

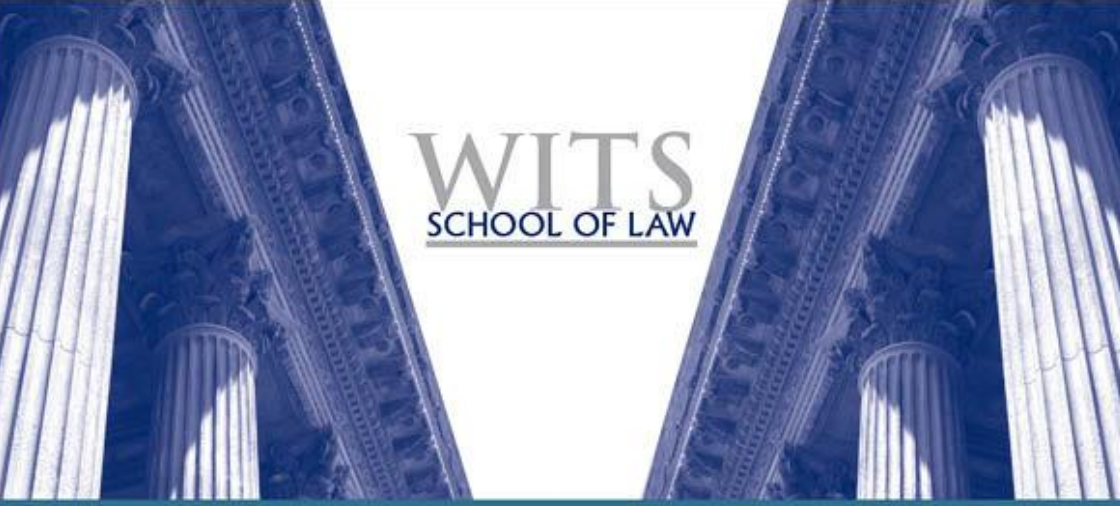
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Achieving Equality for Women: The Limits of a Bill of Rights

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ACHIEVING EQUALITY FOR WOMEN
THE LIMITS OF A BILL OF RIGHTS

by

Cathi Albertyn

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Although women constitute a majority of the South African population (about 53 per cent), we have suffered oppression and discrimination and occupied an unequal place in our society. As the new South Africa looks toward the eradication of racism and racial inequality, so too should we be working towards the eradication of patriarchy and the achievement of non-sexism and substantive equality between men and women. The present constitutional negotiations have offered women a unique chance to fight for equality. The dominant concern of women in this process has been to ensure that their interests are protected in the constitution and particularly in the future bill of rights.

The law is not a neutral institution and women have experienced the partial and unequal 'protection' and application of the law. Women's experience of entrenched and systemic social and economic inequality and discrimination, together with the record of equality litigation in countries as diverse as Canada, Sri Lanka, India and the USA, reminds us that a bill of rights is a double-edged sword whose high-sounding language of equality and rights is not always translated into justice. Mindful of the experience of women in these countries, South Africa women have suggested that a Women's Charter be included in the Constitution. Such a document will be prescriptive in that it will set out the women's point of view which the legislature and judges can or must refer to in making laws or

interpreting the bill of rights.[1]

My intention in this paper is to discuss the manner in which, and extent to which, a bill of rights, an equality clause and a Women's Charter can be used to redress the inequality of women. The paper also considers the limitations of liberal rights litigation and explores legal arguments, interpretations, procedures and practices which can assist in minimising these limitations. In general, it looks at the particular place of a bill of rights in ensuring equality for all in the "new South Africa".

THE INEQUALITY OF WOMEN IN SOUTH AFRICA

One's strategies and expectations of change, and one's political and legal notion of equality, must start from an understanding of the systemic and pervasive social and economic inequality of women in South Africa. Although this paper is particularly concerned with the position of women, my arguments can be applied equally to the question of race. Indeed, an examination of the concept of equality, and the development of relevant and appropriate legal and political interpretations of equality, must be able to accommodate all disadvantaged groups. This has implications for wording of equality clause and the question of separate gender rights which I shall deal with later.

Women are unequal to men in South Africa. They are also unequal to each other. Gender inequality is informed, inter alia, by race, class, mental and physical

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[1] The legal status of this document is undecided. It could be binding or persuasive. See 'What could a Women's Charter be and what could it be used to achieve?' Unpublished paper by the Caucus on Law and Gender, Cape Town.

ability, ethnicity and culture. But gender inequality is also common to all women in South Africa and is entrenched in the home, in the workplace and in the public sphere.

Women in South Africa tend to be poorer than men. They own less property, earn less income per capita and are more likely to be unemployed. Where they are employed, women are concentrated at the bottom end of the employment scale.[2] They generally earn less than their male counterparts and receive unequal benefits, subsidies and recognition on the basis of gender and marital status.[3] The universities and civil service are perhaps the more visible examples of this.[4] Women predominate in marginal and unprotected spheres of work. For example, many African and working class women are employed as domestic servants, in the rural areas, in part-time work and in the informal sector where such employment benefits as job security, pensions and maternity benefits are not available to them. Women also occupy jobs in sectors, such as

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2 By 1985 women made up 36,3 per cent of the labour force. More than 50 per cent of women were employed in traditionally female and low-paid occupations of housing, teaching, clerical and sales. Seventeen per cent of managerial, executive and administrative posts were occupied by women (cited in D Smuts and C Charlewood *Discussion Document on Women's Status* (1991) 11-12).

