on the laws available to them and the potential benefit they hold for them. This is not to take away from the importance of the other two instances, I have however chosen to limit the scope of my work to just this aspect for the sake of thoroughness. I believe that this method allows one to overcome the barriers of language, medium and style that make these laws difficult for rural women to engage with and presents it in a way that is easy to interact with thus engaging in what has described as consciousness raising movement.⁶⁷³

Law necessarily accrues rights but also imposes burdens on all people and narratives can also be used to alert rural women to this fact. I believe this second instance would be most useful to rural women in achieving the above and believe further that using narrative method in this instance will do more than just educate women on their rights but it will also take further the project of healing and empowerment as they shall realise the potential of law, to interact with it and make it as relevant as possible in their lives. This is a project that includes using the law where beneficial to further ones self but also accepting a duty to be critical of the law in a bid to develop it and make it relevant.

The final instance deals with the enforcement of rights provided under legislative enactments. This is a call for all those officials involved in ensuring that women who are now aware of their rights, and have accepted the potential of law to change their lives, can approach them for relief and confidently claim these rights knowing that their story/narrative is relevant, that it shall be given voice and taken into account. What is involved here is contextualising rural women's experiences, hearing their voices and taking heed to secure any enforcement exercise within their context and lived reality encapsulated in their narratives.

⁶⁷³ Minda G (1995).

4.5 CONCLUSION

As previously mentioned what is necessary is a consciousness-raising project which allows rural women to embrace the role they have to play in the fight for substantive realisation of their rights to equality and freedom from violence. Only when they do this can they realise the potential of law to play a role in their lives despite its limitations. There needs to be a move towards consciousness when realising the manner in which our legal culture is exclusive of certain groups of people and how this necessarily affects the manner in which we enforce our rights. Courts are an adversarial and hostile forum premised on European ways of thinking and being which is exclusive of rural women because they subscribe to a different value system. It may be more useful to place the accessing of justice and the right to equality and freedom from violence within a forum grounded in customary law and practice to make it more accessible.

Despite the criticisms levelled against customary law, such as the promotion of certain patriarchal practices, it cannot be excluded as an option for much like other sources of law in South Africa it is legitimate and persistent. There must therefore be a drive to develop it and bring it in line with the constitutional principles of equality, freedom and dignity. All of these processes must take place keeping in mind the spirit of the principle of *ubuntu*. We must use our consciousness to construct new ways of being and living with ourselves and the unfamiliar other in a bid to realise our own humanity and the humanity of those less fortunate than us.

The narrative method can be employed to present the law to women in a medium that is easy to understand and access. It can be used to explain the law in a language and style that is better suited to ensure utmost understanding. The application of this simple method I believe can lead to a multitude of effects including making the court process more accessible by jarring complacency of the legal fraternity and the culture they are steeped in, as suggested by Delgado, in order to learn to listen to the voice of the unfamiliar other and allow room for alternative forums that may make exercise of rights more feasible.

The multiple functions of narratives can allow them to act as a potential vehicle for substantive emancipation, transformation and eventually integration of rural women's narratives in South Africa. In the first instance they serve as a method of critique as envisioned by Delgado, a method through which we can challenge the status quo by hearing the experiences of another and testing them against our own reality.⁶⁷⁴ In the second instance they may serve as a useful instrument for consciousness and serve as a means of delivering the story of emancipation for both women and the law (embodied in the will of those responsible for enacting it). Through this way stories can be used to highlight the roles of both these parties in the struggle for substantive recognition of rights as contemplated in the body of law. Finally they may act as a tool for communication in the three instances previously highlighted that is, injecting the voice of rural women into the law before it is drafted, disseminating laws that have already been enacted and during enforcement they may be employed to realise the best methods possible to ensure efficiency.

⁶⁷⁴ Delgado R (1989) 2440.

CHAPTER 5

CONCLUSION

The aim of this dissertation was to construct a post-apartheid narrative approach to the law in an attempt to bridge the gap between laws promises and rural women's lived reality in South Africa.

In the first instance I highlighted the manner in which poverty affects rural women and their ability to enforce their rights to equality, dignity and freedom from all forms of violence. I then showed how law fails to fulfil the promises made in legislation and other sources because it is steeped in an elitist and exclusive legal culture that does not hear/identify the voice of the marginalised/unfamiliar other. In the final instance I highlighted the need to develop a new approach to law. I thus employed the narrative method as a form of critique and a vehicle for consciousness in a bid to bridge the gap between laws promises and rural women's lived reality in South Africa.

