

What would my mother say? Refusal, forgiveness and the subjectivity of South African women*

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OPSOMMING

Wat sou my Ma sê? Weiering, Vergifnis en die Subjektiviteit van Suid-Afrikaanse Vroue

Hierdie artikel handel hoofsaaklik oor die subjektiviteit van Suid-Afrikaanse vroue bespreek vanuit die oogpunt van vergifnis en versoening. Die prosesse van die Waarheids- en Versoeningskommissie (WVK) word as fokuspunt gebruik om oor die posisie van vroue na te dink. Die getuienis van 'n moeder voor die WVK asook ander narratiewe word bespreek teen die agtergrond van die konsep van "weiering" soos mee omgegaan binne die post-apartheid regsleer. Daar word gepoog om aan te dui dat die prosesse van die WVK bygedra het tot die huidige posisie van Suid-Afrikaanse vroue. "Weiering" word voorgehou as 'n moontlike alternatiewe benadering tot die reg wat eweneens alternatiewe moontlikhede na vore kan bring. In die artikel word daar voorgestel dat aandag aan die manlike kulturele orde geskenk moet word om sodoende die marginalisering van vroue aan te spreek. Verder word daar voorgestel dat die konsep van "weiering" die daaglikse lewe en stryd van Suid-Afrikaanse vroue kan uitlig en na vore bring.

1 Introduction

In the context of post-apartheid jurisprudential thought, Van Marle has asked about the possibility of women as subjects with the capacity to resist and refuse.¹ It is from this perspective that I engage, in this article, in some instances of refusal. The framework of forgiveness and reconciliation is utilised as focal point in order to reflect on the subjectivity of South African women.² I discuss the story of a mother testifying before the Truth and Reconciliation Commission (TRC) in the

* This article is based on relevant parts of my LLM dissertation titled *Contemplating a Post-Apartheid Feminist Jurisprudence* completed at the University of Pretoria. An earlier version of this paper was also presented at the Law Teacher's Conference held in Stellenbosch during February of 2011. I would like to thank Karin van Marle for her guidance, friendship and valuable advice. I would also like to thank my former colleagues at the Department of Jurisprudence, University of Pretoria for their support.

1 Van Marle "Laughter, refusal, friendship: Thoughts on a 'Jurisprudence of Generosity'" 2007 *Stell LR* 198 198.

2 One of the larger issues underlying this research is the search for alternatives considering law's failure to alter the lives of women in a meaningful way. Du Toit reminds that rape figures have remained fairly constant from the political transition to the present, meaning that

first section below. I also employ other feminine descriptions. It is from the belief that the power of narrative may displace stereotypes associated with women as well as bring to light unspoken politics, that I consider some stories. Thereafter, I explore Du Toit's feminist analysis of the processes of the TRC, not only as a possible explanation for the current position of South African women, but also as a concrete example of their marginalisation.³ The notion of "refusal" as described within post-apartheid jurisprudence is considered in the last section so as to suggest a possible alternative approach to law.⁴

2 Forgiveness and Feminine Refusal

The Gugulethu Seven incident was one of the better known killings during the mid 1980s that involved the murder of seven young ANC activists.⁵ Notrose Konile testified before the TRC as the mother of one of the Gugulethu Seven. Most of the other mothers testifying before the Commission showed an extraordinary spirit of forgiveness.⁶ Mrs Ngewu, also the mother of one of the Gugulethu Seven, responded to the question of a lengthy prison sentence for her son's murderers in the following way:

I do not agree with this view. We do not want to see people suffer in the same way we did suffer. We do not want to return the suffering that was imposed on us ... We would like to see peace in this country ... I think all South Africans should be committed to the idea of reaccepting these people back into the community. We do not want to return the evil that the perpetrators

democratisation and a bill of rights that ensures gender equality has had little or no impact on the rape of women and children in South Africa. See Du Toit *A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* (2009) 2. Critical legal scholars as well as writers in the post-apartheid legal context have also continuously maintained that the law is lacking in its capacity to effect social change. See for example Van Marle 2007 *Stell LR* 198, Douzinas *The End of Human Rights* (2000).

³ Du Toit 9-32.

⁴ Many legal scholars, in an attempt to reflect on the place and nature of law in post-apartheid South Africa, have been committed to formulating and searching for a post-apartheid jurisprudence. These engagements have attempted to rethink established ideas around and related to law. The engagements around the notion of refusal may be seen as part of the search for a post-apartheid jurisprudence. Van Marle (ed) *Refusal, Transition and Post-Apartheid Law* (2009).

