TOWARDS AN "ETHICAL" INTERPRETATION OF EQUALITY

by

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Throughout the text of my thesis I insist on the impossibility of achieving justice fully in the present. I hereby concede that it is similarly impossible to thank the people who directly and indirectly assisted and supported me in writing this thesis. Yet, I still would like to say a plain and simple thank you to a few people without whom the creation of this thesis (landscape, patchwork) would not have been possible or at the least much harder.

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SUMMARY

The aim of this thesis is to search for an "ethical" interpretation of equality. Although the current South African approach of "substantive" equality is better than mere "formal" equality, I fear that even substantive equality will again deny or reduce difference. An "ethical" interpretation of equality is a way of interpretation that radically acknowledges difference and otherness.

I argue for an ethical interpretation of equality as an alternative to substantive and formal equality. The intersection between public space, equality and justice is essential to such an ethical interpretation. An ethical interpretation of equality requires that present South African visions of public space must be reconstructed and transformed continuously. This means that an ethical interpretation of equality rejects finality and closure in respect of public space. The visions of public space and perspectives of equality that I support are alert to difference and otherness.

My understanding of justice is that it is never fully achieved in the present. Justice functions as a future orientated ideal.

The "ethical" in an ethical interpretation of equality reflects an awareness of the limits of any present system to encompass equality and justice completely.

Visions of public space, perspectives on equality and landscapes of justice (the features of the ethical intersection) form the main sections of the thesis. I discuss the South African Truth and Reconciliation Commission (TRC) as a manifestation of the ethical intersection between public space, equality and justice. The TRC was an outstanding example of reconstruction and transformation of public space. It was a public space where each and every individual was treated equally while concrete contexts, specific circumstances and difference were taken into account. The TRC as event was inspired by the ideal of justice. The value of the TRC as a manifestation of the ethical intersection is the profound effect it may have on our interpretation of equality by demonstrating the limits of the substantive approach.

OPSOMMING

Die doel van hierdie proefskrif is om ondersoek in te stel na 'n "etiese" interpretasie van gelykheid. Alhoewel die huidige Suid-Afrikaanse benadering van "substantiewe" gelykheid beter is as blote formele gelykheid, vrees ek dat selfs substantiewe gelykheid weereens verskil sal ontken of gering skat. 'n "Etiese" interpretasie van gelykheid is 'n manier van interpretasie wat radikaal kennis neem van verskil en andersheid.

Ek argumenteer vir 'n etiese interpretasie van gelykheid as 'n alternatief tot substantiewe en formele gelykheid. Die interseksie tuseen publieke spasie, gelykheid en geregtigheid is noodsaaklik vir so 'n etiese interpretasie. 'n Etiese interpretasie van gelykheid vereis dat huidige Suid-Afrikaanse visies van publieke spasie aanhoudend gerekonstrueer en getransformeer moet word. Dit beteken dat 'n etiese interpretasie van gelykheid finaliteit en geslotenheid met betrekking tot publieke spasie verwerp. Die visies van publieke spasie en perspektiewe op gelykheid wat ek ondersteun is gevoelig vir verskil en andersheid.

Ek verstaan geregtigheid as nooit volkome bereikbaar in die teenswoordige nie. Geregtigheid tree op as 'n toekomsgerigte ideaal.

Die "etiese" in 'n etiese interpretasie van gelykheid weerspieël 'n bewustheid van die onvermoë van enige teenswoordige sisteem om gelykheid en geregtigheid volledig te omvat.

Visies van publieke spasie, perspektiewe op gelykheid en landskappe van geregtigheid (die eienskappe van die etiese interseksie) vorm die hoofafdelings van die proefskrif. Ek bespreek die Suid-Afrikaanse Waarheids-en Versoeningskommissie (WVK) as 'n manifestasie van die etiese interseksie tussen publieke spasie, gelykheid en geregtigheid. Die WVK was 'n uitstaande voorbeeld van die rekonstruksie en transformasie van publieke spasie. Dit was 'n publieke spasie waar elke individu gelyk behandel is terwyl konkrete kontekste, spesifieke omstandighede en verskil in ag geneem is. Die WVK as 'n gebeurtenis is geïnspireer deur die ideaal van geregtigheid. Die waarde van die WVK as 'n manifestasie van die etiese interseksie is die diepgaande effek wat dit op ons interpretasie van gelykheid kan hê deur die beperkings van die teenswoordige substantiewe benadering uit te wys.

Contents

"The land belongs to the voices of those who live in it. My own bleak voice among them"

- Antjie Krog, *Country of my skull*

... landscapes of democracy, equality and justice

I started this thesis during 1996 after finishing an LLM at the end of 1995. I wanted to explore the interpretation of equality in the "new" South Africa. In my LLM dissertation[1] I focused on pornography and the multiple interpretations of freedom of speech. During my research for the LLM dissertation I jotted down a number of issues which I could not

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[1] (1996) *Rekonstruktiewe feminisme: 'n Ondersoek na die reg as "manlike" struktuur en die moontlikheid van transformasie met spesifieke verwysing na pornografie.* (*Reconstructive feminism: An investigation into the law as a "male" structure and the possibility of transformation with specific reference to pornography*)

focus on then, but which I wanted to follow up in a later project. Jacques Derrida's[2] use of Emmanuel Levinas'[3] understanding of the "ethical", Drucilla Cornell's[4] emphasis of the "ethical" in her understanding of feminism, Carol Gilligan's[5] distinction between an "ethics of care" and an "ethics of justice", Seyla Benhabib's[6] concept of "interactive universalism", and Jennifer Nedelsky's[7] theory on "rights as relationships", served as research for the dissertation on pornography, and also became a great source of inspiration for my next project. I decided to call the work *Towards an "ethical" interpretation of equality.*

As the title indicates, the aim of the study is to describe an "ethical" interpretation of equality. All three concepts, "ethical", "interpretation" and "equality" must be translated for the purposes of this (con)text. I shall not try to give a final definition or closed meaning here. Hopefully, the flow and ruptures of the text will help to sketch a context where meanings can be illuminated. Initially, I wanted to work primarily on the writings of Levinas[8] on the ethical relationship to the other, and especially Derrida[9] and

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2 I primarily relied on Derrida's text on the law and justice: "Force of law: The mystical foundation of authority" in Cornell (ed) (1992) *Deconstruction and the possibility of justice* 29-67.

3 Levinas (1969) *Totality and infinity*; Levinas (1987) *Time and the other*; Llewellyn (1995) *The genealogy of ethics. Emmanuel Levinas*; Peperzak (1993) *To the other. An introduction to the philosophy of Emmanuel Levinas.*

4 "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 Cornell law Review 644- 699; (1991) *Beyond accommodation*; (1992) *The philosophy of the limit*; (1993) *Transformations*; (1995) *The imaginary domain.*

5 (1982) *In a different voice.*

6 (1992) *Situating the self*; (1995) *Feminist contentions: A philosophical exchange.*

7 "Reconceiving autonomy: Sources, thoughts and possibilities" (1989) 1 *Yale Journal of Law and Feminism*" 7-36; "Law, boundaries and the bounded self" (1990) *Representations* 162-187; "Reconceiving rights as relationships" (1993)*Revue of Constitutional Law* 1-17.

8 Levinas (1969) *Totality and infinity*; Levinas (1987) *Time and the other*; Llewellyn (1995) *The genealogy of ethics. Emmanuel Levinas*; Peperzak (1993) *To the other. An introduction to the philosophy of Emmanuel Levinas.* See also Visker R (1999) *Truth and singularity. Taking Foucault*

Cornell's[10] reinterpretations of his concepts of the "ethical" and "the other". I still take their writings into account for my "ethical" investigation, but the initial focus shifted from these philosophical texts to include other, for example, political, legal and literary texts.

At this point I have to turn to myself, my likes and dislikes, my interests – those things that influence my method as well as my (un)finished projects. After reading the first draft of my LLM dissertation, my supervisor told me that he had asked himself how it will be possible to award "an LLM in *law* for such a feminist tapestry". I am not, if it exists, a pure philosopher. Nor am I a political scientist or theorist. I am definitely not a lawyer's lawyer. I studied law for 5 years and after that I wrote the LLM dissertation based on some philosophy, (also legal philosophy), feminist jurisprudence and critical legal theory. After I started reading for this thesis, I again realised that I am unable to work on philosophy or legal theory in isolation. A friend and colleague, understanding some of my uneasiness, introduced me to the work of Hannah Arendt.[11]

Hannah Arendt started her academic career by studying philosophy under Martin

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into phenomenology and "Oneuropese verlangens. Op weg na 'n provinsialisme sonder romantiek" (1999) 3 *fragmente* 63-82.

9 See generally (1976) *Of grammatology*; (1978) *Writing and difference*; (1982) *Margins of philosophy*; (1995) *Points ... Interviews, 1974-1994*; (1995) *Archive fever. A Freudian impression*; (1994) *Spectres of Marx*; (1997) *The politics of friendship*; and "Force of law: The mystical foundation of authority" in Cornell (ed) (1992) *Deconstruction and the possibility of justice* 29-67; "Choreographies" (1982) 12 *Diacrits* 76; "Declarations of independence" (1985) 15 *New Political Science* 7-15; "The deconstruction of actuality. An interview with Jacques Derrida" (1994) 68 *Radical Philosophy* 28-41.

10 "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 644-699; (1991) *Beyond accommodation*; (1992) *The philosophy of the limit*; (1993) *Transformations;* (1995) *The imaginary domain.* See also Cornell "Institutionalization of meaning, recollective imagination and the potential for transformative legal interpretation" (1988) 136 *University of Pennsylvania Law Review* 1135.

11 My thanks to Danie Goosen who told me about her work. For biographical information on Arendt see Young-Bruehl (1982) *Hannah Arendt. For the love of the world*; Ettinger (1995) *Hannah Arendt Martin Heidegger*; Kohler & Sander (eds) (1992) *Hannah Arendt. Karl Jaspers. Correspondence 1926-1969.*

Heidegger. She completed her PhD under Karl Jaspers.[12] She managed to combine her philosophical views with political theory and contemporary issues. I was instantly drawn to her as a person, to her writings and to her theories. For a while I was unsure whether I could go on with the initial project of equality and I considered changing the title and topic. Living in a new democracy - South Africa after 1994 - with a new constitution, and experiencing transformation, helped me realise that Arendt's political theory and her theory on the reconstruction of the public realm were exactly what was needed for my "ethical" interpretation of equality. The project became a bit clearer. I wanted to work on the interpretation of equality because equality was so long denied in my country, and because equality is one of the founding principles or fundamental values of our constitution.

Of patchwork and sauces

Before I continue I pause to make a note on images. Below I shall explain my use of landscape as image and the reasons why I use it. I now want to return to another image, the image of a patchwork. I rely on this image because I think it illustrates the style and method of the text. As I understand it (I am utterly incompetent when it comes to needlework, arts and crafts) a patchwork is created by sewing together many small bits and pieces of material. The patterns of patchworks vary. Some have a specific picture, such as a farm scene, others are just a variety of pieces sewn together. For the first kind, a specific design is followed, and the individual pieces eventually serve the greater design. In the second type of patchwork, the individual pieces matter more, and remain noticeable. The latter is a better illustration of my text. I wrote this text by sewing together various, and not necessarily related, theories, philosophies and thoughts of various writers.

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[12] Arendt (1929) *Der Liebesbegriff bei Augustin.*

A patchwork seldom consists of the colourful pieces only. When it is made up of blocks, for example, the blocks are sewn together by inserting strips or pieces of similar design. These "linking" pieces are important because without them there will be no patchwork, only a basket full of small blocks.

Even if one does not create a specific picture by following a specific design, one must have a vision or an idea of how the patchwork should unfold as it starts taking shape. The exciting side of a patchwork in this style is that it can be in a continuous state of creation. One can add more colours and vary the patterns. It can also at any time be expanded. As a child I had a patchwork that was just large enough to cover a little girl. Later, as I grew up, the patchwork started getting too small. But I had become very attached to my patchwork and refused a new one. My mother then made extra blocks which she sewed onto the original patchwork to make it bigger. I am now married and the patchwork, big enough for a single woman, has become too small once again. Whether I shall get my mother to enlarge it once again, I do not know. Maybe I shall keep it as it is, should I have a child of my own one day. For the time being, I use it to cover an old coach which has become weathered. The point is that the patchwork has grown from its original size and altered its original purpose, but its basic idea has remained.

This text is to a certain extent already the enlarged version of a previous patchwork that was created when I wrote my LLM dissertation. However, this is also not a final product but part of the creation of an even bigger patchwork.

Since I am more comfortable in the kitchen than with a needle in my hand I would like to use another image as well. Unlike a patchwork, which is mainly visual, this one concerns our sense of taste. A common way of making a sauce is to add one ingredient after the other, tasting as one goes along. With some sauces, the various tastes blend together to leave you with a single, and often quite bland taste. You ask yourself how a sauce with so many wonderful ingredients can taste so bland. Yet, it happens. Another time your hand slips and too much of one strong ingredient spoils the whole

sauce. A good sauce, in my experience, has a threefold effect: First, one tastes a delicate combination of ingredients, next, if you take time, and eat slowly, and try hard, you can identify some of the particular tastes and ingredients (keeping in mind that most of the time you will not be able to identify some of the ingredients); and finally, having recognised the various tastes, you once more become aware of the delicate combination of all these tastes together.

The idea of this text is patches and sauces. I want to create a patchwork or a sauce which would make a whole, but still leave the individual patches or ingredients - the authors and their theories - identifiable. The big picture (patchwork or sauce) is an ethical interpretation of equality. The various patches or ingredients are visions of public space, perspectives on equality and landscapes of justice. Obviously the various patches or ingredients again consist of smaller patches or smaller quantities of ingredients. I have chosen certain authors and certain theories for my patchwork. I attempted in each case to explain why I chose a specific author or theory and to show how she or he contributes to the landscape or patchwork or sauce.

The actual focus of this work falls on the interpretation of equality. It was clear from the start of the political negotiations, and from the writing of the interim constitution and the final constitution, that the reconstruction of our country would not be an easy ride. One of the reasons Hannah Arendt's theory had such a big influence on my own understanding of and thinking about equality, is the absence of the public realm, public spaces and political action in South Africa during the years of apartheid. In my view, the reconstruction and transformation[13] of South Africa from an authoritarian (even totalitarian) state to a democracy, and the interpretation of a justiciable bill of rights must occur with a simultaneous (re)creation, (re)construction and transformation of the public realm. What I understand under the public realm and public space will hopefully become clearer as the text unfolds. Suffice it to say that I do not imagine a community where all members adhere to one concept of the common good (the good life); but I

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[13] The reconstruction and transformation of our visions of public space are discussed in Part 1 "... visions of public space".

also do not rely on the media, the internet and cyberspace as the only possible public space in a new millennium.[14] Arendt's writings on Rahel Varnhagen's[15] Berlin salons as examples of public spaces provided a starting point for my own vision. In my view, political and legal transformation can only occur with a strong acceptance of the "public" and of "political action". My own context provided me with an exceptional example of public space in the event of the South African Truth and Reconciliation Commission.

The TRC was a public event in many ways. It was foreseen in the interim Constitution;[16] it was brought about by an Act of Parliament;[17] and it happened in the public all over South Africa in the form of hearings with huge media coverage. The event of the TRC is an astonishing example of the importance of bringing that which was private and in the dark into the public.[18] I shall elaborate on the TRC in the course of the thesis. Right now, I want to stress the importance of the TRC as a public moment in South Africa's history of transformation from inequality, oppression, authoritarianism and totalitarianism to equality and democracy. The ideals of the TRC were to reconcile, to find truth, to bring justice. Although I do not believe that a human commission is fully capable of doing any of the above, the TRC was an important public moment that unlocked possibilities and promises and ideals of justice for all South Africans. My angle on the TRC is its contribution to the recreation of public space, political action, equality and justice. I shall show that the event of the TRC must influence legal interpretation, and for the purposes of this thesis, the interpretation of equality. The

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14 See for example Carpignano "The shape of the sphere: The public sphere and the materiality of communication"; Gamson "Taking the talk show challenge: Television, emotion and public spheres" and Koch "From kingdom to stardom" (1999) 6 *Constellations* 175-189; 190-205; 206-215.

15 Weisberg (ed) (1997) *Rahel Varnhagen. The life of a Jewess*. See also Benhabib (1996) *The reluctant modernism of Hannah Arendt* 1-34.

16 Act 200 of 1993, postamble.

17 Promotion of National Unity and Reconciliation Act 34 of 1995.

18 For Hannah Arendt action is of value exactly because it brings that which is dark and private to the public realm.

initial aim of the thesis remained to seek for an "ethical" interpretation of equality, but with the realisation that such an interpretation will have to be sought within the landscapes of democracy (political action, public spaces), equality (constitutional protection, difference) and justice (stories, memory, TRC).

Through my interaction with the various texts I came to identify an intersection, that I shall call an ethical intersection, between public space, equality and justice. For me, an ethical interpretation of equality is dependent on this ethical intersection between public space, equality and justice. In other words an ethical interpretation of equality will take account of public space, equality and justice. For this reason my argument will fall into three parts: "... visions of public space", "... perspectives on equality" and "... landscapes of justice". The TRC was for me a manifestation of the ethical intersection between public space, equality and justice. I shall elaborate on this theme throughout the thesis. Suffice it to say now that in my view the TRC could and should influence legal interpretation in future and for this thesis the interpretation of equality. In comparison with the interpretation of and approach to equality followed by the legal community in general at present (formal equality and more recently substantive equality), the TRC followed a much more contextual approach, realising the reality of difference and the impossibility of ever fully achieving equality or justice in the present.

In my search for an ethical interpretation of equality I shall investigate various visions of public space to find guidance for the reconstruction and transformation of South African visions of public space; I shall look at some perspectives on equality (the present South African approach included) from where an approach to an interpretation of equality can be developed; and I shall look at the TRC as an embodiment of the ideal of justice and as a manifestation of the ethical intersection between public space, equality and justice.

I write in a South African context, my own context. Social, historical and political landscapes will have a great bearing on the road and the directions which this text will follow. As a woman, I argue from a marginal position, criticising mainstream male

discourse and visions. Although I do not explicitly address women's issues or women's equality, the thesis is definitely "feminist" inspired. The attraction to an "ethical" understanding of equality with a strong reliance on the fact of "difference", explains the vision of feminism I subscribe to, a vision of difference and the affirmation of "feminine" and "masculine" difference. I argue against formalistic, conceptual and instrumental[19] strains in legal thinking and believe that we should explore the imagination, storytelling, an "ethics of care" and relational rights in our approaches to justice. Although I appreciate the deconstructive insights of the impossibility of ever achieving justice[20] in the present, I am still taking up the call to write about and explore these issues. Perhaps because I share Hannah Arendt's "love of the world",[21] I continue the search for approaches that will bring us closer to democracy, to equality and to justice. Exploring the value of the imagination, storytelling and relational interpretations of rights might bring us closer to these ideals.

I rely on "landscape"[22] as an image to illustrate aspects of the possibilities, the impossibilities, the happiness and the tragedies which are so much part of any exploration of democracy, equality and justice.

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19 I use these concepts generally to refer to the approach to law, politics and justice that relies on traditional positivist beliefs in the "rule of law", on the objectivity, logic and coherence of the law, on policy-orientated decisions that do not consider or reflect on normative/moral/ethical concerns.

20 Cornell renames deconstruction as "the philosophy of the limit" in order to show deconstruction's implications for justice. I shall elaborate on this in Part 2 "... perspectives on equality". See Cornell (1992) *The philosophy of the limit.* I shall also refer to Derrida "Force of law: The mystical foundations of authority" in Cornell (ed) (1992) *Deconstruction and the possibility of justice* 29-67. See also Caputo (1997) *Deconstruction in a nutshell. A conversation with Jacques Derrida.*

21 See Young-Bruehl (1982) *Hannah Arendt. For the love of the world.*

22 In the initial stages of the thesis I read a novel by Lettie Viljoen (1996) *Landskap met vroue en slang* (*Landscape with women and snake*)(own translation) that inspired me to use the metaphor of landscape for my explorations. The South African landscapes done by South African artist Walter Meyer also attracted me to use landscape as a way of approaching abstract theory.

Landscape as image

> Ons reis deur die landskap, die groot-groot nie-plek.[23]
>
> Every painting, drawing or poem is a landscape. Or a mindscape.[24]
>
> This is my landscape. The marrow of my bones. The plains. The sweeping veld. The honey-blonde sandstone stone. This I love. This is what I'm made of. And so I remain in the unexplainable wondrous ambuscade of grass and light, cloud and warm stone.[25]
>
> Die ware landskap is een van rus.
> Jy kan van skeppers en taboes vergeet
> want alles is ontplooiing, voltyds voltooi.[26]

In the next few pages I shall try to explain why and how landscape and the representation of landscape serve as metaphor or image for the aim of this thesis, namely to describe the ethical intersection between public space, equality and justice, and ultimately an "ethical" interpretation of equality. I rely strongly on Marilet Sienaert's[27] description of how Breyten Breytenbach's painting and writing, text and image, are interrelated. Sienaert argues that with Breytenbach the interrelation between

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23 "We travel through the landscape, the big-big non-place" (own translation). Miles in Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 51.

24 Breytenbach as quoted by Sienaert in Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 15.

25 Krog (1998) *Country of my skull* 210.

26 "The true landscape is one of rest. Forget creators and taboos, for everything is spread open, permanently completed" (own translation) Breytenbach (1995) *Nege landskappe aan my beminde* (Nine landscapes for my beloved) (own translation).

27 Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 15.

text and image is found less in the finished product than in its making. The interrelation between democracy, equality and justice, or between the existence of a public realm and an "ethical" understanding of equality, might also be found in the various processes, rather than in the final products. Sienaert contends that in Breytenbach's art the "how" dominates the "what", in other words, the process of making is far more important than the final product. In this regard, Breytenbach does not distinguish between making text (writing) and making visual images (painting). By putting questions of politics, public space, equality and justice (the ethical intersection between them) in the image of landscape, I hope to illustrate the importance of the processes inherent to them. According to Sienaert, African art also emphasises the process of making, rather than the finished product, in the sense that art cannot be seen separately from life itself.[28] (In Sienaert's words, art objects are not viewed only as aesthetic objects.) Our "solutions" to political, social, economic and legal problems should similarly be concerned and intertwined with the patterns of living (the process of making) and not be considered simply as instrumental policies (aesthetic objects).

Sienaert[29] describes the creative act of writing or painting against the background of ancient Oriental philosophy. According to this philosophy, human beings take part in the continuous creation of a universe which paradoxically has already reached completion: Although all things have been created and completed once and for all, they remain "unfixed" (open) and in a state of continuous transformation.[30] Breytenbach subscribes to this notion in his understanding of art. For him art is about awareness and communication.

> To be alert to the listener or for that matter to the person speaking to me, I find that one has to talk against the conventions and the perceived expectations. Maybe you never create anything. Maybe you can only help uncover the deadened feeling of being alive by peeling the eye and

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28 Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 15.

29 Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 18.

30 Sienaert in Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 18.

> stripping away certainties. In other words if I don't just want to do the mumbo-jumbo, if I want to make you aware of the texture of what I'm saying, then I have to talk against the grain.[31]

Sienaert shows that inherent in painting or writing (legal interpretation), is the exploration and transformation of an already existing reality. If we consider the way we normally look at or read a landscape (public space, equality, justice), we instinctively attempt to "fix" (reify) the image. In trying to understand a landscape we recognise familiar things like mountains, streams, trees (instrumental politics, entrenched human rights, rule of law, balancing of rights) and so on. But, as Sienaert notes, the way we choose to see a landscape is always influenced by the "conventions of perspective" with which we are familiar. In other words, there is always an already existing conventional code that influences how we see and understand.[32] ("Daar skuil 'n kode agter alle leef sodat jy lees en weet gedig: en herken wat jy nooit ontmoet het nie").[33] This point is similar to the realisation that context influences our understanding and reading of texts, our experience of political and public life and our interpretation of legal rights. However, contexts are constantly changing with the effect that "fixed" concepts are inadequate to describe what we see, understand and experience.

> Because of the multivalence of shapes and words all conventional contradictions have the potential to dissolve, and unusual combinations can transform the known to expose the dynamic nature of the world around us.[34]

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31 Breytenbach as quoted by Sienaert in Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 18.

32 Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 20.

33 "There hides a code behind all living that you can read and know and recognise that which you have never met" (own translation) Breytenbach as quoted by Sienaert in Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 20.

34 Sienaert in Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 23.

Sienaert[35] argues that the dynamic and transformative potential of an image can only be experienced if its inherent multiplicity is continually exposed. Likewise, the transformative qualities of politics and public spaces can only be experienced if their inherent multiplicity is continually exposed. We should constantly be involved in challenging fixed concepts and categories, preventing them from becoming wholly reified. In the legal context this refers to the constant problematisation of the reification of rights and rights jurisprudence.[36]

Sienaert[37] distinguishes between "symbol" and "image": Where a symbol has a static and fixed nature, an image does not refer to any fixed content beyond its own: it is always open-ended and creative. The recurring images in Breytenbach's paintings (horses, parrots, hats etc) do not constitute some hidden message but remain transformative images. She notes that this is reminiscent of the "organic" nature of meaning in some tribal African societies. Meaning is always in the process of change and its interpretation will vary according to each person's unique degree of conditioning[38] and understanding.

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35 Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 23.

36 See Gabel "The phenomenology of rights-consciousness and the pact of the withdrawn selves" (1984) 62 *Texas Law Review* 1563-1599 and "Reification in legal reasoning" (1980) 3 *Research in Law and Sociology* 17-43. See also generally Kairys (1997) *The politics of law. A progressive critique;* Kennedy "Form and substance in private law adjudication" (1976) 89 *Harvard Law Review* 1685-1778; Tushnet "Truth, justice and the American way: An interpretation" (1979) 57 *Texas Law Review* 1307-1359; Tushnet "Anti-formalism in recent constitutional theory" (1985) 83 *Michigan Law Review* 1502-1544; Tushnet "Critical legal studies and constitutional law: An essay in deconstruction" (1984) 36 *Stanford Law Review* 623-647; Unger "The critical legal studies movement" (1983) 96 *Harvard Law Review* 561-675; Kelman "Trashing" (1984) 36 *Stanford Law Review* 293-348; Gordon "Critical legal histories" (1984) 36 *Stanford Law Review* 57-125; Trubek "Where the action is: Critical Legal Studies and empiricism" (1984) 36 *Stanford Law Review* 575-622; Simon "Visions of practice in legal thought" (1984) 36 *Stanford Law Review* 469-507 .

37 Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 24.

38 Tutu (1999) *No future without forgiveness* 204 also refers to the power of conditioning that should not be underestimated. I shall return to this point in the end note, " ... continuous landscapes", of this text.

> The "meaning" of an image would imply fixation and therefore death: "meaning", "understanding" - these neutralize the threat of the unknown or the unexpected, and it is precisely through confronting the unexpected that the experience becomes transformative. Reality renewed.[39]

The notion of "actively confronting an image" is significant for the purposes of this thesis because it implies an "active experience". Sienaert[40] notes the directness and immediacy of exposing the "multivalence of an image". This idea of actively confronting is similar to Hannah Arendt's insistence on "political action" in the public realm. "Human plurality" enables human appearance to each other.[41] The face of "the other"[42] is an active experience that occurs in the public realm. Derrida,[43] when writing on justice and the role of the judge, demands that the judge must actively search for the given norms to be reasonable, but simultaneously the judge must confront the given norms, create new "meaning" and transform. A judge, however, must act "immediately" because "justice does not wait". Judging refers to the application of the law but also to amendment, augmentation and creation. Sienaert[44] shows that to some extent no poem or painting can avoid to be pointing to something with which we are familiar, but direct experience of an image "is" and cannot be described. This tension between familiar images (conventional codes) and constant change with regard to interpreting art is similar to the tension between freedom and textual constraint in the legal context.

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39 Sienaert in Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 24.

40 Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 26.

41 I discuss Hannah Arendt's theory of action and human plurality in Part 1 "... visions of public space".

42 I address the concept of "the other" in Part 2 "... perspectives on equality".

43 "Force of law: The mystical foundation of authority" in Cornell (ed) (1992) *Deconstruction and the possibility of justice* 29-67.

44 Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 30.

The various authors and the dilemma of (re)presenting them, and the various sections

I have already mentioned that I will be focusing on various disciplines, theories and texts. I cover the writings of various authors from the various disciplines, some more than others but none of them in totality or completely. I rely on those aspects of their thinking that is most helpful to my own investigation and argument, that is the identification of the ethical intersection between public space, equality and justice and the search for an ethical interpretation and understanding of equality.

The dilemma I face in representing the theories, the views and the arguments of the various authors (in creating the patchwork or cooking the sauce) is this: Because I use the various authors to enable me to formulate my own argument, I want to stay as close to their own voices as possible. I realise that my representation of an author is already an interpretation, but I nevertheless attempt to describe the specific point of view of every author as true to him or her as possible. The method of representing the respective authors has an obvious impact on the style, flux and fluidity of the text. The reader will notice breaks in the text, hear other voices speaking, using language (terms) other than the language used by me in telling (representing) my story. I have no ready solution to this dilemma. The creation of textual landscapes, like the creation of a patchwork, consists of the combination of various "bits and pieces". The final product must reflect the method and the process of creating it. I hope that the glimpse that I give of each author's theory is sufficient to show the inspiration and direction it provided for my own argument.

In Part 1 "... visions of public space" I start of by putting forward Drucilla Cornell's[45] understanding of transformation, Anthony Kronman's[46] view of judgement and Martha

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45 (1993) *Transformations*.

46 "Living in the law" in (1987) 54 *The University of Chicago Law Review* 835-368.

Nussbaum's[47] call for the "literary imagination in public life" as introduction to the various visions. For me, a combination of Cornell's second meaning of transformation, namely transformation of individuals themselves, Arendt's[48] view of public space as a space of "human appearance", and Kronman's understanding of judgement as the process of imaginatively exploring alternative ways of being, has a significant meaning for the reconstruction and transformation of public space. Following Cornell, Kronman and Arendt, one conclusion, amongst others, is that the reconstruction and transformation of the public realm should take place in an "imaginative" way. Traditional ways of looking at and thinking about "the public" should be expanded by exploring imaginative alternative ways of being. In this respect Martha Nussbaum's argument that the "literary imagination" can enhance current conceptions of public life enters the picture. She promotes the view that literature and the literary imagination are "subversive" and that literary thought can be viewed as the "enemy" of economic thought.

I then critically reflect on some liberal visions of public space with reference to John Rawls,[49] Ronald Dworkin,[50] Bruce Ackerman, [51] Seyla's Benhabib's [52] critique on Ackerman and Michael Sandel's[53] critique on the liberal model. I discuss the views of

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47 "The literary imagination in public life" (1991) *New Literary History* 877-910.

48 (1958) *The human condition*; (1982) *Lectures on Kant's political philosophy.*

49 (1972) *A theory of justice* and (1993) *Political liberalism.*

50 (1977) *Taking rights seriously*; (1986) *Law's empire* and (1995) *Life's dominion.*

51 (1980) *Social justice in the liberal state*; "Why dialogue" (1989) 86 *Journal of Philosophy* 8; "The Storrs lectures: discovering the constitution" (1984) 93 *Yale Law Journal* 1013.

52 (1992) *Situating the self* 95-104.

53 (1996) *Democracy's discontent. America in search of a public philosophy.* See also (1982) *Liberalism and the limits of justice.*

Jean Elshtain[54] and Carol Gilligan[55] as opposing voices to the liberal vision. Secondly I discuss Jürgen Habermas'[56] vision of public space. I repeat some of the critique on his model from a gender perspective, delivered by Benhabib[57] and Nancy Fraser.[58] Thirdly I discuss the "radical democratic" vision of Chantal Mouffe.[59] Although I subscribe to her vision of public space I express an uneasiness with her gender neutral perspective on citizenship. In this regard I discuss the views of Drucilla Cornell[60] and Jennifer Nedelsky[61] who both in their own way argue for an affirmation of the feminine.

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54 "Antigone's daughters" in Daly (ed) (1994) *Communitarianism. A new public ethics.* See also Van Haute "Antigone, heldin van die psigoanalise? Lacan se lesing van *Antigone*"(1999) 3 *fragmente* 83-98.

55 (1982) *In a different voice* and Benhabib "The generalized and the concrete other. The Kohlberg-Gilligan controversy and feminist theory" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 77-95.

56 "Human rights and popular sovereignty: The liberal and republican versions" (1994) 7 *Ratio Juris* 1-13; "On the internal relation between the rule of law and democracy" (1995) 3 *European Journal of Philosophy* 12-20; "Three normative models of democracy" (1994) 1 Constellations 1-10; (1993) *Moral consciousness and communicative action*; "How is legitimacy possible on the basis of legality" and "On the idea of the rule of law" (1988) *The Tanner lectures on human values VIII* 219-249, 249-279; (1979) *Communication and the evolution of society*; (1984) *The theory of communicative action* vol I; (1989) *The theory of communicative action* vol II; "The French path to modernity" (1984) 33 *New German Critique* 79-102; (1987) *The philosophical discourse of modernity*; (1989) *The structural transformation of the public sphere.*

57 (1992) *Situating the self* 104-113.

58 "What's critical about critical theory? The case of Habermas and gender" in Benhabib & Cornell (eds) (1987) *Feminism as critique.*

59 (1993) *The return of the political.* See also Lefort (1986) *The political forms of modern society*; (1988) *Democracy and political theory* and Schmitt (1976) *The concept of the political.*

60 "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 644-699; (1991) *Beyond accommodation*; (1992) *The philosophy of the limit*; (1993) *Transformations*; (1995) *The imaginary domain;* "Institutionalization of meaning, recollective imagination and the potential for transformative legal interpretation" (1988) 136 *University of Pennsylvania Law Review* 1135.

61 Nedelsky "A relational approach to citizenship" paper presented at the (1997) *Gender and Citizenship Conference*, Beirut, Lebanon; Nedelsky (1989) "Reconceiving autonomy: Sources, thoughts and possibilities" (1989) 1 *Yale Journal of Law and Feminism* 7-36; Nedelsky "Law, boundaries and the bounded self" (1990) *Representations* 162-187; Nedelsky "Inadequacy and disentitlement: internal barriers to women's

Finally I discuss Hannah Arendt's[62] vision of public space. This is the vision that I find most attractive and that I follow and support right through the text. In respect to Arendt's vision of pubic space I also discuss her work on Rahel Varnhagen's[63] salons and Bonnie Honig's[64] account of "agonistic feminism". I conclude with Iris Young's[65] description of heterogeneous public spaces. I rely on these authors' visions of public space, politics and democracy in order to explore the various notions that can help me to form my own vision of public space, politics and democracy for a transforming South Africa. I do not make a study of any of the authors in totality. I choose one or two works of each in order to find and compare aspects of the authors' political visions that could be translated into my own vision.

I use the liberal visions as a reference point from where I can turn to other visions in

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equality" paper presented at Annual Meeting of the (1991) *American Political Science Association*; Nedelsky "Challenges of multiplicity" 89 *Michigan Law Review* 1591; Nedelsky "Reconceiving rights as relationships" (1993) 1 *Revue of Constitutional Law* 1-17; Nedelsky "Judgement, diversity and relational autonomy" presented at the Annual Meeting of the (1996) *American Political Science Association*; Nedelsky "Meditations on embodied autonomy" (1995) 2 *Graven Images* 159-170; Nedelsky "Embodied diversity and the challenges to law" (1997) 42 *McGill Law Journal* 91-117; Nedelsky "Dilemmas of passion, privilege and isolation: Reflections on mothering in a white, middle-class nuclear family" in Hanigsberg & Ruddick (eds) (1999) *Mother troubles: Rethinking contemporary maternal dilemmas*; Nedelsky "Relational rights in the world context" paper prepared for (1998) *Women and Human Rights in Muslim Communities Program* University of California.

62 (1952) *The origins of totalitarianism*; (1958) *The human condition*; (1963) *On revolution*; (1963) *Eichman in Jerusalem*; "Reply to Eric Voegelin's review of *The origins of totalitarianism*" (1953) 15 *Review of Politics* 76; (1968) *Men in dark times*; (1968) *Between past and future*; (1971) *The life of the mind. One / Thinking*; (1978) *The life of the mind. Two / Willing*; (1982) *Lectures on Kant's philosophy*.

63 (1997) Weisberg L (ed) *Rahel Varnhagen. Life of a Jewess*; Benhabib (1996) *The reluctant modernism of Hannah Arendt*.

64 "Toward an agonistic feminism: Hannah Arendt and the politics of identity" (1995) in Honig (ed) *Feminist interpretations of Hannah Arendt* 135-166. See also Honig "Introduction; The Arendt question in feminism" and Dietz "Feminist receptions of Hannah Arendt" in Honig (ed) (1995) *Feminist interpretations of Hannah Arendt* 1-16 and 17-50.

65 "Impartiality and the civic public. Some implications of feminist critiques of moral and political theory" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 56-76.

response to the liberal visions. I think one can say that the South African visions of public space (past and present) have great similarities with liberal visions. I am critical of the liberal visions and turn to other approaches for guidance in our reconstruction and transformation. Jürgen Habermas's reconstructive theory is therefore a good place to start. I argue that I find his emphasis on the importance of public space (in the form of dialogue or discourse) positive, but I am not totally convinced by his theory. I therefore continue the search and investigate Chantal Mouffe's theory of "radical democracy" as a suitable response to the liberal visions. I find her visions of democracy and citizenship, especially her emphasis on the "political" and on "antagonism", very useful for the reconstruction and transformation of South African public space. Finally I turn to Hannah Arendt's vision of public space. This is the vision from which we can find a way forward. I argue that an ethical interpretation of equality is situated in the intersection of public space, equality and justice. Hannah Arendt's vision of public space is the best vision for this ethical intersection.

I specifically call for the entrance of "feminine" values in our public visions because any society, in my case South Africa, should reconsider the traditional visions of public and private and broaden these perspectives by allowing aspects of difference and otherness into the public. In response to every vision that I put forward I voice a gender critique. The gender responses that I support are in favour of the "affirmation" of the "feminine" and "feminine" values without being essentialist.

My approach to equality cannot be separated from public space and justice. The main argument in this thesis is that public space, equality and justice are interrelated, I focus on the "ethical" intersection of the three. The "ethical" interpretation of equality that I propose lies at the intersection of all three conceptions. In Part 2 "perspectives on equality" I discuss aspects of deconstruction as the philosophy that provides the inspiration for an "ethical" interpretation of equality. I draw attention to certain aspects of deconstruction. In doing so, I rely on some of the notions which are a source for an ethical interpretation of equality, for transformation and for justice. I discuss Simon

Critchley's[66] and Danie Goosen's[67] "ethical" interpretation of deconstruction to provide the theoretical framework for my argument on "ethical" interpretation. Because my main argument revolves around ethical interpretation I focus on the commentaries on deconstruction that encourage an *ethical* reading of deconstruction. The dialogue between hermeneutics and deconstruction is of significance for an ethical interpretation as well as for the reconstruction and transformation of public spaces. I repeat John Caputo's[68] echo of Aristotle's notion that "life is hard". According to him deconstruction (what he calls "radical hermeneutics") accepts this and does not seek for easy answers. I argue that an ethical interpretation adheres to the notion that "life is hard".

The theories of Jantje van den Oord,[69] Martha Minow[70] and Jennifer Nedelsky[71] on

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66 (1992) *The ethics of deconstruction. Derrida and Levinas*. See also Caputo (1987) *Radical hermeneutics. Repetition, deconstruction and the hermeneutic project*; Caputo (1997) *Deconstruction in a nutshell. A conversation with Jacques Derrida*.

67 "Verlies, rou en affirmasie. Dekonstruksie en die gebeure" (1998) 1 *fragmente* 54-80; Goosen & Van der Walt "Die tragiese, die onmoontlike en die demokrasie. 'n Onderhoud met Jacques Derrida" (1999) 3 *fragmente* 35-62.

68 Caputo (1989) *Radical hermeneutics. Repetition, deconstruction, and the hermeneutic project*.

69 Van den Oord (1994) *Verdaagde rechten*.

70 I focus specifically on (1990) *Making all the difference. Inclusion and exclusion in American law*. See also Minow & Spelman "In context" (1990) 63 *Southern California Law Review* 1597-1652

71 Nedelsky "Reconceiving autonomy: Sources, thoughts and possibilities" (1989) 1 *Yale Journal of Law and Feminism* 7; Nedelsky "Law, boundaries and the bounded self" (1990) *Representations* 162; Nedelsky (1990) *Private property and the limits of American constitutionalism. The Madisonian framework and its legacy*; Nedelsky "Inadequacy and disentitlement: internal barriers to women's equality" paper presented at the (1991) Annual Meeting of the *American Political Science Association*; Nedelsky "Challenges of multiplicity" 89 *Michigan Law Review* 1591; Nedelsky "Reconceiving rights as relationships" (1993) 1 *Revue of Constitutional Law* 1; Nedelsky "Judgement, diversity and relational autonomy" presented at the Annual meeting of the (1996) *American Political Science Association*; Nedelsky "A relational approach to citizenship" paper presented at the (1997) *Gender and Citizenship Conference*, Beirut, Lebanon; Nedelsky "Meditations on embodied autonomy" (1995) 2 *Graven images* 159-170; Nedelsky "Embodied diversity and the challenges to law" (1997) 42 *McGill Law Journal* 91;

rights, difference and relationships and Frank Michelman's[72] call for a republican constitutionalism provide a starting point for my discussion of South African equality jurisprudence. I shall attempt to show connections between the theories of Van den Oord, Minow, Nedelsky and Michelman; connections between these theories and deconstruction; and the significance of these theories for visions of public space and an ethical interpretation of equality. Again I use these texts as an introduction and background to our own development and transformation of equality. I do not claim to write on or cover the multiple materials on equality.[73] I discuss one of the first writings on equality under the interim Constitution which I consider to have had a huge influence on the present approach to equality.[74] I discuss some of the most prominent

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Nedelsky "Dilemmas of passion, privilege and isolation: Reflections on mothering in a white, middle-class nuclear family" in Hanigsberg & Ruddick (eds) (1999) *Mother troubles: Rethinking contemporary maternal dilemmas*; Nedelsky "Relational rights in the world context" paper presented at (1998) *Women and Human Rights in Muslim Communities Program* University of California.

72 "Law's republic" (1988) 97 *The Yale Law Journal* 1493-1537; "The subject of liberalism" (1994) 46 *Stanford Law Review* 1807-1833.

73 In regard to gender and equality in South Africa see generally Kaganas & Murray "Law and women's rights in South Africa - An overview" (1994) *Acta Juridica* 1-38; Albertyn "Women and the transition to democracy in South Africa' (1994) *Acta Juridica* 39-63; O'Regan "Equality at work and the limits of law" (1994) *Acta Juridica* 84-108; Kentridge "Measure for measure: Weighing up the costs of a feminist standard of equality at work" (1994) *Acta Juridica* 84-108; Devenish "The legal and constitutional significance of the equality clause in the interim constitution" (1996) *Stellenbosch Law Review* 92-113; Rautenbach "Die Konstitusionele hof se riglyne vir die toepassing van gelykheid" (1998) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 316-325; Romany "Black women and gender equality in a new South Africa: human rights law and the intersection of race and gender" (1996) 21 *Brooklyn Journal of International Law* 857-898; Wing "Black South African women: Toward equal rights" (1995) 8 *Harvard Human Rights Journal* 57-100; Murray (1994) *Gender and the new South African legal order.*

74 Albertyn & Kentridge "Introducing the right to equality in the interim Constitution" (1994) 10 *South African Journal on Human Rights* 149-178. I also refer to L'Hereux-Dube "Making a difference: The pursuit of equality and a compassionate justice" (1997) 13 *South African Journal on Human Rights* 335-353; Van der Walt & Botha "Coming to grips with the new constitutional order: Critical comments on Harksen v Lane NO" (1998) 13 *Suid-Afrikaanse Publiekreg/ South African Public Law* 17-41 and Freedman "Understanding the right to equality" (1998) 115 *The South African Law Journal* 243-251.

equality cases decided by the South African Constitutional Court.[75]

I believe that our understanding of the event of the Truth and Reconciliation Commission can benefit from deconstructive insights in respect of truth and justice. The ethical moment in deconstruction, as I understand it, is the realisation of the double-handed nature of justice, the simultaneous impossibility and urgency of justice. In other words while we know that justice can never be fully realised in a present system we keep on searching for ways of realising justice. We do this because of the ethical imperative and the urgency of justice (Derrida in his discussion of deconstruction and justice repeats the point that justice does not wait).[76] The double bind of impossibility and urgency is a precondition for my own thesis of an "ethical" interpretation of equality.

In Part 3 "...landscapes of justice" I draw on the TRC to supplement the landscape created by the description of public space and equality. Concerning the TRC, I start of by discussing some theoretical responses[77] that in my view contribute to our understanding of the TRC. I focus on the significance of the event itself for an ethical interpretation of equality. The most important section of Part 3 is the comparison

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75 See Part 2 "... perspectives on equality". I refer to *Fraser v Children's Court of Pretoria North* 1997 (2) BCLR 153 (CC); *Harksen v Lane Non and another* 1997 (11) BCLR 1489 (CC); *President of the Republic of South Africa and another v Hugo* 1997 (6) BCLR 708 (CC) and *City Council of Pretoria v Walker* 1998 (3) BCLR 153 (CC). See also *Baloro and others v University of Bophuthatswana and others* 1995 (8) BCLR 1018 (B); *Larbi-Odam and others v Members of the Executive Council for Education and another (North Western Province)* 1997 (12) BCLR 1655 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice and others* 1998 (12) BCLR 1517 (CC); *S v Lawrence* 1997 (10) BCLR 1348 (CC); *S v Ntuli* 1996 (1) BCLR 141 (CC).

76 "Force of law: The mystical foundations of authority" in Cornell (ed) (1992) *Deconstruction and the possibility of justice* 3-67 at 27. I discuss Derrida's view on deconstruction and justice in Part 2.

77 Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science Review* 97-113; Arendt (1963) *On revolution*; Derrida "Declarations of independence" (1986) 15 *New Political Science* 7-15; Gordon "Undoing historical injustice" in Sarat & Kearns (eds) (1996) *Justice and injustice in law and legal theory* 35-75; Minow (1998) *Between vengeance and forgiveness*.

between six South African responses to the TRC: Kader Asmal and co-authors,[78] Andre P Brink,[79] Antjie Krog,[80] Piet Meiring,[81] Anthea Jeffery,[82] and David Dyzenhaus.[83] The aim of the comparison is to see to what extent, if at all, the authors explored the "ethical" moments in the TRC. With "ethical" moments I refer to the opportunities during which difference and plurality were exposed and to the realisation of all involved of the shortcomings of the TRC, of the impossibility of finding truth, reconciliation or justice. Nevertheless these moments occurred with the simultaneous insight and affirmation of the importance of the event of the TRC because of human appearance through the telling of stories. I ask whether the authors are only concerned about the instrumental and institutional aims and whether they explore the transforming (transformation distinguished from evolution)[84] possibilities. I do not compare Desmond Tutu's[85] personal memoir of chairing the TRC directly to the other responses. Rather I use it to highlight his focus on how the relationship to others is central to our existence as human beings and the effect of this focus on the TRC. I discuss this in the section

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78 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance.*

79 (1998) "Stories of history: reimagining the past in post-apartheid narrative" in Nuttal & Coetzee (eds) *Negotiating the past. The making of memory in South Africa* 29-42.

80 (1998) *Country of my skull.*

81 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa.*

82 (1999) *The truth about the Truth Commission.*

83 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order.*

84 I explain the distinction between evolution and transformation (with reference to Drucilla Cornell) in Part 1. The distinction can be explained with reference to the South African context. If the "change" that took place from the past (authoritarian) to the present (democracy) means mere institutional change, in the sense that we have a new government and a Constitution, but no "real" change has occurred in the ways we approach politics, or public space or rights, and no change of the people themselves, it can be considered as evolution and not transformation. I shall again refer to this distinction in the context of Hannah Arendt's distinction between labour, work and action. See the conclusion to Part 1.

85 (1999) *No future without forgiveness.*

"landscape of care" where I address the issue of an ethics of care in respect to the TRC.

It should be evident by now that the thesis consists of three main sections, namely "... visions of public space", " ... perspectives on equality" and "... landscapes of justice". Equality stands at the centre of the investigation. As I have already indicated the aim is to find an interpretation and understanding of equality suitable to the plurality of our society. My argument is based on the assumption that we cannot understand and interpret equality in isolation from public space (democracy, politics) and from justice (the ethical relationship with the other, the acceptance of difference, in the South African context noticing our differences by remembering the past, specifically the event of the TRC). Before elaborating on the "ethical" intersection of visions of public space, equality and justice I shall try to define my use of the concepts of "ethical", "interpretation" and "equality".

Defining the impossible: ethical, interpretation and equality

The ethical and ethical feminism

"Ethical" should be distinguished from "morality".[86] Cornell describes "morality" as any attempt to spell out the determination of "a right way to behave", which can be translated into a system of rules. By contrast, the ethical relation is concerned with a way of being in the world that accepts divergent value systems and allows us to criticise the repressive aspects of competing moral systems.[87] The ethical relation therefore focuses on the "should be" as an ideal in contrast to the "right way to behave" determined by morality. The ethical imperative in deconstructive thought as formulated

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[86] I follow Cornell's distinction. See Cornell (1992) *The philosophy of the limit* 111.

[87] Cornell (1992) *The philosophy of the limit* 111.

by Jacques Derrida,[88] based on the ethical theory of Emmanuel Levinas,[89] is my source for the understanding of "ethical". The ethical relation to the other means to be open to the otherness of the other without appropriation, without making her the other of myself.

Ethical in the context of the interpretation of equality implicates the acknowledgement of difference. Derrida's double meaning of *diffèrance*, referring to "to differ" but also to "to defer", is crucial for an "ethical" interpretation of equality. Difference is not something that can be identified and dealt with. It is an inescapable continuing "fact" that cannot be identified and known. This can be explained with reference to the essentialist/anti-essentialist debate in feminism. Many women reject any affirmation of feminine difference because in their view it relies on an essentialist assumption that gives only one description of the feminine. Other feminists seek to disrupt the notion of one description of feminine "reality". They argue that the differences between women should also be realised. We can only be open to the various differences because there are so many, for example differences in regard to culture, ethnicity, religion, language and so on. The effect of difference that can not be known is that we should reconsider the fact of difference in each and every situation. I shall return to and continue with discussions on difference in Part 2 "... perspectives on equality". The feminist argument in this study is based on such a contextual understanding of difference. Consequently, the feminist angle is an "ethical feminist" one.

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88 This is elaborated on in section 2 "...perspectives on equality". I strongly rely on Critchley (1992) *The ethics of deconstruction;* Goosen "Verlies, rou en affirmasie. Dekonstruksie en die gebeure" (1998) 1 *fragmente* 54-79; Derrida "Die tragiese, die onmoontlike en die demokrasie. 'n Onderhoud met Jacques Derrida" (1999) 3 *fragmente* 35-61; "The deconstruction of actuality. An interview with Jacques Derrida" (1994) 60 *Radical Philosophy* 28-41.

89 *Totality and infinity*; Critchley (1992) *The ethics of deconstruction.* The work of Belgian philosopher Rudi Visker should also be noted. Visker criticises the ethical relationship with the other in Levinas, Visker (1999) *Truth and singularity. Taking Foucault into phenomenology.*

Cornell[90] explains that ethical feminism seeks the possibility of a new choreography of sexual difference. Ethical feminism in her view does not claim to understand what woman is (or to give a determined description of a right way to behave), but is concerned with the "should be" and the "not yet" of women's story. By taking notice of deconstruction, ethical feminism denies that there is an essence of woman that can be abstracted from the linguistic representations of woman. The referent "woman" is dependent on the systems of representation in which woman is given meaning. The ideal of ethical feminism is not to create a space for women within the current system, but exactly to open the possibility of multiple interpretations of woman which can criticise the repressive aspects of the current system. "Ethical" equality for women should also be understood in this context. The aim of this study is not to seek "ethical" equality for women only, but for all members of the South African community.

Interpretation

The process of interpretation inspired by *différance* in the context of this work does not refer to the finding of meaning. I accept that we continuously create and recreate meaning. Interpretation is a process of finding, creating, augmenting and amending. Derrida's notion of justice as aporia[91] demands that a judge, when making a decision, must take note of given meanings, but must simultaneously create new meanings for the particular case before her. Cornell's vision of legal interpretation as "recollective

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90 Cornell "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 644. See also Fuss (1989) *Essentially speaking: feminism, nature and difference*; Harris "Race and essentialism in feminist legal theory" in Heinzelman & Wiseman (eds) (1994) *Representing women: Law, literature and feminism* 106-146; Olsen "The sex of law" in Kairys (ed) (1997) *The politics of law* 453-467; Dalton "Where we stand: Observations on the situation of feminist legal thought" (1988) *Berkeley Women's Law Journal* 1013; Frug "A postmodern legal manifesto. An unfinished draft" (1992) *Harvard Law Review* 1045-1075; hooks *Talking back: Thinking feminist, thinking black*; hooks *Yearning: Race, gender and cultural politics*; Morley & Walsh (1995) *Feminist academics: Creative agents for change*; Harding (1986) *The science question in feminism*.

91 "Force of law: The mystical foundation of authority" in Cornell (ed) (1992) *Deconstruction and the possibility of justice* 29-67.

imagination"[92] insists on adherence to a future-past or an imagined past when interpreting legal texts.

I have already noted the dialogue between hermeneutics and deconstruction as an important background context. Where the hermeneutic position accepts the idea of a fusion of horizons[93] and the possibility of finding meaning in the present and accepting it, deconstruction seeks to expose the impossibility of a clear and final meaning. The dialogue between hermeneutics and deconstruction is connected to the focus on political and public landscape. The hermeneutical interpretation of political and public life differs from a deconstructive vision. The hermeneutical picture of political and public life shows a public realm where concerned citizens engage in deliberation in order to achieve understanding. The deconstructive picture is "out of focus". Deconstruction aims to show the ruptures and impossibilities, the tragedies and violence in our current systems. Ethical interpretation seeks to be true to deconstruction's rupture, impossibilities and tragedies. As I have already stated an ethical interpretation follows the view that life is hard.

Another feature of an ethical interpretation is that it will follow the view of rights as the structuring of relationships instead of erecting barriers.[94] As an essential feature of this study, the Truth and Reconciliation Commission is interpreted as an example of the ethical intersection of public space, equality and justice. I note the significance of the TRC (as an intersection of public space, equality and justice) for an ethical interpretation of equality in South Africa. The TRC also emphasises the necessity of a relational approach to rights in contrast to the traditional approach. One should seek for further guidelines for the possibility of an ethical interpretation of equality at the

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92 Cornell (1992) *The philosophy of the limit.*

93 This will be elaborated on in Part 2 "... perspectives on equality". See Widdershoven (1990) *Hermeneutiek in discussie*; Van Haute & Ijsseling (ed) (1992) *Deconstructie en ethiek*. See also Gadamer (1976) *Philosophical hermeneutics*; (1981) *Truth and method.*

94 In this regard I refer to the views of Jennifer Nedelsky and Martha Minow that I discuss in Part 2.

intersection of political, public and ethical life. Just as justice does not exist within a present system, a situation where everyone enjoys full equality will never exist. But just as we continually should seek justice, so we continually should seek ways and possibilities to strive for ethical equality.

Equality

I understand equality in the light of the above explanations of "ethical" and "interpretation". Equality can only be sought in a context where difference is accepted. In our heterogeneous community the acceptance of difference when dealing with equality is essential. The distinction between formal equality and substantive equality has been noted by the writers of our constitution. It is argued[95] that our constitutional provision of equality (section 8 in the interim and section 9 in the final constitution) provides for substantive equality. It will become clear through the flow of this text that I do not support the formal approach to equality and that, in this regard, I acknowledge that substantive equality is an improvement in the equality discourse. However, I am also cautious of the present approach of substantive equality. I fear that it will become nothing else but a new formal approach. That is why I turn to other possible perspectives on equality.

I support Cornell's[96] vision of "equivalent" rights. The claim for "equivalent" rights acknowledges difference and does not violate difference like the liberal approach to equality that is based on sameness. With "equivalent" rights Cornell[97]means a programme of legal reform that must recognise the equivalent evaluation of sexual difference. She argues that the evaluation of sexual difference could go further than the difference/equality divide that has hindered the progress of equality jurisprudence. Equality as a prominent value of our judicial, political and public processes should not

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95 See Part 2 for a brief discussion on South African approaches to equality.

96 (1995) *The imaginary domain.*

97 For a detailed account of Cornell's theory of "equivalent" rights see "Sexual difference, the feminine, and equivalency" and "Sex-discrimination law and equivalent rights" in (1993) *Transformations* 112-156.

be understood as individual equality in the first place. The liberal dichotomy and dilemma caused by the tension between the values of equality and liberty must be addressed by adhering to the third cry of the French Revolution, community (fraternity).[98]

The argument that I develop here is that equality can only be addressed within a context where there is adherence to political, public and ethical aspects. It will follow that both equality and liberty are only possible in the context of adherence to a "community". I understand community as an open, heterogeneous community of difference. I do not subscribe to a specific meaning of equality. What I support is a certain way in which equality must be interpreted. Equality will mean different things for different people at different times and places. It can therefore not be a static concept. I argue that an ethical interpretation of equality will provide the best (not perfect) way of approaching the issue of equality and recognising difference.

South African landscape - the "ethical" intersection of democracy, equality and justice

I believe that the search for equality in contemporary South Africa must go hand in hand with the reconstruction and transformation of public space and political action. I investigate various visions of public space, concepts of democracy, citizenship and political action. As I have already explained, the reason for the focus on these aspects

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[98] As a feminist I do not subscribe to the vision of "fraternity". From a postmodern perspective the critique on the cries of the French Revolution is obvious. I hope to show that by focusing on "community" rather than "fraternity" the other two cries can also be displaced. This is a theme that I hope to carry right through the thesis, namely the critique of the modernist protections of human rights inspired by the early modern thinkers. I accept the "double-bind" of deconstruction in this regard, namely that we should strive for *liberté* and *egalité* on the one hand, while at the same time seeking to undermine it with the other. I illustrate this point also in the discussion of the three films, *Blue*, *White* and *Red* in Part 1 "... visions of public space".

is that my understanding of an "ethical" interpretation of equality is only possible within a certain understanding of the public, namely an understanding that accepts difference, plurality, heterogeneity and continuous reconstruction and transformation. A rigid concept of the public will deny difference and heterogeneity and favour sameness. An ethical interpretation can not be followed in such a rigid and fixed public space. The theories of interpretation, rights and equality that I rely on all accept the significance of the public realm, in this case the event of the TRC as a public event or moment in the South African history of transformation. I hope to show that "ethical" equality must be sought at the intersection of public space (democracy, political action, heterogeneity), equality (with the acceptance of difference) and justice (memory, reconciliation, reparation).

We need to reconstruct and transform our visions of public space. In the past and presently public spaces merely existed. The liberal divide between public and private has ruled our concepts of public space. I argue that transformation will not take place if our concept of the public does not change accordingly. (Note that I am not arguing for one final process of reconstruction and transformation. The point is that we must open ourselves up for continuous transformation, otherwise we shall stay the same, repeat the same.)[99]

The perspectives on equality that I support all recognise the significance of public space in their approaches to equality. I argue that, together with all the other reasons why we need a reconstructed and transformed public space, we also need it for equality, or at least for the understanding or interpretation of equality that I visualise, an ethical interpretation. The clear link between the visions of public space and the perspectives of equality that I support (and that are conditional to ethical interpretation)

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[99] Rosemary Coombe titled an article on legal interpretation, "'Same as it ever was': Rethinking the politics of legal interpretation" (1989) 34 *McGill Law Journal* 603-652. She echoes the refrain of a Talking Heads song. This notion of "same as it ever was" is also applicable in this regard. See also Coombe "The cultural life of things: Anthropological approaches to law and society in conditions of globalization" (1995) 10 *American University Journal of International Law & Policy* 791.

is that they all accept difference, plurality, heterogeneity, open-endedness, relationships and so on as inevitable. The ideal of an ethical interpretation of equality will stay totally uncompleted without the ideal of justice.

In regard to justice I follow the deconstructive insight that justice functions as the limit to present systems. Justice will thus never be achieved totally in a present system. But without the stories of justice any vision of public space or perspective on equality will stay empty and have no meaning. That is why I turn to the TRC, where the ideal of justice was served, to supplement the discussions on public space and equality.

Smoke

In this text I attempt to describe a way of interpreting equality that could continuously expose the *impossibilities* of a final answer. A way of interpretation that, although realising its own *inevitable violence* to other interpretations, will not seek to deny or to equalise difference and *otherness*, that will as far as possible take into account the *concrete contexts* and *specific circumstances* of an individual, that will focus on the *relationships* that form us and of which we all are part. The *ethical intersection* between *public space, equality* and *justice* is integral to *an ethical interpretation of equality*.

I argue for a *reconstruction* and *transformation* of public spaces, which means that I want to see some form of public (community) participation and (inter)action. The various authors I discuss are all situated somewhere on the liberal-communitarian-deconstruction continuum. The reconstruction and transformation of public spaces (and communities) are in a continuous flux somewhere on this continuum.

A recent film by Paul Auster[100] and Wayne Whang, *Smoke*, visualised a certain conception of community that I support. The film tells the story of five characters, Auggie, Paul, Raschid, Ruby and Cirus. These characters are all *isolated individuals* who are, through the course of events, drawn into some or other form of *connection, relation* and *community*. These connections, relations and communities are visualised by *smoke*. In a conversation between Paul, Auggie and other characters Paul tells the story of Sir Walter Raleigh who weighed smoke. He took a cigar and weighed it. He then lit up and smoked the cigar but carefully kept all the ashes. Afterwards he weighed the ashes and the stub of the cigar. The difference between the weight of the unsmoked cigar and the weight of the stub and ashes was the weight of smoke. Smoke is something that appears to have no weight, that can not be touched. In this film there is smoke each and every time humans appear to each other. Although there is a great deal of trauma and tragedy in their lives there are moments where individuals are brought together and connect in smoke. The smoke can not be caught, it can not be put into a rational order or system, it can not be essentialised, it appears and disappears before you even know it. I interpret this film as saying that community or relationships or human togetherness are like smoke: seemingly weightless and untouchable, yet they do appear and bring about good things, but also disappear again. Smoke (community) is unfixed.

The image of smoke also captures the spirit of an ethical interpretation of equality. An ethical interpretation of equality realises the necessity of the ideals of public spaces (community), equality and justice but does not provide a fixed or final meaning.

Truth, reconciliation and equality

One only has to imagine where South Africa would be today but for the

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[100] Novels by Auster, amongst others, are (1985) *The New York Trilogy*; (1989) *Moon palace*; (1992) *Leviathan*; and (1999) *Timbuktu.* In a lecture for the Law and Literature elective LLB course I discussed *Smoke* and other works by Auster with a specific focus on the "deconstructive communitarian" moments in his work. I also placed Auster's work in the realm of Critical Legal Studies. In my view the CLS concepts of *indeterminacy*, *fundamental contradiction* and *false consciousness* are all present in his writing.

Truth and Reconciliation Commission in order to appreciate what it has achieved. Few South Africans have been untouched by it. All sectors of its society have been forced to look at their own participation in apartheid - the business community, the legal, medical, and university communities.[101]

The South African Truth and Reconciliation Commission illustrates an innovative and promising effort to combine an investigation into what happened, a forum for victim testimony, a process for developing reparations, and a mechanism for granting amnesty for perpetrators who honestly tell of their role in politically motivated violence.[102]

The significance of the TRC is self-evident. Many commentators from inside and outside South Africa have stated and restated the significance of the TRC process for the future of this country.[103] As I have mentioned earlier my angle on the TRC is its

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101 Minow (1998) *Between vengeance and forgiveness* xii.

102 Minow (1998) *Between vengeance and forgiveness* 3.

103 There are many interdisciplinary perspectives on the TRC reaching from philosophy, psychology, theology, ethics to law. See amongst many others Bronkhorst (1995) *Truth and reconciliation: Obstacles and opportunities for human rights*; Brandon (1995) *Do sleeping dogs lie?: The psychological implications of the Truth and Reconciliation Commission in South Africa*; Boraine & Levy (eds) (1995) *The healing of a nation?*; Boraine & Levy (eds) (1994) *Dealing with the past: Truth and reconciliation in South Africa*; Botman & Peterson (1996) *To remember and to heal: Theological and psychological reflections on truth and reconciliation*; De Kock & Godin (1998) *A long night's damage: Working for the apartheid state*; Ackerman "Tales of terror and torment: Thoughts on boundaries and truth-telling" (1997) 63 *Scriptura* 425-434; Maluleke "Dealing lightly with the wound of my people? The TRC process in theological perspective" (1997) 25 *Missionalia* 324-343; Gobodo-Madikizela "Healing the racial divide?: Personal reflections on the Truth and Reconciliation Commission (1997) 27 *South African Journal of Psychology* 271-272; Olckers "Gender-neutral truth: A reality shamefully distorted" (1996) 31 *Agenda* 61-67; Owens (1996) "Stories of silence: women, truth and reconciliation" (1996) 30 *Agenda* 66-72; Liebenberg "Die Waarheids- en Versoeningskommissie in Suid-Afrika en die implikasies daarvan vir 'n Suid-Afrikaanse historikerstreit en eietydse geskiedskrywing" (1997) 22 *Journal for Contemporary History* 98-114; Verwoerd "Continuing the discussion: reflections from within the Truth and Reconciliation Commission" (1996) 8 *Current Writing* 66-85; Braude

contribution to the recreation of public space, political action, equality and justice. Ultimately I argue that the TRC was a manifestation of the ethical intersection between public space, equality and justice that is integral to an ethical interpretation of equality. I want to insist that the event of the TRC must influence our approach to rights and to interpretation. I shall adhere to my own insistence in my vision of an ethical interpretation. An "ethical" interpretation of equality entails a broader approach than the traditional formal approach and even a substantive one. I shall elaborate on this in Part 2 "...perspectives on equality". As already stated my main concern is that substantive equality will take on a new formalism and again negate or reduce difference to a formula or test. The "public" significance of the TRC is not limited to political action, but encompasses the public nature of the constitution itself. For me the significance of the TRC can be its influence on legal interpretation, the interpretation of equality in particular.

"The archbishop, the private detective and the angel of history: The production of South African public memory and the Truth and Reconciliation Commission" (1996) 8 *Current Writing* 39-65; Lalu "Journeys from the horizons of history: text, trial and tales in the construction of narratives of pain" (1996) 8 *Current Writing* 24-38; Motala "The promotion of National Unity and Reconciliation Act, the constitution and international law" (1995) 28 *CILSA* 338-362; Gauntlett 11 "Towards the truth: the GBC's submissions to the TRC" (1998) *Consultus* 34-39; Whittle "The legal profession and the truth" (1997) *De Rebus* 506-507; Kollapen "Accountability: The debate in South Africa" (1993) 37 *Journal of African Law* 1-9; Liebenberg "The Truth and Reconciliation Commission in South Africa: Context, future and some imponderables" (1996) 11 *Suid-Afrikaanse Publiekreg/ South African Public Law* 123-159; Sarkin "The trials and tribulations of South Africa's Truth and Reconciliation Commission" (1996) 12 *South African Journal on Human Rights* 617-640; Dugard "Is the truth and reconcilation process compatible with international law?" (1997) 13 *South African Journal on Human Rights* 258-268; Braude "Memory and the spectre of international justice: A comment on AZAPO" (1997) 13 *South African Journal on Human Rights* 269-282; Moellendorf "Amnesty, truth and justice: AZAPO (1997) 13 *South African Journal on Human Rights* 283; Du Plessis "Observations on amnesty or indemnity for acts associated with political objectives in the light of South Africa's transitional constitution" (1994) 57 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 473-481; Loots "Die waarheidskommissie: Nurnberg-verhore of bevordering van nasionale eenheid" (1996) *Tydskrif vir die Suid-Afrikaanse Reg* 154-160. See also the cases of *Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa and others* 1996 (8) BCLR 1015 (CC); *Truth and Reconciliation Commission v Du Preez and Another* 1996 (8) BCLR 1123 (CC).

I hope that this thesis and the arguments developed here can in some way contribute to the conversation on South African legal, political and social transformation. The significance of the public realm for politics, for the law and legal transformation, for the community and, most of all, for our humanity, will be part of this conversation. I shall focus on the intersection between public space, equality, and justice. I do not have a specific rigid conception of the public. I do not visualise a specific institutionalised procedure or dialogue. I mentioned earlier that I am drawn to Arendt's vision of public space, in particular her understanding of Rahel Varnhagen's Berlin salons as public spaces and her view that a dinner in one's own private home can become a public space depending on the type of action, type of speech and substantive content of the event. The intersection between public space, equality and justice and accordingly the possibility of an "ethical" interpretation of equality are reflected in the Berlin salons. The salons were reconstructed and transforming spaces in their time where difference, plurality and heterogeneity were celebrated. People interacted with each other on an equal footing without reverting to sameness. During times of inequality and much injustice the salons provided for the ideal of justice to be nurtured. I argue that presently an "ethical" interpretation of equality with a strong reliance on public space and political action and speech can bring us closer to the ideal of justice. This ideal, this hope, was embodied by the South African Truth and Reconciliation Commission.

The TRC was an event, an intersection, an "in between" position where democracy, equality and justice coincided for a moment, opening many possibilities. One possibility is an interpretation of rights which, without negating the rule of law, can encompass context, particularity, story, the imagination, difference, heterogeneity and many other aspects crucial to "ethical" interpretation.

> But I want to put it more simply. I want this hand of mine to write it. For us all; all voices, all victims:[104]

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[104] Krog (1998) *Country of my skull* 278-279.

because of you
this country no longer lies
between us but within

it breathes becalmed
after being wounded
in its wondrous throat

in the cradle of my skull
it sings, it ignites
my tongue, my inner ear, the cavity of heart
shudders toward the outline
new in soft intimate clicks and gutturals

of my soul the retina learns to expand
daily because by a thousand stories
I was scorched

a new skin.

I am changed for ever. I want to say:
  forgive me
  forgive me
  forgive me

You whom I have wronged, please
take me

with you.

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... visions of public space

Introduction

In this part the focus falls upon the first feature of the ethical intersection of public space, equality and justice, namely public space. I shall discuss various "visions of public space" to find guidance for our visions of public space in South Africa. In my view, "public space" or "public realms" must be reconstructed[1] and transformed. I grew up in South Africa between 1970-1990, a time when public space merely existed. I was (and still am) in the fortunate position to experience the change from authoritarianism and totalitarianism to democracy. Unfortunately, with a few exceptions, not much has

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[1] Krog (1998) *Country of my skull* 109 notes that it is problematic to talk about "reconciliation" as if there used to be a time during which South Africans had good peaceful relationships. She suggests that "conciliation", might be a better term. The same argument can be used in regard to "reconstruction". Maybe we should talk about "constructing" public space instead of reconstructing. I chose to use reconstruction.

been done about *reconstructing*[2] South African public space. The same goes for the *transformation*[3]of public space. For example, current conceptions of public space which exclude the"feminine", must be transformed.[4] In the same way that law cannot be separated from politics, legal transformation cannot take place without political transformation.[5] My exploration of visions of public space is inspired by the ideal of legal transformation. The reconstruction and transformation of public space go hand in hand with political and legal transformation. As features of the ethical intersection between public space, equality and justice, that is integral to an ethical interpretation of equality, the reconstruction and transformation of public space are also necessary for my argument of an ethical interpretation of equality. I shall elaborate on my argument of an ethical interpretation of equality through the course of the text.

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2 With "reconstruction" I mean that public spaces should be created and recreated. The media, for example, can assist in reconstruction by focusing on important political issues and making them part of the public discourse. The wide media coverage that the TRC received assisted in the reconstruction of public space.

3 With transformation I mean that the present conceptions (visions) of public space must change. The liberal distinction between "the good" and "the right", for example, must be challenged. It will become clear through the text that I support the notion of a continuous transformation. In other words our visions of public space must be in a constant state of transformation and must not become static and rigid. Transformation is an important addition to reconstruction because reconstruction by itself might portray the notion of fixity, that a public space must be reconstructed and will remain like that once and for all. Reconstruction is a notion usually associated with "modern" thought. Jürgen Habermas is an example of a reconstructive thinker. I shall elaborate on his theory below and explain why I am not comfortable with it.

4 The transition in South Africa from an authoritarian to a new democratic government brought about an expansion of representatives in parliament. For example there are many more women representatives at present than there were in the past. I argue, however, that the mere inclusion of women is not enough to bring about the notion of transformation that I support. With the inclusion of "the feminine" in public space I mean that the dominant values should be challenged, undermined and supplemented with other values. I do not follow an essentialist view of the feminine, in other words I am not saying that all women are the same and subscribe to the same values because of their nature or biology. I argue for difference. The "feminine" represents for me a potential disruptive voice that can challenge the dominant vision of public space and accordingly expand our visions of public space.

5 In regard to the notion of law that cannot be separated form politics I follow the insights of American Realists and Critical Legal Studies. Although I do not discuss any of these theories explicitly in the text the theories of American Realism and Critical Legal Studies provide the background for my search for transformation. See generally Horwitz (1992) *The transformation of American law* and Kairys (1997) *The politics of law. A progressive critique*.

In the next few pages, I draw on the views of Drucilla Cornell, Hannah Arendt and Anthony Kronman in search of inspiration for the reconstruction and transformation of public space in a South African context. I believe that their views can contribute to our own discourse on the reconstruction and transformation of public space.

I find Drucilla Cornell's[6] use of "transformation" helpful in forming my vision of the reconstruction and transformation of public space. Cornell identifies two meanings of transformation. The first refers to such a "radical restructuring" of a system (political, legal or social) that the *identity* of the system itself is altered. The second meaning focuses on the change of *individuals themselves* in order to be open to new (transformed) worlds. Cornell argues that a feminist perspective focuses on the second meaning of transformation. A feminist perspective, accordingly, believes that transformation is only possible if individuals themselves can transform. In this regard she distinguishes transformation from *evolution*. Evolution means change within a system without adherence to an "outside" of the system, in other words mere *institutional* change without regard to the transformation of individuals. The transformation of public space (and legal, political and social systems) that I foresee must be different from evolution. Transformation must not occur only at an institutional level but must also encompass the transformation of individuals. The distinction between evolution and transformation is of great importance in our own context of change. When I refer to the transformation of South African public spaces I mean transformation and not mere evolution.[7] In other words transformation of institutions as well as individuals. The TRC, because it aimed at restoring humanity and human dignity, contributed to the transformation of individuals.

Following Cornell's argument my vision of reconstruction and transformation is a feminist one. I want to see change of institutions as well as individuals in the institutions. A significant part of this transformation for me is a transformation of the

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6 (1993) *Transformations* 1.

7 See in this regard Cornell (1992) *The philosophy of the limit* , (1993) *Transformations*. Note her criticism on Stanley Fish, who argues that the transformation of a legal system is impossible, in (1992) *The philosophy of the limit* 144-147.

traditional sex/gender relationships. I find the recognition of difference very important for the transformation of sex/gender relationships. The concept of difference is central to an ethical interpretation of equality. The reconstruction and transformation of public spaces should acknowledge and even promote difference. The interpretation of and approach to equality that I support emphasise difference and reject sameness. The ideal of justice in my view similarly must regard difference as integral to justice. I regard difference as the most important aspect of public space, equality and justice, that assists in forming the ethical intersection between the three. The multiple voices that we heard in the public spaces of the TRC exposed the reality of difference.

The vision of public space that I find the most inspiring is Hannah Arendt's vision. In her vision of political space, Hannah Arendt drew a distinction between *labour*, *work* and *action*. The public realm is for Arendt the place where humans "appear" to each other, where that which is "dark" is brought into the "light". Distinguished from labour and work, action is the only space where humans can act spontaneously. The public realm is the only space where humans/individuals can truly act in alternative ways of being. The public sphere is the place where *stories* can be told when humans interact with each other. We can learn from Arendt's vision of public space in our attempt to reconstruct and transform public space. In Part 3 "... landscapes of justice" I argue that the event of the South African Truth and Reconciliation Commission can be seen as an example of Arendt's vision of action. The TRC provided a public space for South Africans to act in public by telling their stories, by interacting with fellow South Africans and by bringing that which was private and dark to the light of the public. In her later life, Hannah Arendt worked on "judgement" in an effort to combine her philosophical thought with her political theory of action. In modern society the public realm is not situated in a particular space, but appears in multiple spaces. Judgement that takes place in these multiple public spaces can be a manifestation of action.[8] I shall argue that the TRC was also a space where action in the form of judgement took place. Each and everyone that was confronted with the stories told before the TRC, (the media

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[8] (1978) *The life of the mind. One / Thinking*; (1978) *The life of the mind. Two / Willing*. She was working on a third volume on judging but died before it was finished. The initial writings were taken up in (1982) *Lectures on Kant's political philosophy*.

assured that nearly no one living in South Africa with a television, with access to newspapers, to the internet, who had conversations with family, friends and colleagues could escape the event of the TRC) had to make a judgement on what was told and heard.

Following Arendt's vision of judgement as a form of action in modern society, Kronman's understanding of judgement contributes to how we conceive of judgement. Anthony Kronman,[9] in his discussion of judgement as a "virtue", relies on "alternative ways of being". Our visions of public space are dependent on how we go about judgement and reflective thinking. Kronman describes judgement as the process of "deliberating about and deciding personal, moral and political problems". He believes that good judgement entails more than the application of a general rule and explains that we are most often in need of good judgement in situations where genuine dilemmas force us to choose between or accommodate conflicting interests and obligations which cannot be resolved by the application of a rule. Kronman is of the view that neither deduction nor intuition is adequate for the process of judgement. He refers to the choice that a person makes when she decides to follow a career in law. This process of choice entails judgement. In judging between the various alternatives, one must explore all the alternatives in one's imagination. This means that one should make an effort to see and feel what it would be like to choose between the various alternatives. He argues that this effort would be similar to our everyday attempts to understand the experience of other people. The "imaginary self" I shall become when reflecting on all the alternatives will be a stranger to me. According to Kronman, one will have to rely on the imagination in this process of choosing.

> So to grasp the possibilities before me, even when they are only different ways of living my own life, I need the same sort of imaginative powers that are required to make sense of someone else's situation or experience. What is needed, above all else, is a certain measure of

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9 "Living in the law" (1987) 54 *The University of Chicago Law Review* 835-876 at 847.

> compassion, in the literal sense of "feeling with". I must make the effort, in choosing a life for myself, to feel along with each of the persons I might become the special cares and concerns, the risks and opportunities, that give the experience of that possible future self its own distinctive shape.[10]

Kronman argues that in making choices we should make an effort to grasp in our imagination each of the alternatives. The various alternatives must be entertained sympathetically, but at the same time detached. The process of deliberation consists of the combination of opposite-seeming attributes, like sympathy and detachment. Deliberation is neither deduction nor intuition, but the compassionate survey of alternatives viewed simultaneously from a distance. Those whose deliberation and judgement we regard highly are those who are best able to meet these conflicting requirements and endure the often considerable tension between them. The endurance of tensions is specifically important for judgement in our visions of public space and democracy. This view of judgement is connected with the understanding of transformation that I support. Judgement in this sense can only take place in a public space where humans are free to act and engage in speech and where individuals themselves can be transformed. As I have mentioned, the TRC also highlighted the necessity of good judgment. Victims who were confronted by their perpetrators had to make a judgement whether they will forgive or not. The Amnesty Committee considering the many amnesty applications had to make a judgement on whether a perpetrator will be granted amnesty or not. All South Africans are confronted by the issue of judging the process of the TRC. I believe that Kronman's understanding of judgement can help us in making judgements regarding the TRC, but also regarding the judgement of public, political, social, economic and legal issues in general. I shall refer to Tutu's[11] view that we should realise the extent of "conditioning" in Part 3. The implication of Tutu's words are that when we judge somebody we should, as far as possible, take her concrete context and specific circumstances, in other words difference, into account.

