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Achieving equality - how far have women come?

The need to develop meaningful interventions for bridging the gap between policies and laws and their implementation is urgent. SHARITA SAMUEL looks at the Equality Clause and questions the extent to which it's interpretation has contributed to gender equality in South Africa

'***In theory women's positions in society have been greatly improved – in reality this doesn't seem to be happening.***

The ideals of the Equality Clause remain alive only on paper.

Not only are women not able to claim their rights, but when they attempt to, it seems as if the law is not on their side.'

Against the background of these often-heard statements made by women, this *article* hopes to contribute to heightening an awareness of the goals of South Africa's equality legislation by commenting on the Equality Clause and its significance for gender equity[1]. It will also examine the implications of recent judgments for gender equity and finally, discuss some of the obstacles to realising the intentions of the Equality Clause for women.

The *article* will also examine advances made by women since 1994 – a period that has seen growing class inequalities in South Africa, including among different classes of women. Some educated middle and upper-middle class women may have benefited through the opening up of new avenues in the service sector, information industry and government departments. The majority of women however, have borne the main burden of increasing unemployment and lack of delivery in state-aided programmes in education, health and welfare and the consequent decline in their economic status.

In a context where more than 50 percent of the population lives in abject poverty (Budlender, 1999) of what significance is the promotion of gender equality? For gender activists this poses a challenge to analyse and expose the gendered nature of poverty and inequality as something that affects all aspects of women and men's lives. It also requires insight as to how equality, or the lack thereof, translates into day-to-day experiences for people. It means not limiting equality to abstract terms or a purely legal matter (Commission on Gender Equality, 2000).

For the majority of women in South Africa, day-to-day existence is spent trying to secure money and food for the next day. This struggle for basic survival makes long-term planning almost impossible.

I became homeless by losing my job. I couldn't afford rent. I didn't know you could experience poverty like this. And believe me I know now if I didn't know before. I have experienced it. I always thought I would grow up, go to college – which I would love to do if I could afford it – find a job, have kids. But it did not work out that way (Colon, 1995:15).

The significance of such compelling stories lies in the fact that they represent thousands of lives being battered by the current economic and political situation in South Africa. It also highlights the inextricable link between equality for women and the realisation of their socio-economic rights. This is due in part to the socialisation process and the reality of women's responsibility for their

For gender activists this poses a challenge to analyse and expose the gendered nature of poverty

kin, both in personal relationships and in the community. Without economic equality, civil and political rights exist in a vacuum. Against the background of such a context I seek to evaluate the Equality Clause, supporting legislation and recent judgements.

Provisions of the Equality Clause

The Equality Clause, clause 9 of the Constitution in the Bill of Rights, guarantees equal treatment for all South Africans and ensures enjoyment of economic, social and cultural rights. According to section 9 (2), equality includes the full and equal enjoyment of rights and freedoms. To ensure the promotion and the achievement of equality, legislative and other measures designed to protect or advance persons, disadvantaged by unfair discrimination, may be taken. Section 9(3) provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, sex, gender, pregnancy, disability, religion, conscience, belief, culture, language and birth. Section 9(4) provides the same for horizontal relations, and stipulates that national legislation must be enacted to prevent or prohibit unfair discrimination.

Courts have highlighted the significance of the differences between substantive and formal equality in several judgments

Positive measures to protect or advance disadvantaged groups are expressly permitted in section 9 (2). Affirmative action measures are an integral part of a programme to promote the achievement of equality which is defined in the Constitution to include the 'full and equal enjoyment of all rights and freedoms'. The court has even suggested that such measures are not only permissive but obligatory (*National Coalition for Gay & Lesbian Equality v Minister of Justice 1998 (12) BCLR 1517 (CC)).*

A failure to take positive action can, in certain circumstances amount to unfair discrimination under section 9 (3) or (4). Thus unfair discrimination can result not only from conduct, but also from a failure to take steps to ensure that disadvantaged groups benefit equally from social rights such as jobs, education, housing, medical care and social assistance. The insertion of the right to 'equal benefit' in the law in section 9(1) of the final Constitution seems to encourage positive measures as an integral element of our equality jurisprudence.

Undoubtedly, there is provision in the Equality Clause for positive measures to ensure that women benefit equally from the public and private sector programmes designed to protect or advance disadvantaged groups. This directive for positive measures confirms the context of substantive equality that the Constitution seeks to realise. This must be contrasted with formal equality which is blind to the underlying structural and material inequalities and the context of disadvantage experienced by groups affected by the positive measures which are designed to protect them. Formal equality does not aspire to remedy the socio-economic disadvantages and power relations which reinforce and perpetuate inequalities between different groups in society. Many of the drafters of the equality legislation were attuned to the nuances of formal and substantive equality and sought to implement them in several ways, the most notable being by stipulating timeframes by which supplementary laws had to be passed. Courts have also highlighted the significance of the differences between substantive and formal equality in several judgments (Liebenberg and O'Sullivan, 2000). We can thus be justifiably proud of the Equality Clause in our Bill of Rights that is described as restitutionary in nature, with the primary aim of redressing the racial and gender imbalances affecting the lives of the majority of citizens.

