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“DEMOCRACY STOPS AT MY FRONT DOOR”¹: OBSTACLES TO GENDER EQUALITY IN SOUTH AFRICA

Penelope Andrews[†]

Introduction

*Faced with an ever-increasing prevalence of rape and other forms of violence against women in South Africa, we are challenged like never before to revisit deeply buried stereotypes that inform our views of women in relation to men. . . in the same way we confront our hidden view of blacks in relation to Whites. . . Just as racism increases the potential of violence against Black people, sexism has a similar effect on women.*²

I frequently travel to South Africa, and I also maintain regular e-mail and telephone contact with friends and family there. Certainly during the decades leading up to 1994 (when the first democratic elections were held), the preoccupation was with ending apartheid and establishing a constitutional democracy. Over the last few years, however, I've been struck by two dominant concerns of the society at large.³ The first has to do with the level and severity of crime, and in particular, sexual crimes against women and girls, although increasingly men and boys are also becoming victims of such crimes.⁴ The second concern relates to the alarming escalation of the HIV/AIDS epidemic throughout the country.⁵ Both of these concerns embody several themes, including the ubiquity and vio-

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¹ Helen Moffett, *The Political Economy of Sexual Violence in Post-Apartheid South Africa* 16 (Unpublished paper on file with the author). This is a direct quote from a member of South Africa's Parliament, who "saw no contradiction between his . . . endorsement" of equality and his "repeated insistence that at home, he was the master".

² MMATSHILO MOTSEI, *THE KANGA AND THE KANGAROO COURT: REFLECTIONS ON THE RAPE TRIAL OF JACOB ZUMA* (2007) at 19.

³ These are by no means the only concerns that people raise. The continuing poverty and economic inequalities probably rate as the primary concern of most South Africans. See Marius Pieterse, *Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services*, 22 S. Afr. J. ON HUMAN RTS 473 (2007); see also EBRAHIM KHALIL HASSEN, *FIGHTING POVERTY IN SOUTH AFRICA: A CIVIL SOCIETY READER*, available at http://www.naledi.org.za/fighting_poverty/book.htm.

⁴ Charlene Smith, *Rape has Become a Sickening Way of Life in our Land*, SUNDAY INDEPENDENT, Sept. 26, 2004, available at <http://www.sundayindependent.co.za/index.php?fSectionId=1042&fArticleId=2238856>.

⁵ See R. DORRINGTON *et al*, *THE DEMOGRAPHIC IMPACT OF HIV/AIDS IN SOUTH AFRICA: NATIONAL AND PROVINCIAL INDICATORS FOR 2006, 2006*, cited in Nathan Geffen, *Encouraging Deadly Choices: AIDS Pseudo-Science in the Media* 3-4 (Ctr for Soc. Sci. Research: AIDS and Soc'y Research Unit, Working Paper No. 182, 2007), available at <http://www.aidstruth.org/aids-pseudo-science-in-the-media.pdf>.

lent characteristics of crime, the inability of the police to curtail the prevalence of crime, and the palpable fear of crime to which all communities are subjected.⁶

Beyond the actual rapid spread of the virus, the unwillingness of South Africans to alter their sexual conduct in the face of the HIV/AIDS epidemic is quite perplexing.⁷ One overarching theme that embodies South Africa is the alarming sense of official denial, whether it's governmental denial about crime statistics,⁸ the numbers of HIV/AIDS cases, or even the causal connection between the HIV virus and full-blown AIDS.⁹ Although the South African government appears to have finally discarded its reticence in acknowledging the causal connection between the HIV virus and full-blown AIDS, its response to providing treatment for HIV/AIDS sufferers suggests an underlying sense of reluctance, and some would argue, denial of the contemporary reality of the epidemic in South Africa.¹⁰

My paper addresses this question of denial, and locates it within the current project of formal gender equality underway in South Africa. This official commitment to gender equality is encapsulated in South Africa's impressive Constitution and Bill of Rights, in which equality and dignity underpin the formal constitutional arrangement.¹¹ This commitment to equality is not just incorporated in the constitutional text,¹² but is also reflected in an admirable constitutional jurisprudence emanating from the Constitutional Court that eschews formal equality for a more substantive version.¹³

In addition, post-apartheid legislation promulgated in pursuit of the constitutional commitment to equality demonstrates that the government, at least at the formal level, is committed to a comprehensive democratic framework that promotes equality. Statutes such as the Promotion of Equality and the Prevention of Unfair Discrimination Act,¹⁴ the Prevention of Domestic Violence Act,¹⁵ and the Black Empowerment Act,¹⁶ amongst others, attest to the commitment of such a vision. In addition, statutes such as the Recognition of Customary Marriages

⁶ See SOUTH AFRICAN GOVERNMENT CRIME STATISTICS (2006/2007), available at <http://www.info.gov.za/issues/crime/crimestats0607.pdf>.

⁷ Frederik le R. Booyen, *HIV/AIDS: Poverty and Risky Sexual Behaviour in South Africa*, 3 S. AFR. J. OF AIDS RESEARCH 57 (May 2004).

⁸ Mpumelelo Mkhakebela, *Mbeki Finds Politicking by Stats a Tricky Game*, SUNDAY TIMES, Aug. 12, 2007, available at <http://www.thetimes.co.za/PrintEdition/BusinessTimes/Article.aspx?id=537145>.

