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From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa

Penelope E. Andrews*

I. Introduction

This article discusses the quest for women's rights in South Africa and how the transition from apartheid to democracy led to a commitment to gender equality as incorporated in South Africa's transitional and final Constitutions.¹ In this endeavor, it refers to the organizational attempts by women prior to and during the constitutional drafting process to ensure that the new Constitution embodied the aspirations and reflected the struggles for women's rights by women activists in South Africa. This article is divided into six sections. Section Two describes the legacy of apartheid for all women in South Africa.² This investigation is appropriate because the legacy of apartheid will bear significantly on the status and lives of women for a long time. This section shows how the laws and policies of apartheid were comprehensive, not only in

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¹ South Africa's constitutional negotiations involved a two-stage process. The first stage was the negotiation process that preceded South Africa's first democratic elections in May 1994, leading to the interim Constitution. For an account of the negotiations, see generally *The Small Miracle, South Africa's Negotiated Settlement*, 7 S. AFR. REV. 1 (1994) (analyzing race relations, the African National Congress (ANC), and politics and governance in the period from 1989 to 1994, and making predictions for the years after 1994). The second stage was the writing of the final Constitution by a duly elected Constitutional Assembly; this stage was completed in 1996 and certified by the Constitutional Court that same year. For a detailed account of the constitution-making process in South Africa, see generally HASSEN EBRAHIM, *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* (1998). This paper focuses only on the provisions in the final Constitution.

² See *infra* notes 10-35 and accompanying text.

enforcing rigid racial segregation, but also in racializing gender.³ Section Three focuses on the Constitution and outlines the myriad of ways this document details comprehensive rights for women both in the public and the private spheres.⁴ This section demonstrates how the South African Constitution, in particular its section on equality, has been described as one of the most impressive human rights documents of the twentieth century.⁵ Specifically, the Constitution details rights expansively and comprehensively, while its inclusion of sweeping rights for women satisfies South Africa's international legal obligations. Section Four of this article focuses on two cases regarding women's rights decided by the Constitutional Court, arguing that South Africa's evolving constitutional jurisprudence demonstrates a deep commitment by the highest courts to eradicate odious discrimination against women.⁶ Section Five analyzes the lobbying efforts of women's organizations during the transitional period to ensure that women's rights were incorporated into the new Constitution.⁷ In addition, this section analyzes how these lobbying efforts resulted in significant formal gains as reflected in the Constitution.⁸ This article concludes by assessing some of the remaining obstacles to attaining women's equality despite the significant advancements made thus far.⁹

II. The Legacy of Apartheid for Women

The system of apartheid existing in South Africa since 1948 and the previous periods of colonialism left all South African women in a subordinated position.¹⁰ This position of subordination was determined in part by the racial status of women in South

³ See *infra* notes 10-35 and accompanying text.

⁴ See *infra* notes 36-67 and accompanying text.

⁵ See *infra* notes 36-67 and accompanying text.

⁶ See *infra* notes 68-182 and accompanying text.

⁷ See *infra* notes 183-202 and accompanying text.

⁸ See *infra* notes 183-202 and accompanying text.

⁹ See discussion *infra* Section VI.

¹⁰ Fatima Meer, *Women in the Apartheid Society, in THE STRUGGLE FOR LIBERATION IN SOUTH AFRICA AND INTERNATIONAL SOLIDARITY* 169, 173-81 (E.S. Reddy ed., 1992).

Africa's peculiar racial hierarchy.¹¹ African women, who occupied the lowest place in this hierarchy, were in the most disadvantaged position. Indian and Coloured women fared only slightly better, and white women, as members of the most favored racial group in the apartheid racial hierarchy, were in the most advantageous position.¹² This did not mean, however, that white women escaped the panoply of disadvantages and discrimination suffered by all women in a patriarchal society like South Africa. In this respect, Justice Albie Sachs of the Constitutional Court, one of South Africa's most eminent legal jurists, has referred to patriarchy as being "the only truly non-racial institution in South Africa."¹³

African women were left in a particularly bereft state; for them apartheid meant separation from spouses, and for their children it meant absent fathers. For African women apartheid also signified the entrenched denial of a host of rights, including one of the most fundamental of rights—the right to travel freely to seek gainful employment.¹⁴ The migrant labor system, also known as the system of influx control, locked women into a spiral of dispossession and disadvantage.¹⁵ This system, authorized by the Black Urban Area Consolidation Act and a few other pieces of legislation, operated to allocate rights to Africans in the most pusillanimous manner.¹⁶ The rights articulated in Section 10, the

¹¹ The Population Registration Act of 1959, repealed in 1991, classified South Africans into four broad racial groups, namely white, Coloured, Indian, and African, with different sub-groups in each of the non-white categories. See generally Rene de Villiers, *Afrikaner Nationalism*, in 2 THE OXFORD HISTORY OF SOUTH AFRICA 365 (Monica Wilson & Leonard Thompson eds., 1971).

¹² For a comprehensive discussion of the legacy of apartheid and the impact this hierarchy had on women, see Penelope E. Andrews, *The Stepchild of National Liberation: Women and Rights in the Post-Apartheid South Africa*, in THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA'S BASIC LAW (Penelope E. Andrews & Stephen Ellmann eds.) (forthcoming).

¹³ Albert Sachs, *Judges and Gender: The Constitutional Rights of Women in a Post-Apartheid South Africa*, 7 AGENDA 1 (1990) (suggesting ways to overcome structural inequality based on culture and laws).

¹⁴ ALFRED MOLEAH, SOUTH AFRICA: COLONIALISM, APARTHEID AND AFRICAN DISPOSSESSION 466-70 (1993). It has been pointed out that the economic marginalization of black people in South Africa, created by the migrant labor system, has resulted in African women bearing the brunt of such marginalization. *Id.*

¹⁵ *Id.*

¹⁶ Black Urban Area Consolidation Act 25 of 1945 (repealed 1984).

centerpiece of the legislation, provided extremely limited conditions under which people could move or remain in the areas designated as white.¹⁷ This denial of the freedom to move and to obtain work locked women into a cycle of dependency in which their livelihood depended on absent husbands and, sometimes, on absent sons, who sent meager amounts earned in the city for the upkeep of spouses, parents, and children.¹⁸ This systematized dependency, even at present, has the potential to thwart the economic and social advancement of women for generations to come.

This systematic separation of children from their fathers and wives from their husbands created social and psychological conditions which have yet to be explored in South Africa. The Truth and Reconciliation Commission assessed the psychological and physical trauma flowing from exposure to gross violations of human rights.¹⁹ The forced separation of families arguably constituted a continuing violation of human rights, the consequences of which deserve particular attention today. The system of migrant labor rendered women, sometimes voluntary, but often involuntary, parties to polygamous marriages.²⁰ Men had separate wives and families simultaneously in the cities and in the rural areas.²¹ This situation created uncertainty and insecurity for women and perpetuated the subordination of women, who were seen as appendages of men, and, in fact, relied entirely on men for their well-being.²² Moreover, because South African law did not

¹⁷ These issues are explored in comprehensive detail by Justice Moloto in this volume. Judge Justice Moloto, *South African Legal Reform After April 1994*, 26 N.C. J. INT'L L. & COM. REG. 653 (2001).

