FRAGILE CONNECTIONS?

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In this article, an attempt is made to relate the story of an 'other', embodied as an African woman seeking gender equality in South Africa for herself and her daughter. The cases of *Mthembu v Letsela* (dealing with the constitutionality of customary laws of intestate succession) are critically analysed, and some tentative suggestions are made as to how these judgments could have been less violent in their outcome and impact — that of homelessness. Focus is placed on an ethical interpretation of gender equality which could possibly bring to the fore in such cases the need for care, compassion, responsibility and an (im)possible justice. In arguing for attention to be paid to the stories of women such as Mama Mthembu, I present some introductory comments on the African value of *ubuntu,* and look at how this complex value/ideal of communal connection and humaneness could have assisted the court in reaching a decision more suited to a transforming post-apartheid legal landscape where each person is given the space to imagine their world and their law anew.

Keepers of the law

the judge
is dressed
in red and white
the assessors
in black and white
the prosecutor
in a hostage smile
and I
in the borrowed robes
of my grandmother's wisdom
corn she said
cannot expect justice
from a court
composed of chickens ...[1]

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1 Mogale (1992). Dikobe wa Mogale was arrested in November 1983 and held in solitary confinement until he was charged with treason and terrorism. He was

Introducing the Speaker

The ideas in this paper are exploratory. I am still ensconced in Plato's cave/womb staring at the flickering shadow images on the surfaces of my mind.

Joseph Conrad attempts to transport his readers along the waterways of Africa deep into its centre so feared in the colonial world that it is termed the *Heart of Darkness*.[2] To illuminate the landscape of the mind, it is necessary not to deliver civilisation to the savage but to shed the blinkers of pre-postmodernity and observe the uncomfortable truths inherent in the ancient land. In exploring the map of South African jurisprudence — here lie dragons — I argue that abstract, textual approaches to law results in a refusal to address the lived substance of cases, such as happened in the South African decisions of *Mthembu v Letsela*[3] mapped and explored in more detail later in this paper. This perception of the operation of the law has historically silenced multiplicity and narrative. The only recognised 'speech' in the courts and legal tomes has been masculine and textual in nature. In fact, in Africa it is often said that the most important talks are not held in Parliament or the courts, but are whispered over fences. Along the same lines, the most significant changes do not happen when a new law is passed, but when people change their own minds and hearts.

It is therefore time to move beyond textual self-effacement to a space on the map where we can listen to and take ethical responsibility for the other.[4] This obligation *is* a law as it holds the subject hostage to the relationship. The question which remains to be addressed below along the watercourse of our journey is whether the feminine and *ubuntu* also constitute the law of the other. This is unavoidably an ethical question.

When she (the other — the African woman) stands before the law, it is a face-to-face encounter — an ethical moment reduced to textual certainty. She cannot escape the inevitable violence of this encounter. She can only hope for a response which recognises her location, her particularity, her fragility.[5]

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found guilty of furthering the aims of the African National Congress and carrying out *umkhonto we sizwe* guerilla operations, and was sentenced to ten years' imprisonment.

2 Conrad (1988).

3 (1997) 2 SA 936 (T); (1998) 2 SA 675 (T); (2000) 3 SA 867 (SCA).

4 Levinas (1969) develops an 'ethic of alterity'. According to this ethical construction, he argues that the other can never be an extension of the self or alter ego, but that the sign of the other is her unique and irreducible face, which eludes all categories. In life we are faced with the other and so become obligated to the other person who cannot be consumed, but must be cared for. Here we can see a shift in emphasis from rights to duty or responsibility. See also Derrida (1978), p 100. In the remainder of this text, I shall not capitalise the other. The underlying assumption thus remains that the other is someone known to me, although not possessed by me.

5 This manner of response may allow the other to feel gratitude — not because the response is one of pity, sympathy or caprice, nor as a favour or privilege or a natural result of temperament, 'but from a desire to do what justice demands'. See

When I speak of 'she' who stands before the law, I do so with the knowledge of my white privilege;[6] my skin as boundary/limit; my spiritual and physical location as a law teacher in a township university in South Africa; and my status as a woman in a male-dominated profession. My voice, however, hopefully resonates as I tell my/her story, keeping in mind that legal texts refer to *real* people who are seeking ways in which to live their lives as creatively and imaginatively as possible. We therefore need to acknowledge that we cannot possess the other — we cannot become one with the other. But we can, to a certain extent, learn from the different stories that are told by embracing what I refer to as a (feminine)[7] jurisprudence of care[8] — imaginings of *jouissance* and the momentary rupturing of the One Law. Practising or writing law without this 'overwhelming desire to do justice' remains dangerous, destabilising and dehumanising.[9]

Weil (1986), p 276. Weil maintains that: 'Accordingly he who treats me thus wishes that all who are in my situation may be treated in the same way by all who are in his own' (1986), p 276.

6 Spelman (1988), p x asserts that the assumption that gender identity exists in isolation from race and class identity is not an innocent concept or methodological strategy, but is a very dangerous form of ethnocentrism. As she maintains at p 187, '[t]here are no short cuts through women's lives'.

7 I refer here to the feminine or femininity as marginality. The French-Bulgarian linguist and psychoanalyst Kristeva (1986) refuses to define 'femininity'; she prefers to see it as position. If femininity is to have any definition at all in Kristevan terms, it is simply that which is marginalised by the patriarchal symbolic order. If, as Cixous (1989) has shown, femininity is defined as lack, irrationality, chaos, darkness — as non-Being — Kristeva's emphasis on marginality allows us to view this repression of femininity in terms of positionality rather than essence. What is perceived as marginal at any given time depends on the position one occupies. Women can thus be seen to merge with the chaos of the outside.

8 The real challenge lies in the realisation that different stories revealing different truths do not necessarily render any of the stories invalid. An interesting example of this emanates from the Truth and Reconciliation Commission's amnesty applications in the case of the Guguletu Seven. Of the 25 policemen involved in this brutal incident, only two sought amnesty though the telling of their respective stories, namely Bellingham and Mbelo. When interviewed, Mbelo denied that his experience was the same as 'a white man's story'. Mbelo was accused by his own community of selling his blood for money and he bears the scars to prove his pain. Mbelo met the mothers of the seven boys he had assisted in killing to beg for their forgiveness. In the television footage, the mothers wanted to know how he felt. After listening to him, they chose to forgive him, and one of the women indicated that they felt compassion for him and wished him a productive life in a non-violent environment. Both Bellingham and Mbelo were granted amnesty, despite their very different responses and stories. This footage is from an SABC 2 documentary *Long Night's Journey into Day* (2000) aired on 24 April 2004 and produced by Reid and Hoffman for the Iris Films Feminist Collective Inc.

9 Douzinas and Warrington (1994), p 24.

It is Not the Law that Binds Us but the Other of Law

I wish to emphasise at this early point in the journey that the concepts and values of the feminine, Blackness and African human(e)ness encountered along the way are not unproblematic. It is accordingly necessary to pay careful attention to cultural, spacial, temporal and historical specificities and not to universalise. Be that as it may, you my companions will have to be the judges of whether 'my' ethical approach is a slippery and elusive category, neither linear, exclusive, stationary nor uniform.

Who then is this 'she', this other I speak of? She is a Black mother rendered homeless by the colonial text of the law and by a juridical refusal to heed her call accompanied by an ethical refusal to be endlessly responsible towards her. The context of the story below is South African; the plea is for a more generous response to the other before the law — a plea for respect, care and attentiveness.

The Story of an African Woman

> Attention consists in suspending thought, leaving it available, empty and ready to be entered by its object ... thought must be empty, waiting, seeking nothing, but ready to receive in its naked truth the object that is about to penetrate it.[10]

Let us now pay closer attention to the journey of a particular African woman. I begin with a detailed legal analysis, then I delve into the more human aspects of the cases. The focal point here is not so much the rules of law *per se,* but rather the need to push the existing boundaries of laws and to acknowledge the impact of legal pronouncements and textual landscapes on people's lives.