⁹ See Geffen, *supra* note 5.

¹⁰ See TREATMENT ACTION CAMPAIGN, *Let them Eat Cake: A Short Assessment of Provision of Treatment and Care 18 Months After the Adoption of the Operational Plan* (June 2005).

¹¹ S.AFR. CONST. 1996.

¹² *Id.* at ch. 2.

¹³ For a discussion of South Africa's equality jurisprudence, see Penelope E. Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa*, 26 N.C. J. INT'L. L. & COM. REG. 693 (2001); See also Saras Jagwanth and Christina Murray, 'No Nation Can Be Free When One Half of it is Enslaved': Constitutional Equality for Women in South Africa, in THE GENDER OF CONSTITUTIONAL JURISPRUDENCE 230 (Beverly Baines and Ruth Rubio-Marin eds., 2004).

¹⁴ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹⁵ Domestic Violence Act 116 of 1998.

¹⁶ Broad-Based Black Economic Empowerment Act 53 of 2003.

Act,¹⁷ which purports to protect women in polygamous African customary unions, suggest that the South African Parliament is deeply committed to recognizing the rights of those in indigenous communities who prefer to regulate their private lives according to indigenous principles.¹⁸ This is so even though those principles might at first glance contradict majoritarian notions of equality, as polygamy arguably does.¹⁹

The South African situation therefore raises the central question: How can a country with such a wonderful and expansive constitution, in which gender equality is embraced comprehensively, evince such widespread and systemic violence against women? In addition, what accounts for a democratic government, seemingly committed to the principle of equality in the public sphere, demonstrating such reluctance to decisively confront the egregious consequences of public and private violence against women? It is my thesis that despite the formal embrace of gender equality in the Constitution, and despite attempts by all branches of government to address the legacy of racism, sexism, and patriarchy, the interlocking cultural underpinnings of sexism and patriarchy were never dislodged.²⁰ Moreover, a formal vision of equality was unequivocally endorsed across all sectors of South African society with respect to the eradication of racism, but this universal endorsement was absent with respect to gender equality. Indeed, patterns of violence that incubated during the years of apartheid were unleashed as the society became more open and democratic. Ironically, the transparency of the new democratic order revealed the underbelly of apartheid violence, a very public violence as described in the final report of the Truth and Reconciliation Commission.²¹ But this transparency has also highlighted the chronic reality of private violence, particularly against women.²² It was this violence that apartheid never fully revealed, and that has come to be a major impediment to women enjoying the human rights encapsulated in the South African Bill of Rights.²³

In this paper, I argue that the impressive array of legislative enactment and “transformative constitutional jurisprudence”²⁴ masks the underlying reality of an “unacknowledged gender civil war”²⁵ in which hundreds of thousands of South

¹⁷ Recognition of Customary Marriages Act 120 of 1998.

¹⁸ See Penelope Andrews, *Big Love? The Recognition of Customary Marriages in South Africa*, 64 WASH. & LEE L. REV. (forthcoming 2008).

¹⁹ *Id.*

²⁰ Helen Moffett argues that, “[t]he women’s movement in South Africa. . .had arguably failed to deconstruct the multiple overlapping and entrenched forms of patriarchy that had flourished under apartheid.” Moffett, *supra* note 1, at 16.

²¹ See FINAL REPORT OF THE TRUTH & RECONCILIATION COMMISSION (2004).

²² See Usha Roopnarain, *A Gendered Perspective on Violence in South Africa*, 2 FEMINISTA No. 11, available at <http://www.feminista.com/archives/v2n11/roopnarain.html>.

²³ *Id.*

²⁴ Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 146 (1998).

²⁵ Moffett, *supra* note 1, at 2.

African women are victims of rape and domestic violence.²⁶ The government's persistent questioning and denial of the high incidence of sexual violence (and overall crime) in South Africa is a symptom of a ubiquitous masculinity, one that Judge Sachs has referred to as the "only truly non-racial institution in South Africa."²⁷ This reality demonstrates the limits of legal equality in the face of deeply embedded patriarchal norms, a perennial concern of feminists, critical scholars, as well as legal advocates.

This paper focuses on the underlying interlocking cultures of masculinity and the impediments they generate towards the attainment of gender equality. Yet it recognizes that the enforcement of rights, for example, through aggressive governmental campaigns, vigilant policing efforts, or widespread educational campaigns that teach citizens how to access legal rights, all perform important functions in eradicating violence against women. These are important processes and they play a vital role in the assessment of methods that can stem the tide of violence against women. For the purposes of this paper, I am centrally concerned with how the contemporary social, political, and economic reality of South Africa creates conditions for the pervasive and chronic statistics of violence against women, and how these conditions impede legal redress. In particular, I am interested in examining why the constitutional paradigm of rights and gender equality fails to be internalized across the society.

Violence Against Women: The Problem

Two rape cases in the past decade, and their aftermath, serve as an illustration of the contradiction between constitutional norms of dignity and equality on one hand, and the chronic problem of violence against women on the other. In both of these cases, the alleged rapists were high profile, powerful black men, and their victims were powerless women. One of the accused was a sports icon, the other a prominent political figure.

The events surrounding the trials, including the popular and legal discourse as well as popular response to the victims, say much about the gap between formal equality and reality on the ground. In both cases, the widespread vilification of the victim was especially startling.