¹⁸ Any visitor to the rural areas of South Africa during the apartheid years would have been struck by the absence of young men. The rural areas housed the "superfluous" people of South Africa: the old, the young, and the women. This absence of able-bodied men reflected a rather Kafkaesque policy, the program of the apartheid government to ensure "whiteness" in South Africa's urban areas. See INTERNATIONAL DEFENSE AND AID FUND, *APARTHEID: THE FACTS* 17 (1983).

¹⁹ See 5 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 125-69 (Susan de Villiers ed., 1998).

²⁰ See generally Meer, *supra* note 10.

²¹ *Id.* Polygamy, which was allowed in customary legal regimes, pre-dated the system of influx control. It is arguable, however, that the forced separation of women and men encouraged multiple unions.

²² *Id.*

recognize customary marriages, women in these unions were denied legal protection, and their children were deemed illegitimate.²³

This system of dependency generated by apartheid law and policy was reinforced by a traditional system of law and culture that placed women under the perpetual tutelage of men.²⁴ Under traditional law and culture, women were denied a host of rights: the right to own land, the right to custody of their children, and the right to be chief or elected as chief.²⁵ These laws and policies, bolstered by an apartheid ideology that insisted on the second-class status of women within African society, cemented their inferior status; this legacy will continue to haunt women for many generations.²⁶

Coloured and Indian women were excluded from the migrant labor system and allowed to move freely to secure employment opportunities.²⁷ They also labored, however, under the apartheid system's racial allocation of resources and the panoply of disadvantages engendered by apartheid.²⁸ Coloured and Indian women continue to exist in abject conditions of poverty even today.²⁹

In the private sphere, white women were subjected to highly patriarchal and sexist attitudes within their own communities. South Africa's particular brand of masculinity, bolstered by a Calvinist religious ideology and a militarist white state, had a

²³ *Id.*

²⁴ *Id.*

²⁵ Penelope Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. RACE & L. 307, 323-27 (1998).

²⁶ Martin Chanock, *Law, State and Culture: Thinking About "Customary Law" After Apartheid*, 1991 ACTA JURIDICA 52, 64-70 (1991).

²⁷ HILDA BERNSTEIN, FOR THEIR TRIUMPH AND THEIR TEARS: WOMEN IN APARTHEID SOUTH AFRICA 11-13 (1985).

²⁸ See CHERRYL WALKER, WOMEN AND RESISTANCE IN SOUTH AFRICA 5-7 (1982).

²⁹ See generally DON PINNOCK, THE BROTHERHOOD: STREET GANGS AND STATE CONTROL IN CAPETOWN (1984). The Cape Flats, a large area outside of Capetown, allocated specifically for residence of Coloured and African people, are the most desolate and poverty-stricken areas of Capetown. *Id.* In addition, much of the Cape Flats designated as Coloured is wracked by gang violence, disproportionate unemployment rates compared to the rest of Capetown, horrendous statistics of crimes against women, and lawlessness, all of which appear immutable. *Id.*

particularly pernicious effect on white women, who were conscripted into the maintenance of apartheid from which they could benefit as non-whites, but not necessarily as women.³⁰

The system of racialized sexual subordination under apartheid, and the violence to which women were subjected as a result, only began to emerge as an issue of national concern during the dying days of apartheid.³¹ This was so because during the apartheid years, all women were considered second-class citizens.³² That second-class status, however, was mediated by the apartheid ideology that allowed status in the racial hierarchy to be compromised by the sexist underpinnings of the whole society.³³ One could argue that for white women, their subordinated status as women was compensated by their status as the most favored group in the racial hierarchy. The literature on women's status in South Africa during the apartheid years focused largely on the status of black women, specifically those of African descent.³⁴ Scholarship on the status of white women under apartheid was lacking. At the dawn of South Africa's democracy, however, despite their experiential contradictions, South African women converged around the need to protect their interests as women.³⁵

III. The South African Constitution and Gender Equality

The South African Constitution reflects a clear commitment to the principle of non-sexism and to the attainment of gender equality. In the Founding Provision of Chapter 1, the Constitution makes clear that the South African state is founded on several values, including “[h]uman dignity, the achievement of equality

³⁰ See generally JACKLYN COCK, *MAIDS AND MADAMS: DOMESTIC WORKERS UNDER APARTHEID* (1989) (discussing the dissonance between white women and their black female workers in the highly exploitative conditions of domestic labor).

³¹ See generally WALKER, *supra* note 28, at 5 (noting both the “sexual hierarchy between male and female” and “the colour hierarchy of white over black”).

³² *Id.* at 7. Under customary African law, “women were deemed perpetual minors, always under the guardianship of their nearest male relative, regardless of their age.” *Id.*

³³ BERNSTEIN, *supra* note 27, at 28-30.

³⁴ *E.g.*, Meer, *supra* note 10. *But see* BERNSTEIN, *supra* note 27, at 82-83, 107-08 (documenting the involvement of white women in the struggles of black women); *see also* WALKER, *supra* note 28 (tracing the relations between white women's suffrage groups and the political and social struggles of black women's groups).

³⁵ BERNSTEIN, *supra* note 27, at 88, 94-95.

and the advancement of human rights and freedoms, [n]on-racialism, and non-sexism.”³⁶ The most important provisions relating to gender equality are found in the Bill of Rights,³⁷ particularly Section 9, which outlines the preeminent principle of equality.³⁸ Section 9 contains a general commitment to equality before the law and equal protection of the law, dictating 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 social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”³⁹

Section 9 also provides that “[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds” as listed above.⁴⁰ The language used in this equality section is worth noting for several reasons. First, the prohibition against discrimination on the several grounds listed suggests that discrimination against women is just as constitutionally suspect as discrimination on the basis of race. Thus, the South African Constitution provides a firmer ground for women than that found in American constitutional jurisprudence, which subjects sexual discrimination to intermediate scrutiny and racial discrimination to strict scrutiny.⁴¹ In other words, the South African Constitution places sex or gender on the same footing as race for the purposes of eliminating discrimination. Second, the “prohibition on direct and indirect discrimination implicitly acknowledges the invidiousness and tenacity of institutionalized discrimination.”⁴² This acknowledgment reflects thoughtful arguments by feminist and other critical scholars about the need to include a clear prohibition on indirect discrimination.⁴³ Third, the inclusion of

³⁶ S. AFR. CONST. ch. I, § 1(a)(b).

³⁷ *Id.* ch. II.

³⁸ *Id.* ch. II, § 9.

³⁹ *Id.* ch. II, § 9(3).

⁴⁰ *Id.* ch. II, § 9(4).

⁴¹ See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (noting that gender classifications “must be substantially related to [the] achievement of those [governmental] objectives”); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (stating that the “most rigid scrutiny” should be applied to racial classifications).

⁴² *Andrews*, *supra* note 25, at 328.

