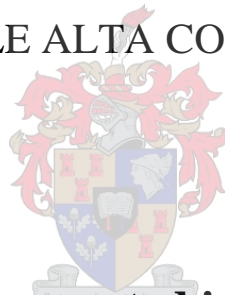


**ADDRESSING THE PROBLEM OF
SEXUAL VIOLENCE IN SOUTH
AFRICA:
A PHILOSOPHICAL ANALYSIS OF
EQUALITY AND SEXUAL
DIFFERENCE IN THE CONSTITUTION
AND THE NEW SEXUAL OFFENCES
ACT**

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fulfilment of the requirements for the degree of Master of
Arts in the Faculty of Arts and Social Sciences,
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DECLARATION

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Abstract:

In this thesis, the South African legal system's attempt to address sexual violence is explored through the lens of the work of the French feminist philosopher, Luce Irigaray. It will be argued that the South African equality jurisprudence lays the foundation for a strongly Irigarayan approach to the transformation of sex and gender relations in so far as our right to equality can be interpreted as being underpinned by an acknowledgment of embodiment, sexual particularity and difference. Our Constitution envisions equality as a value informed by difference rather than sameness and, in accordance with Irigaray's work, it can be said that the implication of this is that the pursuit of the transformation of sex and gender relations on the one hand, and an acknowledgment of sexual difference on the other, are not mutually exclusive, but that sex equality instead calls for a fundamental recognition of sexual difference and an authentic response to the demands thereof. However, it will be argued that our newly reformed sexual violence legislation undermines the progress made on a constitutional level by entrenching a problematic approach to sexual difference in the definition of the crime of rape. This is done through firstly, defining the crime of rape in gender-neutral terms and secondly, retaining the concept of consent as the distinguishing characteristic between sex and rape. I will argue that through these features, our sexual violence legislation reflects the most basic mistakes that Irigaray identifies with the law. It will be argued that the legislation, on the one hand, denies sexual difference in a way that is prejudicial to women through its gender-neutral language, while at the same time, through the concept of consent, (re-)introducing a hierarchical construction of masculine and feminine sexuality into the Act in terms of which femininity is construed as derivative of, and inferior to, masculinity. Furthermore, the combination of the gender neutrality of the definition and the concept of consent exacerbates the situation, in so far as the gender neutrality masks the harmful construal of sexual difference that is incorporated in the definition through the concept of consent. Accordingly, judged from an Irigarayan perspective, the South African sexual violence legislation is deeply problematic. In addition, the legislation undercuts important constitutional developments, in so far as it ignores the constitutional insights that, firstly, sexual violence is a problem of sex inequality, and that secondly, the pursuit of the transformation of sex and gender relations is served, rather than undercut by a concern with particularities. On this basis, it is argued that the South African sexual violence legislation should be amended so that the concept of consent is removed and the crime of rape is defined in sex-specific language (while still allowing for male victims and female perpetrators) that facilitates judicial understanding of the complexities of the crime of rape.

Abstrak:

In hierdie tesis sal die Suid-Afrikaanse regsisteem se poging om seksuele geweld aan te spreek, deur die lens van die werk van Luce Irigaray, 'n Franse feministiese filosoof, ondersoek word. Daar sal geargumenteer word dat die Suid-Afrikaanse gelykheidsjurisprudence 'n grondslag vir 'n sterk Irigarayiese benadering tot die transformasie van geslagsverhoudinge lê, in soverre ons reg op gelykheid geïnterpreteer kan word om in 'n erkenning van beliggaming, seksuele spesifiekheid en verskil (“difference”) begroot te wees. Ons Grondwet stel gelykheid as 'n waarde wat deur verskil eerder as eenvormigheid geïnformeer is, voor oë, en in lyn met die werk van Irigaray, kan daar gesê word dat die implikasie hiervan is dat die nastrewing van die transformasie van geslagsverhoudinge aan die een kant, en die erkenning van geslagsonderskeid (“sexual difference”) aan die ander, nie wedersyds uitsluitlik is nie, maar dat geslagsgelykheid eerder juis 'n fundamentele erkenning van geslagsonderskeid en 'n outentieke reaksie op die eise daarvan, noop. Daar sal egter geargumenteer word dat ons nuuthervormde wetgewing oor seksuele geweld die vordering wat op 'n grondwetlike vlak gemaak is, ondermyn deur 'n problematiese benadering tot geslagsonderskeid in die definisie van die misdaad van verkragting te verskans. Dit word bewerkstellig deur eerstens, die misdaad van verkragting in geslagsneutrale taal te formuleer, en tweedens, om die begrip van toestemming as onderskeidende kenmerk tussen seks en verkragting, te behou. Ek sal argumenteer dat dit deur hierdie eienskappe is, wat ons wetgewing oor seksuele geweld die mees basiese probleme wat Irigaray in die reg identifiseer, weerspieël. Daar sal voorgehou word dat die wetgewing, aan die een kant, deur die geslagsneutrale taal, geslagsonderskeid ontken op 'n manier wat vrouens benadeel, terwyl dit terselfdertyd, deur die begrip van toestemming, 'n hiërargiese verhouding tussen die manlike en die vroulike in die wetgewing daarstel, in terme waarvan die vroulike as derivatief en minderwaardig tot die manlike verstaan word. Verder, die situasie word deur die kombinasie van die geslagsneutraliteit van die definisie en die begrip van toestemming, vererger deurdat die geslagsneutraliteit van die taal die skadelike vertolking van geslagsonderskeid wat deur die begrip van toestemming in die definisie ingesluit word, verberg. Dus, vanuit 'n Irigarayiese perspektief is die Suid-Afrikaanse wetgewing oor seksuele geweld diep problematies. Verder, die wetgewing ondermyn belangrike grondwetlike ontwikkelinge in soverre dit die volgende grondwetlike insigte ignoreer: eerstens, dat seksuele geweld 'n probleem van geslagsongelykheid is en tweedens, dat die strewe na transformasie van geslagsverhoudinge gedien, eerder as ondermyn word deur 'n besorgdheid met die partikuliere. Op hierdie gronde word daar geargumenteer dat die Suid-Afrikaanse wetgewing oor seksuele geweld gewysig behoort te word, deur die begrip van toestemming te verwyder en die misdaad te definieer in geslagspesifieke taal (op 'n manier waardeur manlike slagoffers en vroulike oortreders steeds ingesluit word) wat geregtiglike begrip van die kompleksiteit van die misdaad van verkragting bemiddel.

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INTRODUCTION

I Scope and outline

The South African rape statistics are widely publicised, well known and rarely fail to shock. The South African Police Service (SAPS) crime statistics of 2010/2011 report that 56,272 cases of rape were reported during that year. Furthermore, this figure is estimated to reflect merely a fraction of the rapes that actually occurred, in so far as studies have found that only one in nine rapes are reported (Jewkes & Abrahams 2002:1233). Less than half of reported rape cases result in the initial arrest of the alleged perpetrator in order to start the prosecution process, and a trial commences in only 14.7 percent of cases (Vetten *et al* 2008:7). A 2012 study by Interpol estimates that a woman is raped every 17 seconds, and that one in four women in South Africa suffers domestic violence (Odhiambo 2011). The SAPS rape statistics of 2007 – 2011 report that twenty-six percent of reported rape cases in South Africa are retracted before they get to court, fifty-three percent of reported cases are thrown out of court, and in only eleven percent of reported cases are there successful convictions (Gouws 2012:8). In addition, statistics reveal that the incidence of rape in South Africa is not decreasing but increasing (SAPS Crime Report 2011:10).

Rape is not the only violent threat that South African women face. According to a study by the Medical Research Council (the MRC), South Africa has a female homicide rate six times higher than the global average, and half the women that are murdered are killed by an intimate partner (Jewkes *et al* 2009:1). In 2004, the MRC found in another study that a woman is killed by her intimate partner every six hours (Mathews *et al* 2004:2). At the beginning of 2012, the ‘miniskirt incident’ focused attention on the way in which some South African men deem it their right to sexually violate women if they dress in a certain way. Harassment at taxi ranks of women wearing miniskirts has been reported since 2008. The Mail & Guardian reported that “[w]omen in miniskirts are stripped naked, assaulted and left to the mercy of bystanders” at taxi ranks in Johannesburg (Williams 2008)¹. A member of the Gauteng community safety portfolio committee explained that “these thugs want to say what women should wear” (Williams 2008). In 2012, attention was again focused on this problem when fifty to sixty men were caught on camera chasing, punching and groping a girl wearing

¹ Because this is a newspaper article that I accessed electronically, there is no page number to refer to. The same goes for the article titled *Premier condemns sexual harassment at Noord taxi rank*.

a miniskirt at a Johannesburg taxi rank (*Premier condemns sexual harassment at Noord taxi rank*, 2012). NUMSA commented as follows: “[t]he action of these lumpens that women should not wear miniskirts in public, including taxi ranks, borders on societal patriarchy and relegation of women into cheap sexual commodities as fostered and entrenched by [the] capitalist system” (sic.) (*Premier condemns sexual harassment at Noord taxi rank*, 2012).

South Africa is therefore a society where the freedom, dignity and physical well-being of women are under constant attack from personal and public sources through sexual violence and the threat thereof. This is despite the fact that the Constitutional Court has emphasised on several occasions the constitutional duty of the state to protect women from sexual violence. For example, in the case of *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC), the Constitutional Court confirmed that the state has a constitutional obligation to respect, promote and fulfil the rights in the Constitution, and more specifically, to protect women’s right to safety and security. The Court also declared that South Africa has a duty under international law to prohibit all gender-based discrimination which results in, or is intended to limit, the enjoyment by women of their fundamental human rights and freedoms (par 62). Furthermore, the right to freedom and security of the person, which includes the right to be free from violence from public and private sources, is explicitly guaranteed in section 12 of the Constitution. In this regard, Catherine Albertyn, a prominent South African legal scholar and feminist, notes that the explicit and specific inclusion of this right, as well as the fact that it also finds horizontal application (which means that it can be applied in the context of private agents), is unusual in a national constitution (Albertyn *et al* 2007:297). Accordingly, it is clear that the South African Constitution goes out of its way to condemn violence against women. The fact that sexual violence remains so rife in South Africa is thus also deeply problematic from a constitutional perspective. A further concern is that there is no clear indication that the legislation dealing with sexual violence, despite the fact that it recently underwent a process of reform, has thus far improved the low rate of successful convictions in rape cases, or even changed the way in which rape is handled by the courts.

In this thesis, I will use the work of Luce Irigaray, a French feminist philosopher, to critically evaluate the South African legal system’s attempt to address sexual violence against women. Irigaray traces the problem of the oppression of women to its symbolic origins, and argues that an overhaul of the existing *symbolic* order is necessary in order to emancipate and empower women. She also offers a strategy for such transformation. This strategy entails,

firstly, a rethinking of the subject of the western (and currently globally dominant) symbolic, social and legal order. In this regard, Irigaray argues that the disembodied, universal subject of the western symbolic order represents an exaggerated form of masculinity, and that it is established and maintained through the exclusion of the feminine - a category representing the embodied and the particular. Irigaray then calls for an acknowledgment of the sexed embodiment and particularity of all human beings as the first step toward sex equality (Irigaray 1993b:12). If the subject is reconceptualised in this way, the ideal of equality is not brought about through identical treatment of all people, but through the recognition of the equal value of all persons in all their difference, and through allowing everyone an equal opportunity to flourish as sexed beings. Irigaray also ascribes a very specific role to the law in this symbolic transformation, by arguing that the law should carve out a space for feminine subjectivity and identity in civil society by acknowledging sexual difference and providing both women and men with sex-specific rights that are aimed at their particular needs and vulnerabilities. Irigaray's work thus provides a convincing account of the pervasiveness and resilience of patriarchy, in so far as she understands the patriarchal system to be rooted at the fundamental level of the understanding of subjectivity in the western social and symbolic order. In this thesis, I will explore the extent to which the Constitution and the South African legal system make possible the kind of symbolic transformation that Irigaray deems to be necessary for the successful empowerment of women and the fight against sexual violence.

The first chapter of the thesis will be dedicated to an exposition of the main tenets of Irigaray's work. I will elaborate on, enhance and supplement Irigaray's theory with reference to other feminist thinkers who develop her ideas in ways that render them specifically applicable to equality and the law. This exposition will constitute the theoretical framework which will form the basis for the arguments in the rest of the thesis. The second chapter will be dedicated to an exploration of the right to sex equality as formulated and developed in our constitutional order, in order to determine the extent to which it allows for an interpretation of equality that is in line with Irigaray's emphasis on sexual particularity and difference. This is relevant in so far as it will be argued that sexual violence is a matter of sex inequality and that, accordingly, sexual violence cannot be addressed successfully if the structural inequalities between the sexes remain intact. In the third chapter an evaluation of South Africa's sexual offences legislation, in light of the discussions in the first two chapters, will follow.

The main argument, that will crystallise in the course of the abovementioned discussions, is that the South African equality jurisprudence lays the foundation for a strongly Irigarayan approach to the transformation of sex and gender relations in so far as our right to equality can be interpreted as being underpinned by an acknowledgment of embodiment, sexual particularity and difference. Our Constitution envisions equality as a value informed by difference rather than sameness and, in accordance with Irigaray's work, it can be said that the implication of this is that the pursuit of the transformation of sex and gender relations on the one hand, and an acknowledgment of sexual difference on the other, are not mutually exclusive, but that sex equality instead calls for a fundamental recognition of sexual difference and an authentic response to the demands thereof. However, it will be argued that our newly reformed sexual violence legislation undermines the progress made on a constitutional level by entrenching a problematic approach to sexual difference in the definition of the crime of rape. This approach is entrenched, firstly, by defining the crime of rape in gender-neutral terms, and secondly, by retaining the concept of consent as the distinguishing characteristic between sex and rape. I will argue that, through these features, our sexual violence legislation reflects the most basic mistakes that thinkers like Irigaray identify with the law. It will be argued that the legislation, on the one hand, denies sexual difference in a way that is prejudicial to women, while on the other hand simultaneously (re-)introducing a hierarchical construction of masculine and feminine sexuality into the Act, in terms of which femininity is construed as derivative of, and inferior to, masculinity. It will thus be argued that the legislation undercuts important constitutional developments and cannot guarantee justice to women in the context of rape.

The next section of this Introduction will be dedicated to establishing rape as an act of both sex and violence, which therefore implies that it cannot be reduced to either of these components. In the subsequent section, I will explain the reciprocal relationship between rape and sex inequality which forms the point of departure for the second chapter of this thesis. Thereafter, I will comment on the use of certain terminology. Lastly, a brief discussion regarding the role of the law in the transformation of sex and gender relations and the fight against sexual violence will follow.

II Rape, sex and violence

The arguments in this thesis flow from the standpoint that rape is not simply an instance of private, criminal violence like physical assault, but that it fulfils a very specific political

function which entails the large scale subordination of women and, accordingly, the maintenance of patriarchal rule after the advent of democracy in South Africa. It will be shown that this implies that rape is a gendered and gendering phenomenon which cannot be understood independently of its sexual meanings, to the extent that it is an act perpetrated as a masculine form of dominance over the feminine through sexual means.

In her book, *Rethinking Rape*, Ann Cahill (an American feminist whose work will form the basis of my discussion of South Africa's sexual violence legislation) highlights the problems underlying the line of thinking which defines rape as a purely violent crime. Cahill identifies Susan Brownmiller, a feminist who wrote in the 1970s in America and whose views were largely adopted by the second wave feminists, as one of the main proponents of this view. Brownmiller advocated for an understanding of rape as a violent crime rather than a sexual one, in so far as it is argued that rape does not result from lust, but from an urge to exercise power over the victim (Cahill 2001:1). Rape is then "a deliberate, hostile, violent act of degradation and possession on the part of a would-be conqueror, designed to intimidate and inspire fear" (Brownmiller 1975:391). Brownmiller writes:

[T]he rapist performs a myrmidon function for all men by keeping all women in a thrall of anxiety and fear. Rape is to women as lynching was to blacks: the ultimate physical threat by which all men keep all women in a state of psychological intimidation. Women have been raped by men, most often by gangs of men [...] as group punishment for being uppity, for getting out of line, for failing to recognize 'one's place,' for assuming sexual freedoms, or for behaviour no more provocative than walking down the wrong road at night in the wrong part of town and presenting a convenient, isolated target for group hatred and rage (1975:245 -255).

For Brownmiller and the second wave feminists, separating rape from sexuality was an important political move in so far as it allowed for the focus to shift from the victim to the perpetrator in rape trials (Cahill 2001:20). If rape is understood as sexually inspired, the victim's sexuality can easily be regarded to be the primary cause of the rape, and it is this kind of thinking that justifies the Court's interrogation of the victim as to what she wore the night she was raped, how she acted toward the alleged perpetrator, and what her sexual history is (Cahill 2001: 20). Accordingly, Cahill argues that Brownmiller's reformulation of rape as a crime of violence and *not sex* did serve an important function at the time in so far as

it contributed to countering the default or widespread assumption of female complicity in rape (Cahill 2001:119).

However, the main problem that Cahill identifies with this approach is that defining rape purely in terms of violence results in the setting up of a false dichotomy between power or politics on the one hand, and sexuality on the other, and that this misses the complex interplay between these two domains (Cahill 2001:26). Cahill points out that rape is distinct from other political violence in that group domination is exercised through *sexual* means, invoking the sexuality of the perpetrator as well as the victim (Cahill 2001:26). Interestingly, although Brownmiller tries to rid rape of its sexual elements by conceiving of it as purely a violent phenomenon, an interplay between sex and violence is strikingly evident in her theory, in that she conceives of rape as sexual violence that is directed towards women *because of their sex*. Accordingly, even though Brownmiller wants to deny the sexual aspects of rape, she does not succeed in escaping it. Cahill (2001:27) explains this powerfully:

Simply put, it *matters* that sexuality is the medium of the power and violence that are imposed on the victim. It matters that the act of rape constructs male sexuality in a particular way such that it constitutes a way of imposing harm, pain and powerlessness. It matters that the act of rape constructs female sexuality in terms of passivity, victimhood, and lack of agency. It matters too that in the context of the assault, the rapist is sexually aroused. [...] The rapist's sexuality *is* engaged: he experiences an erection and, frequently, orgasm. That these sexual experiences may be the result of the violence and the asymmetric power relations inherent in the assault makes them no less sexual in nature.

Cahill's point is thus that the crime of rape is significantly and importantly different from other violent attacks in so far as it achieves its goal of domination through *sexual* means. This is central to the argument that I want to make. Rape strikes at the most intimate sphere of interaction between the sexes, and the attack is aimed at cruelly displaying one type of sexual being's dominance over the other. Catherine MacKinnon, a radical feminist and lawyer whose work will form the basis of many arguments made in the last chapter of this thesis, writes:

Sexual violence symbolizes and actualizes women's subordinate social status to men. It is both an indication and a practice of inequality between the sexes, specifically of

the low status of women relative to men. Availability for aggressive intimate intrusion and use at will for pleasure by another defines who one is socially taken to be and constitutes an index of social worth. To be a means to the end of the sexual pleasure of one more powerful is, empirically, a degraded status and the female position (2005:129).

Rape is therefore not merely a passing incident between one man and one woman, but shapes both masculine and feminine sexuality in general in a very specific way by, firstly, constructing the penis as a weapon and the vagina as a potential target (thus undercutting the idea that male and female sexuality function on a complementary and mutually dependent basis for sexual pleasure and procreation), and secondly, constantly reminding women that their sexuality renders them vulnerable and inferior. Debra Bergoffen, an American feminist philosopher, writes in this regard:

Within patriarchy, the sexual disymmetry of the human body is marked as crucial. Thus the question of trust is translated into the question of the sexual relationship. It then gets perverted. Instead of recognizing a mutual vulnerability between men and women that throws them both before each other in the passion and heteronomy of a trust that can neither be determined nor measured, it establishes the law of patriarchal disymmetry. [...] The sexual difference, instead of revealing our shared human vulnerability; instead of throwing us all before each other in our embodied finitude; instead of opening us to the passions, uncertainties, and necessities of trust; becomes the structure through which only one sex lives the humanity of vulnerability (2003:131).

In this regard, Cahill argues that the threat of rape even becomes part of feminine bodily comportment, in so far as it affects how women live their bodies (Cahill 2001:159).

It is difficult to deny this allegedly gendered nature of rape if one considers the fact that men and boys world-wide make up, at most, about seven percent of all rape victims, and that less than one percent of perpetrators are women (Stemple 2009:606-607). Furthermore, statistics regarding instances of rape where the victims are male indicate certain trends that show that these arguments about the gendered nature of rape are also applicable to male rape. Men who become the victims of rape are often perceived to be more 'feminine' by the rapist and in the process of the rape are also actively 'feminised' by the rapist; homosexual men have a higher

chance of being raped and men who rape men mostly identify as heterosexual (Du Toit 2012a:52). In addition, male rape occurs mainly within “strongly hierarchised, institutionalised all-male settings such as prisons or prisoner-of-war camps” (Du Toit 2012a:52). Moreover, Lara Stemple writes that rape is used in prison to maintain a prison hierarchy analogous to the gender hierarchy in which the victims who are humiliated and dominated are also feminised (Stemple 2009: 610). Stemple explains that in South African prisons, the notorious ‘28s’ gang determines the rules for sex and rape through maintaining a strict gender hierarchy which consists of the so-called masculine ‘blood line’ and the feminine ‘private line’. Members of the masculine blood line choose ‘wyfies’ (the Afrikaans term for female animals) from the feminine private line who are forced to perform duties that are traditionally those of a wife – namely domestic chores and sexual services (Stemple 2009:611). In Ross Kemp’s documentary (Ross Kemp on Gangs, 2007) about the South African numbers gangs, he interviews John Mongrel, the leader of the 28s, who is currently incarcerated in Pollsmoor. In reaction to Mongrel’s description of ‘having sex’ with men in Pollsmoor Prison, Kemp asks Mongrel whether he is gay. Mongrel emphatically exclaims that he is not, after which Kemp asks why he has ‘sex’ with men then. Mongrel replies that he does not have sex with men, that they are women, or ‘wyfies’, that they do his domestic chores and that he has sex with them in the missionary position. In this sense, feminist philosopher Louise du Toit holds that male rape (rape of men) is “parasitical” on female rape for its meaning in so far as the male victim is feminised and humiliated for his perceived or imposed femininity (Du Toit 2012a:57) and that women and girls mostly constitute the target of rape *because* they are female / feminine (Du Toit 2012a:52). Similarly, Judge Langa writes in the case of *Masiya v Director of Public Prosecutions (Pretoria) and Others* 2007 (8) BCLR 827 (CC):

[T]he groups of men who are most often the survivors of rape, young boys, prisoners and homosexuals, are, like women, also vulnerable groups in our society. Moreover, they, and most other male victims, are raped precisely because of the gendered nature of the crime. They are dominated in the same manner and for the same reason that women are dominated; because of a need for male gender-supremacy. That they lack a vagina does not make the crime of male rape any less gender-based (par 86).

In the same vein, Shafer and Frye (1977:334) famously write:

Rape is a man's act, whether it is a male or a female man and whether it is a man relatively permanently or relatively temporarily; and being raped is a woman's experience, whether it is a female or a male woman and whether it is woman relatively permanently or relatively temporarily.

It is thus clear on what grounds thinkers like Cahill argue that rape is a distinctly sexual and gendered kind of violence, in that it serves the system of patriarchal oppression of the female or feminine. However, Cahill is careful not to reduce the effects of rape to its broader political function, but highlights that rape is also sexual on a personal or individual level, in so far as the sexual specifics of the bodies of both victim and assailant have an effect on their experience of the sexual attack (Cahill 2001:163). Accordingly, Cahill identifies rape as a sexual act on both a social and personal level (Cahill 2001:121) in so far as it *constructs sexuality* in a hierarchical manner through a violent attack through sexual means on the sexed body of an individual. Furthermore, the political function of rape influences the personal experience thereof, and each individual experience of rape is implicated in the social function (Cahill 2001:126). What this means is that the personal and individual experience of the sexual attack is aggravated by the political function thereof, in that the victim is not only objectified and sexually used by the man attacking her, but that through the rape a message is also conveyed to her about her lack of agency and worth – on the basis of her sexual embodiment – in the context of a broader patriarchal society. Feminine sexuality is thus constructed as instrumental; as a function *for* man. The personal experience of rape is thus informed by (yet irreducible to) its place in the greater political narrative of society. Similarly, the political function that rape fulfils, namely keeping women/the feminine 'in their/its place' in the sexual hierarchy, is enabled through the sexual humiliation and degradation that the individual victim experiences. This point can also be made with reference to Kellard's distinction between direct and indirect harms of rape. Kellard uses the term "direct harm" to refer to the harms done to the victim of rape, for example the violation of her sexual bodily integrity (Kellard 2012:91). On the other hand, "indirect harm" refers to the social effects of the act of rape, in its maintenance of patriarchal rule through a "systemic sexualised control of women" (Kellard 2012:101). Rape thus harms its individual victims directly, but also causes indirect harm to women and feminised men as a collective (Kellard 2012:103). Furthermore, as explained above with reference to the personal and political functions of rape, the direct and indirect harms of rape inform each other in a reciprocal way.

Rape is thus a gendered and gendering crime, and it will be argued throughout this thesis that it can therefore not be understood or successfully addressed without reference to its sexual meanings and the sexed bodies of both perpetrator and victim.

III Rape and inequality

The arguments regarding the sexual and gendered nature of the crime of rape directly explain its connection with sex inequality. In this regard Naylor (2008:23), a South African legal theorist, writes:

The intention of gender-based violence is to perpetuate and promote hierarchical gender relations. No matter how the violence is manifested it ultimately serves the same end: the preservation of male control and power. [...] Sexual violence is thus seen and contextualised as a form of social control.

Albertyn *et al* (2007:300) note that “[i]n the case of South Africa, sexual assault can therefore be said to reflect the substantial gender power inequalities that pervade our society”. With reference to the quote by Naylor above, it can be added that apart from *reflecting* sexual inequalities of our society, sexual violence also *maintains* these inequalities.

Furthermore, Du Toit (2012b:10) writes:

[A] political analysis helps us to see those who rape, those who threaten rape, and those who tolerate rape (all of us), as political actors who informally but with large-scale social support impose a system of oppression on women as a group in order to violently re-subject them to male power. This is a campaign of defiance against the Constitution and the spirit of freedom for all in which the new political dispensation was born.

On this basis Du Toit (2012b:14) argues that rape functions as a strategy to establish the patriarchal foundations of the South African society of the future. Du Toit (2012b:14) explains that this does not mean that every individual rapist is consciously motivated by the overarching political aim of rape to maintain patriarchy. However, the fact that, firstly, rape is meted out by men against women for reasons such as punishment, warning, or as a display of ownership; secondly, that there exists a kind of social consensus that rape is a medium to punish women or to portray certain messages; and thirdly that it is tolerated to such a large extent in our society, indicate that rape is never merely a random and isolated event in the

personal life of the rapist, but also has a specific place in the machinery of patriarchy (Du Toit 2012b:14). MacKinnon also writes:

Surely the legal tolerance of sexual assault is not a fact of nature. It is a fact of sex inequality in human societies, supported by ideologies that explain and exonerate systemic abuses of women by appeals to biological fact (2005:242).

These remarks from Du Toit, Albertyn, Naylor and MacKinnon bring the reciprocal relationship between sex inequality and sexual violence to the fore. This entails that, on the one hand, it is the existing inequality between men and women that results in the occurrence of rape on such a large scale, while, on the other hand, sexual violence is one of the primary ways of maintaining these same patriarchal power structures.