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[10] Kronman "Living in the law" (1987) 54 *The University of Chicago Law Review* 852. See also Morrison (1993) *Playing in the dark: Whiteness and the literary imagination.*

[11] (1999) *No future without forgiveness.*

For me, a combination of Cornell's second meaning of transformation, namely transformation of individuals themselves, Arendt's view of public space as a space of "human appearance", and Kronman's understanding of judgement as the process of imaginatively exploring alternative ways of being, has a significant meaning for the reconstruction and transformation of public space. Following Cornell, Kronman and Arendt, one conclusion, amongst others, is that the reconstruction and transformation of the public realm should take place in an "imaginative" way. Traditional ways of looking at and thinking about "the public" should be expanded by exploring imaginative alternative ways of being. In this respect, I think, Martha Nussbaum's[12] argument that the "literary imagination" can enhance current conceptions of public life, should enter the picture. She promotes the view that literature and the literary imagination are "subversive" and that literary thought can be viewed as the "enemy" of economic thought. The novel, in her view, can be used to express moral and normative values. Literature can accordingly make a valuable contribution to public life.

In South Africa we presently experience the possible contribution of literature in public life through the multiple responses to the TRC that follow a literary style and endorse the significance of the imagination. I shall refer to some of the responses in Part 3.

Nussbaum argues that literature should be encouraged in courts and in law schools. We should create a space for

> [A]n imagination that will steer judges in their judging, legislators in their legislating, [and] policy-makers in measuring the quality of life of people both near and far.[13]

She contends for a public space where we can have something more than mere rational facts. Her vision encourages a shift from the traditional, formalist or instrumental approach to the public, to a literary one. She reacts against the attempt

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[12] Nussbaum "The literary imagination in public life" (1991) *New Literary History* 877-910.

[13] Nussbaum "The literary imagination in public life" (1991) *New Literary History* 879.

to reduce everything to economics and seeks to emphasise the importance of normative considerations. Our responses to the TRC should also emphasise the normative aspects and not reduce the event to an instrumental formalist process. According to Nussbaum the novel can be used as a means to other ways of imagining the world. She uses the Dickens' novel *Hard Times*[14] to illustrate the contrast between the economic and the literary worlds. The economic norm of rationality should be displaced by other normative views of rationality.

Nussbaum highlights three features of "economic rationality" (the traditional liberal approach) and the novel's reaction to it. Economic rationality emphasises the importance of facts; it views the novel as "mere fables about women and men"; and it negates "fancy and wonder". In the reconstruction and transformation of public space, economic rationality can be challenged and undermined by displacing the importance of facts and emphasising the significance of fables (stories) and of "fancy and wonder".

Nothing but Facts[15]

Nussbaum identifies four aspects of the economic utilitarian, or liberal, mind. First, the economic utilitarian mind reduces qualitative differences to quantitative differences. This reduction is accomplished by focusing only on *abstract* or universal aspects and negating the *concreteness* of human beings. Secondly, the economic mind is concerned about the well-being of a group and not about individuals.

> Lives are drops in an undemarcated ocean; and the question how the group is doing is a question whose economic resolutions requires effacing the separate life and agency of each.[16]

Thirdly, the economic mind believes that is possible to find a clear and precise solution

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14 Dickens (1969) Penguin edition.

15 Dickens (1969) *Hard times* 47.

16 Nussbaum "The literary imagination in public life" (1991) *New Literary History* 884.

to any human problem.

> [T]he economic mind finds it easy to view the lives of human beings as a problem in (relatively elementary) mathematics that has a definite solution – ignoring the mystery and complexity that are within each life, in its puzzlement and pain about its choices, in its tangled loves, in its attempt to grapple with the mysterious and awful act of its own morality.[17]

The fourth characteristic of economic rationality is that it views human beings as motivated only by self-interest in all their actions with the effect that altruistic and other-regarding action is ignored. The novel shows us that the economic mind is blind.

> [B]lind to the qualitative richness of the perceptible world; to the separateness of its people, to their inner depths, their hopes and loves and fears; blind to what it is like to live a human life and to try to endow it with a human meaning. Blind above all to the fact that human life is something mysterious that demands to be approached with faculties of mind and resources of language that are suited to the expression of that complexity.[18]

Mere fables about men and women

Nussbaum maintains that when we read a novel we are reading a *story* about people that we can relate to. Reading the novel makes us aware of their "concrete lives", the "shapes of their bodies", their "facial expressions" and the "sentiments of their hearts". We see that as humans they share certain common problems and common hopes and we see how they act upon them in concrete situations. By reading a story the reader participates with the characters, cares about their projects, their hopes and their fears.

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[17] Nussbaum "The literary imagination in public life" (1991) *New Literary History* 885.

[18] Nussbaum "The literary imagination in public life" (1991) *New Literary History* 888.

The reader is encouraged to interpret and evaluate, to be both affectionate and critical.

> In imagining things that do not really exist, the novel, by its own account, is not being "idle" for it is helping its readers to acknowledge their own world and to choose more reflectively in it.[19]

In South Africa, the *stories* told in the public spaces of the Truth Commission showed us how confrontation with concrete humans and their *stories* can contribute to a more reflective, sympathetic and ethical response to the tragedies of our own past. I shall return to this point in Part 3 "... landscapes of justice".

Nussbaum contrasts the novel with economic texts and argues that the person

brought up solely on economic texts is not encouraged to think of workers, for example, as human beings with their own stories to tell. The novel makes us aware of the equal humanity of members of social classes other than our own. Economic texts, on the other hand, focus on abstract facts and are detached from human beings. This vision reminds us of Arendt's reliance on "human plurality",[20] that encompasses the equality *and* the distinctness of all human beings.

"*Reason through the tender light of Fancy*"[21]

To Nussbaum,[22] "fancy" is necessary for the formation of "moral ability". Moral and normative considerations are essential to her conception of the "good life" (the common good). By contrast, the economic approach shies away from normative and moral considerations. The distinction between "fancy" and the economic view reflects the

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19 Nussbaum "The literary imagination in public life" (1991) *New Literary History* 891.

20 I shall elaborate on Arendt's theory on action and her view on plurality below.

21 Dickens (1969) *Hard times* 223.

22 "The literary imagination in public life" (1991) *New Literary History* 896.

tension between a communitarian (civic republican) and a liberal approach to politics. Nussbaum argues that the omission of moral ability impoverishes personal and social relations. She links "fancy" to charity and generosity and to human sympathy. In order to show humanity one must be able to go *further than the facts*. The novel shows how one can go further with the *imagination*. For Nussbaum,[23] going further than the facts involves "charity". The ability to see a face in the moon or talk to a star needs the imagination. The imagination prepares us for life and teaches us how to be more humane, sympathetic and charitable.

Nussbaum makes the important point that all humans, insofar as we interact morally and politically, are projectors, makers and believers of fictions and metaphors. The economist engages in fiction-making as much as the novelist does. This is similar to the Critical Legal Studies'[24] insight that the liberal interpretation of the law is as political as the critical (postliberal) reading. However, the narrow economic view misrepresents the complexity of human beings and human life. A political and legal approach that focuses only on facts and logical, objective rules misrepresents the complexity of human beings and human life – the "false consciousness" to which Critical Legal Studies refers.

Nussbaum pleads for a situation where public life is characterised by a government that knows that every citizen has a complex history of her own and acknowledges their separateness and qualitative difference. Again, the novel encourages such a sense of human community. It highlights the concreteness of individuals while making the reader

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23 Dickens (1969) *Hard times* 54.

24 See amongst others Kennedy "Form and substance in private law adjudication" (1976) 89 *Harvard Law Review* 1685-1778; Tushnet "Truth, justice, and the American way: An interpretation" (1979) 57 *Texas Law Review* 1307-1359; Tushnet "Anti-formalism in recent constitutional theory" (1985) 83 *Michigan Law Review* 1502-1544; Tushnet "Critical Legal Studies and constitutional law: An essay in deconstruction" (1984) 36 *Stanford Law Review* 623-647; Unger "The critical legal studies movement" (1983) 96 *Harvard Law Review* 561-675; Gordon "Critical legal histories" (1984) 36 *Stanford Law Review* 57-125; Trubek "Where the action is: Critical Legal Studies and empiricism" (1984) 36 *Stanford Law Review* 575-622; Kelman "Trashing" (1984) 36 *Stanford Law Review* 293-348; Simon "Visions of practice in legal thought" (1984) 36 *Stanford Law Review* 469-507. See also Sloterdijk "Cynicisms - The twilight of false consciousness" (1984) 33 *New German Critique* 190-206.

aware of common passions, hopes and fears. The novel is "particularistic" but not "relativistic" because it recognises human needs that transcend boundaries of time, place, religion and ethnicity.

The reconstruction and transformation of our vision of public space should thus be enhanced by the imagination. In public discourse and in the judgements we make we must consider human features like human functioning and human capability as more important than utility. We need to listen to normative and moral considerations and not mere facts, structures and institutions. I argue that an imaginative approach which can lead to greater sympathy and humanness in public life will contribute to an "ethics of care".[25] In transforming our visions of public space an "ethics of justice" should be supplemented by an "ethics of care". An "ethics of care" can make a valuable contribution to the reconstruction and transformation of public space and democracy, specifically because it takes into account the *concrete* circumstances and *differences* of each and every individual, without assuming *sameness* and *universality*. In Part 3 I shall highlight how an ethics of care was present in the TRC.

A great part of my story in this thesis is the decline of the public realm and the various reactions to it. The disappearance of homogeneity and of one general understanding of the "common good" are generally held to be the reasons for the decline. Contemporary visions of public space can be viewed in the light of the distinction between "premodern", "modern" and "postmodern" conceptions.[26]

The distinction between premodern, modern and postmodern is problematic, but I follow it nevertheless. By doing this I am not subscribing to a chronological notion of development, but I apply well-known labels in order to explain my argument. Hopefully my own position towards the distinctions will become clearer.

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25 I discuss the distinction between an "ethics of care" and an "ethics of justice" below.

26 It must be noted that the distinctions and labels attached to the various strands of thinking are problematic. The lines between them are not static and the content of these approaches vary. However, I follow the distinctions to situate the various thinkers in certain traditions of thought so that I can explore them and compare them with each other.

"Premodern", or at least some communitarian or civic republican[27] conceptions, adhere to the possibility of one general belief in the "common good". They endorse normative considerations. "Premodern" approaches subscribe to a natural law that searches for justice outside the boundaries of an institutionalised, human-made system. The public realm plays a central role in "premodern" approaches as a place where the members of a homogenous community gather. "Premodern" conceptions of public space is criticised from many sides.[28] The obvious flaw of these conceptions in contemporary societies is that a homogenous community is a precondition for the "premodern" conception. I shall argue that it is possible to follow a communitarian or civic republican vision without accepting the belief in one "common good".

"Modern" (liberal) approaches are identified by the rise of the rational, autonomous individual. The emphasis shifts to the individual at the expense of the community. "Modern" approaches to law subscribe to positivism, in other words, a strong belief in the rational ability of individuals to pass legislation, establish institutions and structures and create procedures. Under "modern" approaches, the public realm loses its importance.[29] The "absent" public space in my own context was and still is a modern one. I hope it is obvious that I am critical of modern approaches.

"Postmodern" approaches reject the belief in rational individuality and seek to expose the limits of human-made, rationally based institutions, structures, procedures and

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27 See generally Daly (ed) (1994) *Communitarianism. A new public ethics.*

28 Communitarian theory is criticised from the liberal (modern) perspective, from the perspective of rational thinkers, like Habermas, attempting to reconstruct modernity and from postmodern perspectives. I shall highlight aspects of these critiques in the discussion of the various visions of public space. See also amongst others Demaine (ed) (1996) *Beyond communitarianism. Citizenship, politics and education* and Peters & Marshall (1996) *Individualism and community: Education and social policy in the postmodern condition.*

29 The liberal (modern) approach to politics and justice will be discussed under the liberal vision of public space. See generally Rosen (1989) *The ancients and the moderns: Rethinking modernity* and Habermas (1987) *The philosophical discourse of modernity: Twelve lectures.*

beliefs. The conversation on values returns in the postmodern context.[30]

I am aware of the manifold problems of any attempt to reconstruct public space, yet I argue that an attempt must nevertheless be made. It must be done in the full awareness of the flexible boundaries between the private and the public and it must accommodate *difference* (*heterogeneity*).[31] In the next sections, I shall further explore "modern", "postmodern" and "premodern" visions.

I start off by looking at visions that can be called liberal or legalistic (modern) because these visions symbolise the current state of affairs in the South African context. These visions rely strongly on formalist or positivist procedures in the public realm. They consider normative considerations as more private. They draw a distinction between law and politics. The task of the judge in the liberal legal system (as functionary of a process taking place in a public space) is to find the law within a logical, coherent set of rules and to apply it to the facts. Normative considerations, which are "private" can not be taken into account. The previous (and with a few exceptions, probably the current) South African visions of public space coincide with this approach. If this conception of public space is unsatisfactory (which I think it is), which other conceptions of public space are there to compare to this one? In the modern concept the feminine has been excluded from public space. Now, in the reconstruction and transformation of public space, people who have been excluded should be included. This should be done in a non-essentialist manner. Those who have traditionally been "other" to institutional public life should enter with the intention to undermine and disrupt the traditional model. Difference is central to the reconstruction and

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30 Winter "Human values in a postmodern world" (1994) 6 *Yale Journal of Law and the Humanities* 233-248; Singer "The player and the cards: Nihilism and legal theory" (1984) 94 *Yale Law Journal* 1-70; Minda (1995) *Postmodern legal movements. Law and jurisprudence at century's end*; Gold (ed) (1993) *Moral controversies: Race, class and gender in applied ethics.*

31 See also Charlesworth "The public/private distinction and the right to development in international law" (1992) *Australian Yearbook of International Law* 190-204.

transformation of public space. I take a cue from Elshtain's[32] article in which Antigone is presented as an example to women who enter the public and corporate world. I also note and support Gilligan's[33] description of "a different voice" and the distinction between an "ethics of care" and an "ethics of justice".

I continue the discussion of the liberal visions by discussing Habermas'[34] rationalist attempt to reflect on normative values. Habermas is a modern (liberal) thinker attempting to reconstruct the "modern project". I believe that we should investigate his theory in order to see what it can contribute to the South African reconstruction and transformation of public space (and politics in general). Habermas strongly relies on the possibility of a "procedural dialogue" between individuals in "an ideal speech situation" through which they can reflect on normative issues. He provides for a public space in his procedure of "discursive ethics". He further subscribes to the "rule of law" and believes that legality can be the basis of legitimacy. Although I am attracted to Habermas' attempt to reconstruct public spaces by procedural dialogue I argue that I am uncomfortable with Habermas. I find his answers too easy. We need to continue the search for inspiration. I note, and support, Seyla Benhabib's[35] and Nancy Fraser's[36] critiques on Habermas' theory form a gender perspective.

The third vision that I discuss is Chantal Mouffe's[37] of "radical democracy". Mouffe

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32 "Antigone's daughters" in Daly (ed) (1994) *Communitarianism. A new public ethics* 335-344.

33 (1982) *In a different voice.*

34 "Three normative models of democracy" (1994) 1 *Constellations* 6. See also Habermas "Human rights and popular sovereignty: The liberal and republican versions" (1994) 7 *Ratio Juris* 1-13 and Benhabib "Deliberative rationality and models of democratic legitimacy" (1994)1 *Constellations* 26-52.

35 (1992) *Situating the self* 108.

36 "What's critical about critical theory" in Benhabib & Cornell (1987) *Feminism as Critique* 31-56.

37 (1993) *The return of the political.*

situates herself as beyond "modern" and "postmodern" approaches. She confronts the tension between the importance given to "modern" rights like *liberty* and *equality* and the problems attached to them. Her vision is more sensitive to *difference* and to the limits of rational systems than the "modern" visions, such as Habermas. Although I voice some critique on her gender neutral approach to citizenship, I argue that we can draw a lot from Mouffe's visions of community and public space. I contrast Drucilla Cornell's[38] call for "ethical" feminism and its implications for the reconstruction and transformation of public space as well as Jennifer Nedelsky's[39] argument that our concept of citizenship should include women's experience with Mouffe's claim to a *gender* neutral citizenship.

Finally, I shall look at Hannah Arendt's[40] vision of public space. She is often criticised for reverting to premodern conceptions and for idolising the Athenian model of public space. Hannah Arendt's vision of public space is the vision that excites me the most, that I suggest that we must explore for our own processes of reconstruction and transformation. I shall concentrate on a reading of Arendt that situates her with thinkers who expose the limits of closed systems. Her insistence on *action* and *speech* within the public realm provides space for reconstruction and transformation of the public space itself together with the transformation of the humans acting within it. With reference to Arendt's work on Rahel Varnhagen,[41] I also focus on the entry of women/females/the "feminine" into public spaces. I argue that such an entry can act as a disruptive force to the traditional conception of public space. I note Bonnie Honig's[42] feminist application of Arendt's theory which she calls "agonistic feminism" and argue that such a vision of feminism can contribute to the reconstruction and transformation

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38 "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 644-699.

39 "A relational approach to citizenship" paper presented at the (1997) *Gender and Citizenship Conference*, Beirut, Lebanon.

40 (1958) *The human condition*.

41 Weisberg (ed) (1997) *Rahel Varnhagen. The life of a Jewess*.

42 "Towards an agonistic feminism: Hannah Arendt and the politics of identity" in (1995) *Feminist interpretations of Hannah Arendt* 135-166.

of public space by undermining traditional concepts of women.

I noted in the introduction that the way public space is conceived is integral to the interpretation of rights, and in particular for this work, an ethical interpretation of equality. The "ethical"' interpretation that I suggest is underpinned by the fact of *difference* and *otherness*, without attempting to equalise or universalise the difference. An "ethical" interpretation of equality, while similar to the concept of substantive equality, stretches *beyond* substantive equality. I am cautious of substantive equality because I think it can too easily be formalised and institutionalised. An "ethical" interpretation accepts the impossibility of fully achieving equality in any present system. An "ethical" interpretation of equality is dependent on a vision of public space that is radically committed to heterogeneity, difference, multiplicity, particularity. Public space "is" not. It is a vision, a description in continuous flux and transformation. Hannah Arendt described the public realm as an "in between" between individuals. It is a vision of the public as an "in between" that contributes to an "ethical" interpretation of equality because an ethical interpretation of equality is concerned with difference and openendedness. Like an "in between" vision of public space is open to continuous transformation, an ethical interpretation is not a final closed interpretation. In Part 2, "... perspectives on equality", I shall explain the concept of justice that I support, namely that justice can never be fully realised in a present system. An "in between"[43] vision of public space and an ethical interpretation of equality accept that justice can never be fully realised in the present. In Part 3, "... landscapes of justice", the event of the South African Truth and Reconciliation Commission will be positioned in Arendt's description of an "in between" space.

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[43] My understanding of "in between" will become clearer through the flow of the text. I basically understand the "in between" as an unfixed space. But the "in between" appears in more instances. For example, I do not subscribe to either a premodern concept of public space or a postmodern one; In Part 2 I shall search for a similar "in between" space between hermeneutics and deconstruction; In Part 3 I shall place the TRC in an "in between" space because it does not fall in any of the given categories of responses to mass atrocities, because it can be interpreted in multiple ways; and I think the tension between textual constraint and interpretative freedom also creates a space for an "in between". Jacques Derrida's use of the "aporia" contributes to my understanding of the "in between". I shall elaborate on the "aporia" in Part 2.

But the world and the people who inhabit it are not the same. The world lies between people, and this in-between ... is today the object of the greatest concern and the most obvious upheaval in almost all the countries of the globe. Even where the world is still halfway in order, or is kept halfway in order, *the public realm has lost the power of illumination* which was originally part of its very nature ... the withdrawal from the world need not harm an individual; ... but with each such retreat an almost demonstrable loss to the world takes place; *what is lost is the specific and usually irreplaceable in-between* which should have formed between this individual and his fellow men.[44]

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[44] Arendt "On humanity in dark times: Thoughts about Lessing" in (1968) *Men in dark times* 4.

Liberal visions

In this section I shall attempt to paint the general picture of the liberal vision. I shall refer generally to the most basic features of modern thought. I refer briefly to the well known reconstructive attempts of John Rawls and Ronald Dworkin. I describe the view of another liberal thinker, Bruce Ackerman, and the critique delivered by political theorist Seyla Benhabib on his thought. For me Rawls, Dworkin as well as Ackerman fail to describe a vision of public space or politics that can contribute to the reconstruction and transformation of our public space. Their theories are based on assumptions of neutrality, are disembedded, disembodied and positivist. I then draw on Michael Sandel's critique on the liberal vision of public space. I find Sandel's critique interesting because he opposes liberal thinking from a liberal perspective. He argues that American public life can be enhanced by focusing on civic republican theories. His arguments should be noted in our own search for a reconstructed and transforming public space. Before I raise objections against the liberal vision from a gender perspective I discuss a recent decision by the New Jersey Supreme Court that I consider a positive development of and contribution to current visions of public space. The main reason for addressing these liberal visions of public space is to set a reference point for comparing the other visions that I shall raise. Another reason is because the liberal visions represent the current and past South African concept of public space.

As a general proposition, it can be stated that the shift from "premodern" to "modern" was, amongst other things, a shift from a strong belief in normative values, morality, metaphysical beliefs and community to the appearance of the individual. In the move to the individual, human plurality came to be acknowledged and the premodern common belief in what constituted the "good life" or the "common good" was rejected.

In early modern thought, the emphasis fell on the individual and on the social contract[45] between the individual and the "state". Here, we need not concern ourselves with the various constructions of the social contract. Suffice it to say that moral deliberations were excluded from the early modern approaches to public space. The vision of public space was accommodated in the social contract where the "state" agreed to protect the individual from interference by other individuals. In other words the individual was regarded as a separate, isolated autonomous subject with no connection to others and involved in no relationships. The individual was regarded as wholly private. A concept of the individual as part of a community and accordingly, as participant in public life, was absent. The effective result was an enormous expansion of the private sphere that led to the decline and perhaps even the disappearance of the public sphere.

Contemporary liberals are faced with the dilemma of excluding normative considerations, and many solutions have been offered. John Rawls,[46] for example, follows in the footsteps of the early social contract theorists. He relies on a social contract between individuals who agree on the basic principles for a just society. The basic principles of justice, according to Rawls, are equal liberty and the distribution of unequal social goods to the greatest advantage of the most unprivileged people in society. The individuals reach agreement from an *original position* where all are in a state of "neutrality" and "equality". They act from behind a *veil of ignorance*, which means that they are uninformed about their status, position and abilities in society. Rawls believes that because they are *rational* beings, individuals under these circumstances will agree on these principles. Rawls' model is criticised from various perspectives that need not be discussed here.[47] The most important critique for the reconstructed and transforming vision of public space that I support is that Rawls'

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45 See generally Hobbes (1651) *Leviathan* and Locke (1690) *Two treatises of civil government.*

46 (1972) *A theory of social justice*; (1993) *Political liberalism.*

47 See amongst others Mouffe "Rawls: political philosophy without politics" (1993) *The return of the political* 41-59; Benhabib "The debate over women and moral theory revisited" (1992) *Situating the self* 178-202 and Pateman (1989) *The disorder of women: Democracy, feminism and political theory.*

model works with an *abstract*, *disembodied* and *disembedded* individual. This stands in contrast to my concern with the concrete context, specific circumstances and difference of the individual.

In his model of "law as integrity", Ronald Dworkin[48] (another well-known liberal thinker), attempts to expand the narrow formalist and positivist approach that focuses only on the applications of rules. His concept is based on the belief that a set of normative principles already exists as the foundation of the legal and political system. Dworkin distinguishes between various types of communities, amongst others, "rulebook communities" and "communities of principle". "Rulebook communities" correspond to the positivist (Dworkin uses the term "conventional") approach to law. "Communities of principle" correspond to Dworkin's model of "law as integrity". Dworkin believes that through his notion of "constructive interpretation" a judge will be able to find the best possible answer (*fit*) and the most just answer (the best *justification*). He compares legal interpretation and adjudication to a chain novel. Like the writer of a chain novel the judge will choose the interpretation that will provide the best fit and the best justification. As with Rawls, Dworkin is criticised from various perspectives.[49] In my view, the most obvious problem with Dworkin is his firm belief that a rational human-made system, like a legal system, can ensure the achievement of justice. This is in contrast with the concept of justice that I support, that justice is never fully realised in the present, justice is the limit of present systems, justice is in the *beyond*.

Another liberal thinker struggling with the question of normative values in the public sphere is Bruce Ackerman.[50] Benhabib[51] labels his model of public life as "legalistic".

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48 (1977) *Taking rights seriously*; (1986) *Law's empire* and (1995) *Life's dominion*.

49 See amongst others Van der Walt "Law's empire: the personification of community" (1995) *The twilight of legal subjectivity: Towards a deconstructive republican theory of law* LLD thesis 381-395.

50 Ackerman (1980) *Social justice in the liberal state* 4; "Why dialogue" (1989) 86 *Journal of Philosophy* 1013. See also Ackerman "The Storrs lectures: discovering the Constitution" (1984) 93 *Yale Law Journal* 1013.

51 Benhabib (1992) *Situating the self* 95.

Ackerman proposes a model of "liberal dialogue". In his view, a political culture of public dialogue is based on certain kinds of "conversational constraints". Neutrality is for him the most significant of these constraints because neutrality ensures that no one's conception of the good can be placed above another's. Ackerman explains that his model of public dialogue is based, "not on some general feature of the moral life, but upon the distinctive way liberalism conceives of the problem of public order".[52] He asks how different groups who do not share the same conception of the good can coexist in a reasonable way. He answers that citizens in a liberal state must be guided by a "Supreme Pragmatic Imperative".

According to Benhabib,[53] Ackerman seeks a justification of the "Supreme Pragmatic Imperative" that will not fall into the traps which traditionally affect moral liberal philosophies, for example Rawls' theory of social justice. These traps are *trumping*; relying on a *translation manual neutral enough*; and asking the parties to rely on a *transcendental* perspective. Ackerman explains the traps as follows: *Trumping* means asserting a supreme moral view over others. Relying on a *translation manual* violates the sense of the "good" of one of the parties. Asking the parties to assume a *transcendental* perspective, such as the *ideal speech situation* or *original position,* or *veil of ignorance*[54] makes the differences abstract and forces the parties to the public dialogue to subscribe to moral truths which they do not hold.

Ackerman suggests "conversational constraint".

> When you and I learn that we disagree about one or another dimension of the moral truth, we should not search for some common value that will

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52 Ackerman "Why dialogue?" (1989) 86 *Journal of Philosophy* 8.

53 (1992) *Situating the self* 96.

54 Rawls developed this concept in (1972) *A theory of justice* to explain the initial stage where individuals gather to enter into the social contract where they agree on the minimum principles for justice. The "original position" refers to an equal, neutral position where individuals act from behind a "veil of ignorance" and are ignorant of their position or status in society.

> trump this disagreement; nor should we try to translate our moral disagreement into some putatively neutral framework; nor should we seek to transcend our disagreement by talking about how some hypothetical creature would resolve it. We should simply say nothing at all about this disagreement and try to solve our problem by invoking premises that we do agree upon. In restraining ourselves in this way, we need not lose the chance to talk to one another about our deepest, moral disagreements in countless other, more private, contexts. Having constrained the conversation in this way, we may instead use dialogue for pragmatical productive purposes: to identify normative premises all political participants find reasonable or, at least, not unreasonable.[55]

Benhabib[56] criticises Ackerman's pragmatic justification of "conversational restraint" because it is not morally neutral: She argues that "conversational restraint", as other models, *trumps* certain conceptions of the good life by making them private and by pushing them off the agenda of public debate. Benhabib agrees with Ackerman that conventional views of morality cannot be accepted as the moral foundations of a liberal-democratic state. Conventional views of morality will not be impartial and accordingly will be inadequate to deal with different normative considerations. But this does not mean that the debate about different conceptions of the good life should be excluded from the public arena. In other words, the fact that we cannot find a translation manual neutral enough does not mean that we should exclude all moral considerations from the public sphere. The pragmatic justification of "conversational restraint" also *transcends* by asking the parties to the conversation to agree to say nothing about their fundamental disagreements. Benhabib[57] disagrees with Ackerman's belief that his concept of *conversational constraint* is less loaded than Rawls' idea of the *veil of ignorance*. I support Benhabib's critique. We can no longer hide behind the abstract assumption of neutrality in order to deny moral considerations that can affect the

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55 Ackerman "Why dialogue?" (1989) 86 *Journal of Philosophy* 16-17.

56 (1992) *Situating the self* 97.

57 (1992) *Situating the self* 98.

concrete circumstances of individual lives and society in general.

Benhabib[58] questions the "moral epistemology" of Ackerman's model because it implicitly justifies a separation between the public and the private that is harmful to certain groups. She explains this moral epistemology as follows: The liberal idea of conversational constraint presupposes that the primary groups to the conversation already know what their deepest agreements are, even before they have started the conversation. They seem to know beforehand, for example, whether the nature of the particular problem concerns moral, religious or aesthetic issues as opposed to matters of distributive justice or public policy. The liberal theorist argues that while it is legitimate to discuss issues of distributive justice, matters of morality and religion should not be discussed. However, who makes the decision whether issues are issues of "justice" or issues of morality and religion (the "good life")? For example, are abortion, pornography and domestic violence questions of justice or of the good life? Benhabib argues that the liberal theorist is not in the "possession of any moral dictionary that would enable her to classify certain issues as issues of justice and others as issues of the good life". We need *un*constrained public dialogue to help us define the nature of the issues that we are debating. The agenda of the public debate should not be defined. Citizens must feel free to debate any of their moral concerns in the public sphere. In Benhabib's view, the liberal principal of "dialogue neutrality" in the public sphere is too restrictive when applied to the "dynamics of power struggles in actual political processes", because all struggles against oppression in the modern world start off by redefining, reconstructing and transforming the public/private boundary. I agree with Benhabib's argument that the liberal principle of "dialogue neutrality" is too restrictive. In our own reconstruction and transformation of public space the public discourse should be as wide and unrestricted as possible.

Taking the argument a step further, Michael Sandel[59]argues that American public life is "rich with discontent." He identifies two fears that lie behind this disquiet, namely fear

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58 (1992) *Situating the self* 98.

59 (1996) *Democracy's discontent. America in search of a public philosophy* 3.

for the loss of self-government and the fear for the erosion of the community. He argues that the reason for the current state of political arguments can be found in the public philosophy that inspires them. The current state of public life, according to Sandel, amounts to a "procedural republic".

> The political philosophy by which we live is a certain version of liberal political theory. Its central idea is that government should be neutral toward the moral and religious views its citizens expose. Since people disagree about the best way to live, government should not affirm in law any particular vision of the good life. Instead, it should provide a framework of rights that respects persons as free and independent selves, capable of choosing their own values and ends. Since this liberalism asserts the priority of fair procedures over particular ends, the public life it informs might be called the procedural republic.[60]

He explains that he does not see *liberalism* as the opposite of *conservatism*, but as the tradition of thought that emphasises individual rights. American politics is based on the liberal tradition of thought inspired by the likes of Locke,[61] Kant,[62] Mill[63] and Rawls.[64] Sandel[65] notes that it is quite recently that American public life started to rely so heavily on liberal thought.[66] He compares the liberal approach to republican political theory. Republican political theory subscribes to the notion of sharing in self-governance, in

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60 (1996) *Democracy's discontent. America in search of a public philosophy* 4.

61 See generally (1690) *Two treatises of civil government.*

62 See generally (1952) *The critique of pure reason*; *The critique of practical reason and other ethical treatises*; *The critique of judgement.*

63 (1861) *Utilitarianism.*

64 (1972) *A theory of social justice*; (1993) *Political liberalism.*

65 (1996) *Democracy's discontent. America in search of a public philosophy* 5.

66 South Africa also has a "republican" past. Before the unification of the country in 1910, the ZAR and the Orange Free State were republics. An investigation into the specific structures of the two Boer republics can be very insightful to form a concept of the republican tradition in our country.

other words participation in politics. While the idea of participation is not in itself in conflict with liberal thought, in republican political theory sharing in self-governance and participation has another dimension.

> It means deliberating with fellow citizens about the common good and helping to shape the destiny of the political community. But to deliberate well about the common good requires more than the capacity to choose one's ends and to respect other's rights to do the same. It requires a knowledge of public affairs and also a sense of belonging, a concern for a whole, a moral bond with the community whose fate is at stake. To share in self-rule therefore requires that citizens possess, or come to acquire, certain qualities of character, or civic virtue. But this means that republican politics cannot be neutral toward the values and ends its citizens espouse[67].

Sandel identifies the aspiration to neutrality as the centre of liberal thought. Liberal political theory supports the idea that government should be neutral on the question of the good life. He contrasts this approach to Aristotelian and ancient political theory, where the aim of politics was to "cultivate the virtue, or moral excellence of citizens". He explains that instead of promoting a particular conception of the "good life", liberal political theory puts its trust in "toleration", "fair procedures" and "respect for individual rights". Sandel discusses two alternative approaches to neutrality, the utilitarian view and the Kantian one. The utilitarian view is based on the theory of John Stuart Mill,[68] who subscribes to the principle of "the greatest good for the greatest number". Kant,[69] on the other hand, reacted against the instrumental defence of utilitarian thought. Sandel[70] explains that Kant rejected utilitarianism because it could not serve as a basis

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67 (1996) *Democracy's discontent. America in search of a public philosophy* 6.

68 See amongst others (1861) *Utilitarianism.*

69 See generally (1964) *The critique of judgement.*

70 (1996) *Democracy's discontent. America in search of a public philosophy* 9.

for morality; did not respect the dignity of individuals; and treated humans as means to the happiness of others and not as ends in themselves. He notes the argument of contemporary Kantian liberals that utilitarianism also fails to address the distinction between persons.

Sandel explains that Kantian liberals depend on an account of rights that is not based on utilitarianism and that does not support any particular conception of the "good". They accordingly draw a distinction between the "right" and the "good", in other words, between a framework of basic rights and liberties and the conceptions of the good that people might pursue within such a framework. The state may support a fair framework, but may not support a particular conception of the good. To Sandel, this commitment to a fair, neutral framework in itself rests on a value orientated choice, namely the choice not to affirm a particular conception of the "good". This is a powerful argument against liberals who claim that they succeed to be free from all normative and moral and value orientated choices. Sandel describes the priority of the "right" over the "good" as follows:

> First, individual rights cannot be sacrificed for the sake of the general good; and second, the principles of justice that specify these rights cannot be premised on any particular vision of the good life. What justifies the rights is ... that they constitute a fair framework within which individuals and groups can choose their own values and ends, consistent with a similar liberty for others.[71]

Kantian liberalism supports a certain conception of the self that is often questioned.[72] The Kantian self is a *self-choosing* subject, *autonomous* and *independent* of others.

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71 (1996) *Democracy's discontent. America in search of a public philosophy* 11.

72 See amongst others West "The difference in women's hedonic lives: a phenomenological critique of legal feminist theory" (1987) 3 *Wisconsin Women's Law Journal* 81-140; West "Jurisprudence and gender" (1988) 55 *The University of Chicago Law Review* 1-72; Taylor "The modern identity" and Gutmann "Communitarian critics of liberalism" in Daly (ed) (1994) *Communitarianism. A new public ethics* 55-71; 89-98.

Sandel notes that this vision of the self is accepted because of its powerful liberating vision (it is free and independent, unencumbered, "self-originating"), and because it makes a strong case for equal respect (it seems to be blind to differences and to look beyond them). However, this concept of the self does not truly reflect human experience. In my view neither the utilitarian nor the Kantian approach to neutrality can positively contribute to the reconstruction and transformation of South African public space, if anything the current support of these approaches should be exposed and undermined.

Referring to the later Rawls[73] and Rorty,[74] Sandel introduces the "minimalist liberals". Minimalist liberalism argues that neutrality can be separated from the Kantian conception of the self. They concede that we are not free and independent and unencumbered in the private realm. They insist, however, that we must detach ourselves from any such private obligations in the public realm.

> However encumbered we may be in private, however claimed by moral or religious convictions, we should bracket our encumbrances in public and regard ourselves, *qua* public selves, as independent of any particular loyalties or conceptions of the good.[75]

Although minimalist liberals distinguish themselves from the Kantian conception of the self as an independent, unencumbered and "self-originating" human being it fails to incorporate the reality of dependance into their visions of the public. In my view it does not mean anything that they differ with the Kantian conception of the self if it stays at an abstract and theoretical level. In other words minimalist liberals still rely on a neutral public space where independent isolated individual pursue their own interests.

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[73] (1993) *Political liberalism*; "Justice as fairness: political not metaphysical" (1985) *Philosophy & Public Affairs* 223-251.

[74] "The priority of democracy to philosophy" in Peterson and Vaughn (ed) (1988) *The Virginia Statute for religious freedom*.

[75] (1996) *Democracy's discontent. America in search of a public philosophy* 18.

If the liberal model in all its forms are flawed where could we turn to? Several authors have argued for a revival of civic republican theory. Sandel[76] refers to two misgivings in this regard: some doubt whether it is possible; others say it is not desirable. The former argue that it is unrealistic to aspire to republican self-government in the modern world because they regard republican ideals as "nostalgic".The latter maintain that republican theory is exclusive and coercive because republican citizenship requires certain virtues. The implication is that republican citizenship is discriminatory (for example, Aristotle barred women, slaves and aliens from the public sphere). Sandel argues that the republican ideal does not necessarily have to be discriminatory. He refers to the democratic versions of republican theory during the Enlightenment. According to Sandel,[77] the second misgiving (coercion) can be a stronger objection to republican theory because of the task of cultivating virtue. He refers in this regard to Rousseau's[78] account of the formative task of the legislature so as to "change human nature, to transform each individual". Sandel, however, argues that "civic education" can also take place in less harsh forms. He refers in this regard to Tocqueville's account of citizenship.[79] Sandel[80] describes the shift that has occurred from the republican tradition where self-government was an activity rooted in a *specific place* (the public realm) to modern politics where self-government requires a *multiplicity of settings*. He warns against two kinds of corruption of civic virtue. The one is the tendency to fundamentalism which he describes as "the response of those who cannot abide the ambiguity associated with divided sovereignty and multiply-encumbered selves".[81] The other is the danger of becoming "story less selves, unable to weave the

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76 (1996) *Democracy's discontent. America in search of a public philosophy* 317.

77 (1996) *Democracy's discontent. America in search of a public philosophy* 319.

78 (1996) *Democracy's discontent. America in search of a public philosophy* 319. See in general Rousseau (1762) *On the social contract.*

79 (1996) *Democracy's discontent. America in search of a public philosophy* 320.

80 (1996) *Democracy's discontent. America in search of a public philosophy* 350.

81 (1996) *Democracy's discontent. America in search of a public philosophy* 350.

various strands of their identity into a coherent whole".[82] He argues that the loss of *story*telling will lead to the total disempowerment of the subject, but at the same time, that such a disempowerment is impossible. His vision for public life lies in the "reparation" of civic life.

> Since human beings are *story*telling beings, we are bound to rebel against the drift to story lessness. But there is no guarantee that the rebellions will take salutary form. Some, in their hunger for story, will be drawn to the vacant, vicarious fare of confessional talk shows, celebrity scandals and sensational trials. Others will seek refuge in fundamentalism. The hope of our times rests instead with those who can summon the conviction and restraint to make sense of our condition and repair the civic life on which democracy depends.[83]

Sandel's warning of becoming "story less selves" is a powerful statement. The event of the Truth and Reconciliation Commission surely contributed to the revival of storytelling and stories in South African public life. I believe that the type of critique delivered by Sandel on the liberal vision of public space and his comments on civic republicanism can be helpful in the reconstruction and transformation of our visions of public space.

The multiple nature of public life and public discourse was manifested in a recent case before the Supreme Court of New Jersey.[84] The question in the case was whether regional shopping centres, or malls, must permit the distribution of leaflets on "societal issues". The plaintiff, New Jersey Coalition, a collection of groups opposed to US military intervention in the Middle East, sought to distribute leaflets at very large regional and community shopping centres in which they urged the public to persuade members of Congress to vote against such military intervention. All the defendants

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82 (1996) *Democracy's discontent. America in search of a public philosophy* 350.

83 (1996) *Democracy's discontent. America in search of a public philosophy* 351.

84 *New Jersey Coalition v J.M.B. Realty Corp.* 1994 N.J. Lexis 1283.

were enclosed malls that permitted and encouraged on their premises a variety of non-shopping activities, some of which involved speech, politics and community issues. They claimed to prohibit issue-oriented speech and the distribution of leaflets because such speech and distribution conflicted with their commercial purpose. The trial court decided in favour of the malls on the grounds that their property was dedicated solely to commercial uses inconsistent with political speech. On appeal, the trial court's decision was confirmed.

The New Jersey Supreme Court decided in favour of the coalition. It was held that the right of free speech embodied in the state constitution required regional shopping centres to permit the distribution of leaflets on societal issues subject to reasonable conditions. The New Jersey Supreme Court took judicial notice of the fact that suburban shopping centres have substantially displaced the downtown business district of the State of New Jersey as places of commercial and social activity. The court referred to decisions where states found their constitutional free-speech-related provisions effective, regardless of "state action" and ruled that shopping centre owners cannot prohibit free speech. The court referred to *Schmidt*[85] where it was held that a private university that had invited the public to participate in discussions of current and controversial issues could not prohibit a member of the public from distributing leaflets and selling political materials on its campus. In *Schmidt* three factors were identified which had to be considered in determining the existence and extent of state free speech rights on privately-owned property: the nature, purposes, and primary use of such property; the extent and nature of the invitation to the public to use the property; the purpose of the expressional activity in relation to both the private and public use of the property. It was decided that the outcome depends on a consideration of all three factors and ultimately on a balancing between the rights of private property owners and the free speech rights of individuals. The court found that each of these factors and their ultimate balance support the conclusion that the distribution of leaflets at shopping centres is constitutionally permitted. The court's assessment of the third factor – the compatibility of free speech and the use of the property – recognises the significance

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[85] *State v Schmidt*, 84 N.J. 535 (1980).

of free speech within the public realm. The fact that free speech and the downtown business were compatible for more than 200 years, was proof enough that the distribution of leaflets in shopping centres should be allowed. The court argued that if free speech is to mean anything in the future, it must be exercised at shopping centres. Where private property rights are exercised in a way that drastically curtails the right of freedom of speech in order to avoid a relatively minimal interference with private property, the property rights must yield to the right of freedom of speech.

This decision in *New Jersey coalition* can be seen as a positive contribution to the reparation of civic life. Modern society must be in a position to create public spaces whenever and wherever they appear. The Aristotelian or republican ideal can be recreated in circumstances of such political and human action. The traditional private/public divide will be softened by this recreation. The liberal assumption of neutrality will likewise be undermined. The South African society is becoming a greater society of consumers by the day - the spaces of consumption, for example shopping malls as the modern metaphor for the ancient *piazza*, should simultaneously become public spaces where there is a potential for political action and free speech.[86]

Liberalism and gender

Above I raised some of the general problems with the liberal visions of public space. Another troubling aspect of the liberal visions is that they acknowledge and highlight only one of the many versions of the self, namely a male version. In this section, I offer two critiques from a gender perspective against the liberal visions of public space. The one is based on *Antigone*, the other on the idea of an "ethics of care" and the "standpoint of the concrete other".

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[86] See Frug "The city as a legal concept" (1980) 93 *Harvard Law Review* 1057.

Antigone's daughters

Antigone is the third of Sophocles' Thebian plays.[87] The events leading to *Antigone* are the death of her father Oedipus and the strife between her two brothers, Eteocles and Polynices, who killed each other. Creon, who after these events becomes king of Thebes, declares that whilst the body of Eteocles, who defended the city, may be buried, the body of Polynices should remain unburied. Antigone speaks to her sister, Ismene:

> *O, Ismene, what do you think? Our two dear brothers ... Creon has given funeral honours to one, And not to the other; nothing but shame and ignominy. Eteocles has been buried they tell me, in state, With all the honourable observances due to the dead. But Polynices, just as unhappily fallen - the order Says he is not to be buried, not to be mourned; To be left unburied, unwept, a feast of flesh For keen-eyed carrion birds. The noble Creon! It is against you and me he has made this order. Yes, against me. And soon he will be here himself To make it plain to those that have not heard it, The punishment for disobedience is death by stoning. So now you know. And now it is the time to show Whether or not you are worthy of your high blood.*

Antigone then asks her sister to help her bury their brother. She says that they will be defying the "holiest laws of heaven" if they do not bury their brother. Ismene responds:

> *I do not defy them* [the holiest laws of heaven]*; but I cannot act Against the state. I am not strong enough. ... Do not breathe a word. I'll not betray your secret.*

And then Antigone's words:

> *Publish it. To all the world! Else I shall hate you more.*

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[87] Sophocles (1947) (Penguin edition) *The Thebian plays*.

Antigone then buries her brother in defiance of Creon's decree. When Creon is told, he asked her whether she knew that she was disobeying his order.

> Creon: *And yet you dared to contravene it?*
>
> Antigone: *Yes. The order did not come from God. Justice, that dwells with the gods below, knows no such law. I did not think your edicts strong enough to overrule the unwritten unalterable laws of God and heaven, you being only a man. They are not of yesterday or today, but everlasting, though where they came from, none of us can tell. Guilty of their transgression before God I cannot be, for any man on earth I knew that I should have to die, of course, with or without your order. If it be soon, so much the better. Living in daily torment, as I do, who would not be glad to die? This punishment will not be any pain. Only if I had let my mother's son lie there unburied, then I could not have borne it. This I can bear. Does that seem foolish to you? Or is it you that are foolish to judge me so?*
>
> ...
>
> Creon: *Go then, and share your love among the dead. We'll have no woman's law here while I live.*

In an article, "Antigone's Daughters", Elshtain[88] illustrates her conception of the public sphere and feminine civic virtue using Sophocles'[89] story of Antigone. Antigone defied the decree of Creon and insisted on burying her slain brother as was required by family honour. For Antigone the family tradition and her belief in "God's law" took precedence over public law. In Greek mythology religion (the belief in the gods) is an indication of certain moral beliefs. I interpret Antigone's reliance on what she calls "God's law" as a reliance on certain normative beliefs. Family tradition was accordingly influenced by these normative beliefs. Elshtain argues that modern women, as "Antigone's daughters", should bring the values of family and community life and normative considerations into the public sphere.

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88 In Daly (ed) (1994) *Communitarianism. A new public ethics* 335-344.

89 Sophocles (1947) (Penguin edition) *The Thebian plays*.

Elshtain[90] notes that most feminist theories[91] seek to transform women into public persons, with a public identity. Such a public identity demands that public issues take precedence in cases of conflict with private lives. The effect of this would be that the private has to be absorbed as completely as possible into the public. Women, formerly the private beings, would be "uplifted" to the status of the man (public being) in order to gain public identity. In practice, the shift in the social identities of women amounts to an identification with the state and the accompanying competitive terms of civil society. Feminists want to acquire a public identity for women because they view women as "victims of deliberate exclusion from public life and forced imprisonment in private life". Since the public world was seen as the only sphere within which individuals make "real" choices, the private world was associated with "powerlessness", "necessity" and "irrationality".

Liberal feminists encouraged women to enter the public sphere and to "empower themselves from their long history of oppression and exclusion". They argued for women to acquire the right to vote, to be allowed in the realms of public office, education and employment. Feminists who rejected liberal feminism embraced difference and reflected critically on women's identification with the role of the (public) male. They made the point that it is also oppressive to regard women's private role as only oppressive. Postliberal feminists suggest that feminists should challenge rather than accept the present public world. Elshtain believes that women participate in the suppression of tradition (heritage) when they fully identify with the present public order.[92]

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90 "Antigone's daughters" (1994) in Daly (ed) *Communitarianism. A new public ethics* 337.

91 Three waves/strands of feminisms are identified. The first wave (liberal feminism) seeks equal rights for women. These claims are based on neutrality. In the second wave the issue regarding sameness and difference are raised. Cultural and radical feminist theories are part of the second wave. The third or postmodern wave accepts the fact of difference not only between men and women but also amongst women themselves. See generally Frug (1992) *Postmodern feminism*; Olsen "The sex of law" in Kairys (1997) *The politics of law*453-467. *A progressive critique* ; Nicholson (ed)(1990) *Postmodernism/feminism*; Kristeva "Women's time" in Keohane (1981) *Feminist theory* 31-53.

92 "Antigone's daughters" (1994) in Daly (ed) *Communitarianism. A new public ethics* 339.

The question of female identity and the state looks different when viewed from the standpoint of Antigone, who challenged Creon's decree that dishonoured her family. According to Elshtain, instead of being perceived as excluded from legitimate public life, Antigone should be seen as an "active historic agent", a participant in social life who located the heart of her identity in a world bounded by the demands of necessity, sustaining the values of giving and preserving life. This sphere of the historic female subject generated its own imperatives, inspired its own songs, stories and myths.[93]

To reconstruct public identity by including only traditional, liberal visions of public identities, to the exclusion of Antigone's voice (that is, the voice of the private sphere and tradition), would prevent multiple identities from appearing in the public sphere. Elshtain identifies the question of contemporary feminist and identity politics as how to hold on to a social location for "contemporary daughters of Antigone", without at the same time insisting that women accept traditional terms and revert to the same old stereotypes.

This is a central concern of this thesis. The "double-bind" of affirming the feminine whilst undermining it is similar to my vision of reconstruction and transformation of public space. Although the liberal instrumental approach to politics and the public sphere is inadequate, the communitarian or civic republican tradition can also not be accepted unconditionally. Likewise, "liberal", "radical" and "cultural" approaches to feminism have inadequacies. An "in between" position will be sought where the boundaries between male and female, public and private, can be softened. It is in this "in between" space where an ethical interpretation of equality will ultimately be placed. In 2 "... perspectives on equality" I repeat the concern that women should not be incorporated into a present system but should disrupt it by bringing their different voices and multiple voices to the fore.

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[93] Elshtain "Antigone's daughters" (1994) in Daly (ed) *Communitarianism. A new public ethics* 341.

Elshtain[94] argues that women can explore, articulate and reclaim the public and the private world and reaffirm the standpoint of Antigone through a "socialist" feminist awareness. She sees a rigid distinction between the public and the private as misleading. "The world of Antigone" is a social location that accommodates heterogeneous identities. By seeing human beings through a many-layered, complex social world, the transformation of identities as well as transformations of the public and private spheres will become possible. Elshtain favours a communitarian approach that can involve a multiplicity of interrelated but autonomous social spheres and incorporates a vision of human solidarity that does not require uniformity and consensus.

Elshtain delivers a powerful critique of the liberal vision of public life as well as of women and feminists who accept this model uncritically. Her vision broadens the liberal vision by making space for other voices. In my view we should take regard of Antigone's voice (Elshtain's vision) in our own processes of reconstruction and transformation. We should regard Antigone's voice not as representative of women or of "the feminine" but as a disruptive force signifying difference.

I shall now turn to Carol Gilligan's[95] distinction between an "ethics of care" and an "ethics of justice".

Ethics of care and the standpoint of the concrete other

Carol Gilligan,[96] in reaction to the studies on the moral development of persons done

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94 "Antigone's daughters" (1994) in Daly (ed) *Communitarianism. A new public ethics* 341.

95 (1982) *In a different voice.*

96 (1982) *In a different voice.*

by Lawrence Kohlberg,[97] argued that women's and men's conceptions of the "good life" differ and that our understanding of moral theory could be enriched by expanding it to include the moral view[98] of women. Gilligan came to the conclusion that Kohlbergs's theory is only valid to measure the development of persons in regard to rights and justice. She distinguishes between an "ethics of justice" and an "ethics of care" and argues that women's moral development should be measured in terms of the latter. Women, according to Gilligan, are more context-bound, involved in relationships and stories. The female moral orientation is more inclined to take the position of the *other*, to act sympathetically and empathetically.[99] In a "postconventional" (postmodern, postliberal) culture these qualities should be viewed as strengths and not as weaknesses.

> The contextuality, narrativity and specificity of women's moral judgement is not a sign of weakness or deficiency, but a manifestation of a vision of moral maturity that views the self as a being immersed in a network of relationships with others.[100]

According to Benhabib,[101] universal moral theory in the Western tradition can be seen as "substitutionalist". This vision of moral theory sets the experience of a specific group (white males) as a paradigm for human experience. Benhabib argues for an "interactive universalism" that acknowledges plurality of modes of being and differences among

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97 (1984) *Essays on moral development. The psychology of moral development.*

98 Gilligan's theory of ethics of care will not be discussed in detail. For an elaborated discussion see Van Marle (1996) *Rekonstruktiewe feminisme: 'n Ondersoek na die reg as "manlike" struktuur en die moontlikheid van transformasie met spesifieke verwysing na pornografie* LLM-dissertation 11-30.

99 See also Kline "Complicating the ideology of motherhood" and "Racism and patriarchy in the meaning of motherhood" in Fineman and Karpin (eds) (1995) *Mothers in law: Feminist theory and the legal regulation of motherhood.*

100 Benhabib "The generalized and the concrete other. The Kohlberg-Gilligan controversy and feminist theory" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 78.

101 Benhabib "The generalized and the concrete other. The Kohlberg-Gilligan controversy and feminist theory" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 78.

humans. Western moral theory makes a strong distinction between "justice" and the "good life". This distinction was created by modern social- contract theorists like Hobbes, Locke, and much later Rawls, who strived to defend privacy and autonomy. The public private-divide was strengthened by this distinction.

In the modern (conventional, liberal) tradition, moral theory was limited to the concept of the "generalised" other that views the individual as a rational being entitled to the same rights and duties we would want for ourselves. The concept of the "concrete" other, on the other hand, views the rational human being as an individual with a concrete history and identity. Gilligan, Benhabib[102] and others[103] argue for a moral theory where the "concrete" other is also taken into account. Kohlberg and Rawls are criticised because they take only account of the "generalised" other in their theories. For example, the choices that Rawls refers to in his *original position* are abstract choices made by disembedded and disembodied selves. Choices made from the position of the "concrete" other will take into account

> [H]ow I as a finite, concrete, embodied individual, shape and fashion the circumstances of my birth and family, linguistic, cultural and gender identity into a coherent narrative that stands as my life's story.[104]

With regard to the "generalised" other and the "concrete" other the one should not be replaced by the other. The concept of the "concrete" other should function as a critical position that can add to the concept of the generalised other. Benhabib argues that this

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102 "The generalized and the concrete other. The Kohlberg-Gilligan controversy and feminist theory" in Benhabib & Cornell (eds) (1987) *Feminism as critique*; (1992) *Situating the self.*

103 Larrabee (1993) *An ethic of care. Feminist and interdisciplinary perspectives*; Sevenhuijsen (1996) *Oordelen met sorg. Feminischtische beschouwingen over recht, moraal en politiek*; Hekman (1995) *Moral voices moral selves. Carol Gilligan and feminist moral theory*; Clement (1996) *Care, autonomy, and justice*; Shogan (1992) *A reader in feminist ethics*; Held (1993) *Feminist morality*; Held (1995) *Justice and care. Essential readings in feminist ethics*; Baier (1995) *Moral prejudices. Essays on ethics*; Tronto (1993) *Moral boundaries. A political argument for an ethic of care*; Assister (1996) *Enlightened women. Modernist feminism in a postmodern age.*

104 Benhabib "The generalized and the concrete other. The Kohlberg-Gilligan controversy and feminist theory" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 89.

view enhances a "communicative ethic of need interpretations".

> One consequence of this communicative ethic of need interpretations is that the object domain of moral theory is so enlarged that not only rights but needs, not only justice but possible modes of the good life, are moved into an anticipatory-utopian perspective.[105]

Gilligan's distinction between an "ethics" of care" and an "ethics of justice" is significant for the South African context. In regard to visions of public space, equality and justice the distinction between care and justice, as well as between the concrete and the general other must be taken into account. An "ethics of care" and the concept of the concrete other form an inherent part of an ethical interpretation of equality that relies on difference. In Part 3 I shall again refer to an ethics of care in regard to the TRC.

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[105] Benhabib "The generalized and the concrete other. The Kohlberg-Gilligan controversy and feminist theory" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 93.

A rationalist vision: Reconstructing the "unfinished project"

After painting a general picture of the various liberal visions and the main points of critique I turn to the theory of Jürgen Habermas who is a "reconstructive" thinker. His reconstruction is focused on the "unfinished project of modernity". It is necessary, I think, to explore Habermas' theory to see whether it can contribute to the reconstruction and the transformation of South African public space. Where the liberal visions that I discussed above focused on the value of *neutrality*, Habermas focuses on the value of *rationality*.

Bernstein[106] situates Habermas in a specific historical context and argues that the discovery of Nazism was a formative experience for Habermas as adolescent.

> The painful awareness of "the ghastliness", of a "collectively realized inhumanity", a sharp sense of "rupture", were the traumatic experiences of the young Habermas. A question began to take shape - a question that has haunted Habermas ever since: how could one account for the "pathologies of modernity"?[107]

Although Habermas realised the danger of "instrumental rationality" that was spreading to all spheres, economic, social and political, of the modern world, he argued that rationality has other more significant aspects. Bernstein explains:

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106 (1991) *The new constellation. The ethical-political horizons of modernity/postmodernity* 202.

107 (1991) *The new constellation. The ethical-political horizons of modernity/postmodernity* 202.

> Habermas argued that this monolithic portrait of the totalitarian character of Enlightenment rationality was overdrawn. It failed to do justice to those philosophic and historical tendencies - also rooted in the Enlightenment - that gave rise to democratic public spaces in which a different type of communal rationality was manifested.[108]

His model of "communicative action" is founded on a distinctive type of rationality and action that relies on mutual understanding and consensus. In his theory of "communicative action", Habermas distinguishes between the different types of "instrumental", "strategic", "systems" and "technological" rationality and his own vision of "communicative", "dialogical" rationality. He draws a further distinction between "communicative" and "purposive-rational" action. Bernstein[109] explains that "rationalisation" in regard to purposive-rational actions means "increasing efficiency" or the "consistency of rational choices". "Rationalisation" in Habermas' communicative action means "overcoming such systematically distorted communication in which action supporting consensus concerning the reciprocally raised validity claims ... can be sustained in appearance only, that is counter factually".[110]

Bernstein argues that Habermas's reconstructive project is not only of theoretical value but also has practical consequences for ethical and political life.

> It directs us to the normative task of overcoming those material obstacles that prevent or inhibit undistorted and non-coerced communication. Positively stated, it means working toward the cultivation of practices that bring us closer to the ideal of seeking to resolve conflicts through

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108 (1991) *The new constellation. The ethical-political horizons of modernity/postmodernity* 203.

109 (1991) *The new constellation. The ethical-political horizons of modernity/postmodernity* 204.

110 (1991) *The new constellation. The ethical-political horizons of modernity/postmodernity* 204; Habermas "Historical materialism and the development of normative structures" in (1979) *Communication and the evolution of society* 117.

discourses where the only relevant force is the "force of the better argument".[111]

Bernstein,[112] however, voices a criticism against Habermas' reliance on science.

> If a theory of communicative action and a universal pragmatics are supposed to be scientific theories that are hypothetical, fallible, and refutable, then what would be the consequences if such a theory were in fact refuted or falsified. ... Habermas gets himself entangled in these and related aporias the more he insists on the scientific status of the theory of communicative action and a universal pragmatics. ... Despite his manifest break with Kantian tradition of transcendental argument, he nevertheless leads us to think that a new reconstructive science of communicative action can establish what Kant and his philosophic successors failed to establish – a solid ground for communicative ethics.[113]

He suggests an alternative reading of Habermas that calls attention to the "moral-political intention". His reading understands Habermas's project as an interpretative and hermeneutic one. Bernstein draws attention to Habermas' "pragmatic voice" and his practice of "interpretative dialectics".

Habermas, in reaction to Richard Rorty's[114] critique of modernity and philosophy, argues as follows:

> Modernity is characterised by a rejection of the substantive rationality

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111 (1991) *The new constellation. The ethical-political horizons of modernity/postmodernity* 205.

112 (1983) *Beyond objectivism and relativism* 194.

113 (1983) *Beyond objectivism and relativism* 194.

114 (1979) *Philosophy and the mirror of nature.*

> typical of religious and metaphysical world views and by a belief in procedural rationality and its ability to give credence to our views in the three areas of objective knowledge, moral-practical insight, and aesthetic judgement. What I am asking myself is this: Is it true that this (or a similar) concept of modernity becomes untenable when you dismiss the claims of a foundationalist theory of knowledge?[115]

Habermas agrees with Rorty[116] and other thinkers that philosophy's roles of "usher" and "judge" are problematic. However, he believes that philosophy should retain its claim to *reason* and play more modest roles of "stand-in (usher)" and "interpreter". He is of the opinion that philosophy can definitely gain from pragmatics and hermeneutics.

> Instead of focusing introspectively on consciousness, these two points look outside at objectifications of action and language. Gone is the fixation on the cognitive function of consciousness. Gone too is the emphasis on the representational function of language and the visual metaphor of the "mirror of nature". What takes their place is the notion of justified belief spanning the whole spectrum of what can be said ... rather than just the contents of fact-stating discourse.[117]

According to Habermas, this does not mean that any claim to *rationality* must be rejected. For him, beliefs can be judged as valid only when they are based on agreement that is reached by argumentation. The "reconstructive sciences" explain the assumed universality of rational experience, judgement, action and linguistic communication by looking at the "intuitive knowledge" of competent subjects. To understand the "life world" requires a cultural tradition that covers the whole spectrum. Philosophers could, by taking on the role of interpreters on behalf of the life world, "refurbish its link with the totality". To be able to do that philosophers should also take

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115 Habermas (1993) *Moral consciousness and communicative action* 3-4.

116 See generally (1979) *Philosophy and the mirror of nature*.

117 Habermas (1993) *Moral consciousness and communicative action* 10.

on the role of "guardians of rationality"[118].

Habermas[119] explains his "proceduralist view" of democracy and deliberative politics with reference to the problems he has with both the liberal and republican views. According to the liberal view, (following Locke), the function of politics is to protect the individual against intrusion from other individuals and the state. Habermas describes the liberal function of politics as "bundling together and pushing private interests against a government apparatus specializing in the administrative employment of political power for collective goals".[120] In the republican view, politics has more than a mere "mediating function". It is "the reflective form of substantial ethical life". The liberal view emphasises a citizen's negative rights against the state and other citizens. These rights include the citizen's protection from interventions. Habermas argues that political rights have the same structure and meaning as these negative rights, with the effect that they give citizens the opportunity to assert their (private) rights by, for example, taking part in elections. Political rights in the liberal view does not extend beyond elections whereby parliamentary bodies and government are formed. In the liberal view, these bodies represent "the political".

In the republican view, citizens are not determined by their negative (private) rights. Political rights in this view are positive rights that guarantee the possibility of political participation. The function of the state in the republican view is not only to protect equal private rights but to guarantee "an inclusive opinion- and will-formation in which free and equal citizens reach an understanding on which goals and norms lie in the equal interest of all".[121] These opposing views of citizenship, and the republican reaction against the classical concept of the legal person indicate a controversy about law itself.

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118 Habermas (1993) *Moral consciousness and communicative action* 20.

119 "Three normative models of democracy" (1994) 1 *Constellations* 1-10.

120 "Three normative models of democracy" (1994) 1 *Constellations* 1.

121 "Three normative models of democracy" (1994) 1 *Constellations* 2.

> While in the liberal view the point of a legal order is to make it possible to determine in each case which individuals are entitled to which rights, in the republican view these "subjective" rights own their existence to an "objective" legal order that both enables and guarantees the integrity of an autonomous life in common based on mutual respect.[122]

Habermas shows that the disagreement about the concept of citizenship and about the law expresses a deeper disagreement about the "nature of the political process". In the liberal view, the political process takes on the metaphor of the market. The processes of "will- and opinion-formation" in the public sphere is nothing but various groups competing for power. In the republican view, these processes are aimed at public communication oriented to mutual understanding.

The republican view is closer to the "original" meaning of democracy because it makes provision for the "communicative conditions" necessary for political opinion- and will-formation. The liberal model of market competition focuses on a choice of optimal strategies and preference, with the result that "politics loses all reference to the normative core of a public use of reason".[123] Habermas is critical of the "communitarian" reading that contemporary republicans give to public communication and the move towards "an ethical constriction of political discourse". Politics may not be reduced to ethics. He places his view of procedural politics in contrast to both the liberal and republican view.

> [D]iscourse-theoretic interpretation insists on the fact that democratic will-formation does not draw its legitimating force from a previous convergence of settled ethical convictions, but from both the communicative presuppositions that allow the better arguments to come into play in various forms of deliberation, and from the procedures that secure fair bargaining processes. Discourse theory

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122 "Three normative models of democracy" (1994) 1 *Constellations* 2-3.

123 "Three normative models of democracy" (1994) 1 *Constellations* 3.

breaks with a purely ethical conception of civic autonomy.[124]

Habermas makes a distinction between questions of "ethics" and questions of "justice". For him, questions of justice are not dependent on a specific community and an adherence to one conception of the "good life". In contemporary plural societies political interests and values will be in conflict and need to be balanced. In his view, this balancing cannot be done through ethical discourses. The balancing and bargaining between competing norms and interests rely on a regulation of fair terms that must be agreed upon beforehand.

> [O]ne can understand the complex validity claim of legal norms as the claim, on the one hand, to compromise competing interests in a manner compatible with the common good and, on the other hand, to bring universalistic principles of justice into the horizon of the specific form of life of a particular community.[125]

Discourse theory takes elements from both the liberal and republican views and integrates them in "an ideal procedure for deliberation and decision-making".[126] The proceduralist view accommodates both universalist human rights and the concrete ethical experience of a specific community in the rules of discourse and forms of argumentation. "[T]he normative content [of the discourse] arises from the very structure of communicative actions".[127]

Benhabib[128] views Habermas' proceduralist theory as a better model of public space

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124 "Three normative models of democracy" (1994) 1 *Constellations* 4.

125 "Three normative models of democracy" (1994) 1 *Constellations* 5.

126 "Three normative models of democracy" (1994) 1 *Constellations* 6. See also Habermas "Human rights and popular sovereignty: The liberal and republican versions" (1994) 7 *Ratio Juris* 1-13; Benhabib "Deliberative rationality and models of democratic legitimacy" (1994) 1 *Constellations* 26-52.

127 "Three normative models of democracy" (1994)1 *Constellations* 6.

128 (1992) *Situating the self* 105.

than the liberal one, but criticises his rigid distinctions between "justice" and the "good life", "needs" and "interests", "values" and "norms". She argues that public space in this model is viewed as the creation of procedures whereby all affected by general social norms and by collective political decisions can have a say in their formulation, stipulation and adoption. Although Habermas also believes that legitimation in a democratic society can only result from a public dialogue, he does not subscribe to the liberal "constraint of neutrality". Public dialogue is judged according to the criteria represented by the idea of practical discourse.[129] Benhabib[130] describes it as follows:

> The public sphere comes into existence whenever and wherever all affected by general social and political norms of action engage in a practical discourse, evaluating their validity. In fact there may be as many publics as there are controversial general debates about the validity of norms. Democratization in contemporary societies can be viewed as the increase and growth of autonomous public spheres among participants.

According to her, the model of a plurality of public spaces can overcome the dichotomy of majoritarian politics versus constitutional guarantees because of its proceduralist nature. Habermas' discourse model of legitimacy and discursive view of public space present normative dialogue as "a conversation of justification taking place under the constraints of the ideal speech situation". The normative constraints of the "ideal speech situation" or of practical discourses that Habermas relies on are the conditions of "universal moral respect" and "egalitarian reciprocity". Benhabib believes that these conditions can overcome the dilemmas of simple majoritarian political outcomes. Most discourse theorists struggle with the problem of how to uphold "unconstrained dialogue" without having majoritarian decision procedures destroy civil liberties and rights. Benhabib argues that the normative constraints of discourses must be formulated as "constraints whose fairness and appropriateness can themselves become topics of

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129 Habermas "How is legitimacy possible on the basis of legality" and "On the idea of the rule of law" in (1988) *The Tanner lectures on human values VIII* 219-249; 249-279.

130 (1992) *Situating the self* 105.

debate".[131]

The discourse theory of legitimacy and public space can transcend the traditional opposition of majoritarian politics versus liberal guarantees of basic rights and liberties to the extent that the normative conditions of discourses are, like basic rights and liberties, rules of the game. These rules of the game can be contested within the game but only insofar as one first accepts to abide by them and play the game at all. Benhabib[132] argues that this formulation corresponds more to the reality of democratic and public speech in democracies than the liberal model of constitutional conventions.

> In democratic politics nothing is really off the agenda of public debate, but there are fundamental rules of discourse which are both constitutive and regulatory in such a manner that, although what they mean for democratic give and take is itself always contested, the rules themselves cannot be suspended or abrogated by simple majoritarian procedures.[133]

Habermas, in his "reconstructive" project, strongly relies on *rationality* in order to set up a procedural model of politics (or a theory of discourse ethics or communicative action). He integrates aspects of the liberal and the republican views of politics into his own view. Although he is critical of the liberal tendency of instrumentalism, he subscribes to some modern assumptions of universalism. He believes that republican theory is in a better position to "preserve" democracy but criticises its reliance on "ethics". His proceduralist theory integrates universal assumptions with community-specific experience. Habermas rejects foundational claims and all "grand narratives", but nevertheless affirms the claim to dialogical reason. He argues that Continental philosophy tends to "dramatise" the dangers of instrumental and objective reason.[134] His

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131 (1992) *Situating the self* 106; Benhabib "Deliberative rationality and models of democratic legitimacy" (1994) 1 *Constellations* 26-52.

132 (1992) *Situating the self* 107.

133 Benhabib (1992) *Situating the self* 107.

134 Habermas (1993) *Moral consciousness and communicative action* 13.

position on modernism and postmodernism is similar to his procedural theory, which is situated in between liberalism and republicanism. This tendency to situate oneself between various strands of thinking stands in the Hegelian tradition of dialectic thought.[135]

There is something attractive to me in Habermas's view because he takes normative issues seriously. He stands critical towards the liberal model of politics and the formalist approach to law. He strongly believes in the possibility of rational procedure to address normative issues in a post-traditional society.

But, Habermas's comfort with rational procedures makes me uncomfortable. Although I appreciate his rejection of instrumental politics and his attention to normative questions, his answers come too easily for me. It might be said that the aim of "reconstructive" thought is to do exactly that (reconstruct) and that it cannot afford to undermine its own project. In other words, if rationality is the basis of Habermas's theory, he cannot afford to question it. If this theory could be more aware of "the tragic" and the "impossible" and of the paradox of possibility within impossibility, it could have a greater effect on South African political life. The term "reconstruction" is very popular in this country and one must concede that a great part of this reconstruction will be dependent on the possibility and availability of "rational" procedures. But reconstruction should also encompass the reality of destruction, failure, malcommunication and irrationality. The possibility of rephrasing this reconstructive project in a paradox should be considered - that *irrationality* can be seen as a condition for (a revised concept of) *rationality*; *destruction* a condition for *reconstruction* and *malcommunication* a condition for *communication*.

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[135] The Hegelian tradition is associated with "dialectical" thought. In dialectical thought all problems are explained in terms of a thesis, anti-thesis, synthesis. See Benhabib (1986) *Critique, norm and utopia*.

Habermas and gender

I have already mentioned that a significant part of any reconstruction and transformation of public space will have to address the past and present exclusion of women. Any theory on public space will have to be accountable to gender perspectives. I already mentioned my uneasiness with Habermas' theory. To add to this uneasiness I do not think that his discourse ethics or theory of communicative action take the concrete circumstances of women and the reality of difference into account seriously. Below I shall discuss the gender perspectives of Seyla Benhabib and Nancy Fraser on Habermas' theory.

Rethinking the private/public dichotomy

Benhabib[136] notes that the distinction between the public and the private has for many years been a central point in feminist theory. The argument goes that this distinction has confined women to the private sphere and kept them out of the public. The activities of the private sphere, like housework, reproduction and nurturing, have been considered matters of the "good life". These activities have been accepted as "natural" and "immutable" aspects of human relations and as such remained "pre-reflexive" and "inaccessible" to discourse analysis. A great part of the "women's struggle" was focused on making these private issues public.

Benhabib[137] points to at least three sides of privacy or the "private" in modern political thought. First, the private has been understood as the sphere of moral and religious conscience. The effect of this was that moral matters were relegated to the private sphere and were considered inappropriate for discussion in the public sphere.

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136 (1992) *Situating the self* 108.

137 (1992) *Situating the self* 108.

Individuals should make their own choices about right and wrong in the private sphere. Secondly, economic freedoms were established as privacy rights. Privacy in this context means non-interference by the state in the economical relations and non-intervention in the free market of labour-power. The third meaning of privacy relates to the "intimate sphere", the domain of the household, the daily needs of life, of sexuality and reproduction. Modern enlightenment and liberation took place in the public sphere only, and questions of justice were accordingly restricted to the public sphere. This liberation was indeed a male liberation and had little or no effect on the females who were relegated to the "intimate sphere."

> As male bourgeois citizen was battling for his rights to autonomy in the religious and economic spheres against the absolutist state, his relations in the household were defined by non-consensual, non-egalitarian assumptions. Questions of justice were from the beginning restricted to the "public sphere" whereas the private sphere was considered outside the realm of justice.[138]

Of course, during the past few decades this image has changed considerably. Women entered the public sphere, gained the right to vote, and entered the labour market. However, Benhabib[139] argues that contemporary moral and political theory continues to neglect the transformations that took place in the private sphere. She identifies two consequences of the practice of conflating religious and economic freedoms with the freedom of intimacy, and addressing them as matters of "privacy" or as "private questions" of the "good life": The one is that contemporary normative moral and political theory, including Habermas's discourse ethics, ignores the issue of "difference". The other is that power relations in the intimate sphere are treated as though they do not exist. Women's work in the private sphere has never been economically valued, with the result that the rules governing the sexual division of labour in the family have been placed beyond the scope of justice.

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138 Benhabib (1992) *Situating the self* 109.

139 (1992) *Situating the self* 109.

Women must make that which were considered "private issues" "public" by bringing them into public discourse. The line between the public and the private and, accordingly, between issues of justice and matters of the good life must be renegotiated.

Benhabib concedes that any theory of the public and the public sphere presupposes a distinction between the public and the private. The traditional way of separating the private from the public sphere has accepted and legitimised the suppression of women and denied difference. Benhabib criticises Habermas in this regard for his rigid boundaries between matters of "justice" and matters of the "good life", between "public interests" versus "private needs", and between "privately held values" and "publicly shared norms". She argues that discourses should be "radically open" and participants should be able to bring any matter under critical scrutiny and questioning, so that we cannot predefine the nature of the issues discussed as being "public" ones of "justice" or "private" ones of "the good life".

> Distinctions such as between justice and the good life, norms, values, interests and needs are "subsequent" and not prior to the process of discursive will formation. As long as these distinctions are renegotiated, reinterpreted and rearticulated as a result of a radically open and procedurally fair discourse, they can be drawn in any number of ways.[140]

Benhabib[141] predicts that Habermas, as well as the liberal thinker, might argue that this position could lead to the "corrosion of the rights of privacy" and the "total intrusion of the state into the domain of the individual". She argues that the "discourse model" can accommodate challenges to the public/private distinction because it is based on a strong assumption of individual autonomy and consent. The renegotiation of the private/public dichotomy should not be done in a way that can be harmful to the basic concept of autonomy. Benhabib believes that the premises of discourse ethics allow us

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140 Benhabib (1992) *Situating the self* 110.

141 (1992) *Situating the self* 11-112.

to question the traditionalist understandings of the public/private dichotomy while simultaneously prohibiting the redrawing of the dichotomy in ways which may harm the autonomy of individuals involved.

Benhabib[142] argues that Habermas' model of the public sphere could be complemented by a critical feminist theory of the public sphere. She suggests a "feminisation of practical discourse by challenging unexamined dualisms between justice and the good life, norms and values, interests and needs from the standpoint of their gender context and subtext".[143]

A critical reflection on critical theory

Nancy Fraser[144] approaches Habermas's model of communicative theory from Karl Marx's definition of "critical theory" as "the self-clarification of the struggles and wishes of the age". She admires the "straightforward political character" of the definition. In her view, a critical social theory should look at the aims and the activities of those oppositional social movements with which it has a "partisan though not uncritical identification". As an example, Fraser mentions the struggles against the subordination of women, which figured among the most significant of this age and which deserve to be addressed by critical social theory. She examines Habermas's theory in the light of this approach and asks, in respect of gender, what is critical and what is not in Habermas's social theory. She poses the following questions:

> [I]n what proportions and in what respect does Habermas's critical theory clarify and/or mystify the bases of male dominance and female

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142 (1992) *Situating the self* 112.

143 (1992) *Situating the self* 113.

144 "What's critical about critical theory" in Benhabib & Cornell (1987) *Feminism as Critique* 31-56.

> subordination in modern societies? In what proportions and in what respects does it challenge and/or replicate prevalent ideological rationalizations of such dominance and subordination? To what extent does it or can it be made to serve the self-clarification of the struggles and wishes of the contemporary women's movement?[145]

Fraser argues that because Habermas says virtually nothing in *The Theory of Communicative Action*[146] on gender, the work must be read from the standpoint of "an absence". She reconstructs his work in order to see how he would have looked at matters of feminist concern had he addressed them.

Fraser[147] looks at Habermas's account of the relations between the public and private spheres of life in classical capitalist societies and tries to reconstruct the unthematised gender context. She agrees with Benhabib that Habermas's model has some genuine critical potential but argues that the unthematised gender context should be reconstructed to realise this potential to the fullest. Fraser[148] submits that the private-sphere relations between economy and family as mediated by the roles of worker and consumer are underlaid by gendered roles. In male-dominated, classical capitalist societies, the role of the worker is a masculine role that is also connected to the role as breadwinner. The struggle for a family wage, when viewed in this light, was

> [A] struggle for a wage conceived not as a payment to a genderless individual for the use of labour power, but rather as a payment to a man for the support of his economically dependant wife and children. A conception which legitimized the practice of paying women less for equal

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145 Fraser "What's critical about critical theory" in Benhabib & Cornell (1987) *Feminism as critique* 32.

146 Habermas (1984) *The theory of communicative action*.

147 "What's critical about critical theory" in Benhabib & Cornell (1987) *Feminism as critique* 40.

148 "What's critical about critical theory" in Benhabib & Cornell (1987) *Feminism as critique* 42.

or comparable work.[149]

In Fraser's view, the masculine subtext of the role of the worker must be held responsible for the ill-treatment of women in the workplace and the work done by women. The other role, linking economy and the family, that is, the role of the consumer, has a feminine subtext. The consumer as the worker's companion is feminine. The sexual division of domestic labour assigns to women the (unpaid and usually unrecognised) work of purchasing and preparing goods and services for domestic consumption. In the same way the role of the citizen which connects the state with the public life-world of political opinion and will-formation, is also a gendered role, the one of the male. For Fraser,[150] the reason for women's exclusion from the public sphere is not only the fact that they did not receive the right the vote until the twentieth century. The exclusion of women from the public sphere has much deeper strains. She notes Habermas's argument that the citizen is centrally part of the political debate and public will-formation. Citizenship in Habermas' view depends on the participation and opinion- and will-formation of citizens in the public sphere. Fraser argues that this participation and opinion- and will-formation are exclusive to men and that women and femininity are excluded. She explains the point with reference to marital rape. The fact that marital rape is still not accepted as a crime in many societies, with the result that a wife is legally subject to her husband, means that she is not accepted as an individual who can give consent, form her own opinion and so on. Fraser quotes Pateman, saying that

> [W]omen find their speech ... persistently and systematically invalidated in the crucial matter of consent, a matter that is fundamental to democracy. [But] if women's words about consent are consistently

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149 Fraser "What's critical about critical theory" in Benhabib & Cornell (1987) *Feminism as critique* 42.

150 "What's critical about critical theory" in Benhabib & Cornell (1987) *Feminism as critique* 44.

reinterpreted how can they participate in the debate among citizens?[151]

Fraser[152] argues that the gender blindness of Habermas's model prevents him from understanding important features of the public/private dichotomy, of economy, family, citizenship etc. She argues that once the gender-blindness of Habermas's model is overcome, it is clear that feminine and masculine gender identity run like "pink and blue threads" through the public sphere of paid work, state administration and citizenship, as well as through the private sphere of family and sexual relations. A gender-sensitive reading of these connections has important theoretical and conceptual implications. It shows that male dominance is "intrinsic" rather than "incidental" to capitalism and to modernism. She argues that it is not correct to understand male dominance as "lingering forms of premodern status inequality". She views male dominance as "intrinsically modern" because many aspects are based on the distinction between public and private, and the separation of "waged labour" and female child-rearing and the household.

