

CONSTITUTIONAL CLAIMS FOR GENDER EQUALITY IN SOUTH AFRICA: A JUDICIAL RESPONSE

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I. BACKGROUND

In South Africa, the history of colonialism and apartheid rule has resulted in a significant overlap of race and poverty. Because poverty and inequality are so strongly gendered, the most disadvantaged and marginalized in our society are black women.¹ A substantial number of black women are further disadvantaged by their exposure to cultural and religious regimes that make the struggle for gender equality even more complex. Specifically, African customary law—which is essentially patriarchal in both character and form and has been interpreted in a way that allocates crucial benefits according to male primogeniture—has had a particularly detrimental effect on the socio-economic power and well-being of rural women.²

The effect of the HIV/AIDS pandemic on women is a reflection of the complexity created by the interface between poverty and inequality as it impacts women's daily lives.³ Achieving effective gender equality is, therefore, the key to the eradication of

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¹ See generally Brigitte Mabandla, *Women in South Africa and the Constitution-Making Process*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 67 (Julie Peters and Andrea Wolper eds., 1995) (noting that black women in South Africa are at the bottom of the social hierarchy primarily as a result of "the intersection of race and class with gender").

² See Thandabantu Nhlapo, *African Customary Law in the Interim Constitution*, in *THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE* 157, 159–63 (Sandra Liebenberg ed., 1995).

³ See Brooke Grundfest Schoepf, *Aids, Gender, and Sexuality During Africa's Economic Crisis*, in *AFRICAN FEMINISM: THE POLITICS OF SURVIVAL IN SUB-SAHARAN AFRICA* 310, 313–14 (Gwendolyn Mikell ed., 1997) (discussing how the conflict between the traditional role of women to provide food and other household necessities for themselves and their dependants and their inability to do so based on poverty and inequality leads many women to participate in "casual employment"—i.e., low-paid labor—including working as barmaids and prostitutes).

disadvantages faced specifically by women.

As soon as the political negotiation process for a new dispensation was on the table and the drafting of a new South African Constitution had begun, a strong and formidable women's movement ensured that gender equality was firmly placed on the agenda.⁴ The resultant Constitution, itself a transformative document which is supreme and supercedes all law, outlaws discrimination based on a number of specific factors, including gender.⁵ With this new document in place, the Constitutional Court of South Africa has been able to move South Africa closer to its goal of gender equality by ferreting out legislation that either directly or indirectly discriminates based on gender.

II. RELEVANT PROVISIONS IN THE CONSTITUTION

Enacted in 1996, the Constitution of the Republic of South Africa contains a Bill of Rights that is proclaimed a "cornerstone" of the new democracy.⁶ The Bill of Rights is based on the three basic values of equality, freedom, and human dignity,⁷ which run like a golden thread throughout. It guarantees protection of civil and political rights—the so-called first-generation rights—as well as economic rights—the so-called second-generation rights—and finally cultural rights—the so-called third-generation rights. The Bill of Rights not only protects individual rights, such as the right to human dignity, but also protects group rights, such as the right to practice one's culture together with members of one's cultural group.⁸

The Constitution contains a separate external limitations clause, which applies to all the rights contained in the Bill of Rights.⁹ In addition, an interpretation clause enjoins courts to infuse the "spirit, purport and objects of the Bill of Rights" with the values it espouses when interpreting legislation.¹⁰ In interpreting the Bill of Rights itself, courts are further enjoined to proceed to international law and the jurisprudence of democratic societies, which are based on freedom, equality, and human dignity.¹¹

⁴ See Mabandla, *supra* note 1, at 68.

⁵ S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights), § 9(3).

⁶ See S. AFR. CONST. (Act 108 of 1996) ch. 2.

⁷ See *id.* § 7(1).

⁸ See *id.* §§ 30–31.

⁹ See *id.* § 36.

¹⁰ *Id.* § 39(2).

¹¹ See *id.* § 39(1).