In support of the first point - namely, that rape of women by men is made possible by sex inequality - it can be argued that women *can* also rape men. A powerful example of this from popular culture can be found in Stieg Larsson's novel *The Girl with the Dragon Tattoo* (2005) where the main character takes revenge on her rapist by returning to her rapist's home, tying him up and raping him in return by repeatedly penetrating his anus forcefully and violently with a dildo which causes him immense humiliation and pain. However, such vindication by women very rarely happens, not because it is physically impossible, but because in our patriarchal society femininity is not conceived of or imagined as a position of sexual agency, and much less as a position of aggression and dominance, and this is also, importantly, the case for women themselves. Women who access positions of dominance or aggression are seen as unnatural, and this is therefore not something that society (including women) recognises as an option for women. Linda Sjoberg explains the problem as follows with reference to female perpetrators in genocidal violence:

In addition to distinctions between women's commission of genocide and genocidal rape and men's commission of similar war crimes, women who commit genocide are distinguished from other, "real," women. "Real" or "normal" women are seen as incapable of committing genocide generally and the sexual violation of women specifically. "Real" women are peaceful, conservative, virtuous, and restrained; violent women ignore those boundaries of womanhood. [...] Because their stories do not resonate with these inherited images of femininity, violent women are marginalized in political discourse. Their choices are rarely seen as choices, and, when they are, they are characterized as apolitical (2011:27).

The point is not that women should start raping or killing men. Rather, the fact that society understands rape as a mechanism available to men for use against women and some men and boys, while not even conceiving of it as an option for women against men, constitutes an indication of the strongly hierarchical construction or imaginary of sexuality that underlies our social order. Moreover, this imaginary is also reflected in the way in which rape of women by men is so often justified and excused by society and the state, and tolerated to such a large extent by the law.

However, as explained above, sexual violence is not only the result of the existing structures of sex or gender inequality, but also plays a central part in the maintenance and perpetuation of these unequal power structures, in so far as rape “forcibly re-sexualises women, turns them symbolically into objects and possessions of men, renders them as natural objects for the use of men, and thus de-politicises their status” (Du Toit 2012b:13).

Accordingly, the eradication of sexual violence would be central to the achievement of equality, while equality between the sexes would mean that rape would not be tolerated.

In a constitutional context, this relationship between sexual violence and inequality between women and men has been acknowledged on numerous occasions. For example, in the *Masiya* case (2007) Judge Nkabinde writes:

It is now widely accepted that sexual violence and rape not only offends the privacy and dignity of women but also reflects the unequal power relations between men and women in our society (par 28).

Furthermore, sexual violence is listed in the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (hereinafter referred to as PEPUDA) as an instance of unfair discrimination on the grounds of gender. PEPUDA was promulgated to give effect to section 9 of the Constitution by developing section 9 in such a way so as to promote equality and eliminate unfair discrimination. The fact that sexual violence is thus listed in PEPUDA as an instance of unfair discrimination on the ground of gender therefore implies constitutional recognition of the fact that sexual violence is both an *equality* issue and a sex/gender issue.

Accordingly, it is submitted, on the basis of these arguments, that an exploration and evaluation of the legal system’s response to sexual violence should also include an examination of its approach to sex inequality.

IV Terminology

For purposes of the clarification of the terminology that will be used in this thesis, it is necessary to pause for a moment at the sex/gender distinction. In terms of this distinction, sex is regarded as referring to the biological traits that distinguish men from women, and gender is understood as the social, cultural and sexual attitude or identity that accompanies the biologically sexed body. Cahill explains that this distinction became prominent in liberal feminism in the 1970s, because the concept of gender allowed feminists to contest the values ascribed to femininity as cultural constructions rather than biological necessities (Cahill 2001:5). Gender was thus seen as the site for the feminist revolution in so far as, while the biological facts of being a woman couldn't be changed, feminine attitudes and identity could (Cahill 2001:5). Cahill explains that the political goal of liberal feminism could then be understood as a denial of the relevance of (biological) sex (Cahill 2001:5).

The problematic nature of a simplistic sex/gender distinction is highlighted by many feminists. Among them is Elizabeth Grosz, an Australian feminist, who aims to counter the dualist logic of western Cartesian metaphysics in terms of which the body has “generally remained mired in presumptions regarding its naturalness, its fundamentally biological and pre-cultural status, its immunity to cultural, social and historical factors, its brute status as given, unchangeable, inert and passive, manipulable under scientifically regulated conditions” (Grosz 1994:x). The most obvious problem with the distinction between sex and gender is, then, that in terms of the distinction, the body is regarded as completely natural, pre-cultural and a-historical, thus ignoring the fact that bodies are “not only inscribed, marked, engraved, by social pressures external to them but are the products, direct effects, of the very social constitution of nature itself” (Grosz 1994:x). Grosz evokes the logic of the model of the Möbius Strip, a three dimensional, inverted figure eight, the surface of which defies a clear distinction between inside and outside, in order to reconceptualise the distinction between body and mind. In this regard she explains that “bodies and minds are not two distinct substances or two kinds or attributes of a single substance, but [...] through twisting [...] one side becomes another” (Grosz 1994:xii). The argument is thus that the body is always shaped by and interpreted in terms of social and cultural contexts, while these constructs are, in turn, influenced by the body, so that the nature/culture dichotomy is rendered superficial. The sex/gender distinction then becomes dangerous in so far as regarding the body as completely natural implies a naturalisation of certain cultural attitudes and constructs. As a result, the use of the term ‘sex’ – understood as an intersection of the

corporeal, cultural and symbolic – is much preferred to the term ‘gender’ in contemporary feminist theory (Cahill 2001:5).

Because the South African Constitution still upholds the traditional liberal distinction between sex and gender and refers, for example, specifically to discrimination on the ground of *gender*, I will also often refer to the term in my discussion of the South African constitutional position. However, in so far as I have argued above that it is widely held in feminist circles that the distinction is superficial, my use of the term ‘gender’ will not refer to anything different to my use of the word ‘sex’.

In this regard, I also want to draw a distinction between my use of the words ‘masculine’ and ‘feminine’ on the one hand, and ‘male’ and ‘female’ on the other. With ‘masculine’ and ‘feminine’ I refer to the symbolic categories of being that are associated with different sets of sexed values and characteristics. Where ‘femininity’ is associated with values like vulnerability, motherhood, dependence, plurality, and is regarded as corresponding to an ethics of care, masculinity is set up as invulnerable, independent, singular and corresponding to an ethics of justice. In a patriarchal symbolic order, masculinity and femininity are set up in a hierarchical dichotomy, where masculinity is the dominant position and its characteristics and corresponding values are deemed more important than those of the feminine. Even though femininity is seen as the appropriate category of being for women and masculinity as the appropriate category of being for men, masculinity and femininity are positions that can both be taken up by either male or female persons. Often, women need to become masculine and embrace masculine values in order to be recognised by society on political or professional levels. On the other hand, men who are more feminine are regarded to have taken up an inferior position and will often be marginalised. It will be argued throughout this thesis that rape serves the domination of the masculine over the feminine. This is why rape remains a deeply gendered issue even when the victim is male.

I also want to comment on my references to the western symbolic order or western metaphysics. My use of the term ‘western’ also includes ‘South African’ in so far as the South African symbolic and legal order have largely absorbed the trends and founding principles of western thought (perhaps especially in so far as we have opted for a liberal democratic constitutional dispensation).

V The role of the law in the fight against sexual violence

The aim and meaning of looking to legal reform as a strategy to improve the lives of South African women is an important issue that needs to be raised from the outset. The usual response to a project like this is that the flaws in the legal system are only the tip of the proverbial iceberg, and that if an issue like rape is to be successfully addressed, it needs to be done at the much deeper level of societal attitudes and relations. However, there are at least two important reasons for involving the law in the fight against sexual violence and the oppression of women. The first reason is that deeper societal change may be almost impossible to achieve as long as the law, as the official reflection of society's conception of justice and the official channel for condemnation of certain behaviour, is complicit in maintaining the hierarchy between the sexes and implicitly tolerating the oppression of women. The second reason, which is closely linked to the first, is that legal reform has symbolic value which contributes in the long term to the changing of societal attitudes. I will explain both of these points in what follows.

In the context of the first abovementioned reason for looking to legal reform as a strategy in the feminist quest for justice, it is argued that, although legal reform does not guarantee social change, social change is unlikely to happen if the law does not reflect, pre-empt or at least allow for such change. Here it is argued (and it will be shown in this thesis) that the law remains riddled with masculine bias and that the patriarchal foundations of our society cannot be dislodged if it remains firmly entrenched in the legal system, which arguably reflects an ideal normative framework toward which society aspires. Artz and Smythe (2008:14), two leading South African feminist legal scholars, note that although women's suffering is often outside the scope of legal redress, and that the law is therefore not the ideal instrument for feminist social change, the continued participation in feminist law reform can at least unmask the masculinist interpretations of justice that find expression and gain power through the criminal legal system. Accordingly, feminist legal reform might not be able to effect all the levels of social change that are necessary for the liberation of women, but it can at least expose the legal system's complicity in the maintenance and perpetuation of patriarchal oppression.

Furthermore, MacKinnon highlights the usefulness of the law in attempts to achieve social change:

A form of force, law is also an avenue for demand, a vector of access, an arena for contention other than the physical, a forum for voice, a mechanism for accountability, a vehicle of authority, and an expression of norms [...] Women who work with the law have learned that while legal change may not always make social change, sometimes it helps, and law *unchanged* can make social change impossible (2005:103).

MacKinnon thus explains that although the law is not a magical instrument that can guarantee results, it functions in a way that can provide useful possibilities and opportunities for feminist change in that it is a public forum through which women can, among other things, access authority, voice their demands and express their norms. Furthermore, if feminism has no access to the channels and forums of the law, it might be impossible to effect social change.

From the previous paragraphs, the symbolic value of law reform should be obvious. Artz and Smythe note that in post-apartheid South Africa the law has gained considerable symbolic importance (Artz & Smythe 2008:19), and accordingly, even though the full equality of women cannot be achieved through the law alone, the law has an important part to play in the process of shifting, or at least acknowledging, inequalities (Artz & Smythe 2008:15).

The work of Drucilla Cornell, a prominent American feminist legal philosopher, also reflects an understanding of the value of symbolic change in our culture. She justifies her decision to ground her work in the realm of legal struggle as follows:

Why enter the preservational economy of law at all? My answer is that we have inevitably already been entered into it. Our demand is to enter it differently, on the basis of the equivalent evaluation of our sexual difference. Thus, I agree with Irigaray when she argues that without changing “the general grammar of our culture, the feminine will never take place in history” (Irigaray 1985a:155). Law is undoubtedly, and particularly in the modern western democracies, a powerful part of our general culture, and that may be reason enough to challenge it from within, as well as from without (1995:235).

Accordingly, even if amended legal provisions do not always directly and immediately bring about change on a social level, legal reform plays a role in the general transformation of our culture, by slowly altering our attitudes toward certain behaviour or our belief in certain

principles and concepts. On the other hand, however, Cornell warns that it is important to recognise the law as a “field of coercion” and that any attempt of feminism to further its cause through legal projects is thus inherently limited (Cornell 1995:26 – 27). Accordingly, “[f]eminism must not entrench itself in the realm of legal struggle as the primary arena of its political and personal aspirations to change the social world and our form of life” (Cornell 1995:26).

I am therefore not arguing in this thesis that phallogocentrism² can be overcome through the correct constitutional doctrines, or that rape will cease to occur as soon as the criminal law definition thereof more closely reflects the relevant issues, but rather that if we are to work towards a society where women enjoy equal freedom and rights to men, the law cannot remain as it is, but should be transformed so that it can set the tone for such broader societal transformation on a practical and symbolic level.

² The Derridaen term for the privileging of the phallus/masculine in understanding or constructing meaning (Culler 2008:61).

CHAPTER ONE

A BRIEF INTRODUCTION TO SUBJECTIVITY AND EQUALITY IN THE WORK OF LUCE IRIGARAY

I Introduction

In this chapter, the main themes of the philosophy of Luce Irigaray will be introduced, with specific reference to, firstly, her insistence on the necessity of dismantling the singular Cartesian subject of the western patriarchal order through an authentic acknowledgment of sexual difference, secondly, her discussion of the need to replace the Cartesian subject with two concrete, embodied and differently sexed subjects, and lastly, the implications that this rethinking of the subject has for equality and the role of the law in the achievement of equality.

In this chapter it will be shown that Irigaray's work offers insight into the nature of the transformation that is necessary for the empowerment and emancipation of women. I will argue that these insights are of particular value in the South African context, where the position of women remains precarious despite numerous legislative measures that are in place to promote equality between the sexes and to protect women against forms of oppression like sexual violence. It will be seen that Irigaray frames the ideal of sex equality in terms of aims that depart from the traditional understanding of equality, which imply and enable the establishment of a new relationship between the sexes. In the second and third chapters I will then explore the South African legal system's approach to sex equality and specifically sexual violence, in order to determine the extent to which it allows for the possibility of an Irigarayan transformation.

In the first section of this chapter, I will explain how Irigaray traces the roots of patriarchy to the symbolic construction of the subject in metaphysical terms, a move which she already identifies in the work of Plato. She argues, in this regard, that the universal, disembodied subject of western philosophy represents an idealised version of the masculine, and is posited through the exclusion of the feminine, the embodied, and the particular. The symbolic order which underpins society is thus in service of the masculine, and is founded on the exclusion

of the feminine. The implication is that a complete overhaul of the symbolic order is necessary in order to dismantle patriarchy.

In the second section, I will discuss Irigaray's insistence that such transformation of the symbolic order, as explained above, will only be achieved through the acknowledgment that all human beings are sexed and embodied, and that such embodiment implies a necessarily partial position which renders the universalisation of one position obviously unjustified and unjust. An authentic acknowledgment of sexual difference in a non-hierarchical manner is therefore key to the dismantling of patriarchy in society.

In the third section, it will be shown that the conception of equality that flows from Irigaray's theory entails the establishment of a culture in which a positive feminine identity is acknowledged, so that women can understand and experience themselves not merely as passive towards, secondary to and derivative of men, but as beings in their own right (Stone 2007:135). Irigaray thus conceives of sex equality as something far more radical than equal treatment - namely, that feminine subjectivity is allowed a place alongside masculine subjectivity in the symbolic and legal order, and that persons are granted the space and freedom to develop and cultivate a feminine identity that is different from the established masculine norm, but equally valued. The question as to whether the ideal of equality is too limited to encapsulate these aims, so that the ideal of equality should be replaced with something else altogether, will also be addressed.

Thereafter, I will explain how Irigaray implicates the law in the process of breaking open a space for feminine subjectivity to develop and flourish by arguing that the law should provide sex-specific rights that correspond to the needs and vulnerabilities of feminine and masculine subjectivities respectively.

Finally, the charge of essentialism that is often raised against the work of Irigaray will be critically discussed.

II Opening up subjectivity through difference

Irigaray's work is grounded in the radical recognition of sexual difference as the crucial first step to sex equality. Her aim is, firstly, to undo the conflation of masculinity with rationality

and universality, and secondly, to create, through her writing, the possibility of a feminine subjectivity that is freed from the confines of patriarchal prescriptions (Braidotti 1994:130).

Irigaray argues that in the western social order, masculine subjectivity is elevated to the position of the only subjectivity (Irigaray 1993a:8), and that the social imaginary is accordingly not neutral, but unashamedly shaped by, and in the service of, the idealised masculine subject. She writes:

In actual fact, the self-proclaimed universal is the equivalent of an idiolect of men, a masculine imaginary, a sexed world. With no neuter. This will come as a surprise only to an out-and-out defender of idealism. It has always been men who spoke and, above all, wrote: in science, philosophy, religion and politics (1993b:121).

Idealised masculine subjectivity is posited as universal subjectivity in opposition to, and to be achieved through the transcendence of, the material and the particular (Irigaray 1985a:133). Irigaray writes strikingly:

Subjectivity denied to woman: indisputably this provides the financial backing for every irreducible constitution as an object: of representation, of discourse, of desire. [...] for he can sustain himself only by bouncing back off some objectiveness, some objective. If there is no more “earth” to press down / repress, to work, to represent, but also and always to desire (for one’s own), no opaque matter which in theory does not know herself, then what pedestal remains for the ex-sistence of the “subject”? (1985a:133).

Accordingly, the universal, disembodied subject of western thought is dependent on the existence of the material and particular other for its unity and coherence (Caldwell 2002:21). Irigaray argues that women, whose embodiment has been regarded as their defining feature in patriarchal society where their primary significance lies in giving birth and providing sex, have been relegated to the order of the material, the changing and the natural (“earth”), which functions as the foil for the emergence of an unchanging, disembodied, universal subjectivity. Irigaray writes in this regard that “[w]oman-as-other” occupies the position of “natural substratum” (Irigaray 1993b:45) in the patriarchal social construction. The feminine represents the “[m]atter’ upon which he [the ‘universal’ masculine subject] will ever and again return to plant his foot in order to spring farther, leap higher” (Irigaray 1985a:134). In

other words, the universal subject, which presents itself as being neutral, is in fact modelled on an idealised conception of masculine subjectivity which is made possible through the act of sacrificing feminine subjectivity, in so far as the material is needed as foil for the emergence of the universal. Irigaray explains this universalisation of the masculine subject as follows:

And by centering man outside himself, it has occasioned above all man's ex-stasis within the transcendental (subject). Rising to a perspective that would dominate the totality, to the vantage point of greatest power, he thus cuts himself off from the bedrock, from his empirical relationship with the matrix that he claims to survey (1985a:133 – 134).

What is at stake here is thus an *idealised* masculine subjectivity, in so far as it is rooted in a mythical conception of a fully autonomous, disembodied and therefore invulnerable masculinity which does not conform to the lived realities of men. Bergoffen (2003:131) explains in this regard that the vulnerable body is feminised so that “only one sex lives the humanity of vulnerability” and “[m]en's lived vulnerable bodies are encased/erased in imaginary, god-like, invulnerable bodies”.

Accordingly, the feminine has been pushed to the margins of subjectivity, in that it is not regarded as a category of human being alongside the masculine - and thus as a category of being in its own right - but merely as a foil or material basis for the emergence of an hyperbolic masculine subjectivity presented as the universal subject. In this sense “the feminine has become [...] the non-masculine, that is to say an abstract nonexistent reality” (Irigaray 1993b:20). In other words, women “are stripped of their identity insofar as they are a non-manifestation of forms corresponding to male-sexed-chromosomes” (Irigaray 1993b:46).

Irigaray shows how the process of the exclusion of feminine subjectivity in order to enable the development of an exclusive ‘universal’ subjectivity can already be recognized in Plato's cave myth, where the cave can be argued to represent the feminine womb from which the prisoner emerges in pursuit of the masculine or patriarchal Idea (Irigaray 1985a:247).

Following Irigaray, Braidotti explains that the feminist project rests on the rejection of this universal subject, on the basis that it is a “falsely generalized standpoint” (Braidotti 1994:98),

because it speaks on behalf of everyone while occupying only the position of the white male. In the western symbolic order, subjectivity is thus constructed as a singular and exclusive standpoint of which difference is the enemy, because the latter exposes and undercuts the false claim to universality. In this regard, Braidotti argues that because western thought is founded on dualistic oppositions, the concept of difference has always functioned as an exclusionary mechanism, in so far as it creates “sub-categories of otherness” where “‘different-from’ came to mean to be ‘less than’” (Braidotti 1994:147). Accordingly, Irigaray regards the death of the logocentric subject as the condition of the possibility of the development of feminine subjectivity (Braidotti 1994:130), to the extent that its demise would allow the development of new forms of subjectivity by creating a space where sexual difference can flourish. Furthermore, the radical acknowledgment of sexual difference inevitably delegitimises the singularity and supposed neutrality of the subject of the western symbolic order. In this regard, Irigaray writes: “[w]omen’s exploitation is based upon sexual difference; its solution will come only through sexual difference” (Irigaray 1993b:12). Difference is thus regarded as the central value of the liberation and empowerment of women, in that a respect for difference undercuts the phallogocentric formation of subjectivity and allows for the flourishing of an authentic feminine sexual identity.

At this point, I want to pause briefly at the concept of ‘sexual difference’. Alison Stone, an English feminist philosopher, explains that the term ‘sexual difference’ is mostly used as an alternative to concepts of sex and gender (Stone 2007:112). In this regard, it is held that sexual difference captures something that sex and gender do not, namely “that as human beings we always live and experience our bodies as imbued with *meaning*, never as bare biological things” (Stone 2007:112). As was explained in the introductory chapter, the term sex is traditionally regarded to refer only to the biologically sexed body, and gender is regarded to refer to a culturally constituted sexual identity. Sexual difference refers then, firstly, to the cultural symbolisation of the difference between male and female, and secondly, to the difference in how men and women “live their bodies” in the context of the cultural symbolisation thereof (Stone 2007:112). Accordingly, Irigaray’s references to sexual difference do not merely refer to the biological differences between male and female bodies, but also to the cultural interpretation of what these differences symbolise and represent (Stone 2007:120).

Irigaray's point is therefore that in so far as, on the one hand, sexual difference is denied, and on the other hand, that the characteristics that distinguish women from men are seen as rendering women inferior and less than human, the feminine is lacking in our symbolic order (Irigaray 1993b:46). She explains:

[T]he feminine will be allowed and even obliged to return in such oppositions as: *be/become*, *have/not have sex (organ)*, *phallic/non-phallic*, *penis/clitoris* or else *penis/vagina*, *plus/minus*, *clearly representable/dark continent*, *logos/silence* or *idle chatter*, *desire for the mother/desire to be the mother*, etc. All these are interpretive modalities of the female function rigorously postulated by the pursuit of a certain game for which she will always find herself signed up without having begun to play. Set between – at least – two, or two half, men. A hinge bending according to their exchanges. A reserve of *negativity* sustaining the articulation of their moves [...] Off stage, off-side, beyond representation, beyond selfhood (1985a:22)

Furthermore, the difference between the sexes is illogically regarded to be situated within the feminine. In other words, femininity is marked with the difference between the sexes and has to bear the full burden thereof. Feminine sexual difference is thus colonized, domesticated and in service of the masculine order. Du Toit writes markedly:

As other of the same, woman's supposed femininity is exalted, and equated with her reproductive and nourishing functions, and with her function of sheltering man in his journey of becoming. Also in this mode, woman's sexuality is objectified and commodified, and her difference is reduced to a calculable, exchangeable and exploitable difference. As other of the same, woman's own journey of becoming is erased (2009:156).

The term 'other of the same' is used by Irigaray to describe the feminine as she is (mis- or un-) represented within the phallogocratic order (a system of masculine dominance) of western philosophy (Irigaray 1985a:246). This term powerfully expresses the idea that the feminine is burdened with the difference between the sexes while the masculine is seen as representing the neutral or the same. As a result, femininity is understood only as a deviant position rather than a category of being in its own right.

An authentic acknowledgment of sexual difference then means, firstly, that where women are different from men - for example in that they get pregnant and men don't - that difference should be acknowledged and respected. It means, secondly, that difference should not be constructed as meaning 'less than' and justifying discrimination in the sense of unequal treatment. Accordingly, the fact that women get pregnant should not mean that they get fewer opportunities in the professional world. Thirdly, certain perceived 'differences' should be recognised as ideological constructions of patriarchy, for example, the idea that women are inferior to men intellectually, because they lack the ability to think rationally. In this sense, an *authentic* acknowledgment of sexual difference is absent from our symbolic order.

Part of the feminist project would then be to redefine difference (Braidotti 1994:175) as something that lies in the space *between* the sexes. It aims to show that women are different from men in the same and equal way that men are different from women, and that sexual difference thus entails a position of being equal in difference (Mackinnon 1987:37). Furthermore, Irigaray calls for a new attitude towards such difference. She describes this attitude in terms of Descartes' first passion, namely, wonder (Irigaray 1993a:12). She explains:

This passion has no opposite or contradiction and exists always as though for the first time. Thus man and woman, woman and man are always meeting as though for the first time because they cannot be substituted one for the other. I will never be in a man's place, never will a man be in mine. Whatever identifications are possible, one will never exactly occupy the place of the other – they are irreducible one to the other (1993a:12).

For present purposes, there are at least two important ideas in the quoted passage. The first is the positive and deferential status ascribed to difference: always meeting someone as though for the first time implies that no assumptions are made as to who and what the other is. This suggests an openness to be surprised by the other and an unconditional acceptance of the other. This gives the other the freedom to flourish. It also allows for "positive expression of female difference" (Du Toit 2009:156) in that "as women we give expression to our different identity in its fullness, rather than simply expressing our difference from men in so far as that 'difference from' is usually understood only in terms of a 'falling away from' the masculine-universal norm, and thus as a deviance, a lack or an excess" (Du Toit 2009: 156). The second important idea here is that the other cannot be subsumed into the same. If wonder entails that

every meeting with the other is like the first, this means that the other is always approached as the unknown, and therefore as that which is outside of myself. Irigaray writes:

Who or what the other is, I never know. But the other who is forever unknowable is the one who differs from me sexually (1993a:13).

This implies an acknowledgment of the other sex as unequivocally other, as separate from and outside of the self. Accordingly, any attempt of one sex to speak for the other, or to regard itself as occupying a universal position, is delegitimised. Therefore, if difference is evoked in the Irigarayan sense, it renders the universal subject impossible. Irigaray's philosophy thus calls for a shift on the part of men who must self-limit their subjectivity from the universal norm to a partial, embedded, embodied and sexually differentiated position. Irigaray (1996:106) writes that "[b]eing a man or a woman already means not being the whole of the subject or of the community or of spirit". This non-hierarchical understanding of difference that renders subjectivity an inevitably partial position not only influences our approach to sexual others, but could also be argued to allow for all other differences, such as race, age, class and ethnicity, to be approached with the greatest respect. Hegemonic centres or positions of sameness that are traditionally regarded to set the standard for being human (such as being white, western and middle class) are exposed as only partial positions alongside others.

In a similar vein, Braidotti evokes Adrienne Rich's notion of "politics of location" to enhance her description of the subject's inherent situatedness (Braidotti 1994:237). The politics of location entails the subject's recognition of her own experience as necessarily partial. The thinking process is therefore not abstract, disembodied and objective, in that it can lay claim to universality, but is merely a voice from a certain place of enunciation (Braidotti 1994:237). Similarly, Jantzen argues that an unavoidable consequence of the acknowledgment of gendered embodiment is the acceptance of a partial perspective, and therefore the acceptance of one's limit or boundary as subject (Jantzen 1998:212). This makes it impossible for the one to occupy the space of the other.

Irigaray also regards the radical respect for sexual difference, or the passion of wonder between the sexes, to be a precondition for real love between the sexes. She argues that in our symbolic order, where the feminine is not symbolically mediated and does not have a place as a category of being alongside the masculine, there is no "double pole of attraction and

support, which excludes disintegration or rejection, attraction and decomposition, but which instead ensures the separation that articulates every encounter and makes possible speech, promises, alliances” (Irigaray 1993a:10). Accordingly, taking sexual difference seriously means that a reciprocal relationship between the sexes, which is not “a disguised or polemical form of the master-slave relationship”, becomes possible for the first time (Irigaray 1993a:17).

For Irigaray then, difference must be activated as the foundation for equality, in so far as a radical recognition thereof allows for a new understanding of subjectivity as a necessarily partial perspective. Difference is therefore reconceptualised, not as a pejorative quality, but as an inevitable underpinning of all human relationships, which evokes wonder and respect through the mere fact that it establishes the other as outside of the self and unknown to the self. This allows for the collapse of any hierarchical constructions of self/other or us/them. Boshoff explains this shift:

The male obsession with unity, totality and purpose (flowing from the visibility of the penis) is provided with an alternative, namely a female preoccupation with the plural and the dynamic. The implications of this shift in focus for cultural perceptions are profound. The traditional/male priority given to unity and consistency of meaning and identity in western culture is replaced by a much more complex feminine culture built around an implicit difference from itself (2007:47).

This echoes Irigaray’s comparison between the male and female sex organs:

The *one* of form, of the individual, of the (male) sexual organ, of the proper name, of the proper meaning ... supplants, while separating and dividing, what contact of *at least two* (lips) which keeps woman in touch with herself, but without any possibility of distinguishing what is touching from what is touched (1985b:26).