In the cases under discussion, Mama Mthembu and her legal representatives chose, quite courageously, to launch a 'full frontal attack' on the African customary law of intestate succession, and in particular the rule of primogeniture, whereby the intestate estate devolves to the eldest son or male relative upon death. The need to respond to this act of cultural resistance was, of course, no easy task for the courts.

As applicant in the *Mthembu* cases,[11] Mama Mthembu challenged the constitutional validity of the customary rule of succession that prevents an (illegitimate) daughter from inheriting from her father. She argued that the rule unfairly discriminated against her daughter, Thembi, on the basis of gender, and further that the court should find the customary law of primogeniture unenforceable for violating public policy. Failing this, she requested the court to order the first respondent to carry out his duty of support and to allow Thembi and her mother to continue living in their home. The respondent contested the application by maintaining that he was the rightful heir to the

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10 Weil, quoted in Tronto (1996), p 128. See also Weil (1952, 1955). It is interesting to note that Weil utilises a masculine metaphor in her text — the 'penetration' of the object of attention.

11 (1997) 2 SA 936 (T); (1998) 2 SA 675 (T); (2000) 3 SA 867 (SCA).

intestate estate of his son, and further alleged that the customary law did not require the heir to maintain the applicant and her daughter, as there was no valid customary law marriage existing between them.

In the first *Mthembu v Letsela* case,[12] the court found, after taking into account and balancing the provisions of section 8,[13] section 31[14] and section 33[15] of the interim Constitution of the Republic of South Africa,[16] that it was 'difficult to equate this form of differentiation between men and women with the concept of "unfair discrimination"',[17] for a duty to provide sustenance and shelter is a corollary of the system of primogeniture. In this case, the Transvaal Provincial Division cited the constitutional entrenchment of the right to participate in a cultural life of one's own[18] as one of the constitutional *indicia* that the customary law of intestate succession passes constitutional muster.

The court further found that, taking into account that customary law is a system of law which exists parallel to the common law, and taking into account the provisions of sections 33(3) and 181(1) of the interim Constitution which, according to the judge, grants a person the freedom to choose the system which governs her relationships, one cannot find in favour of the allegation that the rules of intestate customary succession violate the right to equality, because the concomitant duty to support refutes the presumption of *prima facie* unconstitutionality contained in the equality clause. The judge, however, felt himself unable to make a final decision on the matter as he was unsure on the papers as to whether Mthembu has been married to the deceased by customary law, or whether she had lived with him as a putative spouse. The matter was subsequently postponed *sine die* in order for oral evidence to be heard on the matter.

In the second case,[19] the matter was heard before Mynhardt J. Both applicant and respondent had by this time chosen, in a somewhat risky move, *not* to adduce oral evidence. The matter was to be determined on the basis that there had been no valid customary law marriage and that Thembi had been born out of wedlock (despite the fact that part of the *lobolo* — a sum of money paid to the family of the bride — had already been paid).[20]

Counsel for the applicant invited the court once more to develop the customary rule of intestate succession to include women and children other than the eldest son in terms of section 35(3) of the interim constitution. It was argued that the value of equality lies at the heart of our new constitutional dispensation and that this right must be protected.[21] He further stated that the

12 1997 2 SA 936 (T).

13 The right to equality.

14 The right to language and cultural life.

15 The limitation clause.

16 Act 200 of 1993.

17 *Mthembu v Letsela (No 1)* (1997) 2 SA 936 (T) at 945H.

18 Section 31 of the interim Constitution and s 30 of the final Constitution.

19 *Mthembu v Letsela (No 2)* (1998) 2 SA 675 (T).

20 *Mthembu v Letsela (No 2)* (1998) 2 SA 675 (T) at 677H.

21 *Mthembu v Letsela (No 2)* (1998) 2 SA 675 (T) at 684G–I.

customary rules of intestate succession were profoundly out of keeping with the spirit, purport and objects of the provisions contained in the Bill of Rights, as the current customary rules of intestate succession are founded upon stereotypical societal attitudes which relegate women to subservient (social and economic) roles within their communities and families.[22]

The court generously agreed that gender stereotypes should not remain unchallenged, but held that the rule of primogeniture should not be considered in isolation. This rule is an integral part of the greater customary family law system and it carries with it a concomitant duty to support the widow and her children. Mbatha[23] points out that, although it is in accordance with living customs and laws, this system of inheritance, coupled with responsibilities and the difficult socioeconomic situation in which most Black people find themselves today (mostly as a result of apartheid), has left them with a need to focus — for their own survival — on themselves, and thus to pay less attention to duties towards others. As a result, there is in practice a failure to look after the other dependants of the deceased.[24] Colonially codified customary law has in effect not responded to changing socioeconomic conditions. Nevertheless, courts continue to apply the oppressive and coercive codified customary rules of intestate succession, unaltered.

The court further found that Thembi's disqualification was based on the 'fact' of her illegitimacy, and not the fact that she was a girl-child. The adjudicator in the second Mthembu case thus declined the invitation to develop the customary rule of succession that excludes women from participating in intestacy and which excludes any child other than the eldest male-child from inheriting family property. The conclusion was that such development should be left in the hands of Parliament[25] or, if necessary, be dealt with on a case-by-case basis. The court unfortunately did not expand upon this latter contention.

In addition, the court held that it could not accede to the invitation to declare the rule invalid based on principles of 'public policy', as this would be applying 'Western norms' to a system still adhered to and applied by many African people.[26]

The case then went on appeal, and the constitutional challenge once again failed. In this third case,[27] counsel for the applicant (Mthembu) once more argued that the courts should develop the rules of customary intestate succession in terms of section 35(5) of the interim Constitution, so as to allow all descendants — whether male or female, legitimate or illegitimate — to participate in intestacy on the basis that the current rules are in violation of section 8 of the interim Constitution (the then equality clause).

In casu, the court argued that it would not entertain an invitation to develop the rule as Thembi may ultimately have rights of succession in her

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22 *Mthembu v Letsela (No 2)* (1998) 2 SA 675 (T) at 680H–I.

23 Mbatha (2002).

24 Mbatha (2002), p 261.

25 *Mthembu v Letsela (No 2)* (1998) 2 SA 675 (T) at 686H–I.

26 *Mthembu v Letsela (No 2)* (1998) 2 SA 675 (T) at 688C–D.

27 *Mthembu v Letsela (No 3)* (2000) 3 SA 867 (SCA).

mother's family. It was also averred that the court found itself ill-equipped to deal with the case owing to a lack of information.[28]

The court was further requested to deal with the provisions of section 1(1) of the *Law of Evidence Amendment Act*[29] to the extent that the rule of primogeniture, if not developed to allow women to benefit from intestacy, is profoundly offensive to public policy.[30] The court also declined to accept this invitation to declare the customary law rule of male primogeniture repugnant to public policy and the principles of natural justice.

The courts found in favour of the respondent and chose to leave the rule of primogeniture intact.

As illustrated, when Mama Mthembu approached the courts to consider her dilemma, the adjudicators 'listened' to her through the sound baffles of legal technicalities, rules and precedent. Not once did they acknowledge her story and the possibility of her and her daughter's homelessness. They did not pay attention. In fact, in attempting to escape the complexities of this story, the adjudicators also tended to resort to a form of cultural relativism which failed to adequately address the suffering of the other — as sound as their intentions may have been. They were caught in the dichotomous trap of gender equality versus culture, and thus rendered a Black mother voiceless.

Neither the non-static nature of custom as social phenomenon, nor the impact which customs have on individuals and communities were recognised or considered. In fact, the male adjudicators — in all three cases — clutched at technical straws and, in my view, failed to do justice to the stories told.