⁴³ See, e.g., Margaret Thornton, *The Indirection of Sex Discrimination*, 12 U.

both sex and gender as grounds for proscribing discrimination has the potential of protecting women from invidious discrimination based not only on biological or physical attributes, but also on social or cultural stereotypes about the perceived role and status of women. Section 37 of the Constitution, however, permits emergency derogation from the constitutional protection of equality with respect to gender, though not sex, and reflects a certain reticence on the part of the constitutional drafters to upset prevailing stereotypes about the role and status of women.⁴⁴ Fourth, in Section 9 the Constitution prohibits discrimination by private individuals and obliges the government to enact legislation “to prevent or prohibit unfair discrimination.”⁴⁵ Finally, the equality section also provides that discrimination on the grounds listed “is unfair unless it is established that the discrimination is fair.”⁴⁶

Of enormous potential value to women is the inclusion of protective measures, or affirmative action. Section 9 of the Constitution provides that “[e]quality includes the full and equal enjoyment of all rights and freedoms. 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.”⁴⁷ It is patently “clear that a constitutional mandate for affirmative action is an important weapon for tackling structural discrimination in a comprehensive manner, as well as shielding affirmative action programs from constitutional challenges.”⁴⁸ This incorporation of affirmative action in the Constitution parallels South Africa’s commitment to gender equality as reflected by the government’s ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁴⁹ CEDAW provides that “[a]doption

TASMANIA L. REV. 88, 91-92 (1993).

⁴⁴ S. AFR. CONST. ch. II, § 37. Derogation from the constitutional protection of equality is not allowed “with respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.” *Id.*

⁴⁵ *Id.* ch. II, § 9(4).

⁴⁶ *Id.* ch. II, § 9(5).

⁴⁷ *Id.* ch. II, § 9(2).

⁴⁸ Andrews, *supra* note 25, at 329.

⁴⁹ G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/830, A/34/L.61 (1979).

by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination. . . . [T]hese measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.”⁵⁰

The Constitution also provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”⁵¹ This provision has enormous potential for the protection of women. One could plausibly argue that violence against women in its many forms is clearly a violation of women’s dignity, and that the state’s failure to take steps to prevent violence against women is in contravention of the Constitution. With respect to the right of women to be free from violence, the Constitution provides that “[e]veryone has the right to freedom and security of the person which includes the right . . . [t]o be free from all forms of violence from either public or private sources.”⁵²

This significant advancement has enormous potential to protect women from violence both within the home as well as outside the home. It is now recognized that women are more likely to be subjected to violence from loved ones within the family than from strangers.⁵³ This provision also coheres with feminist agitation about the persistence of the public/private divide in law, and its deleterious impact on women.⁵⁴ Feminist scholars have long argued that the public/private distinction discriminates against women and perpetuates violence against them.⁵⁵

The goals of non-sexism are also found in other sections of the Bill of Rights. Section 12, for example, provides that: “Everyone has the right to bodily and psychological integrity, which includes the right (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected

⁵⁰ *Id.* pt. 1, art. 4(1).

⁵¹ S. AFR. CONST. ch. II, § 10.

⁵² *Id.* ch. II, § 12(1)(c).

⁵³ Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 116, 120 (Rebecca J. Cook ed., 1994).

⁵⁴ See Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, *supra* note 53, at 85.

⁵⁵ See *id.*

to medical or scientific experiment without their informed consent.”⁵⁶ These provisions have enormous potential to protect women with regard to personal choices about birth control and reproduction. The Constitution also protects freedom of expression, but only insofar as it does not involve “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”⁵⁷

With respect to the enforcement of the rights listed in the Bill of Rights, the Constitution comprehensively defines those who have legal standing to sue and also lays the basis for class action litigation.⁵⁸ This section states that any person listed in the Bill of Rights “has the right to approach a competent court” to seek relief when “a right in the Bill of Rights has been infringed or threatened.”⁵⁹ The Bill of Rights also provides that relief may be sought by:

- (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 interest of its members.⁶⁰

In addition to the provision of substantive rights, the Constitution attempts to ensure that the courts and other tribunals and forums interpret the rights in the Constitution in a way that comports with the Constitution’s underlying ideals. The Constitution specifically states that “when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”⁶¹ In addition, courts are also required “to consider international law and may consider

⁵⁶ S. AFR. CONST. ch. II, § 12(a).

⁵⁷ *Id.* ch. II, § 16(2)(c).

⁵⁸ *Id.* ch. II, § 38.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* ch. II, § 39(2).

foreign law” when interpreting the Bill of Rights.⁶² The Constitution also acknowledges rights or freedoms incorporated in legislation, in common law, or in customary law; however, these rights may not contradict the values inherent in the Constitution.⁶³ To abet the enforcement of women’s rights in the Constitution and in pursuit of the goal of non-sexism, the Constitution provides for a Commission for Gender Equality to promote, educate, monitor, and lobby for gender equality.⁶⁴ The functions of the Commission for Gender Equality are set out clearly in Section 187, which provides that:

(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.

(2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise, and report on issues concerning gender equality.

(3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation.⁶⁵

The Constitution also provides for the establishment of the Human Rights Commission to promote and protect human rights.⁶⁶ In addition, the Constitution provides for a Public Protector “to investigate any conduct in state affairs, or in the public . . . [sector that is] suspected to be improper or to result in any impropriety or

⁶² *Id.* ch. II, § 39(1). These issues are explored in detail by Catherine Admay in this volume. Catherine Adcock Admay, *Constitutional Comity: Mediating the Rule of Law Divide*, 26 N.C. J. INT’L L. & COM. REG. 723 (2001).

⁶³ S. AFR. CONST. ch. II, § 39(3).

⁶⁴ *Id.* ch. XI, § 187.

⁶⁵ *Id.* ch. XI, § 187(1)-(3).

⁶⁶ *Id.* ch. XI, § 184. In Section 184, the Constitution provides the following functions for the Human Rights Commission: “(a) [to] promote respect for human rights and a culture of human rights; (b) [to] promote the protection, development and attainment of human rights; and (c) [to] monitor and assess the observance of human rights in the Republic.” *Id.* Most importantly, the Constitution provides that “[e]ach year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.” *Id.* ch. XI, § 184(3).

prejudice” and “to take appropriate remedial action.”⁶⁷

The mandate of these commissions and the Constitutional Court indicates that the Constitution has not only provided for substantive rights, but also for efficient enforcement mechanisms which are required to enforce the spirit of the Constitution in its deliberations. The effective functioning of these commissions as well as the courts, of course, is always predicated on state resources and on the state's commitment to continued vigilance of women's rights.

IV. An Evolving Constitutional Jurisprudence

The evolving constitutional jurisprudence emanating from the Constitutional Court suggests a clear break from South Africa's ignominious legal past to one forged on principles of equality and non-discrimination. The two cases discussed below demonstrate a thoughtful articulation by the Court of the need to eradicate the vestiges of discrimination against women.⁶⁸

In 1996 the Constitutional Court considered the constitutionality of an executive order signed by President Nelson Mandela, that sought to pardon “all mothers in prison on 10 May 1994, with minor children under the age of [twelve] 12 years.”⁶⁹ This section of the Presidential Act was challenged by a male prisoner who argued that the remission of sentences applicable only to mothers violated the constitutional rights of fathers.⁷⁰ The basis of his challenge was that the provision in question unfairly discriminated against him on the grounds of sex or gender, and indirectly against his son because the latter's incarcerated parent was not female.⁷¹ The lower court agreed with the complainant and found that the Presidential Act discriminated against him on the grounds of sex and gender.⁷² The court also found that the presumption of unfairness had not been rebutted by the President.⁷³

⁶⁷ *Id.* ch. XI, § 182(1)(a), (c).