Through such an approach to subjectivity and difference, a space is opened up for a feminine subjectivity to flourish as a sexual identity in its own right.

III The embodied subject

Irigaray argues that the placement of the Cartesian subject at the centre of our culture has resulted in the calamity that we have no culture of the sexual, and this means that our culture

is impoverished in that it is “reduced to a single pole of sexed identity” (Irigaray 1993b:21). The sexual, and by implication also the bodily, are thus not regarded as being relevant to what it means to be a human being in the symbolic and cultural sense. Irigaray’s aspiration to work towards the development of a sexual culture is thus the aspiration to reach a point in history where the subject is seen, in the first place, as an embodied being, and where sexual specificity or difference is therefore crucial to the formation and identity of the subject. Braidotti calls this the “oversexualising [of difference] in a strategic manner” with the purpose of “reversing the attribution of differences in a hierarchical mode” (Braidotti 1995:169). This means that if the body is understood as the “material basis of the self”, sexual duality is a central factor in the constitution of the human subject (Du Toit 2009:153). Accordingly, sexual difference is acknowledged as being central to subjectivity rather than a marginal or accidental factor which justifies discrimination. Again, Braidotti points out how such rehabilitation of sexual difference lays the foundation for the reconsideration of all other differences between persons (such as race, religion and sexual preference) as worthy of respect, because “[s]exual difference stands for the positivity of multiple differences, as opposed to the traditional idea of difference as pejoration” (Braidotti 1994:239).

Irigaray (1993:69) explains that the Cartesian split between mind and body leads to the failure to conceive of being, and as a result, also thought and discourse, as residing in, or emerging from, the body. She argues that this results in discourse and thought being reserved for male bodies, in so far as “bodily tasks remain the obligation or the duty of a female subject” (Irigaray 1993:87). Irigaray (1993:127) writes strikingly:

In all his creations, all his works, man always seems to neglect thinking of himself as flesh, as one who has received his body as that primary home [...] which determines the possibility of his coming into the world and the potential opening of a horizon of thought, of poetry, of celebration, that also includes the god or gods.

The idea is thus that an acknowledgment of the embodiment of the subject will allow a sexual culture to flourish, which would entail the acceptance and celebration of the material foundation of subjectivity. This would pave the way for the possibility of the symbolic and cultural emancipation of women, because their bodies will no longer be regarded as the justification for their exclusion. Irigaray makes use of the term “sensible transcendental” to introduce an understanding of subjectivity that is not constituted through the exclusion or the

sacrifice of the material in favour of the Idea/intelligible/universal, but where the material and the intelligible are inseparable:

This creation would be our opportunity, from the humblest detail of everyday life to the “grandest,” by means of the opening of a *sensible transcendental* that comes into being through us, of which *we would be* the mediators and bridges. Not only in mourning for the dead God of Nietzsche, not waiting passively for the god to come, but by conjuring him up among us, within us, as resurrection and transfiguration of blood, of flesh, through a language and an ethics that is ours (1993a:109).

Accordingly, Irigaray wants to overcome the split between the material and the symbolic that forms the basis of western metaphysics (in terms of which the feminine is relegated to the realm of the material), by rooting the symbolic in the material. This would allow for the symbolic mediation of feminine subjectivity without sacrificing embodiment and sexual particularity. It would also facilitate a more realistic conception of masculine subjectivity in so far as it allows for its material basis and vulnerability to be acknowledged. Accordingly, “[t]he transition to a new age requires [...] a transformation of forms, of the relations of *matter* and *form* and of the interval inbetween” (Irigaray 1993a:9). In this regard, Whitford argues that the sensible transcendental is offered “as a horizon in which we are all implicated” in so far as it, firstly, enables the masculine subject “to shift his position”, and secondly, enables feminine subjects to “to build and create a different place for themselves in the social order” (Whitford 1991:144).

IV Equality as transformation rather than mere inclusion

At this point, it should be clear why Irigaray is extremely critical of the form that equality takes in the (dominant liberal) western social and legal order, where the universal subject represents ‘man’. In legal terms, this form of equality is referred to as formal equality. Formal equality is founded on the Aristotelian principle of treating like cases alike and unlike cases differently.

Feminist criticism of formal equality is based on the argument that in a society where the universal conception of the human being is modelled on an exaggeration of masculine characteristics, it is men (and traditionally also white men) who develop the standard of equality. In terms of this model, being different to men warrants unequal treatment. Sameness

is the key to equality, while difference is construed in a hierarchical way. The implication of this in sex equality cases is that, in so far as the complainant cannot prove sufficient similarities between herself and the relevant man, or between her position and his position, the matter is not treated as an equality issue. As a result, issues like pregnancy, abortion and sexual violence are automatically excluded from the scope of claims to equal treatment. MacKinnon explains:

A system-level consequence of this mainstream approach, rectified nowhere, is the failure to see as inequality issues many that are, especially those that are sexual or reproductive. Sexual violence, because of the overwhelming predominance of male perpetrators and female victims, and its rootedness in normative images of sexuality seen as naturally gendered, has tacitly been construed as an expression of the sex difference, therefore not an issue of sex inequality at all. Because overwhelmingly one sex is the perpetrators and the other is the victims, sexual violence is not sex discrimination, it is sex, that is, a “difference.” [...] Similarly, because women and men contribute differently to reproduction, women’s needs for reproductive rights have been brought under equality law only partially, as exceptions, with severe doctrinal strain, or, in the case of the right to abortion, not at all (2005:51).

MacKinnon’s point is thus, firstly, that under the formal model of equality, reproductive issues are not recognised as equality issues, because men cannot get pregnant and accordingly, in the context of pregnancy, women are not ‘similarly situated’ to men and can therefore not appeal to the right to equality. However, MacKinnon goes further by arguing that, under the formal model of equality, sex *inequalities* are often understood and naturalised as *difference* – which therefore places the situation beyond the scope of the right to equality in so far as it is not a ‘like case’, because women’s treatment cannot be compared to anything similar in the case of men. The formal model of equality thus allows patriarchal society to be selective about the injustices that are recognised as inequalities. Through the formal model of equality, many injustices are simply construed as natural differences that are regarded to justify the discriminating treatment.

Furthermore, a successful claim to equality will result in the mere inclusion of a certain category of women in the masculine position in the hierarchy, where they will be treated in the same way as men and where they will have the same benefits as men, which will still be to the detriment of other women. MacKinnon (2005:50) writes in this regard:

If equality is a sameness and gender a difference; if first-order equality is defined in terms of sameness, and women as such are “not the same” as men, women cannot be equal to men until they are no longer women.

In other words, the underlying hierarchical binary through which men enjoy a superior position to women, and which is based on the cultural symbolisation of the masculine ideal as the human norm, is not addressed, but rather sustained, through the formal model of equality. Critics thus argue that formal equality is not a tool to dismantle hierarchies and to create more inclusive and open structures in society, but rather determines the basis upon which women are ‘man enough’ to be granted access to the masculine position.

Serene Khader, an American feminist philosopher, explains that Irigaray’s critique of (formal) equality draws on two insights: firstly, that western thought operates according to a ‘logic of the same’, and secondly, that there is a lack of symbols to represent women’s experiences, which results in them being distortedly represented as masculine, or as inferior versions of masculinity, or not represented at all (Khader 2008:50). Irigaray sets out the logic of the same in her book *Speculum of the Other Woman* with reference to Freud’s narrative of sexual development. Freud claims the girl’s clitoris to be a “penis equivalent” (Irigaray 1985a:25). Irigaray regards this as a manifestation of the logic of the same, in so far as two different things (in this case the boy and the girl) are likened to each other based on their mutual likeness to a third thing (Irigaray 1985a:27). However, this comparison is problematic in so far as the third thing is more like one of the two things than the other. In the context of Freud’s account of the development of sexuality, the third thing is the phallus (Irigaray 1985a:25). Irigaray quotes selectively from Freud’s essay *Femininity*:

From the onset of the phallic phase, the *differences between the sexes are completely eclipsed by the agreements.... THE LITTLE GIRL IS THEREFORE A LITTLE MAN....*The little girl uses, with the *same* intent [as the little boy] her *still smaller* clitoris a penis *equivalent....*man *more* fortunate [than she] (1985a:25).

According to Irigaray, the boy and the girl are thus likened to each other on account of the fact that both of them can in a sense be said to possess a phallus. However, based on this scheme of comparison, the girl inevitably appears deficient:

So we must admit that THE LITTLE GIRL IS THEREFORE A LITTLE MAN. [...] A little man with a smaller penis. A disadvantaged little man. [...] A little man who would have no other desire than to be, or remain, a man (1985a:25).

The validity of the third term as an appropriate standard for comparison is never questioned, because it is regarded as operating on a different ontological level from the other two terms, in that it is supposedly universal (Khader 2008:52). Irigaray explains:

“Sexual difference” is a derivation of the problematics of sameness, it is, now and forever, determined within the project, the projection, the sphere of representation, of the same. The “differentiation” into two sexes derives from the a priori assumption of the same, since the little man that the little girl is, must become a man minus certain attributes whose paradigm is morphological – attributes capable of determining, of assuring the reproduction-specularization of the same. A man minus the possibility of (re)presenting oneself as a man = a normal woman (1985a:26 – 27).

Khader notes that Irigaray’s theory can be distinguished from other similar theories to the extent that the third term that Irigaray refers to “is not wholly identifiable with one of the two ‘lower’ terms” (Khader 2008:53). Khader explains: “[a]lthough the universal third term presents a standard to which the first term conforms more readily than the second, the first term also appears to conform incompletely to the standard” (Khader 2008:53). Accordingly, in the context of Freud’s narrative of sexual development, the actual living boy also fails to wholly conform to everything that the western order ascribes to the symbol of the phallus.

It is clear how Irigaray’s theory of the logic of the same can be applied to criticise the formal model of equality. The universal gender-neutral subject is the third term upon which the likeness between the first two terms, men and women, is based. The gender-neutral Cartesian subject, however, resembles masculine subjectivity much more closely than it does feminine subjectivity. And yet, as explained above, the Cartesian subject is also not wholly identifiable with masculine subjectivity in so far as it does not encompass the vulnerability and embodiment of men, which is an unavoidable aspect of their embodied (as opposed to their idealised) subjectivity. The implication is that the universal Cartesian subjectivity, to which masculine subjectivity aspires, also disadvantages men, because it requires them to identify with something to which they do not conform completely. Du Toit argues that the myth of men as “rational, self-contained, autonomous, physically invulnerable and independent

beings” (Du Toit 2011:3) who transcend the limitations of their sex-specific embodiment, is withholding actual, living men from acknowledging or exposing any sign of vulnerability (Du Toit 2011:8). In this sense, “the construct of the masculine subject in the current symbolic order is thus an inherently fragile and demanding one because it is so unrealistic and because it needs to constantly prove itself by ‘overcoming’ those as aspects of itself” (Du Toit 2011:6).

On the other hand, women’s embodiment constantly disrupts the illusion of disembodiment (in so far as women are defined by their sexual and reproductive functions in the patriarchal order, as well as the fact that the female body is continuously changing and moving through cycles). When women make a claim for formal equality, their likeness to men is established with reference to their conformity to universal Cartesian subjectivity. Accordingly, feminine bodily issues like pregnancy, abortion and sexual violence are regarded to lie beyond the scope of equality, because the comparison to Cartesian subjectivity leads to the denial and negation of embodiment as a central aspect of human subjectivity. Pregnancy, sexual violence and abortion are thus instances where women deviate from the human (masculine) norm, and in terms of which they are not similarly situated to men – which disqualifies them from making a claim to equality. In this sense femininity is “both construed as imperfect masculinity and repressed within the masculine imaginary of the western philosophical tradition” (Du Toit 2009:154). Therefore, the seemingly ‘neutral’ position of sex equality can be said to be modelled on an idealised masculine subjectivity, and requires that women denounce that which makes them most concretely different from men. The neutral position is therefore never neutral, but always already sexed, in the specific sense that it splits women’s sexual specificity off from their humanity. In this regard, it is useful to refer to Cornell’s use of the term ‘wound of femininity’ to describe the way in which conventional femininity is imposed on woman in a way that splits her off from herself as a sexual being and “rips her away from her identification of herself as a woman *and* as a person beyond the persona or masquerade of femininity” (Cornell 1995:7). Put differently, women’s sexual embodiment is defined in opposition to the covertly masculine ideal of the human as such.

Accordingly, Irigaray holds that the demand for (formal) equality by women is a “mistaken expression of a real objective” (Irigaray 1993b:12). She writes strikingly:

Women must not beg for or usurp a small place in patriarchal society by passing themselves off as half-formed men in their own right. Half the citizens of the world

are women. They must gain a civil identity with corresponding rights; human rights, as well as rights respecting work, property, love, culture, etc. (1994:63).

On this basis then, Irigaray argues for a different kind of equality, which is rooted in the idea that the illusion of a universal subject must be discarded in favour of the development of a sexual culture where sexual specificity/difference is acknowledged as crucial to the formation and identity of the human subject. The ideal of equality must therefore not aim to establish sameness that is grounded in the masculine order and based on phallographic models, but rather to provide both sexes with the opportunity to develop their own human identities, by allowing them to define the values of what it means to belong to either gender (Irigaray 1993b:12). Irigaray writes:

This does not mean that it is entirely as men that women come into today's systems of power, but rather that women need to establish new values that correspond to *their* creative capacities. Society, culture, discourse would thereby be recognized as *sexuate* and not as the monopoly on universal values of a single sex – one that has no awareness of the way the body and its morphology are imprinted upon imaginary and symbolic creations (1993a:67).

For Irigaray then, true equality would entail that women, like men, are enabled to develop their own identity, free from the constraints that patriarchy has placed upon them until now by reducing feminine subjectivity to a function of men's lives. Such an identity for women would be one that, on the one hand, cannot be reduced to motherhood, and on the other hand, cannot be reduced to being "just like men" (Irigaray 1993b:94). Sex equality is then achieved when women also lead validated lives in being who they are and becoming what they want to be. She writes:

In order to obtain a subjective status equivalent to that of men, women must therefore gain recognition for their difference. They must affirm themselves as valid subjects, daughters of a mother and a father, respecting the other within themselves and demanding that same respect from society (1993b:46).

Irigaray explains that this means that:

the female body is not to remain the object of men's discourse of their various arts but that it become the object of a female subjectivity experiencing and identifying itself. Such research attempts to suggest to women a morpho-logic that is appropriate to their bodies. It's aimed at the male subject, too, inviting him to redefine himself as a body with a view to exchanges between sexed subjects (1993b:59).

By understanding the subject in embodied and particular terms, Irigaray thus opens up a space for a new kind of equality which is not based on similar treatment, but rather on a respect for the other in all her difference. She is working towards a cultural and social transformation where both women and men can identify with themselves as sexed beings in their own right, and where femininity is not merely a negative - in other words, non-masculine - but where it is also a positive subjective identity (Irigaray 1993b:56).

The difficulty of this task lies in what Cornell terms the paradox of feminism: "Feminism, particularly in the complex area of sexuality, demands that we live with the paradox that we are trying to break the bonds of the meanings that have made us who we are as women" (Cornell 1995:99). In developing a new model of subjectivity, the subject has to transcend what she has become through imagination. In this sense the feminist ideal represents a utopian³ moment.

At this stage, the question can be posed as to whether Irigaray's ideal of valid subjectivity for men and women, to be achieved through a fundamental respect for sexual difference, can be termed 'equality' at all, or whether the term is too limited to encompass such an ideal. Bergoffen (2003:119) writes, for example, that "Irigaray's equity politics veers away from the ideal of equality to preserve the specificity of difference". Bergoffen thus regards equality, with its traditional focus on sameness and its inability to deal with particularity, as antithetical to Irigaray's 'equity politics' which is rooted in sexual difference. The question is thus whether it is appropriate to argue for an Irigarayan interpretation of sex equality or whether 'equality' as an ideal should rather be completely abandoned. I want to argue, in this regard, that the concept of equality need not be replaced by something else, but that it can be

³ It is useful to note here that the word "utopia" was first used by Thomas More, in his book with the same title, to refer in an ambiguous way both to a place which does not exist (derived from the Greek word *Outopia* which means "no land") and a good place (derived from the Greek word *Eutopiā*, literally meaning "good place" (Engelbrecht 2003:4). The classic utopia is thus a desired place which does not and cannot exist (Engelbrecht 2003:4).

reinterpreted and broadened to allow for an Irigarayan approach. It will be seen in the next chapter that the notion of equality is not inherently and necessarily linked with an Aristotelian emphasis on sameness. In this regard, it will be shown that equality, as conceptualised and framed in the South African constitutional order, has already taken on a new form that allows for a concern with difference and particularity, and which is thus much closer to Irigaray's 'equity politics' than to formal equality. On this basis, it is submitted that an Irigarayan approach to the transformation of sex and gender relations does not necessitate the discarding of the ideal of equality, but merely that the aims and informing values of equality must be reinterpreted. In the same vein, Khader notes that she reads Irigaray's critique of equality "as an enumeration of the dangers facing egalitarian political strategies rather than a rejection of egalitarian ideals" (Khader 2008:50).

V Sexed rights

Irigaray's sexual difference theory culminates in the powerful, but highly controversial notion of sexed rights as a strategy to achieve legal enforcement of the kind of equality that she envisions. In this regard, Irigaray argues that the identity of women cannot be constructed in the absence of a legal framework that regulates horizontal and vertical relations in society with respect for the fact that women and men are sexual and embodied beings who are different from each other (Irigaray 1993b:82) and who need different things from the law. She thus deems it crucial for the achievement of basic justice that women be granted a civil identity (Irigaray 1994:41), in so far as women must, like men, be able to assert their subjectivity through public means and channels, rather than being relegated only to the realm of the personal. In the absence of such a civil identity, women will continue supporting a male tradition and society that marginalize and oppress them (Irigaray 1994:41). The development of a civil identity for women will also necessitate the redefinition of the rights and responsibilities of male citizens (Irigaray 1994:62). Crimes like violence against women, non-consensual pornographic trade, involuntary prostitution, kidnapping of children and incest indicate that there is still a blatant lack of appropriate human rights for women and children in our societies (Irigaray 1994:41). Irigaray (1994:59) explains how the written law is aimed at a society of "men-amongst-themselves". She writes:

The pretext of the neutral individual does not pass the reality test: women get pregnant, not men; women and little girls are raped, boys very rarely; the bodies of women and girls are used for involuntary prostitution and pornography, those of men

infinitely less; and so on. And the exceptions to the rule or custom are not valid objections as long as society is for the most part run by men, as long as men are the ones who enact and enforce the laws (1994:59).

Her point is thus that the legislation that is in place still allows, on a large scale, for women's bodies to be treated as property, and is thus actively complicit in barring women from becoming fully fledged subjects. On this basis, Irigaray demands that women's positive civil identity be written into law by way of granting them sex-specific or 'sexed' civil rights. This point is crucial in the context of the problem of sexual violence against women. Irigaray holds that it is the alleged/false neutrality of legal systems that is supporting the masculine order in its denial of feminine subjectivity, by not providing for the particularly embodied and sexual needs and vulnerabilities of women. For Irigaray, then, the oppression of women, and therefore also sexual violence, cannot be fought and eradicated in the absence of sexed rights.

Irigaray writes that civil rights must operate, firstly, to open up all arenas of public expression to women, secondly to allow them to enter the labour market in a way corresponding to their status as adult citizens, and thirdly "to give them rights that enable them to escape from the alienation of the family and the state, the world of men-amongst-themselves, but also from the possible alienation stemming from other women" (Irigaray 1994:83). Accordingly, Irigaray aims at formulating rights that would enable women to participate as subjects in the spheres of family, state and society, so that these institutions include and empower women rather than functioning through their exclusion and isolation. The specific sexed rights that Irigaray argues for are, in short, the right to human dignity (which is aimed specifically at an end to the commercial use and exploitation of women's bodies and legitimate representation of them in public spaces); the right to human identity; mutual mother-child duties, so that a mother can protect her children and be assisted by them under the law; the right of women to defend their lives and those of their children, their homes, their traditions and their religion against any unilateral decision based on men's law; some financial rights; the restructuring of systems of exchange in order to ensure that women and men have a right of equivalent exchange; and lastly, the right to be represented everywhere that civil or religious decisions are made (Irigaray 1994:60). These rights will be explained in more detail below in my defence of Irigaray against the charge of essentialism.

Accordingly, Irigaray advocates for the active engagement of the law in the quest for equality for women through the explicit inscription of the fundamental recognition of sexual difference within legislation. In terms of this theory, the illusion of the neutral, abstract individual will be destabilised by extending concrete rights to embodied and sexually particular persons.

VI Response to the charge of essentialism in the work of Irigaray

Irigaray's theory often falls prey to the charge of essentialism, in so far as ontological importance is attached to being either male or female. Braidotti (1994:184) explains that Irigaray's deconstruction of sexual polarization in western metaphysics "mimes perfectly the conceptual operation of essentialist logic as the key of phallogocentric discourse" in so far as she does not dissociate questions of the feminine from the presence of real-life women. In equating the feminine with women and the masculine with men, Irigaray thus seems to be repeating the "binary perversion of phallogocentrism" (Braidotti 1994:184). Critics argue that this is problematic because it, amongst other things, firstly assumes that all persons fit into either the category of male or female and that no other sexual categories of human beings exist, and, secondly, could lead to the re-encoding of oppressive stereotypes of male and female identities.

In this section, I will address this criticism by specifically responding to Cornell's formulation thereof. Cornell voices her disagreement with Irigaray in response to the following assertion from Irigaray:

Each man and each woman is a particular individual, but universal through their gender, to which must correspond an appropriate law, a law common to all men and to all women (1996:51).

Irigaray writes these words in justification of her argument regarding the necessity of sexed rights. Cornell formulates her critique in the following way:

I strongly disagree with Irigaray that our sexed identity is a natural reality and that our particularity as a person can be adequately expressed through legally defining gender as a universal (1998:122).

She continues:

Although women would be given a civil identity, the attempt to give rights, thought through sexual difference as a universal, denies women the freedom to reimagine their sexual difference. For Irigaray, there are naturally two sexes. Her ontologization of the two denies that women live their biology in infinitely different and original ways. In the imaginary domain, sexes cannot be counted because what we will become under freedom cannot be known in advance (1998:122).

Cornell's criticism of Irigaray thus hinges on two related points: firstly, that Irigaray tries to exhaustively express our particularity through legally defining gender, and secondly, that Irigaray ontologises sexual difference in an oppressive way by encoding a new hegemonic stereotype of women into the law, and as a result, denies women the opportunity to develop their sexual identities in ways that they want to. According to Cornell, this latter denial also implies that the differences between women are denied. I will respond to each of these points in what follows below.

With regard to Cornell's first point of criticism, I want to argue that a simple analysis of the sexed rights for which Irigaray advocates reveals that Irigaray is not attempting to "adequately express" the particularity of a person through her sexed rights. On the contrary, these rights are aimed at breaking open a space of freedom for women to create their own identities, something which the legal system has to date been complicit in fighting against.

The first sexed right that Irigaray deems necessary is the right to human dignity. This entails an end to the commercial use of women's bodies or images; the legitimate representation of women in actions, words and pictures in all public spaces; and an end to the exploitation of a functional part of women, for example motherhood, by civil and religious powers (Irigaray 1994:60). This right is concerned with the legitimate representation of women in public spaces and is directed toward allowing women to decide over and control their 'functional' aspects (for example motherhood). Here the question can arise as to who decides what constitutes "legitimate" representation of women, and in this regard Irigaray might be read as being willing to be prescriptive about what "legitimate" womanhood entails. However, this right can also be interpreted simply as a prohibition of public displays of pornography and any explicit or sexist material that promotes the harmful stereotyping of women as objects at the disposal of men. Cornell herself argues that pornographic and explicit images of women should be "zoned" so that everyone has a choice about whether they want to be confronted with them or not, because "[n]o woman should be forced to view her own body as it is

fantasized as a dismembered, castrated other, found in bits and pieces” (Cornell 1995:103). Read in this way, this right is not intended to be an adequate expression of the particularity of women, and is necessary to create the freedom for women to determine their own identities.

The second sexed right that Irigaray formulates is the right to a human identity. This entails “the enshrining in law of *virginity* as a component of female identity that cannot be reduced to money” (Irigaray 1994:60). In justification of this right, Irigaray writes:

This component of female identity gives girls a civil status and the right to keep their virginity (for their own relationship to the divine, too) as long as they like, and to bring charges against anyone inside or outside the family who violates it. [...] Girls need a positive identity to which they can relate as individual and social civil persons (1994:61).

Accordingly, in defining this right, Irigaray is intensely concerned with the freedom of girls to develop their own embodied, sexuate and sexual identities and their own relationships to the divine, and their ability to defend this freedom through the official channels of the law. Again, she is not attempting to inscribe what it means to be a woman in law, but is rather trying to get the legal system behind the project of enabling women to develop and explore their own subjectivities. This resonates with Cornell’s idea that the law should function in a way that enables women to become persons – where personhood refers to the Latin meaning of *Persona* as a “shining through” (Cornell 1995:4). Accordingly, for Cornell, being a person entails a development of subjectivity or identity which distinguishes human life from a mere banal bodily struggle for survival. Irigaray’s formulation of the right to human identity serves such a project.

Irigaray’s right to human identity also entails the right to motherhood as a component of feminine identity. Here Irigaray makes it abundantly clear that she is not saying that motherhood is a necessary component of being a woman. She writes:

If the body is a legal issue, and it is, the female body must be identified civilly as both virgin and potential mother, this means that it is a woman’s civil right to choose to be pregnant, and how many times (1994:61).

This therefore entails the right *not* to get married, *not* to have sex, and especially, *not* to have children. This point can be explained in terms of Martha Nussbaum's notion of capabilities, in that the capability of bodily integrity for her entails, crucially, choice in matters of reproduction (Nussbaum 2000:78). Irigaray is thus not saying that womanhood inevitably entails motherhood, but that women should be able to choose for themselves whether they will live their womanhood as mothers. In our society, many young girls do not experience this as a real choice, as the majority of teenage pregnancies in South Africa are unplanned and unwanted (Vundule *et al* 2001:73). In addition, studies have shown that many teenage girls regard pregnancy as a way to demonstrate 'successful womanhood' (Mkhwanazi 2010:348).

Irigaray's third sexed right - that mutual mother-child duties should be defined in the legal code - is directed at enabling women to protect their children and to be protected by them under the law (Irigaray 1994:61). "This will allow her to bring charges on behalf of civil society when children, especially girls, are raped, battered, or kidnapped" (Irigaray 1994:61). Again, this right is aimed at putting in place legal protection against the infringement of bodily integrity for women and their children - it is not trying to define womanhood in any prescriptive way. The same goes for the fourth sexed right, which gives women the right to defend their lives and those of their children, as well as their homes, traditions and religion, against unilateral decisions made through and by men's law (Irigaray 1994:61). Irigaray's reference to men's law here can be read as the patriarchal practices that are so often embedded in the home, family, tradition and religion. And the same can be said for Irigaray's fifth sexed right, which is aimed at empowering women financially by not discriminating against women through systems like taxation or state subsidies. Such financial empowerment would contribute to the bolstering of women's financial, sexual and reproductive autonomy by allowing them to become less dependent on men.

The sixth sexed right that Irigaray formulates entails that "systems of exchange, languages, for example, will be restructured to ensure that women and men have a right of equivalent exchange" (Irigaray 1994:62). She also writes:

Even in technologies based on language and its coding, it seems a good idea to review women's relations to natural and artificial languages before concluding that their easy access to this type of work represents a social victory for them. It may also contribute

to a more subtle alienation of their identity and, thus, to a new type of alienation of society as a whole (1994:63).

