GENDERED TRANSFORMATION IN SOUTH AFRICAN JURISPRUDENCE: POOR WOMEN AND THE CONSTITUTIONAL COURT

Catherine Albertyn
BA LLB MPhil PhD
Professor, University of the Witwatersrand

1 Introduction

Most people in South Africa are poor, and most of the poor are women.[1] It is no surprise that the achievement of equality, human dignity and freedom under South Africa's Constitution[2] is closely tied to the eradication of poverty and inequality.[3] These goals are an essential part of South Africa's transformative constitutional project, part of the wider constitutional commitment to "improve the quality of life and free the potential of all persons".[4]

Central to this transformative project, although often not recognised as such, is the need to address the distinctive forms of poverty and inequality experienced by women. This article explores the extent to which, and how, poor women have been included within the constitutional project, firstly, by an acknowledgment of the complexity of poor women's lives and then through a brief analysis of cases and jurisprudence on equality and socio-economic rights. Underlying these two facets of the article are two key questions: What does the experience of poor women tell us about the meaning of transformation and a transformative Constitution? And how can we seek a more transformative (and gendered) understanding of equality and socio-economic rights jurisprudence? In respect of the latter, the article explores whether we can move beyond a progressive liberal egalitarianism in achieving transformative outcomes that address gendered poverty and inequality.

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1 In the most recent official unemployment statistics the formal unemployment rate for men was 22.2% and for women 28.2%. Statistics South Africa "Quarterly Labour Force Survey, Quarter 1, 2011" (2011) *Stats Online*<http://www.statssa.gov.za/PublicationsHTML/P02111stQuarter2011/html/P02111stQuarter2011.html> (accessed 05-08-2011). In addition, women are more likely than men to live in poor households and have lower earnings, and female-headed households are much more vulnerable to poverty than male-headed households. D Posel & M Rogan "Women, Income and Poverty: Gendered Access to Resources in Post-Apartheid South Africa" (2009) 23 *Agenda* 25.

2 Preamble and s 1 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

3 See the much cited *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 8:

> "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."

4 Preamble of the Constitution. See also P Langa "Transformative Constitutionalism" (2006) 3 *Stell LR* 351.

2 Poor women, gender inequality and transformation

2 1 Poverty and gendered inequalities

Transformative jurisprudence must be grounded in a court's understanding of the actual conditions in which people are living.[5] These often give rise to a complexity that law struggles to tame. Although it is well known that the burdens of poverty fall disproportionately on women, the multiple, intersectional inequalities that shape women's vulnerability to, and experience of, poverty produce a complex and diverse picture. This part provides an overview of some of the main issues that shape poor women's lives.

If poverty is measured solely in terms of income and formal employment, then black women fare the worst. Where women cannot *earn* a living, they *make* a living in any way that is possible.[6] This includes social grants (if they have children up to age seventeen, are disabled, or are over sixty years of age) that help lift households out of extreme poverty,[7] as well as a variety of kinds of informal and subsistence work, and, sometimes, prostitution.[8]

Women's economic inequality is significantly influenced by their reproductive roles and primary care-giving responsibilities, which mean that they bear additional (and often sole) responsibilities for children and other dependants.[9] This care-giving role is significantly under-recognised and means that women devote a disproportionate amount of time and resources in unpaid, domestic labour.[10] As Justice O'Regan has noted:

> "It is unlikely that we will achieve a more egalitarian society until responsibilities for child-rearing are more equally shared."[11]

The practical and normative consequences of this "sexual division of labour" affect women's ability to find work and their place in the labour

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5 D Moseneke "Transformative Adjudication" (2002) 18 *SAJHR* 309 318-319.

6 Karl von Holdt and Eddie Webster distinguish between earning a living (in regular paid employment) and making a living (in any form of income generating or subsistence income): K von Holt & E Webster "Work Restructuring and the Crisis of Reproduction: A Southern Perspective" in K von Holdt & E Webster (eds) *Beyond the Apartheid Workplace: Studies in Transition* (2005) 3 4.

7 M Leibbrandt, I Woolard, A Finn & J Argent *Trends in South African Income Distribution and Poverty since the Fall of Apartheid* OECD Social, Employment and Migration Working Papers No 101 (2010) 66.

8 See, for example, S Benjamin "The Feminization of Poverty in Post-Apartheid South Africa: A Story Told by the Women of Bayview, Chatsworth" (undated) *Centre for Civil Society, UKZN* <http://ccs.ukzn.ac.za/files/The%20Feminization%20of%20Poverty%20in%20Post-Apartheid%20South%20Africa%20.pdf> (accessed 30-08-2011).

9 B Clark & B Goldblatt "Gender and Family Law" in E Bonthuys & C Albertyn (eds) *Gender, Law and Justice* (2007) 195 201.

10 Statistics South Africa *A Survey of Time Use: How South African Women and Men Spend Their Time* (2010).

11 The full quote recognises the social and economic disadvantage experienced by women because of the sexual division of labour:

> "For many South African women, the difficulties of being responsible for the social and economic burdens of child-rearing, in circumstances where they have few skills and scant financial resources, are immense. The failure by fathers to shoulder their share of the financial and social burden of child-rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment. [This] … is one of the root causes of women's inequality in our society … It is unlikely that we will achieve a more egalitarian society until responsibilities for child-rearing are more equally shared." (O'Regan J minority concurring judgment *Hugo v President RSA* 1997 4 SA 1 (CC) para 38).

market that is already marked by high levels of unemployment. As a result, women are most likely to be found in low-paid formal work, domestic work, casual and informal work. Women in these sectors are particularly vulnerable to exploitation, violence and coercion.[12]

Hunter argues that rising unemployment and increased female mobility (largely in pursuit of work) have contributed to a significant decline in marriage amongst poor women. While some women live in informal, long-term relationships,[13] many seek to survive within a network of relationships that also serve an economic function of providing for women's basic needs, including care of children.[14] Many poor women live in women-headed households that are statistically poorer than male-headed households, poignantly illustrated by the fact that members of women-headed households are more likely to be hungry.[15]

Not surprisingly, poor African women are more likely to live in informal housing, in poorer rural areas and are least likely to enjoy access to formal housing and basic services.[16] In addition, women living in rural areas are most likely to be subject to traditional forms of power, which may contribute further to their poverty and vulnerability.[17]

Poverty and inequality affect women's ability to exercise autonomy over their bodies and lives. Poor women are more vulnerable to HIV infection, as a complex mix of poverty and gendered inequalities drive the epidemic.[18] Poor women are also more vulnerable to all forms of sexual violence and coercion.[19]

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[12] These include the exchange of sex for protection as women working in least protected informal spheres might exchange sex to secure protection for their goods and belongings. B Karumbidza *Criminalising the Livelihoods of the Poor: The Impact of Formalising Informal Trading on Female and Migrant Traders in Durban* SERI Research Report (February 2011) <http://www.seri-sa.org/index.php?option=com_content&view=article&id=17&Itemid=29> (accessed 15-08-2011). Women who earn an income through sex work often have to protect themselves from arrest and abuse by having sex with police officers, security guards and other "gatekeepers".

[13] About 7% of South Africans report living together (more than three million people), a number that is gradually increasing. D Budlender "Marriage Patterns in South Africa: Methodological and Substantive Issues" (2004) 9 *Southern African Journal of Demography* 1 1.

