The Stepchild of National Liberation: Women and Rights in the New South Africa

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Introduction

South African women, through creative advocacy, enlarged the concept of the new South African democracy early in the long and difficult process of constitutional negotiations when they insisted that their concerns be included. Before women forced their concerns to the fore, only the urgent task of abolishing apartheid and designing the new non-racial order occupied the attention of the architects of the new South African democracy. The leading parties to the negotiations, namely the African National Congress and the National Party, had political and legal differences about the shape and substance of the post-apartheid order. There was, however, a general consensus that racism, in all its manifestations, needed to be eradicated.

Eradicating sexism was not on the agenda, but even at the margins of discussions negotiators had to deal with this vexing issue. Although oppression of women had been obscured by the larger issues of racial oppression, apartheid political rhetoric occasionally referred to the plights of women. The possibility of imminent democratic transformation however required more than political rhetoric. The entrance into the process of an organised women’s lobby confronted the delegates with a largely ignored reality: the legal and economic edifice of apartheid had, in both the public and private realms, generated and reinforced discrimination against, and dispossession and subjugation of, women. Women sought to ensure that South Africa’s transformation included a commitment to changing many aspects of their lives. A vocal and determined women’s lobby demanded that the largely male delegations pay attention to women’s concerns.

*Parts of this chapter have been published as Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law, 8 Temple Political and Civil Rights Law Review 25 (1999) and Striking the Rock: Confronting Gender Equality in South Africa, Michigan Journal of Race & Law 307 (1998). I owe special thanks to Steve Ellmann for helpful comments on this chapter.

The Heritage of Apartheid

What was the particular legacy of apartheid for women? All women were relegated to a subordinated status in the society. Both European colonial society and African traditional society were male-dominated and patriarchal. The legal landscape was littered with gross gender inequities. Notably, the operation of personal and family laws until recently ensured that women were not treated as equals. For example, under African customary law, women were always under the perpetual tutelage of a male, whether their father, husband or even a son. Until recently also, customary marriages were not recognised as legal unions because they were potentially polygamous. Wives of these unions were particularly disadvantaged because legal non-recognition meant they accrued no rights. These patriarchal legal structures were buttressed and enforced by a culture that did not question the fundamental logic of such gender inequality. For African women, these laws operated to deprive them of rights to rent or buy their own homes, custody of their children, an education or a living wage. In addition, the laws were administered by white bureaucrats or men who found it easier to obtain permission to work in the cities. For the women who remained in the rural areas or the homelands, their livelihoods depended on absent husbands or sons sending meagre allowances. The migrant labour or influx control system had a particularly pernicious impact on the lives and status of African women. The operation of these laws ensured that African women were forced into a cycle of dependency on African men who found it easier to obtain permission to work in the cities. For the women who remained in the rural areas or the homelands, their livelihoods depended on absent husbands or sons sending meagre allowances. The homelands or rural areas were overcrowded, often agriculturally desolate and provided women few opportunities for employment or economic self-sufficiency. They were forced to eke out dire existences for themselves and their offspring. The migrant labour system denied the majority of African people the right to a decent family life. Husbands and wives were forced through the operation of the law to live separately all year long, except for one month a year when men took their annual holidays. African children grew up
with absent fathers—mandated by law—and were denied the opportunities to flourish and grow in a family environment. A woman might be married for ten years but only have spent ten months with her husband—the ten months representing the ten consecutive holiday periods.16

The majority of those African women who did obtain permission to work in the urban areas were forced into domestic labour, the largest source of employment for black women.17 Domestic workers are the lowest paid workers and, until recently, were not covered by the labour statutes and regulations governing minimum wages and basic terms of employment. The conditions of domestic employment, and particularly the domestic workers’ isolation in individual homes, renders these workers especially vulnerable to dismissals or appalling conditions of employment.18

The apartheid government’s racial allocation of resources in education, health, welfare, housing, and many other areas of government spending ensured that black people were locked into a spiral of dispossession, dislocation and poverty. Not only did the system racialise the availability of resources from government spending, but a labyrinth of laws and policies ensured that black South Africans’ private access to economic resources via employment, property ownership and other private economic activity was severely circumscribed. The laws and policies which regulated the movement of black labour and access to housing, with their deleterious impact on family life, cemented the economic inferiority of black South Africans.

Coloured and Indian women were left in a slightly more advantageous position.19 They were not subject to influx control laws and, therefore, had greater rights of labour mobility, and were at least able to maintain the semblance of an undisturbed family life. Their subordinate status was linked to the legal impediments mentioned earlier, but also to their inferior racial status (albeit superior to that of Africans) in the racial hierarchy.20 The apartheid state was typified by rigid racial segregation and stratification in which whites occupied the most favoured positions in the racial hierarchy, followed by Indians, ‘coloureds’ and Africans.21 This racial hierarchy was reflected in government expenditure in a host of areas.22 In classic divide and rule mode, the South African government ensured this rigid segregation through various racially restrictive legislation.23 Social interaction and marriage was also severely restricted by legislation.24

White women, too, suffered legal discrimination, were subjected to paternalistic and sexist attitudes within their communities, and were victims of domestic violence and other forms of abuse. But for white women, their subordination as women was compensated for by the privilege of being members of the highest-ranked group in the racial hierarchy. They could, therefore, offset their gender subordination with their racial elevation.25

So, briefly, a major legacy of apartheid has been that all women were rendered subordinate to men and black women have been left overwhelmingly bereft of rights and resources.

The Resources of Women’s Struggle

In response to these conditions, women pressed for protection in the new Constitution and the new South Africa. Their ability to do so reflected their own determination, but also, in complex ways, reflected the history of women’s political involvement in South Africa and developments in feminist thought and work around the world.

The energies of women’s organisations 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.26 Most of the major women’s organisations have been adjuncts to the liberation movements, or operated with the specific purpose of opposing apartheid.27 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 organised and persuasive manner. How did women succeed in persuading the drafters of the new Constitution that the ‘women’s question’ was part of the ‘national question’? The National Coalition of Women lobbied the major political parties throughout the constitutional negotiations to address women’s issues and to commit themselves to the principle of gender equality. The Coalition also produced a Women’s Charter which set out a broad statement of principles about women’s rights.28 One particularly successful strategy by women activists aimed to ensure the active participation of women in government and in constitution-writing: activists persuaded the African National Congress to allocate one-third of its parliamentary list to women candidates before the 1994 election. South Africa now has a number of female ministers and deputy ministers, and the Speaker of Parliament is a woman.29

Despite these impressive gains, however, the struggle for gender equality was still a stepchild of national liberation. The precedence of the ‘race question’ in South Africa’s political struggle, and women’s active participation in the fight against apartheid, raise questions about the possibilities of fundamental change with respect to women’s rights. One could argue that the close association and identification by women’s organisations with the national liberation struggle often disadvantaged women in that women’s issues were relegated to a secondary place on the political agenda. The theoretical framework, one that focuses on the elimination of racism as a primary goal, largely ignores women’s issues and instead those issues may appear as a preoccupation...
of a discrete constituency of the oppressed community. Moreover, there is no historical tradition of gender equality in South Africa. A combination of these factors often resulted in the discourse of women’s rights or gender equality having the flavour of an afterthought, devoid of the depth of analysis allocated the national or race question.