In 1999, Makhaya Ntini, a star member of South Africa's national cricket team, was charged and convicted in a trial court of the rape of a female domestic worker. On appeal, his rape case was overturned, the appellate court finding too many deficiencies in the state's case.²⁸ In 2005, Jacob Zuma, the former deputy-

²⁶ Penelope E. Andrews, *Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law*, 8 TEMP. POL. & CIV. RTS. L. REV. 425 (1999).

²⁷ Albie Sachs, *Judges and Gender: The Constitutional Rights of Women in a Post-Apartheid South Africa*, 7 AGENDA 1, 1 (1990).

²⁸ Peter Dickson, *Ntini wins Rape Appeal*, WEEKLY MAIL & GUARDIAN, Oct. 29, 1999, available at http://www.mg.co.za/articledirect.aspx?articleid=166910&area=%2farchives%2farchives__online_edition%2f.

President, was also charged with the rape of a young woman who had been a guest in his home. He was acquitted at trial.²⁹

A few things stand out about both trials. The treatment of the victims and the consequences for the accused are particularly significant. Also significant was the public response to the rape victims and the anxiety the victims experienced as a result of their public castigation for accusing prominent men. The woman who accused Ntini stated that, "[a]t first, I felt reporting the rape was a mistake. Everyone hated me, blaming me for ruining [Ntini's] life. Now he has been found guilty, I am glad that I had the courage to stand up for my rights."³⁰

Zuma's accuser was regularly vilified by crowds of his supporters outside the courtroom. Some suggested that because she is HIV positive, she must be a prostitute.³¹ Others referred to her as a witch, and on one occasion Zuma supporters burned an effigy of her outside the courtroom.³²

What was most profound about both trials, however, was the lack of consequences for the accused. In a poll conducted in South Africa in 2006, Ntini was (for the second year) ranked as South Africa's most popular sports personality among adults.³³ Zuma's popularity was also unaffected by his rape trial. Indeed, it is arguable that his claims on the office of the presidency remain quite conceivable.³⁴

Nothing in my comments is meant to suggest that South Africa is unique with respect to these issues. In the United States and other democratic societies, powerful men also engage in sexual misconduct towards women and do not appear to be widely stigmatized by the consequences of their conduct. But in this and other democratic societies, widespread public opprobrium often leads to legislative and other societal changes as a result of concerted agitation by human rights advocates, particularly women's groups. One such campaign comes to mind—the issue of sexual harassment after Anita Hill's testimony on Capital Hill of sexual harassment claims against Justice Clarence Thomas.³⁵ Despite Justice Thomas' successful nomination to the U.S. Supreme Court, Hill's testimony captivated the country and spotlighted the problem of sexual harassment in the

²⁹ See *State v Jacob Gedleyihlekisa* 2006 (7) BCLR 790 (W) (S. Afr.).

³⁰ Nomangezi Matokazi (Age 22), after the East London Magistrate's Court found national squad cricket player Ntini guilty of raping her. *Verbatim*, WEEKLY MAIL & GUARDIAN, Apr 30, 1999, available at http://www.mg.co.za/articleDirect.aspx?articleid=211216&area=%2farchives__print_edition%2f.

³¹ See MOTSEI, *supra* note 2 (a compelling account of the Zuma case).

³² *Id.* at 117.

³³ See *Ntini Takes Top Spot in Popularity Stakes*, WEEKLY MAIL & GUARDIAN, Dec. 23, 2006, available at http://www.mg.co.za/articlePage.aspx?articleid=294475&area=/breaking_news/breaking_news__sport/#.

³⁴ A Zuma supporter said this about the trial "Zuma for president, no matter what. This young girl is crazy and does not respect older people. She has insulted all women in this country, even those supporting her. She's a bitch and deserves to be jailed for dragging Zuma's name in the mud." MOTSEI, *supra* note 2, at 117.

³⁵ See generally TIMOTHY PHELPS & HELEN WINTERITZ, *CAPITOL GAMES: CLARENCE THOMAS, ANITA HILL & THE-BEHIND-THE-SCENES STORY OF A SUPREME COURT NOMINATION* (1992) and *AFRICAN AMERICAN WOMEN SPEAK OUT ON ANITA HILL-CLARENCE THOMAS* (Geneva Smitherman ed. 1995).

United States. Several females were elected to Congress as a direct result of the widespread societal disdain for such instances of sexual harassment.³⁶

When it comes to crimes against children, particularly sex crimes, successful campaigns by advocates have led to decisive legislative action. After Amber Hagerman was abducted and murdered in Texas in 1995, citizens in that state lobbied extensively for a change in the laws to protect children from sexual predators, leading to a system of "Amber Alerts."³⁷ In South Africa, the government has also taken steps to address the widespread incidence of sexual violence and punish those responsible. For example, steps have been taken to improve the prosecution of sexual offenses, such as the establishment of specialized police units and specialized sexual offense courts.³⁸ But these formal legislative steps often appear to contradict the public sentiment as expressed by the government. For example, although advocates, including rape victims, have lobbied extensively in the media and launched public awareness and educational campaigns,³⁹ the government's primary response has been to question the rape statistics, deeming them exaggerated.⁴⁰ One example is the hostility of President Thabo Mbeki to Charlene Smith, a white woman who was raped in her home in Johannesburg, and who has since become one of South Africa's most prominent anti-rape activists. President Mbeki's response to her activities illustrates how an issue of gender becomes embroiled in a debate about race. By suggesting that Smith's motive in campaigning for rape prevention is merely to reinforce societal stereotypes of black men as predatory, the President reduced the issue of violence against women to one of racism, an always toxic issue in South Africa.⁴¹