LAW REFORM PROCESS

Before proceeding, it is necessary to critique South Africa's attempts at realising the objectives of the Equality Clause. Its goal was to put in place a legislative and policy framework that would promote and protect, amongst others, the right to gender equality.

To this end key pieces of legislation were enacted and many of them implemented. These included land, housing, environmental and water laws, employment equity laws, new

and amended family laws, and administrative justice laws. The Appropriation Act 29 of 1998, Land Bank Amendment Act, National Water Act 36 of 1998, National Environment Management Act 107 of 1998, Domestic Violence Act 116 of 1998, Maintenance Act 99 of 1998, Recognition of Customary Marriages Act 120 of 1998, Choice on Termination of Pregnancy Act 92 of 1996, Rental Housing Act No 50 of 1999 and the Access to Information and Administrative Justice Acts are some examples of progressive laws aimed at furthering the constitutional guarantees. Furthermore, laws that were based on racial and discriminatory policies were abolished or amended, making them more accessible to all persons regardless of race and gender. More recently we also welcomed the passing by parliament of the Promotion of Equality and Prevention of Unfair Discrimination Act.

There is no doubt that we have made great strides in achieving a legal framework where the rights of women and men appear to be equally guaranteed. Yet practices in the economic, employment, educational and financial sectors do not reflect much improvement in line with the 'reformed' legal and legislative framework. It forces us to concede that we have spent commendable resources in pursuing and achieving formal equality but have not developed 'real' mechanisms to improve the lives of the majority of our citizens. The Commission on Gender Equality *Annual Report 2000* questions whether we have put enough effort into making these paper rights a reality for those most affected and dependent upon them, and comments that most of the policies and legal amendments translate into formal equality which does little to overcome patterns of social and economic disadvantage.

JUDICIAL INTERPRETATION

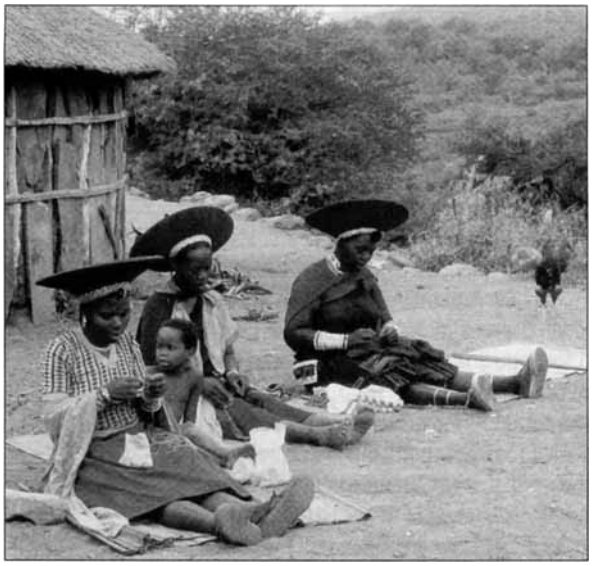
This is illustrated by the shocking stance of some judges and magistrates in our recent past. For example, the judgment by Judge Foxcroft which gave a rapist a lighter sentence for rape because he had raped his own daughter and confined the rape to his own family (*State v A SS.9/99 CPD*). This judgment emphasises that transformation entails changing the mindsets of those who administer justice and those who use the system.

The judgment belies the enormous changes that sentencing law has undergone. Until recently, there was no law that sought to compel the courts to impose particular sentences for serious crimes. The 1997 Criminal Law Amendment Act changed this position drastically. Its effect, since it came into force on 1 May 1998 is as follows: for rape of a woman under 16 as well as for certain other forms of rape and for some specified forms of murder, a life sentence is mandatory. For all other rapes the same law requires a sentence of at least 10 years imprisonment for a first offender. The law however, does allow courts to impose lesser sentences if it is satisfied that substantial and compelling circumstances exist that justify such a course. If there had been no flexibility at all in this Act, then it may have been struck down as unconstitutional.

Ultimately we have to trust our judges with some discretion

A close reading of Judge Foxcroft's judgment suggests that he has not realised the extent to which he is required to operate within a new legislative framework. His analysis of the words 'substantial and compelling circumstances' is arbitrary and he appears to regard any factor that would have been relevant to sentence prior to the enactment of the new law, as a 'circumstance' of the kind that would give the court the unfettered discretion the new Act was designed to limit. He also admitted that in the absence of psychiatric evidence he did not know what the effect of the crime was on the child – however he did not call for this evidence even though he considered it necessary for the decision. Criticism was rightly heaped on the suggestion that since the crime was committed within the family the offender is less of a threat to society, and also that since the public at large do not require protection against the accused, this was a substantial and compelling circumstance of the kind required to allow a departure from the prescribed norm of sentencing.