[14] M Hunter "The Changing Political Economy of Sex in South Africa: The Significance of Unemployment and Inequalities to the Scale of the HIV/AIDS Pandemic" (2007) 64 *SocSci Med* 689 692-693; A Harrison *A Context of 'Non-Marriage': Non-Marital Unions in the Transition to Adulthood in South Africa* (2007) a paper prepared for the symposium *Rethinking Relationships* hosted by the Population Studies and Training Center, Brown University, 19-04-2007 <http://www.pstc.brown.edu/nmu/Harrison%20-%20Non%20Marital%20Unions%204-12-2007.pdf> (accessed 25-08-2011). As Hunter points out, these relationships fulfil a range of social, personal, emotional and economic needs.

[15] According to the 2007 Household Survey, persons living in a female-headed household were 67% more likely to go hungry than those in a male-headed household. Statistics South Africa *General Household Survey 2007* (2008) 46. Female-headed households are much more vulnerable to poverty than male-headed households. See also generally Posel & Rogan (2009) *Agenda* on greater poverty of women-headed households .

[16] J Kehler "Women and Poverty: The South African Experience" (2001) 3 *Journal of International Women's Studies* <http://www.bridgew.edu/soas/jiws/fall01/kehler.pdf> (accessed 22-11-2011).

[17] See, generally, S Mnisi Weeks & A Claassens "Tensions Between Vernacular Values that Prioritise Basic Needs and State Versions of Customary Law that Contradict Them: 'We Love These Fields that Feed Us, But Not at the Expense of a Person'" (2011) 22 *Stell LR* 823.

[18] See M Hunter *Love in the Time of AIDS: Inequality, Gender and Rights in South Africa* (2010) 24-28.

[19] See, generally, Michigan Domestic Violence Prevention and Treatment Board *The Intersection of Poverty and Sexual Violence* (February 2008).

Poor women bear the burden of blame in our society, as they become the scapegoat for a range of socials ills from HIV/AIDS to teenage pregnancies to abortion.[20] Underlying this attribution of blame is a range of gendered stereotypes of women held by women and men, which deepen and reinforce women's unequal position in our society.[21]

It is impossible, in this short space, to capture the diversity and complexity of poor women's lives. However, it is clear that their lived experiences are found in the intersection of race, gender, class, sexuality, space and place, *et cetera*, in which a range of social and economic inequalities are inextricably bound up with each other. Yet women are not passive in the face of enormous obstacles to leading a decent and secure life. Rather, poor women are constantly negotiating "multiple, complex and simultaneous subject positions, identities, inequalities, marginalities and resistances to differing and similar oppressions" in order to secure their lives and livelihoods.[22] Thus, while poverty and inequality undoubtedly deepen women's experience of powerlessness and subordination, this does not mean that women are rendered eternally powerless and dependent. Despite their circumstances, women are resourceful, exercising agency and rational choices within particular contexts of vulnerability and inequality.[23]

2 2 Transformative constitutionalism and transformative strategies

How do we think about transformation and transformative constitutionalism in this context? Clearly the lives of poor women suggest a complexity that cannot be simply reduced to either "poverty" or gendered inequality and subordination.

2 2 1 Substantive, gendered and contested transformation

The lived realities of poor women suggest a vision of the Constitution, and an interpretation of its values of equality, dignity, freedom and democracy, that speak of a society in which individuals are afforded equivalent, substantive conditions for exercising the choices that matter to them, about how to live their lives, maintain their relationships, raise their children and pursue their aspirations. This requires a substantial equality of resources (including remedial measures and redistribution) to satisfy basic needs and

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[20] See, for example, S Leclerc-Madlala "Virginity Testing: Managing Sexuality in a Maturing HIV/AIDS Epidemic" (2001) 15 *Medical Anthropology Quarterly* 533; S Panday, M Makiwane, C Ranchod C & T Letsoala *Teenage Pregnancy in South Africa: With a Specific Focus on School-going Learners* (2009) 26-28 <http://www.hsrc.ac.za/Research_Publication-21277.phtml> (accessed 25-08-2011).

[21] D Everatt "The Undeserving Poor: Poverty and the Politics of Service Delivery in the Poorest Nodes of South Africa" (2008) 35 *Politikon* 293 315-316.

[22] M O'Neill & R Campbell "Desistence from Sex Work: Feminist Cultural Criminology and Intersectionality: The Complexities of Moving In and Out of Sex Work" in Y Taylor, S Hines & S Casey (eds) *Theorizing Intersectionality and Sexuality* (2010) 163 165.

[23] There are many examples of this in research. See Claassen's work on women's resourcefulness in negotiating access to land: A Claassens & S Ngubane "Women, Land and Power: The Impact of the Communal Land Rights Act" in A Claassens & B Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 154. See also Hunter on poor women's agency in negotiating condom use: M Hunter *Love in a Time of AIDS* (2010) ch 9.

enable equivalent levels of well-being, meaningful recognition of diversity and community, unfettered participation in local and national politics and a state that is responsive and accountable.[24]

There is no doubt that addressing economic inequalities, joblessness and redistribution is critical to alleviating the plight of the poor, including and especially poor women. Poor women focus particular attention on how these economic inequalities are gendered. The lives of poor women also demonstrate the interaction of social and economic inequalities, and thus the need *also* to shift those gendered norms, values and social rules that place women in an unequal position in society, affect patterns of (re)distribution, impede their agency, and render them vulnerable to exploitation and violence. In addition, the effective participation of poor women in their community, and in local and national politics requires a particularly inclusive and interactive form of participatory democracy that extends to the public and private spheres. Therefore the lived realities of poor women remind us that the kind of transformation – and transformative strategies – that are necessary to generate meaningful change require attention to structure and agency, to redistribution and recognition, to individual and community, to public and private (especially care-giving roles in family), to inequality and poverty.

There is a significant degree of consensus over the general meaning of constitutional transformation amongst progressive lawyers in South Africa.[25] However, it is a "transformation consensus" that operates at a fairly high level of abstraction, and the differences that exist at the more detailed level of theory, concepts and strategies are not always apparent. Nor is there much engagement with whether and how the experiences of poor women, and of gendered poverty and inequality, might shape this idea of transformation.

Roux has pointed to the commonalities that progressive and egalitarian liberals may share with a more critical and radical mode of thinking, at least at a general level of constitutional interpretation.[26] However, it is in the detail of the ideas that Klare identified as typifying a "post-liberal" view (such as egalitarianism and equality, multi-culturalism and diversity, gender identity, participatory democracy and the public/private divide)[27] that the dividing line between progressive, liberal egalitarian (on the one hand) and more critical and radical interpretations and outcomes (on the other) exists. While liberalism may not have "clear conceptual boundaries",[28] and its reach has certainly extended beyond its more classic liberal forms; it nevertheless has conceptual

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[24] This is developed in the South African context of poverty and inequality from ideas expressed by authors such as Martha Nussbaum, Anne Phillips, Iris Marion Young and Nancy Fraser. This is developed in more detail in relation to constitutional values in a South African context in C Albertyn *Equality Law* (forthcoming).

[25] See S Sibanda "Not Purpose-made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty" (2011) 22 *Stell LR* 482, who discusses a variety of authors.

[26] T Roux "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference" (2009) 20 *Stell LR* 258 261-262. However, Roux does not address the very real differences that exist in the actual interpretation and content of these "shared" ideas and concepts, and the degree of contestation within and between them.

[27] See, generally, K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146.