No analysis of the contemporary reality of crime in South Africa, and particularly crimes against women, can proceed without investigating the social, political, and economic legacies of apartheid. Although feminist scholars have attempted to examine the effects of apartheid on women's status and role within South African society, it is only in the last few years that a concerted effort has been made by feminist and other legal scholars to explore the linkages of today's overwhelming statistics on sexual violence to the legacy of apartheid.⁴²

³⁶ See generally RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS (Anita F. Hill and Emma C. Jordan eds. 1995).

³⁷ See <http://www.amberalert.gov>.

³⁸ See Human Rights Watch, *South Africa: The State Response to Violence and Rape* (1995), <http://www.hrw.org/reports/1995/Safrica/wm-02.htm> (last visited Feb. 22, 2008).

³⁹ In 1999, an advertising campaign involving the South African born actress Charlize Theron that attempted to highlight the alarming statistics on rape, was halted when a men's group sued, claiming that the advertisement violated their constitutional rights to equality. See *Rape Advert Row in South Africa*, BBC NEWS, Oct. 5, 1999, <http://news.bbc.co.uk/1/hi/world/africa/465639.stm>.

⁴⁰ See *Mbeki Questions SA Rape Figures*, BBC NEWS, Oct. 28, 1999, <http://news.bbc.co.uk/1/hi/world/africa/492669.stm>.

⁴¹ Sharon Lafraniere, *After Apartheid: Heated Words about Rape and Race*, N.Y. TIMES, Nov. 24, 2004, available at http://www.nytimes.com/2004/11/24/international/africa/24letter.html?n=Top/Reference/Times%20Topics/People/M/Mbeki,%20Thabo&_r=1&adxnnl=1&oref=slogin&adxnnlx=1192680514-s4dja6srUnAdKwOyN4ema.

⁴² See Sheila Meintjies, *Gender, Citizenship and Democracy in Post-Apartheid South Africa*, GENDER RESEARCH PROJECT BULLETIN (1997); see also Catherine Campbell, *Learning to Kill: Masculinity, The Family and Violence in Natal*, 18 J. OF S. AFR. STUD. 614 (1992); Moffett, *supra* note 1.

Democracy Stops at my Front Door

In this exploration, the work of feminist and other legal scholars, particularly from the United States and other Western societies, has been helpful.⁴³ But the application of their work has been limited because they “fail to provide sufficiently nuanced explanatory or analytical frameworks”⁴⁴ for the “pervasive sexual violence”⁴⁵ that is the reality in South Africa.

In light of South African experiences with the Truth and Reconciliation Commission, specifically its failure to adequately address gross gender-based violations of human rights, there is growing literature suggesting that the Commission’s conduct has contributed to the continuing violence against women, a violation of their human rights.⁴⁶ There is also a growing body of scholarship that suggests that during periods of “political restructuring,” the incidence of sexual crimes against women and children rises exponentially, often linked to the brutal, violent, immediate past.⁴⁷ This appears to be the case in South Africa.

The Constitution and Gender Equality

South Africa’s commitment to equality and dignity is clearly articulated in its Constitution. The preamble to the Constitution explicitly recognizes the injustices of apartheid South Africa, and serves to honor “those who suffered for justice and freedom,” and who “worked to build and develop” the country.⁴⁸ In particular, the Constitution is seen as the vehicle to “heal the divisions” of apartheid South Africa and to “establish a society based on democratic values, social justice, and fundamental human rights.”⁴⁹ Chapter One of the South African Constitution amplifies the founding values of human dignity, equality, non-racism, and non-sexism.⁵⁰

The protection afforded to women is not confined to the traditional categories of protection against discrimination based on sex and gender, but is grouped with the same protections afforded to pregnancy and sexual orientation cases. Combined with other grounds for prescribing unlawful discrimination, including race, national origin, and language, the protection against invidious discrimination is expansive and unequivocal.⁵¹ In addition, a particular novel feature of the South

⁴³ See e.g., Catherine Mackinnon, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1988); Elizabeth Schneider, *BATTERED WOMEN AND FEMINIST LAWMAKING* (2000).

⁴⁴ Moffett, *supra* note 1, at 16.

⁴⁵ *Id.*

⁴⁶ Beth Goldblatt, *Gender and Reparations in South Africa*, available at <http://www.ictj.org/static/Africa/SAfrica/SouthAfricaExecSum.pdf>.

⁴⁷ See Human Rights Watch, “*The Guns Are In The Bushes*”: Continuing Abuses in Liberia (Jan. 2003), available at <http://hrw.org/backgrounders/africa/liberia0104.htm>; see also Jeanne Ward and Mendy Marsh, United Nations Population Fund, *Sexual Violence Against Women and Girls in War and Its Aftermath: Realities, Responses, and Required Resources*, available at www.unfpa.org/emergencies/symposium06/docs/finalbrusselsbriefingpaper.doc.