⁵ Krog, Mpolweni & Ratele *There Was This Goat: Investigating the Truth Commission Testimony of Notrose Nobomvu Konile* (2009) 5. See Jooste *Contemplating a Post-Apartheid Feminist Jurisprudence* (LLM dissertation University of Pretoria 2011) 102-106. An estimated 30,000 people attended the funeral of these young activists. Krog *et al* asserts that this underlined the perception that the tide against the apartheid system could no longer be stemmed. The Gugulethu Seven killings demonstrated like few others the fatal mix in the townships of poverty, anger, unemployment, the desire to take up arms, change and liberation which were manipulated and fuelled by the operations of the apartheid police and security forces. Krog *et al* 5.

⁶ Krog *et al* 5.

committed to the nation. We want to demonstrate humanness towards them, so that they in turn may restore their humanity.⁷

Krog *et al* mentions that in identifying and calling the mothers of the Gugulethu Seven to give testimony, the Truth Commission was looking for a certain kind of narrative: “that of a brutal regime, stoic struggle by the human spirit for truth and freedom and an eventual triumph over evil.”⁸ The family members of the Gugulethu Seven were supposed to show how resilient they were and eventually how forgiving. Although the Commission had been given parts of this grand narrative from the other mothers, they did not get it from Notrose Konile. Her testimony was one of the most incoherent testimonies that came before the TRC. She talked for a long time about a dream she had of a talking goat and of being trapped under a rock.⁹ She did not relay the events leading up to her son’s death chronologically and jumped from the realm of dreams to the realm of reality and back again to her dreams.¹⁰ She confused spaces and places. I quote from Krog, Mpolweni and Ratele:

Mrs Konile began her testimony by sighing heavily six times within five rather short sentences, as if she were saying: ‘I am so tired - I am so tired even before this process of which I already despair begins.’ While the Truth Commission hearings were meant to deal precisely with ‘telling’ its cathartic effect and thus forgiveness, the Commissioners appeared unprepared for and uneasy about Mrs Konile – they addressed relatively few questions to her. On the video footage the discomfort of the other mothers with her testimony is also clearly visible. It was as if her story resisted the imposed framework of the hearings, as if her mind resisted easy readings. She seemed to say ‘mine is not part of what you want to hear. I will tell you of my dreams, my miserable life. I want to do my own kind of accounting’.¹¹

Her response to the question on forgiving her son’s murderers was the following:

I wouldn’t be able to talk to them, it is their fault that now I am in this misery, now I wouldn’t know what to do with them ... I can never tell them what to do. I have just given up everything.¹²

In a subsequent interview many years later, she stated: “I do not want to lie ... I did not forgive them”.¹³ The all-forgiving black mother is usually portrayed as the basis of reconciliation. Notrose Konile refused to embrace this symbolic space and she relayed her story in a particular cultural and metaphoric way. In the context of law and reconciliation, the words of the fictional Winnie Mandela in Njabulo Ndebele’s novel *The Cry*

7 *Idem* 11.

8 *Idem* 56.

9 *Ibid.*

10 *Ibid.* See 6-17 for a detailed account of Mrs Konile’s testimony.

11 *Ibid.*

12 *Idem* 17.

13 *Idem* 145. Krog *et al* mentions that the mothers of the Gugulethu Seven were supposed to become the “custodians of the collective memory of the fallen hero”.

of Winnie Mandela have been quoted many times. It seems again appropriate considering Notrose Konile's testimony:

I give you my heaven as possibly the single element of consistency in my political life: My distrust of reconciliation ... I will not be an instrument for validating the politics of reconciliation. For me, reconciliation demands my annihilation.¹⁴

Two more instances of female refusal may be evoked in the context of reconciliation. In his work on mourning, refusal and forgiveness, Jaco Barnard-Naudé recalls the murder of two brothers.¹⁵ Vuyani and Madoda Papiyana went out celebrating on the evening of 27 April 1994 just after casting their votes in South Africa's first democratic elections. Later that evening Vuyani was killed and Madoda found injured. The brothers were victims of a drive-by shooting. Their attackers were Cornelius Pyper and James Wheeler who supported the AWB or *Afrikaner Weerstand Beweging* which is the well-known rightwing organisation that in the run-up to the elections called on its members to militantly oppose the transition to a democratic South Africa. Both Wheeler and Pyper were found guilty and sentenced to fifteen years' imprisonment.¹⁶ The father of Vuyani and Madoda, Zenam Papiyana, received a letter from Pyper stating that he would like to pay for Vuyani's funeral costs and that he wished to see Mr Papiyana in order to apologise for murdering his son.¹⁷ Zenam Papiyana agreed to meet with Pyper and declared it to be the best thing he could ever have done as it helped him to overcome some of the emotional problems he had as a result of his son's death.¹⁸ Mrs Papiyana declined the invitation stating that she would not be able to face her son's murderer.¹⁹ The other instance brought up by Barnard-Naudé is the words of the character of Joyce Mtimkhulu. When asked whether she will forgive those responsible for her son's death, she replied: "Not today".²⁰