3 Married women were only recognised as separate tax-earners in 1990. Women in the public service suffer discrimination in pension and medical benefits and in their access to housing subsidies.

4 The Public Servants Report recently calculated that the State 'saves' R35 000,00 per female employee per year (cited in Smuts and Charlewood op cit note 2 at 1).

domestic work, the teaching profession and the civil service which are excluded from the protection of the Labour Relations Act.

Women's labour in the home is unpaid and unrecognised. It falls outside the definitions and protection of labour law which define work as work done outside the home for wages. It is not recognised in writing divorce agreements or in sums awarded in damages claims. It is not recognised in the Gross Domestic Product, yet it frees male workers to be productive and fuels the economy.

Despite women's inferior economic status, statistics tell us that women work harder than men whether they are housewives or job-holders in the 'double shift' in the workplace and at home. According to the Humphrey Institute of Public Affairs in the USA, women who represent about 50 per cent of the world population, perform nearly two thirds of all the working hours, receive one tenth of the world income and own less than one percent of the world's property.[5] The 'feminisation of poverty'[6] is a question that

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[5] As cited by Naomi Wolf *The Beauty Myth* (1991) 23. Similar statistics have been reported by the United Nations. The 'Report for the World Conference for the United Nations Decade of Women' agreed that when housework is accounted for, women end up working about twice as many hours as men (ibid at 23).

[6] US statistics tell us that 73 per cent of women experience decline in living standard after divorce, while men experience a concomitant 42 per cent increase in living standards. Sixty per cent of income earning people below the poverty line are women; seventy five per cent of black families below the poverty line are headed by women; sixty six per cent of elderly poor people are women; nearly 1 in 3 female-headed households and only 1 in 18 male-headed households are poor; and the average income of

we have not even begun to address in this country, although the racial disparities of property, income and employment are well-known.[7]

The figures and statistics on inequality in work and wealth are particularly serious when one realises that far from being able to rely on men economically, women head nearly as many families as men in South Africa.[8] In social and economic terms alone therefore, the inequality of women is huge and substantive. This has important implications for our understanding of the legal notion of equality, the possibility of a material change to the inequality of women through a bill of rights and the mechanisms which are required to allow the courts to intervene to redress such inequality.

In a country which already experiences enormous violence, women are more likely to be the victims of violence, often by their male partners. It is estimated that one in six women is battered by her male partner[9] and that

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female-headed families is less than half of male-headed families.

7 These statistics include the notorious fact of approximately 13 per cent of the population owning about 85 per cent of the land.

8 In Khayelitsha, Cape Town, about 42 per cent of the family units are headed by women (see D Budlender *Women and the Economy* (1991)). In the rural areas, this is possibly higher. It is probable that women head more families at the bottom end of the socio-economic scale.

9 Smuts and Charlewood op cit note 2 at 7. Estimates in the USA state that between 25 per cent and 50 per cent of women are victims of battery (T Segal and D Labe 'Family Violence : Wife Abuse' in B McKendrick and W Hoffman *People and Violence in*

one in three women is raped or sexually assaulted in her lifetime. Put another way, it is estimated that a woman is raped every one and a half minutes in South Africa.[10] The majority of assaults and rapes are perpetrated by men known to their victims. Accordingly, a large number of attacks and assaults on women take place in the home or the 'private sphere'.

Women are less likely to occupy positions of power in the work-place, the home, in the street or in the public world of politics and culture. To understand the inequality of women, one has to understand that gender relations are relations of power in which women are subordinate. This subordination of women is both rooted in and reflected by the persistent and deeply entrenched ideologies that separate the private world of women from the public world of men, and the 'masculine' sphere of reason, work and politics, from the 'feminine' sphere of emotion, the family, the home and nurturing support for men. Stereotypical images of women abound in our society as cultural dualisms such as masculine/ feminine, work/home, public/private and reason/emotion, in which the male is positively valued and the feminine turned into 'the other', are perceived as 'natural'. These dominant cultural values and ideologies inform society's view of women; are used to judge and control women; structure and justify a high level of violence against, and abuse of, women; devalue women's work and

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South Africa (1990) 253).

[10] Put another way this amounts to 1 000 women raped every day and 390 000 every year. This is based on official figures of rape complaints and the general agreement amongst experts that only one rape in twenty is reported. See Lloyd Vogelman *The Sexual Face of Violence* (1990) 1 and footnotes.

ensure that women retain a subordinate position in this country.