[28] Roux (2009) *Stell LR* 262.

limits. It is clear that the interaction between liberal and radical or critical intellectuals produces an overlapping middle ground in some instances,[29] but there are also significant differences as will be discussed in relation to equality below. Although beyond the scope of this article, identifying these commonalities and differences is an important component of developing a more radical, indigenous jurisprudence that meets the needs of South Africa: one that is characterised by "local" ideas of, *inter alia*, redistribution, stronger positive duties and remedial action by a more interventionist state; recognition of a strong and positive cultural diversity; robust ideas of choice; and an understanding of separation of powers that appreciates the judiciary's positive role in a "pro-poor" constitutional democracy.[30]

A key question for critical scholars is whether the Constitution's liberal focus and interpretation, and the necessary engagement with legal liberalism that this entails, limits the interpretation and application of the Constitution to a struggle between the reach permitted by the tenets of classic liberalism,[31] and to a more egalitarian and progressive, but nevertheless, liberal approach (thus excluding critical approaches). What space is there for a more critical understanding? Does a more critical or radical approach offer something different from progressive and strongly egalitarian forms of liberalism?

2 2 2 Transformative strategies in law

Although there is a fairly vigorous scholarship on transformation, and a strong critique in areas of law where courts are seen to fall short of transformative outcomes,[32] there is less concrete legal debate on what transformation might mean in any particular context, for a particular group, as well as how we might get there, and the role of law within this.

Most of us agree that opportunities for transformation in and through law are limited, contingent upon a range of legal and other factors that include the state of jurisprudence and legal doctrine, the culture of judicial decision-making and values, the facts of a particular case, the values and choices of lawyers, and the wider political, social and economic context. However, social change literature alerts us to the importance, also, of understanding the direct

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[29] Here the work of Michael Walzer on multi-culturalism in *Politics and Passion: Towards a More Egalitarian Liberalism* (2004) or Martha Nussbaum *Women and Human Development: The Capabilities Approach* (2000) on capabilities, choice and family are excellent examples of "liberals" articulating more critical views, and thus of the impact of the radical critique on liberalism.

[30] See Klare (1998) *SAJHR* 151-156; J Baker, K Lynch, S Cantillon & J Walsh *Equality: From Theory to Action* 2 ed (2009) 33-41; Albertyn *Equality Law* (forthcoming).

[31] See, for example, M Pieterse "What Do We Mean When We Talk About Transformative Constitutionalism?" (2005) 20 *SAPL* 155.

[32] Especially in relation to equality, socio-economic rights and private law. See, generally, C Albertyn "Substantive Equality and Transformation in South Africa" (2007) 23 *SAJHR* 253; P de Vos "Same-sex Sexual Desire and the Re-imagining of the South African Family" (2004) 20 *SAJHR* 187; D Bilchitz *Poverty and Fundamental Rights* (2007); S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010); D Davis & K Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *SAJHR* 403.

and indirect benefits of litigation, and of conceiving of court action as part of wider political struggles for change.[33]

The opportunities for transformative legal action present in many different ways and have multiple possible outcomes. These might be purely, practical legal rights and remedies that positively affect the lives of the poor and marginalised. They might be more normative advances, restating the values and norms that shape social and economic inequalities. Or they might be steps in wider political struggles with a range of outcomes. Transformative legal action might be particularly powerful, with a potential "multiplier effect" if it also affects the norms, values and background rules that underlie different areas of the law.[34] For example, Wilson argues that *Government of the Republic of South Africa v Grootboom*[35] generated developments in property law (over a series of cases) that dislodged the normality assumption that an owner is entitled to exclusive possession of his property, at least insofar as evictions that might lead to homelessness were concerned.[36] Some of this did not occur by accident, but was the result of conscious litigation strategies. Wilson argues that this is an incomplete and uncertain trajectory where the principles have "yet to be stated as a coherent whole".[37] This argument is based on the suggestion that building a transformative jurisprudence takes place over time, requiring strategic lawyers to take advantage of destabilising moments to bring about small actual or potential, intended or unintended, shifts in the background rules. These moments need to be exploited to push the law in a progressive direction, build jurisprudence and achieve conceptual and practical results.

Positive outcomes to cases are often difficult enough. Transformative outcomes, which not only address poverty and/or inequality, but also do so in a way that opens up the possibility of substantial shifts in social and economic relations and alters the underlying norms and rules, are rare and difficult. But opportunities for such transformative outcomes might present more often than we think. The challenge is to recognise and understand these opportunities for change. Even though the construction of critical alternatives is inevitably circumscribed by the need to work with existing jurisprudence, there are spaces and opportunities presented by law that are potentially transformative.[38]

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[33] M McCann *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994). See also new work in South Africa, especially issue 2 of (2011) 27 *SAJHR* (a special issue on public interest litigation).

[34] See Davis & Klare (2010) *SAJHR* 435-449 on the manner in which background rules shape social and economic relations, and can also potentially "undo" them.

[35] 2001 1 SA 46 (CC).

[36] See, generally, S Wilson "Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality" (2009) 126 *SALJ* 270.

[37] 290.

[38] See, for example, Liebenberg *Socio-Economic Rights*, which takes the court's socio-economic rights reasonable review jurisprudence and seeks to push the boundaries in more transformative directions. See also Davis & Klare (2010) *SAJHR* 403-509 (identifying a range of transformative judgments); Albertyn (2007) *SAJHR* 253-276 on transformative possibilities in equality.

2 2 3 Women and transformation[39]

For women, transformation in general means that each woman is afforded the ability and the resources to pursue her well being, that the vision of the Constitution, set out in broad terms above, is fulfilled.[40] Poor women require the resources necessary not only to meet their basic needs, but also to enhance their control over their lives and ability to make real choices for themselves and their dependants. As stated above, this includes attention to recognition and redistribution, to poverty and inequality, to structure and agency, to inclusion and transformation. Poor women present the challenge of overcoming such dualisms, and of finding legal ways of doing so.

What that means practically in any given case or context is open for debate. However, it usually entails choices about legal arguments, in terms of content and approach, characterisation of the case, rights arguments, and remedies. Certainly, there is often a choice of inclusive or transformative strategies, those that affirm the *status quo* and those that seek to dislodge its rules, norms and institutions.[41] However, what is actually transformative, and in what manner, in any particular case – and whether it is capable of legal argument and resolution – remains contested.

For example, it is transformative to extend equal rights within marriage and inheritance, as well as to land, resources and leadership, to women living under customary law. As occurs under civil law, the shifting of a normative framework of inequality (that defers to men as heads of households and providers, and women as subordinates serving the sexual and reproductive needs of men within patriarchal families) to one of equality (which recognises the entitlements of women to power, status and resources within the family), fundamentally affects underlying legal and social norms. It is true that this does not immediately translate into actual equality, nor does it necessarily challenge embedded gender roles (such as women's social position as mother and sole care-giver). However, it enables a revaluing of women's status and constitutes a real shift in recognition. It also enhances the possibilities of redistribution of resources within the family and even beyond.[42] It opens up the opportunity to advance a more sex and gender equal society in which women are not the sole custodians of child and male welfare. Perhaps the most important cases concerning poor women in the Constitutional Court were therefore the equality cases of *Bhe v Magistrate, Khayalitsha*[43] (that found the rule of patriliny to be unfair gender discrimination and extended inheritance rights to women); *Gumede v President of the Republic of South Africa*[44] (which removed the discriminatory proprietary consequences of customary

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[39] For more detail on these arguments, see C Albertyn "Law, Gender and Inequality in South Africa" (2011) 39 *Development Studies* 139.

[40] Part 2 2 1 above. See also C Albertyn & B Goldblatt "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" (1998) 14 *SAJHR* 248.

[41] For a discussion on this in relation to gender, see Albertyn (2007) *SAJHR* 253-276.

[42] Women's access to family property for example, extends their ability to secure credit for income generating purposes.

[43] 2005 1 SA 580 (CC).