However, the benefits to women’s struggle of their engagement in the struggle against apartheid were numerous, and arguably outweighed the disadvantages. The benefits were, first, that the concerns of women were raised in a community already amenable to political change. So, for example, even though women’s groups in South Africa have existed largely to further the racial struggle, women acquired tremendous organisational 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 organisational structures of the Mass Democratic Movement, trade unions, civic organisations and NGOs are replete with the input of women activists.

Second, it was more difficult for the architects of the new order to ignore the demands of women. Notions of gender equity were at least formally accepted, and there was widespread recognition that subordinated groups should be accorded constitutional protection.

Third, women’s needs were easier to see as national needs because women could bring to the negotiating table the discrete (and often overlooked) experiences of women and demonstrate the connection between the situation of women and the situation of the South African people as a whole. For example, a program of land redistribution has to recognise the role women play in the agricultural sphere; so, too, achievement of access to housing requires taking cognisance 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 – and the more they may be able to avoid ‘much of the elitism and class-bias which has weakened women’s movements in the advanced industrial societies’.

At the same time, it is important to recognise that South African women were 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 that had brought women’s issues from the margins of political and legal discourse to a place where women’s concerns and priorities were accorded some formal international recognition. While recognising vast economic, geographical, cultural and social differences between women in the developed world and their counterparts in the developing world, feminist scholars have nevertheless suggested a collective mobilisation 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 the 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.

Buoyed by their achievements in law and policy, Western feminists turned their attention to international issues. One significant reason for this shift in focus was the United Nations declaration of the Decade for Women, 1975 to 1985, which provided an opportunity for feminist activists and scholars from the developed world to interact with their counterparts in the developing world. The growing presence of women from developing countries on the international stage was another reason that Western feminists became more aware of international issues. Women from developing countries formed strategic political coalitions with Western feminists around specific issues. This period of change coincided with widespread political upheaval in some Third World countries, where popular movements were attempting to unseat non-democratic minority governments.

Western feminists initiated the theoretical onslaught in the international law arena by calling for an expanded definition and operation of international law, one that recognises the ‘fundamentally skewed nature of international law’ that privileges men and ignores the interests of women. Feminist activists, particularly those from the developing countries involved in the decolonisation process, have also engaged in sophisticated and partially successful lobbying of the United Nations to ensure that the organisation more vigorously pursues women’s rights.

The United Nations’ 1980 adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (Cedaw) was a political milestone for women activists. It outlines the major legal and social structures that have impeded women’s rights and opportunities, and it specifies measures that states ratifying Cedaw must take to eliminate such discriminatory structures. In relation to cultural matters Cedaw describes how state parties must modify the conduct of their citizens in order to eliminate all practices which incorporate the idea of the inferiority of either of the sexes or set up stereotyped roles for men and women.

Since the adoption of Cedaw, pressure by female lobbyists has ensured that women’s issues remain on the global agenda. The political momentum made the 1983 adoption of the Vienna Declaration on Violence Against Women
possible, and it generated a renewed dedication to the principles and aims of Cedaw in the Beijing Platform for Action in 1995.

Despite formidable obstacles to women’s equality in a vast array of economic, social, and political areas, there now exists a highly organised, politically astute, articulate, and vocal cadre of feminists who have committed themselves to eradicating the vestiges of patriarchy, not only within their borders, but on a global scale. However, some aspects of their activities have also raised concerns even among people who agree with the ultimate goal of women’s equality. These concerns arise from reservations about global feminist campaigns that are tinged by a certain evangelism. This evangelism often surfaces in discussions about traditional or religious law, and it becomes particularly animated with regard to certain practices, such as polygamy and female genital surgeries. Many observers of such campaigns have responded by arguing that these practices represent the body of laws, customs and procedures that have maintained the culture of entire communities for centuries. To these observers, the focus on simply discarding these practices means losing a comprehensive view of what constitutes a particular community’s traditions and laws, and ignoring the complexities of communities’ interactions with their traditions as well as the nuances of individuals’ engagement with these practices.

South African women activists were in the happy position of taking advantage both of the achievements of world feminists and of a recognition of the problems with some of their work. (Later in this chapter I will discuss the ways in which South African women may now build upon and modify the thinking of international feminists.) In the 1990s, when delegates to South Africa’s constitutional negotiations fought over details of the rights to be included in the new Constitution, women activists within South Africa had already managed to organise and influence the process successfully. They armed themselves with evidence of the importance of formalising protection for women. They were also sensitive to the complex arguments over human rights and moral relativism that ensue when an attempt is made to incorporate gender equality into a system of constitutional law that retains respect for traditional law.

The Claims of Tradition

If the claims of women acquired new prominence and new sympathy in post-apartheid South Africa, so did another group of claims, those of African traditional culture. These claims had hardly enjoyed high standing in the liberation movement during the years of apartheid. On the contrary, in South Africa, the ideal of non-racialism and the vision of a unitary system of government had so dominated the political discourse and rhetoric of the previous liberation movements and of all opponents of apartheid, that reference to tribalism and ethnic identification had largely been treated with disdain and scepticism. However, this attitude did not acknowledge the reality that African culture had been so denigrated and marginalised by the dominant white society, that the substance and the rhetoric of cultural identity and cultural pride – a cultural renaissance, as it were – would have particular appeal amongst sectors of the black South African community.

Along with women’s rights, questions of culture and ethnicity were largely neglected until fairly late in the constitutional negotiations. Those within the liberation movement had avoided serious discussion of these issues for a variety of reasons. Firstly, the liberation movements were largely dominated by urban elites, who tended to neglect the concerns of rural communities. Secondly, African laws and customs, when accorded authority through the Bantustan structure and the system of chiefs, had actually served a useful purpose in administering apartheid. The chiefs were frequently the apartheid government’s surrogates in the so-called homelands. Thirdly, successive South African governments have utilised ethnic and cultural differences in the most malignant and opportunistic ways to further their policies of separate development, by accentuating cultural and ethnic differences, thereby undermining any sense of solidarity on the part of black South Africans.