The female refusals above may be associated with the refusal of Ophelia in East-German playwright Heine Müller's *Hamletmaschine*. Müller rewrote Shakespeare's *Hamlet* in eight pages and considered Ophelia the main character. Ophelia turns her body into vehement revolt by declaring:

This is Electra speaking. In the heart of Darkness. Under the sun of torture. To the capitals of the world. In the name of the victims. I eject all sperm I have received. I turn the milk of my breasts into lethal poison. I take back the world I gave birth to. I choke between my thighs the world I gave birth to. I

14 Ndebele *The Cry of Winnie Mandela* (2003) 112-113.

15 Naudé "The work of mourning, refusal, forgiveness" in *Refusal, Transition and Post-Apartheid Law* (ed Van Marle) (2009) 103.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

20 *Idem* 119. Joyce Mtimkhulu is a character in Michael Lessac's musical play *Truth in Translation*. The character is modelled on the real Joyce Mtimkhulu who testified before the TRC about the disappearance of her son Sipiwo Mtimkhulu.

bury it in my womb. Down with the happiness of submission. Long live hate and contempt, rebellion and death. When she walks through your bedrooms with butcher knives you'll know the truth.²¹

In this play Ophelia refuses the Lacanian designation of her as an object of male desire.²² She revolts against her place in the masculine symbolic order. Du Toit has argued that the TRC established or contributed to the establishment of a masculine symbolic order in the South African context.²³ In her analysis Du Toit focuses on rape, but her argument also sheds light on the broader aspect of women's political agency and subjectivity within a masculine symbolic order. In her reading of the processes of reconciliation, the TRC entrenched a single-sex model of politics in which masculine agency and victimhood posed as the universal. According to Du Toit, the TRC imitated and reiterated the strategy of the larger Western Symbolic order to dichotomise female sexuality and agency.²⁴ Before turning my attention to Du Toit's analysis it should be mentioned that within what is called "the feminine turn" of twentieth century European philosophy, the dominant Western cultural order is identified as masculine and patriarchal.²⁵ In other words it is a hegemonic cultural order sanctioned by male ideologies and concerns. The "feminine" within this order is excluded and subordinate and this, *inter alia*, results in feminine invisibility.²⁶ Harms committed against women, such as rape and other forms of sexual violence, as well as their marginalisation in general is located by feminist sources as a product of

21 Müller *Hamletmachine* at Théâtre Gérard Philipe in Saint-Denis 1979. See Hirvonen "Desiring Body in Revolt: Transgression in Ophelia" 2010 copy on file with author.

22 See Jooste 88, 97. In Lacanian psychoanalysis the moment when the infant recognises itself as having an identity separate from the mother, it experiences loss and pain. The pain and loss results in a repression that buries the memory of the relationship with the mother in the unconscious and simultaneously the infant enters the Symbolic realm so as to fulfil its desire for the Other. Once the infant is projected into language, the primary identification with the mother is projected only as lack. The phallic mother and what she represents cannot be expressed in language. Lacan appropriates signification in general with the masculine. Woman as a result, in Lacanian psychoanalysis, is identified only by her lack of phallus and can therefore not be represented in the symbolic order. See in general Minsky *Psychoanalysis and Gender: An Introductory Reader* (1996).

23 Du Toit *op cit*. See also Jooste 12-15.

24 Du Toit 12.

25 *Idem* 3-7.

26 According to Derrida the conflation of reason (logos) with the phallus (the authoritarian origin of a decidedly male symbolic order) has led to phallogocentrism as being characterised as the foundational feature of Western thought. Here we find reason and narrative brought together in a gendered unity. The combination of a logocentric system of exclusion and inclusion and a phallic symbolic order results in the exclusion of woman from the narrative of Western thought and it also results in feminine invisibility. Clark explains this in simple terms: To be a meaningful member of the societal order is to be phallogocentric. See Clark "Deconstruction, feminism and the law: Cornell and Mackinnon on female subjectivity and Resistance" 2005 *DUKEJGLP* 126. See also Jooste 80-88.

a one-sided or masculine cultural order.²⁷ Questions on the marginalisation of women automatically render questions on women's subjectivity within a masculine symbolic. Therefore, in order to address the marginalisation of women, the nature, extent and consequences of the larger cultural order should be addressed. The Western symbolic order is therefore described as an order of gender hierarchy. Du Toit mentions that South Africa's longstanding history of interaction with the West, its predominantly Western legal system, its place in the global economy and the historical collaboration between social systems indicates that an equation with the masculine Western symbolic order with the South African cultural order is not only appropriate, but necessary.²⁸ Moreover, it is well taken from various feminist sources that the feminine and women occupy a subordinate position within traditional Western metaphysics of which currently dominant liberal theories is a consequence.²⁹ This of course includes those theories underlying the progressive South African constitution. She aptly notes that although Western metaphysics are evidently Western in origin:

the economic and military dominion of the West has ensured that virtually no spot on earth remains fully outside the orbit of, and thus untouched by, the symbolic orders, 'meaningful universes' and master narratives of western modernity.³⁰