⁶⁸ *See infra* notes 69-182 and accompanying text.

⁶⁹ *Hugo v. President of the Republic of S. Afr. & Another*, 1996 (4) SALR 1012, 1016 (CC).

⁷⁰ *Id.*

⁷¹ *Id.* at 1012.

⁷² *Id.* at 1016.

⁷³ *Id.*

After hearing the case on appeal, the Constitutional Court reversed the lower court's decision.⁷⁴ In a lengthy deliberation, the Court first considered the nature of the power granted to the President under the Interim Constitution to pardon individuals or groups.⁷⁵ The Court concluded that the presidential power to pardon is guided by the principle of equality as articulated in the Constitution, even though its origins lie in the royal prerogative.⁷⁶ The Court undertook a comprehensive journey through comparative jurisdictions that have addressed the question of judicial review of presidential pardons and concluded that the President's decision to grant the pardon to women and not men was done in the best interests of the child.⁷⁷

Justice Goldstone, writing for the majority, first found that the presidential pardon discriminated against the complainant.⁷⁸ Addressing the presumption of unfairness that is triggered by the discrimination, the Court evaluated the rationale underlying the Presidential Act in allowing the special remission for mothers of minor children.⁷⁹ The Court referenced the special testimony of the Director of the South African National Council for Child and Family Welfare on the peculiar role that mothers play in the rearing of their children.⁸⁰ The Court noted the apparent contradiction between the reality that mothers bear the greatest

⁷⁴ *Id.* at 1017.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1020.

⁷⁷ *President of the Republic of S. Afr. & Another v. Hugo*, 1997 (4) SALR 1, 11-25 (CC).

⁷⁸ *Id.* at 19.

⁷⁹ *Id.* at 20.

⁸⁰ *Id.* at 21. In her affidavit, the Director stated:

In my opinion, the identification of this special category for remission of sentence is rationally and reasonably explicable as being in the best interests of the children concerned. It is generally accepted that children bond with their mothers at a very early age and that mothers are the primary nurturers and care givers of young children. In my experience, there are only a minority of fathers who are actively involved in nurturing and caring for their children, particularly their pre-adolescent children. There are, of course, exceptions to this generalization, but the *de facto* situation in South Africa today is that mothers are the major custodians and the primary nurturers and care givers of our nation's children.

Id. at 21.

burden of childrearing and the constitutional imperative that everyone be treated equally.⁸¹ The Court acknowledged, however, the contemporary situation in South Africa in which mothers have the greater share of childrearing.⁸² Distinguishing between the idealized situation in which fathers and mothers equally share childrearing functions, and the generalized situation of unequal childrearing, the Court found that children would substantially benefit from the Presidential Act.⁸³

The Court acknowledged that the generalization about women bearing the greater proportion of the burden of childrearing has historically been used to justify the unequal treatment of women.⁸⁴ In this respect, reference was made to an earlier court decision in South Africa in which women were denied entry to the legal profession in part because of their childrearing responsibilities.⁸⁵ The Court, however, distinguished between the burden flowing from the generalization as opposed to an opportunity such a generalization may spur.⁸⁶

The Constitutional Court considered the likely outcome if equal treatment were applied and concluded that no public benefit would be gained by releasing fathers because they were not the primary caretakers of children.⁸⁷ Pointing out that the Presidential Act provides for individual application for remission of sentences by male prisoners where special circumstances can be shown, the Court therefore found the discrimination to be fair.⁸⁸

⁸¹ *Id.* at 22.

⁸² *Id.* at 21.

⁸³ *Id.* at 25.

⁸⁴ *Id.* at 22.

⁸⁵ *Id.* (citing *Inc. Law Soc'y v. Wookey*, 1912 A.D. 523).

⁸⁶ *Id.*

⁸⁷ *Id.* at 25. The Court also referred to the large numbers of male prisoners as opposed to female prisoners, and to the public outcry that may ensue if large numbers of male prisoners were to be released in light of the alarming levels of crime. *Id.*

⁸⁸ *Id.* at 26. Justice Didcott dissented in the judgment, basing his opinion on a previous Constitutional Court case which held that when no benefit or advantage can be derived from a declaration from the Constitutional Court, that declaration becomes "wholly academic . . . exciting no interest but an historical one." *Id.* at 30 (Didcott, J., dissenting) (citing *J.R. Publ'g (Pty.) Ltd. & Another v. Minister of Safety and Sec. & Others*, 1997 (3) SALR 514 (CC)). Justice Didcott believed that because of the absolutely unique nature of the presidential decree, "its repetition on any similarly auspicious occasion which may arise some day seems improbable." *Id.* at 30 (Didcott, J.,

Justice Kriegler's dissent is worth noting because it appears to comport with current American equal opportunity jurisprudence.⁸⁹ He agreed with the Court's conclusion that the power of presidential pardon granted under the clemency powers of the South African Constitution is subject to judicial review for consistency with the equality section of the Constitution.⁹⁰ He also agreed that the court below made an error in requiring that this be corrected because it violated the Constitution.⁹¹ He disagreed, however, with the Court's conclusion that the clemency granted for mothers of young children was fair.⁹² In his opinion, the presidential pardon did not pass constitutional muster.⁹³ Like the majority, he found that the President violated the equality provisions of the Constitution by distinguishing between classes of parents on the basis of their gender, but, unlike the majority, he concluded that the presumption of unfairness in "attaching that distinction has not been rebutted."⁹⁴ Justice Kriegler questioned one of the assumptions of the presidential decree that had not been fully explored, namely, that large numbers of men being released from prison would shake public confidence.⁹⁵ He questioned the absence of empirical data to support this proposition, noting that the majority had instead relied on public perceptions about crime.⁹⁶

Justice Kriegler insisted that where some rebuttal is provided for the presumption of unfairness, such rebuttal must be scrutinized thoroughly and must not be "discharged with relative ease."⁹⁷ He took issue with the rationale that women were the primary caregivers of young children, stating this generalization to

dissenting). He pointed out that the decree was time-specific and was certainly not designed to continue indefinitely. Moreover, the decree would not benefit the father whose child was not under the age of twelve; by the time the matter came to Court, the child had already celebrated his thirteenth birthday. This rendered the matter moot. *Id.* at 29 (Didcott, J., dissenting).

⁸⁹ *Id.* at 31 (Kriegler, J., dissenting).

⁹⁰ *Id.* (Kriegler, J., dissenting).

⁹¹ *Id.* (Kriegler, J., dissenting).

⁹² *Id.* (Kriegler, J., dissenting).

⁹³ *Id.* (Kriegler, J., dissenting).

⁹⁴ *Id.* at 32 (Kriegler, J., dissenting).

⁹⁵ *Id.* at 34 (Kriegler, J., dissenting).

⁹⁶ *Id.* (Kriegler, J., dissenting).

