RACE AND RAC(IAL)ISM, THE POLITICS OF PEACE AND FRIENDSHIP IN A LIBERAL CONSTITUTION

NEW REFLECTIONS OR OLD WINE IN NEW BOTTLES? A CRITICAL ANALYSIS

*by J Modiri**

1 Introduction

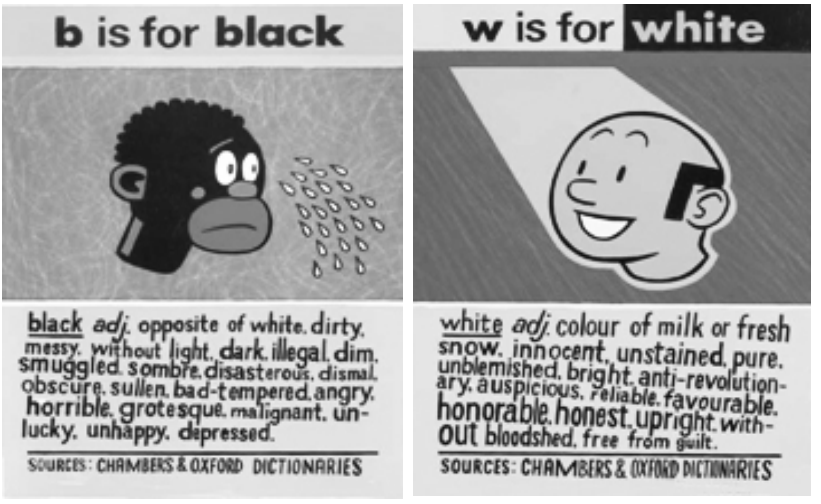

Figure 1 & 2: Lithographs by Anton Kannemeyer (bitterkomix)[1]

The context of this article is a two-part investigative documentary on 'race' as an enduring fault line in South African politics on etv's *3rd*

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1 In these prints Anton Kannemeyer has focused on images from his *Alphabet of Democracy* series.

degree (2010)[2] programme as well as a true-life drama, *For One Night* (2006)[3] which explores a 30-year old 'tradition' of racially segregated school dances in southern American states. The events detailed in both shows resonate strongly with the essence of this article in that they both publicly engage with and challenge pre-existing ideas about race and racialism and depict ordinary citizens having to be confronted by the ongoing uneasiness of race in their daily lives. On *3rd degree*, students at University of the Free State (UFS), spoke honestly about the challenges of racism they face at UFS, on campus and in the residences. On *For One Night*, conservative white families had to come to terms with the possibility of their children mingling with their black counterparts at the traditionally segregated school dance for the first time in 30 years.

The wider concern of all of this is firstly, to question whether and why 'race' still exists as a major force of South African identity 17 years after legislated apartheid came to an end and then to explore the role of law in our 'race' and 'colour' lives. With reference to the Truth and Reconciliation Commission (TRC) and the emergence of modern forms of racism, questions will be raised on whether the law has been able to deliver authentic transformation, substantive equality and social justice. This article will also follow a critical analysis of notions of 'reconciliation' and 'victimhood' which are central to dialogue on race in South Africa. Against this background, I will reflect on Hannah Arendt's theories on the 'banality of evil' and her subsequent call for deliberate thought and action in order for people, black and white, to 'appear to each other...'.[4]

Following this, central focus will be given to the possibilities of a politics of peace and friendship in South Africa — one that goes beyond the *racial* and transcends the current hopes of a colour-blind society.[5] In order to explain how we could achieve such a politics, I turn to Van Marle's notion of 'refusal' as a way to reflect on ethics and politics in post-Apartheid South Africa.[6] This 'ethics of refusal'

2 Produced and hosted by award-winning journalist Debora Patta. Part 1 (25 May 2010) deals with white South Africans and part 2 (1 June 2010) deals with young South Africans. The documentary vividly crystallises the South African experience when it comes to race and reconciliation 16 years since the advent of our new democracy. See in general D Herwitz *Race and reconciliation: essays on the New South Africa* (2003).

3 Directed by Ernest Dickerson. 'A black southern high school senior becomes a catalyst for a historic change in tradition. She fights to desegregate her high school prom.'

4 K van Marle 'On loneliness and the value of slow reflection' (2009) 30 *Verbum et Ecclesia* 338.

5 See N Gotanda 'A Critique of our "Constitution is Colour-Blind"' (1991) 43 *Stanford LR* 1.

6 K van Marle 'Laughter, refusal, friendship: thoughts on a "jurisprudence of generosity"' (2007) 18 *Stellenbosch Law Review* 194. See S Woolman 'On rights, rules and relationships: a reply to Van Marle's 'jurisprudence of generosity' (2007) 18 *Stellenbosch Law Review* 508.

will be proposed as an appropriate response to the gaps in the current discourse on race in South Africa. Writing elsewhere, Van Marle also offers a suggestive understanding of the role of the South African community in fundamentally altering race relations in her reading of 'loneliness' and 'solitude' as forms of political action. I will then consider the role of the Constitution and fit into place, the concepts of 'transformative constitutionalism' and 'memorial constitutionalism'. In conclusion, it will be argued that *ubuntu* — or an 'ethics of humanity' — should be a flagship feature of a politics of peace and friendship in South African society.