The Stories Remain for Anyone to Hear

That is the end of the story. Or is it? Was the story ever told or heard? Here three different courts were faced with Mama Mthembu's dilemma, and not one of them engaged with her in dialogue as to *why* she experienced the rule of primogeniture as gender oppressive or as unfair gender discrimination. The courts tended rather to adopt a 'hands off' approach to customary law and refused to stare for too long into the abyss. Perhaps the adjudicators needed to be reminded that not only does customary law now enjoy constitutional recognition on par with common law, but that the Constitution also places a mandate on the courts to apply and *develop* customary law. This mandate must be taken as seriously as the mandate to develop the principles that underlie the common law. Both systems are thus recognised, but neither is beyond constitutional, social or political critique. Both systems should therefore be engaged with on a critical level in order to determine whether their respective rules lend themselves to the continued oppression of socially marginalised groups such as Black women.[31]

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28 *Mthembu v Letsela (No 3)* (2000) 3 SA 867 (T) at paras 40–43.

29 Act 45 of 1988.

30 *Mthembu v Letsela (No 3)* (2000) 3 SA 867 (T) at paras 43–44.

31 The Justices in all three instances also failed to consider carefully the interpretation of the Constitution as a postcolonial or post-liberal document, which has been suggested by a number of progressive legal academics in South Africa.

What is desired when faced with *this* particular other (being Mama Mthembu) as a Black woman living within a matrix of domination is the opening of minds and hearts to a humanist vision of an empowered Afrocentric feminist (or Womanist) knowledge.

In fact, it is contended that the 'living' customary law attaches more importance to the interests of the dependants than to the rights of the heir (something the courts did not do).[32] Issues such as who needs the property should accordingly guide and influence the court's decision. The impact of the decisions was, however, harmful to both mother and child as a result of the way the inquiry was conducted and because of the lack of evidence as to the existence of a valid customary law marriage.

The outcome of the *Mthembu* cases may well have been different had the courts been exposed to the developed substantive equality test as it exists in South Africa today.[33] The courts might then have considered the context and life circumstances of Mama Mthembu, and referred to the living customary law and the adaptations communities are introducing in assessing the fairness of the customary rule at issue in such cases.

Ultimately, in a utopian sense, adjudicators cannot afford to continue their attempts to escape the metaphysical difficulties of such cases and do their 'business as usual'. Facing responsibility for decisions that are made, and for the impact of these decisions on the lives of those who stand before the law, is necessary to avoid totalitarianism. It is true that any call for the development of the law should be dealt with carefully, and that community values should be attended to so that the development of law remains in harmony with these underlying values. The submission here is that these values may be *discovered* by listening to the narratives of people who live by these values (such as *ubuntu*), and not merely by referring to stock stories and colonial texts.[34]

Gardiol Van Niekerk[35] illustrates the importance of deviating from formal, inflexible court proceedings by referring to the judgments in *Mthembu*

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32 See in general Mbatha (2002), p 265.

33 See, for example, *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 SA 6 (CC) 1998 6 BCLR 726 (W), where the court formulates the right to equality as a right which should be considered from a 'person-centred' rather than a 'formula-based' position, and that this right should be analysed contextually rather than abstractly (as per Sachs J at 1565H–1566A).

34 In the second and third *Mthembu* cases, the court called upon the Legislature to reform the customary law of succession. The Amendment of Customary Law of Succession Bill B108-198 has been drafted and, should it become law, will amend the customary law of succession to conform more to the values underlying the Constitution. In the process of drafting the Bill, consultations were held with traditional and religious leaders and rural women's movements within a period of less than one year. Some commentators have argued that, although the Bill is set to ensure greater gender equality in the customary law of succession, the legal reforms have the potential to infringe upon the 'communitarian ideals' of customary family law. See Van Niekerk (2000), p 413.

35 Van Niekerk (1999).

v Letsela.[36] She asks whether the court would have come to the same conclusion if it had heard the story of Thembi and her mother, and whether the stories would have put the written material into proper perspective.[37] In these cases, the real issues were swamped by legal technicalities unfamiliar to customary law.[38] *Reconciliation or the restoration of harmony* is at the heart of African adjudication, which is an informal and relaxed process and which has as its aim the restoration of *equilibria* within the community.[39] Van Niekerk thus questions the use of application proceedings where customary law is at issue. In application proceedings, the court must rely on written documents without affording an opportunity to the parties to tell their stories. The possibility of hearing counter-stories, which may challenge the stock stories, is reduced to a minimum. The courts should rather encourage the recounting of personal stories and in so doing would find it easier to apply or reform customary law in an ethical manner according to the particularities of the case. This, of course, would be stranger than kindness.

Accordingly, Van Niekerk submits that one of the ways in which to change these existing stock stories in order to reflect lived experiences, is simply to listen to the untold stories of the women and children who have been marginalised in customary law. In this manner, the telling of counter-stories challenges the present understanding and application of customary law. Sarmas[40] submits that:

> the telling of counter-stories [,] is seen as a means of challenging dominant legal stories ... thereby transforming the legal system so that it is more inclusive, and responsive to the needs of outsider groups.[41]

African culture consists of narratives and myths,[42] and therefore the only access we have to these narratives and myths is through a recounting of the experiences of 'outsider groups'. For African-American women, as an illustration, the telling of stories results in a figurative and spiritual emancipation from the chains of racism, sexism and social subjugation.[43]

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36 *Mthembu v Letsela (No 1)* (1997) 2 SA 936 (T); *Methembu v Letsela (No 2)* (1998) 2 SA 675 (T).

37 It is thanks to author Toni Morrison's tremendous contributions in giving voice to African-American women in particular (for example, her novel *Sula*) that we have learned something about the invisibility of narratives and codes across groups and cultures and genders. Morrison's work also demonstrates the indispensability of narrative for the empowerment of oppressed and marginal groups and individuals. See Morrison (1980).

38 See Van Niekerk (1999).

39 Allott '(1986), p 145.

40 Sarmas (1994).

41 Sarmas (1994), p 703 (my emphasis).

42 Vargas (1998).

43 See Goodwin (2001), pp 196–97. Goodwin submits that: 'In expression of events through words, the experiences themselves were acknowledged, affirmed and brought out of the darkness.' (p 197) Goodwin uses creative prose to express this

Returning to the cases of *Mthembu v Letsela*, Van Niekerk agrees with the court that the customary law of succession should not be interfered with by applying Western norms to customary law, but she also submits that the development of customary law rules should lie in the hands of the courts and not in the hands of the legislature or Parliament. Each case should be judged on its own merits, taking into account the specific circumstances of the case (here we encounter a plea for the particularity of justice). General reform by the legislature cannot cater for individual needs and specific circumstances.[44]

Furthermore, the adjudicators appear to have blinded themselves to the complexities of urban life. In all three cases, the judges failed in their attempts to draw bright-line boundaries between conflicting values, interests and rights. Rather, such judgments should be substantively fair and judges should no longer have the luxury of hiding behind formal legal rules. The fact is that judges need to make choices, and the validity of these choices depends upon the cogency of their policy and value judgments.

According to some critical legal scholars, human rights do not exist prior to, or independently of, the political process and public dialogue. Rights could thus be interpreted as the expression of human connectedness, and not as a means to protect or isolate us from others. We need, as the Constitution requires of us, to subject our traditional assumptions to a transformative critique. Judges ought to justify the choices they make and outline the imaginative processes that underlie the making of such choices. Therefore, for example, if the right to a particular culture is to be preferred to the rights of those women affected by its practice, adjudicators must take care to justify their conclusions in making such hard choices. The answer is not to avoid the call for justice altogether in the name of the Law of the Father.

