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Western Liberal Legalism and its Discontents: A Persepective from Post- Apartheid South Africa

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WESTERN LIBERAL LEGALISM AND ITS DISCONTENTS: A PERSPECTIVE FROM POST-*APARTHEID* SOUTH AFRICA[*]

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Much of the development in human rights is today reflected and understood through the lens of the meta-narrative of western legal liberalism, which inherently inhibits the full progress and utility of the rights discourse. Legalism and formalism work to legitimise the law, and make transformation and alternative formulations of notions of equality and rights impossible, thus perpetuating a status quo that ignores the empowerment of subaltern groups. This article argues in favour of changing the lens through which we appreciate law and legal processes today. Looking at the constitution of post apartheid South Africa, and subsequent case law, the author introduces the theoretical tool of an ethical reading of the traditional legal concepts - this moves away from interpreting the notions of equality and rights within established meta-narratives, making rights more meaningful and empowering.

Introduction

This contribution focuses on legal and constitutional transformation in post-*apartheid* South Africa and the need for the identification and utilisation of sites of resistance within (and outside) the law. Just as the founding violence persists in law, so does the founding *dream* that things could be otherwise, different – be thought anew.[1] This dreaming tends to be concealed and suppressed by injunctions to accept things as they are and to give up faith in the possibility that there exists *something better*. Ultimately then, the revolutionary or radical beyond of the law could also be seen to be contained within the law. It is therefore our ethical task to attach ourselves to the law (as we continue to consider our very detachment from the letter of the law) through a belief in the dream rather than through a perverse enjoyment of its founding violence. I call

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[*] This article is an amended version of a chapter in my doctoral thesis entitled *Developing a New Jurisprudence of Gender Equality in South Africa.* My sincere appreciation to my supervisor, Karin van Marle, for her inspiration and guidance.

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[1] CIXOUS, THREE STEPS ON THE LADDER OF WRITING 107 (Cornell and Sellers trans., 1993) writes on the novelty of dreams and dreaming:

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

here for the recognition of new *ethical* interpretations of the law, human rights and gender equality, which reach beyond the hierarchical dichotomies of the enlightenment[2] in order to embrace diversity and different views of reality within the post-*apartheid* South African context. In pursuit of a new style of thinking, I seek to re-figure and ethically re-interpret the right to gender equality[3] whilst keeping in mind the tension between the violence and the dream of law, as "[c]entral to a critical enquiry in law is the paradox or tension between law's potential and law's limits."[4]

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

[3] § 9 of the final Constitution of the Republic of South Africa, 1996 provides that:

> 9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law;
>
> 9(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designated to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken;
>
> 9(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, *gender*, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;
>
> 9(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination;
>
> 9(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[4] Van Marle, *Gender mainstreaming – An ethical feminist consideration* 12 (2005) (unpublished manuscript in author's possession). Van Marle rightly places emphasis on the need to 'call things into question'. Throughout this journey I keep in mind the dangers of "incorporationism" which Scales describes as a process through which marginal voices are *made to believe* that they now have a place within the existing system. *See also* Scales, *The emergence of a feminist jurisprudence: An essay*, 95 YALE L.J. 1382 (1986).

I open the critique by addressing the problems inherent in western, positivistic jurisprudential thought. Objective and abstract styles of legal reasoning are challenged and re-thought and an argument is forwarded for the transformation of the legal system, which in turn forces us to confront the ethical considerations of the law's violent dealings with actual human beings. It is thus not a naïve endorsement of the law and its capacity, but a reminder of the violent limits positive law imposes on the future of a justice yet-to-come.[5]

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

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

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

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[5] Van Marle, *Lives of action, thinking and revolt – A feminist call for politics and becoming in post-apartheid South Africa*, 19 S. AFR. PUB. L. 605, 607 (2004).

[6] DOUZINAS, THE END OF HUMAN RIGHTS 374 (2000). *See also* Douzinas, *Human rights and postmodern utopia* 200 LAW AND CRITIQUE (2000) and Van Marle, *In support of a revival of utopian thinking, the imaginary domain and ethical interpretation*, 2 TYDSKRIF VIR SUID-AFRIKAANSE REG/J. S. AFR. L. 501 (2002).

[7] Davies understands transformation as follows:

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

See DAVIES, ASKING THE LAW QUESTION: THE DISSOLUTION OF LEGAL THEORY 205 (2002).

[8] Van Marle, *supra* note 6, at 605-606, draws our attention to the dilemma that the enthusiastic embracing of human rights contributes to "an absence of action, thinking and revolt". I submit in this chapter that this may indeed be so, but that we should also, somehow,

The South African Constitutional Court has abandoned formal interpretations of gender equality in favour of substantive interpretations, but I argue below that this approach does not have far-reaching enough effects. The central assertion is that this fundamental right should be interpreted *ethically* along the lines of assertions made by Drucilla Cornell and Karin van Marle.