Therefore, the western symbolic, as the currently globally dominant cultural order, leaves no single so called "non-western" culture intact.³¹

I detect from Du Toit's critical analysis five main reasons for the TRC's establishment of a masculine symbolic order which I discuss in the section below.

3 Reconciliation and the Masculine Symbolic

In the first instance Du Toit contends that the TRC did not take women seriously as first order victims.³² Secondly, the TRC repressed the issue

27 Du Toit 3.

28 *Idem* 3, 202.

29 *Idem* 202. The Constitution of the Republic of South Africa, 1996. The South African constitution that has the familiar features of a liberal democracy also contains a more substantive vision of democratic inclusion, participation and accountability. It envisions the redistribution of the country's resources and benefits as well as the reconstruction of our society along egalitarian lines.

30 *Ibid.* A major contingent of Australian feminists has come to the same insight. See for example Pateman & Gross (eds) *Feminist Challenges: Social and Political Theory* 1987. Western modernity is characterised by its persistence on the masculine specific as universal.

31 Du Toit 4 mentions that the feminist critiques of the colonial era illustrated that dominant African symbolic frames collaborated with Western ones, at least insofar as both were patriarchal and one-sidedly masculine and both possibly became more so as a result of their interaction.

32 Du Toit 11. For a more detailed discussion on Du Toit's analysis of the processes of the TRC see Jooste 12-23.

of rape in its dealings with struggle rape victims.³³ Thirdly and importantly, historically and traditionally within the South African context, women have been excluded from definitions of the political through highly patriarchal cultures and social institutions.³⁴ The TRC did not conceive of the possibility of the need for political reconciliation between the sexes. It therefore failed to consider whether there shouldn't also be political transformation on the level of sexual difference, sexual politics and sexual oppression.³⁵ In the fourth instance, Du Toit suggests that the TRC failed to recognise rape as a political instrument. She contends that rape, by locating within a masculine symbolic order, functions as a way of maintaining the political space as masculine.³⁶ Struggle rape victims were never asked to forgive rape as an attempt to negate their female sexual difference. This connects with the third reason above, namely, that sexual difference was not conceived of as a political issue. Lastly, the TRC modelled victimhood and political agency on masculine presumptions by failing to recognise the masculine political context within which the hearings took place.³⁷

With regard to women not being taken seriously as first-order victims, Du Toit explains that women were given a prominent place in the processes of reconciliation and in the public performances of forgiveness.³⁸ The typical scenario was that women were asked to forgive human rights violations against their male family members, usually their husbands, sons, fathers and brothers. Hundreds of women publically forgave on behalf of those recognisable as the political agents on both sides of the struggle.³⁹ There were very few instances where women were asked to forgive on behalf of themselves.⁴⁰ And it would seem from the discussion above, where they were asked to forgive on behalf of themselves; they were expected to indeed forgive.

The typical scenario during the processes of reconciliation leads Du Toit to declare that women weren't taken seriously as first-order victims. She further explains that during 1996 when the hearings was well underway and when it became clear that women were doing most of the

33 Du Toit 11. Struggle rape victims refer to women that were raped by apartheid security forces in the course of interrogation as well as women raped by so-called struggle soldiers.

34 *Idem* 20.

35 *Ibid.*

36 *Idem* 9.

37 *Idem* 12, 20. Du Toit explains that the nature and harm inflicted and violation of rape is not and has not been obvious because of the fact that symbolic orders dominated or heavily influenced by the history of western ideas have a blind spot when it comes to acknowledging rape as a political and sex-specific crime. Rape and sexual violence is also seen as a way of securing or maintaining the social and political sphere as a masculine space as well as being seen as the result of a society that denigrates women. See for example Hester, Kelly & Radford (eds) *Women, Violence and Male Power: Feminism, Activism, Research and Practice* (1996).

