
Ambiguity, Entanglement, Equality

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Abstract

I consider, tentatively, the possible contribution that De Beauvoir's philosophical insights can bring to substantive equality jurisprudence, maybe also to jurisprudence in general. I focus mainly on De Beauvoir's reflections on becoming, freedom, ambiguity and judgement, which are all interrelated. My contention is that the main thing that is lacking in how courts, and much of the scholarship on substantive equality, approach equality, is ambiguity. One might have expected that an approach that places difference at the centre of its analysis will have a sense of ambiguity, and of the impossibility of making grand claims. However, it seems to have turned out quite the opposite. Drawing on De Beauvoir and the extent to which substantive equality scholarship hasn't relied on her insights, I contemplate the question whether and how ambiguity could come into the picture. I read entanglement alongside ambiguity to consider if, instead of relying so strongly on difference, substantive equality may benefit by entanglement as 'a term which may gesture towards a relationship or set of social relationships that is complicated, ensnaring, in a tangle, but with also a human foldedness' (Nuttal 2009:1). At the heart of entanglement lies for me an ambiguity that highlights the flaws in the certainty of one-dimensional grand narratives.

1. Introduction

In my doctoral thesis, *Towards an Ethical Interpretation of Equality* (2000), I reflected on the notion of substantive equality that was introduced to South African law after the adoption of the 1994 and subsequently the 1996 Constitution. The South African

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Constitutional Court in a series of cases took the first steps to unpack its understanding of substantive equality. In my thesis I was cautious about the potential of substantive equality as a concept, but also as it was developed by the court, to respond fully to the manifold problems that inequality posed to a society seeking to deal with its unequal past and present. Others, most notably scholars like Albertyn and Goldblatt (1998:248), Albertyn (2007:253), and Botha (2009:1), engaged critically with the court's development of equality jurisprudence. Albeit from different angles there seems to be agreement, at least among these authors that the South African Constitutional Court has not managed to live up to the hope that its equality jurisprudence, steeped in the notion of substantive equality, will disclose possibilities for, let us call it for now, 'real' transformation.

In response to the focus of the project (or series of workshops) of which this special section is part, namely to 'problematise feminist scholarship's seeming oblivion of certain intellectual traditions', I want to focus on Simone de Beauvoir. De Beauvoir and her contribution to feminist theory is hardly forgotten. Simons (2004:1; 2006:1) refers to 'a renaissance' that happened after her death in 1986 in academic circles and in the wider public discourse. *The Second Sex* (1949) was elected as one of the top ten non-fiction books of the twentieth century by *Time* magazine and De Beauvoir was identified as one of the one hundred most influential people of the millennium. However, Simons (2004:1) notes that specifically her philosophical work did not receive the attention it deserved for a number of reasons. The way in which De Beauvoir approached philosophy, that it should be grounded in concrete problems so as to reflect life's ambiguity and uncertainty, may be one of the reasons. Another is the extent to which her work has been perceived to be influenced by Jean Paul Sartre, but also her own denial of her work as philosophy. Simons writes that it was only after Sartre's death in 1994 that De Beauvoir's philosophical work started to receive recognition. Another reason is also that much of her work has not been available in English until recent years.

I want to consider, tentatively, the possible contribution that De Beauvoir's philosophical insights can bring to substantive equality jurisprudence, maybe also to jurisprudence in

general. I focus mainly on her reflections on becoming, freedom, ambiguity and judgement, which are all interrelated. I start by revisiting her famous claim (1949:295) that 'one is not born but becomes a woman' via a piece by Judith Butler (1986:35) in which she underscores the 'consequential ambiguity' of this statement. Even though the work, *The Ethics of Ambiguity* (English translation 1948) preceded *The Second Sex*, I start with the latter because this is the work traditionally more relied on in feminist scholarship. I then draw on De Beauvoir's work on ambiguity and on the work of commentators (Weiss 2004; Keltner 2006; Kruks 2009, 2012). Her understanding of ambiguity is linked also to her understanding of freedom and judgement (Marso 2012; Gardiner 2013). As indicated, my concern in this piece is to consider how De Beauvoir's insight could assist in our critical engagement with substantive equality jurisprudence.