Our predominantly Western (legal) discourse can be challenged by the narratives of people such as Mama Mthembu and her girl-child in the present cases. Although narratives are more than oral communication, it is the verbal communications before the courts which should form the starting point for an inquiry into the living customary law (ie the law as experienced by the individuals subjected to it). People such as Mama Mthembu should be afforded the opportunity to speak for and about their lives and experiences under/before the law. This is, of course, not possible in motion proceedings. The primary concern here is the process of adjudication, and not necessarily assumptions about the outcome. One can never claim to foresee an outcome, but one can

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view, and poetry forms the focus of her narrative. She further states that: 'In this reclaimed space for creative texts, legal theorists are suggesting that human experiences deserve consideration wherever they are centred — which may not be in a court transcript or captured by deceased white men.' (p 197)

44 Van Niekerk (1999), p 226, where she criticises the Amendment of Customary Law of Succession Bill B109-98, which provides that if a person in a customary law marriage dies without a will, succession takes place in accordance with the general (Western) rules which regulate intestate succession. The *Intestate Succession Act 81 of 1987* is made applicable with some minor adaptations. This legislative amendment would, in her opinion, have far-reaching consequences for millions of people in South Africa.

critique the processes and/or interpretations that may have prevented an outcome which would be more conducive to promoting the well-being of individuals and groups.

In his critique of the cases, Lourens Du Plessis[45] states that the three judgments lean towards a trusting recognition rather than a critical questioning of customary law, 'lest traditionalist lifestyles be dismissed in a high-handed, condescending manner'.[46] The problem with the judgments, however, is that the courts failed to fully acknowledge the plight of mother and daughter.

What is *most* disturbing about this is the fate of Thembi, and the fact that she and her mother were left homeless as a direct result of the failure of the adjudicators to make responsible choices. In fact, the adjudicators were at times quite glib about the right to gender equality. In the first judgment,[47] Le Roux J intimated that the customary law of intestate succession, insofar as it encroaches on the rights of women (and children born out of wedlock) to equality, may be seen as a constitutionally passable limitation to the said right in terms of the general limitation clause in the Bill of Rights.[48] This is his somewhat surprisingly trivial explanation:

> There are other instances where a rule differentiates between men and women, but which no right-minded person considers to be unfairly discriminatory, for example the provision of separate toilet facilities.[49]

In reality, hardest hit by the judgment was a girl-child who had no choice in the matter but to be subjected to customary law. Thus this 'over-recognition'[50] of the customary law of intestate succession did the law, the community and the individuals no good at all. The three judgments present us with an either/or situation intimating that customary law would cease to exist if tested against the underlying values of the Constitution, and should thus be left to its own devices — as should the people who 'choose' to subject themselves to such laws and values.

Interestingly, Du Plessis moves the emphasis of his concern away from gender equality issues towards the rights of children.[51] The 'union' between Mthembu and Letsela was in the process of being formalised at the time of his death, and thus Thembi should have been considered to be born of a valid customary marriage. But this would still not entitle her to the inheritance — she was, after all, only a girl. This is a commendable approach, but I would argue that the gender equality implications should not be ignored. Du Plessis

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45 Du Plessis (2002).

46 Du Plessis (2002), p 367.

47 Mthembu (1) supra.

48 Section 33 of the Interim Constitution.

49 *Mthembu v Letsela (No 1)* (1997) 2 SA 936 (T) at 946B.

50 Du Plessis (2002), p 376.

51 Du Plessis (2002), p 377.

does remind us, however, that the Constitution should assist us in creating a 'home' for the other as (s)he is.[52]

In the light of the above, Mbatha draws our attention to the fact that our courts do not always see the creation of a place of well-being for the other as (s)he is as their constitutional duty:

> Courts often do not apply the law that is most beneficial to the litigant ... and fail to consider the impact of the law they choose on people's lives since this is not part of their decision-making criteria. The application of customary law without regard to the consequences of such application on the property rights of women in particular undermines the progress made by women in other areas. It also retards the achievement of the constitutional vision.[53]

In essence, the unwillingness of our courts to push the boundaries of the existing law can and will lead to negative effects on the lives of real people — the closure of the decision renders us hopeless.[54] By ignoring the consequences of the law, they choose to impose on people's lives, the courts cause harm and the impact of their decisions remain violent — and thus unethical — in nature.[55]

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52 Du Plessis (2002), p 386.

53 Mbatha (2002). See also Moseneke (2002).

54 Mbatha (2002).

55 In the latter part of 2004, the Constitutional Court was finally faced with the problem of primogeniture, and the majority of the court held that the customary rule of primogeniture was unconstitutional in that it unfairly discriminated against women and children born out of wedlock. In the cases of *Bhe and Others v Magistrate* CCT 49/03, *Khayelitshe and Other* CCT 49/03; *Shibi v Sithole and Others* CCT 69/03; and *South African Human Rights Commission and Another v President of the Republic of South Africa* CCT 50/03, Langa DCJ proclaimed that the rule of male customary succession should be struck down as it was unconstitutional and had not kept up with the socioeconomic concerns of urban South Africa, where women were largely left to their own devices after the death of a partner. (These cases were reported simultaneously on 15 October 2004 and full text is available at www.concourt.gov.az.) The Constitutional Court accordingly rejected the approach taken in the *Mthembu v Letsela* cases. The South African Gender Commission and the Women's Legal Centre Trust have welcomed this decision. However, in his singular minority judgment, Ngcobo J expressed concern over the majority's total rejection of African customary succession law and pleaded for a development of this law in line with section 211 of the *Constitution of the Republic of South Africa Act*, 108 of 1996. The learned justice mourns the erosion of the traditional sense of community found amongst Africans as manifested in the philosophical concept of *ubuntu* (at para 163). It is interesting to note that *ubuntu* is only mentioned once by Justice Langa in the majority decision of the case. Ngcobo would have preferred to see a preservation of the communal sense of responsibility, although he gives no indication as to how the rule of primogeniture could be developed in such a way as not to unfairly discriminate against women and girls (as well as children born out of wedlock). His proposal in general is that the law should remain open to allowing families

In Search of the Beyond

Would such a decision have been reached in a Goodrichian Court of Love?[56] Surely caring for Mthembu as other and paying close attention to her ethically rich drama would have allowed us a glimpse of the (im)possible, singular justice Derrida dreams of. In a world of objective law and liberal human rights, we are all care-free in our separation and our bodies determine our edges. However, Levinas suggests that the tidy visual world is not the whole story. It is transcended in face-to-face interaction where speech 'cuts across the vision of forms',[57] and denies neat-edged closure. What matters is that I am here, speaking, sharing a proximity and uncertainty with you. We are thus implicated in each other's lives as in Panu Minkkenin's description of the 'law of the neighbour'.[58] There should at least be an attempt, in judgment, to acknowledge a radical, ethical encounter of care, love and the 'as-if'.

An aporetic ethics of both care and hesitation may for a moment release us from the violence of legal decision-making. This caring justice *(juste)* is born of attention to the particularity of the other, and is defined by heterogeneity. We are surrounded by different voices, different tongues (different laws?) and we need to address ourselves endlessly to every singular voice. The preciousness of the other renders us inseperable but unique. This leads us to deconstruction as justice. Deconstruction is the process of transition between the written, universal law and the many peculiarities that are the faces and voices of others. However, a synthesis of universal law and caring justice is not possible. There is always already a gap between them as they need each other and constantly strive towards each other. Thus caring justice cannot simply be the product of a legal machine, but must stem from a fresh and

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themselves to reach an agreement as to which system of succession they wish to adopt, but Ngcobo does not suggest how such agreements can be reached without further entrenching existing gender and age hierarchies. What is interesting to note here is that Mama Mthembu may have been more successful if her story had reached the ears of the Constitutional Court justices. However, her voice remained silenced as a result of the fact that she did not have the necessary finances to reach this court and, surprisingly, no organisation chose to take up her particular cause.