38 Du Toit 11.

39 *Ibid.*

40 *Ibid.*

public forgiving, the Centre for Applied Legal Studies at the University of Witwatersrand made a submission to the TRC in what they perceived as a lack of sensitivity when it came to gender issues.⁴¹ The TRC, in response, established the Special Women's Hearings or Gender Hearings. These hearings were grouped together with the hearings of children and military conscripts and they were also separately conducted and reported on. Du Toit contends that by making women into a special case and by dealing with their victimhood on the side, the issue of the masculinity of the political sphere was avoided.⁴² These issues were contained outside of the main processes of reconciliation and further served to affirm the marginality of women.⁴³ The TRC also avoided the issue of rape. It was overshadowed by other forms of oppression and violence where men were the vast majority of victims.⁴⁴ She argues that the issue of rape was suppressed when the official version of the struggle was forged during the hearings and in subsequent report writing.⁴⁵ Du Toit states:

Framing the struggle in terms of men's struggles, leaving women on the roadside of history, the TRC contributed to the disappearance of rape and women's particularities – including women's history and their role in the liberation struggle – from the political and public consciousness and agendas after 1994.⁴⁶

Du Toit explains that during the struggle the rape of women was politically justified.⁴⁷ Rape was used as an instrument of torture, a weapon of terror and a reward for soldierly acts; stripping away women's political identity, agency and dignity.⁴⁸ There were deliberate attempts to shame women morally and sexually. In many cases women's bond with their children was exploited to expose them as vulnerable and there were attempts to tap into their sense of responsibility for dependent others.⁴⁹ On both sides of the struggle certain women were reduced to

41 *Idem* 12.

42 *Idem* 12.

43 *Ibid.* Du Toit further asserts that the marginality of women in the processes of reconciliation should have been seen as a structural necessity for the processes of masculine reconciliation. She contends that it remains a superficial gesture to ask whether women are included or excluded in a particular paradigm, system or symbolic order. Women or the feminine serves to guarantee or uphold the borders, boundaries and logic of a symbolic order or paradigm. With reference to Lyotard "One of the things at stake in women's struggles" in *The Lyotard Reader* (ed Benjamin) (1989) 144-115 she explains that the feminine is at the very heart or centre of the western political paradigm. The feminine constitutes its borders. It constitutes the limits of the rational, thinkable and political. Although women in this paradigm are endowed with activity, in the sense that the feminine is the condition for the existence of the paradigm, the feminine is still repressed and silenced without a voice of her own.

44 *Ibid.*

45 *Ibid.*

46 *Idem* 17.

47 *Idem* 16.

48 *Ibid.*

49 *Idem* 19.

unpaid prostitution which created a “license” for sexual abuse by the police, interrogators and soldiers.⁵⁰ Du Toit further mentions that in the ANC camps abroad, women comrades were raped and used as concubines, their role in the struggle therefore reduced to a sexual function.⁵¹ She identifies a paradox at the heart of the struggle: Women (and children) were portrayed as the ultimate reason for it while at the same time being foreign to it in the sense that they were marginalised and exploited.⁵² Women were therefore associated with what ultimately lies outside of reality, politics and war, but also associated with that which is being fought over, namely, land, home, family and human existence.⁵³

For support to her readings, Du Toit discusses Antjie Krog’s reports on the TRC hearings.⁵⁴ From Krog’s analysis it becomes clear that women militants were “broken” in jail by communicating to them that women should stay out of politics and should stay home and see to the responsibility of looking after their families.⁵⁵ Responsible women are purely private, apolitical creatures. They do not have an autonomous political identity and their role is merely supportive. Du Toit contends that women, during the struggle, could not be women in the sense of political agency or sexual specificity. If women entered the political sphere, which is masculine territory, they silently agreed to have their sexuality made into a public commodity in the service of the struggle.⁵⁶ Whether imprisoned in the freedom fighter camps or incarcerated in apartheid prisons, women were likely, on Krog’s reports, to be notified that their presence there meant that they had made the choice to make their sexuality available.⁵⁷ In this way the feminine or female sexuality was put up against political agency and the simultaneous incorporation of both was made logically impossible.⁵⁸

Du Toit describes how women as a group experienced great difficulty during the hearings to account for the sex-specific suffering.⁵⁹ She attributes this to the difficulty in explaining their political role in a context which perpetuated a masculine understanding of the political.⁶⁰ They were expected to translate their oppression in masculine universal terms perceived to be neutral terms. For Du Toit this resulted in the effective silencing of women’s voices.⁶¹ She contends that it is therefore not surprising that many women chose to remain silent about their rape.⁶²

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 *Idem* 16.

54 Krog *Country of My Skull* (1998) as cited by Du Toit *op cit.*

55 Du Toit 18-19.

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

62 *Idem* 20.