Furthermore, any discussion of customary law is confronted by two significant issues. Firstly, it is difficult to ascertain how many African people live under a customary regime, or have significant aspects of their lives governed by customary law. Yet it has been argued that despite the increased urbanisation of South Africa, significant proportions of the African population still have aspects of their lives governed by customary law and that traditional authorities are, in effect, the bridge from the pre-colonialist Africanist past to contemporary South Africa. The second issue is that, except in the Code of KwaZulu Law, customary law has generally not been codified. It is therefore difficult to determine whether what is stated as customary law is authentically so. Moreover, successive South African governments have distorted customary laws to suit the ends of separate development and apartheid. In many ways, however, this is irrelevant. The search for an ‘authentic’ customary law is always to some extent a fruitless one, because customs are shaped, influenced and transformed by a variety of factors.

As already noted, however, the reality is that traditional law and institutions in South Africa emerge from a legacy of marginalisation and denigration. The colonial and apartheid legal order perpetuated an inferior role and status for traditional law within the national legal framework. Interaction and exchanges of ideas and approaches between the two systems and their underlying values were almost non-existent. As a result, African values that dominate customary law, founded upon a tradition of communalism and mutual self-help through the extended family and the larger community, have not been allowed to
influence much of the South African common law. The result has left the common law bereft of a greater egalitarian basis. The question of customary law and its status in a democratic South Africa surfaced during a period of significant agitation around human rights issues. Arguably human rights discourse during the 1970s and 1980s increasingly came to occupy centre stage in the international law arena. The consequences of these developments are apparent in the formal encapsulation of rights, such as those embodied in international human rights instruments like the International Convention Against All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women. Part of this international codification of rights has included a focus on the status of indigenous peoples, who have demanded recognition of their cultural and other derivative rights.

In light of the historical disrespect for indigenous law and custom, the international rekindling of the rights of indigenous peoples resonated strongly in South Africa. This became apparent in the years preceding the elections. An unintended consequence at the constitutional negotiations was the emergence of a conflict between certain aspects of indigenous custom and the expanded consensus (albeit a fragile one) on women’s equality.

What became increasingly obvious was that the metamorphosis from a European to an African country required that its Africanness be reflected in the legal system and that it incorporate certain aspects of traditional law. But this reality had to recognise that the strictures of traditional law kept women in perpetual tutelage. Rules about property, ownership, custody and guardianship of children, and a plethora of personal and family laws relegated women to subordinate status. This conflict between the maintenance of traditional law and structures on the one hand, and gender equality on the other, created the paradigm whereby those with vested interests in maintaining a traditional order were pitted against feminist activists during the constitutional negotiations.

Both constituencies lobbied extensively to secure constitutional guarantees. Moreover, during the 1980s and early 1990s, the conditions of rural communities had featured significantly in the anti-apartheid struggle, and so the leverage of traditional leaders had increased. There were efforts to bridge the gap – notably, a large number of traditional leaders, women’s groups, rural women, political leaders and lawyers gathered in Pretoria in late 1993 to discuss the issue of traditional law and gender equality – but the conflict was a real one. The shaping of South Africa’s new constitutional dispensation provided the possibility of incorporating African values, as outlined in traditional law, into the new constitutional framework, while also protecting the rights of women; we shall see below how the drafters ultimately chose to achieve these goals.

The Constitution and Gender Equality

The provisions of the South African Constitution reflect both the success of the effort by women to win constitutional recognition of their rights and needs, and the particular efforts made to harmonise this recognition with a simultaneous protection of traditional African culture and customary law.

Substantive rights provisions

References to the ideals of non-sexism are scattered throughout the South African Constitution. In the Founding Provisions the values that underpin the democratic state, including non-racialism and non-sexism, are listed. The most significant provisions relating to gender equality are found in the Bill of Rights, particularly section 9, the guarantee of equality. This section contains a general commitment to equality before the law and equal protection of the law and provides that:

the 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.

Several points stand out about the language in section 9. This provision suggests, that discrimination against women is just as constitutionally suspect as discrimination on the basis of race – a firmer stance than that of the American courts that subject sexual discrimination to intermediate scrutiny and racial discrimination to strict scrutiny. The prohibition on direct and indirect discrimination implicitly acknowledges the invidiousness and tenacity of institutionalised discrimination. This acknowledgment reflects the dominant jurisprudential trends in liberal democracies where the principle of equality has been trumpeted in constitutional and legislative packages. The inclusion of both sex and gender as grounds for proscribing discrimination protects 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. However, section 37 permits emergency derogation from the constitutional protection of equality with respect to gender, though not sex, reflecting a certain reticence on the part of the constitutional drafters to upset prevailing stereotypes about the role and status of women.

The inclusion of protective measures or affirmative action is of potentially great value to women. The relevant constitutional provision reads:

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.
The Post-Apartheid Constitutions

It has become 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 challenge. The policy of affirmative action has been enshrined in international human rights instruments, most notably in CEDAW, which provides that:

Adoption by States of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discriminatory ... These measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

The goals of non-sexism are also promoted in other sections of the Bill of Rights. Section 12 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 to medical or scientific experiments without their informed consent.

All these provisions have the enormous potential of protecting women with regard to personal choices about birth control and reproduction. Another clause has potentially profound consequence for victims of domestic and other forms of violence; this is section 16, which includes the guarantee that:

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 source.

Similarly, the constitution 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'.

Enforcement tools

The most conventional way of enforcing constitutional rights is, of course, litigation. This tool is fully available under the South African Bill of Rights, which takes care to spell out in comprehensive terms who will have access to the courts and who will have legal standing to sue, and arguably lays the basis for class action litigation:

(a) anyone acting in his or her own interest;
(b) anyone acting on behalf of another person who cannot act in his or her own interest;
(c) any one person acting as a member of, or in the interest of, a group or class of persons;
(d) any one person acting in the public interest;
(e) an association acting in the interests of its members.

Moreover, in addition to providing the rights set out in the Bill of Rights, the Constitution seeks to ensure that the courts (as well as other tribunals and forums) interpret these rights, and approach all other legal questions, in a way that comports with the Constitution's underlying ideals. 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. Courts are also required to consider international law and may consider foreign law in interpreting the Bill of Rights itself. Rights or freedoms incorporated in legislation, the common law, or customary law are acknowledged unless they contradict the values inherent in the Bill of Rights.

The Constitution also provides an innovative enforcement method, a Commission for Gender Equality empowered to promote, educate, monitor and lobby for gender equality. In addition, the Constitution makes provision for a Human Rights Commission to promote and protect human rights.