In moving towards the development of an utopian and ethical jurisprudence of care it is necessary to recognise from the outset that western law has evangelical, hegemonic and patriarchal tendencies which impact negatively on those who do not fit the 'ideal' of the law of western men. Accordingly, in order to listen to and respond to the different voices of others, there is a need for ethical spaces of openness to difference, care and compassion.

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

I. A critique of dominant legal narratives

> And their judges spoke with one dialect,
>
> But the condemned spoke with many voices.

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hold onto the dream of a better future promised by human rights, whilst at the same time not closing off spaces for "continuous contestation and questioning".

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

[10] Van Marle, *supra* note 6, at 606.

[11] *See* IRIGARAY, THE WAY OF LOVE x-xi (Bostic and Pluhacek trans., 2002).

> And the prisons were full of many voices,
>
> But never the dialect of the judges.
>
> And the judges said:
>
> 'No one is above the Law.' [12]

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

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

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

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

Similarly, the doctrine of legal positivism formulates law as a determinable and empirical science. This entails an outright rejection of the law having a

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[12] LEONARD, SITUATIONS THEORETICAL AND CONTEMPORARY, *quoted in* Maley, *Beyond the law: The justice of deconstruction*, 10 L. & CRITIQUE 49, 59-60 (1999).

[13] Marinos Diamantides, *Ethics in law: Death marks on a still life: A vision of judgement as vegetating*, 195 L. & CRITIQUE 209. It is suggested that lawyers find an alternative to traditional legal theory as the precepts of determinacy, objectivity and neutrality have failed us and, in the light of this failure, we need to imagine new ways to live together. *See* Singer, *The player and the cards: Nihilism and legal theory*, 1 YALE L.J. 9, 266 (1984). Singer submits that "[w]e cannot answer our question of how to live together by applying a non-controversial rational method. We will have to take responsibility for making up our minds".

metaphysical or natural existence. In this sense, positivism merely reinforces the legal *status quo* by placing unquestionable faith in the legal canon.

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

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

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

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

In practice, legalism, formalism and positivism remain the dominant language(s) of the western world and the typical outlook of most western legal professionals and academics. Here we encounter another relation, that with traditional liberalism. Legal positivism in particular is perceived to be fundamental to the constitution of western legal thought. Positivist jurisprudence is congenial to those who seek to defend rightist economic liberalism as positivism is the ultimate guarantor of the 'free' market and as it is perceived to be removed from the arena of politics, morality and ethics. It is the key reason why lawyers come to accept the 'official' story of law as legal reality and why they tend not to question the nature and purpose of law, but

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[14] LAWRENCE, STUDY OF THOMAS HARDY AND OTHER ESSAYS 11 (1985). Lawrence here is interestingly targeting the laws proposed by the suffragettes. Although he sees their struggle for emancipation and empowerment to be a worthy one, he also maintains that they are missing the point. Something *other* than increased regulation should be attempted. *See also* Davies, *supra* note 8, at 24-25.

take it as a given. It also helps to explain why the law comes to assume the status of objectivity and why judges become the seekers of universal Truth in the Platonic sense of the word.[15]

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

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

> [B]y recognising the impossibility of easy, logical answers we can free ourselves to think about the questions in a more constructive and imaginative manner. Law cannot be successfully separated from politics, morals, and the rest of human activities, which is an integral part of the web of social life.[16]

The overlapping and interwoven problems outlined above tend to convince that we need to move beyond western liberalism and legal positivism if we hope to embrace the diversity within and around us as legal subjects and lawyers. It is also important to move beyond these unstated norms, as the continued application of the law 'as it is' contributes to the continued oppression of women and other marginalised groups and individuals.[17]

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[15] CAVARERO, FOR MORE THAN ONE VOICE: TOWARD A PHILOSOPHY OF VOCAL EXPRESSION 8, 13, (Kottmann trans., 2005) places in question the tradition of metaphysics since Plato which has posited a philosophical affinity for "an abstract and bodiless universality" where the word "does not come out of any throat of flesh". This programmatic lack of attention to the uniqueness of the voice, is, according to Cavarero a way of preserving the canonical text at the expense of understanding the act of speaking as relational.

[16] Olsen, *Feminism and critical legal theory: An American perspective*, *in* FEMINIST LEGAL THEORY VOL. 1 473 (Olsen ed., 1995).

[17] Young identifies the five faces of oppression as exploitation, marginalisation, powerlessness, cultural imperialism and violence. *See* YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 48-63 (1990). To illustrate the fact that the discourse of oppression makes sense of much of our social experience, Young analyses oppression as a social construction. She opens

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

II. The Text of the Law and Human Rights

Western liberal legalism constructs the unitary subject (atomistic individual) of the law and human rights discourse where this subject is in conflict with others, and yet formally equal to them. Freedom and autonomy as the values of this form of legalism spring from feelings of vulnerability and the fear that the existence of an other could lead to the annihilation of the self. Therefore, emphasis is placed on *enforcing* human rights *against* others, and consequently duties and responsibilities take a back seat. The 'holders' and 'enforcers' of rights are reduced to the generalised white, middle-class male who determine when and how harm is done and to whom. This reductionist approach to law renders women and other 'outsider' groups and individuals, as well as the subversives, subalterns and subterraneans amongst us, silent.[18]