⁹⁷ *Id.* at 35 (Kriegler, J., dissenting).

be “a root cause of women’s inequality in our society. It is both a result and a cause of prejudice: a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and feature of the patriarchy which the Constitution so vehemently condemns.”⁹⁸ Justice Kriegler concluded that a small number of women would benefit from this pardon, but the rebuttal and the rationale for the rebuttal used by the majority would operate as a “detriment to all South African women who must continue to labor under the social view that their place is in the home.”⁹⁹ The benefit to a few hundred women cannot justify the continued stereotyping of women as the primary caregivers.¹⁰⁰

Justice O’Regan’s concurring opinion is also particularly noteworthy.¹⁰¹ She agreed with the statements made by the majority about the reviewability of the presidential pardon and focused her comments entirely on the question of whether the discrimination inherent in the presidential order was unfair.¹⁰² She found Justice Kriegler’s approach too restrictive, instead noting that the determination of whether the discrimination was unfair required a recognition 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.”¹⁰³ She noted that

⁹⁸ *Id.* at 37 (Kriegler, J., dissenting). Justice Kriegler also made an important point that nowhere in the presidential decree was it mentioned that the purpose of the decree was to benefit women, because childless women were not included in the decree. *Id.* (Kriegler, J., dissenting). The purpose was not to make good past discrimination against women; the purpose of the decree was to benefit children. *Id.* at 37-38 (Kriegler, J., dissenting).

⁹⁹ *Id.* at 38 (Kriegler, J., dissenting). He also pointed out that this would have the effect of men internalizing the notion that they have a secondary role in caring for their children. *Id.* (Kriegler, J., dissenting).

¹⁰⁰ *Id.* (Kriegler, J., dissenting).

¹⁰¹ *Id.* at 40-47 (O’Regan, J., concurring). Justice Mokgoro’s concurring opinion noted specifically that the question before the court was whether, under the Presidential decree, only women should be released or no one released. *Id.* (Mokgoro, J., concurring). In addition, he noted that, taking everything into account, particularly the enormous benefit to the children to be united with their parent, the limitation in Section 33(1) of the Constitution can be justified by the Presidential decree. *Id.* (Mokgoro, J., concurring).

¹⁰² *Id.* at 47 (O’Regan, J., concurring).

¹⁰³ *Id.* at 49 (O’Regan, J., concurring).

there were two factors relevant to the determination of unfairness: an analysis of the group that has suffered discrimination, and the “effect of the discrimination on the interests of those concerned.”¹⁰⁴ She evaluated the vulnerability of the group affected by the discrimination and the particularly invasive nature of the discrimination.¹⁰⁵ Justice O’Regan noted that even though the goal of equality in the Constitution is very clear, the factual reality in South Africa was that women did carry, and would continue to carry in the foreseeable future, the greater burden of childrearing.¹⁰⁶ She considered this a crucial fact in looking at discrimination and determining the unfairness of the distinction made.¹⁰⁷ Referring to Justice Kriegler’s proposition that there would be a profound disadvantage for women in perpetuating the stereotype through the distinction, Justice O’Regan pointed out that the profound disadvantage did not result from the presidential decree but from the inequality which was part of the social fabric of South African society.¹⁰⁸ She disagreed with Justice Kriegler that this presidential pardon harmed women.¹⁰⁹ She also pointed out that any discrimination that men may suffer as a result of the presidential pardon was not severe.¹¹⁰ Even though fathers were denied the special remission of sentence by the general decree, they did have the opportunity to make individual applications.¹¹¹

The majority and concurring opinions in this judgment indicate the broad contours of equality that the Constitutional Court is prepared to embrace. The Court is concerned not just with formal equality (equal treatment), which can at times lead to inequality, but also with substantive equality, which contextualizes the actual experiences and reality of women within the formal impediments to equality.¹¹²

¹⁰⁴ *Id.* (O’Regan, J., concurring).

¹⁰⁵ *Id.* (O’Regan, J., concurring).

¹⁰⁶ *Id.* (O’Regan, J., concurring).

¹⁰⁷ *Id.* (O’Regan, J., concurring).

¹⁰⁸ *Id.* (O’Regan, J., concurring).

¹⁰⁹ *Id.* (O’Regan, J., concurring).

¹¹⁰ *Id.* at 50 (O’Regan, J., concurring).

¹¹¹ *Id.* (O’Regan, J., concurring).

¹¹² See generally Diana Majury, *Strategizing in Equality*, 3 WIS. WOMEN’S L.J. 169 (1987) (comparing the “equal treatment” type of equality requiring complete gender-

In *S. v. Baloyi*,¹¹³ the Constitutional Court considered the constitutionality of Section 3(5) of the Prevention of Family Violence Act 133 of 1993 (the Act).¹¹⁴ The subsection had been declared invalid by the Transvaal High Court, which had referred its finding to the Constitutional Court for confirmation.¹¹⁵ The High Court's declaration of invalidity was based on its finding that the subsection under review "place[d] a reverse onus of proving absence of guilt on a person charged with breach of a family violence interdict,"¹¹⁶ thus conflicting with the constitutionally protected presumption of innocence without compelling constitutional justification.¹¹⁷ The case presented the opportunity for the Constitutional Court to confront the vexing issue of domestic violence and to balance the need to eradicate domestic violence against the constitutional rights of accused persons to a fair trial.¹¹⁸

The Minister of Justice and the Commission for Gender Equality intervened in the action, challenging the High Court's decision on three grounds.¹¹⁹ First, they felt the "alleged violators should not be considered 'accused persons' entitled to the presumption of innocence."¹²⁰ Second, even if they were to be treated as such, the sections of the Criminal Procedure Act under review should not be interpreted as imposing a reverse onus.¹²¹ Third, if the proper interpretation of those sections involved the imposition of a reverse onus, "then the limitation of the presumption of innocence involved could be justified."¹²²

neutral treatment of women with a different type of equality that affirmatively recognizes inherent differences between men and women).

¹¹³ 2000 (2) SALR 425, 427 (CC).

¹¹⁴ *Id.*

¹¹⁵ *Id.* Although the Prevention of Family Violence Act was soon to be replaced by the Domestic Violence Act 116 of 1998, the Constitutional Court believed it appropriate to deal with the sections under review because they would soon affect appellant and others similarly situated. *Id.* at 428.

¹¹⁶ *Id.* at 427-28.

¹¹⁷ *Id.* at 428.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 430.

¹²⁰ *Id.* at 431.