The eradication of the inequality of women is thus not merely a matter of amending prima facie discriminatory laws or removing the remaining legal disabilities affecting women. Inequality exists not only in the letter of the law, but also in its practice and interpretation, and in the social interests, values and practices and the political system that the law upholds and reflects.[11]

EQUALITY AND A BILL OF RIGHTS

The process of political negotiation in South Africa will eventually result in a social compact between groups, or between the majority and the minority, where all parties agree to be bound by certain overriding and fundamental principles and values. Within this compact, the institutionalisation of individual rights in a justiciable bill of rights will constitute the primary mechanism which will guarantee that the compact is not overthrown. The judiciary will accordingly be granted the role of watchdog of those values and principles which will underlie and shape our future democratic society. Given our history of racial oppression, it is to be expected that equality will be a fundamental principle of the constitution and that equality rights will be guaranteed in the bill of rights.

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[11] This is particularly visible in customary systems of law such as African Customary Law and Muslim law, especially family law, which have entrenched women's unequal social and economic status. In customary unions women are minors, their inferior position affects their access to land and resources, their education and their popular and political participation.

The new emphasis on constitutional and legal rights and liberal concepts and principles has meant that the dominant form of women's struggle is one for equality rights or women's rights. Given both the fact and the nature of the constitutional negotiations, the form of this struggle is probably inevitable. But it is also problematic. Equality has no fixed meaning. Although freedom and equality were the founding principles of the United States, equality did not envisage gender equality.[12] The new South African constitution will incorporate a commitment to gender equality, but this does not mean that the political or legal meaning and implications of this have been worked out.[13] It is probable that we will look both to the history of discrimination and disadvantage of apartheid and the liberal values of other constitutional systems to provide guidance and precedent. In this regard, the liberal democratic tradition has much to avoid and many of the mainstays of liberalism (the public/private distinction, formal equality and abstract rights) are potentially antagonistic to the achievement of equality by women. The notion of equality and rights are not inherently progressive. Both the form and the content of rights are sites of struggle in themselves in which women will have to confront dominant ideas and values about law, equality and themselves.

In other words, the location of the struggle for equality in the law and in the discourse of competing constitutional rights has problems for those people whom

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[12] P A Cain 'Feminism and the limits of Equality' (1990) 24 (4) *Georgia Law Review* 803 at 824.

[13] The political debate has tended to focus on how, and whether, social and economic rights can be protected and enforced rather than on the meaning and content of equality.

the Canadians call 'equality-seekers'. For women, these range from the gendered nature of the law and the legal system to the difficulty of framing arguments about the social conditions that lead to women's subordination in the form of legal arguments about equality rights. If women are to fight for equality through the courts, then we have to address the gendered nature of the law and legal systems as well as develop both our political understanding and legal arguments about equality. This is important not only for women but for all disadvantaged groups and our understanding of equality should include all such groups.

EQUALITY AND THE LAW IN THE ANGLO-AMERICAN TRADITION

The history of legal equality in Anglo-American constitutional law has largely been one of formal equality or equal treatment before the law. The basic notion has remained unchanged since it was formulated by Aristotle, viz that equality means that likes should be treated alike and unlikes should be treated unlike. It was developed in legal racial equality theory in the United States and much of the history of equal treatment before the law in Anglo-American legal theory has turned on this axis.[14]

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[14] Perhaps the only time that the South African courts have considered the meaning of equality was in the series of cases surrounding the segregation of public facilities by local authorities. Called upon to exercise judicial review of subordinate legislation, the courts sought to define the boundaries between discrimination and equality. After some debate, the South African courts eventually concluded that the provision of separate but substantially equal facilities for different races was a manifestation of 'equality before the law' (approved by the South African Appellate Division in *Minister of Posts and Telegraphs v Rasool* 1934 AD 167). This was in line with legal developments in the US, but as the rest of world repudiated this principle as

Lawyers have traditionally used Aristotelian concepts to deal with the question of equality between men and women around the dichotomy of sameness and difference or 'equal treatment' and 'special treatment'.[15] 'Equal treatment' requires that women should be treated the same as men and afforded equal treatment according to the law and 'special treatment' requires the law to recognise and accommodate some of the differences between men and women. Feminist lawyers in search of gender equality have often been trapped in a closed dialogue of equal versus special treatment.

Equal treatment: The dominant approach here, the 'assimilation approach', argues that social institutions should treat women as they already treat men.[16] The test to

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discriminatory (eg in the US Supreme Court case of *Brown v Board of Education* 347 US 483 (1954)), the South African government gave legislative authority to the provision of separate and unequal facilities in the Reservation of Separate Amenities Act 49 of 1953.

15 Much has been written by feminist lawyers about the sameness/difference debate and criticism of it. See for example, Christine Littleton 'Reconstructing Sexual Equality' which was first published in (1987) 75 *California Law Review* 1279, and Lucinda M Finlay 'Transcending Equality Theory : A way out of the maternity and the workplace debate' (1986) 86 *Columbia Law Review* 1118.

16 A second approach within the 'sameness' school of thought is the 'androgenous' approach which calls for some sort of androgenous standard or non-gendered standard to operate as a 'golden standard' of sexual equality. See for an example of such an argument Joan Williams 'Deconstructing Gender' (1989) 87 *Michigan Law Review* 797. The conceptualisation of an androgenous mean is difficult to do even by way of example and this underlies the difficulties inherent in implementing this.

determine whether a woman has been discriminated against on the basis of her gender is to ask how a man in her position would have been treated.