My contention is that the main thing that is lacking in how courts and much of the scholarship on substantive equality approach equality, is ambiguity. One might have expected that an approach that places difference at the centre of its analysis will have a sense of ambiguity, and of the impossibility of making grand claims. However, it seems to have turned out quite the opposite. I hesitantly ask if the emphasis placed on systemic/structural inequality, albeit important, might beckon exactly a response devoid of any ambiguity. Drawing on De Beauvoir and the extent to which substantive equality scholarship hasn't relied on her insights, I contemplate the question whether and how ambiguity could come into the picture. I do this by relying also on the notion of 'entanglement' as Sarah Nuttal (2009) has written on it.

I read entanglement alongside ambiguity to consider if, instead of relying so strongly on difference, substantive equality may benefit by entanglement as 'a term which may gesture towards a relationship or set of social relationships that is complicated, ensnaring, in a tangle, but with also a human foldedness' (Nuttal 2009:1). At the heart of entanglement lies for me an ambiguity that highlights the flaws in the certainty of one-dimensional grand narratives.

I start off by revisiting De Beauvoir's insistence on becoming, via Judith Butler's engagement, before I focus on the notion of ambiguity and how it also underlies the

understanding of freedom and judgement in the former's work. I then turn to the development of substantive equality jurisprudence in the South African context, after which I consider the possible contribution of 'entanglement' alongside ambiguity for substantive equality jurisprudence. By way of conclusion, I connect this piece with my broader work on jurisprudence and how ambiguity feeds into it.

2. The consequential ambiguity in becoming woman

'One is not born, but rather becomes a woman' is the famous phrase from *The Second Sex* (1949:295) that provided the basis for second wave feminism's distinction between sex and gender, according to which sex is regarded as anatomy, that which is factual, described by biology, fixed. Gender, on the other hand, is regarded as 'an aspect of identity gradually acquired', it is cultural, acquired by way of acculturation (Butler 1986:35). Butler aptly notes that according to this insight, 'All gender is, by definition, unnatural', with the effect that being a woman 'is one cultural interpretation of being female' (1986:35). The body thus can also become the 'locus of other gender constructions' (1986:35). Butler describes this as a 'radical heteronomy of natural bodies and constructed genders' (1986:35). For Butler, the main insight of De Beauvoir's famous phrase, 'one is not born but becomes a woman', is that what it means to be a female differs significantly from being a woman. The meaning of the reference to 'female' is thus fixed; but woman holds the possibility of different modes according to cultural meaning. Butler explains:

Gender must be understood as a modality of taking on or realizing possibilities, a process of interpreting the body, giving it cultural form. In other words, to be a woman is to become a woman; it is not a matter of acquiescing to a fixed ontological status, in which case one could be born a woman, but, rather, an active process of appropriating, interpreting, and reinterpreting received cultural possibilities. (1986:36)

However, what is perplexing is what Butler phrases as a 'consequential ambiguity' at the heart of De Beauvoir's understanding of becoming, in which cultural construction is also 'a process of constructing ourselves' which carries an element of choice (1986:36). The question arises, how to make sense of choice in this regard, what does it mean that one's gender can be chosen, is purposive, a project? If gender is/can be chosen, what do we make of it as cultural construction? The idea of gender as cultural construction usually holds that gender is passively determined. However, Butler asks what the mechanisms are of this construction? If gender is inscribed with no agency, how do we explain the different ways in which individuals embody and live their gender? Does personal agency play a role? For Butler, De Beauvoir's phrase can be read so as to raise the question: 'To what extent is the "construction" of gender a self-reflexive process?' (1986:36).

Butler explains that we should understand gender as a process by which the body is interpreted and given form rather than as merely accepting a fixed status: it is 'an active process of appropriating, interpreting, and reinterpreting received cultural possibilities' (1986:36). What this means is that our bodies are not experienced as merely sexed, because our sexed and gendered bodies are intertwined. De Beauvoir goes along with Sartre for whom 'the natural body is an "inapprehensible" and, hence, a fictional starting point for an explanation of the body as lived' (1986:39). The crux here is that 'we do not become our genders from a place prior to culture or to embodied life, but essentially within their terms', which also underscores that the temporal movement doesn't happen in a linear way, gender doesn't have a specific point of origin or end (1986:39).