In an attempt to decentre the centre, the underlying thesis developed here is that community, compassion and care – valued traditionally in the private sphere - need to be (re)introduced into legal and human rights discourse in order to break the silence. In other words, a privileging of uncertainty and fluidity is needed in order to re-imagine and reconstruct the legal domain.[19] If this is achieved, there would no longer be clear boundaries between self and other or subject and object. This new way of thinking has the potential to lead

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her chapter entitled "Five faces of oppression" by quoting from Weil:

> Rape is a terrible caricature of love from which consent is absent. After rape, oppression is the second horror of human existence. It is a terrible caricature of obedience.

[18] *See, for example* LACEY, UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY 44, 193 (1998). She argues that we must try to alter law so as to make it more receptive to the arguments of the powerless (p.44). She also supports the transformation of law for it to become more "polyphonous" and inclusive (p.193).

[19] IRIGARAY, THINKING THE DIFFERENCE 78 (Montin trans., 1994) makes a speculative appeal for the development of sexuate rights or women's laws in order to unsettle the legal system as a whole. She relies on the notion of 'femininity' as a condition of disorder and disruption and thus centralises sexual difference in her thinking on rights. These rhetorical arguments have been a part of Irigaray's work for many years and culminates in her conception of *ecriture feminine* which seeks to recover the repressed feminine, the unacknowledged body and give them a place within language. Her work in this area is particularly provocative. *See also* IRIGARAY, AN ETHICS OF SEXUAL DIFFERENCE (Burke and Gill trans. 1993).

us to connection(s) – the flowing and blending of boundaries that both separate *and* connect us.

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

Should the others of the law, such as women, wish to be heard they must speak the language of their oppressors. In this way, unique voices are drowned out or dismissed in favour of traditional legal texts and rules – denominations, classifications and categories.[20] The concern addressed below is that the monovocality of the law as it is can only lead to injustice.

On the other hand, perspectival social reality can be (re)constructed through a network of multiple stories hitherto unheard.[21] For this reason, the postmodern initiative convinces that the enlightenment project - which holds that the world's diverse communities have to see things the same way, the rational way, the *correct* way - must be reconsidered.[22]

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[20] *See* Goodrich, *Maladies of the legal soul: Psychoanalysis and the interpretation of law*, *available at* http://www.wlu.edu/-lawrev/text/543/Goodrich.htm.

[2122] *See* Benhabib, *Sexual difference and collective identities: The new global constellation* in VISIBLE WOMEN: ESSAYS ON FEMINIST LEGAL THEORY AND POLITICAL PHILOSOPHY 137 (James and Palmer eds., 2002) where she states the following with regard to perspectival reality:

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

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

Should we choose to declare the victory of western liberalism and the end of history[23] we choose also closure and what Costas Douzinas refers to as the end of the utopian and transformative possibilities of a human rights culture.[24]

Following this Douzinasian utopianism, instead of declaring the wholesale victory of western liberalism after *apartheid*, it is essential to (re)interpret human rights and the right to gender equality within the 'new' South African context, taking into account difference(s), and the need to care responsibly for, with and towards others, without denying the inherent worth of the person or the value of diversity.

III. The South African Constitution(s) and the 'end' of Apartheid

> We cannot stop criticising the present and we cannot do that without adopting the position of the future; but similarly, we can never remove ourselves sufficiently from our here and now to adopt the redemptive position.[25]

The post-*apartheid* South African Constitution(s)[26] require lawyers to abandon the formalism, objectivism and reductionism that characterised the

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[23] FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 46 (1992). The danger of declaring the victory of liberalism and liberal human rights is reflected in Fukuyama's statement that the purpose of history has come to an end:

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

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

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

[24] *See generally* DOUZINAS, THE END OF HUMAN RIGHTS (2000).

[25] Douzinas, *Human rights and postmodern utopia*, L. & CRITIQUE 200, 238 (2000).

[26] The interim Act 200 of 1993 and the final Act 108 of 1996.

law under the previous oppressive regime.[27] These Constitutions and their Bills of Rights have been hailed as bridges from the past to the future – a triumph of human rights. However, in reclaiming the both past and present it is necessary to re-think the world and our place in it in terms of a future-directedness.

In his insightful discussion of the notion of a transition to a constitutional democracy Andre van der Walt analyses the metaphor of the South African Constitution as a bridge between the past of unfair discrimination and the future of constitutionalism.[28] The 'Post-amble' to the 1993 interim Constitution introduces the metaphor of a bridge as follows:

> This Constitution provides *a historic bridge* between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.[29]

Ettienne Mureinik extends this conception of the interim Constitution as a bridge that facilitates the transition from a culture of authority to a culture of justification, entrenching the image of the Constitution as a bridge that spans the abyss of potentially violent transition.[30] This interpretation of the bridge metaphor has become established in South African constitutional discourse and in popular consciousness as a powerful image for social, political and legal transformation and progress. The bridge is thus seen as "an instrument of escape and liberation, of linear movement from old to new, from inside to outside…".[31] Regarded in this way, the bridge metaphor is the expression of a wish to break away from a violent and divided past and to complete the transition, once crossed. The point of the exercise is to cross the bridge – make the transition and get it over and done with. It is a process of *forgetting*.