This article attempts to conceive of 'race' as a critical project through which dominant assumptions about race and apartheid are questioned and to challenge the contradictions inherent in the dichotomies of race/redress, race/equality, and race/class. In this way, the space for critique and dissent is widened and the role of law in helping South Africans to *live differently under law after apartheid* is contemplated. A critical analysis of race in the context of law, history and political ethics also makes room for the detection and elimination of emerging subtle forms of modern racism in society. Throughout all of these reflections and contemplations, there will be no attempts to give solid and conclusive answers — not least because there are no such answers to give but because any attempts to answer or solve might possibly end the debate; stifle urgent and pressing issues which lay beneath the soil of racial politics and close the space for the engagement of clashing values, of plural minds and of the difficult discussions that still need to take place.

2 Race and rac(ial)ism

It is common cause that *racism* began long before apartheid was institutionalised by the National Party (NP) in 1948.[7] Throughout its many guises in history — from slavery in the 1600s – 1800s,[8] to white supremacy, to segregation — it was portrayed as the need to separate the different ethnic groups and to give each race their own spaces to preserve their heritage and to develop political and administrative governing systems that were congruent with their cultures, traditions and identities. Notwithstanding this, racial segregation has always been accompanied by supremacist tendencies of racial violence, state repression and prejudice as well as economic deprivation. One could very easily criticise law and legal institutions for its culpability throughout this part of history. Through law, colonialism distorted the cultures and identities of black people. Colonialists seized the land

7 H Giliomee & B Mbenga *New history of South Africa* (2007) 306. See N Rubin 'Law, race and colour in South Africa' (1974) 3 *A Journal of Opinion* 6.

8 http://africanhistory.about.com./od/slaveryinsouthafric1Slavery_in_South_Africa.htm (accessed 11 September 2010).

(which they termed as *terrae nulliae)* as well as the resources of indigenous African societies whom they considered to be uncivilised.[9] The law aided the continued subjugation of black people into the 20th century through substandard *Bantu* education, humiliating pass laws and extreme forms of political violence against black people. It is in this kind of law and in this particular history that we can find the birth and continued existence of racism. It also follows therefore that the end of apartheid in 1994 or perhaps in 1990 when FW de Klerk announced the unbanning of the ANC, PAC and other anti-apartheid organisations, did not, or rather should not have symbolised the end of racism and racial politicking. However this was not the case. A formal change in the legal and political system to many in the country meant, albeit erroneously, that racism was a relic of the past and South Africans could somehow 'move on'. This false belief, further compounded by the 'rainbow nation' motif of the mid-1990s and the euphoria of the 1995 Rugby World Cup and 1996 African Cup of Nations, created the impression that a new South Africa had been born and that racial animosity and all the concomitant problems of oppression, discrimination, victimisation and marginalisation had come to an end. But this was not to be.

The TRC, set up in 1995 in terms of the Promotion of National Unity and Reconciliation Act[10] was a spectre of how racially divided the South African landscape had become because of and after apartheid. The TRC was divided into three committees.[11] The Committee on Human Rights Violations (HRV) was tasked with investigating the human rights abuses that took place between 1 March 1960 and 10 May 1994, testimonies and statements of unspeakable horrors surfaced and old wounds were torn open as families heard — in graphic detail — how their loved ones were tortured, killed, maimed and violated. The Reparations and Rehabilitation (R&R) Committee was empowered to provide victim support to ensure that the TRC process protected the dignity of the victims and to formulate policy proposals on the rehabilitation and healing of survivors. The compensation from the President's Fund and counselling services to survivors was the only visible result of the work of the R&R Committee with little focus — in practice — being placed on re-engineering South African societal relations and reconciling ordinary citizens. The third committee and perhaps the most controversial source of the unresolved racial divisions that pervade our body politic, was the Amnesty Committee (AC) whose function, broadly defined, was to grant amnesty to perpetrators of apartheid-era violations, which included murder, abduction and torture. All that

9 PhJ Thomas, CG Van der Merwe & BC Stoop *Historical foundations of South African Private Law* 2ed (2008) 9. See also A Rycroft *Race and the law in South Africa* (1987) xiii – xx

10 Act 34 of 1995.

11 http://www.justice.gov.za/trc/trccom.html (accessed 9 June 2010).

was required from these individuals was a full disclosure of the facts related to the violation in question and the showing of 'remorse' whereupon they would be exempted from any future prosecution for those crimes.