Several women declared that they were raped during the struggle, but could not testify about this before the TRC. The TRC had the mandate of getting as complete a picture as possible of the nature, causes and extent of politically motivated gross human rights violations. Acts of torture, killing, abduction and severe ill-treatment were some of the included violations.⁶³ Rape, however, was not included in the list. Du Toit argues that rape and other forms of sexual violence committed against women in South Africa currently should be understood against the background of the processes of reconciliation and its failure in dealing with rape.⁶⁴ She reminds that South African rape figures are contested, but that there is wide consensus over the fact that South Africa either has the highest or one of the highest rates of rape *per capita* in the world. There is an estimated 1.7 million rapes per year whilst 41 % of victims are under the age of twelve.⁶⁵ According to Du Toit, the TRC attempted to establish closure on a violent and illegitimate past. This resulted in the existence of a vacuum when it comes to gross rights violations at the moment. The rape of women and children is seen as private matters against the backdrop of a perceived morally and legitimate political sphere.⁶⁶ Violence against women and children is removed from the political sphere and political attention because of the fact that it has successfully been privatised or domesticated.⁶⁷

In Du Toit's reading the failure of the TRC to do justice to women rape victims as well as its failure to take women seriously as first-order victims was not a simple oversight, but is rather constitutive of the patriarchal symbolic order dominating the South African political landscape.⁶⁸ By not creating a space for a truly sexually differentiated politics and cultural order the TRC dichotomised female sexuality and agency. It failed to forge a new vocabulary and space within which to address the structural marginalisation of women in politics.⁶⁹ Thus, the failure of the TRC to recognise the masculine context within which the hearings took place in the first place resulted in the new dispensation being built, as it was before, on masculine presumptions and ideologies. The processes of reconciliation perceived as an integral historical, political and social turning point, resulted, *inter alia*, in the continuance of a patriarchal political and masculine symbolic.

As mentioned in the introduction, Van Marle has asked about the possibility of women as subjects with the capacity to resist and refuse. Before concluding, I turn my attention to her engagement with the notion of refusal.⁷⁰ I also discuss other post-apartheid jurisprudential

63 Ch 1 def 1(xi) Promotion of National Unity and Reconciliation Act 34 of 1995.

64 Du Toit 11.

65 *Idem* 2.

66 *Idem* 16.

67 *Ibid.*

68 *Idem* 6.

69 *Idem* 12.

70 Van Marle 2007 *Stell LR* 198.

engagements with this notion. The refusal to forgive may in this regard be associated with the refusal to submit to certain approaches to law, human rights and constitutionalism.

4 Post-Apartheid Jurisprudential Refusal

Van Marle has linked the notion of refusal with the notion of laughter. She discusses Cavarero who draws on a certain passage from Plato. The passage reads as follows:

While looking at the sky and scrutinizing the stars, Thales fell into a well. Then a quick and graceful maidservant from Thrace laughed and told him that he was far too eager to find out about everything in the heavens, while things around him, at his feet, were hidden from his eyes.⁷¹

Van Marle mentions Cavarero's response to this passage:

I am not sure that she was a servant or that she came from Thrace, but some woman laughed at the philosophers. A quick smile can often be seen on the faces of women as they observe the self-absorption of brainy intellectual men. Philosophers have put this down to biased ignorance, not realizing that it is the expression of a kind of detachment that locates the roots and meaning of female existence elsewhere.⁷²

Laughter and detachment are put forward as ways of refusing and resisting patriarchy. Detachment and laughter on this reading discloses the possibility for women to seek to create their own spaces from where to engage in political ways of living.⁷³ Laughter is "a response of refusal, neither active nor passive, but a refusal nevertheless".⁷⁴ Cavarero's mention of "detachment that locates the roots and meaning of female existence elsewhere" denotes an alternative outside of or other than that of the masculine symbolic universe.⁷⁵ Van Marle also discusses Cavarero's engagement with Penelope. Cavarero, Van Marle explains, retells the narrative of Penelope in which Penelope's act of weaving and unweaving is interpreted as a way of refusing the order that was forced upon her by patriarchal society.⁷⁶ Penelope weaves during the day and unweaves during the night. According to Van Marle Penelope, by weaving and unweaving, creates her own rhythm thereby creating a space for refusal.⁷⁷ Penelope has no desire to be part of Odysseus' world, but she also does not accept the role of women, producing clothes. Cavarero states:

71 *Idem* 197-198. Cavarero *In Spite of Plato: A Feminist Rewriting of Ancient Philosophy* (1995) 31 as cited by Van Marle. See also Jooste 103-131.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*

On the contrary, by unravelling and thereby rendering futile what little work she has done, she weaves impenetrable time... by doing and undoing Penelope weaves the threads of a feminine symbolic order from proportionate materials.⁷⁸

The role of all Greek women of Penelope's time is connected to the home and Penelope by weaving and unweaving refuses the space and role given to her by patriarchy. In the weaving room, the women engage in action and speech. The weaving room becomes a public space for political action. Van Marle contends by using Cavarero that:

According to the conventional standards of men's time as well as women's time, Penelope's time is 'empty' and 'futile' and therefore 'negative', 'a pure denial'. However, when judged against its own standards, this space and time becomes a 'feminine space' where women belong to themselves. It displaces the patriarchal order, setting up an impenetrable distance between that order and itself.⁷⁹

The notion of refusal is utilised by Van Marle to reflect on the possibility of a politics of refusal and ultimately a way of refusing traditional ways of thinking and doing law. The possibility that may arise from this engagement is the beckoning of another law and another politics. She also engages with the notion of generosity which illustrates the unexpectedness that breaks with the formality and predictability of law. It is this unexpectedness that discloses possibilities for refusal and therefore for new directions in law. She explains that Karl Klare's notion of transformative constitutionalism connects with a "jurisprudence of generosity" as used by Patricia Williams:

Jurisprudential conservatism ... may induce a kind of intellectual caution that discourages appropriate constitutional innovation and leads to less *generous* or innovative interpretation and applications of the constitution ... Caution in this context refers to a legal actor's relationship to legal materials and to interpretive work, not her moral courage ... My fear is that 'caution' of this kind might in some cases discourage a judge or advocate from investing intellectual resources ... Constitutional transformation might suffer accordingly.⁸⁰

Van Marle laments the fact that in South Africa it would seem as if transformation, socio-economic reparation and other social problems like violence are addressed mostly through the law and human rights.⁸¹ She reminds of the argument that the law is lacking in its capacity to effect social change.⁸² Van Marle relies on Hannah Arendt and Julia Kristeva to demonstrate the dangers of a society being overtaken by law, human rights and constitutional discourse:

78 *Ibid.*

79 *Ibid.*

80 Van Marle "Refusal, Risk, Liminality" in *Refusal, Transition and Post-Apartheid Law* (ed Van Marle) (2009) 1. Author's emphasis.

81 Van Marle 2006 *Stell LR* 194. Jooste 115-121.

82 *Ibid.*

... namely the result of a society where political action, thought, eternal questioning and contestation are absent and replaced with an understanding of freedom as mere commercial/economic freedom and of thought as calculated and instrumental.⁸³

Kristeva refers to “revolt in the psychic sense” which is a “permanent state of questioning, transformation, change and endless probing of appearances”. The notion of refusal may also be perceived as disruption. Patrick Hanafin mentions Herman Melville’s character Bartleby in relation to refusal.⁸⁴ When Bartleby starts a new job and is asked to do certain tasks, he merely states: “I would prefer not to”. He refuses to submit to any requests. Van Marle notes Hanafin’s words with regard to Bartleby: “his not saying, his passivity, his persistent just being there is enough to disrupt”.⁸⁵ Hanafin connects Bartleby to Maurice Blanchot as one of the French intellectuals that participated in the drafting of the Declaration on the Right to Insubordination in the war in Algeria.⁸⁶ The Declaration insisted on the right to refuse to go to war against the Algerian people. The Algerian War of Independence lasted from 1954-1964 and was marked by repeated massacres and torture. The signatories of the Declaration asserted an absolute right of insubordination and it was because of the inability of, *inter alia*, legal institutions to bring the military to account that Blanchot’s and the others felt themselves compelled to take a public stance. Hanafin discusses Blanchot’s reply to the criticism that the right to refusal embodied an ineffective gesture.⁸⁷ This criticism, according to Blanchot, misrecognises the force of an ineffective gesture. It was not just a mere negation, but rather demanded a response.⁸⁸ Blanchot stated that the Declaration and the right to refuse therein was:

... an act of judgment ... and intellectual act, which decides firmly, in the actual situation of the Algerian War and of that of the transformation of military power into political power, that which is just and that which is not ... When the state provokes or allows an oppressive force to threaten essential liberties, then every citizen has the right to refuse and denounce it. Nothing more. Is this ineffective? Perhaps, even if all the political developments stemming from this simple word demonstrate the contrary ... such a word, a word of judgement, owes all its actual efficacy from its refusal to make itself contingent on calculations of political and practical effectiveness ... it is

83 *Idem* 195-196. Kristeva *Revolt She Said* (2002). Arendt *The Human Condition* (1985).

84 *Idem* 201-202. Hanafin “The writer’s refusal and the law’s malady” 2004 *JLS* 8.

85 *Ibid.*

86 Hanafin regards Blanchot’s involvement as a response to the call to responsible to the unknown other. Van Marle (2009) 21, 23. The other refers to Emmanuel Levinas’ conception of the (im)possible ethical responsibility of struggling against the appropriation of the other into any preconceived meaning of his/her difference or singularity. It is an aspiration to a non-violent ethical relationship with the other. Levinas *Totality and Infinity: An Essay on Exteriority* (1969).