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[27] *See* Botha, *Metaphoric reasoning and transformative constitutionalism (Part 2)*, 1 TYDSKRIF VIR SUID-AFRIKAANSE REG/J. S. AFR. L. 20 (2003).

[28] Van der Walt, *Dancing with codes – Protecting, developing and deconstructing property rights in a constitutional state*, 118(2) J. S. AFR. L. 258 (2001).

[29] Constitution of the Republic of South Africa, Act 200 of 1993. My emphasis.

[30] *See* Mureinik, *A bridge to where? Introducing the interim Bill of Rights*, 10 S. AFR, J. HUM. RTS. 31, 31-32 (1994). For an analysis of Murienik's notion of the switch from a culture of authoritarianism to the constitutional culture of justification, see Van der Walt and Botha, *Democracy and rights in South Africa: Beyond a constitutional culture of justification*, 7 CONSTELLATIONS 341 (2000).

[31] Van der Walt, *supra* note 29, at 260.

Although many constitutional theorists subscribe to this interpretation of the bridge metaphor as crossing from old to new and not looking back, Van der Walt argues that this metaphor places a particular theoretical spin on the discourse of constitutional transformation. This theoretical spin denies and suppresses other (utopian) interpretations of, and discourses about, transition and constitutionalism.[32] Van der Walt thus deconstructs this dominant metaphor of transformative constitutionalism by establishing that the image of *apartheid* land law and of transformative land law as two stationary positions on either side of the bridge is unsuitable. He introduces a new metaphor – that of dancing/movement:[33]

> However, even when we trade the static imagery of position, standing, for the more complex imagery of dancing, we still have to resist the temptation to see transformation as linear movement or progress – from authoritarianism to justification, from one dancing code to another, or from volkspele jurisprudence to toyi-toyi jurisprudence… I suggest that we should not only switch to a more complex metaphorical code such as dancing when discussing transformation, but that we should also deconstruct the codes we dance to; pause to reflect upon the language in terms of which we think and talk and reason about constitutionalism, about rights, and about transformation, and recognize the liberating and the captivating potential of the codes shaping and shaped by that language.[34]

Van der Walt convinces that we should "continually dare to imagine alternatives" and to "open our imagination to the possibility that things can be different."[35] In this sense he endorses the understanding of human rights as instruments of ethics. Human rights should thus reflect ethical concerns for the other and the duty to respect the singular and unique experiences of the other.

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[32] Van der Walt, *supra* note 29, at 261.

[33] Van der Walt, *supra* note 29, at 262. Here Van der Walt makes reference to the popular 'madiba jive'.

[34] Van der Walt, *supra* note 29, at 262-263.

[35] Van der Walt, *supra* note 29, at 263. As he states "[o]nce clear meanings are out of the house, we can allow language to dance on the table". This approach may then allow us to speak to the other in the language of the other – that is, without naming and appropriating with words but by turning to a language which creates new meanings. IRIGARAY, *supra* note 12, at ix, also concentrates on the need for a 'new' language. In this work she proposes ways of preparing a place of proximity and nurturing ways to nearness which are dependent on the transformation of speech and speaking-positions and related to the experience of listening-to.

A human rights society in this sense would always look to re-definitions and re-conceptualisations and to new possibilities and subjectivities:

> [t]he time of such societies is the future because their principle is always-still to be declared and met. But a society of human rights operates also a (non-essential) theory of the good, and becomes a community of obligation to the singular, unique other and her concrete needs.[36]

The (im)possible justice of human rights is therefore based upon a position of proximity and not disinterested detachment, on concern and closeness and not abstract universality. The concrete needs of the other are what must come first according to this interpretation.[37]

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

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

i. The Constitutional Court's Equality Jurisprudence Revisited

In President of the Republic of South Africa v. Hugo,[38] Justice Goldstone introduced the concept of "equal dignity" to the interpretation of equality rights.[39] He explains that the purpose of the prohibition on unfair discrimination is to create a society in which the inherent dignity of individuals is protected:

> The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all

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[36] Van der Walt, *supra* note 29, at 263.

[37] Douzinas, *supra* note 26, at 380.

[38] (1997) 6 B.C.L.R. 708 (CC).

[39] *Id.* at ¶ 40-41.

> human beings will be accorded equal dignity and respect, regardless of their membership of particular groups.[40]

As a result of this focus on the dignity of the individual, the majority of the Constitutional Court in *Hugo* found that an imprisoned father had not been unfairly discriminated against as his dignity had not been impaired when only mothers of children under the age of twelve years were released from prison under a presidential pardon. This case illustrates the gender stereotyping still prevalent in the reasoning of the Court as mothers were released to care for their children, but fathers, such as Hugo, were left to serve out their prison sentences as fathers are not perceived to be the nurturers of minor children.