The furore about the Amnesty Committee and the nature of its powers led to *AZAPO v TRC* (*AZAPO I*).[12] The Azanian People's Organisation (AZAPO) and the families of Steve Biko, Victoria and Griffiths Mxenge and Fabian Ribeiro challenged the constitutionality of the TRC Amnesty Committee on the basis that it violated the constitutional right of access to justice and to have disputes settled in court. The high court rejected the challenge and the matter was then taken to the Constitutional Court (itself a new construction of post-apartheid ambition) in *AZAPO v President of the Republic of South Africa* (*AZAPO II*).[13] In *AZAPO II*, the court denied the appeal on the basis that 'truth' was necessary in order to enable reconciliation and to prevent the repetition of past injustices. For this 'truth' about past abuses to come out, amnesty had to be granted to those responsible, especially considering the transition in South Africa.[14] Since *AZAPO II*, legions of academics, researchers and commentators have spoken unfavourably of the TRC. One such researcher, Nahla Valji, exposes the 'denial of the politicisation of race and the fundamental racialisation of politics that characterised apartheid' in the work of the TRC. She notes how '[c]ommissioners visibly steered participants away from discussing race' and also how '[t]he final TRC report itself mentions racism fleetingly.'[15] The failure of the TRC to engage with the historical legacy of racism has led to the easy and misleading claim by former beneficiaries of apartheid that what happened in the TRC is *adequate* transformation. This technocratic approach to reconciliation produced the odd rhetoric that was employed by the Mbeki government and 'big business' to oppose a lawsuit against multinational corporations which benefitted unjustly from the oppression of blacks during apartheid.[16]

The ongoing debate on race, racism and racialism in South Africa stands in this framework. Racism and racial thinking was created by conditions that were social, political, legal and economic in nature. The solution must therefore be as multifaceted as the problem. It is here where 'victimhood' or the definition of who falls under the

12 1996 4 SA 562 (C).
13 1996 4 SA 671 (CC).
14 See K van Marle and W le Roux 'The unmentioned names that remain' in Van Marle & Le Roux (eds) *Law, memory and the legacy of Apartheid: ten years after AZAPO* (2007) vi.
15 N Valji 'Race and reconciliation in a post-TRC South Africa' available at http://www.csvr.org.za/wits/papers/papnv3.htm (accessed 11 September 2010).
16 http://www.mg.co.za/article/2010-01-05-daimlers-economic-threat (accessed 1 October 2010).

category of 'victim' or 'survivor' becomes pertinent. Madlingozi[17] argues that the TRC process classified 'victims' quite narrowly as only those who, in the opinion of the HRV Committee, had suffered a gross violation of human rights in the form of murder, abduction, torture or severe abuse. He then relies on Borer who argues that '[t]he victimisation of one individual clearly has ripple effects on families and communities and several indirect victims can be identified'.[18] Madlingozi includes families (of primary victims) as secondary victims who can in fact become primary victims in cases where they themselves were harassed and brutalised by security forces in order to extract information from them. Another tier of victims that Madlingozi identifies are those people who were casualties in the state-engineered 'black-on-black' inter-community violence as well as whole communities who 'suffered under apartheid policies of forced removal, the migrant labour system, racial classification [and] job reservation'.[19] The notion of 'victimhood' played a significant role in dividing South Africans because those who benefitted from post-apartheid reparations, special pensions and other Affirmative Action (AA) and Broad-Based Black Economic Empowerment (BBBEE) policies — the 'good victims' — found it easy to embrace the reconciliatory tone of the TRC and the spirit of 'Madiba Magic' while the 'bad victims' were left in the doldrums of the South African economy — jobless, poor and illiterate — to die alone in their social misery.

Racial prejudice is therefore a problem and the eradication thereof has to do with the eradication of deeply entrenched power relations and a change in the living conditions of South Africans in order for them to enjoy the freedom that could liberate them from the baggage of the past.

However, even attempts to reverse the racial polarisation that pervade South Africa also require that we reckon with the changing contours and dynamics of racism. Mosikatsana, in contemplating the adoption of critical race theory in South African legal discourse argues that '[t]he deinstitutionalisation of racism in South Africa by abolishing racist laws ushered in a new phenomenon referred to as modern racism. This form of racism has distanced itself from ideas of biological inferiority by linking race with trumped-up concepts such as 'culture', 'the maintenance of standards' and 'tradition'.[20] The most

17 T Madlingozi 'Good victim, bad victim: apartheid's beneficiaries, victims and the struggle for social justice' in Van Marle and Le Roux (eds) *Law, memory and the legacy of Apartheid: Ten Years After AZAPO* (2007) 109 – 110.

18 T Borer 'A taxonomy of victims and perpetrators: human rights and reconciliation in South Africa' (2005) *Human Rights Quarterly* 1088.