[44] 2009 3 SA 152 (CC).

marriages concluded prior to the enactment of the Recognition of Customary Marriages Act 110 of 1998); and *Shilubana v Namwita*[45] (which accepted that women could be traditional leaders). Equally important are cases extending rights to women in Muslim marriages.[46]

It is also transformative to amend the law to recognise and protect partners to a broad range of relationships outside of marriage, so that parties to these relationships are afforded status, rights and opportunities, and their relationships recognised as valuable social institutions. For poor women, who are least likely to be able to rely on the income of a spouse within marriage, but who tend to live in more informal relationships of various kinds, the failure of cases such as *Volks NO v Robinson*[47] to recognise their plight in any meaningful way is a missed opportunity for both protection and transformation. (In *Robinson* the Court denied that the exclusion of co-habiting partners from claiming maintenance from the estate of a deceased partner – a right extended to spouses in a marriage – was unfair discrimination based on gender and marital status). Although a case concerning spousal maintenance from a deceased estate does not reflect the reality of the limited resources available in the relationships of poor women, *Robinson* nevertheless presented the Court with a chance to address the underlying norms and rules of cohabiting relationships in a transformative manner. At the very least, the Court might have established a normative framework that was inclusive of the needs and relationships of poor women (for whom marriage is not the norm).[48]

At the same time, judgments that produce positive outcomes for poor women are not necessarily transformative. It is hugely significant to grant women access to life-saving treatment to prevent HIV transmission to their babies, but it is only transformative to do so on terms that recognise the agency of poor young women in doing so. If women are granted access to such treatment solely out of a need to "save" their children, they tend to be viewed as mere vessels of reproduction rather than as rights-bearing citizens. Arguably, this was the outcome of *Minister of Health v Treatment Action Campaign (No 2)*,[49] as discussed in more detail below.[50] Indeed, I would suggest that the practical extension of socio-economic rights to women (whether housing, water, social assistance or health-care) is always significant in terms of alleviating the burden of poverty, but is rarely transformative if it does not address – and undermine – the gendered barriers to access and full enjoyment of these rights.

Given the invisibility of women in all socio-economic rights cases so far (except for *Minister of Health v TAC*), the mere inclusion of women, as women rather than (gender neutral) applicants, would be significant. It would

45 2009 2 SA 66 (CC).
46 *Daniels v Campbell* 2004 5 SA 331 (CC); *Hassam v Jacobs* 2009 5 SA 572 (CC).
47 2005 5 BCLR 446 (CC) (denying partners in cohabitating couples the same rights as married couples to maintenance from the estate of a deceased spouse).
48 This was more evident in the two minority, dissenting judgments of O' Regan and Mokgoro JJ and Sachs J in *Volks NO v Robinson* 2005 5 BCLR 446 (CC).
49 2002 5 SA 721 (CC).
50 See part 3 2 below.

begin to recognise women as citizens and rights-bearers to whom the state is accountable. Developing a gendered understanding of women's particular position and needs in relation to socio-economic rights, and shaping arguments and remedies around this, is potentially transformative.

Seeking transformative outcomes for women thus entails attention to social and economic inequalities, to recognition and redistribution, and to the connections between them. Put another way: poverty is always, also, a matter of gendered inequalities. For example, improving access to jobs or resources will not assist women in the long term unless this takes into account the particular social and economic ways in which women are excluded from work. Broadening access to basic services will reproduce gendered social and economic hierarchies unless the extra burdens caused by women's gender roles and economic marginalisation are addressed. Extending social grants to women to address the additional social and economic burden of care might alleviate economic hardship, but reinforce unequal recognition.[51] It is always important to address gendered inequalities in a manner that subverts, rather than reinforces, the gender roles and stereotypes that place women in unequal positions. Improving the lives of poor women must comprehend the multiple barriers that poor women face in accessing rights, including the resistance of overlapping systems of law, power and authority: the state and state law, community, custom and tradition, and family.

What does this mean for transformation through law? It seems that there are at least three areas that could be fruitfully addressed. They are listed briefly here, and discussed further below.

Firstly, the context of an alleged rights violation should be understood to include these intersecting social and economic inequalities – the particular complexity of women's lives. When (poor) women bring their claims to court, lawyers and judges need to understand this context: how gender inequality and poverty intersect, how gendered material conditions relate to gendered norms and social attitudes. This information needs to be introduced in court as part of the contextual analysis that is required in determining whether a right has been violated. The importance of context is discussed further in parts 3 and 4 below.

Secondly, attention needs to be paid to overcoming the divides between gender and poverty manifest in, for example, equality and socio-economic rights cases. Poor women fall between the different conceptual approaches that address gender *or* poverty. Thus poor women may find that a court's reluctance to entertain arguments of poverty and class (or redistribution) in equality cases results in a narrow focus on recognition issues that does not meet their specific needs.[52] Alternatively, a court might acknowledge the complexity of their plight but defer it to social policy to address (often

[51] N Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation" in N Fraser & A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 1 64.

[52] See, for example, the manner in which the majority in *Volks NO v Robinson* 2005 5 BCLR 446 (CC) acknowledges the plight of poor co-habiting women, and then leaves this issue for Parliament or the Executive to address through policy and legislative measures (especially paras 63-66). See further part 3 1 below.

as a matter of redistribution). In socio-economic rights cases, lawyers and judges tend to address the problem of poverty without reference to gender.[53] Transformative cases need to address poverty and gender, recognition and redistribution.

Thirdly, remedies need to be shaped to meet the particular needs of women. Here the practical and normative effects of judgments and remedies must be considered. Courts need to worry about practical relief at the same time as they consider the message about women that is present in a particular judgment and remedy. Although space prevents a detailed discussion of this, it is important to pursue remedies that shift the traditional understandings of gender.[54]

What all of this means practically in any given case or context is always open for debate, involving choices about legal arguments, in terms of content and approach, *amicus curiae* briefs, and remedies. Certainly, there is often a choice of inclusive or transformative strategies, those that affirm the *status quo* and those that seek to dislodge its underlying rules, norms and structures. However, what is actually transformative, and in what manner, in any particular case remains contested. Sometimes, transformative outcomes might not be practically or strategically possible. For example, the case of *Minister of Health v TAC* discussed in part 3 2 below was – subjectively – determined by lawyers to be strategically problematic, even dangerous. The cases of *Volks NO v Robinson* and *S v Jordan*[55] suggest that judicial attitudes might prevent transformative outcomes.

3 Determining poor women's claims– legal choices and constraints

Lawyers play a crucial role in selecting and characterising the cases that end up in the Constitutional Court. A particular experience of poverty or inequality is given meaning, evidence is chosen, applicants identified, legal arguments are developed. These decisions and choices set important limits to the kinds of gendered outcomes that are possible, so a few points on these choices are relevant.

3 1 Poverty and/or inequality?

Both equality and socio-economic rights jurisprudence place some emphasis on notions of disadvantage and vulnerability. How important is it to select applicants and cases on the basis of extreme disadvantage or vulnerability? Marius Pieterse has argued that the "certain unique circumstances or characteristics of individual plaintiffs, [including the degree of privilege] may

[53] See part 4 below. Whether socio-economic rights cases, in fact, address issues of poverty is beyond the scope of this article. See, for example, S Wilson & J Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" (2011) 22 *Stell LR* 664 for further reading on this subject.

[54] See Albertyn (2007) *SAJHR* 262.