Irigaray is thus concerned with the development of symbolic forms and linguistic skills that would allow women to represent, verbalise, or communicate in a way that serves their development of specifically feminine identities. Cornell also regards this kind of symbolic mediation as essential for the becoming of feminine subjectivity in so far as she lists “access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others” as a minimum condition of becoming a person (Cornell 1995:4).

Accordingly, the rights formulated by Irigaray clearly refrain from prescribing what it means to be a woman, and are open-ended rights that are aimed at enabling women to enjoy equal sexual, bodily, financial, political and religious freedom to men. In Cornelian terms, Irigaray is thus working to undermine and dislodge the conventional femininity that is imposed upon women and to create a space for the flourishing of the person and the woman “beyond the masquerade of femininity” (Cornell 1995:7). In other words, Irigaray wants the law to carve out a legal space where the ‘other of the other’ or feminine subjectivity can be born and sustained.

As noted above, Cornell’s second objection to Irigaray’s work is that Irigaray ontologises sexual difference in an oppressive way by encoding a new hegemonic stereotype of women into the law. According to Cornell, the result of this is that, firstly, women are denied the freedom to develop their sexual identities in ways that they want to, and secondly, the differences between women are denied.

The ontologisation of sexual difference by Irigaray has been defended by many thinkers. The most convincing argument in this regard is put forward by Braidotti, and holds that Irigaray’s radicalization of the categories of male and female is the basis for a new kind of ethics in which alterity is fully respected and accepted as a fundamental element of human existence (Braidotti 1994:133). Accordingly, the enabling of a new feminine humanity through sexual difference breaks open the exclusionary zone of the singular subject based on sameness. Subjectivity is therefore opened up in a movement toward the recognition and love of the other, thus enabling a fertile relation with alterity.

Braidotti also regards Irigaray's strategic ontologisation of the female as a sex alongside the male as a necessary step in activating sexual difference as a political option (Braidotti 1994:177). Braidotti explains this point as follows:

The factual element that founds the project of sexual difference, and that is also a sign, is not biological, it is biocultural, historical. Its importance lies in the fact that it allows me, and many like me in the sameness of our gender – all differences taken into account – to state that “we” women find these representations and images of “*Woman*” highly insufficient and inadequate to express our experience as women. Before any such assertion is being made, however, the consensus point needs to be cleared, that “being-a-woman” is always already there as the ontological precondition for my existential becoming as a subject (1994:188).

Accordingly, Braidotti interprets Irigaray's position as a strategic move aimed at the opening up of a space, through the breaking open of the singular and universal subjectivity, in which women can begin to define their own sexual subjectivities. Essentialism is thus used as a lever to activate difference as a central notion of our understanding of subjectivity. Braidotti formulates this as follows:

As women we are firmly attached to a culture and to logic of discourse that has historically defined Woman/woman, woman and the feminine, in a pejorative sense. The conscious political realization of our being already present, however, in a system that has turned a blind eye/I to the fact of what we are and that we are, instead of becoming a statement of defeat, could pave the way for a new ethical and political project aimed at affirming the positivity of the difference we embody (1994:190).

On such an interpretation, at least, Irigaray's notion of sexual difference changes difference from a ground for discrimination and a “mark of pejection” (Braidotti 1994:160) to a positive constitutive element of human existence, so that the differences between people can be regarded as cause for respect and celebration. Accordingly, for Irigaray, ontologising sexual difference is a tool which allows for a move away from the ‘sameness’ model of subjectivity and which creates a space for love for the other. Her position is thus not an exclusionary one, but the basis of an ethics that is marked by full respect for otherness and difference. On this basis, thinkers like Braidotti refer to it as “love ethics” (Braidotti 1994:133).

With regard to the charge that this ontologisation of the two sexes can result in the legal entrenchment of a new hegemonic stereotype of women, Cornell argues that ethical feminism resists the urge to rigidly produce the categories of men and women, which inevitably results in the exclusion of persons who do not identify with either of these categories, or who prefer to move more fluidly between them (Cornell 1995:26). Cornell's argument is thus that the law must not entrench respect and protection for the category of woman, because this entails that a certain static conception of woman is written into the law. The law must rather allow and enforce the equal valuation of women and men in principle, so that women need not conform to a specific conception of femininity in order to be respected and protected. Cornell argues:

We also want to refrain from imposing other constraints in the very name of trying to give women the right to speak. Paradoxically, a feminist program of legal reform must be aware of the limit imposed upon such reforms by the unlimitedness of feminist aspirations to search out a world beyond accommodation to current forms of gender confinement (1995:106).

Cornell's point is an important one in so far as there exists general consensus among feminists that feminism should guard against repeating patriarchy's sin of prescribing a model of femininity, and, as a result, excluding women who do not conform to it, on the basis that such women are 'unnatural' or undignified. I want to argue that Irigaray is not guilty of this. Irigaray regards the feminine as still merely a horizon of becoming, and accordingly, she is in no way claiming to know what the feminine entails or what it is capable of becoming, and she is therefore not attempting to inscribe it into the law in any way. In fact, Irigaray emphasises the importance of each woman giving form to her own subjectivity:

I must open out my female body, give it forms, words, knowledge of itself, a cosmic and social equilibrium, in relation to the environment, to the different means of exchange with others, and not only by artificial means that are inappropriate to it (1993:116).

The passage quoted above also again alludes to the possibility of *symbolic* mediation of femininity as a category of being. Braidotti (1994:131) describes Irigaray's project as follows:

‘The feminine’ she is after is a woman-defined-feminine and as such it is still a blank, it is not yet there, we are to think of it in the conditional mode: how can the feminine of/in/by women come into being in the sexually undifferentiated system of our culture? What are the conditions that would make the first coming of the female subject possible?

Similarly, Du Toit points out that for Irigaray, Woman is not something that yet exists in the masculine order of western thought, and therefore remains rather “a horizon of becoming awaiting us in the future” where the female sexed body is a material basis or genre from which this becoming emerges (Du Toit 2009:174).

Accordingly, the recognition of and respect for sexual difference that is at issue in Irigaray’s work is more radical than merely respecting members of the other sex for what they are, but also entails recognition and respect for whatever they want to *become*. It is about enabling the feminine to develop a sexed identity that has been denied to her under patriarchal rule, and enabling the development of a kind of masculinity that is freed from the straitjacket of the Cartesian subject. The respect for sexual difference that Irigaray promotes therefore does not merely entail respecting sexually particular persons when they behave and appear in a certain way that conforms to the prevalent idea about what a woman or man is, but rather entails unconditionally respecting them in whatever way they choose to live and express their sexed identity. In this sense, an authentic respect for sexual difference therefore has a temporal element which allows for the surpassing and transcendence of sexual stereotypes, in that it is not only about allowing people to be who they are, but also about creating a space for their becoming.

Furthermore, Irigaray explicitly responds to the concern that in emphasising sexual difference, differences among women are ignored, by criticising women who “confuse their unmediated will with a model of law or the way to happiness for all women” (Irigaray 1996:3). On this basis, Irigaray holds that it is “necessary for a gender to learn to oppose itself” (Irigaray 1996:4), and that women should not project their “contradictions onto other women [...] side-step[ping] the labor of the negative amongst them” (Irigaray 1996:4). Caldwell explains Irigaray’s positions as follows:

Her attention to a negative among women would – or should – reject any one woman’s efforts to present her particular experiences as a universal experience or

identity for women. It is also important to recall her definition of the feminine universal as a sensible transcendental that simultaneously precedes me and is constituted by me. Given these parameters, a feminine universal cannot refer to one set of characteristics (2002:31).

It is thus clear that Irigaray's sexed rights are not aimed at providing the exact content of, and thereby formulating prescriptions for, a new kind of femininity, but are rather directed towards enabling women to define their own contours. Accordingly, Irigaray should not be read as re-encoding a new hegemonic conception of the feminine into the law through her sexed rights, because her whole point is that the Feminine does not exist yet. In this regard, Braidotti (1994:130) writes that "[t]here is a visionary, utopian, and at times even prophetic quality in Irigaray's writing, which expresses her faith in the force of the feminine as a new symbolic and discursive economy". Nussbaum's words find interesting application here:

We want an approach that is respectful of each person's struggle for flourishing, that treats each person as an end and as a source of agency and worth in her own right. Part of this respect will mean not being dictatorial about the good, at least for adults and at least in some core areas of choice, leaving individuals a wide space for important types of choice and meaningful affiliation. But this very respect means taking a stand on the conditions that permit them to follow their own lights free from tyrannies imposed by politics and tradition (2000:69).

In these terms, Irigaray's sexed rights can be regarded as an instance of "taking a stand" against the "tyrannies" of the western and African patriarchal orders which bar women from taking on the struggle for flourishing.

VII Conclusion

This chapter has shown how, for Irigaray, equality lies not in the equal treatment of similar categories of people, but is rather grounded in a new conception of subjectivity which is not based on singularity, disembodiment and universality, but on plurality, difference and embodiment. Sex equality would therefore flow from a radical re-envisioning of the self as having its material basis in the body, which results in an inevitable shift in attitude toward the sexed other, and if Irigaray is read generously, also toward otherness in race, class, age, and so on. As explained earlier, Irigaray uses the concept of the sensible transcendental to express

this idea of a subjectivity that is constituted by a dynamic interaction between the material and the intelligible. The shift in attitude toward the other is born out of the recognition that as an embodied being, every subject only has access to a partial perspective, and that the sexed other therefore remains unknown to and outside of the self. The universalisation of one sex as representative of humanity becomes incongruous, and sexual difference is acknowledged as a constitutive element of subjectivity and the foundation of any relationship with the other. Through the understanding of subjectivity as embodied, and undeniably and inevitably sexed, so that sex gains ontological importance, the oppression of one sex by the other through the relegation of one set of sexual particulars to an inferior position is rendered absurd, as well as absurdly unjust. Furthermore, this also applies to other differences between persons in society, in so far as the recognition of the partial perspective of the embodied subject also leads to an acknowledgment of the partiality of being white or of belonging to a certain ethnic, cultural or age group. Accordingly, Irigaray's approach to subjectivity enables the emergence of a society in which all difference is respected and approached with wonder.

It has been shown that the kind of equality envisaged by Irigaray's philosophy cannot be accomplished by the formal model of equality, in so far as this model merely leads to the perpetuation of existing gender hierarchies. Accordingly, Irigaray's philosophy calls for a reinterpretation of equality as an ideal that is underpinned by difference, and thus fundamentally concerned with particularities. Irigaray regards the supposedly gender-neutral and universal language of legal discourse as incapable of bringing forth and supporting this kind of equality, and as a result proposes the legal inscription of sexual difference through the entrenchment of sex-specific rights.

Irigaray's identification of patriarchy as an institution that is rooted in the symbolic order helps to explain the pervasiveness of patriarchy across most cultures and religions, as well as the difficulty of overcoming it. Furthermore, her philosophy contributes to an understanding of the nature of the transformation that is necessary to empower women. Irigaray shows that such a transformation needs to happen at a fundamental symbolic level and that it will result in a complete overhaul of the symbolic and social structures of society. It is this that renders her work relevant to the South African context, where the legislative attempts to address the oppression of women have failed to effect a significant improvement in the prevailing social attitudes and beliefs in terms of which women's bodies are treated as men's property.

Following Irigaray, I want to submit that in order to bring about real transformation of sex and gender relations in South Africa (and thereby to address the problem of sexual violence) the legal system should facilitate the necessary symbolic change through altering the way in which it approaches and posits the subject. On this basis, I want to argue that replacing the disembodied, universal subject of traditional legal discourse with a sexed and embodied subject within the South African Constitution and legislation could be the first step to a deeper transformation of sex and gender relations in South African society. This will enable the legal system to start taking the needs and vulnerabilities of concrete and actual living women seriously so that they can develop as subjects alongside men, without having to conform to the masculine norm in order to be respected as subjects and persons by the law.

In the next chapters I will explore the South African constitutional equality jurisprudence and the sexual offences legislation in order to determine the extent to which the legal system's approach to sex equality and sexual violence allows for an Irigarayan approach to subjectivity and equality.

CHAPTER TWO**EMBODIMENT, SEXUAL PARTICULARITY AND
DIFFERENCE: AN EXPLORATION OF
SUBJECTIVITY AND EQUALITY IN THE SOUTH
AFRICAN CONSTITUTION****I Introduction**

From the arguments in the introductory chapter of this thesis, which framed sexual violence as fundamentally a problem of inequality, and moreover, a deeply gendered one, it can be concluded that if the legal system is to address sexual violence effectively, more drastic measures than the mere criminalisation of rape are called for. The eradication of sexual violence against women, then, demands that the law should contribute to an interruption of sex and gender relations by working to uproot the deep hierarchical structures through which masculine and feminine identities were defined for centuries.

In the previous chapter it was shown that Irigaray argues that the empowerment of women requires transformation at the level of the symbolic order. Such transformation would begin with a rethinking of subjectivity, so that the disembodied and falsely universal subject of the western symbolic and philosophical order (and accordingly, also the legal order), which represents an idealised masculine subjectivity and emerges through the exclusion and sacrifice of the feminine, is replaced with an embodied and sexually particular subject. Such transformation will entail and support a new approach to sexual difference, in which subjectivity is recognised as being rooted in the sexed body, and in terms of which sexual particularity is thus respected and embraced rather than denied or misused. In this way the hierarchical dichotomies of same/other, universal/particular, disembodied/embodied, culture/nature, public/private, and so on, which are all underpinned by the masculine/feminine hierarchy (where all the secondary terms are associated with femininity and regarded as inferior while the primary terms correspond with masculinity) can be dismantled and collapsed. Irigaray argues that this will allow, on a symbolic level, for the feminine to emerge as a sex in its own right, and accordingly, women will be able to develop human identities and subjectivities that are not merely derivative of and in service of men. For Irigaray, sex equality then entails the recognition of all sexed persons as valid subjects. It has also been shown that Irigaray ascribes a strategic and radical role to the law in this

transformation, in so far as she argues that the law should enable women, through sex specific rights, to develop civil identities that are denied through gender-neutral laws that are covertly in service of the masculine.

Thus far I have argued that Irigaray's work is important because she provides a convincing account of the level at which transformation of sex and gender relations must begin and the legal system's role in such transformation. In South Africa, where women remain the victims of large scale oppression through sexual (and other forms of) violence, it would therefore be of value to determine the extent to which our constitutional equality jurisprudence, which is aimed at fighting this oppression, allows for an Irigarayan approach to transformation by addressing the deep problems on the level of the symbolic order. In this regard, the question will be posed as to whether the South African equality jurisprudence, with reference to the Constitution, relevant legislation, case law and academic literature, can be interpreted so as to enable the emergence of an embodied and sexually particular legal subject, and the extent to which the right and value of equality can be interpreted so as to allow for an authentic acknowledgment of the sexed self as the foundation for sex equality.

I will start in the next section by introducing the form that equality takes within the South African equality jurisprudence. This section will explain that the much criticised model of formal equality is largely replaced in the South African constitutional dispensation by the substantive model of equality. It will be shown that this model immediately draws the ideal of equality closer to an Irigarayan conception thereof, in so far as it is not simply concerned with similar treatment of certain categories of people, but with dismantling systemic inequalities and power asymmetries in society which withhold concrete individuals and groups from enjoying their basic constitutional rights and freedoms.

In the subsequent section, I will expand on the preceding discussion by focusing specifically on the kind of legal subject that features in the equality jurisprudence of South Africa. Here I will show that within the specific context of the right to equality, the subject is mostly approached not as an abstract, gender-neutral and disembodied legal category, but as a concrete, sexed and embodied being. It will also be shown that an authentic recognition of sexual difference is written into our equality jurisprudence through PEPUDA's listing of sex-specific instances of unfair discrimination on the basis of gender. I will argue that our right to sex equality is thus informed and enhanced by what closely resembles sexed rights in the Irigarayan sense.

In the third section, I will explore the approach of the South African constitutional order to sexual difference in the context of sex equality. Here I will show that the Court's acknowledgment of difference as a positive feature of society which, according to the Court, should underpin our understanding of equality, allows for difference to be dislodged from its automatic association with hierarchy. It therefore lays the foundation for a society where 'different from' does not mean 'less than', and where equality is pursued through a respect for difference. A concern with the particular and the concrete is therefore not understood as inimical to the quest for equality, but rather, as being in service thereof. It will be argued that this lays a promising foundation for an Irigarayan-type acknowledgment and application of sexual difference. However, it will be shown that the Court has not yet explicitly acknowledged the implications of such an approach to difference in the context of the relationship between the sexes. Accordingly, *sexual* difference has not yet been directly included in the constitutional discussion of equality and difference. Furthermore, with reference to case law, I will show that the Court has to date still relied too much on sameness in sex equality cases, which contradicts its emphasis in other contexts on the importance of difference. However, I will argue that even though sexual difference has not yet been activated in our equality jurisprudence to an extent that fulfils its full potential as catalyst for transformation of sex and gender relations in South Africa, a foundation for this has been laid through the Court's understanding of equality as an ideal that is underpinned by difference rather than sameness. There is thus an opening in our equality jurisprudence for the emergence of an Irigarayan approach to sexual difference as a core value in a strategy for sex equality.

It will therefore be argued throughout the course of these discussions that the South African equality jurisprudence does lay a foundation for an Irigarayan approach to the transformation of sex and gender relations in so far as our right to equality can be interpreted to be underpinned by an acknowledgment of embodiment, sexual particularity and difference.

II Formal Equality and Substantive Equality

From the outset, the South African Constitution proclaims its commitment to gender equality to be just as strong as its commitment to racial equality, by listing non-sexism together with non-racism as founding values of South Africa. Gender and sex are also listed alongside race as prohibited grounds of discrimination in the equality clause. Furthermore, from PEPUDA's preamble, it can be seen that the Act recognises that gender inequality is just as big a problem

as racial inequality. In this regard it is explicitly stated that patriarchy, as a form of domination which is systemic in nature has, alongside colonialism and apartheid, “brought pain and suffering to the great majority of our people”. Accordingly, the Constitution and PEPUDA openly proclaim and insistently emphasise the country’s commitment to the achievement of sex equality. This constitutionally proclaimed commitment to sex equality creates the possibility of the achievement of a powerful break with the past.

In the establishment of the South African constitutional democracy, it was recognised that a robust model of equality is needed for the kind of transition that has to be made from a severely unequal society to one where all people live together as equals. As a result, the formal model of equality was discarded in favour of a substantive model of equality.

As explained in the previous chapter, the traditional form that equality takes within liberal legal systems is formal equality. From a feminist perspective, the formal model of equality is highly problematic because within the application of formal equality, the masculine norm is regarded as the standard for the ‘likeness’ that must be established as a basis for a claim to equality. As explained in the previous chapter, the implication of this is that to the extent that the complainant is not similarly situated to men (in that her case is not regarded to be a ‘like case’ to those of men), she is not granted access to equality. Furthermore, a successful claim to equality will result in the mere inclusion of a certain category of woman into the masculine position in the hierarchy, where she will be treated in the same way as men and will have the same benefits as men, which will still be to the detriment of other women and possibly herself. Through the formal model of equality, a pernicious attitude toward difference is thus entrenched in the law, in so far as, on the one hand, difference is constructed hierarchically and is regarded as justification for discrimination, and on the other, existing inequalities are interpreted as differences which remove the case from the scope of a claim to equality. MacKinnon (2005:53) explains this point as follows:

Sex equality for the “similarly situated” best provides equality for whoever is “the same as men.” Actually, these people have *been* men: white men have brought most of the leading Supreme Court sex discrimination cases. Next in line are women whose biographies most closely approximate those of men, elite women with privileges (white skin, money, education, and so on). Unrecognized here is that it is hierarchy, not difference as such, that is the opposite of equality. The inequality that is hierarchy,

existing theory builds in as difference, meaning something that can be treated differently –that is, less well, hierarchically lower [.]

MacKinnon's point here is that in terms of the formal model of equality, socially and ideologically constructed hierarchies (thus inequalities) between people and groups of people are naturalised and then construed as difference, which disqualifies the issue from being a 'like' case to that of the more privileged person or group. Inequalities are thus understood as difference which places the issue beyond the scope of equality, because it does not pass the 'similarly situated' test. Formal equality therefore necessitates no critical evaluation of the law itself or of other entrenched systems of inequality within society. Rather, it sustains the hierarchical, binary logic which keeps masculine privilege invisible and firmly in place. Accordingly, the pursuit of formal equality has the anomalous effect that hegemonic relations are enforced and perpetuated under the guise of equality.

With the advent of democracy in South Africa, the drafters of the Constitution decided from the outset that in the 'new' South Africa, a stronger and more complex model of equality will be needed in order to overcome the gross inequalities created by the previous dispensation. The formal model of equality was thus replaced with a substantive approach, which is evident from section 9(2) of the equality clause in the Constitution:

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.

Accordingly, the meaning of the notion of equality in the South African Constitution is extended beyond mere formal equal treatment of all persons to the active promotion of equality through legislation and other actions. The Constitutional Court in the case of *National Coalition for Gay and Lesbian Equality (NCGLE) and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC), quoting Judge Goldstone in the case of *President of the Republic of South Africa and another v Hugo* 1997 (6) BCLR 708 (CC), states that the notion of substantive equality as opposed to formal equality has been encapsulated in the following way:

We need, therefore, 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 (par 61).

The substantive model of equality is thus not concerned with treating everyone the same, but rather with treating people in a way that will result in the *achievement* of equality. Therefore, substantive equality is regarded by scholars, as well as the Constitutional Court, to be a transformative tool. Albertyn explains that substantive equality does not entail a process of comparison where one group is seen as embodying the neutral standard of sameness (humanness), but that the disadvantaged group or person is instead compared in a concrete way to the advantaged group or person in order to determine how the former is kept from enjoying their full human potential (Albertyn 2004:4.3.1). Albertyn further writes that, by providing for a conception of equality that entails the equal enjoyment of rights and freedoms set out in the Bill of Rights, section 9(2) “envisages a society in which all people enjoy a level of psychological, physical and material well-being that enables them to participate fully in society” (Albertyn 2004:4.24). This resonates strongly with Cornell’s understanding of equality as requiring that each person has an equal chance to pursue the project of becoming a person (Cornell 1995:4). Accordingly, substantive equality represents a decisive shift away from the requirement (or assumption) of sameness to an emphasis on the ideal that all people should be enabled to an equal extent to enjoy their full human potential.

The transformative potential of substantive equality is also highlighted in PEPUDA. Its preamble repeatedly refers to systemic inequalities that necessitate large scale transformation of social structures, practices and attitudes:

Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.

The preamble of PEPUDA states that the constitutional values of human dignity, equality and freedom constitute the basis for progressively redressing systemic inequalities which were generated historically by colonialism, apartheid and patriarchy, in order to create a “non-racial and non-sexist society where all may flourish”.

PEPUDA thus also emphasises that the right to equality has a more radical role to play than simply ensuring that like cases are treated alike. Furthermore, PEPUDA clearly embraces the substantive model of equality by defining equality in section 1 as “the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and as including *de jure* and *de facto* equality and also equality in terms of outcomes”. One of the guiding principles set out in section 4 of the Act is that “the existence of systemic discrimination and inequality, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy” must be taken into account in the application of the Act, as well as “the need to take measures at all levels to eliminate such discrimination and inequalities”.

Furthermore, PEPUDA offers progressive responses to the acknowledgment that the route to equality does not lie in mere equal treatment, but in the dismantling of systemic inequalities in order to create a society in which everyone has an equal chance to flourish. In this regard, PEPUDA firstly reverses the burden of proof in section 13 in cases of unfair discrimination. This reflects an acknowledgment that systemic inequalities in society often make it very difficult to prove that discrimination has taken place, because the discrimination is an accepted practice in society, or alternatively, because the discrimination is so subtle and embedded in community attitudes and structures that it is regarded as being unavoidable or natural. In this context, PEPUDA stipulates that the complainant merely has to make a *prima facie* case of discrimination, after which the burden of proof is on the respondent to prove that the discrimination did not take place or that the discrimination was not based on one or more of the prohibited grounds. Sex, pregnancy, gender, sexual orientation and marital status are all prohibited grounds in terms of section 9 of the Constitution. Similarly, if it is established that discrimination did take place on a prohibited ground, then the discrimination is deemed to be unfair, unless the respondent can prove otherwise.

From an Irigarayan perspective, this shift from formal to substantive equality allows for the dismantling of the seemingly gender-neutral, but unashamedly phallogocentric standard of sameness which obstructs women’s access to equal opportunity for full participation in

society. This is made possible by the fact that the emphasis is not on sameness of treatment for similar categories of people, but on the ideal that all people, in all their differences, should be enabled to equally enjoy basic human rights and freedoms. The emphasis on the necessity of dismantling systemic inequalities thus resonates strongly with the kind of equality envisioned by Irigaray, in so far as the role of equality goes much further than merely similar treatment to encompass the aim of removing obstructions to every person's development as a valid subject with a positive identity that is unconditionally recognised and acknowledged by civil society. The substantive model of equality thus undermines the logic of the same, which forms the basis of Irigaray's critique against formal equality, on three important grounds. Firstly, it does not grant equality only on the basis of sameness and therefore does not necessitate that individuals conform to an idealised (masculine) standard of subjectivity before being granted legal access to equality. Secondly, rather than prescribing how one should be in order to deserve equal treatment, substantive equality seeks to open up a space in which everyone is enabled to develop their own identity and subjectivity. Lastly, rather than culminating in equal treatment so that women become 'social males', substantive equality focuses instead on equal enjoyment of human rights and freedoms, which might entail difference in treatment.

Furthermore, the Constitutional Court informs the right to equality with the value of human dignity by arguing that equality means equal human dignity and that unfair discrimination is thus a violation of human dignity. This resonates strongly with Irigaray's idea that equality means that all persons are equally regarded as valid subjects without establishing sameness or similarities as the basis thereof. The idea is therefore that the inherent worth of every sexed being must be recognised. This move of the Constitutional Court of informing the right to equality with the value of human dignity is a contentious issue among scholars⁴, but a discussion of this criticism is beyond the scope of this thesis.

⁴ In this regard see for example Ackermann, L. 2000. Equality and the South African Constitution: The role of dignity. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 63: 537 – 556; Cowen, S. 2001 Can 'dignity' guide South Africa's equality jurisprudence? *South African Journal for Human Rights*, vol. 17: 34 – 58; De Vos, P. 2000; Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court. *Tydskrif vir Heedendaagse Romeins-Hollandse Reg*, vol. 63: 62 – 75; Botha, H. 2004. Equality, dignity, and the politics of interpretation. *South African Public Law*, vol. 19: 724 – 751.

It can thus be argued that the South African legal system has managed to respond in a sophisticated way to the problems that have been raised with regard to formal equality by legal scholars as well as thinkers like Irigaray. Substantive equality's attention to the concrete person and its aim of dislodging systemic barriers to the development of subjectivity can be praised in this regard. This point will be elaborated on in the next section with reference to the approach to the subject that is found in our constitutional equality jurisprudence. Importantly, it can be seen that we have departed decisively from the traditional notion of equality as sameness and that the concept of equality is broadened so as to enable it to deal with particularity and difference in an authentic way.

III Equality and the embodied subject

The disillusionment with the abstract, universal and the absolute that is seen in Irigaray's work is also reflected in the equality analysis in the South African constitutional context, through the newly established emphasis on context and the impact of inequality on the lives of concrete individuals.