⁴⁸ S.AFR. CONST., *supra* note 11.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at ch. 2 § 9(3) (providing that “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or

African Constitution is its recognition of the interconnectivity of different forms of discrimination, providing that the state may not discriminate “on one or more grounds.”⁵² The Constitution, therefore, protects individuals on one or several grounds, thereby embracing the arguments that focus on the intersections of different forms of discrimination made by critical race scholars.⁵³

By creating the conditions, at least formally, for the development of a jurisprudence of substantive equality, the Constitution embodies the right to dignity and preferential treatment in order to redress the legacy of discrimination and dispossession. Section Nine of the Constitution provides that “to promote the achievement of equality,” the government may take “legislative and other measures designed to protect or advance persons” who have been “disadvantaged by unfair discrimination.”⁵⁴ The Constitution also envisions access to justice as a fundamental right⁵⁵ and, in addition to a range of procedural safeguards, provides a generous provision for standing.⁵⁶ This provision therefore guarantees that a range of interested parties, not directly affected by the immediate dispute may, in the public interest, bring a host of constitutional claims.

The Bill of Rights purports to protect the “right to bodily and psychological integrity” which includes the reproductive rights of women, providing that everyone has the right “to make decisions concerning reproduction.”⁵⁷ In addition, the Bill of Rights also protects the right of everyone to personal security⁵⁸ and freedom from violence, thus proscribing violence in both the public and private sphere.⁵⁹ This provision has been interpreted by the Constitutional Court to mandate the government to take proactive steps to shield women from domestic violence,⁶⁰ as well as violence at the hands of strangers.⁶¹

The Bill of Rights has been hailed as one of the Twentieth Century’s most impressive documents, and has been examined and analyzed by a variety of local

social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”).

⁵² *Id.*

⁵³ See Taunya Banks, *Toward a Global Critical Feminist Vision: Domestic Work and The Nanny Tax Debate*, 3 J. GENDER RACE & JUST. 1 (1999); see also Hope Lewis, *Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995).

⁵⁴ S. AFR. CONST. 1996, *supra* note 11, ch. 2, § 9(1), (2).

⁵⁵ *Id.* at ch. 2, § 34.

⁵⁶ The Constitution provides that an aggrieved individual has the right to approach a court seeking relief. This section lists those individuals as:

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own name;
- c. anyone acting as a member of, or in the interest of, a group or class of persons;
- d. anyone acting in the public interest; and
- e. an association acting in the interests of its members. *Id.* at ch. 2, § 38.

⁵⁷ *Id.* at ch. 2, § 12(2).

⁵⁸ *Id.* at ch. 2, § 12(1).

⁵⁹ *Id.* at ch. 2, § 12(1)(c).

⁶⁰ *S. v Baloyi*, 1999 (2) SA 425 (CC) ¶ 11 (S. Afr.).

⁶¹ *S. v Carmichele*, 2001 (4) SA 938 (CC) ¶ 62 (S. Afr.).

and global texts, in a range of disciplines, particularly law and politics.⁶² The African National Congress ("A.N.C."), the ruling party since 1994, negotiated with other political parties in drafting such an impressive constitutional document committed to equality. Such negotiations created the conditions for significant female representation in Parliament by setting aside one-third of the A.N.C.'s first Parliamentary list for female candidates.⁶³ As a consequence, women are now represented in Parliament in impressive numbers, and women also hold several ministries, including key ministries such as Minerals and Energy, Justice, and Health and Foreign Affairs.⁶⁴

The Constitutional Court and Gender Equality

The Constitutional Court's evolving jurisprudence on equality has for the most part demonstrated a commitment to substantive equality, as opposed to mere formal equality.⁶⁵ The Court has been mindful of the context within which discrimination and disadvantage are embedded within South African society, and its judgments have attempted to focus not just on equal treatment, but also on equitable outcomes. As Justice O'Regan noted in an earlier equality case, "it is necessary to recognize that although the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality."⁶⁶

Since its inception in 1995, the Constitutional Court has heard several cases that directly address the equality principle as outlined in the Constitution.⁶⁷ In this endeavor the Constitutional Court has incorporated international human rights law, and in particular the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),⁶⁸ in its interpretation of equality. By doing so, the Court has spawned an equality jurisprudence that is widely cited by legal scholars.⁶⁹ Indeed, this literature constantly references the transforma-

⁶² See, e.g., RIGHTS AND CONSTITUTIONALISM: THE NEW SOUTH AFRICAN LEGAL ORDER (David Van Wyk et. al. eds., 1995). See also THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW (Penelope Andrews & Stephen Ellmann eds., 2001); and NEGOTIATING JUSTICE: A NEW CONSTITUTION FOR SOUTH AFRICA (Mervyn Bennun & Malyn D. D. Newitt ed., 1995).

⁶³ See Danisa Baloyi, *Apartheid and Identity: Black Women in South Africa*, in CONNECTING ACROSS CULTURES AND CONTINENTS: BLACK WOMEN SPEAK OUT ON IDENTITY, RACE, AND DEVELOPMENT 39, 43 (Achola O. Pala ed., 1995).

⁶⁴ *Id.*; see also Brigitte Mabandla, *Women in South Africa and the Constitution-Making Process*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 70 (Julie Peters & Andrea Wolper eds., 1995).

⁶⁵ See Sandra Fredman, *Providing Equality: Substantive Equality and the Positive Duty to Provide*, 21 S. AFR. J. ON HUM. RTS. 163 (2005); see also Pierre De Vos, *Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness*, 17 S. AFR. J. ON HUM. RTS. 258 (2001).