In refusing to recognise difference, the 'equal treatment' approach has had significant problems when confronted with the key difference between men and women, viz, the fact that women fall pregnant and bear children. 'Equal treatment' lawyers, in search of a male standard, have resorted to analogising pregnancy to disability. Women have thus become entitled to maternity leave and benefits to the extent that an employer provides job protection for employees suffering disabilities.

Special treatment: Partly to avoid the anomalous results of pregnancy as disability, liberal feminist lawyers in the US and Canada have argued that the law must take account of real biological differences between men and women. The dominant approach here has sought to accommodate the fact of biological difference by calling for the 'accommodation' of women by according them 'special treatment' in respect of their child-bearing and child-rearing roles and responsibilities (maternity leave and benefits and child-care), but insisted that social and cultural differences are dealt with under an 'equal treatment' model.

I am not going to detail the nuances of these approaches as I will argue that they have crucial limitations which mean that they will be unable to deliver equality through the courts in South Africa. In detailing these criticisms and the problems inherent in liberal ideology which these approaches typify, I will be arguing the need for a purposive, substantive and context-based interpretation of equality in South Africa.

Both equal treatment and special treatment approaches are comparative approaches which require a norm from which to measure discrimination on the basis of sameness or difference. This is accomplished by reference to a woman's correspondence or lack of correspondence with men. Thus sameness or difference are measured from an apparently universal and neutral standard of equality which, when viewed from the women's perspective, is clearly a male norm. Thus the central problem with these approaches is that they presume a fair, egalitarian and 'gender neutral' law which does not account for the gendered nature of the letter and practice of the law and the competing social analyses, visions and interests which underlie legal issues.

Law and legal language are socially and culturally constructed, and produce meanings and interpretations which reinforce certain world views and understandings of events[17] and exclude others. Feminists have argued these meanings have been shaped, interpreted and defined by men who have occupied social and political power. The characteristics of law and of liberal thinking are individualism, objectivity, universal abstraction, dichotomy and conflict. Objectivity and universalism mean that the hierarchical dichotomies thrown up by law and liberal thought are established as a 'natural' way of ordering the world (male/ female; culture/nature; mind/body; reason/emotion; public/ private). It also means that law is associated with the 'male' and higher valued side of each of

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[17] For example, the use of 'surrogate' rather than 'birth' mother defines the issue as one of contract rather than parenthood. The use of 'domestic' violence which tells us that this is a private occurrence. The opposition of 'mother' versus 'single' mother or 'working' mother.

these dualisms and that diversity is not valued as the merely different is turned into the absolute other. Individualism means that the social and political context, issues of race, gender and class are not seen as important or relevant. Objectivity and neutrality prevents the law from talking about values, structures and institutions and how they construct knowledge, choice and worldviews. Neutrality means that it is difficult to comprehend that women's definitions have been excluded and marginalised and labels alternative voices as biased.[18]

The result of this is that these approaches are unable to address the structural disadvantage that women suffer; 'Sameness' because it works from the premise that man and women are the 'same' and that 'given the chance' women can do as well as men; 'difference' because it focuses on accommodation or special treatment within the existing norms and values rather than the transformation of those norms and values. Both approaches reduce the causes and conditions of equality to identified 'either/or' biological, social and cultural differences and do not address the host of assumptions, myths and stereotypes which underlie the process of identifying and defining difference.[19]

The sameness and difference approaches therefore

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[18] See L M Finlay 'Breaking Women's Silence in Law : The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886 at 887-910.

[19] The inability of the formal equality approach to deal with the issue of pregnancy is an example of how it can never penetrate those assumptions, stereotypes and male norms which underlie the letter and practice of the law. See Finlay op cit note 15 at 1118 for an extensive discussion of this.

mask a complex network of inequality and disadvantage between men and women.[20] In doing so, these approaches perpetuate social disadvantage and unequal power relations. Although the equal and special treatment models have resulted in some advances for women in the jurisdictions where they have been used and entrenched, these advances have been limited in their nature and effects. Canadian and American commentators admit that the appeal for formal equality has allowed some women to advance and permitted some access to education and employment in professional, academic and blue-collar spheres. But these advances have been to gain access to male institutions and prerogatives and the women who have benefitted are those whose social curriculum vitae's approximate those of men. This means that gains under these arguments are not only limited,[21] but reinforce and elevate a male norm.

Given the nature of South African society, it will only be a privileged few who will ultimately benefit in terms of

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20 One of the problems in equality litigation in the US courts has been their inability to deal with multiple disadvantage and black women litigants have been told to base their claim of discrimination on race or gender (K Crenshawe 'Demarginalising the intersection of Race and Sex : A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist politics' (1989) *The University of Chicago Legal Forum*.