56 See Goodrich (1996).

57 Levinas (1969), p 193.

58 See Minkkinen (1999), pp 168ff. For Minkkinin, Wolf's theology of law claims that the ultimate foundation of the obliging essence of law can only be determined from man's unconditional responsibility for his neighbour before God. If the juridical is transformed into love, an abstract other, as conceptualised by law, is redefined as a neighbour: 'A juridical subject is by necessity an abstract other who can enjoy the benefits offered by law under certain specified circumstances. But within the order of love, the other is always a neighbour, and in such a neighbourly relationship, the subjects rapport *vis-a-vis* the other is defined rather by the former's responsibility than the latter's formal rights as they are defined in the law. Wolf cannot accept the notion of a formal and loveless law that would merely recognise an abstract other and its rights without assigning a responsibility to respect them. On the contrary, the law of the neighbour is the foundation on which all law rests.'

complete transformation and/or re-engineering of the machine. It demands rupture. Justice is thus always suspended, undecidable. But the law *must* decide — the plea is merely for an attentive and compassionate judgment. The moment is hesitant, and in this moment of caring decision we are ethically exposed, unsure of boundaries and vulnerable. Ethical sensitivity allows us to stammer when facing the ghost of the law and thus raises questions of the body and our own mortality.

This form of critical theory is utilised in the same way that Iris Young uses and understands it: as a normative reflection that is historically and socially contextualised — it is a *situated interest* in justice.[59] The theoretical approaches referred to throughout this intellectual journey should not be seen as a totality which is to be accepted or rejected in its entirety, but as useful tools for critique and transformatory discourse. These are tools used to dismantle the 'master's house'.[60] It is about the invention of new ways of speaking and writing, and the fact that our relationship with otherness allows for openings to explore these new discourses. Exchange, thought of in terms of giving and receiving, plays a crucial role in the woman question. How do we give or receive? How do we talk and listen? And what does this have to do with our relation to alterity?

In order to move beyond traditional legal discourse and to open up spaces for the telling of stories in/by/with different voices, it is necessary to reimagine ourselves as (legal) subjects and to reimagine the role of the law in our lives. It is proposed that the concept of justice as caring[61] is a sound one and that we can only care for the other[62] in a just manner if we enter into a conversation

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59 Minkkinen (1999).

60 Lorde (1984), pp 37–38. The question is whether feminists and other marginal legal theorists have the power necessary to construct the debate in their own terms. If the jurisprudential enterprise is loaded towards masculinist concepts and male interests, then the construction of a feminist jurisprudence would be in, Lorde's famous phrase, a futile attempt to destroy the master's house with the master's tools.

61 See West (1997).

62 The Afrikaans poetess Ingrid Jonker (2001) writes about the other in one of her celebrated poems entitled 'Double Game':

> Our double game diverted me,
> the playful tricks, the repartee.
>
> In my room one looking-glass
> was clear, the other cracked across.
>
> You think, man-god, you've fathomed me;
> I shall so confuse you and so dismay
>
> You'll run from glass to glass and ponder:
> if this is she, God, who is the other ...?

Jonker died on 9 July 1965 in tragic circumstances, but has left as her legacy to us a collection of memory.

with the other where our listening to her story is fundamental to our interaction. In this process of legal attentiveness, we need to learn to recognise and accept our *own* strangeness in order to recognise and accept the strangeness in others. This should not be an attempt at assimilating the other or at attaining 'full knowledge' of the other, as this would be a denial of the fluid and opaque nature of people. It should instead involve the compassionate answering of the call of the other and the making of responsible (but always difficult) choices and judgments.

The search for (gender) equality involves facing the multiple realities of oppression because the oppressed are seldom heard, as in the (legal) narrative of Mama Mthembu. The false dichotomies created by liberal Enlightenment thinking have resulted in the division between Inside and Outside. The silenced and oppressed outsiders or 'out-laws' should be our primary concern as this divide is deconstructed.[63]

It has widely been argued that oppressed individuals and groups form the margins of our society. They are the others, the outsiders. If these marginals wish to be heard, they are required to speak the language of their oppressors. In courts, for instance, legal subjects must speak the rational, objective and neutral language of the law in order to be given a fair hearing. This legal language is believed to have a fixed and determinate meaning, which has stood the test of time. In this way, unique voices are drowned out or dismissed in favour of traditional legal texts and rules.[64] The concern addressed above with reference to the story of Mama Mthembu is that the monovocality of the law as it is can only lead to injustice.

On the other hand, perspectival social reality can be constructed through a network of multiple stories, and postmodernism therefore allows knowledge to become a discursive practice.[65] Ethical postmodernism thus attempts to move

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63 I shall not use deconstruction as a literary device, but rather use it to find ethical moments — moments that take us temporarily beyond violence. See Cornell (1992). The deconstructionist Derrida (1992) explores the concept of justice as deconstruction and, specifically, deconstruction as justice. Derrida holds that the law as law is different from justice and cannot be justice as the very foundation and continuance of the law is embedded in violence/force. Justice is thus the 'experience which we are not able to experience' or 'the experience of the impossible' (p 16). As Derrida puts it, in order to 'attain' justice one needs to address oneself to the other in the language of the other, which is not possible. As Levinas (1969, 1993) would have it, justice can never be identified with any descriptive set of conditions or rights. Levinas's messianic conception of justice demands the recognition of the call of the other, which always remains a call that can never be fully answered. For Levinas, to try to know the other is in itself unethical, because to do so would be to deny her otherness/difference. Instead, our responsibility is to hear her call, which demands that we address her and seek redress for the wrongs done to her. The other is 'there' in the ethical relationship only as the subject's responsibility to her. There is thus a responsibility without limits to the other. Justice, like democracy, is always 'yet to come'.

64 See Goodrich (1996).

65 See Benhabib (2002), p 137, where she states the following with regard to perspectival reality: 'Others are not just the subject matters of my story: they are

away from traditional theories (such as positivism) and shows an incredulity towards the legitimisation of metanarratives.[66] This incredulity implies that the postmodern progresses toward a plurality of narratives that are more local, contextual and fluid.[67] Therefore, 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 — be reconsidered.[68]

The positivistic order of apartheid South Africa, with its mechanical application of immoral law, led to various injustices.[69] Even since 1994, the Constitutional Court has at times denied its political and moral responsibility.[70] However, according to postmodern discourse, multiple truths, realities and stories should be accepted and promoted as was achieved by the Truth Reconciliation Commission (TRC), where different truths, realities and stories were listened to and accommodated.[71]

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

66 Lyotard (1984), p xxii. Metanarratives can be characterised as collections of rules (such as legal rules) that decide whether a statement or narrative is legitimate within a particular or dominant genre of discourse.

67 Anderson (1997), p 36.

68 It is important to note that relinquishing the universal Truth does not mean that we are left with nothing: 'Rather postmodernism promotes social criticism: from a postmodern perspective everything is open to challenge, including postmodernism' (Anderson 1997, p 37). Postmodernism is not against other schools of thought. It only challenges their attitudes to alternative truth. As Gergen (1992), p 57 argues: 'We 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.' Similarly, we need not ask whether a (metanarrative) is true to us, but rather whether it can move us to accommodate those who differ from us.

69 To illustrate, in the case of *Minister of the Interior v Lokhat* (1961) 2 SA 587 (A), the complainant argued that the division of living areas as it existed during apartheid was unreasonable and discriminatory. The Appellate Division, through Holmes JA, said that the question before the court was purely legal in nature and that it was not the court's role to decide whether the statute discriminated or not.

70 In *S v Makwanyane* (1995) 6 BCLR 665 (CC) at para 207, Kriegler J said that the interpretative methods 'to be used are essentially legal, not moral or philosophical ... The incumbents are judges not sages, their discipline is the law, not ethics or philosophy and certainly not politics.' (at para 207) Sachs J said in similar vein that the court's 'response must be a purely legal one'. These words depict positivist thought where reality is determined by what Law explicitly prescribes and posits as Truth.

71 In its *Reports*, the Truth and Reconciliation Commission (1998), p 110 distinguishes between four notions of truth: Factual or Forensic Truth; Personal or Narrative Truth; Social or 'Dialogue' Truth; and Healing and Restorative Truth.