¹²¹ *Id.*

¹²² *Id.*

The complainant, the wife of an army officer, had been granted an interdict against her husband by a magistrate in Pretoria.¹²³ The appellant was ordered not to assault either the complainant or their child and not to prevent them from entering or leaving the marital home.¹²⁴ The appellant ignored the interdict and subsequently assaulted and threatened to kill the complainant.¹²⁵ She complained to the police, and after she signed an affidavit, the police arrested the appellant and brought him before a magistrate to inquire into the alleged breach of the interdict.¹²⁶

The Court began its discussion by addressing the Constitution's express reference to the problem of domestic violence.¹²⁷ Justice Sachs, writing for the majority in a unanimous decision, embarked on a thoughtful analysis of the need to deal comprehensively and effectively with the problem of domestic violence.¹²⁸ He described the unique "hidden, repetitive character" of domestic violence, its ubiquity in cutting across class, race, culture, and geographic boundaries, and the deleterious consequences of its persistence for society.¹²⁹ Moreover, because of the gender-specific nature of domestic violence, it mirrored and mimicked patriarchal domination in a particularly abhorrent manner.¹³⁰

Justice Sachs explored the banality and perceived inevitability of domestic violence and the imperatives on the government to stem it.¹³¹ He contextualized the problem as embedded in patriarchy and the continued subordination of women.¹³² In their research, women's organizations have uncovered "high levels of domestic abuse across all sectors of South African society."¹³³

¹²³ *Id.* at 428.

¹²⁴ *Id.* at 428-29.

¹²⁵ *Id.* at 429.

¹²⁶ *Id.*

¹²⁷ *Id.* at 432.

¹²⁸ *Id.* at 431-33.

¹²⁹ *Id.* at 431.

¹³⁰ *Id.* at 432.

¹³¹ *Id.* at 431-33.

¹³² *Id.* at 432.

¹³³ 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, 445

These disturbing numbers confirm the Court's assessment of the "certain normalcy or banality" of domestic violence.¹³⁴ In his analysis, Justice Sachs detailed the effects of domestic violence on its victims.¹³⁵ Moreover, he noted that the collusion of the state in failing to eliminate domestic violence undermined the state's promise of gender equality and non-discrimination so clearly articulated in the Constitution.¹³⁶ Such inaction on the part of the government also contradicted South Africa's international and regional obligations, including those contained in the General Assembly Declaration on the Elimination of Violence Against Women,¹³⁷ the Convention on the Elimination of All Forms of Discrimination Against Women,¹³⁸ and the African Charter on Human and Peoples' Rights.¹³⁹

Dealing with the constitutional presumption of innocence,¹⁴⁰ Justice Sachs cited a list of Constitutional Court decisions that reiterated this right.¹⁴¹ He then elaborated on the hybrid (public/private) nature of the Act and analyzed the complications that surface when the private (family) domain intersects with the public through the interdict provisions.¹⁴² The interdict proceedings in the Act are situated somewhere between family and criminal law remedies; their purpose is to supplement and enforce those

(1999).

¹³⁴ *Id.* at 446.

¹³⁵ *Baloyi*, 2000 (2) SALR at 431-33.

¹³⁶ *Id.* at 431-33 n.22. Of particular relevance to domestic violence is the right in Section 12(1) of the 1996 Constitution: "Everyone 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." S. AFR. CONST. ch. II, § 12(1)(c) (emphasis added).

¹³⁷ G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/629 (1993).

¹³⁸ G.A. Res. 34/180, *supra* note 49, at 193.

¹³⁹ 21 I.L.M. 58 (1982). "The Charter was signed by South Africa in 1995 and ratified in 1996." *Baloyi*, 2000 (2) SALR at 434 n.30.

¹⁴⁰ Section 35(3) of the 1996 Constitution provides: "Every accused person has a right to a fair trial, which includes the right . . . to be presumed innocent, to remain silent, and not to testify during the proceedings . . ." S. AFR. CONST. ch. II, § 35(3)(h).

¹⁴¹ *Baloyi*, 2000 (2) SALR at 435 (citing *Osman & Another v. Att'y-Gen.*, Transvaal, 1998 (4) SALR 1224 (CC); *Pharbhoo & Others v. Getz NO & Another* 1997 (4) SALR 1095 (CC); *S. v. Coetzee & Others* 1997 (3) SALR 527 (CC); *S. v. Prinsloo* 1996 (2) SALR 464 (CC); *S. v. Gwadiso* 1996 (1) SALR 388 (CC)).

¹⁴² *Id.* at 435-38.

remedies.¹⁴³

Citing feminist scholarship on this issue, Justice Sachs stressed the unique character of domestic violence as a legal problem because of the “strange alchemy of violence within intimacy.”¹⁴⁴ Innovative legal skills and methods are therefore essential in combating the problem; to some extent, the interdict provisions of the Act create the legal space for such a possibility.¹⁴⁵ These provisions require that police officers and other actors in the legal system temporarily jettison often negative attitudes about the appropriateness of interfering in private family matters.¹⁴⁶ In a country where victims of domestic violence have largely experienced the policy as ambivalent to their predicament, these provisions are imperative if the attitudinal shift in policing domestic violence is to occur.¹⁴⁷ The interdict provisions are intended as an “accessible, speedy, simple and effective” process.¹⁴⁸ It is a proactive mechanism aimed at preventing further violence without being punitive.¹⁴⁹ In the words of Justice Sachs, “it seeks preventive rather than retributive justice.”¹⁵⁰

Justice Sachs then went on to deal with the three grounds on which the Act was challenged.¹⁵¹ The first was whether the alleged violator was “an accused person” and therefore entitled to the presumption of innocence.¹⁵² Counsel had argued on the basis of *Nel v. Le Roux No and Others*¹⁵³ that the proceedings under the Act were “essentially civil in character” and that “the arrested person was not an accused person entitled to the protection of section

¹⁴³ *Id.* at 437-38.

¹⁴⁴ *Id.* at 436 (citing Joanne Fedler, *Lawyering Domestic Violence Through the Prevention of Family Violence Act 1993—An Evaluation After a Year in Operation*, 12 S. AFR. L.J. 231, 243 (1995)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 438-44.

¹⁵² *Id.* at 438.

¹⁵³ 1996 (3) SALR 562 (CC).

35(3)(h).¹⁵⁴ *Nel* dealt with the procedural consequences of the failure to testify when a legal duty to do so had been established.¹⁵⁵ Justice Ackermann held that “[t]he recalcitrant examinee who, on refusing or failing to answer a question, triggers the possible operation of the imprisonment provisions of section 189(1) [of the Criminal Procedure Act] is not, in my view, an ‘accused person.’”¹⁵⁶ Justice Ackermann described the imprisonment provisions of Section 189 as “nothing more than process in aid.”¹⁵⁷

Justice Sachs, however, distinguished *Baloyi* from *Nel* by pointing out the punitive nature of Section 6 of the Prevention of Family Violence Act, which provided for the imposition of a fine or imprisonment for breach of the interdict provisions.¹⁵⁸ Whereas the examinees in *Nel* carried “the keys of their prison in their own pockets,”¹⁵⁹ no such situation existed with violators of the interdict provisions of the Act.¹⁶⁰ Once the inquiry into the alleged violation of the Act commences, the complainant essentially has abdicated control of the proceedings to the state.¹⁶¹ The Court concluded that

¹⁵⁴ *Baloyi*, 2000 (2) SALR at 438.

¹⁵⁵ *Id.* at 439.

¹⁵⁶ *Nel*, 1996 (3) SALR at 571.

¹⁵⁷ *Id.* Section 189 of the Criminal Procedure Act provides that:

If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.

Id. at 571 n.4.

¹⁵⁸ *Baloyi*, 2000 (2) SALR at 439.

¹⁵⁹ *Nel*, 1996 (3) SALR at 571.