The constitutional establishment of these two commissions has engendered some passionate debate in South Africa. Supporters of a separate structure such as the Commission for Gender Equality opine that only such a body can comprehensively deal with women's issues, and develop the capacity to build and enhance a solid culture committed to the eradication of sexism. They fear that the incorporation of women's concerns under the general rubric of human rights will marginalise and trivialise women's issues, and that the eradication of racism will take priority.

Opponents of a separate body to administer only women's issues argue that such a structure will inevitably serve to ghettoise women's issues and, that in any event, for most black women their subordination stems from an interplay of racial, gender and economic questions. Opponents also argue that it is important that a body like the Human Rights Commission develop the means to cope with women's subordination so that the experience and needs of women can be incorporated into a comprehensive and effective strategy to combat all kinds of discrimination, no matter where they originate.

Only the passage of time will vindicate either position. Both Commissions have been fully established and appear to be functioning effectively. There is some sentiment in the country that the delay in setting up the Gender Commission (as opposed to the more efficient establishment of the Human Rights Commission) does not bode well for securing women's rights. Whether this anxiety is justified is contested, but the Commission will surely have to
negotiate a difficult landscape in order to be effective in enforcing women's rights.

In a society so resistant to removing long-established patriarchal institutions and sexist practices, implementing the constitutional promises of gender equality will require tremendous vigour and vigilance by women activists. As Diana Majury has stressed, women must be vocal and active in shaping the meaning of equality; they must 'operationalise equality' instead of simply 'defining it through legal analysis and theory making'. The constitutional provisions promoting gender equality represent a major victory for women, but including these protections in a bill of rights is obviously only the first step on the road towards gender equality.

**Women's rights and traditional law**

In contrast to the gender equality provisions in the Bill of Rights and elsewhere in the Constitution, the Constitution is remarkably abbreviated on the issue of traditional law. Moreover, while a number of provisions do offer some protection for cultural or traditional practices and institutions, these provisions are regularly limited by language emphasising the supremacy of the other human rights guaranteed by the Constitution. The supremacy of equality in the face of a 'cultural conflict' is clearly secured in various sections of the Bill of Rights, and it appears to subvert any claims by traditional authorities to discriminate against women. Initially traditional leaders had sought to place traditional institutions outside the ambit of the equality clause in the Constitution, or indeed any enabling legislation. However, after a concerted effort by women activists to thwart this, and after losing the support of political parties sympathetic to their perspectives, the traditional leaders were forced to succumb to the arrangement which prioritises equality.

Chapter 12 provides for the recognition and role of traditional leaders. A significant provision is the stipulation that 'the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. This section suggests that the constitutional principle of equality will supersede any aspect of traditional law that violates it. Similarly, section 30 states, '(e)veryone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights'. In the same vein, Section 31 provides that:

- persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of the community -

(a) to enjoy their culture, practice their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

But the next sentence of the section states that these rights 'may not be exercised in a manner inconsistent with any provision of the Bill of Rights'.

The Bill of Rights also makes provision for legislation that recognises (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. However, recognition of these systems may not conflict with 'the other provisions of the Constitution'. Finally, the Constitution makes provision for a Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities, but exhorts that the composition of the Commission 'broadly reflect the gender composition of South Africa'.

**The Situation of Women in South Africa Today**

**Progress**

To date, and certainly at the formal level, there have been impressive strides made with respect to women's rights and equality.

South Africa ranks seventh in the world with respect to the representation of women in the national Parliament. In 1995 there were 117 women in Parliament, the Speaker of the National Assembly was a woman and 30 per cent of ministers' and deputy ministers were women. Several senior diplomatic posts were held by women, in key countries such as the United States, Britain, and France.

Moreover, since 1994, the South African Parliament has passed several important pieces of legislation that further women's interests. They include the Choice of Termination of Pregnancy Act, the Domestic Violence Act and the Employment Equity Act.

The South African Parliament has created various structures in all levels of government to implement and monitor the progress towards gender equality. These structures, labelled the National Machinery for Advancing Gender Equality, include the following: Office of the Status of Women located in the President's Office; gender desks in various departments, including provincial government departments; a multi-party Women's Parliamentary Caucus; independent bodies, such as the Commission on Gender Equality, the Human Rights Commission, the Public Protector, and the Public Service Commission.

Fourth, the Constitutional Court has in its judgements clearly acknowledged the need to eradicate structures of patriarchy and discrimination against women. For example, in *President of the Republic of South Africa v Hugo* the Court provided a comprehensive definition of equality to incorporate not just formal equality, but substantive equality as well. Similarly in *S v Baloyi* the Court...
dealt decisively with the issue of domestic violence and the need for its eradication as a national priority. In the other courts in the country as well, the constitutional imperatives of equality are taking root. For example, in Christian Lawyers Association of SA v Minister of Health and Others\textsuperscript{105} the High Court unequivocally confirmed a woman’s right to make decisions about her reproductive capacity and the right to exercise control of her body as articulated in the Constitution.

The formal legal landscape therefore appears very promising for women’s activists. But there are some significant structural obstacles to the attainment of women’s equality and in the next two sections, I will deal with those.

**The possible reconciliation of customary law and gender equality**

The constitutional balancing of women’s rights and the institutions and structures of traditional law raises perennial questions about the role of law in perpetuating cultural norms and values. In South Africa, there remains a distance between the lofty ideals of the Constitution and the reality of people’s lives. The evolution of a new legal culture cognisant of underlying African communitarian values and judicious of women’s rights will be a challenging endeavour.

It is undeniable that aspects of traditional law will continue to govern the lives of many South Africans, particularly residents in the rural areas. It seems apparent that despite the distortions that traditional institutions have historically suffered under colonialism and apartheid, their legitimacy in certain rural communities remains intact. How might the possible conflict between the Constitution’s commitment to gender equality and the persistence of what adherents see as ancient customary practices be resolved? A few likely scenarios may emerge.

First, it is possible to conceive of the democratisation of traditional leadership. It has been argued that the institution of the chieftancy is conducive to democratisation and that this democratisation should be pursued instead of abolition.\textsuperscript{107} It has been suggested that a thorough overhaul of the chieftancy be attempted, including changes to hereditary succession, primogeniture, the patriarchal basis, election, powers, period of office, government imprimatur, skills acquisition, governing principles, and procedures and judicial review. These changes would be congruent with the values of the new democratic state, and they would contribute substantively and symbolically to the goals of gender equality.