21 Andrew Petter ('Legitimising Sexual Equality : Three Early Charter Cases' (1989) *McGill Law Review* 358-67) demonstrates how lawyers involved in representing women in equality cases advanced arguments which accepted and reinforced certain liberal assumptions concerning formal equality and the public/private divide. Although these won short-term gains for a single litigant, they impeded the progress of the broader task and were subsequently used against women in later cases.

these approaches.[22] Crucially, they do not recognise that the difference between men and women, or black and white, is in fact about inequality and hierarchy, and that this inequality and hierarchy is institutionalised in the letter, practice, interpretation and application of the law. The resultant formal equality of the equal treatment/special treatment approach does not and cannot address the systemic discrimination and economic and social subordination of women, black people and other disadvantaged groups. This is clearly unacceptable for the achievement of gender and racial equality in South Africa. New interpretations of equality have to be found.

TOWARDS AN UNDERSTANDING OF EQUALITY IN SOUTH AFRICA

If the bill of rights is to have any impact (or legitimacy), the South African courts will have to be persuaded to endorse a theory of equality that promotes the equality of the powerless, the excluded and the disadvantaged. Equality should be defined substantively and not abstractly and should be based on the particular nature, experience and needs of disadvantaged groups in South Africa. At all costs we should avoid the experience of Canada where those who initially came to court to enforce equality did so to reinforce positions of power and advantage.[23]

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22 This was certainly the experience in Canada where the use of formal equality arguments and other liberal concepts allowed established groups and interests to use the Charter to the exclusion and detriment of the socially disadvantaged (See Petter, ibid).

23 For example, in the case of *R v Seaboyers, R v Gayme* (1991) 48 OAC 81 (SCC) equality litigation reversed women's hard fought legislative gains in the procedure of rape prosecutions (rape shield laws). In this case two defendants in rape trials challenged the

Furthermore, we need a concept of equality where the difference between men and women or ethnic or racial difference, or difference of sexual orientation or mental or physical ability, is valued and is non-hierarchical and non-pejorative. This means separating difference from domination and discrimination. The existence and value of diversity should be affirmed and the hierarchy and dominance that often accompanies and orders difference should be recognised and addressed. Sameness should be reformulated to mean no more than that persons are entitled to the same dignity and respect irrespective of difference.[24] In addressing the consequences of gender difference, the aim should be to make these differences 'costless'. Christine Littleton[25] argues that the function of equality is

> 'to make gender differences, perceived or actual, costless relative to each other, so that anyone may follow a male, female or androgenous lifestyle according to their natural inclination or choice without being punished for following a female lifestyle or rewarded for following a male one'.[26]

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constitutionality of those Canadian criminal code sections which had limited the cross-examination of women about their past sexual history. The basis of the challenge was that section in the Canadian Charter which provided for a right to a fair trial and due process.

[24] For a reformulation of sameness and difference, see J Williams 'Dissolving the Sameness/Difference debate: A Post-modern path beyond Essentialism in Feminism and Critical Race Theory' (1991) 2 *Duke Law Journal* 296-323.

[25] Littleton op cit note 15.

[26] Littleton op cit note 15 at 1297.

All of this means that construction of a legal concept of equality and equality rights in South Africa must resist the restrictions of much of the Anglo-American experience. Most importantly we should heed the feminist insights into the partial and gendered nature of law and legal standards. South Africa is in a unique position because the experience of apartheid has sensitised us to the hidden interests, values and social visions of law. The response has been to call for a liberalisation of law and the enshrinement of liberal values in our law. Another response has been to eradicate race as a criterion and operate on merit or according to 'objective standards'. In view of what I have discussed above, this holds little comfort for women or disadvantaged groups.

One of the most significant claims of feminism has been that the equal application of gendered rules will not attain equality, and to stipulate the need to examine the underlying assumptions and content of legal rules to determine whether laws are discriminatory in their impact and results. Such an approach has roots in the liberal principle of equality as a distributive goal which requires the distribution of goods and services to be equal according to a merit principle. In its more radical form, distributive justice requires equality according to need rather than merit. Translated into equality of opportunity and equal protection this has allowed feminists to argue for substantive equality in legislative lobbying and before the courts. It has also been used to justify positive and affirmative action.

However to ensure that men and women receive *equal benefit and effects of the law,* this approach must address the fact that the law is partial and gendered. This has consequences for the kind of equality arguments that we put before the courts as well as for the procedures and remedies that are available.

An equality argument for South African courts

The courts should adopt a purposive and remedial approach in assessing whether laws, customs and practices are discriminatory. The test is not to assess what the state intended in the legislation,[27] but how the legislation affects people. Thus both direct and indirect or unintentional discrimination should be subject to the scrutiny of the court.

At the same time, the court should place in the foreground the value or freedom that it seeks to uphold. In respect of equality, the court should not adopt a narrow, technical or formalistic interpretation of the equality clause. On the contrary, the courts should endorse equality as a fundamental value which entitles all persons to equal dignity and respect. This means promoting particular groups who have been excluded and suffered disadvantage and it inevitably means differential treatment to overcome past discrimination and disadvantage. Ultimately, it means accepting that the purpose of the equality clause is to benefit individuals and groups which historically have had unequal access to social and economic resources and to assist them in overcoming their condition of inequality.[28]

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27 The test adopted in the United States which has severely limited equality litigation.