In the 2008 case of *Harksen v Lane NO* 1998 (11) BCLR 1489 (CC) a test was formulated in terms of which courts should determine whether unfair discrimination had occurred. This test provides that in order to determine whether a discriminatory provision has impacted on complainants unfairly, various factors must be considered, including: the position of the complainants in society and whether they have suffered from patterns of disadvantage in the past or not; the nature of the provision or power and the purpose sought to be achieved by it, and whether it is aimed at achieving a worthy and important societal goal; any other relevant factors; the extent to which the discrimination has affected the rights or interests of complainants; and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature (par 51). This same test was incorporated in largely the same terms into PEPUDA in 2004, so that PEPUDA provides that the Court must take the following factors (among others) into account when deciding whether an instance of discrimination was unfair: the context; the impact or likely impact of the discrimination on the complainant; the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage; and whether and to what extent the respondent has taken reasonable steps to accommodate diversity. PEPUDA is now the route through which allegedly discriminating actions of persons can be brought before the Court, while the *Harksen* test is

still used to challenge the constitutional validity of legislation that is argued to discriminate unfairly. The point that I want to make here is that the test that is used to determine whether unfair discrimination occurred, pays great attention to the particularities of the complainant's situation, and in this way she is approached as a concrete human being and not as a merely abstract legal category. On this basis it can be said that equality is conceived of in particular rather than abstract terms in our constitutional order.

Here the distinction between the 'generalised other' and the 'concrete other' made by Seyla Benhabib, an American political philosopher, is instructive. Benhabib refers to these categories as two incompatible conceptions of self-other relations in contemporary moral theory (Benhabib 1992:158). The conception of the generalised other "requires us to view each and every individual as a rational being entitled to the same rights and duties we would want to ascribe to ourselves" (Benhabib 1992:158). This entails an abstraction from the individuality and concrete identity of the other. The moral dignity of the other is based on "what we, as speaking and acting rational agents, have in common" and not in that which differentiates us from one another (Benhabib 1992:159). Our relations to this generalised other are governed by the norm of formal equality, and the moral categories that are implicated are those of right, obligation and entitlement (Benhabib 1992:159). On the other hand, the standpoint of the concrete other "requires us to view each and every rational being as an individual with a concrete history, identity and affective-emotional constitution" (Benhabib 1992:159). The focus is thus not on commonality, but on individuality, and accordingly, difference (Benhabib 1992:159). In terms of this standpoint, our relationship with the other is not governed by formal equality, but instead by equity and complementary reciprocity, in so far as "each is entitled to expect and to assume from the other forms of behavior through which the other feels recognized and confirmed as a concrete, individual being with specific needs, talents and capabilities" (Benhabib 1992:159). The moral categories that are implicated are those of responsibility, bonding and sharing (Benhabib 1992:159).

Following Benhabib's discussion, it can be argued that the focus on the particularity of the situation of the complainant in the South African equality analysis effectively means that self-other relations are approached in terms of the standpoint of the concrete other. As was noted above, this standpoint corresponds to a more substantive idea of equality where the focus is on difference rather than sameness. In this regard, it will be argued in the rest of this

chapter that by grounding equality in the embodied subject, the South African right to equality has the potential to work with and through difference in a truly transformative way, in so far as it allows for the possibility of rethinking the subject in terms of the sexed body. In other words, as explained in the previous chapter with reference to the work of Irigaray, if the body is regarded as being a central part of the subject rather than something which should be overcome, difference is by implication acknowledged as an undeniable constitutive element of human subjectivity in so far as the human body cannot be universalised. For women, this means that their bodily differences will not qualify as justification for their exclusion from subjectivity and public participation, but will rather be recognised as the basis of being. It can be said that this works against the symbolic split that Cornell identifies between the bodies and selfhood of women.

The South African equality jurisprudence allows for the emergence of a sexually particular and embodied legal subject in another significant way. Although South Africa's constitutional equality clause is formulated in gender-neutral terms, even with regard to the transformation of sex and gender relations, PEPUDA transcends this neutrality by listing a range of sex-specific practices which would qualify as gender discrimination. These include: sexual violence; female genital mutilation; the system of preventing women from inheriting family property; any practice, including traditional, customary, or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child; any policy or conduct that unfairly limits access of women to land rights, finance, and other resources; discrimination on the ground of pregnancy; limiting women's access to social services or benefits, such as health, education and social security; and lastly, systemic inequality of access to opportunities by women as a result of the sexual division of labour.

PEPUDA thus couches gender discrimination in sex-specific terms with regard to many instances thereof. In this sense, the South African right to equality is informed by what is close to sexed rights in the Irigarayan sense. This is a progressive move, which reflects Irigaray's insight that in a society that is founded on a masculine social order, gender-neutral rights fail to achieve equality between men and women and are complicit in the perpetuation of the established sexual hierarchy. This move can also be applauded in so far as it is a first step towards equality starting to function as an ideal which opens up the space for a sexual culture to develop, as advocated by Irigaray. Within such a sexual culture, sexual particularity

is recognised as a constitutive factor in the formation of subjectivity, and the “sexual dimension” can thus be “recognized as part of civil identity” (Irigaray 1994:81). As a result, women, in all their difference, can become fully fledged subjects. Irigaray formulates this point powerfully:

What this implies is that the female body is not to remain the object of men’s discourse or their various arts but that it become the object of a female subjectivity experiencing and identifying itself [...] It’s aimed at the male subject, too, inviting him to redefine himself as a body with a view to exchanges between sexed subjects (1993b:59).

Furthermore, many of these listed instances of unfair discrimination on the ground of gender closely resemble the kinds of sexed rights advocated for by Irigaray. Irigaray’s emphasis on human dignity, which entails among other things the prohibition on exploitation of motherhood by civil and religious powers, is reflected in PEPUDA’s listing as an instance of unfair discrimination any practice which impairs the dignity of women and undermines the equality between women and men, including the undermining of the dignity and well-being of the girl child.

Furthermore, Irigaray argues for a specific conception of the right to human identity which entails the legal encodification of virginity (that she explicitly links with physical and moral integrity) as a component of female identity that is not reducible to money (Irigaray 1993b:87). By divesting virginity of the monetary value that it has obtained in patriarchal societies, Irigaray attempts to restore ownership of feminine sexuality to girls and women themselves on a practical and symbolic level. This move is indirectly evoked in PEPUDA’s listing of gender-based violence, female genital mutilation, as well as the undermining of the dignity and well-being of the girl child by tradition, customary or religious practice as instances of unfair discrimination on the ground of gender. In this regard it is obvious how gender-based violence results in the violation of the right to identity of a girl in so far as it constitutes an attack on her physical and moral integrity even if she was not a virgin. Furthermore, countless girls are deprived of the right to their virginity and to decisions about their own sexuality through sexual violence and domination. The practice of female genital mutilation is another instance where the moral and physical integrity of girls is violated. Moreover, these practices form part of traditional rituals to ensure that girls remain virgins until they marry. The broad prohibition of any traditional, customary or religious practice

which undermines the dignity and well-being of the girl child can be interpreted to include practices such as virginity testing, which can be physically and psychologically harmful and which is once again aimed at the patriarchal control of the sexuality of women (Rankhota 2004:87).

Irigaray's formulation of women's right to be represented in equal numbers in all civil and religious decision-making bodies is reflected to an extent in PEPUDA's listing as instances of unfair discrimination any practice which undermines equality between women and men as well as any policy or conduct that unfairly limits access of women to any resources and systemic inequality of access to opportunities by women.

It is significant that in PEPUDA the prohibition against discrimination on the ground of gender directly entails the prohibition of sexual violence. This means that PEPUDA acknowledges sexual violence as a manifestation of inequality. This is a progressive step in terms of which South Africa is ahead of countries like America. In this regard, MacKinnon laments the fact that even though the United States Supreme Court has started to acknowledge that rape is an issue of gender equality, this insight is not reflected at all in the United States criminal law (MacKinnon 2005:242). She writes:

Although sexual assault is always sexual and often physically violent, the awareness that rape is not so much an act of violence or sex as it is an act of sex inequality – specifically of sex eroticized by the dominance that inequality embodies and permits, of which physical violence is only one expression – is barely traceable in U.S. criminal law (2005:242).

PEPUDA's explicit recognition of rape as an instance of sex inequality can thus be applauded. However, I will argue in the next chapter that, like the American criminal law, the South African sexual violence legislation sadly also fails to reflect this insight.

PEPUDA's listing of gender-based violence as an instance of unfair discrimination on the ground of gender can also be praised for allowing sexual violence to become a constitutional issue. Instead of remaining merely a criminal matter, where it is understood as a crime against society and is accordingly prosecuted by the state, sexual violence is now also seen as an attack on the constitutionally guaranteed human right to equality, and by extension dignity, of women. This serves to give women agency in the process of the prosecution of

sexual violence by being the applicants in their own cases⁵ and litigating for the protection and promotion of their own rights. This actively undercuts the narrative that sexual violence is a way of attacking other men or a society (thus the 'owners' of the woman), rather than the woman herself, which was the historical basis for criminalising rape (Du Toit 2009:36) and which still manifests in circumstances of war where civilian women are raped as part of the strategy against the opposition army (Sjoberg 2011:21). In Irigarayan terms, the listing of sexual violence as an instance of unfair discrimination on the ground of gender contributes to the establishment of a civil identity for women in law, by, firstly, providing them with agency to utilise the law for the protection of their own bodies, and secondly, directly linking the sexual violation of their bodies to an attack on human rights. In this way, women's sexual bodies are written into the law. Accordingly, from an Irigarayan perspective, this can be said to be a highly significant moment in the emancipation of South African women. However, to date, there has been no case before the Constitutional Court where the complainant based her rape complaint on PEPUDA's prohibition of unfair discrimination on the ground of gender rather than only working through the criminal legal system. The reason for this is unclear, and it would be highly interesting to see the direction in which these issues are developed if such a case is brought.

In more general terms, although the instances of unfair discrimination on the basis of gender listed in PEPUDA are narrower and less enabling than Irigaray's sexed rights (in so far as Irigaray's formulation of the rights covers a much larger range of oppressive and potentially oppressive practices than the specific instances prohibited by PEPUDA), the fact that they address some of the issues that Irigaray prioritises in her formulation of sexed rights is a promising sign. The South African right to equality, as developed in PEPUDA, is thus moving in the direction of granting women rights that are specific to their needs and vulnerabilities as women, which should be able to address forms of oppression that are left untouched by a neutral right to equality in a phallographic society, such as sexual violence. The South African notion of equality is therefore directly informed by an acknowledgment of sexual difference. In this way, a sexed and embodied notion of subjectivity is written into our equality law, which allows for attention to be paid to the particular and concrete details of women's lives when applying the right to equality, such as, for example, the direct and

⁵ This differs significantly from the process followed in terms of the criminal law, where the rape case is between the state and the accused and where the victim is merely a witness.

indirect harms of rape referred to in the introductory chapter. From an Irigarayan perspective, it can be said that this opens up a space for the development of a civil identity for women along with a sexed culture in law and society. Accordingly, rooting the South African right to equality within the concrete and embodied subject is an important step in positioning the right to equality for the kind of transformation that is necessary for the fight against sexual violence.

IV The constitutional recognition of the central role of difference in equality

Another aspect of the South African constitutional equality jurisprudence that is highly significant for present purposes is that the Court places a fundamental recognition of and respect for difference at the centre of its interpretation of the right to equality. This aligns it with Irigaray's theory wherein difference plays a crucial role in the dismantling of oppressive hierarchies. The concurring judgment of Judge Sachs in the case of *NCGLE v Minister of Justice* (1998) offers an inspiring and eloquent description of the crucial role of difference, without discrimination, in the young democracy of South Africa. In this case, the criminalisation of sodomy was declared as constitutionally invalid. Here Judge Sachs insists that "the success of the whole constitutional endeavour in South Africa will depend in large measure on how successfully sameness and difference are reconciled" (par 131). He writes:

The present case shows well that equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference (par 132).

The Court thus envisages a kind of equality that establishes itself within and across difference. The idea that equality does not imply a levelling of identity and behaviour opens up the notion of equality to become a non-comparative mechanism which frees difference from the constraints of societal norms in order to flourish. Judge Sachs continues by saying:

What the Constitution requires is that the law and public institutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are. At the very least, what is statistically normal ceases to be the

basis for establishing what is legally normative. More broadly speaking, the scope of what is constitutionally normal is expanded to include the widest range of perspectives and to acknowledge, accommodate and accept the largest spread of difference. What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour (par 134).

The principle of difference itself is thus envisaged as the basis for equality in the sense that equality is not achieved when everyone is simply treated the same, but when everyone has the freedom to pursue and celebrate their own divergent paths, while receiving equal respect from society. The Constitutional Court thus describes a kind of equality that enables every person to be who she wants to be, rather than having to conform to a specific standard or identity in order to be respected as a human being. Furthermore, in the same case, Judge Ackermann's reasoning bears testimony to an acknowledgment that no one subject can speak on behalf of humanity. He writes:

To understand 'the other' one must try, as far as is humanly possible, to place oneself in the position of 'the other' (par 22).

The Court thus recognises the necessarily partial perspective of subjectivity which means that no one category of persons can be universalised as representing the human being. The best one can do is to try to imagine the position of the other, and even here one must be aware of the final impossibility of such an endeavour. As was seen in the previous chapter, Irigaray argues that it is this impossibility that enables dialogue with and love for the other (Irigaray 1993a:12). The problematic approach to difference that is entrenched in the law through formal equality is therefore overcome by the Court's acknowledgment that difference is an inevitable underpinning of the relationship with the other, and that it should be celebrated and approached with wonder rather than being regarded as a negative aspect which renders the other inferior, or as an element that must be repressed in the name of equality as sameness. The kind of approach to difference described in the quoted passages above thus enables a collapse of hierarchical constructions of the relationship between the self and the other.

The Constitutional Court's conception of equality thus reflects a sophisticated approach to difference, which in principle allows for the establishment of the kind of sex equality that is

advocated for by Irigaray. However, the Court has unfortunately thus far not explicitly acknowledged the full implications of these insights in the context of the relationship between the sexes. Sexual difference has thus not yet been activated in an Irigarayan sense to break open the hierarchical masculine/feminine dichotomy. Such an application of the Court's insights regarding difference between people in general to sexual difference in particular would entail, firstly, the admission that *sexual* difference is also an inevitable difference which must be approached with wonder; secondly, an understanding that sexual difference necessarily results in a partial perspective, so that I can never speak for the sexed other, and that one sex cannot be universalised as representing humanity; and thirdly, the admission that the sexual hierarchy that is so institutionalised in our society is not natural, but a superficial construct of patriarchal society.

Furthermore, not only have the implications of the Court's insights regarding the relationship between difference and equality not yet been acknowledged and voiced in the context of sex inequality, but case law shows that the Constitutional Court has thus far not prioritised difference as a core value of substantive equality by making full use of its transformative potential in cases regarding discrimination on the ground of sex.

Albertyn's distinction between an inclusionary approach to equality, on the one hand, and a transformative approach, on the other, is useful in this regard. The former entails the inclusion of the complainant in the *status quo*, on the basis that the complainant is 'just like us' and should therefore be treated the same, while the latter is concerned with the transformation of the *status quo* so that the structural conditions that create systemic inequalities and which excluded the complainant in the first place, are eradicated or changed/extended to include more variation (Albertyn 2007b:256).

Albertyn explains that inclusionary equality can be achieved through formal equality alone, without the emphasis that substantive equality places on context, impact, difference and values (Albertyn 2007b:256). Accordingly, instead of breaking down the structures of domination, an inclusionary approach to equality merely results in the assimilation of certain groups into the hegemonic group. The point is not that there is no place for inclusionary approaches to equality in our constitutional dispensation, but rather that inclusion should not be regarded as the only function of equality. Albertyn points out elsewhere that inclusionary and transformative approaches to equality are not mutually exclusive, but that the concept of equality has "both backward- and forward-looking components: the removal of past

disadvantage and the creation of conditions for future equality and equal social citizenship” (Albertyn 2007a:95). She explains that the “backward-looking” component is mainly concerned with socio-economic equality and the emphasis is accordingly on the remedial aspect of the right (Albertyn 2007a: 95). On the other hand, the “forward-looking” component focuses on “the need for conditions that permit women to live to their full human potential, and which affirm their personhood, their choices and integrity” (Albertyn 2007a:95).

Although both of these functions of equality have a place in our constitutional order, Albertyn writes that in the South African constitutional discourse substantive equality is closely linked with the idea of “transformative constitutionalism”, and that accordingly it does not aspire to mere inclusion, but rather to the achievement of a social and economic revolution which requires the dismantling of systemic inequalities on a social and economic level (Albertyn 2007b:257). In a lecture on transformative adjudication, Judge Moseneke asserted that a “commitment [...] to transform our society [...] lies at the heart of the constitutional order” (Moseneke 2002:315). Judge Langa also writes that “it is clear that the notion of transformation has played and will play a vital role in interpreting the Constitution” (Langa 2006:351). Accordingly, the transformative function of the right to equality has a crucial role to play in our democracy. It is thus of great importance in the South African context that the Constitutional Court does not restrict the role of equality to mere inclusion.

However, Albertyn shows that, to date, the Constitutional Court’s approach to equality in gender matters tends to be more inclusionary than transformative, in that equality is regarded to be achieved when previously marginalized groups are included within the *status quo* through arguments that they are in fact ‘just like us’ (Albertyn 2007b:273). She further argues that not only does our Constitutional Court mostly limit the struggle for equality to inclusionary solutions, but this inclusion tends “to occur within clearly defined institutional, doctrinal and normative boundaries that limit the possibilities of fundamental shifts in power relations in society” (Albertyn 2007b: 273). She ascribes this to the “powerful tug of formal equality” (Albertyn 2007b:273). The defined doctrinal boundaries that she refers to include conventional notions of choice, marriage, sexuality and gender roles, where certain traditional norms (like marriage) are upheld as standards against which equality needs are assessed (Albertyn 2007b:274). According to her argument, the judgments thus focus on how or whether to include outsider groups within the institutionalized norms of society, and thereby

fail to bring such norms and standards themselves into question and to explore the possibilities of constructing other, more inclusive, open or flexible standards and structures in society. South Africa's affirmative action policy also falls within the inclusionary category. Although the inclusion of women within the hierarchies of the workplace is indeed a welcome improvement, it remains a mere inclusionary measure which does not question or challenge the masculine nature of the structures and types of workplaces into which women are included.

The Constitutional Court's reasoning in the case of *NCGLE v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC)⁶ is a very good example of the inclusionary approach to equality, which functions through the identification and pursuit of sameness and which is accordingly closer to formal equality than to substantive equality. In this case, the constitutional validity of section 25(5) of the Aliens Control Act 96 of 1991 was challenged on the basis that it discriminated unfairly on the grounds of sexual orientation. The section conferred the advantage of gaining an immigration permit through application exclusively upon "spouses" of people residing permanently in South Africa, thereby excluding homosexual life partners (who were at the time still prohibited from marrying). The Court quotes the judge in the Canadian case of *Vriend v Alberta* (1998) 156 DLR (4th) in saying the following:

It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet, as soon as we say any [...] group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of [...] society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy (par 385).

The Court in *NCGLE v Minister of Home Affairs* (2000) endorses this statement, which reflects the inclusionary logic of formal equality in that it sets up a dichotomy between 'us', who are 'the same' and who represent the standard for sameness, and 'them', who are different. The purpose of the judgment would then be to show that 'they' are actually not that different from 'us' and therefore deserve the same treatment as 'us'. The Court then proceeds

⁶ Note that this is a different case to the previous case cited in which the NCGLE was also a party.

to give a lengthy description of the sacrosanct institution of marriage which is characterized by the *consortium omnis vitae* and concludes that homosexual people are just “as capable as” heterosexual people of “expressing and sharing love in its manifold forms including affection, friendship, eros and charity”; “forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household” as well as of “adopt[ing] children and in the case of lesbians to bear them” (par 53). The Court concludes:

In short, they have the same ability to establish a *consortium omnis vitae*. Finally, and of particular importance for purposes of this case, they are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses (par 53).

What the Court manages to do is to strike down the artificial difference between heterosexual and homosexual relationships, constructed by a patriarchal society, by countering the traditional portrayal of lesbians and gays as “hyper-sexualized, promiscuous, and immature” (Robson 2007:420). On this basis, the Court then decides in favour of the complainant by extending the rights of heterosexual couples to homosexual couples. The Court’s application of inclusionary logic can accordingly be said to fulfil an important function. However, it is not entirely unproblematic. Ruthann Robson, an American legal scholar, who spent some time analysing the South African Constitutional treatment of homosexuality, writes in this regard:

When the basis of the claim is an unfair distinction between married heterosexual couples and unmarried same-sex couples, the extent to which the couples are deemed the same enhances the argument for equal treatment. Yet the ‘sameness’ approach requires the same-sex couple to argue that they are functionally if not legally like the most traditional married couple (2007:420).

She thus argues that the Court tends to construct homosexuality as a “model minority” in that it “prefers its sexual minorities to be comparable to its romanticized version of heterosexuals”, and uses this as a basis for treating them equally to heterosexual couples (Robson 2007:431). Accordingly, “the best lesbian plaintiffs are those who ‘but for’ their

lesbianism are ‘perfect’” (Robson 2007:240). Robson’s point is thus that equality is granted here on the basis of sameness, rather than through a respect for difference.

Moreover, this inclusionary approach of the Court is limited to the extent that it fails to identify marriage as an ideologically loaded institution that has an important role to play in the maintenance of heterosexual and patriarchal power structures. In this regard Robson writes:

Yet honouring the sexual in a democracy means more than being inclusive regarding marital forms, such as recognising same-sex, customary and Muslim marriages. It also means interrogating the very form of marriage itself and the state’s role in the marital relationship (2007:428).

Accordingly, instead of questioning the idea that family life can only persist and flourish within the confines of the institution of marriage (traditionally a very exclusive institution in South Africa which has prohibited unions between people of religions other than Christianity, as well as customary unions, unions between people of the same sex and mixed race unions), the Court relies on the fact that gays and lesbians are capable of being included in the hegemonic heterosexual norm in so far as they are ‘just like’ heterosexuals with regard to their ability to have relationships that conform to the heterosexual requirements for marriage. The hierarchical structure producing disadvantage and discrimination is thus not challenged, but merely slightly adjusted and thereby confirmed.

I want to emphasise again that the point is not that there is no place for an inclusionary approach to equality in our constitutional order. On the contrary, an authentic approach to difference will in many cases require the Court to reverse forms and instances of exclusion that are based on superficial differences produced by patriarchal ideology. However, the transformative element of equality requires that this should not be done uncritically in a way that confirms and sustains entrenched hierarchies and systems of domination on a symbolic level. The Court must thus be sensitive to systemic inequalities that are embedded deeply in the structures and institutions of society and should aim to dismantle these structures by applying the right to equality in a forward-looking way, rooted in respect for difference rather than in an assumption of sameness.

A closer look at the sex equality cases that have been decided by the Constitutional Court points to the same problem: the cases that are about simple inclusion of women in the institutions and rights of men are decided easily and uncritically in favour of the women making the inequality claims, while cases that demand more than inclusion fail to evoke a satisfactory response from the Court in which deeper transformation is embraced. Classic examples of inclusionary sex equality judgments include *Brink v Kitshoff NO* (1996) 6 BCLR 725 (CC)⁷ and *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC)⁸. On the other hand, examples of sex equality cases that have yielded controversial results because they do not merely hinge on a claim for inclusion, but necessitate deeper transformation of the existing structures, are *Jordan and Others v S and Others* 2002 (11) BCLR 1117 (CC) and *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC).

In *Jordan* (2002), the majority of the Court decided that section 20(1)(aA) of the Sexual Offences Act 23 of 1957, which criminalises the conduct of the prostitute but not of the client in instances of sex for reward, does not discriminate unfairly against women in so far as the provision is gender neutral and punishes the conduct of the prostitute regardless of gender. The majority judgment in the *Jordan* case has been criticised extensively for its “superficial approach” which lacks a “contextual understanding of the substantive issues of sex work and the unequal gender relations in society that shape this occupation” (Albertyn 2007b:269), as

⁷ In *Brink* (1996) the complainant challenged certain provisions of the Insurance Act 27 of 1943 which discriminate against married women by depriving them, in certain circumstances, of all or some of the benefits of life insurance policies ceded to them by their husbands, while the Act contains no similar limitation upon the effect of a life insurance policy ceded or effected in favour of a husband by a wife. The Constitutional Court decided that South Africa’s commitment to equality demands that no such discrimination should be allowed and that the impugned provisions of the Insurance Act are thus unconstitutional. It is therefore a clear-cut case of putting an end to an instance of formal discrimination through the inclusion of women into the *status quo* (which is the normal and fair position that men occupy with regard to the inheritance of life insurance policies).

⁸ In the *Bhe* case, the rule of male primogeniture in the context of African customary law was found to be constitutionally invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property. Again, the case is an instance of including women in the *status quo*, the position in which men as the hierarchically dominant group have found themselves for centuries.

well as for its “failure [...] to situate section 20(1)(aA) within a context of sexual double standards, material inequality and systemic discrimination against women” (Botha 2004:728).

Judge Ngcobo argues on behalf of the majority:

And if there is any discrimination, such discrimination can hardly be said to be unfair. The Act pursues an important and legitimate constitutional purpose, namely to outlaw commercial sex. The only significant difference in the proscribed behaviour is that the prostitute sells sex and the patron buys it. Gender is not a differentiating factor. Indeed one of the effective ways of curbing prostitution is to strike at the supply (par 15).

The reasoning of the Court focuses uncritically on sameness of treatment of certain categories of people, without sensitivity as to the impact and context of that treatment. The provision in the Sexual Offences Act represents a typical instance of a gender-neutral provision which is not really neutral at all, but which embodies the interests of the dominant group - in this case, men. The law draws its distinction between prostitutes and their clients and finds it appropriate to treat them differently – by punishing the one and not the other. This is regarded as being gender neutral because prostitutes can in principle be either male or female, and their clients could likewise be of either sex. The distinction between prostitute and client is thus not acknowledged as being a highly gendered distinction. The Court ignores the fact that in the overwhelming majority of cases, the prostitute is a woman and her client a man. Furthermore, in a society where men wield the power, prostitution is often a symptom of the systematic oppression of women, where they are left without many options for earning money and making a living, and where their bodies are quite naturally regarded as commodities and objects. The distinction between the prostitute and the client is thus a clear instance of the law blatantly siding with men, which perpetuates harmful stereotypes and patterns of discrimination under the guise of gender neutrality. This is a powerful example of the hypocrisy that legal systems are often guilty of – namely, applying a seemingly or ostensibly gender-neutral rule to a highly gendered phenomenon.

Furthermore, the Court’s reasoning clearly falls short of the demands of substantive equality, if substantive equality is understood to be aimed at the removal of barriers to equal participation in society and the creation of conditions under which every person is able to reach his or her full human potential. It can thus be argued that a substantive equality

approach would at least recognise that the Act's distinction between prostitute and client constitutes a distinction between women and men, and that by punishing only the prostitute in a crime which entails "intimate, shared conduct engaged in by two people" (par 73 of the minority judgment of O'Regan and Sachs), it is discriminating blatantly and cruelly against women. In contrast, a true sensitivity to the ingrained patterns of oppression at work here (and a truly substantive approach) would have gone even further by questioning the justice of the punishment of the prostitute in the first place. It would have recognised that the real equality issue is, firstly, that women are often left with no choice but to resort to prostitution, secondly, that women's bodies are so devalued by society that they are regarded as commodities, and thirdly, the implication that women who pursue sex work are regarded as less worthy of respect and human dignity simply because of their sexual decisions. The majority decision in *Jordan* fails to do this, and instead sticks to the masculine-biased formula of treating like cases alike and different cases differently. The minority decision of Judges O'Regan and Sachs⁹ does better in applying a substantive approach to equality, but treads too deferentially around the central question, namely, whether prostitutes should receive punishment and marginalisation at the hands of the law at all.