The second scenario might witness the reconstruction of some practices of customary law. This has been suggested in light of the popularity and tenacity of certain customary practices. The institution of lobolo\textsuperscript{108} is an interesting case in point. The practice remains universally popular in Southern Africa. Even before the new constitutional order it was suggested that lobolo be modified to accommodate modern urban conditions in South Africa and the actual situation of women. Instead of the payment being controlled by the father (and often having the consequence of entrapping a woman in an unhappy marriage), lobolo could be altered so that it takes on the form of security for a woman when she is ill-treated or abandoned by her spouse.\textsuperscript{109} Similar approaches in relation to access to property, custody and guardianship, and other areas of personal rights may arguably pass constitutional muster in relation to women’s rights.\textsuperscript{110}

The third scenario is the gradual phasing out of certain practices. This prospect reflects the experience of many post-colonial societies where social and economic changes have rendered certain customary practices inappropriate or irrelevant.\textsuperscript{111} Women’s increased access to education and all the other prospective benefits of the new non-racial and non-sexist order might result in their having the economic status and capacity to make real choices about the laws which govern them.

The reality of customary law is manifested in everyone’s daily experiences. Ultimately, African communities and individuals will renegotiate traditional practices to accommodate the changing political, economic and cultural environment. There may be room for laws and the legal process, but in order for the legal compact agreed to and enshrined in the Bill of Rights to succeed in transforming the lives of women, it must be bolstered by widespread attitudinal change.

**Violence against women**

Perhaps the least promising marker of the likelihood of such change, not just for women living under customary law but for South African women generally, is the level of violence committed daily against women. Although accurate statistics are unavailable, both research and anecdotal evidence suggest that violence against women in South Africa has reached epidemic proportions.\textsuperscript{112} It has been estimated, for example, that one in every four adult women is regularly assaulted by her partner.\textsuperscript{113} One 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 USA. 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.\textsuperscript{114} 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) or one confined to black residential areas and therefore of no concern to the police (in the case of rape). The new political
atmosphere of transformation has resulted in greater recognition and exposure of this problem.

The two major forms of violence against women in South Africa discussed here, rape and domestic violence, are somewhat racialised; domestic violence affects all women across class and colour lines; whereas rape disproportionately affects black women.115

**Domestic violence**

While in the conventional wisdom abuse tends to bring to mind an uneducated, unemployed, working class man hitting his wife mercilessly, and although literature and intervention with abusive men has revealed that the perpetrators of violence against women include men who hold respectable jobs and positions in society, including lawyers, doctors, psychologists, psychiatrists, priests and business executives, we call such men monsters. Yet nearly every woman has had contact with an abusive man at some point in her life. He looks and behaves like any other.116

Research carried out by several women's organisations in South Africa bears testimony to the high levels of domestic abuse across all sectors of South African society. For example, a survey conducted by the Human Sciences Research Council, a government-funded research organisation, found that 43 per cent of 159 women in their survey sample in the Cape Town area had been subjected to marital rape and assault.117 The alarming numbers suggest that until recently the occurrence of domestic violence has had a certain normalcy or banality. In this environment, women 'do not seek help outside an informal network of family and friends'.118 Only when women are hospitalised or killed is there any vocal attention paid to this issue.

Reliable statistics about the incidence of domestic violence are difficult to obtain for several reasons. Abused women and particularly black abused women experience the police as largely indifferent and unsympathetic to their predicament. The South African Police historically prioritised the stifling of political dissent and control of black communities at the expense of the provision of conditions for safe community life. The absence until recently of any attempt to involve communities in policing has made the communities more dangerous and, as a corollary, has made reporting of crimes less of a meaningful option for black victims.119 Moreover, since South Africa does not yet have a tradition of refuges and shelters for abused women (though this situation is changing slightly), most abused women who seek support do so from family and friends. In addition, domestic violence is so widespread, and so widely viewed as an inevitable part of intimate, especially marital, relationships, that there exists a sense amongst abused women that it is futile to bother to report its occurrence.120

Even when domestic violence is reported, police records do not distinguish between domestic violence and other forms of assault.121 Nor are there alternative national statistics to turn to, because no nationwide survey has been conducted to ascertain accurate statistics, although regional groups exist to support female victims of domestic and other forms of violence and have gathered some data.122 The result is that much of what evidence there is remains anecdotal. Even anecdotal evidence is unreliable, moreover, because victims of domestic violence may not tell even their families, out of fear of ostracism and pressure to remain in an abusive relationship, or because their families, though supportive, themselves fear the stigma associated with domestic violence.

Domestic violence, however, is increasingly being recognised as interfering with a woman's rights to security, equality, health, and development, and as being in violation of the South African government's obligation under CEDAW. The passage of the Domestic Violence Act in December 1998 by the South African Parliament vindicates this recognition and is a commitment by the South African government to address this problem. In addition, the Act has survived a legal challenge to its validity in the Constitutional Court.123

**Rape**

The statistics on reported rapes have risen dramatically in South Africa in the last decade.124 This increase in sexual assaults against women coincides with generally growing crime rates in South Africa.125 One particularly alarming feature has been the increase in sexual assaults against girls.126

Although these numbers are disturbing, they do not reflect the reality that rape is largely under-reported. This, like the under-reporting of domestic violence, reflects several factors. Among them are the traditional lack of faith that women, particularly black women, evince in the police, who often appear unsympathetic and insensitive; the low rape conviction rates; and the trauma of a rape trial for the victim. Consequently, as is the case with domestic violence, accurate rape statistics are hard to come by. However, the spectre of rape looms large with women, and is a major cause for concern.

But the rape statistics are racialised. Unlike the situation of victims of domestic abuse, the victims of rape are overwhelmingly poor and black. South African police statistics confirm this, as does the research carried out by various research bodies, hospitals and clinics. For example, a clinic in a district near downtown Johannesburg found in a 1992 study of rape victims that 71 per cent of the victims were black, even though the 1991 census indicated that there were three times as many white women as black women living in the area. Similarly a survey in Cape Town in 1990 found that 93.6 per cent of the women treated for violent attacks had an income of R1 000 (US $285) or less per month, an income level well below that of most whites.
These statistics largely reflect the reality of the lives of black women in a country where economic disadvantage and race coincide. It is poor women who have to take public transportation to and from work, where they are most vulnerable. They often have to leave early in the morning or late at night when it is dark, and walk long distances from the bus or train station to their homes. They live in crime-ridden areas where the police presence is diminished and support services often lacking. Homeless women, a growing population in South Africa, have increasingly become the targets of rape, especially gang rape. They typically sleep in railway and bus shelters where they are particularly vulnerable. In the homelands, where poverty is the local currency, women have to walk great distances to gather water and fuel. They often find themselves in isolated areas in the bush, where the likelihood of attack, and actual attacks, are frequent.

The conditions of poverty produce their harshest effects in generating the high incidence of sexual assaults on young girls and the practice of ‘jackrolling’, as the following quotation attests:

When you leave your child alone in the home she is not safe. And in the street she is not safe. And in the school she is not safe. There is nowhere she can walk and be safe. Girls are afraid somebody in a car will stop them and say, ‘get in.’ When they walk in the street they are raped by men with guns. Sexual abuse happens so much that some students stop going to school.

