2002

Evaluating the Progress of Women's Rights on the Fifth Anniversary of the South African Constitution

Penelope Andrews
New York Law School, penelope.andrews@nyls.edu

EVALUATING THE PROGRESS OF WOMEN'S RIGHTS ON THE FIFTH ANNIVERSARY OF THE SOUTH AFRICAN CONSTITUTION

Penelope Andrews*

Good Morning!

My mandate on this panel is to evaluate five years of the Final South African Constitution by focusing on the pursuit of women's rights in South Africa.[1] This is an immense topic that requires far more time than I have. I will therefore just touch on some broad themes and sketch the major points. Hopefully, we can pursue them more deeply during the discussion period. In my presentation I will first briefly discuss the major sections of the Constitution, which deal with gender equality.[2] Second, I would like to examine the Constitutional Court's approach to equality, specifically, gender equality. Third, I will outline some statutes enacted by the South African Parliament in light of the constitutional mandate that benefit women directly. Finally, I will discuss some of the limitations on using a judicial approach to the enforcement of rights, as opposed to pursuit of rights in the legislative policy, administrative policy, and other arenas. This involves a reference to the major obstacles to women's rights in South Africa and an examination of what role the Constitution and the Constitutional Court can play in relation to minimizing or removing those obstacles.[3]

The most significant provisions relating to gender equality are outlined very clearly in section 9 of the Bill of Rights of South Africa's Constitution. As my colleague Professor DeVos mentions, the Constitution is expansive

---

* Penelope Andrews, B.A., LL.B. (Natal), LL.M. (Columbia); Stoneman Visiting Professor of Law and Democracy, Albany Law School; Associate Professor, City University of New York School of Law. A special thanks to Mark Kende for organizing the panel.

1. For a comprehensive survey of women's rights see generally GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER (Christina Murray ed., 1994); THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE (Sandra Liebenberg ed., 1995); PUTTING WOMEN ON THE AGENDA (Susan Bazilli ed., 1990).

2. For a comprehensive discussion of women's rights and the Constitution, see Penelope E. Andrews, *The Stepchild of National Liberation: Women and Rights in South Africa*, in THE POST APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW 326 (Penelope Andrews & Stephen Ellmann eds., 2001).

3. For a discussion of some obstacles to women's rights, see 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. 25 (1999). *See also* HUMAN RIGHTS WATCH, VIOLENCE AGAINST WOMEN IN SOUTH AFRICA (1995).

and very generous.[4] Indeed, the South African Constitution has been admired widely for the range of protections it affords.[5] Section 9 contains a very broad mandate to pursue gender equality and to remove unlawful discrimination.[6] This section outlines a general commitment to equality before the law and equal protection under the law. It also provides several grounds on which the state may not unfairly discriminate, directly or indirectly. Some of the grounds include race, gender, sex, pregnancy, marital status, and sexual orientation.[7]

There are a few factors worth noting with respect to the language of section 9. These are particularly interesting when compared to the situation as it pertains to the United States. The first factor that stands out is the language of this section, which suggests that discrimination against women in South Africa is just as constitutionally suspect as discrimination on the basis of race. This is a firmer stance than is taken by the American courts, which subject gender discrimination to intermediate scrutiny and race discrimination to strict scrutiny.[8]

The second issue worth noting is the prohibition on direct and indirect discrimination. This is an implicit acknowledgment of the tenacity and the invidiousness of institutionalized discrimination.[9]

The third issue worth highlighting is that section 9 acknowledges the intersectionality of different grounds of discrimination.[10] This is particularly important when redressing discrimination against black women because they suffer from multiple forms of discrimination. In one of the earliest equality cases before the Constitutional Court, Judge Goldstone noted that there is often a complex relationship between specified grounds.[11] The temptation to force them into neatly self-contained categories should be resisted.

---

4. Pierre de Vos. *South Africa's Constitutional Court: Starry-eyed in the Face of History?*, 26 VT. L. REV. 837 (2002).

5. Craig Scott & Phillip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: a Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 S. AFR. J. ON HUM. RTS. 206, 211–12 (2000).

6. S. AFR. CONST. ch. 2 § 9.

7. *Id.* § 9(3).

8. The intermediate scrutiny standard was pronounced in *Craig v. Boren*, 429 U.S. 190, 197 (1976). The strict scrutiny standard was pronounced in *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944).

9. Diane Majury. *Strategizing in Equality*, 3 WIS. WOMEN'S L. J. 169, 179–80 (1987).

10. For a comprehensive discussion of the intersection of race and gender, see Penelope E. Andrews, *Human Rights, Globalization and Critical Race Feminism: Voices from the Margins*. 3 J. GENDER RACE & JUST. 373 (2000); *see also*, Adrien Wing & Eunice Carvalho, *Black South African Women: Towards Equal Rights*, 8 HARV. HUM. RTS. J. 8 (1995).