[55] 2002 6 SA 642 (CC).

influence … outcome[s]" in equality cases.[56] Choosing the "right" poor or disadvantaged claimant is arguably significant in equality cases. The framing of claims around the needs of relatively privileged claimants in both *S v Jordan* (criminalisation of prostitution not considered to be a violation of equality rights) and *Volks NO v Robinson*[57] (providing benefits to married couples, but not unmarried, heterosexual co-habiting partners not unfair discrimination) was certainly important in the court's rejection of those claims. Yet it was not determinative.[58] In both instances, the majority judgments are better explained by the Court's resistance to recognising co-habiting couples on the same basis as married couples, and accepting prostitution as a legitimate activity chosen under difficult circumstances. Poor applicants might have elicited more sympathy, but not necessarily different results. The real problem in these cases was not the absence of poor women as applicants, but judicial attitudes that valorised marriage over other relationships, misunderstood the nature of women's choices in an unequal world, and were uncomfortable with women who fell outside the traditional norms of wife and mother.[59] It is questionable whether more emphasis on the plight of poor women would have shifted such attitudes towards gender, sexuality, choice and relationships.

Indeed, had the Court wanted to address the plight of poor women, there was arguably sufficient contextual evidence in *amici curiae* briefs to enable a much more sensitive gendered analysis of the plight of women in unprotected relationships and in sex work. In addition, although neither Ellen Jordan nor Mrs Robinson could be classified as "poor", their lives certainly reflected a combination of gendered inequalities that place women in positions of dependence upon men and in precarious work, and that demonstrate continuities with the plight of poor women. As both minority judgments show, a more sensitive analysis of the impact of the law on "poor" prostitutes or women in co-habiting relationships was clearly possible.

Although the Constitutional Court has previously recognised the persistence of "deep patterns of disadvantage" in our society, which are "particularly acute in the case of black women",[60] the Court's approach to unfair discrimination in terms of section 9(3) has largely sidestepped the intersection of poverty and complex, group-based inequality. Instead, the Court has tended to focus on the implications of status based discrimination arising from singular grounds.[61]

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[56] M Pieterse "'Finding for the Applicant': Individual Equality Plaintiffs and Group-based Disadvantage" (2008) 24 *SAJHR* 397 423.

[57] 2005 5 BCLR 446 (CC).

[58] In *Volks NO v Robinson* 2005 5 BCLR 446 (CC), the Court suggests that it would be sympathetic to claims of poor women for protection within their relationships (paras 66-68). However, it seems clear from its readiness to accept a legitimate distinction between the regulation of married and unmarried couples, that this could not be achieved through the broadening of legislated rights of married couples to unmarried couples. Similarly, in *S v Jordan* 2002 6 SA 642 (CC), the Court's finding that sex work is not gender based discrimination was not dependent upon who the sex worker was.

[59] Albertyn (2007) *SAJHR* 253-276; E Bonthuys "Institutional Openness Resistance to Feminist Arguments: The Example of the South African Constitutional Court" (2008) 20 *Can J Women & L* 1 23-26; Pieterse (2008) *SAJHR* 405-413.

[60] *Brink v Kitshoff* 1996 4 SA 197 (CC) para 44.

[61] See S Liebenberg & B Goldblatt "The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution" (2007) 23 *SAJHR* 335 349.

As discussed in more detail in part 5 below, women are largely invisible in socio-economic rights jurisprudence. These cases have focused on poverty at the expense of equality. This is at least partly due to legal choices by lawyers. Therefore, in both equality and socio-economic rights cases, legal choices might exclude, subvert or limit the particular experiences, needs and concerns of poor women (and thus limit the possible outcomes). The development of a jurisprudence that is truly reflective of the needs and interests of poor women at the very least requires that public interest lawyers understand and present the complex context of poor women's lives, but also that they are alert to the kind of jurisprudential developments that are needed for more transformative legal outcomes. This is discussed further in parts 4 and 5 below.

3 2 Poor women and non-transformative outcomes[62]

Sometimes poor women are the primary claimants because they are central to the case. The question that then arises is whether such cases are "transformative". *Minister of Health v TAC*[63] is a particularly fascinating case-study of how the context of a case, and the choices made by lawyers about that case, can shape the possibilities of transformative outcomes in courts.

Minister of Health v TAC is a rightly praised case, securing the rights of poor, HIV-positive pregnant women to obtain antiretroviral therapy in public sector hospitals to reduce the risk of transmitting HIV to their babies. Although this was a triumphant outcome to a case fought within a hostile political climate, as part of a highly successful public campaign for access to affordable treatment for HIV-positive poor people,[64] it also represented a missed opportunity for a more transformative jurisprudence on reproductive choice and the rights of access to reproductive health-care.

The *TAC* case is the only socio-economic rights case that has directly addressed gender issues, in this case women's role as mothers. Initially conceived as a violation of multiple rights, the case eventually turned on section 27 of the Constitution, the right of access to health care services, including reproductive health care. Central to a transformative idea of reproductive healthcare is the idea of women as able to make real choices about their sexuality, reproduction and fertility. Rather than cast as "vessels" of reproduction – mothers whose primary role it is to bear and raise children – the centrality of reproductive and sexual choice sees women as independent and equal agents and rights-bearing citizens, able to act to secure their bodily and moral autonomy. This idea of gender and choice is also critical to an ideological and policy context concerning HIV/AIDS that affirms the right

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[62] This part is based on C Albertyn & S Meer "Citizens or Mothers? The Marginalization of Women's Reproductive Rights in the Struggle for Access to Health Care for HIV-Positive Pregnant Women in South Africa" in M Mukhopadhyay & S Meer (eds) *Gender, Rights and Development: A Global Sourcebook* (2008) 27 <http://www.kitpublishers.nl/net/KIT_Publicaties_output/ShowFile2.aspx?e=1456> (accessed 31-05-2011).

[63] 2002 5 SA 721 (CC).

[64] For an excellent study of the context of this case, see M Heywood "Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health" (2003) 19 *SAJHR* 278.

of women to choose when and whether to have sex, to act to protect herself from HIV, to choose whether to have children, and to be entitled to treatment in their own right.

The dominant characterisation of the *TAC* case, as a campaign to "save babies", while undoubtedly laudable, ends up by casting poor women as victims and dependants, their decisions subordinated to the overriding goal of treatment, and the lives of their children. This approach reinforces, rather than undermines, "the ethical and legal inequalities inherent in a societal structure that places more value on a women's reproductive capacity than her … individual well being".[65]

Mindful of these problems, feminist groups had sought to intervene as an *amicus curiae* in the *TAC* case to raise the choice arguments, to assert the conditions necessary for women to exercise their own choices, and to illustrate the consequences of an approach that treated women solely as mothers. These arguments were withdrawn after lawyers in the case indicated a concern with court time available, given the multiplicity of parties to the case. There was also evidence of a concern that feminist arguments about choice would undermine the case, suggesting that women might choose not to take the potentially life-saving nevirapine.[66]

Although the withdrawal of these arguments was the immediate result of the approaches of the TAC lawyers and their legal choices about the best strategic approach to the case; it also reflected a political context that was characterized by state-civil society conflict over HIV/AIDS and a weaker women's movement.[67] The hostile political context of HIV policy was certainly influential in how the case was fought and won. Nevertheless, it illustrates that the strategic choices that lawyers make in framing cases means that they are important gatekeepers to transformative outcomes.[68] The case also suggests that strongly gendered arguments are difficult to make in courts, and that these difficulties are both political and legal. Lawyers make legal choices within a particular political and legal context.

It is important to note that ten years after the judgment, "choice" arguments remain contested in HIV policy, which is consistently criticised for its focus on women as "vessels of reproduction":

> "Women of reproductive age bear the brunt of the epidemic. For prevention to work, we need to be affirming women and providing them with better choices. There is a need to move away from a maternal paradigm that conceptualises treatment for women only as mothers. With the highest rate of infection, women of reproductive age need a continuum of care that takes into account their sexual, reproductive and fertility intentions."[69]

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[65] C Eyakuze, D Jones, A Starrs & N Sorkin "From PMTCT to a more Comprehensive AIDS Response for Women: A much-needed Shift" (2008) 8 *Developing World Bioethics* 33 36 (writing about the intersection of HIV and pregnancy generally).