Hugo (1997) is another case which is widely criticised with regard to the Court's application of the right to equality. In this case, a man claimed that he was being unfairly discriminated against on the ground of gender, because the President issued a pardon in accordance with which women who had children below the age of twelve could be released from prison. The President justified this decision by arguing that women played a special role in the care and nurturing of children. There was general agreement among the judges that the distinction that was made between men and women amounted to discrimination against men, although they disagreed about whether it was unfair or not. The question that they grappled with was whether the fact that women historically bear a greater burden and responsibility than men with regard to the rearing of children justified the discriminatory act by the President. The majority of the Court decided that, even though the President's act was based on a harmful stereotype regarding women's role in society, it was acceptable to rely on such a stereotype if

⁹ Judges O'Regan and Sachs argue that prostitutes and their customers both consent to engage in sexual activity, and that there are only three differences between them. Firstly, the prostitute is paid while the customer pays; secondly, in general the prostitute is female and the customer is male; and thirdly, the prostitute's actions are rendered criminal by the Sexual Offences Act, while the actions of the customer are legal. Judges O'Regan and Sachs then argue that criminalising only the behaviour of the prostitute reinforces the patterns of sexual stereotyping and is in conflict with the principle of gender equality (par 60).

it for once served the purpose of conferring an advantage on women. Judge O'Regan argued in this regard that it is a social fact that women bear the greatest burden of child rearing responsibilities (even if it is not how it should be), and the reliance on this fact to confer a benefit on women does not constitute unfair discrimination.

In his minority judgment, Judge Kriegler argued that the notion of women as primary caregivers of children is “a root cause of women’s inequality in our society” (par 80) and that the Court’s reliance thereon perpetuates the relegation of women to a “subservient, occupationally inferior yet unceasingly onerous role” (par 80). He says that the President’s pardon may confer an advantage on the few women who are involved, but it legitimises the harmful stereotype that is the cause of extreme disadvantage to all women in society (par 85).

What makes this case complicated for the purposes of the present analysis is that the issue of the stereotyping of women as the primary caregivers of children was not raised by the complainant, but by the Constitutional Court itself in the process of its evaluation of the justification offered for the President’s differentiation between men and women. Accordingly, the discrimination complained of was discrimination against men, and in terms of the minority judgment, this complaint was upheld on the basis of the act’s discriminatory effect on women. It is this paradox which makes it so difficult to evaluate the judgment. Accordingly, the issue before the Court was turned on its head, in so far as it started with the request by Hugo that he too be granted the opportunity to take care of his child, and turned into a debate about whether it is acceptable for the Court to ascribe the role of care giving to women at all. I will return to this point below.

The difference between the decisions of the majority and minority can be understood in terms of the distinction between being and becoming that was highlighted in the previous chapter. In terms of the work of Irigaray, the other (and women in particular) must be respected and celebrated for what they *are* while being granted the opportunity to *become*, in so far as it is argued that a space should be created in which all sexed beings can be free to establish new values that correspond to their bodies and creative capacities. In this sense, the minority judgment can be praised for taking seriously the position in which women find themselves at present, but criticised for not creating a space for becoming. The majority judgment is thus

criticised by South African feminists such as Karin Van Marle¹⁰ for its failure to apply the right to equality in a transformative way. This is the result of basing the decision purely on the situation that women find themselves in, without attempting to transform this situation. On the other hand, it can be argued that Judge Kriegler bases his decision on a conception of what women could be if they were granted the freedom to transcend their current situation, while not sufficiently taking into account where and what they are presently.

The fact that the President only considered women to be responsible for the task of caring for children confirms the stereotype that feminine identity is necessarily bound to the role of nurturing. In this regard, Judge Kriegler's judgment proves to be more in line with the transformative ideal of substantive equality in so far as it dislodges the automatic association between women and nurturing and thus opens up a space for their becoming by allowing them to choose their own destinies. It creates an opportunity for women to decide for themselves the extent to which they want their main characteristic to be their propensity for nurturing. In this regard Van Marle, a South African legal philosopher and feminist, argues that Judge Kriegler's approach is closer to an "ethical interpretation of equality" than the majority judgment in that it is based on a vision of a future which transcends the current social reality (Van Marle 2000:605). However, a problem with the minority judgment comes to light here. I want to submit that Judge Kriegler's judgment betrays a hierarchical construction of the difference in roles between nurturing and pursuing a professional career. In terms of Judge Kriegler's judgment, care giving and nurturing are established as inferior roles. He thus assumes that in a truly equal society where women have the freedom to decide on their own roles, they will choose not to be nurturers. This betrays a subscription to patriarchy's pernicious approach to difference where certain roles or functions (which have a central place in human existence, but which are split off from the masculine ideal and projected onto or relegated to women) are marked as inferior because they do not conform to the characteristics of the universal subject which is modelled on a hyperbolic and phantasmatic conception of masculine subjectivity. What is thus at work here is a covertly masculine human norm that transcends bodies and their care, while such transcendence is only possible on the basis of women's unacknowledged and naturalised care work (Kroeger-Mappes 1994:116). This prejudice as to the value of the role of caring explains why Judge

¹⁰ See Van Marle, K. 2000. Equality: An ethical interpretation. *Tydskrif vir Heedendaagse Romeins-Hollandse Reg*, vol. 63: 595 – 607.

Kriegler switches the focus from the question as to whether Hugo should also be regarded as an actual or potential nurturer, to whether women should be regarded as nurturers at all. While he thus has the insight to dislodge the assumption that women are necessarily carers, his motivations for this betray an uncritical acceptance of the harmful approach to difference that is central to the maintenance of the power structures of patriarchy. It is therefore submitted that the minority judgment in *Hugo* is not less problematic than the majority decision.

Therefore, just like in the *Jordan* case, the Court in *Hugo* fails to rise to the occasion by effecting transformation on a deeper, more symbolic level. The point here is that the Constitutional Court is confident and capable in applying the right to sex equality in so far as it can rely on sameness in order to effect inclusion, but where a case resists reliance on sameness or demands understanding and caution with regard to the acknowledgement and treatment of sexual difference, the Court's judgments display an insensitivity to the entrenched hierarchical structures that are at stake, and a reluctance to make the leaps necessary to dislodge these hierarchies. This falling back onto sameness, or the inability to deal decisively with a case that resists such an approach, is inimical to the Court's own conception of substantive equality, as set out above, as something that should be rooted in difference rather than sameness.

Respect for difference, which is explicitly recognised by the Constitutional Court as a driving force behind transformation, has therefore not yet been activated in order to achieve the full potential of the substantive model of equality in the context of sex and gender in South Africa, in so far as the Court, firstly, has not yet explicitly acknowledged the full implications of its approach to difference with reference to *sexual* difference, and secondly, struggles to decisively abandon a formal application of equality rooted in sameness in the case of sexual matters. However, it can at least be said that the Constitutional Court's recognition of difference as a positive feature of society and as a necessary underpinning of equality marks the beginning of a new legal approach to the relationship between difference and particularity on the one hand, and equality or justice on the other. A concern with difference and particularity is no longer set up in opposition to the pursuit of justice and equality, and the right to equality is aimed at fighting the kind of systemic inequalities that were perpetuated through formal equality's pernicious approach to difference. The Court's recognition of difference as a positive feature of society can therefore be argued to create the possibility for

a future acknowledgment of sexual difference in the Irigarayan sense as a central value and catalyst of the transformation of sex and gender relations.

V Conclusion

In this chapter, the South African constitutional dispensation's approach to equality was critically explored and analysed with reference to the ideas of Irigaray, in order to determine the extent to which the right to equality in the South African Constitution can be interpreted as allowing for an Irigarayan pursuit of transformation of sex and gender relations. It was argued throughout the chapter that the way in which the right is formulated in the Constitution and PEPUDA and interpreted by the Constitutional Court can be shown to resonate strongly with central aspects of Irigaray's theory. In this regard, it was firstly argued that the substantive model of equality that replaced formal equality allows for an approach to equality that is concerned with the dismantling of the kind of systemic inequalities that were naturalised as difference under formal equality. Furthermore, the equality jurisprudence displays a concern with the concrete and particular rather than merely striving toward an abstract ideal of equality rooted in sameness. It was also shown that, within the equality jurisprudence, the subject is approached as a concrete, sexually particular and embodied being rather than a disembodied, universal and unsexed legal construct. PEPUDA's listing of sex-specific instances of unfair discrimination on the basis of sex was said to reflect Irigaray's strategy of sexed rights while further dismantling the idea of the unsexed and abstract legal subject. Lastly, it was shown how the Constitutional Court's interpretation of equality, as something that is rooted in difference rather than sameness, provides the basis for an Irigarayan notion of sexual difference to infuse the Court's approach to sex equality. It was argued that, even though the full implications of these insights have not yet been acknowledged by the Constitutional Court with reference to *sexual* difference, and the Court still fails to apply difference in a truly transformative way in sex equality cases, these insights lay the foundation for the future acknowledgment of a new relationship between sex equality and sexual difference.

In this regard, it is useful to refer to Albertyn's identification of the five characteristics in the South African Constitutional Court's approach to substantive equality that infuse it with transformative potential: firstly, an acknowledgment of the importance of understanding inequality not in an abstract way, but within its social and historical context; secondly, a primary concern with the impact of the alleged inequality on the lives of concrete human

beings; thirdly, a recognition of difference as a positive feature of society; fourthly, attention to the purpose of the right and the values underpinning it that demonstrates concern with remedying systemic inequality; and fifthly “its ability to affirm or imagine a future society through practical [...] and normative [...] means” (Albertyn 2007b:258).

These characteristics can also be argued to be the characteristics that open up the South African equality jurisprudence toward an Irigarayan approach to equality. Should the Constitutional Court thus develop these characteristics in such a way that their full implications are acknowledged in the context of sex and gender inequality, the emergence of a new feminine subjectivity and civil identity in the Irigarayan sense might become possible in our democracy.

In the following chapter, it will be shown how the progressive insights that manifest in the constitutional context with regard to sex equality and sexual difference, as well as in the relationship between sex inequality and sexual violence, are largely ignored and undercut in the South African sexual offences legislation.

CHAPTER 3

SEXUAL VIOLENCE, EQUALITY AND SEXUAL DIFFERENCE: A CRITIQUE OF THE NEW SEXUAL OFFENCES ACT

I Introduction

A few years after the advent of democracy, South Africa's *Sexual Offences Act* 23 of 1957, along with the common law on sexual violence, was subjected to extensive revision by the Law Reform Commission and replaced in 2007 with the *Criminal Law (Sexual Offences and Related Matters) Amendment Act*, 32 of 2007 (the New Sexual Offences Act). The New Sexual Offences Act was aimed at addressing the problems with the previous outdated Act, for example the fact that, in the eyes of the law, only women could be raped and only men could rape, and that many acts of sexual assault that are arguably equally as humiliating and invasive as rape were not included in the definition of rape (for example coerced penetration of the anus). In this chapter, the South African legal system's newly reformed approach to sexual violence, and specifically rape, will be explored critically in light of the discussions in the previous two chapters.

In Chapter Two it was argued that the South African equality jurisprudence lays a foundation for an Irigarayan approach to the transformation of sex and gender relations in so far as our right to equality can be interpreted as being underpinned by an acknowledgment of embodiment, sexual particularity and difference. It was seen that our Constitution envisions equality as a value informed by difference rather than sameness. In accordance with Irigaray's work, it can be said that the implication of this is that sex equality and an acknowledgment of sexual difference are not mutually exclusive, as was assumed under formal equality (where the ideal of equality was framed with reference to sameness and identical treatment), but that sex equality should instead be based on a fundamental recognition of sexual difference and an authentic response to the demands thereof.

The criticism that I will raise against the New Sexual Offences Act is that it counters the progress made on a constitutional level regarding the possibility of the emergence of an Irigarayan approach to the transformation of sex and gender relations, rooted in sexual difference. This is done by entrenching a problematic approach to sexual difference in the

definition of the crime of rape through, firstly, defining the crime of rape in gender-neutral terms, and secondly, retaining the concept of consent as the distinguishing characteristic between sex and rape.

With regard to the gender neutrality of the rape, I will show that within the definition of rape in the New Sexual Offences Act, the subject is approached as an unsexed and disembodied being, which is in contradiction to the embodied and sexually particular subject of the equality jurisprudence. In an attempt to serve justice with regard to male victims of rape, the legislature reformulated the definition of rape so that perpetrator and victim are completely sexless and interchangeable. The equal treatment of male and female victims of sexual violence was thus understood as necessitating a denial of sexual difference. However, as was shown in the previous chapters, the result of denying sexual difference is not gender neutrality, because what is deemed neutral in our symbolic and legal order is informed by an implicit masculine norm. Following Irigaray it can be said that through subscribing to a universal subjectivity, the influence of the masculine norm (that is so deeply entrenched in the western symbolic and legal order) is rendered invisible and thereby confirmed and sustained through the application of the definition of rape in the New Sexual Offences Act. I will argue that this has numerous problematic effects. It results, firstly, in the legislation retaining a hidden masculine bias which is especially harmful to women in the context of rape. Secondly, the New Sexual Offences Act cannot account for rape as a gendered and gendering phenomenon in so far as the gender-neutral language strips the crime of any sexual meanings, and thereby depoliticises it. This is also problematic in light of the fact that sexual violence is explicitly recognised in the constitutional context as an issue of masculine domination of the feminine. Thirdly, the latter two problems result in the legal system struggling to recognise when rape had occurred, because it does not facilitate an adequate legal understanding of what rape entails. Lastly, it will be argued that a gender-neutral definition of rape blinds the criminal law system to the various harms of rape. On these grounds, I will argue that a sex-specific definition of rape, which can still account for female perpetrators and male victims, must be written into the law. This argument will be concluded with a discussion of the question as to whether it is appropriate and possible for the criminal law to allow for a focus on sexual particularity.

The concept of consent is the second characteristic of the definition of rape in the New Sexual Offences Act that undercuts the possibility, created on a constitutional level, of

pursuing the transformation of sex and gender relations through an acknowledgment of and respect for sexual difference. My argument in this regard is that the concept of consent infuses the definition of rape with a pernicious rendition of sexual difference, because it feminises the position of the victim in so far as feminine sexuality is automatically associated, in our symbolic order, with the passive role of consenting to intercourse, while the position of the perpetrator who is active and acting in accordance with desire corresponds necessarily to the idealised masculinity of patriarchy. Furthermore, because the definition is so deeply rooted in a naturalised sexual hierarchy, and because it largely limits the court's enquiry to what happened in the mind of the victim, the definition obstructs the identification of the inequality and force that underlie instances of rape. The argument here is that what makes something rape cannot be found in the victim's state of mind, but is rather based in the coercive circumstances surrounding the act. The concept of consent focuses the rape enquiry on the victim's mental state, while blinding the court to the inequalities that constitute coercive circumstances. It is thus doubly problematic.

Thus, contrary to the gender-neutral language of the definition, sexual difference is acknowledged through the concept of consent, but in a problematic way. In other words, non-consent as the defining characteristic of rape implies an admission that feminine sexuality is different from masculine sexuality, but it construes feminine sexuality as less than; inferior, secondary, or responsive to; or derivative of, masculine sexuality. Accordingly, the way in which an acknowledgment of sexual difference is incorporated into the definition of rape through the concept of consent is inimical to equality, in that it works to perpetuate existing inequalities through the construal of the masculine dominant sexual hierarchy as given in nature. It therefore implies that 'normal' feminine sexual subjectivity amounts to the minimal form of agency called "consent". It will also be argued that, paradoxically, the consent doctrine (the theory that rape equals 'normal' sex without consent) simultaneously assumes equality between the victim and perpetrator, in so far as it attaches a great deal of weight to the victim's reaction, as though the victim will always be in a position to voice her non-consent or that her non-consent will always be effective in warding off rape. Accordingly, it will be argued that the consent-based approach to rape is so deeply rooted in hierarchy, that it is insensitive to, and perpetuates instead of dismantling, the inequalities underlying the crime of rape. This stands in contrast to the constitutional insights regarding the relationship between rape and inequality.

Therefore, whereas the gender neutrality of the definition denies or erases sexual difference by positing masculine subjectivity as the standard for all persons, the concept of consent introduces a hierarchical approach to sexual difference into the definition. Accordingly, sexual difference is assumed through the concept of consent, but in a way that marks the feminine with difference that is construed as automatically rendering it inferior to the masculine. In terms of Irigaray's theory, these two problems constitute two sides of the same coin in so far as the positing of a universal subjectivity (and thereby the denial of sexual difference), modelled on an exaggerated notion of masculinity, inevitably results in the construction of femininity as something less than the universal human being to the extent that femininity is different from masculinity. The denial of sexual difference in our symbolic order thus leads to a hierarchical construction of sexual difference, and both of these moments feature in the South African definition of rape.

Accordingly, the New Sexual Offences Act constitutes a textbook example of the problems that Irigaray, as well as other feminist thinkers like MacKinnon, identify with legal language and the legal system. It denies sexual difference through gender-neutral language, while covertly privileging the masculine. Furthermore, when it acknowledges sexual difference, it does so in an hierarchical way, in terms of which difference is regarded to be situated in the feminine and is understood as rendering women inferior.

This chapter will start by providing a brief overview of the law reform process which culminated in the current sexual violence legislation. The subsequent section will be devoted to redrawing the connection between sex, rape and sex inequality. Thereafter, two separate sections will address the problems of gender neutrality and consent in the definition of rape.

At this stage, it is necessary to reiterate the acknowledgment that the origin of the problem of sexual violence lies deeper than in the criminal justice system, and that an altered approach in the courts will not, on its own, eradicate sexual violence. However, it will be argued that our rape legislation, in particular, as it stands, it is still actively complicit in society's tolerance of sexual violence in that it is permeated with masculine bias and promotes an understanding of rape from a masculine perspective. This probably contributes significantly to the low conviction rate as well as to the high percentage of attrition in rape cases. Accordingly, the criminal law, as society's official channel for the prosecution and condemnation of certain behaviour, still blatantly sides with the rapist. This cannot be excused. Therefore, even

though rape law reform will not magically solve the problem of sexual violence, it is an essential step towards addressing the situation at the symbolic and practical levels.

Lastly, as point of departure for this chapter, it is necessary to again emphasise the specific South African constitutional context in terms of which the problem of sexual violence must be addressed. It was explained in the introductory chapter that not only is sexual violence explicitly acknowledged as an instance of unfair discrimination on the ground of gender, but the Constitutional Court has emphasised on several occasions the constitutional duty of the state to protect women against sexual violence on the basis of the right to freedom and security of the person as entrenched in section 12 of the Constitution. Accordingly, it is clear that the South African Constitution goes out of its way to condemn and fight violence against women. The fact that the South African sexual violence legislation remains inept to deal with rape and sexual violence is thus highly problematic and can be argued to render the legislation vulnerable to constitutional attack.

II The reform of rape law in South Africa

Prior to the recent reforms, the prevailing definition of rape in the South African criminal law hailed from the common law in terms of which rape was defined as “the intentional unlawful sexual intercourse with a woman without her consent” (Burchell & Milton 2000:699). Sexual intercourse was defined as the penetration of the vagina by the penis. In the *Masiya* case (2007) the meaning of rape was extended to include acts of non-consensual penetration of a penis into the anus of a female. The common law definition of rape was severely criticised by South African scholars and courts alike. The most obvious reason is that according to the definition only women could be victims of rape and only men could be rapists. Accordingly, the gender specific common law definition of rape was not able to account for male victims or female perpetrators of rape (Law Reform Commission Discussion Paper 85:81). It was also argued that such a gender specific definition ‘sexualises’ the crime of rape and as a result “women are confirmed and entrenched as the eternal passive victims of sexual violence” (Naylor 2008:25). Accordingly, the argument is that the stereotypes that promote sexual violence are perpetuated and entrenched through a gender-specific approach to rape. On this basis law reform was deemed necessary to provide for a gender-neutral definition of rape. in order to include male victims and female perpetrators of rape and to destabilise naturalised sexual hierarchies in accordance with which femininity is automatically associated with victimhood.

A further problem that was identified with the common law definition is the fact that many acts that are just as harmful and humiliating as the forced or coerced penetration by a penis of a vagina, like the penetration of the mouth by the penis, or the penetration of an anus by a penis or any other object, did not fall within the category of rape. It was thus argued that the definition of rape should be broadened in order to include such acts under the crime of rape (Law Reform Commission Discussion Paper 85: 81).

Lastly, consent as the distinguishing factor between sex and rape was identified as a highly problematic concept for various reasons. In this regard Naylor (2008:42) explains that the South African Law Reform Commission (the Law Reform Commission) declared in its 1999 Discussion Paper 85, after thorough comparative research regarding rape law reform, that:

It is essential to redefine the offence of rape to be reliant on ‘coercive circumstances’ rather than absence of consent in order to establish *prima facie* unlawfulness. A shift from ‘absence of consent’ to ‘coercion’ represents a shift of focus of the utmost importance from the subjective state of mind of the victim to the imbalance of power between the parties on the occasion in question. This perspective also allows one to understand that coercion constitutes more than physical force or threat thereof, but may also include various other forms of exercise of power over another person: emotional, psychological, economical, social or organisational power (114).

Discussion Paper 85 also states that as a result of the difficulty of interpreting the meaning of consent, the courts often rely on stereotypical notions of consenting sexual behaviour in order to come to a decision regarding the guilt of the accused. Such stereotyped views then inform the decisions of police and other role players in the prosecution process to screen out cases in which consent seems to be a major issue (112). There are three main problems with the consent approach as recognised by the Law Reform Commission. Firstly, there is the difficulty of proving rape when its defining characteristic (namely lack of consent) is to be found in the head and possibly in the behaviour of the victim, rather than in the objective facts of the occurrence. Secondly, the consent approach is insensitive to the hierarchical relations and issues of inequality underlying rape. Thirdly, consent contributes to the construction of harmful stereotypes of women and their behaviour, which are then used against them in rape cases. These will be discussed below, along with other problems resulting from the consent approach. The Law Reform Commission thus advocated the replacement of the term ‘without consent’ by the term ‘under coercive circumstances’.

The abovementioned problems, as well as other considerations, resulted in the initiation of the rape law reform process by the Law Reform Commission. In the Law Reform Commission's Discussion Paper 85, rape was defined gender neutrally, with reference to "sexual penetration" (which was defined in a much broader way than penetration of a vagina by a penis) and in terms of coercive circumstances:

Any person who intentionally and unlawfully commits an act of sexual penetration with another person, or who intentionally and unlawfully causes another person to commit such an act, is guilty of an offence. For the purposes of this Act, an act of sexual penetration is *prima facie* unlawful if it takes place in any coercive circumstances (115).

Coercive circumstances were described as including, but not being limited to, the circumstances where:

- there is any application of force, whether explicit or implicit, direct or indirect, physical or psychological against any person or animal;
- there is any threat, whether verbal or through conduct, direct or indirect, to cause any form of harm to any person or animal;
- the complainant is under the age of 12 years;
- there is an abuse of power or authority, whether explicit or implicit, direct or indirect, to the extent that one person is inhibited from communicating his or her resistance to an act of sexual penetration, or his or her unwillingness to participate in such an act;
- a person is unlawfully detained;
- a person believes that he or she is committing an act of sexual penetration with another person;
- a person mistakes an act of sexual penetration which is being committed with him or her for something other than an act of sexual penetration; or
- a person's mental capacity is affected by –

- sleep;
- any drug, intoxicating liquor or other substance;
- mental or physical disability, whether temporary or permanent,

to the extent that he or she is unable to appreciate the nature of an act of sexual penetration, or is unable to resist the commission of such an act (116 – 117).

The proposed inclusion of ‘coercive circumstances’ was welcomed by scholars as bringing South African rape legislation in line with international developments and trends (Albertyn *et al* 2007:317). Although Discussion Paper 102 that was released in 2001 contained a somewhat altered version of the definition of rape to that which was included in Discussion Paper 85, the implications were largely the same.

However, the Redrafted Criminal Law (Sexual Offences) Amendment Bill B20-2003 that was released in 2006 returned to a consent-based definition of rape. Following on this redrafted Bill, the current definition of rape in section 3 of our New Sexual Offences Act is as follows:

Any person (“A”) who unlawfully and intentionally commits an act of sexual penetration with a complainant (“B”), without the consent of B, is guilty of the offence of rape.

“Sexual penetration” is defined as including:

Any act which causes penetration to any extent whatsoever by

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person.

The New Sexual Offences Act also includes in its definitional section a list of circumstances under which a person (“B”) does not voluntarily or without coercion agree to an act of sexual violation. These include, but are not limited to:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of –

the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or

a threat of harm by A against B, C or D or against the property of B, C or D;

- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;

- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that –

B is committing such a sexual act with a particular person who is in fact a different person; or

such a sexual act is something other than that act; or

- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act-

asleep;

unconscious;

in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B’s consciousness or judgment is adversely affected;

a child below the age of 12 years; or

a person who is mentally disabled.

Naylor (2008:48) explains that this definition is the exact definition of rape that is contained in the United Kingdom Sexual Offences Act of 2003, except that our Act fails to include the detailed evidential and conclusive presumptions regarding consent that accompany the definition of rape in the UK Act. This entails a list of examples where consent is not present in section 74 of the Act. The prosecution only has to prove that sexual activity occurred in one of the circumstances on the list, in which case the evidential burden to prove consent is shifted onto the defendant. Accordingly, although consent is retained in the UK definition of rape, the prosecution is relieved of the notorious difficulty of proving non-consent. This is not the case in the New Sexual Offences Act of South Africa, where the onus remains on the prosecution to prove that consent was not present, even if the alleged rape occurred in the context of one of the listed ‘coercive circumstances’.

Therefore, even though the reform process was largely driven by a critique of the consent-based definition, the element of consent was retained in the reformed New Sexual Offences Act. The biggest change that was effected by the reform process is that the definition of rape is now couched in gender-neutral terms.

Du Toit (2012a:48 – 49) notes that this new definition can be praised for four reasons: it allows for the recognition of male rape victims, it allows for the possibility of female perpetrators, it facilitates a broader understanding of sexual injury caused by rape in so far as the definition is not limited to the penetration of a vagina by a penis, and the explicit inclusion of male rape victims and female perpetrators of rape may to some extent contribute to the destabilising of the naturalised sexual hierarchy in which masculine sexuality is associated with domination and feminine sexuality with submission.

However, in the following sections I will argue with reference to thinkers like Cahill, Du Toit and MacKinnon that, although these positive developments are deserving of praise, they are achieved in a way which not only fails to solve many other problems of the previous Act, but also causes some new problems. The rape law reform process which presented a rare and valuable opportunity to better the plight of women in South Africa can therefore be said to have had disappointing results.

III Rape, sex, violence and equality

In the introductory chapter to this thesis it was argued, with reference to the work of Cahill, that rape cannot be reduced either to its violent or its sexual aspects exclusively. It was explained that an understanding of what is at stake in the act of rape, as well as the harms resulting from it, is dependent on the understanding of rape as a sexual act of violence. Rape is thus best understood as a form of masculine domination of the feminine through sexual means. Furthermore, it was shown how rape is sexual on a private and a political level and how it functions as a tool in the hands of patriarchy to maintain the large scale oppression of women and feminised men. An understanding of the sexual nature of the act on a private or personal level was also argued to be central to an understanding of the experience and injuries of rape. Lastly, the individual and political sexual effects and aims of rape were argued to be inextricably linked.

If rape is understood as being sexual on a broader social level, in that it fulfils the political function of the hierarchisation of the sexes, the problem of rape becomes a problem of substantive inequality. PEPUDA's listing of gender-based violence as an instance of unfair discrimination on the ground of gender constitutes a constitutional manifestation of this insight. Rape is thus constitutionally acknowledged as an act through which the equality of persons is undermined on the basis of their sex/gender. It is thus crucial that the legislation aimed at addressing sexual violence is able to recognise and deal with sexual violence as a tool through which the feminine is systematically subordinated in the sex/gender hierarchy. A failure to do this renders it inconsistent with the constitutional commitment to substantive equality and the explicit recognition by the Constitutional Court that sexual violence is a form of oppression and subordination of the feminine.