19 Madlingozi (n 17 above) 110.

20 T Mosikatsana 'Critical Race Theory' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 283. See also K van Marle 'Teaching critical race theory in South African universities/law faculties' (2001) 12 *Stellenbosch Law Review* 86.

defining features of this new form of racism are (1) its lack of explicit reference to race and (2) the systemic exclusion of previously disadvantaged groups through the operation of structural power.[21] These new subtle and cryptic forms of racism naturally pose problems for any strategies at alleviating racial inequality and discrimination. James and Lever note:

> It seems fair to suggest that race-consciousness remains high in South Africa but that overt racism has declined considerably. There are continuing reports of rather anomic outbreaks of interpersonal violence, such as the shooting of a child by a white farmer early in 1998. This incident in turn had to be viewed against a spate of killings of white farm occupants that took on worrying dimensions in 1997. It is an open question to what extent high levels of crime (as in the farm killings) are in some sense racially based or at least racially justified in the minds of perpetrators. Similarly, the extent to which the economically dominant white section practices informal racial exclusion of an odious kind is not easy to gauge.[22]

This illustrates that a more sustained engagement with the cultural patterns that have reproduced racial bias and racial prejudice in institutions of higher learning and the workplace, in the private sector, in schools, in integrated communities, in civic and political organisations and in the private sphere of friendships, clubs and romantic relationships discloses new possibilities for 'race as a radical analytical focus area for research and political project.'[23]

I will now turn to Hannah Arendt's thoughts on the 'banality of evil'.[24] This is a notion that should be reflected on as the question of race and racialism in South Africa is considered. Like Arendt's contemplations on the Eichmann controversy, it is argued that when dealing with race, racism and racialism in South Africa we should be less concerned with political action and more with the faculties of judging and thinking. In this way racism, like evil, is correctly seen as a failure to exercise one's capacity of thinking, to self-reflect and to then use that self-reflection as the basis for personal judgment.[25] Her observations of Eichmann can be said of those who willingly served the apartheid regime and those who continue to perpetuate racist ideology and racial social thinking. These are not malicious bigots and unrepentant racists but rather victims of 'artificial reconciliation' and

21 See P Gilroy 'The end of anti-racism' in P Essed & D Goldberg (eds) *Race critical theories* (2002) 253 – 258.

22 W James & J Lever 'The second republic: race, inequality and democracy in South Africa' in CV Hamilton *et al* (ed) *Beyond racism: race and inequality in Brazil, South Africa and the United States* (2001) 51.

23 J Jansen 'The racial question and intellectual production in South Africa: A critical response to Ivan Evans'(1991) 12 *Perspectives in Education* 107-110 .

24 H Arendt *Eichmann in Jerusalem: A report on the banality of evil* (1963). See also L Le Roux 'Where does evil reside? a comparative study of Hannah Arendt and Antjie Krog' (2009) 3 *Pretoria Student Law Review* 84-99.

25 H Arendt 'Personal responsibility under dictatorship' in J Köhn (ed) *Responsibility and judgment* (2003) 23.

innocuous individuals who operated thoughtlessly in the reality of the day. Because they had understood life as one in which the 'white man' was supreme they never had the chance to imagine the possibility of a black majority government and so carried out the order of the day with uncaring force and precision. The persistence of racism and racial paranoia (the fears about reverse-racism and about the 'white man' still oppressing blacks) should also be understood in that context. The banality of evil or the ordinariness of racism lies in the inability of South Africans to engage in internal dialogue. Consequently, people become unaware of the nature of their deeds and thoughts and are accordingly isolated by their self-evident conceptions of South African life, which make them insensitive to the experiential standpoint of their victims or the targets of their racism. It is through Arendt's conception of an honest and self-reflective thinking that our actions might keep us from slipping into a passive acceptance of evil crimes and a tolerant acquiescence of the immorality and hatred that is racism.

3 The politics of peace and friendship

In the preceding section, it was lamented that the 'rainbow nation' myth and the misdirected work of the TRC[26] created the delusion in the South African community that 'we can now move on' and that we have been able to develop a cohesive national identity in South Africa. Consequently, in this section, more constructive criticism to the lofty ideals which the TRC and the 'rainbow nation' sought to — but failed to — achieve will be offered.

The starting point is Van Marle's thoughts on an ethics of refusal[27] which, following Arendt above, signals the start of more conscious thinking, introspection and action. Van Marle writes:

> In South Africa it seems as if transformation, socio-economic reparation and other social problems like poverty, violence and disease are addressed mostly through law and human rights. But, as is often argued and exposed, law and human rights are lacking in the capacity to effect

26 See C Du Toit 'Diversity in a multicultural and polyethnic world: challenges and responses' (2004) 25 *Verbum et Ecclesia* 442 in which he argues that: 'The effect of the TRC hearings was perhaps to amplify black prejudice towards whites rather than to facilitate reconciliation. One can assume that the redistribution of power and the new Constitution helped to change people's prejudices. The government's efforts to instill a culture of dignity, to sell the idea of the rainbow nation, to approve the rights of minorities, to try and address the needs of the poor must also have impacted on prejudices. However, we have enough prejudice remaining to make it necessary that we remain very creative in solving our problems. The best way to change prejudice is by societal interaction and by exposure to difference.'