⁶⁶ *President of the Rep. of S. Afr. & Another v Hugo*, 1997 (4) SA 1 (CC) ¶ 112 (S. Afr.).

⁶⁷ See Penelope E. Andrews, *Evaluating the Progress of Women's Rights on the Fifth Anniversary of the South African Constitution*, 26 VT. L. REV. 829 (2002).

⁶⁸ Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 Dec. 1979, entry into force 3 Sept. 1981.

⁶⁹ See S. AFR. CONST. 1996, *supra* note 11.

tive possibilities generated by the equality jurisprudence of the South African Constitutional Court.⁷⁰

The Court has adjudicated a vast array of equality issues.⁷¹ Exploring a range of factual situations, the Court has formulated a substantive vision of equality. In a case involving the rights of HIV-positive persons not to be discriminated against in their employment, the Court made it clear that it would not condone the stigma and stereotyping of those who are HIV positive.⁷² Justice Ngcobo, writing for the majority, stated:

In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation [sic] and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.⁷³

The Court in its judgment examined the commercial reasons provided for the disparate treatment of those who are HIV positive, and concluded that those reasons cannot be conscripted to disguise prejudice.⁷⁴

The Court has also reviewed prohibitions made on the rights of homosexuals to engage in consensual sexual conduct, finding such prohibitions a violation of their constitutional rights to equality, privacy, and dignity.⁷⁵ Similarly, the Court has struck down legislation that failed to provide the same benefit to permanent same-sex life partners as it did to heterosexual spouses.⁷⁶

In an equality judgment that examined the law of primogeniture, the Court weighed the rights of African girls and women not to be discriminated against under indigenous customary law.⁷⁷ In its judgment, the Court examined the place of indigenous law in South Africa's constitutional framework, recognizing the important role of indigenous law in South Africa's culturally diverse society. Referring to the neglect of the positive aspects of customary law, including its

⁷⁰ Cathi Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality*, 14 S. AFR. J. ON HUM. RTS. 248, 255 (1998).

⁷¹ See e.g., *Harksen v Lane NO, O & Others* 1998 (1) SA 300 (CC) (S. Afr.); *Brink v Kitshoff NO*, 1996 (4) SA 197 (S. Afr.); *Pretoria City Council v Walker* 1998(2) SA 363 (CC) (S. Afr.); *Prinsloo v Van Der Linde & Another* 1997 (3) SA 1012 (CC) (S. Afr.).

⁷² *Hoffmann v S. Afr. Airways*, 2001 (1) SA 1 (CC) ¶ 28 (S. Afr.).

⁷³ *Id.* at ¶ 28.

⁷⁴ For a discussion of the protection of HIV positive individuals in the workplace, see generally Charles Ngweni, *HIV in the Workplace: Protecting Rights to Equality and Privacy*, 15 S. AFR. J. ON HUM. RTS. 513 (1999).

⁷⁵ *Nat'l Coal. for Gay and Lesbian Equal. & Another v Minister of Justice & Others*, 1999 (1) SA 6 (CC) ¶ 2 (S. Afr.).

⁷⁶ *Nat'l Coal. for Gay and Lesbian Equal. & Others v Minister of Home Affairs & Others*, 2000 (2) SA 1 (CC) ¶ 2 (S. Afr.).

⁷⁷ *Bhe & Others v Magistrate, Khayelitsha & Others*, 2005 (1) SA 580 (CC) ¶ 222 (S. Afr.).

Democracy Stops at my Front Door

“nurturing of health communitarian traditions,”⁷⁸ the Court nevertheless found it subject to the Bill of Rights, particularly the equality provisions.

The Court has also addressed the issue of violence against women, interpreting such violence as an impediment to equality. Utilizing both the imperatives in the Bill of Rights, and those found in international instruments such as the CEDAW, the Court has adopted a purposive approach, outlining very clearly in its pronouncements the need to eradicate the ubiquitous problem of violence against women in South Africa. Justice Sachs has noted that, “[t]he non-sexist society promised in the . . . Constitution, and the right to equality and non-discrimination guaranteed. . . [is] undermined when spouse-batterers enjoy impunity.”⁷⁹

The court has applied this approach to violence against women in the public criminal law arena. An example of the former is the Court clearly articulating that the right to be free from violence in both the public and private sphere may result in state actors being held accountable when they negligently or intentionally fail to protect female victims from violence perpetrated by third parties.⁸⁰

The Court has struck an impressive balance between the competing rights of privacy and state regulation⁸¹ and religious rights and equality.⁸² It has done so by appreciating the context of the lived realities and deeply held beliefs of individuals and groups as well as the need to create a society predicated on equality and dignity. In the same vein, the Court has tried to strike a healthy accord between the rights of criminals in a very violent society, such as South Africa, and the rights of individuals to personal security.⁸³

The Court has therefore appreciated its central role in ensuring that the equality and dignity provisions in the Constitution are interpreted in a manner that will benefit women, especially black women, who are the most disadvantaged group in South African society. But the effectiveness of the Court in this venture is dependent upon the willingness of government officials and members of civil society to give effect to, and enforce, its judgments.⁸⁴

Impediments to the Eradication of Violence against Women

In previous articles I have outlined the contours of the cultures of masculinity in South Africa.⁸⁵ These articles have left a devastating legacy for women, who

⁷⁸ *Id.* ¶ 45.