87 Van Marle (2009) 155-156.

88 *Ibid.*

necessary that at a certain point it be pronounced, whatever the consequences may be ... that is its power; it is a just word ... Certainly the ruling order can always ... strike at those who speak. But the word as such is beyond grasp. It has been said, and that which is said will remain said ... We must all protect this right, protect it because, reaffirmed and maintained, it remains that which it is ... the power to say No.⁸⁹

Botha has highlighted the fact that the struggles of ordinary people in South Africa so often remain hidden and absent from public consciousness.⁹⁰ Refusal may be able to offer the possibility of a richer conception of politics. For Botha refusal could open up a political conception that offers complexity and multiple perspectives and it could challenge traditional conceptions of democracy.⁹¹ It could disclose ways of talking about and considering singularity, solidarity, plurality, equality and difference.⁹² Van Marle perceives the notion of risk or a risking law as an alternative disclosed by refusal:

If the refusal of traditional ways of approaching law can take us to other kinds of approaches to law and even a different law, what will these approaches look like?, what kind of law will this be?⁹³

She tentatively suggests that it might be a risking law. Generally, it merely refers to the possibility of taking the risk in using law in order to address one or the other aim.⁹⁴ More pertinently, it refers to an approach that goes beyond the certainty of predictable approaches and is candid about the risks involved when engaging with law.⁹⁵ This leads to the question of law's limits or reflexivity. Central to risk is the refusal of a certain "Razzian logic of exclusionary reasoning".⁹⁶ Therefore, refusal becomes the effort of having humility with respect to our own analytical reasoning. Van Marle explains that refusal should be seen as a counter-hegemonic action, challenging the law in its mode of business as usual. Refusal is an action imbued with reflection and thought and thinking is central to it.⁹⁷ Refusal is also situated within the limit or "in-between" space.⁹⁸ It always already refers to another place or time to come. Refusal therefore does not close off or end. This is one of the reasons why refusal is not nihilist or passive. It is a contemplative gesture, risking thought.

Refusal in the post-apartheid jurisprudential context involves the rethinking of prevalent ideas on law, transformation and democracy.⁹⁹ It is a call to refuse instrumental approaches to knowledge and

89 *Ibid.*

90 *Idem* 10.

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*

94 *Ibid.*

95 *Ibid.*

96 *Idem* 5.

97 *Idem* 13.

98 *Idem* 6-7.

99 See Jooste 103-131.

reductionist, easy formations. It highlights not only the complexity of law, politics and life, but also the everyday, marginalised and material contexts of suffering and exploitation of South African people. The technisation of law and human rights discourse are challenged and resisted as well as neo-liberalism and modern technology.¹⁰⁰ Refusal may be perceived as a mode of critical thought, but ultimately as a possible alternative approach to law.¹⁰¹ Van Marle explains that refusal involves a slow time, the time and place of refusal is uncertain, unfixed and continuous. Refusal therefore takes the risk of thought without the burdens of having to prove immediate success or relevance.¹⁰²

5 Conclusion

In reflecting on women's subjectivity and selfhood, the notion of refusal may disclose some meaningful possibilities. In the era of human rights and constitutionalism, this alternative approach to law puts forth what remains to be thought in addressing the needs of South African women. It is an approach that beckons alternatives. The refusal to forgive, immediately renders another possibility, namely, to not forgive, or at least not today. This notion may be able to illuminate the sexual violence perpetrated against women daily as well as the economic hardship and suffering of the majority of South African women. The context of reconciliation and forgiveness serve to illustrate some of the symbolic spaces that women are still forced to occupy. The feminine descriptions and narratives represent the possibility of refusing occupation. Du Toit's analysis offers a possible starting point in dealing with the marginalisation of women. Her analysis demonstrates the need for reconciliation on the level of sexual difference, but more importantly, the necessity to address the larger masculine symbolic order. She has contended that women's association with home, care and forgiveness contributed to the framing of the TRC in feminine terms. She asks: "If reconciliation is so closely connected to the feminine, where do women go to reconcile?"¹⁰³ This insight seems almost too appropriate if one considers Justice Albie Sachs's description of how the Truth Commission came about.¹⁰⁴ The portrait of the African mother is invoked here again. In 1993 a meeting was held by the Executive Committee of the ANC. One particular issue that was raised involved the question of how to deal with the comrades that perpetrated human rights violations during the struggle. One participant stood up and asked: "What would my mother say?" After the participant relayed what he thought his mother would have said, Professor Kader Asmal declared that a Truth Commission is the only option. Mrs Konile might have preferred to say no.

100 *Idem* 13.

101 *Ibid.*

102 *Ibid.*

103 Veitch (ed) *Law and the Politics of Reconciliation* (2007) 188-190.

104 Sachs *The Strange Alchemy of Life and Law* (2009) 68.