A sinister spinoff of ‘jackrolling’ is that it is considered by some not to be a crime, but ‘just a game’. Even schools, university dormitories and women’s hostels are no refuge for girls and young women, and are constantly targets for rapists.

The trauma associated with rape, and the physical and psychological cost to the victims, are of course enormous. In addition, it is estimated that 10 per cent of rape cases will result in pregnancy. In recent years, however, the usual risks associated with rape have been aggravated by the spread of the HIV virus in South Africa. Women activists, health organisations and women’s support groups therefore have a human rights crisis to deal with, a crisis that affects not just the right to freedom or security and safety, but the right to life itself.

Women activists have responded to this crisis by engaging in public campaigns, setting up rape crisis and other centres, and by expanding the kinds and level of support for victims of rape. They have certainly succeeded in creating public awareness of the magnitude of the problem; it is as yet unclear whether their efforts have curbed the extent of sexual violence against women and girls.

A Theoretical Framework for Achieving Gender Equality

Until the early 1980s there was no substantial body of feminist legal literature in Southern Africa dealing specifically with women’s issues as feminist issues. A host of reasons account for this state of affairs, but two are obvious. First, education is a scarce commodity, and is particularly so for women. There is therefore not a large community of Southern African female legal scholars as compared to their male counterparts, or to female scholars in the developed world. Second, most of the writing by female legal scholars has focused on issues of development, education, health and other basic survival questions that confront large sectors of the society. Now the exploration of women’s concerns is well under way; the remaining question is what direction this exploration should take.

The major tenets of Western feminism have generally not been attractive to women in developing societies. In particular, the location of patriarchy as the chief source of women’s oppression is seen as too narrow. In the developing world, an exclusive focus on patriarchy as the ultimate source of women’s oppression tends to trivialise issues of the overall oppression of women. Similarly, the highly individualistic concerns of Western feminism do not resonate with women who have matured in communitarian societies. The feminist movements in industrialised societies have largely been dominated by white, middle-class women, whose concentration on the situation and issues of middle-class women has often raised concerns about elitism, and sometimes racism.

Since the 1980s South Africa has experienced a proliferation of feminist scholarship (and particularly feminist legal theory), but this project is by no means finished. The articulation of a theoretical framework for women’s liberation in South Africa requires the excavation of theory beyond the body of feminist literature available in the advanced industrial societies. There is an emerging scholarship from developing countries which will be of enormous benefit to South African women. Moreover, the dialectic range of feminist scholarship provides some useful insights for South African women. The input from women in developing societies and women of colour in the industrial world, in their attempts to deflect feminism’s preoccupation with white middle-class concerns, outlines some of the pitfalls that need to be considered.

In short, the script for women’s emancipation is now multi-authored, incorporating marginal and outsider discourses. South African women are therefore in the enviable position of choosing from a substantial amount of feminist scholarship and research, and can articulate a relevant feminist theory and practice.
Reconstruction and Development Program, the government in South Africa has placed the country on a path that can lead to true equality for women and men. Women will have to be vigilant and creative to make that goal a reality, but in the struggle they will be able to utilise a wealth of resources and experience, in addition to the insights gained from feminist theory.

These include, firstly, the returns on the substantial amount of political labour during the last few years that probed the needs of women, nationally and at the community level. Since the 1980s the country has witnessed the proliferation of NGOs, community groups and other bodies committed to addressing the needs of women. I am not suggesting that a comprehensive blueprint exists which tabulates exactly the needs of all women in all locations in the country. But political campaigns targeting the needs of women, and academic research specifically addressing their status, role and needs have focused attention on the situation of women. The information gathered will assist the new government in shaping programs and policies for women.

Secondly, the campaign for gender equality in South Africa is bolstered now, as it was in the negotiation period, by a plethora of international human rights instruments. These include, in particular, the Convention on the Elimination of All Forms of Discrimination Against Women (Cedaw) and the Vienna Declaration on Violence Against Women, which comprehensively list a host of rights to which women globally are entitled. These instruments and the parallel discourse around them in many ways smoothed the way for the formal adoption of similar constitutional guarantees and for the efforts to implement them in South Africa. The developing articulation of these rights in South Africa will depend on thoughtful feminist discourse on how best to indigenise the contents of those international provisions.

Thirdly, the transformation of South African society occurs in an international political and legal atmosphere devoid of the romanticism that accompanied other ‘third-world revolutions’. This is not meant to denigrate the transformation and innovations of former colonial societies, but a survey of them and a perusal of the post-colonial literature witnesses a rather disappointing legacy when it comes to the implementation of women’s rights. Most post-colonial governments of the past few decades formally committed their administrations to gender equality. From this distance it is obvious that they fell short of their promises. For South African women the important lesson to be learned from these failures is the need for continued vigilance on behalf of women’s rights.

The feminist or womanist project in South Africa necessitates a straddling of the multi-layered world of activism and theory, as well as the many worlds of South African women. There is ample space for the articulation of theory that will influence the shape of government policy and practice. And there is a huge practical demand to address basic socio-economic needs such as education, employment and health. The deconstruction and reconstruction of this prospective non-sexist society will oscillate between ameliorative (short-term) and transformative (long-term) goals. But those very contradictory and competitive conditions will spur feminist scholars and activists on to greater creativity – both intellectually and politically.

It is difficult during this period of transformation to identify an uncontroverted and widely diffused version of a feminist theory in South Africa. But one may speculate, based on issues raised in the previous few pages, about the distinctive shape of the developing South African feminism. The humanistic values of non-racialism, which have guided political action in the struggle against apartheid and in these heady days of transformation, may serve as a beacon for a theory of gender equality that encapsulates the divergent, competing and contradictory needs of South African women.

Such an approach would not deny or ignore the differences between the nature of sexism and its various manifestations, and the structure of racism. Racial inequality and gender inequality respond to similar mechanisms for their eradication, but there are also marked differences in the programmes required. But the combination of South Africa’s metamorphosis from a European to an African society and the political values internalised through decades of struggle against apartheid has left a legacy of communitarianism and interdependence that will influence the society’s transformation in a positive way; one may hope that it will also lay the foundation for an inclusive philosophy that informs the feminist agenda.

The chance that South Africans now have to formulate and build a society based on the principle of non-sexism also provides the opportunity to shape and articulate a philosophy that serves both women’s interests and the interests of the society at large. Ideally, such a philosophy will have at its core a recognition, both African and feminist, of the interdependence of individuals and communities. The eradication of sexism cannot take place without the education and active participation of men. While there will be moments when the right approach for women will be to be ‘strategically essentialist’, emphasising the special and common features of women’s experience as opposed to men’s, South Africa should avoid the substance and tone of separatism which pervades aspects of Western feminist theory and practice.