The Law Reform Commission Report on Sexual Offences Discussion Paper 85 displays an awareness and understanding on the part of the Law Reform Commission of the issues discussed above. In Discussion Paper 85 it is stated:

We recognise that acts of sexual violence against men and women constitute a violation of their human rights and fundamental freedoms and impair or nullify their enjoyment of those rights and freedoms. We do, however, recognise that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by

men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men (29).

The Discussion Paper thus clearly acknowledges the social and political function that sexual violence fulfils. It shows adequate understanding of sexual violence as a phenomenon that serves patriarchy and by means of which woman or the feminine is systematically damaged and disempowered. Furthermore, the Discussion Paper also displays sensitivity to the sexual nature of the crime of rape on a personal and individual level in so far as it uses sexual means to inflict damage on a person's body and psyche:

Rape is a crime that is not comparable to any other form of violent crime. Unlike other crimes against the person, rape not only violates a victim's physical safety, but their sexual and psychological integrity. It is a violation that is not only marked by violence, but by a form of 'sexual terrorism'. The act of rape is invasive, dehumanising, and humiliating (63).

What is evident here is an awareness on the part of the Law Reform Commission of the sexual meanings of rape with reference to the individual victim, as well as an understanding of the way in which the sexual nature of the attack fulfils an undeniably political function in society and is the result of, as well as a means to, the perpetuation of an oppressive, hierarchical relationship between the sexes.

By quoting Andrea Dworkin (1997:23), the Discussion Paper also acknowledges that rape is a crime against the body just as much as a crime against personal autonomy:

The boundary of the body itself is broken by force and intimidation, a chaotic but choreographed violence (63).

The quote acknowledges that rape constitutes a particularly humiliating and harmful violation of the body, and that this violation is both violent and sexual. Furthermore, the violence is not merely random and pathological, but "choreographed", in that it fulfils a strategic political function.

However, these insights are already blatantly undermined in the Preamble of the New Sexual Offences Act. Although it recognises that women and children are particularly vulnerable to

sexual violence¹¹, it pushes the crime back into the private realm by labelling it a “social phenomenon” and ascribing it to the “dysfunctionality of society” rather than acknowledging it as a public and political problem of structural inequality:

Whereas the prevalence of the commission of sexual offences in our society is primarily a social phenomenon, which is reflective of deep-seated, systemic dysfunctionality in our society, and that legal mechanisms to address this social phenomenon are limited and are reactive in nature, but nonetheless necessary.

In the next sections of this chapter it will be shown how the insights of the Law Reform Commission and our constitutional order are further denied, ignored and undercut in the definition of rape contained in the New Sexual Offences Act. It will be argued that the Act follows a highly problematic approach to sexual difference by, firstly, denying sexual difference through gender-neutral language (which is not neutral, but informed by a hidden masculine norm), while secondly, through the concept of consent, constructing femininity as inferior to or derivative of masculine sexuality. The combination of the gender-neutral language and the concept of consent is especially pernicious, because the sexual hierarchy that is entrenched through the concept of consent is rendered doubly invisible through the use of gender-neutral language.

IV A critique of the gender neutrality of the New Sexual Offences Act

Even though the gender neutrality of the definition of rape in the New Sexual Offences Act is successful in allowing for the inclusion of male victims and female perpetrators, it will be shown that it is highly problematic in many other ways, because its overt denial of sexual difference results in the implicit privileging of the masculine. On this basis I will argue that the legislature should find another way of including male victims and female perpetrators in the crime of rape, without resorting to gender-neutral language. My point is not that we should return to the previous definition of rape, but rather that the reform of the previous definition should have been concluded differently.

¹¹ The Preamble states in this regard:

Whereas women and children, being particularly vulnerable, are more likely to become victims of sexual offences, including participating in adult prostitution and sexual exploitation of children.

In what follows I will mainly use the work of Cahill and Du Toit in order to identify and discuss what I regard to be the four primary problems inherent in and arising from a gender-neutral definition of rape, judged from an Irigarayan perspective. It will be seen that these problems all arise from the fact that the seemingly gender-neutral and universal subject of the western symbolic and legal order represents an hyperbolic form of masculine subjectivity. In this regard, it was explained that Irigaray argues that the universal subject is set up in opposition to the feminine, which represents the material or the particular. The ‘universal’ subject is thus modelled on an idealised masculine subjectivity and is sustained only through a continuous expulsion, exclusion or sacrifice of the feminine. The legal implication is that laws directed towards the needs and vulnerabilities of the supposedly universal human being primarily serve men. It was seen in the previous chapter that the constitutional jurisprudence has started to move away from the gender-neutral universal subject in its equality jurisprudence through an increased focus on the concrete situations of embodied persons. This indicates an awareness of the idea that legal concepts like justice and equality are served rather than undercut by a concern with particularities. It was also seen that PEPUDA develops the right to gender equality with express reference to the *sexually* particular subject. An explicit acknowledgment of sexual difference is thus incorporated into the law’s pursuit of equality. However, the gender neutrality of the definition of rape in the New Sexual Offences Act undermines these insights by implicitly positing sexual difference and justice or equality as being in opposition to each other, in that sexual specificity is seen as undermining the quest for equality and justice (as aims that should be pursued on ‘universal’ terms) and that sexual specificity is accordingly something that should not be taken into account by the law. This results in a covert privileging of the masculine, because the unsexed and disembodied perpetrator (‘A’) and victim (‘B’) who feature in the gender-neutral definition of the New Sexual Offences Act represent the universalised Cartesian subject of the western social order that was criticised in the first chapter.

The problem with the gender-neutral definition of rape in the New Sexual Offences Act is thus the way in which the unequal power relations underlying a society in which rape fulfils a political function are perpetuated, in so far as the gender-neutral legal language is informed and permeated by implicit and unacknowledged masculine bias. The legislature’s attempt to provide male rape victims with equal protection to female rape victims by defining rape in gender-neutral language does not, therefore, result in equality or equal protection of men and women, but in the sustained oppression of women. It can be argued that masculine bias is

found in three ways or on three levels of the gender-neutral definition of rape in the New Sexual Offences Act.

Firstly, the Cartesian unsexed and disembodied conception of the subject within the definition of rape results therein that certain qualities are implicitly ascribed to the victim and perpetrator and that certain assumptions are made about their actions and experiences. Du Toit argues that the placing of the Cartesian subject at the centre of the definition of rape either has the effect that women are judged in accordance with a masculine norm, or alternatively, that their femininity is constructed as a deviant position (Du Toit 2012a:51). Accordingly, when evaluating, for example, whether the victim has consented to intercourse or not, the courts implicitly measure the woman victim's behaviour against the 'reasonable man' standard. Furthermore, she is assumed to be a disembodied rational being who can direct her actions in accordance with rationality, detached from a body and its experiences. In addition, she is regarded to be fully autonomous and not as influenced by or constituted through her relations to other people and their actions. This standard is very far removed from the flesh-and-blood victim who appears before the court. However, as stated above, Du Toit (2012a:51) explains that judging women according to an idealised masculine norm is only one side of the problem, and that the other possible outcome of the implicit masculine norm in the gender-neutral language of the definition of rape is that femininity is constructed as a deviant position. This is done through ascribing qualities such as "fickleness, untrustworthiness, excessive emotion, and an affinity with corporeality and sex" (Du Toit 2012a:551) to women, thereby also making it extremely difficult for them to prove rape in a court of law. The denial of sexual difference in the formulation of rape in the western symbolic and legal order thus does not allow for an acknowledgment of the feminine as a sex in its own right: femininity is either denied altogether, or is regarded as inferior and lacking in comparison to the masculine norm. An acknowledgment of the sexual particularity of all subjects, and therefore of the fact that sexual difference is an inevitable underpinning of subjectivity, through sex-specific legal language and rights is thus necessary if femininity is to be recognised by the court as a valid position to be judged according to its own standards.

The second level at which built-in masculine bias operates within the gender-neutral definition of rape is that the gender neutral-language serves to mask hidden gender assumptions. Du Toit argues that the gender neutrality of the definition merely hides (and therefore perpetuates) the gender assumptions that characterised the previous gender-specific

definition of rape (Du Toit 2012a:51). These assumptions include the “construction of rape perpetrator and victim around masculine-dominant and feminine-subordinate sexualities respectively” (Du Toit 2012a:51), as well as an understanding of the sexual domination inherent in rape as a natural or biological phenomenon in so far as masculine sexuality is seen as naturally active and feminine sexuality naturally passive (Du Toit 2012a:51). Again, this problem is also present in the context of rape with female perpetrators and male victims. The position of victim is feminised, even if the victim is a man, because in our symbolic order, the position of weak sexual agency, passivity and victimhood is construed as feminine. Similarly, the active position of the perpetrator is one of idealised masculine sexual agency, and this is also the case when the perpetrator is a woman. The survival of these gender assumptions in the gender-neutral definition results from the fact that the western symbolic and legal orders are not founded on an acknowledgment of and respect for sexual difference. Rather, as explained in the first chapter and reiterated above, our understanding of universal subjectivity is based on a masculine norm, and difference from that norm is constructed as ‘less than’. This has historically justified the construction of feminine subjectivity and sexuality as derivative of masculine subjectivity and sexuality. By referring to gender-neutral and disembodied ‘A’ and ‘B’, the submissive position of victim is automatically ascribed to the feminine while the dominant A is assumed to represent the masculine. Du Toit holds that the gender-neutral definition of rape in the New Sexual Offences Act reinforces these assumptions in so far as it does nothing to actively counter them (Du Toit 2012a:51). Cahill also notes that, to a large extent, the power of the patriarchal discourse which produces the vulnerable, rapeable feminine body lies in the invisibility of this discourse, which leads to the acceptance of its effects as natural or biologically necessary (Cahill 2001:163). Accordingly, if the harmful gender assumptions that were overtly manifest in the previous gender-specific definition of rape are to be confronted, it can be argued that it can only be done through sex-specific legal language which responds in an authentic way to the demands of sexual difference. It is thus submitted that it is only through a definition that is founded on an explicit acceptance of and respect for sexual difference that the perpetrator/victim dichotomy can successfully be dislodged from its lingering association with masculine and feminine respectively, and can be explored and applied in a more fluid and flexible way.

The third level at which the inherent masculine bias operates in a gender-neutral definition of rape which is centred in the disembodied Cartesian subject is found in the idea that the harm of rape is regarded to lie simply in the thwarting of the will of the victim, or in the physical

injuries incurred at the level of the body. Because Cartesian subjectivity is not rooted in the sexed body, but in the rational mind, the harm of rape is not understood to be very grave, because it is judged from a hyperbolic masculine perspective in which the sexed body is regarded only as a marginal element. The only harm of rape which is admitted to reach and affect the core of subjectivity is the undermining of the autonomy of the subject. By not acknowledging the harm of rape to be any deeper than the thwarting of the will of the subject, rape law is masculine biased in so far as the harm of rape, of which women are the primary targets and men the primary perpetrators, is underestimated. This stands in stark contrast to the insights of the Law Reform Commission discussed above, where the harm of rape is acknowledged to lie in the breaking of the “boundary of the body”. I will elaborate on this point below, where I discuss the problem that the gender-neutral definition of rape limits judicial understanding of the harms of rape, as well as in the discussion of consent.

The levels at which masculine bias operates in the gender-neutral definition of rape in the New Sexual Offences Act are thus threefold: firstly, the victim is either judged according to a masculine norm, or her femininity is constructed as a deviant position, which results in severe damage to the status of the feminine subject; secondly, in the perpetuation of the hidden gender assumptions that the previous Act was criticised for; and thirdly, in the understanding of the harm of the rape as merely consisting in the thwarting of the will of the victim. Cahill (2001:123) formulates the problem as follows:

There is no reason to believe that sex neutrality, or the denial of sexual difference, is any more likely to be a liberating force for women than the recognition of sexual difference. Because of both the particular, historical construction of the sexes and the bodily differences among differently sexed subjects, women are not identical to men. Demanding that they be treated as just humans (that is, as not sexed) is not, therefore, necessarily a step away from sexual hierarchization. Rather, because such a demand invokes an illusory generic that is implicitly sexed male, the result is that the meanings that are specific to women’s lives are rendered invisible.

The next big problem with a gender neutral-legal definition of rape, which flows directly from the problem of the hidden masculine norm, is that it results in the depoliticisation of the act of rape, in that the structural patterns of domination that are enforced and perpetuated through the crime remain outside of the understanding of the nature of rape, and are also not

taken into account in the Court's determination of the harm resulting from rape. Cahill (2001:32) writes:

If the phenomenon of rape is directly linked to the oppressive structure by which women are dominated by men, if rape is a major tool of patriarchy, then a law that renders such sex-specific claims inaudible will not be able to take into account that very characteristic.

Therefore, if rape is defined without any reference to the sexed bodies of perpetrator and victim and the sexual meanings of the act, the established understanding of rape as a tool of masculine domination and social control of the female/feminine is lost. It can thus be seen that the gender-neutral legal language works here to naturalise and privatise rape, and thereby to maintain established hegemonic relationships and oppressive structures instead of facilitating the dismantling of these structures in the pursuit of equality and justice. As explained above, this depoliticisation is especially problematic in the South African constitutional context, where the political function of rape is explicitly acknowledged in PEPUDA and has been reiterated on several occasions by the Constitutional Court. In denying the gendered and gendering sexual nature of the crime of rape, and thereby ignoring its implications for sex equality, the criminal law is thus not in line with the constitutional understanding of the crime of rape.

Furthermore, if rape is depoliticised in the eyes of the law, and if the victim and perpetrator are regarded as disembodied rational subjects, the law cannot escape encountering problems in identifying and understanding when rape happens or what constitutes an act of rape. A prime example of this issue can be found in the case of *S v Zuma* [2006] 3 All SA 8 (W), where then ex-vice-president Zuma was accused of raping a young woman. Here the court used the fact that the victim, who was later nicknamed "Khwezi" by the media, was a traumatised and confused young woman, as a counter argument to the allegations that she was raped by Zuma. In the case, the fact that Zuma was a respected and very powerful figure while the complainant was perceived to be a "a sick person who needs help" (par 221(e)) served as an indication to the court that whatever happened that night was not rape, because she could not have managed to refuse consent and to portray her dissent unambiguously. The court stated that "[i]t is quite clear that the complainant has experienced previous trauma and it is quite possible that she perceives any sexual behaviour as threatening" (par 221(g)) and

used this to support the contention that it could not have been rape. Du Toit (2007:63) explains in this regard:

By showing that this woman does not know what she sexually wants, and/or cannot communicate it unambiguously, that she is thus not a full and fully responsible sexual subject, lawyers for the defence proved to the Court that this woman (and ‘such’ women) cannot be raped.

If rape is understood as a political act which is made possible by, and which simultaneously perpetuates, unequal gender relations, Khwezi’s weakness and Zuma’s power would have been interpreted in the opposite way, namely, that those power configurations made rape *more* likely. It is also clear that Khwezi’s femininity was represented in contrast to the masculine norm of the reasonable man, and was constructed as a deviant position in so far as she was portrayed as a “confused and troubled person” (par 221(g)) without agency (sexual and otherwise). Even though this case was decided in terms of the common law definition of rape, it is submitted that the gender-neutral definition of the New Sexual Offences Act will do nothing to actively improve the courts’ sensitivity to the issues at hand.

On the contrary, the depoliticising of the crime of rape, as well as the inherent built-in masculine bias in the ostensibly gender-neutral formulation of rape in the New Sexual Offences Act, might even further obstruct the understanding of the courts about when rape actually occurs and what it entails. I will explain later in this chapter why the inclusion of a set of ‘coercive circumstances’ as part of the definition of non-consent does not solve these problems.

The last problem with the gender neutrality of the definition of the crime of rape is that it results in the overlooking by the criminal justice system of the whole scope of injuries of rape. The argument is that the kind of experience that the female victim endures is grossly misunderstood if rape is not comprehended within the context of, firstly, the sexed body and subjectivity of both victim and perpetrator, and secondly, the systematic sexual oppression of women/the feminine by men/the masculine. Cahill writes:

Hence, any theory that attempts to describe rape independently of the sexes of the attacker and the victim will necessarily fail to articulate meanings that are central to

any particular victim. The experience of rape is always substantially informed by the sexed quality of the bodies involved in the assault (2001:121).

She notes that the experience of male rape victims “does not have the same, or even vaguely similar” social and personal meanings attached to it, because, for example, the threat of rape is not something that men have to confront and deal with on a daily basis (Cahill 2001:121). For women, the phenomenon of rape shapes their experience of their own safety and mobility, and in this regard rape has a function of social sexual differentiation (Cahill 2001:121), as well as territorial control that entrenches masculine domination. Here it is important to repeat that Cahill does not argue for grading rapes in terms of harm and thereby establishing a hierarchy of victims. Rather, she wants to highlight the different meanings that rape can have with reference to the sexed bodies of the perpetrator and victim involved. Cahill thus argues that the problem does not lie with the mere act of distinguishing between the sexes, but is rather that rape enacts a kind of differentiation that constructs the difference between the sexes in a hierarchical way, where the feminine is deemed inferior. Cahill (2001:162) writes:

A significant element of the woman victim’s experience of rape is directly related to the constitutive element of a power discourse that produces her body as violable, weak, and alien to her subjectivity. From the rape victim’s perspective, although not necessarily consciously (in fact, precisely in a bodily way), these meanings too are part of the crime in so far as that particular action is perceived as a threat fulfilled.

She also writes:

The sexual meanings of rape from the perspective of the victim have everything to do with the construction of the particularly feminine body, and as such are fundamental to the crime experienced by the victim (2001:163).

Accordingly, the ever-present threat of rape as experienced by women results in the production of a specifically feminine bodily comportment (Cahill 2001:159). The pervasive threat of rape, as experienced by women in South Africa, produces a particularly vulnerable feminine body in so far as women cannot express their sex as freely as men, do not have the physical mobility and freedom that men experience, and are much more aware of their potential victimhood (Cahill 2001:159). The phenomenon of rape thus “produces and

presents women as pre-victims expecting to be victimised (not because men are rapists, but because women's bodies are rapeable)" (Cahill 2001:159). Similarly, Albertyn *et al* (2007:307) write:

We note that where the risk of sexual assault pervades a society or environment, women's everyday freedom of movement and behaviour become restricted. Women are taught from an early age to avoid certain forms of dress and social interaction. Even where they have never been sexually assaulted themselves, the omnipresence of threatened violence serves a powerful symbolic function in shaping women's lives. It has been argued that the ubiquitous threat of sexual assault, for instance, serves as a warning to women to watch their behaviour, curtail their freedom of speech and movement, and conform to social expectations concerning their demeanour, actions, and use of public space. Sexual assault also punishes women who stray beyond the boundaries of their accepted gender roles.

Du Toit (2012a:55) highlights another very specific aspect of the feminine experience of rape that is obscured by a gender-neutral legal definition. She writes:

Because the meanings of rape are already parasitical upon the abject meanings our culture attaches to the female sexual body, the meaning of being raped cannot be the same for men and women. Women are forced through rape into a shameful complicity with their own demise as subjects and forced to acknowledge on a deep level that a woman's body particulars – her body as sex object – is incompatible with full humanity. Unable to escape their female embodiment, women rape victims can hardly escape the derogatory – or devaluated and degraded [(Cornell 1995:19)] – meanings imposed upon the particulars of that embodiment (2012a:57).

According to Du Toit, women thus experience a specific type of harm through being raped that men do not necessarily experience, in so far as the sexual specifics of women's bodies (here Du Toit mentions menstrual flow, breasts, the womb and pregnant body, breast milk, cellulite and 'excess flesh') are constructed as abject in the western symbolic order, because they betray the undeniable embodiment of the subject, and are thus seen as a threat to the social order which has carefully been constructed in opposition to the natural and material (2012a:56). When a woman is raped, she is thus forced to recognise her body as an object of shame, which leads to her undoing as subject (Du Toit 2012a:56). Although a man who is

raped also experiences great injury and harm, it does not “depend on the pervasive symbolic abjection of his body particulars, because those are still the valorised male particulars” (Du Toit 2012a:57). His injuries are based on other physical, psychological and symbolic particulars.

The point is not that women’s experiences of rape are more injurious and harmful than the experiences of male victims, but that rape has different effects on women and men. Rape also produces subjects that are differentiated by sex (Cahill 2001:126). On this basis then, Cahill and Du Toit hold that a universal, generic and gender-neutral theory of rape (and therefore such a legal definition too) is incapable of picking up on and dealing with these differences among experiences of rape (Cahill 2001:118, Du Toit 2012a:56) and also does not facilitate legal understanding of the sexually differentiating social function of rape (Cahill 2001:122). Furthermore, it precludes the articulation of basic aspects of a victim’s experience in court cases which represent society’s official response to the crime (Cahill 2001:123).

The problems arising from the denial of sexual difference through the gender-neutral formulation of rape in the New Sexual Offences Act are thus clear and manifold. The definition of rape in the New Sexual Offences Act thus constitutes a prime example of the way in which the implicit masculine norm functions within gender-neutral legal language and the injustices that it thus allows to pass as justice. Accordingly, even though the definition of rape in the New Sexual Offences Act seems gender neutral, it is not. The claim that it is gender neutral results in a double injustice to women/the feminine. Firstly, the gender assumptions built into the definition prejudice woman/the feminine. Secondly, the invisibility of the masculine-biased gender assumptions in a gender-neutral definition has the effect that the prejudice that woman/the feminine suffers as a result of these gender assumptions is held to be neutral, natural and just. Therefore, it is submitted that a description and definition of rape is needed in our criminal law that acknowledges the gendered and gendering nature of the crime, which remains intact even in the case of female perpetrators and male victims. In order for a definition to fulfil these requirements, it will have to incorporate a fundamental recognition of and respect for sexual difference and its significance through approaching the subject as embodied and sexually particular.

A possible objection to this line of reasoning might be that the criminal law does not operate with reference to the particularities of the specific embodied experience of the victim and the larger political implications of an act. Rather, the criminal law’s strength lies in the way in

which it manages to isolate the central aspects of human action in order to create universally applicable categories of wrongs. Cahill (2001:115) formulates the dilemma of law and difference as follows:

For if every rape is different, if every victim is radically different from every other, what can we claim of the crime in general? Isn't it necessary to articulate some universal aspect of rape in order to fix its meaning (and hence its appropriate punishment) in the legal system, as well as to provide a generally acceptable and coherent understanding of the crime in society at large? Are we not compelled to determine an ostensibly comprehensive definition of rape, despite the obvious futility of such an attempt? The difficulty here (encountered with remarkable persistence in this discussion) is the difficulty of difference.

Cahill thus identifies the problem as the legal system's inability to account for difference while trying to measure all people against the same universal standard of justice. As mentioned above, it is exactly the legal system's universality that gives it its power. However, in the context of rape, the legal system's approach has been proven to be unsuccessful. Statistically, only eleven percent of reported rapes end in convictions (Gouws 2012: 8)¹². This indicates that the way in which the phenomenon of rape is universalised in law currently renders it unable to pick up on the particulars relevant to the crime. Accordingly, it is necessary to re-evaluate the universals that are employed in rape law. Cahill (2001: 115) offers a solution to this dilemma in the context of rape by identifying an element that is universal to all instances of rape and which can be used by the legal system as foundation for a coherent understanding of the crime:

¹² The Law Reform Commission Criminal Case Outcome Research Report of 2000 shows that successful convictions in murder cases in South Africa are only marginally more than successful convictions in rape cases (11% of murder cases to 7% of rape cases) (Van Zyl Smit 2000:22). This might be an indication that the problem is not with the criminal law's approach to rape *per se*, but rather with the entire South African criminal justice system. However, the same report shows that in America the successful conviction rate for murder is 49% while for rape it is only 19% (Van Zyl Smit 2000:22). Similarly, in England and Wales it is 56% for murder and 10% for rape (Van Zyl Smit 2000:22). Accordingly, the low conviction rate of rape in South Africa cannot be solely ascribed to the general state of our criminal justice system, and the difference between successful convictions in the contexts of rape and murder is not coincidental or irrelevant. Rather, these statistics seem to indicate that in criminal justice systems in general, the crime of rape is approached in a way that tips the scales of justice in favour of the rapist. The fact that the successful conviction rate for murder in South Africa is also very low is thus not a valid counter argument to the idea that our rape law is in need of reform.

While experiences of rape are significantly differentiated by such factors as race, age, political climate, and many others, the differences among them do not, by their sheer multiple nature, imply that rape itself has no specificity. As a particularly sexual, bodily attack on the embodied subject, rape constitutes a fundamental and sexually specific undermining of that person's subjective integrity. This specificity of the act of rape can produce a variety of experiences, because that undermining can be expressed and experienced to differing degrees and in differing ways. However, that variety is not limitless, and the nature of those experiences can be (although not, perhaps, exhaustively) understood through the lens of the significance of embodiment.

Accordingly, Cahill argues that the universal aspect of rape that can be used in order to fix the meaning of the crime of rape within the criminal law system is the fact that it is a sexual attack on an embodied and sexed person, and thus an attack on the victim's sexuality and subjectivity. If the central and underlying aspect of rape is understood to be a sexual attack on a specifically sexed body, the experience of the victim is relevant in understanding whether rape occurred and what harms resulted from it. Again, as was explained in the first chapter, a fundamental awareness of sexual embodiment opens the door for all other differences to be considered and respected. Cahill notes, for example, that because bodies are marked by race, rapes between persons from different races can have different meanings attached to them to rapes between persons of the same race (Cahill 2001:115). If, for example, the historical oppression of black people by white people is considered, the rape of a black woman by a white man might invoke narratives of racial superiority that are not present in the rape of a white woman by a white man (Cahill 2001:117). Cahill repeatedly emphasises that it is not about grading rapes in terms of seriousness, but about being sensitive to the different power relations, forms of domination and sexual degradation that are at stake when a body is sexually attacked (Cahill 2001:126). The point is that understanding rape, in the first instance, as a sexual attack on a specifically sexed body, allows for a more comprehensive and flexible understanding toward, firstly, the question as to whether rape occurred, secondly, the experience of the victim, and thirdly, the resultant harm. In this sense, through defining rape in terms of specifically sexed bodies, the definition of rape takes on a new kind of universality in so far as it is able to comprehend, include and pick up on a much greater scope of scenarios and issues that are relevant in cases of rape.

Here Benhabib's distinction between the generalised and concrete other that was explained in the second chapter again becomes relevant. Benhabib argues that the universalistic standpoint of justice necessitates knowledge of the concrete history of the agents who are involved (Benhabib 1992:163). In this regard, Benhabib explains that every procedure of universality presupposes that "like cases should be treated alike" or that I should act in such a way that I should also be willing that all others in a like situation act like me" (Benhabib 1992:163). However, to know whether it is a 'like' case requires knowledge of the particularities of the concrete persons involved (Benhabib 1992:163). Benhabib (1992:163 – 164) writes:

I conclude that a definition of self that is restricted to the standpoint of the generalized other becomes incoherent and cannot individuate among selves. Without assuming the standpoint of the concrete other, no coherent universalizability test can be carried out, for we lack the necessary epistemic information to judge my moral situation to be "like" or "unlike" yours.

Accordingly, Benhabib argues that the process of universalising necessitates the acknowledgment of particulars; otherwise the universal standpoint of justice becomes impossible. This argument regarding the functioning of the universalistic process is relevant to every application of the law in so far as the law creates rules which should be applied equally to all people who find themselves in situations that conform to certain requirements. My point is that the argument that the law functions in a universalistic way should not excuse it from acknowledging the particulars of the subject standing before it, in order to assess the extent to which the situation of the subject conforms to the requirements set out in the legal provision. Cahill's argument that the crime of rape should be defined in terms of the specifically sexed body can thus be understood as enabling justice, rather than undercutting it.

Moreover, Cahill notes that approaching the crime of rape as something that occurs between embodied subjects does not commit one to radical relativism, because material particularities are partly shared by all subjects and allow for communal experiences (Cahill 2001:114). Furthermore, the differences between embodied experiences are subject to certain limits, for example, the unpleasantness of a certain degree of pain (Cahill 2001:114). Accordingly, even though understanding rape in terms of embodiment broadens the range of particularities that the law needs to take into account when deciding whether a rape occurred and what harm was

incurred, embodiment remains a universally shared characteristic of all rapes and helps to anchor the Court's enquiry.