The narrative metaphor as used by the TRC is a device whereby people can organise their experiences into untold stories experienced and lived. Storytelling is composed of telling stories to ourselves, bearing witness to stories and telling them on behalf of the other(s).[72] Only through the acceptance of multiple truths, realities, meanings and interpretations can we construct narratives that are accommodating and comprehensive.

Narratives have a powerful transformative potential. Carlos Fuentes explains this as follows:

> We are voices in a chorus that transforms lived life into narrated life, and then returns narrative to life, not in order to reflect life, but rather to add something else, not a copy but a new measure of life; to add, with each novel, something new, something more, to life.[73]

This (re)turns me to the oral African tradition which at times renders me voiceless and which speaks of obligation and dignity *irrespective* of the constitutional order of things.

African Human(e)ness: Possibilities for Transformation?

According to the age-old indigenous tradition of *isivavani*, when a man embarked upon a journey of importance, he would bid farewell to his family and the *kraal* and proceed along the road towards his destination. At the first crossroads he would stop, look around and find a suitably sized stone, close his eyes and hold the stone to his forehead. He would then make two wishes. The first would be for the travellers who had preceded him upon this road, hoping that their journey would be a happy one, as well as successful. The next wish would be made for the travellers following him. He would then place the stone on the pile at the side of the road. In this ancient ritual, the man does not make a wish for himself because, according to the belief of *ubuntu*, the people who have gone before you, as well as those who follow, cover your needs.[74]

African jurisprudence has only recently received (some limited) attention in South African legal discourse, and a key concept in customary African jurisprudence is *ubuntu*(ism).[75] Loosely defined, *ubuntu* is a multi-layered

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72 The law and literature movement holds that stories in the form of literature can 'humanise' law. Nussbaum (1990) maintains that literary works invite the reader to identify with characters through the text. In so doing we judge, as readers, the lived experiences of a number of diverse individuals. Literature promotes sympathy for the narrated stories of these individuals.

73 In Anderson (1997), p 211.

74 See a description of this ritual in Webster (2001), pp 72–73.

75 Johnson and Du Plessis (2002), p 46. The poetess Nkonyeni (2002), p 46 describes in her own words her experience of *ubuntu*:

> We all are the messengers
> of God.
> We all are the bringers of
> light.

concept denoting both a traditional African form of life and a communal or communitarian ethic[76] which appears to provide alternative values to liberal legalism and Western individualism, as does feminism. Cixous has in fact referred to the feminine as the 'dark continent' and drawn her own milk-like conclusions about the fragile connections between the feminine and African diasporas.[77] Radical dispropriation is at the root of *ubuntu* — apparently antithetical to individual rights yet insisting on responsibility. It demands both the exercise of claiming belonging and performing duties as an ethical being. It is a foundationless basis for reconciliation, as was illustrated in the painful catharsis exercised with the spaces created by the TRC.

Archbishop Desmond Tutu defines the essence of *ubuntu* as follows:

> Africans have a thing called *ubuntu*; it is about the essence of being human, it is part of the gift that Africa is going to give to the world. It embraces hospitality, caring about others, being willing to go that extra mile for the sake of another. We believe that a person is a person through other persons; that my humanity is caught up, bound up and inextricably in yours ... When I dehumanise you, I inexorably dehumanise myself. The solitary human being is a contradiction in terms. Therefore you seek to work for the common good because your humanity comes into its own in community, in belonging.[78]

It embraces a law of being-with-others and inspires us to learn of others as we learn of ourselves and respect their difference(s) from us.

Ramosa[79] explains the concept in far more Western philosophic terms, but he also maintains much of the African spirituality of this parallel law. For him, *Ubu-ntu* defines how the be-ing of an African is anchored in the cosmos. This is primarily expressed by the prefix *ubu-* which contains the being as enfolded, while the stem *-ntu* means the unfolding of the being by means of a concrete manifestation through particular modes and forms of being. This process of unfolding includes the emergence of the speaking and knowing human being. Therefore, the African conceptions of the universe — and of the position of the human being in it — is premised on movement or motion and consequently 'order' cannot be established and fixed for all time. The living soul, cultural practices and spiritual values are rendered fluid and there is a tension here between the enfolded and the unfolding which has not received much attention in jurisprudential circles in South Africa, probably because *ubuntu* or the feminine-beside-*ubuntu* are not generally perceived to be 'valid' alternatives to the system in any pragmatic sense of the word.

> Find the message within.
> Find the light within.

76 Lenta (2001), p 180.

77 Cixous (1976), p 310.

78 Battle (1997); Tutu (1999), pp 34–35.

79 Ramosa (1999).

The Postamble to the interim Constitution[80] explicitly recognises the concept of *ubuntu* as follows:

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

Although the final Constitution[81] makes no mention of *ubuntu*, the most written about utilisation of the complex philosophy of *ubuntu* is found in the case of *S v Makwanyane*, where the Constitutional Court held the death penalty to be unconstitutional contrary to the wishes of the majority of South Africans.[82] This case has given much legal weight to *ubuntu* as a constitutional value, although the concept has not been extensively utilised by the court since the 'death penalty' case.

Justice Yvonne Mokgoro,[83] who contributed to the decision reached in *Makwanyane* by communicating her own understanding of the African philosophy of *ubuntu* within the constitutional context,[84] is of the view that constitutional law reform can harness the 'spirit' of *ubuntu(ism)*, with its key values of human dignity, respect, inclusivity, compassion, concern for others and honesty in the development of a young democracy.[85] She mentions the following as examples of ways in which South African jurisprudence could be transformed in order to align itself with these renaissance values:

- Law should be transformed to the extent that it is no longer conceived as a tool for personal defence.
- Communalism should place more emphasis on group solidarity and interests.
- The *conciliatory* character of the judicial process should be developed in order to restore peace and harmony between members, rather than placing undue reliance on the adversarial approach which emphasises retribution and seems repressive.
- The importance of public ritual and ceremony should be given due recognition.

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80 Act 200 of 1993.

81 Act 108 of 1996.

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

83 'Ubuntu and the law in South Africa', www.puk.ac.za/lawper/1998-1/mokgorab.html.

84 Mokgoro refers to *ubuntu* as 'one shared value that runs like a golden thread across cultural lines' (S v Makwanyane (1995) 2 SACR 1 at 307–8), and equates this African concept with the English word 'humanity' and the Afrikaans word *menswaardigheid*.

85 *S v Makwanyane* (1995) 2 SACR 1 at 4.

- The idea that law experienced by an individual within the group is bound to individual *duty* as opposed to individual rights or entitlement should be advanced.
- The importance of sacrifice for every advantage or benefit, which has significant implications for *reciprocity and caring within the communal entity* should also be advanced.[86]

As Mokgoro so eloquently puts it:

> Quite obviously, the complete dignification of South African law and jurisprudence would require considerable re-alignment of the present state of our value systems. We will thus have to be ingenious in finding or creating law reform programmes, methods, approaches and strategies that will enhance adaptation to such unprecedented change.[87]

Consequently, *ubuntu/botho*, 'if consciously and conscientiously harnessed, can become central to a new constitutional jurisprudence [of care] and to the revival of sustainable African values as part of the broader process of the African renaissance'.[88] It is, of course, trite that these values — as any others — would be required to surmount a threshold of constitutional and critical scrutiny and must be consistent with the text, spirit and values of the 1996 Constitution.[89]

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*[90] — life with and through others.

It is interesting to note that, in the *Mthembu* cases, the practice of *ubuntu* as enfolding mother and child within the community failed, for economic and other political reasons. Mama Mthembu and Thembi were ousted from their home once their recourse to the (Western) law had failed. The unfolding nature of *ubuntu* also failed, as the courts chose to adhere to static customary law texts. These cases thus continue to haunt South African male-stream legal academics and the small critical contingent. Especially puzzling is the fact that Mthembu did not approach the Constitutional Court. Perhaps she ho longer

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86 What is of particular interest is that these suggestions of legal transformation through the application of the value of *ubuntu*(ism) returns us to the work of Menkel-Meadow (1985) and her interpretation of Gilligan's ethic of care as of value in the predominantly masculine rule-orientated legal domain.