27 Van Marle (n 4 above) 194.

> real change. How can we find different ways to approach these issues in the face of the pervasiveness of law and human rights?[28]

Although, Van Marle conceived this 'ethics of refusal' in terms of rejecting patriarchy and the pervasive 'maleness' of law and society, it also provides a distinctly original ideological response to the polarised and antagonistic race relations in post-apartheid South Africa. Refusal marks a major shift in legal theory primarily because of its concern with the possibilities and simultaneous impossibilities of another political community, another law and a more egalitarian set of relationships between people. Situated within a post-apartheid context, refusal opens up legal discourses to social, political and ethical issues in people's day-to-day lives. Invoking the feminist slogan of 'the personal is the political', Van Marle places the accent on the agency of individuals to actively resist and reject certain archaic, essentialist and racist notions in the way they lead their lives.[29]

In the film, *For One Night*, black and white students, who attended the same classes, took part in the same sport activities jointly and had over the years built strong relationships beyond racial lines with one another, had to confront the idea that it was somehow correct and justifiable to separate them along racial lines on their prom night every year. It was when the lead character, Brianna McCalister, raised the obvious point that an ethics of refusal kicked in. The refusals illuminated by Brianna's actions, as well as the refusals which could be employed to resist racism and racial politics in South Africa, are:

- A refusal of the need to defend a narrow racial identity and a rejection of the 'us/them' dichotomy which is used to sustain segregation and discrimination. In the South African context, this also demands a dismissal of racial labels as 'apartheid-constructed identities'.[30]
- A refusal to accept the recurrence of archaic and prejudiced cultures such as Afrikaner Nationalism and African Chauvinism which live through racially-exclusive organisations.[31] In *For One Night*, the fact that a segregated school dance was a 30-year old tradition and the conservative call for 'keeping things as they are' were rejected by the seniors at Mercier High School when they ultimately did have a non-segregated dance.
- A refusal of the coercive pressures, calculated arguments and subtle dismissals which make it easier to tolerate racial divisions. When Brianna was told by the principal that part of being a 'good' valedictorian was being a good citizen, it was clear she was hinting to

28 Van Marle (n 4 above) 194.
29 See K van Marle 'The archaic structures of our desire' (2010) 25 *SAPL/PR* 195.
30 J Jansen 'Intellectuals under fire' (2004) 18 *Critical Arts Journal* 165.
31 See P De Vos http://www.constitutionalllyspeaking.co.za/158/ for a discussion on the constitutionality of racially-exclusive organisations (accessed 10 June 2010).

Brianna that her continued call for a desegregated prom was disturbing those in power and that her hard-earned academic record could be on the line for this. By sustaining her activist call for one prom dance and not a black and white dance Brianna exemplifies this kind of refusal.

- A refusal to abide by the histories and heritages which symbolise racism. This also implies a refusal of the notion that cultural heritage and political history are 'set in stone' 'unchallengeable' and 'unchangeable'.
- A refusal of the perceptions, suspicions and subjectivities that fuel racial hatred and blow racial tensions out of proportion. This also means being vigilant and perhaps also sceptical of the media, politicians and even so-called analysts and intellectuals[32] who often impose a narrative on South Africans which is inaccurate, negative and has the potential to send subliminal messages of racial divisions and disharmony among race groups in South Africa.
- But more generally, a refusal of tendencies and practices that exclude, divide (or separate) and indoctrinate. To quote Derrida, the refusal of racist ideology, 'requires that we change the most resistant, protected, archaic structures of our desire'.[33]

An ethics of refusal can be linked with terms such as 'resistance' and 'revolt' to indicate the need for a radical reformation of societal structures and a revisiting of law, its limits and its disconnect from justice and from politics.[34] I will now turn to Van Marle's idea of 'solitude' over 'solidarity' as she interprets the relationship between Hannah Arendt and Mary McCarthy in order to understand how this politics of peace and friendship can be a part of the lived experience and how ordinary South Africans can each be a part of post-apartheid living. It should be clear that simply living in a time after apartheid does not imply post-apartheid living. As Van Marle mentions 'every day we still experience the legacy of apartheid on many levels'[35] and so post-apartheid living 'indicates the attempts to deal with the past, the struggle of the becoming of something that could be named as 'post' but not 'past', at least by no means yet'.[36] It is argued therefore that while the legal and political institutions which created and fuelled racism have been 'transformed', the organic seed of racism still lives strongly in people and institutions that are still struggling to deal with the past.

32 For an example, see M Mbeki and J Rossouw 'Many nationalisms still cripple SA' *Sunday Times (Review)* 20 June 2010 6. See the response: M Blatchford 'Nonsense will bring disaster to SA' *Sunday Times (Review)* 27 June 2010.

33 J Derrida 'Opening plenary: Is feminist philosophy philosophy?' in Bianchi (ed) *Is feminist philosophy philosophy?* (1999) 27. See also J Derrida 'Racism's last word' (1985) 12 *Critical Inquiry* 291

34 K Van Marle 'Law's time, particularity and slowness' (2003) 19 *SAJHR* 239.

35 K van Marle 'Jurisprudence, friendship and the university as heterogeneous public space' (2010) 127 *SALJ* 628.

36 As above.

This is why it is prudent to suggest 'solitude' as a way to resist racism. To start off, I would like to connect post-apartheid living with 'being alone' and on the 'same side'.[37] Similar to Nelson's accounts of post-war movements calling for 'solidarity' and 'bonds of intimacy and group identification', the 'rainbow nation' motif and talks of a 'common national identity' made the same calls of South Africans. Considering the current political landscape and how it is mired with racial tension, Arendt and McCarthy's rejection of those stances and their choice of solitude and detachment over grandiose gestures of solidarity are appropriate to how society and law can deal with racial tension and general division in South Africa. The TRC is one of the many examples that amplify the horror of apartheid and like Arendt and McCarthy, South Africans should choose 'toughness' as a response to the pain of that horror. Van Marle observes that:

> Instead of being indifferent or callous, they wanted to face 'reality' without being consoled by intimacy, empathy or solidarity, which they regarded as having a potential 'anaesthetic' effect ... Arendt rejected notions of friendship that relied on intimacy as well as notions of national belonging, ideological partisanship and party politics. Nelson explains that, apart from solidarity's potential anaesthetic effect, it also holds the danger of coercion and exclusion.[38]

In a word, loneliness and detachment from the grand gestures and spectacle of the day could provide for what Mamdani calls 'social reconciliation'[39] –a project 'aimed at the ongoing construction of an active public sphere and at the becoming of a sociality that truly reflects plurality'.[40]

Central to the becoming of a politics of peace and friendship in South African law and politics is the displacement of the pervasiveness of race-based identities through a radical understanding of difference. Botha laments the irony in how, despite the repeal of the Population Registration Act,[41] racial categorisations created by the apartheid bureaucracy are being affirmed by the post-apartheid government and still provide the blueprint for official definitions of race in state documents and legislation.[42] In Botha's view, 'continued state reliance on the racial categories of the apartheid era does little to challenge the crude, 'common-sense' view which equates race with biological attributes and uses it as a basis for making cultural generalisations'.[43] Relying on MacDonald,

37 Van Marle (n 4 above) 90. See D Nelson *The virtue of heartlessness: Mary McCarthy, Hannah Arendt, and the anaesthetics of empathy* (2006).
38 Van Marle (n 4 above) 91.
39 M Mamdani 'When does reconciliation turn into a denial of justice?' in S Nolutshungu (ed) *Memorial Lectures* (1998) 1.
40 Van Marle (n 4 above) 93. See also K van Marle 'The Spectacle of Post-apartheid Constitutionalism' (2007) 16 *Griffith LR* 411 – 429.
41 30 of 1950.
42 H Botha 'Equality, plurality and structural power' (2009) 25 *SAJHR* 21.
43 As above 22.

Botha argues firstly for an alternative approach to broad-based economic redistribution which does not assume that all black people benefit when some of them join the capitalist elite.[44] Secondly, he argues for a conception of difference which does not reduce individuals to social categories like race but takes their material circumstances and complex particularities into account.[45] Botha calls for a constant questioning of the idea that reified racial categorisations are acceptable and immutable features of South African life. In this way, equality jurisprudence in South Africa is challenged to remedy the effects of past racism more effectively by responding to material disadvantage, structural inequality and social complexity.

4 A *liberal* constitution

The late Ettiene Murenik argued for the Constitution to serve as a 'bridge between an authoritarian past and a new democratic society'.[46] This well-known bridge metaphor portrays the Constitution as a bridge between a past of deeply entrenched racism and gross violations of the dignity and rights of people and a future based on democracy and the protection of human rights and freedoms. This metaphor is taken up by another scholar, Karl Klare, who in a rightly in a rightly renowned essay coined the term 'transformative constitutionalism', which he defines as:

> [A] long-term project constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change though nonviolent political processes grounded in law ... In the background is an idea of a highly egalitarian, caring, multi-cultural community, governed thorough participatory, democratic processes in both the polity and large portions of what we now call the 'private' sphere.[47]

In the context of race, the noticeably transformative aspect of the Constitution is the inclusion in its founding provision of the ideal of 'non-racialism'.[48] On this topic, Sharp describes non-racialism as 'an ideal of societal transformation' and a 'process' in which a commitment to eradicating racism and racial discrimination is

44 Botha (n 42 above) 22. See M MacDonald *Why race matters in South Africa* (2006); O Dupper 'Affirmative Action: who, how and how long? (2008) 24 *SAJHR* 425.
45 Botha (n 42 above)18.
46 E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31.
47 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146.
48 Sec 1(b) of the Constitution of the Republic of Southern Africa, 1996.

complemented by a comprehensive scheme to provide wide-ranging redress for the disadvantages and injustices that the majority of South Africans suffered in the past. He adds that 'putting this ideal into practice will call not simply for a formal declaration of intent, as in the new constitution but also for the exercise of political will.'[49]

Recent judgements in the Constitutional Court point to the fact that 'non-racialism' does not suggest that South Africa is a colour-blind or race-neutral society. In *Minister of Finance v Van Heerden,*[50] the Court expressly noted that 'we are far from having eradicated the vestiges of racial discrimination'. De Vos adds:

> [O]ne can get to grips with the meaning of the constitutional text if one refers to the specific apartheid past to identify all the wicked attitudes and practices that existed before the commencement of the interim Constitution. It is thus only with reference to this shameful history that we can really understand what the text of the Constitution is trying to achieve.[51]