[66] See Albertyn & Meer "Citizens or Mothers?" in *Gender, Rights and Development* 41.

[67] 47-49.

[68] A second, and different, example in which strategic legal choices possibly trumped arguments of poverty and inequality is the constitutional challenge to CLARA in *Tongoane v Minister for Land and Agricultural Affairs* 2010 6 SA 214 (CC).

[69] M Stevens "Sacrificing the Woman for the Child" (2008) 28 *RJR* 60 60-61.

The courtroom offers an important space to challenge these ideas and comparable assumptions in other policy areas (especially in the absence of widespread political support). Judgments play an important symbolic and standard-setting role. But this requires public interest lawyers, as gatekeepers of litigation, to be responsive to these claims, and incorporate them into the manner in which a case is conceptualised, characterised and presented through evidence and argument.

4 Equality jurisprudence and poor women

To what extent does equality jurisprudence (in theory and practice) address issues of poverty and gender inequality?

The shift from "formal" to "substantive" equality adopted by the South African Constitutional Court enabled a jurisprudence that moves away from an abstract analysis of discrimination to one that is more focused on the actual context in which rights violations occur. In theory, the Court's emphasis on context and impact, as well as its concern with disadvantage, should allow a proper examination of the actual impact of law and policies on the poor, including poor women.[70] In addition, the adoption of a value-based approach should facilitate a nuanced engagement with the extent to which a law or policy falls short of the kind of society that is envisaged in the Constitution. In practice, two fault-lines appear in the jurisprudence: one between formal and substantive equality, and a second between a liberal egalitarian model of substantive equality and a more critical or radical idea of substantive equality.[71]

The distinction between formal and substantive equality has been widely discussed by legal scholars. Important to understanding the ambit of this debate is the distinction between formal and substantive equality as philosophical goals and as legal means. In addressing equality jurisprudence, I am more concerned with the latter. Here formal equality, as the abstract, mechanical, "value-free" and acontextual comparison of two groups, is found in cases such as *Jordan* and *Robinson*. Underlying the majority judgments in these cases are more dominant, libertarian views of freedom and individual choice, an acceptance of certain norms as inherently dominant (over egalitarian difference), as well as a more limited role for the courts, even in deciding issues of status and recognition.[72]

Legal ideas of substantive equality are characterised by an understanding that difference is an aspect of equality, and that the problem is with disadvantageous impact. An understanding of context is necessary to decide when differentiation is indeed discrimination, and when (re)distribution is permitted. Values and mediating principles are important to the determination of inequality.

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[70] See Albertyn (2007) *SAJHR* 258-261.

[71] These models and fault-lines are examined in more detail in Albertyn *Equality Law* (forthcoming).

[72] See, generally, Albertyn (2007) *SAJHR* 253, Bonthuys (2008) *Can J Women & L* 1; Pieterse (2008) *SAJHR* 397; H Botha "Equality, Plurality and Structural Power" (2009) 25 *SAJHR* 1.

However, there is also a difference between a liberal egalitarian model of substantive equality and one that might be constructed within a more critical approach. This difference has not always been clearly drawn, but is significant in understanding the limits and possibilities of South African equality jurisprudence, especially in addressing the role of equality jurisprudence in addressing poverty and inequality, and the connections between them.

A liberal egalitarian model is characterised by a concern with equality and distribution, accepting that individual freedom must, on occasion, defer to equality concerns. The balance is sought through the application of values and mediating principles, including the remedying of (group-based) disadvantage and the importance of dignity, as well as legitimate, equality-related, state purposes. The idea of fairness achieves this balance. The context of discrimination is important in the sense that the history and impact of the impugned law on an outsider or disadvantaged group must be interrogated.

Underlying this model is the idea of fair equality of opportunity: the idea that a degree of redistribution is necessary to enable the fair pursuit of individual freedom. However, the separation of social and economic inequalities that this entails tends to mean that anti-discrimination law (and courts) addresses status-based discrimination (although more widely defined to include forms of group-based disadvantage) and affirmative action, especially in employment and education. Although courts play a far greater role in adjudicating discrimination and affirmative action than under a more classic liberal model, for the most part, economic redistribution remains within the purview of government, and is protected (by courts) from constitutional attack where the purposes are legitimate and remedial.[73] The model permits important, and even transformative, advances for outsider groups. Ultimately, however, this model does not fundamentally challenge the structures and institutions of society (broadening the ambit of inclusion rather than transforming them) and tolerates significant socio-economic inequalities.

A more critical perspective on substantive equality is characterised by a more robust approach to redistribution (requiring a greater equality of resources and substantive conditions to enable individuals to pursue their well-being) and recognition of the need to transform structures and institutions to achieve actual "substantive" equality. Grounded in actual socio-economic inequalities, this approach also entails a more nuanced idea of individual choice and the conditions in which it can be more freely exercised. In legal terms, it differs from a more egalitarian liberalism in (at least) the following respects: a deeper understanding of structural disadvantage and the manner in which social and economic inequalities are bound up together; a broader approach to the context (and impact) that are relevant to a legal dispute; a more complex understanding of intersectional discrimination; greater attention to difference and diversity; a concrete reliance on values as constituting an articulated standard for adjudication and thus for forward movement by our society; a

[73] Under s 9(2) of the Constitution. See *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC).

more robust role for courts; and a willingness to engage redistribution and to formulate innovative remedies to manage separation of powers issues.

Ultimately, it is the South African courts' tendency towards the former model of egalitarian liberalism that limits the reach of equality jurisprudence, especially where poor women are concerned. This is not to deny the huge importance of judgments in terms of this model: the cases concerning sexual orientation and the minority judgments in *Jordan* and *Robinson* all testify to its power (and the extent to which it has moved equality jurisprudence from a formal model). However, its reach is limited.[74]

A detailed exposition of this approach is beyond the scope of this article,[75] but a useful way of illustrating the differential approach, reach and impact of liberal and critical models of equality is to consider the different phrasing of the "equality question" under each. For example, in *Jordan* the minority considered how to address, and reduce the harm of, the gendered patterns of stigma and stereotype that characterised the criminalisation of female, but not male, sex workers. A more critical approach might phrase the question in terms of the structural social *and* economic inequalities that shape the choices faced by women (and men) in particular contexts and mean that they end up in sex work. In such circumstances, is it discriminatory to criminalise this conduct? The latter question is much wider in terms of understanding context and impact (and thus scope of evidence), as well as inequality itself (social and economic, not just a matter of stigma and stereotype), thus allowing a more detailed consideration of poor women within sex work. It also speaks to a different interpretation of the values of dignity and freedom (choice).[76]

Perhaps the most interesting recent example of the liberal/critical split in substantive equality is the case of *Mazibuko v City of Johannesburg*,[77] a matter directly concerned with poverty and redistribution in relation to the right of access to sufficient water by the poor.

Mazibuko concerned two major constitutional questions, does the right of access to sufficient water include a right to a basic minimum supply? Was the installation of prepaid water meters constitutionally permissible? An equality argument was raised in relation to the second question. The applicants argued that the instalment of pre-paid water meters in poor areas of Soweto, but not in more affluent, largely white, suburbs constituted unfair racial discrimination. In support of this, the applicants argued the pre-paid water meters resulted in water cut-offs without notice, and thus in poor people not having access to water once cut off.[78]

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74 Albertyn (2007) *SAJHR* 265-273.