⁷⁹ *S. v. Baloyis*, *supra* note 60, ¶ 12.

⁸⁰ *S. v. Charmichele*, *supra* note 61.

⁸¹ *Case & Another v Minister of Safety & Sec. & Others*, 1996 (3) SA 617 (CC) ¶89 (S. Afr.) (statutory prohibition of possession of pornographic material unconstitutional).

⁸² *Prince v President of the Law Soc’y of the Cape of Good Hope*, 2002 (2) SA 794 (CC) ¶ 90 (S. Afr.) (religious use of cannabis not sufficient ground for exemption from drug laws).

⁸³ *See S. v. Zuma & Others*, 1995 (2) SA 642 (CC) (S. Afr.).

⁸⁴ In addition, certain scholars have argued that the contextual interpretative stance of the Court may not be as transformative as it appears, since it draws too much on an experiential base that judges may not possess. *See* Albertyn & Goldblatt, *supra* note 70, at 260.

⁸⁵ *See* Andrews, *supra* note 26. *See also* Penelope Andrews, *Learning to Love After Learning to Harm: Post-Conflict Reconstruction, Gender Equality and Cultural Values*, 15 MICH. ST. J. INT’L L. 41 (2007) [hereinafter *Learning to Love*].

Democracy Stops at my Front Door

continue to be subject to widespread fear of violence. Indeed, as Mmatshilo Motsei, a South African women's rights activist, poignantly notes:

For me, the Zuma rape trial did not help relieve the fear that I will not be able to protect myself and my daughter or her daughter from rape. Since I started working in the area of gender-based violence, I have carried a fear of being raped. When I lie awake at night after watching a news bulletin riddled with bullets and blood, rage and rape, I long for a place where women and children are cherished and loved by equally loved and self-loving men.⁸⁶

In the last few years, lesbians have become the target of a pattern of intimidation and violence. In fact, it is suspected that three female murder victims in the last year were targeted specifically because of their sexual orientation.⁸⁷

In my scholarship I have examined the tripartite components of masculinity in South Africa. I have argued that the peculiar flavour of South African patriarchy emanates from three interlinked political and cultural origins, and that these origins overlap and combine to create particularly vexing political, social, and cultural conditions in which to pursue gender equality.⁸⁸ The three sources I identify are first, a masculinist culture emanating from an authoritarian and militaristic apartheid state; second, the masculinist cultural remnants of a violent anti-apartheid struggle; and third, aspects of indigenous customary law that continue to subordinate women.⁸⁹ Regarding the first, the Final Report of the Truth and Reconciliation Commission has delineated in graphic detail the depths to which the South African military and security establishment have gone to retain white supremacy in the face of overwhelming opposition to apartheid.⁹⁰ Such violence became an integral part of white South Africa's maintenance of rigid racial hierarchies, and it also reinforced a militaristic masculinity predicated on the subordination of white women and the suppression of black women.⁹¹

The liberation movements were scrutinized as well by the Truth and Reconciliation Commission, and their methods also raised questions about male violence and female subordination.⁹² Despite popular rhetoric, the very nature of this clandestine military struggle and the inevitable absence of transparency and accountability reinforce patterns of masculinity that disadvantaged women disproportionately.⁹³ The mythologized and lionized "comrade" became the

⁸⁶ MOTSEI, *supra* note 2, at 195.

⁸⁷ See Jessica Stern, *Letter: Homophobic Violence Mars Women's Day*, HUMAN RIGHTS WATCH, Aug. 8, 2007, <http://hrw.org/english/docs/2007/08/08/safric16618.htm>; and *South Africa: Murder Highlights Violence Against Lesbians*, HUMAN RIGHTS WATCH, Mar. 3, 2006, <http://www.hrw.org/english/docs/2006/03/02/safric12753.htm>.

⁸⁸ See Andrews, *supra* note 26.

⁸⁹ Andrews, *Learning to Love*, *supra* note 85, at 46-48.

⁹⁰ See FINAL REPORT OF THE S. AFR. TRUTH & RECONCILIATION COMM'N, *supra* note 21.

⁹¹ Andrews, *Learning to Love*, *supra* note 85, at 46-48.

⁹² *Id.*

⁹³ See Tumi Makgetla, *Zuma Trial Lifts the Lid on Gender Based Violence During Exile*, MAIL & GUARDIAN ONLINE, Mar. 17, 2006, <http://www.mg.co.za/articlePage.aspx?articleid=267002&area=in->

Democracy Stops at my Front Door

penultimate symbol of black political opposition, epitomizing male strength and male defiance.⁹⁴

The third component of this masculinist culture in South Africa was a patriarchy rooted in some indigenous and religious institutions, and in indigenous and religious practices that subordinate and disadvantage women in a host of areas, including the custody of children, access to property, and rights to inheritance.⁹⁵ These systems have also come under scrutiny as more women exert their autonomy in the face of new opportunities generated by the equality framework in the Constitution.⁹⁶