Hugo was followed by Prinsloo v. Van der Linde[41] and Harksen v. Lane[42] where the Court adopted a similar approach to the one articulated by Goldstone. As Warren Freedman puts it, the latter decisions appear to reconfirm a more formal and individualistic approach to equality by once again placing dignity at the centre of the enquiry into unfair discrimination.[43]

The problem with a formal interpretation of the right to (gender) equality has been acknowledged by South African jurists and for this reason there have been strong arguments to recognise a substantive interpretation of equality which does not focus on individual dignity.[44] Such an interpretation of the right to equality requires contextual adjudication where *historical disadvantage* forms a central concern. Concrete needs and circumstances are granted legal importance and post-liberal philosophies influence to a limited extent the interpretation of this right.

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[40] *Id.*at ¶ 41. The Justice adopted this view from the equality jurisprudence of the Canadian Supreme Court in Egan v. Canada, (1995) 124 D.L.R. (4th) 609; (1995) 29 C.R.R. (2d) 79. *See also* the judgment of L'Heureux-Dube J. in Egan v. Canada at 106 as well as the judgment in National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1998 12 B.C.L.R. 1517 (CC) at ¶ 27.

[41] 1997 6 B.C.L.R. 759 (CC).

[42] 1997 11 B.C.L.R. 1489 (CC), 1998 1 SA 300 (CC).

[43] Warren Freedman, *Formal versus substantive equality and the jurisprudence of the Constitutional Court in National Coalition for Gay and Lesbian Equality* v. *Minister of Justice 1998 12 BCLR 1517; 1999 1 SA 6 (CC)*, 63(2) TYDSKRIF VIR HEEDENDAAGSE ROMEINS-HOLLANDSE REG/J. CONTEMP. ROMAN-DUTCH L. 314, 318 (2000). *See also* Davis's criticism of the connection between the rights of equality and dignity in Davis, *Equality: The majesty of legoland jurisprudence*, 116 S. AFR. L.J. 396 (1999).

[44] *See* Albertyn & Goldblatt, *Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality*, 14 S. AFR. J. HUM. RTS. 248 (1998).

ii. A Substantive Vision of Equality

Cathi Albertyn and Beth Goldblatt argue that the objective of equality is not to recognise the inherent dignity of each individual, but to provide individuals with the (equal) opportunity to advance and develop their human potential and social, economic and legal interests:[45]

> The challenge of achieving equality within this transformation project involves the eradication of systemic forms of discrimination and material disadvantage based on race, gender, class and other forms of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.[46]

They therefore formulate the following as an alternative equality test:[47]

- The equal protection subsection of the clause must be interpreted substantively in the light of a more integrated approach of the clause as a whole.
- Discrimination must not be presumed but must be given its proper connotation of harm and prejudice. Unlisted groups must be considered on the basis of harm caused to the individual due to his or her

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

[46] Albertyn & Goldblatt, *supra* note 44, at 249.

[47] Albertyn & Goldblatt, *supra* note 44, at 273.

membership of a group rather than with reference to the value of dignity.

- The court should consider the location of the complainant within his/her social group and the interests affected by the impugned act when considering whether the impact of the act has resulted in (personal and/or group) disadvantage.
- The court should look at whether the discrimination was permissible (fair) or impermissible (unfair) by focussing on disadvantage rather than on dignity. This stage of the enquiry should be based on moral and political values underlying the equality right. If the act is found to be unfair the limitations clause should then be used to consider whether the act is justifiable for important social ends.[48]

Here the authors place less emphasis on liberal human rights discourse and more emphasis on the need to determine the right to equality within social and relational contexts. Their theoretical stance is underpinned by the belief that societal stereotypes and patriarchal attitudes need to be addressed and transformed. The *historical location and societal context* of the individual are thus highly relevant, and *group disadvantage* an integral part of this alternative, value-laden equality test. The individual before the law should not be seen as atomistic, but situated, unique, concrete and interdependent.

Following these criticisms of the Constitutional Court's equality jurisprudence, the question of whether the Court should adopt a substantive or formal interpretation of equality was again raised in National Coalition for Gay and Lesbian Equality v. Minister of Justice.[49] The Court found in the latter case that the common law and statutory offences of sodomy discriminated unfairly against gay men on the basis of both gender and sexual orientation and could not be justified in terms of the limitation clause of the final Constitution.

In an *amicus curiae* submission the Centre for Applied Legal Studies (CALS) argued that by focussing on dignity, the Constitutional Court had not given enough weight to the concept of substantive equality. It was further argued that the Court should adopt a new interpretation of section 9 (the equality clause), since its interpretation of section 8 of the interim Constitution had failed to recognise substantive equality. Justices Ackermann and Sachs

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[48] § 36 of the final Constitution Act 108 of 1996 and the previous § 33 of the interim Constitution.