28 For a discussion of this notion of equality see G Brodsky and S Day *Canadian Charter, Equality Rights for Women* (1989) Canadian Advisory Council on the Status of Women, chapter 8. There is legal precedent for such a theory in Canada. The key case here was that of *Andrews v The Law Society of British Columbia* (1989) 1 SCR 143 and the arguments were those of a feminist legal action group, the Women's Legal Education and Action Fund (LEAF).

In practice this means that the courts have to address the patterns of socially constructed inequality. They can only do this by shifting their emphasis away from the individual to examine the social history and context of the disadvantaged group to determine how differences operate to discriminate against or disadvantage such a group. The introduction of 'context' also means the introduction of the experiences and voices of disadvantaged groups and breaking down of stereotypes in areas of law which are fundamentally structured by men's perspectives and experience. The law does not easily allow these voices and context to be introduced and it probably involves a significant shift of focus in procedures and justifications and in our legal culture and value system and a hitherto unprecedented recognition of disadvantage and discrimination.

CLAUSES, PROCEDURES AND ENFORCEMENT MECHANISMS

The litigation of equality for women raises important questions about the nature of the equality clause and limitations clause, access to courts, locus standi, the power of the courts to direct changes to legislation to ensure commitment to equality, the nature of evidence, the composition of the court and the scope of judicial review. Limitations on procedures and remedies can be significant obstacles to the achievement of equality by women. Although procedures and the particular wording of a clause in the bill of rights cannot guarantee equality, they can facilitate legal arguments and remedies aimed at achieving substantive equality. Perhaps most important in this respect is the wording of the equality clause in the bill of rights.

The Equality clause

The equality clause should be worded in such a manner as to facilitate interpretations of substantive equality and to prioritise the purpose of the clause as protecting and promoting equality for disadvantaged groups. Most importantly, equality rights should be contained in a single clause and *not* separated out into in gender rights, disability rights and equality rights, for example, as the ANC draft bill has done. There is not one form or equality for South Africans (article 1(1)), another for women (article 7), yet another for black people (article 1(2)) and yet others for gay persons (article 7(2)), disabled persons (article 8) and any other disadvantaged group that can be identified. It makes little sense to separate equality rights and is potentially dangerous as it leaves the door open to argue that women are different from 'people', 'citizens' or 'individuals'.[29]

The wording of the clause should list historically disadvantaged groups but should be open-ended to allow for the incorporation of future disadvantaged groups. It should allow for substantive equality and for affirmative action as an expression of, and commitment to, substantive equality.

Equality as a limiting principle

Human rights are not absolute. They often have to be balanced against competing rights. Equality must be measured against such rights as freedom of expression,

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[29] For an excellent critique of the separation of equality rights and the language of the ANC draft bill, see D Driver *Women and language in the ANC Constitutional Guidelines* (1989) IDASA occasional paper 26.

religious and cultural rights particularly in debates around pornography, cultural relativism and the oppression of women in certain customary systems.[30] I want to suggest that the recognition of equality is important not only as a right but as a limiting principle on the exercise of other rights.

The Canadian courts have recently had to consider the limits of freedom of expression in respect of pornography. While rejecting a direct limitation of freedom of expression by the equality clause,[31] the Supreme Court accepted that the limitation clause[32] limited such freedom in circumstances which took account of equality. The Canadian limitations clause allows such limits on rights as may be reasonable in a 'democratic society'. The court decided that harm to society was such a limitation and that the harm caused to women by certain types of pornography constituted harm to society and violated the 'principles of human equality and dignity'. Obscenity provisions which proscribed 'the undue exploitation of sex' were accordingly found not to contravene the guarantee of freedom of expression.[33]

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30 In Sri Lanka, the constitutional guarantees of religion and culture were used to undermine women's rights to equality. A key issue of women's struggles in that country has been the resolution of equality and cultural rights (see Savithri Goonasekera 'Women, Equality Rights and the Constitution' (1990) Nov/Dec *The Thatched Patio* 41).

31 Article 15 of their Charter of Rights.

32 Article 1 of their Charter of Rights.

33 *Butler v Her Majesty the Queen* Supreme Court of Canada Case no 22191/92, unreported.

This is but one way of arguing for the overriding value and status of the principle of equality in a bill of rights. Given the history of this country, equality must be recognised as a limiting principle on the exercise of potentially conflicting rights if we are to overcome past discrimination and disadvantage.

Access and locus standi

Access to the courts and the ability to bring a complaint in terms of the bill of rights are crucial if women are to be able to use equality rights to further their substantive equality. To gain access, women need funding and resources. To have locus standi as well as access, women require flexible rules of procedure.

Funding: Disadvantaged groups are poor and cannot afford to litigate. In Canada women were rarely the primary litigants in equality or other human rights cases. In only 9 out of 52 gender equality claims were women the applicants. Only 17 out of 591 cases were brought by disadvantaged groups.[34] Mechanisms have to be found to allow access to courts for such people. Legal Aid and a state human rights or equality rights litigation fund are important here.[35]

Resources: Women need resources and power. This does not only mean public funding but also organisations and research networks to take on the work of promoting equality

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34 Brodsky and Day op cit note 28 at 49.