This is so for reasons both of practicality and principle. First, there are scarce economic resources in the society, and the Reconstruction and Development Program and GEAR emphasise that the needs of all South Africans are to be addressed. Second, in a society where so much human interaction is based on interdependence and communalism through the extended family and closely-knit communities, autonomy and independence are values that must find their place along with others. Third, and most importantly, apartheid was predicated on separateness, with its most devastating consequences in the migrant labour
system which systematically and brutally separated husbands and wives, and fathers and children. Thus, what South African women and men need is to be united on just terms, not to be further divided.

**Conclusion**

I have attempted to trace the constitutional achievements of the past years and offer a vision of the course that feminism in South Africa may take. Despite the progress that has been made, the situation of the majority of women in South Africa, and particularly the situation of large numbers of black women, is desperate. The formal encapsulation of rights in the Constitution and enabling legislation will not automatically translate into substantive rights for women. For that to occur, certain conditions have to exist. First, the government has to implement effective enforcement mechanisms to realise the rights embodied in the Constitution. Second, the interpretation of such rights needs to be undertaken by adjudicators who will not ignore the historical legacy and the social, economic, and cultural realities of South Africa. But by far the most essential condition is the continued vigilance and creativity of all South Africans who yearn for a society free from oppression and discrimination against women.


2 Reference to the negotiations in this chapter encompasses Codesa I (the first multi-party Convention for a Democratic South Africa), which commenced in December 1991; the second session of Codesa, Codesa II, which commenced in May 1992; and the third phase, normally referred to as the Multi-Party Negotiating Process or the World Trade Centre Talks, which commenced in April 1993 after a lengthy breakdown over violence and key constitutional issues. For an insightful account of the negotiations, refer to Allister Sparks, Tomorrow is Another Country (1995). See also Friedman, S & Atkinson, D(eds), The Small Miracle, South Africa’s Negotiated Settlement (1994) (analysing race relations, the ANC, and politics and government generally in the period from 1989 to 1994, and making predictions for the years after 1994).


4 See generally Albertyn, supra note 1.


6 I use the term 'transformative' deliberately to suggest the attainment of both formal and substantive equality.
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22 For example, in 1980-81 per capita expenditure on education was as follows: whites R1 010; Indians R550; 'coloureds' R290; Africans R180. See Apartheid: The Facts, supra note 19, p 27.
23 For example, through the Group Areas Act of 1950 and the Population Registration Act of 1950.
24 See, for example, the Reservation of Separate Amenities Act of 1953 and the Mixed Marriages Act 16 of 1950.
25 The lifestyles of the overwhelming majority of white women under apartheid were exceedingly privileged. They had at their disposal an abundance of grossly underpaid domestic workers to clean their houses, tend their gardens and raise their children. See Cock, supra note 13, p 106.
26 Until 1956 women had not been required to carry the passbooks dictated by the migrant labour system; that year, this requirement was extended to women. See Cheryl Walker, Women and Resistance in South Africa (1992); Hilda Bernstein, For Their Triumph and Their Tears (1985).
27 See Hilda Bernstein, For Their Triumph and Their Tears, ibid, p 81.
28 See generally Albertyn, supra, note 1.
31 Cock, supra note 7, p 29. In fact, developments in South Africa for women with respect to these issues are promising. For example, the efforts of the Hon Pregs Govender, a female ANC Member of Parliament, have led to an annual publication entitled The South African Women's Budget Initiative which closely examines the impact of the national budget on women's lives.
35 For a feminist critique of the mechanisms and procedures of the United Nations, see Hilary Charlesworth et al, Feminist Approaches to International Law, ibid.
36 GA Res 180 UN GAOR, 34th Sess Agenda Item 75, UN Doc A/RES/34/180 (1980).
37 Cedaw, Article 5.

42 Chanock, supra note 12, p 52.
43 The legal instrument that solidified this arrangement was the Black Administration Act No 38 of 1927 (also known as the Native Administration Act). Through the passage of this Act, the South African government imposed upon the African population a national system of 'recognition' of African law. See TW Bennet, A Sourcebook of African Customary Law for Southern Africa (1991), p 62. Under this system, 'the governor general (of the Union of South Africa) was made the supreme chief of all Africans, and was empowered to appoint and depose chiefs, divide or amalgamate tribes, deport and banish tribal groups or individuals, and legislate by decree for the scheduled native areas'. HJ Simons, African Women (1968), p 53.
44 Barbara Rogers, Divide and Rule: South Africa's Bantustans (1976).
46 For a thoughtful analysis of these issues, see Martin Chanock, supra note 12.
49 Id, p 360.
50 Id. For an illustration of the role that African values can play in a reconstruction of South African law, see S v Makwanyane, 1995(6) BCLR 65 (CC), in which the Constitutional Court prominently referred to African values, and specifically the value of ubuntu (human-ness), in determining that the Interim Constitution forbade the use of the death penalty.


56 See discussion of customary law, pp 3-4 supra.

57 See Murray & Kaganis, supra note 54.


60 Id, ss 1-6.

61 Id, s (1) (b).

62 Id, s 9.

63 Id, s 9 (1).

64 Id, s 9 (3).


67 Majury, supra note 66, pp 173-76.

68 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’. Constitution of the Republic of South Africa 1996, s 37 (5).

69 Id, s 9 (2).


71 Cedaw, supra note 36.


73 Id, s 12 (1) (c) (emphasis added).

74 Id, s 16 (2) (c) (emphasis added).

75 Id, Sec 34. This section states: ‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

76 Id, s 38.

77 Id, s 39 (2).

78 Id, s 39 (1).

79 Id, s 39 (3).

80 Id, s 187. This section provides for the following functions of the Commission for Gender Equality:

(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.

81 Id, s 184 (1).


84 These sentiments were raised in workshops and conversations at the Conference on Gender and Constitution, attended by the author and held under the auspices of the University of the Western Cape in Cape Town in January 1995. The proceedings of the conference culminated in the publication The Constitution of South Africa from a Gender Perspective, supra note 70.

85 Majury, supra note 66, p 187. See also Denis Meyerson, Sex and Gender, 9 So Afr J Hum Rts p 291 (1993).

86 For a thoughtful discussion of these matters see Iain Currie, The Future of Customary Law: Lessons from the Lobolo Debate. In Gender and the New South African Legal Order, supra note 1, pp 146, 148-150. See also Catherine Albertyn, Women and the Transition to Democracy in South Africa, supra note 1, pp 57-60.