The critical schools of thought highlighted above all rely on a consciousness approach when dealing with the law. This entails a call for consciousness for all to realise that privilege still determines people's ability to access justice. This is evidenced clearly through the reliance on courts as the main forum for enforcing ones rights. Krog and Motsei illustrated the issues women still face when they attempt to engage with the law including issues such as costs involved as well as the formality of language and procedures which operate to the exclusion of the non-elite.

In *There was this Goat* Mrs Konile's testimony was sidelined for its apparent incoherency but only upon entering her world and understanding her lived reality did her testimony being to make sense. Further than that was seen as a challenge to the grand narrative set at the commission by its refusal of easy forgiveness, determined truth and purported justice. In the same manner therefore we must learn to listen to the narratives of rural women. Although the stories shared may be incoherent or uncomfortable, it is

necessary to hear them if we are ever to truly move towards a substantive notion of equality for all.

What is needed is a contextualisation of law and its procedures in order to ensure that its promises are accessible by all. This means taking into account rural women's way of living and being and as suggested by Greenbaum and therefore developing this source of law within our constitutional democracy. Drawing on *ubuntu* and Black Consciousness I offer an alternative approach to law in an attempt to extend equality and social justice to rural women in response to this call for consciousness. This is done by highlighting the need to humanise the law by injecting the voices of the excluded other in the dominant legal discourse through the use of narratives. In order for this justice sought to be sustainable it is imperative to keep the people we seek to protect at the centre of any strategies developed. Rural women should therefore be involved in any developmental attempts designed to their benefit. In this way as Motsei showed, the heart is involved, and the possibility of true integration is experienced. Their story, their narrative must therefore be sought, heard and vindicated.

In line with the arguments put forward by Van Marle and Ndebele I argue that we must steer clear of the spectacle that is constitutionalism. The advent of democracy came with the promise of equality, dignity and freedom for all embodied in the constitution. However branded as spectacle it runs the risk of becoming another archaic document reifying the exclusive and elitist structures in society inherited as a legacy of apartheid. What is suggested is a return to the ordinary, a confirmation of the ordinary lived existence of the majority and not the spectacle that is law. In this way democracy remains alive and contextual and therefore relevant with more potential to cause change under our transformational aspirations.

I also highlighted the contingency of law as a social construct and therefore indicate the space for change and development for the benefit of the majority. Privilege necessarily permeates legal culture as majority of the members of the legal fraternity do not know the voice of poverty and deprivation and are therefore seldom able to respond

appropriately in the drafting of legislation. As described by Van Marle subject to false consciousness the privileged members of our legal fraternity see their position as normal and therefore fail to understand the existence of narratives outside of privilege and elitism. This call for consciousness therefore demands that we be aware of the varied lived experiences of people in south Africa and take this into account when attempting to make the law come alive in the lives of the ordinary people. Therefore we must engage in a politics of recognition as put forward by Nancy Fraser, a realisation and vindication of the various lived realities of women in South Africa.

Law acts as both a cause and a solution to poverty and can therefore not be completely excluded as a source of relief when attempting to better the lives of rural women. What is evident is that we need to reconsider the way we approach law and take heed to listen to the voices of those who due to a legacy of subjugation stand spoken for to their detriment. It is time to consider to what extent customary law and practice can be infused in to the law to make it more accessible for rural women especially who due to their poverty are particularly vulnerable.

Black man you are you own, was a slogan employed by the black consciousness movement to highlight the value and importance of indigenous knowledge systems. This still rings true in post-apartheid South Africa, especially in the rural areas which still rely primarily on these systems in their daily existence. Further they are recognized as a valid source of law under the constitution and should therefore be developed as part of mainstream legal discourse as opposed to kept in the margins like the people they influence daily.

I argued that the use of narratives can make this process possible if employed throughout the consideration of legislation; at drafting, enactment and enforcement. As suggested by Delgado they can serve as a medium through which the voice of the marginalised other can be heard at all three stages. Further than that they can serve as a vehicle for consciousness by jarring the complacency of those in a position of privilege and causing them to realise that their humanity is linked to the humanity of others.

Therefore only when we extend humanity to all, especially marginalised groups like rural women, can we truly realise our constitutions democratic aspirations on the journey towards transformation.

Accepting the possible existence of power structures within this group of women I argued for the possibility of employing this method in the dissemination of some sort of relief for rural women. This method I believe can open up a space for dialogue and consideration in which new ways of interacting with the law and each other are opened up. What I propose here is not an imposition of this method of critique but rather the idea that we should be open to listening/hearing. Hearing not only the voices of the marginalised but truly engaging with their lived reality. Only when this is done can we truly claim to be on a substantive journey to transformation realising our humanity along the way, as we attempt to realise that of others.

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