35 In Canada the 'Court Challenges' programme was a government sponsored litigation fund for the use of minority and disadvantaged groups.

for women. Women in practice should take on cases voluntarily or for lesser fees and women in universities and organisations should be developing the necessary research and arguments to sustain claims for substantive equality. In Canada, equality litigation has been co-ordinated by the Women's Legal Education and Action Fund (LEAF) and consideration should be given to a co-ordinated strategy in this country.

Who will the court recognise as a party - the power to litigate: Applicants normally have to show a direct and substantial interest in a case. In constitutional challenges, this would inevitably limit the parties. Canadian lawyers have recently argued that a court challenge can be brought by a citizen who is not affected directly by the legislation in the following manners:

1 where there 'is no other reasonable and effective manner in which the issue may be brought before the court';[36]

2 anyone charged in a criminal offence can challenge the constitutional validity of the statute under which he or she is charged;

3 legislation can be challenged as part of a defence to a civil suit.

Consideration should be given to the nature of the interest which is necessary for participation in a particular matter. In this respect attention should be paid to the formulation of a specific right of access to the courts to

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[36] *Minister of Justice (Canada) v Borowski* (1981) 2 SCR 575.

enforce rights within the bill of rights. The Olivier Report goes some of the way to achieving these ends in article 35(d).[37]

Collective and class actions: The question of collective and class actions should also be considered. In the absence of such an action individual women have to be named as applicants. The experience of other countries has demonstrated that many potential women litigants are vulnerable and marginal persons who not able or willing to act as applicants for fear of losing their job or other reprisals. Women and disadvantaged groups have thus been hesitant to challenge working conditions or situations in which they find a lack of legal protection (eg immigrant workers). Challenges to the laws of procedure governing rape and sexual assault also mean that an individual women is put through the continuing stress of litigation. In such circumstances, it would be easier for a women's organisation involved in the issues of the case to initiate challenges on behalf of women as a group. For example, an organisation such as People Opposing Women Abuse (POWA) could represent women in matters dealing with issues around sexual assault, rape and battery.

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[37] Article 35 (d) reads :

> 'Any individual, juristic person or association has the capacity on behalf of himself or herself or itself or any other individual or any group or class of persons to test, by virtue of the provisions of this Bill, the validity of any legislative, executive or administrative act by applying to the appropriate division of the Supreme Court for a declaratory order notwithstanding the fact that the applicant is able to prove only an indirect interest or indirect prejudice.'

The power of intervention: Rights litigation is characterised by the wide range of interests affected. Women and other groups should have the power to intervene in any case which affects their interests directly or indirectly. Feminists in Canada have admitted that the flexibility of the judiciary has allowed them to be heard in a wide range of matters, including family law matters (concerning the entitlement of a wife to pension credits in a divorce settlement).[38] The intervention procedure in South Africa will have to become more flexible to allow parties to intervene in cases.[39]

The intent requirement

In the US the intent requirement states that a law will not be struck down merely because its effect is discriminatory. So long as the purpose of the law is non-discriminatory, it will stand. This can be avoided by proper wording of the equality clause and by the kind of equality arguments outlined above.

Evidence

If equality is about extending rights and benefits to disadvantaged groups, we have to think about how to ensure that the experience of these groups is listened to and admitted as relevant evidence. This is particularly important in view of the fact that studies have told us that judges do not understand the experience of women and that the law

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[38] In Canada the intervention procedure is based on the court's inherent jurisdiction to accept assistance from an amicus curiae as well as statuary rules of intervention.

[39] See Brodsky and Day op cit note 28 at 134-7.

is loaded against the admission or understanding of such experience.[40]

Remedies

If the courts are to be an effective institution in protecting women's equality rights, appropriate judicial remedies must be made available to address any legislative failure to respond to women's interests. In other words, courts must have the power to order effective remedies. What women will often need in gender equality cases is the explicit extension of benefits formerly available to men only, and other results-oriented remedies such as compensation and structural relief requiring governments or others to act to eliminate the causes of inequality. A purposive approach to equality described above requires a concern for effective remedies.

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[40] Many studies have been done in the United States on gender bias amongst the judiciary. An overview of these studies makes the following points:

1. Judges work with a small set of stereotypes of women : the woman who is chaste, domestic and unsuited to position of authority; the 'eternal temptress' and 'superwoman'.
2. There is a pervasive tendency to regard men as more credible than women.
3. Judges are ignorant and misinformed about the economic and social realities of most women.
4. Men identify with men and are more sympathetic to their views.

(Norma J Wikler 'Educating Judges about Gender Bias in the Courts' in *Overcoming Gender Bias* 227-45. This is a summary of studies and evidence of gender bias in the United States and the training programs in the United States which have been set up to deal with this.)