It is important to highlight that it is not



DAVID GOLDBLATT: SOUTH PHOTOGRAPHS

Women's domestic responsibilities often isolate them from public functions and leave them with less time to be 'active citizens'

constitutionally feasible for our law-makers to prescribe absolutely mandatory sentences. Nor would it be fair to do so. Although a crime may appear so vile as to always require a long, mandatory sentence, there is the danger of an unforeseen case in which such a sentence would be unjust. Ultimately we have to trust our judges with some discretion.

In contrast to the above case, in *S v C 1996 (2) SACR 181*, the appellant was convicted of three serial rapes and sentenced to an effective 14 years of imprisonment. Judges Van Deventer and Prest agreed that rape is regarded by society as one of the most heinous crimes. A rapist 'murders' the victim's self-respect and destroys her feelings of mental and physical integrity. The offenders' monstrous deed often haunts the victim and subjects her to mental torment for the rest of her life – a fate often worse than the loss of life. Society demands protection in the form of heavy and deterrent sentences.

Inconsistent judgments have served as a contributory factor to the spiralling violence against women

In *S v Chapman 1997 (2) SACR 3* (SCA) the Supreme Court of Appeal indicated that rape is a very serious crime which is humiliating, degrading and a brutal invasion of the privacy and dignity of the victim. Women are entitled to protection of these rights which are basic to the ethos of the Constitution. Women have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go to and from work and to enjoy the tranquillity of their homes without fear and apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The court was under a duty to send a clear message to the accused, to other potential rapists and to the community that the courts are determined to protect the equality, dignity and freedom of all women and will show no mercy to those who seek to invade those rights. Judgments such as these are noteworthy in their goals to work within the legislative framework of the Equality Clause.

However, for deterrent sentences to work effectively, there must be constant publicity of sentences passed and a marked increase in the conviction rate. Inconsistent judgments and very often the lack of any action at all have served as the contributory factors to the spiralling violence against women, obstructing their goals in the employment sector, public platforms and in their personal relationships. But stating this as often as we do is insufficient and fails to contribute substantively to the reduction of socio-economic inequality affecting women. The need to develop meaningful interventions for bridging the gap between policies and laws and their real practical implementation is urgent.

The case of *Woolworths (Pty) Ltd v Whitehead (CA 06/99)* also illustrates the disastrous consequences of judicial interpretation without reference to the ethos of the equality framework[2]. This case involved a woman who applied for a job and admitted at her interview that she was pregnant and subsequently believed that she had been offered the job. However, the job was later offered to a man and she was advised that her pregnancy would interrupt her employment and that this was an obstacle to her qualification for the position. The Labour Appeal Court considered it fair that Woolworths had taken the fact of Whitehead's pregnancy into account in deciding whether to employ her.

A decision of this kind is a complete antithesis to the laws striving to make

women's equality a reality and seeking to prevent unfair discrimination. The Equality Clause expressly prohibits discrimination on the grounds of pregnancy. The judges in this matter gave different reasons for their judgments. Whitehead lost her case in the Labour Appeal Court and the matter was subsequently settled so the issue of unfair discrimination on the grounds of pregnancy was not heard.

Some of the points in the judgments highlight the stereotypical and sexist attitudes that prevail in the judiciary which is entrusted to interpret laws within our transformed legislative framework. The reasoning in the Whitehead case was that forcing employers to employ pregnant women would result in job losses and harm the economy. However, there was no research before the court to support this statement. It was also assumed that it was the responsibility for women to bear the costs of pregnancy and not society. This supports the view that the judgment in this case rendered pregnancy an individual biological function that is the responsibility of women alone rather than a social function which women perform for the reproduction and benefit of society (Centre for Applied Legal Studies Gender Research Project, 2000). Our Constitution prohibits discrimination based on pregnancy and courts must take cognisance of this in their interpretation of the law. It is a violation of a woman's right to equality when such provisions are flouted in cases such as these. This affects her role in the workplace and her means to maintain her economic status which has a direct bearing on her ability to realise and enjoy other rights promised in terms of equality legislation (Centre for Applied Legal Studies Gender Research Project, 2000).

LAW REFORM AND IMPLEMENTATION

The above cases remind us that law reform alone is not sufficient to address all the difficulties faced by civil society. Laws may change some of the structures and procedures in the courts but many of the problems relate to judicial interpretation, a lack of resources, poor administration and unskilled staff and are likely to continue to hamper women's access to justice in South Africa. However, law reform remains a vital process and represents the first step to a legally recognisable democracy. It provides the framework to challenge and realise rights. For this reason, participation of women in the process is crucial. We therefore need to ask the questions: has the process served the interests of women citizens; has it corroded or enhanced the realisation of equity for women; was there a forum for women to be heard in this process and did any interest group make concerted efforts to solicit their contributions?

I support Goldblatt (1997) who states that one of the reasons for the breakdown between the law reform process and implementation of the laws can be attributed to the gender bias that has influenced the process. This has resulted in the virtual exclusion of women's interests from many law reform measures. Lister (in Goldblatt 1997) also highlights some of the obstacles to women's participation in law reform and states that women have less time than men do to be 'active citizens'. Their domestic responsibilities such as caring for children, the disabled and the elderly, serves to isolate them from more 'public' functions. Lack of time has much to do with the unequal distribution of household work, both where women are employed and do a 'double shift' and where they are not. Factors such as the limited availability of transport combined with the very real fear of violence outside the home also contribute to women's lack of participation in the public sphere (Lister in Goldblatt, 1997). These factors are rarely acknowledged and have been rendered some of the most notably invisible obstacles to women's participation and public profiles. Socialisation has institutionalised these obstacles for many women, rendering them almost incapable of identifying a place for themselves in this and other similar public sphere forums.

Goldblatt also cites the unnecessarily complicated and confusing form that the law reform process has taken, which has failed

Law reform remains a vital process and represents the first step to a legally recognisable democracy

to encourage many interest groups to participate. A practical obstacle that is often neglected is the high levels of illiteracy amongst women and their unequal access to educational opportunities. The absence of appropriate and adequate consultation within realistically formulated time frameworks has also been noted. Government needs to acknowledge the fact that many South Africans have no history or culture of public involvement in the law reform process in this country and needs to make a concerted effort to ensure that people are reached. This could be accomplished by more timeous newspaper announcements of proposed reforms with clear indications for the form of submissions and closing dates. Notices to relevant non-governmental and community-based organisations and provincial directives to publicise the proposed reform as widely as possible may assist in drawing more women into the process. There must be a recognition that reforms have to draw upon women's concrete experiences if they are to make a difference to women's lives.

Intended beneficiaries of laws are often in the best position to comment on how particular laws affect them as citizens

Therefore, despite the flurry of reform to address gender inequality, we must question the significance of the process for women. We must reflect on the reasons for their minimal participation and the impact of the 'new laws' aimed at achieving equality for women, in terms of implementation and administration. The case discussed below illustrates how shortfalls in the current administration of the Maintenance Act could have been circumvented if more women were given the opportunity to relate their experiences with maintenance claims. A holistic analysis of a basic issue such as maintenance reinforces the emptiness of 'equality' for women when it is hampered by the lack of appropriate budget allocations and does not take into account women's experiences.

This is not to say that the position of women will be magically transformed if they had access to the law reform process and were able to relate their experiences to impact on the nature of laws drafted and the mechanisms to ensure effective implementation. Rather, it is to highlight that any process is enhanced when it proceeds in a participatory and inclusive manner. Intended beneficiaries of laws are often in the best position to comment on how particular laws affect them as citizens. Surely the object of the equality legislation and its supplementary laws is to ensure the realisation of equity for as many disadvantaged citizens as possible, among whom women rank the highest?

The case of *Mgumane v Setemane 1998 (2) SA 247 (TK)*, illustrates the effects of the breakdown between law reform, implementation and administration of the law that could be avoided if consultation was actively promoted. Here maintenance was claimed for five children by an unrepresented mother, married under customary law. In an appeal from an order of magistrate it was found that the magistrate and the maintenance officer should have conducted a thorough enquiry to establish the financial circumstances of both parties and the validity of the mother's maintenance claim and her personal expenses. In particular, evidence should have been heard for her reason for claiming the same amount of maintenance in regard to the two children who were not at the time living with her, as for the other children. The father, who was a businessman, alleged that he did not earn sufficient income to meet the maintenance claim. His evidence should not have been accepted. Instead the magistrate and maintenance officer should have inquired into and if necessary, subpoenaed witnesses to establish the true income from his various business ventures. The responsibility of placing evidence before the court was not only that of the parties concerned but was shared by the maintenance officer and the presiding judicial officer. The court further held that where the facts demonstrate this to be possible, a parent should be required to expand his or her economic activities in order to meet the needs of dependent children and that parent's inability to pay maintenance should be real and not apparent.

In this case a decision on inability to pay could not be taken as there had been a failure to adequately enquire into the income of the father or to summons witnesses to give evidence on income as was possible in terms of the Act. The court therefore referred the matter back to the magistrates court for a fresh hearing, and ordered the father to pay R500 per month towards the maintenance of the five children pending the finalisation of the fresh enquiry. Despite clear provisions in the law, the officers entrusted with administering the law failed to do so in this case (and in many others) simply because time, lack of staff or adequate incentives, do not motivate them to conduct thorough investigations for each maintenance enquiry.

Recognising these factors, women's groups emphasised the importance of the appointment of maintenance investigators and it was included in the Maintenance Act of 1998. This case highlights some of the inadequate maintenance enforcement mechanisms that the new Maintenance Act intends to remedy. A maintenance investigator would have gathered the facts and necessary financial evidence to provide the court with the necessary information in this case, thereby ensuring the expeditious finalisation of the maintenance claim.

However, despite cases such as these clogging up the justice system and resulting in untold prejudice to users of the relevant laws, our government has still not taken steps to ensure the implementation of section 15 of the Maintenance Act of 1998 that provides for the appointment of maintenance investigators. Apparently due to budgetary constraints, this portion of the Act has yet to be implemented. Once again we see how 'equal laws' do not necessarily improve the lives of disadvantaged women, unless accompanied by a commitment of resources such as a budget, that will ensure effective use of the law by women to protect or challenge their rights within the anti-discrimination and equality framework.

SUBSTANTIVE EQUALITY

Any attempt at achieving substantive equality requires highly developed inter-governmental cooperation, critical analysis of state policies and programmes and an acceptance that conflicts of nights may often arise, since we are seeking equity, not merely similar treatment.

Having somewhat recovered from the unfulfilled expectations of our law reform process and the mainly formal equality that it represents, women have finally committed to learning to speak in terms of substantive equality. The task of recognising and rooting out inequality and injustice from our society is hopefully also considerably refined. We have also realised that inequality and discrimination do not always stem from positive intentions on the part of any given individual or institution. Often inequality permeates some of our most cherished and long-standing laws and institutions. Our obligation therefore is to reconsider our assumptions, re-examine our institutions and re-visit our laws (L'Hereux-Dube, 1997).

We must reject the definition of equality where women have the right to be treated equally to men only to the extent that they are the same as men. This view must be replaced with the recognition that sometimes different people must be treated differently in order for substantive equality to prevail. Also, sometimes the furtherance of equality may enter into conflict with other rights. In such circumstances the courts must realise it may be justifiable for the state to impose reasonable limits on other constitutional rights for the purpose of protecting equality interests.

This reasoning was employed by the Canadian court in *R v Butler (1992) 1 SCR 452*, to uphold provisions of the Criminal Code banning certain types of pornography. The contribution of pornographic material to the exploitation of and violence against women in the broader society was found to justify a stringent limit on the freedom of expression enjoyed by those who engage in its production and distribution.

The question remains whether our courts will do this by passing effective and deterrent

The sources of inequality lie beyond our grasp, in the realities of the labour market, the divisions of familial responsibilities, and prejudicial attitudes held by many members of society

sentences for crimes of violence against women, whether government will allocate realistic budgets to those departments that administer laws impacting directly on the transformation of women's lives, and whether training can ensure positive attitudes in key institutions and the public sector to accommodate the differing needs of women by planning and acting within the legislative framework already in place to ensure such transformation.

Although our courts have recently revealed the importance of re-examining long-standing laws, institutions and assumptions in the light of our commitment to equality, we must acknowledge that real substantive equality cannot be achieved through the actions of judges and lawyers alone. To a large extent the sources of inequality lie beyond our grasp, in the realities of the labour market, the divisions of familial responsibilities, and prejudicial attitudes held by many members of society.

It has been argued that the majority of the court has been insufficiently sensitive to the historical context of racially-based socio-economic inequalities under apartheid

However, substantive equality can be achieved where there is cooperation to achieve the goals of equity. The family law jurisprudence in Canada especially, illustrates the success of effective judicial interpretation in cooperation with the legislative framework and provides useful precedents for the development of jurisprudence that is sensitive to the needs of disadvantaged women. The judgment in *Moge v Moge (1992) 3 SCR 813* must be noted for its reliance on the relevant social context and substantive equality principles. In this case, the court took judicial notice of the phenomenon of the impoverishment of women upon divorce, and the benefits men often gain in their earning capacity due to the unrecognised work by women in the home, and was inspired to fashion a doctrine of equitable sharing of the economic consequences of the marriage upon dissolution.

Subsequent Canadian Supreme Court cases in the family law domain are consistent with this encouraging trend. *Peter v Beblow (1993) 1 SCR 980* and *Willick v Willick (1994) 3 SCR 670* for instance, recognise in no uncertain terms the value of 'housework' as well as the value of the child-rearing responsibilities undertaken by the custodial spouse. These decisions have served to advance the economic and social status of women and children in society when one considers the post-divorce reality: women make up the majority of custodial parents and tend to live in impoverished circumstances compared to their former male partners (L'Hereux-Dube 1997).

APPLYING THE EQUALITY JURISPRUDENCE

The manner in which the Constitutional Court has applied its equality jurisprudence in particular cases has been criticised. It has been argued that the majority of the court has been insufficiently sensitive to the historical context of racially-based socio-economic inequalities under apartheid. Importantly however, the court has noted that a jurisprudence that merely requires negative abstension from certain discriminatory conduct, will not contribute to redressing systemic inequality. However to date, despite having developed key elements of a jurisprudence of substantive equality under section 9, the Constitutional Court has not yet had an opportunity to apply this jurisprudence to claims brought by disadvantaged women seeking the full and equal enjoyment of socio-economic rights.

In *President of the Republic of SA v Hugo 1997 (4) SA 1 (CC)* the court held that Presidential Act 17 of 1994 which provided for remission of sentence to certain categories of prisoners, was not a violation of section 8 of the Interim Constitution. The case concerned a single father who challenged the terms of a Presidential Act which provided for certain categories of prisoners to be granted a special remission of the remainder of their sentences. One such category was mothers with children under the age of 12 years. The respondent had contented that but for the fact that he was male, he would have enjoyed the benefit of the remission. According to the single father, this amounted to unfair discrimination on the ground of gender, coupled with parenthood of

children below the age of 12 years. His claim was rejected by the majority of the judges with Judge Kriegler dissenting on the ground that the provision entrenched gender stereotypes and was accordingly unfair.

Judge O Reagan, in her separate concurring judgment, holds that,

> *insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality (O'Regan J in President of the Republic of South Africa v Hugo 1997 (6) BCLR(CC)).*

According to her, at least two factors are relevant in determining that the effect of the discrimination is unfair in terms of section 8(2). It is necessary to examine the group or groups which have suffered discrimination in the case and the effect of the discrimination on the interests of those concerned: first, the more vulnerable the group adversely affected by the discrimination and second, the more invasive the nature of the discrimination, the more likely it is that it will be held to be unfair.

FACTORS THAT PERPETUATE INEQUALITY: FORMAL EQUALITY

Farha (2000) states that it is not easy to prioritise a global overview of the key issues for women, simply because there are a multiplicity of issues confronting them. To explore and better understand these aspects of women's experiences we are required to highlight conditions which threaten women's political, economic and social equity in South Africa.

For example, even though women's rights are protected in law through anti-discrimination provisions, women's experiences show that obstacles remain because the law is open to judicial interpretation and government administration. This is mainly a result of 'gender neutral' laws applied in a social and cultural context where women are relegated to the private and silent realm, which result in judicial decisions that do not benefit women. Legislation prohibiting discrimination based on gender provides vital protections for women's equality and in many instances prevents discrimination against women. However, women are often faced with a further legal impediment to the realisation of their rights: legal pluralism. Legal pluralism refers to a legal system where two systems of law – such as statutory law and customary law – co-exist. This is common in many African nations. Discrepencies between the two systems are determined in one of two ways: either statutory law or customary law prevails. Our jurisprudence clearly highlights this dilemma and leaves many of the issues unresolved and still governed by customary law, even if that customary law discriminates against women. For example, the customary law of inheritance which is based on a system of male primogeniture and excludes women from inheriting any real rights in immovable property, has been cited with approval by the Supreme Court of Appeal of South Africa in *Mthembu v Letsela, Case no 71/98 May 2000.* This issue of succession in customary law is currently the subject of review by the legislature in line with a recent court judgment instituted by a man who was negatively affected by procedures governing intestate succession in customary law.

Customary law and dominant social attitudes have a direct bearing on women's equality. In many parts of South Africa, men still control the land and the household because community authorities – who are still predominantly male – allocate land to male-headed households. For most women, rights to housing, land and property are dependent on their relation to male relatives, affecting their autonomous rights to land. In practice these rights only attach to women through a system of vicarious ownership – through men as husbands, fathers, uncles, brothers and sometimes sons. Even with our reformed laws where women have the statutory right to own land and property, tradition and dominant social attitudes often prohibit these rights from being enforced. Consultations with women show that our fairly progressive legal framework with respect to gender, is still rooted in a social framework that denies women the

Customary law and dominant social attitudes have a direct bearing on women's equality

legitimacy of legal claims and of being able to exercise 'control' over their land they do own.

In urban communities social attitudes also threaten low-income earning women's security of tenure. Women who receive social assistance, particularly single mothers, often find it difficult to secure or maintain adequate housing because of discriminatory social attitudes held by landlords who believe low-income earning women with children are unlikely to pay their rent and are troublesome. Financial institutions do not provide mortgage loans to these women if the debt service payments constitute more than one-third of their income. This makes it extremely difficult for women to retain their matrimonial home in the event of marital breakdown or separation and it obstructs home ownership as a housing option. These attitudes and practices prevail despite legislation such as the Rental Housing Act No 50 of 1999 which defines the responsibilities of the government in respect of rental housing property; creates mechanisms to promote the provision of rental housing property and access to adequate housing; provides for facilitation of sound relations between tenants and landlords and even lays down general requirements for leases.

The case of *Van Onselen NO v Kgengwenyane 1997 (2) SA 423 (B)* illustrates some of the issues affecting women's access to housing and shelter for her dependents and the consequent impact on her enjoyment of rights guaranteed in the equality legislation. In this case a liquidator had been appointed to attend to the sale of a house which had been the joint property of the respondent and his former wife, Mrs K, to whom he had been married in community of property. After the divorce, Mrs K had moved out of the house with her five children. The liquidator obtained an appraiser's valuation of the house and advised the attorneys of the respondent and of Mrs K, respectively, thereof. Mrs K made an offer to purchase the property. As there were no other offers that were forthcoming, the liquidator obtained an interim order calling upon the respondent to show cause why he and all other persons occupying through him should not be evicted from the house.

In exercising the power to divide the joint estate or to supervise its division, the courts tend to apply the rule relating to the dissolution of partnership – that partnership assets be sold to the highest bidder. The court held that such a rule was not to be applied inflexibly so that the property could not be sold to one of the partners at valuation. The court therefore held it was not inequitable for the house to be sold to misk at a fair and reasonable valuation. It was noted that she needed the house to accommodate the children of the marriage and had raised the requisite funds to pay the purchase price. The court noted that equitable discretion must be exercised to achieve a result which was both fair to the parties and sensible in the circumstances of a given case. Further, that it was not good law to hold that common property had to be sold to the highest bidder in every case, instead of to one of the parties to the divorce if necessary. The court accordingly approved the sale of the house to Mrs K and to ensure her undisturbed possession, granted an eviction against her ex-husband.

This is an important case since it deals with an issue that contributes to women's impoverished financial status after divorce or separation. If there were decisions based on similar reasoning, then perhaps the welfare and maintenance queues would be considerably shorter. It reflects a slowly transforming mindset that is beginning to question invisible barriers that perpetuate women's disadvantage. It encourages further challenges to existing laws and particular judicial interpretations that impact on disadvantaged women. It reminds us that notwithstanding the pervasive negativity around transormation, we are perhaps just a few steps behind the Canadian jurisprudence – which, in similar circumstances, has already taken judicial notice of women's post-divorce impoverishment and the gains to men as a result of women's invisible child-rearing contributions. Had the liquidator in this case been slightly more creative, perhaps the court

could have been asked to order that the house be transferred to Mrs K without her having to pay the purchase price, since 'awarding' her custody really meant she had to accommodate and rasie five children of the marriage, while her ex-husband's post-divorce contribution amounted to alternative weekend contact with the children. Surely her invisible labour in fulfillment of the custody 'award' necessitates some monetary value being attached to it? And perhaps that monetary value could then be set-off against her portion of the purchase price of the matrimonial home, which she only needed to accommodate the children born of the marriage?

THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT

This Act was passed in February 2000 to give effect to the constitutional requirement that national legislation 'must be enacted to prevent or prohibit unfair discrimination' (Section 9(4) of the Constitution). The Act prohibits discrimination by the state as well as private persons; promotes equality; and prohibits hate speech.

The objective of the Act is to achieve substantive equality. It emphasises that it is not unfair discrimination to take affirmative action or positive measures and mandates certain positive measures. It creates remedies for the violation of the prohibition on unfair discrimination and provides mechanisms for its enforcement. It has broad application and extends to both the public and private domain. It provides protection for women who were previously left without assistance because of the reluctance to cross the public/private divide.

The Act prevails where there is a conflict with any other statute. Employees in the informal sector who fall outside the definition of employee in the Labour Relations Act (LRA) and Employment Equity Act, will be afforded protection by this Act. The view is that these groups will be able to bring their claims under the Equality Act rather than have to prove their status as employees under the LRA or Employment Equity Act. Since many of them are women, this Act provides another pocket of legal protection for women (Liebenberg and O'Sullivan 2000). Any person with a complaint may approach the magistrates court for one of the many remedies provided for in the Act. Discriminatory practices by banks and insurance companies; barring of accommodation on racial and sexist grounds; barring of certain groups from restaurants and clubs are some of the areas of discrimination that are covered by the Act.

It is hoped that this Act will live up to its expectation and prove a useful tool for women in their challenges to gender discrimination. Like other laws, this Act is heavily reliant on the allocation of resources from the state for effective administration and implementation. It is hoped that the magistrate's courts, as the first point of entry, will simplify the process for women who have been discriminated against.

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OBSTACLES TO WOMEN'S EQUALITY

Notwithstanding commendable efforts to achieve equality for women, there are significant obstacles hampering the path to equality, I shall outline some of these and comment on some possible constructive interventions that may assist in realising women's aspirations for equity.

With regard to work-related rights, the traditional problem areas for women employees, ie restricted access to work and unequal pay, remain. This aspect is particularly relevant for women farm workers. In addition, the reconciliation of family obligations and work responsibilities also remains a problem for women. We also need to consider the question of women's unpaid work in urban and rural family enterprises and the question of unpaid domestic activities of women.