[49] 1998 12 B.C.L.R. 1517 (CC); 1999 1 S.A. 6 (CC).

rejected the *amicus curiae* argument. Ackermann held that the Court has recognised that the purpose of the equality clause is a remedial or restitutionary one[50] and Sachs J argued that the Court should continue to emphasise respect for dignity when faced with equality infringements.[51]

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

> [I]n the final analysis, it is the *impact* of the discrimination on the complainant or the members of the affected group that is the determining factor regarding the unfairness of the discrimination.[52]

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

IV. Ethical Interpretations of the Right to (Gender) Equality

> Feminism demands the enlarged mentality that allows the imagination to run free.[53]

Cornell maintains that all human beings should be considered to be of equal and unique worth.[54] Her configuration of the "imaginary domain" as a right

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[50] *Id.* at ¶¶ 60, 61.

[51] *Id.* at ¶¶ 126, 129.

[52] *See* National Coalition, *supra* note 49, at ¶ 19.

[53] CORNELL, JUST CAUSE: FREEDOM, IDENTITY, AND RIGHTS 7 (2000).

[54] *See* in particular CORNELL, AT THE HEART OF FREEDOM: FEMINISM, SEX, AND EQUALITY (1998) [hereinafter CORNELL (1998)] and THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY AND SEXUAL HARASSMENT (1995) [hereinafter CORNELL (1995)]

encourages us to grant each individual the chance to live a uniquely self-created life - an essential right of personality.[55] The aesthetic idea(l) of the imaginary domain denotes the psychic and moral space in which women as "sexed creatures who care deeply about matters of the heart" are able to re-imagine who they are for themselves.[56]

For Cornell the imaginary domain is the space of the 'as if' in which beings imagine who they may be if they made themselves their own end.[57] This imaginary domain is the political and ethical basis of the self-representation of one's (sexuate) being. This links up with the Kantian ideal that the most precious of rights is the right to freedom, but that individuals may be legally coerced to harmonise their freedom with that of others.[58] This subjective account of rights has possibly been the most controversial in traditional human rights discourse because it may be perceived to threaten the ideal of community by replacing it with a western capitalist notion of the possessive and defensive individual.[59] Cornell, however, explains that the recognition of the imaginary domain does not necessarily go hand-in-hand with a subjective conception of right. She acknowledges the importance of community and of close personal relationships and argues that the right to represent one's own (sexuate) being allows intimate associations that have historically been prohibited by law.[60]

In her discussion of human rights, Cornell addresses the question as to whether the imaginary domain is a western, liberal concept based on imperialist principles and the central value of the individual.[61] Her argument in defence of the imaginary domain returns us to what John Rawls would call a philosophical

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[55] Cornell (1998), *supra* note 54. Cornell's use of the term "imaginary domain" is interesting. In the archaic sense of the word, a domain constitutes "landed property which one has in his [sic] own right". It is thus an indicator of possession or ownership. It is also an indicator of control over something, a realm of human control or a mathematical aggregate. *See Webster's Third New International Dictionary of the English Language Unabridged* (1993 edn., Merriam-Webster). Using "imaginary" in conjunction with "domain" thus presents us with what could be interpreted as an understanding of utopia. The imaginary domain is thus according to this reading an imaginary but specific 'place' or 'right to a place' which cannot be found on a Cartesian map.

[56] Cornell (1998), *supra* note 54, at x.

[57] Cornell (1998), *supra* note 54, at 8.

[58] KANT, CRITIQUE OF PRACTICAL REASON (1956) is one of the foundations of modern jurisprudence according to which the moral will is free because it finds all its determinations in itself.

[59] Cornell (1998), *supra* note 54, at 159.

[60] Cornell (1998), *supra* note 54, at 167.

[61] Cornell (1998), *supra* note 54, at 151ff.

conception of our *equal worth* as persons.[62] Women (and men) must be "imagined and evaluated as free persons" and for this reason all forms of egalitarian legislation must be tailored so as to be consistent with their freedom.[63]

The imaginary domain is thus a utopian ideal - a vision of something truly new, "a world in which we all share in life's glories".[64] Cornell reminds us that it is the dream itself that proves the possibility of change.[65] She thus argues that controversial legal and human rights issues should be understood in the light of her imaginary domain which is the projected bodily integrity and sexual *imago* that the psychoanalytic Lacanian "mirror stage" installs in each of us early in life:[66]

> The imaginary domain recognises that literal space cannot be conflated with psychic space and reveals that our sense of freedom is intimately tied to the renewal of the imagination as we come to terms with who we are and who we wish to be as sexuate beings. Since, psychoanalytically, the imaginary is inseparable from one's sexual imago, it demands that no-one be forced to

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[62] *See* RAWLS, A THEORY OF JUSTICE (1972) wherein Rawls constructs the fiction of natural man contracting behind a 'veil of ignorance' that conceals all individualising characteristics from the contractants. Rawls thus seeks to express his concept of justice by concentrating on what people would agree to if they were free to make that choice. Rawls has been criticised for the liberal individualism inherent in this theory. *See* BENHABIB, *supra* note 10, at 166-168 where she states that Rawlsian agents behind the veil of ignorance are disembodied and disembedded selves, who are expected to reason from the standpoint of everyone else in the *same position.* She adds that "[n]either the concreteness nor the otherness of the "concrete other" can be known in the absence of the *voice* of the other" (emphasis in the original).