75 This is part of a larger project. See Albertyn *Equality Law* (forthcoming).

76 See J Barrett "Dignatio and the Human Body" (2005) 21 *SAJHR* 529 for a discussion of how dignity could have been more transformatively conceived in *S v Jordan* 2002 6 SA 642 (CC). A more radical notion of choice would have elicited more compassion for the rational nature of choices made by poor women in difficult circumstances.

77 2010 4 SA 1 (CC).

78 The High Court found this to be unfair discrimination: *Mazibuko v City of Johannesburg* 2008 4 All SA 471 (W) paras 94 and 155. However the matter was not addressed in the SCA: *City of Johannesburg v Mazibuko* 2009 3 SA 592 (SCA).

However, the Constitutional Court differed. It accepted the presence of discrimination, but in weighing up the nature of the disadvantage, the purpose of the policy and the harm inflicted, it found that this discrimination was not unfair. In brief, the Court accepted that Soweto residents constituted a historically disadvantaged group, although less so than poor, black residents of informal settlements such as Orange Farm or Ivory Park.[79] However, the Court concluded that the differential treatment did not necessarily deepen this disadvantage, especially as its purpose was both necessary and desirable (the eradication of severe water losses in Soweto).[80] Overall, the Court found the policy not to be harmful or disadvantageous to consumers, especially when compared to the flat rate policy and credit meter customers. In particular, pre-paid customers paid less for their water than credit meter customers, and avoided negative consequences of non-payment in the form of interest and blacklisting as creditors.[81] In sum:

> "The group affected by the installation of pre-paid water meters is a vulnerable group, the purpose for which the meters are installed is a laudable, indeed necessary government objective, clearly tailored to its purpose. Moreover the difference between the pre-paid water meter system and a credit system is not disadvantageous to the residents of Phiri… [I]t cannot be said that the introduction of a pre-paid water meter system in Phiri was unfairly discriminatory."[82]

The equality analysis is brief. The comparative nature of equality, context and impact are all present, but narrowly defined. The equality question is defined as a comparison of the impact of policy provisions that address payment rates and consequences. The nature of disadvantage is not poverty, but race (poverty is not a permitted, prohibited ground). Gender was not argued, and is absent. The long-term remedial aspects of the policy in relation to overcoming apartheid inequalities are broadly stated,[83] thus justifying differential policies as a form of substantive equality.[84] The context is thus the nature and purpose of the policy in relation to scarce water, rather than the actual conditions of poor people's (and women's) lives in a situation of insufficient water. Most surprisingly, there is no mention of the standard of dignity in determining fairness.

In line with some of the components of substantive equality, the Court is concerned with context, disadvantage and difference (although not with values), but in a limited manner. Thus *Mazibuko* finds the limits of substantive equality in the liberal egalitarian model, largely, I suggest, because of a consequent discomfort with matters of poverty and redistribution (unless defending state action), rather than status and recognition, and of the courts' role in such matters.

How might the matter be better addressed under a more critical approach to substantive equality? Here, the delineation of context, the assessment of impact and the role of values would play out differently, as would the willingness to find creative remedies.

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79 *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) paras 149-150.
80 Para 151.
81 Paras 152-153.
82 Para 154.
83 Para 148.
84 Paras 151 and 156.

Instead of limiting the equality question to narrow policy provisions, the problem could be phrased as follows (starting with the nature of inequality): Should impoverished communities in Soweto's poorer neighbourhoods, whose position is a result of deep structural social and economic inequalities of apartheid, be given prepaid water meters (without a sufficient basic supply) that allow water to be cut off without notice and without the financial means to reconnect to ensure basic needs for water are met? The "comparator group" would be found amongst those who live in areas that benefitted from apartheid and where higher income levels mean that they have the means to pay for sufficient water. Here the context would require evidence and/or judicial notice of the inherited and current socio-economic inequalities that structure the inability of the poor to pay for water, as well as how the prepaid water meters and a limited basic supply affected this. To insert a necessary gendered analysis, one would demonstrate how a lack of water always impacts disproportionately on women, making poor women especially vulnerable in this context. One would expect the Court to take account of the detailed and diverse picture of poor households and their struggle to live a dignified life with adequate water.

A conscious articulation of the values underlying equality[85] might see the court envisaging a society in which women and men were afforded the substantive conditions necessary to exercise meaningful choices: the provision of adequate and affordable water being one of these. Fairness would require the state to enable these conditions.

Such an approach would begin to set standards for non-discriminatory conduct in relation to the right to water and is a significant component of a legal approach to reducing poverty and inequality. The Court's extensive remedial powers would allow it to enhance accountability and accommodate any separation of powers concerns that it might have in requiring a different mode of water provision that does not amount to unfair discrimination, including structural interdicts that allow government to address the problem.[86]

Although sketchy in the confines of this paper, I suggest that the development of such a critical approach would enable courts to grapple with more substantive redistribution within an equality framework, mediated through remedial powers.

In the end, the Court's egalitarian liberal approach, although capable of significant judgments and important equality gains, sets boundaries to equality jurisprudence that tend to marginalise the experiences and concerns of poor women. Poor women thus fall outside the protections of legal liberalism. While a critical engagement with legal liberalism might sometimes secure important rights (such as in status based gains in customary law), in most instances issues of poverty and gender inequality are not adequately addressed. In the end, therefore, equality jurisprudence needs to rest on different philosophical and conceptual foundations to those based on a liberal egalitarian model. Those

[85] See C Albertyn "'The Stubborn Persistence of Patriarchy?' Gender Equality and Cultural Diversity in South Africa" (2009) 2 *CCR* 165 for a development of these in relation to gender and cultural diversity issues.

[86] See L Williams "The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study" (2010) 3 *CCR* 1 on this. See also Liebenberg *Socio-Economic Rights* ch 8.

foundations require not merely an equality of equal concern and respect, but of substantive conditions for a decent life. More conceptual work is required to advance a more critical and indigenous model of substantive equality.

5 Socio-economic rights and poor women

5 1 Why Women?

As alluded to earlier, women are largely invisible in socio-economic rights cases. For example, the *Grootboom* community represented a "textbook" example of gendered poverty: an informal settlement in which the majority of residents were women and children,[87] and arguments would clearly have been available about the particular plight of poor woman-headed households. While the absence of gendered arguments might not have affected the eventual outcome, it can be seen as a missed opportunity in the development of socio-economic rights jurisprudence. Introducing a gendered analysis could have set important standards for the evaluation of reasonableness, as discussed below. Similarly, in *Mazibuko*, a case concerning the right of access to adequate water by poor households living within a formal township, three out of five applicants were women living in woman-headed households. Household water shortages have a disproportionate impact on women who bear the burden of domestic reproduction, meaning that it is women who usually have to seek out available water for the needs of the entire household: drinking, cooking, cleaning and care work. It is also women who usually defer their own needs to those of the family. However, nothing was made of this in the application or judgment.

The emphasis on poverty at the expense of other forms of inequality and exclusion, or on singular rather than intersectional forms of discrimination, is commonplace in political and legal discourse. Single issues simplify the complexities of life, making them easier to describe and adjudicate. However, if addressing *gendered* poverty and inequality is central to our constitutional project – rather than an after-thought, an add-on, or a rhetorical device – then gender is a nettle that must be grasped.

Firstly, Everatt has written about the failure of government anti-poverty programmes to target the specific needs of different groups of the poor. He suggests that a general concern with disadvantage and the "poorest of the poor" tends to translate into large (and unmanageable) groups and undirected programmes.[88] Similarly judgments might be ineffective or reinforce inequalities. Courts can assist with more nuanced judgments, but this would only be possible if the cases are argued in a more gender conscious manner.

Secondly, a more careful consideration of the gendered context of claims can affirm women as citizens, build a more "gendered" accountability through courts (a primary function of socio-economic rights jurisprudence), and help publicise the issue for political action. Legal action is almost always a moment

[87] *Government of the RSA v Grootboom* 2001 1 SA 46 (CC) n 2, which states that 510 children and 390 adults lived in desperate circumstances. Although no gender breakdown is provided, it is statistically probable that the majority of adults were women.

[88] Everatt (2008) *Politikon* 305-311.

in a longer political battle – positive judgments can be significant weapons in those bigger battles for gender equality.

Finally, properly conceived and argued, such cases will assist in more transformative outcomes at a practical or symbolic level. Judgments are important indicators of how we can or should see the world.

5 2 Engendering "reasonableness"

Despite the preponderance of women amongst the poor, and substantial qualitative and statistical evidence of gendered access to socio-economic rights, gender issues are almost completely absent in socio-economic rights jurisprudence. A small, but important, body of academic literature has begun to engage this gap. Beth Goldblatt and Sandra Liebenberg have called for the interpretive interdependence of socio-economic rights and equality,[89] while Sandra Fredman has extended this approach to argue for a more engendered conception of socio-economic rights.[90] In the same edition of the *South African Journal of Human Rights*, various authors have begun to document the ways in which women's enjoyment of socio-economic rights is gendered, meaning that we need to rethink some of our conceptual approaches to socio-economic rights as well as our understanding of women's (lack of) enjoyment of these rights.[91]

The current jurisprudence of reasonableness is ultimately limited by the same kind of constraints as equality jurisprudence. There is no doubt that a more critical and gendered approach to socio-economic rights is required, and that this needs to be located in a substantive understanding of our democratic values of freedom, equality and dignity, and a nuanced consideration of differing material conditions of poor people's lives.

A more pressing concern is the absence of poor women from the current jurisprudence. Within the confines of this article I want to suggest (albeit very briefly) that there is substantial room to engage in a more gendered analysis within this jurisprudence: firstly, in the depiction of context; secondly in the procedural and "governance" criteria of reasonableness; thirdly, in a more nuanced understanding of "the needs of the most desperate"; fourthly, in a more gendered idea of the accountability that underpins the jurisprudence; and fifthly, within the meaning of "meaningful engagement" as a form of remedy.

As with equality, the Constitutional Court has emphasised that socio-economic rights must be judged within their social, economic and historical context of inequality and deprivation,[92] even if it has not always addressed this context sufficiently. There is ample scope for the development of a gendered analysis in respect of the context of socio-economic rights claims generally, and not merely those that refer to women claimants alone. Building gender

[89] Liebenberg & Goldblatt (2007) *SAJHR* 335-361.
[90] See, generally, S Fredman "Engendering Socio-Economic Rights" (2009) 25 *SAJHR* 410.
[91] See, generally, the articles in issue 3 of (2009) 25 *SAJHR*.
[92] *Government of the RSA v Grootboom* 2001 1 SA 46 (CC) para 43.

inequality within this contributes to the idea that a gendered analysis should be the norm.

The courts' test for reasonableness tends to focus on process and accountability rather than substance. It looks at whether government action to give effect to socio-economic rights is appropriate or fair, but omits an engagement with the objective norms promoted, or the specific goods and services guaranteed, by the rights themselves. Thus, as is well-known, the Court has identified a number of criteria to assess reasonableness including availability of resources; flexibility; the comprehensive, coherent and effective nature of the policy; its balance in terms of short, medium and long term needs; and the allocation of governmental responsibilities.[93] It appears that a carefully crafted engagement with these elements of reasonableness could be used to hold government to account for ensuring that its policies are appropriately "engendered", and that the needs of women and men are built into the conceptualisation, resource allocation, budgeting *et cetera* of government policies.[94]

The most "substantive" criterion of reasonableness is that a policy needs to pay special attention to the needs of the poorest and most vulnerable, the most desperate.[95] This remains an undeveloped category within the Court's jurisprudence and it is not always clear who the most desperate are. What is clear, however, is that more specificity is required and, again, a gendered analysis of the "most desperate" will always be important to addressing the needs of poor women.

In *Mazibuko*, the Constitutional Court highlighted the accountability aspect of justiciable socio-economic rights.[96] This provides important space to develop an idea of state accountability, that the delivery of goods and services must be structured in a manner that meets the needs of women *and* men. It also develops notions of equal participation within the structures of civil society. Socio-economic rights cases could be used to set standards for a more gendered form of accountability. Similarly, any imposition of "meaningful engagement"[97] over the implementation of socio-economic rights needs to take account of gender, especially of how women participate equally within this engagement.

The development of a more critical and transformative jurisprudence of socio-economic rights remains important. However as described above, even within the confines of reasonableness currently utilised by the Constitutional Court, there are opportunities to begin to address the intersections of gender inequality and poverty.

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93 Paras 40-46.

94 For example, the manner in which the Court assesses reasonableness in *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) shows a lack of consideration of context of poverty and impact of policy on living poor and women (paras 82-88 provide just one example of the absence of any reference to the lived reality of the applicants).

95 *Government of the RSA v Grootboom* 2001 1 SA 46 (CC) paras 42 and 44.

96 Paras 61 and 70.

97 *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC).

6 Conclusion

If the constitutional project is to effect change and transformation in the lives of women and men, then all of us who engage in that project have limited its potential: in how we select cases, prepare our arguments, write our judgments, and engage in the jurisprudence. Gender inequalities, like poverty, raise particularly difficult issues about the connections between reform and transformation, recognition and redistribution, law and politics, and between a "strategic engagement with legal liberalism" and something more than that.

While it remains important to critically engage with legal liberalism and the jurisprudence that we have, in order to pursue those transformative claims and judgments that are possible within the bounds of liberal egalitarianism; an important academic and legal pursuit continues to be to construct more critical and "indigenous" conceptions of equality and socio-economic rights. Importantly, these should be shaped within the particular context ("political economy" and cultural or social values) of South Africa as a constitutional democracy and a developing state. While the ideas generated by welfare liberalism and social democracy of western welfare states are important footholds in equality and socio-economic rights jurisprudence, they require significant development to meet the challenges of South Africa's constitutional project.

SUMMARY

Central to the transformative project of the South African Constitution, although not always recognised as such, is the need to address the distinctive forms of poverty and inequality experienced by women. This article explores the extent to which, and how, poor women have been included within the constitutional project, firstly, by describing the complexity of poor women's lives and then through a brief analysis of cases and jurisprudence on equality and socio-economic rights. Underlying these two facets of the article are two key questions: What does the experience of poor women tell us about the meaning of transformation and a transformative Constitution? How can we seek a more transformative (and gendered) understanding of equality and socio-economic rights jurisprudence? The article argues that the lived realities of poor women remind us that the kind of transformation – and transformative legal strategies – that are necessary to generate meaningful change require attention to structure and agency, to redistribution and recognition, to individual and community, to public and private (especially care-giving roles in family), to inequality and poverty. To achieve this through equality and socio-economic rights jurisprudence entails greater care in the choices made by lawyers in selecting and arguing cases, and in advancing critical arguments that push the boundaries of progressive and strongly egalitarian forms of liberalism. It also requires a more gendered jurisprudence in courts where attention to women's socio-economic context is combined with a conscious attempt to give meaningful content to the values informing constitutional rights, the gendered interests at stake and the manner in which application of legal principles, such as reasonableness and fairness, can be shaped to include women. In the end transformation requires the construction of a society in which women and men are afforded equivalent, substantive conditions for exercising the choices that matter to them, about how to live their lives, maintain their relationships, raise their children and pursue their aspirations.