¹⁶⁰ *Baloyi*, 2000 (2) SALR at 439.

¹⁶¹ *Id.* In Justice Sach’s summary:

[T]he objective is not to coerce the will to desist from on-going defiance, but to punish the body for completed violation; and the convicted person carries no keys in his pocket—indeed there is nothing in the Act to suggest that he can be released early if either the complainant so wishes, or the judicial officer so decides.

the alleged violator of the interdict was an “accused person,” and therefore entitled to the presumptions of innocence.¹⁶²

The Court then went on to discuss whether Section 3(5) of the Prevention of Family Violence Act imposed a reverse onus.¹⁶³ Commenting on the “obscure” nature of the words used in Section 3 of the Family Violence Act and Section 170 of the Criminal Procedure Act, Justice Sachs examined three possible interpretations of the actions under review.¹⁶⁴ They are summarized in the judgment as interpretations A, B, and C.¹⁶⁵

Interpretation A, emphasizing the word “procedure,” allowed only the importation of the summary procedure, and not a reverse onus.¹⁶⁶ In other words, the protections guaranteed in the Criminal Procedure Act were not suspended; there was therefore no reverse onus interfering with the presumption of innocence.¹⁶⁷ As the Court pointed out, this interpretation lent itself to the approach mandated in Section 39(2) of the Constitution: “[w]hen interpreting any legislation . . . every court . . . must promote the spirit, purport and objects of the Bill of Rights.”¹⁶⁸

Interpretation B embodied the High Court’s position that Section 170 “provides for a procedure which incorporates a reverse onus as a central element.”¹⁶⁹

Interpretation C provided for a reverse onus, but only once the “accused person” had proved lack of willfulness on his part.¹⁷⁰ The Court articulated interpretation C as follows:

It presupposes that the judicial officer must first be satisfied beyond reasonable doubts that the interdict has in fact been breached and that only then is the onus placed on the alleged violator to prove on a balance of probabilities a lack of wilfulness on his part. There is a reverse onus, but

Id.

¹⁶² *Id.* at 440.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 441.

¹⁷⁰ *Id.*

its reach would be restricted because it would be triggered only after a breach of the interdict has been proved beyond a reasonable doubt.¹⁷¹

Finding that interpretation C was too “strained,”¹⁷² and not persuaded by the High Court’s position (interpretation B), the Court adopted interpretation A as stating the correct legal position.¹⁷³ Distinguishing the substantive law question (what must be proved) from the procedural law question (how to prove it), Justice Sachs pointed out that Section 170(2) of the Criminal Procedure Act provides for conviction for failure to attend court proceedings “unless the accused satisfies the court that his failure was not due to fault on his part.”¹⁷⁴ This shifting of the burden to the accused renders the issue one of substantive law, and therefore, the procedures of the Criminal Procedure Act are no longer apposite.¹⁷⁵ In short, the presumption of innocence is left undisturbed.

Justice Sachs referred to the need to provide the legislature with latitude in dealing with intransigent social problems that find their way to the courts.¹⁷⁶ He did, of course, recognize that while such latitude exists within constitutionally appropriate limits, fairness to the complainant is pre-eminent.¹⁷⁷ This requires that the proceedings are “speedy and dispense with the normal process of charge and plea,”¹⁷⁸ something akin to a bail hearing.

This judgment follows the *Hugo* decision in contextualizing the contemporary reality of South African women. There is widespread recognition that private violence against women is a cause for great concern. Some would argue that such violence constitutes a continual violation of women’s human rights.¹⁷⁹ The

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 442.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See, e.g., Kenneth Roth, *Domestic Violence as an International Human Rights Issue*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, *supra* note 53, at 326.

Court places its imprimatur on the need to eradicate such violence without constraining the constitutional rights of the perpetrators.¹⁸⁰

The Court's decision is incontrovertible: there is a general, societal consensus that private violence, indeed any violence, against women is odious, and the state ought to deal with this problem aggressively.¹⁸¹ There is still a large gap, however, between ubiquitous cultural attitudes about women, fueled by a particular brand of South African masculinity that gives rise to such violence, and the laudable statements of the Court. Closing this gap will require a recognition that the structural and attitudinal impediments to the "right to be free from private violence" as articulated in the Constitution¹⁸² can only be eradicated by a combination of governmental assaults which include education, access to resources, and continued vigilance regarding the extent and persistence of violence. The Constitutional Court, at least, is doing its part, but it needs to be bolstered by other institutional arrangements that will include both legal and extra-legal measures.

V. Possibilities and Limitations in the Quest for Gender Equality

The energies of women's organizations in South Africa have historically been directed toward the eradication of apartheid. For example, one of the most significant and widespread protests in South Africa occurred in 1956 when approximately 20,000 women marched in Pretoria to protest the pass law system.¹⁸³ Most of the major women's organizations have been adjuncts to the liberation movements or operated with the specific purpose of opposing apartheid.¹⁸⁴ The quest for racial equality dominated the political and legal discourse prior to the constitutional negotiations.

The call for emphasis on women's rights or gender equality in South Africa surfaced relatively late in the negotiations, but it was presented to the delegates in an organized and persuasive manner.

¹⁸⁰ *Baloyi*, 2000 (2) SALR at 434.

¹⁸¹ *Id.* at 431-34.

¹⁸² S. AFR. CONST. ch. II, § 12(1)(c).

¹⁸³ T. R. H. DAVENPORT, *SOUTH AFRICA: A MODERN HISTORY* 384 (1988). Until 1956 women had not been required to carry the passbooks dictated by the migrant labor system. *Id.*

¹⁸⁴ BERNSTEIN, *supra* note 27, at 81.

The Women's National Coalition lobbied the major political parties throughout the constitutional negotiations to address women's issues and to commit to the principle of gender equality.¹⁸⁵ The Coalition persuaded the drafters of the new Constitution that women's rights needed to be integrally linked to national reconstruction.¹⁸⁶ The Coalition also produced a Women's Charter that set out a broad statement of principles about women's rights.¹⁸⁷ In a particularly successful strategy aimed at ensuring the active participation of women in government and in constitution-writing, women activists persuaded the African National Congress to allocate one-third of its parliamentary list to women candidates before the 1994 election.¹⁸⁸ South Africa now has several female ministers and deputy ministers, and the Speaker of Parliament is a woman.¹⁸⁹

The formal legal landscape appears very favorable for women. As noted earlier, the Constitution embraces an impressive panoply of rights to ensure that women benefit from the new constitutional dispensation.¹⁹⁰ The enforcement mechanisms in the Constitution will also further the goals of equality.¹⁹¹ Most significantly, the Constitutional Court in its judgments has aimed at substantive, as opposed to formal, equality.

The South African government has also passed legislation to give effect to the constitutional mandate of equality. For example, the Domestic Violence Act was passed in 1998 and provides for an aggressive approach to stemming private violence against

¹⁸⁵ Catherine Albertyn, *Women and the Transition to Democracy*, in GENDER AND THE NEW SOUTH AFRICAN LEGAL ORDER 39, 51-57 (T. W. Bennett et al. eds., 1994). In this article, the author assesses "the extent to which [the architects of the new order] took account of the experiences, interests and demands of women in South Africa," and concludes that women "succeeded in obtaining an equal commitment to race and gender equality in the preamble and the constitutional principles." *Id.* at 39, 60-61.