A justiciable bill of rights assumes that the courts can test legislation, but this has traditionally meant a negative power of striking down legislation. Can a court also insist that the state extend or provide social benefits to protect disadvantaged groups? A social commitment to equality is expensive. If the state saves R35 000,00 per female civil servant, how does one ensure gender equality? The extension of benefits is one of the most important battles in Canada at the moment[41] and it raises important questions about the relative roles of the judiciary and the legislature. In the US substantive equality arguments to found an extension of social benefits have not been accepted by the courts in the absence of supportive legislation.[42]

This would challenge current concepts of the way in

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41 The Canadian Unemployment Insurance Act provides for maternity benefits for biological mothers and childcare benefits for adoptive parents. Biological fathers received neither. This was challenged by Schachter, a biological father, on the grounds of equality. The court a quo found that for as long as the Unemployment Insurance Act remains in force, it must provide equal rights to biological parents.

The Federal government appealed on the basis that the court's power was confined to striking down discriminatory provisions and it could not order an extension of benefits.

LEAF argued that this would have the consequence of producing 'sameness' (no benefits for anyone) rather than equality. In view of the fact that the Supreme Court in *Andrews* and other cases had accepted that the purpose of the equality clause was to promote equality for disadvantaged groups, it could not be used to roll back benefits designed to alleviate disadvantage.

There was no judgment as at January 1992.

42 Cain op cit note 12 at 823, fn 80 and at 826.

which legislative and judicial power is divided and inevitably involves the question of so-called second generation rights. Substantive equality rights slide into socio-economic rights very quickly and the boundaries between first and second generation rights are blurred in this respect.

Against whom and what is the bill of rights enforceable?

Linked to the question of effective remedies is what agencies, institutions and persons women can take to court to enforce equality rights. In the liberal tradition rights operate to protect the individual from the state and in many jurisdictions (including the US and Canada), the right to invoke the bill of rights only occurs after state action. This arises out of a particular historical tradition, including the non-interference in the economy and the accepted dichotomy between the private and the public realms. The justification based upon a rigid distinction between public and private is unacceptable in contemporary South Africa where there are huge corporations, multiple sites of discrimination, inequality and abuse.

Two examples should suffice. First, our common law and customary law are both sexist and discriminatory in many respects. Yet if the bill of rights is only enforceable against the state, it will be very difficult to challenge these areas of law. Secondly, the state had recently 'privatised'[43] the transport services and the postal and communications services. Does this mean that two substantial employers are now excluded from the ambit of the bill of rights? If not, how broadly can we define the

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[43] I place this in inverted commas as the privatisation has taken the form of establishing a single shareholder - the state!

'state' or the 'government'.

THE LIMITS OF A BILL OF RIGHTS

It is important to pause and consider that there are substantial limits on what can be achieved through a bill of rights.

The moot question for women is whether we can expect gender equality to be protected and enforced by the judiciary. Not only is litigation costly, lengthy[44] and often reduced to abstract points and principles, but for women it will conducted in an institution and language which is not our own. The example set by the judiciary in other countries does not leave us optimistic.[45] In South Africa, the entrenchment of particular sexist values and ideologies in the law and in society, and the bias in the way that judges interpret and apply the law raises serious questions about the ability of white middle-class male judges to deliver equality or even to perceive issues about women or blacks as problems of inequality. This may be ameliorated by the addition of black judges, but it is unlikely that many women judges will be appointed.

This does not mean that women should avoid the courts. On the contrary, legal guarantees of equality provide an opening that can be used. But this should be treated with caution. As I have earlier argued equality and equality rights are contested terms. The struggle to put forward our notions of equality is firstly a political one. This means that

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[44] In Canada, it took until 1989 to obtain the *Andrews* judgment.

[45] See note 40 above.

the experience, meanings and interpretations of women should be expressed and should be heard to challenge dominant meanings in all institutions of the state and in civil society. Equality rights have already demonstrated their potential to mobilise women,[46] but this mobilisation must take place in the context of a conscious political programme which takes on the dominant ideologies in a political struggle which asserts our vision. It is only in a vigorous democratic civil society where people are free to organise, debate and dissent that there is hope of change. Our notion of equality is accordingly closely tied to our notion of democracy and the relationship between civil society and the state.

It is for this single reason that the Charter campaign is important. It provides the opportunity to educate, to mobilise and publicise women's view of equality, dignity and respect. However the role of the Charter should not be overestimated. Neither a Women's Charter nor a Bill of Rights will guarantee rights for women.

All of this being said, probably one of the most important considerations is whether, in spite of a progressive bill of rights, the focus of equality should be the courts. The extent of inequality in this country, not only amongst women, but amongst the majority black population means that greatest attention should be paid to a programme of socio-economic upliftment and legislative reform and action. Thus litigation strategies are only part of a broader strategy of education, law reform and state action to redress inequality. What women have to do is to ensure that the state does act to eliminate inequality, sexism and racism,

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[46] We have already seen this in the extraordinary unity of women in the Women's National Coalition and amongst the Gender Advisory Committee representatives at CODESA.

whether by using the courts or other tribunal such as a human rights or equal opportunities commission. But in order to use these institutions effectively, a strong women's movement should exist in civil society.

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