As already mentioned, responding to racism through an 'ethics of refusal' or a 'politics of peace and friendship' urges a direct confrontation with 'the past'. This is captured by Klare's post-liberal reading of the Constitution as having 'historical self-consciousness'.[52] This is where 'memorial constitutionalism' comes to the fore. Van Marle notes that:

> Memorial constitutionalism, in contrast to monumental constitutionalism, holds the potential of being more aware of history, of the role of memory in post-apartheid law and, importantly, of being more aware of its own limits, its own impossibilities.[53]

In the context of race, 'memorial constitutionalism' could possibly provide the unlocking key to dismantling racism and racial living. An awareness of the terror and horror that plagued black communities, anti-apartheid activists and other victims of apartheid confirms the mantra that 'those who do not learn their history are condemned to repeat it' and can possibly lead to the paradigm shifts necessary to eschew the reproduction of inequality and the emerging forms of 'modern racism'. Memorial constitutionalism highlights the (utopian) promise of the Constitution because it focuses less on the experiences

49 J Sharp 'Non-racialism and its Discontents: A Post-apartheid Paradox' (1998) 50 *International Social Sciences Journal* 243.

50 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) paras 147–8.

51 P De Vos 'A bridge too far? history as context in the interpretation of the South African Constitution' (2000) 16 *SAJHR* 11.

52 Klare (n 47 above) 155. See also T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: distinction without a difference' 2009 *Stellenbosch LR* 276; M Pieterse 'What do we mean when we talk about transformative constitutionalism' (2005) 20 *SA Public Law* 155; K van Marle 'Transformative Constitutionalism As/And Critique' (2009) 20 *Stellenbosch Law Review* 291.

53 Van Marle (n 4 above) 91. See also L du Plessis 'The South African constitution as memory and promise' (2000) 11 *Stellenbosch Law Review* 385.

of apartheid agents and anti-apartheid activists and more on the lives of ordinary citizens. In this way, memorial approaches to the Constitution do not treat the evils of apartheid, socio-economic inequality and injustice as part of normal life and also give recognition to other diverse forms of disadvantage. Instead of 'monumental constitutionalism' and symbolic gestures of racial togetherness that claim South Africans are one big happy family, 'memorial constitutionalism' pursues a narrative of nation-building and inclusive citizenship which, unlike the TRC, does not negate the voices of the victims of racial violence while simultaneously retaining South African cultural diversity.

The paradox inherent in the notion of 'memorial constitutionalism' however is that in order to remedy the inequality and disadvantage created by racist apartheid laws, it will be necessary to invoke the broad racial labels, identities and categories which are themselves implicated in racial discrimination and prejudice. This paradox played itself out most notably in *City Council of Pretoria v Walker*.[54] In this case, the City Council of Pretoria was charging Black townships, as was the case during apartheid, based on a flat rate (because no meters were installed for measuring water) whereas the municipal charges for 'old city' residents were based on consumption. Walker (a white resident of old city Pretoria) considered the differential methods of levying and collecting service charges as unfair discrimination and consequently decided to pay the flat rate that was charged in the black townships. As a result, he fell in arrears for which the City Council of Pretoria sued him. After numerous decisions in the lower courts, the case ended up in the Constitutional Court which had to consider whether the system of charging different tariffs was a form of reverse discrimination in violation of the equality clause in the Interim Constitution. Langa DP, as he was known then, stated that the matter must be viewed in light of the fact that residents of Black townships were 'disproportionately poor and under-serviced'.[55] The Court held that while the practice of charging different fees did indeed amount to discrimination, it did not constitute *unfair* discrimination on the grounds of race. Sachs J pointed out that Walker had benefited from past discrimination against blacks and continued to enjoy the services of 'regular municipal services at all material times'[56] which was not the case in Black townships. In Mosikatsana's view, the strategy adopted by Walker is a denial of racism by a white man who seeks to reverse charges of discrimination 'against a constituency which sought to alleviate social disparities which are a legacy of apartheid'.[57]

54 1998 3 BCLR 257 (CC).
55 As above, para 269.
56 As above paras 103 – 105.
57 Mosikatsana (n 20 above) 289.

5 Conclusion

Van Marle asks 'what entails research in post-apartheid jurisprudence?'[58] At the very least I would like to respond that post-apartheid jurisprudence should engage with race and rac(ial)ism, its causes and an investigation of possible ways to dismantle whatever foothold it still has in society.[59] The advent of a new constitutional order in South Africa enables a transformative discourse on race, equality and freedom which could disturb South African interaction on issues of race, reparation and redress in such a way that Mamdani's notion of social reconciliation[60] and Madlingozi's call for social justice[61] can possibly materialise. By 'disturbance' I mean a re-awakening of the social conscience of people, an invocation of memorial constitutionalism and an active adoption of an ethics of refusal. I find disruption even more fitting considering the original missteps in the reconciliation agenda of the 1990s — the fact that we had a transition without meaningful transformation. Hannifin correctly describes disruption in this context as 'moments of interruption to expose the limits of legal discourse'.[62]