11. President of the Republic of S. Afr. v. Hugo, 1997 (6) BCLR 708 (CC), 1997 SACLR LEXIS 91 1997 (4) SALR 1 (CC).

The fourth issue is the constitutional mandate for affirmative action, which in effect shields affirmative action programs from constitutional challenges.[12] The other sections in the Bill of Rights are very clear concerning violence against women. Section 12, for example, provides that "[e]veryone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources."[13] I have provided a brief constitutional sketch describing the major sections that provide the promise for gender equality and the grounds for fighting discrimination.

Now surprisingly, or maybe not surprisingly, since 1995 the Constitutional Court has heard fourteen equality cases and only three involved gender.[14] These cases, to a large extent, demonstrate that it has not been the most historically disadvantaged South Africans who have thus far invoked the protection of the equality provision.[15] In fact, the most important gender equality case was not brought under the rubric of gender equality, but rather involved social and economic rights.[16] My colleague Professor Klug discusses this case.[17] Of the three gender equality cases heard by the Constitutional Court, two have been brought by men who sought the protection of the equality clause.[18] One case was brought by a relatively

---

12. S. AFR. CONST. ch. 2 § 9(2) provides that: "To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

13. *Id.* § 12(1)(c).

14. Fraser v. Naude and Another, 1998 (11) BCLR 1357 (CC), 1998 SACLR LEXIS 53; *Hugo*, 1997 (6) BCLR 708 (CC); Brink v. Kitshoff, 1996 (6) BCLR 752 (CC), 1996 SACLR LEXIS 9; City Council of Pretoria v. Walker, 1998 (3) BCLR 257 (CC), 1998 SACLR LEXIS 27; Moseneke & Others v. Master of the High Court, 2001 (2) BCLR 103 (CC), 2000 SACLR LEXIS 87 (2000); Nat'l Coalition for Gay & Lesbian Equality v. Minister of Justice, 1998 (12) BCLR 1517 (CC), 1998 SACLR LEXIS 36; Hoffmann v. S. African Airways, 2000 (11) BCLR 1211 (CC), 2000 SACLR LEXIS 127; Harksen v. Lane NO & Others, 1997(1) BCLR 1489 (CC), 1997 SACLR LEXIS 20; Prinsloo v. Van der Linde & Another, 1997(6) BCLR 759 (CC); Larbi-Odam & Others v. Member of the Executive Council for Educ. (North-West Province) & Another 1997, (12) BCLR 1655 (CC), 1997 SACLR LEXIS 39; S. v. Ntuli, 1996 (1) BCLR 141 (CC), 1995 SACLR LEXIS 299 (1995); Jooste v. Score Supermarket Trading (Pty) Ltd., 1999(2) BCLR 139 (CC), 1998 SACLR LEXIS 75 (1998); Nat'l Coalition for Gay & Lesbian Equality & Others v. Minister of Home Affairs & Others, 1999 (3) BCLR 280 (CC), 1999 SACLR LEXIS 13; Minister of Defense v. Potsane & Another, 2001 (11) BCLR 1137 (CC), 2001 SACLR LEXIS 136.

15. This particular point was highlighted during a discussion of the South Africa Reading Group by Ms. Saras Jagwarth of the University of Cape Town Faculty of Law.

16. *See* Republic of S. Afr. v. Grootboom, 2000 (11) BCLR 1169 (CC), 2000 SACLR LEXIS 126.

17. Heinz Klug, *Five Years on: How Relevant is the Constitution to the New South Africa?*, 26 VT. L. REV. 769 (2002).

18. *See Fraser*, 1998 (11) BCLR 1357 (CC), at *2; *Hugo*, 1997 (6) BCLR 708 (CC), ¶ 2.

privileged white woman, who stood to lose approximately two million Rand from an estate. She based her challenge on the equality provision.[19]

These are not problems of the Court itself, but rather are perennial problems about access to resources, including access to legal services.[20] Therefore, these structural limitations have some bearing on who has access to the courts.