Fraser argues that a critical social theory of capitalist societies needs gender-sensitive categories. Concepts such as worker, consumer, and citizenship must be understood not as mere economic and political (scientific, rational and logical) concepts but as "gender-economic" and "gender-political" concepts. Fraser argues that the reconstruction of Habermas's model has normative implications because it would lead to the transformation of "male-dominated capitalist societies" and gender.

> As long as the worker and the child rearer roles are such as to be fundamentally incompatible with another, it will not be possible to

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151 Fraser "What's critical about critical theory" in Benhabib & Cornell (1987) *Feminism as critique* 44. Fraser refers to an unpublished typescript of Pateman "The personal and the political: Can citizenship be democratic?" Lecture III of her "Women and democratic citizenship" The Jefferson Memorial Lectures, delivered at the University of California, Berkeley, February 1985. See generally Pateman (1989) *The disorder of women: Democracy, feminism and political theory* and (1991) *Feminist interpretations of political theory.*

152 (1987) "What's critical about critical theory" in Benhabib & Cornell *Feminism as critique* 45.

> universalize either of them to include both genders. ... Thus, changes in the very concepts of citizenship, child rearing and unpaid work are necessary, as are changes in the relationships among the domestic, official-economic, state and political-public spheres.[153]

These perspectives do not reject Habermas's theory totally but show how it can be broadened by a gender perspective. Although I agree that aspects of his theory are very powerful and can not be merely rejected, I shall continue the search for inspirational visions of public space.

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153 "What's critical about critical theory" in Benhabib & Cornell (1987) *Feminism as critique* 46.

A "radical democratic" vision

Having discussed two modern approaches to public space (the liberal visions and Habermas) I now turn to another approach, namely Chantal Mouffe's[154] "radical democratic" vision. Mouffe approaches the concepts of radical democracy, liberalism, citizenship, pluralism, liberal democracy and communitarianism from an "*anti-essentialist*" perspective, in other words she seeks to displace static approaches and understandings and to open these concepts to multiple interpretations and meanings. She describes her own position as beyond modernism and postmodernism. In her view, current liberal discourse that is based on individualist and rationalist thinking negates "*the political*" and is inadequate to address democracy in contemporary society. Two arguments central to her vision of "radical democracy" are the significance of "*the political*" and the "reality *of antagonism*".

Mouffe notes that the collapse of Communism has brought about many particularisms and new antagonisms that challenge Western universalism. She describes the current conception of contemporary politics as "rationalist, universalist and individualist"[155] and advances two reasons why the current conceptions of democracy are inadequate to address the challenge of particularisms to universalism: They do not recognise the specificity of the political and they do not realise the important role of antagonism. Mouffe relies on Carl Schmitt's[156] critique of liberal democracy for her own vision of "radical democracy". She argues that by placing emphasis on the friend/enemy relationship in politics, Schmitt brings to light the link between the political and an element of hostility among human beings. Mouffe reformulates the friend/enemy relation

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154 (1993) *The return of the political.* See also McLaren (1997) *Revolutionary multiculturalism: Pedagogies of dissent for the new millennium* and Giroux (1993) *Living dangerously: Multiculturalism and the politics of difference.*

155 (1993) *The return of the political* 2.

156 (1976) *The concept of the political.*

in her anti-essentialist critique.

> When we accept that every identity is relational and that the condition of existence of every identity is the affirmation of a difference, the determination of an "other" that is going to play the role of a "constitutive outside", it is possible to understand how antagonisms arise. In the domain of collective identifications, where what is in question is the creation of a "we" by the delimitation of a "them", the possibility always exists that this we/them relation will turn into a relation of the friend/enemy type; in other words it can always become political in Schmitt's understanding of the term.[157]

Mouffe rejects the "instrumental" approach to politics. For her the political cannot be limited to a certain institution or sphere but must be understood as "inherent to every human society"[158]. Her main focus is on creating (and maintaining) a pluralistic democracy under the reality of antagonism. She distinguishes between "enemy" and "adversary".

> It requires that, within the context of the political community, the opponent should be considered not as an enemy to be destroyed, but as an adversary whose existence is legitimate and must be tolerated. We will fight against his ideas but we will not question his right to defend them. The category of the "enemy" does not disappear but is displaced.[159]

Her vision of "radical democracy" relies on the notion of a "radical democratic citizenship" that can provide an identification with "a common political identity among

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157 (1993) *The return of the political* 2-3. See also 117-134.

158 (1993) *The return of the political* 3.

159 (1993) *The return of the political* 4.

diverse democratic struggles".[160] Although she is critical of the liberal individualist conception, she is also wary of communitarianism because of its rejection of pluralism and its reliance on one substantive conception of the "common good".

Mouffe argues that the idea of "pluralism" must be "radicalised". For this radical pluralism, the ideas of "rational", "individual" and "universal" need to be reconceptualised. They need not be rejected but their plurality, "discursively constructed" nature and inherent power must be realised. She distinguishes the vision of "radical pluralism" from the postmodern conception of the "fragmentation of the social, which refuses to grant the fragments any kind of relational identity".[161] She also reacts against Habermas's model of communicative theory. She believes that his reliance on a "regulative ideal" of "free and unconstrained communication" puts the democratic projects at risk. For her "radical democracy" or "radical plurality" contains a paradox.

> [S]ince the very moment of its realization would see its disintegration. It should be conceived as a good that only exists as good as long as it cannot be reached. Such a democracy will therefore always be a democracy "to come", as conflict and antagonism are at the same time its condition of possibility and the condition of impossibility of its full realization.[162]

Mouffe stands critical towards contemporary liberal thought and finds it inadequate to address democracy in current societies because of its negation of "the political" and antagonism. She is against the instrumental-political vision of liberal thought and the insistence on neutrality. She is also critical towards the communitarian belief in one substantive meaning of the "common good". Although she reacts against certain aspects of modernity (liberal thought), she also has difficulties with postmodernity. She

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160 (1993) *The return of the political* 6. See also 60-73, 74-89.

161 (1993) *The return of the political* 7.

162 (1993) *The return of the political* 8.

situates her vision of "radical democracy" beyond the approaches of liberalism, communitarianism, Habermas as well as postmodernity. She describes her vision of "radical democracy" as a "democracy to come". She rejects neither modernity nor postmodernity but accepts the double-bind in her vision. In other words, "radical democracy" is both modern and postmodern. Her emphasis on anti-essentialism distinguishes her from other visions that tend to capture "truth".

According to Mouffe, "radical democracy" pursues Habermas' "unfulfilled project of modernity" without being essentialist. In order to understand her vision of "radical democracy" as both modern and postmodern, her understanding of modernity and postmodernity should be highlighted. She defines modernity "at the political level" and argues that the "fundamental character of modernity" is the "advent of the democratic revolution".[163] Postmodernism is for her "a recognition of the impossibility of any ultimate foundation or final legitimation that is constitutive of the very advent of the democratic form of society and thus of modernity itself."[164] To her, the questioning of rationalism and humanism does not mean a total rejection of modernity. What must be rejected is the Enlightenment project of self-foundation. The matter must be conceived in a different way.

> To be capable of thinking politics today, and understanding the nature of these new struggles and the diversity of social relations that the democratic revolution has yet to encompass, it is indispensable to develop a theory of the subject as a decentred, detotalized agent, a subject constructed at the point of intersection of a multiplicity of subject positions between which there exists no a priori or necessary relation and whose articulation is the result of hegemonic practices. Consequently, no identity is ever definitely established, there always being a certain degree of openness and ambiguity in the way the different subject positions are

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163 (1993) *The return of the political* 11. Mouffe strongly relies on Claude Lefort's description of modernity. See Lefort (1986) *The political forms of modern society* and (1988) *Democracy and political theory*.

164 (1993) *The return of the political* 11-12.

> articulated. What emerges are entirely new perspectives for political action which neither liberalism, with its idea of the individual who only pursues his or her own interest, nor Marxism, with its reduction of all subject positions to that of class, can sanction, let alone imagine.[165]

This vision has the effect that universalism is not rejected, but particularised. The debate amongst feminists in regard to whether feminism should totally embrace postmodern theory and reject modern theory is relevant to this point. Benhabib, in reaction to the three characteristics of postmodernism, the death of the subject, the death of history and the death of metaphysics,[166] has argued that feminism as a political theory still needs a concept of the subject, and of history and of metaphysics.[167] She is in favour of an interactive universalism that should supplement the present substitutionalist universalism.[168] An interactive universalism acknowledges every person as a concrete person with particular needs.

It is such a particularised universalism that might contribute to the reconstruction and transformation of South African public space. The notion of an interactive and particularised universalism is true to my vision of an "in between" public space, it does not fully embrace modernism or postmodernism. This means that we need not totally reject modernist concepts like democracy, equality and justice. We must, however, reinterpret them by following such a particularised approach. An ethical interpretation of equality insists on adhering to concrete contexts and specific circumstances when addressing issues of equality and difference.

Mouffe explains that the revival of the Aristotelian concept of practical reason (phronesis) can be understood in light of the challenges to universalism. She argues

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165 (1993) *The return of the political* 12-13.

166 See Flax (1990) *Thinking fragments: psychoanalysis, feminism and postmodernism in the contemporary west.*

167 Benhabib (1995) *Feminist contentions: A philosophical exchange.*

168 Benhabib (1992) *Situating the self* and Benhabib & Cornell (1987) *Feminism as critique.*

that Kant's philosophy gave rise to a scientific, universal kind of practical reason that opened the way for positivism.[169] She refers to Gadamer's[170] view that the Aristotelian vision of practical reason is better for judgement as well as for the comprehension of the relationship between the universal and the particular. Mouffe argues that the "false" choice between "universal-criterion" and the "rule of arbitrariness" must be avoided. The choice between universalism and relativism is false because the absence of a scientifically correct answer does not mean that it is impossible to form a reasonable opinion. Mouffe agrees with Hannah Arendt, who identified the political sphere as the realm of opinion and not as that of truth.[171]

> To assert that one cannot provide an ultimate rational foundation for any given system of values does not imply that one considers all views to be equal. ... It is always possible to distinguish between the just and the unjust, the legitimate and the illegitimate, but this can only be done from within a given tradition, with the help of standards that this tradition provides, in fact, there is no point of view external to all tradition from which one can offer a universal judgement.[172]

Mouffe concedes that the emphasis "radical democracy" places on the particular and on tradition in some way intersects with conservative thinking. (She explains that this is why Habermas insists that postmodern thought is conservative.) She argues, however, that tradition must be distinguished from traditionalism. Tradition can be important for "radical democracy" if the inherent open and indeterminate character of the democratic tradition is emphasised.

For Mouffe "radical democracy" is beyond liberalism as well as communitarianism or

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169 (1993) *The return of the political* 14.

170 (1993) *The return of the political* 14. See also Gadamer (1984) *Truth and method.*

171 (1993) *The return of the political* 14. See also Arendt (1968) *Between past and future.*

172 (1993) *The return of the political* 15.

civic republicanism. Although she wants to retain aspects of the civic republican tradition, she distinguishes between the various strands. Mouffe criticises Sandel[173] (and Alasdair MacIntyre)[174] for defending premodern conceptions of politics without distinguishing between "the ethical" and "the political". Radical democracy in Mouffe's view can provide us with a better conception of politics than either liberalism or civic republicanism.

> Our societies are confronted with the proliferation of political spaces which are radically new and different and which demand that we abandon the idea of a unique constitutive space of the constitution of the political, which is particular to both liberalism and civic republicanism.[175]

She argues that we need to create new "subject positions" because both the liberal conception of the "unencumbered self" and the communitarian/civic republican conception of the "unitary situated self" are deficient. For her, the problem lies in the conception of the "unitary subject". She criticises communitarianism and civic republicanism for assuming only one community with one conception of the "common good".

> But we are in fact always multiple and contradictory subjects, inhabitants of a diversity of communities (as many, really, as the social relations in which we participate and the subject positions they define), constructed by a variety of discourses, and precariously and temporarily sutured at the intersection of those subject positions.[176]

At some points, I find Mouffe's criticism and interpretation of the communitarian/civic

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173 (1982) *Liberalism and the limits of justice.*

174 See generally MacIntyre (1984) *After virtue.*

175 (1993) *The return of the political* 20.

176 (1993) *The return of the political* 20.

republican vision too harsh. Even though she distinguishes between the lines of thinking, and associates herself more with some of their authors than with others, all these theories remain open to interpretation. I believe that some of the authors she interprets as naively subscribing to one community and one substantive "common good", can be read and interpreted as more open to heterogeneity than she may concede.

Mouffe refers to Sandel's critique of Rawls's prioritisation of "the right" over "the good". She agrees with Sandel that Rawls gives an inadequate explanation, but disagrees with Sandel's conclusion that Rawls's deficiency is proof of the superiority of a politics of the "good" over a politics of defending rights. Kantian liberals believe, first, that individual rights are more important than the "common good", and further that the principles of justice can be totally separated from a particular conception of the "good life". Communitarians believe that it is impossible to prioritise the "right" over the "good" because it is only through participation in the community that the "good" is defined and we can have a sense of right and an understanding of justice.[177] Mouffe rejects Sandel's conclusion that we should reject the priority of justice and return to a politics based on moral order. For her, what really is at stake, is the consideration of contemporary politics in a non-instrumental manner.

Mouffe's double-handed approach is reflected in her view of morality and politics: To account for politics in a non-instrumental manner entails assuming everything involved under the notion of a "political good", while respecting the separation between morality and politics. Mouffe argues that neither Sandel nor Rawls makes this distinction adequately. Sandel fails because he works from an Aristotelian framework that does not separate politics from morality. Rawls reduces politics to an instrumental activity. The positivist distinction between fact and value had the effect that many questions of a political nature, such as that of justice, were regarded as moral questions and have accordingly been relegated to the moral domain. Mouffe[178] argues that liberalism has

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177 (1993) *The return of the political* 31.

178 (1993) *The return of the political* 33.

an inability to think of the political. It is important to re-ask the question of the common good and of civic virtue, but in a modern way.

In discussing Waltzer's communitarianism, Mouffe follows her double-handed approach of criticising individualist liberalism without abandoning the positive aspect of rights and pluralism. She see in Waltzer's communitarianism an approach that manages to criticise liberalism without rejecting its positive aspects. Waltzer relies on a "complex equality" that recognises difference:

> [Complex equality] requires that different social goods be distributed, not in a uniform manner but in terms of a diversity of criteria which reflect the diversity of those social goods and meanings attached to them.[179]

Mouffe discusses the civic republican ideal in America that strives to correct the inadequacy of liberalism. She distinguishes between the Aristotelian and the Machiavellian civic republican tradition. Mouffe prefers the Machiavellian tradition because it distinguishes between politics and morality and because it recognises the central role of conflict in the preservation of liberty. She favours a civic republican approach that does not negate the individual in favour of the citizen. In this regard, she refers to Skinner's re-evaluation of the republican conception of citizenship and of liberty. Skinner[180] rejects Berlin's[181] assertion that the positive concept of freedom is anti-modern and finds in the republican tradition a negative concept of liberty that does not negate political participation and civic virtue.

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179 (1993) *The return of the political* 34.

180 Mouffe (1993) *The return of the political* 37-38. See also Skinner (1978) *The foundations of modern political thought* and Skinner (1984) "The idea of negative liberty: Philosophical and historical perspectives" in Rorty, Schneewind & Skinner (eds) *Philosophy in history.*

181 Berlin (1969) "Two concepts of liberty" in *Four essays on liberty*.

In a recent newspaper article,[182] Xolela Mangcu argued that Berlin's distinction between positive and negative freedom has practical application in our current South African political context. White people, according to the writer, subscribe to the concept of negative freedom, while black people subscribe to the concept of positive freedom. Mangcu maintains that the ANC came to power on the promise of positive freedom for black South Africans, while the constitution also provides for all the classic liberal rights (negative freedom). The writer predicts a major political realignment, should poor whites together with poor blacks turn to the government for socio-economic help. An increasing number of middle-class blacks might join whites in their claim for liberal protections (negative freedoms). The writer calls for "a new political ethos that transcends the familiar political categories of left and right". It is unnecessary and even destructive to choose between modern opposites like national and local; public and private; liberty and community. Along the same lines as Mouffe, Mangcu proposes that we need both opposites. He quotes the American historian Alan Brinkely's words:

> We need a vigorous government and a healthy market. We need strong national institutions and strong local ones. We need a healthy public world and a healthy private one. Above all, we need both liberty and community, for neither is sustainable without the other.[183]

Mangcu argues for "a new political idiom that would be broader than political differences" and that would "foster identification with a set of national ideals that cut across the fault lines of race, class and ethnicity". I am not sure what to make of this call. If it means a negation of differences (race, class and sexuality), it is a dangerous one that does not adhere to the double-bind of liberty and community. Mangcu concludes by saying that Mbeki's African Renaissance could be such a "unifying philosophy, if democratically and pluralistically articulated". If "democratic" and "pluralistic" here can be interpreted in Mouffe's idiom, the call for an identification with

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182 Mangcu "Freedom's just another word for someone else's space" (1998) *The Sunday Times* August 2.

183 Mangcu "Freedom's just another word for someone else's space" (1998) *The Sunday Times* August 2.

a set of national ideals can reflect her concept of radical democratic citizenship; if not, Mangcu's vision will be flawed because it will amount to an equalising of multiple perspectives, thereby reducing and violating difference.

The reconstruction and transformation of South African public space can benefit from Mouffe's vision of "radical democracy"and "radical particularity". The value of the liberal tradition should be affirmed with the value of the civic republican tradition, while their shortcomings are simultaneously exposed and displaced. It is significant to note that where Habermas situates himself in between the liberal and the republican vision, Mouffe situates herself beyond them. I believe that our reconstructed and transforming visions of public space should also seek a space beyond the liberal and republican visions.

Mouffe[184] strives for a model of politics where, without affirming a single concept of the "common good", one can still talk about a political community. She relies on Oakeshott's distinction between *societas* and *universitas*. Oakeshott argues that these medieval associations can represent alternative versions of the modern state. *Universitas* refers to an association where a common interest is shared. *Societas*, on the other hand, is not an association with a common purpose, but one where there is loyalty. Mouffe argues that Oakeshot's description of *societas* is adequate to describe contemporary political association.

> Indeed it is a mode of association that recognizes the disappearance of a single substantive idea of the common good and makes room for individual liberty. It is a form of association that can be enjoyed among relative strangers belonging to many purposive associations and whose allegiances to specific communities are not seen as conflicting with their membership of the civil association.[185]

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184 (1993) *The return of the political* 66.

185 (1993) *The return of the political* 67.

Mouffe argues that in order to belong to the political community, we need to accept a "specific language of civil intercourse, the *respublica* that creates a common political identity that is not one substantive idea of the common good, but a 'public concern'." The political community that is created is a community "without a definite shape or a definite identity and in continuous re-enactment." In terms of this view, citizenship is a common identity of multiple persons, all engaged in different activities and bound together by their common recognition of a set of ethical-political values. Mouffe explains that since citizenship is a political concept, competing forms of identification will be linked to different interpretations of the *respublica*. She argues for a "common political identity as radical democratic citizens" that implicates a "collective identification with a radical democratic interpretation of the principles of liberty and equality". Many elements of her vision of "radical democracy" become relevant and converge in her concept of "radical democratic citizenship". The latter relies on the rejection of the unitary subject, or in other words, it relies on multiple subject positions that must be conceived in an anti-essentialist manner. The radical conception of citizenship ties in with the current debates about modernity and postmodernity, and the critique of rationalism and universalism. Mouffe's vision of public space is a "radical democratic" vision which leads to a "radical democratic citizenship".

South Africa as a young democracy, where for the first time ever al South Africans can be full citizens, can benefit from such a "common political identification" described by Mouffe. As a heterogeneous society we need to reject a unitary conception of the subject and make space for multiple subject positions. The various stories and different voices that came to the fore in the event of the TRC are great examples of how multiple subject positions can be articulated.

Gender perspectives

Below I shall raise three accounts of feminism. The first account is Mouffe's where she applies her vision of radical democracy to feminist politics. Secondly, I refer to Drucilla Cornell's insistence on the affirmation of the feminine in an anti-essentialist way. Thirdly I repeat Jennifer Nedelsky's view that we need to acknowledge the feminine in our concepts of citizenship.

A new conception of citizenship

Mouffe[186] describes her approach to feminist politics as an "anti-essentialist approach informed by a radical democratic project". She argues that an essentialist approach is inadequate to answer questions concerning democracy, plurality and oppression. For Mouffe the deconstruction of *identities* is a necessary condition for her vision of radical democracy which is committed to liberty and equality.

> It is only when we discard the view of the subject as an agent both rational and transparent to itself, and discard as well the supposed unity and homogeneity of the ensemble of its positions, that we are in a position to theorize the multiplicity of relations of subordination.[187]

She argues that it is impossible to understand the subject only in one homogenous way. The subject must be approached as a plurality, dependent on the various subject positions through which it is constituted. This plurality does not involve the coexistence of a plurality of subject positions but the constant subversion and over-determination

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[186] Mouffe (1993) *The return of the political* 74-89. See also Meintjies (1995) *Gender, citizenship and democracy in post-apartheid South Africa.*

[187] Mouffe (1993) *The return of the political* 77.

of one by the others. To Mouffe[188] such a constant subversion is extremely important for an understanding of feminist and other contemporary struggles.

Mouffe states that the question of what feminist politics should be has to be phrased in completely different terms. Most feminists have been divided by looking either for "specific demands" or for "specific values". Liberal feminists have focused on acquiring rights for women in order to make them equal citizens but *without challenging the dominant liberal model of citizenship and politics*. Other feminists (cultural and relational), who criticised the liberal feminists, argued that the present conception of the political is a male one and that women's interests cannot be accommodated within such a framework.

Mouffe[189] suggests the construction of a "new conception of citizenship". In her conception of citizenship, sexual difference will become irrelevant.

> I want to argue that the limitations of the modern conception of citizenship should be remedied, not by making sexual difference politically relevant to its definition, but by constructing a new conception of citizenship where sexual difference would become effectively irrelevant.[190]

Mouffe emphasises the significance of *rights* for a modern conception of citizenship. The need for political participation and belonging to a political community must not be neglected. She argues for a concept of citizenship that identifies with the political principles of modern pluralist democracy, liberty and equality. In this vision the public/private distinction is not rejected but constructed in a different way. Mouffe explains that if citizenship is identified with the ethical-political principles of modern democracy (liberty and equality) there can be as many forms of citizenship as there are interpretations of those principles. She wants to create a collective political identity for

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188 (1993) *The return of the political* 77.

189 (1993) *The return of the political* 80.

190 (1993) *The return of the political* 82.

the different groups - women, workers, gays, blacks - that are struggling for liberty and equality.

Mouffe argues that the absence of a female essential identity and of a pre-given unity does not preclude the construction of multiple forms of unity and common action. "Partial fixations" can take place and precarious forms of identification can be established around the category "women" that can provide the basis for a feminist identity and a feminist struggle. She argues that feminist politics should not be understood as a separate form of politics designed to pursue the interests of women, but rather as the pursuit of feminist ideals within the wider context of articulation and demands. Feminisms should not pursue a given form of feminist discourse that can "really" capture the "true essence" of womanhood. The aim should rather be to show how feminisms can enhance the possibilities for an understanding of women's multiple forms of subordination.

I believe that Mouffe's vision of "radical democracy" is a positive contribution to our own reconstruction and transformation of public space. I do not subscribe fully to her view of feminist politics. An anti-essentialist approach to feminism and gender does not need to rely on a neutral vision of citizenship. Below I shall discuss Drucilla Cornell's affirmation of the "feminine" and Jennifer Nedelsky's "relational approach to citizenship". Both authors follow an anti-essentialist approach but do not accept Mouffe's reliance on neutrality.

The "doubly-prized world"

Cornell focuses on a central dilemma facing feminism, namely how to affirm the feminine without reverting to stereotypical, essentialist, naturalist images of women. Cornell argues for a "feminine voice" and a "feminine reality" that can be identified and linked to the lives of "actual" women. The problem, however, is that all accounts of the

feminine seem to reset the trap of rigid gender identities, deny the real differences among women, and reflect the history of oppression and discrimination rather than an ideal to which we ought to aspire. She argues that one way to resolve this dilemma might be to return to the "significance" of the feminine. Cornell refers to the words of Emily Brontë: "this world is hopeless without, the world I doubly prize". She suggests that we must give a new twist to Brontë's lines to describe the feminine.

> The world doubly prized is the world stranger than the facts that opens us to the possibility of a new choreography of sexual difference, through an allegorical account of the Feminine as beyond any of our current stereotypes of Woman.[191]

Cornell argues that feminist theory demands the retelling of the myths of the feminine as an "imaginative universal". Her "ethical" approach to feminism implies that "Women" cannot be reduced to a mere descriptive account of the way women are or have been. Although it is important to break the silence that has kept women's stories from being heard, we should also explicitly recognise the "should be" (in other words the ethical dimension) inherent in accounts of the feminine. Cornell suggests "ethical" feminism as an alternative to both "liberal" and "radical" feminism. She argues that ethical feminism explicitly recognises the "should be" in representations of the feminine and rests its claim for intelligibility and coherence of "woman's story" not on what woman "is", but on the remembrance of the "not yet" recollected in both allegory and myth.

Cornell turns to Derrida's[192] philosophy of language (deconstruction) to explain her understanding of the essentialist/anti-essentialist debate.

> Deconstruction undermines the attempt to establish language as a pure

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191 Cornell "The doubly-prized world: myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 645.

192 Cornel refers to Derrida (1982) *Margins of philosophy*. In Part 2 "... perspectives on equality" I shall discuss aspects of deconstruction.

medium that simply accepts sense and brings it to conceptual form.[193]

Deconstruction shows that there is no "essence of woman" that can be abstracted from the linguistic representations of woman. The referent woman is dependent on the systems of representation in which she is given meaning. We cannot separate the "truth" of woman from the "fictions" in which she is represented and in which she portrays herself. These fictions in which we confront her always carry within them the possibility of multiple interpretations. There is no outside referent, such as nature or biology, or a ground of *feminine identity* in which this process of interpretation comes to an end.

Cornell argues that Derrida seeks a "new choreography of sexual difference" but explains that he is wary of any attempt to introduce a "new concept of representation" of woman to replace the ones we now have. Such a new representation would again turn her into an "object of knowledge". Derrida emphasises that there is no ultimate feminine concept of woman that can be identified once and for all. But it is also important to note that Derrida does not proclaim the "truth" of woman as "absence".[194] This in direct contrast to Lacan, who only experiences woman as "absence", as "lack". Cornell explains that Derrida does not rely on any rigid representation of women. However, this does not mean that there are no stabilised gender representations enforced in social conventions. Without such stabilised representations it would be impossible to give a critical account of the treatment of the feminine, and of women, within law. Cornell argues that it would be a mistake to conclude that all interpretations of the feminine are equal. The criteria for judgement are both ethical and political. She explains:

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193 Cornell "The doubly-prized world: myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 652.

194 This can be compared to Lacan's description of woman as "lack". See generally Mitchell and Rose (eds) (1985) *Feminine sexuality: Jacques Lacan and the ecole freudienne*. See Cornell and Thurschwell for a critique on Lacan's description of women as "lack", "Feminism, negativity, intersubjectivity" in Benhabib & Cornell (1987) *Feminism as critique* 143-162.

> Does one interpretation rather than another expand and enhance the Woman as "seen", so as to lift the stereotypes that justify the continuing oppression of women?[195]

Cornell argues that there is an "ethical risk" inherent in a gender-neutral position. Traditionally, ethics has been understood as a universal position that can be reached by all subjects independent of their sex or gender. Derrida argues as follows in this regard:

> One could, I think, demonstrate this: when sexual difference is determined by *opposition* in the dialectical sense ... one appears to set off "the war between the sexes"; but one precipitates the end with victory going to the masculine sex. The determination of sexual difference in opposition is destined, designed in truth, for truth; it is so in order to erase sexual difference. *The dialectical opposition neutralizes* or supersedes ... the difference. However, according to surreptitious operation that must be flushed out, *one insures phallocentric mastery under the cover of neutralization every time*. These are now well known paradoxes.[196]

Cornell argues that the only escape from this paradox is to work against the order of repression within the hierarchy. For this reason, Derrida positions himself through the feminine. To open metaphysical oppositions, one cannot simply deny their existence in already established "neutral" discourse. There must be an intervention into the hierarchical structure of opposition. But this intervention will not simply pass, because the oppositions will continually re-assert themselves. Cornell explains:

> We never just "get over it". We cannot settle down once and for all. In that sense, deconstruction is interminable, there cannot be a clear line

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195 Cornell "The doubly-prized world: myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 682.

196 Cornell "The doubly-prized world: myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 684. See Derrida & MacDonald "Choreographies" (1982) 12 *Diacritics* 76.

between "phase one" and "phase two".[197]

Cornell's ethical feminism criticises "radical feminism", as represented by Catherine MacKinnon.[198] MacKinnon accepts the Lacanian framework that teaches us that the law and the legal system cannot be separated from the "Law of the Father", through which gender identity is established. MacKinnon's position is that we can only achieve legal equality if we challenge the very basis of sexual difference. For her, the feminine self is the one who is objectified. Femininity is a trap in which we willingly fall in our distorted desire to lose and to be objectified.[199] In her words:

> I'm saying femininity as we know it is how we come to want male dominance, which most emphatically is not in our interest.[200]

The man is the one who in MacKinnon's view dominates and objectifies. But why is it the end of the world to be objectified, asks Cornell. Is the problem really objectification or the system of gender representation that defines the masculine and the corresponding self as the one who dominates? To MacKinnon, all heterosexual intercourse is a form of oppression. Cornell, on the other hand, refers us to Bataille's[201] reminder that eroticism demands nothing less than the "risk of self". She argues that MacKinnon does not successfully distinguish the inherent value, ability and risk to the self involved in eroticism from the specific feminine position of being objectified. This

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197 Cornell "The doubly-prized world: myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 684.

198 See generally MacKinnon (1987) *Feminism unmodified: Discourses on life and law*; (1989) *Towards a feminist theory of the state*; "Difference and dominance: On sex discrimination" in Bartlett & Kennedy (eds) *Feminist legal theory* 81-94; "Reflections on sex equality under law" (1991) 100 *Yale Law Journal* 1373-1403.

199 For MacKinnon, the feminine self is the one "who gets fucked". The masculine self is defined as the "one who fucks". In her view the world is divided into two groups; the "fuckors" and the "fuckees". MacKinnon (1987) *Feminism unmodified. Discourses on life and law* 54.

200 Cornell "The doubly-prized world: myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 690; MacKinnon (1987) *Feminism unmodified. Discourses on life and law* 54.

201 George Bataille (1989) *Theory of religion.*

MacKinnon cannot do as long as she re-casts the subject as seeking freedom, not intimacy, in sex. As long as the masculine view of the self as "not objectified" is accepted, women, if they are objectified, cannot be individuals. In terms of this view of the individual or the subject, the body becomes the "barrier" behind which the self hides, and the weapon - the phallus - asserts itself against others. Cornell argues that the feminine self as it is celebrated in myth, "lives" the body differently.

> The body is not an erected barrier, but a position of receptivity. To *be* accessible is to *be open* to the other. To shut oneself off is *loss* of sexual pleasure.[202]

Viewing the body this way, being objectified is not the end of the world. Cornell refers to words in Elizabeth Bishop's poem, "One Art": "It's evident /the art of losing's not too hard to master/ though it may look like ... disaster". She argues that even if one loses the self in some forms of objectification or sex, it is important to remember that there are more important things to do than maintaining the self against others. Empowerment is not and should not be the ultimate goal in all relationships. Cornell argues that the identification of empowerment as the sole political goal of feminism, shows how profoundly we remain under the sway of masculine symbolism.[203] We must seek a new idiom in which we can speak of feminine desire. We should not deny male power, but we must not make the masculine our world by insisting that we are only what men have made us to be. Cornell reminds us of Helene Cixous's words:

> She is a woman, heaven knows,/What is the difference? It isn't only the sex,/ It's the way that love loves, above walls, despite armour, after the end of the world,/ But I don't know how to say it.

Cornell replies: "I don't know how to say it either. But if there is a reason to keep writing,

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202 Cornell "The doubly-prized world: myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 691.

203 Cornell "The doubly-prized world: myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 693.

it is for the sake of trying to say it."[204]

Ethical feminism is a deconstructive approach to the questions of woman, the feminine, socially constructed oppositions, and so on. By recognising the "should be" inherent in accounts of the feminine, and by remembering the "not yet" which is recollected in both allegory and myth, ethical feminism does not again describe woman in a rigid way, but keeps her open to multiple interpretations. Just as the legal system is not a closed system which has its origin in itself or in some other identified institution, patriarchy or the sex-gender system is not a closed system with its origin in, for example, biology or nature. Deconstruction which seeks to disrupt the present or the given without at the same time seeking to replace the "old" with a "new", ensures the possibility of transformation and the possibility of justice.

Our visions of public space need transformation, not evolution. This transformation would entail an understanding of the theory and praxis of notions such as deconstruction, *différance*, and ethical feminism. We should make space for the reconstruction of myth to tell multiple stories of the feminine and of woman. In the words of Cornell:

> Feminism calls us all to wake up and to see "the doubly prized world" which might be ours. The world ... is doubly-prized, not only as a disruptive power of difference, but also as the opening of the space of the feminine so "her story" can be told, in all its suffering and pain, as well as in all its glory".[205]

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[204] Cornell "The doubly-prized world: myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 693.

[205] Cornell "The doubly-prized world: myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 699.

A "relational" approach to citizenship

Jennifer Nedelsky[206] notes that, historically, equality and citizenship have excluded many. She goes on to say that the history of exclusion is not only "historical blind spots", but part of the conceptual framework of citizenship and equal rights. This leads to a certain tension in the struggle for equality and citizenship.

> This built in exclusion has meant that everywhere in the world women struggling for equality face a tension in their strategies: to call upon traditional conceptions of citizenship and equal rights to challenge the existing subordination and exclusion of women is to call upon a tradition deeply implicated in that very exclusion and subordination; but to fail to do so seems to abandon a tool ... that has been used throughout the world in emancipatory struggles.[207]

Nedelsky argues that "the reconception of citizenship must go together with a reconception of rights". For this reconstruction of citizenship (and rights) we need to adopt another conception of *the self*. The conception of the self that underlies the dominant (liberal) conception of citizenship, perceives the self as an "autonomous", "rational" agent which asserts its "self-determination" by choosing its relationships and obligations. Nedelsky explains that this conception of the self gives rise to a set of claims about the rights needed for self-determination and rational agency. She argues that the liberal conception of the self excludes the experience of women and is also "culturally specific". Constructive relationships allow autonomy:

> The self is a fundamentally relational self, which requires constructive

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206 "A relational approach to citizenship" paper delivered at (1997) *Gender and Citizenship Conference* Beirut, Lebanon 19-23 March.

207 "A relational approach to citizenship" paper delivered at (1997) *Gender and Citizenship Conference* Beirut, Lebanon 19-23 March 2.

relationships for any of its potential to be fully realised.[208]

She believes that a relational view of the self can address the exclusionary nature of the conception of citizenship. Any conception of citizenship and of rights must be founded on a vision of the self.

> Some conception of the nature of the human self must ground one's view of the rights to which people are entitled and the ways in which membership in national communities should be structured and conceived.[209]

Nedelsky argues that the concept of the relational self could avoid the exclusion of cultural specificity. It could also incorporate women's experience of "complex interconnectedness" in the concept of citizenship. She emphasises the necessity of investigating the concrete contexts of individuals.

> As soon as we want to know anything at all specific about the actual rights people should enjoy, we need to turn to the concrete particulars of their situation. It is here that the feminist insistence on context and particularity instead of abstract universality is crucial.[210]

Nedelsky argues that the approach followed by theorists like Virginia Held,[211] Sarah Ruddick[212] and Joan Tronto,[213] amongst others, can be fruitful in the reconstruction of

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208 "A relational approach to citizenship" paper delivered at (1997) *Gender and Citizenship Conference* Beirut, Lebanon 19-23 March 9.

209 "A relational approach to citizenship" paper delivered at (1997) *Gender and Citizenship Conference* Beirut, Lebanon 19-23 March 10.

210 "A relational approach to citizenship" paper delivered at (1997) *Gender and Citizenship Conference* Beirut, Lebanon 19-23 March 15.

211 (1993) *Feminist morality*; (1995) *Justice and care. Essential readings in feminist ethics.*

212 (1989) *Maternal thinking.*

213 (1993) *Moral boundaries. A political argument for an ethic of care.*

the traditional conception of citizenship. She does not find them to be essentialist. She believes that the knowledge, experience, insight and emotional connections that women gain from mothering, should not be excluded from the public realm.[214] To make citizenship a reality we should address the particulars of a person's context and situation. Nedelsky says that the particulars of a person's context at present, and for the foreseeable future, will not only differ in respect of class, education and so on, but it will also differ in respect of *sex* and *gender*.

The perspectives of Cornell and Nedelsky are significant for how we conceive of the feminine and of woman in the reconstruction and transformation of public spaces. Although Mouffe's emphasis on an anti-essentialist approach must be remembered, ways of affirming gender (and other) differences must be explored to prevent the recurrence or mere continuance of neutral exclusion. In the next section I shall put forward Hannah Arendt's vision of public space.

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214 See also Nedelsky "Dilemmas of passion, privilege and isolation: Reflections on mothering in a white, middle-class nuclear family" in (1999) Hanigsberg and Ruddick (eds) *Mother troubles: Rethinking contemporary maternal dilemmas.*

Hannah Arendt's vision of public space

> *We can no longer afford to take that which was good in the past and simply call it our heritage, to discard the bad and simply think of it as a dead load which by itself time will bury in oblivion. The subterranean stream of Western history has finally come to the surface and usurped the dignity of our tradition. This is the reality in which we live. And this is why all efforts to escape from the grimness of the present into nostalgia for a still intact past, or into the anticipated oblivion of a better future, are vain.*
> [215]

In this section, the final section on visions of public space, I turn to Hannah Arendt for guidance and inspiration for the reconstruction and transformation of public space. For me, Arendt can not be pinned down to a premodern, modern or postmodern approach. Moments of all three of these approaches can be found in her theory. She is indeed situated in an "in between" position.

To appreciate Hannah Arendt's vision of action and speech in the public realm, we need to understand her views on totalitarianism. In *The origins of totalitarianism*, she adopted a "fragmented" approach to history and to the "event of totalitarianism". In the three sections subtitled "Antisemitism", "Imperialism", and "Totalitarianism", she described the elements of totalitarianism. In the final section she gives her account of totalitarianism which forms an important background to *The human condition,* where she explains her theory of action and her view of public space.

Arendt regards Nazism and Stalinism as essentially similar, both being totalitarian events. To her, Nazism was not a specifically German phenomenon, but one which, in

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[215] Arendt (1951) *The origins of totalitarianism* xxxi.

terms of modern developments could also be linked to Stalinism.[216] Canovan[217] notes that by doing this Arendt was moving in the same direction as other intellectuals who sought to connect Nazism with modernity, thereby deflecting blame from specifically German traditions. For example, according to the Frankfurt School, totalitarianism is the outcome of a "dialectic enlightenment" engendered within the rational, liberal, capital west itself. Although Arendt supported some of the views of the Frankfurt School,[218] she also shared the views of those who put the blame for Nazism on the rejection of enlightenment and democracy and the worship of Romantic nature. She attributed the collapse of humanistic enlightened civilisation to capitalist-imperialistic practices in particular.

This tension in Hannah Arendt's thinking on the nature of Nazism is characteristic of all her writings. In Benhabib's view, Arendt can be seen as both modernist and anti-modernist.[219] Canovan,[220] again, argues that Arendt's concern as a political theorist was to challenge the ways in which "conceptual packages" are put together. She argues that by making distinctions within modernity Arendt drew the battle lines in different places. She placed less emphasis on the influence of ideas, than on totalitarianism as an event.

> What is unprecedented in totalitarianism is not primarily its ideological content but the event of totalitarian domination itself.[221]

To Arendt totalitarianism was not simply a form of tyranny, but something new and unprecedentedly terrible.

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216 (1951) *The origins of totalitarianism.*

217 (1992) *Hannah Arendt. A reinterpretation of her political thought.*

218 See generally Bottomore (1984) *The Frankfurt School*; Connerton (1980) *The tragedy of enlightenment: an essay on the Frankfurt School.*

219 Benhabib "Hannah Arendt and the redemptive power of narrative" (1990) 57 *Social Research* 171.

220 (1992) *Hannah Arendt. A reinterpretation of her political thought* 22.

221 Arendt "Reply to Eric Voegelin's review of The origins of totalitarianism" (1953) 15 *Review of Politics* 80.

> Suffering of which there has always been too much on earth, is not the issue, nor is the number of victims. Human nature as such is at stake.[222]

She characterises totalitarianism as "absolute" or "radical" evil.[223] The totalitarian assault on human nature is an attempt to destroy the *human* qualities that distinguish human beings from *animals*, namely their *individuality* and their *capacity to act*. She describes being human as being one of a *plurality* of individuals each of them *different*, each of them capable of starting something *new*. Totalitarian leaders seek total domination. *Human spontaneity* has to be destroyed to reduce human beings to *predictable* members of a *herd* so that they will not upset the system. According to Arendt, totalitarians believe that everything is possible. They aspire to omnipotence, the price of which is necessarily human *plurality* and *spontaneity*, and thus human nature itself. The totalitarian belief rests on the destruction of human unpredictability on the one hand and on delusions of human omnipotence on the other. Totalitarian leaders believe that everything is possible without believing in human freedom and responsibility, not even their own. To Hannah Arendt totalitarianism is

> [A]n attempt to exercise total domination and demonstrate that everything is possible by destroying human plurality and spontaneity at all levels, and ironing out all that is human and contingent to make it fit a determinist ideology.[224]

Further,

> [T]he totalitarian belief that everything is possible seems to have proved only that everything can be destroyed.[225]

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222 Arendt (1951) *The origins of totalitarianism* 433.

223 Arendt (1951) *The origins of totalitarianism* 433.

224 Canovan (1992) *Hannah Arendt. A reinterpretation of her political thought* 27.

225 (1951) *The origins of totalitarianism* 433.

"All sorrows can be borne if you put them into a story or tell a story about them": Arendt's theory of action [226]

Hannah Arendt developed her theory of action and speech in *The human condition*, which appeared in 1958, seven years after *The origins of totalitarianism*. In *The human condition* she expanded her earlier vision on human beings' capacity to act, and pluralism. She distinguished between the *public* and the *private* spheres, and between three human activities: *work*, *labour* and *action*. Labour corresponds to life, to being alive. The slave is captured in the condition of labour, ruled by necessity. Work corresponds to the world, to that which is tangible. The merchant is immersed in the condition of work and is ruled by materialism. Action corresponds to culture, history and to the human world of plurality. The citizen is in the condition of action and is free to interact and to engage in speech. Action and speech distinguish humans from animals.

Arendt identified human plurality as the basic condition for action and speech. Plurality has the twofold character of *equality* and *distinction*. Humans are *equal* because if they were not they would have been unable to understand each other. Humans are *distinct* because if they were the same they would not have needed speech or action to make themselves understood. Human distinctness is not the same as "otherness".[227] Although it is an important aspect of plurality, "otherness" is found only in the "sheer multiplication of inorganic objects". Only humans can express variations and distinctions and communicate them.

> [O]therness ... and distinctness ... become uniqueness, and human plurality is the paradoxical plurality of unique beings.[228]

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226 Arendt (1958) *The human condition* 175.

227 I shall discuss the concept of the "other" in Levinas and Derrida in Part 2 "... perspectives on equality".

228 Arendt (1958) *The human condition* 176.

This unique distinctness is revealed through speech and action. Speech and action, as distinguished from physical appearance (labour) rest on *initiative*, from which no human can refrain and remain human. Arendt argues that this cannot be said of *labour* or *work*. We insert ourselves into the world by our *words* and our *deeds*. This insertion is like a second birth, not forced upon us by necessity, like *labour*, and not prompted by utility, like *work*. By referring to the Greek *archein* and Latin *agere*, she explains that "to act", in its most general sense, means to take initiative, to set something into motion. In the nature of beginning, something new is started, something which cannot be expected from whatever may have happened before. Inherent in all beginnings is the element of "startling unexpectedness".[229]

> The new always happens against the overwhelming odds of statistical laws and their probability, which for all practical everyday purposes amounts to certainty; the new therefore always appears in the guise of a miracle. The fact that man is capable of action means that the unexpected can be expected from him, that he is able to perform what is infinitely improbable.[230]

It is by acting and speaking that humans show who they are, that they reveal their personal identities, that they appear to each other in the human world. This appearance is different from physical identities, which appear without any activity of their own. The disclosure of "who" someone is, distinguished from "what" she is, is implicit in everything a person says and does. This revelatory quality of action and speech comes to the fore where people are *with* others, in "sheer human togetherness". Because it discloses the agent together with the act, action needs for its full appearance "the shining brightness we once called glory". This is only possible in the public realm.

Action loses its specific character without the disclosure of the agent in the act. It

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229 Arendt's vision of action can be compared with Derrida's conception of the "event". I shall discuss Derrida's "event" in section 2 "... perspectives on equality".

230 (1958) *The human condition* 178.

becomes merely one form of achievement among others, no less a means to an end than making is a means to produce an object. Whenever "human togetherness" is lost, when people are only *for* or *against* other people, *action* loses the quality of transcending mere productive activity. Arendt refers to the example of modern warfare: Where people are only *for* or *against* other people, they go into action to achieve certain objectives *for* their own side and *against* the enemy. Speech in this situation becomes mere talk and in the absence of *action* reveals nothing.

> Action without a name, a "who" attached to it is meaningless, whereas an art work retains its relevance whether or not we know the master's name.[231]

She argues that the monuments to the "Unknown Soldier" bear testimony to the need for glorification, for finding a "who". The frustration of this wish and the unwillingness to resign oneself to the brutal fact that the agent of the war was actually nobody, inspired the erection of monuments to the "unknown". These soldiers who could not disclose themselves by their action were not robbed of their achievement, but of their human dignity.

Arendt explains that action and speech happen *between* people. She identifies specific, objective, *worldly* interests which lie between people and bind them together. Most action and speech are concerned with this "in between". In addition to the disclosure of the agent in acting and speaking, most words and deeds are also about some worldly objective reality. There is also a subjective "in between", which consists of deeds and words which originated exclusively in people's acting and speaking to one another. This subjective "in between" is not tangible, but no less real than the world of things we visibly have in common. Arendt calls this intangible (subjective) "in between", the "web of human relationships", which is the realm of human affairs (public realm). Disclosure of the *who* through *speech* or the setting of a *new beginning* through *action*, always falls into an *already existing web*. Because of this already existing "web of human

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[231] (1958) *The human condition* 180-181.

relationships", with its innumerable, conflicting wills and contentions, action never achieves its purpose, but gives birth to "stories" which may be told and retold. In this regard Arendt argues for a "fragmented" view of agency and of the subject.

> Although everybody started his life by inserting himself into the human world through action and speech, nobody is the author or producer of his own life story. In other words, the stories, the results of action and speech, reveal an agent, but this agent is not an author or producer. Somebody began it and is its subject in the twofold sense of the word, namely, its actor and sufferer, but nobody is its author.[232]

An assessment of Arendt's "fragmented" approach to the subject would depend on whether her vision is being regarded as modern or postmodern. One of the main aspects of postmodern thought is "the death of the subject". Arendt's insistence on human action and speech can be interpreted as modernist. Her "fragmented" view of the subject clearly rejects a vision of an omnipresent subject. She argues that every individual life between birth and death can be told as a *story* with beginning and end which is the pre-political and prehistorical condition of history, "the great story without beginning and end". The reason why each human life tells a *story* and why history ultimately becomes the storybook of humankind, is because both are the outcome of *action and speech*. When one considers history, one finds that its subject, humankind, is an abstraction which can *never become an active agent* (omnipresent subject). Although an agent can set the whole (life) process in motion, he/she is never the author of its eventual outcome.

Arendt notes that the specific content as well as the general meaning of action and speech are so indissolubly tied to the living flux of acting and speaking, that it can be represented and "reified" only through a kind of repetition, the imitation or *mimesis*. She explains this repetition with reference to Greek tragedy where only the actors and speakers who re-enact the story's plot can convey the full meaning.

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[232] Arendt (1958) *The human condition* 184.

> In terms of Greek tragedy, this would mean that the story's direct as well as its universal meaning is revealed by the chorus, which does not imitate and whose comments are pure poetry, whereas the intangible identities of the agents in the story, since they escape all generalization and therefore all reification, can be conveyed only through an imitation of their acting. This is also why the theatre is the political art par excellence; only there is the political sphere of human life transposed into art. By the same token, it is the only art whose subject is man in his relationship to others.[233]

Action and speech are never possible in isolation. It needs the surrounding presence of others. As fabrication needs the surrounding presence of nature and of the world, so action needs the web of the *acts* and *words* of other people.

Since action and speech always establish relationships, they have an inherent tendency to force open limitations and cut across boundaries. Because action and speech can open limitations and cut across boundaries, human institutions and laws are not closed and static and are renewed by new generations.

> The fences inclosing private property and insuring the limitations of each household, the territorial boundaries which protect and make possible the physical identity of a people, and the laws which protect and make possible its political existence, are of such great importance to the stability of human affairs precisely because *no such limiting and protecting principles rise out of the activities going on in the realm of human affairs itself.*[234]

The limitations of the law are thus never reliable safeguards against political action and speech. Likewise, the boundaries of a territory are never entirely reliable safeguards

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[233] Arendt (1958) *The human condition* 188.

[234] Arendt (1958) *The human condition* 191.

against action from without. In this argument Arendt clearly situates herself against a liberal modern approach to law and politics. She identifies the boundlessness of action as merely the other side of its tremendous capacity for establishing relationships. While the various limitations and boundaries we find in the body politic may offer some protection against the inherent boundlessness of action, they are helpless in respect of the inherent *unpredictability* of action and speech. This unpredictability is not simply a question of inability to foretell all the logical consequences of a particular act, but arises out of the *story* which is an inevitable result of action, even though it is not the actor but the storyteller who perceives and "makes" the *story*. This unpredictability of action is closely related to the revelatory character of action and speech in which one discloses one's self without being able to know beforehand whom one reveals.

Action can result in a finished product only on condition that its own authentic non-tangible and always utterly fragile meaning is destroyed. Arendt draws on the pre-philosophic Greek remedy for this "frailty", namely the polis. The polis had a twofold function: it was intended to give permanence, and immortality. Human life in the polis seemed to assure that the most futile of human activities, action and speech, and the least tangible, the *deeds* and *stories* which result from them, would become imperishable. The organisation of the polis is a kind of "organised remembrance", assuring mortals that their passing existence and fleeting greatness will never lack being seen and being heard. Thus, the "political" realm rises directly out of acting together. Action and speech find themselves in the most intimate relationship to the public part of the world common to us all, but it is the one activity which constitutes it.

> It is as though the wall of the polis and the boundaries of the law were drawn around an already existing public space which, however, without such stabilizing protection could not endure, could not survive the moment of action and speech itself.[235]

The polis is not the city-state in its physical location but the organisation of the people

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[235] Arendt (1958) *The human condition* 198.

as it arises out of acting and speaking together. The true "space" of the polis lies *between* people living together for the purpose of action, no matter where they happen to be.[236] Action and speech create a "space" between people at any time, at any place. It is the space of *appearance* in the widest sense of the word. The "space of appearance" comes into being whenever people act or speak together. This action and speech precede all the various forms in which the public realm can be organised (such as institutionalised forms of government).The "space" does not always exist, and although all people are capable of action and speech, most of them do not live in the space of action and speech all the time.

Arendt notes that the modern age is not the first to consider action, speech and politics in general as useless and idle. Since ancient times people have been frustrated by the "unpredictability of action's outcome, the irreversibility of the process and the anonymity of its authors".[237] People have sought a substitute for action in order to escape the complexities following the plurality of agents. They seek for an activity where one person isolated from others "remains master of his doings from beginning to end".[238] This is regarded by Arendt as an attempt to replace *acting* with *making*. The consequence of this argument is that democracy and the "essentials" of politics, action and speech are threatened. For her, the attempt to do away with plurality will lead to the abolition of the public realm itself:

> The most obvious salvation from the dangers of plurality is monarchy, or one-man-rule, in its many varieties, from outright tyranny of one against all to benevolent despotism and to those forms of democracy in which the many form a collective body so that the people "is many in one" and constitute themselves as a "monarch".[239]

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236 I repeat this view below where I discuss Arendt's description of Rahel Varnhagen's Berlin salon.

237 Arendt (1958) *The human condition* 220.

238 Arendt (1958) *The human condition* 220.

239 Arendt (1958) *The human condition* 221.

She observes that all tyrannies have in common the banishment of the citizens from the public realm, insisting that they should mind their "private" business while "the ruler should attend to public affairs".[240]

Another feature of modern politics is the "process" character of action. The central concept of the two new sciences of the modern age, natural and historical science, is the concept of process. Arendt argues that only because we are capable of acting, of starting processes on our own, can we conceive of both nature and history as systems of processes.[241] While the strength of the production process lies in the end product, the strength of action can never be exhausted in a single deed.

> [W]hat endures in the realm of human affairs are these processes, and their endurance as unlimited, as independent of the perishability of material and the mortality of men as the endurance of humanity itself. The reason why we are never able to foretell with certainty the outcome and end of any action is simply that action has no end.[242]

Arendt reminds us of the "lost treasures" of our tradition of political thought under conditions of modernity. The "loss of public space" is one of the biggest. She views "the rise of the social" as a reason for the decline of public space. The social sphere replaced both the private and the public sphere. The "social" denies the plurality of the human world because it reflects only the material (tangible) world. As a result of the transformation of the private and the public sphere into the "social", economic processes, which were confined to the private realm, became public matters. She sees in this process the occluding of the political by the social. The public space of politics is transformed into a "pseudo" space of interaction in which individuals no longer *act*

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240 Arendt (1958) *The human condition* 222 argues in this regard that Plato attempted to find theoretical foundations and practical ways for an escape from politics altogether. He emphasised the concept of rule, saying that people can only live together lawfully and politically when some are entitled to command and others are forced to obey.

241 (1958) *The human condition* 232.

242 Arendt (1958) *The human condition* 233.

but merely *behave* as economic producers, consumers and urban city dwellers. With the "rise of the social" something meaningful has disappeared, namely human plurality, action and speech.

Benhabib[243] notes that Arendt is often criticised for the idealised picture of Greek political life on which she bases her idea of public space. Her critics argue that the agonistic[244] political space of the *polis* was possible only because women, slaves and non-citizens were excluded from it. Only a few could enjoy the leisure of politics because all the others made it possible for them to do so. Does this critique against Greek political life mean that the recovery of the public space under conditions of modernity is necessarily an elitist and anti-democratic project? Can the demand for universal political emancipation and the universal extension of citizenship rights - that have accompanied modernity since the American and French revolutions - be reconciled with a recovery of the public space?

Benhabib[245] argues that Arendt should not be read only or primarily as an agonistic thinker because Arendt also devoted much space in her work to analysing the "prospects of politics under conditions of modernity". Arendt's account of public space must be understood in the light of her "odd methodology", namely her use of *storytelling* to explain political thought. Benhabib views Arendt's use of *storytelling* as an "exercise" of thought. Benhabib maintains that if one approaches Arendt's account of politics and her account of the "decline" of the public realm in particular from this angle, it seems less "nostalgic". Benhabib describes Arendt's account of politics as "an attempt to think through history in sedimented layers of language", despite certain nostalgic moments in her thinking. To Benhabib, Arendt's thinking reveals two strands: The one stands in the tradition of "fragmentary historiography", inspired by Walter Benjamin;[246] the other

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243 (1992) *Situating the self* 90.

244 I return to the phrase "agonistic" below.

245 (1992) *Situating the self* 89-95; (1996) *The reluctant modernism of Hannah Arendt.*

246 See (1968) *Illuminations. Essays and reflections.*

is inspired by the phenomenology of Husserl and Heidegger,[247] in terms of which memory is the "mimemic recollection of the lost origins of phenomena as contained in fundamental experience". Arendt's account of the "loss" of public space can be typified as "nostalgic". Benhabib argues that Arendt uses the concept of public space in *The origins of totalitarianism* in a non-nostalgic manner, where she compared constitutional government to public space - and the absence of public space with totalitarianism.

> Tyranny is like a desert; under the conditions of tyranny one moves in an unknown, vast, open space, where the will of the tyrant occasionally befalls one like the sandstorm overtaking the desert traveller. Totalitarianism has no spatial topology: it is like an in band, compressing people increasingly together until they are formed into one.[248]

Benhabib[249] sees in Arendt's concept of "public space" in her theory of totalitarianism a different focus from the one prevailing in *The human condition*. She describes the contrast between Arendt's views of public space with the terms "agonistic" and "associational".

According to the "agonistic" view, the public realm represents the space of appearances where moral and political greatness, heroism and preeminence are displayed and shared with others. The "agonistic" space is a competitive space. Ultimately this space is where one seeks a guarantee against the futility of all things human.

> For the *polis* was for the Greeks, as the *res publica* was for the Romans, first of all their guarantee against the futility of individual life, the space protected against this futility and reserved for the relative permanence, if

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247 See generally Heidegger (1962) *Being and time*.

248 (1992) *Situating the self* 92; Arendt (1951) *The origins of totalitarianism* 466.

249 (1992) *Situating the self* 93.

not immortality, of mortals.[250]

The "associational" view of public space suggests a space that can emerge whenever and wherever people come together to act. Public space is the space where freedom and action can appear. In this approach, public space can be a private dining room in which people gather, a forest or a field. Arendt describes this view of public space in her work on Rahel Varnhagen's salons. The salons became public spaces because of the power and action that were displayed there through speech and action. Used in this sense, public space is not confined to a certain geographical space, but emerges wherever there is a space for human plurality, action and speech, or wherever humans can appear to each other.[251]

The distinction between the "agonal" and "associational" models of public space corresponds to the distinction between Ancient Greek and modern experience of politics. The agonal space in the Greek *polis* was made possible by a morally homogenous and politically egalitarian community where women, slaves and non-citizens were excluded. Under these conditions, agonistic action could take place and the public agenda of debate could be predefined. Benhabib argues that the modern public space was extended by, for example, the emancipation of workers who made property relations a public issue, and by the emancipation of women who brought the family and so-called private sphere issues into the public realm. She believes that the "agonistic" model cannot accommodate and is not suited to the modern, extended public space. Cultural questions of "self- and other-representations" have also been put on the

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250 Arendt (1958) *The human condition* 56.

251 I place the TRC in an Arendtian conception of public space because of the human appearance that was involved. In public spaces people can act, display their plurality and appear to each other because they are freed from the necessity and materiality of labour and work. Humans appear to each other by telling stories and by acting spontaneously and unpredictably. These acts are in contrast with the routine and predictability that are associated with labour and work. I argue that what made the TRC a public space is exactly the possibilities for spontaneous action. It is for this reason that I am critical of responses to the TRC that emphasise the institutional, instrumental, legal process and negate the human presence. I shall elaborate on this in Part 3.

modern public agenda. None the less, Benhabib[252] notes that "the struggle over what gets included in the public agenda itself is a struggle for justice and freedom".

For me Arendt's vision of public space that is based on her theory of action and speech is very suggestive for our own process of reconstruction and transformation. The fact that she can not be pinned down to a certain approach and escapes labelling makes her theory so much more open for further investigation, exploration and possible application. Arendt rejected the instrumental neutral politics of the liberal model and through her theory of action and speech provided a strong alternative. However, she was not caught up in a rationalist proceduralist approach like Habermas (although he must have drawn from her thought). There are moments of civic republicanism in her thought but she cannot be described as totally premodern or civic republican. I consider Mouffe, who is concerned with the deconstruction of rigid identities and anti-essentialism, close to Arendt's own vision of politics and public space. Arendt's work on Rahel Varnhagen contributes significantly to the discourse on gender in public space.

Gender perspectives

Below I shall focus on Arendt's biography on Rahel Varnhagen and her descriptions of the Berlin salons. I find her view of the Berlin salons of exceptional significance for the reconstruction and transformation of South African public space. I shall also turn to Bonnie Honig's argument that Arendt's theory of action gives rise to an "agonistic"

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252 (1992) *Situating the Self* 94. Benhabib identifies what she refers to as Arendt's "phenomenological essentialism", as problematic for the application of her theory today. Arendt defines public space as that space in which only a certain type of activity, namely action and speech, as opposed to work and labour, can take place. She relegates certain types of activity, like work and labour, to the private realm alone and ignores that work and labour, insofar as they are based on power relations, could become matters of public dispute.

feminism.[253]

Rahel Varnhagen's salon as public sphere

Between 1929-1933, Hannah Arendt wrote a biography of Rahel Varnhagen, entitled, *The life history of a German Jewess from the romantic period.* Rahel Varnhagen was born in Berlin on May 19, 1771. She was the eldest child of a well-off merchant, Marcus Levin. After her father's death in 1790, her brother took over the family business and provided Rahel and her mother with a regular income. Between 1790 and 1806 Rahel held a salon[254] in Jägerstrasse. During these years she had a series of love affairs with aristocrats from various European origins. With Napoleon's invasion of Berlin on October 27, 1806, Rahel's salon and circle of friends broke up. After the death of her mother, Rahel met Karl August Varnhagen and moved to Teplitz. After being baptised in 1814, she married Varnhagen. They resettled in Berlin in 1819 and from 1821 to 1832 she again held her Berlin salon. Rahel died on March 7, 1833.

Arendt's reconstruction of Rahel's story is based primarily upon the unprinted letters and diaries from the Varnhagen collection in the Manuscript Division of the Prussian State Library. Arendt wanted to tell Rahel's story as she herself "might have told it". ("What interested me solely was to narrate the story of Rahel's life as she herself might

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253 Arendt has been criticised for seemingly ignoring the "woman question". See for example Rich (1979) *On lies, secrets and silence* 212 where she comments on Arendt's *The human condition*: "To read such a book, by a woman of large spirit and great erudition, can be painful, because it embodies the tragedy of a female mind nourished on male ideologies. In fact, the loss is ours, because Arendt's desire to grasp deep moral issues is the kind of concern we need to build a common world which will amount to more than mere 'life-styles.'" Benhabib "The pariah and her shadow: Hannah Arendt's biography of Rahel Varnhagen" in Honig (ed) (1995) *Feminist interpretations of Hannah Arendt* 85 in reaction to Rich refers to "the self-righteous dogmatism of the latecomers ... [that] kills the spirit and dries up the soul, and [is] certainly not conducive to the task of 'building a common world' which will amount to more than mere "life-styles.'"

254 A salon was a place/space where people from all walks of life gathered to socialise.

have told it.")[255] Benhabib[256] argues that in approaching Arendt's story of Rahel's life, there are manifold layers of reading and interpretation. During the time when Arendt was working on the Rahel story, her own understanding of Judaism in general and her relationship to her own Jewish identity were undergoing profound transformations. Arendt's thought shifted from the egalitarian, humanistic Enlightenment ideals of Kant, Lessing and Goethe toward a recognition of the indelible fact of Jewish difference within German culture. Her story of Rahel Varnhagen tells us about the "paradoxes" of Jewish emancipation between the breakdown of the ghetto and the emergence of the nineteenth-century Christian modern nation-state.

Arendt's use of the *pariah* and the *parvenu* in describing this episode of German Jewish social history is of great significance. The *parvenu* is someone who becomes like the others of the dominant culture by erasing difference and assimilating to dominant trends. The *pariah* is the outsider and the outcast who either cannot or chooses not to erase difference.[257] Arendt admired Rahel for being a *pariah* who transforms *difference* from being a source of *weakness* and *marginality* into one of *strength* and *defiance*. In a letter addressed to Pauline Wiesel, Rahel wrote:

> We have been created to live the truth in this world ... We are alongside of human society. For us no place, no office, no empty title exists! All lies have some place; eternal truth, proper living and feeling ... has no place! And thus we are excluded from society. You because you offended it ... I because I cannot lie and live along with it. [258]

Arendt notes: "One had to pay for becoming a *parvenu* by abandoning the truth, and

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255 Weisberg (ed) (1997) *Rahel Varnhagen. The life of a Jewess* 81.

256 (1996) *The reluctant modernism of Hannah Arendt* 7. See also Benhabib "The pariah and her shadow: Hannah Arendt's biography of Rahel Varnhagen" in Honig (ed) (1995) *Feminist interpretations of Hannah Arendt* 83-104.

257 Benhabib (1996) *The reluctant modernism of Hannah Arendt* 10.

258 Weisberg (ed) (1997) *Rahel Varnhagen. The life of a Jewess* 242.

this Rahel was not prepared to do."[259]

Benhabib identifies Rahel's Jewish identity and Arendt's own understanding of her identity during the 1930s as the central hermeneutic motifs in the biography. For Arendt Rahel had remained a Jew and a *pariah*. Only because she clung to both conditions did she find a place in the history of European humanity.[260] An additional dimension to the Rahel story that leads more directly to future themes in Arendt's political philosophy (her theory of action, for example), is Arendt's description of a certain form of "romantic inwardness". Rahel once said: "Everyone has a destiny who knows what kind of destiny he has." Arendt believed that this concept of destiny *reduced* Rahel to a certain *passitivity*, to a certain *refusal to choose and to act*. Arendt found that the fact that Rahel wanted to live life as if it were a work of art was the great error she made. Rahel once commented: "But to me life itself was the assignment."[261] In Rahel's words "What am I doing? Nothing. I am letting life rain upon me,"[262] Arendt finds a "wordless" sensibility here to which she objects. She is opposed to the "apolitical" quality of romantic introspection that leads one to lose a sense of reality by losing the boundaries between the private and the public, the intimate and the shared. The *world* is the missing link between Rahel Varnhagen and her contemporaries and Arendt's own search for the recovery of the public world.

> To live life as if it were a work of art, to believe that by "cultivation" one can make a work of art of one's own life, was the great error that Rahel shared with her contemporaries ...[263]

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259 Weisberg (ed) (1997) *Rahel Varnhagen. The life of a Jewess* 242. See also 242-249.

260 Weisberg (ed) (1997) *Rahel Varnhagen. The life of a Jewess* 258.

261 Weisberg (ed) (1997) *Rahel Varnhagen. The life of a Jewess* 81.

262 Weisberg (ed) (1997) *Rahel Varnhagen. The life of a Jewess* 81.

263 Weisberg (ed) (1997) *Rahel Varnhagen. The life of a Jewess* 81.

Benhabib[264] explains that the qualities displayed by "romantic inwardness" were quite the opposite to those required from actors in the political/public sphere. Arendt believed that "romantic introspection" blurred the boundaries between the public and the private sphere. In Arendt's view, "romantic inwardness" eliminated the distinction between one's own perspective and the perspectives of others. "Romantic inwardness" thus eliminated the ability to judge the world from different points of view, which is a very important aspect of political action. "Romantic inwardness" fosters the soul rather than sustaining the world. Fundamental to political action is an interest in the world and a commitment to sustain it.[265]

Rahel's search for a place in the world was not only defined by her Jewish identity and romanticism, but also by her gender. Arendt argues that she attempted to gain a place in the world by using "typically female strategies". She sought assimilation and recognition through love affairs, courtships and eventually marriage with a gentile male. By giving herself to the right man, Rahel had hoped to attain the "world" that was denied her as a Jew and as a female. To Arendt, Rahel and her contemporaries failed to create a *world* in their lifetime. One exception was between 1790 and 1806, when a small number of Jews entered the world of genteel society. Through their salons Rahel and other Jewesses created brief moments of public life, of living in the world.

Benhabib[266] notes that Rahel Varnhagen's "moment of glory" coincided with the brief period in German cultural history when the Enlightenment, the ideals of the French Revolution, the spirit of Prussian reforms and German Romanticism, came together in the *public sphere* provided by the *salon.* The Jewish women who ran the salons were daughters and wives of well-off Jewish merchants and intellectuals. Benhabib identifies three contributions that the salons made to these social activities: First, Jewish women emancipated themselves from traditional patriarchal families. Secondly, they helped to create high culture by creating a social space where writers, artists, as well as civil

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264 Benhabib (1996) *The reluctant modernism of Hannah Arendt* 11.

265 Benhabib (1996) *The reluctant modernism of Hannah Arendt* 11.

266 (1996) *The reluctant modernism of Hannah Arendt* 14.

servants and aristocrats could gather to exchange ideas, view texts, mix, mingle, see and be seen. In this respect the salons created spaces for intelligentsia in a city that at the time lacked public spaces such as a university, a parliament, and a generous court. Thirdly, the salons created spaces where people from various classes, religious groups and sexes could mix. New forms of social interaction and intimacy were developed accordingly.

The Berlin salons can be compared to the French salons. Benhabib[267] mentions three characteristics of the French salons: They were social *spaces* where individuals from different and traditionally segregated groups, ranks and classes could mix and mingle. They were social *events* where literary and artistic works were read and discussed. And they were social *processes* through which individuals of a hierarchical ancien regime learned new and non-hierarchical, more fluid forms of self and other presentation. She describes the salons as social experiments of a period in transition from the old to the new in pre-revolutionary Europe. Although gatherings with the characteristics of salons had existed in classical Greece and in twelfth-century French courts, it is only with the beginning of the Renaissance that they became more regularised. With the emergence of modern civil society, the salons became a recurring feature of social interaction, which Hertz describes as follows:

> The word *salon* came into use to describe a public room that began to appear in wealthy European homes between the sixteenth and eighteenth centuries as the "great hall", which had been the centre of medieval family life, gradually lost its private character and four-poster beds were moved into separate rooms. The great hall, now called the salon, was a lavishly decorated public space where the piano was played, feasts served and guests received.[268]

I am interested in how the private/public dichotomy was "lived out" in these spaces.

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267 (1996) *The reluctant modernism of Hannah Arendt* 16.

268 Hertz (1988) *Jewish high society in old regime Berlin* 14.

Benhabib notes that even though the salons of early modernity were confined to specific places, the forms of social interaction that they encouraged were not confined.

> The public reveals and conceals at the same time; it is only in the withdrawal from the public into the sheltered space of a two- or three-person relationship that one can also move inward, toward who one really is. In this respect as well, the salon is a fascinating space; unlike an assembly hall, a town square, a conference room or even simply the family dinner table, the salon, with its large, luxurious, and rambling space, allows for moments of intimacy; in a salon people are with each other but must not always be next to each other. Salons are amorphous structures with no established rules of entry and exit for those who have formed intimacy; in fact it may be a sign of good manners to foster and to allow the formation of intimacy among members of the salon. *What is important here is the fluidity of the lines between the gathering as one and the gathering as many units of intimacy and how the salons can be both public and private, both shared and intimate.*[269]

In the salons the written and spoken word often flowed into each other.[270] Letter writing became prominent. Benhabib shows that letter writing in the late eighteenth century was closely related to the emergence of a new form of individuality and self-understanding in European culture. Letters had a quasi-public, quasi-private quality and became the preferred "feminine" pattern of prose. Women discovered a medium through which they could communicate from the intimate toward the public.

> Women through their letters, appear to re-create themselves as texts, thus overcoming their own silencing in the major texts of the tradition, which as educated upper-and middle class females, they would have had to read. The letter form, like the salon, is a transgressive mode: it is a

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269 (1996) *The reluctant modernism of Hannah Arendt* 17-18 (my emphasis).

270 Benhabib (1996) *The reluctant modernism of Hannah Arendt* 18.

mode in which boundaries are crossed, erased, renegotiated, and re-created.[271]

The kind of public spaces created by the salons contradicts Arendt's "agonistic" vision of the public sphere in *The human condition*. Benhabib notes a number of contrasts and similarities between the Greek polis and the salons. The polis *excluded women*, amongst others, while the salons were dominated by *female presence*. The public spaces in the polis were *serious*, the salons were *playful*. The public space of the polis was governed by visibility and transparency, the salons were governed by visibility but not transparency – on the contrary, self-concealment and pretending to be quite other than one was, were the norms. The common features are that both the salon and the polis were based on the assumption of equality among the people who interact and both of them enabled the *creation of bonds* among their members. Both the polis and the salon contributed to the formation of "civic friendship" among a group of citizens or among a group of private, like-minded individuals who could gather for a common political purpose.

The salons are a good example of transformed and transformative public spaces, in other words, they were not only transformed public spaces themselves, but contributed to other transformations in society as well. Deborah Hertz argues that the salons were indeed typically female forms of the public sphere.

> That the home could be a public as well as a private place was obviously one reason why salons were organized by women. The synthesis of the private and the public salons was evident in the curious, bygone way that guests arrived at the door ... That social institutions like salons should ever have appeared in pre-industrial Europe, even intermittently, came to be seem quite odd. It was odd that private drawing rooms should have been public places, odd that in an age when women were excluded from educational and civic institutions, even wives of rich and powerful men

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[271] Benhabib (1996) *The reluctant modernism of Hannah Arendt* 19.

should lead intellectual discussions among the most learned men of their cities. It was odd that men and women should have had important intellectual exchanges during centuries when the two sexes generally had little to say to each other and few public places in which to say it.[272]

Rahel Varnhagen's salon was a space of social interaction where for a brief moment a "piece of the world" was recovered. It was a space where desire for difference and distinctness could assume an "inter-subjective reality", in other words it was a space where human action could take place. It was a space where the private/public dichotomy was problematised by the presence of difference and by the primarily female presence. The salon as a public space presents an example how difference and a feminine presence can contribute to the reconstruction and transformation of public space.[273]

Agonistic feminism

Commenting on Arendt's political theory from a feminist perspective, Bonnie Honig[274] describes her as neither a "theorist of gender" nor a "woman theorist", but as a "theorist of an agonistic and performative politics". To Honig "agonistic" feminism presupposes not an already known and unifying identity of "woman", but "differentiated, multiple beings that are always becoming, always calling out for amendment".

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272 Benhabib (1996) *The reluctant modernism of Hannah Arendt* 21.

273 See also Landes "Novus ordo saeclorum: Gender and public space in Arendt's revolutionary France" in Honig (ed) (1995) *Feminist interpretations of Hannah Arendt* 195-220.

274 "Towards an agonistic feminism. Hannah Arendt and the politics of identity" in Honig (ed) (1995) *Feminist interpretations of Hannah Arendt* 135-136. See also Honig "Introduction: The Arendt question in feminism"; Dietz "Feminist receptions of Hannah Arendt" and Markell "Annotated bibliography on Hannah Arendt and feminism" in Honig (ed) (1995) *Feminist interpretations of Hannah Arendt* 1-16; 17-50; 357-365.

For Honig[275] "resistibility" is a precondition of Arendt's politics. She notes that in Arendt's view, "identity" is the "performative production" and not the "expressive condition or essence of action". Honig says that the value of Arendt's theory for feminist politics lies in her rejection of an expressive, identity-based politics. Honig[276] uses the American Declaration of Independence to explain her understanding of Arendt's action that gives effect to an "agonistic feminism". For Arendt the real source of the authority of the American constitution was not the "constative"[277] moment but the "performative". Honig notes that Arendt opposes attempts to conceive of politics as the expression of shared identities such as gender, race, ethnicity or nationality. She views the self as a "complex site of multiple identities that are always performatively produced".

> From Arendt's perspective, a political community that constitutes itself on the basis of a prior, shared, and stable identity threatens to close the spaces of politics, to homogenize or repress the plurality and multiplicity that political action postulates.[278]

Arendt's emphasis of difference and plurality made her wary of any assertion of homogeneity in "women's experience" or in "women's ways of knowing". Honig argues that Arendt would have been critical of any feminist politics that relies on a universal definition of woman that would silence differences and pluralities.

This type of feminist politics can be extremely fruitful to our processes of transformation and reconstruction of sex-gender relations. Voices that have been silenced by the authorities of the past should not again be silenced and violated by the mere

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275 In Part 3 I shall elaborate on Honig's discussion of Arendt's and Derrida's readings of the American Declaration of Independence, "Declarations of independence: Arendt and Derrida on the problem of founding a republic" (1991) 15 *American Political Science Review* 97-113.

276 See Honig "Declarations of independence: Arendt and Derrida on the problem of founding a republic" (1991) 85 *American Political Science Review* 97-113.

277 The constative refers to the fixed, unchangeable phrases.

278 "Towards an agonistic feminism. Hannah Arendt and the politics of identity" (1995) *Feminist interpretations of Hannah Arendt* 148.

acceptance of one way of being as the norm (for example, the standard of the white, middle class male, or of the black male or of the white power-seeking female).

Towards a heterogeneous public sphere

In the previous sections I have discussed four visions of public space, namely liberal visions, Habermas' vision, Mouffe's vision and Arendt's vision. Before I conclude my discussion on the various visions of public space I shall add the perspectives of two other authors to the picture. Iris Young exposes the flaws in the modern approaches to public space, in particular its emphasis on impartiality in the public. Her argument that public spaces could be more inclusive if the concrete contexts of individuals are noticed is valuable for our own reconstruction and transformation. Seyla Benhabib uses the phrase "the public as phantom" to make the point that the public always comes back. The notion of the public as phantom is suited for our present and future conceptions of public space.

In an article entitled "Impartiality and the civic public", Iris Young[279] puts forward the view that contemporary politics should break with modern traditions of moral and political life. Emancipatory politics must develop a conception of normative reason that does not oppose "reason" to "desire" and "affectivity". Young criticises the deontological tradition's assumption that normative reason is "impartial" and "universal". She says that

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279 "Impartiality and the civic public" Cornell & Benhabib (eds) (1987) *Feminism as critique* 57-76.

the "ideal of impartiality" expresses what Adorno calls "the logic of identity" or Derrida calls "the metaphysics of presence". This ideal of impartiality denies and represses *difference* and expresses the ideal of *unity*, which generates an oppressive opposition between reason and desire. Young argues that the theoretical and practical exclusion of women from the public sphere is a manifestation of the civic public's will to unity, which leads to the exclusion of those aspects of human existence "that threaten to disperse the brotherly unity of straight and upright forms".[280] An emancipatory conception of public life, in her view, must ensure the inclusion of all persons and groups, not by claiming a unified universality but by explicitly promoting heterogeneity in public life.

Young argues that the ideal of impartiality removes people from their "actual" contexts of living and moral decision-making, to a situation where they could not exist. She refers to Michael Sandel's argument that "the ideal of impartiality requires constructing the ideal of a self that is abstracted from the context of any real persons: the deontological self is not committed to any particular ends, has no particular history, is a member of no communities, has no body".[281]

The "logic of identity" seeks to unify concrete particulars by relying on an "essence" which eliminates otherness and reduces the specificity of situations and the difference among moral subjects.

> In modern moral discourse, being impartial means especially being dispassionate: being entirely unaffected by one's judgement. The idea of impartiality thus seeks to eliminate alterity in a different sense, in the sense of the sensuous, desiring and emotional experiences that tie me to the concreteness of things, which I apprehend in their particular relation to me. Why does the idea of impartiality require the separation of moral

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280 Young "Impartiality and the civic public" in Cornell & Benhabib (eds) (1987) *Feminism as critique* 59.

281 Young "Impartiality and the civic public" in Cornell & Benhabib (eds) (1987) *Feminism as critique* 60.

> reason from desire, affectivity and a bodily sensuous relation with things, people and situations? Because only by expelling desire, affectivity and the body from reason can impartiality achieve its unity.[282]

Young[283] argues that the "logic of identity" generates dichotomy instead of unity. She notes that the move to bring particulars under a universal category creates a distinction between "inside" and "outside". The dichotomy between reason and desire is reflected in modern political theory in the distinction between the "universal public" realm of the state and the "particular private" realms of needs and desires. Modern normative political theory aims to embody impartiality in the public realm.

Young focuses on the unique public life that developed in the eighteenth century. The *space of the city itself* changed during this time to create more *openness, vast boulevards, coffee houses and salons*[284] where people from different classes mingled in the same spaces. Young refers to Habermas's argument that "the function of the public life of the mid-nineteenth century was to provide a critical space where people discussed and criticized the affairs of the state in a multiplicity of newspapers, coffee houses and other forums".[285] Young describes the public life in this period as seemingly "playful and sexy". Sexes and classes, discourse and play, the aesthetic and the political were all mixed in this "wild public". Young sees the republican philosophy of a universalist state expressing an impartial civic public as a reaction to this differentiated public. To her, Rousseau's political philosophy was the "paradigm of this ideal of the civic public", a reaction to the public life of the eighteenth century.