[63] CORNELL (1998), *supra* note 54, at 159.

[64] CORNELL (1998) *supra* note 54, at 186.

[65] CORNELL (1998), *supra* note 54, at 186.

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

> have another's imaginary imposed upon herself or himself in such a way as to rob him or her of respect for his or her sexuate being.[67]

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

In the South African context, Karin van Marle supports Drucilla Cornell's theory of the imaginary domain, equivalent rights and ethical feminism, which, she believes, provides the best insight for the processes of reconstruction and constitutional transformation in South Africa.[68] Her theory provides for the affirmation of the feminine (and feminine difference) without being essentialist. In other words, ethical feminism is sensitive towards difference, not only between men and women, but also among women themselves. Ethical feminism is, according to Van Marle, sensitive to the multiple contexts, stories and needs of our heterogeneous and historically divided society.

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

> If there is to be a feminism at all, as a movement unique to women, we must rely on a feminine voice and a feminine `reality' that can be identified as such and correlated with the lives of actual women. Yet all accounts of the feminine seem to reset the trap of rigid gender identities, deny the real differences among women (white women have certainly been reminded of this danger by women of colour), and reflect the history of

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[67] CORNELL (1995), *supra* note 54, at 8.

[68] *See* Van Marle, *Some perspectives on sex, gender, difference and equality*, S. AFR. PUB. L. JOURNAL 461 (2000) and Van Marle, *Towards an ethical interpretation of equality* (2000) (doctoral thesis) [hereinafter Van Marle, doctoral thesis].

> oppression and discrimination rather than an ideal to which we ought to aspire. To solve this dilemma we must return to the significance of the feminine.[69]

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

But how can the feminine (or any cultural difference for that matter) be affirmed without relying on essentialist stereotypes? Cornell supports the psychoanalytic approach that describes the feminine as a disruptive force.[70] According to this approach the feminine is not celebrated *because* it is The Feminine, but because it stands for the heterogeneity that undermines the "logic of identify".[71] She claims that this position demonstrates how the feminine is produced within a particular system of gender representation. The feminine acts as a disruptive force, a promise that remains to be fulfilled. A journey to a u-topia, a place which does not exist and yet a journey worth embarking upon.[72]

Ethically speaking, therefore, we need to be reminded that there is more to the story(ies) of woman or other outsiders than meets the eye, and that there is more than one dance. Therefore we should *not* attempt to introduce a new monovocal way of representing women to replace previous ones. Because there is no Ultimate Representation of Woman, the 'truth' of woman as absence or lack should also be problematised. The feminine should act as a disruptive force of the current system, and at the same time open a space for a future where women's stories can be heard with attentiveness and responsiveness.[73]

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[69] Cornell, *The doubly-prized world: Myth, allegory and the feminine*, 75 CORNELL L. REV. 644, 645 (1990).

[70] *Id*, at 659.

[71] *See generally*, ADORNO, NEGATIVE DIALECTICS (1973) for an analysis of this meta-logic.

[72] The Xhosa proverb *Kukude e-Bhakhuba* is an indigenous illustration of this journey. Directly translated it means "it is a great distance to Bhakubha". *Bhakhuba* is a metaphoric expression of a place both anywhere and nowhere – an imaginary place which suggests a great distance from a longed-for place. *See* CALANA, XHOSA PROVERBS 42 (2002).

[73] CAVARERO, *supra* note 15, at 12, 207 explains that western systems of patriarchy have been restrictive in their theorising of the voice "in general" at the expense of the body:

V. A Return to the Call of the Ethical

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

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

Karin van Marle is an exponent of an ethical interpretation of gender equality[74] based upon an understanding of Drucilla Cornell's idea(l) of ethical feminism. She explains the significance of the intersection between public space, equality and justice, and submits that an "ethical approach to equality needs a 'slowness', a 'strategy of delay', a careful reading".[75] Van Marle understands the ethical as an "openness to difference and the acceptance of the impossibility of ever fully knowing each other's differences".[76] In her view, the ethical imperative demands that we seek the least exclusionary or reductionist interpretation of equality, in theory and in practice.

i. Van Marle's challenge

Van Marle believes that the substantive approach to equality as outlined above does not go far enough. I agree with this view. This substantive

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

[74] Van Marle, doctoral thesis, *supra* note 68.

[75] Van Marle, doctoral thesis, *supra* note 68, at 161.