In the final analysis, only one thing should remain clear: post-apartheid living, democracy, justice, diversity and their tensile interaction and overlap with law are complex projects which entail a critical engagement with dialogue, thought/thinking and more importantly, resolute action. This complexity should be evident in the use of multiple theories in this article. To drive this point home, I would like to think of ubuntu or an 'ethics of humanity' as a concept that encompasses an 'ethics of refusal', 'loneliness, detachment and solitude', a 'politics of peace and friendship', 'disturbance/ disruption' as well as 'thinking and judging'. For Cornell, ubuntu 'has a profound effect on both the institutions of law and the actual rules and processes that guide legal conflict'.[63] Mokgoro J crystallises this idea quite vividly in the famous case which abolished the death penalty by arguing for an unashamedly ubuntu-based reading of the Constitution:

> Ubuntu translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion,

58 Van Marle (n 40 above) 638.
59 See K Crenshaw *et al* (eds) *Critical Race Theory (*1995).
60 Mamdani (n 39 above).
61 Madlingozi (n 17 above) 107.
62 P Hannafin 'The writers refusal and the law's malady' (2004) 31 *Journal of Law and Society* 9.
63 D Cornell 'Ubuntu, pluralism and the responsibility of legal academics to the new South Africa' *Inaugural Lecture*, University of Cape Town, 10 September 2008.

> respect, human dignity, conformity to the basic norms and collective unity, in its fundamental sense, it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.[64]

Her colleague Mahmood J offers an equally succinct description of the basic underpinnings of ubuntu jurisprudence in the Constitutional Court:

> The need for ubuntu expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and fulfilment involved in recognising their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies it releases both in givers and the society which they serve and are served by.[65]

Because apartheid and racism, when conceived in terms of dignity, both had the effect of demoting the self-worth and intrinsic value of black people (and of white people in the process),[66] I want to put forward ubuntu as a channel for moral repair and transracial unity in the becoming of a truly prosperous, non-sexist and non-racist society. Cornell describes ubuntu as an 'activist ethics of virtue'[67] but the following statement by her shows very little tension between her description and mine:

> Ubuntu requires us to come out of ourselves so as to realise the ethical quality of humanness. We are required to take that first ethical action without waiting for the other person to reciprocate. ubuntu then is not a contractual ethic. It is up to me. And, in a certain profound sense, humanity is a stake in my ethical action. Thus, if I relate to another person in a manner that lives up to ubuntu, then there is at least an ethical relationship that exists between us. Of course, if the two of us relate to others around us in a manner that lives up to an ethical understanding of humanness then we will have created an ethical community.[68]

It is this ethic of humanity that should be placed at the centre of post-apartheid jurisprudence and it is through this ethic of humanity that the roots of racism could be problematised and challenged. As Kennedy puts it, '[w]e need to be able to talk about the political and cultural relations of the various groups that compose our society without falling into racialism, essentialism, or a concept of a 'nation'

64 *S v Makwanyane* 1995 3 SA 391 (CC) ; 1995 6 BCLR 665 para 307. See also Y Mokgoro 'Ubuntu and the law in South Africa' (1998) 4 *Buffalo Human Rights* LR 15.

65 As above, para 263.

66 See Art 1 of the UN Declaration on the Elimination of All Forms of Racial Discrimination (1963): '[d]iscrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity.'

67 Cornell (n 63 above) 7.

68 Cornell (n 63 above) 6. See also D Cornell & K van Marle 'Exploring ubuntu: tentative reflections' 2005 *African Human Rights LJ* 195; D Cornell 'A Call for a nuanced jurisprudence' (2004) 19 *SA Public Law* 661.

tied to sovereignty'.[69] Racism and racial living has been a thorny issue in discourses on justice, democracy and law. These are deeply entrenched forms of being and living and it is only through a change in the core values of South Africans and the crafting of a politics that is strongly imbued with peace and friendship that we can hope to dislocate it. The transition from authoritarianism and civil conflict to a democratic order recalls a life of 'solitude' and interpretation of law and memory that takes into account the concrete experiences of victims of apartheid. The notion of ubuntu discloses possibilities for the creation of an ethical non-racial community animated by a refusal of past practices of discrimination and hatred. But as is also evident in the closing lines of the movie, *For One Night*, 'transformation has no beginning and end, but is a *continuous* process'[70] and so the same is to be said of the challenges of modern racism that now face the country:

> The following year, the committee once again, invited everyone, black and white, to the same prom. A group of white students, however, decided to go back to the 'tradition' of two separate parties. Two steps forward, one step back ...

69 D Kennedy 'A cultural pluralist case for Affirmative Action in legal academia' in Crenshaw *et al* (n 65 above) 159. See also D Kennedy *Sexy Dressing Etc: Essays on the Power and Politics of Cultural Identity* (1993) 34.

70 K van Marle & D Brand 'Ten thoughts on transformation' in Visser & Heyns (eds) *Transformation and the Faculty of Law, University of Pretoria* (2007) 55.