> The civic public expresses the universal and impartial point of view of

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282 Young "Impartiality and the civic public" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 62.

283 "Impartiality and the civic public" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 62.

284 For example, Rahel Varnhagen's Berlin salons.

285 Young "Impartiality and the civic public" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 64.

reason, standing opposed to and expelling desire, sentiment and the particularity of needs and interests.[286]

Young[287] notes that in modern political philosophy a concept of the public realm that expresses impartiality and universality and excludes partiality and desire is emphasised. The effect of this (modern political philosophy) was that women, because they are the "caretakers of affectivity, desire and the body", were excluded from the public realm. Modern normative reason with its political expression in the idea of the "civic public" has unity and coherence because it expels all difference (such as the specificity of women's bodies and desire, the difference of race and culture etc).

Young[288] argues that while Habermas's idea of a communicative ethics provides the most promising starting-point for an alternative conception of normative reason, it remains inadequate because he retains a commitment to impartiality and reproduces in his theory of communication an opposition between reason and desire. Habermas retains an universalistic understanding of normative reason and therefore finds that norms must express shared interests. In doing so, he again expels and devalues difference.

The distinction between public and private as it appears in modern political theory expresses a will for homogeneity to the exclusion of many persons and groups. We need to transform the public/private distinction in such a way that it does not correlate with an opposition between reason and desire, or universal and particular. Young defines public as that "what is open and accessible".[289] The feminist slogan, "The

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286 Young "Impartiality and the civic public" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 64.

287 Young "Impartiality and the civic public" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 64.

288 Young "Impartiality and the civic public" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 67-73.

289 "Impartiality and the civic public" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 73.

personal is the political", does not deny a distinction between public and private, but it does deny a social division between public and private spheres. Instead of defining privacy as what the public excludes, privacy should be defined as that aspect of her life that any individual has a right to exclude others from. She notes that two principles that follow from the "personal is the political", are, first, that no social institutions or practices should be excluded as being the "proper" subject for public discussion and expression, and secondly, no person, actions or aspects of a person's life should be forced into privacy. We should strive for a new kind of public where persons, aspects of their lives or topics of discussion are not excluded and where "aesthetic" as well as "discursive" expression are encouraged.

> In such a public, consensus and sharing may not always be the goal, but the recognition and appreciation of differences, in the context of confrontation with power.[290]

The public as "phantom"

> [W]here once there was a public sphere of action and deliberation, participation and collective decision making, today there no longer is one; or if a public sphere still exists, it is distorted, weakened, and corrupted as to be a pale recollection of what once was.[291]

Benhabib[292] argues that all theories concerned with the public space have a "what was then and what no longer is" quality to them. She perceives the public as a "phantom" that will not go away. Even after the many "funeral rites" it has gone through, it comes

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290 Young "Impartiality and the civic public" in Benhabib & Cornell (eds) (1987) *Feminism as critique* 76.

291 Benhabib (1996) *The reluctant modernism of Hannah Arendt* 204.

292 Benhabib (1996) *The reluctant modernism of Hannah Arendt* 204.

back to haunt conscience and memory. This idea of the public as "phantom" reminds one of Derrida's notion of the "ghost of justice" that is always haunting us.[293]

According to Benhabib the "public" has lost its "metaphorical anchoring" in some form of body and has become "desubstantialised" or "decorporealised". She uses the example of e-mail, where those communicating neither *see* nor *hear* each other's voices and are present only as *senders* and *receivers* of electronic messages. The new public has *no space in particular* but is constituted by an "anonymous" public conversation taking place in *multiple spaces* in society. Today's citizen has become the "faceless" speaker and listener in "anonymous" public conversation. Benhabib asks whether an "anonymous" public conversation can be the medium through which democratic deliberation can take place. She notes that access to public means of communication has *in*creased while the *quality* of public debate and reasoning have *de*creased. Radio and television talk shows have not encouraged public deliberation either.[294] Rather,

> [T]he public sphere is filled with the voices of resentment, prejudice, and unanalysed opinions that are exposed to others, more often than not, in acts of exhibitionist defiance. The more impersonal the public conversation has become, the more the temptation is increasing to "let it all hang out"; the line between intimacy and publicity has been corroded.[295]

Benhabib explains that the "regulative ideal" of democracy presents the notion of collective public deliberation. This regulative principle needs the idea of an "autonomous" public sphere where "self-governance through the deliberation of a

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293 Derrida (1994) *Spectres of Marx*.

294 South Africa's own experience of talk shows, for example those hosted by Felicia Mabusa Suttle and Dali Tambo, is an example of how contemporary public spaces like talk shows and the media lack true public debate and public deliberation.

295 Benhabib (1996) *The reluctant modernism of Hannah Arendt* 205.

community can take place". Benhabib[296] argues that there exists a "hiatus" between the regulative ideal of democracy and the increasingly desubstantialised carriers of the public conversation of mass society which transforms the "regulative ideal" of democracy into a "constitutional fiction".

Benhabib shows that although the principle of the "sovereign deliberative body" of citizens (in other words public participation and discourse) is and always has been problematic the "phantom" of the public will not go away. She explains that the public is not only a "sociological quantity" but a "norm" and a "principle". In the name of the public we can criticise the fairness of outcomes, we can decide whether decisions are just, and whether deliberations are wise. She says that we require a "transgression" (by forcing so-called private issues into the public) and "remapping" (I think these two terms correspond with my terms of transformation and reconstruction) of the public and the boundaries associated with it. The challenges to democratic politics under conditions of social complexity also require "innovative institutional designs". It is necessary to revitalise the public sphere and to make it possible for citizens to put forth their "social imaginary", their utopian hopes for the future. The public sphere has a crucial role in moulding the identities of anonymous citizens in nation-states facing complex social relations.

It is essential that the public sphere in a democratic community allows equal access to all groups and individuals within civil society to represent themselves in public. By entering the public and representing itself to others every social, cultural and political group can make itself present in the public. This process of self-representation and articulation in the public is a way through which the "civic imagination" can be cultivated. To present reasons in public forces one to think from the "standpoint" of others to whom one is trying to tell your *story*, presenting your point of view. Benhabib identifies the ability to take the "standpoint" of others and to see the world from their perspective as a crucial "civic virtue". (The ability to see things from other points of view is especially important in a diverse society like our own.)

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296 (1996) *The reluctant modernism of Hannah Arendt* 205.

Benhabib[297] compares the public sphere in a democratic community with the pupil of the eye: When its vision is murky, cloudy or hindered, the sense of direction of the political is also impaired.

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[297] (1996) *The reluctant modernism of Hannah Arendt* 211.

... conclusion

democratic landscapes

In this part I have discussed various visions of public space. I repeat that the reason for this discussion is because public space is a significant feature of the ethical intersection between public space, equality and justice that is integral to an ethical interpretation of equality. At this stage we should recall the image of landscape that presents a horizon for the various visions. I justified the use of landscape as an image in the Introduction, "landscapes of democracy, equality and justice". I said that my main reason for using landscape as image is the varied nuances of interpretation and differences of emphasis associated with landscape(s). I argue that our own conception of democracy, the political and the public should be informed and greatly influenced by such a recognition and awareness of varied nuances of interpretation and differences. In other words we should not strive for a rigid concept of democracy, the political and public spaces. I said that an ethical interpretation of equality insists on such an open and unfixed vision of public space where difference is accepted and not reduced or violated by putting it in an instrumental procedure or test. I focused on the possibilities for the reconstruction and transformation of public spaces and turned to the various visions for guidance. In the next part ("... perspectives on equality") I shall argue that the right to equality must be interpreted in a "web of human relationships" and that ethical interpretation cannot be separated from the reconstruction and transformation of public space in South African society.

I want to expose the relationship (together with the ethical intersection between public space, equality and justice) between democracy, politics, public space, equality, interpretation and justice. A certain conception of democracy or politics will influence the visions of public space and vice versa. These conceptions and visions will again influence our approach to and understanding of interpretation, equality and justice.

Our visions of political reconstruction and transformation are interconnected with legal

transformation. As the political landscape transforms, the legal system undergoes parallel transformation.

A few years ago a film trilogy, *Three colours Blue*, *White* and *Red*, appeared on our movie circuit. Each of these movies symbolised a colour of the French flag, and each one of them represented one of the three cries of the French Revolution, namely, liberty, equality and community (fraternity).[298] The theme of *Blue* was liberty, *White,* equality and *Red* community. In the third of the trilogy, *Red*, all the characters of the previous films come together at the end of the movie after they have been rescued from an accident on a ferry. Various themes can be drawn from these films. One possibility is that the achievement of liberty and equality is impossible without the acknowledgement of the third cry of the revolution, community. It is through our involvement in the community and our relationships with others that liberty and equality can be achieved.

The impossibility of community manifests itself simultaneously with the affirmation of its necessity. The moment or the event where the people in the film are brought together in some sort of community is an event of trauma. It is an accident. This theme links republican ideas of public participation and community life to deconstruction's insights with regard to the event, violence, trauma and mourning. I shall discuss aspects of deconstruction and deconstructive accounts of community in Part 2.

The fact that the three films take place in three different countries with different political and public landscapes is not incidental. *Blue,* with the theme of freedom, takes place in Paris. *White*, where the theme is equality, takes place in Paris and in Poland. *Red* is about the story of a friendship that develops in Geneva. Kieslowski[299] said in an interview that he especially wanted to focus on the theme of community in

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298 In the Introduction to the thesis I explained the use of "community" instead of "fraternity". I do not believe that these two concepts are synonyms. Particularly the use of "fraternity" during the French Revolution probably meant exactly that, brotherhood. I believe that the call for fraternity can be rephrased in the concept of "community". It should be self-evident that the concept of "community" that I rely on is a heterogeneous one.

299 Kieslowski is a well known Polish director. He died shortly after the making of this trilogy.

Switzerland because of the total absence of community in Switzerland. It is interesting that the place where the accident, "the event", occurs, is the English channel. The passengers leave the European continent, on their way to Britain. They are removed from their home countries, their own private spheres and their roots when the event of community happens, without them knowing it. The viewer notices the connections between the stricken passengers. Can it be that community takes place precisely when we are not aware of it? Community in this understanding is not something that we can positively create, but that will happen. Community is made possible through the event, the accident, the unpredictable and the unexpected. I shall pick up on this view when I discuss aspects of deconstruction in Part 2. For Derrida, for example, a condition of the event of community and unity is disunity. This view has major implications for the idea of reconstructing and transforming the public sphere, community life, democracy and justice. It highlights the necessity of an anti-essentialist approach (we should recall Mouffe's radical democratic vision here) to public spaces, community, democracy and justice.

I introduced this part with a discussion of Cornell's understanding of *transformation*. Transformation in her view means the transformation of a system on one level, while on a deeper level it means the changing of individuals so that a system may transform. Cornell distinguishes transformation from evolution, the latter being mere institutional change. I followed the second meaning of transformation, as distinguished from evolution, for the reconstruction and transformation of public space that I envisage. I then referred to Arendt's view of judgement as a form of political action in modern times where public spaces are not situated in particular geographical spaces. I compared Cornell's understanding of transformation and Arendt's view of judgement as a form of action with Kronman's view of *judgement* as an act of deliberating and reflecting on various ways of being. Kronman's view of judgement encompass the notion of transformation because it acknowledges various ways of being.

I argued that the process of reconstruction and transformation should also embrace the *imagination* in its vision and turned to Nussbaum's view concerning the "literary

imagination in public life". The views of Cornell, Arendt, Kronman and Nussbaum were an initiation (background or framework) for the further discussions of visions of public space. I argue that South African public space needs to be reconstructed and transformed in a way that entails "real" change (transformation) and not mere institutional change (evolution). I believe that visions that are imaginative (for example to take the concrete life stories of individuals into account) will be more appropriate to promote reconciliation and transformation than mere instrumental and institutional processes.

In Part 3 I shall argue that the TRC process emphasised the significance of the imagination by recognising stories and memories. Through the stories we tell we remember the past by imagining it.

I used the *liberal* vision to set the scene for the discussion on the various visions of public space and highlighted the liberal commitment to neutrality. I mentioned the liberal attempts of Rawls, Dworkin and Ackerman to "reconstruct" politics and to provide some kind of normative consideration in the public realm. I do not think that any of them succeeded in breaking with either liberal or positivist thought. For the reconstruction and transformation of South African public spaces I find Rawls' reliance on an "original position" and "veil of ignorance", Dworkin's theory of "constructive interpretation" and Ackerman's "conversational constraint" inadequate. I repeated Sandel's argument that liberal politics is the reason for "democracy's discontent" and for the impoverishment of politics and public life.

I raised two critiques on the liberal vision from a gender perspective, namely the voice of *Antigone* reclaiming "feminine" values and the vision of an *"ethics of care"*. These critiques affirmed to a certain extent why the liberal visions are not suited for my vision of a reconstructive and transforming space. The liberal vision's reliance on procedures, neutrality and justice is not sensitive to normative considerations and different perspectives coming from other voices (like the feminine) and from an ethics of care. The liberal vision is not part of the ethical intersection between public space, equality

and justice that is integral to an ethical interpretation of equality, because the liberal vision of public space is in contrast with the whole notion of an ethical interpretation of equality. An ethical interpretation of equality insists on taking account of difference, plurality and otherness. In other words the focus on particular contexts is of great importance in an ethical interpretation of equality in contrast with the liberal vision's assumptions of *neutrality* and universality.

I then turned to Habermas' proposal of his theory of *discourse ethics* or *communicative theory* as an alternative to both the liberal and the civic republican/communitarian models of politics and public space. I expressed discomfort with his strong belief in *rationality* and the possibility of rational procedure in his vision of public space. I noted Benhabib's and Fraser's critique on Habermas from a gender perspective. Although Habermas realises the need of the political and of a concept of public space he approaches these concepts in a modernist way and accepts the basic liberal assumptions of neutrality and universality.

I then put forward Mouffe's vision of *"radical democracy"* and her insistence on anti-essentialism and antagonism. Her view that we cannot totally reject universalism but must make it more particular is of great significance. Mouffe's view provides major possibilities for the reconstruction and transformation of our vision of public space. I am critical of her claim to neutrality in regard to sex/gender issues. In this regard I contrasted the views of Cornell and Nedelsky, who both support an affirmation of "feminine" *difference* in their own way, with Mouffe's views.

Finally, I discussed Hannah Arendt's vision of political *action and speech* as it is intertwined with her vision of public space. Arendt's distinction between labour, work and action and their correlation with the private and public spheres provide a structure (framework) for reconstruction and transformation. Her account of the "rise of the social" gives us a starting point for reconstruction and transformation. I argue that during the years of apartheid white South Africa had virtually no experience of action and speech according to Arendt's understanding. The state of politics during those years was akin

to totalitarianism. Most people acted with a "herd-like mentality" and were drawn down by the necessity of the life-processes (labour) and the materialism (tangibility) of work. This would at least be a reflection of the experiences of (most) white South Africans. By contrast a vast number of black South Africans were involved in a political struggle that reflected moments of action and speech. My concern is that the political enthusiasm that characterised resistance politics of the past might have disappeared in the process of institutionalised politics.

I commenced this part by supporting a vision of *transformation* that is distinguished from *evolution*. I believe that Arendt's distinction between *labour*, *work* and *action* in their relation to the private and the public, provides the best framework for the distinction between transformation and evolution.[300] *Evolution* that involves a mere change of the system is related to the private sphere and the human conditions of *labour* and *work*. Evolution takes place in nature, in the life process (labour). Evolution also takes place in the human condition of *work*. Transformation, that entails the *transformation of individuals*, depends on the human condition of *action and speech* in the public realm. The transformation of politics and of a public vision can only take place in circumstances where human plurality, unpredictability and spontaneity can step forward. In my view, Hannah Arendt's vision still provides the best framework for the reconstruction and transformation of our own visions of public space.

In Part 3, where I identify the TRC as a manifestation of the ethical intersection between public space, equality and justice, I shall argue that the TRC as a public space contributed to the transformation, and not mere evolution, of South African public space. Mere evolution in this regard would have meant an institutional process that was aimed at dealing with the past by finding truth for record purposes, or by a process of blanket amnesty. The TRC focused on the finding of truth through the telling of stories by the victims and perpetrators in order to transform individuals by restoring their humanity and

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[300] Off course these distinctions are not clear cut. In present times the work place has become a public space where contentious political issues are raised. Although Arendt's distinctions can be and must be problematised, I nevertheless follow her distinction as a framework for my argument.

human dignity.

Our conceptions of public space must be reinterpreted. Arendt's understanding of public and private does not necessarily refer to specific places, such as the market place versus the private home. The division is fluid and in a constant state of flux. That which is private in one place may be public in another, and that which is private today may become public tomorrow. I have argued that liberal (modern) politics and liberal legal theory contributed to the "decline of the public sphere", public participation and community life. This "decline" must be addressed, but a type of communitarian approach which aims at a single substantive "common good" is not the solution. Through its adherence to human plurality, unpredictability and spontaneity, Arendt's "public" accommodates the fluidity and fluctuations.

The affirmation of the "feminine" in the public sphere may be a way of disrupting the traditional vision as well as the traditional content of the public realm. Arendt's descriptions of Rahel Varnhagen's salons in Berlin draw our attention to the transforming possibilities of public spheres where the distinctions between public, private and intimate are not rigid but in a constant state of flux. Listening to the voice of Antigone helps us to displace and disrupt the male model of public space that is accepted as norm. Expanding the current concept of justice with a focus on care can enhance normative considerations and also judgement. Accepting that this is "a doubly prized world" can help feminists and all those who want to transform sex and gender identities to look further than stereotyped and essentialist affirmations of "woman". Addressing the singularity of woman in our concept of citizenship can enrich our vision of public life and political participation.

This part was concluded with Iris Young's argument for a heterogeneous public space and Benhabib's contention that the public, although it might have died, keeps coming back as a "phantom".

I conclude with two South African examples which in my view could contribute to the

reconstruction and transformation of public space. The first is an address given by Judge Mahomed Navsa[301] at the 21st anniversary of the law faculty of the University of the Western Cape. The judge argued that there are times when judges must be heard beyond the courtroom to "nurture" public confidence in the law.

> We are in the throes of transformation and it is uncomfortable. ... Haunted as we are by our terrible past, our public debates about court decisions are often informed by race, emotion and politics. ... The truth is that we have not yet, as a nation, fully developed the confidence to apply the constitution properly. Our new constitutional jurisprudence is still in its infancy. We are engaging in debates that other nations have experienced and conducted for decades. In respect of some questions there appear to be no complete solutions. Traditionally judges avoided engaging in public debate. They talk through their judgements and occasionally academic writings. The rationale for this approach is that the dignity, independence and impartiality of their office demand that they avoid public controversy. But judges, both here and abroad have recognised that, where the judiciary is in a position because of its experience and particular skills to enhance the public's understanding of the administration of justice and its place in the constitutional order, it should do so. ... The judiciary must be more public-friendly. It must promptly release into the public domain full reasons for decisions. We should, all of us, nurture in our public a proper and informed understanding of the importance of an independent and strong judiciary ... We should have confidence that an informed public will ensure that the independence and strength of the judiciary is maintained rather than constantly weakened. We should take heed of justifiable public criticism of the judiciary.[302]

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301 Judge of the High Court of South Africa.

302 "Why justice must be more people-friendly" (1999) *The Sunday Independent* September 5.

The other event which contributes to public dialogue and public participation is the centenary of the Anglo-Boer South African War.[303] The celebratory response to this event has, surprisingly, become an important public space for the discussion of our country's past. The way in which it has managed to draw the previously ignored into the process represents a significant step on our road to transformation. Groups and individuals which have traditionally been excluded and marginalised from the War stories, for example, blacks and women, have been included in the retelling of stories. Such a disclosure of humans in public spaces through the telling of stories contributes to the reconstruction and transformation of our public spaces in an imaginative way.

> Hoe onthou 'n land sy geskiedenis? Hoe probeer 'n mens iets begryp van 'n oorlog so ingrypend soos dié wat vanaf 10 Oktober 1899 tot 31 Mei 1902 tussen die Boererepublieke en Brittanje gewoed het en wat veel verder as die twee vegtende groepe mans op die slagveld gestrek het? Een van die betroubaarste maniere is om *stories* daaroor te vertel.[304]

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303 This war was fought between the two Boer republics (Zuid-Afrikaansche Republiek and the Republic of the Orange Free State), and Britain from 1899-1902.

304 Ferreira (ed) (1998) *Boereoorlogstories: 34 verhale oor die oorlog van 1899-1902* (*34 stories on the Boer war 1899-1902*)1. (How is the memory of a country preserved? How can one attempt to comprehend a war such as the one that was fought between 11 October 1899 and 31 May 1902 between the Boer republics and Britain, that exceeded the two groups of fighting men on the battle fields. One of the most reliable ways is to tell *stories* about it.) (Own translation)

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... perspectives on equality

Introduction

In this part I explore some perspectives that can provide us with an horizon in the formulation of an ethical interpretation of equality. In the previous part, I argued that the reconstruction and transformation of public space is a precondition for such an ethical

interpretation. Following Arendt, I emphasised the significance of human disclosure through story-telling (action and speech) for reconstruction and transformation. In this part, I focus on equality. I have already mentioned the significance of the intersection between public space, equality and justice for an ethical interpretation of equality. Because of this intersection, the approach which I follow with regard to equality is similar to the visions of public space that I support. My interpretation of the Truth and Reconciliation Commission, which I explain in Part 3, will again be similar to my approach to public space and equality.

A significant feature of the reconstruction and transformation of public space is the room it can create for the telling of stories and for the acceptance, even celebration, of human plurality, differences and heterogeneity. (The event of the TRC created such a space for the telling of stories and celebration of difference). This feature of a reconstructed and transformed public space is essential for an ethical interpretation of equality. An ethical interpretation of equality is an interpretation that "radically" acknowledges the inescapable fact of *difference*. An ethical interpretation of equality does not seek to "accommodate" difference. The ethical dimension lies precisely in the understanding that such an accommodation is impossible. Difference can not be defined and enclosed in a definition or provided for in a specific test. I argue that "substantive" equality, despite the fact that it goes a step further than "formal" equality, disregards the ethical dimension of equality and difference. Through its assumptions of generality and universality, any institutionalised approach to equality aimed at defining difference or providing for difference (for example, the *Harksen*[1] test), will fail to prevent the exclusion or the reduction of difference.

An ethical approach to equality needs a "slowness", a "strategy of delay", a careful reading. I understand "ethical" as an openness towards difference and the acceptance of the impossibility of ever fully knowing each other's differences. The ethical imperative demands us to seek the less "violent", in other words exclusionary or reductionist, interpretation of equality, in theory and in practice. The fact that we can

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1 *Harksen v Lane* 1997 (11) BCLR 1489 (CC).

never reach perfect equality does not mean that we should abandon the project. However, we should realise the limitations of seeking equality in the *economy* of daily life. An ethical understanding of equality demands a double-handed approach, seeking ethical interpretation within the system of rights and law and at the same time realising the impossibility of such an equality. The ethical moment lies outside our current system, beyond our daily economies. The ethical is that which does not exist within the system, that which is almost impossible to describe. I am interested to see whether one can catch glimpses of these ethical moments[2] in an ethical interpretation of equality.

An ethical perspective on equality realises the shortcomings of any attempt to understand or identify difference, and accordingly to address it. This realisation, however, does not imply a nihilistic acceptance of the present situation which entails that we must revert to the neutral assumption of sameness. An ethical perspective on equality insists that we go to trouble with difference, that we seek for answers, that we believe in the ideal of equality and the promise of justice. It forces us to go beyond conventional methods of enquiring and to disregard the limits of present systems. The vision of public space (and community) that I support, is one where human plurality, differences and heterogeneity can appear in a spontaneous and unpredicted manner. The concepts of community and citizenship must continually escape definition and closure to ensure the openness of public spaces. Of course, in present systems – our symbolic order – these visions and concepts are enclosed in definitions. Quite often they become reified. We must expose, undermine and disrupt this reification exactly for what it is, namely *man* made things. Aspects of the philosophy of deconstruction contain ideas for such a disruption of all present *man* made systems. Deconstruction considers *justice* as the limit to all present systems. An ethical interpretation of equality is situated at the intersection between public space (political theory, democracy), equality (institutionalised, constitutionalised rights) and justice (memory, forgiveness, promises, truth, reconciliation) and is inspired by the philosophy of deconstruction.

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2 The focus on the TRC in Part 3 "... landscapes of justice" has the same aim, to understand and read - even though pure, unconditional forgiveness is impossible - the TRC as a political, public and ethical event and look for possible traces or spectres of the forgiveness and truth which only exist in the beyond.

Although I shall address justice in Part 3, "... landscapes of justice", the perspectives on deconstruction, equality and feminism are all related to the ideal of justice. The spectre of justice is present in the following perspectives.

I focus on various perspectives that in my view contribute to an ethical interpretation of equality. The first section focuses on perspectives of deconstruction that are significant for an ethical perspective on interpretation and equality and therefore significant for the ideal of justice. I start of as an introduction with Drucilla Cornell's[3] renaming of deconstruction as the philosophy of the limit. I think that the renaming of deconstruction as the philosophy of the limit clarifies the value of deconstruction for an ethical interpretation of equality in that it shows the limit of present systems to fully achieve justice or provide for equality. I then turn to Samuel Critchley's[4] and Danie Goosen's[5] comments on Jacques Derrida's[6] use of deconstruction, his focus on the "event" and the term central to deconstruction, *différance*. I also highlight the "ethical"[7] which is inherent to deconstruction. (The purpose of discussing these authors is to give a brief theoretical explanation on deconstruction because I experience deconstruction as the inspirational source for ethical interpretation).

I also focus on the dialogue[8] and difference between deconstruction and hermeneutics because the various visions of public space, politics, community, legal systems, the law

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3 Cornell (1992) *The philosophy of the limit.*

4 Critchley (1992) *The ethics of deconstruction.*

5 Goosen "Verlies, rou en affirmasie. Dekonstruksie en die gebeure" (1998) 1 *fragmente* 54-79. See also Goosen and Van der Walt "Die tragiese, die onmoontlike en die demokrasie. 'n Onderhoud met Jacques Derrida" (1999) 3 *fragmente* 35-61.

6 See generally (1974) *Of grammatology*; (1978) *Writing and difference*; (1982) *Margins of philosophy*; "Choreographies" (1982) 12 *Diacrits* 76; (1995) *Points ... Interviews, 1974-1994*; (1995) *Archive fever. A Freudian impression*; (1994) *Spectres of Marx*; (1997) *The politics of friendship*; "The deconstruction of actuality. An interview with Jacques Derrida" (1994) 68 *Radical philosophy* 28-41.

7 Critchley (1992) *The ethics of deconstruction*; Van Hauten en Ijsseling (red) (1992) *Deconstructie en ethiek.*

8 Widdershoven & De Boer (red) (1990) *Hermeneutiek in discussie.*

and justice can be situated within the hermeneutics/deconstruction debate. The dialogue between a hermeneutical interpretation and a deconstructive reading is therefore relevant to the reconstruction and transformation of public space, equality, justice and "ethical" interpretation. I argue that there is no interpretation that is either purely hermeneutical or deconstructive. An "ethical" interpretation of equality requires that the tension between hermeneutics and deconstruction is preserved. I conclude the section on deconstruction by highlighting its significance for legal interpretation and for an ethical interpretation of equality in particular. With reference to Derrida's[9] argument on "justice" and Drucilla Cornell's[10] understanding of legal interpretation as "recollective imagination", I show how a deconstructive perspective can influence interpretation and legal transformation in general, and an ethical interpretation of equality in particular.

In the next section I consider certain perspectives on rights and interpretation. I discuss the perspectives of Jantje Van Den Oord,[11] Martha Minow,[12] Jennifer Nedelsky,[13] and Frank Michelman[14] on rights and interpretation. Their arguments can greatly contribute to our understanding of and approach to interpretation and equality. Although their arguments are by no means similar there are significant points of connection between the various perspectives that I shall show. In my view these authors reflect aspects of deconstructive thought. I shall identify some deconstructive moments in their theories.

I start of with Jantje van den Oord's deconstructive approach to equality. She identifies

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9 "Force of law: The mystical foundations of authority" in Cornell (ed) (1992) *Deconstruction and the possibility of justice* 29-67.

10 (1992) *The philosophy of the limit* and (1993) *Transformations.*

11 (1994) *Verdaagde Rechten.*

12 (1990) *Making all the difference*; Minow & Spelman "In context" (1990) 63 *Southern California Law Review* 1597-1652.

13 "Reconceiving autonomy: sources, thoughts and possibilities" (1989) 1 *Yale Journal of Law and Feminism* 7-36; "Law, boundaries and the bounded self" (1990) *Representations* 162-187; "Reconceiving rights as relationships" (1993) 1 *Review of Constitutional Studies* 1-17.

14 "Law's republic" (1988) 97 *The Yale Law Journal* 1493-1537. See also "The subject of liberalism" (1994) 46 *Stanford Law Review* 1807-1833.

the distinction between the inside and the outside and applies it to equality and difference. Using the same method she argues that equality should be approached as a social right. Martha Minow supplements Van den Oord's argument by focusing on differences. She argues that we should consider the relationship in which differences are made and that we should especially be aware of the various power relations. Minow identifies three approaches that are followed with regard to difference, namely the "abnormal-persons" approach, "rights analysis", and the "social-relations" approach. She supports the last-mentioned which is attentive of deconstructive thought.

Jennifer Nedelsky takes the argument a step further and argues that we should understand and structure rights in relationships and not as barriers or limits or boundaries as the liberal approach does. Her approach to the interpretation and structuring of rights flows from her view of the experience of the "self". She reflects on the experience of "self" and rejects the liberal story of the autonomous isolated individual as a myth. Her rejection of the fully present subject (autonomous, isolated individual) is similar to a deconstructive approach of a fragmentary subject. For her, relationships are the source of autonomy. The final perspective is that of Frank Michelman. In his analysis of a case decided by the US Supreme Court, *Bowers v Hardwick,*[15] he argues for a "republican constitutionalism". He says that in our interpretation of constitutional provisions, we need to take note of the public sphere, public discourse and public interest. He describes another way of understanding privacy. I argue that Michelman's perspective ties the other perspectives (Van den Oord's description of the "inside" and the "outside"; Minow's focus on difference and Nedelsky's emphasis on relationships) together by bringing public space explicitly into the picture. By focusing on public space "republican constitutionalism" crosses the intersection between public space, equality and justice. In think Michelman's understanding of "republican" can be regarded as "deconstructive". He is critical of the liberal model of politics and the law, but does not fully embrace republican theory as it is traditionally understood. He gives new content to republican theory by exposing some of the misunderstandings of the past and reformulating it.

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[15] 478 US 186 (1986).

The third section consists of a few South African perspectives on equality. I start of by referring to an early article by Albertyn and Kentridge[16] on the equality clause in the interim constitution. I discuss this article because in my view it provided a starting point and reference point for the interpretation of the constitutional protection of equality. In my view the Constitutional Court equality decisions were until now greatly influenced by the Albertyn and Kentridge equality analysis in deciding equality cases. I briefly refer to an address that was delivered by Canadian judge L'Heureux-Dube[17] where she translated the question of equality into an issue of language and explained the Canadian approach of substantive equality. I discuss the most prominent equality cases,[18] in my view, which were decided by our courts, and reflect on the various judgments. I apply Pierre Schlagg's[19] distinction between an "analytical" and an "instrumental" aesthetic, to the Constitutional Court's approach to equality. I also consider to what extent the current (absence of) public space influences the decisions of the Constitutional Court.

Finally, I turn to two feminist perspectives on equality. I am concerned in this section as to which feminist perspective will be suitable for the South African context of reconstruction and transformation. I briefly refer to Julia Kristeva's[20] early article on the state of feminism in Europe during the seventies and eighties and compare it to South Africa. I then discuss Drucilla Cornell's[21] "ethical" feminism and its implications for an

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16 "Introducing the right to equality in the Interim Constitution" (1994) 10 *South African Journal on Human Rights* 149-178.

17 L'Heureux-Dube "Making a difference: The pursuit of equality and a compassionate justice" (1997) 13 *South African Journal on Human Rights* 335-353.

18 *President of the Republic of South-Africa and another v Hugo* 1997 (6) BCLR 708 (CC) *Fraser v Children's Court of Pretoria North* 1997 (2) BCLR 153 (CC); *Harksen v Lane* 1997 (11) BCLR 1489 (CC);*City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC).

19 "Rights in the postmodern condition" in Sarat & Kearns (eds) (1997) *Legal rights. Historical and philosophical perspectives* 263-304.

20 "Women's time" in Keohane et al (1981) *Feminist theory* 31-53.

21 "The doubly-prized world: myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 644-699; (1991) *Beyond accommodation*; (1992) *The philosophy of the limit*; (1993) *Transformations*; (1995) *The imaginary domain. Abortion, pornography and sexual harassment.*

"ethical" interpretation of equality and Christine Littleton's[22] review of the practical approaches to equality and difference. Cornell disrupts the traditional approach to "difference" because she writes from a "deconstructive" angle. She echoes Cassandra's criticism on Aeneas that it is *better to be loved by Dido than to found the Roman empire.* I support her vision of ethical feminism in my vision of public space as well as in the ethical interpretation of equality. Christine Littleton[23] distinguishes a symmetrical and asymmetrical approach to equality. She favours an asymmetrical approach of "acceptance". Littleton uses the very important term, "phallocentrism", which includes not only biological maleness but also "cultural" maleness. Her critique on "phallocentrism" is similar to Antigone's[24] voice against her sister Ismene, who would not dare to oppose the powers that be. The feminist arguments of both Cornell and Littleton contribute to an "ethical" interpretation of equality because they realise the difficulties of difference.

As a prelude to the various perspectives on deconstruction, I return to Martha Nussbaum's[25] vision of the literary imagination in public life,[26] which already provided an horizon for the earlier part on visions of public space. This time, I want to consider her call for "poets as judges", because poets have a greater capacity to consider a person's concrete life story. I address this view because, like the call for the "literary imagination in public life", I think the call for "poets as judges" must be repeated and listened to in the South African context.

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22 "Reconstructing sexual equality" (1987) 75 *California Law Review* 1279 and in Smith (ed) (1993) *Feminist jurisprudence* 110-135.

23 "Reconstructing sexual equality" in Smith (ed) (1993) *Feminist jurisprudence* 110-135.

24 I discussed this in Part 1 "... visions of public space".

25 I discussed her call for the literary imagination in public life in Part 1.

26 See also Gates (1997) *Cultural and literary critiques of the concepts of race* and Morrison (1993) *Playing in the dark: Whiteness and the literary imagination.*

"*Poets as judges*"

> Each one of those persons and each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about human passion. Each of those stories involves a man, a woman, children, families, work, lives.[27]

Nussbaum[28] argues for "poets as judges" because she believes that poets are better equipped for the task of judging than judges. The poet-judge judges according to normative considerations that differ from conventional judging models. The poet will be a good judge because she will be aware of fairness and of history. Nussbaum's view of judgement and the literary imagination is based on the Aristotelian notion of practical wisdom and practical judgement. Judgement should be made with an awareness of concrete situations. She refers to Whitman's[29] argument that poets will be better judges because they would take greater notice of the concrete life circumstances of people and would not rely only on abstract principles. A judge, like the poet, who takes notice of people's specific contexts and the complexities of human life, has a greater affinity for fairness and for the influence of history. To be just to a person one should notice every detail of her life. With reference to three court cases, Nussbaum shows the role that the literary imagination, as an approach that focuses on the concrete context, can and should play in adjudication. The imagination, sympathy and humanity are essential qualities for a judge, and generally for each citizen and participant in public life.

Nussbaum's first case is *Hudson v Palmer.*[30] Palmer was a prisoner who served a

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27 Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) 62 *The University of Chicago Law Review* 1477-1519. See also Nussbaum (1995) *Poetic justice. The literary imagination in public life.*

28 Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) 62 *The University of Chicago Law Review* 1477-1519.

29 Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) 62 *The University of Chicago Law Review* 1478.

30 468 US 517 (1984).

sentence for forgery, grand larceny and bank robbery. He brought the case against Hudson, a police officer who had searched his cell and damaged some of his goods. Palmer alleged that the search was done in order to harass and humiliate him. He argued that Hudson intentionally destroyed some of his legitimate personal property and that this amounted to a deprivation of property without due process of law. The majority of the court decided that a prisoner does not have "a reasonable expectation of privacy in his prison cell"[31] and that he is not entitled to protection against unreasonable searches. Justice Stevens, for the minority, did not agree with the majority view. He argued that maliciously motivated searches and intentional harassment of prisoners "cannot be tolerated by a civilized society".[32] Nussbaum argues that his decision, although not literary in the sense of being "stylistically impressive", embodies some of the general characteristics of her vision of the"poet-judge". The judge confronts and recognises Palmer's individuality and concrete context. He shows respect towards the prisoner's humanity and dignity.

> Rather than treating the prisoner simply as a body to be managed by institutional rules, he treats him as a citizen with rights and with a dignity that calls for respect.[33]

The second case is *Carr v Allison Gas Turbine Division, General Motors Corporation.*[34] Mary Carr was the first woman who worked in the tinsmith shop of the gas turbine division of General Motors. She resigned after 5 years, as a result of unbearable sexual harassment. She sued General Motors for compensation. On appeal, Justice Posner decided in Carr's favour. Nussbaum points out that the judge gave great attention to the

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31 Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) 62 *The University of Chicago Law Review* 1497; 468 US 517 (1984) at 519.

32 Nussbaum "Poets as judges: judicial rhetoric and the literary imagination"(1995) 62 *The University of Chicago Law Review* 1497; 468 US 517 (1984) at 528.

33 Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) 62 *The University of Chicago Law Review* 1500.

34 Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) 62 *The University of Chicago Law Review* 1502; 32 F3d 1007 (7th Cir 1994).

concrete circumstances of the plaintiff. However, the appellate court found errors in the findings of fact of the lower court. Nussbaum comments as follows:

> When we speak of "facts" in this case, we must be aware that these are not "facts" as distinct from values and evaluation. There is no dispute about the incidents that occurred in the tinsmith's shop. What is in dispute is their human meaning - how intimidating they were, how adversely they affected the climate in which Carr worked. The relevant facts, then, are human facts of the sort the literary judge is well equipped to ascertain.[35]

Justice Posner observed that there is a distinction between "merely vulgar and mildly offensive" and "deeply offensive and sexually harassing" behaviour. He drew the distinction to arrive at a better understanding of the effect of the behaviour on Carr. Nussbaum notes that without having disregarded the facts and the law, Judge Posner acted imaginatively and sympathetically.

In *Bowers v Hardwick*,[36] Hardwick was arrested for violating Georgia's sodomy law. Hardwick brought a suite to invalidate the sodomy law. The court had to decide whether the alleged right to sodomy was protected by the constitution. The court came to the conclusion that homosexuals had no constitutional right to engage in sodomy.[37] Nussbaum asks how a literary approach would have influenced the outcome of the decision. She describes the judge's language as "distancing language", and how it illustrates the refusal to acknowledge the humanity that is hurt and infringed by the law in question. The judge kept the human story at a distance and described the events as if they did not really happen to a person, or could ever happen. The court clearly

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35 Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) 62 *The University of Chicago Law Review* 1503.

36 478 US 186 (1986).

37 Recently the South African Constitutional Court decided that sodomy is not a crime under South African law. See *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC).

followed a "non-narrative" approach. The effect was to distance the court from the person's real context. Hardwick's humanity was denied and he was described as a hardened criminal.

Nussbaum admits that a judge is always restricted by the text of a statute, by precedent and by history. The literary imagination cannot have an influence on every case, while the law should be applied in every case.[38] However, the literary imagination can play a role in many cases. For example, In *Hudson*, Palmer's concrete context was acknowledged in the literary approach; In *Carr* the literary approach was applied to determine the gravity of the harassment; and in *Hardwick* the judge could have acquired a better vision of the situation and the role of fundamental freedoms in society if the case was approached with literary imagination and the concrete context had been acknowledged.

> In order to be fully rational a judge must be capable of literary imagination and sympathy. She must educate not only her technical capacities but also her capacity for humanity. This means, I think, that literary art is an essential part of the formation of the judge - and, more generally, of the formation of citizenship and public life.[39]

I find Nussbaum's vision of "poets as judges" very significant for my argument of an ethical interpretation of equality. I have already mentioned the importance of judgement in Part 1. I referred to Hannah Arendt's work on judgement where she attempted to describe judgement as a form of action in contemporary societies. Judgement is not

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38 The tension between freedom and constraint in adjudication and the reality of legal indeterminacy have been focus points for Critical Legal Scholars. Critical Legal Scholar, Peter Gabel ("The phenomenology of rights-consciousness and the pact of the withdrawn selves" (1984) 62 *Texas Law Review* 1563-1599; "Reification in legal reasoning" (1980) 3 *Research in Law and Sociology* 17-43) refers to "reification" as the process by which traditional and formalist judges seek to deny legal indeterminacy and seek to give rights frozen and static meanings. In reifying rights judges do not focus on the specific context or relationship in which a right becomes significant but adhere only to the same static interpretations.

39 Nussbaum "Poets as judges: judicial rhetoric and the literary imagination" (1995) 62 *The University of Chicago Law Review* 1519.

only for judges, each and every individual is confronted with judgement in their daily lives. However, I want to emphasise the importance of judicial judgements (decisions) and how it can contribute to the process of reconstruction and transformation. We need our judges when they make decisions in regard to equality (but also in general) to act as "poet-judges" and take notice of the concrete circumstances of a person in order to show greater humanity and understanding, in order to give a better judgement. I want to repeat the significance of judgement for the Truth Commission that I have already indicated in Part 1. The commissioners, the researchers, the judges on the Amnesty Committee, and also the public were and are all engaged in judging. The necessity to act as "poet-judges" is of particular importance in the context of the TRC. Nussbaum's vision of the "poet-judge" also contributes to an ethical interpretation of equality because the "poet-judge" will take care not to exclude or reduce difference and otherness. I think that Nussbaum's "poet-judge" can also benefit from certain perspectives on deconstruction.

Towards an "ethical" reading: Perspectives on deconstruction

In this section I discuss aspects of the philosophy of deconstruction that serve as an inspiration for my main argument in this text, namely an ethical interpretation of equality. I am by no means attempting to write in an authoritative voice on deconstruction or to cover even the most important texts. In highlighting the aspects that I consider to be the most important for my argument of ethical interpretation I rely on the voices of a few authors and commentators. I do believe that present (modern) conceptions of public space, politics, the law, justice, legal interpretation and many others can be greatly challenged and undermined and maybe even altered by taking note of the philosophy of deconstruction. What I am doing in this section is to explain, firstly, for myself and secondly, for the reader, the aspects of deconstruction that are relevant to my argument. I start off, as a means of an introduction to the philosophy of deconstruction, with Drucilla Cornell's renaming of deconstruction as the philosophy of the limit; her explanation of the "ethical" that is relevant for an ethical interpretation of equality and Cornell's and Derrida's deconstructive accounts of community.

"The philosophy of the limit", the "ethical" and the "ideal of community"

"The philosophy of the limit"

Drucilla Cornell[40] renames deconstruction as the "philosophy of the limit" in order to focus on what deconstruction "actually is" and to articulate its significance for law. In her view, deconstruction, reconceived as "the philosophy of the limit", exposes the

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[40] (1992) *The philosophy of the limit* 1.

"quasi-transcendental"[41] conditions of any system, including a legal system as a system. She relates the renaming to Charles Peirce's[42] notion of "secondness". "Secondness" indicates the impossibility of concepts to capture meaning. "Secondness, in other words, is what resists,"[43] implying that reality cannot be fully interpreted and the real can never be completely captured. Cornell observes that Derrida's engagement with "secondness" is foundational to his interest in the relationship to the *Other*. She argues that Derrida does not attempt to describe the limit as an "oppositional cut" between the inside and the outside because the force of *différance* prevents any system from encompassing its *Other* or its excess. "The *Other* for Derrida remains other to the system."[44]

Cornell gives two reasons for renaming deconstruction as the philosophy of the limit. The one is to emphasise the significance of understanding *justice* as the limit to any system of positive law. The understanding of justice as the limit to any system of positive law is very relevant in our present context of reconstruction and transformation where many of the problems of the past are exposed. We must realise that in order not to repeat the past, present (and future) systems must be left open and unfixed. In other words we must realise that it is impossible to capture justice within a system, justice is the limit to the system. An ethical interpretation of equality captures this insight that justice will never be completely achieved in any present system.

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41 Quasi-transcendental is an "in between" position that accepts the necessity of reaching beyond present systems without accepting the decided solution of a pure transcendental (metaphysical) point of view.

42 Charles Peirce was a prominent pragmatist philosopher. The American Realists (American scholars who reacted against legal formalism) were influenced by Peirce's pragmatism. See generally Holmes "The path of the law" (1897) 10 *Harvard Law Review* 457, reprint in (1997) 110 *Harvard Law Review* 991-1009; Grey "Holmes and legal pragmatism" (1989) 41 *Stanford Law Review* 787-863; Cohen "Transcendental nonsense and the functional approach" (1935) 35 *Columbia Law Review* 809-849; Hale "Coercion and distribution in a supposedly non-coercive state" (1923) 38 *Political Science Quarterly* 470-494; Fisher, Horwitz and Reed (1993) *American legal realism*; Singer "Legal realism now" (1988) 76 *California Law Review* 467-544.

43 Cornell (1992) *The philosophy of the limit* 1.

44 Cornell (1992) *The philosophy of the limit* 2.

Her other reason for renaming deconstruction as the philosophy of the limit is to change the terms of the debate between thinkers of "modernity" and "postmodernity". I have already mentioned, in Part 1, that we can not refer to the concepts "modern" and "postmodern" unproblematically. Cornell's discussion on this issue is important for the "in between" position that I subscribe to. This position does not literally mean that I take a position between two strands, merely that I do not necessarily subscribe to one specific strand. I understand Mouffe's position of being "beyond" modernity and postmodernity as along the same lines as Cornell's position. Cornell argues that the traditional understanding of the concept of postmodernity implies a progression from the "premodern" to the "modern" to the "postmodern", which presupposes a "teleological"[45] notion of historical development. She says that Habermas, for example, makes a distinction between the modern and the postmodern that is based on the "teleological" development from *mythos* to *logos*. This development implies a separation of the "Right" from the "Good". The move from *mythos* to *logos* is for Habermas the key aspect of modernity, where questions of justice are separated from questions of the "Good".

According to Cornell, Derrida and Levinas[46] both reject the belief that there exist normative criteria that can be used to distinguish historical periods from one another. This rejection does not mean that their work is a-historical, or that they deny transformation. They merely question a rigid historical periodisation. Cornell argues that in contrast with Habermas the above thinkers concentrate on the connections between the periods. Habermas needs to distinguish between periods in order to defend what is an "enlightened" political order. (I have discussed Habermas's understanding of modernism as the "unfinished project of modernity" in Part 1). Cornell identifies what she calls "an ethical configuration" of the writing of Derrida, Levinas and

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45 Teleological in this sense implies a development or progress aimed at a specific purpose from premodern to modern to postmodern.

46 (1982) *Ethics and infinity*; (1987) *Time and the other*; Llewelyn (1995) *The genealogy of ethics. Emmanuel Levinas*; Peperzak (1993) *To the other*; Critchley (1992) *The ethics of deconstruction. Derrida & Levinas;* and Visker (1999) *Truth and singularity. Taking Foucault into phenomenology.*

Lacan.[47] She notes that Derrida, Lacan and Levinas all reject the idea that the movement from *mythos* to *logos* can be completed. This does not mean that there is no content to the term "postmodern". Cornell suggests that "postmodern"[48] should be understood as an allegory and that it represents an ethical insistence on the limit to positive descriptions of the principles of modernity. This emphasis on the limit is crucial for legal transformation.

The "ethical" relationship

Cornell's distinction between morality and the ethical relationship is crucial for my own understanding of the "ethical". She explains:

> For my purposes, "morality" designates any attempt to spell out how one determines a "right way to behave", behavioural norms which, once determined, can be translated into a system of rules. The ethical relation, a term which I contrast with morality, focuses instead on the kind of person one must become in order to develop a nonviolative relationship to the other. The concern of the ethical relation, in other words, is a way of being in the world that spans divergent value systems and allows us to criticize the repressive aspects of competing moral systems.[49]

Cornell describes the "ethical relation" as a focus less on *following rules* than on the *development of an attitude of tenderness toward otherness.*[50] The significance of

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47 See generally Lacan (1977) *Écrits: A selection*; Mitchell & Rose (eds) (1985) *Feminine sexuality: Jacques Lacan and the ecole freudienne.*

48 See also in general Lyotard (1984) *The postmodern condition*; (1985) *Just gaming*; Jameson "The politics of theory: Ideological positions in the postmodernism debate" (1984) 33 *New German Critique* 53-66; Foster "(Post)Modern polemics" (1984) 33 *New German Critique* 67-78 ; Benhabib "Epistemologies of postmodernism" (1984) 33 *New German Critique* 103-126; Winter "Human values in a postmodern world" (1994) 6 *Yale Journal of Law & the Humanities* 233-248.

49 Cornell (1992) *The philosophy of the limit* 13.

50 See Cornell (1992) *The philosophy of the limit* 56-61 where she discusses Adorno's and Derrida's critique of the conventional understanding of community. Derrida and Adorno reject the identification of ethics with the perpetuation of order *per se* or with the current order. The disruption of the force of the other turns against the appeal to a "self-enclosed"

ethical in ethical interpretation is exactly concerned with such an "attitude of tenderness toward otherness" in contrast with a focus on rules that in my view both formal and substantive approaches to equality follow.

Community

Cornell[51] argues that the "philosophy of the limit" can transform present conceptions of community that emphasise unity and "full presence". The deconstructive accounts of community should be noted in our own conceptions of a South African community. This deconstructive vision of community ties in with the previous discussion on community and public space in Part 1.

> The power of communalism as a dream lies in the chance of uncovering or having revealed to us a different way of belonging together, which does not revert to classic individualism and which is also not just the identification of the individual with the community in mass society.[52]

For her, the ideal of community expresses the recognition of the *sameness* that marks each one of us as an individual and thus as both *different* and the *same*. In the recognition of the *connection* between *sameness* and *difference, belonging together* can be understood without an essentialist understanding of connection. Cornell's understanding of community is close to Chantall Mouffe's vision that I discussed in Part 1.

The philosophy of deconstruction exposes how the mere existence of "community" draws boundaries between an inside and an outside, whereby some are inevitably

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tradition. She notes that for Derrida there can be no self-enclosed tradition, ethical or otherwise which will not show the *economy* of *différance*. The conventions of a community cannot be shown to be a closed totality. The ethical message in Derrida and Adorno reminds us to care for *difference*. This care for difference does not attempt to grasp what is *other* as one's *own*. Cornell argues that the danger of certainty is that it prevents oneself to open up to the other and to listen truly, to risk the chance of being wrong.

51 (1992) *The philosophy of the limit* 60.

52 Cornell (1992) *The philosophy of the limit* 60.

excluded. Derrida[53] says that deconstruction insists on multiplicity, heterogeneity and difference. From a deconstructive perspective the "privilege granted to *unity* and totality and community is a danger for responsibility, decision, ethics and politics". Derrida therefore insists that the unity must be prevented "to close itself, to close up". This does not mean that we have to destroy unity.

He refers to the example of culture and argues that cultural identity

> [I]mplies a difference within the identity. That is, the identity of a culture is a way of being different from itself; a culture is different from itself. Once you take into account this inner and other difference, then you pay attention to the other and you understand that fighting for your own identity is not exclusive of another identity, is open to another identity. And this prevents totalitarianism, nationalism, ethnocentrism and so on and so on.[54]

Derrida argues that to grant privilege to "gathering" (association and unity) and not to dissociation will have the effect of leaving no room "for the other, for the radical otherness of the other, for the radical similarity of the other".[55] For him separation, in contrast to unity is the "condition" of my relation to the other. The other can be addressed only to the extent that there is a separation and a dissociation. Dissociation is also the condition for community. Dissociation is also the condition for a state.

> [A] state in which there would be only "unum" would be a terrible catastrophe. And we have had, unfortunately, a number of such experiences. A state without plurality and a respect for plurality, would

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53 See "The Villanova roundtable" in Caputo (1997) *Deconstruction in a nutshell. A conversation with Jacques Derrida* 4-13.

54 Derrida "The Villanova roundtable" in Caputo (1997) *Deconstruction in a nutshell. A conversation with Jacques Derrida* 13-14.

55 Derrida "The Villanova roundtable" in Caputo (1997) *Deconstruction in a nutshell. A conversation with Jacques Derrida.*

> be, first a totalitarian state and not only is this a terrible thing, but it does not work. We know that it is terrible and that it does not work. Finally it would not even be a state. It would be, I do not know what, a stone a rock, or something like that. Thus, a state as such must be attentive as much as possible to plurality, to the plurality of peoples, of languages, cultures, ethnic groups, persons and so on. That is the condition for a state.[56]

As I have already mentioned an ethical interpretation of equality consists of visions of public space, equality and justice. How we conceive of "community" is therefore related to an ethical interpretation of equality. I argue that we can benefit from deconstruction's emphasis of separation and dissociation in contrast to unity. In "unity" the radical other and difference are excluded. An ethical interpretation of equality seeks to address the exclusion of the other and difference in its approach.

I shall now turn to some theoretical aspects concerning deconstruction, its ethical imperative, deconstruction as a strategy of delay and the dialogue between hermeneutics and deconstruction. I shall be addressing Samuel Critchley's and Danie Goosen's commentaries on Jacques Derrida. Here and there I shall turn to Derrida himself. I shall refer to Samuel Ijsseling's[57] reading of deconstruction as a "strategy of delay" which I regard crucial for ethical interpretation. I shall mention aspects of the dialogue between hermeneutics and deconstruction because it is relevant to legal interpretation, as well as to the issue of modernity and postmodernity. I shall then refer to Caputo's view that we must return to the notion that "life is hard". His argument is also very relevant to legal interpretation. I believe that an ethical interpretation acknowledges life's difficulty. I shall conclude this conversation with a discussion on a possible effect of deconstruction on the law and legal interpretation.

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56 "The Villanova roundtable" in Caputo (1997) *Deconstruction in a nutshell. A conversation with Jacques Derrida* 15.

57 "Jacques Derrida: een strategie van de vertraging" in Widdershoven en De Boer (1990) *Hermeneutiek in discussie* 9-15; Van Haute and Ijsseling (1992) *Deconstructie en ethiek*.

There are certain terms, concepts and phrases that are part of any discussion and conversation on deconstruction. It is impossible to provide dictionary definitions and meanings for them. They must be understood in a certain context. However, I shall try to make these terms as clear as possible without reducing them to simple definitions. The notion of *justice* can not be separated from the understanding of deconstruction that I follow. Hopefully this connection between deconstruction and justice will become clearer through the various discussions in this section. I have already referred to Cornell's formulation of justice as the limit to any system. I explained that Cornell renames deconstruction as the philosophy of the limit because she thinks that it will then be easier to understand what is meant by deconstruction. If justice is the limit to any system and deconstruction is renamed as the philosophy of the limit, it follows that deconstruction is justice. Derrida himself says it in more or less the same words. I shall refer to his view on deconstruction as justice below. Some of the other terms that are frequently used in the conversation on deconstruction are *double reading, double bind, alterity, differance*, the *event*, the *other*, the *promise* and the *arrival.*

What deconstruction is not

Samuel Critchley[58] says that it is easier to describe deconstruction in terms of what it is not. Deconstruction is not something negative, in other words, it is not a process of demolition. Deconstruction does not presuppose a reduction of entities to their "essential" elements. It is not critique. It is not a method or way that can be used in interpretative activities. It cannot be reduced to a methodology or a technical procedure. Deconstruction is not an act that can be produced and controlled by a subject and it is not an operation that works on a text or an institution. Critchley[59] explains:

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58 Critchley (1992) *The ethics of deconstruction* 21.

59 (1992) *The ethics of deconstruction* 22.

> All ontological statements of the form "Deconstruction is x" miss the point *a priori*; for it is precisely the ontological presuppositions of the copula that provide one of the enduring themes of deconstruction.

Critchley refers to Derrida's claim that deconstruction "takes place", which means that it cannot be defined. How does deconstruction "take place"? It takes place during the reading of a text. As a textual practice it is "double reading". This means that there are at least two layers of reading. The first will usually be the "dominant interpretation" of a text in the guise of a commentary. The second layer is within and through the repetition, by opening a text up to blind spots within the dominant interpretation. In his reading of a text, Derrida[60] seeks to expose the blind spots, the spaces between the writer's intentions and the text, between the writer's commands and her failures to command a language.

How does a deconstructive reading take place? Derrida observes that the signifying structure of a deconstructive reading cannot simply be produced through the "respectful doubling of commentary". Commentary "has always only *protected*, it has never *opened*, a reading".[61] Critchley explains that Derrida uses the word "commentary" to refer to the "reproducibility" and "stability" of the dominant interpretation of a text. *Commentary is always already interpretation.* Derrida does not believe in the possibility of a pure and simple repetition of a text. This does not mean however that one must not be true to the text. Derrida explains "Otherwise, one could indeed say just anything at all and I have never accepted saying, or being encouraged to say, just anything at all."[62] In other words a deconstructive reading must remain within the limits of textuality.

This can be explained with reference to the tension in legal interpretation between textual constraint on the one hand, and the freedom of a judge to interpret on the other.

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60 (1976) *Of grammatology* 158.

61 Derrida (1976) *Of grammatology* 158.

62 (1976) *Of grammatology* 58.

Ronald Dworkin[63], although he does not represent deconstructive thought at all, recognises the tension between textual constraint and freedom in his argument of legal interpretation as a chain novel. He explains that what judges do when they interpret the law is similar to the writers of a chain novel. Like the writers in the case of the chain novel are free to be creative and imaginative on the one hand and are constrained by what happened in previous chapters on the other, judges are similarly free to interpret creatively and imaginatively while being constrained by the law, legal texts and legal precedent. Closer to deconstructive thought is the legal critique of the Critical Legal Studies.[64]

CLS scholar Karl Klare[65] in a recent article explains the tension between textual constraint and judicial freedom in the South African context. He shows the significance of legal *indeterminacy* for legal transformation in South Africa. He argues that *indeterminacy* and the tension between freedom and constraint that traditionally has been thought of as a dilemma, should be made a virtue.[66] South African lawyers should accordingly re-examine their analytical and argumentative methods. Klare[67] argues that because there is no total constraint (in other words the text is always open for interpretation), adjudication can be a site of "law-making activity". He argues that to be

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63 See generally (1977) *Taking rights seriously,* (1986) *Law's empire* and (1995) *Life's dominion.*

64 See amongst others Kennedy "Form and substance in private law adjudication" (1976) 89 *Harvard Law Review* 1685-1778; Tushnet "Truth, justice, and the American way: An interpretation" (1979) 57 *Texas Law Review* 1307-1359; Tushnet "Anti-formalism in recent constitutional theory" (1985) 83 *Michigan Law Review* 1502-1544; Tushnet "Critical Legal Studies and Constitutional Law: An essay in deconstruction" (1984) 36 *Stanford Law Review* 623-647; Unger "The critical legal studies movement" (1983) 96 *Harvard Law Review* 561-675; Gordon "Critical legal histories" (1984) 36 *Stanford Law Review* 57-125; Trubek "Where the action is: Critical Legal Studies and empiricism" (1984) 36 *Stanford Law Review* 575-622; Kelman "Trashing" (1984) 36 *Stanford Law Review* 293-348; Simon "Visions of practice in legal thought" (1984) 36 *Stanford Law Review* 469-507.

65 "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146-186. See also Klare "Legal theory & democratic reconstruction: Reflections on 1989" (1991) 25 *University of British Columbia Law Review* 69.

66 "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 185.

67 "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 147.

a conscientious judge in the new South Africa means to fulfil the values of dignity, equality and freedom. The values of dignity, equality and freedom, however, must be interpreted and given meaning in different context. Judges will still experience the tension of freedom and constraint.

> But judges still, and will always, confront the conflicting pulls and tensions ... of freedom and constraint. On the one hand, there is a grand constitutional text replete with broad phrases and redolent with magnificent hopes to overcome past injustice and move toward a democratic and caring society. Yet, on the other, just about everyone takes for granted that adjudication is not and cannot be infinitely plastic and open-ended ... a commitment to legal constraint (evoked in the mantra "rule of law") seems to be a foundation of the democratic enterprise.[68]

Back to deconstruction it must be asked how a reading can remain within the limits of textuality without merely repeating the text in the manner of a commentary. The answer is by following a double reading:

> If the *first moment* of reading is the *rigorous, scholarly reconstruction of the dominant interpretation of a text*, its *intended* meaning ... in the guise of a *commentary*, then the *second* moment of reading, in virtue of which *deconstruction obeys a double necessity*, is the *destabilization* of the stability of the dominant interpretation. It is the moment of *traversing* the text which enables the reading to obtain a position of *alterity* or *exteriority*, from which the text can be deconstructed. The second moment brings the text into contradiction with itself, opening its intended meaning, ... onto an *alterity* which goes against what the text wants to say or mean.[69]

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68 "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 149.

69 Critchley (1992) *The ethics of deconstruction* 27.

Critchley explains that the second moment, the "*moment of alterity*" must be shown to arise necessarily out of the first moment of "repetitive commentary". By following the path of repetition, one inevitably crosses the path of something wholly *other*, something that cannot be *reduced* to what the text or tradition wants to say. Deconstruction thus can be understood as a *double reading* that operates within a *double bind* of belonging to a tradition, language, and a philosophical discourse while at the same time being incapable of belonging to it.

If legal interpretation can merely accept the notion of a double reading and a double bind it will be able to show greater understanding to difference and otherness. It is such a double reading and double bind that ethical interpretation seeks to be true to.

Deconstruction's ethical imperative

According to Critchley[70] the textual practice of deconstructive reading should be understood as an "ethical demand". He identifies three waves of the reception of deconstruction. The first was its literary reception by scholars like Paul de Man, JH Miller, Bloom and Hartman. The second wave was the philosophical reception. Both paid little or no attention to the ethical moment, which is essential to a deconstructive reading, and which anticipates the third wave. Critchley distinguishes deconstructive ethics from the traditional concept of ethics as a branch or a region of philosophy.

The ethics of deconstruction does not mean that ethics has its origin or foundation in deconstruction, or that the relation between ethics and deconstruction is one of inference or derivation. It does not mean that the meaning of deconstruction is so clear that one can draw implications and applications. It does not mean that ethics can be derived from deconstruction or that it is a superstructure on an infrastructure or a second critique from a first critique. Critchley formulates the ethics of deconstruction as a pattern of reading that has an ethical structure, in other words, *deconstruction takes place ethically.*

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70 (1992) *The ethics of deconstruction* 1.

The third wave, beyond literary and philosophical appropriation, is the one in which ethical (and political) questions are uppermost.[71] The ethical demand in deconstruction has significant implications for legal transformation and interpretation.

Deconstruction and the event - Danie Goosen

Goosen, in reaction to the critique that considers deconstruction as nihilistic, describes deconstruction as "the event".[72] The event in this regard refers to a "traumatic" moment where the subject is overcome by the "singular other". He argues that deconstruction, because of its focus on the traumatic event, is characterised by experiences of loss and fragility. But, deconstruction, because of its special relationship with the future does not leave us with feelings of loss and mourning. It affirms the future with a *yes*. He explains that it is significant to realise that rational thought can never gain access to the event in the present. We know the event only indirectly, from a distance. The event refers to that which comes from "outside" to destabilise and disrupt our own symbolic order (that is, a system that seeks to systematise our reality). The event refers to the broken moments between our symbolic orders and reality, which cannot be bridged. If symbolic orders seek to force an identity between themselves and reality, the event disrupts this false identity. For example, deconstruction seeks to remember the disruption between reality and language.

Goosen[73] argues that the ethic-political dimension of deconstruction exists exactly in remembering this break between reality and language. He calls this a "politics of remembrance". In a "politics of remembrance" the "present" presence of the event is not

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71 See also Bauman (1998) *Postmodern ethics*; Van Hauten & Ijsseling (red) (1992) *Deconstructie en ethiek*.

72 Goosen "Verlies, rou en affirmasie. Dekonstruksie en die gebeure" (1998) 1 *fragmente* 54-79. See also Goosen and Van der Walt "Die tragiese, die onmoontlike en die demokrasie. 'n Onderhoud met Jacques Derria" (1999) 3 *fragmente* 35-61.

73 Goosen "Verlies, rou en affirmasie. Dekonstruksie en die gebeure" (1998)1 *fragmente* 57.

stated. Rather the incapability of symbolic orders to bridge reality is remembered. To practise a "politics of remembrance" may mean to be open, even "hospitable", to the event. Goosen[74] explains that deconstruction is interested in the occurrence of the event itself and not the reasons for it. Deconstruction creates an openness for the event to take place before it is rationally tied in and explained by the symbolic order. For Goosen, hospitableness towards the event translates into a political idiom as the vision of a "democracy always to come". *Justice* exists in the hope that the borders of existing systems can be deconstructed and opened up for the coming of the event, the coming of democracy. This formulation is similar to Cornell's renaming of deconstruction as the philosophy of the limit and her remark that justice is the limit of any system.

Goosen explains *différance* as an indication of the event, especially the event of language. *Différance* can have two possible meanings: to differ and to defer (postpone). Because of *différance* meaning is always removed from the present to the future. The effect of *différance* is that finality is always postponed because of the disruptions of the symbolic order. The subject, therefore, finds herself in a context of incompleteness, insecurity and ambiguity. A promise can be used to explain the meaning of *différance*. *Différance* moves the meaning of language, or the coming of the event, or the fulfilment of a promise to the future. Goosen[75] notes the paradox inherent in *différance* and the promise. The event and also *différance* can take place as long as it is not taken up in a rational symbolic structure; the promise of language is only a promise as long as it is not fulfilled. To make a promise is to situate oneself in an "in between" space, between being and not being. Deconstruction defends this "in between" space (or state) because it is a space gracious towards unfinality and openness. Goosen[76] argues that deconstruction defends the "in between" also because it creates room for the *other.* This description of an in between space is related to the discussion in Part 1 here I supported Hannah Arendt's vision of public space. She considered public space as such an "in between". I shall return to the deconstructive account of the promise in Part

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74 Goosen "Verlies, rou en affirmasie. Dekonstruksie en die gebeure" (1998)1 *fragmente* 58.

75 Goosen "Verlies, rou en affirmasie. Dekonstruksie en die gebeure" (1998)1 *fragmente* 73.

76 Goosen "Verlies, rou en affirmasie. Dekonstruksie en die gebeure" (1998)1 *fragmente* 73.

3 where I focus on the significance of the promise in the TRC. I describe the TRC also as an "in between" space.

Following the explanation of the event, *différance* and a promise we can say that justice is to be open towards that which is excluded by the violence of language. Justice also means to be open for the *singularity* of things, in other words the event, that can surprisingly occur "from" the future.[77] In response to the accusation that *différance* (and accordingly deconstruction) are evading the pressing needs of the present, especially political and ethical ones (needs concerning justice), Derrida argues that there is no conflict between *différance* and the pressing urgency of present need.

> *Différance* points to a relationship ... a relation to what is other, to what differs in the sense of alterity, to the singularity of the other - but "at the same time" it also relates to what is to come, to that which will occur in ways which are in appropriable, unforeseen, and therefore urgent, beyond anticipation: to precipitation in fact. The thought of *différance* is also, therefore, a thought of pressing need, of something which, because it is different, I can neither avoid or appropriate. The event and the singularity of the event - this is what *différance* is all about.[78]

Derrida explains that *différance* involves an opposite movement that takes place "at the same time", in other words a double movement. The notion of taking place at the same time and a double reading (movement) is relevant to ethical interpretation where the ideal of justice is nurtured while at the same time the impossibility of fully achieving justice in the present is realised.

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77 "Geregtigheid beteken vir hom om 'n openheid te skep vir dit wat deur die geweld van taal uitgesluit word, dit wil sê 'n openheid vir die singulariteit van die dinge wat ons altyd weer vanuit die toekoms op 'n verassende wyse kan oorval." (For Derrida, justice means to create an openness for that which is excluded by the violence of language, in other words an openness for the singularity of things which will always surprise us from the future.) (Own translation) Goosen "Verlies, rou en affirmasie. Dekonstruksie en die gebeure" (1998) 1 *fragmente* 75.

78 Derrida "The deconstruction of actuality" (1994) 68 *Radical philosophy* 31.

In reply to the question what he means by "the event", Derrida answered that it is another name for experience, which is always experience of the *other*. To prevent the happening of the event will be to shut oneself off from the *future*. Derrida refers in this regard to "absolute arrivals":

> Absolute arrivals must not be required to begin by stating their identity; I must not insist that they say who they are, and whether they are going to integrate themselves or not; nor should I lay down any conditions for offering them hospitality, ... with an absolute new arrival, I ought not to propose contracts or impose conditions ... it actually goes far beyond morality, and even further beyond law and politics.[79]

An *arrival* must be something absolutely *different*. It must be something that cannot be explained or predicted rationally. If we knew it was coming, such knowledge would anticipate the future and deaden it in advance. (Like a promise is only a promise as long as it is unfulfilled) Derrida mentions that the arrival of someone I am waiting for may also astonish and surprise me every time and be new every time. The crucial point is that there can be no event without surprise. In Part 3 I shall argue that the event of the TRC was a public space where action took place because there was room for spontaneous and unpredictable action, in other words surprise.

In regard to the new arrival the "messianic" characteristic of deconstruction must be noted. Derrida explains the term "messianic" as a Messianic experience that will only be determined *a posteriori*, by the event. The messianic reference to an arrival that may turn up and of whom we know nothing in advance, is inherently part of *justice* and of the *event*.

The understanding of deconstruction and *différance* as an event and its implications for justice is crucial for the story of the political, the public and the ethical that I attempt to develop in this text. The search for an ethical understanding of equality is dependent

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[79] Derrida "The deconstruction of actuality" (1994) 68 *Radical philosophy* 32.

on the deconstructive "hospitableness" to the event of the future. The public moment of the TRC, which is integral to an ethical interpretation of equality, relies on the absolute new arrival that astonishes and surprises. Notions of a "democracy to come" and a justice that does not exist, are crucial for South Africa's processes towards transformation and reconciliation, which must (can) never be completed. As the promise of language is broken the moment it is fulfilled, the processes of transformation and reconciliation will become impossible the moment they are perceived to be completed or to have succeeded. It is for this reason that the various responses to the TRC are of significance. I believe that the TRC should be approached in such an open, future-orientated way.

Below I shall put forward Samuel Ijsseling's reading of deconstruction as a "strategy of delay". I have already mentioned that an ethical interpretation of equality follows such a "strategy of delay", a slowness when considering issues of equality and difference.

Deconstruction as a strategy of delay - Samuel Ijsseling

Ijsseling[80] describes deconstruction as a "strategy of delay". He argues that Derrida draws our attention to the "unsaid" and that he focuses on the open places in the text. The unsaid, the open places, relate to context, which is central to a deconstructive approach. The reader/listener should pay attention to the moment of the discussion or text. The context can never be comprehended fully, or closed off. Derrida uses the idea of *iterability* which means that every word can be taken out of one context and placed in another, which will function in another way and create different meanings. The principle of *mimese*, which is related to *iterability*, implies that a word with one meaning can be moved to another context to have a different meaning. Because of the importance of context, and the ambiguity and fluidity of meaning, meaning can never

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80 "Jacques Derrida: een strategie van de vertraging" in Widdershoven en De Boer (1990) *Hermeneutiek in discussie* 9-15.

be found. It always escapes us with the result that a multiplicity of meanings is created. This does not mean that one should not try to create a meaning or to understand. The double bind of deconstruction demands that we seek to produce meaning while "at the same time" realising that it is impossible to understand fully. Significantly, Ijsseling[81] notes that Derrida advises us to be careful when reading.

He argues that for Derrida the "quasi-transcendental" can be seen in that which is not thought and not said. This *unthought* and *unsaid* is part of the "economy" of being human. The unwritten creates conditions for the production and the understanding of a text. The open spaces in one text form the condition for the creation of new texts that can be written in the margins of the existing text or in the open spaces of other texts. The economy of a text is an aspect of the impatience and haste of human existence. It attempts to achieve the biggest possible effect with the smallest possible effort.

Ijsseling mentions that Derrida presupposes a "delay" when he reads. He uses delay as another word for *différance*. This means that if one only concentrates on that which is physically in the text, one negates judgement. The ethical imperative of deconstruction and Derrida's ethical moments are highlighted in the delay. For Derrida, to interpret a text means to judge. Responsibility is captured in an inescapable double bind - although we know that we can not comprehend the context fully, and therefore can not judge, we know that we must. The responsibility lies in the knowledge that we must judge although we can not. "The strategy of delay" takes notice of that which cannot be known, the "other of knowing". It focuses on that which can not be systematised, predicted and foreseen. It awaits the event of a new arrival, of a surprise. Ijsseling argues that the strategy of delay is not a method to be followed, it is rather a way of reading and writing texts that creates an openness for the event.

Below I shall discuss the dialogue between deconstruction and hermeneutics. This

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81 "Derrida skryf zoals in een donkerte en onbekende ruimte waar men met handen en voeten alles aftast voordat men een stapje verder zet." (Derrida writes as someone who is in a dark and unknown space and is cautious of each and every step.) (Own translation) Ijsseling "Jacques Derrida: een strategie van de vertraging" in Widdershoven en De Boer (1990) *Hermeneutiek in discussie* 11.

dialogue is of significance for an ethical interpretation of equality, but also relevant to the reconstruction and transformation of public space and community.

The ongoing dialogue between deconstruction and hermeneutics - H Kimmerle, V Vasterling and S Ijsseling

The dialogue between deconstruction and hermeneutics connects with the above discussion on a strategy of delay and the one below on the philosophy of facticity. The main point is that hermeneutics tends to subscribe to an easy or more comfortable position than deconstruction. The dialogue between the two, in my view, relates to the various approaches to equality - formal or substantive approaches in contrast with an ethical interpretation.

According to Kimmerle,[82] Gadamer[83] and Derrida both make use of "the game" to describe language events. In Derrida's case it is not a question of an ontological game. The disruption of tradition is part of the dynamics of the game. He explains that the infatuation with history is not taken up in a general theory or methodology. Derrida's deconstruction does not have the same level of generality as Gadamer's hermeneutics. In Derrida's language game the person who wants to understand and the one that must be understood are often not playing the same game. Derrida focuses more explicitly than Gadamer on the importance of text by emphasising the divisions and breaks in interpretation and understanding.

Kimmerle argues that in the hermeneutical tradition, where unity is treasured, these divisions and breaks cannot be accepted. He notes that Gadamer himself sees

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82 "Van hermeneutiek naar deconstructie?" in Widdershoven en De Boer (1990) *Hermeneutiek in discussie* 26 - 36 at 31.

83 (1976) *Philosophical hermeneutics*; (1981) *Truth and method.*

resemblance between hermeneutics and deconstruction because of the understanding of history through the interpretation of language events. An important difference between hermeneutics and deconstruction or between Gadamer and Derrida, is that deconstruction (Derrida) does not create or find a "fusion of horizons" or a "third position". This does not mean that deconstruction negates meaning. Meaning is made possible by the problematisation of understanding or the problematisation of finding meaning. For Kimmerle this is Derrida's "hermeneutical moment". He notes that although Derrida is more radical than Gadamer they both acknowledge a "metaphysical" realm.

Vasterling[84] shows the difference between Gadamer and Derrida in their vision of language. Gadamer works with a present autonomous reader/writer (subject). For Derrida the language itself is autonomous. He argues that their similarity lies in the fact that they are both occupied with "conditions of being". Classical hermeneutics searches for concrete "real" conditions. Deconstruction insists on the fact that nothing can be fully comprehended or marginalised. Vasterling sees a crucial difference between hermeneutics and deconstruction in the former's belief in the possibility of finding truth and the latter's scepticism towards any final closed understanding of "truth".

Ijsseling formulates one of the possible definitions of deconstruction as

> [H]et zich rekensschap geven van de conteksts zonder grens, de mees levendige en de breedst mogelijke aandacht voor de contekst, en derhalve een voortdurende beweging van recontekstualisatie.[85]

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84 "Derrida's filosofie als radicaal eindige hermeneutiek" in Widdershoven en de Boer (1990) *Hermeneutic in discussie* 16-21.

85 (To give account of the limitless context, of the most alive and broadest possible attention to context and accordingly of a continuous movement of recontextualisation) (Own translation) Ijsseling "Derrida over teksts en conteksts" in Van Hauten & Ijsseling (reds) (1992) *Deconstructie en ethiek* 18.

Ijsseling[86] notes that context also plays a crucial role in traditional hermeneutics where it is accepted that the meaning of a certain word, sentence, fragment of a text or text as a whole relies on the context for its meaning. Ijsseling argues that although Derrida is continually busy with interpretation, he does not stand in the hermeneutical tradition. Hermeneutics focuses on already *constituted* meaning. Deconstruction is interested in the process of the *production* of meaning and in "the event" that is taking place during this process. To move in the margins of a text is therefore of the utmost importance. Ijsseling argues that the relationship between hermeneutics and deconstruction is more complicated than suggested by hermeneutics. Although every text has its context, there is also a break between every text and its context. This break forms part of the process of the production of meaning. Derrida does not foresee a circle of communication or a dialectic, but rather a *break* with it and *difference*. For him there is not just one context but always a multiplicity of contexts. As has been said above, no context can ever be marginalised or closed.

Deconstruction as a radical hermeneutics focuses on the breaks and differences in texts, interpretation and understanding. It accepts the incompleteness of present understanding. The crucial difference between deconstruction and hermeneutics is that hermeneutics accepts a certain meaning in the present and lives with it. Deconstruction insists that the present understanding must be disrupted and problematised. Deconstruction's ethical imperative lies precisely in this refusal to accept present meaning as final and complete. This refusal gives effect to a utopianism or messianic hope, which results in the ideal of a democracy to come, and of justice in the beyond. As I shall show, an ethical interpretation of equality combines this reach into the future with memory.

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86 Ijsseling "Derrida over teksts en conteksts" in Van Hauten & Ijsseling (reds) (1992) *Deconstructie en ethiek* 9-28.

"We have it from Aristotle that life is hard" - John Caputo

The belief that life is hard and that philosophy must be true to this is related to Ijsseling's understanding of deconstruction as a strategy of delay. Because life is hard, one can not go through it quickly and inattentively. The same holds for interpretation.

Referring to Heidegger's[87] argument that philosophy must become a "hermeneutics of facticity", Caputo[88] pleads for a reading of life which could restore "factical existence" to its original difficulty. A hermeneutics of facticity will follow the opposite course from a "metaphysics of presence", which has been making life light and easy. From the start, metaphysics has been giving us eloquent assurances about *Being* and presence. In Caputo's own words

> [A] hermeneutics of facticity, convinced that life is toil and trouble (*Sorge*), would keep a watchful eye for the ruptures and the breaks and the irregularities in existence. This new hermeneutics would try not to make things look easy, to put the best face on existence, but rather to recapture the hardness of life before metaphysics showed us a fast way out the back door of the flux.[89]

Philosophy, for Caputo, must begin by putting *Being* as "presence" in question. He argues that in metaphysics the question is always foreclosed, but in "radical hermeneutics" the disruptive force of the question is contained. Radical hermeneutics is therefore for the "tough". Caputo focuses on the radicalisation of hermeneutics that starts with Heidegger. Derrida, in Caputo's view, drives hermeneutics to its most extreme and radical formulation and pushes it to its limits. The essence of

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87 See generally Heidegger (1962) *Being and time.*

88 (1987) *Radical hermeneutics* 1.

89 Caputo (1987) *Radical hermeneutics* 1.

hermeneutics is to create the opening, not to find a resolution. To Caputo, Derrida is the turning point in hermeneutics, the point where hermeneutics is pushed to the brink. He views Gadamer's[90] philosophical hermeneutics as an attempt to block off the radicalisation of hermeneutics and to return to the fold of metaphysics. Caputo argues that it is essential not to see radical hermeneutics as an exercise in nihilism. Radical hermeneutics describes the "fix" we are in. The point of radical hermeneutics is to make life difficult, not impossible. Caputo[91] refers to certain breaking points in the habits and practices of everyday life where the flux is exposed and the fixed constructions of everydayness come tumbling down.