87 Mokgoro, in *S v Makwanyane* (1995) 2 SACR 1 (CC) at 6.

88 Mokgoro, in *S v Makwanyane* (1995) 2 SACR 1 (CC) at 6. Thus there has been an acknowledgment that there is a need for constitutional values to be located within African sources. See also the judgments in *S v Makwanyane* (1995) 3 SA 391 (CC), para 131, 446F–G, per Chaskalson P; paras 224–26, 481, per Langa J; paras 237–45, 484–85, per Madala J; paras 263, 488G–H, per Mohamed J; paras 307–8, 500–501, per Mokgoro J; and paras 374, 516G, per Sachs J.

89 See Sachs J in *S v Makwanyane* (1995) 3 SA 391 (CC) at paras 374, 516E.

90 See Albertyn and Goldblatt (1998), where the authors develop a detailed theory of substantive equality, placing emphasis on context and historical disadvantage.

wanted her body to be broken or her voice to be silenced by the Western legal system.

It is dangerous to merely embrace *ubuntu* as a universal value without some thoughtful critique. Postmodern critiques of essentialism, foundationalism and meta-narratives have taught us that rendering concepts stable and static only leads to further oppression and exclusion as those who do not 'fit in' are once more excluded. Narayan's warnings against cultural essentialism should also be heeded when 'labelling' groups as exclusively good or bad.[91]

A Critical Analysis of the Value of Ubuntu

> I think as long as one remains aware that it is a very problematic field, there is some hope.[92]

In his (pragmatic postmodern) discussion of *ubuntu,* Patrick Lenta[93] points out that the recognition of *ubuntu* as a constitutional value has been heralded in South Africa as an indication that we now share a substantive, inclusivist vision of the law and justice.[94] However, he then cautions us against once again declaring a victory:

> On the other hand there is a danger that indulging in nostalgia about African colonial cultures will reinforce the myth that there is a single African culture and that the continent lacks diversity ... *Ubuntu* has the potential to homogenise, normalise, elicit consensus and exclude through rhetorical and other violence.[95]

In *S v Makwanyane* the concept of *ubuntu* was embraced as a constitutional value and a method of voicing the marginalised other. This marks the concept as a site of resistance and reintroduces the 'subjugated knowledge' of the colonised into legal theory. However, the Constitutional Court's resort to *ubuntu* can also be seen as providing cover for the operations of power in the case.[96] According to Lenta's deconstructive reading of the case:

> although the Court's resort to *ubuntu* seems to contain ethically laudable sentiments — the valorisation of excluded identity, tradition and forms of community — on a Foucauldian reading, its political

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91 Roy (2002) refers to the dangerous tendency in India to value only what is dictated as 'truly' Indian culture. This form of extremist nationalism has led to the exclusion, oppression and genocide of Muslims and Christians living in India.

92 Spivak (1990), p 63.

93 Lenta (2001).

94 Lenta (2001), p 189.

95 Lenta (2001), p 189.

96 Lenta (2001), p 190.

> effect is to substitute long prison sentences in the place of execution, which Foucault perceives as a new form of domination'.[97]

When a value is legally entrenched, the other can easily be turned into the same and the site of resistance obliterated. What is of importance here is the *impact* of a legal decision and the fact that we remain vigilant when judging and when examining emergent truths. What is demanded is the recognition of the other on the other's terms, 'even though this demand is "incalculable", excessive and infinite and thus incapable of (final and complete) fulfillment'.[98]

In their attempts to legalise the value of *ubuntu*(ism), the Constitutional Court Justices remained silent about indigenous spiritual wisdom, magic, mythology, legends and proverbs as these teachings do not fit easily (or at all) into legal discourse. They did not acknowledge — even in passing — that there are other ways of knowing and being, other means of connecting with the cosmos and relating to one another, or other selves and voices that are subjects who can speak *for themselves.*[99] Indeed, the cosmology (I borrow the term from Chris and Shaun) of *ubuntu* is sacred and cannot be objectified.[100]

However, on a more pragmatic leval, when struggling towards the experience of justice, we should utilise the radical 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.

Having been warned against closure, we move beyond to a landscape of ethical and caring justice — that which I choose to refer to as the 'jurisprudence of care'. If we accept *ubuntu* as a philosophy or way of living, then we also accept that *ubuntu* means different things to different people. The values encompassed in *ubuntu*(ism) are passed down from generation to generation through the art of storytelling, and so the theory obtains meaning in the lives of those who chose to listen closely:

> Unlike the written word, which can be removed from its unique moment, be referred to, and re-experienced as often as the subject pleases, the spoken word, the tune spontaneously sung, once it has been uttered, is gone and cannot be recaptured.[101]

This is not to say that stories are the final 'answer' to a myriad questions. It is indeed offensive when stories are arrogantly proffered to you as your own.[102]

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97 Lenta (2001), p 191.

98 Lenta (2001), p 196.

99 This statement problematises Spivak's claim that the subaltern cannot speak — perhaps she is merely not heard.

100 See Goduka (2000).

101 Jordan (1973), p xvi.

102 Achebe (2000) refers to this extensively. He illustrates his point by way of quoting colonialist writing on Africa and Africans by Conrad, Cary and Huxley, amongst others. He uses the following by way of metaphor at p 73: 'Until the lions produce their own historian, the story of the hunt will glorify only the hunter.'

However, the Nigerian author Chinua Achebe[103] calls for what he refers to as a 'balance of stories' among the world's people and a 're-storying' of Africa.

Embracing a Jurisprudence of Care

> I am the woman
> Offering two flowers
> Whose roots are twin
> Justice and Hope
> Hope and Justice
> Let us begin.[104]

Our legal system as it is does not adequately accommodate contextual analysis, embeddedness, emotion, compassion and so on. The procedures in courts do not facilitate the telling of stories or narratives, and there is not a serious enough consideration of the ethical responsibility which underlies the making of wise and responsible decisions.

If, in the antique legal maxim, to do justice is to follow the heart — *carde creditur ad iustitiam* — then how can justice be done by a subject who cannot feel? Essentially it is difficult to conceive of a truly effective lawyer or adjudicator who is unable to comprehend the life-world or the living landscape within and around them. What the law tends to do is to assimilate otherness and to bring the plural within its domain — to render differences understandable and non-threatening.

We need, therefore, to keep in mind that there is more to the story(ies) of woman or other outsiders than meets the eye, and that there is more than one Narrative or Truth, even within the limited but powerful domain of the law.[105] Therefore we should not attempt to introduce new monovocal ways of representing women or Blacks to replace previous ones. There is no ultimate *representation* of the other. The feminine and Blackness are most powerful when they serve as disruptive forces within and around the current system. *Different voices* should not be appropriated, but should expose the limits of the current (closed) system, in this context the legal system. The multiple stories related by outsiders are examples of dialogues from the margins which seek to challenge our perspectives and certainties continually. Within the African context:

> Folk tales and stories constitute a significant part of historical African tradition and culture, since African customs are often transmitted via the medium of oral tradition ... Further, [they] are narrative turns that are instructive for describing social reality, for analyzing and interpreting

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103 Achebe (2000), pp 79ff.

104 Walker (1991).

105 The power of the meta-narrative always remains, however. As Spivak (1990), p 19 explains: 'the narrative takes on its own impetus as it were, so that one begins to see reality as non-narrated. One begins to say that it's not a narrative, it's the way things are.'