Butler explains that De Beauvoir in her understanding of becoming a gender as both choice and acculturation disrupts the tension between gender as 'project' and 'construct' (1986:37). It is the ambiguity that underlies 'becoming' that discloses gender as both constructed ('received') and self-made ('innovated'). De Beauvoir through this articulation breaks with the existential take on choice. For her, choice/choosing always occurs within a context of and influenced by a multitude of cultural norms. Butler reflects as follows:

That one is not born, but becomes, a woman does not imply that this 'becoming' traverses a path from disembodied freedom to cultural embodiment. Indeed, one is one's body from the start, and only thereafter becomes one's gender. The movement from sex to gender is internal to embodied life, i.e. a move from one kind of embodiment to another. (1986:39)

Butler explains the extent to which De Beauvoir relies on Sartre's work of 'prereflective choice' which he refers to as 'quasi knowledge' (1986:40). This can be described as a choice we make while not fully realising that we make it when we make it, but only after. For Butler: 'Becoming a gender is an impulsive yet mindful process of interpreting a cultural reality laden with sanctions, taboos and prescriptions' (1986:40). Butler also further unpacks the relation between autonomy and alienation, the body as situation and the body as politic, that I do not expand on in this piece. The most important aspects of this understanding of becoming are the emphasis on ambiguity and the extent to which the self is situated with others, in constant relation with and influenced by them. I now turn to De Beauvoir's work on ambiguity as such.

3. Ambiguity

For De Beauvoir (1948; Keltner 2006:201; Kruks 2009:214) ambiguity is fundamental to our social and temporal being. She argues that traditional philosophies mask this ambiguity by distinguishing, for example, between pure inwardness and pure externality. De Beauvoir insists that it is impossible to distinguish between world mastery and world destruction. Although we should try to find a way to escape the knowledge of death we can never get away from the knowledge of our finitude. According to an ethics of ambiguity, human existence is materially, socially, and historically embedded. Ambiguity recognises separateness and connection. Instead of denying this ambiguity we should embrace it. De Beauvoir believed that the social and temporal conditions of late modernity emphasise ambiguity.

An essay titled, 'Introduction to an Ethics of Ambiguity' (1946a) was published a year before the publication of the full work, *The Ethics of Ambiguity* (1948). In this essay, De

Beauvoir highlights a number of themes that remained prominent in her future work. The essay was later reworked into the first chapter of the book. Weiss (2004:280) describes these themes as firstly, 'the relationship between transcendence and immanence'; 'the difference between the "desire to disclose being" and the "desire to be"' and 'the need to find intrinsic rather than extrinsic justifications for human existence'. Fundamental ambiguity is the central topic that links these three themes. De Beauvoir starts the essay by underscoring the fundamental ambivalence of life and death, writing: 'From the moment he is born, from the instant he is conceived, a man begins to die; the very moment of life is a steady progression toward the decomposition of the tomb' (Weiss 2004:289). She believes that our knowledge of this ambivalence is a result of concrete experience (Weiss 2004:281). The first ambiguity mentioned is the relationship between transcendence and immanence, which relates to her view of reflection, which can be seen as a critique of Descartes' model of detached thinking. For De Beauvoir, we share with all organisms the tension between life and death. We have the ability to distance ourselves from a concrete situation whilst being enmeshed in it. Transcendence refers to the extent to which we can detach from a situation; immanence refers to us being 'part and parcel of it' (Weiss 2004:281). This tension is central to her work and to her specific understanding of ambiguity. The second ambiguity is related to the first one and relates to our being as 'temporally indeterminate' (Weiss 2004:282). We never exist only in the present but exist also in the past and the future. The third ambiguity invokes the tension between on the one hand being unique or alone, and at the same time being connected to others.

Keltner also identifies three essential moments as reflective of ambiguity, namely 1) the experience of self in the world; 2) the fundamental ethical relation with others; 3) the temporal unity of existence between past, present and future (2006:201). Another way to think about ambiguity is to see it as the 'seemingly opposing' experiences of the self as both a free subject and an object for others (2006:201). The subject is neither striving for pure freedom, interiority, or transcendence, nor pure object, exteriority. Underlying this ambiguity is, as seen above, the tension between transcendence and facticity. Subjectivity is thus not a substantive but a temporal and situated process or movement.

As noted, De Beauvoir believes ambiguity is more intense in late modernity. Humanity is simultaneously an ultimate end and pure means. Even though Western philosophy's evasive logic denies ambiguity, De Beauvoir insisted that existentialism is a philosophy of ambiguity, with implications for how we make sense of the social bond. Existentialism can be regarded as a resource for articulating an ethics adequate to social and historical existence (Keltner 2006:205). Ethics for De Beauvoir is something concrete, to be found in meaningful action in a socio-historic situation and not in abstract universal values. Her emphasis on ambiguity highlights embodiment and our 'mutual vulnerability in relationship to others' (Marso 2012:167). One insight that is of particular value for my consideration of substantive equality is De Beauvoir's insistence that we must come to terms with failure, in particular that we will not succeed to harmonise different aspects with each other (Weiss 2004:284).

Freedom

De Beauvoir's view on freedom is that freedom for the individual is intimately bounded to and dependent on the freedom of others. Existentialism for her is not a solipsistic account but rather a philosophy that situates the individual in relationship with others. It is exactly because of this relationship to others that we can pursue freedom in a manner that could lead to justice. 'Personal freedom brings with it an ethical responsibility for others' (Gardiner 2013:118). Dogmatism or excessive idealism, that both move away from concrete issues that are situated and relational, often prevent us from regarding others. The desire for stability prevents us from recognising and making peace with ambiguity and that ultimately prevents us from pursuing freedom in a just manner. For De Beauvoir, people are unfree, oppressed, if they are unable to transcend their circumstances. In order to understand and respond to this we need to make sense of freedom not in an abstract way but by looking at people's concrete circumstances. She makes a connection between freedom and judgement: if we care about the freedom of others, we should be willing to speak up, to judge those who curb the freedom of others.

Judgement

De Beauvoir (1946b) in her essay on the trial of Robert Brasillach, judged him for his inhumanity, and especially for his failure to give regard to ambiguity (Marso 2012:168). Brasillach was a French intellectual and journalist who, by publishing information on the places where Jews were hiding, caused their deaths. Her judgement of him is compared to Hannah Arendt's (1964) judgement of Adolf Eichmann. Like Arendt, De Beauvoir also agreed with the finding but rejected the court's reasoning. Arendt famously judged Eichmann for his inability to think. De Beauvoir judged Brasillach for his 'refusal to acknowledge the ambiguity of the human condition' (Marso 2012:168). She insisted that we reject any system 'that impose[s] a predetermined meaning on the world'. We must 'recognise our fundamental human failure to control others or to determine the future ... accept that each individual is, like ourselves, both subject and other' (Marso 2012:168). Brasillach violated ambiguity by treating 'embodied, unique and free human beings as things to be manipulated and destroyed' (Marso 2012:168). In contrast to the French state which charged him and found him guilty of treason, De Beauvoir judged him for 'reducing human beings to things – regarding people as body-objects and denying their subjectivity and future' (Marso 2012:169).

Marso notes the similar political contexts shared by the Eichmann and Brasillach trials. Both countries, Israel and France, treated the trials as nation-building exercises. France, defeated and recovering from its occupation, condemned 'traitors' and 'collaborators' from a place of deep humiliation and impotency. Israel sought legitimacy for a newly formed state. Arendt and De Beauvoir both felt that the political motivations affected the judgments and the extent to which justice was served (Marso 2012:170). They both argued that the crimes committed by Eichmann and Brasillach respectively urged judgement, and in particular reflection on the role played by them as individuals (Marso 2012:173). Both of them relate the need to judge to freedom – 'we enact our freedom by choosing good over evil ... to fail to judge ... is to abdicate the responsibilities of freedom, both to ourselves and others' (Marso 2012:173).

Arendt judged Eichmann for his unwillingness to share the world with others and justified her support of the death penalty by relying on the 'we' of worldly plurality (Marso 2012:174). Marso notes the significance of Arendt's claim of a 'larger "we" than Jewish victims' and the affirmation of 'plurality as a fact of the human condition that must be recognised and preserved' (2012:174). De Beauvoir relied on a different reasoning, 'a different we' – that of solidarity – thereby supporting the idea that one can 'affirm justice via solidarity' (2012:174).

De Beauvoir's writing on the 'sub-man' helps us to get a better sense of her understanding of freedom and ambiguity. For her the 'sub-man', when subordinating his freedom to a movement or ideology, refuses his responsibility to judge and to choose and shies away from his freedom. This refusal also comes down to a refusal of the 'tragic ambiguity' of the human condition, 'a refusal of the anguish and responsibility that human freedom demands of each individual' (Marso 2012:176). Arendt in her understanding of judgement draws on Kant's notion of representative thinking, arguing that enlarged thought (invoking the aesthetic community) could assist us in placing ourselves in the shoes of others. De Beauvoir, on the other hand, believes that it is impossible to think from the standpoint of others. This does not mean that we should not be concerned about others as 'we must find existence for our own existence by recognising the existence of others who also desire freedom' (Marso 2012:177).

The last aspect that I want to note is the extent to which for De Beauvoir, judgement is always political and influenced by political circumstances. She insists that we need to judge not only because of a sense of ethical responsibility but also because of the influence of politics, underscoring personal embodiment and suffering. Her focus on embodiment and its relation to freedom is of value. Her explanation of the body's vulnerability and its political meanings are intrinsically linked to freedom (Marso 2012:181). She exposed how the political meanings that were given to certain bodies led to individuals being in danger. It is important to note that she situated political community and the demands of freedom within relations marked by ambiguity. Her judgement of Brasillach is particularly focused on the extent to which he degraded individuals to objects, dehumanised them. She highlights the extent to which, even

where rights are protected, one's freedom is still linked to embodiment and the extent to which political spaces are free and equal (2012:184). My sense is that De Beauvoir's understanding of ambiguity that underlies her view of freedom and judgement carries significance for the contemplation of jurisprudence, maybe in particular one dealing with enduring legacies. I turn now to substantive equality jurisprudence as it developed in the South African context.

4. Substantive equality

I recall below, briefly, three reflections on substantive equality to illustrate something about the academic discourse and commentary on the Constitutional Court's development of its substantive equality jurisprudence. Albertyn and Goldblatt (1998:248) in one of the first reflections on the Constitutional Court's substantive equality jurisprudence, start out by flagging the Constitution as the political and legal foundation for democratic transformation in South Africa. They regard the Constitution as being the vessel that should realise the vision of a new society. At the centre of this vision is also the invitation to engage actively with the values and rights contained in the Constitution to build that new society, and a commitment to a new order and the ideal of transformation. They concede that several readings of transformation may be plausible but declare that they expect 'transformation to require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines' (1998:249). Following on this understanding of transformation, equality for them denotes 'the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality' and the 'development of opportunities which allow people to realise their full human potential within positive relationships' (1998:249). They describe equality as a value and as a right, with the former giving substance to the vision of the Constitution, and the latter providing the mechanism for achieving substantive equality.

The authors emphasise the centrality of equality to the constitutional project of transformation and regard legislative and judicial interpretations of equality as important

sites of struggle concerning the pace, nature, and extent of transformation. The notion of equality entrenched in the Constitution is substantive rather than formal. In contrast to formal equality that is abstract and ignores differences, substantive equality regards difference; seeks to address and remedy material inequalities; is aware of context and systemic forms of domination, structural and entrenched disadvantage; and aims to maximise human development. Substantive equality is seen to be a challenge to liberalism, in particular abstract individualism (1998:251). It heeds social context, concrete inequality, and disadvantage and specifically inequality based on race, gender, class etc.

Albertyn and Goldblatt note the extent to which substantive equality has been influenced by feminist theory's insistence on the importance of recognising 'lived experience' (1998:252). Substantive equality according to the authors places difference and disadvantage at the centre of equality and recognises intersectional inequalities. They note early on in the development of an equality jurisprudence a jurisprudential shift from pure legal liberalism to a critical framework appropriate for the transformation needed (1998:255).

However, they raise a few difficult questions that the court in the development of substantive equality should be aware of, namely the relationship between equality, dignity, and disadvantage; the meaning, nature, and extent of the constitutional analysis and the boundaries of the equality test (1998:255). Commenting on the first three cases in which the court set out its approach to substantive equality, they raise the concern that the court focuses too much on the feelings of the individual, and too little on the material disadvantage of the group. For them, this is because of an incorrect framing of the question, and they propose that the court should develop a substantive and integrated approach; that it should be concerned with harm linked to membership of a group rather than individual dignity; and that it should focus on disadvantage rather than dignity and, if the act is found to be unfair, use the limitations clause (1998:273).