A. The Right to Equality

The right to equality protected in Section 9 of the Constitution is a rather elaborate clause. It initially provides that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law.”¹² The section goes further, however, outlawing unfair discrimination—whether direct or indirect—based on a specific list of factors that include race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, culture, belief, language, disability, and birth.¹³

B. Other Constitutional Provisions

In several ways the Constitution reflects a concern for the rights of women that goes beyond the equality clause itself. The Bill of Rights protects the right to freedom from all forms of violence—“from either public or private sources”¹⁴—clearly responding to the manner in which domestic violence manifests itself. It protects the right “to make decisions concerning reproduction,” and “to security in and control over [one’s] body.”¹⁵ It also secures the right of access to health care, which specifically includes reproductive health care.¹⁶ In its protection of the right to freedom of expression, the Bill of Rights expressly excludes advocacy of hatred based on certain grounds—including gender—that incites to cause harm.¹⁷

The Constitution also deals with the apparent tension between the recognition of systems of cultural law—which may have a discriminatory impact on women—and certain provisions in the Bill of Rights. It expressly recognizes marriages under any traditional, religious, personal, or family law system.¹⁸ However, reflecting the concerns that this provision might insulate these marriages from constitutional scrutiny, this section requires that these marriages be consistent with the provisions in the Constitution—including the Bill of Rights.¹⁹ Evidently, although these cultural normative systems that conflict with equality are recognized, they cannot be nullified. They must instead be modified in terms of the spirit and

¹² S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights), § 9(1).

¹³ *Id.* § 9(3).

¹⁴ *Id.* § 12(1)(c).

¹⁵ *Id.* § 12(2).

¹⁶ *Id.* § 27(1)(a).

¹⁷ *Id.* § 16(2)(c).

¹⁸ S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights), § 15(3)(a).

¹⁹ *Id.* § 15(3)(b).

purport of the Bill of Rights—a process of harmonization that draws on the rich cultural values—while disposing of their oppressive effect, particularly on women.

Other constitutional rights which could have direct beneficial impact on women's lives are the justiciable socio-economic rights protected in the Bill of Rights, particularly the right of access to adequate housing,²⁰ access to health care,²¹ sufficient food and water,²² and access to social security²³ and education.²⁴ The effective protection of these rights has the potential of bringing about great gains for the quality of life of women exposed to abject poverty.

Soon after the first democratic elections, newly created national policy and decision-making institutions and organs of state reflected an unprecedented diversity and a relatively reasonable balance between men and women. This shift permeated Parliament, the Cabinet, commissions, committees, the Public Service, and newly created judicial structures, notably the Constitutional Court.²⁵

III. JUDICIAL RESPONSES

How have South African courts responded to gender equality claims since the inception of the new Constitution? Here, I will focus on the jurisprudence of the Constitutional Court of South Africa—the court of final instance—and highlight the most important cases that have come before that Court.

Unfortunately, only five gender equality matters have come before the Court, which is a rather negligible number considering the total number of cases heard by the Court since its inception in 1995. Two of these five cases were brought by male applicants.

Early on in its interpretation and application of the equality clause, the Court stressed the central nature of equality in the new South African order. Linking equality to human dignity, the Court developed the principle that differentiation that has no rational connection with a legitimate—i.e., state and government—purpose amounts to discrimination. In terms of the equality clause, such discrimination will be unfair if it impacts a person in a way that

²⁰ *Id.* § 26.

²¹ *Id.* § 27(1)(a).

²² *Id.* § 27(1)(b).

²³ *Id.* § 27(1)(c).

²⁴ S. AFR. CONST. (Act 108 of 1996) ch. 2 (Bill of Rights), § 29.

²⁵ *See* S. AFR. CONST. (Act 108 of 1996) ch. 8 (Courts and Administration of Justice), § 174(2) (stating that “[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed”).

impairs the fundamental human dignity and self-worth of the person, or has a similar effect. Up front, the Court also emphasized the substantive or effective equality that is protected in the Constitution—as opposed to mere formal equality—which is a major breakthrough.

A. Case 1

In *Fraser v. Children's Court*,²⁶ Pretoria North—a single father—successfully challenged provisions of the Child Care Act, which allowed the adoption of children born outside of marriage without the consent of the father.

B. Case 2

In the case of *President of the Republic of South Africa v. Hugo*,²⁷ the respondent was a single father of a child under twelve years of age. He challenged the constitutionality of the pardon and reprieve granted by President Mandela to inmate mothers with children twelve years old and younger. The majority of the Court held that while the pardon indeed discriminated against fathers on the basis of gender, the discrimination was not unfair.²⁸

While it was inconceivable that a constitutional challenge could be mounted against the decision of the President to pardon an individual inmate, here the power of pardon was exercised in general terms and to the benefit of a group of prisoners. Regarding the impact that the discrimination had on the fathers, the majority of the Court found that the pardon—which was purely in the discretion of the President—merely deprived fathers of an early release and could not be said to fundamentally impair their sense of dignity, since they were not legally entitled to the pardon.²⁹ The pardon, therefore, was held not to be unfairly discriminatory against the fathers.