The question that now arises is whether such a definition must be formulated in sex-specific terms or whether the concept of the sexed body is robust enough to constitute a new universal which renders specific references to woman/the feminine and man/the masculine unnecessary.

Here Bergoffen's argument regarding the decision of the United Nations Hague war crimes tribunal in *Prosecutor v Krstic* (IT-98-33-T) (2001), where rape was identified for the first time as a crime against humanity, becomes relevant. Bergoffen (2003:120) argues that the classification of a crime against the sexed body of a woman as a crime against humanity, firstly, exposed the fallacy of regarding the masculine body as representing the universal, secondly, implied that the woman's body is the mark of the universal, and thirdly, "directed us to the intersections of difference and universality; for it is not as the neutral/universal body, but as the specifically sexed body that the woman's body is seen as speaking of our shared human condition". Accordingly, Bergoffen calls for a universalisation of the sexed and vulnerable body. Bergoffen does not, therefore, deem it necessary to use sex-specific legal language in order to introduce a recognition of and respect for sexual difference into the law. She believes this to be possible through rethinking and broadening the universals that we use. The question is then whether this kind of approach - namely, substituting sex-specific definitions of rape with broadened universals grounded in the recognition of human beings as sexed and embodied - can be successful in rape law.

However, Du Toit warns against an overly swift return to gender neutrality, in so far as this too easily slides back into a masculine approach to and understanding of key concepts, so that feminine sexual specifics are again ignored and denied (Du Toit 2012a:61). On this basis, Du Toit then argues that a focus on the concrete sexual specificities of women is "a necessary detour" in order to come to terms with women's sexual specifics and cultivate a legal understanding and recognition thereof (Du Toit 2012a:61). Following Du Toit, I want to argue that the issue of rape in South Africa is too fraught with harmful stereotypes, hidden gender assumptions and problematic rape myths to rely immediately on broadened or altered universals with the hope that the courts and society will now start to understand it in ideologically and theoretically appropriate terms. Even our newly appointed Chief Justice (which is the highest position that a judge in South Africa can occupy), Judge Mogoeng,

made shocking statements in decisions in rape cases when he was still a high court judge, displaying a profound lack of insight into the phenomenon of rape¹³. Accordingly, I want to submit that rape is an issue that is still so misunderstood in our society, that it is naive to think that our courts and criminal justice system will suddenly manage a consistent interpretation of existing universals in completely different and more nuanced terms so as to allow for an authentic incorporation of a concern for sexual difference into our rape law. A return to broadened universals can make sense only once a better understanding of the issue of rape, as well as an acknowledgment of and respect for sexual difference, have been cultivated in our courts and society.

On these grounds, I want to argue in favour of a sex-specific definition of rape, which describes male rape and female rape separately with reference to the sexed bodies of the perpetrators and the victims and with regard to the specific individual and political harms and meanings of the rapes. The universal aspect of the crime of rape that constitutes a foundation for the coherent understanding of the crime would be that it is a sexual attack on a sexually particular subject. By working with a sex-specific definition of rape, we move away from an ostensibly gender-neutral but implicitly masculine-biased definition, towards a more robust understanding of the crime of rape which is broad and flexible enough to facilitate a much better understanding of the experience of the victim (both male and female) and the harms he or she incurred, as well as a stronger sensitivity toward the systemic inequalities that underlie the problem of rape.

¹³ In an appeal in the North West High Court in 2007, Judge Mogoeng suspended a convicted rapist's jail sentence because:

“[t]his is a man whose wife joined him in bed, clad in panties and a nightdress. When life was still normal between them, they would ordinarily have made love. The appellant must, therefore, have been sexually aroused when his wife entered the blankets. The desire to make love to his wife must have overwhelmed him, hence his somewhat violent behaviour. He, however, neither smacked, punched nor kicked her. Minimum force, so to speak, was resorted to in order to subdue the complainant's resistance” (*E Modise v The State* (CA 113/06 Bophuthatswana Provincial Division) par 19).

Similarly, in the 2005 case of *S v Moipolai* 2005 (1) SACR 580 (BD), Judge Mogoeng drastically reduced the sentence of a man who was imprisoned after raping his wife, who was eight months pregnant, in front of another person. Judge Mogoeng reduced the sentence of ten years' imprisonment to five years' imprisonment on the basis that “the nature of the complainant and appellant's relationship is such that it renders their intercourse incapable of being legally categorised as rape” (par 23).

These judgments were passed 12 and 14 years after the criminalisation of marital rape in 1993 by the Prevention of Family Violence Act 133 of 1993.

V Consent and Inequality

It is widely accepted that the element of consent introduces a range of problems into the criminal law's approach to rape. As seen above in the overview of the rape law reform process in South Africa, removing consent from the definition of rape and replacing it with the notion of coercive circumstances was a central aim of the reform process. The legislature's final decision to return to a consent-based definition was thus met with great disappointment (Artz & Smythe 2008:6). In this section, I will provide an exposition of the main practical and philosophical problems inherent in a consent-based approach to rape.

Throughout this section I will argue that these problems persist despite the fact that certain coercive circumstances are explicitly named in the New Sexual Offences Act as instances where no consent is present. This is mainly as a result of the fact that by retaining consent (albeit a more nuanced understanding thereof) as the distinguishing factor between sex and rape, the gender assumptions inherent to and underlying the previous definition of rape, which was developed from a blatantly masculine and patriarchal perspective, are confirmed and perpetuated. In the context of rape law, consent is thus a concept that is so loaded with masculine bias and patriarchal meanings that the mere broadening of its definition is too weak a strategy to counter its harmful effects in the definition of rape.

For purposes of this thesis, the main problem with a consent-based approach to rape is that the concept of consent introduces a highly problematic approach to sexual difference into the definition. The presence of consent in the definition of rape as the central distinguishing characteristic between sex and rape implies that sexual relations are naturally hierarchised, where masculine sexuality plays the role of asserting itself and feminine sexuality submits (Du Toit 2012a:52). As explained earlier, even though the sex of A, who initiates the sexual encounter, and B, who must decide whether to consent or not, is not specified in the New Sexual Offences Act, the definition does nothing to counter the established understanding of masculine sexuality as dominant and feminine sexuality as passive. The result of the combination of the gender-neutral language and the concept of consent is thus that A is assumed to be a man whose role is to initiate sex and B is assumed to be a woman whose role is to submit. Accordingly, the position of the victim remains implicitly feminised "since 'consent' to masculine sexual initiative is seen as the appropriate form of weak sexual agency for those designated 'female' or 'feminine'" (Du Toit 2012a:51). This one-sided understanding of *normal* sexual relations perpetuates an understanding of naturalised sexual

domination by men. In this way it allows for a much greater tolerance of rape and limits condemnation thereof in so far as the line between rape and normal sex becomes very fine and the complainant must always fight against the presumption of her consent.

Consent thus remains a highly gendered concept which is rooted in a conception of femininity as inherently inferior to or derivative of masculinity. Through the concept of consent, a harmful approach to sexual difference is therefore written into the New Sexual Offences Act. Accordingly, where the gender-neutral formulation of the crime of rape denies sexual difference, the concept of consent acknowledges sexual difference, but in a harmful way. As explained above, in our symbolic order such an approach to sexual difference is an inevitable result of the denial of sexual difference, in so far as such a denial implies that masculine subjectivity is set up as representing the universal human being. The way in which femininity differs from masculinity is then regarded as a deviation from this norm which renders the feminine as something less than human.

A further problematic aspect of the concept of consent in the definition of rape has to do with the relationship between, on the one hand, this hierarchical construction of sexuality, and on the other hand, sex inequality. Du Toit shows how the consent doctrine in rape law constitutes a performative contradiction in so far as it assumes a free and autonomous subject with full-blown sexual agency, while at the same time undercutting such freedom and agency by constructing femininity as naturally submissive and inferior (2007:59). Du Toit's analysis is aimed at the previous definition of rape in South Africa; however, it remains relevant with regard to the definition in the New Sexual Offences Act as a result of the fact that this definition still frames the crime of rape in terms of consent. Du Toit argues that on the one hand, the law does not allow woman/the feminine any sexual agency by regarding sex as an act in which the woman/the feminine plays no active role and merely submits to the sexual agency of man/the masculine exercised on her (this is done by making rape an extension of normal sex by defining it as "sex without consent"). However, on the other hand, by making non-consent the defining factor of rape, the law assumes that it is working with a fully autonomous and free person who has full-blown sexual agency and no fear of exercising it. Du Toit articulates the dilemma powerfully:

The law thus frames and constructs 'normal' heterosexual intercourse as a male-driven, forceful and one-sided event involving woman's essentially passive sexualised

body, but then in its tail, right at the end, it turns the woman's consent, her response, into a crucial axis for determining the very nature of the event (2007:62).

Du Toit (2007:62) then explains how, in rape cases, the defence capitalises on this ambiguous situation by focusing on the mental state of the rape victim and showing that she is too confused and weak to have had the agency to unambiguously experience and communicate non-consent. Accordingly, the less agency a victim is regarded to have, the less 'rapeable' she is, because the court finds it all the more unlikely that she could have taken a stand against the man forcing sex on her. It was explained earlier how Du Toit makes this point with reference to the *Zuma* case. The implication is thus that the weak sexual agency afforded to women through the consent approach, is not regarded as an instance of inequality and is therefore not understood as something that influences their capacity for dissent.

The implication is that, as was argued to be the case with the gender neutrality of the definition, a consent-based definition of rape remains unable to recognise and to deal with the systemic structures of inequality that simultaneously justify and are perpetuated by sexual violence. This is caused by the fact that the consent-based approach to rape is so deeply rooted in hierarchy which renders it insensitive to inequality. Accordingly, the way in which an acknowledgment of sexual difference is incorporated into the definition of rape through the concept of consent is inimical to equality, in that it works to perpetuate existing inequalities through the construal of the masculine dominant sexual hierarchy as natural. The hierarchy through which the masculine dominates the feminine is thus not understood as inequality, but as sexual difference. Accordingly, despite the existence of this hierarchy that is actively promoted through the definition of rape, the definition assumes equality between the sexes. This consent-based definition of rape is thus a prime example of how sexual difference should not be acknowledged and applied in the law.

In this vein, and similar to Du Toit's argument explained above, MacKinnon (2006:955) holds that rape legislation fails as it incorrectly assumes equality of power between the parties involved through the element of consent. MacKinnon writes:

Consent often operates as a flag of freedom flown under the illusion that, if it is instituted as a legal standard, whatever sex women want will be allowed and whatever sex women do not want will be criminal. Legal consent standards do not conform to

this fantasy anywhere, wholly apart from the complexities that inequality introduces to what members of powerless groups can want or reject (2006:955).

The argument is thus that defining rape in terms of consent only makes sense if, firstly, the woman is in a position where she has the freedom and power to refuse consent to unwanted sex, secondly, if her non-consent will be interpreted as such by her assailant as well as the legal system, and thirdly, if her non-consent will have the authority to ward off any unwanted sexual acts. In this regard MacKinnon explains that “[w]ithin its legal ambit, consent can include sex that is wanted, but it can also include sex that is not at all wanted and is forced by inequality” (MacKinnon 2005:245). Van Marle (2007:75) notes in this regard that “[c]onsent can only have meaning within a context where dissent and refusal are real possibilities”, and thus where forms of force and inequality that rule out the possibility of dissent are uncovered.

Furthermore, MacKinnon argues that because rape, in terms of the consent approach, hinges on what transpired in the psychic space of the victim, and necessitates no exploration of the forms of force and inequality that might underlie the rape, consent is a highly inappropriate way of conceptualising the boundary between sex and rape, in so far as it isolates the event from the structures of inequality surrounding it (MacKinnon 2006:942). MacKinnon explains that, in other words, “when the law of rape finds consent to sex, it does not look to see if the parties were social equals in any sense, nor does it require mutuality or positive choice in sex, far less simultaneity of desire” (MacKinnon 2005:243). On this basis MacKinnon argues in favour of rather defining rape in terms of coercive circumstances. If rape is defined in terms of coercion, proof of physical acts and the surrounding context is decisive (MacKinnon 2006:942). The questions that are asked concern the material plane of concrete events: “who did what to whom and sometimes why” (MacKinnon 2006:942). Force and inequality are thus factors that can more readily be taken into account if rape is defined in terms of coercive circumstances.

MacKinnon writes in this regard:

Emphasis on coercion as definitive [...] sees rape fundamentally as a crime of inequality, whether of physical or other force, status, or relation (2006:942).

Furthermore, MacKinnon argues that even the criminal law’s treatment of force in the context of rape does not display an awareness of the hierarchy between the sexes that is at stake, in so

far as the dominant positions that men occupy in the power structures of society are not acknowledged as forms of force at all (MacKinnon 2005:244). MacKinnon lists the following as instances of such forms of force: the economic superiority and dominion of men as employers, dominance in the patriarchal family, the power and authority of teachers and religious leaders, the dominance of men in state office such as policemen and prison guards, and “the credibility any man has (some have much more than others based on race and class and age), not to mention the clout of male approval and the masculine ability to affirm and confirm feminine identity” (MacKinnon 2005:244). The insensitivity of South African courts to these forms of power comes strikingly to the fore in the *Zuma* case, where the effects of Zuma’s powerful political position, his positioning as patriarch in a big family, as well as the complainant’s financial dependence on him, were not considered by the court at all.

MacKinnon then argues that rape legislation which correctly understands sexual violence as a practice and manifestation of inequality would frame rape, firstly, as a physical attack of a sexual nature, and secondly, as an attack under coercive conditions which include inequalities (MacKinnon 2005:247). Furthermore, MacKinnon argues that consent should be replaced with a “welcomeness standard” (MacKinnon 2005:247). An understanding and recognition of the power relations at stake should inform the court’s investigation into the wantedness of the sex. Accordingly: “[t]he idea here is not to prohibit sexual contact between hierarchical unequals per se but to legally interpret sex that a hierarchical subordinate says was unwanted in the context of the forms of force that animate the hierarchy between the parties” (MacKinnon 2005:247).

Here it should be noted again that although consent is defined in the New Sexual Offences Act in terms of coercive circumstances (which constitutes an improvement on the previous definition, which referred only to consent with no reference to coercive circumstances), it is not sufficient. The retention of the concept of *consent* at the centre of the definition pushes the crime back into the ‘psychic space’ of the victim, even though an interpretation of what happened in that psychic space is now enhanced by taking note of coercive circumstances. There is no indication that the listing of coercive circumstances in the New Act has changed the approach to rape in courts. Accordingly, in order to transform the approach of the courts in terms of what they need to look at to determine whether a rape occurred or not, consent as an ideologically loaded concept must be removed completely from the definition.

In her analysis of *Prosecutor v Akayesu* (Case No. ICTR-96-4-T) decided by the International Criminal Tribunal of Rwanda (ICTR) in 1998, MacKinnon extends her argument in an interesting way. In *Akayesu* the crime of rape was for the first time formulated in terms of coercive circumstances in the context of international law. The ICTR held that rape is “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive” (par 688). The ICTR also held that coercive circumstances do not necessarily entail a show of physical force, but that “[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances” (par 688). MacKinnon explores the possibility of extending this kind of definition of rape, which was formulated in the context of international law, to domestic rape law. She writes (2006:955):

To make a transition to settings where no collective conflict is recognized to exist – for example, to global sex inequality with its attendant violence against women – requires bringing into focus the extent of force that exists as a background condition for specific rapes in these other settings. The *Akayesu* approach and the pattern of outcomes in cases since support the suggestion that rape laws fail because they do not recognize the context of inequality in which they operate, focusing as they so often do on isolated proof of nonconsent against a false background presumption of consent in the context of a presumed equality of power that is not socially real.

MacKinnon thus argues that there is no clear reason why the *Akayesu* approach is not applicable to rape in domestic settings as well, in so far as rape legislation fails to address rape successfully because it does not take into account the context of inequality in which rapes happen. Accordingly, MacKinnon argues that if the force that exists as a background condition for rape in a place like South Africa (which she notes has the highest rape statistics in the world according to Interpol and the Guinness Book of World Records) is brought into focus, it would be seen that the *Akayesu* approach should also find application in our situation (MacKinnon 2006:955). In this regard it is shocking to note that fifty-thousand rapes of women are reported in South Africa each year (which is estimated to be nine times lower than the actual number of rapes that occur) (Seedat 2009:1011), while in the whole Bosnia-Herzegovina conflict between twenty-thousand and fifty-thousand rapes were reported (Amnesty International Report 2009:5). Even though the number of rapes was much higher in the Rwandan genocide, it is no exaggeration to argue that rape in South Africa is happening

on the scale of a crime against humanity and that the consent approach is accordingly highly incompatible with the context in which rapes occur.

Force which operates as a background condition for rapes in South Africa would include, for example, factors like the poverty and unemployment of so many women, and the “high levels of sexual coercion in heterosexual relations” (Mills 2010:251).

These arguments by MacKinnon and Du Toit gain further importance in the South African constitutional context where gender-based violence is explicitly recognised as an equality issue through being listed as a prohibited instance of discrimination on the ground of gender in PEPUDA, and where the Constitutional Court has on several occasions highlighted the relationship between sexual violence and substantive inequality. The retention of the concept of consent in the definition of rape in the New Sexual Offences Act can thus be argued to be unconstitutional to the extent that it is unable to pick up on the trenchant role of inequality in rape and is therefore inconsistent with the guarantee of substantive equality contained in the Constitution.

The problem with the concept of consent at the centre of the definition of rape in South Africa is thus that it introduces an hierarchical, masculine-dominant approach to sexual difference into the definition of rape. Through constructing feminine sexuality as naturally submissive, the line between sex and rape is blurred, which makes rape very difficult to prove in court. Furthermore, this hierarchical construction of sexuality results in a performative contradiction in so far as the crime of rape hinges on the response of the feminine victim who is understood as being naturally submissive and weak. The definition thus assumes equality while actively undercutting it. This is the result of the definition being rooted in a hierarchical construction of sexuality, which results in the naturalisation of this hierarchy. The inequality that flows from this hierarchy is thus not problematised at all, and is treated as equality. This problem is heightened by the gender neutrality of the definition which renders this power play invisible. Furthermore, the fact that the consent approach hinges mostly on an exploration of what happened in the psychic space of the victim blinds the court to the inequalities and forms of force that constitute the backdrop of rapes. The consent approach is therefore not at all concerned with the inequalities inherent to or underlying the crime of rape. On this basis it is submitted that the concept of consent in the definition of rape should be replaced with the notion of coercive circumstances.

Lastly, it is important to respond to the objection raised by Naylor, that even if consent is written out of the definition of rape, which may have symbolic importance, the problem of consent is likely to remain an issue in most rape cases (Naylor 2008:27), because the accused will still be able to evoke consent as a defence. The argument is thus that a definition of rape without the consent element will still in most cases lead to the scrutiny of the behaviour and mental state of the victim when the legitimacy of the defence of consent is considered. Naylor explains that this appears to be the case in jurisdictions where the consent approach has been replaced with a coercive circumstances approach (Naylor 2008:27).

I want to respond to this objection with two points. Firstly, the removal of consent from the definition of rape has great symbolic value in the transformation of the understanding of rape in the social imaginary, in so far as it will resist the perception of the courts and society that rape is merely an extension of sex and will as a result contribute toward a dismantling of the naturalised sexual hierarchy in which the masculine is regarded to be naturally dominant and the feminine naturally submissive. It will also enable a broader and deeper understanding of the harms of rape, and will be able to pick up on the role of inequality in rape. Even though consent may thus come up as an issue in the trial, the basic legal and social understanding of the crime of rape will be able to develop independently of the oppressive and limiting masculine bias inherent in the concept of consent. Secondly, the practical advantage of having consent raised only as a defence is that the evidential burden then rests on the defendant and not the complainant. Accordingly, even though the issue of consent will not be completely removed from the court proceedings, its removal from the definition of rape can allow for rape to become a 'provable' offence, and can play a crucial role in the transformation of society's attitude to rape on a symbolic level.

VI Conclusion

In this chapter it was thus argued that, except for allowing for male victims and female perpetrators, the New Sexual Offences Act does not solve the problems of the common law definition of rape. The main point that was made in this chapter is that through the gender neutrality of the definition of rape on the one hand, and the retention of the concept of consent on the other, the New Sexual Offences Act deals with sexual difference in a doubly problematic way. Through the gender-neutral language of the definition, sexual difference is denied. However, this is done through ascribing to the notion of the universal human being, modelled on a covertly idealised notion of masculine subjectivity. Difference from the

masculine norm is thus construed as meaning 'less than'. Femininity is therefore not understood as a position in its own right, but as inferior to the masculine. In our symbolic order, where sexual difference is not acknowledged and celebrated, the gender-neutral definition of rape is thus inevitably sexed. This is especially problematic in the context of the crime of rape where the legislation is supposed to seek justice for women as the overwhelming majority of victims. On the other hand, the concept of consent does introduce an acknowledgment of sexual difference into the Act. However, the way in which sexual difference features in the New Sexual Offences Act is damaging. It was argued with reference to thinkers like Du Toit that, through the concept of consent, masculine sexuality is construed as naturally active and dominant and feminine sexuality as passive and of only marginal significance in sexual encounters. Furthermore, any sexual activity by a woman beyond coyness and resistance is then often seen as provocation. By understanding normal sex as something in which the only role of the feminine is to submit, a sexual hierarchy is naturalised as sexual difference. This superficial construct of sexual difference thus serves to entrench a sexual hierarchy in society. This hierarchy is not understood as inequality, because it is construed as being natural and not something that the law has to address. Accordingly, the concept of consent renders the definition blind to the systemic sexual inequality that underlies and that is perpetuated by the phenomenon of rape. In addition, because the consent approach largely limits the court's enquiry to what transpired in the mind of the victim, the systemic inequalities and force that constitute the backdrop for rape are not taken into account at all. The definition of rape thus remains unable to identify and deal with the problem of systemic sex inequality that lies at the heart of the problem of sexual violence against women.

Furthermore, the combination of the gender neutrality of the definition and the concept of consent exacerbates the situation in so far as the gender neutrality masks the harmful construal of sexual difference that is incorporated in the definition through the concept of consent. Accordingly, judged from an Irigarayan perspective, the New Sexual Offences Act is guilty of all the mistakes in the book. In addition, the definition is just as problematic from a constitutional perspective, in so far as it ignores the constitutional insights that, firstly, sexual violence is a problem of sex inequality, and that secondly, the pursuit of the transformation of sex and gender relations is served, rather than undercut by a concern with particularities.

CONCLUSION

In this thesis it was argued that the New Sexual Offences Act negates and undermines insights that have been reached on a constitutional level. It was shown in the second chapter that the way in which the ideal of equality is approached in the Constitution and interpreted by the Constitutional Court shows significant overlaps with Irigaray's conceptualisation of equality as an ideal that is underpinned by a radical acknowledgment of and respect for difference (even though the notion of *sexual* difference has not yet been developed and activated in a fully Irigarayan sense by the Constitutional Court). In addition, the equality jurisprudence allows for the emergence of a concrete, embodied and sexually particular legal subject rather than the abstract, disembodied and universal subject of traditional legal discourse, and sexual particularity is introduced explicitly into the right to sex equality through PEPUDA's listing of sex-specific instances of discrimination on the ground of gender. It was thus argued that the South African constitutional order has made a promising start in its approach towards the transformation of sex and gender relations, in so far as it opens up a space for the setting in motion of the kind of symbolic transformation advocated for by Irigaray, where the pursuit of justice and equality cannot be separated from a concern with the particularities of the embodied person. Moreover, the constitutional commitment to *substantive* equality is aimed at identifying systemic inequalities that traditionally fell outside the scope of equality, because in terms of a formal approach they were regarded as natural differences rather than legal issues of inequality. Albertyn's description of the relationship between difference and hierarchy in a substantive approach to equality is relevant here:

It is widely recognized that the problem of inequality is not difference *per se*, but rather the manner in which difference is tied to hierarchies, exclusion and disadvantage. The South African Constitutional Court has affirmed the importance of difference as a positive feature of society. An important indicator of the law's capacity to dismantle systemic inequalities lies in its ability to deal with difference in a practical and normative manner. In a transformative approach, the law should be able to prohibit difference linked to discrimination at the same time as it affirms positive and future forms of difference and diversity. Fundamental to this is the ability to facilitate or establish new, and non-hierarchical, normative frameworks of participation and social inclusion (2007b: 260).

So whereas the Constitutional commitment to equality is aimed at dislodging difference from hierarchy and establishing new structures and frameworks in society that are able to deal with difference as a positive feature, the newly reformed sexual violence legislation reverts back to an approach where difference is either denied or inevitably tied to hierarchies that are naturalised, and accordingly not treated as inequalities. Furthermore, in PEPUDA, sexual violence is explicitly acknowledged as an issue of sex inequality. This is completely ignored by the New Act. The New Sexual Offences Act can thus be said to blatantly undermine the spirit of the Constitution. In this regard it can be argued that the definition of rape in the New Sexual Offences Act is inconsistent with the constitutional commitment to substantive equality of the sexes, as well as the constitutionally entrenched right to freedom from all forms of violence from either public or private sources. These problems are particularly disappointing when viewed in the light of the fact that the New Sexual Offences Act is the result of a legal reform process lasting more than a decade. It also points to a systemic blindness and insensitivity towards the oppression of the feminine that is still in place in the social and symbolic imaginary of our society.

It is thus submitted that a gender-specific definition of rape, which still includes the possibility of male victims as well as female perpetrators, is crucial in order to more successfully address the crisis that we are facing in South Africa and to start the necessary transformation of society's attitude toward rape. I want to argue that this is necessary even if it means that the criminal law must sacrifice some of its traditional and esteemed word economy and conceptual simplicity, in order to provide a more nuanced definition of the crime of rape perpetrated by a man against a woman, by a man against a man, or by a woman against another woman or man. It was argued that Cahill's idea of rape as a violent sexual attack on a *sexed body* could be the universal element to anchor the meaning of rape. Defining rape in sex-specific language will reflect the constitutional recognition of the Irigarayan idea that "the neutral individual is nothing but a cultural fiction" (Irigaray 1994:75), but that the particularities of the concrete individual are central to the pursuit of justice. In this way, rape will be rendered a more readily provable offence, and women and feminised men will be able to rely on the legal system to protect their bodies. Furthermore, it was argued that the concept of consent must be removed completely from the definition of rape and replaced with a reference to coercive circumstances.

It is beyond the scope of this thesis to attempt the development of a different definition of rape in accordance with the requirements and suggestions set out above. However, Du Toit provides some useful guidelines for the formulation of a definition of rape which would be better able to deal with the complexities of rape. She argues that the language of rape legislation should allow for an articulation of spirit injury, as well as sex-specific injury, and that the recognition of such injuries should not be dependent on the complainant's ability to prove it (Du Toit 2012a:63). An articulation of the injury of rape should draw attention to the way in which rape destroys the subjectivity of the victim through sexual subjugation, and to the fact that all embodied persons are vulnerable to such violations (Du Toit 2012a:63). Furthermore, the definition of rape should alert the Court to the gender hierarchy that underlies and is perpetuated by rape (Du Toit 2012a:63). Closely related to this point, Du Toit notes that the definition of rape should not naturalise the violence of masculine sexuality and the submissiveness of feminine sexuality respectively (Du Toit 2012a:63).

Admittedly, the development of a definition of rape which can do justice to the many facets of the crime, and which can respond appropriately to the complex network of ideological and political narratives that are supported and perpetuated thereby, is an unusual and highly challenging task for the legislature. However, as argued throughout this thesis, it is action that is demanded by our Constitution's commitment to the protection and empowerment of women in South Africa.

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