In the equality cases, the Constitutional Court has elaborated at length what equality means in South Africa.[21] As Professor DeVos has pointed out, the Court has tried to contextualize discrimination in South Africa and also provided a more substantive definition of equality as opposed to a mere formalistic approach.[22] The Court has also focused very largely on disparate impact as opposed to strict equal treatment.[23]

One of the first cases on gender equality involved an unmarried father, who challenged the provisions of the Child Care Act. The Child Care Act allowed the adoption of children born out of wedlock without the consent of the father.[24] For children born in wedlock, the father and mother's consent was required. The father's challenge in this case was successful in that the law was declared unconstitutional, but the Constitutional Court, citing the best interest of the child, declined to allow further appeal to set aside the adoption.[25]

The second case, one in which I think the Court's analysis provided a clear blueprint of the approach to equality in South Africa, has been fairly controversial. This is the *Hugo* decision in which the applicant, a convicted prisoner, challenged a Presidential pardon issued by President Mandela.[26] He pardoned certain categories of prisoners, including women in prison who had children under the age of twelve at the time of South Africa's first election.[27]

Hugo challenged the Presidential pardon on the basis that it violated his constitutional rights to equality and that it discriminated against him on the

---

19. Brink v. Kitshoff, 1996 (6) BCLR 752 (CC), at 9–10. One South African Rand is roughly equal to 9 cents U.S. *See* XE.com, Universal Currency Converter, *at* http://www.xe.com/ucc (last visited Apr. 20, 2002).

20. A. Chaskalson, *Law in a Changing Society the Past Ten Years: A Balance Sheet and Some Indicators for the Future*, 5 S. AFR. J. ON HUM. RTS. 293, 298–99 (1989).

21. *See generally Fraser*, 1998 (11) BCLR 1357 (CC); *Hugo*, 1997 (6) BCLR 708 (CC); *Brink*, 1996 (6) BCLR 752 (CC).

22. De Vos, *supra* note 4; *see also* Pierre De Vos, Grootbroom: *the Right of Access to Housing and Substantive Equality as Contextual Fairness*, 17 S.AFR. J. ON HUM. RTS. 258 (2001).

23. *Brink*, 1996 (6) BCLR 752 (CC), ¶¶ 10–11.

24. Child Care Act 74 of 1983, § 18(4)(d).

25. *Fraser*, 1998 (11) BCLR 1357 (CC), ¶¶ 3, 9–10.

26. *Hugo*, 1997 (6) BCLR 708 (CC), ¶¶ 1–3.

27. *Id.*, ¶ 3, n. 3.

basis of sex.[28] The Court, in its judgment, went through an elaborate discussion of equality. It then applied the test outlined in the Constitution: if discrimination is alleged and found on any of the particular grounds, such as race, gender, and marital status, that finding creates a presumption of unfairness.[29] The person against whom the allegation of discrimination is made must then rebut the presumption of unfairness by showing the validity of the action.[30] The Court, in its analysis, looked at the Presidential pardon and found it to be unfair—the need for the President to rebut the presumption arose.[31] It looked at the reasons for the Presidential pardon, including who would benefit from the pardon.[32] Clearly, children whose mothers or fathers were in prison benefited.

The Court then examined the other group who benefited from the pardon—women, the most disadvantaged group in South African society. The Court acknowledged that mothers are the primary caregivers of children, but it also recognized that this reinforced a stereotype about women, child caring, and child rearing. Despite this, the Court adopted a pragmatic approach and tried to place the issue in the South African context. It stated that because women have historically been discriminated against, this approach will benefit them,[33] but it will not perpetuate a disadvantage. The Court found the discrimination valid.

The dissent forcefully challenged the stereotypes the majority opinion appeared to perpetuate.[34] It stated very clearly that the Constitution is meant to be transformative. Part of that transformative vision is not to reinforce old stereotypes, but to pursue a vision in which, in this case, fathers are also seen as care givers of children.[35] The dissent objected strongly to the pragmatic approach that the majority took.

The Court considered an alternative, that is, to release fathers of children under the age of twelve.[36] In assessing this alternative, the Court noted, first, that there are significantly larger numbers of male prisoners in South Africa than female prisoners, so the numbers of men who would be released would be enormous.[37] Second, the Court recognized the serious problem of crime in South Africa and the public outcry that would follow a

28. *Id.*, ¶ 3.
29. S. AFR. CONST. ch. 2, § 9 (5).
30. *Hugo*, 1997 (6) BCLR 708 (CC), ¶ 4.
31. *Id.*, ¶ 66.
32. *Id.*, ¶ 47.
33. *Id.*, ¶ 38.
34. *Id.*, ¶ 82 (Kriegler, J. dissenting).
35. *Id.*, ¶ 80.
36. *Id.*, ¶ 87.
37. *Id.*

large release of male prisoners.[38] Interestingly, the Court made this assumption without providing the empirical data. In fact, this was not an argument raised by counsel during the course of the proceeding. The dissenting opinion voiced its alarm at the stereotypes that were reinforced in the majority's judgment.[39]