¹⁸⁶ *See id.* at 57, 60-61.

¹⁸⁷ *Id.* at 52-53.

¹⁸⁸ Danisa E. Baloyi, *Apartheid and Identity: Black Women in South Africa*, in CONNECTING CROSS CULTURES AND CONTINENTS: BLACK WOMEN SPEAK OUT ON IDENTITY, RACE, AND DEVELOPMENT 39, 43 (Achola O. Pala ed., 1995).

¹⁸⁹ *Id.*

¹⁹⁰ S. AFR. CONST. ch. II.

¹⁹¹ *Id.* at ch. II, § 38.

women.¹⁹² The Employment Equity Act was passed in 1998 to ensure women's equal access to the workplace,¹⁹³ and the Recognition of Customary Marriages Act was passed in 1998 to prevent the continuing disadvantage that women in customary unions encounter.¹⁹⁴

Despite these impressive gains, however, the struggle for gender equality will require constant attention and continued vigilance. By initially abdicating the struggle for gender equality in order to focus on racial equality, women may have inadvertently relegated the struggle for women's rights to a secondary place on the political agenda. The intersection of race and gender in the lives of South African women, however, will ensure that the issue of women's rights continues to move to the center of political discourse and concern.

The alarming patterns of violence against women remain a significant obstacle to women's equality. Although accurate statistics are unavailable, both research and anecdotal evidence suggest that violence against women in South Africa has reached epidemic proportions.¹⁹⁵ It has been estimated, for example, that one in every four adult women is regularly assaulted by her partner.¹⁹⁶ Sociologist Diana Russell estimates that 750,000 women are raped every year in South Africa, "making South Africa's rape incidence the highest in the world—double that of the U.S.A. One in two South African women are raped in their lifetime, and the rape rate for Black women is three times higher than it is for whites."¹⁹⁷ Arguably, violence against women has always been a serious problem; the distortions of apartheid merely rendered such violence either a private issue (with respect to domestic violence)¹⁹⁸ or one confined to black residential areas and therefore

¹⁹² Domestic Violence Act 116 of 1998, 3 BSRSA § 1 *et seq.* (2000).

¹⁹³ Employment Equity Act 55 of 1998, 5 BSRSA § 1 *et seq.* (2000).

¹⁹⁴ Recognition of Customary Marriages Act 120 of 1998, 3 BSRSA § 1 *et seq.* (2000).

¹⁹⁵ See generally HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH/AFRICA, VIOLENCE AGAINST WOMEN IN SOUTH AFRICA (1995).

¹⁹⁶ Jenni Irish, *Women and Political Violence*, 16 AGENDA 7 (1993).

¹⁹⁷ *The War Against Women's Bodies*, WEEKLY MAIL, Sept. 6-12, 1991, at 12 (describing Russell's estimates).

¹⁹⁸ HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, *supra* note 195, at 44-45, 47, 61.

of no concern to the police (in the case of rape).¹⁹⁹ The new political atmosphere of transformation has resulted in greater recognition of and exposure to the problem of violence against women.²⁰⁰

Phenomenal resources will be required in order to overcome the obstacles to gender equality in South Africa, namely, deeply embedded patriarchal attitudes and widespread violence including the violence of poverty as a legacy of colonialism and apartheid. South African women have valuable human resources at their disposal. The benefits to women of their engagement in the struggle against apartheid are numerous. First, the concerns of women are now being pursued in a society already amenable to political change. For example, even though women's groups in South Africa have existed largely to further the racial struggle, women acquired tremendous organizational and political skills in the process, skills that could now be harnessed to lobby for women's rights. The wealth of women's skills is apparent, for the organizational structures of the Mass Democratic Movement, trade unions, civic organizations, and NGOs are replete with the input of women activists.²⁰¹ Second, it is more difficult for the government to ignore the demands of women. Notions of gender equity have been incorporated in law and policy, which has in turn generated an expectation of such gender equity. Third, women's needs are easier to view as national because women are able to demonstrate the connection between the situation of women and the situation of South African people as a whole. For example, a program of land redistribution has to recognize the role women play in the agricultural sphere; so, too, achievement of access to housing requires recognition of the large number of female-headed households. Women's struggles revolve around very basic issues, such as food, shelter, health, education, and physical security. The more they focus on these issues, the more clearly South African women activists can present themselves as participants in the larger effort to rebuild South Africa.

¹⁹⁹ *Id.* at 52, 93-94.

²⁰⁰ *See generally id.*

²⁰¹ *See generally* NON-GOVERNMENTAL ORGANISATIONS FOR THE ADVANCEMENT OF WOMEN, BEIJING CONFERENCE REPORT: 1994 COUNTRY REPORT ON THE STATUS OF SOUTH AFRICAN WOMEN 12-13 (1994), *available at* <http://www.sn.apc.org/Beijing/status.html>.

South African women have been able to build on the achievements of other women around the globe. The political events in South Africa in the early 1990s occurred on the heels of a well-orchestrated campaign by international feminists who brought women's issues from the margins of political and legal discourse to a place where women's concerns and priorities were accorded formal international recognition.²⁰² While recognizing vast economic, geographical, cultural, and social differences between women in the developed world and their counterparts in the developing world, feminist scholars and activists nevertheless have suggested a collective mobilization of women against male domination.

In the Western world, a groundswell of scholarship and activism flowed from significant legal and policy successes toward eradication of discrimination against women. In the last few decades, feminist jurisprudence has made an important contribution to the field of legal theory. It has succeeded in transforming many areas of domestic law, forcing accommodation of women's experiences. A cursory glance at the areas of criminal law (particularly rape and domestic battery), family law, and anti-discrimination law reveals the impact of feminist jurisprudence. Although a male bias in the law persists, the situation of certain women has improved dramatically in the past few decades, and this change is a direct result of feminist law reform efforts.

South African women activists were in the happy position of taking advantage of both the achievements of global feminist agitation and the recognition of the limitations of some of their work. In the 1990s, when delegates to South Africa's constitutional negotiations fought over the details of the rights to be included in the new Constitution, women activists within South Africa had already managed to organize and successfully influence the process. They armed themselves with evidence of the importance of formalizing protection for women.

VI. Conclusion

In just under a decade, South Africans have made remarkable

²⁰² See generally Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, *supra* note 53, at 3.

steps towards the eradication of racial discrimination. Efforts to sweep away the vestiges of gender discrimination have also been impressive. Whereas ten years ago one could argue that the eradication of racial discrimination was paramount, the contemporary reality reflects that argument to be rather short-sighted, both politically and legally. The purpose of the movement from apartheid to democracy requires that attention be paid to all forms of discrimination, wherever they occur and whomever they affect. This is a difficult process that requires continued vigilance. As this article has shown, apartheid had a particularly pernicious effect on women and has left a legacy that will require Herculean efforts to overcome. The South African government, through its expansive Constitution, Bill of Rights, and enabling legislation, has placed the country on firm footing for overcoming that legacy.