C. Case 3

In *Brink v. Kitshoff NO*,³⁰ a woman claimed the benefits of a life-insurance policy valued at two million Rand (\$250,000). Here, it

²⁶ 1997 (2) BCLR 153 (CC), 1997 SACLX LEXIS 1.

²⁷ 1997 (6) BCLR 708 (CC), 1997 SACLX LEXIS 91.

²⁸ *Hugo*, 1997 SACLX LEXIS 91, at *76.

²⁹ *Id.*

³⁰ 1996 (6) BCLR 752 (CC), 1996 SACLX LEXIS 9.

suffices to say that the Court found that the Insurance Act differentiated against married women on the basis of gender and marital status and such differential treatment was discriminatory and unfair because it could not be justified.³¹ Important is the Court's observation that although gender-based discrimination might not be overt and as widely condemned in South Africa as racial discrimination, it has "nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution."³²

D. Case 4

In *Harksen v. Lane NO*,³³ the applicant claimed that the statutory vesting of her property in the trustee of her insolvent husband's estate simply because she was married to the insolvent was unfair discrimination based on marital status. Although the Court held that there was discrimination based on marital status, it concluded that such discrimination was justified.³⁴ The Court observed that there is often a "complex relationship" between the specified grounds of discrimination enumerated in the equality clause and, therefore, "[t]he temptation to force them into neatly self-contained categories should be resisted."³⁵ In making such a statement, the Court clearly indicated that a finding of unjustified discrimination requires more than an analysis of where the alleged discrimination fits within the grounds listed in the Act. The fundamental rationale behind the decision of the Court lay in the governmental purpose of

³¹ *Brink*, 1996 SACLR LEXIS 9, at **51-52, 56-57.

³² *Id.* at *52.

³³ 1997 (11) BCLR 1489 (CC), 1997 SACLR LEXIS 20 (addressing the constitutionality of provisions contained in the Insolvency Act 24 of 1936). This case was decided under the equality clause of the interim Constitution contained in section 8, which provided in relevant part: "No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language." *Id.* at *51 n.29. This provision of the interim Constitution clearly mirrors section 9 of the Constitution of the Republic of South Africa enacted in 1996; therefore, *Harksen* is appropriate for this discussion.

³⁴ *Harksen*, 1997 SACLR LEXIS 20, at **76-77 (noting that although "[t]he differentiation does arise from their attributes or characteristics as solvent spouses," thus resulting in discrimination, "there can be no doubt as to the existence of a rational connection between the differentiation created by section 21 of the Act and the legitimate governmental purpose behind its enactment. Moreover, . . . reasonable procedures were introduced to safeguard the interests of the solvent spouse in his or her property.").

³⁵ *Id.* at *62.

the Act, a determination which requires that the court look beyond categories to the legislative intent.

The dissenting opinion argued that the challenged legislation promoted a concept of marriage in which husbands' and wives' estates are combined irrespective of outside factors such as the living circumstances and careers of the spouses.³⁶

Being trapped in a stereotyped and outdated view of marriage inhibits the capacity for self-realisation [sic] of the spouses, affects the quality of their relationship with each other as free and equal persons within the union, and encourages society to look at them not as "a couple" made up of two persons with independent personalities and shared lives, but as "a couple" in which each loses his or her individual existence. If this is not a direct invasion of fundamental dignity it is clearly of comparable impact and seriousness.³⁷

Therefore, the dissent concluded that the law as it stood failed to reflect the fundamental values of a democratic society.

E. Case 5

*S v. Jordan*³⁸ concerned a matter in which a provision of the Sexual Offences Act was challenged on the basis of gender discrimination.³⁹ The Court—in a 6-5 decision—held that there was no gender discrimination because the provision was couched in gender-neutral terms. Since the provision criminalized both male and female sex-work and subjected both to the same penalties, the provision withstood constitutional scrutiny.⁴⁰ The majority's opinion in this case has been criticized as disregarding the larger framework within which sex-work takes place. In particular, the

³⁶ *Id.* at **127–28.

³⁷ *Id.* at *133.