87 Constitution of the Republic of South Africa 1996, s 211 (3).


in a male-female relationship is frequently accepted as normal and inevitable.' Human Rights Watch/Africa, supra note 112, pp 46-47. See also Catherine Campbell, Learning to Kill? Masculinity, the Family and Violence in Natal, (1992) 18 J S Afr Stud, p 614. Campbell recounts the findings of a survey to probe violence in the family. ‘Violence was a common theme in the young respondents’ accounts of their sexual relationships. Several respondents referred to the use of violence in what they called the “common practice of forced sex” amongst young people. Violence also played an important role in the territorial control of women.’ Id, p 626.

119 Obviously the police had no legitimacy with black communities – so a vicious cycle of violence could be perpetrated against black individuals with the collaboration and acquiescence of the police. Id, p 61. See also Suzanne Daley, Vulnerable and Violated in the New South Africa, The NY Times Magazine 12 July 1998, p 30. However, the last few years have witnessed a concerted campaign by the Ministry of Safety and Security to come to grips with this monumental policing program. For a detailed discussion of transformation in policing, see Diana Gordon in this volume.


121 Human Rights Watch/Africa supra note 112, p 44.

122 Ibid.

123 In The State v Baloyi, supra note 105, the Court upheld the validity of the statute in a challenge by an individual arrested in terms of the statute’s provisions. Balancing the constitutional right to be free from private violence, and the right to a fair trial, Justice Sachs, writing for the Court, detailed comprehensively the State’s commitment to eradicating domestic violence. Id.

124 The figures are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Reported Rapes</th>
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<tbody>
<tr>
<td>1983</td>
<td>15 342</td>
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<td>1984</td>
<td>15 785</td>
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<td>1988</td>
<td>19 638</td>
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<tr>
<td>1989</td>
<td>20 458</td>
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</tbody>
</table>

125 Human Rights Watch/Africa, supra note 112, p 51. The figure for reported rapes of children rose by almost 50% in 1994 – from 4 736 cases in 1993 to 7 559 cases in 1994; between January and April 1995, 2 809 cases of child rape were reported. Ibid. See also Daley, supra note 119.

126 Human Rights Watch/Africa, supra note 112, p 51. See also Daley, supra note 119.


128 Id, p 57.

129 ‘Jackrolling’ is the term used to describe the ‘forceful abduction of women in ... [black] townships’. Human Rights Watch/Africa at p 54 n 112 [citing Steve Mokwene,
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130 Id, p 55 [quoting Diana Russell, Rape and Child Sexual Abuse in Soweto: An Interview with Community Leader Mary Mabaso, 6 Centre for African Studies, University of Cape Town (1991)].

131 Id, p 58.

132 This is not to suggest that women's concerns have been ignored; rather, they have been merged with local or national concerns. But note projects such as Armstrong, Alice & Ncube, Welshman (eds), Women and Law in Southern Africa (1987).

133 The very use of 'feminist' in relation to African women writers is problematic and part of an ongoing debate in international feminist or womanist circles. The contours of this debate centre on the very narrow and limited doctrinal approach taken by many Western feminists. 'There is a tendency in radical feminist writing to posit a feminine essentialism which ignores differences of class and race.' Sheila Meintjes, Ideologies of Female Subjectivity and the Gendered Nature of Legal Practice in South Africa, Paper presented to conference on Women and Gender in Southern Africa, U of Natal, Durban, January 1991.

134 For example, although clichéd today, the feminist concern with 'liberation from the kitchen sink' appears somewhat vulgar when most women don't even have a kitchen. See Domitilla Barrios de Chungara, Let Me Speak (1978). This debate is not confined, however, to that between Western and African feminists. In the United States, African-American women have consistently taken umbrage at mainstream feminists for marginalising, at best, or ignoring, at worst, the particular and unique situation and history of black women. See Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness and Empowerment (1990).

135 See Cock, supra note 7, p 29.

136 The tone and substance of the debates within feminist circles have increasingly become esoteric and elitist, and in fact have fallen prey to the very criticism feminists have historically levelled against male critical scholars. See Celina Romany, Ain't I a Feminist, (1991) 4 Yale Journal of Law and Feminism, p 23; Paulette M Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 Duke L J, p 365.


138 A select few from the list include: Lindsay, Beverly (ed), Comparative Perspectives of Third World Women: The Impact of Race, Sex and Class (1980); Schuler, Margaret (ed), Empowerment and the Law (1986); Stewart, Julie & Armstrong, Alice (eds), The Legal Situation of Women in Southern Africa (1990); Davies, Miranda (ed), Third World - Second Sex (1983); Institute for Women Law and Development, Claiming Our Place: Working the Human Rights System to Women's Advantage (1993).


140 These goals of gender equality have not been similarly articulated in the government's current economic program, the Growth Employment and Redistribution Program (GEAR).

141 The campaign of Cosatu (the Congress of South African Trade Unions) is particularly noteworthy. In the early 1990s the organisation set up a women's desk and committed itself to a policy of non-discrimination against women at all levels. Similarly the endeavours of the National Coalition of Women (see text at note 30 supra) produced tangible results in the form of the inclusion of gender equality provisions in the Constitution. See Fayyeeza Kathree, The Struggle for Women's Rights in South Africa. In Smith, Penny (ed), Making Rights Work (1999), pp 13, 19.

142 See text at notes 28-33 supra.

143 Supra note 36.

144 Supra note 38.

145 For an interesting discussion on the use of international human rights to pursue women's rights, see Rebecca Cook, State Responsibility for Violation of Women's Human Rights, 7 Harv Human Rights J 125 (1994). See also Hilary Charlesworth, Feminist Critiques of International Law, supra note 34, p 227.


147 The term is taken from Alice Walker, In Search of Our Mother's Gardens (1982).

148 For an informative discussion on the challenges to feminist scholars to 'develop both more inclusive feminist theory and more effective feminist practice', see Elisabeth M Schneider, Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse, (1992) 67 NYU L Rev, p 520.


150 I am certainly not suggesting that there is homogeneity in this body of theory and practice – and this very issue of separatism has created a perennial dialectic in the body of literature. See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, (1990) 42 Stanford L Rev, p 581; Judy Scales-Trent, Black Women and the Constitution: Finding Our Place, Asserting Our Rights, (1989) 24 Harv Civil Rights-Civil Liberties L Rev, p 9.
151 This is not to suggest that interdependence be allowed to become a subterfuge for subordination. See Adrien Wing, Communitarianism v Individualism: Constitutionalism in Namibia and South Africa, (1993) Wis Int'l J, p 295.

152 This separateness also manifested itself in a plethora of other policies and practices which separated people racially in the most trivial details of their lives. See John Dugard, Human Rights and the South African Legal Order (1978).