In an article almost ten years later by Albertyn (2007:253) she evaluates the extent to which equality has led to transformative change. She repeats the idea that substantive

equality designates both a transformative idea and a legal mechanism and confirms that substantive equality should bring about social and economic change. She believes that the Constitutional Court by its adherence to context, impact, difference, and potential has the capacity to bring about social and economic change. However, she is concerned about several constraints, such as institutional concerns (separation of powers and institutional legitimacy); the capacity and willingness of judges to explore context to address multiple systemic inequalities; and the ability of judges to develop a transformative jurisprudence (2007:253-254).

Albertyn notices, for example, certain social boundaries, normative and doctrinal, that sustain conventional gendered ideas about society. Equality jurisprudence has broadened the net of inclusion but is not (yet) truly transformative. In terms of social inequalities, certain patterns of inclusion and exclusion can be identified to which the court has responded by way of 'recognition' that does not always result in economic inclusion. Inclusion tends to confirm the liberal idea of confirming the status quo – it may broaden recognition but does not address structural conditions. True transformation should bring about a shift in current power relations. Albertyn relies on the following example to illustrate her point:

An inclusionary approach to women would recognise their disadvantage as mothers and accommodate this without shifting the underlying ideas of gender that establish different, unequal and static roles and institutional positions for women and men as parents, workers and members of society. A transformatory approach would locate an understanding of women's disadvantage within these systemic inequalities, and then seek to dismantle them through new normative interpretations of equality and through remedies that affirm a more egalitarian and flexible set of gender roles, and thus dislodge the underlying norms and structures that create and reinforce a rigid and hierarchical status quo. In sexual orientation claims, an inclusionary approach would affirm the identity of gay and lesbian people on an equal basis with heterosexual individuals and families. A transformatory approach would contemplate a more radical understanding of

society in which dominant heterosexual norms give way to a plurality of families and relationships. (2007:256)

As Albertyn notes, there is clearly a gap between aspiration and reality in the current society. And the question is whether the right to equality and the right interpretation and application can close this gap. She concedes that the court has adopted four features that nudge them in the right direction: it understands inequality within its social and historic context; emphasises the impact of the alleged inequality on the complainant; recognises difference as a positive feature of society; and pays attention to the purpose of the right and its underlying values in a manner that evinces a direct or indirect concern with remedying systemic subordination or disadvantage (2007:258). She insists on the need for both practical remedies and normative values. Law should be understood as 'a product of social relations that can be re-inscribed with transformative ends' (2007:258).

Henk Botha (2009:1) in a later reflection describes the extent to which substantive equality relies on a paradox, namely that what is needed to address discrimination and to respond to disadvantage focuses and highlights, and in a way repeats, those very unequal social categories and identities that cause discrimination. He unpacks three perspectives that could enable a transformative discourse on equality, namely, a complex understanding of equality; a radical understanding of difference, and a memorial understanding of constitutionalism which resists monumentalisation and underscores the limits of the law (2009:2). Botha's position is close to what I argued for in my thesis – 'an ethical interpretation of equality'. My understanding of ethical was derived from Drucilla Cornell's (1991) formulation of ethical feminism, which insists on the importance of sexual difference while at the same time refusing to rely on any fixed/prescribed notion of difference. Cornell's (1992) renaming of Derridean deconstruction as 'the philosophy of the limit' was at the core of my understanding of substantive equality. My aim with this piece is to reflect on my own neglect to focus and draw on De Beauvoir's concept of ambiguity. In retrospect, I can see that my critique of the development of substantive equality jurisprudence is its neglect of ambiguity, maybe more the neglect to place ambiguity at the centre of it. I think that there are elements in

Albertyn (and even earlier, Albertyn and Goldblatt) that also relate to ambiguity. However, the suggestions made are ultimately not engaging ambiguity but rather certainty. Botha is closer to confronting the limits of the law and the paradoxical nature of substantive equality. However, I think that there is a difference between complexity and ambiguity that matters. A complex problem can still be solved, albeit not easily. Ambiguity, in particular as it is asserted by De Beauvoir, is fundamental, ontological, and ongoing. I do wonder also about the way in which difference has been invoked as a boundary rather as a relation (I am drawing here on Nedelsky's (2011) formulation) and consider entanglement in this light.