³⁸ 2002 (11) BCLR 1117 (CC), <http://www.concourt.gov.za/cases.php> (last visited Nov. 10, 2003). The Court in this case first determined that the High Court erred by applying the 1996 Constitution in its resolution of this issue rather than the interim Constitution, which was in effect when the events giving rise to the cause of action arose. The Court, however, agreed to exercise jurisdiction over the case based on the similarities between section 8 of the interim Constitution and section 9 of the current Constitution. *See id.*

³⁹ The provision at issue—section 20(1)(aA) of the Sexual Offences Act—deems sexual intercourse with "any person" for a reward illegal. *Id.*

⁴⁰ *Id.* (noting that, "[t]he differentiation between the dealer and customer is a common distinction that is made in a number of statutes" and, therefore, imposing criminal liability on the person who receives a reward for sexual activities—i.e., the "dealer"—and not on the person who tenders that reward—i.e., the "customer"—is a lawful means to curb the business of commercial sex).

Court did not address the fact that most sex workers are women at a time when the majority of citizens are in denial about the true socio-economic reasons why women engage in the sex trade.

F. Other Cases Concerning Gender Equality

There are a number of other matters that came before the Court in which gender equality arose indirectly. For example, domestic violence was characterized as a gender equality issue based on its “systemic, pervasive and overwhelmingly gender-specific” nature, which “both reflects and reinforces patriarchal domination” in society.⁴¹ If the criminal justice system is ineffective in dealing with domestic violence, it sends a message that “[p]atterns of systemic sexist behaviour”⁴² are acceptable. When spouses can batter with impunity, the Court opined, the foundational values of the Constitution are undermined.⁴³

The Court also characterized a child maintenance matter as an intrinsic gender equality issue in *Bannatyne v. Bannatyne*.⁴⁴ In that case, the Court observed that the child maintenance system was inherently gendered because, upon divorce or separation, it is most frequently mothers who become the custodial parent. That in turn places an additional financial obligation on mothers and inhibits their ability to participate in the job market. These mothers then “face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched.”⁴⁵ Child maintenance is, therefore, essential to bring relief for women. The Court further opined that in matters of this nature, courts have a particular responsibility to be aware of and guard against instances of “recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards their children.”⁴⁶

The South African Constitution prohibits both direct and indirect discrimination. Therefore, when gender equality issues are brought before them, courts should not only examine the constitutionally challenged legislation on its face, but should also consider the

⁴¹ S v. Baloyi, 2000 (2) BCLR 86 (CC), <http://www.concourt.gov.za/cases.php> (last visited Nov. 10, 2003).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 2003 (2) BCLR 111 (CC), 2002 SACLR LEXIS 42.

⁴⁵ *Id.* at *36.

⁴⁶ *Id.* at *38.

ultimate effect of such legislation. Courts must pay particular attention to any possible indirect discriminatory impact that laws and policy have on women.

IV. CONCLUSION

It is vital that the struggle for gender equality not be confined to the court rooms. Litigation has its limitations as it tends to be the privilege of the economically empowered. More accessible and direct strategies—such as legislation and policy development, which are agitated all the time by a vigilant civil society—can be effective.

In South Africa, a massive creation of new legal instruments and the revision and/or repeal of apartheid laws and policies has occurred in response to the demands of the new Constitution. The most important of these are the Promotion of Equality and Prevention of Unfair Discrimination Act,⁴⁷ the Employment Equity Act,⁴⁸ the Prevention of Family Violence Act,⁴⁹ the Choice on Termination of Pregnancy Act,⁵⁰ the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act,⁵¹ and the Recognition of Customary Marriages Act,⁵² all of which are in part intended to promote equality for women. Although the record of new legislation and policy development in South Africa is respectable, the implementation of these reforms has been rather inconsistent, mostly due to the scarcity of resources. The role for a vigilant civil society to agitate for change and monitor implementation can, therefore, not be overemphasized.

⁴⁷ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (prohibiting unfair discrimination on the basis of gender, including gender-based violence, female genital mutilation, and preventing women from inheriting property).

⁴⁸ Employment Equity Act 55 of 1998 (forbidding direct or indirect discrimination against an employee on one or more bases, including gender and sex).

⁴⁹ Prevention of Family Violence Act 133 of 1993 (expressing that a husband can be convicted of raping his wife).

⁵⁰ Choice on Termination of Pregnancy Act 92 of 1996 (granting a woman the right to choose whether to terminate her pregnancy).

⁵¹ Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (giving special consideration to the rights of households headed by women in granting orders for eviction).

⁵² Recognition of Customary Marriages Act 120 of 1998 (allowing a wife in a customary marriage equal status with respect to the matrimonial property system, "including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate").