

**How Can the Law Help Reduce
Group-Based Inequalities?**

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**Law, Gender and Inequality in
South Africa: Inclusion and
Exclusion**

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‘HOW CAN THE LAW HELP REDUCE GROUP-BASED DISPARITIES’

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LAW, GENDER AND INEQUALITY IN SOUTH AFRICA
INCLUSION AND EXCLUSION

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I INTRODUCTION

Post-Apartheid South Africa has seen the extensive use of law, guided by human rights, to address the inequalities of the past. This paper looks at the role of law, both in the legislature and in the courts, in addressing gender inequality in South Africa. In doing so, it problematises both the idea of ‘equality’ and the nature of ‘law’ to ask what kind of ‘equality’ the law has been able to extend to women.

Drawing on previous research,¹ the paper looks at three ‘case-studies’ that demonstrate different aspects of the role of the law in reducing group-based disparities. The first looks at a bundle of laws, mostly enacted in the first five years of democracy, that address women’s inequality and subordination in the private sphere. The paper suggests that, beyond the regulatory role of extending rights and benefits, a particularly significant role of these laws was to establish powerful normative frameworks that challenged the traditional gender roles of South African society and, together with the constitutional rights that support them, provide resources for ongoing struggle over women’s position in society. As such, other than their practical effects, these laws constitute important footholds in the task of transforming gender relations. The extent to which they have any further traction in society however, depends on whether and how they are embedded within, and taken up by, wider political struggles.

The second study looks at the role of the Constitutional Court in adjudicating the equality right. It finds that the court has developed a progressive jurisprudence that enables the court to address social and economic equality claims. However, the courts response to claims for social recognition has tended to inclusive (sometimes reinforcing traditional gender roles) rather than transformative, and the court’s ability to address claim for economic inequality is limited by its institutional role and the nature of equality law. Courts are accordingly better at enabling social inclusion, rather than transformative or redistributive outcomes (although the latter are sometimes possible).

¹ See C Albertyn ‘Defending and Securing Rights through Law: Women, Law and the Courts in South Africa’ (2005) *Politikon* 217; C Albertyn ‘Substantive Equality and Transformation in South Africa’ 2007 (23) *SAJHR* 253; C Albertyn ‘Rights At Work – The Transition To Constitutional Democracy And Women In South Africa’ in C. Jenkins, K. Govender & M. du Plessis (eds) ‘Law, Nationbuilding & Transformation: The South African Experience In Perspective’ (2009 forthcoming).

Finally, the third study looks at the area of gender and customary law to illustrate how law and constitutional rights constitute ongoing sites of struggle over power, interests, meanings and resources. These struggles take place in courts, the legislature and in people's day to day lives. This study suggests that public norms do find their way into private contests, thus showing that links can be, and are, forged between public and private norms (albeit, in this case, with a flexible system of community based law).

The paper concludes that law is a necessary tool in reducing group based inequalities, indeed its regulatory and normative power mean that it cannot be ignored. Beyond the state-related problems of implementation, the law's impact depends upon the extent to which its regulatory and normative potential is taken up beyond courts and parliaments (and politicians, lawyers and advocacy groups) in broader political and community struggles.

II WOMEN IN SOUTH AFRICA

Apartheid resulted in the extensive and systematic discrimination, exclusion and subordination of black people in all aspects of political, social and economic life. Bound up with this racial inequality and oppression, but also autonomous from it, was inequality on the basis of gender. South Africa was, and remains, a deeply patriarchal society in which women have been subordinated to men, in different ways, in public and private life. These specific and diverse forms of gender inequality are graphically captured in sociologist, Belinda Bozzoli's image of a 'patchwork quilt of patriarchies'² – connoting the multiple intersections of gender with class, geographic location, culture, and so forth, that constitute the position of women in South Africa.

Racial divisions have characterised much of women's experience of the law in South Africa. For African women, colonialism and segregation meant that their lives were defined by rigid racial and sexual boundaries. The law was central to maintaining these boundaries as it enforced racial segregation, and reinforced customary law as a gendered set of rules and customs that privileged men over women.³ However, the pre-eminent concern of black women was to challenge the apartheid system and its racist laws within the national liberation struggle.⁴ In contrast, white women, although subordinate to their fathers, husbands and sons, enjoyed many of the privileges of their race and (usually) class. Their enfranchisement in 1930 enabled them to challenge their legal disabilities within the white state. Thus throughout the post-war period, and especially from the 1970s, small, white, middle-class, liberal feminist groups engaged the state on issues such as legal status, marriage, abortion, family law and violence against women.⁵ Although both black and white women

² B Bozzoli 'Marxism, Feminism and South African Studies' in (1983) 9 *Journal of Southern African Studies* 139. Although subsequently criticised for portraying race, class and gender in monolithic terms, the image remains a vivid description of the racially fragmented, yet patriarchal, South African society. See A Charman, C de Swardt & M Simon 'The Politics of Gender: Negotiating Liberation' (1991) *Transformation* 15.

³ M Chanock *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985); and S Burman 'Fighting a two-pronged attack: The changing legal status of women in Cape-ruled Basutoland, 1872-1884' and J Guy 'Gender Oppression in Southern Africa's precapitalist societies' both in C Walker *Women and Gender in Southern Africa to 1945* (1990).

⁴ For a detailed account of the role of women in struggles against colonialism and apartheid, see Cheryl Walker *Women and Resistance in South Africa* (1982).

⁵ For a discussion of the legal issues taken up by women after 1960, although without detailed attention to the racial divides that structured access to these legal reforms, see C Murray and F Kaganas note 24 above. The older

were relegated to the domestic sphere, this occurred under different and unequal systems of law.⁶ 'Patriarchy' as a set of gendered norms and structures remained intact across all communities.

In 1994, gender was a significant source of inequality in South Africa, but race remained an important determinant of women's access to rights and benefits, both in the content and in the implementation of the law. For example, many black women had little choice in the application of customary law to areas of their lives (such as inheritance and access to communal land) and were significantly discriminated within this system. Black women also had less access to benefits 'enjoyed' by all women, for example, they were significantly discriminated against in accessing abortion.⁷

Race, as well as class and gender, also determined the social and economic position of women in South Africa. The absolute subordination of black to white, and the relative treatment of different black groups (African, coloured and Indian), under apartheid placed black African women at the bottom of the socio-economic hierarchy, but, in many instances, African men, just above them. Amongst the poor, black African women have less income, are more likely to be unemployed, less likely to be educated and have less access to facilities and services than any other group.⁸ By 2008, while overall poverty has declined slightly (largely due to the impact of social grants), inequality has deepened.⁹ Women continue to demonstrate lower incomes, higher unemployment rates and less access to assets than men, with young women under thirty showing an unemployment rate of 30%.¹⁰ African rural women remain the poorest category of citizens, largely untouched by poverty alleviation strategies.¹¹ In

article by J Segar and C White ('Deconstructing Gender: Discrimination and the Law in South Africa' (1989) 4 *Agenda* 95) has less detail, but gives a greater sense of the race and class underpinnings of legal reforms for women in the late twentieth century.

⁶ In addition, institutionalised racial inequality meant that many white women were released from some of the constraints of social reproduction by relying on black women in domestic service.

⁷ In 1995, just over half (54%) of 2 463 legal abortions were performed on white women - just under 11% of the population. Furthermore, 92% (2 260) took place in two main urban centres and almost half in private clinics. See the statistics set out in the Reproductive Rights Alliance's *Submission to the Portfolio Committee on Health on The Termination of Pregnancy Bill* (1996) 5.

⁸ For example, just after democracy, in 1994, official statistics confirmed that while the unemployment rate amongst all Africans was 42.5%, it was 52.4% among African women. This exceeded that of coloured (24.1%), Indian (14%) and white (5.1%) women. Of those women who are employed, 57% of African women and 41% of coloured women were in elementary (unskilled) occupations. Only 6% of Indian women and 2.8% of white women fall into this category. Nearly half of all employed African women (48%) earn less than R500 per month (the lowest earning category). Only one quarter of African men (25.8%) earn this amount. (*The People of South Africa Population census, 1996; Census in Brief Statistics South Africa, Report no. 1 03-01-11 [1996]*). For detailed gender comparisons see D Budlender *Women and Men in South Africa* (1998) and D Budlender *Women and Men in South Africa: Five Years on* (2002).

⁹ Economic inequality is well-documented, with a rising Gini co-efficient pointing to significant income inequalities, largely driven by increased wage inequality South Africa's Gini coefficient rose from 0.64 in 1995 to 0.72 in 2005. H Bhorat, C Van der Westhuizen & T Jacobs 'Income and Non-Income Inequality in Post-Apartheid South Africa: Drivers and Possible Policy Interventions' Unpublished presentation, 29 September 2008, Development Policy Research Unit, University of Cape Town.

¹⁰ Neva Seidman-Makgetla 'Women and the Economy' (2004) citing the 2003 Labour Force Study of Statistics South Africa).

¹¹ In a study of the poorest developmental nodes in South Africa, Everatt & Smith found the 'poorest of the poor' (based on asset and social poverty) to be overwhelmingly rural (in KZN, EC and FS), living on farms or traditional homesteads and overwhelmingly female (78%) D Everatt and M Smith *Building Sustainable Livelihoods. An overview* The Department of Social Development's study on the ISDRP and URP (October 2008). See also D Everatt 'The undeserving poor. Poverty and the politics of service delivery in the poorest nodes of South Africa' (2009) 36 *Politikon* (forthcoming).

addition, South Africa has seemingly endemic gender based violence¹² and high rates of HIV infection¹³ among women, especially young women.

More difficult to measure perhaps is the place occupied by women in relation to men in all communities. Social norms tend to subordinate women in traditional gendered roles of wife, mother and daughter. There is some evidence of this in opinion surveys which continue to show conservative attitudes towards women (eg. attitudes to abortion). There is also some evidence that these are more prevalent amongst poorer communities, for example, Everatt et al found that the ‘poorest of the poor’ demonstrated the most hostile attitudes to reproductive rights and gender based violence, suggesting that ‘gender is the first casualty of low social capital’,¹⁴ and also suggesting the important connections between social and economic inequality.

Gender inequalities are complex in South Africa, compounded by race, class, culture and geographic location. Responses to these inequalities also complex, encompassing a significant network of social grants (for a developing country), economic policy and development programmes, and a range of job creation and poverty alleviation measures. The focus of this paper is limited – looking only at what the law has done in relation to women’s rights, focussing of ‘women specific’ laws and cases.

III ‘LAW’ AND ‘EQUALITY’

a) Some thoughts on law

Law has always played an important role in relation to group-based inequality in South Africa. Under colonialism and, especially, apartheid, law was the primary means by which racial inequalities were entrenched.¹⁵ In the particular context of a white, oligarchic and increasingly authoritarian state, the principle of parliamentary sovereignty saw the National Party- dominated Parliament pass racist laws with impunity and absolved those laws from compliance with ‘higher’ values.

The achievement of democracy ushered in a legal revolution in South Africa as the new Constitution established a democracy based on universal suffrage, democratic values and fundamental rights. The Constitution, with a substantive Bill of Rights, became the supreme law and judicial review enabled courts to scrutinise all state action (and some by private individuals) against the rights and values enshrined in the Constitution. Human dignity, the achievement of equality and freedom were characterised as foundational democratic values and the entrenchment of a powerful equality clause and the socio-economic rights provided potentially important legal

¹² GBV – police figures for rape have shown a consistent upward trend from 1994 – but as reflect reported, do not know true extent. Community studies on domestic violence show between 20% and 50% subject to physical or emotional abuse Summarised in Lisa Vetten ‘Violence Against Women in South Africa’ in Sakhele Buhlungu et al *State of the Nation: South Africa 2007* (2007) 425, 429-430.

¹³ The SA Department of Health found that 24.8% of women attending public health clinics in 2001 were infected with HIV. This was estimated to result in 4.74 million (1 in 9) South Africans (2.65 million women and 2.09 million men) infected by the end of 2001. *National HIV and Syphilis Sero-prevalence Survey of women attending public antenatal clinics in South Africa – 2001* SA Department of Health (2002) <http://www.doh.gov.za/aids/index.html>

¹⁴ D Everatt ‘The undeserving poor. Poverty and the politics of service delivery in the poorest nodes of South Africa’ (2009) 36 *Politikon* (forthcoming).

¹⁵ This was largely a continuation of the past – law regulated lives of black people since colonial times. See the work of Martin Chanock. The most obvious example of this is the 1913 Land Act which authorized the reservation of about 13% of the land for more than 80% of the population.

tools for the addressing poverty and all forms of inequality. The coming to power of a liberation movement committed to eradicating the inequalities of the past suggested that law reform would be an important tool for transforming South African society in accordance with fundamental rights and values of the Constitution.

However, as several generations of feminist scholars have pointed out, for women the law is a 'double-edged sword' - both responsive and resistant to feminist approaches and perspectives.¹⁶

In thinking about the role of law in relation to gender equality, one might distinguish between law's regulatory power and its normative power. Law is important both in its ability to regulate access to rights, benefits and resources and in its power to define an authoritative 'reality'.¹⁷ In the exercise of its regulatory and its normative power, law draws lines of inclusion and exclusion: on the one hand who has access to rights, resources, benefits etc., and on the other, who falls within or outside of the boundaries of social recognition (good/bad, deserving/undeserving, etc). This is the power of law and the reason why the law is so important to the problem of inequality – at the very least it can redraw the boundaries of inclusion (and exclusion) in regulatory and normative terms.

While the law and legal struggles cannot be eschewed, for women the law can be an imperfect and even hostile tool. Law is more likely to reproduce existing social and economic relations, than to change them. Potentially transformatory policies and laws can be limited by inadequate enforcement. Court victories may extend rights to women on terms that reinforce, rather than challenge, the *status quo*. The law often includes or accommodates women into an existing set of social and economic relations – where the fundamental power relations remain unchanged. It is less likely to address the social and economic power relations of society: the way we think about women and men, their roles and relationships, the family and society, as well as the gendered distribution of opportunities and resources within the family, the community, the economy and the state.

Nevertheless, some feminist legal thinkers have argued for the transformative potential of law, for the possibility that the law may not merely include or accommodate women, but can also help to transform their 'reality' in normative or practical terms.¹⁸ This process goes well beyond a concern with the content of a particular law. On the contrary, it requires legal strategies that also address the normative and conceptual underpinnings of the law, as well as its application and practice. It is also an incremental process that requires constant engagement with the many faces of the law.

b) (Substantive) Equality as a force for change

¹⁶ Mossman, Mary Jane (1998), 'Feminism and the Law; Challenges and Choices', *Canadian Journal of Women and the Law*, 10, pp. 1-16.

¹⁷ Smart, Carol (1989), *Feminism and the Power of Law* (London: Routledge).

¹⁸ e.g. R West (1998) 55 'Jurisprudence and Gender', *University of Chicago Law Review* 1; J Nedelsky, Jennifer (1993), 'Reconceiving Rights as Relationship', *Review of Constitutional Studies/Revue d'etudes Constitutionnel*, 1; J Nedelsky (1998), 'Violence Against Women: Challenges to the Liberal State and Relational Feminism' in I. Shapiro and R. Harding (eds.) *Political Order*, pp. 454-497.

In South Africa, 'equality' came to be the primary idea that would drive gendered change – in law, politics and economics. Indeed, much has been written about the significance of gender equality as a mobilising force, a political aspiration and a constitutional ideal for the South African women's movement during the political negotiations for democracy in the early 1990s. United by a common experience of exclusion, women rallied across race, class and political divisions to secure their inclusion in the new democracy under the banner of the Women's National Coalition (WNC). The WNC sought to entrench gender equality in the form and content of the constitutional text, and to define its meaning in a new South Africa through a political campaign to draw up the 'Women's Charter'.¹⁹

Equality, of course, is a contested concept. In the South Africa's women's movement of the 1980s and early 1990s, for example, an emphasis on socio-economic equality (redressing the wider social and economic inequalities of the past) co-existed with a more radical feminist understanding of women's autonomy and equality in family relations (freedom from violence, reproductive choice). It was the former meaning – a more redistributive paradigm concerned with economic liberation and substantive equality (understood as the elimination of the structural determinants of inequality and linked to national liberation) – that was perhaps dominant over the more radical view (that prioritised women's agency over their bodies) in 1994.²⁰ However, both shaped law reform after 1994, and perhaps both need to be understood within the meaning of 'substantive equality' - in the sense that issues of agency and bodily integrity are partly linked to systemic and group-based inequalities that generate particular norms and stereotypes about women's gender roles (eg. Ideas about women as victims or as weak and requiring protection mitigate against the recognition of women's agency).

In the early 1990s South African gender activists, including feminist lawyers, were able to draw on feminist legal writing, mainly from Anglo American legal systems, that warned of the dangers of a formal idea of equality that sought to include women on the same terms as (white) men.²¹ This helped to shape the idea of 'substantive equality' in the constitutional text, and, later, the jurisprudence of the Constitutional Court (see V below). The idea of 'substantive' equality is derived from the understanding that inequality is rooted in political, social and economic cleavages between groups, rather than the result of arbitrary or irrational action. It acknowledges the complexity of inequality, its systemic nature and its entrenchment in social values and behaviours, the institutions of society, the economic system and power relations.

¹⁹ C Albertyn (1994), 'Women and the Transition to Democracy in South Africa', in C. Murray (ed.) *Gender and the New South African Legal Order* (Cape Town: Juta and Co) pp. 39-63; S Hassim (2005), *Women's Organizations and Democracy in South Africa: Contesting Democracy* (Madison: University of Wisconsin Press); S Meintjes (1998), 'Gender, Nationalism and Transformation: Difference and Commonality in South Africa's Past and Present', in Rick Wilford and Robert L. Miller (eds.) *Women, Ethnicity and Nationalism: The Politics of Transition* (London: Routledge).

²⁰ C Albertyn & S Hassim (2003) 'The Boundaries of Democracy: Gender, HIV/AIDS and Culture' in D Everatt & V Maphai (eds.) *The Real State Of The Nation* (Johannesburg: Interfund); S Hassim 'Voices, Hierarchies and Spaces: Reconfiguring the Women's Movement in DemocrAtic South Africa' (2005) 32 *Politikon* 175, 180.

²¹ K Crenshaw (1989) 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *University of Chicago Legal Forum*, special edition 139; A Harris (1990) 'Race and Essentialism in Feminist Legal Theory', *Stanford Law Review*, 42, p. 581; C MacKinnon (1986) 'Difference and Dominance: On Sex Discrimination', in C. MacKinnon *Feminism Unmodified: Discourse on Life and Law* (Cambridge: Harvard University Press); K Mahoney (1994) 'Canadian Approaches to Equality Rights and Gender Equity in the Courts' in R. Cook (ed.) *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press).

For women, it was also important to transform gendered social and economic inequality in the public and private spheres, and to ensure that the 'the concepts of both human rights and democracy [are] ... be redefined and interpreted in ways that encompass women's experience'.²² This suggested a reliance on equality to inform change in a manner that might fundamentally alter existing patterns of gender relations.

IV LAW REFORM – TRANSFORMING PUBLIC NORMS

After 1994, women's rights advocates were able to take advantage of the fact that laws, framed by human rights, were major tools for shaping the new society.²³ In addition, the particular conditions of the transition to democracy enabled the passage of a series of laws attending to gender equality and women's rights. This included a strong political commitment to gender equality within the ruling party,²⁴ a significant presence of women in the state, strong civil society organizations and a positive constitutional framework. Indeed, the Constitution accorded women a central place in the new democracy, envisaging a society based on non-sexism and non-racism in which there would be equality between men and women, and people of all races.²⁵ The value of gender equality was given force by a powerful equality right, justiciable socio-economic rights as well as the right to be free from violence and the right to bodily integrity and reproductive decision-making.²⁶

Historically, rights and the law have reinforced the public/private divide and have traditionally ignored ideas of justice in the family (the distribution of opportunities and resources, recognition of value of women's work, including women's reproductive role, importance of women's choice and autonomy). In South Africa in 1994, a particular concern was that rights should embrace the private sphere, including the areas of culture and religion. Most black women lived under a system of customary law that denied them equal rights with men and relegated them to the status of children.²⁷ Many women struggled to obtain maintenance for themselves and their children through the court based maintenance system. Family law had otherwise been subject to fairly extensive reforms from the 1980s and there were few legal obstacles. However, women had few legal avenues to protect themselves against violence, were subject to rape laws whose content and application reinforced

²² Women's National Coalition (1994) *The Women's Charter for Effective Equality* (Johannesburg: Women's National Coalition) preamble.

²³ For a comprehensive description of legislative gains for women see Michelle O'Sullivan & Christina Murray 'Brooms Sweeping Oceans? Women's Rights in the First Decade of Democracy'; in Murray and O'Sullivan (eds) *Advancing Women's Rights* (2005: Juta and Co) 1-40.

²⁴ Some feminist scholars have suggested that gender equality had emerged as a 'moral touchstone' of the new democracy. Catherine Albertyn, Beth Goldblatt, Shireen Hassim, Likhapha Mbatha and Sheila Meintjes 'Engendering the Political Agenda in South Africa' in United Nations International Research and Training Institute for the Advancement of Women *Engendering the Political Agenda: the Role of the State, Women's Organisations and the International Community*: (Santo Domingo, Dominican Republic: United Nations International Research and Training Institute for the Advancement of Women, 2000) 170. See also the research report: Catherine Albertyn (ed) *Engendering the Political Agenda: A South African Case Study* (Johannesburg: Centre for Applied Legal Studies, 1999) 15.

²⁵ Preamble, interim Constitution; section 1 of the 1996 Constitution.

²⁶ Sections 12(2), 24, 25, 26, 27, 28 & 29 of the Constitution of the Republic of South Africa, 108 of 1996

²⁷ K Robinson *SAJHR*

gendered stereotypes and denied justice, and had limited access to safe, legal abortions.

Since 1994 a series of laws have been passed to address these issues. These related to women's bodily autonomy (reproductive choice²⁸ and violence²⁹) and introduced greater equality to the private sphere of the family (customary marriage,³⁰ maintenance,³¹ custody and access). Other processes addressed inequality and gave legal protection against sex and gender discrimination in employment³² and more widely in society.³³ Apart from laws that directly addressed women's subordination, there was some recognition of women's needs in laws relating to land and housing,³⁴ access to water,³⁵ health,³⁶ social assistance,³⁷ the public sector³⁸ and local government.³⁹ (these are not addressed in this paper)

At the same time, engaging the state was not always a successful strategy. In some instances, law reform processes were interminably delayed by a range of factors, including the need to resolve competing interests or policy positions, their place in the list of legislative priorities or resource constraints. Such laws included the reform of customary succession, Muslim marriages and co-habitation, as well as the law relating to rape and sex work.⁴⁰

²⁸ The Choice on Termination of Pregnancy Act, 92 of 1996 provides for abortion on request in the first 12 weeks and in terms of broad conditions between 12 and 20 weeks.

²⁹ The Domestic Violence Act, 116 of 1998, provides for increased protection against violence by removing several definitional and legal barriers to obtaining restraining orders against abusive partners; the Criminal Law Amendment Act, 105 of 1997, provides for minimum sentences for certain kinds of rape and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 is a comprehensive reform of the procedural and substantive law relating to rape and sexual assault.

³⁰ The Recognition of Customary Marriages Act, 120 of 1998 fully recognises customary marriages and provides for equality in status, decision-making, rights to marital property and children.

³¹ The Maintenance Act, 99 of 1998 improved the system of securing private maintenance. This was especially important for women claiming maintenance for their children from fathers.

³² The Basic Conditions of Employment Act, 75 of 1997, extended maternity and parental protections and the Employment Equity Act, 55 of 1998 provides protections against discrimination on the basis of sex, gender, pregnancy and marital status. It also provides that women are a 'designated group' for the purposes of affirmative action.

³³ The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, provides for protection against unfair discrimination on the grounds of sex, gender, pregnancy and marital status.

³⁴ Policy frameworks and laws on housing, as well as land reform, have sought to address gender concerns. See O'Sullivan & Murray 30-31.

³⁵ The development of policies on water sought to ensure that women were empowered as users of waters and as participants in water management activities. Department of Water Affairs and Forestry *White Paper on a National Water Policy for South Africa* (Pretoria: Department of Water Affairs and Forestry, April 1997) para 73.3.

³⁶ See Barbara Klugman 'Mainstreaming gender equality in health policy' *Agenda* (Monograph:1999), 54.

³⁷ Social grants were expected to reach over 13 million beneficiaries in South Africa and are a major component of poverty alleviation. See the 2009 Budget Speech of Finance Minister, Trevor Manuel available at <http://www.gov.za>.

³⁸ Here, gender was addressed in relation to employment conditions within the public sector. For example, the White Paper on the transformation of the public sector set the target that 30% of new recruits to middle and senior management should be women. Department of the Public Service *The Transformation of the Public Service* (Pretoria: Department of the Public Service, 15 November 1995), chapter 10.

³⁹ There was intense engagement on the policy and law reform process of local government, especially in relation to the representation of women in local government. See Mirjam Van Donk (2000) 'Local Government: A Site of Struggle for Gender Equity' *Agenda* 45 (2000), 4-12.

⁴⁰ The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 was eventually passed four years after the Bill [B50-2003] was first tabled in Parliament. The Reform of Customary Law of Succession & Regulation of Related Matters Bill [B10-2008] was still before Parliament in March 2009 (although due to be passed before April 2009 elections), four years after the customary law of inheritance was found to be unfair sex/gender discrimination in *Bhe v Magistrate Khayelitsha* and the publication of the final report by the South African Law Reform Commission (Project 90 Report on the Customary Law of Succession, April 2004). In relation to the reform of Muslim marriage, the South African Law Reform Commission approved a Report

Nevertheless, by 2000 women in South Africa came to enjoy unprecedented legal equality in the form of entrenched human and legal rights. What did this mean?

Firstly, it is clear from ongoing research that women experience a range of difficulties in accessing these rights. This is, of course, especially true for women marginalized by poverty or by living in a rural area. There are significant obstacles of institutional capacity, human and financial resources, political will, knowledge and education etc. that interrupt the ability of women to secure these rights. Addressing these remains an important and ongoing task.

However, some of the most significant advances measured by these laws lie in what they say about law's normative power and the ability to entrench, at least in public frameworks, 'new' ideas about women as equal to men, and as autonomous beings, capable of moral agency and deserving of bodily integrity. Thus, the Choice on Termination of Pregnancy Act, 92 of 1996, shifted the public meaning of abortion from a crime (except in certain defined circumstances) to the exercise of fundamental rights to equality and choice. The Recognition of Customary Marriages Act, 120 of 1998, established the idea of women in customary marriages as fully equal to men with the same rights over property and children (rather than subordinate to them and requiring their protection). The Domestic Violence Act, 116 of 1998, recognized domestic violence as a serious social evil and affirmed women's rights to bodily integrity (rather than an entitlement of men). Both in the advocacy processes leading up to the reform of the laws, and in the laws themselves, the presence of public norms and values that had excluded and subordinated women were challenged – and ensured new norms of gender equality and women's dignity and autonomy entrenched in law.

The nature of the shift is perhaps demonstrated by the fact that several of these laws were challenged. The Choice on Termination of Pregnancy Act has been challenged on at least two occasions, both of which contested the autonomy of women to make choices about their pregnancy. The first sought to argue that abortion was a violation of fetal rights,⁴¹ while the second claimed that minors lacked the autonomy to make decisions about abortion with parental assistance.⁴² In both instances, the court reiterated women's right to reproductive decision-making guaranteed in s 12 (2) of the Constitution, and hence their status as autonomous beings capable of moral agency. The Domestic Violence Act⁴³ has also been challenged in court, only to be justified on the basis of women's rights, especially their rights to equality, dignity and freedom and security of the person. Finally, the Recognition of Customary Marriages Act is contested by traditionalists whose view of women is one of paternalism and protection, rather than equality and independence (see below).

containing recommendations and a proposed draft Bill on the recognition of Islamic marriages and submitted it to the Minister for Justice and Constitutional Development on 22 July 2003 for consideration and promotion in Parliament. The Bill has yet to be tabled in Parliament. The South African Law Reform Commission's investigation into Domestic Partnerships (Project 118) ended with a Report in 2006, but has seen no further legislative action as the question of same-sex marriages was fast-tracked after the case of *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) and the issue of heterosexual co-habitation left hanging.

⁴¹ *Christian Lawyers Association v The Minister of Health* 1998 (11) BCLR 1434 (T).

⁴² *Christian Lawyers Association v The Minister of Health* 2005 (1) SA 509 (T).

⁴³ *S v Baloyi*, a case in which the Constitutional Court was asked to consider the legality of the Prevention of Family Violence Act, 133 of 1992, a law that provided legal protection to victims of domestic violence by permitting easy access to an interdict that restrained the perpetrator from continuing the violence. ADD OMAR

In addition, this contestation influences women's ability to exercise their legal rights. There is growing evidence, for example, of how attitudes of police officers prevent women from accessing help with domestic violence and how some health workers stigmatise women seeking abortions.

Engaging the state in law reform has thus resulted in important symbolic changes to the idea of women, their place in society and their recognition as equal, autonomous beings. At the same time, these run the risk of being merely rhetorical unless they are embedded in wider political struggles. Indeed, some of the criticism of law reform as a strategy for addressing gender inequality has been on the limited nature of its impact. This takes a number of forms.

Firstly, the almost exclusive focus on law and the state, and on public norms, has meant that private norms have been left untouched. Law thus can limit the reach of the debate and provide a 'comfortable' alternative to the more difficult task of addressing social norms.

Secondly, some of the ways of engaging formal processes have tended to reinforce traditional ideas of women (eg as victims, deserving of protection) and have not necessarily been located in more transformative discourses.

For example, abortion is justified on the grounds of socio-economic conditions and health needs rather than as an unambiguous right. As a result, constitutional and legal frameworks have not been used to firmly embed women's rights to sexual and bodily autonomy in the public spheres. Nor have they been used to engage the cultural norms and values of gender and family that shape women's private subordination, and intense vulnerability in the private sphere and to HIV/AIDS. Equality discourses are also limited here as they tend to establish the idea of women's equal status in the family, but do not necessarily provide a mechanism for challenging more traditional ideas of women's dependency and men's dominance. This needs a more nuanced discussion about the position and value of individual women in our society.

.... asserting women's agency through insisting on referring to 'survivors' rather than 'victims' of gender-based violence has not been part of a sustained ideological engagement with gender norms and stereotypes and the construction of alternative discourses. In general, gender politics are often reactive, rather than actively promoting an alternative world. They meet women's practical needs, rather than their strategic interests.⁴⁴

Thirdly, Shireen Hassim has suggested that the 'strategy of inclusion of women in formal political institutions of state and party' has secured substantial formal recognition but has tended to 'displace the transformatory goals of structural and

⁴⁴ C Albertyn & S Hassim (2003), 'The Boundaries of Democracy: Gender, HIV/AIDS and Culture', in David Everatt and Vincent Maphai (eds.) *The Real State Of The Nation* (Johannesburg: Interfund).

social change'.⁴⁵ She has argued that these have been insufficiently integrated into the needs and interests of poor women.

Despite these problems, addressing normative frameworks – the symbolic value of law in defining who are women are – remains a potentially significant part of using the law to reduce group based disparities. However, it needs to form part an active political engagement with the social and cultural norms that regulate people's daily lives and subordinate women. In this context, an engagement with social and cultural norms has not been a priority of the women's movement in South Africa. For example, in relation to violence against women, the emphasis has been on national advocacy work to improve the law and its enforcement and increase the allocation of resources from the state, rather than a sustained engagement with the cultural attitudes, norms and values that ferment gender based violence.⁴⁶ While this focus on the state may be necessary, it tends to reflect an approach to politics that is limited to conventional understandings of the public sphere. Arguably, with a basic set of legal rights in place, it is now time to address the more difficult task of institutionalising democratic norms of women's equality, autonomy and freedom within society as a whole. This entails multiple challenges to the dominant cultural understandings of gender, sexuality, relationships and the family within society, thus bringing issues of private power, and the cultural norms that sustain them, into the public domain.

III COURTS

In a constitutional democracy, courts are significant sites for advancing gender equality.

South African has a strong equality right, that permits positive measures to address past inequalities and outlaws all unfair discrimination based on one or more ground, including race, sex, gender, marital status and sexual orientation.⁴⁷ A particular concern, early on, was to ensure that the interpretation of this rights by the Constitutional Court would enable the pursuit of 'substantive equality' – one that was concerned with remedying group-based disadvantage, enabling courts to interrogate alleged inequality or unfair discrimination with due regard to the context and impact of the impugned law or conduct. In a series of early cases (in which women's groups engaged by way of amicus curiae briefs), the Constitutional Court established a fairly robust jurisprudence that required an interrogation of context, impact and the nature for the group of which the complainant was a member.⁴⁸ Attention to context and impact is a potentially powerful aspect of equality jurisprudence, enabling courts to move beyond abstract and formalistic reasoning to understand the actual nature and impact of the impugned law or conduct (ie. to look at group based disparities in a social and economic and not just a legal sense). In addition, the court identified the impairment of dignity as the litmus test in determining whether a particular law or conduct was indeed unfair and thus impermissible. This has proved to be the

⁴⁵ S Hassim 'Voices, Hierarchies and Spaces: Reconfiguring the Women's Movement in Democratic South Africa' (2005) 32 *Politikon* 175, 189.

⁴⁶ See Jane Bennett "'Enough lip service!'" Hearing postcolonial experience of gender based violence' *Agenda* 50 (2001) 90-91; Shereen Essof 'African feminisms: histories, applications and prospects' *Agenda* 50 (2001) 126.

⁴⁷ Section 9 of the Constitution.

⁴⁸ See *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC). For a discussion of this jurisprudence, see C Albertyn & B Goldblatt 'Equality' in S Woolman et al (eds) *Constitutional Law of South Africa* (2 ed 2007) chapter 35.

weakness in equality jurisprudence as the Court has been able to adopt different understandings of dignity to undermine substantive equality ends.⁴⁹

For women, the equality right has been used to target laws that discriminate on the basis of sex, gender and marital status.⁵⁰ These include claims by customary wives for equal access to family resources,⁵¹ claims by women in (unrecognised) muslim marriages⁵² and by cohabiting partners for legal benefits similar to those accorded married couples,⁵³ claims by sex workers for recognition (by decriminalising sexwork).⁵⁴ While some of these cases have resulted in important practical and normative victories – particularly in relation to customary law- they have also exposed the faultlines of equality jurisprudence, namely, that '[w]hile courts can be powerful institutions for achieving social inclusion, this had tended to occur within clearly defined institutional, doctrinal and normative boundaries that limit the possibilities of fundamental shifts in power relations in society'.⁵⁵

Most equality claims brought to the Constitutional Court have been claims for social recognition,⁵⁶ claims that assert the social identities and value of the excluded group and that ask for inclusion within a moral community of equals and for access to rights, resources and benefits based on membership of that community. Other than claims by women, these include challenges to racially discriminatory laws and practices;⁵⁷ claims for legal recognition of gay and lesbian identities, relationships and families, and the corresponding benefits;⁵⁸ and claims by permanent residents/asylum seekers for legal access to the same jobs and benefits as citizens.⁵⁹ These include significant victories of inclusion – not least the recognition of gay and lesbian relationships firstly by extending a series of 'marital' benefits and finally by recognising the right to marry.⁶⁰

However, there are clear limits to the social recognition of groups. There is space for one brief example.⁶¹ The extension of rights to gay and lesbian couples was based on the idea that these relationships were equivalent to marriage, but because marriage was legally impossible – the choice to marry was not available to partners in these relationships. In contrast, rights were denied a cohabiting (heterosexual) claimant as

⁴⁹ Ibid.

⁵⁰ For a detailed discussion of the equality right and its application to women, see C Albertyn 'Equality' in E Bonthuys & C Albertyn *Gender, Law and Justice* (2007) chapter four.

⁵¹ *Bhe v Magistrate, Khayalitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 1 SA 580 (CC); *Gumede v President of the RSA* [2008] ZACC 23 (8 December 2008).

⁵² *Daniels v Campbell*

⁵³ *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

⁵⁴ *Jordan v The State* 2002 (6) SA 642 (CC).

⁵⁵ Albertyn (2007). See also Bonthuys (2008).

⁵⁶ N Fraser *Justice Interruptus* (1997).

⁵⁷ *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); *Moseneke v Master of the High Court* 2001 (2) BCLR 103 (CC); *Mabaso v Law Society of the Northern Provinces* 2005 (2) BCLR 129 (CC); *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 (4) BCLR 347 (CC).

⁵⁸ In particular, the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 SA 6 (CC).

⁵⁹ ⁵⁹ *Larbi-Odam v member of the Executive Council for Education (N-W Province)* 1997 (12) BCLR 1655 (CC); *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC); *Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority*.

⁶⁰ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (3) BCLR 355 (CC).

⁶¹ See in more detail Albertyn 2005; 2007.

she had a choice to get married, but had chosen not to do so, thus ‘choosing’ the (lack of) legal consequences that flowed from such a choice. Underlying both these cases is the ‘legitimacy’ of prioritising marriage and a libertarian understanding of choice in the hands of free and autonomous individuals. In both instances, rights are granted or denied in relation to the dominant norms and institutions of marriage and family. Neither case adopts an approach that dismantles dominant norms or is more inclusive of other family forms. (A more transformative approach would have accorded rights to such a diversity of family forms and relationships in which marriage is not preferred, but rather where different relationships are affirmed and celebrated.⁶²) While the division is more subtle in relation to gay and lesbian relationships it actively excludes cohabiting couples.

Courts thus draw lines of inclusion (as well as the terms of such inclusion) and exclusion around different social groups. The means by which they have done so, in relation to women, has been to abandon aspects of their jurisprudence and resort to legal formalism (suggesting that the legal method that is used to adjudicate a claim is important). In cases in which groups have been rejected in South Africa, the court has tended to define the issue narrowly, avoid a consideration of context and impact, and adopt a superficial and abstract view of dignity.

There are thus two important limits on the role of courts, and of equality law, in reducing group-based disparities. Firstly, that the terms of inclusion are often not those which fundamentally shift underlying structural differences. As a result of this, certain groups remain beyond constitutional protection.

At the same time, one should not underestimate the power of inclusionary judgments. Cases such as *Jordan* (sex work) and *Robinson* (cohabitation) are regressive in that they embed us in a vision of society in which the real concerns of vulnerable groups are not deemed worthy of constitutional protection. By contrast, groups defined by their sexual orientation, their gender or their permanent residence status have been granted a significant array of rights and benefits by the courts. The mere act of bringing groups into the constitutional community is indubitably significant – bringing practical relief and social affirmation. It also changes the nature of the debate as new voices are heard and might in fact ‘assist in setting democratic norms that may eventually shift the social norms’.⁶³ However, as long as the terms of inclusion are not radically changed, social hierarchies will not be dismantled and important groups will remain excluded – including, under current caselaw, sex-workers, co-habitees, and gay and lesbian families that do not conform to heterosexual norms.

Before moving on from courts, it is interesting to consider whether equality can form the basis for successful claims for redistribution. In South Africa a handful of equality claims may be categorised as redistributive, or partly redistributive, claims. In *Van Heerden v Minister of Finance*,⁶⁴ a s 9(2) case, the Constitutional Court was asked to defend a positive measure that sought to equalize pension benefits by subsidizing the contributions of members of a disadvantaged group. In *Khosa v Minister of Social*

⁶² For further discussion of inclusionary vs. transformative outcomes, see Albertyn (2007), Bonthuys (2008), Pieterse (2008).

⁶³ Albertyn 2005.

⁶⁴ 2004 (6) SA 121 (CC).

Development,⁶⁵ a case assisted by the conflation of equality and the right to social assistance, destitute permanent residents successfully claimed the extension of social benefits to them. However, it is important to note that this case concerned the extension of an existing benefit, rather than the creation of a new one. Arguably, this distinction is significant. The comparative or relational nature of equality allows for the inclusion of an outsider groups into existing benefits/rights; it is far more difficult, conceptually, to use equality to found a claim for a benefit/right that is not already enjoyed by a particular (insider)group.

Redistributive equality claims are always going to be more difficult as they inevitably nudge the courts towards policy and budgetary issues that traverse the institutional boundaries between courts and the executive/legislatures. Section 9(2) enables the courts to play an important role in defending and securing redistributive measures initiated by government or the legislature. Under s 9(3), the courts' redistributive role is likely to be limited to claims by groups that are defined by prohibited grounds, which are able to show relative deprivation (that they lack a benefit that another group has), and where budgetary issues are outweighed by dignity concerns.⁶⁶ Goldblatt and Liebenberg have accordingly argued for greater attention to intersectionality and the development of additional grounds, such as socio-economic status, thus enabling courts to address equality concerns of poor people as well to as specific groups, such as poor, black HIV positive women.⁶⁷

In the end, the redistributive role of the courts is secondary to that of government, and the policies and laws that are put in place to redress our past. The importance of courts lies in upholding the Constitution, and in ensuring either that redistributive measures are constitutional because they are positive measures under s 9(2) or that (further) redistributive measures are required because, in their current form, they are insufficiently inclusive under s 9(3).

III LAW AS A SITE OF STRUGGLE –THE CASE OF CUSTOMARY LAW

In the early 1990s customary law and traditional leaders still governed the lives of many black South Africans. However, these institutions had been denigrated, co-opted and manipulated through centuries of white rule.⁶⁸ While culture and custom remained important to the identity of many, the system of customary law had ossified, losing much of its flexible nature and entrenching unequal gender relations.⁶⁹ Thus, in 1994 women were minors under customary law, under the guardianship of their husbands or fathers. In marriage they had few, if any, rights to property and over children. The entrenchment of the rule of male primogeniture (inheritance by the eldest male heir), meant they had no enforceable rights to inheritance.⁷⁰

⁶⁵ *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

⁶⁶ See *Hoffman* para 34.

⁶⁷ Liebenberg & Goldblatt (2007) *SAJHR* 346-348.

⁶⁸ See M Chanock (1985) *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* Cambridge University Press: Cambridge.

⁶⁹ M Chanock, *ibid*; S Burman 'Fighting a two-pronged attack: The changing legal status of women in Cape-ruled Basutoland, 1872-1884' and J Guy 'Gender Oppression in Southern Africa's precapitalist societies' both in C Walker *Women and Gender in Southern Africa to 1945* (1990).

⁷⁰ Kim Robinson "The Minority and Subordinate Status of African Women under Customary Law" (1995) 11 *SAJHR* 495.

For many women, the idea of a constitutional democracy based on human rights was an opportunity to challenge discrimination in customary law. Implicit within this was a deeper challenge to men's authority within the family and the community. As rights-bearing citizens in a democracy and not subjects of traditional communities, women could claim their dignity and exercise choices over their lives. At the same time, the transition had seen an increase in the 'politics of traditionalism', especially in the province of KwaZulu-Natal, where traditional leaders, often aligned with the Inkatha Freedom Party against the ANC, organised around a conservative, patriarchal Zulu nationalism'.⁷¹ More broadly, traditional leaders mobilised within the constitutional negotiations to secure their place in the new dispensation. One of their demands was that customary law should be exempt from the Bill of Rights, and that human rights, especially the right to equality, were foreign, western ideas that had no place in traditional communities.

Women's immediate and strenuous resistance to this claim saw the battle-lines drawn between the idea of women being fully included in the new democracy as rights-bearing citizens on the one hand, and as the subjects of traditional power and paternalism on the other. Particularly active were women in the ANC, the WNC and the Rural Women's Movement, an organization of African, rural women founded in the early 1990s to secure rights for rural women. It is perhaps no surprise that the dominant discourse of inclusion and democracy at the time saw women's claims to full citizenship accepted in the Interim Constitution.⁷² The subsequent 1996 Constitution appeared to remove any doubt that in a potential clash between culture and gender equality, women had the right to be free from any form of unfair discrimination and that the exercise of cultural rights had to be 'consistent with ... the Bill of Rights' and thus with equality.⁷³ At the same time, the constitutional recognition of traditional power and customary law⁷⁴ pointed to more difficult future questions about how these constitutional clauses might be translated into law, policy and practice. In particular, the emphasis on political equality and citizenship during the early 1990s had left untouched the more thorny questions of social and cultural power, especially as it related to the private sphere.⁷⁵

The strong constitutional principle and right to equality and freedom from unfair sex and gender discrimination proved to be decisive in the legislative reform of the customary law of marriage and the judicial reform of customary marriage of inheritance. In proposing the marital reform, the South African Law Reform Commission (SALRC) noted that the 'Constitution has sent a clear message to the country that discrimination will no longer be tolerated and that women ... can expect the law to be changed in their favour'.⁷⁶ In the lengthy process of consultation on the reform of customary marriage, the SALRC and Parliament discounted the objections

⁷¹ C Walker 'Women, "Tradition" and Reconstruction' (1994) 61 *Review of African Political Economy* 347.

⁷² Albertyn 1994; Walker 1994.

⁷³ Section 30 of the Constitution of the Republic of South African, Act 108 of 1996. See B Goldblatt & L Mbatha 'Gender, Culture and Equality: Reforming Customary Law' in C Albertyn (ed) *Engendering the Political Agenda: A South African Case Study* (Johannesburg: Centre for Applied Legal Studies, 1999).

⁷⁴ Sections 211 & 212 of the Constitution.

⁷⁵ C Albertyn 'Contesting Democracy: HIV/AIDS and the Achievement of Gender Equality in South Africa' (2003) 29 *Feminist Studies* 595, 603-07; Albertyn & Hassim (2003) 147-151.

⁷⁶ SALRC Discussion paper 74 Customary Marriages [Project 90 The Harmonisation of the common law and indigenous law] August 1997 para 2.1.1

of Traditional Leaders to the idea of equality in customary marriage.⁷⁷ The 1998 Recognition of Customary Marriages Act secured women's equal rights to status, property, decision-making and children. It also reflected some crucial compromises, especially in its controversial recognition of polygyny,⁷⁸ its failure to require the consent of first wives to polygyny and its limited proprietary rights for women married before the commencement of the Act.⁷⁹

The reform took place within a dominant discourse of harmonizing customary law with the Constitution, especially with gender equality. The assumption was that the positive principles and (African) values of customary law were compatible with fundamental constitutional values of equality, dignity and freedom. Customary law could thus be 'developed', in line with changing socio-economic conditions, to reflect these values. In this view, rights, including rights to equality, could be integrated into the changing law, without loss of important cultural values and identity.⁸⁰ In this process, those traditional voices which viewed rights with suspicion and as foreign to 'African culture' remained a minority, reflecting the constitutional rejection of separate spheres for culture and human rights.

However, while diluted by the constitutional assertion of gender equality, traditional voices have not been silenced in South Africa. Changing political conditions have seen the traditional lobby 'reinvent' itself in the context of constitutional democracy to secure the authority of traditional leaders and to preserve their version of culture and custom from change. Prominent here is the idea that the Constitution protects culture and that customary law does not discriminate against women, rather it 'protects' them. This view suggests the courts should not unduly interfere with customary law, but rather protect its important values and principles without the influence of equality. It was illustrated in an early court challenge to the customary rule of primogeniture, *Mthembu v Letsele*.⁸¹ This case failed when the Supreme Court of Appeal found no unfair discrimination as customary law also imposed obligations upon the male heir to maintain the widow and children.⁸² More recently, chairperson of the Congress of Traditional Leaders of South Africa (CONTRALESA) and ANC member of Parliament, Patekile Holomisa, has called for the preservation of traditions

⁷⁷ For example, in the submissions of the Houses of Traditional Leaders from the Eastern Cape and Northern Province to the SALRC 'Women who challenged customary practices of marriage as discriminatory were labeled westernized They condemned endeavours to liberate African women from male domination as westernization' L Mbatha 'The content and implementation of the Recognition of Customary Marriages Act 120, 1998: A social and legal analysis' Unpublished LLM thesis, University of the Witwatersrand, 2005), Chapter 3.

⁷⁸ The call for the recognition of polygyny was not merely the preserve of traditionalists. Several women's groups supported the legalisation of polygyny in so far as it would provide rights to vulnerable women and children in these relationships. See Goldblatt & Mbatha (1999), 104.

⁷⁹ For discussion about problems with the content and implementation of new laws, see Bonthuys, Elsje & Pieterse, Marius "Still Unclear: The Validity of Certain Customary Marriages" 2000 *THTHR* 616; Mbatha, Likhapha "Reflection on the Rights Created by the Recognition of Customary Marriages Act" 2005 *Agenda Special Focus: Gender, Culture and Rights* 42; Mofokeng, LL "The *Lobolo* Agreement as the 'Silent' Prerequisite for the Validity of a Customary Marriage in Terms of the Recognition of Customary Marriages Act" 2005 *THRHR* 277; Bronstein, Victoria "Confronting Custom in the New South African State: An Analysis of the Recognition of Customary Marriages Act 120 of 1998" 2000 *SAJHR* 558; De Koker, YL "Proving the Existence of a Customary Marriage" 2001 *JSAL* 25.

⁸⁰ Likhapha Mbatha has criticized the Act for relying too much on civil law concepts in its attempts to harmonise customary law with the Constitution (L Mbatha 'The content and implementation of the Recognition of Customary Marriages Act 120, 1998: A social and legal analysis' Unpublished LLM thesis, University of the Witwatersrand, 200?).

⁸¹ *Bhe v Magistrate Khayelitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2000 (3) SA 687 (SCA).

⁸² Para 11.

and traditional gender roles, claiming that they are designed to protect vulnerable women and children.⁸³

These kinds of arguments sow what Sibongile Ndashe calls a ‘deliberate confusion’.⁸⁴ They emphasise the importance of retaining cultural values, often on the basis of a right to culture, but ignore the patriarchal and discriminatory aspects of those values and the equality rights that challenge them. Thus the SCA in *Mthembu* correctly points to the customary principle of maintenance of those in need, but does not address the manner in which its current meanings reinforce gender stereotypes (only men maintain, only women and children are protected) and how it is not enforced in the many instances when the surviving family is evicted from their home and left destitute.

These arguments also persist in the face of the clear language of the Constitution and its interpretation by the Constitutional Court. Its 2004 judgment, *Bhe v Magistrate, Khayalitsha*, declared the customary rule of primogeniture to be unconstitutional as

a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with equality under this constitutional order.⁸⁵

This unequivocal rejection of gender-based discrimination in customary law was accompanied by an equally strong affirmation of customary law as part of South Africa’s legal system.⁸⁶ Such a co-existence seemed possible, in the Court’s view, if one saw customary law as a living system of law, able to respond creatively to changing socio-economic conditions and which encapsulated positive and communitarian values that could be harmonized with the Constitution.⁸⁷ However, perhaps reflecting the difficulties of such an approach, the Court shied away from a remedy that developed customary law, choosing instead to replace it with the Intestate Succession Act, pending parliamentary amendment.⁸⁸ As Cheryl Walker notes, this conclusion underpins just how difficult it seems to be to reconcile gender equality with custom and culture in practice.⁸⁹

The reform of the customary law of marriage and inheritance by different arms of the state (Parliament and the courts) demonstrates the enormous significance of the constitutional framework and its commitment to women’s rights at a formal and normative level. The overall commitment to gender equality and the presence of constitutional rights provided the standards for law reform and enabled women to entrench their interests in law. At a formal level, these laws rejected traditional,

⁸³ P Holomisa ‘A Traditional Leadership perspective of gender, rights, culture and the law’ in K Bentley & H Brookes *Agenda Special Focus* (2005) 48.

⁸⁴ S Ndashe ‘Human Rights, Gender and Culture – a deliberate confusion?’ in K Bentley & H Brookes *Agenda Special Focus* (2005) 37, 37.

⁸⁵ Para 91.

⁸⁶ Para 41.

⁸⁷ Para 45; 82-90.

⁸⁸ Paras 109-119. In contrast, see the minority judgment of Ngobo J, paras 228-239. For a criticism of the Court’s approach, see Chuma Himonga ‘The advancement of women’s rights in the first decade of democracy in South Africa: the reform of the customary law of marriage and succession’ in M O’Sullivan & C Murray *Advancing Women’s Rights* (2005) 82. The Reform of Customary Law of Succession & Regulation of Related Matters Bill [B10-2008] was still before Parliament in March 2009.

⁸⁹ C Walker ‘Women, Gender Policy and Land Reform in South Africa’ (2005) 32 *Politikon* 297, 298.

patriarchal power in important areas of women's private lives (marriage, family, inheritance).

These positive examples of the normative and political power of rights and gender equality must be seen against more recent examples in which male traditionalists seem to (re)gain power and where women have to defend equality rights. If women have been an important constituency in the new democracy, so too have male traditionalists worked to secure their interests. Indeed, Walker has suggested that the ANC has, since the early 1990s, followed a dual strategy with 'women' and 'traditional leaders', pursuing the latter to secure important ends, such as defusing political violence in the province of KwaZulu-Natal. She suggests that the need to maintain the support of male traditionalists means that certain areas remained their domain. In particular, the ANC was unlikely to be 'willing or able to go very far in enforcing limits to the authority of traditional leaders to allocate land, administer local affairs, and uphold patriarchal norms and practices'.⁹⁰ This established limits to the pursuit of gender equality and women's rights, even at a formal level, in which women secured more power/rights within the family but not within the sphere of public power and the key rural resource of land.

In this context, two bills dealing with land and traditional power provide a useful example of the changing power of women's rights in engaging traditional power. The first, the Communal Land Rights Act (CLRA) was passed by Parliament in 2004. The Act regulates the transfer of rural, communal land from the state to communities, and, in some cases, to individuals.⁹¹ Its final form (after several different drafts that were more beneficial for women) reflected a compromise of interests, with the reconstituted Traditional Councils⁹² responsible for the administration and management of land and with some protection for women in the recognition of joint ownership by spouses and a provision on gender equality stating that women are entitled to the same rights and security of tenure as men (to act as a guiding principle in the implementation of the Act).⁹³ This has been widely criticised for its failure to protect the rights of women effectively. Aninka Claassens argues that the Act reinforces patriarchal power and entrenches, rather than removes, past discriminatory practices by failing to recognize women's 'user' and 'occupier' rights, by "upgrading" and formalizing "old-order" rights held by men' and by enhancing the powers of traditional leaders over land.⁹⁴ At the root of the problem, according to Claassens, is the manner in which the Act fits into rigid and formal ideas of top-down power, in which gender equality is reduced to quotas on Traditional Councils and statements of principle that have little practical meaning.⁹⁵ She argues for an approach that strengthens the rights of users and occupiers relative to communities and thus strengthens women's actual access to communal land.⁹⁶

⁹⁰ C Walker 'Women, "Tradition" and Reconstruction' (1994) 61 *Review of African Political Economy* 347, 355.

⁹¹ Discussions on the Act include C Walker (2005); A Claassens 'Women, Customary Law and Discrimination' in O'Sullivan and Murray *Advancing Women's Rights* (2005) 42; S Hassim 'A Virtuous Circle? Gender Equality and Representation in South Africa' in J Daniel, R Southall & J Lutchman (eds) *State of the Nation. South Africa 2004-2005* (2005) 336.

⁹² Established under the Traditional Leadership and Governance Framework Act, 41 of 2003.

⁹³ Section 4(2) & (3) of the Act.

⁹⁴ Aninka Claassens 'Women, Customary Law and Discrimination' in O'Sullivan and Murray *Advancing Women's Rights* (2005) 42, 43.

⁹⁵ *Ibid* page 78-79.

⁹⁶ *Ibid* 79-80.

This compromise of women's rights in favour of traditional power occurred despite opposition to the Bill in Parliament by women's groups and by some ANC women in Parliament.⁹⁷ The reasons for this are complex. On the one hand, it suggests that the governing party will resist women's opposition and compromise their interests, as gender equality is just one of many competing interests, the most important of which is securing power for the party. On the other hand, Shireen Hassim has argued that the nature of the opposition by women was significant.⁹⁸ She suggests that this opposition lacked a strong united voice and vision that had characterized previous conflicts between gender equality and traditional power. The characterization of some NGOs as 'ultra-left' by ANC MPs and the youth of some NGO representatives meant that they were subtly ignored and/or belittled within the process. In addition, gender equality was not always sufficiently foregrounded in NGO strategies, nor did it anchor an alliance of ANC and NGO women. Indeed, despite some opposition, there was little evidence of a concerted effort amongst ANC women to oppose the Bill and take up the issue of rural women's rights.⁹⁹ This also suggests that the party was concerned with passing the Bill in its current form, and thus attending to the interests of traditional leaders. Hassim's work suggests the importance of political organization and alliances amongst women in defending and securing rights, especially 'strong forms of participation and a clear vision of what kinds of gender equality are desirable'.¹⁰⁰ It also reveals how women are constrained by dominant party interests, and how this affects their ability to oppose laws that go against women's interests.¹⁰¹

This demonstrates the ongoing struggle over the place of gender equality and women's human rights in culture and custom, in which the women claimants and organizations are able to use rights as levers to secure their interests in the face of consistent opposition. What is interesting about these examples is that success has been dependant upon the ability to rely on constitutional rights and, increasingly, on the ability of claimants to refer to positive practices that comply with the Constitution, in other words, that there have been changes in community practices that comply or coincide with the Constitution. This suggests that rights operate both at a public and a private level. Indeed, there is a small but growing pool of evidence that constitutional principles and values have some purchase in more localized and individual struggles for resources. Research by Likhapha Mbatha on land and inheritance practices has suggested that women have been able to secure access to land and resources in certain instances by relying on egalitarian customary principles that aim to ensure the maintenance of those in need.¹⁰² In addition, research by Aninka Claassens and Sizani Ngubane suggests that the onset of democracy and the principle of equality have enhanced women's ability to negotiate rural power struggles and gain access to land

⁹⁷ See the submissions by CALS 'Submission on the Communal Land Rights Bill to the Portfolio Committee, National Assembly, Parliament' (November 2003); Rural Women's Movement 'Submission Report to the Portfolio Committee on Agriculture and Land Affairs on the Communal Land Rights Bill' (10 November 2003); PLAAS 'Submission Report to the Portfolio Committee on Agriculture and Land Affairs: Comments on the Communal Land Rights Bill [B7-2003]' (10 November 2003). See also S Hassim (2005) 353-355; Claassens (2005) 45-48.

⁹⁸ Hassim (2005).

⁹⁹ Hassim (2005) 354-355.

¹⁰⁰ Ibid 356.

¹⁰¹ See on this point AM Goetz & S Hassim 'Women in Power in Uganda and South Africa' in AM Goetz & S Hassim (eds) *No Shortcuts to Power: African Women in Politics and Policymaking* (2003).

¹⁰² L Mbatha 'Land Allocation Practices in Taung and Braklaagte' (unpublished research report) (undated); L Mbatha 'Reforming the Customary law of Succession' (2002) 18 *SAJHR* 259, 269.

and resources.¹⁰³ They found single mothers and women facing eviction have been able to assert claims to land based on a combination of equality and custom:

In many instances, arguments about the values underlying customary systems (in particular the primacy of claims of need) and entitlements of birthright and belonging are woven together with the right to equality and democracy in the claims made.¹⁰⁴

Crucially, this points to the strategic and normative value of constitutional democracy (rights and values) in shifting culture and custom and in securing concrete objectives. However, the evidence is based on small-scale studies, and it lies alongside evidence that women are being ‘punished’ for having rights.¹⁰⁵ The largely untold story of women as individuals and in communities seeking to rely on rights remains uncertain. What remains important to their success or failure is the bigger picture of battles won and equality rights secured in courts and in Parliament. Although decided in favour of women more often than not, this remains unresolved. The Communal Land Rights Act is making its way through the judicial system to the Constitutional Court as rural claimants try to show that it violates, inter alia, their rights to tenure security (especially for women).¹⁰⁶ What seems equally important is the ability to meld together the two spheres of the public and the private. Here, research into the practices of communities, as well as the development of strategies that enable women to use the moral and legal force of rights in their daily negotiations for resources, are critical.

ENDS

¹⁰³ Aninka Claassens & Sizani Ngubane ‘Women, land and power: the impact of the Communal Land Rights Act’ in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) chapter 7. UCT Press. Cape Town.

¹⁰⁴ Ibid.

¹⁰⁵ Catherine Campbell ‘Learning to Kill? Masculinity, The Family and Violence in Natal’ (1992) 18 *JSAS* 614-628.

¹⁰⁶ See Founding Affidavit (paras 24.2, 25, 117) *Tongoane and Others v National Minister for Land and Agricultural Affairs and Others* (TPD). Judgment pending at time of writing. Although beyond the scope of this chapter, it is interesting to note that the main argument in court ended up focusing on the procedural problems in passing the Act (the s 76 procedure was not followed) and downgrading the substantive arguments about tenure security and women rights.