> Something breaks through because the constraints we impose upon things break down. ... What breaks down in the breakthrough is the spell of conceptuality, the illusion that we have somehow or another managed to close our conceptual fists around the nerve of things, that we have grasped the world round about, circumscribed and encompassed it.[92]

The notion of "life is hard" must be pursued in an ethical interpretation of equality. The purpose is not to make interpretation (rights, rules, the law) impossible, but to put us on our guard against easy answers and quick fixes, and to avoid blind trust in a present human-manufactured system of rules and regulations. The ethical imperative in deconstruction lies in the restoring of life's difficulty, in the opening of presence without closing it again. Ethical interpretation seeks to expose the breaking points.

At this point we must turn to Derrida's vision on law and justice.

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90 Gadamer (1977) *Philosophical hermeneutics*; (1981) *Truth and method.*

91 (1987) *Radical hermeneutics* 269.

92 Caputo (1987) *Radical hermeneutics* 270.

"If anything is undeconstructable, it is justice" - Jacques Derrida

Derrida[93] argues that justice is undeconstructable. Law, on the other hand, is deconstructable. To him, justice is the best word to describe the affirmative experience of the coming of the other as *other*. The openness of the future is related to justice that is undeconstructable and never achievable within a system, and to a democracy to come.

> Justice requires us to prevent certain events (or arrivals) from coming to pass. Events are not good in themselves, and the future is not unconditionally desirable. ... But it will always be possible to show that what we are opposing, what we would hypothetically prefer not to happen, is something which, rightly or wrongly, is thought of as obstructing the horizon, or simply forming a horizon (the word means limit) for the absolute coming of what is completely other, for the future itself.[94]

Justice in Derrida's view is not the same as law and it is broader and more fundamental than human rights. Justice is also not the same as distributive justice and it is not the same as respect for the other as human subject in the traditional sense of the word. Justice is the experience of the other as *other* and the fact that the other is permitted to be *other*. This presupposes a *gift* without exchange, without reappropriation, without jurisdiction. Derrida argues for "the return of a little hope" within society by striving for the ideal of justice. An "insurgence" in the name of justice is bound to return and will give rise to critiques which are inspired by Marxism.[95] This "insurgence" believes that

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93 Derrida "The deconstruction of actuality" (1994) 68 *Radical philosophy* 36.

94 Derrida "The deconstruction of actuality" (1994) 68 *Radical Philosophy* 36.

95 Derrida "The deconstruction of actuality" (1994) 68 *Radical Philosophy* 39 argues for a new and completely different interpretation of Marx's philosophy. See also Derrida (1994) *Spectres of Marx*.

something is wrong and does not accept the new world order which is currently being shaped.

Derrida describes justice as "incalculable. You cannot calculate justice. Levinas says somewhere that the definition of justice - which is very minimal but which I love, which I think is really rigorous - is that justice is the relation to the other. That's all".[96] Derrida continues and says further that the law can always be improved. Laws can be replaced by other ones, constitutions can be written, institutions created. Each time a legal system is replaced by another one it is a kind of deconstruction. The fact that the law can be deconstructed is a condition for historicity, revolution, morals, ethics and progress. But justice is what gives the impulse and the movement to improve the law. Justice can never be "calculated". The law can be "calculated", for example, a judge can see whether a person has obeyed a certain rule or not. But justice is not only a matter of knowledge or theoretical judgement. A responsible judge must therefore reinvent the law each time. She cannot simply apply the law as a coded programme to a given case. A judge must "reinvent in a singular situation a new judgement relationship". The call for justice is therefore never fully answered. No one can say, "I am just". Unlike law, economics or social security, justice cannot be calculated. Justice should go beyond calculation. This does not mean that we should not calculate, but we must realise that there is a point beyond which calculation must fail.[97]

The search for an "ethical interpretation" of equality must take notice of deconstruction's ethical imperative and its implications for politics, public space, the law and justice. Although the South African political and legal system has experienced change over the past few years the limits of present systems must be exposed. Judges must judge with responsibility. They should not make mere calculable decisions but should rather adhere to the concrete circumstances of each and every situation. An

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96 "The Villanova roundtable" in Caputo (1997) *Deconstruction in a nutshell. A conversation with Jacques Derrida* 17. See Levinas (1969) *Totality and infinity: An essay on exteriority* 89.

97 "The Villanova roundtable" in Caputo (1997) *Deconstruction in a nutshell. A conversation with Jacques Derrida* 17.

ethical interpretation of equality notes the "practical" effect of deconstruction on the law, justice and legal interpretation. Although many scholars argue that deconstructive theory cannot address justice because justice demands reconstructive approaches, in my view deconstruction has a great capacity to address justice because it "is" inherently ethical. The concept of justice in this thesis does not primarily entail programmes of social security or human rights or economic upliftment. I subscribe to the understanding of justice as something that can never be fully achieved within a present system of law and rules and regulations. This does not mean that justice is impossible to strive for. The fact that the impossibilities of present programmes and systems to fully achieve justice are exposed does not negate the validity and necessity of those programmes. A deconstructive approach requires a double-handed approach, in other words one must be an "activist" of sorts and a "deconstructionist" of sorts at the same time. All our actions and movements in public and private life should be regulated by the "ideal of justice". Our relations towards the other and all others must be driven by the ethical imperative to be just. The demand that we must be open to the radical other without making her the other of myself is a demand for justice.

Below I shall first discuss first Derrida's notion that "deconstruction is justice" and the implications of it for legal interpretation. I shall then turn to Cornell's theory of "legal interpretation as recollective imagination". Both these perspectives are important for an ethical interpretation of equality.

The law, justice and legal interpretation: Deconstruction is justice - Jacques Derrida

Derrida's[98] later writings on the law, politics and justice illustrate the ethical dimension

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98 "Force of law: The mystical foundations of authority" in Cornell (ed) (1992) *Deconstruction and the possibility of justice* 3-67. See also Derrida (1997) *The politics of friendship.*

in deconstruction. He distinguishes between law and justice. According to him, law, that comprises rules and regulations, can be calculated. A judge can look to see whether the provisions of a certain act have been adhered to. In each and every case there are certain facts, procedures, rules and regulations that should be followed. But such a process can never be enough. Each and every case demands a judge to go further. Deconstruction undermines the legal system that claims to find authority in its own functioning. To appeal to a present reality as the basis for justice denies future possibilities for legal reform. To identify an existing state of affairs with justice, is to impose silence on the other who does not have a voice in the present system. The divide between law and justice is a divide between "what is" and "what ought". Justice is the limit to the legal system that identifies its own norms as justice.

To Derrida justice operates as *aporia*. Aporia refers to the "in between", the space between the inside and the outside, an entrance or an exit. In the first place there is an *aporia* between norm and rule, in other words between what ought to be and what is. When a judge is called to judge she must not only state what the law "is", but must also confirm its value as it "ought to be". The judge is caught in a paradox. While she must judge according to law she must also adhere to the singularity of each case. Although many legal scholars might respond to this by saying "of course, that is how the law and legal interpretation and judgement work in any case", my response will be to refer them back to Caputo's theme of facticity. "You might think that you are adhering to the concrete circumstances, and that you are noticing difference and singularity, but be careful, to regard singularity or radical otherness, is easier said than done." The ethical moment in deconstruction lies in the realisation of the difficulty and the tragedy that the paradox of judging entails.

> In short, for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle. Each case is other,

> each decision is different and requires an absolutely unique interpretation ... [if] the judge is a calculating machine ... we will not say that he is just, free and responsible. But we also won't say it if he doesn't refer to any law, to any rule or if, because he doesn't take any rule for granted beyond his own interpretation, he suspends his decision, stops short before the undecidable or if he improves and leaves aside all rules, all principles.[99]

The second *aporia* is the "undecidable".

> There is apparently no moment in which a decision can be called presently and fully just: either it has not yet been made according to a rule, and nothing allows us to call it just, or it has already followed a rule ... which in turn is not absolutely guaranteed by anything; and, moreover, if it were guaranteed, the decision would be reduced to calculation and we wouldn't call it just. That is why the ordeal of the undecidable that I just said must be gone through by any decision worthy of the name is never past or passed, it is not a surmounted or sublated (*aufgehoben*) moment in the decision.[100]

The third *aporia* is created by the urgency of justice. Justice cannot wait. We must judge in the present, but we cannot judge because the ideal (justice) is not present. A mere norm should never be justified as justice. This will in any event be prevented by the "performative" inherent in the act of interpretation.

> Paradoxically, it is because of this overflowing of the performative, because of this always excessive haste of interpretation getting ahead of itself, because of this structural urgency and precipitation of justice that the latter has no horizon of expectation (regulative or messianic) ...

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99 Derrida "Force of law: The mystical foundations of authority" in Cornell (ed) (1992) *Deconstruction and the possibility of justice* 23.

100 Derrida "Force of law: The mystical foundations of authority" in Cornell (ed) (1992) *Deconstruction and the possibility of justice* 24.

> Perhaps it is for this reason that justice, insofar as it is not only a juridical or political concept, opens up for *l'avenir* the transformation, the recasting or refounding of law and politics. "Perhaps", one must always say, perhaps for justice.[101]

A deconstructive approach to law distinguishes rigidly between law and justice, between what presently is and what in the future ought to be. The *aporias* ("in between") influence each and every legal decision. A judge must apply the law, but at the same time question the law's validity. All judgments will therefore remain *undecided*. This does not negate the necessity of judgement in the present. The utopianism inherent in deconstruction keeps the promise of justice alive. There is always a future for legal reform because the present system can never encompass justice.

Back to the future: Legal interpretation as "recollective imagination" - Drucilla Cornell

Cornell[102] puts forward a notion of legal interpretation as "recollective imagination". This entails the rethinking of the relationship between the past (as embodied in the normative conventions which are passed down through legal precedent) and the projection of future ideals through which the community seeks to regulate itself. She relies on Charles Peirce's conception of pragmatism for her understanding of legal interpretation as recollective imagination. Peirce[103] reconceptualises the relationship between retrospective and prospective aspects of legal interpretation and accordingly highlights the importance of imagination in the enunciation of legal and normative

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101 Derrida "Force of law: The mystical foundations of authority" in Cornell (ed) (1992) *Deconstruction and the possibility of justice* 27.

102 (1993) *Transformations* 23-44.

103 Hartshorne and Weiss (eds) (1960) *The collected papers of Charles Sanders Peirce, 1931-1934 vol v.*

ideals. His pragmatism can contribute to the development of a concept of agency that is consistent with the active role of the judge in the process of legal interpretation as recollective imagination.

The critique against many neopragmatists is that they reduce the process of interpretation to strategic programmes and policies. Ronald Dworkin,[104] for example, has criticised this version of pragmatism: it ignores the past in favour of visions for the future. Principles and rights in this vision are only strategically useful for the actualisation of an ideal community. Dworkin argues that the pragmatist, when judging, only looks at what is in her own vision best for the future. For Dworkin legal pragmatism involves the worst kind of subjective interpretation because each judge attempts to impose her best vision of the future. Cornell argues that Peirce's pragmatism does not turn to the future in the sense that it reduces rights and principles to strategic legal instruments in order to create the best possible community. Peirce accepts the paradox that one can only look at the future by relying also on the past. This is why Cornell uses the phrase of "recollective imagination" to capture this paradox.

Interpretation is retrospective because we always begin the process of interpretation within a pregiven context. The process is also prospective because it involves elaboration of the "would be's" inherent in the context itself. For Peirce the meaning of a norm or proposition is ascertained through an imaginative enterprise.

> We imagine ourselves in various situations and animated by various motives; and we proceed to trace out the alternative lines of conduct which the conjectures would leave open to us. We are, moreover, led by the same inward activity to remark different ways in which our conjectures could be slightly modified. The logical interpretant must, therefore, be in a relatively future tense.[105]

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104 (1986) *Law's Empire* 151-175.

105 Hartshorne and Weiss (eds) (1960) *The collected Papers of Charles Sanders Peirce, 1931-1934 vol v* 330-331.

In legal interpretation we rely on an "as if" that is oriented toward the future in that a proposition is projected onto a future situation in order to draw out its meaning. Cornell[106] argues that our understanding of a right is led by the same process. Dworkin's notion of "law as integrity" is not "more relentlessly interpretive" than pragmatism. Peirce's insistence on the future is not instrumentalist as Dworkin argues. It does not deny the text in favour of an instrumentalist vision of the future, nor does it deny the past because it accepts that we are in a pregiven context. The "past" is always offered to us within competing frameworks and since not any single framework is a pure account of what actually was, we cannot prefer one over the other. The "past" is not there for us to collect. When interpreting we must look at all the frameworks to guide us through the legal problems confronting us now. The past can never be known and fully recollected other than through interpretation.

> The past in other words, grasps us. We cannot grasp it. ... The past is there, but not finished.[107]

Thus, the past can only be given meaning within an interpretational framework that is future-oriented. There can be resolutions within any given interpretative framework. But these resolutions can only be conditional since reinterpretation is always possible. Past legal precedent can likewise only be understood as a body of conditional meanings.

> The very effort to guarantee continuity of the "spirit" of the law demands that we restate the normative message of the legal text. What we pass on, however, cannot be the letter of the law, as if there were a plain meaning that is simply there to be excavated, but instead must be its spirit. In this sense ... the enunciation of the legal principle inherent in the judge's decision implicates the "should be". ... The very statement of what the law is implicates the "should be" because it depends on justification of a particular interpretation since there can be no pure statement of what

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106 (1993) *Transformations* 28.

107 Cornell (1993) *Transformations* 30.

the law "is". There can be no acritical reference to the past in the law that does not imply justification.[108]

Three realms of legal interpretation

Cornell[109] goes on to identify three realms of legal interpretation: the *Good*, or the "Law of the Law";[110] the *Right*, or the "moral law" of the self-legislating subject; and the *principles* inherent in an existing legal system. The *Good*, the *Right*, and the *principles* inherent in an existing legal system describe codes of human interaction within a legal system and cannot be reduced to mere rational categories.

Cornell then proceeds to three stories of legal interpretation. The first story is told by Hegel where the *Good* is given to us in "Absolute Knowledge" and therefore fully revealed. The other two stories are two (of the many) versions of the postmodern story. The one version comes from Stanley Fish, who represents the *Good* only as absence. In this version there is no horizon of the *Good* to which one can appeal for guidance when evaluating competing legal interpretations. The other version is Derrida's deconstructive vision. In the deconstructive one the *Good* is irreducible to negative theology. The projection of the *Good* is essential to the possibility of legal interpretation. The *Good* is the as of yet unrealised potential of the *nomos* and can therefore not be conceived as the truth of a self-enclosed system which perpetuates itself.[111] The *Good* is beyond any of its current justifications.

Thus, the deconstructive emphasis on the opening of the ethical self-transcendence of any system that exposes the threshold of the "beyond" of the not yet is crucial to a conception of legal interpretation that argues

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108 Cornell (1993) *Transformations* 30-31.

109 (1992) *The philosophy of the limit* 92.

110 The *Good* is understood in two ways: First, as universal in the wide or strong sense; and secondly, as the universal within a given legal system conceptualised as an indeterminate *nomos*.

111 The deconstructive critique against communitarianism should also be understood in this context. The closure upon which communitarianism insists, cannot be.

> that the "is" of Law can never be completely separated from the elaboration of the "should be" dependent on an appeal to the Good. Ethical alterity is not just the command of the Other, it is also the Other within the nomos that invites us to new worlds and reminds us that transformation is not only possible, it is inevitable.[112]

Cornell argues that deconstruction, renamed by her, as we have seen, to the "philosophy of the limit", reminds us that the meaning of the "ethical" is necessarily displaced into the future because the *Good* is not fully present. A conception of time is central to legal interpretation since legal interpretation should be focused on the future. She explains that the deconstruction of the traditional conception of time – a conception that privileges the present – can help us understand why justice is irreducible to the pregiven norms of any legal system.

According to Cornell *legal interpretation is transformation.*[113] When we interpret we must remember that we are *responsible* for the direction of that *transformation*. We cannot escape the responsibility implicit in every act of interpretation. Interpretation always involves both *discovery* and *invention* because there can be no simple "origin" of legal meaning. Legal interpretation is always "conditional". The "philosophy of the limit" emphasises the necessity of invention. This invention entails a judge's "responsibility toward *memory*". *Remembering involves not an accurate repetition of legal norms, or simply a recovery of the past, but a turn towards the future by remembering the past.* She notes that the act of memory involved in judging involves the paradox of "remembering the future". The future of the "not yet" remains *other* to the present. The future is distinguished from the present, which merely reproduces itself. Justice, whether understood as the limit to the present system, or as the voice of the *other* that cannot be silenced, is the opening of the beyond that makes "true" transformation possible. Without an appeal to the beyond, transformation would not be transformation but evolution, that is mere continuation. For Cornell the very concept of evolution of the

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112 Cornell (1992) *The philosophy of the limit* 111.

113 Cornell (1992) *The philosophy of the limit* 112.

system implies the privileging of the present.

It is appropriate to return to Cornell's double-handed interpretation of transformation, that I discussed in "...visions of public space" (the first part of this work). The one interpretation means change radical enough to restructure any system so that the identity of the system is itself altered. The other asks the question what kind of individuals we would have to become in order to open ourselves to new worlds. I argue for a transformation of the South African legal system in both senses. This means that the system itself should be altered radically, but also that the members of the South African community should be open to new worlds. Cornell's vision of legal interpretation that must involve both the past (memory) and the future (because the present is incapable of avoiding violence, being unethical to the Other) is very important to my vision of ethical interpretation. Ethical interpretation in the South African context must involve memory – remembering the past (this is why I insist on the significance and value of the Truth and Reconciliation as an event); transformation, that must involve the change and disclosure of individuals by disrupting the "full presence" of the present (legal system, community, interpretation of equality); and the idea of a democracy, justice, equality "to come".

Perspectives on the interpretation of rights (equality)

In this section I shall discuss the perspectives on interpretation and equality of a few authors. I chose to focus on these authors for a specific reason. For me all these perspectives encompass something of what I see as an "ethical moment", in other words I think that all these theories in their own way can contribute to my picture of ethical interpretation. These authors have certain similarities amongst themselves but, as I interpret them, they also have connections with the above conversation on deconstruction. I know that I must be very cautious when I say this. In the first place the authors themselves might not agree that their theories are deconstructive and secondly serious followers of deconstruction might accuse me of "violation" and unresponsibility. That said, I argue that the authors below focus on the same "in between" space that deconstructive theory describes. They are all conscious of the limit of present systems to fully encompass justice, in other words they subscribe to a continuous process of interpretation, of seeking equality, democracy and justice. The authors below are all sceptical of the modern rationalist view of the self (the subject). In my view they accept the notion of a "fragmentary" self. Their theories address, context, relationships, public life and community. They are concerned with difference and the other.

I start of with Jantje van den Oord's approach to equality as a "social right". She explicitly applies deconstruction and the philosophical writings of Jacques Derrida in a legal context. I see her theory as a good place to start because her theory is the closest to the previous discussion on deconstruction and is also the beginning of a more legal orientated enquiry.

Equality as a "social right" - Jantje van den Oord

Jantje van den Oord[114] notes that the discourse on equality has for a time focused on the tension between formal equality (where equality is protected on the basis of sameness), and substantive equality (where difference is accepted and incorporated in the approach). She applies Derrida's philosophy of deconstruction to equality. She argues that the opposition between equality and difference is closely related to the similar opposition between that which is *inside* the law and that which is *outside*. She argues that a deconstruction of the inside/outside opposition shows that inside/outside as well as centre/margins are intertwined. (The opposition between inside and outside occurred also earlier in the discussion of community, unity and disunity.)

The *outside* forms a structural condition which allows us to speak of an *inside*. (With regard to community it was said that the notion of community (inclusion of some) is based on the exclusion of others). The opposition between *outside* and *inside* is constantly shifting. (This is also true for the community). Van den Oord argues that the significance of the "intertwining" of *inside* and *outside* for the relationship between equality and difference is that it would be in vain to push *difference* (the *other* of equality), to the margins or outside the law in order to secure the unity and generality of law. (This is why I subscribed to the idea of an open heterogeneous community that is continuously transforming). *Difference* remains within the law and continues to disrupt law from within, time and time again. She argues that a deconstructive approach makes the relationship between inside/outside and equality/difference *undecidable*. This undecidability is at the same time a condition for the creation of meaning and disrupts meaning.

Van der Oord shows the critical implications of deconstruction for the law. By emphasising equality as the norm, the law oppresses equality's *other* (*difference*), but

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114 Van den Oord (1994) *Verdaagde Rechten.* (Doctoral thesis submitted at the University of Utrecht.)

the law must at the same time allow the other to operate within law as an innovative and disruptive force. Van den Oord argues that a deconstructive view does not consider rights, such as the right to equality, as contributing to any general value, but considers it as a *promise that can never be definitely fulfilled.*[115] The fulfilment remains deferred, delayed or adjourned. She notes that the desire for transformation, equality and justice must be kept open as a promise.[116]

Van den Oord[117] also applies a deconstructive strategy to the distinction between classic and social rights in order to explain the relation between difference and equality. In her view equality can be understood as both a "classic" and "social" constitutional right. In the traditional approach, equality protects citizens from the state and the state must abstain from interference in society. (This is true of course for any classic right, not only for equality). In this approach individual rights are emphasised; group-membership such as sex is not taken into account and differences are neglected. In an interpretation of equality as a social right, the state must intervene in social relations in order to realise equality. The latter approach allows for a substantive interpretation of equality. Van den Oord notes that the traditional approach has maintained a rigid dichotomy between classic and social rights.

In the traditional approach classic rights are regarded as general and abstract rights which protect the individual against the state. Because social rights demand further elaboration by the state, it is argued that they are not "real" rights. Social rights are then perceived as the *other* of the "normal" or "original" rights. Van den Oord argues that the

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115 Women's rights have received great attention during the past few decades. See generally Alfredsson and Tomaševski (eds) (1995) *A thematic guide to documents on the Human Rights of Women*; Cook (ed) (1994) *Human rights of women: national and international perspectives*; Peters & Wolpers (1995) *Women's rights human rights: international feminist perspectives*; Kerr (ed) (1993) *Ours by rights: women's rights as human rights.* But see also Marks "Nightmare or noble dream: the 1993 World Conference on Human Rights" (1994) 53 *Cambridge Law Journal* 54-62 and Nhlapo "Cultural diversity, human rights and the family in contemporary Africa: Lessons from the South African constitutional debate" (1995) 9 *International Journal of Law and the Family* 208-225

116 See Du Plessis "The jurisprudence of interpretation and the exigencies of a new constitutional order in South Africa" (1998) *Acta Juridica* 8-20.

117 (1994) *Verdaagde Rechten.*

disruptive force of social rights must be emphasised in order to deconstruct the opposition between social and classic rights. Here she applies Derrida's term of the "logic of supplement". The "logic of supplement" refers to the power relation between opposites, with one of the poles (the original/centre) being privileged. The *other* (the supplement/margin) is defined in terms of the original and is therefore derivative. Following Derrida, she argues that the "self-sufficient" original/centre is a myth. There can only be an original/centre at the expense of the supplement/margin as the *other*. Van den Oord explains that the word "supplement" can have at least two meanings: It can mean something which is added to an already complete and self-sufficient thing, and it can mean something that is added to something in order to complete it. In the first meaning the supplement is a simple exterior of the original, while in the second meaning the supplement compensates for a lack of the assumed whole of the original. The two meanings of "supplement" are usually considered contradictory. A deconstructive approach demands that we combine them. Thus where social rights are usually considered necessary in order to realise classical rights, they undermine the full presence of the original classic rights. The result is that the supplement becomes a structural condition for the original. The supplement not only makes the original possible, but at the same time fractures and undermines its self-presence.

Van den Oord puts forward an interpretation of equality as a social right. By showing that the relationship between equality and difference is *undecidable*, she creates room for the *other*, which allows us to discuss equality again and again. Because of their heterogeneity, social rights[118] escape a closed definition and resist the oppositional logic. *Difference* becomes a disruptive force to formal equality and, accordingly, another way of preventing closed definition and resisting oppositional logic.

Van den Oord's theory is of particular value because she applies deconstruction convincingly to the very crucial issue of equality. Her analyses of the inside and the

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118 See also De Vos "Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 constitution" (1997) 13 *South African Journal on Human Rights* 67-101; "The economic and social rights of children and South Africa's constitution" (1995) 10 *Suid-Afrikaanse Publiekreg/South African Public Law* 233-259.

outside and how it relates to equality and difference, between the original and the supplement and how it relates to classic rights and socio-economic rights and her references to the other, difference and undecidability and law make the abstract theory of deconstruction concrete in the context of the legal concept of equality. However, it seems to me as if she uses deconstruction (and the key phrases like the *other*, *undecidable*, *difference*) as a pure structure or a technique. Maybe I can express my sense better in terms that I used earlier. I fear that Van den Oord, although she applies the theory of deconstruction so adequately, reflects something of a disembeddedness and disembodiment. This does not negate the significance of her approach but encourages me to continue my search for other perspectives.

Below I shall highlight Martha Minow's approach to equality and difference. Minow, in contrast with Van den Oord, follows a more contextual and relational and less abstract approach. The crux of her argument, I argue, is similar to Van den Oord's approach, that we should displace the traditional approach to equality by focusing on difference. Minow's approach of rights in relationships provides a further perspective to the question of the interpretation of and approach to equality.

Rights in relationships - Martha Minow

"Instead of making differences, let us make all the difference"[119]

Minow[120] observes that legal analysis simplifies, categorises, classifies and identifies one thing as "like the others", and the other as "unlike the others". Although this seems harmless, it is not, because when we classify we create certain categories with consequences. Minow argues that classifications can express and implement prejudice, racism, sexism and anti-Semitism. The effect of classifications can be an intolerance

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119 Minow (1990) *Making all the difference. Inclusion, exclusion and American law* 16. See also Minow & Spelman "In context" (1990) 63 *Southern California Review* 1597-1652.

120 Minow (1990) *Making all the difference. Inclusion, exclusion and American law* 3.

for difference. Minow does not deny the reality of difference, but is cautious about the way we make distinctions. She says that we should be wary not to use classifications as if there is a natural way for things to be.

According to Minow boundaries[121] figure prominently in legal assumptions about the self and about society. She shows how traditional legal rules presume that there is a clear and knowable boundary between each individual and all the others.[122] (Minow's use of boundaries here is related to Van den Oord's analysis above of the inside and the outside). Although legal rules seem to avoid labels because it emphasises the individual, it contributes to labelling by favouring a view of certain and clear *boundaries* rather than of *relationships*. Law has accordingly neglected ongoing relationships between people, and has failed to resolve the meaning of equality for people defined as different by society. Minow[123] argues that the concept of boundary depends on relationships: relationships between the two sides drawn by the boundary and also relationships between the people who recognise and affirm the boundary. From this starting point, connections between people are the precondition for boundaries. We can therefore not make a choice *between boundaries and connections*, or *between individualism and relationships*. Rather we should consider *which kind of relationships we should enhance*. Differences can be treated similarly as a function of relationships. (Again Minow's argument is similar to Van den Oord's analysis. Minow, in my view, is reflecting the deconstructive insight of *undecidability*. By arguing that it is not about making a choice between boundaries (individualism) and connections (relationships) she disrupts dialectical (opposing) thought). She suggests that instead of treating differences as the private, internal problem of each different person, they can be treated as a feature of communal life.

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121 Minow (1990) *Making all the difference. Inclusion, exclusion and American law* 5. She refers to the work done by an animal behaviourist, Harold A. Herzog who examined the impact of the labels used in moral responses to mice. See also Ackerman "Tales of terror and torment: Thoughts on boundaries and truth-telling" (1997) 63 *Scriptura* 425-434.

122 (1990) *Making all the difference. Inclusion, exclusion and American law* 7. Nedelsky makes a similar point about boundaries and the boundary-like approach to rights. I shall discuss her view below.

123 (1990) *Making all the difference. Inclusion, exclusion and American law* 10.

In short, Minow[124] advocates a shift in focus from the distinctions between people to the relationships within which we notice and draw distinctions. She rejects both the claim that we must *abandon* rights as illusory or insufficient and the claim that we must *preserve* existing forms of rights as protections of individual autonomy. In her view, *embedding rights with relationships* offers another and more promising alternative. She says that we should be self-conscious about the concepts we use and their effects on what we think we know and who we are.

> A scholar's ... focus on people who are "different" or who seem marginal is itself a way to remake the meaning of difference. Making central what has been marginal remakes the boundaries of knowledge and understanding and sheds new light on the whole; we are constituted by what and how we know even as we constitute what we know as we know it.[125]

Minow[126] states that the dilemmas of difference appear unresolvable because the risk of discrimination accompanies both efforts to ignore and to recognise difference in equal treatment and special treatment. The problem lies in the fact that difference is stigmatised. If to be equal means to be the same, to be different accordingly means to be unequal or even "deviant". All distinctions are made from the starting point of some claimed "normality". Difference gives rise not only to a relationship of equality and inequality, but to one of superiority and inferiority as well.

> To be different is to be different in relationship to someone or something else - and this point of comparison must be so taken for granted, so much the "norm", that it need not even be stated.[127]

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124 (1990) *Making all the difference. Inclusion, exclusion and American law* 15.

125 Minow (1990) *Making all the difference. Inclusion, exclusion and American law* 16.

126 (1990) *Making all the difference. Inclusion, exclusion and American law* 49.

127 Minow (1990) *Making all the difference. Inclusion, exclusion and American law* 50.

Five unstated assumptions

Minow identifies five unstated assumptions with regard to difference: First, we often assume that differences are *intrinsic*, rather than viewing them as expressions of comparisons between people on the basis of their *particularity*. Secondly, we adopt an *unstated point of reference* when assessing others in order to determine who is *different* and who is *normal*. (The unstated point of comparison, which is particular and not general, promotes the interest of some and not others, but remains unstated because those who are described as different do not have the power to select the norm in terms of which the comparison is made.) Minow notes that a reference point for comparison purposes is central to equality because equality asks: "equal compared with whom?" Thirdly, we treat the person making the comparison as *someone without a perspective* instead of as someone with a *particular situated* perspective. Fourthly, we assume that the perspectives of those being judged are either *irrelevant* or already taken *into account* through the perspective of the judge. Finally, there is an assumption that the existing social and economic arrangements are *natural* and *neutral*.[128]

Minow argues that if the assumptions behind the difference dilemmas are exposed and debated, the tension between formal, predictable rules and individualised judgements will reflect the relationships and patterns that influence the negative consequence of difference. The realisation that difference arises in relationships and in dynamic contexts introduces new possibilities for change.[129]

Institutional difference

Minow[130] observes that the question of difference is symptomatic of a particular way of perceiving the world. Because of the institutionalisation of difference, challenging the assumptions in regard to difference will require more than "fresh thinking by individuals". In her view it is fairly easy to make alternative assumptions in the place of

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128 Minow (1990) *Making all the difference. Inclusion, exclusion and American law* 74.

129 See Brennan "The influence of cultural relativism on international human rights law: Female circumcision as a case study" (1989) *Law and Inequality* 367-373.

130 (1990) *Making all the difference. Inclusion, exclusion and American law* 199.

the previously mentioned unstated ones: One can attempt to understand difference in a particular context; the people who assign difference can take the perspective of others into account; the relationship between the status quo and the assignment of difference can be renovated. To make these assumptions concrete, however, is a more difficult matter. The problem of institutional difference is off course also relevant for the South African context. Although transition from an authoritarian state to a democracy has occurred many of the perceptions of the previous order are deeply embedded in institutions.[131]

Minow uses paid pregnancy and parental leave from work as a concrete example of dealing with relationships of difference.[132] The traditional approach was that employers either made no provision, or that they allowed pregnancy leave as a form of special treatment for women employees. In the first option, the woman is not accommodated at all; in the second she is, but pregnancy becomes equal to disability. Another approach[133] was to afford men *and* women the same opportunities to combine work and family. Minow argues that this view begins to address the problems of difference, because it challenges the association of sameness with equality, and difference with inferiority or disability, and introduces a new "female" norm. It asks why an individual worker must bear responsibility for differing from the norm. She frames the problem of pregnancy as not just a problem for women who are pregnant, but also for men who have family responsibilities, for employers who miss out on skills of people involved in child rearing, and for the wider community with an interest in reproduction and child rearing, on the one hand, and in production at the workplace, on the other.

According to Minow, the last approach challenges the presumed norm which divides work and family duties. It also challenges the framework of difference analysis. The

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131 See Cook "State responsibility for violations of women's human rights" (1994) 7 *Harvard Human Rights Journal* 125-175.

132 Minow (1990) *Making all the difference. Inclusion, exclusion and American law* 86. See also her discussion of "Appropriate Education for handicapped children" at 81. See also Littleton "Reconstructing sexual equality" (1987) 75 *California Law Review* 1279-1314.

133 Minow (1990) *Making all the difference. Inclusion, exclusion and American law* 87.

distinction between the private and the public becomes problematised. The consequences of this approach is that the various relationships involved are acknowledged. She observes that if difference is related to relationships between people and social institutions, difference is no longer the problem of the "different person". Minow argues that solutions to dilemmas of difference cannot work if they put the responsibility for redressing negative meanings of difference on the person who is treated as different. The norms formulated by institutions should not make people who differ from them, feel inferior.

Three approaches

Minow[134] identifies three approaches that have been followed in situations of difference: the "abnormal-persons" approach; the "rights-analysis" approach and the "social relations" approach.

The "abnormal-persons" approach divides the world into two classes of persons, normal and abnormal. Different legal treatments apply depending on what class one belongs to. Individuals with "normal" competence and capacity enjoy rights and are held responsible for their acts because they are able to reason and act accordingly. Individuals with "abnormal" competence and capacity may be subjected to legal restraints on their autonomy and their rights may be denied. They need legal protections to guard them and others from the effect of their incapacities. The "abnormal persons" approach does not recognise variations and distinctions among "abnormal" persons, because it focuses on them compared to "normal persons". Minow[135] argues, for example, that different legal treatment based on mental competence and incompetence rests on the view that "all persons similarly situated should be treated alike".

The "rights analysis" approach departs from the point that legal rights apply to every

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134 Minow (1990) *Making all the difference. Inclusion, exclusion and American law* 86.

135 Minow (1990) *Making all the difference. Inclusion, exclusion and American law* 86.

individual.[136] The fact of personhood and citizenship entitles each individual to be free from state interference and to be treated the same as others by the state. Notions of inferiority based on race, gender, or ethnicity can no longer be defended. In this approach the same legal rights enjoyed by "normal" persons should be available to those labelled "abnormal", unless it can be proved that the differences between the groups are based on "demonstrable evidence" rather than prejudice. This approach advocates new rights, programmes and protections designed to benefit the "mentally incompetent". The special treatment is justified because it could address continual deprivation of such persons' basic rights, or it could be an entitlement founded on their special needs.

Finally, instead of assuming that autonomy is the essential dimension of personhood, the "social-relations" approach assumes that there is a basic *connection* between people.[137] It challenges the method of social organisation that constructs human experience in fixed, immutable categories (such as the categories and differences used to define and describe people on a group basis). According to Minow, this approach is "suspicious" of the attribution of difference located in the *specific person* who does not *fit,* rather than in relationships between people and social institutions. This approach assumes that people exist in *relationships.* Difference is understood as expressions of relationships.

> "Difference" is meaningful only as a comparison. A comparison draws a relationship; a short person is different only in relation to a taller one. As a relational notion, difference is reciprocal: *I am no more different from you than you are from me.*[138]

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136 Minow (1990) *Making all the difference. Inclusion, exclusion and American law* 107.

137 See also Coombe "The cultural life of things: Anthropological approaches to law and society in conditions of globalization" (1995) 10 *American University Journal of International Law & Policy* 791.

138 Minow (1990) *Making all the difference. Inclusion, exclusion and American law* 86.

Minow argues that it is important to realise that the statement of difference distributes power. Differences are named by "those with the power to name and the power to treat themselves as the norm". The "social-relations" approach demands analysis of difference in terms of the relationships that construct it. This approach entails a particular, normative evaluation of legal assignments of difference. Differences should only be sustained if they do not express or confirm unfair and harmful distribution of power. The "social relations" approach recognises that it is impossible to really take the perspective of the other. In trying to see the perspective of another, one may easily attribute a kind of unitary difference within that very group.

Minow[139] draws our attention to the fact that differences are quite often *reified*. By reification she means the way in which abstractions silence experience and distance people's sense of understanding of and participation in their own experiences. She submits that the "social-relations" approach, although new to law, can offer new insights and is essential to legal transformation.

Recovering rights

Minow echoes the argument that the liberal approach to law and rights neglected the community in favour of the individual. Yet, she still believes that rights can contribute significantly to society, and that especially people on the "margins" can benefit from rights.[140] She argues that we should "reimagine" rights as instruments for illuminating the various relationships that we are involved in. She believes that rights, for example, can redress assigned differences without repeating the historical patterns of family relationships. Traditional family law enforced gender-based roles and embraced a particular notion of family autonomy which prevented the legal system from invading

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139 (1990) *Making all the difference. Inclusion, exclusion and American law* 114.

140 Critical Race Scholars reacted against Critical Legal Scholars for rejecting rights. They argue that rights can be helpful for people who have traditionally been excluded. See amongst others Williams (1991) *The alchemy of race and rights* and (1995) *The rooster's egg;* Crenshaw & others (eds) (1995) *Critical race theory: The key writings that formed the movement;* Delgado (ed) (1995) *Critical race theory: The cutting edge;* West (1993) *Prophetic reflections: Notes on race and power in America;* De Keseredy "The left realist perspective on race, class and gender" in Schwartz & Milovanovic *(1996) Race, gender, and class in crimininology* 49-69.

the private sphere of the family, or the sphere of power reserved to the head of the family. Apart from the protection of children against serious physical or psychological harm, there was a *public neglect* of children that was justified by the theory that only parents were responsible for their children.[141] The public neglect of children can be seen as a manifestation of liberalism's impoverished view of politics and of public life. Violence against women similarly remained a hidden issue.[142] Minow argues that the introduction of "formal" equality into family law quite often had negative consequences. She observes that "*one person's freedom can be another person's disaster*".[143] Freedom means different things to different individuals. To introduce formal equality and freedom where each party is in a direct relationship with the state, does not provide real equality but only exposes the difficulties of freedom in a world of relationships.

Minow notes how the introduction of legal rights to the family context highlights the injustice of treating people the same if they are situated differently. The history of domestic violence shows the dangers in obscuring the private sphere, where family members are subjected to the unrestrained authority of others, from the public sphere and from public intervention. (Here, Mouffe's[144] arguments that the liberal notions of freedom and equality must be extended to all spheres of potential domination of others come to mind as well as the argument that the private-public dichotomy must be reformulated. The public-private divide should be seen in another way as a divide between two physical spheres, and room should be made for public moments within the private realm and vice versa.)

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141 See also Minow's discussion on children's rights (1990) *Making all the difference. Inclusion, exclusion and American law* 283-306.

142 In this regard The Domestic Violence Act 116 of 1998 should be noted. This act provides for the harmed party to obtain an interdict in order to prevent the continuation of the abuse. The act specifically provides for public intrusion by stating that anyone who has a suspicion that someone is abused has a legal obligation to report it to the police.

143 (1990) *Making all the difference. Inclusion, exclusion and American law* 275.

144 See Part 1"... visions of public space" where I discussed Mouffe's arguments as set out in (1993) *The return of the political.*

Minow[145] states that the traditional absence of state power in the private sphere suggests something "powerful" about boundaries. It shows that both sides of a boundary are regulated, even if the line was supposed to distinguish the regulated from the unregulated. The analysis of family law itself can provide an angle of inquiry about the failure of traditional liberal rights to acknowledge the threats of private power to liberty and equality. Minow comes to the conclusion that rights can be revitalised if they are located within relationships.

Minow says that we need to reclaim and reinvent rights by exposing and challenging the hierarchies of power and violence. She highlights Robert Cover's[146] point that law embeds interpretations of political texts in institutions that exercise the state's monopoly over legitimate violence. The very act of focusing on community through a language of rights may expose the divisions within the community and beyond it. Rights can then be understood as "a kind of language that reconfirms the difficult commitment to live together even as it enables the expression of conflicts and struggles".[147] She observes that legal language can never reflect experience because it "constrains" and "limits" meaning.

> Perhaps people can work through legal interpretation to communicate disjunction, misunderstanding, even the right to avoid conversation. Such work requires context as well as theory, actual settings and ongoing relationships in which discourse is part of a way of life. Beyond our talk of rights we have each other, and the steady burden of learning to live together and apart.[148]

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145 (1990) *Making all the difference. Inclusion, exclusion and American law* 277.

146 See Cover "Violence and the word" (1986) 95 *Yale Law Journal* 1601-1629. See also Cover "The Supreme Court 1982 term - foreword: Nomos and narrative" (1983) 97 *Harvard Law Review* 4-68.

147 Minow (1990) *Making all the difference* 309.

148 Minow (1990) *Making all the difference* 311.

According to Minow the "social relations" approach can provide guidance for alternative legal treatments of difference. This approach emphasises the basic *connectedness* between people, and the injuries that result from social *isolation* and *exclusion.* It focuses on an understanding of difference as a function of comparison between people and rejects the way distinctions are drawn by people in power in order to harm the less powerful. The "social relations" approach focuses on *relationships* between people, within which each individual develops a sense of autonomy and identity. The focus on relationships in the context of rights is sometimes criticised as being contradictory, but Minow says that it is only contradictory if a conceptual framework of "either/or" solutions are accepted. Relational strategies are not inconsistent with rights and an emphasis on connections between people and between theory and practice can synthesise what is important in rights with what rights miss. She argues that rights must be reconceived as a language for describing and making patterns of relationships. It can be understood as "recognised rituals" by everyone and can secure attention in a continuing struggle over boundaries between people. Rights cannot provide an ultimate language, but one of many languages for the creation of collective and individual lives.

In the South African context, the issue of difference has never been more important. Boundaries and categories are inevitable and even necessary, and could be important points of connection. The differences that we assign are expressions of ourselves which are human made and mutable. In the search for equality the fact of difference must be acknowledged with the realisation of our own participation in the meanings of difference. An "ethical" interpretation of equality requires these acknowledgments and realisations. Below I shall turn to Jennifer Nedelsky's perspective. Her argument that we should approach "rights as relationships" and not as "boundary-like structures" adds to the perspectives of Jantje van den Oord and Martha Minow.

Rights as relationships - Jennifer Nedelsky

Nedelsky[149] discusses how boundaries are central to the conceptual and institutional framework of the American constitution. She argues that the American constitution functions as a "boundary-like structure", especially in regard to property.[150] Much of constitutional protection can be understood as an attempt to protect individual autonomy. Autonomy[151] in this regard must be protected from the intrusion of the collective. Nedelsky sees individual autonomy not as a static human characteristic but as a capacity that can be developed. If we want to inquire into autonomy, it is better to focus on how to structure relationships so that they can foster and not undermine autonomy, than to focus on the boundary metaphor. Nedelsky argues that the function of boundaries is to structure relationships, "indeed to structure them in ways that enable an autonomous self to emerge".[152] New metaphors and myths must be developed that focus on forms of human interaction and responsibility. If we let go of the boundary metaphor, the structure of legal conceptions of autonomy and freedom will disintegrate. Because there is no consensus on the basic meaning of law or of the values it protects, new metaphors are a genuine option.

> We are in a period of flux where our presuppositions are in doubt. It is therefore possible to exercise some deliberate choice about the frame of reference through which we see the world. We can try to transform our own language, push it in the direction of the barely articulated "intimations" that have reached us. Disintegration entails promise. If we

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149 "Law, boundaries and the bounded self" (1990) *Representations* 162-189.

150 See Nedelsky (1990) *Private property and the limits of American Constitutionalism.*

151 See also Nedelsky "Reconceiving autonomy: Sources, thoughts and possibilities" (1989) 1 *Yale Journal of Law and Feminism* 7-36; "Reconceiving rights as relationships" *(1993)* 1 *Review of Constitutional Studies* 1-17; "Meditations on embodied autonomy" (1995) 2 *Graven images* 159-170; "Embodied diversity and the challenges to law" (1997) 42 *McGill Law Journal* 93-117.

152 Nedelsky "Law, boundaries and the bounded self" (1990) *Representations* 171.

> can let go of our wall of rights, the reintegration is likely to be far fuller and more promising.[153]

In Nedelsky's view, that there are some critical problems with rights that we ought to take seriously. These problems fall into two categories: justifying the constitutionalisation of rights, on the one hand, and "rights talk" in general, on the other. Nedelsky prefers a "dialogue of democratic accountability" to the model of rights as trumps. She also suggests an approach to rights as relationship. It is problematic to view rights as limits to democracy where there is no consensus on the content of these rights. There are disputes about whether natural rights are the source of our legal rights, what would count as basic rights and whether we should use the term "rights" at all. She feels it is useful to retain the term

> [B]ut if we are to invoke rights to constrain democratic outcomes, we must do so in a way that is true to the essentially contested and shifting meaning of rights.[154]

Nedelsky advises that we should take note of the changes that have taken place in both the popular and legal understanding of rights. She argues that if we acknowledge the mutability of basic values, the problem of protecting them from democratic abuse is transformed. The terms "democracy" and "individual rights" and the nature of the tension between them should be reconsidered. Constitutionalism's balancing of the tension between democracy and individual rights is not adequate. We should realise that rights are actually only "terms" for capturing and giving effect to what judges perceive to be the values and choices that "society" has embedded in the "law". In this framework rights are as much collective choices as laws passed by the legislature. Constitutionalism is then no longer about the question of how to protect rights from democracy. The question is rather why should some rights limit other rights, or why should some collective choices (rights) limit other collective choices (the outcomes of

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153 Nedelsky "Law, boundaries and the bounded self" (1990) *Representations* 184.

154 Nedelsky "Law, boundaries and the bounded self" (1990) *Representations* 185.

ordinary democratic processes). Nedelsky phrases the problem as follows: "we need a new way of understanding the source and content of the values against which we measure democratic outcomes".

I started the discussion on Nedelsky with a theme that runs right through her thought, namely her reaction against the conventional formulations of rights as limits to democracy and her argument that we should think in terms of relationships. An example that she uses is autonomy: In the conventional formulation, rights are seen as barriers that protect the (autonomous) individual from intrusion by other individuals and the state. Rights define the boundaries that protect individual autonomy from intrusion by others. Nedelsky points out that what makes autonomy possible is not separation, but relationships. If we accept that the community is a source of autonomy the relation between the individual and the community and the state shift. Constitutional protection of autonomy is then no longer the protection of the individual against intrusion but "a means of structuring the relations between individuals and the sources of collective power so that autonomy is fostered rather than undermined".[155]

With relationship as starting point, we can move beyond "rights as limits to democratic outcomes". The focus on rights as limits, barriers and boundaries must be shifted to a "dialogue of democratic accountability". For this we need an institutionalised process of articulating basic values and ways of continually asking whether our institutions of democratic decision-making are consistent with democracy and other values. A focus on relationship makes us aware of our context and accordingly of the fact that values and beliefs and rights change over time. In this framework rights do not "trump" democratic outcomes. Instead, an ongoing dialogue about the content and values of rights and democracy is set up.

Nedelsky identifies three general critiques of rights talk: (1) rights are undesirably individualistic; (2) rights obfuscate the real political issues; (3) rights serve to alienate and distance people from one another. All these critiques can be addressed by

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[155] Nedelsky "Law, boundaries and the bounded self" (1990) *Representations* 187.

focusing on rights in the context of relationships.

According to Nedelsky we should reconceptualise rights as a means of setting up a dialogue of democratic accountability. She says that this will enable us to redefine the kinds of justification necessary for constitutional constraints on democratic decision-making and help to provide a conceptual framework that will assist us in designing ways of dealing with rights in democracies. This reconceptualisation and redefinition of constitutionalism requires an understanding of rights as structuring relationships.

Until now I have focused on the perspectives of Jantje Van den Oord, Martha Minow and Jennifer Nedelsky. We heard Van den Oord's structural (with deconstruction as instrument) analysis of the relationship between the inside (equality) and the outside (difference) and her approach to equality as a social right. After Van den Oord, I repeated Minow's warning that we must be cautious when we talk about differences. With reference to legal examples she repeated the point made earlier by Van den Oord relating to boundaries, to the inside and the outside. What is striking about Minow's approach is that even though she does not use the deconstruction jargon and labels she is very much aware of language and the power of language. The social-relations approach that she follows, takes account of the philosophy of deconstruction. After Minow I turned to Nedelsky's emphasis of relationships and critique of the traditional boundary-like approach to rights. The perspectives of these three authors highlighted that we should be cautious of boundaries (inside and outside, equality and difference, classical rights and social rights) and rather focus on relationships and contexts.

I shall now consider Frank Michelman's argument of "republican constitutionalism". Again we shall hear echoes of deconstruction, of the significance of public space and relationships. To a certain extent I shall repeat the debate between a liberal and a communitarian and civic republican approach to law and politics that I discussed in Part 1 "... visions of public space". An added dimension to this debate as discussed by Michelman is its application to a case decided by the US Supreme Court. As I have already mentioned Michelman's perspective ties the other perspectives together

because he makes the link between visions of public space and equality clear. The other authors have built up to this, and Michelman makes the link explicit. The intersection between public space and equality (and justice) is an ethical intersection that gives body to an ethical interpretation of equality.

Republican constitutionalism - Frank Michelman

Michelman[156] considers how the decision in *Bowers v Hardwick*[157] could have been different if the court took notice of a "republican-inspired" standpoint. He makes three claims: that the Supreme Court's analysis and decision in *Bowers v Hardwick* are strikingly resistant to obvious claims of political freedom; that judicial constitutional analysis ought to be receptive to such claims; and that constitutional analysis is rooted in underlying sensibilities and understandings regarding the larger aims and methods of constitutionalism. He argues that American constitutional understanding and analysis might benefit from reflection upon civic republicanism and that it might invigorate a constitutional discourse that would prevent decisions like the one in *Bowers v Hardwick*.

Michelman notes the claims by critics of communitarianism and republicanism that they are "solidaristic doctrines" that presuppose a degree of moral consensus that is nonexistent in modern society. The same critics argue that communitarianism and republicanism support a majoritarian doctrine of popular legislative supremacy that is

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156 Michelman "Law's Republic" (1988) 97 *The Yale Law Journal* 1493-1537.

157 478 US 186 (1986). I have already referred to Martha Nussbaum's discussion of *Bowers v Hardwick* in the introduction of this part. As I mentioned there the facts of the case were as follows: A man was arrested and accused of sodomy that is a crime according to Texas law. The charge was later withdrawn by the state but the accused then argued that it is unconstitutional to criminalise sodomy. The court found that under US law sodomy is a crime and that it is not in contravention of the constitution. I have already mentioned earlier that when this issue came before our Constitutional Court the court found that the common law of sodomy is in contravention of the South African constitution. See *National Coalition for Gay and Lesbian Equality v Minister of Justice and others* (1998) 12 BCLR 1517 (CC).

fundamentally incompatible with modern constitutionalism. He argues, however, that republican constitutional thought does not necessarily reflect any such static communitarianism. He contends that a reconsideration of republicanism's deeper constitutional implications can remind us of how the renovation of political communities, by including those which have been excluded, can enhance everyone's freedom. To him, republican constitutionalism involves "a kind of normative tinkering" that entails the "ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members". A reconception of these histories will also be needed to extend political community to persons that have been excluded. He says that contemporary liberals have less to fear from "lurking social solidarism" than from a constitutional jurisprudence that prevents the community from self-transformation.

Michelman argues that what ought to alarm liberals from the *Bowers* decision is not a judicial affection for moral majoritarianism, but the decision's embodiment of an "excessively detached" and "passive" position toward constitutional law. He calls the jurisprudence of the decision in *Bowers* "backward looking" and "authoritarian" because it equated public values with the formally enacted preferences of a recent legislative, or past constitutional majority, or with the teachings of a historically dominant orthodoxy. Michelman notes that Justice White's opinion in *Bowers* wears its "positivistic constitutional theory on its sleeve". The judge believes that it is not for the court to "impose" its "own choice of values" on the people. The judge believes that the court is the "servant", not the "author" of a prescriptive text and accordingly cannot inquire into meaning, reason or value. Michelman asks why the Supreme Court should not be an organ of politics if that is what it would have taken to secure liberty and justice for Hardwick. The court's reason is that for the court to act politically would amount to a judicial usurpation of power that belongs to "the people", acting through their elected representatives. Michelman responds:

> But again, why? Why by right to others? Why ought popular-majoritarian preference rather than judicial argument ultimately determine the

question of law controlling Hardwick's liberty?[158]

He replies the answer is of course democracy, but argues that the answer entails more, like deliberation on *what* democracy is. If such a deliberation does not happen, democracy conveniently answers to the need for authority.

> When the social determination of disputed questions of value is imaginable only as a battle of preferences or as the exertion of an arbitrary, dominant will, then law - the adjudicative act - tends to be understandable only as the unquestioning and uncreative (which is to say necessarily wooden or unintelligent) application of the prior word of some socially recognized, extra-judicial authority.[159]

Michelman advocates a republicanism that entails a close consideration of certain implications of historical republican constitutional thought that can point us towards an account of the relations among law, politics, and democracy. He argues that American constitutionalism rests on two premises regarding political freedom: "first, the American people are politically free insomuch as they are governed by themselves collectively, and, second, that the American people are politically free insomuch as they are governed by laws and not men".[160] The problematic relationship between the "government of the people by the people" and the "government of the people by laws" is evident. Both the formulas of "self-rule" and "law-rule" express a demand that the American people are bound to respect as a primal requirement of political freedom. "Self-rule" demands the people's determination for themselves of the norms that are to govern their social life, while "law-rule" demands the people's protection against abuse by arbitrary power.

He considers a possible way of thinking through this tension by conceiving of politics

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158 "Law's Republic" (1988) 97 *The Yale Law Journal* 1498.

159 Michelman "Law's Republic" (1988) 97 *The Yale Law Journal* 1499.

160 Michelman "Law's Republic" (1988) 97 *The Yale Law Journal* 1500.

as a process in which "private regarding 'men' " become "public regarding citizens" and thus members of a people. Michelman refers to this political process as "jurisgenerative". Jurisgenerative politics is historically recognisable as an idea of "republican lineage". He believes that republicanism signifies the sort of belief in "jurisgenerative politics" that must play a role in any explanation of how the constitutional principles of self-rule and law-rule might coincide.

Michelman[161] explains that in republican thought the "normative" character of politics depends on the independence of mind and judgement, the authenticity of voice, and in some versions of republicanism, the diversity of a plurality of views that citizens bring to "the debate of the commonwealth".[162] He argues that republicanism has always realised the importance of both good politics and a strong legal order. He observes a "republican attachment" to rights.

> Yet republican thought is no less committed to the idea of the people acting politically as the sole source of law and guarantor of rights, than it is to the idea of law, including rights, as the precondition of good politics.[163]

Michelman sees plurality[164] as the social condition that defines modern American politics. He argues that modern (American) politics cannot be made jurisgenerative without plurality as a virtue. Michelman develops a "dialogic constitutionalism" that responds affirmatively to social plurality where courts can play an active and generative role.[165] He argues that we must reclaim the idea of "jurisgenerative politics" from its

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161 "Law's Republic" (1988) 97 *The Yale Law Journal* 1504.

162 The emphasis on plurality is central to Arendt's political thought and her version of republicanism that I discussed in Part 1.

163 Michelman "Law's Republic" (1988) 97 *The Yale Law Journal* 1505.

164 See 1 "... visions of public space" for Mouffe's reliance on plurality as a condition for modern politics.

165 Michelman "Law's Republic" (1988) 97 *The Yale Law Journal* 1505.

ancient context of hierarchical, organicist and solidaristic communities, for the modern context of equality, liberty and plurality.

Michelman seeks to clarify certain conditions of republican constitutionalism's possibility in a modern, liberal society. He wants to uncover beliefs we must hold regarding ourselves, our social relations, and specifically our capacities for "dialogic self-modulation". He states the problematic experience of the tension between popular self-government and a government of laws, and derives from it a normative idea of "dialogic constitutionalism" as consistent with this problematic experience. A political process can validate a societal norm, like plurality, as self-given law only if participation in the process results in some shifts or adjustments in relevant understandings on the part of participants; and if there exists a set of prescriptive social and procedural conditions under which one's understanding is not considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom, and if those conditions actually prevailed in the process supposed to be jurisgenerative.[166] Michelman supports a certain view of the self:

> Such a self necessarily obtains its self-critical resources from, and tests its current understandings against, understandings from beyond its own pre-critical life and experience, which is to say communicatively, by reaching for the perspectives of other and different persons.[167]

He argues that such a conception of political freedom might make plurality a virtue. The legal form of plurality is indeterminacy. Legal indeterminacy in that sense is the precondition of the dialogic, critical transformative dimension of legal practice. But the generative indeterminacies are products of action by those who enter the dialogue and seek to disrupt it from the margins.

So the suggestion is that the pursuit of political freedom through law

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166 Michelman "Law's Republic" (1988) 97 *The Yale Law Journal* 1526-1527.

167 Michelman "Law's Republic" (1988) 97 *The Yale Law Journal* 1528.

> depends on "our" constant reach for inclusion of the other, of the hitherto excluded - which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups.[168]

Michelman then makes the crucial observation that much of the normatively significant dialogue in the United States occurs *outside* the major, formal channels of electoral and legislative politics. In fact, in modern society these formal channels cannot possibly provide for most citizens much direct experience of "dialogic engagement". Most dialogic engagement occurs in various other arenas of public life in the broad sense, some political, and some not. He argues that encounters, conflicts, interactions and debates that arise in town meetings, civic and voluntary organisations, social and recreational clubs, schools, public events and street life and so on are all arenas of potentially transformative dialogue.[169] He notes that the daily experience of social life and policy that takes place in "private" can affect people's lives more profoundly than government action. These experiences must be seen as sources and channels of republican self-government and jurisgenerative politics. These arenas of citizenship encompass not only *formal participation* in public affairs but *real presence* in public and social life at large. Michelman argues that such a non-state centred notion of republican citizenship is historically American and characteristic of the contemporary civic revivalism of the time. He argues accordingly that a notion of republican dialogue that is not exclusively and immediately tied to the coercive exercise of centralised majoritarian power, can contribute to active citizenship.

For Michelman the decision in *Bowers v Hardwick* is one of "unjustified denial of due citizenship", by the denial of *liberty*, and specifically the aspect of liberty known as *privacy*. The US Supreme Court accepted the explanation of the *meaning* and *purpose* of the challenged law. The meaning of the law is to *punish* the engagement by homosexual partners in certain forms of sexual intimacy. The purpose of the law is to

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168 Michelman "Law's Republic" (1988) 97 *The Yale Law Journal* 1529.

169 See in this regard Nedelsky "Dilemmas of passion, privilege and isolation: Reflections on mothering in a white, middle-class nuclear family" in Hanigsberg and Ruddick (1999) *Mother troubles: Rethinking contemporary maternal dilemmas*.

give *expression* and effect to a legislative majority's *moral rejection* of homosexual life. Michelman states that such a purpose is deeply suspect under the modern republican commitment to social *plurality*. Homosexuality has not only come to be experienced, claimed and socially reflected and confirmed as an aspect of identity demanding respect, but is also challenging established orders. The effects of a law like the one in Georgia on homosexuals is denial or impairment of their citizenship. He argues that participation in the various arenas of social life is central to modern republican constitutionalism. The sodomy law is a public expression that endorses and reinforces majoritarian denigration and suppression of homosexual identity, but it also denies citizenship by violating *privacy*.

Michelman refers in this regard to the critique of pro-abortion supporters of the Supreme Court for affirming women's rights of choice on a constitutional principle of privacy. The same argument was used to say that a constitutional principle of privacy would be a poor basis on which to ground judicial invalidation of laws, such as Georgia's penalising homosexual acts. It is said that to base such a decision on privacy would reinforce the idea that homosexuality is merely a form of conduct and would fail to recognise it as a continuous aspect of identity that demands public expression.

Michelman, however, argues that these critiques of the constitutional privacy doctrine are relevant as long as *privacy stands for an attitude of hostility towards public life and a need for refuge from and protection against public power*. He notes that an approach which differs from this strategy of carving a private space to defend against the public can produce a reoriented understanding. A republican slant can lead to an appreciation of privacy[170] as a political right. He explains that just as property rights become, in a republican perspective, a matter of constitutive political concern, (as underpinning the independence and authenticity of the citizen's contribution to the collective determinations of public life), the privacies of personal refuge and intimacy become a matter of constitutive political concern. He argues that Justice Blackmun's dissenting

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170 See Benhabib (1996) *The reluctant modernism of Hannah Arendt* 212 where she puts forward Hannah Arendt's concept of privacy. Benhabib argues that the reconstruction of the public world can only take place with a parallel reconstruction of the private world.

opinion in *Bowers* begins to articulate the republican appreciation of the *political significance of privacy*, by explaining the value of intimate association as formative and supportive of personal identity, of self-understanding, and thus of diverse ways of life.

Michelman argues that Cornell's idea of "recollective imagination" can be applied to republican constitutional theory. He argues for constitutional interpretation as a "Machiavellian practice of return-to-the-founding-principles" in which the first principle of the founding turns out to be the constant value of (re)foundation (renewal, renovation) itself.[171] The problematic character of the constitutional construct (the dichotomy of self-rule and law-rule) allows the constitution to ground our identity as a political community by also inviting us to self-revision through debate over its meaning. Although a judicial constitutional intervention "is not equivalent and rather contrary to actual democracy, actual democracy is not all there is to political freedom".[172]

An "ethical" interpretation of equality, inspired by the philosophy of deconstruction, will incorporate and combine the insights of Van den Oord, Minow, Nedelsky, and Michelman. In the discussion of the various perspectives on the interpretation of rights and equality I hoped to illustrate the following: In the first place the connections between the various perspectives, secondly the connections between these perspectives and the perspectives on deconstruction that I discussed earlier, the connection between equality and public space and the significance of these perspectives for an ethical interpretation of equality. The connections between the various perspectives are that they all focus on interpretation of and approaches to equality. They all adhere to the deconstructive insight that equality will never be fully achieved in a present system. They are true to deconstruction's double-bind search for equality and justice. The various perspectives recognise the problem of distinction, whether it is between the inside and the outside, equality and difference, individual and relationship, private and public and seek to rephrase these distinctions. They all focus on the importance of context and relationships. The public appears as a phantom

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171 In Part 3 I shall discuss Arendt's and Derrida's reflections on the problem of founding.

172 Michelman "Law's Republic" (1988) 97 *The Yale Law Journal* 1537.

through all the perspectives and comes to the fore for the first time in Nedelsky's, but then explicitly in Michelman's perspective. I argue that the latter focus on public space ties all the other perspectives together. I shall summarise the various perspectives as follows: They present perspectives on the interpretation of rights that adhere to the significance of a public space for equality. They problematise traditional distinctions and boundaries and turn to context and relationships. Although only Van den Oord explicitly applies and recognises deconstruction, I argue that the others expose the spirit of deconstruction that is relevant for an ethical interpretation of equality, namely the limit of present systems to fully encompass equality and justice. They also adhere to the deconstruction of the autonomous separate individual or subject. The fact that they recognise the significance of a public space in their perspectives on equality contributes to the intersection between public space, equality and justice that I rely on. In the light of the above my conclusion is that these perspectives contribute to the formulation and application of an ethical interpretation of equality.

Equality - South African perspectives

In this section I highlight the "approach" to the interpretation of equality presently in South Africa. I realise that there are writers who differ with the approach that I put forward here and that there are many more nuanced positions. I am putting forward a general observation of what I consider to be the state of the South African approach to equality.[173] I focus on an article by South African writers, Albertyn and Kentridge and a visiting Canadian judge, L'Heureux-Dube. Both articles appeared in *The South African Journal for Human Rights*.[174] The Albertyn-Kentridge article constituted an influential early voice on equality. The authors argued for "substantive" equality that must be achieved by following a "purposive" approach to interpretation. By now the notions of "substantive" equality and "purposive" interpretation are well known and not

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173 In regard to gender and equality in South Africa see generally Kaganas and Murray "Law and women's rights in South Africa - an overview" (1994) *Acta Juridica* 1-38; Albertyn "Women and the transition to democracy in South Africa" (1994) *Acta Juridica* 39-63; O'Regan "Equality at work and the limits of law" (1994) *Acta Juridica* 84-108; Kentridge "Measure for measure: Weighing up the costs of a feminist standard of equality at work" (1994) *Acta Juridica* 84-108; Romany "Black women and gender equality in a new South Africa: Human rights law and the intersection of race and gender" (1996) *Brooklyn Journal of International Law* 857-898; Wing "Black South African women: Toward equal rights" (1995) *Harvard Human Rights Journal* 57-100; Murray (1994) *Gender and the new South African legal order*. For equality in general see Devenish "The legal and constitutional significance of the equality clause in the interim constitution" (1996) *Stellenbosch Law Review* 92-113; Rautenbach "Die Konstitusionele hof se riglyne vir die toepassing van gelykheid" (1998) *Tydskrif vir die Suid-Afrikaanse Reg* 316-325; Van Reenen "Equality, discrimination and affirmative action: An analysis of section 9 of the constitution of the Republic of South Africa" (1997) 12 *Suid-Afrikaanse Publiekreg/South African Public Law* 151-165; Loenen "The equality clause in the South African constitution: Some remarks from a comparative perspective" (1997) 13 *South African Journal on Human Rights* 401-429; Rautenbach "Die verband tussen die gelykheidsbepaling en die algemene beperkingsklousule in die Handves van Regte" (1997) *Tydskrif vir Suid-Afrikaanse Reg* 571-583. See also Butler "The Constitutional Court certification judgements: The 1996 constitution bills, their amending provisions, and the constitutional principles" (1997) 13 *South African Journal on Human Rights* 703-723; Cockrell "Rainbow jurisprudence" (1996) 12 *South African Journal on Human Rights* 1-38 and De Waal and Erasmus (1999) *The Bill of Rights Handbook* 187-215.

174 See Albertyn and Kentridge "Introducing the right to equality in the interim Constitution" (1994)10 *South African Journal on Human Rights* 149-178; L'Heureux-Dube "Making a difference: The pursuit of equality and a compassionate justice" (1997)13 *South African Journal on Human Rights* 335-353. I shall also refer to Van der Walt & Botha "Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*" (1998) 13 *South African Public Law/Suid-Afrikaanse Publiekreg* 17-41 and Freedman "Understanding the right to equality" (1998) 115 *The South African Law Journal* 243-251.

new at all. But I repeat the Albertyn and Kentridge arguments briefly before I continue to discuss the first few equality decisions of the Constitutional Court, where it developed its approach to equality. These decisions reflect an approach to equality similar to that advanced by Albertyn and Kentridge. I briefly refer to the discussion on "substantive" equality in Canada by L'Hereux-Dube. My concern with the substantive approach is that although substantive equality goes a step further than formal equality, it has again become formalised and conceptualised. In other words, substantive equality has become the new formula, the new tool, the new instrument that will attempt to equalise difference by formalising difference.

The equality clause in the interim constitution and in the final constitution

The preamble of the interim constitution expressed the

> [N]eed to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to exercise their fundamental rights and freedoms.

The peculiar afterword of the same constitution visualised

> [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.

Equality was also taken up in the constitutional principles that served as a guide both in the interpretation of the interim constitution, and to the writers of the final constitution.

The preamble of the final constitution provides for

> [T]he foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.

Section 9 of the final constitution protects equality as a fundamental right.

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (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.
> (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.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The equality clause in the interim constitution, section 8, was not entirely dissimilar.

> (1) Every person shall have the right to equality before the law and to equal protection of the law.
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating form the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
> (3)(a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
> (b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with section 121, 122, 123.
> (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

The 1996 constitution provides that any right may be limited only if the limitation complies with section 36.

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account al relevant factors, including
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the constitution, no law may limit any right entrenched in the bill of Rights.

The limitations clause in the interim constitution, while less extensive in scope, was none the less the clear forerunner of section 36. An important addition to section 36 was human dignity as one of the principles according to which the justifiability of a limitation has to be tested. Section 33 of the interim constitution only mentioned freedom and equality.

The constitutional protection of equality and non-discrimination

Albertyn and Kentridge[175] argue that equality serves as a guide to the interpretation of all other rights. They note that equality and freedom underpin the vision of democracy embodied in the constitution. They viewed these two rights as mutually supportive, but argue that there are many instances where equality may limit individual liberty and where freedom may limit equality. Equality and freedom must therefore be balanced to ensure and promote their legal, political and social underpinnings.

They ask the question whether equality should be understood and read as "formal" or "substantive" equality and describe "formal" equality as equal treatment of individuals

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175 "Introducing the right to equality in the interim constitution" (1994) 10 *South African Journal on Human Rights* 149-178.

regardless of their actual circumstances in contrast to substantive equality (the understanding they support) which requires effective economic and social equality that take regard of differences. According to them a purposive approach would reveal that the constitution provides for substantive equality. They argue that a formal understanding of equality will ignore the value commitments in the constitution.

Albertyn and Kentridge make the following analysis of section 8, (the equality provision in the interim constitution):
Section 8(1) guarantees to every person the right of being "equal before the law" and to "equal protection and benefit of the law". They argue that this clause provides for substantive equality.
Section 8(2) provides for equality through affirmative action. They note that this section makes the commitment to substantive equality explicit. In other words substantive equality permits treatment which is differentiated according to the needs of the recipient.

In regard to the relationship between sections 8(1) and 8(2) they argue that section 8(1) is concerned with equality in all its manifestations whereas section 8(3) is concerned with specific forms of unfair discrimination. According to Albertyn and Kentridge a "purposive", "substantive" reading of section 8(1) would avoid reading the phrases contained in this section as separate. They say that the two phrases must be read as widely and flexibly as possible without giving it rigid and fixed meanings. Section 8(1) must be interpreted to give effect to the values of the constitution. An interpretation of section 8(1) must "take account of a history of inequality and oppression and the need for reparation and reconstruction".[176]

According to them section 8(3), that prohibits unfair discrimination, is not simply a negative formulation of the right to equality but a provision for a mechanism whereby specific denials of equality may be challenged. In other words the section provides

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176 Albertyn and Kentridge "Introducing the right to equality in the interim constitution" (1994) 10 *South African Journal on Human Rights* 160.

"substantive" and not only "formal" protection. Albertyn and Kentridge[177] note the constitution's explicit reference to "unfair" discrimination. They support an interpretation of "unfair" that does not only distinguish between different kinds of discrimination but that also distinguishes between "permissible" and "impermissible" discrimination. They say that a "simple" prohibition of discrimination does not distinguish between discrimination against members of subordinate groups and discrimination against the privileged. Although the discrimination may take the same form in both instances and will cause harm in each case, the kind of harm will be different. In their view the inclusion of "unfair" accommodates the idea that discrimination may have different qualities in different contexts and requires that the specific context is taken into account. That which is unfair in one context may be justified in another context.

They support the two phase approach of interpretation and observe that the justification of infringement on equality will be tested at two stages, once under the definitional stage, under section 8(3) and a second time at the limitation stage, under section 33. Albertyn and Kentridge[178] argue that the two stages of justification could be understood by saying that each stage presents different kinds of justification. The inquiry under section 8(3) is aimed at identifying discrimination which is unfair because it finds no justification in the "political morality" embraced by the constitution. The inquiry under section 33 considers whether discrimination is permissible because it serves a "legitimate social purpose" and passes the proportionality test.

They point out that direct and indirect discrimination are prohibited. Direct discrimination occurs when a person is disadvantaged simply on the basis of race, sex, ethnicity, religion, disability and so on, or on the basis of some characteristic specific to the members of a particular group. Indirect discrimination occurs when apparently neutral policies are applied in such a way that they adversely affect a disproportionate number of members of a specific group. The explicit prohibition of both direct and

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177 "Introducing the right to equality in the interim constitution" (1994) 10 *South African Journal on Human Rights* 162.

178 "Introducing the right to equality in the interim constitution" (1994) 10 *South African Journal on Human Rights* 175.

indirect discrimination in section 8(3) and (4) should guide the courts to adopt a wide approach to discrimination.

They mention that section 8(3) prohibits discrimination on one or more of the listed grounds and note that the listing of grounds should not derogate from the generality of the prohibition on discrimination. This section should be interpreted as widely as possible to entrench the principle of anti-subordination.

They argue that section 8(4) gives horizontal application to the equality clause. Section 8(4) places the burden of proof on the state in the case where discrimination occurs on a listed ground to show that the discrimination in question is not unfair. Where discrimination is alleged on an unlisted ground the burden of proof is on the applicant to establish unfairness. The function of section 8(4) is to require justification of any form of discrimination on the listed grounds. The respondent must prove that although the discrimination is unfair, it is reasonable and justifiable in an open and democratic society based on freedom and equality.

The language of equality

Justice Claire L'Heureux-Dube[179] describes the engagement with equality as "learning to speak the language of equality". She acknowledges that equality is a term that in a vacuum means nothing, which has no universally-recognised, inherent or intrinsic content. She observes that in Canada, and in South Africa, people speak the language of substantive rather than formal equality. She argues that when interpreting equality we must "revisit" the "underlying assumptions" to see where the language we use is inconsistent with concrete circumstances.

She refers to a few decisions where the Canadian Supreme Court accepted substantive equality. In *Weatherall v Canada (Attorney General)*,[180] the court upheld a policy which

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179 "Making a difference: The pursuit of equality and a compassionate justice" (1997) 13 *South African Journal on Human Rights* 336.

180 [1993] 2 SCR 872.

prohibited pat-down searches of women prisoners by male guards, but did not provide parallel protection for male inmates. She says that the court accepted that such contact with a member of the opposite sex would have a much more traumatic effect on women than it would on men. The court accommodated the *difference* between men's and women's "historical" and "present day" experiences of violence. In *R v Turpin*,[181] the court stated that a "broader social, economic and political" context should be examined in order to determine whether *differential* or *identical* treatment in a specific case results in inequality. In *Egan v Canada (Attorney General)*,[182] the court accepted that in some cases discrimination must be assessed by focusing on the specific context. In order to appreciate whether state action has a discriminatory impact on a group of individuals, it is essential to examine both the *nature* of the *group* adversely affected and the *nature* of the *interest* involved.

According to L'Heureux-Dube, women in Canada had some success with discrimination complaints brought under provincial human rights legislation.[183] She mentions *Janzen v Platz Enterprises Ltd*,[184] where the court had to consider whether sexual harassment was a form of sex discrimination within the meaning of the Manitoba Human Rights Act. The employer argued that sexual harassment was "gender neutral" and not a form of "categorical" discrimination against women. The Supreme Court, by focusing on the social context, concluded that men have the power to harass sexually and that women experience the greatest risk of harassment.

She also discusses *Brooks v Canada Safeway Ltd*,[185] where the court determined that the exclusion of pregnant women from an employer's accident and sickness plan is a form of sex discrimination. The court argued that the plan disadvantaged pregnant

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181 [1989] 1 SCR 1296.

182 [1995] 2 SCR 513.

183 L' Heureux-Dubé "Making a difference: The pursuit of equality and a compassionate justice" (1997) 13 *South African Journal on Human Rights* 344.

184 [1989] 1 SCR 1252.

185 [1989[1 SCR 1219.

women solely because of their pregnancy, a condition unique to women. Because pregnancy is to the benefit of all in society, the costs of pregnancy should not be imposed solely on women. She further notes *R v Lavallée*,[186] where the Supreme Court decided that the defence of self-defence was available to a woman who killed her husband after he had repeatedly threatened to kill her. The court noted that the criminal law must take into account the *differing experiences* and *perspectives* of those affected by the law. The judge questioned the appropriateness of the traditional "reasonable man" standard.[187] L'Heureux-Dube argues that this decision is important for two reasons. First, because it rejects the view of sexual equality based on *sameness* and replaces it with the recognition that *sometimes different people must be treated differently in order for substantive equality to prevail.* Secondly, because it shows the need to "re-examine" past and present laws, institutions and assumptions by employing the language of substantive equality[188]. She argues that if equality is seen as a basic component of justice and therefore an essential characteristic of our commitment to human rights, the right to equality must be protected and acknowledged in all contexts.

Equality cases under the South African constitution[189]

The cases below were all decided on the equality section of the interim constitution, but the approach to equality that was developed in regard to the interim constitution will be applied similarly to section 9 of the final constitution.

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186 [1990] 1 SCR 852.

187 L'Heureux-Dubé "Making a difference: The pursuit of equality and a compassionate justice" (1997) 13 *South African Journal on Human Rights* 345.

188 L'Heureux-Dubé "Making a difference: The pursuit of equality and a compassionate justice" (1997) 13 *South African Journal on Human Rights* 345.

189 See also *Baloro and others v University of Bophuthatswana and others* 1995 (8) BCLR 1018 (B); *S v Ntuli* 1996 (1) BCLR 141 (CC); *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC).

President of the Republic of South Africa and another v Hugo[190]

Hugo was imprisoned at a time when the former president, Nelson Mandela, (in the Presidential Act 17 of 1994) pardoned certain categories of prisoners. One of these categories was all mothers in prison on 10 May 1994 with minor children under the age of 12 years. Hugo, a widower and the father of a son under the age of 12 applied for an order declaring the Presidential Act unconstitutional on the grounds that it discriminated unfairly against him on the basis of *gender.*

The court a quo argued as followed: The phrase to discriminate means to make an *adverse distinction* with regard to; discrimination seems to be *fundamentally unfair*; it is difficult to visualise the notion of discrimination which is not unfair; what a respondent must prove in order to discharge the onus of unfairness is that it is *not unreasonable* to discriminate; an adverse distinction was made between Hugo, a single parent and any incarcerated mother, whether or not a single parent; the Presidential Act discriminated against Hugo; the state did not prove that the discrimination was reasonable and fair.

The majority in the Constitutional Court held that there was *discrimination* against Hugo, but that it was *not unfair.* Mokgoro, in a separate judgment, held that there was indeed unfair discrimination, but that it was justified in terms of section 33. O'Regan also gave a separate judgment. Didcott and Kriegler gave dissenting judgments. Goldstone, for the majority, accepted that the appellants relied on a generalisation, namely that women are the primary caretakers of children, and that it will often be unfair for discrimination to be based on that particular generalisation. He said that the fact that the individual who was discriminated against by the particular action did not belong to a class who had been historically disadvantaged, did not mean that the discrimination was fair. He stated that at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of the new constitutional and democratic order is the

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190 *President of the Republic of South Africa and another v Hugo* 1997(6) BCLR 708 (CC) at 729.

establishment of a society in which all human beings will be given equal dignity and respect regardless of their membership of particular groups. Goldstone argued that the court followed a substantive approach to equality by focusing on the differences between the genders.

> We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.[191]

The court accepted that the President acted in good faith and did not intend to discriminate unfairly and had in mind the benefit of children. The court noted that these facts were not enough to show that the discrimination was not unfair. To determine that impact is unfair, the following factors should be regarded: The *group* who has been disadvantaged; the *nature* of the *power* in terms of which discrimination was effected and the *nature* of the *interests* which have been affected by the discrimination.

The court considered the presidential pardon to be in the *public interest*. It argued that because male prisoners outnumber female prisoners a release also of single parent fathers would have implied the release of a very large number of prisoners. This would have caused a considerable public outcry. It therefore would have been unacceptable and impossible for the President to release fathers on the same terms as mothers. It argued that the rights of fathers were not restricted or limited in a permanent manner,

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191 *President of the Republic of South Africa and another v Hugo* 1997(6) BCLR 708 (CC) at 729.

their freedom was curtailed as a result of their conviction and not as a result of the presidential act. This meant to the court that men's rights of dignity or sense of equal worth were not impaired. The court concluded that the impact on the fathers was not unfair and the respondent had no justified complaint.

In her separate judgement O'Regan emphasised two factors that are relevant to the determination of unfairness: the *group* which has suffered discrimination and the effect of the discrimination on the *interests* concerned. In her view, *the more vulnerable* the group adversely affected, *the more likely* the discrimination will be held to be *unfair.* Similarly, *the more invasive* the nature of the discrimination, the more likely it will be held to be unfair. She argued that even though it will be better for equality if the responsibilities of child-rearing are shared fairly between fathers and mothers, the *reality* at present is and will be in the near future that mothers will bear the primary responsibility. The disadvantage for women does not lie in the President's order, but in the *social reality*. She focused on the fact that the President's reliance upon women's greater share of child-rearing responsibilities in order to offer an advantage to some women, has not caused any significant harm to other women.

Kriegler, in a dissenting judgement, argued that Hugo had suffer unfair discrimination. According to him, the relevant section of the presidential pardon was inconsistent with the prohibition against gender or sex discrimination and because it had not been shown to be fair, it was invalid. In his view the notion relied upon by the President, namely that women are to be regarded as the primary care givers of young children, is a root cause of women's inequality.

> One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely.[192]

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192 *President of the Republic and another v Hugo* 1997 (6) BCLR 708 (CC) at 743.

Another aspect Kriegler mentioned is that no data had been presented stating how many male prisoners would have been released if the pardon treated the sexes equally. He focused on the fact that the President relied on an "inherently objectionable generalisation" for the benefit of a particular group of women prisoners. Kriegler argued that there was no suggestion in the Presidential Act of compensation for wrongs of the past or an attempt to make good for past discrimination against women. The primary justification provided for the President's proclamation was the "interest of children". He identifies two criteria that must be satisfied for a generalisation such as that relied upon in the pardon to be vindicated. There must be a strong indication that the advantages flowing from the perpetuation of a stereotype compensate for "obvious and profoundly troubling disadvantages"; the context would have to be one in which discriminatory benefits were apposite. In terms of the first criterium, he argued that women as a group do not benefit by the perpetuation of the stereotype and in terms of the second he noted that the fact that women suffered discrimination generally does not mean that they suffered in the penal context. He concluded by arguing that on occasion sex/gender distinctions can and should be made but such distinction must shown not to discriminate unfairly, or must be justifiable under the limitations clause.

Is the majority in Hugo following an "Instrumental aesthetic"?

Pierre Schlag[193] identifies two dominant "aesthetics" of American legal thought, namely the "analytical" and the "instrumental" aesthetic. He shows how these two aesthetics have enabled American legal thinkers to presume simply that rights have a generally recognisable ontology. The "analytical" aesthetics enacts a "rhetoric of order" where every legal conception has its proper place. The "instrumental" aesthetic enacts a "rhetoric of progress" where the inadequacies of the present can be redressed through change, reform, progress and so on. He places each of these aesthetics in a historical period. The "analytical" aesthetic flourished in the late nineteenth century in the attempts of legal formalists, doctrinalists, analytical positivists and proponents of

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193 "Rights in the postmodern condition" in Sarat and Kearns (eds) (1997) *Legal rights. Historical and philosophical perspectives* 263-304. See also Schlag "Fish v Zap: The case of the relatively autonomous self" (1987) 76 *The Georgetown Law Journal* 37-58; Schlag "Normative and nowhere to go" (1990) 43 *Stanford Law Review* 167-191.

scientific jurisprudence to systematise law into an orderly science. The "instrumental" aesthetic flourished in mid to late twentieth century American legal thought. Where the "analytical" aesthetic strives to impose and maintain order by providing a stable, all-encompassing, objectivist frame, the "instrumental" aesthetic seeks to produce change, reform and transformation. He notes that the metaphors and images of the "instrumental" aesthetic are *motion* oriented. Rights in the "instrumental" aesthetic are seen as the sources, the instruments, or the ends of change. They are symbolised as energy sources (antecedents, motivations etc), trajectories (paths, vehicles, connections etc) and as end goals (prizes, trophies, conclusions), and as all three at once.[194]

It is interesting to read the words and phrases of the postamble of the interim constitution and the preamble to the final constitution in the light of the above. The postamble refers to "a historic bridge"; "a future founded on"; "reconstruction of society"; "secure foundation"; "reparation".[195] Similarly the preamble of the final constitution contains metaphors of "healing"; "foundations"; "improving" and "building".[196] In my view, although these metaphors could lead to an "instrumental"

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194 Schlag "Rights in the postmodern condition" in Sarat and Kearns (eds) (1997) *Legal rights. Historical and philosophical perspectives* 285-286.

195 National Unity and Reconciliation
This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
The pursuit of national unity, the well being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
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.

196 Preamble
... Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally

reading and interpretation of the constitution, they need not do so. The metaphors of motion describing change, progress and transformation could rather be interpreted as signifying an openness. The constitution could be read and interpreted as a bridge, if the conditions associated with the metaphor are accepted. For example, a rift is a condition for a bridge, and a bridge can only exist as long as the rift exists. Following that argument, transformation and change could be attractive metaphors as long as a definite concluded end goal is not visualised. An ethical reading, having regard to the radical alterity of the other, can never strive for a definite visualised future. Because the unknown cannot be known, and the ethical space for the "event" must be kept open, the metaphors we use when describing our own utopian vision must be open and flexible. The interpretation and application of rights, such as equality, must take place in the same vein. Because complete and pure equality can never be achieved within the present system, a space for the future event must be kept open.

The approach that is followed when we deal with equality in the present system will influence future visions and possibilities. By reinforcing a harmful stereotype on the grounds of addressing previous disadvantages and subscribing to the (by now formalised) approach of substantive equality, the Constitutional Court moves within an "instrumental" aesthetic. The political aspiration of addressing past inequalities in the present could ignore future consequences. The court does not experience, realise or take account of radical alterity or radical difference which is impossible to know and define and address. It adheres to a comfortable difference. The Constitutional Court formulates that equality does not mean that all people should be treated the same, without recognising the fact of difference, but does not accept the radicalness and impossibility of their own observation. Kriegler, in the *Hugo* judgment, seems to be more aware of the difficulties of difference and the harmful effects of relying on generalisations. He does not only address the case before him, but recognises the effect and consequences of the judgment on broad society. The majority decision

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protected by law'
improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

reinforces current stereotypes. Kriegler's dissenting judgment criticises the past and present status quo and opens possibilities of equality for the future. The dissenting judgment plays an important political role in the sense that deeply rooted socialised and cultural constructions of inequality are questioned. Sachs, in his analysis of the patriarchal view of marriage in *Harksen*,[197] followed a similar inquiry.

Fraser v Children's Court Pretoria North[198]

In this case the court acknowledged that the guarantee of equality lies at the very heart of the constitution. Fraser approached the court to declare section 18(4)(d) of the Child Care Act 74 of 1983 inconsistent with the interim constitution because it did not require the consent of a father of an illegitimate child for the adoption of the child. The court agreed that the section contravened the guarantee against unfair discrimination. The court argued that the provision discriminated unfairly between some matrimonial unions and others, as well as against the fathers of certain children on the basis of their gender and marital status.

An important aspect of the decision is that the court realised that a "blanket rule" governing the rights of parents to veto or consent to an adoption would be undesirable. It noted that, for example, the consent of the father of a child born as a result of its mother being raped, or from an incestuous relationship, need not be obtained before adoption. The court further decided that a father who had "a very casual encounter on a single occasion" with the mother also should not have the automatic right to refuse his consent to the adoption of a child born from such relationship. The court argued that in the case where both parents have been involved with the child and have given equal love and support both parents should consent to adoption. The value of this decision is that the court accepted that whatever rule or provisions is made, the relevant context of the people involved should be taken into account.

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197 1997 (2) BCLR 153 (CC).

198 1997 (2) BCLR 153 (CC).

Harksen v Lane[199]

In this case the plaintiff argued that section 21 of the Insolvency Act violated amongst others the equality guarantee in section 8 of the interim constitution.

The court argued that where someone relies on section 8 to attack a legislative provision or executive conduct on the ground that it differentiates between people, or categories of people, in such a way that it creates *unequal* treatment or *unfair* discrimination, the first question is whether the provision indeed differentiates between people, or categories of people. If the court finds such differentiation, the next step is to see if there is a *rational connection* between the differentiation in question, and a legitimate governmental purpose. If the rational connection is proved, the differentiation does not amount to a breach of section 8(1).

However, if there is no rational connection between the differentiation and a legitimate government purpose, the provision in question violates the provisions of section 8(1). The court would then proceed to the limitations clause, section 33, to see if the violation could nevertheless be justified.

Even when there is a rational connection, the court would turn to section 8(2) to determine whether despite the rational connection, the differentiation none the less amounted to unfair discrimination.

To determine whether differentiation amounted to unfair discrimination under section 8(2) a two stage analysis was followed. First, it must be determined whether the differentiation amounted to "discrimination" and if it did, whether it amounted to "unfair discrimination". The interim constitution provides for two categories of discrimination. The first is differentiation on one of the grounds specified in section 8(2). The second is differentiation on a ground not specified in subsection (2) but *analogous* to such ground. The court decided that discrimination on an *unspecified* ground is differentiation based on attributes or characteristics which have the potential to impair

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199 1997 (2) BCLR 153 (CC).

the fundamental dignity of persons as human beings, or to affect them adversely in a comparably manner. If the discrimination is on a *specified* ground, unfairness will be *presumed*, in terms of s 8(4), but if it is on an unspecified ground, unfairness will have to be *established* by the complainant.

In order to determine whether discrimination is unfair the following factors should be considered:

(a) the *position* of the complainants in *society* and whether they have suffered in the *past* from patterns of disadvantage; (the court added that this should be taken into consideration whether the discrimination in the case is on a specified ground or not);
(b) the *nature* of the provision or power and the purpose achieved by it;
(c) any other relevant factors.

If the discrimination is held to be unfair one will proceed to the final leg of inquiry as to whether the measure can be justified under section 33, the limitations clause.

The court decided that section 21 of the Insurance Act does not violate the provision of section 8(1) or (2) of the interim constitution. O' Regan J agreed with the majority decision that there was a rational connection between the differentiation and the purpose of section 21 and that section 8(1) was not violated. However, in terms of section 8(2), she decided that section 21 constituted unfair discrimination. She concluded that section 21 does not meet the justification test of section 33 and is inconsistent with the provisions of the interim constitution.

Sachs J argued that section 21 of the Insolvency Act affronts the personal dignity of the persons involved in a marriage relationship and perpetuates a vision of marriage rendered archaic by the values of the interim constitution. He said that section 21 was patriarchal in origin and promoted a concept of marriage in which, independently of the living circumstances and careers of the spouses, their estates are merged. The underlying premise of this section is that "one business mind is at work in marriage, not

two". This reinforces a stereotypical view of the marriage relationship which in the light of the values of the constitution is demeaning to both spouses. The judge notes that the spouses vowed to support each other in sickness and in health, "not in insolvency and solvency".

Van der Walt and Botha[200] raise other interesting questions which were not considered by any of the judgments in *Harksen*. They argue that section 21 of the Insolvency Act includes the definition of a spouse, a wife or husband by virtue of law or custom as well as a man living with a woman as his wife or a woman living with a man as her husband, but it does not include same-sex partners. They argue that this could constitute unfair discrimination on the ground of sexual orientation. According to Van der Walt and Botha, although both the majority and minority judgments accepted that there is a rational connection between the differentiation and the purpose of section 21, it could be argued that section 21 is indeed arbitrary. If section 21 is inconsistent with section 8(1) of the interim constitution, the further question would be whether it can be justified under section 33. They argue that O'Regan and Sachs offered good reasons why the limitation would not be reasonable and justifiable: It is unreasonable because it promotes an outdated patriarchal view of marriage and relationships that are inconsistent with the constitutional protection of human dignity. It is unjustifiable because it places a disproportionate burden on the solvent spouse in the attempt to protect the interests of the insolvent's creditors.

Van der Walt and Botha[201] argue that the judgments of O'Regan and Sachs reveal serious difficulties in the majority's approach. They foresee that the standard articulated by Goldstone, "unless supported by a thoroughly contextual approach and a more critical understanding of power, may give rise to a new conceptualism and conservatism". They note that the judgements of Goldstone, and O'Regan and Sachs

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200 Van der Walt & Botha "Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*" (1998) 13 *South African Public Law/Suid-Afrikaanse Publiekreg* 17-41 at 33.

201 "Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*" (1998) 13 *Suid-Afrikaanse Publiekreg/South African Public Law* 34.

reveal "fundamentally different assumptions" about the nature of power, the division between the public and private spheres and the contexts(s) in which fundamental rights disputes should be adjudicated. They argue that Sachs objects to the majority judgment because it fails to pay sufficient attention to the social, historical and political context within which section 21 of the Insolvency Act operates. The power relations which underlie and are perpetuated by section 21 are ignored.

Van der Walt and Botha argue that the majority considered an "inappropriate" context in view of the facts of the case.[202] According to them, O'Regan, like the majority "clung to an individualist concept of power" and did not pay sufficient attention to the ways in which current beliefs and attitudes are themselves inscribed in power relations. They say that Sachs was conscious of the fact that seemingly neutral statutory distinctions may both reflect and perpetuate social values which are not in accordance with the value of an open and democratic society based on human dignity, equality and freedom as entrenched in the constitution. Van der Walt and Botha emphasise Sachs's warning that

> [A]n "oppressive hegemony" can be "established by the accumulation of a multiplicity of detailed, but interconnected, impositions, each of which, decontextualised and on its own, might be so minor as to risk escaping immediate attention, especially by those not disadvantaged by them.

They say that this "should be taken to heart by judges and impressed on the minds of all law students".[203]

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202 Van der Walt & Botha "Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*" (1998) 13 *Suid-Afrikaanse Publiekreg/South African Public Law* 36.

203 "Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*" (1998) 13 *Suid-Afrikaanse Publiekreg/South African Public Law* 41.

Freedman[204] gives three reasons why it will be very difficult for the applicant on whom the onus rests to show that there is no rational connection between the differentiation made by the law and the governmental object. In the first place, it is extremely unlikely that in a modern democratic society a government, although having a legitimate objective, chooses irrational means to achieve it. Secondly, the courts are unlikely to find that differentiation is not rational, either out of "judicial sympathy for the difficulties of the legislative process or from a belief in judicial restraint generally". Thirdly, he argues, it will always be possible to define the legislative purpose in such a way that the statutory classification is related to it. According to Freedman it will therefore be rare that the courts will find a law that is not rationally connected to a legitimate objective.

He argues that the test to show discrimination will be relatively easier. He places the test for unfairness at the "heart" of the Constitutional Court's equality analysis. He identifies two categories of fact that should be taken into account when assessing the discriminatory impact of a law: the nature of the group and the nature of the interest adversely affected. He notes three consequences: First, that it will no longer be acceptable to single out historically disadvantaged or socially vulnerable groups for more burdensome or less advantageous treatment simply on the basis of their differences from those in a position of relative privilege; secondly, special treatment may be required to meet the needs of those groups who have previously been disadvantaged; and thirdly, it is only by examining the broader social, economic and political context within which a law applies that a court can determine whether it perpetuates inequality.

Freedman[205] argues that the test for unfairness adopted by the Constitutional Court clearly indicates the important purpose of "eradicating entrenched and systematic forms of social disadvantage". He is of the opinion that the courts must fulfil an "institutional

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204 Freedman "Understanding the right to equality" (1998) 115 *The South African Law Journal* 243-251 at 248.

205 "Understanding the right to equality" (1998) 115 *The South African Law Journal* 251.

role" and that it limits the extent to which the judiciary can eradicate social disadvantages. According to him the "adjudicative model" is designed to deal with "discrete wrongs and not with systematic inequality". He argues that judicial review must focus on the *effect* of a particular law and the *fate* of particular groups and should not "attempt to restructure the overall distribution of benefits in the community". He concludes by saying that the task of addressing the unequal social position of disadvantaged groups is a complicated "political" task for which the courts are "ill equipped" and should best be left to the legislature.

I strongly object to the narrow view of judicial review and the role of the courts taken by Freedman. Although the limits of any legal redress to social upliftment and reconstruction should be accepted, the courts still have an extremely important political and social role to play.[206] If the constitution is seen as an instrument of change and transformation, or as a bridge between a divided past and a democratic future, the courts, which are the primary interpreters of the constitution, must adhere to the political imperative of creating a democratic society based on freedom, equality and human dignity. In *S v Lawrence,*[207] the court ignored this important social and political function when it upheld the prohibition on the selling of liquor on Sundays. By upholding this prohibition, the court failed to address the ideological, political and moral content of the prohibition. Freedman's view of judicial review is reflective of how traditionalist and formalist South African lawyers still are. Karl Klare[208] noted this and compared South African lawyers' belief in the distinction between law and politics with that of American lawyers. His critical analysis of the *Makwanyane*[209] case shows how the court came to a "progressive" decision by following a "conservative/traditionalist/formalist" approach.

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206 See Sarkin "The political role of the South African Constitutional Court" (1997) 13 *South African Law Journal* 134-150.

207 1997 (10) BCLR 1348 (CC).

208 "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146-186 at 166.

209 *State v Makwanyane* 1995 (6) BCLR 665 (CC); Klare "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146-186 at 170-173.

City Council of Pretoria v Walker [210]

In *City Council of Pretoria v Walker*[211] the Constitutional Court had to consider whether the practice of the City Council of Pretoria that differentiated between people living in different geographical areas with regard to the paying of services amounted to unfair discrimination. In the process of the restructuring of local authorities, two formerly black townships were amalgamated with the area which formerly comprised the "old city" of Pretoria. Historically the provision of services and the recovery of service charges in these two formerly black areas had been on a very different footing from that in the former municipal area of Pretoria. There were no meters in the former townships and a flat rate for services was charged. This situation persisted after the amalgamation. A target date of June 1995 was set for the implementation of a new uniform system but the date was not met. Walker, the respondent, who was a resident in a formerly white area adopted a practice of paying no more than the flat rate charged in the former black townships. This resulted in a build-up of an outstanding balance on which the city council instituted action. Walker raised unfair discrimination in defence. The Supreme Court found that the city council's conduct had been unconstitutional. The city council appealed to the Constitutional Court.

Langa J acknowledged that the dispute should be seen in the light of changes which have come about as a result of the adoption of a new constitutional order. He argued that the council treated the respondent, together with the other residents of old Pretoria *differently* in the following manner. First, the residents of Mamelodi and Atteridgeville were treated differently because they were expected to pay a flat rate while a higher rate based on consumption was used in old Pretoria. Secondly, because it differentiated between old Pretoria and those parts of Atteridgeville and Mamelodi where meters had already been installed; and thirdly because the council took legal steps to recover payments from residents of old Pretoria only and failed to take similar action against defaulters in Mamelodi and Atteridgeville.

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210 1998 (3) BCLR 257 (CC).

211 1998 (3) BCLR 257 (CC).

The court was satisfied that there was a *rational connection* between the different manners of differentiation and their objective. It found that the measures were temporary and designed to provide continuity in the rendering of services by the council while phasing in equality in terms of facilities and resources. The court then went on to consider whether the differentiation constituted *unfair discrimination*. In assessing whether the differentiation amounted to unfair discrimination, Langa J said that the wording of section 8 and the constitutional and historical context of the developments in South Africa are relevant factors that had to be considered. He noted that not all differentiation amounted to unfair discrimination and that it must be determined whether the differentiation constituted a violation of the right to equality.

Langa J referred to the four previous judgements of the Constitutional Court[212] that dealt extensively with the equality provision in the interim constitution and analysed the concept of discrimination. This was the fist occasion where the court had to consider the difference between direct and indirect discrimination and whether such difference had any bearing on the section 8 analysis as developed in the four judgements. Langa J accepted that the facts of this case constituted *indirect* discrimination and argued that there was no reason for distinguishing between direct and indirect discrimination. He indicated that the discrimination was on *race*, one of the listed grounds in section 8(2). The council therefore had to prove that the discrimination was not unfair. He considered various factors: the position of the respondent in society, the nature and purpose of the power, the flat rate, the issue of cross-subsidisation, the selective enforcement. The court took note of the fact that the respondent did not belong to a *group* that had been *disadvantaged in the past* by racial policies and practices, but that the respondent did belong to a *racial minority* which could in a political sense be regarded as vulnerable. Members of such minorities who are vulnerable to discriminatory treatment must look to the Bill of Rights for protection:

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212 *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa and another v Hugo* 1997 (6) BCLR 708 (CC); *Harksen v Lane NO and others* 1997 (11) BCLR 1489 (CC) and *Larbi-Odam and others v Members of the Executive Council for Education and another (North-West Province)* 1997 (12) BCLR 1655 (CC).

> When that happens a court has a clear duty to come to the assistance of the person affected. Courts should however always be astute to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other.[213]

In this light the court found that the practice of charging different rates for residents of formerly black areas and residents of old Pretoria did not amount to unfair discrimination, as the differentiation was the only practical solution in the circumstances of the case. With regard to the policy of selective enforcement of debt the court came to a different conclusion.

The court's reference to historical factors such as the existence of a culture of non-payment in Attridgeville and Mamelodi is significant. The reason for the culture of non-payment is partly the history of resistance against apartheid structures in the past where services in these areas were non-existent or very poor. In old Pretoria the services were of a high standard. The context did not encourage a culture of non-payment. The council had to confront the problem of preventing a culture of non-payment in old Pretoria and at the same time converting the culture of non-payment in Mamelodi into one of payment. The city council argued that the policy adopted by the council was to enforce payment in old Pretoria, if necessary by means of suspension of services or legal action and to encourage payment in Atteridgeville and Mamelodi but not to take legal action against them while the installation of meters was still in progress.

Langa J argued that section 8 of the interim constitution was a guarantee that "at least" at the level of law-making and executive action, "hurtful discrimination" will not be a part of South African life. Although a city council may *differentiate* by taking note of, for example, the financial position of their debtors the policy it relies on must be "rational

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[213] 1998(3) BCLR 257 (CC) par 48, 280

and coherent". Although section 8(3) provides for special measures in order to address the inequalities of the past the council did not argue that the policy of selective enforcement was a measure adopted for the purpose of addressing the disadvantage experienced in the past by the residents of Atteridgeville and Mamelodi. Langa J stated that "[T]he reasons given for the policy were pragmatic". This comment can be seen as a rejection of "pragmatic" instrumental, policy based decisions in favour of principle based decisions.[214] He stated that:

> No members of a racial group should be made to feel that they are not deserving of equal "concern, respect and consideration" and that the law is likely to be used against them more harshly than others who belong to other race groups.[215]

The majority of the court concluded that the council's conduct of selective enforcement of debt amounted to unfair discrimination within the meaning of section 8(2) of the interim constitution. Since the respondent's challenge was directed at the conduct of the council which was not authorised, either expressly or by necessary implication, by a law of general application, section 33(1) was found not applicable.

The order finally made by the court is interesting. The court found that the course followed by the respondent was inappropriate to the extent that his reliance on the breach of the section 8 right is not a defence to the council's claim. It was found that the High Court's order of absolution from the instance with costs was not appropriate relief. The effect of the decision was that even though the council's conduct amounted to unfair discrimination, Mr Walker was not in the right to react by not paying. This case

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214 Dworkin (1977) *Takings rights seriously* and (1986) *Law's empire* distinguishes between "rules", "policy" and "principle". He associates "policy" with the pragmatism that was brought about by American Realism. Dworkin focuses on the application of principles. His view of "law as integrity" and "constructive interpretation" is based on the notion of "principles". He argues that when a judge makes a decision she must not merely find the correct rule (like the conventionalist or positivist judge) or apply the relevant policy (like the pragmatist) judge, but through constructive interpretation find the principle that provides the best "fit" and the best "justification".

215 1998 (3) BCLR 257 (CC) at par 81, 290.

is a good illustration of the multiple factors that come into play at the intersection of the public, the constitutional protection of equality and justice (the ethical). The court's approach reflects a "principled" based approach and not a "pragmatic" instrumental approach. In other words the court's approach is reflective of political and public action and speech. The court was not ruled by the necessity and tangibility of the economy of present politics and policies.

I would like to put this judgement in the formulation of "legal interpretation as recollective imagination". In this case the political contexts of the past, the present and the future were taken into account. The court had to enact memory, but also had to reimagine the future. The past policies of the apartheid government, whose services to people living in the townships were very poor if not non-existent, had to be addressed. The council had to confront a culture of non-payment. The fact is that where non-payment might have been justified in the past, in the present we need each and everyone to pay for services, to contribute to the public good. Walker was not in the right by contributing to the culture of non-payment. The court, however, found that the council was in the wrong to follow a policy that discriminated unfairly against some persons. In the light of the present and future context and circumstances, the court found that the actions of the city council amounted to unfair discrimination. The court's order reflects the impossibility of the situation. At the end, the decision remains undecided. Although the court accepted that the policy of the city council amounted to unfair discrimination, Walker was also in the wrong. Walker, although the court found that he was vindicated on a political and moral level, was ordered to pay the outstanding balance. If this case was only about aspects of instrumental/policy considerations, one could say that the city council was the "winner", but if we situate it in the public realm, no one walked out as a winner. The court's decision highlighted the necessity of a relationship and of interaction between the city council and the public.

In a dissenting decision, Sachs J argued that although Walker was treated *differently* he was not *discriminated* against "in any manner whatsoever", alternatively that if the

council's conduct could be classified as discrimination against him, it was *not unfair*. In his view the selective enforcement was based on the identification of objectively determinable characteristics of different geographical areas and there was *no indirect* discrimination on the grounds of race simply because whites lived in one area and blacks in another. He stated that the mere coincidence in practice of differentiation and race, without some actual negative impact associated with race, is not enough to constitute indirect discrimination on the grounds of race. In order to prove discrimination and unfair discrimination some element of *actual or potential prejudice* must be immanent in the differentiation. He said that in the light of our *history of institutionalised racism and sexism*, there might be sound reasons for treating *direct* differentiation on the grounds specified in section 8(2) as *prima facie* proof of discrimination without further evidence of prejudice being required. In the case of *indirect* differentiation there must be some element of prejudice whether of a material kind or to self-esteem. With reference to section 8(3), the affirmative action clause, he argued that

> The value system clearly enunciated by section 8 read as a whole would be inverted if the spectre of indirect discrimination was automatically raised each and every time a measure had some differential impact, even if only tangential and psychological, on the advantaged groups in society. In our still fragmented and divided country, with its legacy of racial discrimination and its deeply entrenched culture of patriarchy, and with its practices and institutions based on homophobia or on a lack of attention to the most elementary rights of disabled people, almost every piece of legislation, and virtually every kind of governmental action, will impact differently on the groups specified in section 8(2) of the constitution. There are *strong policy and practical reasons* for holding that something more than differential impact is required before indirect discrimination under section 8(2) can be inferred[216]. (my emphasis)

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[216] 1998 (3) BCLR 257 (CC) at par 112 and 116, 301-303.

Sachs J argued that the real issue before the court was not about money but about the "rights and responsibilities of citizenship" and about the "path of achieving a negotiated integration of the community into a new united Pretoria". He concluded by saying that the fact that the complainant could not succeed in terms of section 8(2) did not mean that he could not have found any remedy at all under section 8. If the complainant based his claim on non-acceptable criteria of an arbitrary character which infringed his rights to equal protection and equality before the law, he could have sought a remedy based on a violation of section 8(1) of the constitution. The question before the court would then have been whether the law had been impartially applied and administered and not whether the complainant's dignity had been attacked.

In the *Walker* case the court had the opportunity to apply the equality test set out in *Harksen*. It was also the first case where the court had to decide on the difference in approach to direct and indirect discrimination. The political and historical context played a crucial role in the assessment of this case. The court again affirmed the substantive approach to equality, that differentiation will not necessarily amount to discrimination that is unfair. In some cases differential treatment will be the only way of achieving equality. The difference between the decisions of Langa and Sachs is reflective of the ambiguities and undecidability within the constitutional guarantee of equality and of its application. Even though Langa concludes that section 8(2) had been infringed, the order made by the court could not bring the relief that the complainant wanted. Sachs, by denying infringement of section 8(2), takes account more radically of the political and historical contexts. His references to "rights and responsibilities of citizenship" put the whole issue into one of political reconstruction of the past. He argues that the fact that the complainant's dignity was not infringed and no prejudice could be proved, does not mean that section 8(1) had not been violated. Sachs' approach here is consistent with his approach in *Harksen*, where he argued that the hidden structures of inequality should be brought to light. The *Walker* case confronted the court with difficult questions with no easy answers. It is these difficult questions which *par excellence* highlight the undecidability of the law.

It is too early to come to any final conclusions about the South African approach to equality. The South African Constitutional Court is still young and in an initial phase of developing approaches to equality. As I already stated my concern is that the Constitutional Court, lawyers and legal scholars might accept the present "substantive" approach as enough and adequate to deal with equality and difference. The fact that it seems as if the Constitutional Court has more or less formalised their approach (relying a great deal on the early Albertyn and Kentridge article) troubles me. I discussed the perspectives on deconstruction and the perspectives on the interpretation of equality to show the multiple possible approaches that can be followed and should be investigated. Off course I choose deconstructive perspectives because they support my vision of an ethical interpretation of equality. In the next section I shall investigate two feminist perspectives to see how they can contribute to an ethical interpretation of equality.

An ethical interpretation of equality and the TRC

In this section I have described the present approach to equality in South Africa as it was developed by Albertyn and Kentridge and later on followed in decisions of the Constitutional Court. Even though substantive equality is a better approach to equality than the formal approach, in my view, it can easily become formalised and instrumentalised again. My greatest concern is that although a substantive approach to equality is supposed to be more aware of difference, it will again reduce difference. An alternative to both the formal and substantive approach to equality is an ethical interpretation of equality. An ethical interpretation of equality regards difference as radical difference that can never be identified fully and known fully. It is, however, concerned with difference, it seeks to accept difference and not to reduce it or violate it. An ethical interpretation of equality subscribes to the view of justice as the limit of any system, in other words that justice can never be achieved fully in the present and that justice is in the beyond. In the same way equality in the present will also be

incomplete. This does not mean that the ideals of equality and justice are negated. An ethical interpretation of equality insists on, on the one hand, striving for equality and justice whilst, on the other, accepting the impossibility of achieving it fully.

In the light of the discussion on perspectives on equality until now we can note the following important characteristics of equality: Central to an ethical interpretation of equality is *difference*. The distinction between the *"inside"* and the *"outside"*, the drawing of *boundaries* should be undermined constantly. We should be aware of the *power* involved when we decide on difference. An ethical interpretation of equality asks that we focus on the *relationships* of which we are part when we consider the right to equality and difference. We should regard the significance of *public space* when we interpret equality.

As I have already stated, an ethical interpretation of equality is dependent on the ethical intersection between public space, equality and justice. In the next part, "... landscapes of justice" I shall focus on the South African Truth and Reconciliation Commission as an event. I shall state why I regard the TRC as a manifestation of the ethical intersection between public space, equality and justice. I would, however, like to make a short comment on the TRC and an ethical interpretation of equality now. The TRC insisted on adhering to equality, in other words they aimed at treating each and everyone (victim and perpetrator) equally. Since the initial talks that led to the creation of the TRC the issue of equality has been controversial. There were people who argued that individuals who committed crimes and violated human rights as members of the resistance could not be placed on an equal footing with the perpetrators who represented the apartheid regime and their forces.[217] The TRC response was that since the primary aims of the commission was reconciliation, unity and truth it was of the utmost importance that people trusted the TRC and that the TRC acted fairly. The TRC treated perpetrators from all sides equally. Each and everyone had equal opportunities

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217 I shall refer to Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* in Part 3. See also Liebenberg "The Truth and Reconciliation Commission in South Africa: Context, future and some imponderables" (1996) 11 *Suid-Afrikaanse Publiekreg/ South African Public Law* 335-353 and Kollapen "Accountability: The debate in South Africa" (1993) 37 *Journal on African Law* 1-9.

to share their side of the story. But, in its report, the TRC recognised apartheid as a crime against humanity. This means that the TRC, when it had to consider the various stories, had to take the concrete *contexts* and *specific circumstances* into account. In other words, the TRC had to regard *difference*. This does not mean that the TRC treated the individuals representing opposite groups in an unequal fashion. But, the TRC had to look at the background context. In this respect, in my view, the TRC argued along lines similar to an ethical interpretation of equality. Equality was not approached in a formal and rigid way. Difference, concrete contexts, specific circumstances and relationships were regarded highly. Our courts (legal scholars and the community in general) can benefit from investigating the TRC's approach to equality. In comparison with some of the equality decisions taken by the Constitutional Court the TRC's approach to equality was refreshing and different. The TRC did not only contribute to the reconstruction and transformation of public space, but also had an impact on our views on equality and justice.

Another aspect that I want to highlight is the two requirements for amnesty. An amnesty applicant had to give full disclosure and had to prove a political motive in the sense that the deed had to be performed on orders from a recognised political party, organisation or movement. The latter requirement once again focuses on the concrete context of an applicant. The commission did not follow a blanket amnesty as was followed in other countries. The TRC did not follow a general universal equalising approach. To refer back to terms that I have used earlier, one can say that every individual was regarded as a *"concrete other"* and not as a *"generalised other"*.

Another significant feature of the TRC was the presence of women. I have argued above that women have traditionally been excluded from public spaces. South Africa was not different in this regard. I also stated earlier that for "real" transformation and not mere evolution it is not enough to have women fulfilling traditional male roles. We need to disrupt and undermine present value systems and mind sets with other voices. I stated that I do not subscribe to an essentialist position that believes in one existing women's voice or essence of women. However, women or the feminine can undermine

and disrupt present value systems and mind sets. In the context of the TRC we saw many women and heard many women telling their stories. Krog tells us that although most of the stories told before the TRC were told by women, they told stories about what happened to men: their husbands, partners, lovers, brothers, fathers and so on. The TRC made provision for special hearings on abuses against women. The fact that the Women's Hearings were not a huge success in the sense that very few women came forward to tell their stories is troublesome. In light of the present rape statistics and cases of women's abuse the fact that women did not come forward to tell how they were abused by the forces of apartheid and in the ANC camps tells us something powerful about the present culture and attitude against women that must be addressed in our processes of reconstruction and transformation. Nevertheless, the presence of women telling their stories contributed to the presence of an ethics of care in the TRC. I shall elaborate on this in Part 3. I argue that the TRC did not primarily focus on traditional concepts of justice, but supplemented justice with a care perspective. Rehabilitation and reparation as one of the primary aims of the TRC illustrated that the TRC was not only concerned with formal justice and equality but aimed at changing the circumstances of real lives. In this regard the TRC disrupted and undermined present formal concepts of justice. In my view the space of the TRC in this regard can be described as a "feminine" space. The effect of the TRC's attentiveness to a care perspective can be that an ethics of care in future may be accepted as equally as significant as the formal concept of justice. The "different voice" must not be incorporated in the present system but regarded as a significant reminder of the incompleteness of the present system. The TRC not only assisted in the reconstruction and transformation of South African public space but contributed to our perspectives on equality and justice.

Equality: A feminist/gender perspective

In this section I shall consider the issue of feminism and equality by putting forward the perspectives of Drucilla Cornell and Christine Littleton. I refer briefly to Julia Kristeva's response to the state of feminist thought in Europe during the seventies and eighties because I think it can provide some insight into the current state of feminist thought in South Africa. Kristeva identifies three reactions to what she calls linear (chronological) time. I shall argue that we are presently experiencing all three reactions. I start of with Cornell's ethical feminism (I have already addressed aspects of her ethical feminism in Part 1). I admit that Cornell's vision of ethical feminism is a highly abstract and theoretical position, but I am attracted to it. More than that I think that ethical feminism will provide the best insight for the processes of reconstruction and transformation, in particular because the theory provides for an affirmation of the feminine (and feminine difference) without being essentialist. I shall conclude this section with Littleton's discussion of practical approaches to equality and difference.

"Liberated women want it both ways"

A newspaper report with the heading "Liberated women want it both ways"[218] provided me with a starting point from where I could address the issue of a feminist perspective on equality. The report is an illustration of the misunderstanding and misgivings held by people about "feminism", "women's liberation", and "sexual harassment", to name a few. I accept that is it impossible (and undesirable) to refer to one general universal feminism. One can but only refer to the various feminisms or the various strands in feminism.

I shall argue for Cornell's concept of "ethical" feminism as a "better way" of understanding current sex and gender relations. Ethical feminism relies on deconstruction's insights with regard to language, justice and democracy. It focuses on

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[218] Langton (1998) *The Sunday Times* June 28.

woman as *beyond* our current systems of representation. Ethical feminism does not seek to replace the current sex-gender system with a new way of being. It seeks to problematise and displace current stereotyped understandings and beliefs of "woman" and the "feminine". It does not seek to assimilate women and men within the current sex-gender system. "Woman" or the "feminine", should remain *other* to the system and should expose the flaws in the present system from a marginal "ethical" position. This does not mean, however, that women should not strive for their voices to be heard on a theoretical and practical level. They should, but they should use their voices as representative of the *other* and not be appropriated by the power games of the current system.

"Sexual appeal goes with working hard, say Wall Street's babes" [219]
The newspaper report tells us about five women who used to work on Wall Street and who were recruited by Jockey underwear manufacturers for their advertising campaign. The five women appear in little more than double breasted jackets advertising underwear and tights. The reporter argues that they ought to be "role models" for every modern US feminist getting to the top in a "cutthroat world long dominated by men" - getting to the top by wearing nothing but double-breasted jackets. The report tells us that the women do not have any regrets at achieving fame on the basis of beauty rather than brains. One of the women is quoted saying: "An attractive woman has a certain power".

The issue of sexual harassment in the workplace is raised in the report. It is stated that many companies have to pay huge sums of compensation for sexual harassment and senior managers are forced to attend "gender sensitivity" courses. The reporter also states that women's rights organisations are "predictably" outraged because of the advertisement, but argues that the idea that women can be sexually attractive at work and yet still demand equal treatment from their male partners is increasingly popular. Even young girls are wanting to have it both ways, the report indicates. This state of affairs, it is argued, creates great confusion between girls, boys, men and women. The

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[219] Langton (1998) *The Sunday Times* 28 June.

report concludes by stating the "reality" that "US males find it increasingly difficult to comprehend where feminism ends and sexual harassment begins".

The problems I have with the report are manifold. Whether I agree or disagree with "babes" wearing nothing but double-breasted jackets is not one of them. The whole understanding of feminism and approach to the problems of the current sex-gender system is seriously flawed. A question that I would like to address is why should women compete with men on men's terms; why should women accept the current system as something that should be strived for, and why do they? From an ethical feminist standpoint women should not want it any of the *given* ways, they must rather provide an alternative, a *different* voice.

Various feminist theories through the years have sought various solutions. I am not going to describe the phases or waves of feminism - that has been done adequately by many scholars.[220] I shall only discuss ethical feminism. Ethical feminism moves in the same ethical landscape as deconstructive thought, it radically takes note of deconstruction's insights and ethical and political imperatives in its theory.

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220 Kristeva "Women's time" in Keohane et al (1981) *Feminist theory*; Adam "Feminist social theory needs time. Reflections on the relation between feminist thought, social theory and time as an important parameter in social analysis" (1989) 37 *The Sociological Review* 458-473; Fuss (1989) *Essentially speaking: Feminism, nature and difference*; Nicholson (ed) (1990) *Feminism/Postmodernism*; Benhabib & Cornell (1987) *Feminism as critique*; Benhabib, Butler, Cornell & Fraser (1995) *Feminist Contentions: A philosophical exchange*; De Beauvoir (1949) *The second sex*; Fox-Genevese (1991) *Feminism without illusions*; Harris "Race and essentialism in feminist legal theory" in Heinzelman & Wiseman (eds) (1994) *Representing women: Law, literature and feminism* 106-146; Olsen "The sex of law" in Kairys (ed) (1997) *The politics of law. A progressive critique* 453-467; Dalton "Where we stand: Observations on the situation of feminist legal thought" (1988) *Berkely Women's Law Journal* 1-13.

"Ethical feminism" - Drucilla Cornell

"Better to love like Dido, than to found the Roman empire" [221]

According to Drucilla Cornell ethical feminism seriously takes note of the belief that the feminine should not be identified with the experience of any given historical group of women.[222] The challenge for ethical feminism is to affirm the feminine without relying on an essentialist or naturalist theory of woman.

> If there is to be feminism at all, as a movement unique to women, we must rely on a feminine voice and a feminine "reality"' that can be identified as such and correlated with the lives of actual women. Yet all accounts of the Feminine seem to reset the trap of rigid gender identities, deny the real differences among women (white women have certainly been reminded of this danger by women of colour), and reflect the history of oppression and discrimination rather than an ideal to which we ought to aspire. To solve this dilemma, we must return to the significance of the feminine.[223]

Cornell argues for the possibility of a new "choreography of sexual difference" that must be brought about by an "allegorical" account of the feminine. The feminine must be prized through the retelling of myths. These accounts must describe the feminine as

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221 Cornell "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 698.

222 Western feminism has (and still does) negated the experience of non-western women. The postcolonial discourse is of great importance in this regard. See amongst others Bhabha "The other question: Difference, discrimination and the discourse of colonialism" in Barker (ed) (1986) *Literature Politics & Theory* 148-172; Spivak (1988) *In other worlds* in general, specifically "Feminism and critical theory" and "A literary representation of the subaltern: A woman's text from the third world" 77-92 and 241-268; Spivak "The Rani of Sirmur: An essay in reading the archives" (1985) *History and Theory* 247-272. See also hooks (1992) *Black looks: Race and representation*; hooks (1988) *Talking back: Thinking feminist, thinking black;* hooks (1992) *Yearning: Race, gender and cultural politics*.

223 Cornell "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 645.

beyond any of the current stereotypes of women. The ethical perspective in ethical feminism demands an utopian perspective of the "not-yet". Ethical feminism does not state things as they *are*, but as they *should be*. The "not-yet" and the "should be" are recollected in allegory and myth.

Cornell[224] identifies four approaches to the affirmation of the feminine, namely the approach of West and Kristeva, the liberal approach, MacKinnon's approach and the deconstructive approach (ethical feminism). She discusses the theories of Robin West[225] and Julia Kristeva[226] who both rely on mothering as metaphor for the feminine.[227] The important difference between the two is that West relies on a naturalist or a biological view of the feminine, where Kristeva, being a Lacanian feminist, makes use of psycho-analysis.[228] She finds Kristeva's theory less essentialist than West's. West, who argues that women, because of their biology, value intimacy and connection, rather than autonomy and separation, attempts to develop a phenomenology of "women's unique and shared" experience. Cornell argues that the psycho-analytic framework that Kristeva relies on rejects West's biologism. Kristeva leaves open the possibility that men too can care and love. Kristeva's account does not identify two realities, one male and one female.

Cornell experiences difficulties with relying on mothering as a basis for feminist theory. She argues that although the maternal is not an unimportant metaphor for the feminine,

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224 See Van Marle (1996) *Rekonstruktiewe feminisme: 'n Ondersoek na die reg as "manlike" struktuur en die moontlikheid van transformasie met spesifieke verwysing na pornografie.* LLM dissertation

225 See West "The difference in women's hedonic lives: A phenomenological critique of legal feminist theory" (1987) 3 *Wisconsin Women's Law Journal* 81-140; West "Jurisprudence and gender" (1988) 55 *The University of Chicago Law Review* 1-72; West "Pornography as a legal text" (1989) *For adult users only* 108-130.

226 (1980) *Desire in language*.

227 I discussed the theories of West and Kristeva in my LLM dissertation (1996) *Rekonstruktiewe feminisme: 'n Ondersoek na die reg as "manlike" struktuur en die moontlikheid van transformasie met spesifieke verwysing na pornografie.*

228 See Gallop (1982) *Feminism and psychoanalysis. The daughter' s seduction.* See also Cornell "What takes place in the dark" in (1993) *Transformations* 170-194.

the feminine should not be limited to it. She notes the danger of reifying the historical experience of a group of women into a second nature that is attributed to all women. Another problem is that women themselves disagree on the experience of mothering, what it is and what it means to female identity.

Cornell turns to Lyotard's writing on the *differend*.

> The *differend* is that which has been shut out of traditional legal discourse and the social conventions of meaning. The suffering of women can be understood as the *differend*. The harm to women literally disappears because it cannot be represented as a harm within the law.[229]

She explains that it is impossible to give expression to the *differend* in a present legal system[230] by turning a woman into a litigant and translating her suffering into the prevailing norms of the system. The current discourse through the performative power of language should be expanded in order to create an openness for another feminine "reality". A third approach identified by Cornell (the approach that supports ethical feminism), is the "deconstructive allegory of woman". Deconstruction's undermining of language as a pure form and its scepticism towards "mirror writing" and metaphysical language is crucial for feminist theory. The impossibility of meaning without a pregiven context has consequences for descriptions of the feminine and of woman. By relying on essentialist views of "woman", stereotypes are reinforced and "woman" is reinstated in her "proper place":

> [T]he deconstructive project resists the reinstatement of a theory of female nature as a philosophically misguided bolstering of rigid gender

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229 "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 669.

230 Spelman & Minow "Outlaw women: An essay on *Thelma and Louise*" (1992) 26 *New England Law Review* 1281-1296; Frug (1992) *Postmodern legal feminism*; Frug (1992) *Women and the law*; Frug "A postmodern legal manifesto" (1992) 105 *Harvard Law Review* 1045-1075.

> identity within the dichotomous structure of the logos. Deconstruction also demonstrates that there is no essence of Woman that can be eidetically abstracted from the linguistic representations of Woman. The referent Woman is dependent on the systems of representation in which she is given meaning.[231]

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 specified gender identity. In this approach there is no shared female identity, 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 suffering of women. How can the feminine be affirmed without relying on essentialist stereotypes? Cornell supports the psycho-analytical approach that describes the feminine as a disruptive force of the gender system in which it is given meaning. In this approach the feminine is not celebrated because it is the feminine but because it stands in for the heterogeneity that undermines the "logic of identity". She says that this position does not claim to show what the feminine or woman *really is*, but demonstrates how the feminine is produced within a particular system of gender representation. The feminine acts as a disruptive force of the given gender identity and hierarchy.[232]

Another approach discussed and opposed by Cornell is the radical feminist theory of Catherine MacKinnon.[233] MacKinnon views any affirmation of the feminine as co-option

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231 Cornell "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 659.

232 Cornell warns against the possible danger of this approach to present the "not-yet" of a new choreography of sexual difference as an actual reality rather than as a promise that remains to be fulfilled in (1990) 75 *Cornell Law Review* 659.

233 MacKinnon (1987) *Feminism unmodified*; MacKinnon (1989) *Towards a feminist theory of the state*; MacKinnon (1993) *Only words*; MacKinnon "Reflections on sexual equality under law" (1991) 100 *Yale Law Journal* 1281-1328.

within the male dominated sphere.[234] She stands for a "feminism unmodified". For Cornell her central error is that she reduces feminine reality by identifying the feminine totally with the world as it is constructed by males. Cornell argues that feminism will always be modified as women experience their realities differently. Ethical feminism wants to affirm a different way of being. It is not about gaining power for women but about the *redefinition* of all our fundamental concepts. For example, in MacKinnon's theory, the body becomes the barrier in which the self can hide and defend itself against invasion. Cornell argues that the feminine self, as it is celebrated in allegory and myth, lives the body differently.

> The body is not an erected barrier, but a position of receptivity. To be accessible is to be open to the other. To shut oneself off is loss.[235]

I fully agree with Cornell when she notes that the struggle for empowerment as the ultimate political goal of feminism shows how profoundly we remain under the sway of masculine symbolism. Empowerment is not and should not be the ultimate goal in all relationships. MacKinnon believes that all women are forced to be "losers" under the current system. Cornell argues that we should seek to find a way beyond winning and losing. The vision Cornell and French feminists like Cixous[236] and Irigaray[237] hold, is one where there is space for "feminine desire". They view the body[238] as a point of *connection* rather than a barrier.

> We must give Woman body if we are to translate the Feminine into an

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234 MacKinnon "Feminist discourse, moral values and the law - A conversation" (1985) 34 *Buffalo Law Review* 11-87.

235 Cornell "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 693.

236 Cixous (1986) *The newly born woman*; Conley (1984) *Helene Cixous*.

237 Irigaray (1985) *Speculum of the other woman*; Irigaray (1985) *This sex which is not one*; Irigaray (1987) *Sexes and genealogies*; Irigaray (1993) *Je, tu, nous. Towards a culture of difference;* Irigaray (1994) *Thinking the difference. For a peacuful revolution.*

238 See also Butler (1993) *Bodies that matter. On the discursive limits of sex.*

ideal which represents a better way of human being.[239]

Truth does not inhabit fiction

Cornell focuses on Derrida who illustrates how Lacan again locates woman within the system. Lacan, in spite of his own analysis that woman is the other to the system, wants to contain the feminine by proclaiming her truth. Lacan defines the woman as the "lack of the phallus". He perceives this as a fact and thinks that he got to the bottom of woman. He "indulges in essentialising fetishes".[240] Derrida explains that for Lacan, "truth inhabits fiction". Derrida recognises the need to describe woman but accepts that descriptions can never be explanations. We cannot separate the "truth" of woman from the "fictions" in which she is represented.

> Therefore we cannot know once and for all who or what She is, because the fictions in which we confront Her always carry within the possibility of multiple interpretations, and there is no outside referent, such as nature or biology, in which this process on interpretation comes to an end. As a result, we cannot "discover" the ground of feminine identity which would allow us to grasp her Truth once and for all.[241]

This does not mean that woman can be reduced to "lack". Cornell refers in this regard to Duras, who seems to accept mourning as the only basis for female solidarity. She notes that Derrida affirms "the power to dance differently". The feminine should open the space for women (and men) to enhance and expand their reality. This requires a certain understanding and telling of history.

> Your "maverick feminist" showed herself ready to break with the most

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239 Cornell "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 696.

240 "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 670.

241 Cornell "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 675.

> authorised, the most dogmatic form of consensus, one that claims ... to speak out in the name of the revolution and history. Perhaps she was thinking of a completely other history: a history of paradoxical laws and non-dialectical discontinuities, a history of absolutely heterogeneous pockets, irreducible particularities, of unheard of and incalculable sexual differences; a history of women who have - centuries ago - "gone further" by stepping back with their lone dance, or who are today inventing sexual idioms at a distance from the main forum of feminist activity with a kind of reserve that does not necessarily prevent them from subscribing to the movement, and even, occasionally, from becoming a militant for it.[242]

According to Cornell, Derrida's emphasis on the break with history and the break with the story of revolution opens the possibility of breaking with the notion of the feminine as *opposition*. To push beyond the limit of the "reality" and of perceived categorisations is inherently ethical and political. Again, this does not mean that there is no room for the revolution in feminist theory. The task is to "bring the dance and its tempo into tune with the revolution". We must always be reminded that there is more to the story of woman than meets the eye. Therefore, one should be careful not to attempt to introduce a new concept of representation of woman to replace previous ones. Because there is no ultimate concept of woman, the "truth" of woman as absence should also be denied. Truth does not inhabit fiction and there is not a complete cut between the "imaginary" and the "real".

Cornel argues that the utopian ideal, inherent in deconstruction, assures us that "we are not stuck with the way things "are" "now", because the way things "are" "now" carries within the beyond to the current system of gender representation".[243] In this regard myth, allegory and the imaginary are important for reclaiming and retelling of

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242 Derrida and MacDonald "Choreographies" (1982) 12 *Diacrits* 76.

243 Cornell "The doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 681.

women's stories. Helene Cixous[244] appeals to mythical figures in her writing in order to find a way *beyond* the current system of gender representation and patriarchy. Cornell says that through "recollective imagination" we remember (recollect) the memories of the past, but simultaneously we reimagine new ways of being for the future. Ethical feminism reminds us of the world "doubly-prized". By this, deconstruction's insistence on the double-bind, the in between is adhered to. The feminine should act as disruptive force of the current system but at the same time open the space for a future where women's stories can be told. The feminine should be affirmed neither as a present "reality" or as lack or absence.

> Woman (truth) will not be pinned down. In truth woman, truth will not be pinned down. That which will not be pinned down by truth is, in truth - feminine. This should not, however, be hastily mistaken for a woman's femininity, for female sexuality, or for any other of those essentialising fetishes which might still tantalize the dogmatic philosopher, the impotent artist or the inexperienced seducer who has not yet escaped his foolish hopes of capture.[245]

I support Cornell's vision of ethical feminism. I think that for the processes of reconstruction and transformation of South African public life, equality and justice an ethical feminist perspective can be of great value. But I realise that other feminist perspectives will also influence the processes of reconstruction and transformation. In this regard we can note Julia Kristeva's[246] identification of three feminist reactions (or perspectives) to linear (chronological) time. She describes them in terms of historical generations and she refers specifically to the experience of European feminist movements. One reaction aspires to gain a place in linear time by political demands, struggles for equal pay and so on. Another reaction is to refuse linear time and to place herself outside the linear time of identities. Such a feminism rejoins the mythical

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244 (1986) *The newly born woman* 63.

245 Duras (1966) *The ravishing of Lol Stein* 55.

246 Kristeva "Women's time" in Keohane et al (1981) *Feminist theory* 31-53 at 37.

memory and cyclical temporality. A third reaction is a mixture of the two attitudes, namely insertion into history and the radical refusal of the subjective limitations imposed by linear history.

In South Africa, although there were signs of earlier liberal feminist movements, we are experiencing all three of Kristeva's reactions at present. The South African constitution protects the equality of women. Two laws, one for the prevention of family violence[247] and the other to allow abortion[248] on demand, were promulgated during the past few years. Equality and non-discrimination, women's rights, women's liberation and women's empowerment are very popular political slogans at present. South African women have multiple reactions to all the recent changes. Some follow the liberal feminist approach of demands for formal equality, equal pay etc. These women want to be treated the same as men for the same pay. Other women accept sex and gender differences and argue for equal treatment with regard to their differences. I think it is necessary that the heterogeneity of the South African community must be taken into account in terms of class and race differences. The "reality" is that not even these approaches can be clearly separated. The third approach identified by Kristeva is close to "ethical" feminism which demands a double handed approach. South African women should adhere to the ethical incentive in ethical feminism. They should not accept the current system as a given, but should try to change it from within. At the same time they must not be co-opted by the system and have their different voices appropriated.

Feminism should expose the limit of the current system of sex and gender representation. Transformation does not mean the assimilation of men and women in the present system. It does not mean that women and men can move comfortably between traditional stereotypes. It does not mean that women (or men) can have it "both ways". Ethical feminism demands that we disrupt, problematise and break with stereotypes, or at least emphasise the problems inherent in all closed systems.

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247 The Domestic Violence Act 116 of 1998.

248 The Choice on the Termination of Pregnancy Act 92 of 1996.

Equality, equivalence and sexual difference

Cornell[249] defends a vision of equality based on the "minimum conditions of individuality". These are bodily integrity, access to language in which differentiation of oneself from others can be articulated and the protection of the "imaginary domain". She notes that feminist theory has experienced an ongoing and seemingly irreconcilable tension between freedom and equality. This tension has come to light particularly in the areas of pornography, abortion and sexual harassment. There is a tension in feminist equality theories between formal and substantive equality. This tension has divided feminists on issues of difference and equality, and sexuality and equality. Cornell argues that MacKinnon's substantive theory of equality rests on the theoretical acceptance of male dominance. As was stated above, MacKinnon re-encodes the unconscious structure of gender hierarchy. According to Cornell her theory is dangerous because it re-invests a limited concept of femininity. By striving for equality with men (rather than equality of personhood) MacKinnon undermines the full power of the appeal to equality. Cornell argues that formal equality with its appeal to likeness and denial of difference fails to help women in circumstances where difference matters.

Cornell argues for a programme of legal reform that could synchronise the values of equality and freedom.[250] Such a programme of legal reform must recognise the equivalent evaluation of sexual difference. This recognition could go further than the difference/equality divide that has hindered the progress of equality jurisprudence.

> It is not the "fact" of sexual difference but the degradation of our "sex" so as to mark a lesser form of being that has presented the barrier to equality.[251]

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249 (1995) *The imaginary domain.*

250 For a detailed account of Cornell's theory of equivalency see "Sexual difference, the feminine, and equivalency" and "Sex-discrimination law and equivalent rights" in (1993) *Transformations* 112-156.

251 Cornell (1995) *The imaginary domain* 231.

According to Cornell, women should demand their equivalent worth, thereby enhancing an equal chance for freedom. Law should not deny the minimum conditions of individuation. Such a programme of legal reform assumes no theoretical description of women as the truth and therefore does not encode any particular figure of woman as the basis of the demand of equality. Respect for others in public space is demanded. Cornell asks why women should enter the "preservational economy of law". She observes that the reality is that we have inevitably already been entered into it. But we should demand to enter differently, on the basis of equivalent evaluation of our sexual difference.

Luce Irigaray argues in this regard that without changing "the general grammar of our culture, the feminine will never take place in history."[252] She views sexual difference as one of our greatest hopes for the future and is cautionary towards present claims to equality. She argues that present claims to equality could produce a greater split between people. According to Irigaray, women should seek justice in terms of their identities. Cornell argues that women should not be regarded as women before the law. They should instead demand equivalent evaluation by the law of their sexual difference. Such an evaluation is an "ontological intervention" in that it goes against what we have been designated to be. It is also a demand for transformation, "a demand for the end to our *déréliction*".[253]

"Reconstructing sexual equality" - Christine Littleton

Christine Littleton[254] uses the term "phallocentrism" to describe the history of male

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252 Irigaray (1985) *This sex which is not one* 155.

253 Cornell (1995) *The imaginary domain*.

254 "Reconstructing sexual equality" in Smith (ed) (1993) *Feminist jurisprudence* 110-135. See also Murray "Equality at work and the limits of the law: symmetry and individualism in anti-discrimination legislation" in Murray (ed) (1994) *Gender and the new South African legal order* 64-83.

oppression of women. She argues that "phallocentrism" entails more than the inequality of women.

> It has also created a self-referencing system by which those things culturally identified as "male" are more highly valued than those identified as "female," even when they appear to have nothing to do with either biological sex. By this process, "to be a man" does not simply mean to posses biologically male traits but also to take on, or at least aspire to, the culturally male. Similarly, social institutions within a male-dominated culture can be identified as "male" in the sense that they are constructed from the perspective of the culturally male.[255]

Littleton says that she wants to "capture" the perspective which this culture wants us to aspire to and by which it justifies its dominance through the term "phallocentrism". She argues that equality is inherent to the system that feminists are trying to resist, but notes that equality, like any other "social construct," can be "deconstructed". Littleton argues for the "reconstruction" of sexual equality by challenging social institutions created by the dominant culture (phallocentrism).

She identifies two models of sexual equality, a "symmetrical" model and an "asymmetrical" model. Within the "symmetrical" model she makes a further distinction between "assimilation" and "androgyny". She defines the assimilation approach as based on the belief that "women, given the chance, really are or could be just like men".[256] Androgyny, in her view, also subscribes to the view that men and women are alike, but attempt to find a "golden thread" or "middle position" that can accommodate both sexes. Littleton says that she is uncomfortable with the attempt at finding a "middle position" because she distrusts the ability of any person, especially a court, to value women enough to find the "middle". Within the asymmetrical model she distinguishes between "special rights", "accommodation", "acceptance" and "empowerment". The

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255 Littleton "Reconstructing sexual equality" in Smith (ed) (1993) *Feminist jurisprudence* 110.

256 "Reconstructing sexual equality" in Smith (ed) (1993) *Feminist jurisprudence* 112.

"special rights" model subscribes to differences between men and women and provides for women by "special treatment". She says that accommodation agrees to differential treatment with regard to biological differences, but argues that cultural (or hard to define) differences should be treated under an equal treatment or androgenous model. Littleton supports the acceptance model and argues that acceptance does not regard differences as problematic per se, but focuses on the ways in which society justify inequality.

> The focus of equality as acceptance ... is not the question of whether women are different but, rather, on the question of how the social fact of gender asymmetry can be dealt with so as to create symmetry in the lived-out experience of all members of the community. ... the function of equality is to make gender differences, perceived or actual, costless relative to each other, so that anyone may follow a male, female or androgenous life-style according to their natural inclination or choice without being punished for following a female life-style or rewarded for following a male one.[257]

She argues that the approach of empowerment rejects difference as a relevant subject of inquiry. The dominance approach of MacKinnon, for example, subscribes to the view that male domination and female subordination are the cause of differences between men and women.

According to Littleton current equality analysis is "phallocentrically biased" in three respects: it can not be applied in the context of "real" difference; it places the difference in women, rather than in relationships; and it fails to question the assumptions that social institutions are gender neutral. She argues that "equality as acceptance" provides a better answer to the above three concerns. Equality as acceptance does not stop at the discovery of difference, but attempts to understand the "cultural meaning" of the difference and seeks to achieve equality "despite" it. She argues that equality as

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257 "Reconstructing sexual equality" in Smith (ed) (1993) *Feminist jurisprudence* 114.

acceptance locates difference in relationships and not in women. Equality as acceptance acknowledges that social institutions are not gender neutral and exposes that men and women stand in asymmetrical positions to social institutions, in other words, that women are frequently disadvantaged by seemingly neutral practices.

Littleton notes that the approach of accommodation accepts the present norm as legitimate and thereby supports the practice of describing women as deviant from the norm. She illustrates the difference between acceptance and accommodation with the following story. A feminist lawyer once walked up to a podium to deliver a speech. The podium was not high enough for her to reach the microphone. While arrangements were being the feminist lawyer noted made that the podium was "built for a man". Littleton observes that "accommodation is a step platform brought for her to stand on. Acceptance is a podium whose height is adjustable."[258] She argues that the model of equality as acceptance responds to the feminist critique of equality as well as the feminist critique of society.[259] She concedes that no reconstruction of equality can claim to be totally free from phallocentric bias, but the acceptance model still attempts to reconstruct equality. According to Littleton such a reconstruction "can increase equality and invite later, freer reconstructions by shifting the frame and moving the margin into the picture."[260]

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258 "Reconstructing sexual equality" in Smith (ed) (1993) *Feminist jurisprudence* 121.

259 "Reconstructing sexual equality" in Smith (ed) (1993) *Feminist jurisprudence* 122-126.

260 "Reconstructing sexual equality" in Smith (ed) (1993) *Feminist jurisprudence* 131.

Conclusion

landscape of difference

In this section I addressed various perspectives that all contribute to an ethical interpretation of equality. I started off with perspectives on deconstruction. I highlighted certain aspects of the philosophy of deconstruction that provide an inspiration for the *ethical* in ethical interpretation. I looked at Drucilla Cornell's renaming of deconstruction to "the philosophy of the limit". To understand deconstruction as "the philosophy of the limit" clarifies its significance for legal interpretation, and ethical interpretation in particular. I used Samuel Critchley's formulation of what deconstruction is not as a further step to show the relationship between ethical interpretation and deconstruction. Danie Goosen's explanation of deconstruction as the event highlighted the affirmative aspects in deconstruction. Deconstruction, by being open to the "event", is future orientated and is never caught up in the limitations of the present. Derrida's description of deconstruction as justice brings the ethical dimension in deconstruction to the fore. Justice (and similarly equality and democracy), can never be achieved in a present system, but this does not mean that justice must be rejected or forgotten. Justice must be strived for as a future ideal that regulates our present actions. Cornell's formulation of "legal interpretation as recollective imagination" shows the necessity of a deconstruction of the present. The law should be interpreted by focusing on remembering (memory) and by imagining (the future).

Secondly I discussed the perspectives of certain legal writers on the interpretation of rights and equality. Jantje van den Oord highlights the undecidable aspects of law and of any content or interpretation of equality. Her insistence on the disruptive element of difference is significant for the interpretation of equality in the South African context. Her approach to equality is an example of where the philosophy of deconstruction was applied to the concrete issue of legal interpretation. The argument put forward by her that equality should be interpreted as a social right is of great relevance for South Africa. Inequality in our country cannot be addressed by a formal, abstract approach

to equality. We need to redress the concrete circumstances of individuals that were unequal in the past. In most cases the achievement of equality will entail the betterment of concrete things, like food, housing, health care and education. The approach to law as the "undecided" reflects an awareness of the problems and the difficulties that are experienced in the attempt to achieve equality. Van den Oord's approach does not provide a quick fix, a naive problem free answer that negates the impossibilities and tragedies entailed in the attempt to achieve equality. This approach acknowledges the radicalness of difference and of the other. In this approach the other is not merely seen as the other of myself, but as the other that can not be known and not be incorporated into a definition and an institutionalised approach and abstract theory.

Martha Minow also acknowledges the fact of difference. Her warning that we should be aware that every distinction or every identification of difference is made from the assumption of normality will be reflected in an "ethical" interpretation of equality. Her insight that the assignment of difference is made from a certain position of power and that it accordingly reflects a hierarchical distinction is of great significance to our own context. Minow shifts the emphasis from the difference itself to the relationship where difference is identified and assigned. To deal with difference in terms of relationships will expose the underlying power relationships. Minow's statement of traditionally unstated assumptions helps us to be more aware of the dynamics involved when addressing issues of difference and equality. Her argument that it is not enough for individuals to have a change of heart, but that institutional change must take place, reflects the need for transformation on two levels, the transformation of systems as well as the transformation of individuals. Rights are often criticised from the perspective of white male critical scholars. Minow's belief that we cannot reject rights, reflects the argument of Critical Race Scholars[261] that for people who have been excluded and marginalised, and still are, rights can be helpful. Her argument that rights should be

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261 Williams (1991) *The alchemy of race and rights* and (1995) *The rooster's egg*; Crenshaw and others (eds) (1995) *Critical race theory: The key writings that formed the movement;* Delgado (ed) (1995) *Critical race theory: The cutting edge;* West (1993) *Prophetic reflections: Notes on race and power in America;* De Keseredy "The left realist perspective on race, class and gender" in Schwartz and Milovanovic (1996) *Race, gender, and class in crimininology.*

recovered, reclaimed and reimagined is significant for "ethical" interpretation.

Nedelsky tells us that we should structure rights as relationships and not as boundaries or limits. Her approach to rights reflects the problems of the American approach to rights. She shows that the view of the self as an autonomous, independent, isolated and separate self is not a true reflection of how individuals experience themselves. This false concept of the self gives rise to the approach to rights as boundaries or limits. If one acknowledges that individuals experience themselves as embedded and embodied in certain relationships and that relationships are a source of individual autonomy, the approach that is followed to rights will be more accurate as well. Nedelsky's argument that we should understand and interpret rights as relationships is of great value to our approach to rights. She argues that we should attempt to set up a "dialogue of democratic accountability" in which we can reflect on the real value of democracy, rights and so on. Nedelsky's view relies on reconstructed and transformed public spaces that can enable such democratic dialogue. The strong distinction between the private and the public is problematised in this approach because seemingly private individuals must assert their rights in the context of public relationships. This argument lies at the crux of an "ethical' interpretation in so far as the existence of public space is a precondition for such an interpretation.

Michelman's vision of a "law's republic" is also significant for "ethical" interpretation. His argument does not only provide for the reconstruction and transformation of public space and politics, but also for constitutional transformation. He draws a clear link between the political and the legal/constitutional. The tension between self-rule and law-rule, which reflects the American experience, is also a cause of tension in our own society. His focus on a "jurisgenerative politics" should be applied in our own context. His emphasis on plurality as a value will be incorporated in an "ethical" interpretation. Michelman's observation of the value of public action that takes place outside the formal political spaces is of great value to our context. South African public spaces will only be truly reconstructed and transformed if people act outside the formal political structures. The perspective that the concept of privacy can be expanded to a political

right can be transformative of both private and public life. One should be cautious, however, that this concept does not simplify the right to privacy for institutional purposes, in other words privacy, like difference, can never be fully known and identified. His argument that constitutional interpretation is a "Machiavellian practice" that entails constant renewal and renovation is crucial to "ethical" interpretation.

I noted significant connections between the various perspectives and argued that they present the deconstructive insight of the limit of present systems to fully capture equality and justice. They all focus on the problematic aspects of distinctions and turn to context and relationships in their consideration of equality and difference. I argued that all of these perspectives are attentive of public space and therefore significant for the ethical intersection of public space, equality and justice and ethical interpretation.

Thirdly I put forward some South African perspectives. I noted that the "substantive" approach supported by certain writers and followed by the Constitutional Court has been caught up again in its own formalisation and conceptualisation. Of course, the formalisation and conceptualisation were inevitable. The aim of this thesis is to expose the limit of a legal system or approach to equality to achieve equality or justice fully. I ask myself how will an "ethical" interpretation escape the inevitability of closure (formalisation, instrumentalisation). The fact that I do not have an answer for this question worried me at first, but then I realised that the virtue of an "ethical" interpretation lies exactly in its incapability of providing a self-assured, fool-proof answer. Perhaps the most that an "ethical" interpretation of equality can "do" is to serve as critique of the present system and to nurture the ideal of equality and the ideal of justice. I do no reject the substantive approach to equality. It could be a way of addressing inequality by accommodating more than formal requirements. I am cautious about the relationship of substantive equality to difference. I fear that the substantive approach treats difference as something that can be known and conceptualised and placed in compartments. An "ethical" interpretation insists that the other is a "radical" other that can never be fully known. An "ethical" interpretation of equality can never achieve full presence, in other words, it resists being formalised in a specific test. An

"ethical" interpretation of equality, however, is not an abstract disembedded and disembodied position. It is always situated in a context, but the contexts vary continuously.

The context that will enable an "ethical" interpretation to have any value must be a context where humans can appear to each other, in other words, a public context, a space where the content of the action and speech, the content of the discourse, can be described as "public". Hannah Arendt distinguished between labour, work and action. The condition of labour was ruled by necessity, the condition of work was ruled by tangibility, and the condition of action characterised by human appearance and plurality. Where the realm of labour was part of the cyclical life process and work always came to an end in a finished product, the realm of action was the realm of durability and immortality. Arendt argued that with "the rise of the social" the realm of action and its durability have disappeared. In the "social" realm human plurality disappears because it is ruled by necessity and tangibility, there is no concern for durability and immortality. I fear that the substantive approach to equality as formulated and followed by the Constitutional Court at present is similarly ruled by the concern of necessity and tangibility. An "ethical" interpretation of equality requires the continuous reconstruction and transformation of public space where human plurality can come to the fore and where the ideals stretch beyond the daily economies of politics and policies.

Finally I focused on two feminist perspectives on the law and equality. "Ethical" feminism adheres to deconstructive insights and rejects any attempt to give a closed or final definition to the feminine. Difference similarly does not fit a certain description or formulation. Women should strive for equality in their own way(s) and not be assimilated within the present system. Christine Littleton's term, phallocentrism, that exposes the reality of cultural constructed maleness is of importance for ethical feminism and ethical interpretation.

The various perspectives on equality in this section must be linked to the visions of

public space in the previous section. I argue that these perspectives can only have real meaning in a reconstructed and transformed vision of public space. The vision of public space that I support acknowledges the reality of difference, plurality and heterogeneity. The vision of public space will inspire and direct the approach to equality. A "deconstructive" public that continuously undermines its own self-presence nurtures an approach to equality that is open for the event and for the coming of the other. The intersection between the public and equality is aimed at the future, waiting for a democracy to come, equality to come, justice to come. An ethical interpretation of equality is situated where public space intersects with equality. The final dimension of the intersection, the stories which are told, heard and experienced will be the focus of Part 3 "... landscapes of justice".

3

... landscapes of justice

Introduction

"landscape" as image, the ethical intersection, and the TRC

In the introduction to this thesis, "... landscapes of democracy, equality and justice" I explained my reasons for relying on "landscape" as image. I said that "landscape" as

image might be able to capture aspects of the possibilities and impossibilities and the happiness and the tragedies which are integral to my exploration of democracy, equality and justice. I also rely on "landscape" as image to illustrate my argument of an ethical interpretation of equality. In this section I follow "landscape" as image for my discussion on justice. I think that the ways of interpreting landscape are useful for my consideration of justice. I shall come back to this below.

In Part 2 I discussed aspects of deconstruction. I emphasised Drucilla Cornell's renaming of deconstruction as the philosophy of the limit because of the implications for justice. We saw that the renaming of deconstruction to the philosophy of the limit illustrates a certain vision of justice, namely justice as the limit to any present system. I accept this vision of justice. In other words when I use the word justice, I mean something that is not present yet, that is outside the present system, that is in the "beyond". I have explained throughout the text that the fact that justice is not attainable in the present does not have nihilistic implications. Justice is an ideal that serves as inspiration in all our actions. It is in this spirit that I discuss landscapes of justice in this section.

I have identified an intersection, that I call an ethical intersection, between public space, equality and justice. The reason why I identified this ethical intersection is because it is integral to my argument of an ethical interpretation of equality. In other words all three aspects of this intersection, public space, equality and justice, form part of an ethical interpretation of equality. An ethical interpretation of equality is thus an interpretation that takes aspects of public space, equality and justice into account. I have already discussed two of the features of the ethical intersection, namely public space and equality. In regard to public space I investigated various visions. The motivation for the investigation was to find guidance for the reconstruction and transformation of South African public spaces. I used some liberal visions as reference point and turned to three responses to the liberal visions. Although I find Habermas' interest in public discourse encouraging, I said that I am not totally satisfied and comfortable that his approach will be suitable for our context. I said that, in my view,

Mouffe's vision of radical democracy and her emphasis on antagonism and the political could be explored for the South African reconstruction and transformation of public space. But, I was mostly drawn to Arendt's vision of action and speech and followed her vision of public space in the Part on equality. In my discussion of the third feature of the ethical intersection, justice, I shall again follow Arendt's vision of public space.

In the previous part I turned to certain perspectives on equality. Again the motivation was to see how our approaches to and interpretation of equality can benefit from other perspectives. I described the current approach to equality in South Africa as a "substantive" approach. My critique of the present substantive approach is that it might become a new formalism. My fear is that *difference* will, as in the formal approach, be negated or at the least reduced to a formula or test. The meaning of "ethical", in an ethical interpretation of equality, is exactly the openness for difference and for "radical" otherness that cannot be reduced. The practical effect of this meaning of "ethical" and of an ethical interpretation is that it is impossible to achieve equality fully or to recognise, accommodate and accept difference fully. The same argument that holds for justice, applies to equality. As justice is only possible in the "beyond", equality that is totally realised will never be achieved in a present system. This is exactly the implication of an ethical interpretation of equality. Again, this does not mean that we should not strive for equality and even fight for equality in the present but an ethical interpretation makes us aware of the shortcomings of our present attempts to achieve equality. One more thing that I have already mentioned in Part 2 but that I want to repeat here is that I do not have a certain vision of equality. Equality in my view is an abstract concept that becomes concrete only in specific contexts. I therefore subscribe only to a certain interpretation of equality, an ethical interpretation of equality.

The reason for repeating and summarising some of the main arguments up to this point is because I shall now turn to the example of the ethical intersection that I have been talking about. To appreciate the value of the example fully it is necessary that my understanding of the ethical intersection, the three features of the ethical intersection and an ethical interpretation of equality is clear. I argue that the TRC is an illustration

of my conception of an ethical intersection. In others words I say that the TRC is true to the features of public space, equality and justice. The first feature, public space, is obvious. I have indicated throughout the text that the TRC is a good example of a public space, it was a public event for many reasons. The interim constitution initially provided for the setting up of the TRC, it was created by an act of parliament,[1] and most importantly almost all of the hearings took place in public spaces throughout the country.

Why is equality a feature of the TRC? I want to identify reasons on three levels. On the first level equality is a feature of the TRC because the process itself attempted to treat each and everyone equally. Each and every person who was living in this country during the time March 1960 to May 1994, whether she was part of the struggle against apartheid or part of the regime who enforced apartheid, victim or perpetrator, had an equal opportunity to come forward. (I have noted that this was a point of critique of some commentators who argued that it was not proper that victims and perpetrators were treated equally).[2] Below I shall explain why I think the TRC, in doing this, did not subscribe to a formal concept of equality. Even though they treated each and everyone equally, they did not necessarily treat them the same. In other words they took concrete contexts and circumstances into account. The fact that they recognised apartheid as a crime against humanity is an indication that they did not perceive equality as sameness. In this regard I think the TRC's approach is along the same lines as an ethical interpretation of equality. On the second level I argue, following Arendt's vision of action and speech, that equality is a feature of the TRC because it is a distinctive part of plurality. I have discussed Arendt's argument that two features of plurality are distinctness and equality.[3] The TRC as a public space provided for humans to act, in

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1 Promotion of National Unity and Reconciliation Act 34 of 1995.

2 See Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance*; Liebenberg "The Truth and Reconciliation Commission in South Africa: Context, future and some imponderables" (1996) 11 *Suid-Afrikaanse Publiekreg /South African Public Law* 123-159; Kollapen "Accountability: The debate in South Africa" (1993) 37 *Journal of African Law* 1-9.

3 See Part 1 "... visions of public space".

other words to appear in their plurality. The second reason why equality is a feature of the TRC is therefore connected with public space as a feature of the TRC. The third reason why equality is a feature of the TRC is related to justice as a feature of the TRC. One of the aims of the TRC was to assist in the achievement of equality for all the people living in South Africa. The aim was that as a result of the TRC we should be closer to the possibility of achieving equality. In this regard the feature of equality is connected to the feature of justice. The most important aim of the TRC, but also of the transition from the old to the new, is to move from an unjust past to a just future.

I have now illustrated how the three features of the ethical intersection relate to the TRC, or in other words why I say that the TRC is an example of the ethical intersection between public space, equality and justice. I want to repeat that the significance of the ethical intersection is that it is integral to my argument of an ethical interpretation of equality. My task in this part is to say more about the concrete example of the ethical intersection, namely the TRC. It should be clear that my interest in the TRC is to show how, as an ethical intersection, it can enhance my argument of an ethical interpretation of equality. How should I approach the TRC and the many writings, commentaries and critiques that appeared since 1995 and are still appearing every day?[4] I should state

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[4] See amongst many others Bronkhorst (1995) *Truth and reconciliation: Obstacles and opportunities for human rights*; Brandon (1995) *Do sleeping dogs lie?: The psychological implications of the Truth and Reconciliation Commission in South Africa*; Boraine & Levy (eds) (1995) *The healing of a nation?*; Boraine & Levy (eds) (1994) *Dealing with the past: Truth and reconciliation in South Africa*; Botman & Peterson (1996) *To remember and to heal: Theological and psychological reflections on truth and reconciliation*; De Kock & Godin (1998) *A long night's damage: Working for the apartheid state*; Ackerman "Tales of terror and torment: Thoughts on boundaries and truth-telling" (1997) 63 *Scriptura* 425-434; Maluleke "Dealing lightly with the wound of my people? The TRC process in theological perspective" (1997) 25 *Missionalia* 324-343; Gobodo-Madikizela "Healing the racial divide?: Personal reflections on the Truth and Reconciliation Commission (1997) 27 *South African Journal of Psychology* 271-272; Olckers "Gender-neutral truth: A reality shamefully distorted" (1996) 31 *Agenda* 61-67; Owens (1996) "Stories of silence: Women, truth and reconciliation" (1996) 30 *Agenda* 66-72; Liebenberg "Die Waarheids- en Versoeningskommissie in Suid-Afrika en die implikasies daarvan vir 'n Suid-Afrikaanse historikerstreit en eietydse geskiedskrywing" (1997) 22 *Journal for Contemporary History* 98-114; Verwoerd "Continuing the discussion: Reflections from within the Truth and Reconciliation Commission" (1996) 8 *Current Writing* 66-85; Braude "The archbishop, the private detective and the angel of history: The production of South African public memory and the Truth and Reconciliation Commission" (1996) 8 *Current Writing* 39-65; Lalu "Journeys from the horizons of history: Text, trial and tales in the construction of narratives of pain" (1996) 8 *Current Writing* 24-38; Motala "The promotion of National Unity and Reconciliation Act, the constitution and international law" (1995) 28 *CILSA* 338-362;

from the start that my aim is to reflect on a few of the various responses to the TRC. For me the value of the TRC, for an ethical interpretation of equality in particular, lies in how people understand and interpret it. I am interested to see how, and if at all, people reflect on the features of public space, equality and justice.

In regard to the interpretation of the TRC it is now necessary to return to "landscape" as image of justice. I have noted in the introduction that context influences our understanding and reading of texts, just like Sienaert[5] notes that the way we choose to see a landscape, is always influenced by the "conventions of perspective" with which we are familiar.[6] I have noted Sienaert's argument that the dynamic and transformative potential of an image can only be experienced if its inherent multiplicity is continually exposed. This argument is also relevant in the context of the TRC. We should highlight the inherent multiplicity of the TRC so that its dynamic and transformative potential can be exposed. Below I shall refer to some of the metaphors that are used in our language

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Gauntlett 11 "Towards the truth: The GBC's submissions to the TRC" (1998) *Consultus* 34-39; Whittle "The legal profession and the truth" (1997) *De Rebus* 506-507; Kollapen "Accountability: The debate in South Africa" (1993) 37 *Journal of African Law* 1-9; Liebenberg "The Truth and Reconciliation Commission in South Africa: Context, future and some imponderables" (1996) 11 *Suid-Afrikaanse Publikereg/ South African Public Law* 123-159; Sarkin "The trials and tribulations of South Africa's Truth and Reconciliation Commission" (1996) 12 *South African Journal on Human Rights* 617-640; Dugard "Is the truth and reconciliation process compatible with international law?" (1997) 13 *South African Journal on Human Rights* 258-268; Braude "Memory and the spectre of international justice: A comment on AZAPO" (1997) 13 *South African Journal on Human Rights* 269-282; Moellendorf "Amnesty, truth and justice: AZAPO" (1997) 13 *South African Journal on Human Rights* 283-291; Du Plessis "Observations on amnesty or indemnity for acts associated with political objectives in the light of South Africa's transitional constitution" (1994) 57 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 473-481; Loots "Die waarheidskommissie: Nurnberg-verhore of bevordering van nasionale eenheid" (1996) *Tydskrif vir die Suid-Afrikaanse Reg* 154-160. See also the cases of *Azanian Peoples Organisation (AZAPO) and others v President of the Republic of South Africa and others* 1996 (8) BCLR 1015 (CC); *Truth and Reconciliation Commission v Du Preez and another* 1996 (8) BCLR 1123 (CC).

5 I have discussed Sienaert's discussion on landscape as image in the work of Breyten Breytenbach in the introduction, "... landscapes of democracy, equality and justice". See Philip (ed) (1993) *Breyten Breytenbach. Painting the eye* 15.

6 See Introduction "... landscapes of democracy, equality and justice".

of transformation. I shall also note Antjie Krog's[7] and Piet Meiring's[8] use of landscape in their responses to the TRC.

In this part I shall focus on three landscapes, a broader theoretical landscape, a specific South African landscape and a landscape of care. In the theoretical landscape I focus on four authors whose perspectives are all in some or other way related to the ethical intersection, an ethical interpretation of equality and the TRC. The first two authors, Bonnie Honig and Melissa Orlie, reinterpret the theories of Hannah Arendt and Jacques Derrida. I start of with Bonnie Honig's[9] reading of the Arendtian and Derridian interpretations of the American Declaration of Independence. Arendt and Derrida differ from each other: Arendt emphasises the *performative* aspect of the Declaration, and Derrida acknowledges the inevitability of the *constative*. Honig, however, argues that their differing views can be negotiated. Arendt's and Derrida's interpretations of the American Declaration of Independence and Honig's negotiation of their readings provide an interesting angle on interpretation that can be followed in our interpretation and understanding of the TRC. When we read the final report of the TRC we shall have to acknowledge both the performative and constative aspects. In other words, the TRC report will have unfixed (performative) and fixed (constative) moments. I then discuss Melissa Orlie's[10] deconstructive focus on two aspects of Arendt's theory of action – promising and forgiving – that are significant for our interpretation of the TRC. Orlie argues that promising and forgiving are only possible because of the unpredictability and spontaneity inherent to action. I view the TRC as an excellent example of public space in the Arendtian sense, in other words I am saying that the TRC was a space where action took place. Because of the spontaneity inherent to action victims were

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7 (1998) *Country of my skull.*

8 (1999) *Chronicle of the Truth Commission. A journey through the past and present - into the future of South Africa.*

9 "Declarations of independence: Arendt and Derrida on the problem of founding a republic" (1991) 85 *American Political Science Review* 97-113; Arendt (1963) *On revolution*; Derrida "Declarations of independence" (1986) 15 *American Political Science Review* 7-15.

10 "Forgiving trespasses, promising futures" in Honig (ed) (1995) *Feminist interpretations of Hannah Arendt* 337-356; Arendt (1958) *The human condition.*

able to forgive their perpetrators, and perpetrators (and actually every person involved in the TRC and aspiring to transformation in South Africa) were able to make promises. The last two authors, Robert Gordon and Martha Minow, discuss various responses to mass atrocities. Robert Gordon[11] makes a distinction between narrow agency, broad agency and structural approaches (he supports the latter). In my view the TRC can not be placed squarely in any of these approaches. The TRC occupies an "in between" space. Martha Minow[12] searches for a path between "vengeance and forgiveness" as a response to mass atrocities. The TRC fulfilled such a space. She identifies the necessity of following a contextual enquiry into the concrete circumstances of each case.

In the next section, South African landscape, I reflect on some of the various authors who wrote on the TRC. I repeat that my focus on the TRC is not the process itself – whether it followed the correct procedures, for example; or the various acts of human rights abuse; the granting or refusal of amnesty; or the recommendations of the reparation committee. The relevance of the TRC for my argument are the features of the ethical intersection, namely public space, equality and justice, and accordingly of an ethical interpretation of equality.

I shall reflect on the responses of a writer, activists, a poet, a pastor, a researcher and a lawyer.[13] I want to see how the various responses can contribute to my argument of

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11 "Undoing justice" in Sarat & Kearns (eds) (1996) *Justice and injustice in law and legal theory* 35-75.

12 (1998) *Between vengeance and forgiveness. Facing history after genocide and mass violence*.

13 I focus on the following publications that I regard as the most important. These are all books - for the argument that I am developing I wanted to focus on a comprehensive work of an author. In my opinion an author's particular point of view is better illustrated in a specific work. With the exception of Brink, I focus on books published by the various authors. Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance*; Krog (1998) *Country of my skull*; Meiring (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa*; Jeffery (1999) *The truth about the Truth Commission*; Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* and Brink "Stories of history: Reimagining the past in post-apartheid narrative" in Nuttal & Coetzee (eds) (1998) *Negotiating the past. The making of memory in South Africa* 29-42.

an ethical interpretation of equality. Before I say more about the various authors I need to make a remark about language. Language is central to any process of understanding and interpretation. In the reading of the various responses to the TRC the type of language employed will reflect much of an author's view.

André P Brink argues as follows in regard to language and interpretation:

> The past cannot be corrected by bringing to it the procedures and mechanics and mind-sets that originally produced our very perception of the past. After all, it is not the past as such that has produced the present or poses the conditions for the future (this was the fatal delusion of Naturalism), but the way we think about it. Or even more pertinently, the way in which we deal with it in language.[14]

I start of with André P Brink's[15] reflection on truth and memory. He uses Margaret Atwood's[16] story of Grace Marks to illustrate his view on truth and memory. The telling of stories is significant in Brink's assessment of the process of the TRC. He notes the special relationship between memory, imagination and story. In an earlier work,[17] Brink focused on the importance of stories, memory and imagination for history.

> It seems to me that in situations such as this what matters are not the specifics of the inventions ... but the fact that they are resorted to at a given moment in an individual's life, or at a specific historical juncture ... Whether Ouma Kristina's stories contain any grain of "historical truth" or not is immaterial in this regard. The fact that her response to a historical

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14 Brink "Stories of history: Reimagining the past in post-apartheid narrative" in Nuttal & Coetzee (eds) (1998) *Negotiating the past. The making of memory in South Africa* 33.

15 "Stories of history: Reimagining the past in post-apartheid narrative" in Nuttal & Coetzee (eds) (1998) *Negotiating the past. The making of memory in South Africa* 29-42.

16 (1996) *Alias Grace.*

17 (1996) *Sandkastele / Images of sand.* See also (1998) *Duiwelskloof.*

(or political, or social, or personal) challenge is couched in stories ... poses, it seems to me, a much more complex problem to the reader, as it did to the writer in the first place.[18]

He continues

History may remain an enigma, as Atwood suggested: but it is only through story that the nature and context of each specific enigma can be approached.[19]

The first book published on the TRC was the one by Kadar Asmal, Louise Asmal and Ronald Suresh Roberts.[20] All three authors share a legal background, all three were inspired by the African National Congress (two of them are members) and all three were outside South Africa during the time 1960-1990. The big difference between this book and the others is that it was written before the proceedings of the TRC had actually begun. The authors discuss the importance of the TRC's process for reconciliation and truth. An important theme is apartheid as a crime against humanity. The subtitle of the book "A reckoning of apartheid's criminal governance" gives an indication of their framework. The authors accordingly feel strongly that victims and perpetrators can not be placed on an equal footing. I shall reflect on the significance of this view for an ethical interpretation of equality. They place emphasis on the notion of "never again" and argue that

[T]he South African exercise of facing the past will be far more than a legalistic exercise or a bureaucratic fact-finding mission. It must ask how living, breathing, political institutions could have so distorted and abused

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18 "Stories of history: Reimagining the past in post-apartheid narrative" in Nuttal & Coetzee (eds) (1998) *Negotiating the past. The making of memory in South Africa* 40.

19 "Stories of history: Reimagining the past in post-apartheid narrative" in Nuttal & Coetzee (eds) (1998) *Negotiating the past. The making of memory in South Africa* 41.

20 (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance.*

> their duties to secure humane values. It must lay bare the immoral anatomy of apartheid and never again allow truth to be hostage to the few.[21]

They anticipated that

> [A]fterwards we will be blessed with a complex, perhaps contradictory, set of narratives about our past. And our task, necessarily a ceaseless one, will be to reconstitute our political reality into something that is coherent but self-questioning, ethically decisive but not self-righteous.[22]

Antjie Krog[23] delivers a personal response to the TRC process, stories and events. She is a poet who was involved in the struggle against apartheid in the past. Krog reported on the TRC for SABC radio as Antjie Samuels. The fact that I have quoted her frequently in this thesis should already be an indication of my own reflection on Krog's narrative. In her telling of the events of the TRC she is influenced by her own concrete circumstances. She writes from the perspective of a woman – a white, Afrikaans speaking, South African woman. Her multiple response to the TRC and to truth and memory is a reflection of the multiple responses to the TRC. She does not attempt to bring the process to closure but emphasise the value of the TRC in relation to the ideals of reconciliation, healing and justice.

> The word "Truth" makes me uncomfortable.
> The word "truth" still trips the tongue.
> Your voice tightens up when you approach the word "truth", the technical assistant says, irritated. "Repeat it twenty times so that you become

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21 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 213.

22 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 215.

23 (1998) *Country of my skull.*

familiar with it. *Truth is mos jou job!* [Truth is your job, after all!]
I hesitate the word, I am not used to using it. Even when I type, it ends up either as turth or trth. I have never bedded that word in a poem. I prefer the word "lie". The moment the lie raises its head, I smell blood. Because it is there where the truth is closest.
The word "reconciliation", on the other hand, is my daily bread. Compromise, accommodate, provide, make space for. Understand. Tolerate. Empathize. Endure ... without it, no relationship, no work, no progress is possible. Yes. Piece by piece we die into reconciliation.[24]

Krog is embedded in the landscape of her country and follows the metaphor of landscape in her narrative.

> As I stand half-immersed in the grass crackling with grasshoppers and sand, the voices from the town hall come drifting on the first winds blowing from the Malutis - the voices, all the voices of the land. The land belongs to the voices of those who live in it. My own bleak voice among them. The Free State landscape lies at the feet at last of the stories of saffron and amber, angel hair and barbs, dew and hay and hurt.[25]

Piet Meiring[26] is a theologian from the NG (Dutch Reformed) Church and academic at the University of Pretoria who was approached by the Chairperson of the TRC, Archbishop Desmond Tutu, to serve as a commissioner on the TRC to represent the Afrikaner community. In his work on the TRC he gives a historical account of the process and events of the TRC. Similar to Antjie Krog, Meiring gives a personal account of the process. Himself being a theologian in the Christian faith, he follows a

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[24] Krog (1998) *Country of my skull* 36.

[25] Krog (1998) *Country of my skull* 210.

[26] (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa.*

religious approach to the TRC. He employs the metaphor of "trek"[27] and journey through the South African landscape in his telling of the TRC process.

> And thus the journey came to an end for the time being at least. The trek of two and a half years through the past and present of our country was behind us. It was a long and arduous journey, though dark valleys of pain and suffering, of shame and guilt. It was, however, also an inspiring route over peaks of bravery and generosity, of reconciliation in places where it was least expected. ... The footsteps of thousand victims and transgressors, and eventually of the entire South African community who joined in the trek, will stretch across the landscape.[28]

Anthea Jeffery[29] is a research consultant to the South African Institute of Race Relations. In a previous publication[30] she investigated the conflict between the ANC and the IFP in Kwa-Zulu-Natal. As the title of the work on the TRC indicates, Jeffery attempts to tell the "truth" about the truth Comission. Her work is different from the other accounts as she does not consider the value of stories or narrative or the processes of healing that was an inherent part of the TRC. Jeffery is highly critical of the TRC, of the content of its findings and its methods of investigation in particular. I do not subscribe to her view of the TRC at all. Not because she is critical of the TRC nor because she categorically states that truth was distorted, but because of her own style and method in analysing the TRC. She gives an instrumental, legalistic account, totally devoid of the concrete context. She negates the one aspect without which the TRC could never have come to light, the human one. She seems totally unaware of the fact that this process was meant to address human stories, atrocities and abuses against

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27 "Trek" refers to the "Great Trek" of 1938 that was a migration of Afrikaner Boers (farmers) who left their farms in the Eastern Cape to explore the country in the North.

28 Meiring (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 369-370.

29 (1999) *The truth about the Truth Commission.*

30 (1997) *The Natal Story: 16 years of conflict.*

humans. Jeffery's response is a perfect example of what in Brink's perspective (quoted at the beginning of this section) we should not be doing, *attempting to reflect on the past by bringing to it the procedures and mechanics and mindsets that originally produced our very perception of the past.*

Finally, I briefly discuss the perspective of David Dyzenhaus,[31] legal academic at the University of Toronto, with regard to the TRC's focus on the legal community during apartheid. Dyzenhaus is an ex-South African who taught at the University of the Witwatersrand before he moved to Toronto. He was the first witness to give testimony at the TRC hearings into the legal profession. His response contributes directly to the issue of legal interpretation, and to an ethical interpretation of equality. Dyzenhaus argues that lawyers in the past could have prevented many of the atrocities of apartheid.

> Law, as we have seen, can make a difference, even under the very compromising conditions of apartheid South Africa, and this goes a long way to show that legal order or legality places constraints on the powerful which at bottom are political and moral constraints - the constraints of commitment to a community of free and equal citizens.[32]

The various texts reflect on the TRC from various perspectives. Brink provides an academic-intellectual and literary perspective. He uses other texts, *Alias Grace* by Margaret Atwood, and one of his own literary works (*Images of sand*)[33] as points of comparison to the TRC stories. Brink's angle is on the relationship between the TRC and memory. Asmal, Asmal and Brooks deliver a political and ideological critique on the apartheid order and show how the TRC can "reckon" with it. Their response, although they have been affected by apartheid, is of an academic nature and not narrative. Krog plays a dual role. She reports and gives facts, she tells a chronological

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31 (1998) *Truth, reconciliation and the apartheid legal order.*

32 (1998) *Truth, reconciliation and the apartheid legal order* 182-183.

33 (1996).

story of the events and the hearings, but she also reflects on the process. She creates a literary and poetic text, a narrative of the events. Meiring's text is in this regard similar to Krog's; he gives a historical account of the events, but simultaneously expresses his own experience and thoughts. Of all the authors Krog and Meiring had the closest involvement with the TRC, Krog in reporting and Meiring as a Comissioner. Brink, Krog and Meiring, in their responses to the TRC, break with conventional methods of analysis. Their language and style accommodate the uniqueness of the TRC as event. They are intensely aware of the human element and do not revert to instrumental, objective, cerebral methods and style. Jeffery's response, in her search for the "truth" of the Truth Comission, stands in contrast to the responses of Brink, Krog and Meiring. The analysis of the legal system during apartheid by Dyzenhaus differs from the other writings in the sense that his focus is a legal one and that he deliberately writes for an international and South African audience.

Finally in the section on Landscape of care I shall make a short comment on certain aspects of truth, reconciliation and *care*. In my view, there is still too much emphasis on the traditional concept of justice in the South African discourse. I have referred to Gilligan's[34] distinction between "an ethics of care" and "an ethics of justice" in Part 1 "... visions of public space". This distinction can be applied to the event of the TRC and to the various responses to it. In the TRC discourse, and the report in particular, the concept of "restorative justice" is identified as a significant part of their concern with justice. The report also refers to "caring". I would like to see that this broader concept of justice goes beyond the event of the TRC and becomes part of our visions of public spaces, equality and justice in every day life. Where justice is an ideal that should be strived for, care is something that can daily be encompassed, recognised and employed in our actions. The various responses to the TRC can also be analysed in terms of their emphasis; whether the authors take a care perspective or a justice perspective. In a care perspective the other is perceived as a concrete other with specific, concrete needs. In the justice perspective the other is seen as a generalised other with general universal needs. The stories told in the public space of the TRC

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[34] (1982) *In a different voice.*

were told by concrete people. It is necessary not to see their experiences as one general universal "grand" narrative. I am interested to see to what extent the TRC's aim of reparation is inspired by an ethics of care.

Before I start with the theoretical perspectives, let us first view some of the metaphors used in the South African landscape of transformation, reconciliation and justice.

Landscape of constitutional language - On bridges, roads and foundations

With the release of Nelson Mandela from prison in 1990, South Africa's "long walk to freedom" was set in motion. Of course, for many activists this struggle "originated" many centuries ago, but FW de Klerk's speech on 2 February 1990 and the events following it, made the struggle, the "revolution", official. Negotiations followed, imbued with political bargaining and compromise. One of the most important processes was the creation of a new constitution. An interim constitution came into effect in 1994, with specific provisions for the writing and creation of a truly democratic constitution. The postamble of the interim constitution[35] made special reference to "National Unity and Reconciliation".

> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, 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.
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
> The adoption of this Constitution lays the secure foundation for the people of South Africa

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[35] Act 200 of 1993.

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 vengeance, a need for reparation, but not for retaliation, a need for ubuntu but not victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

Nkosi sikele' iAfrika. God seën Suid-Afrika
Morena boloka sechaba sa heso. May God bless our country
Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika

The metaphors chosen to describe our "revolution", to tell our stories of change and transformation are significant. How we read, understand and interpret the symbolic language will affect how we actually think about reconciliation, equality and justice. The understanding and expectations of the Truth and Reconciliation Commission are intertwined with the language and metaphors chosen to describe the process. The metaphor of the constitution as a "bridge" should be explored.[36] The question arises, if the constitution is a bridge, what is the TRC: part of the structure of the bridge, or maybe a toll gate?[37] Officially the image provided for the TRC is a "road". A condition for a bridge is an abyss, in other words, for a bridge to have a function, to exist, there must be something, a divide that must be crossed. The constitution, it is argued, serves as a bridge between a "historically divided past" and a "democratic future". The

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36 See Mureinik "A bridge to where? Introducing the interim bill of rights" (1994) 10 *South African Journal on Human Rights* 31.

37 I am thankful to Prof Andre van der Walt who came about with the idea of a toll gate during one of our weekly group discussions.

significance of this metaphor is that the divide can never be erased. In order to understand and interpret the bridge, one must cross and cross it again - future understanding relies on past and present experience. The constitution as a bridge could be a constant reminder of the "crisis". The metaphor of a bridge could illustrate the function of the constitution as an "in between". This understanding of the constitution as a bridge enhances the notion of legal interpretation as recollective imagination. Every act of interpretation requires acknowledgement of the past, the present and the future. Memory and recollection will play a significant role in every act of interpretation.

One of the most important events with regard to memory in our country is the Truth and Reconciliation Comission, "the road to reconciliation and truth". Our reading of the TRC will effect the future of political, social and economic life. It will affect the reading and understanding, interpretation and application of the constitution, and entrenched human rights even more.

The preamble of the final constitution refers to images of building, developing, establishing, and laying of foundations.

> We, the people of South Africa
> Recognise the injustices of the past;
> Honour those who suffered for justice and freedom in our land;
> Respect those who have worked to build and develop our country; and
> Believe that South Africa belongs to all who live in it, united in our diversity.
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -
>
> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person; and
>
> Build a united and democratic South Africa able to take its rightful place

as a sovereign state in the family of nations.

May God protect our people

Nkosi Sikele'iAfrika. Morena boloka setjhaba sa heso.

God seën Suid-Afrika. God bless South Africa.

Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.

The laying of foundations is a problematic metaphor if interpreted literally. If this image and the other images in the Preamble are understood to be in a constant state of motion and as dynamic images, their effect on the reading and interpretation of the constitution can be fruitful. Here, Derrida and Arendt's different and similar views on the American Declaration of Independence can contribute to a more nuanced understanding.[38] The images of the preamble cannot be separated from an understanding of the TRC. If we understand the processes of healing and reconciliation through the telling of stories and the creation and recreation of memory as ongoing, fluid processes, it will be easier to recognise the similar metaphors and images of the constitution.

Antjie Krog's[39] and Piet Meiring's[40] use of landscape in their responses to the TRC contribute to the fluidity of the TRC process. Krog is personally involved and situated (embodied and embedded) in the landscape. Her description of landscape enhances her narrative style. By doing this she places the TRC in the fluid and openended landscapes of justice. Meiring makes use of the idiom of journey[41] (*trek*) to describe the process of the TRC. The TRC undertook a long journey through the South African landscape. (It is interesting to note that although the journey is a metaphor the TRC actually travelled through the country in order to have hearings all over the country. On one level the TRC thus also physically undertook a journey). The images of landscape,

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38 Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science Review* 97-113.

39 (1998) *Country of my skull.*

40 (1999) *Chronicle of the Truth Comission. A journey through the past and present - into the future of South Africa.*

41 See also Lalu "Journeys from the horizons of history: Text, trial and tales in the construction of narratives of pain" (1996) 8 *Current Writing* 24-38.

journey and road (that I mentioned earlier) all create a vision of the TRC as continuous, constantly changing and never ending. Desmond Tutu in the foreword of the TRC report[42] also refers to landscape. Like we need to follow multiple interpretations in an approach to landscape, we need to follow multiple interpretations in regard to the TRC. Landscape as a way of describing the TRC makes its significance for an ethical interpretation of equality clearer.

[42] *The report of South Africa's Truth and Reconciliation Comission* (1998) foreword.

Theoretical landscapes

In this section I turn to four theoretical discussions which all contribute to my investigation and interpretation of the TRC. The first two authors, Bonnie Honig and Melissa Orlie, reinterpret the theory of Hannah Arendt by reading her together with or through the philosophy of deconstruction. Honig compares Arendt's and Derrida's reading of the American Declaration of Independence and comes to the conclusion that although their readings differ, they can be "negotiated". As I shall elaborate below, this negotiation of the two readings has significant implications for the TRC. Orlie follows a deconstructive reading of Arendt's theory of action. She places emphasis on the two features of action, namely promising and forgiving. In her view Arendt's theory of action gives effect to performative, openended, unfixed actions and performances. In the TRC a lot of promising and forgiving took place. This was possible because the TRC was a public space where action could take place. Robert Gordon and Martha Minow investigate various responses to mass atrocities. I address their views because they shed some light on the nature of the TRC. In my view the TRC does not fit in any of the identified approaches but occupies an "in between" space. The TRC does not fit in any specific approach because it was a public space where action took place, where there was opportunity for promising and forgiving. Because the TRC occupied an in between space, an interpretation will involve both performative and constative moments, and accordingly a negotiation (in between reading) of the two.

Rereading Arendt

The central question in Arendt's thought is: On what can one rely in the politics of an

era that is under the constant threat of the deluge?[43] Honig[44] describes the question as where to find authority for politics within modernity. This is also the central question of our time. How do we account for politics, for the law, for ethics in a postmodern era where the belief in objectivity, morality and truth has been undermined and displaced? Where do we find legitimacy for our current politics, legal system and so on? Where do we find an authoritative voice amongst the multiple voices heard in the TRC?

Arendt, like others who experienced the "radical evil" of totalitarian regimes, was shocked by the events of the Second World War. These events influenced her future interests and thinking. Her correspondence with Karl Jaspers[45] was dominated by questions that arose from her experience as a German Jew who had to go into exile during the Second World War. Whether Arendt totally rejected modernism is in dispute. Some commentators[46] argue that Arendt rejected all modern assumptions. Others described her as a "reluctant modernist".[47] What is certain, is that Arendt rejected the instrumental approach to politics. Through the distinction between labour, work and action and her critique of "the rise of the social", she illustrated the loss of political action and the decline of a public space where humans can appear.

Most visions of public space[48] also seek to provide possible answers for the absence of political authority and the recovery of public space. If one rejects the traditional positivist, instrumental, liberal approach, where does one turn to? In Part 1 we saw the visions of Habermas, Mouffe and Arendt. In Part 2 I discussed the philosophy of deconstruction in the search of new visions of equality (but indirectly also politics,

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43 Kohler & Saner (eds) (1985) *Hannah Arendt. Karl Jaspers. Correspondence 1926-1969* xvi.

44 "Declarations of independence: Arendt and Derrida on the problem of founding a republic" (1991) 85 *American Political Science Review* 97-113.

45 Arendt studied under Jaspers in Heidelberg from 1926-1928. She completed her doctoral thesis under him. They became great friends and corresponded for many years.

46 See Canovan (1992) *Hannah Arendt. A reinterpretation of her political thought.*

47 Benhabib (1996) *The reluctant modernism of Hannah Arendt.*

48 See Part 1 "... visions of public space".

ethics and justice). Here I want to address the question to what extent deconstruction can guide our visions of public space, equality and justice, and our interpretation of the TRC in particular. I often feel uncomfortable with the extent of disembodiment and disembeddedness in deconstructive philosophy. Can we find a position where the valuable insights of deconstruction, specifically with regard to the ethical, are followed together with a perspective of care that is rooted within a specific context and history? In other words, is it possible to give "body" to deconstruction? Will the notion of a bodied deconstruction be seen as a reversion to modernism, to project thinking, to "economical" thinking? On the other hand, the disembedded and disembodied position of deconstruction can be experienced as too close to Rawls'[49] "original position" and "veil of ignorance". I believe we should seek for a space other than the formalist, instrumentalist, positivist, liberalist position and also other than the postmodern, deconstructive position of disembodiment and disembeddenness. This space should adhere to the notions of imagination, stories and a perspective of care. Honig's negotiation of Arendt and Derrida reflects, in my view, on a theoretical level an in between space than can also take account of the imagination, stories and a perspective of care. The TRC is a practical illustration of such an in between space.

I have already said that Arendt's vision of politics and democracy provides a powerful way of structuring South African political and ethical life. Certain shortcomings in her theory could be addressed by the ethical moments in deconstruction. Similarly Derrida's theory of deconstruction that guides our visions of public space, equality and justice can be supplemented by aspects of Arendt's theory.

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[49] Rawls (1972) *A theory of social justice* made use of these two images to illustrate his hypothetical position where people will gather in order to agree upon the basic principles of justice. This position has been criticised by communitarians, feminists and postmodernists as accepting only the traditional, liberal, male view of the self. Rawls in his later book (1993) *Political liberalism* altered his earlier reliance on the autonomous individual. See Benhabib (1992) *Situating the self* 145-177 and Mouffe (1993) *The return of the political* 41-59 for their critique on Rawls.

"On the problem of founding a republic" - Bonnie Honig

Honig[50] is of the opinion that although the impasse between Arendt and Derrida is not easy to bridge, it is not non-negotiable.[51] Arendtian and Derridian views, even though diverse, are inescapable moments in our interpretation of public space, equality and justice, and accordingly of the TRC.

Honig looks at Arendt's and Derrida's views on the problem of politics in modernity. She notes that for Arendt the problem of politics in modernity lies in the *disappearance* of political authority in modernity. Arendt constructs a *replacement* through a "fabulist" account of the American Revolution. Honig notes that Arendt is ambiguous about the disappearance of authority. On the one hand it opens new possibilities of innovative (performative) political action, but on the other hand it illustrates the absence of tradition and religion without which the task of founding and maintaining lasting institutions seems impossible. She says that the question for Arendt is whether a politics of foundation is possible in a world where traditional guarantees of stability, legitimacy and authority are absent.

Honig explains that according to Arendt we should not try and find an *absolute* in which to ground and legitimate the political realm. An absolute undermines the *contingency* which is a necessary feature of the public realm. It also undermines the *human* achievement of founding because it makes it dependent on something *external* to the human world. She says that Arendt views an absolute as "a truth that needs no agreement" and accordingly compares it to "despotic power". For Arendt unique

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50 "Declarations of independence: Arendt and Derrida on the problem of founding a republic" (1991) 85 *American Political Science Review* 97-113.

51 This view is in contrast with Cornell "Gender hierarchy, equality, and the possibility of democracy" (1993) *Transformations* 156-169 who argues that Arendt's understanding of the polis perpetuates the gender hierarchy which accordingly makes her own ideal of politics impossible. Arendt, according to Cornell, gives us a conception of politics that is inseparable from the subordination of women. She argues that Derrida opens a space for a redefinition of gender so as to provide a concept of participatory democracy and civic friendship uncontaminated by the erasure of women. I would rather argue with Honig that the differences in Arendt and Derrida when read together can help us to formulate a more powerful account of politics, community and legal interpretation. I am in no way seeking to synchronise the theories of Arendt and Derrida or trying to create a new theory by incorporating their views.

political action is not the constative (the absolute) but the performative (human) utterance.[52]

Honig observes that the act of foundation requires for Arendt no appeal to a source of authority beyond itself. *The source of authority is found in the act of foundation.*

> It was the authority which the act of foundation carried within itself, rather than the belief in an immortal Legislator, or the promises of reward and threats of punishment in a 'future state', or even the doubtful selfevidence of the truths enumerated in the preamble to the Declaration of Independence, that assured stability for the new republic.[53]

Honig explains that Arendt gives an account of an *alternative* form of *authority* which she finds *inherent* in the *performative* Declaration of Independence. This alternative form of authority does not exist in a shared belief in gods or myths but in a "common subscription to the preexisting authoritative linguistic practice of *promising*".[54] The community that Arendt envisions here is not a strong homogeneous community, but one bound together by *common linguistic practices* whose members understand and subscribe to *performative* practices.

Honig observes that there is a *paradox* in Arendt's reliance on action and promising. Action, which consists partly in the activity of promising, on the one hand takes place in a *contingent* world where its *meaning* and *consequences* are always *undetermined* if not *indeterminate*. On the other hand promising also serves as a "control mechanism" and establishes "islands of stability". (This same paradox is also present in her vision

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52 Arendt (1958) *The human condition* 245-246; Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science* Review 100.

53 (1963) *On revolution* 199; Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science Review* 101.

54 Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science Review* 97-113.

of the public realm. This is why she views the public as an in between space. The TRC also reflects this paradox and is an illustration of an in between space). Honig then argues that if action is really as *contingent* and *unpredictable* as Arendt says it is, *promising* will not by itself be able to *provide the stability* Arendt expects it to. The stability is coming from somewhere else, possibly from something *external to action's purely performative speech act*. Honig relies here on Derrida's account of the Declaration of Independence.[55] Derrida states his view as follows:

> The "we" of the declaration speaks "in the name of the people". But this people does not yet exist. They do not exist as an entity, it does not exist, before this declaration, not as such. If it gives birth to itself, as free and independent subject, as possible signer, this can hold only in the act of the signature. The signature invents the signer. This signer can only authorize him or herself once he or she has come to the end, if one can say this, of his or her own signature, in a sort of fabulous retroactivity. That first signature authorizes him or her to sign.[56]

Honig says that for Derrida the *signers lack authority to sign until they have already signed*. They appealed to a constative because they did not overestimate their own power. To guarantee power and secure their innovation they had to *combine* their *performative* with a *constative* utterance.

> Another "subjectivity" is still coming to sign, in order to guarantee it, this production of signature. In short, there are only countersignatures in this process. There is a differential process here because there is a countersignature, but everything should concentrate itself in the simulacrum of the instant. It is still "in the name of" that the "good people" of America call themselves and declare themselves independent, at the

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55 Derrida "Declarations of Independence" (1986) 15 *New Political Science* 7-15.

56 Derrida "Declarations of independence" (1986) 15 *New Political Science* 10; Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science* Review 104.

> instant in which they invent (for) themselves a signing identity. They sign in the name of the laws of nature and in the name of God. ... He comes, in effect, to guarantee the rectitude of popular intentions, the unity and goodness of the people. He founds natural laws and thus the whole game which tend to present performative utterances as constative utterances.[57]

Honig says that founding and promising or signing, to have meaning, must have a *last instance*. "God" is the name that Derrida gives to this last instance, which is the inevitable *aporia* of founding. No act of *founding* or *promising* or *signing* is free of this *aporia*. Honig explains this aporia as a "gap that needs to be anchored", which is a *structural feature of language*. She argues that Arendt is aware of this aporia as a structural feature of all performatives but insists that this gap can and should be held *open*. Arendt differs from Derrida because she does not see the need to fill this gap as a systemic, conceptual or linguistic need. This is clearly illustrated by their various reliance on performatives and constatives in the American Declaration of Independence. Where Arendt sees the performative and constative combination of the Declaration as *incongruous*, Derrida argues that this *undecidability is necessary*:

> One cannot decide - and that's the interesting thing, the force and the coup of force of such a declarative act - whether independence is stated or produced by this utterance. We have not finished following the chain of these representatives of representatives, and doing so further complicates this necessary undecidability. ... This obscurity, this undecidability between, let's say, a performative structure and a constative structure, is required in order to produce the sought-after effect.[58]

Honig notes that for Arendt the Declaration's *constative* moments are moments of *impurity* and that there is *no undecidability* for her. In her view *constatives* are *violent*,

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[57] Derrida "Declarations of independence" (1986) 15 *New Political Science* 11.

[58] Derrida "Declarations of independence" (1986) 15 *New Political Science* 9.

despotic and *disempowering* because they are not the products of shared public agreement (action and speech). She says that Arendt misses Derrida's point that in every system (linguistic, cultural, political) *there is a moment that the system cannot account for.*[59]

Honig[60] argues that Arendt fills this moment with a *fable*, her fable of the American revolution and founding. For Honig it is appropriate from a Derridean perspective that Arendt fills this gap with a fable because Derrida himself refers to the signing as a "fabulous retroactivity". She says that Arendt was critical of the American founders because of their *inability to conceive of a beginning that was not rooted in the past.* The *historical event* is for Arendt the *inspiration* of the fable, but it does not bind it. She *dismisses the constative* nature of the declaration and *insists on the pure performative* nature of the declaration as a sufficient guarantee for the authority of the new republic. The *fable* takes the place of the constative for Arendt's theory of a non-foundational politics possessed of legitimacy, authority, stability and durability. However, Honig is critical of Arendt's fabulist account in the sense that her fable hides the *violence* and *ambiguity* that *marked the original act of founding.* Honig says that the effect of Arendt's fable is the same as all other fables, *to prohibit further inquiry into the origins of the system and to protect it.*

Negotiating the impasse

Honig[61] believes that in spite of Arendt and Derrida's apparent irreconcilability the impasse between them may be negotiated. She says that this could be done if instead of *dismissing* the *constative* moment of *founding*, as Arendt does, we could respect Arendt's rejection of the anchoring of political institutions in an absolute, while at the

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59 This is the same mistake Stanley Fish makes in his analysis of the legal system. In his account only evolution is possible and not transformation because the system cannot change from itself. See Cornell (1992) *The philosophy of the limit* 155-169.

60 Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science* Review 107.

61 Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science* Review 108.

same time acknowledging that all acts of founding are, as Derrida claims, secured by a constative. For Honig, by doing this, we do not deny the constative moment of founding, nor do we succumb to its claim to *irresistibility*.

According to Honig, *resistibility* is at the centre of Arendt's new conception of authority for modernity. Arendt regarded an absolute in politics as impermissible because it is irresistible. In other words an absolute is not the outcome of action and speech but a demand that must be obeyed. Absolutes (constatives) are thus *anti-political*. Resistibility is therefore a condition for Arendt's politics. Arendt was critical of the New World's failure to prevent absolutes and accordingly irresistibility in politics.[62] Honig says that Derrida recognises the fact that we will never totally prevent absolutes and irresistibility in politics. He therefore recognises both performative and constative moments in politics. The fact that he recognises both is also a commitment to resistibility.[63]

Honig notes that in her theory on authority Arendt relies on the close connection in Roman thought between the concept of *authority* and a practice of *augmentation*. The concept of Roman authority suggests that the act of foundation inevitably develops its own stability and permanence. Authority in this context is a kind of necessary "augmentation" by virtue of which all innovations and changes remained tied back to the foundation which, at the same time, they augment and increase.[64]

Honig observes that Arendt's commitment to political action is important for two reasons. The one is related to Arendt's motif of *self-realisation*. Human beings who are denied the opportunity to exercise their *world-building capacities*, live impoverished lives, which are less than human, without freedom and without happiness. (This is at the centre of her distinction between labour, work and action). The other reason

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62 Arendt (1963) *On revolution* 39; Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science Review* 108.

63 Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science Review* 108.

64 Arendt (1963) *On revolution* 202; Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science Review* 110.

concerns her new *conception of authority for modernity*. Arendt wanted to know how to prevent "foundationalism". For her authority which is based on such an irresistible "foundationalism" is unsuited to modern politics because it prohibits the practices of augmentation and amendment and encourages a withdrawal from active politics. In regard to the American Declaration of Independence, for Arendt the "very authority of the constitution resides in its inherent capacity to be amended and augmented".[65]

Honig says that Derrida identifies this *same structure of amendment and augmentation which he calls "survivance"*. By "survivance" he means a kind of *preservation through augmentation*. According to Honig:

> [A]s with Arendt, survival is not produced by the maintenance of a present into a future in the way that a fixed moment seeks to preserve the presence of what is past. For Derrida, this maintenance is an augmentation that takes place by way of translation, by way of a translation that is called for and heard in the original text.[66]

According to Honig Derrida's account of the text, like Arendt's, calls out to be amended, to be translated, "it is not present yet".[67] *Translation necessarily means augmentation because it does not merely copy or reproduce but is a "new linguistic event" which produces "new textual bodies"*. It does not simply preserve an original text through repetition but "dislodges the constative yearnings of the original and finds there the point of departure for a new way of life"[68]. For Derrida, this *augmentation* is "what survival is". This *augmentation* is the same as Arendt's *practice of authority*, which

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65 (1963) *On revolution* 204; Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science* Review 110.

66 Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science Review* 110.

67 Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science Review* 110.

68 Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science Review* 110.

responds to the text or document that seeks to preserve the past moment of founding by augmenting it with another event. Although the commitment to augmentation may derive from a reference to a beginning that is in the past, the practises of augmentation and amendment make that beginning our own construction and performative.

Honig[69] comes to the conclusion that since, on Arendt's account, the practice of authority consists largely in the commitment to *resistibility*, the practice of authority turns out to be a practice of *deauthorisation*. Accordingly, Derrida's own project of deauthorisation becomes a part of a practice of authority, not simply an unauthorised assault on the institutions of authority from an outside point. Honig notes that for Arendt and Derrida *the moment of intervention is the moment of politics*. The difference between them is that for Derrida *politics begins with the entry of the irresistible absolute*, while for Arendt *politics ends with the entry of the antipolitical absolute*. Derrida's political intervention is the *impossible superimposition of the constative on the performative*. Arendt's intervention consists of her insistence that *acts of founding can and should resist the urge to anchor themselves in an absolute*.

The notion of resistibility as a condition for politics is significant for the South African context. The previous years of apartheid symbolised precisely a preservation of absolutes and irresistibility. But even though we experienced transition from an authoritarian past to a democratic present we must listen to Derrida's acknowledgement of the constative and the performative. In the interpretation of the TRC we must realise that the process was not purely performative. As I have already mentioned the TRC was created by an act of parliament and there were certain legislative provisions (constatives) that had to be abided by. But at the same time there was also space for unanticipated action, promising and forgiving, through the telling of stories (performative moments). The TRC was an in between space, a political (and off course public) space that reflected resistibility and irresistibility an acknowledgement of constative and performative moments.

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[69] Honig "Declarations of independence: Arendt and Derrida on the founding of a republic" (1991) 85 *American Political Science* Review 111.

Living responsibly and freely: Action, promising and forgiving - Orlie

In an essay titled "Forgiving trespasses, promising futures",[70] Melissa Orlie provides a deconstructive account of Arendt's theory on action. She focuses on two features of action, namely promising and forgiving. In the context of political resentment about things that happened in the past, promising and forgiving are significant. Orlie says that Arendt made helpful suggestions about the question of why and how resentment about our own and others' injuries might be overcome in the realm of political action. Orlie identifies the following question as an important one to ask in the context of resentment: *What does it mean to live responsibly and freely in the context of responding to the past and present collective and individual harms of our society?* Following Arendt's view on action, Orlie says that we live responsibly and freely when we put our identities in question and refuse merely and passively to "reinscribe" social rule.

> To live responsibly and freely – to act extraordinarily and to reveal who we are – requires that we disrupt and unsettle social rule because when we do not, we reinforce and expand the "necessities" that not only harm others, but also constrict the power of our own action.[71]

According to Orlie, cycles of resentment might be broken by disrupting social rule (in other words by acting responsibly and freely) and seeking forgiveness for the atrocities of the past. But seeking forgiveness is not enough. Promises that the same things will never repeat themselves in future must also be made, "for promises institute and sustain the political spaces where we answer to one another".[72] *Responsibility* therefore implies *incalculability* and *unpredictability* ("action" in Arendt's terms) and *freedom* requires that we are responsive to the harms that invariably accompany the "good" we

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70 Orlie "Forgiving trespasses, promising futures" in Honig (ed) (1995) *Feminist interpretations of Hannah Arendt* 337.

71 Orlie "Forgiving trespasses, promising futures" in Honig (ed) (1995) *Feminist interpretations of Hannah Arendt* 339.

72 Orlie "Forgiving trespasses, promising futures" in Honig (ed) (1995) *Feminist interpretations of Hannah Arendt* 339.

would do. In this regard Orlie refers to Butler's[73] formulation of *living ethically*, to "begin, without ending, without mastery, to own – and yet never fully to own – the exclusions by which we proceed."[74]

She says that the correlative in Arendt of Butler's "exclusions by which we proceed" are the "trespasses [against other humans] that occur as we position ourselves in the world". These trespasses flow not from our intentions *per se*, but from our *identities* as they are conditioned and constituted by social rule. According to Orlie how we should respond to the collective trespasses is a problem of responsibility and a problem of freedom. She notes Arendt's[75] suggestion that the problem of *responsibility* and the problem of *freedom* are intimately related. In Arendt's view we are *irresponsible* and *unfree* when we behave *predictably. Responsible and free action entails acknowledging our trespasses and opening them to creative and unpredictable action (promising and forgiving).*

Forgiving and *promising* can be seen as *ethical* and *political* practises of "overcoming" resentment. Orlie asks whether political forgiveness can be expressed with a simple "I forgive you"? She says that this formulation is inadequate because it presupposes an "I" and a "you" fully present and self-made. A "you" alone caused the harm and wounds no more than an "I" has the authority or power to excuse them.

> Political forgiveness is a more provisional, reciprocal release but, like any political action it may have boundless, unexpected, even miraculous, effects. By breaking cycles of reactive resentment and beginning something new, Arendtian forgiveness opens futures and, if only momentarily, frees from the consequence of previous activities both the

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73 See Butler (1993) *Bodies that matter: On the discursive limits of sex.* See also Butler (1990) *Gender trouble: Feminism and the subversion of identity.*

74 (1993) *Bodies that matter* 53.

75 (1951) *The origins of totalitarianism* 139-146.

one who forgives and the one forgiven.[76]

Orlie's deconstructive account of Arendt's theory of action is, in my view, another attempt at a negotiation between Arendt (action) and Derrida (deconstruction). She highlights the "deconstructive" moments in action, namely spontaneity and unpredictability (the hospitality towards the event). In Arendt's formulation promising and forgiving can take place because of the spontaneity and unpredictability inherent in action. In a deconstructive account promising and forgiving can take place because of the openness to the event. To live responsibly and freely in this context means to put our identities in question and to disrupt social rule. This connects with the notion of resistibility as a condition for politics. The questioning of one's identity also recalls Drucilla Cornell's understanding of transformation as the transformation of individuals themselves. We disrupt social rule when we open ourselves to transformation (in deconstructive terms be open to the event) and act in an unpredictable manner. In the context of the TRC many moments of spontaneity and unpredictable action took place. In many cases we did not expect a victim to have the capacity to forgive, in many cases we were surprised. Because the TRC was a public space where action could take place, individuals acted in a spontaneous and unpredictable, and transformed manner. Individuals in many cases in the TRC lived responsibly and freely and resisted the predictability of social rule. The TRC as a public (political) space of action accepted resistibility against absolutes (for example prescribed social rule) as a condition. In the interpretation of the responses to the TRC it will be interesting to see whether a response emphasises the constative moments, the performative moments or both. In other words whether a response situates the TRC in a public space where people acted responsibly and freely (in an unpredictable and spontaneous manner).

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[76] Orlie "Forgiving trespasses, promising futures" in Honig (ed) (1995) *Feminist interpretations of Hannah Arendt* 349.

Making the future by redesigning the past - Robert Gordon

Robert Gordon[77] analyses the legal responses of liberal politics to epochal injustices. He says that every new government that comes to power must deal with injustices of the past. He shows how the legal responses chosen by a new regime express a relation of the new society with its history. These responses come embedded in a history and tell a story that "stitches" together the society's past and future. Many of these responses try to tell the story of injustices as things that happened and which distorted history, or were a deviation from history's "normal" path. The response of a new government is often to propose to undo injustice by telling a story of what went wrong and how to get back on the normal path. Gordon[78] argues that the way of classifying these modes of response in terms of a relation to the past as either backward or forward looking, is misleading. Examples of such classifications are the distinctions between justice and policy, adjudication and administration, righting of past wrongs and prevention of new ones, and corrective compensation and social engineering. He suggests a different set of categories which he calls *narrow agency*, *broad agency* and *structural* approaches.

Narrow agency attributes injustice to bad actors, broad agency to bad groups and structural approaches to bad structures. The narrow agency approach frames injustice as wrongs done by specific perpetrators to specific victims. This approach wishes to restore life to normal and address the past injustices by either the limited and negative retributive sanction of the criminal process or the corrective remedy of the civil suit for compensatory damages.

The *broad agency* approach aims at corrective or compensatory justice from collectives. It sometimes uses judicial proceedings, for example the Nuremberg trials.

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77 "Undoing historical justice" in Sarat & Kearns (eds) (1996) *Justice and injustice in law and legal theory* 35-75.

78 "Undoing historical justice" in Sarat & Kearns (eds) (1996) *Justice and injustice in law and legal theory* 36.

On the other hand, broad-agency arguments are often not aimed at legal redress in courts, but at official or unofficial actions effecting moral redress. Broad agency actions to undo collective injustices can thus entail compensation or return of property, but also apologies, acknowledgement of responsibility or harm and official ceremonies of remembrance. The aim of this approach is to prevent the repetition of past errors. Gordon[79] uses the example of the Chilean Truth Commission's investigations into the period of military rule to investigate the abuses of the Pinochet regime. One of its main tasks was to record as accurately as possible the fate of every dead or missing person who might have been the victim of the regime and the probable cause of death or disappearance.

Another way of dealing with the past through the *broad agency* approach is for the new government to try and cancel past sins by forgiving and forgetting, by granting pardons and general amnesties and by maintaining official silence through the absence of references and records of the unjust period from public discourse and education.

The *structural* approach attributes injustice to bad structures rather than bad agents and attempts to undo the injustices by reforming the structures. This approach seeks explanations rather than a search for bad agents and attribution of blame. The remedies are directed at altering institutions, systems and incentives rather than exacting punishment or liability. Gordon[80] argues for a "particular-type of forward-looking response" - a restructuring response where the policies are directed not at individuals, but at institutions, cultures and social structures. He is cautious of the social engineering strategies designed to rearrange the social system so that its organisations will lack the capacities and incentives to repeat the injustices.

It is impossible, in my view, to locate the TRC in any one of Gordon's categories. In the most general sense, the obvious place would be the broad agency approach. However,

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79 "Undoing historical justice" in Sarat & Kearns (eds) (1996) *Justice and injustice in law and legal theory* 38.

80 "Undoing historical justice" in Sarat & Kearns (eds) (1996) *Justice and injustice in law and legal theory* 41-75.

we must admit there are moments of narrow-agency where specific perpetrators are exposed. The question is whether there are elements of a structural approach within the work of the Truth Commission. In my view there is room for a reading of the TRC which does not rely on a victim- perpetrator dichotomy and that addresses "structural" reform in regard to political and social policies of the future. In this regard transition and transformation as aims of the TRC come to the fore. The fact that one of the aims of the TRC was that it should assist our processes of transition and transformation shows a structural element. The aim of reparation can also be placed in such a structural approach. After looking at Gordon's analysis of the various responses to mass atrocities I want to emphasise the TRC's "in between" position. Just as it cannot be seen as purely performative or constative it also can not be placed in one of Gordon's specific approaches.

Between vengeance and forgiveness - Martha Minow

Martha Minow[81] argues that the twentieth century will be remembered for its mass atrocities. She describes various responses to these atrocities: In Argentina and Rwanda the response was a legal one in the form of prosecutions, which were in any event found to be inadequate. In East Germany public access to secret police files was provided. In Czechoslovakia officials of the old regime were screened and removed from office. In Canada land restitution took place. In Brazil the names of those involved in committing the atrocities were published. In Germany and Switzerland certain reparations were made. In Scandinavia and some Latin America countries other than Brazil therapy was provided to those affected by the atrocities. In Chile and South Africa truth Commissions were created by the state to investigate the human rights abuses. In many places public monuments and museums were built as a response to

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[81] (1998) *Between vengeance and forgiveness. Facing history after genocide and mass violence.*

the violations of human rights. Individuals responded by addressing the topic in art, poetry, drama and public education. In Chile, Greece and Uruguay amnesty was given to the perpetrators. In South Africa amnesty was combined with a process of assembling and publishing information about the horrible past. Minow argues that all these various alternatives share one common feature: "They depart from doing nothing. ... at best they can only seek a path between too much memory and too much forgetting. Yet they also try for a way between vengeance and forgiveness. ... Dwelling in the frozen space of inability and incapacity is unacceptable, unresponsive to victims, unavailing to the waiting future."[82]

Minow explains her goal as to "develop and to deepen a vocabulary" for examining the various responses. She argues that survivors of violence have various responses to their perpetrators. Some want retribution and public acknowledgement; others financial redress; others psychological or spiritual healing. Some survivors choose to go on with their lives and place the past behind them, others believe that the wrongdoers should be punished before life can go on. Minow says that she does not seek precision or tidiness in her analysis of the various responses. She believes that any sense of completion should be resisted for two reasons. First, because the differences between the various contexts will ask different responses. Secondly, because no response can be adequate to deal with the atrocities committed. According to her closure is not possible and any attempt to closure will be an insult to those who experienced violations. Silence, however, is also unacceptable. It can even be an indication that the perpetrators succeeded in their violations of humanity.

Minow describes her investigation into the various responses to mass atrocities as a

> [F]ractured meditation on the incompleteness and inescapable inadequacy of each possible response to collective atrocities. It is also a small effort to join in the resistance against forgetting. It is an effort to

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82 (1998) *Between vengeance and forgiveness. Facing history after genocide and mass violence* 4.

> speak even of the failures of speech and justice, truth-telling and reparation, remembering and educating, in the service of urging, nonetheless, response.[83]

Minow argues that the two general responses from governments to address collective violence is to ensure justice and to find the truth. She argues, however, that truth and justice are not the only objectives. She identifies two other goals or responses to collective violence, namely vengeance and forgiveness.[84] In her view, neither of the two, vengeance or forgiveness, is an adequate response. Minow argues that legal and cultural institutions must offer paths that lie between vengeance and forgiveness.

She argues that one way between vengeance and forgiveness may pursue therapeutic goals. Another way is to pursue political goals, to create a culture of human rights and democracy. Yet another goal is the promotion of reconciliation. Minow argues that reconciliation will assist stability and democracy and restore dignity. She observes that responses in art, for example literature, poetry, dramas and exhibition of paintings, reject the older paradigm that contrast punishment and forgiveness.

In her analysis of the various responses she focuses on trials, truth commissions and reparations. She argues that the past must be "faced". "To seek a path between vengeance and forgiveness is also to seek a route between too much memory and too much forgetting".[85] She quotes Milan Kundera's words which she describes as a summary of "resistance against totalitarianism": "The struggle against power is the

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83 (1998) *Between vengeance and forgiveness. Facing history after genocide and mass violence* 5-6.

84 (1998) *Between vengeance and forgiveness. Facing history after genocide and mass violence* 9-24.

85 (1998) *Between vengeance and forgiveness. Facing history after genocide and mass violence* 118.

struggle of memory against forgetting".[86] She refers to playwright Ariel Dorfman's[87] words: "How do we keep the past alive without becoming its prisoner? How do we forget it without risking its repetition in the future?"[88]

Minow[89] argues that instead of focusing on the development of a theoretical response we should take contextual concerns into account. She identifies six kinds of inquiries into particular historical and political circumstances: "Does the project of nation building or reconstituting a new national community have real promise?"; "What is the distribution of minority and majority groups?; "How involved, or potentially involved, are international institutions and nongovernmental institutions?"; "How much time has passed since the atrocity?"; "Were the atrocities of war, with human rights violations committed by all sides?"; "Is the response to genocide or collective violence addressed by a successor regime or by members of the very regime that presided over the wrongs?" According to her private groups, national stages and international bodies should address the various responses in the light of these contextual inquiries. For Minow the responses to mass atrocities must lie between vengeance and forgiveness, where the past and the future must be "faced".

> Between vengeance and forgiveness lies the path of recollection and affirmation and the path of facing who we are, and what we would become.[90]

The TRC presents such a path between vengeance and forgiveness. It did not

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86 (1998) *Between vengeance and forgiveness. Facing history after genocide and mass violence* 118; Kundera (1980) *The book of laughter and forgetting.*

87 His well known play, (1991) *Death and the maiden*, portrays the experience of a Chilean woman, who was tortured, when she meets her erstwhile torturer.

88 (1998) *Between vengeance and forgiveness. Facing history after genocide and mass violence* 119.

89 (1998) *Between vengeance and forgiveness. Facing history after genocide and mass violence* 132-135.

90 (1998) *Between vengeance and forgiveness. Facing history after genocide and mass violence* 147.

encourage vengeance by taking on the form of a witch hunt. In other words it resisted the *absolute* of inscribed social rule. It did not only follow the approach of narrow agency. But it also did not encourage mere forgiveness and forgetting, through, for example blanket amnesty. The TRC exhibited moments of action (performative moments, spontaneous and unpredictable moments of promising and forgiving) but constative moments as well. As an example of public space it was situated in an "in between" space.

Significant for my argument is the TRC as an example of the ethical intersection of public space, equality and justice and accordingly an ethical interpretation of equality. The views of the various authors highlighting the multiple possibilities of a public space such as the TRC contribute to my view of the TRC as an in between space, as an ethical intersection of public space, equality and justice. The performative aspects of the TRC, (the moments of action, of living freely and responsibly, of acting in a spontaneous and unpredictable manner, of promising and forgiving), but also the constative aspects, (the moments of narrow agency, broad agency and structural aspects) are features of the ethical intersection between public space, equality and justice. The emphasis on the ethical aspects of promising and forgiving is also significant. We must recall Derrida's reliance on the promise (that I discussed in Part 2) here. He applies the philosophy of deconstruction to a promise and says that a promise is only a promise as long as it stays unfulfilled. A promise takes on the same structural effect as justice: It is not attainable in the present and serves as an ideal. In regard to the TRC the notion of a promise that can never be fulfilled ensures that the TRC remains open and continuous. The promise that was made in the public space of the TRC was one of democracy, equality and justice. This promise forms an ethical horizon. Like a horizon is always viewed from a distance, the promise of democracy, equality and justice will always escape the present experience and serve as a future orientated ideal. This vision of an ethical horizon is true to an ethical interpretation of equality that strives to achieve equality by taking note of difference while realising the impossibility of fully achieving equality or recognising difference.

South African landscapes

The child who was shot dead by soldiers in Nyanga[91]

The child is not dead
the child lifts his fists against his mother
who screams Africa shouts the scent
of freedom and the veld
in the location of the cordoned heart

The child lifts his fists against his father
in the march of the generations
who are shouting Africa shout the scent
of righteousness and blood
in the streets of his warrior pride

The child is not dead
not at Langa not at Nyanga
not at Orlando not at Sharpeville
not at the police station in Philippi
where he lies with a bullet through his brain

The child is the shadow of soldiers
on guard with rifles saracens* and batons
the child is present at all gatherings and law-giving
the child peers through house windows and into the hearts
of mothers
the child who wanted just to play in the sun at Nyanga is
everywhere
The child grown to a man travels all over Africa
the child grown to a giant travels through the whole world

Without a pass
*Saracens: Armoured police vehicles

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[91] Jonker (1988) *Selected poems* 27.

The response of a writer

André P Brink's reflections on the TRC appeared in 1998 as part of a collection of essays on memory.[92] In the introduction editors Sarah Nuttall and Carli Coetzee argue that it was the right time for a publication on the ways in which memory is investigated. They say that "we are as yet unable to judge which memories and ways of remembering will come to dominate in South Africa in the future."[93] They note that the various essays in the collection address the question how it happens that "certain versions of the past get to be remembered, which memories are privileged".[94]

Brink is a well-known novelist. He has been addressing political issues in his work for many years. Brink[95] describes his notion of truth and memory as follows:

> The individual constitutes and invents her/himself through the constant editing and re-editing of memory; the confluence of innumerable records and recordings of memories determines the publicly sanctioned account which debouches into history; facts, as a Kantian *Ding an sich*, remain forever inaccessible except through our versions of them - and these versions are dependent on memory (as the testimonies in front of the TRC demonstrate with great dramatic impact). And the workings of the imagination are at the very least inspired by memory.

Brink illustrates his view of truth and memory with reference to Margaret Atwood's novel

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92 Nuttal & Coetzee (eds) (1998) *Negotiating the past. The making of memory in South Africa.*

93 Nuttal & Coetzee (eds) (1998) *Negotiating the past. The making of memory in South Africa* 1.

94 Nuttal & Coetzee (eds) (1998) *Negotiating the past. The making of memory in South Africa* 1.

95 "Stories of history: Reimagining the past in post-apartheid narrative" in Nuttal & Coetzee (eds) 1998 *Negotiating the past. The making of memory in South Africa* 29-42.

Alias Grace.[96] Atwood tells the well-known story of Grace Marks who, with James McDermott, was accused of murdering their employer and his housekeeper/mistress. Attwood does not offer a new "correct" version of the story but demonstrates how historical mysteries are constructed. Grace can recall various versions of the story of the murder. Brink notes that she becomes entangled in a patchwork of versions:

> I can remember what I said when arrested, and what Mr MacKenzie the lawyer said I should say, and what I did not say even to him; and what I said at the trial, and what I said afterwards, which was different as well. And what Mr McDermott said I said and what the others said I must have said.[97]

This testimony is significant for the creation of public memory in the workings of the TRC. Atwood relies on memory but memory is not an objectively reliable tool.

> The mind ... is like a house - thoughts which the owner no longer wishes to display or those which arouse painful memories, are thrust out of sight, and consigned to attic or cellar; and in forgetting, as in the storage of broken furniture, there is surely an element of will at work.[98]

Brink argues that "history, in the conventional sense of the term is denied or repressed in favour of story. And story is located beyond the reach of that kind of morality that normally distinguishes truth from lie."[99] The reinvention of the past through the imagination involves primarily "a peculiar machination of memory".[100] Memory in turn

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96 (1996).

97 Atwood (1996) *Alias Grace* 295.

98 Atwood (1996) *Alias Grace* 362.

99 Brink "Stories of history: Reimagining the past in post-apartheid narrative" in Nuttal & Coetzee (eds) 1998 *Negotiating the past. The making of memory in South Africa* 35.

100 Brink "Stories of history: Reimagining the past in post-apartheid narrative" in Nuttal & Coetzee (eds)1998 *Negotiating the past. The making of memory in South Africa* 36.

involves both selection and suppression. One approach to this selection and suppression can be to compile as many and as diverse narratives as possible thereby creating a jigsaw puzzle (Brink) or patchwork (Atwood) of memories. Significantly Brink highlights the double bind that will prevent this kind of exercise being complete. "Like all narratives, this one must eventually be constructed around its own blind spots and silences".[101] He is in favour of an imagined rewriting of history, of an openness to "the role of the imagination in the dialectic between past and present, individual and society."[102]

Brink refers to three characteristics of "the story" that are relevant: the story as the outcome of a process of internalisation and personalisation; the story as the construction of a version of the world; and the story as the embodiment of an imagining or a complex of imaginings. First, the story explores a situation from the inside where the public domain accommodates public narratives of history. Secondly, the story does not presume to tell the truth, but merely a version of it. Thirdly, even when the story narrates a "real" event it is infused with and transformed by private motivations, hidden agendas, prejudices and so on. Brink concludes that the best we can do is to

> [F]abricate metaphors - that is, tell stories - in which, not history, but imaginings of history are invented. Myth may have preceded history, but in the long run it may well be the only guarantee for the survival of history.[103]

Brink's approach to memory and his emphasis on story telling is a valuable contribution to the discourse on the TRC. His emphasis on the imagination is significant for an ethical interpretation of equality.

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101 Brink "Stories of history: Reimagining the past in post-apartheid narrative" in Nuttal & Coetzee (eds) 1998 *Negotiating the past. The making of memory in South Africa* 37.

102 Brink "Stories of history: Reimagining the past in post-apartheid narrative" in Nuttal & Coetzee (eds) 1998 *Negotiating the past. The making of memory in South Africa* 37.

103 Brink "Stories of history: Reimagining the past in post-apartheid narrative" in Nuttal & Coetzee (eds) 1998 *Negotiating the past. The making of memory in South Africa* 42.

The response of three activists - Reconciliation through truth. A reckoning of apartheid's criminal governance

In the foreword to Asmal, Asmal and Roberts' book on the TRC, Nelson Mandela[104] comments on the contribution the publication made to "public debate". This is, for me, one of the most important features and effects of the TRC, the fact that it created a public debate and accordingly a public "space" for South Africans. The contribution of the various writings on the TRC to such a public space is accordingly significant. The publication by Asmal and others influenced the nature of the debate because it was accessible to the public during the event of the TRC. Whether one agrees or disagrees with their views is not the point. The significant fact is that they assisted with the creation of a public debate.

> One of the real delights of our new democracy, for me personally, has been the vibrant culture of public debate that is slowly emerging. We have come a long way since our public intellectual life was blighted by apartheid's regime of censorship, described in this book. ... The Truth and Reconciliation Commission is a milestone on the freedom road, and this book will illuminate the journey. Like all useful contributions to any country's new awakening, it will spark lively debate.[105]

The Asmal publication on the TRC is not a response to the process. It was written before the actual hearings started. The authors provide a historical analysis of apartheid. Apartheid as a "crime against humanity" and how the TRC can address the atrocities of apartheid form the central themes. They tell the reader on the first page of the introduction that all three of the authors were outside South Africa for most of the

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104 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* foreword.

105 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* foreword.

apartheid period. In their view the TRC was not an "instrument of vengeance":

> A spirit of vengeance would destroy the country's new politics of nonracialism. It would contradict the ideals of the resistance, specifically the nonracialism of the African National Congress, from which all three of the authors have drawn inspiration and to which two of us belong.[106]

Although all three authors come from legal backgrounds, they argue that their contribution was not aimed only at lawyers.

> We aim to show that the burdens of history comprise an invaluable ballast of common sense in charting the new country's course away from its inglorious past.[107]

Kader Asmal grew up in apartheid South Africa. The authors write that Albert Lutuli, Nobel prize winner and once President of the ANC, was the reason for his political involvement. They say that the atrocities of Nazi Germany provided for him an early awareness of human rights abuses. He was exiled in Ireland for 27 years where he taught law and became Dean of the Faculty of Arts (Humanities) at Trinity College. At the time of writing, he was minister of Education. Louise Asmal has a history of civil rights campaigning, during which she met her husband, Kader. She was honorary secretary of the Irish Anti-Apartheid movement. Ronald Suresh Roberts is a member of Trinidad's first post-colonial generation. He grew up in a political and cultural environment where resistance against apartheid was prominent.

They respond to the previous system of apartheid as follows:

> What kind of world was this? In the existential belly of white supremacy,

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106 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 2-3.

107 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 3.

> ordinary human relations were suppressed or distorted. The normal likes and dislikes of people for one another were controlled by the state and disfigured by white supremacist culture; the whole ugly process was hidden behind the soothing euphemisms of apartheid, or separate freedoms. It was a world that was upside-down.[108]

In answering the question "Why face the past?", they emphasise the need of memory, "public debate", "public atmosphere", "public acknowledgement" and "public currency". Their understanding of memory as well as their vision of community or nationhood is in line with the heterogeneous vision of a reconstructed and transformed South African public space.

> In moving away from the discredited governing consciousness of the past, we will need to build a new, shared and ceaselessly debated memory of that past. Without sustained remembrance and debate, it will be difficult to develop a new South African culture with its various strands intertwined in constructive friction, rather than in mere conflict and mutual strangulation. This talk of shared memory must not be understood or mystified. It is not the creation of a post-apartheid *volk* or a stifling homogenous nationhood; nor a new Fatherland. Nor is it merely a nationwide equivalent of every individual's mental ability to retain facts and arguments at the front of her consciousness. Such analogies between individual and collective memory are unhelpful. Rather shared memory, in the intended sense, is a process of historical accountability.[109]

They identify a number of goals that would be addressed by the TRC. These included the achievement of justice through truth; acknowledging the illegitimacy of apartheid; the decriminalisation of the anti-apartheid resistance; the achievement of "genuine"

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[108] Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 5.

[109] Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 10.

reconciliation and the building of a culture of public ethics; acknowledging the need for corrective action; confronting the roots of violence; illuminating the longstanding humane values of the anti-apartheid resistance; demonstrating the morality of the armed struggle; establishing equality before the law; placing property rights on a secure and legitimate footing; enabling privileged South Africans to understand and face up to collective responsibility for the past; acknowledging the wrongs done in the past to South Africa's neighbouring countries; clarifying the international implications of apartheid and the finding of one South Africa.

> The exercises of facing the South African past, no mere horror story or exercise in historical voyeurism, is rather, in multiple ways ... a cornerstone of reconstruction.[110]

And

> Justice must come out of the closet.[111]

Their view of the relationship between law and society, and law and politics is reflected in their response to arguments that human-rights abuses must be prosecuted.

> It is ironic that the calls for a prosecution-centred approach to past human rights abuses - and the contemptuous dismissal of "mere" sociological counterarguments - is presented as a form of progressive politics. For the idea that a bright line divides law and sociology and separates law from politics is itself a recognised reactionary falsehood in legal academia today. Those who assert that a wall separates law and politics urge, in general, that judges should be oblivious to the social consequences of their decisions. It is a view that civilised jurisprudence -

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[110] Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 11.

[111] Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 12.

all law, not only international law - must reject. A preferable starting point is that law's highest purpose is to serve societal ends.[112]

In regard to reconciliation they observe certain views that hold that the search for memory is in conflict with reconciliation. In this view reconciliation means a "painless forgetting".[113] The authors argue that this is a fundamental misunderstanding of the concept of reconciliation. They refer to the *Oxford Dictionary* meaning of "to reconcile: 1. restore friendship between (people) after an estrangement or quarrel. 2. Induce (a person or oneself) to accept an unwelcome fact or situation ... . 3. Bring (facts or statements etc) into harmony or compatibility when they appear to conflict."[114] In their view reconciliation is

> [T]he facing of unwelcome truths in order to harmonise incommensurable world views so that inevitable and continuing conflicts and differences stand at least within a single universe of comprehensibility.[115]

The authors quote the words of Nelson Mandela during the Rivonia trial as support for their own goal of decriminalising the resistance, in other words, proving that the armed struggle was a just struggle, that it was the only choice to make under the regime of apartheid. The TRC, in their view, had to acknowledge this in its handling of the various abuses. The atrocities of the apartheid government could not be placed in the same light as the human rights abuses of the members of the resistance.

> I would say that the whole life of any thinking African in this country

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112 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 20.

113 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 46.

114 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 46.

115 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 46.

> drives continuously to a conflict between his conscience on the one hand and the law on the other ... The law as it is applied, the law as it has been developed over a long period of history, and especially the law as it is written by the National Government is a law which, in our view is immoral, unjust and intolerable. Our consciences dictate that we must protest against it, that we must oppose it and that we must attempt to alter it.[116]

In the authors' opinion the TRC should not place victims and perpetrators on an equal footing. The TRC, however, insisted on treating each and everyone equally. But equal does not mean the same. In my view the fact that the TRC undertook to treat each and everyone equally does not mean that they treated them the same. The fact that the TRC in its report recognised apartheid as a crime against humanity is an indication that they took the different circumstances into account.

The authors argue that South Africa's processes of reconciliation would not only be to the country's own benefit, but could contribute to other places where violence was the order of the day. In this regard the South African "exercise" of addressing the past is more than a mere bureaucratic instrumental mission because it exposes the abuse of human values. It did not only seek institutional transformation, but transformation of society and individuals in society.

> Since so many kinds of violence are wrapped up in apartheid, South Africans have a responsibility to themselves, but also to histories and peoples beyond South Africa. If South Africa speaks in a muddled way about its past, the intellectual barriers against whole categories of violence in faraway places will be weakened, both now and in times to come. And also, of course, in South Africa itself.[117]

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116 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 54.

117 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 213.

They quote Magnus Malan's (Minister of Defence in the previous apartheid government) objection to the anti-apartheid resistance of the End Conscription Campaign:

> No citizen can decide of his or her free will which laws to respect.[118]

The authors respond by saying

> It was the call of an evil system for the abdication of the moral sense of the individual.[119]

Something that worried me about the TRC is that it might attempt to write a new history,[120] thereby repeating the same mistakes of the past. I feared that the attempt of "closing that chapter" of our history would be another form of violence. A similar concern that I had was that the final report of the TRC would have the effect that things that should be kept open and in a constant flux would become cast in stone and that it would attempt to put forward a unified, homogenous vision of community. The possible realisation of these fears and concerns had negative implications for the notion of an ethical interpretation that is dependent on a radical openness, difference and heterogeneity. In this regard the following view of the authors is positive in that they seem to nurture the values of openness, multiplicity and heterogeneity:

> The South African Truth Commission is only one of the structures through which we should hope to dismantle the old regime of truth in order to

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118 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 213.

119 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 213.

120 See in this regard Liebenberg "Die Waarheids-en Versoeningskommissie in Suid-Afrika en die implikasies daarvan vir 'n Suid-Afrikaanse historikerstreit en eietydse geskiedskrywing' (1997) 22 *Journal for Contemporary History* 98; Braude "The archbishop, the private detective and the angel of history: The production of South African public memory and the Truth and Reconciliation Commission" (1996) 8 *Current Writing* 39-65.

> replace it with new and multiple narratives. We must remain aware of the dangers of replacing apartheid's false utopian historicism with our new orthodoxies. As we construct new historical narratives, it will be in our new currency of *heterotopias,* multiple idealisms, rather than the single-mindedness of utopia; it will be with an awareness of the pain that is inflicted when one ethical choice conflicts with others nearby.[121]

One can react to their statement by pointing out that they might have approached the issues of heterogeneity and multiplicity as if they were easy and comfortable ones. One could argue that the authors do not acknowledge the weight and tragedies and impossibilities that are involved in the creation of any history or society. The tension or paradox between unity and disunity, homogeneity and heterogeneity, sameness and difference must be acknowledged. However, the authors elaborate on their view by saying:

> This exercise should not be confused with the cheap pluralism of live and let live; accountability and ethical choice are inevitable parts of this process. There can be no indifference towards apartheid, nor towards its legacy. Rather, we must be driven by what Edward Said has called an "unstoppable predilection for alternatives" to the old order.[122]

Nuttall and Coetzee[123] note that this book offers the most significant counter-arguments to the view that past acts of "terrorism" by the resistance must receive equal treatment with misdeeds done by the defender of apartheid. They interpret the book as:

> [A] defence of a particular role for the TRC, namely that it should act as

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121 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 214.

122 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 214.

123 (1998) *Negotiating the past. The making of memory in South Africa* 2.

> a vehicle that will allow South Africans to move to "reconciliation" through "truth", by "reckoning" with apartheid's actors.[124]

With reference to Hitler, who was a "history buff", Asmal, Asmal and Roberts argue that to remember the past is not a guarantee that the past will not be repeated.

> Since the devil can quote history to his or her own purposes, a simple factual record of the apartheid past, devoid of an ethical basis, would be of little value. What matters is not merely the fact that we remember history but the way in which we remember it.[125]

I argue in a similar way with regard to the TRC. The contribution of the TRC to the reconstruction and transformation of public space and to an ethical interpretation of equality depends on how we talk about it and remember it by the stories we tell about it. In the light of Arendt's distinction between private (labour and work) and public (action), the authors of *Reconciliation through truth* seem to place the TRC in the realm of action. They reject a mere instrumental, institutional, legalised perspective and encourage an interpretation of the TRC as an event of action that is ruled by human appearance, unpredictability and immortality instead of necessity and materiality. Their response to the TRC enhances my own vision of an ethical interpretation of equality because they recognise the necessity to focus on different circumstances and contexts. They are opposed to a formal (blanket) application of equality. The pointing out of this difference between victims and perpetrators is of great significance in the context of the TRC responding to atrocities of the past. In future this exposure of difference should be remembered every time when we interpret equality. An ethical interpretation of equality insists on such an acknowledgement of difference.

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124 (1998) *Negotiating the past. The making of memory in South Africa* 2.

125 Asmal, Asmal & Roberts (1996) *Reconciliation through truth. A reckoning of apartheid's criminal governance* 216.

The response of a poet - Country of my skull

Antjie Krog's *Country of my skull*[126] was one of the first publications that responded to the actual TRC process. In this book she tells the story of the Truth Commission as she experienced it. By mingling her own story with the stories told at the TRC she creates an imaginative narrative and demonstrates the power of storytelling. In the publisher's note to *Country of my skull*, emphasis is placed on the personal recollections and stories of those who have been silenced in the past. This is the emphasis of Krog's narrative:

> Because it has allowed this past to be told through the personal recollections of those who testify before it, it has put real flesh on rhetorical phrases like "a just war" and "crimes against humanity". The people who tell these stories, along with the people who listen to them, and like Antjie Krog, the people who report on them, are living South Africans. They are struggling to find identity for themselves, individually and collectively, within the shadows still cast by their country's brutal history. The spotlight is thus not just a harrowing, often liberating revelation of the past; it illuminates present predicaments and future possibilities too. Many voices of this country were long silent, unheard, often unheeded before they spoke, in their own tongues, at the microphones of South Africa's Truth Commission. The voices of ordinary people have entered the public discourse and shaped the passage of history. They speak here to all who care to listen.[127]

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126 (1998). See Snyman "Bevry my tot rou. Oor Antjie Krog se *Country of my skull*" (1999) *fragmente* 3 155-164 and Heyns "'n Boek waarvan mens nie gou herstel nie. 'n Persoonlike soektog na waarheid" (1998) *Beeld* June 15.

127 (1998) *Country of my skull* viii.

Antjie Krog was born in the Free State province and grew up on the farm *Middenspruit*. She has published eight volumes of poetry and has won several prizes for her work. In one of her volumes of poetry, *Lady Anne,*[128] she delivered a feminist critique on South African bourgeois society in a postmodern style. In her first novel, *Relaas van 'n moord* (*Account of a murder*),[129] she dealt with the South African political reality in a chilling manner. Krog reported on the TRC for SABC radio.

Krog's narrative on the TRC is

> for every victim
> who had an Afrikaner surname on her lips.[130]

She tells the story in five parts: "before the commission", "first hearings", "politics", "reactions", "unwinding". Krog did not expect the Truth Commission to achieve reconciliation or justice, but argued that the value of the commission was in the event of storytelling, the narratives.

> It is asking too much that everyone should believe the Truth Commission's version of the Truth. Or that people should be set free by this truth, should be healed and reconciled. But perhaps these narratives alone are enough to justify the existence of the Truth Comission. Because of these narratives people can no longer indulge in their separate dynasties of denial.[131]

She relates a personal event to show the difficulties that surround truth:

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128 (1989).

129 (1995).

130 (1998) *Country of my skull.*

131 (1998) *Country of my skull* 89.

A big fire burns in the fireplace. My husband sits in a steamy bath. I soap my hands and start washing him limb by limb - slowly, gently, caressingly - from his beard to his toes. "I will never forgive you - you have destroyed everything," his voice breaks into the towel that I hand out for him. What do I say? Do I quote definitions: "Narrative understanding is our most primitive form of explanation. We make sense of things by fitting them into stories. When events fall into a pattern which we can describe in a way that is satisfying as narrative then we think that we have some grasp of why they occurred. Nations tells stories of their past in terms of which they try to shape their futures". "Stop talking crap," he says ... I have no framework in which to address him. ... "I need to know everything ... I need detail ... I need to have language for it in order to pack it neatly away. I want the truth. ... The word "truth" is explained by different theories: the correspondence theory of truth, the coherence theory of truth, the deflationary theory of truth, the pragmatic theory of truth, the redundancy theory of truth, the semantic theory of truth, double truth, logical truth and the subjective theory of subjective truth. Pragmatic truth theorists say that truth has no cognitive value - that we literally should not care whether our beliefs or stories are true or false, but rather whether they enable us to achieve happiness and well-being. ... It is useless to talk about the truth. ... "Rubbish. There is always a basic truth ... What truth I don't know you will never tell me."[132]

She takes a similar approach to evil. In a conversation with a colleague they discuss the phenomenon of evil. Krog says that it is "too easy" to identify Hitler with absolute evil. She sees the "obsession with evil" as a "male thing". In her view, women, because they give birth, are capable of another experience. They acknowledge that all people have good and evil in them. It is too easy for her to describe Hitler as evil because one would deny his humanity and by doing that "you are saying that you are not capable of

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[132] (1998) *Country of my skull* 196-197.

what he did ... And I say you *are* capable of it."[133] Her colleague responds by saying that if one refrains from judging Hitler "you kill off the awareness that you should avoid certain ideologies, certain people, because they represent evil ...".[134] But Krog argues that

> [T]here is not a single atom that you can pinpoint and say: this is absolute evil and this is absolute good. Good and evil are never absolute. Every good is imperfect in its own way and every evil has an underlying potential to be good.[135]

A strong feature of Krog's narrative is the emphasis she places on gender.[136] Her own perspective is a gendered one; she refers to her own experiences as a woman, the fact of being a mother, being a wife, influenced her perceptions and analysis. She places a special emphasis on the fact that most stories were told by women about men (husbands, sons, fathers). Yet, her account of woman is not an essentialist account where she gives a final closed definition of woman or the feminine. She views women as a disruptive force to traditional male rational logic.

> She is sitting behind a microphone, dressed in beret or kopdoek and her Sunday best. Everybody recognises her. Truth has become Woman. Her voice, distorted behind her rough hand, has undermined Man as the source of truth. *And yet nobody knows her.*[137]

Krog perceives the TRC as a special public space. In my view, her approach to the

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133 (1998) *Country of my skull* 261.

134 (1998) *Country of my skull* 261.

135 (1998) *Country of my skull* 261.

136 See also Olckers "Gender-neutral truth: A reality shamefully distorted" (1996) 31 *Agenda* 61-67; Owens "Stories of silence: Women, truth and reconciliation" (1996) 30 *Agenda* 66-72.

137 (1998) *Country of my skull* 56 (my emphasis).

TRC is comparable to public space in Arendt's sense. She places more emphasis on stories and human appearance than Asmal. Her text is deeply situated in her own context, even more than the text of the activists, who for many years were involved in the struggle against apartheid.

> The TRC is where the reality of this country is hitting home and hitting home very hard. And that is good. But there will be no grand release.[138]

Krog's response to the TRC is helpful in the search for an ethical interpretation of equality. Her vision reflects a vision of a poet-judge, who, because she can take greater care with the concrete life story of humans, has greater ability to acknowledge difference and otherness and accordingly can make better judgements. Such a vision of human otherness, together with a strong public awareness, underlie ethical interpretation.

The response of a dominee (pastor) - Chronicle of the Truth Commission

The foreword of this work was written by Archbishop Desmond Tutu. He tells the reader that he suggested Prof Piet Meiring as commissioner because of his credibility and influence within the Afrikaner community. Tutu notes that Meiring's book is the second book published on the TRC, the second book on the TRC by an Afrikaner. He says:

> Is it some coincidence that both books are by Afrikaners? I hope, so fervently, that my Afrikaner fellow-South Africans will be moved by Piet Meiring to see the TRC as a remarkable tool to enable us South Africans

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[138] (1998) *Country of my skull* 129.

to come to terms with our horrendous past as efficaciously as possible.[139]

Piet Meiring is a theologian in the NG Church and professor at the University of Pretoria. He served on the TRC (as commissioner on the Reparation Committee), to represent the Afrikaner community. He uses the metaphor of *trek* (journey) to describe the process of the Truth Commission. Landscape, as in the Krog text, is described in order to visualise the events and stories and tears and happiness of the TRC process.

> The journey had been long and sometimes arduous. Since the Truth Commission had embarked on its road through the history of our country, eighteen months ago, we had achieved a great deal. ... The road reached several mountain peaks, pinnacles of success. But the way often led us through deep valleys as well, valleys of pain and sorrow, of frustration and failure. ... But, it was unanimous, the trek had to proceed.[140]

Meiring's *trek* covers the following roads and landscapes: "the great trek to the past"; "via dolorosa"; "on mountains and valleys; embarking on the journey inward"; "fellow-travellers; the second last leg of the journey". It ends at "the longest journey - from person to person, via the heart". Meiring tells a chronological story of the TRC, from the day Archbishop Tutu called him ("Hello, Piet, Desmond speaking. Are you sitting down ... ?")[141], through the hearings, the commission's various "bosberade",[142] to the handing over of the report. His account is nevertheless a personal one. He does not attempt to give an "objective" view of the process, his story is filled with his own experience of and reflection on the process.

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139 Meiring (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* foreword.

140 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 155.

141 Meiring (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 9.

142 An unique South Africa term for strategic planning sessions.

Meiring's story emphasises the religious moments and aspects of the process which were harshly criticised by people involved in the process as well as by people looking on. He spends a lot of attention on issues such as the role of churches during apartheid and the confessions of members from religious communities. Again he does not hide his personal involvement. He writes that after the General Synodal Commission of the NG Kerk reported that they would not make an official confession to the TRC: "I was disappointed and sad".[143] When members of the church later decided to make individual submissions, Meiring was overjoyed. Although he writes from the Christian religious perspective (Tutu also represents the Christian religion), other faith communities were not neglected during the TRC process. Tutu, in addressing the various faith communities during hearings, noted how most people assumed that South Africa is a "Christian country". He apologised to other faith communities on behalf of fellow South African Christians "for the arrogant way in which we as Christians acted - as though ours was the only religion in South Africa, while we have been a multi-religious community from day one."[144]

Since Meiring was suggested by Tutu to represent the Afrikaner community on the TRC, he spends time and space on the role of the Afrikaner community. He tells about the interactions with the Afrikaner press,[145] "Afrikaner Broederbond[146] and the

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143 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 95.

144 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 272. See also Maluleke "Dealing lightly with the wound of my people? The TRC process in theological perspective" (1997) 25 *Missionalia* 324-343.

145 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 96-99.

146 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 314-316. The "Afrikaner Broederbond" was an all male secret organisation that was very powerful during the days of apartheid. The main aim of the organisation was the protection of "Afrikaner" interests. Government, the media, the Dutch Reformed Church, top business structures and universities, amongst others, were under Afrikaner Broederbond management. The "youth league" of the Afrikaner Broederbond was the "Ruiterwag".

"Rapportryers".[147] He also refers to the relationship between Afrikaans and English speaking South Africans. Meiring recalls a conversation between him and his colleague Hugh Lewin where the latter remarked: "You are worried about the Afrikaners. I am worried about the English! ... You Afrikaners at least talk about the Truth Commission. You are in favour or against it. But many English-speaking persons continue their lives as if these things do not affect them at all. It was, after all, not they who had instituted apartheid. They are not *Boere* or Nationalists! And still they benefited from the process just as much ...".[148] He refers to arguments about the Anglo-Boer war and the absence of a truth and reconciliation process following it. Beyers Naudé,[149] when he delivered the annual Langenhoven Memorial Lecture at the university of Port Elizabeth, said that "[T]he British should really, after all these years, express their sincere remorse about the injustice inflicted on the Boers during the Second War of Independence".[150] Naudé argued that after a hundred years the wounds of the Anglo-Boer War have not yet been healed. He asked whether the history of our country would not have been completely different had the British confessed their guilt towards the Afrikaners. In the report of the TRC the same argument is made.[151] He went on to say that Afrikaners should be generous enough to apologise for the killing of the Zulu warriors at Blood River, they

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147 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 334-335. The Rapportryers was an Afrikaner cultural organisation that was closely associated with the Afrikaner Broederbond and subscribed to the ideals of apartheid.

148 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 65.

149 Beyers Naudé was a pastor in the Dutch Reformed Church and member of the Afrikaner-Broederbond before he resigned to join the struggle against apartheid. He was under house arrest for many years. See Naudé (1995) *My land van hoop. Die lewe van Beyers Naudé.*

150 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 235.

151 "It was not the upholders of apartheid who introduced gross violations of human rights in this land. We would argue that what happened when 20 000 women and children died in the concentration camps during the Anglo-Boer War is a huge blot on our copy book. Indeed, if the key concepts of confession, forgiveness and reconciliation are central to the message of this report, it would be wonderful if one day some representative of the British/English community said to the Afrikaners, 'We wronged you grievously. Forgive us.' And it would be wonderful too if someone representing the Afrikaner community responded, 'Yes, we forgive you ...' " *The report of South Africa's Truth and Reconciliation Commission* (1998) foreword, par. 65.

should apologise to the Biko family; Apla should apologise for the murders of white farmers in the Eastern Cape.

Meiring discusses the famous lecture of German philosopher, Karl Jaspers, which he delivered at the University of Heidelberg after the Second World War.[152] Jaspers addressed the question: "Who is guilty?" Jaspers was married to a Jewish woman. They managed to escape from Nazi Germany to Switzerland. Jaspers identified four categories of guilt: *criminal guilt*, *political guilt*, *moral guilt* and *metaphysical guilt*. In terms of *criminal guilt* there were people, politicians, SS officers and others who were directly involved in gross human rights violations. These people were charged during the Nuremberg trials with specific crimes, and sentenced. Meiring argues that "The same applied to our country, where several people on all sides of the struggle were guilty of specific offences. Their guilt was not difficult to indicate. In many cases it was proclaimed from the house-tops. Many of these people applied for amnesty."[153] The second category is *political guilt*. Jaspers explained that the millions of Germans who voted for Hitler and the Nazi-Party had to accept political responsibility. Meiring responds: "As was the case in our country. The National Party, who had accepted and implemented apartheid as policy, did not come into office by itself. With every election held in this country hundreds of thousands of white people - the people who had suffrage - sounded a resounding "Yes" at the polls. In many different ways we gave our approval to the apartheid policy. And of this we are guilty."[154]

Jaspers's third category of *moral guilt* is the reverse side of political guilt. "This was the guilt of people in Germany - and here in South Africa - who had allowed themselves to be misled, who enjoyed the benefits of a very unfair system, and did not object to it. There were very few white South Africans who could say with a clear conscience today

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152 See also Schoeman "Afrikaners en die skuldvraag" (1999) 3 *fragmente* 138-145.

153 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 62.

154 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 63.

that they did not know *anything*. Closer to the truth would be : I knew certain things, but I pretended to be ignorant; in my newspapers from time to time articles appeared, but I chose not to take it seriously; I knew that people were being treated unfairly, but I did not want to become involved; my conscience urged me to talk, but I was afraid and kept quiet."[155]

The fourth category Jaspers called *metaphysical guilt* which concerns our communal guilt. Meiring again: "Collectively we were carrying the guilt of mankind on our shoulders! Knowing this made one humble, less prone to judge others. Because who of us could guarantee that we, if we found ourselves in the same circumstances and were subjected to the same influences as, for example, the SS soldiers, would have acted differently? ... The knowledge that all of us were guilty made it possible to forgive each other.[156]

This analysis of guilt is similar to Krog's argument concerning Hitler and evil. She made the point that it is too easy to describe anyone or anything as "absolute evil" because all people possess good and evil features. Although I agree with both Krog's and Meiring's (Jaspers') method of problematising the issues of guilt and evil, I am cautious of the view that we are all guilty. Such an approach can lead to a vague generalisation and universalisation where at the end, *because all are guilty, no one is guilty.*[157] In this regard the emphasis in the Asmal book that the atrocities of the apartheid government are not equal to the crimes committed by the resistance should be noted.

A significant part of the book is devoted to Meiring's discussion of the Afrikaner press during the years of apartheid.

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155 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 63.

156 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 63.

157 In respect to the question of guilt in the South African context see also Goosen "Skuld en kompensasie. Opmerkings rondom die ekonomie van skuld" (1999) 3 *fragmente* 127-137.

> On its journey inward - in its search to find answers to all the *whys* of the past - South African media workers needed to reflect on their own role. To what extent did the media provide the climate within which the injustices of the past could flourish? To what extent were the radio and television,[158] the various newspapers, the press magnates guilty of distorting the facts? Had there even perhaps been human rights violations in the industry? What had happened to the journalists and newspapers that consistently wished to put across the other side of the coin?[159]

The issue of the press is of particular significance for the investigation of public space in the past, present and future. In modern society where public space is not necessarily situated in a specific geographic space and where public space can appear anywhere and at any time, the press can play a significant role in facilitating and creating such a space. In some cases a specific media event can be such a public space. The absence of public space in the apartheid past can also be explained in the light of the absence of public debate in newspapers, television reports etc. Predictably, in the ranks of the Afrikaans press there was division about their own involvement with past events.

Hennie van Deventer (group CEO of *Nasionale Koerante* (National Newspapers)) made a personal submission to the TRC in which he wrote that the Afrikaans press had not simply been supporters of the previous state of affairs. He said that *Die Volksblad* campaigned for change and supported the 1992 referendum. Ton Vosloo, chief executive officer of *Nasionale Pers*, said: "The *Nasionale Pers* does not regard itself to be guilty of any violation of human rights or other offences and need not make a confession or record or an apology." Johan de Wet, editor of *Beeld*, said: "*Beeld* would

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158 An alternative Afrikaans musician, Johannes Kerkorrel and his Gereformeerde Blues Band, commented in one of their songs ("Sit dit af"/ "Turn it off") on the South African Broadcasting Corporation's wide propagation of National Party dogma on every channel.

159 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 214.

not really be able to report about gross human rights violations in its own ranks."[160] Meiring writes that Tutu was deeply disappointed that no official submission would be coming from the Afrikaans media.

During the hearings, the SABC was the first to confess that it contributed to the violation of human rights. Johan Pretorius, the former editor of TV news, said that the historical context had to be taken into consideration. The SABC was often under enormous pressure from politicians from all parties, but especially the National Party. "I am sorry to say that some NP politicians were the greatest offenders. They completely confused publicity value with news value and the other way round, if this suited them. They were paranoid about what they considered to be 'exposure to subversive elements' and right-wing opponents. We had to manage both them and the news and often had to take two steps backwards, to be able to take two steps forwards the next day."[161] Two former members of the *Afrikaner Broederbond*, Sampie Terblanche and Louis Raubenheimer, differed about the roll of the *Broederbond*. The former said that it had "wielded power" over the SABC, the latter that in his experience the *Broederbond* had a minimal influence. Zakes Nene, a representative of the Media Workers Association, told about the atrocities committed against black media workers. Four state agents confessed how the top structures of the media organizations and senior journalists were influenced by government during the years of apartheid. They confessed how journalists were used by the police. The English press (Times Media Limited as well as the Independent Newspaper group) also took the opportunity to report about their past. "Despite the mistakes made - particularly in that they had not always treated their black colleagues justly - they said that they had done their best to consistently criticize the government, to ensure that the voice of opposition in South

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160 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 215.

161 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 216.

Africa did not die down."[162]

Max Du Preez, former editor of the alternative Afrikaans newspaper, *Vrye Weekblad*, also took the stand. He recounted "one of the blackest moments in our legal history" when his newspaper lost a libel case brought by retired police general Lothar Neethling and had to close down as a result. Du Preez was also disappointed that the Afrikaans press refused to submit an official statement to the TRC. In the light of their statement that they had been in favour of reform, Du Preez wanted to know about the dismissal of Johan Grosskopf as editor of *Beeld* when he began to ask "difficult questions"; the cover-up of the South African Defence Force's actions in Angola; the "hysteria" when a number of Afrikaners went to Dakar in 1987 to talk to the ANC. (It is ironic, and quite sad, that Max du Preez who subsequently presented an investigative news programme, Special Assignment, was replaced by the SABC in 1999. One would have hoped that in a new dispensation the closing down of public debate and silencing of dissenting voices would not be repeated.)

A few weeks after the media hearings, 120 Afrikaans journalists (from *Naspers*) made a statement in which they expressed their disappointment with *Nasionale Pers'* refusal to testify. Meiring notes that : "In a statement the journalists made it clear that although they had not been personally or directly involved in gross human rights violations, they regarded themselves as morally co-responsible for everything that had been done in the name of apartheid, because they helped maintain a system in which these abuses could take place".[163] Ton Vosloo responded to this statement by saying that the journalists's actions were a "repudiation of great and honourable names in *Naspers*'

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162 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 219. Meiring notes that the English press was criticised by Thami Mazwai of the Forum of Black Journalists, who argued that the English newspapers "were still stuck in sixties' apartheid thinking." Moegsien Williams criticised the English newspapers "for seeing the Afrikaners as their opposition partners and never thinking about it that the true opposition with whom they had to enter into debate had been incarcerated all those years on Robben Island".

163 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 220-221.

long and rich and proud journalistic tradition, and are to be regretted".[164]

On the 4th of December 1996 Piet Meiring, John Allen (press representative of the TRC) and Archbishop Desmond Tutu went to see Izak de Villiers, editor of the Sunday newspaper, *Rapport.* It was felt that the perceptions of the average Afrikaner of the Truth Commission had to be addressed. The TRC wanted to solve some of the problems and misconceptions about itself. Izak de Villiers was not enthusiastic about such a meeting because "he did not like the Truth Commission, its chairperson or its methods."[165] Although he agreed to a conversation, Meiring reports that De Villiers was on the offensive from the start. "He made it clear that he did not trust the TRC process, that it was nothing other than a political onslaught on the Afrikaner and *his* (sic) history." At one stage of the conversation, De Villiers even said "that apartheid also had a good side". This is a sad and dark moment in the reconstruction and transformation of South African public space.

Meiring's response greatly contributes to the discourse on the Truth Commission. His chronological account, his personal involvement and his focus on specific themes affirm the value of the TRC as a public moment in South Africa's history of transformation. Because he was approached to represent a specific grouping (the Afrikaners) he is attentive and sensitive to difference and otherness. By employing the metaphors of trek, road and landscape he creates a new way (new language) of responding to the past, present and future. These metaphors also prevent the danger of coming to an end.

The response of a researcher - The truth about the Truth Commission

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164 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 221.

165 (1999) *Chronicle of the Truth Commission. A journey through the past and present - Into the future of South Africa* 96.

I already indicated in the introduction that I do not like Anthea Jefferey's book. I do not think it contributes at all to the public discourse about the TRC. In a letter in the *Sunday Independent,*[166] Richard Lyster, who was a commissioner, said that he had not read it for two reasons. The first is because "the title is a giveaway. It is the sort of title that Senator Joseph McCarthy might have given his book, if he was able to string a sentence together, about Marxists in the Hollywood film industry. Yet this Oxford "academic", purporting to comment seriously on a topic of international importance calls her book *The truth about the Truth Commission.*" The second reason is because of her last book, which contained "myriad errors, half-truths, misleading innuendoes and sheer disinformation".[167]

In the foreword, John Kane-Berman, chief executive of the South African Institute of Race Relations, notes certain "Orwellian" moments in the Truth Commission. He identifies a "fundamental" problem with the report because it did not tell the "truth". The report, in his view, omits and distorts the truth. Omissions were, for example, the fact that "multiple" killings were excluded without explanation. The truth was distorted because of methods used and aspects of violence that were left out. He stands critical towards the commission's redefinition of truth. He praises Jefferey for a "sober evaluation" and notes that in all the other accounts the commission has been accepted in a positive manner.

Jefferey is a special research consultant to the Institute of South African Race Relations. She comes from a legal background with law degrees from the University of the Witwatersrand and from Cambridge and a doctorate in human rights law from the University of London. Her previous book[168] that focused on the conflict between the ANC and the IFP in KwaZulu-Natal is criticised by Richard Lyster, who argues that she

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166 "Jefferey "truth" book a waste of good trees" (1999) *The Sunday Independent* September 5.

167 "Jefferey "truth" book a waste of good trees" (1999) *The Sunday Independent* September 5.

168 (1997) *The Natal Story: 16 years of conflict.*

came to "ludicrous" and "entertaining" conclusions. Lyster refers to Prof John Atchison of Natal University who in his analysis of this book "suggested that, because of its unusual thickness, it would make a good doorstop".[169]

Jefferey[170] argues that the TRC acknowledged that its success will be measured by looking at the content of its findings as well as the methods used to reach them. She identifies the main object of her study to analyse the evidence before the Commission and the way in which it was assessed. She follows four questions in her analysis of the report: "How factual was the evidence?"; "How comprehensive was it?"; "How objectively was it complied and analysed?"; "How well was it contextualised?". Jefferey argues that because the TRC had to make its findings on a "balance of probabilities" two further questions arise: "Were established legal principles applied?"; "Were the probabilities properly assessed?".

She covers the following aspects in her analysis: the publication of the current TRC report; the need for factual evidence; the need for comprehensive findings; the need for objective operation; the need for violations to be contextualised; the need to accord with established legal principles; findings based on "a balance of probabilities". She provides a brief summary of the TRC's main findings.[171]

Jefferey[172] discusses the four kinds of truth described by the Truth Commission. She notes that the TRC in terms of its founding legislation, had to base its report on "factual and objective information and evidence". In her view, the TRC, however, also took account of three other kinds of truth. The TRC made a distinction between "factual or forensic truth"; "personal and narrative truth"; "social or dialogue truth"; and "healing and restorative truth". Factual truth is described by the TRC as "the familiar legal or

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169 "Jefferey "truth" book a waste of good trees" (1999) *The Sunday Independent* September 5.

170 (1999) *The truth about the Truth Commission* 8.

171 (1999) *The truth about the Truth Commission* 161-164.

172 (1999) *The truth about the Truth Commission* 68.

scientific notion of bringing to light factual, corroborated evidence, and of obtaining accurate information through reliable (impartial, objective) procedures". In Jefferey's opinion the TRC did not only give regard to factual truth, but also other truths, which she finds problematic. She stands critical towards the value of "personal or narrative truth" that is concerned with the healing of individuals. The Commission also noted "social or dialogue truth" in its work. In Albie Sachs's words: "Dialogue truth ... is social truth of experience that is established though interaction, discussion, and debate".[173] The Truth Comission also accepted the notion of "healing truth ... that places facts and what they mean within the context of human relationships, both amongst citizens and between the state and its citizens".[174]

Jefferey argues that the TRC, in following a "victim-centred" approach, placed too much emphasis on other truths and "detracted from the accuracy of its conclusions regarding culpability".[175] For her, the personal beliefs of individuals provide no proper basis for conclusions regarding culpability.

As I already indicated, my objection to this book is not the fact that it contains a critical response to the TRC. The TRC can only benefit from critical perspectives in the public dialogue about the South African past and memory and future. The absence of critical debate in public in the past was to the detriment of each and every member of our community. The book lacks what the other books discussed so far thoroughly incorporate, namely a situated, embodied and embedded approach. These approaches take care of the individuals involved. They do not come to any grand or final conclusion concerning the findings of the TRC. Jefferey, in my view, does not follow a critical approach. She follows a legalistic approach and is obsessed with procedures, evidence, methods and so on. She does not take into account any interdisciplinary work, such as political theory, philosophy and psychology. The effect of her response and analysis is that the public moment (action) of the TRC is negated. The TRC is

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173 (1999) *The truth about the Truth Commission* 68.

174 (1999) *The truth about the Truth Commission* 69.

175 (1999) *The truth about the Truth Commission* 69.

placed within the realm of work where material and tangible things (evidence, facts) are what matters and where everything comes to an end in finished products. Rather than contributing to lively public discourse about the TRC, her approach will again force South African society into silence. Jefferey will argue that she follows an "objective", neutral approach to the TRC. If one accepts the basic critique raised more than a century ago by Holmes[176] and adopted by the Critical Legal Studies,[177] namely that neutrality and objectivity do not exist and that the law cannot be separated from politics and society, one cannot accept any claim to objectivity and neutrality. Her dissatisfaction with the TRC's findings might be inspired by another story.

The response of a lawyer - Truth, reconciliation and the apartheid legal order

The publication by Dyzenhaus differs from the others in the sense that it focuses on the legal hearings of the Truth Commission. The author analyses the rule of law during apartheid and criticises judges for not ensuring justice during that time. By doing this he makes previously unsaid things public.The most significant aspect of this book for my argument is that it focuses on legal interpretation. Dyzenhaus acknowledges the fact that politics can not be separated from the law, legal theory and philosophy, and ultimately legal decisions.

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176 See amongst others "The path of the law" (1897) 10 *Harvard Law Review* 457. See also Grey "Holmes and legal pragmatism" (1989) 41 *Stanford Law Review* 787-863 and Singer "Legal realism now" (1988) 76 *California Law Review* 467-544.

177 See amongst others Kennedy "Form and substance in private law adjudication" (1976) 89 *Harvard Law Review* 1685-1778; Tushnet "Truth, justice, and the American way: An interpretation" (1979) 57 *Texas Law Review* 1307-1359; Tushnet "Anti-formalism in recent constitutional theory" (1985) 83 *Michigan Law Review* 1502-1544; Tushnet "Critical Legal Studies and Constitutional Law: An essay in deconstruction" (1984) 36 *Stanford Law Review* 623-647; Unger "The critical legal studies movement" (1983) 96 *Harvard Law Review* 561-675; Gordon "Critical legal histories" (1984) 36 *Stanford Law Review* 57-125; Trubek "Where the action is: Critical Legal Studies and empiricism" (1984) 36 *Stanford Law Review* 575-622; Kelman "Trashing" (1984) 36 *Stanford Law Review* 293-348; Simon "Visions of practice in legal thought" (1984) 36 *Stanford Law Review* 469-507.

Kader Asmal, in the foreword to the book, notes Tutu's suggestion that the hearings into the legal profession[178] were the most important within the Commission's mandate. The system of apartheid was unique in comparison with other twentieth century atrocities because it was underpinned by the entire legal system. Asmal mentions that with the hearings into the legal profession, "potentially arcane jurisprudential debates found their way into the pages of the national media with unaccustomed clarity and thoroughness."[179] Dyzenhaus focuses on judges and is critical of the fact that they declined to attend the hearings. The judges based their denial to attend on "judicial independence". Asmal argues that the apartheid judiciary was "almost totally monopolistic and excluded women."[180] In his view the new South African judiciary will not be able to move away from the past if they do not acknowledge their "racially compromised" pasts.[181] He emphasises the necessity of public confidence in the judiciary.

> This [public confidence] is not merely a public relations function, a creation of ad-men, something that image consultants can be hired to fix. Public confidence in a judiciary reflects far-reaching sentiments of belonging, identity and - ultimately - of justice amongst us all.[182]

David Dyzenhaus is professor of law and philosophy at the University of Toronto. He previously taught at the University of the Witwatersrand. In his doctoral thesis,[183] he investigated South African law from a legal philosophical perspective. Dyzenhaus was the first person to appear during the TRC hearings into the legal profession. His

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178 See also Gauntlett "Towards the truth: The GCB's submissions to the TRC" (1998) 11 *Consultus* 34-39; Whittle "The legal profession and the truth" (1997) *De Rebus* 506-507.

179 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* viii.

180 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* ix.

181 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* ix.

182 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* x.

183 (1991) *Hard cases in wicked legal systems: South African law in the perspective of legal philosophy.*

analysis of the process of the TRC consists of four sections: "truth, memory and the rule of law"; "judicial dilemmas: tales of disempowerment"; memory's struggle"; and "the politics of the rule of law". He stresses the importance of the TRC as a public event throughout the book:

> The TRC brings to light the details of what happened and forces a public acknowledgement both of the general pattern of events and of specific acts. It is, for example, only through the public hearings of the TRC that white South Africans have been forced to acknowledge that the security forces systematically engaged in assassinating their opponents. It is also important to surviving victims and their families and friends to have publicly aired exactly what was done, and family and friends of those who were murdered, some of whom disappeared without trace, need to get a public account.[184]

The main tenet of his argument is that judges, even under apartheid law, could have ensured justice and protected individual rights. He refers to Chaskalson's argument that "[T]he common law heritage of the judges required them to interpret statute law, in so far as this was possible, in the light of the principles developed by judges in their decisions which deny all forms of discrimination."[185] Dyzenhaus argues that this view is problematic because statute law always took precedence over the common law. Chaskalson suggested that judges were under a duty to resort to common law presumptions in cases of alleged ambiguity in statutory language. Dyzenhaus argues that it is a controversial suggestion because many judges are hostile to the notion that their "moral responsibilities" should effect their interpretation and decisions. He says that judges see their duty as judges "to interpret the law as it was in fact intended by the legislators to be interpreted".[186] Dyzenhaus mentions his previous description of the

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184 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 8.

185 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 8.

186 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 16.

interpretative approach of South African judges as the "plain fact approach".[187] He describes it as follows:

> Plain fact judges hold that the judicial duty when interpreting a statute is always to look at those parts of the public record that make it clear what the legislators as a matter of fact intended. In this way, the judges merely determine the law as it is, without permitting their substantive convictions about justice to interfere. And in South Africa, the facts of the public record - both the deeds and the policy of those charged with implementing apartheid - were very clear as to what the National Party majority in Parliament wanted. Indeed, judges knew from the record that judicial decisions which imposed legal constraints on the implementation of apartheid statutes would usually be overruled by legislative amendments to make the government's intention plain. Thus in cases where arguably a statutory provision seemed ambiguous, such judges reasoned that their duty as a judge required them to clear up the ambiguity, not by reference to a common law presumption, but by reference to the public facts of the matter about how the Legislature would have wanted the statute interpreted. And that understanding of duty was rooted in a particular conception of the rule of law. That conception has it that the role of judges in upholding the rule of law largely involves judges' seeing to it that the officials who implement a statute do so in accordance with the law as it is, as a matter of plain fact, intended to be implemented.[188]

Dyzenhaus argues that there were judges who were not caught between the "facts" of apartheid statutes and the pull of common law principles. In these judges' view, "their duty did not take them beyond what they took to be facts of the matter about legislative

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187 (1991) *Hard cases in wicked legal systems: South African law in the perspective of legal philosophy.*

188 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 16-17.

intention."[189]

He reflects critically on Chaskalson's remark that the "past ought not to be lamented". For him, the question has to do with memory:

> Is it healthier to leave a traumatic past largely behind, dwelling only on its positive moments, in order to go to a healthy future? Clearly, those who established the TRC answered "no" to this question and so the "no use in lamenting the past" stance may seem in direct conflict with the rationale for establishing the TRC.[190]

Dyzenhaus notes the suggestion by Kritz and Chaskalson[191] that an idea of the rule of law as "antipolitics" should be preserved during a transitional process. For them the rule of law should be conceived as neutrally as possible. Dyzenhaus, however, argues that the rule of law as antipolitics is conceivable only within a plain fact interpretation. He makes the further significant point that "the antipolitical stance of the conception is driven by politics, by the argument that it is politically appropriate that judges adopt that conception".[192] Dyzenhaus argues that the notion of bringing legal officials to account for the past cannot rely on the politics of memory that depend on a conception of the rule of law as antipolitics.

> Just as remembering the past will reveal the politics of the different understandings of the rule of law, so a policy of forgetting the past (however noble its motivation) will obscure such politics, perhaps

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189 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 19.

190 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 20.

191 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 21. See Chaskalson "Law in a changing society" (1989) 5 *South African Journal on Human Rights* 293; Kritz "The dilemmas of transitional justice" in Kritz (ed) (1995) *Transitional Justice: How emerging democracies reckon with former regimes* and Teitel "Transitional jurisprudence: The role of law in political transformation" (1997) 106 *Yale Law Journal* 2009.

192 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 22.

permitting the bad old politics to exercise a hold on the future.[193]

Dyzenhaus[194] notes the paradox of the law and apartheid: the law was used as the "instrument of apartheid" but simultaneously held out some promise of limiting its worst excesses. Two related questions were put to those who were part of the previous legal order: "How was it that you implemented without protest, and often with zeal, laws that were so manifestly unjust? And how was it that when you had some discretion as to how to interpret or apply the law, you consistently decided in a why that assisted the government and the security forces? And to those whose skills could have been used to resist - if only by criticising - apartheid law, the question was put of why they stood passively by or actively supported the regime."[195]

Dyzenhaus echoes the general disappointment that not one judge was willing to appear in person in the hearings.[196] He repeats Tutu's words that judges faced in the past with moral choices generally made the wrong choices. When faced with another moral choice, whether to appear before the TRC, they again made the wrong choice. For Tutu this meant that they "had not changed a mind set that properly belongs to the old dispensation."[197]

Tutu's remarks are crucial when we analyse and reflect upon present judicial decisions. An "ethical" interpretation relies on a new mind set and a memory that supports the political in interpretation. Dyzenhaus shows how the legal hearings illuminated a relationship between law and justice that reflects the age-old legal philosophical debate between positivism and natural law theories. He says that he does not think that the question of the relationship between justice and the law could be settled by three days

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193 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 23.

194 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 26.

195 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 27.

196 A few of them made written submissions, see (1998) 115 *South African Law Journal* 15-106.

197 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 30.

of hearings but it provided "a rare opportunity" for the relationship to be "reexamined". He argues that the legal hearings showed that the relationship between law and justice are "inherently political but at the same time morally loaded".[198] He comes to the conclusion that law can make a difference, even under the "unpromising" conditions of apartheid. Even though there will be many ways of understanding the commitment to a "community of free and equal citizens" one can at least

> [R]ule out any legal theory or ideology which attempts to reduce our understanding of law to what a plain fact approach determines to be the content of the commands of the powerful. For law is better understood as the expression of a relationship of reciprocity between ruler and ruled, one in which the rulers commit themselves not only to being accountable to law, but to making law before which all subjects are equal. That in turn suggests that the rule of law is best understood as the institutional expression of democracy.[199]

Dyzenhaus' account of the TRC hearings into the legal profession during apartheid is another significant contribution to the public discourse on the TRC as event. His analysis of the rule of law, legal interpretation and the judicial responsibility is of particular importance for critical analysis of present decisions. In the search for new approaches to interpretation the mistakes of the past must be remembered.

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198 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 182.

199 Dyzenhaus (1998) *Truth, reconciliation and the apartheid legal order* 183.

Landscape of care

In this section I shall make a few short remarks on the TRC as a landscape of care. I have identified justice as a significant part of the ethical intersection between public space, equality and justice. I have indicated the understanding of justice that I support, namely that justice is unattainable in a present system. Justice serves as an ideal, and a promise. I referred to an ethical horizon of the promise of justice. Here I want to join in the conversation[200] that started after Carol Gilligan's publication (*In a different voice*)[201] where she argued that an ethics of justice must be supplemented with an ethics of care. My main interest is to consider the application and extension of an ethics of care in the context of the TRC. I think that the chairperson of the TRC, Archbishop Desmond Tutu, followed and maybe even gave preference to an ethics of care. I shall address the aims and the work of the Reparation Committee and ask whether the task of reparation can benefit by supplementing the aim of justice with a care perspective.

I have already discussed aspects of an ethics of care in Part 1 as part of a gender critique on the liberal visions of public space. I argued that the perspective of an ethics of care could assist us in the reconstruction and transformation of our visions of public

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200 There are multiple perspectives and writings on an ethics of care. See amongst others Held (ed) (1995) *Justice and care. Essential readings in feminist ethics*; Held (1993) *Feminist morality. Transforming culture, society, and politics*; Hekman (1995) *Moral voices moral selves. Carol Gilligan and feminist moral theory*; Baier (1994) *Moral prejudices. Essays on ethics*; Bowden (1997) *Caring. Gender-sensitive ethics*; Larrabee (ed) (1993) *An ethic of care. Feminist and interdisciplinary perspectives*; Tronto (1993) *Moral boundaries. A political argument for an ethic of care*; Clement (1996) *Care, autonomy, and justice. Feminism and the ethic of care*; Sevenhuijsen (1996) *Oordelen met sorg. Feminischtische beschouwingen over recht, moraal en politiek*; Shogan (ed) (1992) *A reader in feminist ethics*; Keller (1986) *From a broken web*. See also Glaspell "A jury of her peers" in Gemmette (ed) (1992) *Law in literature: Legal theory in short stories* 124-139; Prominent radical feminist and lawyer Catherine MacKinnon reacted strongly against Gilligan. She argued that for women to accept the care perspective is part of male dominance. See MacKinnon "Difference and dominance: On sex discrimination" in (1987) *Feminism unmodified* and in Barlett & Kenndey (eds) (1991) *Feminist legal theory: Readings in law and gender* 81-94. Cornell reacted against this critique in "A doubly-prized world: Myth, allegory and the feminine" (1990) 75 *Cornell Law Review* 644-699.

201 Gilligan (1982) *In a different voice*. See also Kohlberg (1984) *Essays on moral development. The psychology of moral development.*

space. An ethics of care will not replace an ethics of justice but supplement it. I believe that it can disrupt and undermine present (male) static visions of public space. I shall repeat here what I consider to be main features of an ethics of care. Carol Gilligan came about with this view after working with Lawrence Kohlberg on a research project investigating the moral development of children and adults. The outcome of these tests were that women scored lower marks than men and stayed at a lower level of moral development. Gilligan reacted to this by adding other questions to the prescribed list of questions covered. She came to the conclusion that women tended to speak in a different voice about morality itself and about moral maturity. She said:

> Since the reality of interconnection is experienced by women as given rather than freely contracted they arrive at an understanding of life that reflects the limits of autonomy and control. As a result women's development delineates the path not only to a less violent life but also to a maturity realized by interdependence and taking care.[202]

She also wrote that

> [W]omen perceive and construe social reality differently from men, and that these difference centre around experiences of attachment and separation ... because women's sense of integrity appears to be intertwined with an ethics of care, so that to see themselves as women is to see themselves in a relationship of connexion, the major changes in women's lives would seem to involve changes in the understanding and activities of care.[203]

An ethics of care takes a different perspective on autonomy and independence than the

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202 Gilligan (1998) *In a different voice* 172.

203 Gilligan (1982) *In a different voice* 171.

liberal point of view.[204] Gilligan accordingly also supports a different version of community than the liberal version. In Part 1 I noted the distinction, followed by the liberal point of view, between "the right" (questions of justice) and "the good" (questions of morality). In the liberal model "the right" and questions of justice enjoy preference. "The good" and questions of morality in the liberal model are considered to be private issues that should be excluded from public life. The Kantian view of the self is the philosophy behind the liberal outlook. I have already referred to the Kantian view of the self in Part 1. The self in this perspective is perceived as an autonomous, isolated and separate individual. In the Kantian (liberal) version of society justice is the most important virtue. Justice in this model means mutual respect for equal rights such as the right to contract, equal opportunity, free speech, free association and others. The main feature of these equal rights is that they all involve only the individual and totally ignore the relationships which individuals experience.[205]

A significant challenge posed by Gilligan's theory of an ethics of care is its challenge to Western individualism. Annette Baier[206] states that

> The most obvious point [of Gilligan's theory of an ethics of care] is the challenge to the individualism of the Western tradition, to the fairly entrenched belief in the possibility and desirability of each person pursuing his own good in his own way, constrained only by a minimal formal common good namely a working apparatus that enforces contracts and protects individuals from undue interference by others.[207]

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204 See also Ackerman "Tales of terror and torment: Thoughts on boundaries and truth-telling" (1997) 63 *Scriptura* 425-434 where the author reflects on boundaries from a feminist theological perspective.

205 This is also taken up by Jennifer Nedelsky. I have already referred to her view (in Part 2) that the conventional approach to rights as barriers should be replaced with an approach to rights as relationships. See "Reconceiving rights as relationship" (1993) 1 *Revue of Constitutional Law* 1-17.

206 "The need for more than justice" in Held (1995) *Justice and care. Essential readings in feminist ethics* 52.

207 "The need for more than justice" in Held (1995) *Justice and care. Essential readings in feminist ethics* 52.

Gilligan made the very important point that in certain cases noninterference can amount to neglect, especially for the powerless. The liberal state's noninterference in so-called private issues quite often contributes negatively to a situation, like for example where the state refuses to intrude into the private sphere to assist victims of domestic violence. Another aspect highlighted by Gilligan's theory that I discussed in Part 1 is the distinction between the perspective of the generalised and the concrete other. In the liberal vision where the perspective of the autonomous individual is followed the other is seen as a generalised other. In other words the other is seen merely as an other of myself. For justice to be attained every person must allow the other that which he wants the other to allow him. I noted in the previous discussion that the features of reciprocity and respect are features of the liberal model. In the perspective of an ethics of care the other is seen as a concrete other with his/her own life story. The recognition of difference is significant for an ethical interpretation of equality. In the context of the TRC it was necessary to acknowledge the fact of difference and to bring each and every person's concrete circumstances and story to the fore.

I have viewed the TRC as an in between space and as a practical illustration of the ethical intersection between public space, equality and justice. I have elaborated on certain visions of public space and indicated that I support Hannah Arendt's vision. For this discussion Hannah Arendt's theme of the "web of human relationships" is significant. Arendt considered the public realm to be significant exactly because it is a space where human interaction could take place, human plurality is displayed and humans appear to each other. Humans left the darkness (separation) of the private behind when they enter the public, the realm of action, speech and relationships. I looked at a few approaches to equality that all support a relational approach to rights and reject the liberal vision of the isolated and autonomous individual. The philosophy of deconstruction that serves as an inspiration for my understanding of the ethical, difference and justice also rejects the notion of the autonomous subject (individual). Deconstruction (postmodernism in general) rejects grand narratives and universal and general statements. My reason for mentioning this is because the investigation that these theories (deconstruction and postmodernism in general) follow is an investigation

into the *particular* or the *singular other*. The deconstructive concern with the singular other is an ethical concern that in my view has similar implications than an ethics of care. My concern with the formal approach to equality is that it accepts the liberal view of the autonomous individual. It follows the traditional approach to justice (to allow the other that which you also expect for yourself). I have raised my fear that the present substantive approach to equality is not that much different. The approach to equality that I support, an ethical interpretation of equality, accepts the value of the perspective of an ethics of care to supplement the notion of justice that always escapes the present system and is viewed from a distance. Since I use the TRC as a practical illustration of the ethical intersection that is integral to an ethical interpretation of equality I shall explain why I think the perspective of an ethics of care was followed in the TRC (at least followed sometimes by certain figures).

> This chapter concludes where it began. Reconciliation is a process which is never-ending, is costly and often painful. For this process to develop, it is imperative that democracy and a human rights culture be consolidated. Reconciliation is centred on the call for a more decent, more caring and more just society. It is up to each individual to respond by committing ourselves to concrete ways of easing the burden of the oppressed and empowering the poor to play their rightful part as citizens of South Africa.[208]

I have been arguing throughout that the value of the TRC was the public space it provided for humans to come together and tell (and share) their stories. I said that Martha Nussbaum's[209] call (that I discussed in Part 1 and Part 2) for the "literary imagination in public life" and for "poets as judges" has a special value for the TRC. Although certain formal and institutional aspects and traditional understandings of

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208 *The report of South Africa's Truth and Reconciliation Commission* (1998) part four, Recommendations par. 115.

209 "The literary imagination in public life" (1991) *New Literary History* 877; Poets as judges: Judicial rhetoric and the literary imagination" (1995) 62 *The University of Chicago Law* Review 1477.

justice were integral to the TRC, it was primarily a space (an event) where reconstruction and transformation took place. In other words where stories were told, where human action took place, where people forgave and promised and where an ethics of care was followed. I read the various responses, that I discussed above, with the perspective of an ethics of care in mind. I already stated that Anthea Jefferey follows the typical traditional perspective of justice and did not consider the human aspect of the TRC. It is obvious that an ethics of care was absent in her response. The other responses, Krog and Meiring in particular, are sensitive to alternative ways of approaching justice, also to an ethics of care. Like justice is never fully realised in the present we must also realise that an ethics of care is also fallible. The mere fact that we can tell and listen to stories, that we take the concrete contexts and specific circumstances into account does not mean that all problems will be solved, all wounds healed or all people reconciled. The "ethical" of an ethical interpretation is also relevant here. We must realise the impossibility of realising equality or justice fully. But this does not mean that we can not do anything. A perspective of an ethics of care, while realising its shortcomings on the one hand, still strives for the ideals of equality and justice on the other.

> Not all storytelling heals. Not everyone wanted to tell his or her story. Many, on the other hand, were able to reach toward healing by telling the painful stories of their pasts.[210]

The way in which the TRC was structured and how it went about in doing its task made it possible for an ethics of care to come into play. Hearings were conducted through out the country, the TRC went to the people, taking the first step of human interaction. The people who came to tell their stories were accommodated as far as possible. They could tell their stories in their mother tongue, translators translated it into English. A witness was assisted by relatives or friends when on the stand. The hearings were conducted totally differently from traditional court hearings. It was as if all involved in

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[210] *The report of South Africa's Truth and Reconciliation Commission* (1998) part four, Reconciliation, par.6.

the process realised that what was at the heart of this event was something bigger and greater than the conventional understanding of justice. The presence of Archbishop Tutu played a significant role in the manner the hearings were conducted, in the amount of care and consideration that was displayed. Tutu went to trouble to make people feel comfortable, he sang and he prayed and when he was deeply affected by some of the horror stories that were told, he cried. But off course an ethics of care was not only present in the concrete conducting of the TRC.

I think also its aims and objectives can be regarded as inspired by something more than conventional justice. If the only aim was a conventional one South Africa could have opted for one of the approaches identified by Robert Gordon above. But South Africa chose the TRC, an in between space, to address the atrocities of the past from many perspectives in order to bring about many effects. One of these was to follow an ethics of care in order to restore humanity. In this regard we can recall Cornell's second understanding of transformation, namely a transformation of individuals themselves. Part of the transformation of individuals in South Africa was to restore their humanity. The commission stated its commitment to "restorative justice":[211]

> We have been concerned, too that many consider only one aspect of justice. Certainly, amnesty cannot be viewed as justice if we think of justice only as retributive and punitive in nature. We believe, however, that there is another kind of justice - a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships - with healing, harmony and reconciliation. Such justice focuses on the experience of victims; hence the importance of reparation.[212]

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211 See also Llewellyn & Howes "Institutions for restorative justice: The South African Truth and Reconciliation Comission" (1998) unpublished paper and "Restorative justice - A conceptual framework" (1998) unpublished paper prepared for the Law Comission of Canada.

212 *The report of South Africa's Truth and Reconciliation Commission* (1998) foreword, par. 36.

The investigation that was followed took note of the concrete contexts of each case and considered the special circumstances, of each story was listened to without making the unique experiences of people general. I want to turn to the issue of reparation and consider to what extent an ethics of care is followed in this context. But before I do that I want to refer briefly to Tutu's reflections on the TRC and his emphasis on relationships and community in particular.

Tutu,[213] in his personal memoirs on the TRC emphasises the importance of relationships. He says

> Our humanity is caught up in that of all others. We are human because we belong. We are made for community, for togetherness, for family to exist in a delicate network of interdependence.[214]

In respect to the heterogeneous South African society he says:

> [I]nstead of separation and division, all distinctions make for a rich diversity to be celebrated for the sake of the unity that underlies them. We are different so that we can know our need of one another, for no one is ultimately self-sufficient. A completely self-sufficient person would be sub-human.[215]

Some people might catch onto Tutu's use of the phrase "the unity that underlies them." His words could be read as being essentialist and negating the inevitableness of radical difference and the radical other. But, I think, one should grant him a more nuanced reading. He is not seeking to deny difference and equalise each and every one. If the "unity" that he is referring to means the various relationships that connect

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213 (1999) *No future without forgiveness.*

214 (1999) *No future without forgiveness* 154.

215 (1999) *No future without forgiveness* 214.

different people on different levels I can go along with that.[216]

Tutu relates an experience that he once had while travelling in a plane with a Nigerian pilot.

> Coming from South Africa, where blacks did not do such work, I experienced a strong feeling of pride in black achievement. The plane took off smoothly. Then we hit turbulence. At one moment we were at one altitude and the next you had left your stomach up there as the plane shuddered and dropped. I was shocked at what I discovered - I found I was saying to myself, "I wish there was a white man in the cockpit. Can these blacks manage to navigate us out of this horrible experience?"[217]

He shares this experience to make the point that we should not "underestimate" the "power" of conditioning.[218] Tutu argues that because of this we should be more generous in understanding and judging the perpetrators of human rights violations. This does not mean that the violations should be condoned, but by taking notice of a person's concrete context one is in a better position to judge. Tutu believes that there is hope for reconciliation (reconstruction and transformation) because the perpetrators "are revealed as human beings." We should strive to encompass the human element in all the judgements we make and when we interpret rights. An ethical interpretation of equality asks that we should judge and interpret by focusing on relationships and on concrete contexts.

I have already referred to Hannah Arendt's theory of action that illustrates the capacity for promising and forgiving and its significance for the TRC. I have also endorsed

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216 See in regard to a heterogeneous community, multiculturalism and difference Giroux (1993) *Living dangerously: Multiculturalism and the politics of difference*.

217 (1999) *No future without forgiveness* 204.

218 hooks (1992) Black looks: Race and representation; Delgado (1997) *Critical white studies;* West "The new cultural politics of difference" in Thompson & Tyagi (eds) (1993) *Beyond a dream deferred: Multicultural education and the politics of excellence.*

Cornell's vision of "legal interpretation as recollective imagination" which entails the paradox of "remembering the future". In regard to ethical interpretation this means that the relationship to time, the past, the present and the future is not necessarily chronological. The reason, for example, why the past is addressed is to enable us to walk into the future, but the walk in the future entails a continuous going back to the past. Tutu provides another angle on forgiving, time and the relationship between them:

> In forgiving, people are not being asked to forget. On the contrary, it is *important* to remember, so that we should not let such atrocities happen again. Forgiveness does not mean condoning what has been done. It means taking what has happened seriously and not minimising it; drawing out the sting in the memory that threatens to poison our entire existence. It involves trying to understand the perpetrators and so have empathy, to try to stand in their shoes, and to appreciate the sort of pressures and influences that might have brought them to do what they did. ... Forgiving means abandoning your right to pay back the perpetrator in his own coin, but it is a loss which liberates the victim.[219]

I shall now make a few remarks concerning reparation. One of the three committees [220] that were set up by the TRC act[221] was the Committee on Reparation and Rehabilitation. As I have already mentioned, my interest here is to see whether an ethics of care is followed in regard to reparation. On the one hand, the whole notion of reparation can become part of an instrumental and economical reaction that will defeat many of the other aspects of the TRC that made it what it was - an event of public space, where human stories were told and human dignity restored. If this is what the reparation will amount to the TRC will not be a reflection of an Arendtian public space and of action and speech, but will be closer to the realm of labour and necessity, and

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219 (1999) *No future without forgiveness* 219.

220 The other two committees were responsible for the investigation of human rights violations and for the amnesty hearings.

221 National Reconciliation and Unity Act 34 of 1996.

work and materiality (that what is tangible). On the other hand reparation can be a manifestation of an ethics of care. An ethics of care, that may assist people in their daily lives, maybe even make it better, is a necessary supplement to my view of justice, that justice is never fully realised in a present system. Before I continue I quote from the TRC report:

> 22. The granting of reparation awards to victims of gross violations of human rights adds value to the "truth-seeking" phase by:
> a) enabling the survivors to experience in a concrete way the state's acknowledgement of wrongs done to victims and survivors, family members, communities and the nation at large;
> b) restoring the survivors' dignity;
> c) affirming the values, interests, aspirations and rights advanced by those who suffered;
> d) raising consciousness about the public's moral responsibility to participate in healing the wounded and facilitating nation-building.
>
> 23. Thus the Commission recommends that:
> A structure be developed in the President's office, with a limited secretariat and a fixed life-span, whose function will be to oversee the implementation of reparation and rehabilitation policy proposals and recommendations. The functions of the proposed secretariat will require co-operation with a number of ministries which have a long-term mandate to integrate services and activities. The secretariat will also apply itself to:
> facilitating mechanisms for financial reparation; facilitating the issuing of death certificates; by the appropriate ministry; expediting exhumations and burials by the appropriate ministry; facilitating the issuing of declarations of death in those cases where the family members request it; facilitating the expunging of criminal records where the political activity of individuals was criminalised; facilitating the resolution of outstanding legal matters related to reported violations; facilitating the renaming of streets and community facilities in order to remember and honour individuals or significant events; facilitating the building of monuments and memorials and the development of museums to commemorate events of the past.
> The government declare a National Day of Remembrance.
> The President, in consultation with organised business and civil society at large, establish a trust fund whose finances will support reparation and restitution initiatives as prioritised

by different ministries and civil society.[222]

There are many difficult questions and problems involved in the issue of reparation. Most of them will be impossible to answer or to solve. I have decided to support the *principle* of reparation. Exactly how the government is going to address reparation is still another issue. As I already have indicated I would not like to see the reparation as merely an economical response. The symbolism in every act of reparation should get a far bigger emphasis and exposure. In this regard we should recall Arendt's and Derrida's different readings of the American Declaration of Independence. We saw that Derrida, unlike Arendt, does not only recognise the performative aspects of the Declaration (and of politics in general), but notices the fact that there will always also be constative moments. If I apply this reading to the TRC and to reparation in particular I suppose one can say that the reparation will be partly economical (closer to the constative moments) and partly performative (closer to the performative moments).

Another issue in regard to Arendt's theory of the public realm that I have raised is that her distinction between the social and the public can not be applied simplistically in our times. Economic issues, that might have been purely economic issues (and therefore not public in the Arendtian sense) have become political and public issues. (For example we can not consider labour unions, because they are involved in the negotiation of wages, as having primarily private concerns). What I am saying is that the mere fact that one of the aims of the TRC is to address reparations, which will in many cases involve material reparations, does not necessarily have a negative impact on it as a public event. It can even enhance my understanding of the TRC as an illustration of the ethical intersection between public space, equality and justice. This

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222 *The report of South Africa's Truth and Reconciliation Commission* (1998) part four, Recommendations, par. 22, 23. Meiring (1999) *Chronicle of the Truth Commission* 209-210 explains the process of the Reparation and Rehabilitation Commission 209-210. See also the summary of the 5 main proposals for reparation: Firstly the most urgent needs of victims who were old, ill or living in destitution had to be attended to; Secondly every victim of gross human rights violations, or their survivors had to be paid a sum of money; Thirdly community services had to be improved; Fourthly symbolic reparation and lastly institutional reparation. (244-247) The TRC drew up the proposals but it was the task of the government to implement them. Meiring writes (341) that the first reparation letters were sent out on 7 May 1998.

can be the case if the perspective of an ethics of care is followed in regard to reparation and not merely a traditional approach to justice. To what extent can the concrete contexts and special circumstances of individuals (concrete others) be accommodated? Antjie Krog refers to the old man whose trees were taken away from him. His only request was to have his trees back. What is going to happen with his request?

> Perhaps the oldest person ever to testify before the commission is William Matidza, born in 1895. Bolt upright, with a trimmed white goatee, he walks on to the stage without assistance. He is here, he says, not because the police arrested him from time to time for political reasons and threw him in jail. Not because he was already eighty the last time he was detained. But because all his things have been confiscated. He doesn't care about the house and the furniture and the livestock, these losses he can deal with - but it's his trees, you see. He wants his trees back. ... He wants reparation for that. The commissioners explain somewhat uncomfortably that they don't really have the power, that they can only submit suggestions to the President, that it will all take time. "Doesn't matter", says Matidza. "I know waiting".[223]

The aim of reparation is not necessarily in conflict with the ethical intersection between public space, equality and justice, and accordingly not in conflict with an ethical interpretation of equality. Like I have already mentioned it can even enhance an ethical interpretation of equality. Reparation will, like the TRC process itself, take place in public. It will be a public gesture and public recognition of the past and part of the processes of restoration, reconciliation and even reconstruction and transformation. In regard to equality a formal approach to equality will be impossible to follow. There is no way in which the present government by ways of reparation can bring about formal equality. In this context the value of an ethical interpretation of equality can be illustrated. The reparation can restore a sense of equality. The various applications can be investigated with the radical reality of difference in mind. In other words what

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[223] Krog (1998) *Country of my skull* 195-196.

will mean not much to a white middle class South African can mean a lot to a person whose house, possessions and trees were taken away by the government of the past. Ethical equality (we must recall Cornell's term of equivalence that I discussed in Part 2) will mean that all people will have equal moral worth. Humanity and human dignity will be restored. The total aim of reparation must be followed with a strong realisation of its own shortcomings and incompleteness. In this regard reparation can illustrate the deconstructive implications for justice. Justice is an ideal that is strived for in the present, but it can never be fully realised in the present. Reparation will illustrate the incompleteness of present attempts to achieve equality and justice but at the same time it could, by supplementing the ideal of justice with an ethics of care, affect and even improve present circumstances.

Conclusion

"The past is another country"

> The past, it has been said, is another country. The way its stories are told and the way they are heard change as the years go by. The spotlight gyrates, exposing old lies and illuminating new truths. As a fuller picture emerges, a new piece of the jigsaw puzzle of our past settles into place.[224]

In this part I focused on landscapes of justice. I explained my reason for using landscape as image for the text in general, but also for justice in particular. The image of landscape has a sense of unfixity and openness. The multiple methods of interpreting landscape can be fruitfully applied to the interpretation of justice. I said that the vision of justice that I follow is that justice will never be fully realised in the present, justice is in the beyond. The role of justice in our daily lives is that it presents an ideal, an horizon that should be strived for.

In the three sections, Theoretical landscape, South African landscape and Landscape of care, I described perspectives on the interpretation of texts; on promising and forgiving; on responses to mass atrocities; a few responses to the TRC and the significance of an ethics of care for the TRC. At the centre of these discussions stand the ethical intersection of public space, equality and justice and accordingly an ethical interpretation of equality. My aim was to show why, in my view, the TRC presents an example of such an ethical intersection and ultimately why I think it contributes to an ethical interpretation of equality. I was specifically interested in the responses to the TRC, how people think and talk about the TRC, what language they use. In this regard I was greatly influenced by André P Brink's observation about language that I quoted

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[224] *The report of South Africa's Truth and Reconciliation Commission* (1998) foreword, par 17.

in the introduction to this part. Brink argued that we should not repeat the mind-sets of the past and said that how we think about the future in language is the true reflection of change.

The arguments of Drucilla Cornell, Hannah Arendt and Anthony Kronman that I raised in Part 1 are connected to my reflections on the TRC. In the previous discussion I highlighted Cornell's understanding of transformation on two levels, the first level meaning the change of a system and the second level the change of individuals. I said in this part that the TRC's restoration of humanity and human dignity can be seen as part of the transformation of individuals. Together with the discussion of Cornell's understanding of transformation I referred to Hannah Arendt's vision of judgement as a manifestation of action in modern times where the public realm and political action are absent. I then turned to Kronman's description of judgement where he refers to how one must employ the imagination when making judgements, trying to place oneself in the other person's position. I argued that a combination of these three views tells us something important about our own visions of public space and about the processes of reconstruction and transformation. The notions of transformation and judgement are also significant for the TRC. One of the aims of the TRC was to assist in the transformation from the past to the future. It was expected from each and every person in our country who was aware of the TRC to make a judgement concerning the TRC. It was not only the commissioners and people directly involved in the process that had to think about and make judgements concerning the TRC. We all had to go through the process of deliberating the various points of view, trying to place ourselves in the shoes of others. Trying to understand why and how the atrocities happened. Through this process of making judgements about the TRC we all were involved in political action. South African suburban homes that, not long ago, were perfect examples of private spaces were temporarily transformed into public spaces each and every time the TRC was discussed and deliberated, each and every time someone made a judgement regarding the TRC. The TRC had an inevitable effect on the South African society. I believe that the TRC might have forced the first steps of the transformation of the South African society.

I have argued that equality was a feature of the TRC on three levels. Firstly, because everyone involved in the process, whether victim or perpetrator, was treated equally. Secondly, because of the display of human plurality of which equality is a feature it was an equal space and thirdly because of the aim of restoration of equality. In regard to the significance of the TRC for an ethical interpretation of equality I have already indicated that I regard the TRC as an illustration of the ethical intersection between public space, equality and justice which is integral to an ethical interpretation of equality. I want to make two further points. The first one I have mentioned above in the discussion of Asmal's and his co-authors' response. According to them the TRC could not treat the victims of apartheid (members of the resistance) equally to human rights abusers. The TRC, however, treated each and everyone equally. This does not mean that they treated them the same, or that they did not take the different contexts and circumstances into account. The fact that the TRC recognised apartheid as a crime against humanity in its report is a clear indication that they did not treat the victims and the perpetrators the same, equal yes, but not the same. What I am saying is that the TRC rejected a formal approach to equality and followed an approach where the concrete context influenced the investigation and approach. In my view this approach is along the same lines as an ethical interpretation of equality. By describing and emphasising the approach to equality followed by the TRC I hope to illustrate the value of the contextual interpretation that I support (an ethical interpretation of equality) that regards difference. I quote from the report:

> Some have criticised us because they believe we talk of some acts as morally justifiable and other not. Let us quickly state that the section of the Act relating to what constitutes a gross violation of human rights makes no moral distinction. It deals with legality. A gross violation is a gross violation, whoever commits it and for whatever reason. There is thus legal equivalence between all perpetrators. ... the same kind of act attracts different moral judgements. A venerable tradition holds that those who use force to overthrow or even to oppose an unjust system occupy

the moral high ground over those who use force to sustain the system.[225]

The other point concerns the relationship between memory, storytelling, the imagination and conceptions of time. In Part 2 I discussed Drucilla Cornell's view of legal interpretation as recollective imagination and said that an ethical interpretation of equality follows the notion of recollective imagination. The notion of recollective imagination requires the disruption of chronological (linear) time. In other words in this notion the past can be "imagined" and the future "remembered". This disruption of the traditional concept of time becomes relevant for interpretation in regard to the application of past decisions. To imagine the past means to reinterpret the past, to give it new meanings and new applications. Concepts like memory, history, the past and the future were often used in the TRC and the conversations on the TRC. André P Brink's reflection on memory in his discussion of Grace Marks gives a valuable perspective on how memory works. In the stories told before the TRC certain versions of the past were given, but as the report of the TRC itself states in future these versions might be altered and replaced with new memories. The past is imagined continuously in each and every story we remember and tell. But at the same time it also remembered. Cornell's phrase of "recollective imagination" captures this paradox of remembering while also imagining the past. The point of all this is that the special relationship between memory, the imagination and time in the TRC will influence legal interpretation, an ethical interpretation of equality in particular.

> Inevitably, evidence and information about our past will continue to emerge, as indeed they must. The report of the Commission will now take its place in the historical landscape of which future generations will try to make sense - searching for the clues that lead endlessly, to a truth that will, in the very nature of things, never be fully revealed.[226]

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225 *The report of South Africa's Truth and Reconciliation Commission* (1998) foreword, par 52-54.

226 *The report of South Africa's Truth and Reconciliation Commission* (1998) foreword, par 18.

... continuous landscapes

This is the final part of the thesis. It is followed by the required bibliography, after which the journey would seemingly come to an end - for now. Or perhaps not, even for now. The journey, the reflection, the conversation, the reading - everything that went into this text - goes on. Nothing is coming to an end, or has been solved. The landscape never stops. It changes from one type to another, and there is no point where we can say we have left the landscape. I am not at the grand finale. I am not about to put forward my definitive test for an ethical interpretation of equality. In other words, this is not a conclusion. Nor is it an end note. It is not a summary either, because I am not merely repeating in briefer form everything that I have said so far.

I used the image of landscape for this thesis because I hoped to capture the complexities of public space, equality and justice. I wanted to describe an "in between" position and to avoid extreme positions. My perspectives on public space, equality and justice are founded on a double-handed approach.

An ethical interpretation of equality acts as an "in between" position. It is a way of interpretation that takes into account the ethical intersection of public space, equality and justice. The heart of an ethical interpretation of equality is that it radically acknowledges difference and otherness, in other words difference is not comfortably perceived as unproblematic. Difference is radical difference that cannot be submitted to an instrumentalist test or formula. By the same token the other is not seen as the "other" of myself, but as the "other that can never be known".

In my view, the South African Truth and Reconciliation Commission is an embodiment or manifestation of the intersection of public space, equality and justice and a concrete example of an ethical interpretation of equality.

Because the future, too, is another country[1]

As the title indicates, my aim with this thesis was to reflect on an ethical interpretation of equality. One of the reasons was that I grew up in a country where there was severe inequality. After the transition to democracy, equality appeared as one of the fundamental values of our democratic society. Section 39 of the constitution requires that all law must be interpreted in the light of equality (together with dignity and freedom). Equality is not only a fundamental value that must guide us in the interpretation of all law, it is also a concrete aim that must be strived for in the upliftment of the major part of our society. Yet, how do we understand equality? What

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[1] *The report of South Africa's Truth and Reconciliation Commission* (1998) foreword.

do we mean when we talk about equality? Or when we strive for equality as an ideal and envisage an equal society? These questions inspired me to write a thesis on equality. My fear is that even though substantive equality has replaced formal equality, substantive equality will once again become formalised with the effect that difference will be reduced and rejected.

However, I realised from the start that I could not write a thesis on equality. I do not know what equality means. To be honest I do not think that *equality exists*. I decided to describe a certain understanding of equality that I thought to be of value in the South African context. This understanding, to my mind, could best be described as an "ethical interpretation of equality".

In my description of an ethical interpretation of equality, I discussed the three elements of what I call an ethical intersection of public space, equality and justice. However, the ethical intersection is not an intersection of merely any vision of public space, nor merely any perspective on equality or landscape of justice.

I elaborated on various visions of public space and endorsed a specific one. I said that South African visions of public space must be reconstructed and transformed. I used the two concepts of reconstruct and transform because on the one hand public spaces must be positively constructed and created but on the other hand past and present conceptions of public spaces must be challenged, undermined and changed. I support a heterogeneous vision of public space, where difference is accepted. I am drawn to the possibility of a public space where action can take place, human plurality is displayed and humans appear to each other.

In my view the TRC as an event was such a reconstructed and transformed public space. The TRC was a reconstructed public space, because physical spaces of public gathering were constructed throughout the country. More important than the physical spaces, were the public discourse and public dialogue which were created by the TRC. The public dialogue and public discourse will have an ongoing reconstructive effect on

public space in the future. The TRC might have been a single historical moment, but in my view it opened up the possibilities for public space in the future. The TRC was an example of a transformed public space because it was representative of race, ethnic grouping, language, religion, sex, gender, class and much more. I view it as a transformed public space also because things that were banned from public dialogue in the past were the centre of the TRC's investigation. Another reason why it was a transformed public space is because the rational legalistic model was challenged by the telling of and listening to stories. The faceless absent South African became embodied, and present.

I have mentioned in Part 1 how the centenary of the South African War created a public space. The fact that people who were excluded in the past, black people and women, became part of the public space surrounding the centenary celebrations transformed the exclusive event and remembrance of this part of South African history to an inclusive source of public dialogue. Even the name of the war changed. In the past the war was called the *Boer War* or the *Second Liberation War*. The new name, the *South African War*, strives to encompasse each and everyone in South Africa. In my view, if not for the event of the TRC, the centenary of the South African Boer War would not have been accepted in such a positive way by all groupings.

I believe that the event of the TRC has altered (reconstructed and transformed) South African visions of public space. Obviously, whether and how public spaces will take shape in future will depend on the South African public in general and on our institutions. The "phantom" of the public will haunt us, but it is in our hands to ensure that certain concrete moments of public space are created.

Sport has always been a public event in South Africa and since 1990 it has become more inclusive. Rugby and cricket are not exclusively white sports anymore. More and more whites are becoming enthusiastic soccer supporters. Part of this transformation in support is because rugby and cricket teams are, not wholly, but nevertheless more representative than in the past. Another reason is that there has been a change in

attitude. The change in the country from authoritarianism to democracy had an effect on the sports arena as public space. Sport has for a long time been a contentious public and political event. During the years of apartheid South African teams were not allowed to play in countries who objected to the political system of authoritarianism and segregation based on race. South Africa in turn refused teams who had black players to play in the country. After the release of Nelson Mandela and the first democratic election in 1994 South Africa was readmitted to the international sports arena. Presently the issue of representative teams is again a contentious political topic. The point that I want to make is that something that is seemingly non political and for pure private enjoyment like sport was and still is a public space where action and speech can take place. People who are not really interested in public issues are drawn into public dialogue because of their support for their sports team. On the other hand people, like me, who are not interested in sport, but interested in public issues are also drawn in. Sport, like the centenary of the South African War, is an example where public space appeared in an unlikely and unexpected context.

Sometime during 2000 local government elections will take place. Local government politics can be an excellent public space where each and every individual can participate and become part of a broader public debate in the context of practical issues that can affect their particular circumstances. Participation in these elections will be a great challenge to South Africans to reconstruct and transform public space.

The context closest to me where I strongly believe public spaces should be reconstructed and transformed is the university and law faculties in particular. I would like to see that we encourage public discourse and dialogue in our lectures and on campus in general. Part of this process is to encourage student participation in student politics, but even more importantly, to recreate the curriculum of the law degree and the general attitude of the legal mind. Easier said than done, I must concede, but if we want to see a change in society a good place to start is by making law students more aware of the influence of public space, politics and democracy on the law. The tension between legal formalists and critical theorists can be a creative tension if the law faculty

can be a public space where action and speech can take place, between the lecturers and between lecturers and students.

The perspectives on equality that I think are best suited to the South African context and for an ethical interpretation of equality are those that accept the fact of difference and recognise the significance of relationships and public space for equality. I accept the concept of justice as the limit to any present system, in other words that justice can never be achieved fully in the present and serves as an ideal. It is precisely this concept of justice that makes an ethical interpretation of equality ethical: the realisation of the impossibility, incompleteness and fallibility of all present attempts to accept difference, ensure equality or achieve justice. I repeat a point that I have already made several times in this thesis, that the understanding of justice as unattainable in the present is not a nihilistic or cynical rejection of justice. I am also not denying that there are and always will be moments where justice is served. However, the reason why I believe we should insist on the impossibility of justice in the present is to prevent us from feeling satisfied that it is possible to attain justice within the parameters of a rational human made system. I fear it is such complacency that leads to totalitarian or at least undemocratic and very unjust contexts. The belief in the impossibility of justice to be achieved fully in the present inspires and motivates us to keep on working on it. Another aspect is that we cannot put forward one ideal of justice. Our ideals for justice must be, like our society, multiple. In our search for justice difference must also be recognised.

At this point I want to return to my discussion of some of the equality cases that have been decided by the Constitutional Court. In regard to the *Hugo* case[2] I have argued that the court followed an "instrumental approach" in deciding that a presidential pardon to all single mothers with children under the age of 12 did not amount to unfair

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[2] *President of the Republic of South Africa and another v Hugo* 1997 (6) BCLR 708 (CC). I have discussed this case in Part 2 "... perspectives on equality".

discrimination.[3] The majority of the court applied its approach of substantive equality to conclude that the state did not discriminate unfairly against Hugo, a widower and the father of a son under the age of 12. This case illustrates something about my fear that substantive equality will again become formalised and why I argue for an ethical interpretation rather than a substantive interpretation of equality. The court said that we cannot insist on "identical treatment" and that each case will require a careful and "thorough understanding" of the impact of the discrimination in the particular case and that a "classification which is unfair in one context may not necessarily be unfair in a different context". This is exactly what we generally understand under the substantive approach. But it is striking how the court only focuses on certain particulars and contexts. O'Regan in her judgement focused on the *group* which has suffered discrimination. She relied heavily on "social reality" which is that at present and in the near future most mothers will bear the primary caretaking responsibility. Kriegler, who delivered a minority judgement, argued that to regard mothers as the primary care givers is a root cause of women's inequality. What I find encouraging about Kriegler's approach is that he emphasised the importance "of both men and women to form their identities freely". An ethical interpretation of equality does not accept one social reality as the final one. If one takes difference seriously the implication is exactly that difference cannot be reduced to a generalisation of sameness, not even to prove a political point. One set of the concrete contexts and specific circumstances that was ignored by the court is that of the child, Hugo's son. From the perspective of an ethical interpretation of equality the state discriminated between the children of single mothers and the children of single fathers because not enough attention was given to the concrete contexts of the children. In this respect the court also did not follow a relational approach, in other words the special relationship between a parent and a child was ignored and only the parent's rights received attention. The substantive approach followed by the court investigated the past and present context. An ethical interpretation of equality follows a future-orientated approach and does not accept a present experience as "the reality". An ethical interpretation of equality would have

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[3] I have used Pierre Schlag's ("Rights in the postmodern condition" in Sarat and Kearns (eds) (1997) *Legal Rights. Historical and philosophical perspectives* 263-304) concept of "an instrumental aesthetic".

acknowledged the concrete context and specific circumstances of Hugo and his son. It would have accepted radical difference, in other words not the difference as perceived by a substantive approach to equality. An ethical interpretation of equality does not presume to know difference fully and to accommodate difference fully.

In the Walker case[4] the court had to consider whether the Pretoria City Council's differential treatment of people living in different geographical areas along racial lines amounted to unfair discrimination. The court decided that the differentiation in method of payment between people living in different areas did not amount to unfair discrimination. In making this decision the court considered the difference in concrete contexts and specific circumstances of living. The people in Pretoria who payed a higher rate lived in far better conditions and received better services than those living in Mamelodi and Atteridgeville. In this case, the court acknowledged the difference in concrete contexts and did not apply an instrumental predictable approach to equality. With regard to the City Council taking legal steps to recover payments from some residents and not from others the court found that this practice amounted to unfair discrimination. The fact that the court made a different finding in regard to the differential treatment in taking steps to recover payments is another positive aspect that shows that the court considered the contexts and the difference between the two practices. As I have already mentioned the court ordered Walker to pay the money he owed to the City Council even though it conceded that it was unfair discrimination to take steps against him and not against other defaulters. The court here did not only take regard of the past and the present, but was also future-orientated. The decision reflects the undecidability of law and the impossibility of justice. I am not labelling the court's approach in *Walker* as an ethical interpretation of equality, but spectres of an ethical interpretation can certainly be identified. The court realised the significance of public space, equality and justice and interpreted equality in the light of the ethical intersection between them. Walker and people in situations similar to Walker were treated by the court with a better understanding of equality than Hugo.

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[4] 1998 (3) BCLR 257 (CC). I discussed this case in Part 2 " perspectives on equality".

The actual application of an ethical interpretation of equality must still be tested in many concrete contexts and specific circumstances. This is something that I shall occupy myself with in future. This thesis was the first step towards an ethical interpretation of equality. I want to stress that I do see this not only as an abstract theoretical interpretation. In my view an ethical interpretation of equality is not only a philosophical and theoretical point of view but something that can be tested in real situations. Part of an ethical interpretation of equality will be to challenge the law's current belief in fixity. The challenge will be to show that an ethical interpretation of equality and accordingly an open-ended approach can have a more substantial effect on the concrete contexts and specific circumstances of individuals than a formalised approach, and at the end can serve the ideal of justice better. If an ethical interpretation of equality was followed in the case of Hugo, his son and himself could have found themselves in better, more just circumstances.

The TRC was the example I used as a practical illustration of the ethical intersection between public space, equality and justice. I explained why I regard all three features as present in the TRC, and how they are connected. The TRC was a public event and an example of public space. It was an equal space. More than that, in my view, an ethical approach to equality was followed by recognising the difference between victims and perpetrators. The TRC treated all persons equally, but accepted that equal treatment does not amount to sameness. By accepting apartheid as a crime against humanity the TRC regarded the concrete contexts, specific circumstances and difference. But even the TRC inevitably failed in some cases to recognise the radical difference that it was confronted with by some of the stories.

Antjie Krog[5] repeats the tale of Lekotse, the shepherd. Lekotse told the TRC how his family was affected since the day when the police came to his house, broke down the door and violated the privacy of their home.

> Lekotse: My family was affected since that day. ... Now my life was

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[5] (1998) *Country of my skull* 210-220.

affected since that day. It was at night ...

Ilan Lax: I want to know about your children first.

Lekotse: I have ten children, two have passed away ... Now on the day of the assault, I was with three children at home ...

Lax: Can you tell us about the incident that happened. Was it in May 1993?

Lekotse: Maybe you're right - you know my problem is, I was a shepherd. I cannot write and forget all these days, ... Now listen very carefully, because I'm telling you the story now ... They were [at my home] ... you know, it's a pity I don't have a stepladder. I will take you to my home to investigate ...

Lax: You indicate that you injured your shoulder. Did you sustain any other injuries?

Lekotse: I was not injured anywhere else ...

Lax: In your statement you mentioned you were injured in your ribs? I'm just helping you to remember.

Lekotse: Are you not aware that the shoulder is related to the *ribs* sir?

Lax: Did you or your son ever make a case against the police?

Lekotse: We never took any initiative to report this matter to the police, because how can you report policemen to policemen?[6]

Krog notes how Ilan Lax, the leader of the testimony, at the beginning of his story continually interrupted Lekotse. He did this because of a specific *technique* employed by the TRC when a testimony was given. Krog explains that the leader of a testimony had the twofold task of firstly, steering the testimony in a direction that will yield enough facts of use to the commission and secondly, of letting the testimony unfold as spontaneously as possible so that there can be healing and renewed self-respect. This is why Lax started of on a personal note by asking him about his children. But, as Krog observes, this technique made the shepherd impatient. He wanted to continue with his story about the event that affected the life of him and his family forever. Lax kept on

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[6] Krog (1998) *Country of my skull* 210-216.

interrupting him and at a certain stage the shepherd spoke to close to the microphone so that Lax had to ask him to speak more softly. Then Lax indicated that he had to start and asked the date.

> This throws the narrator off course again. Surely the precise date on which your life was destroyed is irrelevant? It could have been any day, the important thing is that it happened.[7]

Lekotse hesitated for a moment and said that being a shepherd he cannot write and cannot remember dates.

> But he is a hardened survivor, and he rightly gets firm with Lax: "Now listen very carefully, because I'm telling you the story *now*." He starts with a contradiction: "On that day, it was night." And this introduces the ambiguity that is maintained throughout the story, not only in the facts of the testimony but in the symbols used: day and night, white and black, life and death, educated and illiterate.[8]

Lekotse gave attention to details in his story: The police broke the door out of the door frame, stormed into the house with dogs, insulted the occupants, opened the closets and threw the contents on the floor. Lekotse, being a shepherd, said that not even a jackal when it gets in among the sheep, behaves like this.

> They were worse than jackals, says Lekotse. And since the jackal is the shepherd's greatest enemy, a threat to the flock night and day, he means that the security police exceeded his worse expectations of evil.[9]

Krog notes how Lekotse tried to understand the behaviour of others and transplanted

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7 Krog (1998) *Country of my skull* 217.

8 Krog (1998) *Country of my skull* 217.

9 Krog (1998) *Country of my skull* 218.

himself in the positions of the farmer who allowed the police to do this to him and the police.

> What makes his story all the more poignant is the fact that he can imagine himself in the other characters' positions, but no one seems able to empathize with his own. His empathy, his ability to think himself into other positions, goes beyond the night he is describing. It even includes the people from the Truth Commission. Perhaps, he is thinking, they are struggling to understand fully the destruction that was sown in his house. "It's a pity I don't have a stepladder. I will take you to my home to investigate ..."[10]

Lekotse experienced frustration with the lack of communication between him and the Truth Commission. One of the reasons for the lack of communication is because of the *technique* followed by the TRC in leading his testimony. I find it quite ironic that a specific technique can be employed with the aim of getting a more spontaneous testimony. Lekotse's frustration was highlighted by the last two questions asked by Lax about his injury and if they reported the incident to the police. His responses to these questions were "Are you not aware that the shoulder is related to the rib" and "How can you report policemen to policemen?" Lekotse told the TRC that he requested the police to kill them and to bury them all in one grave. He repeated this request again while delivering his testimony: "If one of these policemen is around here, I'll be happy if one of them comes to the stage and kills me immediately." Krog comments on this request with reference to an unpublished interview of the Zulu poet, Masi Kunene, where he told American academic, Colleen Scott, that "in the African system there is diversity. The ideal is diversity, not symmetry."[11] Krog argues that this notion of diversity is echoed in Lekotse's need to understand the actions of the intruders.

> He does not naturally ignore or resist the police. His instincts are to give

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[10] (1998) *Country of my skull* 219.

[11] (1998) *Country of my skull* 219.

> them access to the fullness of his world, and he expects to gain access to their world.[12]

Krog observes how the police not only refuse Lekotse access to their world, but at the same time invades and violates his world, his private space.

> The policemen's intention is not just to invade his private space, but to damage the access to it in such a way that it will never be a private space again. Although the police penetrate his world, they refuse him access to theirs, and their intentions, which would help him to redefine his own space. ... From the safe shelter which the shepherd has created for his family, they are driven out to where it is so cold and inhospitable that the best place for his flock becomes the grave.[13]

This story illustrates something significant about the difficulty of difference. If there ever was and ever will be an institutionalised process and space aimed at taking account of, celebrating and nurturing difference it was the TRC. Yet, it failed. It failed to accept the diversity, the otherness of Lekotse's life world and to place itself in his position. It was not because of lack of intention that the TRC failed. It is as if the TRC could not address the shepherd's difference fully because it was hampered by its own rational beliefs and rational life world. The TRC followed a specific technique when leading a testimony. This illustrates something about my uneasiness with substantive equality. I fear that the use of a technique or a test will prevent us from regarding difference without reducing it to something that we know.

What are the implications of this for an ethical interpretation of equality? Perhaps that the shepherds of this world might be better able to perceive the meaning of an ethical interpretation of equality than trained legal minds. What this story does tell us is that to regard difference is not easy, to have good intentions is not enough, but it also tells

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12 (1998) *Country of my skull* 219.

13 (1998) *Country of my skull* 220.

us that sometimes it is possible. Lekotse followed an ethical interpretation of equality by not putting himself above or beyond the people he had to deal with. He showed a willingness to share his understanding and to listen to the intentions of others with the hope that he may obtain a better understanding of their life world. An ethical interpretation of equality poses a huge challenge to formal equality, but also to substantive equality as it is applied by South African lawyers, courts and institutions. To return to the philosophy of deconstruction, an ethical interpretation of equality asks a certain delay, a slowness and a carefulness.[14] Difference should be regarded as a reality, but not as a present reality that can be known and identified. Rather, difference should be carefully approached from the starting point of diversity.

I had an experience with one of my Legal Philosophy students this year that reminded me once again of my own inadequacy in regard to difference. The student asked me before the lecture started whether he can leave after an hour because his lift club is leaving at a certain time and should he miss his lift he will not be able to get home. He was living quite a distance from the university and there was a moratorium on all taxis at that stage because of taxi violence. I said that it is fine with me and started with the lecture. After an hour I heard a faint whistling in the distance, but did not really take notice of it. I went on with the lecture with the faint whistling remaining in the background. When I looked across the faces of the students at a certain stage I noticed that Mr Bodiba's, the student who asked me to leave early, face and body was tense and I immediately realised that the whistling was his sign to go. I stopped and said, "Mr Bodiba, is this your lift?", upon which he sighed a relieved yes and got up. As he walked out hastily, I said "you should have told me that you must go", but as I said it realised that if I had been sensitive enough to the situation I might have been able to recognise the whistling for what it was ...

I said that I am not going to spell out a definite test for equality. I nevertheless tried to start to show what an ethical interpretation of equality is, and how it can make a difference to how we perceive difference.

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[14] I discussed the philosophy of deconstruction in Part 2.

> And I wade into song - in a language that is not mine, in a tongue I do not know. It is fragrant inside the song, and among the keynotes of sorrow and suffering there are soft silences where we who belong to this landscape, all of us, can come to rest.[15]

For a while, before we continue the journey through the landscape.

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[15] Krog (1998) *Country of my skull* 217.

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