5. Entanglement

Sarah Nuttal defines entanglement as 'a condition of being twisted together or entwined, involved with; it speaks of an intimacy gained, even if it was resisted, or ignored or uninvited' (2009:1). She describes it further as a term that could identify a relationship or group of relationships that is 'complicated, ensnaring, in a tangle, but which also implies a human foldedness' (2009:1). Entanglement, albeit not blind to difference, is concerned with overlap, which is often ignored. I am interested in how in analysis of case law, entanglements between various legal subjects, and their entanglement with law, space, and time, are neglected. Nuttal relies on entanglement in her engagement with literary and cultural formations. She identifies six ways in which entanglement has been employed to engage with cultural theory in the aftermath of apartheid: 1) Historical entanglement; 2) Spatio-temporal entanglement; 3) Ideas of seam and complicity; 4) Entanglement of people and things; 5) DNA; and 6) Race. Historical entanglement invokes the sense in which in colonial and later apartheid South Africa, a story of difference and separateness on the surface is in fact one of dependence, showing patterns of connections. Spatio-temporal entanglement challenges linear notions and asserts a 'complex temporality' (2009:4). Expanding on the idea of the seam, Nuttal invokes Leon de Kock, for whom the seam 'is the place where difference and sameness are hitched together – where they are brought to self-awareness, or displaced' (Nuttal

2009:5). She notes how Mark Sanders invokes complicity to argue that we will be able to make more sense of apartheid and its aftermath if we focus not only on apartness but also 'track interventions, marked by degree of affirmation and disavowal in a continuum of what he calls human foldedness' (2009:6). The entanglement of people and things speaks to alternative ways in which to make sense of commodity culture, possession, and objects. New work on DNA rejects fixed conceptions of racial identity that underlay colonial rule. Nuttal unpacks racial entanglement with reference to the work of Eduard Glissant on creolisation (2009:9; Glissant 1992). She describes two strands in which race and ethnicity were employed in the 1990s. The first strand, critical race studies, places racism and identity at the centre of its focus, exposing 'institutional racism', 'patterns of racial exclusion', and the role of structures and systems keeping these in place. A second strand looks at race via entanglement, for example Paul Gilroy (2004). My focus here is not race per se, but rather how substantive equality jurisprudence has accepted and taken on the notion of patterns of exclusion, systemic and structural discrimination, in a totalising way.

Nuttal unpacks how difference was used by postcolonial studies as a strategic tool to respond critically to the pervasiveness of universalism and Western homogenisation (2009:31). She argues, however, that after 1994, it was possible for critical theory to rethink the 'absoluteness of difference'. Entanglement is not a way to deny or contest separation and difference but to address identities, spaces, and histories to find possible points of intersection (2009:20). I am interested in entanglement as both a critical theoretical approach and a method. Nuttal considers the extent to which entanglement could assist with 'the possibility of a different cartography' (2009:25).

The notion of entanglement resonates with De Beauvoir's work on ambiguity, as it also challenges attempts to close, to totalise, to succeed once and for all. The way in which the distinction between sex and gender has been reified, goes against the ambiguity with which De Beauvoir initially invoked the idea of becoming one's gender. I argue tentatively that the way in which difference is asserted in substantive equality jurisprudence, in conjunction with tropes like systemic, structural, and patterns of discrimination and exclusion, albeit true, is not supporting the development (becoming)

of a nuanced approach. All the talk about context and materiality has in a strange way become very abstract. Could De Beauvoir's judgement of someone like Brasillach, who failed to recognise ambiguity, be of value for jurisprudence? At a very simple level her critique that his failure to recognise ambiguity led him to deny humanity, reducing people to objects, is something to work with, to make possible connections between programmes of reform devoid of ambiguity and the endurance of inhuman and unequal treatment. Turning to sex and gender and how the two are inherently related, entangled, problematises the attempt to demarcate clear boundaries and identities. Substantive equality is distinguished from formal equality for its recognition of difference. My suggestion is that it is now time to engage in a serious manner with the many ways in which individuals are entangled with each other, rather than different from each other. I conclude by drawing on the work of William Kentridge as an artist engaged with doubt, that I relate to ambiguity and entanglement to think about jurisprudence.