The *Hugo* decision, as I said, is very controversial. However, it has been praised in many quarters specifically for contextualizing women's oppression in South Africa and the discrimination that women suffer.[40] But the Court has had difficulty coming to grips with a vision or articulation of equality that some commentators have argued is inconsistent.[41] I think if we have time during the discussion we can go through more of the cases. It is interesting to note that in the race discrimination area, one major case was an action brought by a white applicant. It involved a challenge to the provision of services, water, and electricity in his community compared to those provided for an adjacent black community.[42] The second was a challenge brought by one of South Africa's wealthiest males, who happened to be black, about the racial distinctions in estates, which still pertained in South Africa at the time the action was brought.[43]

Although the parties seeking relief and protection from the Constitutional Court are not from the ranks of the most disadvantaged in South Africa, one could argue that the Court has comprehensively confronted the concerns of a large proportion of South Africa's women.[44] In addition, the social and economic rights case that Professor Klug discusses provides a noteworthy opportunity for pursuing rights that affect the majority of women in a very real way.

For the brief moments I have left, I would like to consider the major obstacles to women's equality in South Africa. Some of these obstacles are implicitly recognized in the Constitution, which provides a detailed framework for redressing them. These obstacles, however, are formidable.

---

38. *Id.*

39. *Id.*, ¶ 82.

40. Mark Kende, *Gender Stereotypes in South African and American Constitutional Law: The Advantage of a Pragmatic Approach to Equality and Transformation*, 117 S. AFR. L. J. 745, 746–47 (2000).

41. *See* 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 (1998). *See also* D.M. Davis, *Equality: The Majesty of Legoland Jurisprudence*, 116 S. AFR. L. J. 398 (1999).

42. City Council of Pretoria v. Walker, 1998 (3) BCLR 257 (CC), 1998 SACLR LEXIS 27.

43. Moseneke & Others v. Master of the High Court, 2001 (2) BCLR 103 (CC), 2000 SACLR LEXIS 87 (2000).

44. *See, e.g.*, State v. Baloyi, 2000 (2) SALR 425 (CC) (the Court analyzed the issue of violence against women as one of gender equality).

The first major impediment to women's equality is violence against women in South Africa.[45] After the elections in 1994, the government passed legislation to deal with some aspects of the problem, specifically violence in the private sphere.[46] The Constitutional Court has delivered two impressive judgments that confront and analyze violence against women.[47] What is remarkable is that the Court articulates violence against women as a question of gender equality.

The second obstacle to women's equality is poverty. For a sizeable proportion of women in South Africa, poverty clearly thwarts their ability to benefit from the new constitutional mandate.[48] Many rights are compromised by women's inability to access economic resources. For example, the ability to prevent HIV infection, as well as the treatment of AIDS, is extremely difficult for women who are still caught in a cycle of economic dependency and powerlessness.

Finally, there are cultural attitudes which continue to impede women's rights in a host of areas.[49] The intransigence of certain cultural attitudes raises questions about law, and how pursuing legal rights in the courts can modify cultural attitudes. But I think far more important is the fact that despite the existence of this wonderful Constitution and despite laudable efforts by women's groups to incorporate women's rights in the democratic legal framework, including urging the government to pursue a gendered legislative agenda, the privatized nature of the South African economy and the imperatives of a market driven agenda may undermine the transformative possibilities of the Constitution.[50] We all know that women suffer disproportionately from government cutbacks in health, education, social welfare services, and the like. The constitutional paradigm does not provide a vehicle to fundamentally challenge governmental economic policies; it merely operates to ensure that government policy takes account of its constitutional mandate. The Constitution cannot comprehensively

---

45. Andrews, *supra* note 3, at 425–26.

46. For example, The South African Parliament passed the Domestic Violence Act 116 of 1998.

47. *See Baloyi*, 2000 (1) BCLR 86 (CC); *see also* Carmichele v. Minister of Safety & Security & Another, 2001 (10) BCLR 995 (CC), 2001 SACLR LEXIS 47.

48. *See* FATIMA MEER, *Women in the Apartheid Society*, *in* THE STRUGGLE FOR LIBERATION IN SOUTH AFRICA AND INTERNATIONAL SOLIDARITY 169 (E.S. Reddy ed., 1992).

49. *See* Yvonne Mokgoro, *Traditional Authority and Democracy in the Interim South African Constitution*, 3 REV. OF CONST. STUD. 60 (1996) (discussing the tension between women's rights and patriarchal attitudes); *see also* Penelope E. Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. OF RACE & L. 307 (1998).

50. A noted American constitutional scholar has outlined the transformative possibilities of the South African Constitution. *See* Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. ON HUM. RTS. 146, 149–50 (1998).

overturn the deep structural inequalities that face women in South Africa today; it may, however, force the powers that be not to ignore these inequalities.