These interlocking and overlapping patriarchal norms have provided tremendous challenges for South Africa in its quest towards gender equality. In a society in transition, beset by economic and social problems, attacking the root causes of violence against women will require considerable resources. Moreover, as I indicated earlier, the government has committed itself, at least formally, to take steps to stem violence against women.⁹⁷ Arguably, however, much of behavioural change is not predicated on money, but merely a change in values. Prominent South Africans have called for a reappraisal of the "value system",⁹⁸ and have bemoaned the "failure of idealism" of those who govern South Africa, as well as its citizens.⁹⁹

Since 1994 and the establishment of the democracy in South Africa, significant opportunities have arisen in which an evaluation of the widespread incidence of violence against women may have provided the moment for an unequivocal rejection of such violence, one that went beyond mere platitudes. One occasion presented itself during the process of the Truth and Reconciliation Commission in which the issue of violence against women could have been explored in greater detail.¹⁰⁰ Indeed, feminists who have lamented the failure of the Truth and Reconciliation Commission to do so have argued persuasively that this omission was a missed opportunity for the society to recognize in a vivid and

sight/insight_national; see also Jacklyn Cock, *Keeping the Fires Burning: Militarisation and the Politics of Gender in South Africa*, 16 REVIEW OF AFRICAN POLITICAL ECONOMY 50 (Summer 1989).

⁹⁴ Andrews, *Learning to Love*, *supra* note 85, at 46-48.

⁹⁵ See Christina Murray and Felicity Kaganis, *The Contest Between Culture and Gender Equality Under South Africa's Interim Constitution*, 5 OXFORD INT'L L. REV. 17 (1994); and Ronald Thandabantu Nhlapo, *International Protection of Human Rights and the Family: African Variations on a Common Theme*, 3 INT'L J.L. & FAM. 1 (1989).

⁹⁶ See *Bhe & Others v Magistrate, Khayelitsha & Others*, 2005 (1) SA 580 (CC) ¶ 222 (S. Afr.).

⁹⁷ See Andre Grobler, *Mbeki Focuses on Fighting Crimes Against Women*, MAIL & GUARDIAN ONLINE, Aug. 9, 2007, http://www.mg.co.za/articlePage.aspx?area=/breaking_news/breaking_news_national/&articleid=316220.

⁹⁸ MOTSEI, *supra* note 2, at 173 (quoting Sello wa Loate, *Violence-Related Deaths in the Lives of Young Black Men in Alexandra Townships*).

⁹⁹ See Anton Ferreira, *Tutu Sees 'Original Sin' in SA Leaders*, MAIL & GUARDIAN ONLINE, Sep. 26, 2006, http://www.mg.co.za/articlePage.aspx?articleid=284961&area=/breaking_news/breaking_news_national/; and Bishop Desmond Tutu, *The Joy and Shame of SA Today*, THE TIMES, Sep. 1, 2007, <http://www.thetimes.co.za/News/Article.aspx?id=553563>.

¹⁰⁰ Andrews, *Learning to Love*, *supra* note 85, at 51-52.

compelling way the systemic nature of violence against women.¹⁰¹ This recognition may have also contributed somewhat to a greater societal commitment to address this violence.

The Zuma trial and its aftermath provided a crucial moment for South Africans to engage with the issues of violence against women in a fruitful manner. Instead, the trial divided the nation, and created a level of rancour and hostility that allowed the issue to become submerged in the acrimony.¹⁰² As a consequence, the moment was lost.

Annually an opportunity arises when South Africans celebrate International Women's Day on the eighth of August. This day is an opportunity widely recognized as a national moment to reflect on the situation of women. Although the government annually embarks on widely publicized public events, it has been argued that the day should be more about concrete action and less about platitudes.¹⁰³ A female commentator noted caustically on the celebrations this past August:

Why are we willing to subject ourselves to the words of powerful men and women who unashamedly act in hateful ways towards women. . . What does this incessant talk of women's empowerment matter if most women continue to live below the poverty line. . . Which women's rights are we speaking about when we turn around and tell young lesbians it is their fault they were raped, or make homophobic jokes?¹⁰⁴

Her observations, understandably exasperated, reflect widespread scepticism on the part of women advocates, as a result of insufficient action on the part of the government, the police, and other relevant parties to deal aggressively and comprehensively to reduce the statistics of violence against women.

Conclusion

I have argued that the unravelling of the cultures of masculinity, so deeply ingrained in the political, social, and emotional DNA of South Africa, will require more than a constitutional and legal framework committed to equality to radically eviscerate such deeply ingrained attitudes.¹⁰⁵ This is not to discount the enormous symbolic and substantive possibilities generated by a legal edifice committed to gender equality, but such a legal infrastructure requires constant, vigilant, and effective implementation and enforcement processes.

¹⁰¹ Lyn Graybill, *The Contribution of the Truth and Reconciliation Commission Toward the Promotion of Women's Rights in South Africa*, 24 WOMEN'S SUTD. INT'L F.1 (2001); and Beth Goldblatt and Shiela Meintjes, *Gender and the Truth and Reconciliation Commission: A Submission to the Truth and Reconciliation Commission* (May 1996), available at <http://www.doj.gov.za/trc/submit/gender.htm>.

¹⁰² See generally MOTSEI, *supra* note 2.

¹⁰³ Pumla Dineo Gqola, *Whip Out the Gender-Speak*, MAIL & GUARDIAN ONLINE, Aug. 8, 2007, http://www.mg.co.za/articlePage.aspx?articleid=316006&area=/insight/insight__comment_and_analysis/.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*