> the roles of actors in such a reality, and subsequently stimulating the imagination of the hearers and readers in *transforming that reality*'.[106]

To interrupt myself, one project of this study is to identify and sort out damaging from valuable incoherences, dilemmas, dissonances and tensions in traditional Western thought *and* in the feminist and African critiques. A contention would be that it is the tensions we long to repress, to hide and to ignore that are the most dangerous ones. They are the ones to which we give the power to capture, to enthrall and to seduce us to actions and justificatory strategies for which we can imagine no alternatives. Traditional legal discourses are full of such damaging tensions. However, arguing for a more open acknowledgment and appreciation of the tensions that exist in feminist and African critiques may reflect valuable radical thinking which is in opposition to the coerciveness and regression of modern and traditional law and interpretations of the legal.

There is yet another world hidden from the consciousness of law — the world of emotions, feelings, values; of the individual and collective unconscious; of historical and cultural particularity explored by novels, drama, poetry, music and art — within which we live most of our waking and dreaming hours, under the constant threat of its increasing infusion by Enlightenment rationality.[107] Part of the project of feminism in its many forms is to reveal the relationship between these two worlds which we all inhabit and to explore how each of these worlds or world-views shapes and informs the other.

For this very reason, feminists cannot afford to ignore the diverse concrete experiences of *all* women — it is this that should underpin both feminist theory and praxis. Feminist jurisprudence should thus play both ends in order to expand the repertoire of resistance, disruption and dissent. The aim is to learn to embrace the paradoxes of lived experiences and constantly challenge received and entrenched knowledge systems and legal doctrine. Luce Irigaray encourages us to speak differently in order not to disappear altogether:

> If we continue to speak this sameness, if we speak to each other as men have spoken for centuries, as they have taught us to speak, we will fail each other ... words will pass through our bodies, above our heads, disappear, make us disappear.[108]

It is clear that, in order to be heard, the social, scientific, metaphysical and legal foundations of white patriarchal systems need to be shaken up. The concept of gender equality itself also needs to be reinterpreted and reimagined so that it no longer implies a measurement according to a given standard.[109]

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106 Kunnie (1994), pp 41–42.

107 Kundera (1984).

108 Irigaray (1977), p 6.

109 That is, quite simply, the Western, middle-class, heterosexual man.

Therefore, in order to avoid a mere slotting into pre-existing patriarchal categories and theoretical spaces, women's lives, experiences and stories should provide the criteria by which patriarchal (legal) texts can be judged. Should particular perspectives and points of view be asserted, this would result in women becoming subjects of knowledge and not mere objects.

To illustrate, let us consider the story of Sarah Baartmen, the so-called 'Hottentot Venus', whose remains were returned to South Africa last year. Sarah was displayed in life to curious Europeans who flocked to see her parading as a 'barbarian' and 'savage monstrosity' at circus sideshows, museums, bars and universities. Baartman was objectified, humiliated and put on display as a sexual freak.

At her burial in Hankey near Port Elizabeth, President Thabo Mbeki drew an analogy in his speech between the restoration of Sarah Baartman's dignity and the transformation of South African society 'into a truly non-racial, non-sexist and prosperous country, providing a better life for all'. He continued his eulogy by pointing out that:

> [a] troubled and painful history has presented us with the challenge and possibility to translate into reality the noble vision that South Africa belongs to all who live in it. When that is done, then it will be possible for us to say that Sarah Baartman has come home.[110]

Within the webs of theory presented above, the single golden thread apparent is that the feminine and African as critical and ethical spaces challenge both the content and frameworks of entrenched legal and social discourses, disciplines and institutions. What is needed is to bring into plain view the hitherto unarticulated humane perspectives on the world and on the legal structuring of the world. There remains the possibility, however, that you and I may continue to struggle in our understanding of one another:

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[110] Quoted in the Supplement to *The Herald and Daily Dispatch,* 'Celebrating 10 Years of Freedom', dated 26 April 2004. On the front page of this supplement is a poem written by Diane Ferrus in celebration of Baartman's return. The most moving stanza of the poem reads as follows and supports a rejection of the perception of Black women as objects to be observed and used:

> I have come to wrench you away —
> away from the poking eyes
> of the man-made monster
> who lives in the dark
> with his clutches of imperialism
> who dissects your body bit by bit
> who likens your soul to that of Satan
> and declares himself the ultimate god!

> I must, therefore, assume the risk involved in addressing myself to you in the knowledge that I may not be understood by you ...[111]

New Discursive Spaces and Fragile Connections

Having come a long way since the path mapped out in the introduction, we are faced with the 'heart of darkness' and *new discursive spaces* where subalterns and subversives can write, think and speak their own law. This space then encourages a proliferation of voices, instead of a hierarchical structuring of voices, and the plurality of perspectives and interests instead of a monopoly of one. We have come face-to-face with 'new kinds questions and different kinds of answers'.[112]

In these gaps, interpretations are open to critique, including the interpretation of the right to gender equality as in the case of Mama Mthembu who attempted to articulate her discomfort with a system adversely affecting her experience of well-being in the world and her own *feeling of the law and how it should be*. Why do we deny her this? If legal theorists consider themselves to be the prophets who interpret our dreams and visions into words/law, they need to interpret with caution.

The search is therefore on for a legal space where we are able to move beyond a conflictual attitude towards one another, where we pay careful attention to the narratives of others and where we are not bound to texts, but to bodies, faces and voices — to people with unique, irreducible lives shaped by those with whom they come into contact. The I cannot exist without the other.[113]

To illustrate this point, South African playwright/poet Athol Fugard articulates our fear of social erasure through the words of his character, Don, in *People are Living There*:

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111 Irigaray (2001), p 103. The danger lies in 'his word being his law' and leaving no space for contemplating the value of the other outside the word and the law. In reference to Antigone and her failure to obey her father Creon's law, Irigaray describes her actions as follows: 'For Antigone, attention to the other comes before retreat into blind egoism. She affirms that, without this care for the other, life is not worth living ... Her law — neither simply civil nor simply religious — is not abstract or empty. It does not deal solely with the ownership of goods, but concerns respect for persons, for concrete persons ...' (p 77) For the story of Antigone see Sophocles (1947).

112 Grosz (1997), p 74.

113 To give a respectful nod to the German philosophical tradition, Heidegger (1962), pp 144–45, emphasises the historical and social nature of self. Self is not constituted before its implication with others. (An)other is not only anyone else but me, but those whom I exist amongst. The world is always one I share with others, there is no life without others. For Heidegger, however, unlike Levinasian alterity, self and other are equal participants in the 'we' through which we share the world. See Douzinas and Warrington (1994), pp 161–62 for a more detailed analysis.

> You lose your place in the mind of man. With a bit of luck once or twice in your life you have it. That warm nest in another mind where 'You' is all wrapped up in their thinking and feeling and worrying about 'You'. But even if you are one of the lucky ones, sooner or later you end up in the cold again. They die, or you get divorced. One way or another they go, they forget, and you end up in your little room with your old age pension and a blind bitch for friendship. From then on it's just a matter of days. When they're good, the two of you crawl out to a bench in the sun where she can hate the pigeons and you can hate the people. When it gets dark, you crawl back to the room. Until one day, one more sunny day with the pigeons flocking and the people passing, you're not there. But who misses you? Who's to know that inside a room, finally, forgotten by the world ...[114]

The story told in these pages highlights the fact that mother and daughter were faced with legal *and* social erasure. In her attempts to voice her concerns, Mama Mthembu was erased and silenced by the texts of Western as well as (written) customary law. Sadly, we have learned to live with the violence of law(s) to such a degree that should we awake someday to discover that God and the Law are African women, we will pronounce their death, and voluntarily exile ourselves from an African Eden so that we can continue to carelessly scatter corn before the chickens.

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114 Fugard (1994), pp 33–34. This is a narrative of a woman, Milly, who has been rejected by her lover as she is no longer a 'woman' in his eyes — that is, no longer a child-bearer. The play takes place in her small flat in Port Elizabeth, where she tries to celebrate her birthday. The narrative has an air of desperation to it as Milly throws a last-minute party, eating koek (cake) and drinking Oros (an orange-flavoured drink) in her shabby nightgown with her outsider friends.

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