[76] Van Marle, doctoral thesis, *supra* note 68, at 161.

approach, endorsed by Albertyn and Goldblatt,[77] is indeed an improvement on the formal approach to equality where the law treats all individuals *as if* they were the same, but it does not go far enough in its recognition of difference and dialogue. Substantive interpretations of equality may also easily become formalised and instrumentalised again and may in this way once again become just another 'universal' test that reduces the multiplicity of lived experienced of unfair discrimination to a set of factors to be decided by a court of law. An alternative to both formal and substantive equality is an *ethical interpretation of equality.* This interpretation does not seek to reduce or violate difference, but urges us always to strive for an unknowable equality and an impossible justice. This does not invalidate our search for equality and justice, but prevents the complacency and conformism that Douzinas warns us against.

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

It is my submission that this interpretation of equality has much in common with the jurisprudence of care where I argue that an *ethic of care* be inserted into the law. The following are the central premises to my argument:

- We need to *listen* to the other and embrace her differences;
- We need to considering the social context of both the individual and her community; and
- We been to move beyond an abstract conception of justice in order to embrace an ethic of care.

These alternative suggestions (there may be many more) encourage legal and social responsibility when faced the other, when making legal/moral judgments, and when interpreting, critiquing and transforming the law. This responsibility should not lead to ethical and political quietism, but requires an

[77] Albertyn & Goldblatt, *supra* note 44.

understanding of each person as a unique being among other unique beings. To move beyond the long-standing tension between theory and activism/praxis, it is simply enough to accept that *both* are necessary. To illustrate, gender has to be acknowledged, but the ego can never be reduced to a gender. In order to acknowledge *who* I am I need to acknowledge my situation and position as a woman, but I cannot be *reduced* to that position or situation, as it is constantly in motion as my everyday encounters with others shape my own understanding of being-in-the-world.

VI. Retracing the Way

To reiterate, the path we traverse together begins with a critique of enlightenment values and western legalism/formalism/positivism which leave no spaces for the voices of those who do not fit safely, comfortably and easily into current legal categories or predetermined meanings and definitions. Related to this is the historical adoption of formal interpretations of equality which ignore social, political, economic and cultural situatedness dependent on relations of power and the devaluation of the 'feminine' and care. I have thus offered up for inspection feminist challenges to dominant legal conventions and argued that traditional methods of legal reasoning may systematically silence the voices of those who do not speak the abstract, neutral and objective language of the law. It is ultimately an appeal for an openness to that which is still to be said and a reflection on the dangers of complacency.[78]

Since 1994 the South African constitutional dispensation has offered us promises of something better to come. In line with this more open approach to the law and human rights discourse, the Constitutional Court has turned to a more contextual understanding of the *impact* of laws on human well being, resulting in the adoption of a substantive interpretation of equality. It is submitted above that this approach does not reach far enough beyond the *status quo*. For this reason, I support an ethical interpretation of gender equality that focuses on utopian possibilities and the opening up the horizons of continued transformative and relational thought.

Current western, masculine jurisprudential thought must be questioned in order to encourage transformative thought and the careful consideration of new possibilities which allow us to hear the call of the other and to face our endless

[78] Van Marle, *supra* note 5, at 621 issues a warning against the tendency of the law and human rights discourse to "capture" life and mourns the absence of contestation in post-*apartheid* constitutionalism.

and complex responsibilities in law and in life. [79] To allow, thus, for a blossoming of becoming:

"To become enraptured in a language already there signifies an exile with regard to an approach of the near. More than the adequation of the thing to the word, of the word to the thing, such a path demands forgetting words previously defined, progressing beyond their frontiers and asking language itself how it can allow acceding to proximity".[80]

This blossoming would be dependent on a sense of wonder and hope. Once we have acknowledged our anger and discomfort at unfair discrimination and the silencing of those in pain, we are able then to approach others with a sense of wonderment. We wonder when we are moved by that which we face. Wonder is thus "the motivating force behind mobility in all its dimensions" and it energises the hope of transformation, and the will for politics.[81] Wonder and hope open up spaces for the theory and politics of transformation and keeps something open which may be unimaginable in the present. Sara Ahmed expresses the workings of the passions of anger, wonder and hope as follows:

"Through the work of listening to others, of hearing the force of their pain and energy of their anger, of learning to be surprised by all that one feels oneself to be against; through all of this … an attachment is made."[82]

Here is hoping that in moving beyond traditional concepts of western legalism we learn to reach out in love and wonderment to those who stand before the law awaiting our attentiveness and responsiveness to their suffering, *without* reducing them to helpless victims who need us to 'save' them.

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[79] As Goodwin, *Poetic Reflections in Law, Race and Society*, 10 GRIFFITH L. REV. 195, 195-196 (2001) reminds us, stories tell us about the myriad ways in which people live and allow those who are legally and socially silenced to find their voices. The call of the other can thus be heard *via* the media of oral history, journal entries, poetry, music (such as jazz) and novels.

[80] IRIGARAY, *supra* note 11, at 57.

[81] IRIGARAY (1993), *supra* note 19, at 73.

[82] AHMED, THE CULTURAL POLITICS OF EMOTION 188 (2004). Ahmed's discussions about wonder and hope are reminiscent of Cornell's emphasis on the 'not yet'.