6. Conclusion

My claim in this article is simple. It is also tentative. I am saying that the substantive equality approach/jurisprudence, at least as it developed in the South African context, could benefit by engaging with De Beauvoir's notion of ambiguity. Her notion of becoming one's gender as explained by Butler means much more than the often-repeated distinction between sex as biology and gender as cultural construct. Becoming one's gender is a reflection of the ontological state of ambiguity. To be is always already to become. This view thwarts if not refutes grand claims and totalising schemes. Her insistence on ambiguity as a necessity for ethics troubles approaches and writing that deny ambiguity by embracing a false sense of clarity. Her understanding of individual freedom as possible only within the context of the freedom of others challenges simultaneously excessive individualism and good-hearted communitarianism. Lastly, her judgement of Brasillach grapples with the messiness of politics, asserts the importance of freedom and illustrates the inhumanity of certain acts.

Substantive equality jurisprudence and discourse show awareness of the importance of context; the need for a nuanced approach; being alert to the extent to which different rights and needs and subjectivities intersect and overlap. However, my sense since the early days is that something in these reflections is lacking, that we are missing something. That the more we talk about context and material needs, the more abstract it becomes. That the acceptance of systemic and structural discrimination, however true and important, creates a gap. My suggestion here is that a greater awareness and concerted embrace of ambiguity might disclose new ways from which to think about what makes substantive equality an approach with substance.

Entanglement, without ignoring or resisting difference, like ambiguity, frustrates settled assumptions and responses. Thinking about a case in which a single father asserted his right to equality in response to a presidential pardon that released only single mothers through entanglement, might bring other conversations to the fore (this question was raised in the case of *Hugo*¹). Similarly, deciding on the question of why the clients of sex workers escape criminalisation but the sex workers don't (as in the *Jordan* case²).

I mention above that I will conclude with a brief reference to jurisprudence in general in relation to De Beauvoir. Ambiguity will not be of value only for how we make sense of substantive equality but for jurisprudence in general. In this vein I have relied on South African artist William Kentridge explaining indeterminacy in his work. Kentridge, in contrast to Western modernity's embrace of reason and certainty, invokes doubt. In 2018 a retrospective of his work was put together in an exhibition titled, *Why should I hesitate: Putting drawings to work*. In the foreword to the book with the same title as the exhibition, Azu Nwagbogu (2019:10) notes Kentridge's reliance on the idea that 'wisdom starts with doubt.' Themes of ambiguity and uncertainty and the active construction of meaning rather than accepting meaning are present in the exhibited works. His insistence on doubt, on the shifting of meaning, on resisting the need to understand

¹ *President of the Republic of South Africa and Another v Hugo* (CCT 11/96) [1997] ZACC 4 (18 April 1997).

² *S v Jordan and Others (Sex Workers Education and Advocacy Taskforce and Others as Amici Curiae)* (CCT 31/01) [2002] ZACC 22 (9 October 2002).

rather than to understand, may be seen as a response to formal law's insistence on certainty and truth (Kentridge 2019:25). Drawing, for Kentridge, has 'remained the foundational approach to seeing the world' (2019:22). It is through the process of drawing that new images, ideas and associations come to the fore. Every line can constantly change into something else, 'shift its intention' (2019:24). In a talk delivered at the New York library, Kentridge reflects on the activity of 'reordering, dismembering, and reordering' as essential to his work in the studio, by which the world is 'invited into the studio', then 'taken apart and fragmented, the fragments reordered, and sent back into the world' (2019:53). This dismantling for him is 'not simply technique' but 'a revelation of the instability of knowledge in the world. Its provisionality' (2019: 54). He states that 'the certainty of knowledge' is always 'only a single moment of coherence amongst a sea of possible other sense and meanings' (2019:59) I don't know if Kentridge has read De Beauvoir, but from where I sit his work and reflections on his work can be placed alongside De Beauvoir, from where we might continue to weave and unweave a jurisprudence of doubt, entanglement and ambiguity.

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