A recognition that women's lives are shaped by larger economic, social, political and cultural trends will help us understand that markets are structured to respond to the interests and demands of those people with

wealth and access to information. In this way, the human needs of those without 'market power', among which women rank the highest, is rendered invisible and is further aggravated by their lack of access to and control of resources.

It is crucial to mainstream gender and particularly women's equality, into economic frameworks and to promote women's intervention in the decision-making processes that define the allocation of resources.

Civil and political rights are therefore necessary since they ensure the space and freedom for people to participate in an open, transparent and democratic way in those decisions that will affect the realisation of their social, economic and cultural rights.

Besides the legal framework, it is crucial to establish mechanisms to evaluate the fulfilment of social and economic rights

Hofbauer (2000) highlights the fact that women's inclusiveness in any transformation process will ensure that their advancement is not stifled by policies that are neutral on the surface and therefore fail to acknowledge underlying inequalities. If we acknowledge that women are the pillars of marginalised communities and that they disproportionately carry the burden of poverty and human and social reproduction, then we will also recognise that their ability to accurately identify priorities for the well-being of their communities and themselves is crucial. It is through their participation, and the incorporation of gender-sensitive visions that the spiral of poverty can be interrupted. The budget process has frequently been highlighted as one of the key tools in integrating a people-centred approach to development and the design of public policies that strengthen and build up the capabilities of the excluded (Budlender, 1999).

Governments are obliged to move as effectively as possible towards the realisation of socio-economic rights, making 'full use of their maximum available resources' (Budlender, 2000). Even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes. None of the above mentioned provisions is being pursued consistently under the current trend of poverty alleviation programmes in South Africa. The Child Support Grant and its controversial age requirements illustrates this, as does the plight of dependent pensioners in terms of the Social Assistance Act and the thousands of homeless awaiting delivery from the government's housing programmes.

We must concede that we lack concrete and deliberate programmatic action to ensure progress towards closing the inequality gap between men and women and their enjoyment of social and economic rights. To guarantee those rights in the Constitution can only be regarded as an initial formal step that ought to be followed by ensuring a gender-sensitive interpretation of them. Besides the legal framework, it is crucial to establish mechanisms to evaluate the fulfilment of social and economic rights, such as targets for the satisfaction of specific standards, as well as the design of statistical tools and information which is not only disaggregated by sex, but also 'makes visible the full range of women's activities'(Liebenberg and O'Sullivan, 2000).

Mainstreaming a gender perspective in any form of planned governmental action,

> *is a strategy for making women's as well as men's concerns and experiences an integral dimension of the policies and programmes in all political, economic and social spheres so that women and men benefit equally and invisible inequalities are not perpetuated. It doesn't mean that women will be 'allowed' to participate in a development agenda that has already been decided upon. Rather that women as well as men are involved in setting goals and in planning so that development meets the priorities and needs of both men and women (Hofbauer, 2000: 9).*

To ignore the differentiated impact expenditure has on women and men is not merely an act of gender neutrality, but one of gender blindness for which we will eventually pay the price. Many of these costs are currently borne by women and children who are already victims of abuse in the form of emotional and economic hardship. These costs are also borne by society in the form of

lower productivity, strain on health care and welfare resources and its inability to benefit from the vast contributions women can make to the economy and the realisation of the goals of the equality framework. The longer-term impact of inequality could even lead to further tensions on the justice system and other government resources as we become a society in conflict with the explicit directives and goals of our equality clause and all supplementary legislation.

The concern remains that improvements in the law will not make a difference for ordinary women in South Africa if government does not commit sufficient resources to implement the equality provisions. Resource allocation is ultimately, to a large extent, where the legislation will stand or fall. More so, since each law has significant budgetary implications across several departments, co-ordination and inter-departmental co-operation is particularly important for effective implementation of these laws.

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FOOTNOTES

1. Equality views all women and men as the same and deserving of the same equal treatment. It assumes they have common goals and values and that the constitutional guarantee of equality for every individual is sufficient. It does not question whether our laws, policies and programmes that provide for and even promote equality, actually improves the lives of the majority of disadvantaged women. Tantamount to saying that since South AFrica has achieved formal equality through new laws, blacks and whites are now equal and there is no need to redress past imbalanaces through empowerment and redistribution.

   Equity recognises that because of historical conditions, socialisation and patriarchy the needs and goals of women and men are not universal. Further that the struggle for emancipation of women must be linked with the dismantling of all systems that oppress them and not merely by the introduction of equality legislation. Equity anticipates real access to resources realise our constitutional guarantees of equality and ensures an analysis of policies, programmes, planning strategies and evaluation. It recognises the unequal power relations in society despite 'equal laws' and seeks to change this.

2. See Wyllie, 2000.

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