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SUBSTANTIVE EQUALITY AND TRANSFORMATION IN SOUTH AFRICA

CATHERINE ALBERTYN*

ABSTRACT

This article considers whether 'substantive equality', as a transformative idea and legal mechanism in the South African Constitution, can generate legal solutions and court decisions that may result in transformative change. It does so by establishing a framework for analysing the 'inclusionary' or 'transformatory' effects of equality cases in relation to gender and sexual orientation. It argues that the idea of substantive equality is capable of addressing diverse forms of social and economic inequality, and that the legal form of substantive equality adopted by the Constitutional Court, emphasising context, impact, difference and values, has some potential for achieving meaningful social and economic change by and through courts. However, the manner is which the Court has engaged with this legal form suggests that the transformative possibilities of equality are constrained by a number of factors. These include institutional concerns, the capacity and willingness of judges to recognise and address the multiple systemic inequalities that still pervade our society as well as their ability to develop a consistently transformative jurisprudence that applies the ideas of substantive equality to the concepts and doctrines that underpin many equality claims.

I INTRODUCTION

This article engages the idea that 'equality' in the South African Constitution can generate legal solutions and court decisions that may result in transformative change in South Africa. It does so by identifying the possibilities of 'substantive equality' as a transformative idea and legal mechanism, before analysing some of the Constitutional Court's equality cases that deal with issues of social transformation (gender and sexual orientation). The article suggests that the idea of substantive equality contemplates both social and economic change and is capable of addressing diverse forms of inequality that arise from a multiplicity of social and economic causes. In addition, the legal form of substantive equality adopted by the Constitutional Court, with its emphasis on context, impact, difference and values, has some potential for achieving meaningful social and economic change by and through courts.

However, the manner is which the Court has engaged (or refrained from engaging) with context, difference and values in its equality cases suggests that the transformative possibilities of equality are constrained. The constraints include, inter alia, institutional concerns (questions of the separation

* Professor of Law and Director of the Centre for Applied Legal Studies, School of Law, University of the Witwatersrand. This article has benefited from the comments of the participants of the workshop 'Equality As A Social Right: Towards A Concept Of Substantive Equality In Comparative And International Law' held at the International Institute for Sociology of Law, Onati, Spain, 21–23 June 2006, as well as an anonymous reviewer. This article forms part of a broader research project on Equality and Transformation.

of powers and institutional legitimacy), the capacity and willingness of judges to recognise and address the multiple systemic inequalities that still pervade our society (particularly in exploring 'context'), and the ability of judges to develop a jurisprudence that applies transformative ideas to the concepts and doctrines that underpin many equality claims.

This article argues that, despite the broad reach of constitutional protection of equality, there remain clear legal and social boundaries that are both normative and doctrinal, that sustain conventionally gendered ideas of society — women, family, marriage and sexuality. As a result, equality jurisprudence has broadened the net of 'inclusion', but has not necessarily dislodged the underlying social framework. For the equality jurisprudence to be truly 'transformative', rather than merely 'inclusionary', the legal application of substantive equality needs to be more conceptually consistent. This requires it to be embedded in a broader transformative jurisprudence that is better able to understand systemic inequalities (social context) and to overcome legal formalism, especially the chilling effect of traditional legal concepts and doctrines on transformative outcomes.

Part II explores the meaning of substantive equality in South Africa, and its relationship to inclusionary or transformative change. Part III discusses the legal rules of substantive equality followed, in part IV, by an analysis of selected Constitutional Court cases concerning sex, gender, marital status and sexual orientation discrimination. Part V discusses the implications of this analysis for the transformative use of substantive equality.

II Substantive Equality And Transformation

The call for 'substantive' equality[1] emerges from particular understandings of inequality as rooted in political, social and economic cleavages between groups, rather than the result of arbitrary or irrational action. It acknowledges the complexity of inequality, its systemic nature and its entrenchment in social values and behaviours, the institutions of society, the economic system and power relations.

A constitutional commitment to substantive equality is thus also a commitment to the eradication of such systemic inequalities. It establishes an aspirational ideal — the achievement of a society based on equality[2] — and presumes that this is (at least partly) possible through law. In a constitutional sense, therefore, substantive equality is both a value and a legally enforceable right.[3] In addition, in South Africa, the value and the right of substantive

1 In South Africa, the political claim for substantive equality emerged from the constitutional negotiations of the early 1990s, mostly from the women's movement. See C Albertyn 'Women and the Transition to Democracy in South Africa' in C Murray (ed) *Gender and The New South African Legal Order* (1994); S Hassim *Women's Organizations and Democracy in South Africa* (2006) chapter 5. It has also been a dominant theme in South African constitutional scholarship.

2 See the preamble and s 1 of the Constitution.

3 On this distinction, *Minister of Home Affairs v National Institute for Crime* Prevention 2005 (3) SA 280 (CC) para 21.

equality are both central to ideas of social and economic 'transformation' and the role of the law in achieving this.

In thinking more deeply about the nature and possibilities of substantive equality in South Africa, it is useful to differentiate between different forms of inequality in order to analyse the extent to which different constitutional claims, based on such inequalities, are understood and addressed. For the purpose of argument, I will distinguish between social and economic equality claims, and between claims based on, and/or that result in, inclusion and transformation.[4] However, the analysis that follows is limited to social claims.

Different groups in society experience a different mix of political, social and economic inequalities, giving rise different kinds of equality claims. Social inequalities result in patterns of inclusion and exclusion in which the identity, culture, values and behaviours of a particular group are stigmatized, marginalised and/or denigrated, while another group is affirmed and privileged. Such exclusion may reflect or result in increased vulnerability to physical and psychological violence and to political marginalisation. Claims arising out of these inequalities tend to emphasise what Nancy Fraser has called 'recognition', asserting the social identities and values of the excluded group.[5] In South Africa, many of the claims brought by gay and lesbian groups have been claims for social recognition of gay and lesbian identities, relationships and families.[6] In addition, the equality claims by customary wives,[7] cohabiting partners[8] and sex workers[9] discussed in this article are also, arguably, fundamentally claims for social recognition.

Equality claims may also arise out of economic inequalities, manifest in the unequal access to, and distribution of, basic needs, opportunities and material resources. These claims emphasise economic inclusion, and might also entail a claim for a (re)distribution of resources. Although these are not discussed further in this article,[10] South African courts have considered both defensive and positive claims about economic inequality. In *Van Heerden v Minister of Finance*[11] the Constitutional Court was asked to defend a positive measure that sought to equalize pension benefits by subsidizing the contributions of members of a disadvantaged group. This case suggests that the courts will

4 I have identified these distinctions elsewhere. See C Albertyn 'Defending and Securing Rights through Law: Women, Law and the Courts in South Africa' (2005) 32 *Politikon* 217; C Albertyn 'Equality' in E Bonthuys & C Albertyn *Gender, Law and Justice* (2007) 82.

5 N Fraser *Justice Interruptus* (1997).

6 In particular, the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 SA 6 (CC).

7 *Bhe v Magistrate, Khayalitsha; Shibi v Sithole; SA Human Rights Commission v President of the RSA* 2005 1 SA 580 (CC).

8 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

9 *Jordan v The State* 2002 (6) SA 642 (CC).

10 I have discussed this elsewhere. See C Albertyn & B Goldblatt 'Equality' in S Woolman et al (eds) *Constitutional Law of South Africa* (2 ed 2007) 35, 12–4, 29–42. See also S Liebenberg & B Goldblatt 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 *SAJHR* 335.

11 2004 (6) SA 121 (CC).

largely defer to government measures,[12] and it remains an open question as to how far courts may nudge government in more transformative, redistributive directions.[13] In *Khosa v Minister of Social Development*,[14] a case assisted by the conflation of equality and the right to social assistance, destitute permanent residents successfully claimed the extension of social benefits to them.[15]

In truth, disadvantaged and vulnerable groups usually experience a mix of inequalities, and many claims include aspects of both social and economic equality. Gender based claims are thus often claims for equal social recognition in order to achieve a fairer distribution of resources. The relationship between claims for social recognition and claims for redistribution is an issue that is discussed later.

The second distinction is between equality claims that result in 'inclusion' and those that contribute to, and result in, 'transformation'. An inclusive approach to equality would align with a liberal idea of inclusion into the *status quo* (and may even be achieved through formal equality alone). Inclusion broadens the umbrella of social recognition, but does not address the structural conditions that create and perpetuate systemic inequalities. Nancy Fraser uses the term 'affirmative' change to describe a similar process. She speaks of 'remedies aimed at correcting inequitable outcomes without disturbing the underlying framework that generates them'.[16] On the other hand, a 'transformatory' approach aims to address such inequalities, and thus to shift the power relations that maintain the status quo. Fraser speaks of 'remedies aimed at correcting inequitable outcomes precisely by restructuring the underlying generative framework'.[17] To illustrate by way of example: An inclusionary approach to women would recognize their disadvantage as mothers and accommodate this without shifting the underlying ideas of gender that establish different, unequal and static roles and institutional positions for women and men as parents, workers and members of society. A transformatory approach would locate an understanding of women's disadvantage within these systemic inequalities, and then seek to dismantle them through new normative interpretations of equality and through remedies that affirm a more egalitarian and flexible set of gender roles, and thus dislodge the underlying norms and structures that create and reinforce a rigid and hierarchical status quo. In sexual orientation claims, an inclusionary approach would affirm the identity of gay and lesbian people on an equal basis with heterosexual individuals and families. A transformatory approach would contemplate a more radical understanding of society in which dominant heterosexual norms give way to a plurality of families and relationships.

12 Albertyn & Goldblatt (2007) (note 10 above) 40.
13 Ibid 40–42.
14 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).
15 See Albertyn & Goldblatt (2007) (note 10 above) 41–42; Liebenberg & Goldblatt (note 10 above) 341–350.
16 Fraser (note 5 above) 23.
17 Ibid.

Several scholars of South African constitutionalism have addressed the idea of transformative constitutionalism.[18] Substantive equality is closely related to this idea in South African constitutional discourse, and for some legal scholars and Constitutional Court justices, the idea of substantive equality entails 'transformatory' change.[19] Recently, Langa CJ described the achievement of substantive equality as requiring a social and economic revolution in which all enjoy equal access to the resources and amenities of life, and are able to develop to their full human potential.[20] This requires the dismantling of systemic inequalities, the eradication of poverty and disadvantage (economic equality) and the affirmation of human identity and capabilities (social equality). It also confirms a strong relationship between substantive equality and the achievement of socio-economic rights.[21] Such an approach coincides, in theory, with the understanding of transformatory change set out above. However, the idea of transformation is a politically and legally contested space[22] in which the possibilities of substantive equality/transformation are limited by 'inclusionary' approaches and remedies or bolstered by those that are truly 'transformatory'. One would thus expect transformatory claims for social, cultural or political recognition, at minimum, to dislodge the dominant and systemic cultural and social norms and stereotypes that suppress and subordinate unequal groups, and to engage in the creation of new norms of equality. Transformatory claims for redistribution, although lodged in a complex series of economic issues, should, at a minimum, enable forms of economic redistribution, and seek to reduce rather than entrench poverty and inequality.

Much of the discourse of substantive equality and transformation is located in the realm of constitutional values, establishing the vision of the Constitution. It is an aspiration, a goal that our society seeks to achieve.[23] To what extent can legal claims for equality under s 9 of the Constitution close the gap between that aspiration and the reality? Can s 9 equality claims result in 'transformatory change' that goes beyond the inclusion and accommodation of unequal groups, such as black people or women, to trigger and/or effect a deeper shift

18 The idea of transformative constitutionalism was arguably first expressed by Karl Klare in 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146.

19 C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248; M Pieterse 'What do we Mean when we Talk about Transformative Constitutionalism?' (2005) 20 *SAPL* 155; A J van der Walt 'Legal History, Legal Culture and Transformation in a Constitutional Democracy' (2006) 12 *Fundamina* 1; P de Vos '*Grootboom,* The Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 258.

20 P Langa 'Transformative Constitutionalism' (2006) 3 *Stell LR* 351, 352–353 citing Albertyn & Goldblatt ibid.

21 For a discussion on the relationship between equality and socio-economic rights see Goldblatt & Liebenberg (note 10 above).

22 Henk Botha and Johan van der Walt have both written about transformation as a permanent ideal, in which new ways of being are constantly explored and created, accepted and rejected. H Botha 'Metaphoric Reasoning and Transformative Constitutionalism' 2002 *TSAR* 612; 2003 *TSAR* 20; J van der Walt *Law and Sacrifice* (2005).

23 I have discussed this further in Albertyn & Goldblatt (note 10 above) 1–5, 13–14.

in the systemic inequalities of our society? Is this possible through a legal approach to substantive equality?

III Substantive Equality in Law

Part of the answer to these questions lies in the nature of 'substantive equality' law and jurisprudence in South Africa. Legal ideas of substantive equality differ across jurisdictions and are often linked to the particular legal precedents and debates within such jurisdictions.[24] The legal promotion of substantive equality in any one jurisdiction will almost inevitably focus on overcoming existing limitations in anti-discrimination laws and constitutional jurisprudence. As described elsewhere in this volume, this might include the strengthening of indirect discrimination or the inclusion of positive measures within anti-discrimination laws, or a concern with the application of values in equality jurisprudence.[25] The development of substantive equality in South African constitutional jurisprudence was not constrained by pre-existing equality regimes, thus providing the opportunity to develop a constitutional understanding of equality de novo. It was also shaped by a political context of democratic change, and a global legal context that provided comparative examples of the limitations of 'formal equality' and some jurisprudential precedents for a 'substantive' approach.[26]

The legal application of 'substantive equality' in South Africa has been developed at some length by the Constitutional Court. Although there has been some unevenness in the Court's approach, substantive equality has at least four characteristics, endorsed by the Constitutional Court, that give it 'transformative potential': an emphasis on understanding inequality within its social and historic context; a primary concern with the impact of the alleged inequality on the complainant; a recognition of difference as a positive feature of society; and attention to the purpose of the right and its underlying values in a manner that evinces a direct or indirect concern with remedying systemic subordination[27] or disadvantage.[28] An additional feature of transformative substantive equality, achieved through the application of the above, would be its ability to affirm or imagine a future society through practical (remedies) and normative (values) means. Underlying all of these characteristics is a necessary retreat from legal formalism and an understanding of law as a product of social relations that can be re-inscribed with transformative ends.

24 For example, Sandra Fredman has identified at least four 'overlapping' approaches to substantive equality: Equality of results, equal opportunities; substantive rights and a broad value driven approach. S Fredman *Discrimination Law* (2002).

25 See eg S Mullally 'Substantive Equality and Positive Duties in Ireland' (2007) 23 *SAJHR* 291.; C Barnard & B Hepple 'Substantive Equality' (2000) 59 *Cambridge LJ* 562.

26 The call for substantive equality in law has important roots in feminist legal theory, and its exposure of the law's failure to address the concrete inequalities of women. On the global impact on constitutionalism generally, see H Klug *Constituting Democracy* (2000).

27 C Pateman 'Equality, Difference, Subordination: The Politics of Motherhood and Women's Citizenship' in G Bock & S James *Beyond Equality and Difference* (1992) 17, 28.

28 D Rhode 'The Politics of Paradigms' in Bock & James ibid 149. See also R Colker 'Section 1, Contextuality and the Anti-Disadvantage Principle' (1992) 42 *University of Toronto LJ* 77.

a) Context and impact

Substantive equality is understood as a remedy to systemic and entrenched inequalities. This requires that judges and lawyers understand the context in which inequality occurs, and identify the social and economic conditions that structure action and create unequal and exclusionary consequences for groups and individuals.[29] The interrogation of the actual social, political and legal context in which an alleged rights violation occurs requires an examination of the substantive arrangements that determine a group's social or economic position,[30] including the relationship between disadvantaged or vulnerable groups and more powerful and privileged groups. Care should be taken to avoid the use of a comparator that intentionally or inadvertently reproduces inequalities because it reinforces dominant norms and standards. Closely related to context is the investigation of the *impact* of the impugned action on the individual and her group. Equality claims are thus assessed in relation to lived inequalities. Such lived realities have no formal boundaries, meaning that courts must interrogate the private sphere and understand the relationship between law and social arrangements.

Attention to context and impact are both central to equality jurisprudence in South Africa. In the adjudication of unfair discrimination under s 9(3), the impact of the discrimination on the complainant and his or her group is said to be determinative.[31] This enquiry is described as a contextual one that considers, inter alia, the position of the complainant in society and whether she has suffered from past patterns of disadvantage.[32] The Constitutional Court has described its approach as 'comprehensive and nuanced'[33] in which all relevant factors have to be considered.

As will be demonstrated below, the manner in which courts engage these enquiries is a key determinant of the outcome of a case and a crucial indicator of the achievement of substantive equality through law. Important also is the extent to which the cases comprehend the systemic foundations of inequality, and are able to identify practical and normative solutions that begin to dismantle these inequalities.

29 A contextual approach was adopted by the Canadian Supreme Court in the case of *Andrews v Law Society of British Columbia* [1989] 1 SCR 143. In the same case, the court found that 'to approach the ideal of full equality before and under the law, the main consideration must be the impact on the individual or group concerned' (at 165).

30 See also, the work of Martha Minow who argues that difference does not inhere in the individual or group but in the relation between individuals and/or groups. It is not the characteristics of the individual or the group that are the concern, but the social arrangements that make these matter. See M Minow 'The Supreme Court 1986 Term, Foreword: Justice Engendered' (1987–88) 101 *Harvard LR* 10 and M Minow *Making All the Difference: Inclusion, Exclusion and American Law* (1990).

31 See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 43; *Harksen v Lane NO* 1998 (1) SA 1300 (CC) para 51 and *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 6 above) para 19.

32 *Hugo* ibid para 37; *Harken* ibid.

33 *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 6 above) para 19.

b) Difference

It is widely recognised that the problem of inequality is not difference per se, but rather the manner in which difference is tied to hierarchies, exclusion and disadvantage. The South African Constitutional Court has affirmed the importance of difference as a positive feature of society.[34] An important indicator of the law's capacity to dismantle systemic inequalities lies in its ability to deal with difference in a practical and normative manner. In a transformative approach, the law should be able to prohibit difference linked to discrimination at the same time as it affirms positive and future forms of difference and diversity. Fundamental to this is the ability to facilitate or establish new, and non-hierarchical, normative frameworks of participation and social inclusion.

As seen below, one of the barriers to the transformative use of equality is the use of a hidden or visible comparator that tends to reinforce existing hierarchies of difference, rather than shift them.

d) Purpose and values

The adjudication of equality claims should be grounded in a discussion of the purpose of the right and the values that underlie it.[35] While an analysis of the context in which the alleged violation occurs enhances the court's understanding of the legal claim, a clear exposition of the purpose of the right, and of the constitutional values that underpin it, provide the court with crucial signposts to a decision most faithful to the Constitution. Again, as discussed below, the content given to the purpose and values influences whether a particular case takes a transformative or inclusionary turn.

Feminist and other legal scholars have argued that the purpose and principles of equality should be derived from an understanding of systemic inequalities and the goal of removing them. The principles of anti-subordination and anti-disadvantage are important for achieving transformative ends. This has been partly captured in South African jurisprudence in relation to s 9(2) on positive measures, where the redistributive nature of equality is also discussed.[36] The principles are also present in the determination of unfair discrimination in s 9(3), both independently as a consideration in the fairness enquiry, and (to a lesser extent) in the value of dignity, the primary value underlying this section of the right. However, the purpose and values underpinning equality have also been mechanisms for shaping its boundaries and have not always served a transformative purpose.[37] Finally, one would also expect the courts' discussion of purpose and values to set transformative aspirational ideals. As discussed below, this has often proved elusive.

34 Ibid.

35 See Colker (note 28 above). This approach was adopted by the Canadian Supreme Court in *Andrews* note 29 above, 171 and by the South African Constitutional Court in its early equality cases (note 31 above).

36 See Albertyn & Goldblatt (2007) (note 10 above) 30–31.

37 Ibid 8–14.

The next sections ask whether and how South Africa's equality jurisprudence has been socially transformative in relation to gender and sexual orientation. Limitations of space mean that the discussion is necessarily brief and the sections merely highlight key cases against the backdrop of the jurisprudence as a whole. The cases have been chosen because they illustrate the positive and negative boundaries of substantive equality and the extent to which we can call it 'transformative' in the sense identified in this article. As mentioned above, they focus on claims of social rather then economic equality.

IV Gender, Equality And Transformation

There have been nine Constitutional Court decisions concerned with gender, including claims based on marital status, but excluding claims based on sexual orientation (a separate ground in South Africa). These cases relate to issues of property and access to family resources,[38] bodily freedom[39] and parenting.[40] In this section, I analyse four cases as examples of the legal application of substantive equality: Firstly, *President of the RSA v Hugo*[41] (on gender roles) and *Masiya v DPP*[42] (on gender based violence and women's victimhood/autonomy) largely to explore the transformative potential of cases that apparently show a significant understanding of systemic gender inequalities. Secondly, *Volks NO v Robinson*[43] on women's choices and alternative relationships) and *Jordan v The State*[44] (on women's choices and sex work) are discussed for their clear illustration of the social and doctrinal boundaries of equality protection.

a) Gender roles (parenting)

Fixed and hierarchical gender roles, in which women are relegated to specific, and naturalised, roles in the family and home, rather than the public sphere, have been a fundamental source of gender inequality in many societies. A transformative legal approach to these issues would see the courts demonstrate an understanding of these systemic gender inequalities, the manner in which gender roles have become linked to relations of power, and how motherhood can be a practical and normative barrier to women succeeding

38 *Brink v Kitshoff* 1996 (6) BCLR 752 (CC) concerned discrimination in the treatment of husbands and wives in relation to life insurance policies; in *Van der Merwe v Road Accident Fund* 2007 (1) SA 176 (CC) the Constitutional Court considered a legislative scheme which prevented a spouse married in community of property (but not out of community of property) from claiming patrimonial damages 'in respect of bodily injuries suffered by him and attributable either wholly or partly to the fault of that spouse'; *Harksen v Lane NO* (note 31 above) concerned sex/gender or marital status discrimination in insolvency law affecting the rights of insolvent spouses vis a vis each other; *Volks NO v Robinson* (note 8 above) was a claim by a co-habiting partner for maintenance from the estate of her deceased partner.

39 *Jordan* note 9 above; *Masiya v DPP* unreported, CCT 2006/54 (10 May 2007).

40 *Hugo* note 31 above; *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC).

41 Ibid.

42 Note 39 above.

43 Note 8 above.

44 Note 9 above.

in the public sphere (in education and the workplace). However, it would also provide a public interpretation of equality or a remedy that would contribute to the subversion of unequal gender roles. Two Constitutional Court cases have concerned gender roles, both brought by men.[45] This discussion focuses on *Hugo*.[46] This was the Court's second equality case concerning an equality challenge to a presidential decree that gave amnesty to women prisoners with children under twelve years, but not to men prisoners who were fathers of such children. The President had justified his decision on the basis of the needs of children and the 'special role … that mothers play in the care and nurturing of younger children'.[47] The Court found the preference of mothers over fathers to be fair discrimination.[48]

Hugo was a difficult case for many reasons.[49] However, for the Constitutional Court it was an early opportunity to talk about gender equality and women's burdens in a political context that had affirmed gender equality as a dominant democratic value.[50] For a Court that was but three years old, such an opportunity to build legitimacy proved irresistible. Its conclusion that women's role as mothers justified the benefit of an early release, to the exclusion of fathers, was generally welcomed by feminist and critical scholars for its attention to the context of women's lives, and its recognition of the responsibilities and complexities of motherhood. The Court willingly took judicial notice of the fact that 'mothers… bear more responsibilities for child-rearing in our society than do fathers',[51] that this was often borne without skills or resources, that it was 'one of the causes of the deep inequalities experienced by women in employment',[52] and one of the reasons historically for excluding them from public life.[53]

At the same time, there was some disquiet about the judgment's dismissal of the small, but vulnerable group of fathers who are single parents and care-

45 *Fraser* (note 40 above) is not discussed here. It concerned the rights of a biological father to consent to the adoption of his baby. The case was decided on the basis of marital status, not sex/gender discrimination.

46 Note 31 above.

47 Ibid para 35.

48 Ibid para 47.

49 The case has been criticised for being heard at all, and there was some disagreement amongst the judges as to whether the case was wholly academic and effectively moot (Didcott J paras 54–62); whether prerogative powers were indeed reviewable executive powers (Kriegler J para 65); whether a prerogative constituted a law of general application (Mokgoro J paras 95–104). All judges agreed that it was a very difficult case. Subsequently, it has been suggested that the matter should rather have been decided as a defence of positive measure under s 8(2) of the interim Constitution (Albertyn & Goldblatt (note 15 above) 79).

50 The role of gender equality in the constitutional negotiations and its eventual place as a key democratic value is discussed in Albertyn (note 1 above) and Hassim (note 1 above). See also s 1 of the Constitution.

51 Note 31 above, para 37.

52 Ibid para 38.

53 Ibid para 39. See also O'Regan J's minority, but concurring, judgment paras 109–110.

givers.[54] It was suggested that the recognition of this group might have resulted in a more 'transformative' judgment as it would have begun to break down the sex-based barriers of gender.[55] A second issue concerned the judgment's reliance on women's role as mothers in a manner that reinforced, rather than transformed, stereotypical gender roles. Here the judgment exhibits an unresolved tension between the need to address women's current conditions of inequality and the need to transform them.[56] The Court's inability to transcend this tension through a practical recognition of disadvantage, coupled with a normative assertion of a more equal society in which women and men are free to make choices about their lives and are not subordinated by patriarchal gender roles,[57] ultimately limits the transformative possibilities of this case. Despite its progressive recognition of the systemic inequalities of the sexual division of labour, neither the remedy nor the jurisprudence takes a further step towards dismantling that disadvantage and setting the terms for more egalitarian society. In its competing judgements, the Court treats the need to protect women in their gender roles and the need to transform these roles as mutually exclusive. It thus ends up protecting women within the status quo, and normatively affirms their traditional gender roles as mothers.

b) Violence and victims

Masiya v Director of Public Prosecutions[58] was an appeal against a conviction in the Regional Magistrates Court (and then the High Court) for rape in which the courts had developed the common law definition or rape (limited to vaginal penetration by a male penis) to include 'acts of non-consensual sexual penetration of the male sexual organ into the vagina or anus of another person'.[59] The Constitutional Court was asked to determine whether this development was consistent with the Constitution. Nkabinde J's majority judgment finds that, although the current definition was consistent with the Constitution, the development of the common law is necessary in 'the interests of justice' and for the proper realisation of the principles, ideals and values underlying the Constitution. The Court develops the definition to include anal penetration of

54 The court majority considered and dismissed this group for administrative rather than equity reasons (para 48). In her minority judgment Mokgoro J found that 'stereotypical ideas concerning men's aptitude at child rearing is an infringement upon their equality and dignity' (para 92). See also Albertyn & Goldblatt (note 15 above); K van Marle 'Equality: An Ethical Interpretation' (2000) 63 *THRHR* 595.

55 Didcott J finds that the respondent's child was over 12 at the time of the application, disqualifying him from relief (para 57) However, as the majority of the Court had clearly decided to give a judgment in this case, the fact that the complainant might or might not have qualified under the amnesty was not an obstacle to a more transformative outcome.

56 This tension is most visible in the dissenting judgment of Kriegler J (para 80–85) and the concurring judgment of O'Regan J (para 109–113).

57 These points are mentioned by Kriegler J (para 80) and O'Regan J (para 113) but do not form part of a strong normative statement of equality.

58 Note 39 above.

59 Ibid para 11. The case had proceeded to the Constitutional Court via the High Court, which had confirmed the conviction and exercised its powers of sentencing in terms of s 52 of the Criminal Law Amendment Act 105 of 1997.

a female.[60] A minority dissenting judgment by Langa CJ (Sachs J concurring) extended the definition to include male victims of rape as well.[61]

The case raises interesting issues about transformation. The Court offers several reasons for its limited expansion of the definition of rape, including the need to develop the common law incrementally,[62] the principle of legality that mitigates against extending the definition of a crime, and the fact that the development would entail statutory amendments.[63] It also makes strong arguments about the gender-based nature of rape, finding that rape is 'a crime of which females are its systemic target … an act of physical domination … [and] an extreme and flagrant form of manifesting male supremacy over females'.[64] Langa J, on the other hand, acknowledged the fact that women were the main targets of rape at the same time as he asserted the inherent power dynamics of the act of rape to insist on a gender neutral definition.[65]

The issues in *Masiya* potentially echo those in *Hugo* — both cases are concerned with the concrete realities of women's lives and ultimately fail to address the needs of another vulnerable group: male rape victims or male care-givers. While neither judgment can be faulted for its concern with issues of fundamental import for women in South Africa — motherhood and gender based violence, both of which go to the core of gender equality– they nevertheless raise difficult questions about transformation. If concerns about equality are to do more than expose systemic inequalities and extend legal rights and protections to vulnerable and/or excluded groups, then such cases need to find ways of recognising structural inequalities *and* seeking to transcend them. While that might sometimes only be possible in normative terms, it is important to envisage a society in which power and subordination are delinked from gender. In *Hugo*, that might have been achieved through a more positive assertion of parenting roles. In *Masiya*, it might (at least partly) be achieved by Langa's partial delinking of rape from gender, and his insistence that rape be extended to include male victims as 'to do otherwise fails to give full effect to the constitutional values of dignity, equality and freedom', and perversely, might even 'entrench the vulnerable position of women in society by perpetuating the stereotypes that women are vulnerable'.[66] In the end, both cases demonstrate that the Court has been insufficiently proactive in giving substantive, transformatory content to our constitutional values.

60 Ibid paras 32 & 45.

61 Ibid paras 75–93.

62 On this aspect of the case see S Dersso 'The role of courts in the development of the common law under s 39(2): *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* CCT Case 54/06 (10 May 2007)' (2007) 23 *SAJHR* 373.

63 Ibid paras 33–36.

64 Ibid para 36. Interestingly, the amicus curiae, the Centre for Applied Legal Studies and Tshwaranang Legal Advocacy Centre, both organisations with a strong history of women's rights work , had provided evidence of the patriarchal and gendered history of rape, and argued for a non-gendered definition of rape (para 36).

65 Ibid paras 84–86.

66 Note 52 above, paras 80, 85, 86.

At the same time, this approach is not without risks in a society that has strong and conservative views about women. Doubtless, there is a concern that statements about father's rights and male rape victims can be used in reactionary ways to deviate from, or deny, the real inequalities and subordination that women experience. Arguably, however, if these statements are embedded in an understanding of systemic gender-based inequalities, and a clear exposition of constitutional values, then they can begin to set new terms for democratic debate. If transformation is about change, then it remains important to engage precisely those conversations, and to give meaningful content to our constitutional values.

c) Women in relationships

Women in South Africa live in a variety of relationships, including marriage. Beth Goldblatt's work has reminded us that many people live in co-habiting relationships,[67] some through choice but many because the choice to remain single, to co-habit or to marry is limited by gendered social and economic inequalities. Women are poorer and less powerful than men, and often become economically dependant on their partners, unable equally to influence life decisions. Co-habiting relationships are almost without any form of legal protection, and confer no substantive benefits upon a separated or surviving partner.[68]

A transformatory approach to co-habiting relationships would acknowledge and understand the conditions that have shaped the legal exclusion of such relationships, as well as the social and economic inequalities that shape women's choices in relationships. It would also set terms for the recognition of a broader range of relationships, other than marriage, as fundamental to our society, and provide remedies that ensure the affirmation and protection of the parties in these relationships, and seek to enhance the choices of vulnerable parties within relationships.

The extension of legal rights within co-habiting relationships was considered in *Volks NO v Robinson*.[69] In this case the Court was asked to find the Maintenance of Surviving Spouses Act 27 of 1990[70] unconstitutional in that it excluded partners of co-habiting relationships and thus constituted unfair marital status discrimination. Even though the respondent eventually conceded the equality claim,[71] a majority of the Court rejected this claim, while a minority agreed that the Act unfairly discriminated on the basis of marital status and gender.

67 O'Regan and Mokgoro JJ note that 2.3 million people (or about 8% of the adult populations) described themselves in the 2001 Census as 'living together like married partners' although they were not married (*Volks NO v Robinson* (note 8 above) para 119).

68 B Goldblatt 'Regulating Domestic Partnerships ─ A Necessary Step in the Development of South African Family Law' (2003) 120 *SALJ* 610.

69 Note 8 above.

70 This Act enables the surviving spouse who is insufficiently provided for in the will of his or her spouse to claim reasonable maintenance needs until death or remarriage.

71 Note 8 above, para 26.

The majority judgment is disappointing in its limited understanding of context, its privileging of marriage and its consequent failure to embrace a contextual or progressive idea of cohabitation. The Court's uncritical prioritization of marriage as a foundation of our society, without any reference to its historically racial and gendered nature, allowed it to conclude that it was not unfair to discriminate between relationships that attract legal obligations of support (marriage) and those that do not (cohabitation). In effect, the majority found that it is fair to distinguish between married and unmarried couples, even to the detriment of the latter.[72] Although the Court went on to concede that cohabiting couples should have some legal protection, it found that little would be achieved by extending the ambit of the Maintenance of Surviving Spouses Act, particularly as this was unlikely to assist women most in need, namely poor women who 'cannot marry despite the fact that they wish to and who become the victims of cohabitation relationships'.[73] This was due to the fact that their problem is not the law, but poverty.

The dissenting judgment of O'Regan and Mokgoro JJ was 'unable to agree' with the finding on discrimination, arguing that it not only 'defeats the important constitutional purpose played by the prohibition on discrimination on the grounds of marital status', but also ensures that 'marriage will inevitably remain privileged'.[74] This judgment is more faithful to the legal prescripts of substantive equality, speaking to the purpose of the right and basing its conclusions on a comprehensive contextual analysis of marriage and co-habitation, and women's place within these relationships.[75] In contrast to the majority, the minority applies the Court's equality jurisprudence[76] to find that the exclusion of co-habiting couples from the Act is unjustified, unfair discrimination. In an even stronger dissent, Sachs J criticizes the majority failure to appreciate the context of co-habitation and for seeing 'patterns of gender equality, reinforced by the law … as part of an unfortunate yet legally neutral background'.[77] This dissociation of law and social relations is a recurring theme in the Court's conservative and formalist judgments.[78]

A consideration of context is not completely absent in the majority judgment. The Court shows some understanding of the systemic inequalities that underpin women's choices. It recognizes the 'structural dependence of women in marriage and in relationships of heterosexual unmarried couples', as well as women's economic dependence on men, their lack of power within relation-

72 Ibid paras 56–60.
73 Ibid para 68.
74 Ibid para 118.
75 Ibid para 110.
76 Ibid para 123.
77 Ibid para 103.
78 Albertyn (note 4 above) 217, 221.

ships, and the negative consequences of this.[79] However, as law is separated from social life, so the contextual analysis is both textually[80] and intellectually delinked from the claim before the court, and shows little appreciation of the complexities of cohabiting relationships and women's position within them. Women in co-habiting couples are divided into those who exercise free choice (such as, it seems, the complainant, who must live with the consequences of so 'choosing' not to marry, even in circumstances where law provides no protection)[81] and women who have no choice at all (and who require help, but from Parliament not the courts).[82]

The misapplication of the contextual analysis is thus complicated by the Court's assumptions about marriage and choice. Marriage is a privileged institution. Choice is an 'all or nothing' concept, where only women who demonstrably have 'no choice' are worthy of legal protection. In all other circumstances, choice is apparently exercised by free, autonomous individuals and trumps equality ends.[83] This essentially libertarian view does not fit with substantive equality which requires an understanding of choice that perceives 'constraints as coming from history, from the operation of power and domination, from socialization, or from class, race and gender'.[84] As a result, women's choices are not understood by the Court.[85]

A further result of this is that the judgment falls into stereotypical reasoning in which women are cast in the role of victims and supplicants, needing protection rather than equality, and where women who are not seen as such 'victims' are ultimately 'undeserving' of constitutional protection. Although a substantive equality approach certainly focuses on the disadvantage women suffer, it also requires an affirmation of women's agency and personhood within their conditions of inequality.

In the end, the majority judgment does not apply the prescripts of substantive equality: The judgment demonstrates no real examination of context or impact, no affirmation of difference and no nuanced understanding of disadvantage. The resultant privileging of legally sanctioned marriage and abstract

79 Note 8 above, paras 63–4. Interestingly, the Court is prepared to judicial notice of these facts, at the same time as it rejects the evidence of the amicus curiae on these very points. However, the fact that the Court finds this evidence not to be relevant to the case is, of course, another indicator of its distinction between women who have choice, represented by the complainant, and other women who do not (paras 31–35).

80 The discussion on 'vulnerability and economic dependence' is placed near the end of the judgment, after the conclusion of the equality section (paras 63–66).

81 Note 8 above, para 58. This is even more strongly articulated by Ncgobo J (paras 92–94) in his minority, but concurring, judgment. See also his comments on women being free to withdraw from these relationships at will (paras 53, 63, 64).

82 Ibid paras 59, 63–68.

83 A Phillips 'Multiculturalism, Universalism and the Claims of Democracy' in M Molyneux & S Razavi *Gender Justice, Development and Rights* (2002) 115, 126.

84 L Finlay 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886, 896.

85 See also the dissent of Sachs J, paras 154–159, about the nature of women's choices. For a discussion of choice in this judgment see E Bonthuys 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2007) 19 *Canadian Journal of Women and the Law* (forthcoming).

choice results in a negatively gendered and socially conservative judgment.[86] Placed within equality jurisprudence as a whole, *Volks NO v Robinson* is doctrinally contradictory, a case in which substantive equality ends are limited by the application of conventional, libertarian/liberal concepts, such as choice and marriage. By contrast, the two minority judgments affirm a transformatory idea of society in their recognition of a range of relationships and the complexities and inequalities of choice.

d) Women's (choices and sex) work

Sex work or prostitution was outlawed in South Africa by an amendment to the Sexual Offences Act in 1988. Section 20(1)(aA) of the Act criminalises the sex worker, but not her client, for engaging in sexual intercourse 'for reward'. Prior to that, the act of prostitution was not criminalised, but the activities surrounding it were.[87] In *Jordan v The State*,[88] the Constitutional Court was asked to declare s 20(1)(aA) and certain other provisions to be unconstitutional, inter alia, because they constituted unfair sex and gender discrimination. This was an appeal from the High Court, which had agreed that the criminalization of sex work was unfair discrimination.[89]

Sex work has been divisive amongst feminists, representing for many the sexual exploitation of women in an unequal society, and for others the possibilities of sexual freedom in an equal society. Radical feminism condemns sex work as 'enforced sexual abuse under a system of male supremacy that itself is built along a continuum of coercion — fear, force, racism and poverty'.[90] For liberal feminists, sex work is a choice that women make, a form of 'work' that should be supported and protected by law, including decriminalisation and labour law protection.[91] Critical feminism questions the liberal notion of choice, emphasising rather the unequal socio-economic relations that shape the demand for sex work and that present different women with different choices:

> In some cases these relations present people with a stark 'choice' between abject poverty or prostitution, or between violence, even death or prostitution. In other cases the 'alternatives' may stretch to include monotonous, low paid employment, as well as prostitution.[92]

Sex work is thus diverse, characterized by complex power relations 'which produce a series of variable and interlocking constraints upon action'.[93]

86 This judgment also places the Court to the right of policy development in other parts of the state. See the developments described by O'Regan and Mokgoro JJ (note 8 above) paras 114–119.

87 Such as pimping or brothel-keeping. See *Jordan* (note 9 above) para 44.

88 Note 9 above.

89 *The State v Jordan* 2002 (1) SA 797 (T).

90 N Bingham 'Nevada Sex Trade: A Gamble for the Workers' 1998 *Yale J of L & Feminism* 77, 82. See also C MacKinnon *Feminism Unmodified: Discourses on Life and Law* (1987).

91 These ideas are discussed by the SA Law Reform Commission *Adult Prostitution* paras 4.14–4.20.

92 J O'Connell Davidson *Prostitution, Power and Freedom* (1998) 3.

93 Ibid 18.

A transformatory approach to sex work in South Africa, itself complicated by race and class,[94] should, at minimum, recognise the inequalities of society that underpin sex work, and which structure the demand for sex work and the choices that women make. It should go further to articulate an understanding of equality in which sex is not tied to exploitation and inequality, and seek to craft a remedy that both protects women and expands the choices available to them, including sex work.

For the first time, the Constitutional Court split 6:5 on an issue. The minority judgment of O'Regan and Sachs JJ has some of the elements of the above. The justices agree that the criminalisation of sex workers, who are overwhelmingly women, is unfair sex discrimination. This conclusion is based on an understanding that this directly reinforces a pattern of sexual stereotyping which the Constitution seeks to eradicate.[95] It is the fact that the stigma of criminalization rests only on the sex worker that is the problem. It reproduces deeply entrenched patterns of sexual stereotyping and 'archetypal presuppositions about male and female [sexuality and] behaviour in which the female sex worker is 'tainted', the 'social outcast', and 'morally reprehensible', while the male client is 'accepted or ignored', seen to be merely engaging in the 'sort of things that men do'.[96]

This judgment demonstrates some understanding of the concrete conditions of women's lives, in which social and economic inequality shape their decisions to engage in sex work,[97] as well as the systemic inequalities that influence the fact of sex work. However, in limiting its concern to the question of differential criminalization,[98] the judgment implies that the criminalization of both sex worker and client would not be constitutionally impermissible. Ultimately, even the minority finds it difficult to imagine sex work as anything other than potentially criminal, despite its recognition of the manner in which sex work reproduces existing inequalities.[99]

The majority court's dismissal of the claim has been widely written about for its failure to apply the court's substantive equality jurisprudence, its mechanical, abstract reasoning and its narrow view of dignity.[100] The Court's superficial approach, with no contextual understanding of the substantive issues of sex work and the unequal gender relations in society that shape this occupation, is a low point in the Court's equality jurisprudence. Its importance, perhaps, is

94 I Pauw & L Brener 'Naming the Dangers of Working on the Street' (1997) 36 *Agenda* 80; J Wojcicki 'Race, Class and Sex: The Politics of the Decriminalisation of Sex Work' (1999) 42 *Agenda* 97.

95 Note 9 above, para 60.

96 Ibid paras 64–65.

97 Ibid paras 66 & 68.

98 Ibid para 71.

99 On this point in relation to the Court's treatment of dignity see J Barrett 'Dignatio and the Human Body' (2005) 21 *SAJHR* 525, 539: 'A society is currently unimaginable that is sufficiently egalitarian and lacking in social judgment to refrain from conferring low social status on a sex worker'.'

100 Albertyn (note 4 above); Bonthuys (note 85 above); S Jagwanth 'Expanding equality' in C Murray & M O'Sullivan (eds) *Advancing Women's Rights* (2005) 131; S Jagwanth & C Murray 'No Nation Can Be Free When One Half of It is Enslaved: Constitutional Equality for Women in South Africa' in B Baines & R Rubio-Marin *The Gender of Constitutional Jurisprudence* (2005); R Krüger 'Sex Work from a Feminist Perspective: A Visit to the Jordan Case' (2004) 20 *SAJHR* 145.

in the manner it confirms the nature of the boundaries of constitutional equality protection. There are important similarities in the judgments of *Robinson* and *Jordan*. In both, the Court perceives women as having exercised a choice (albeit acknowledged to be 'constrained' in *Jordan*[101]) that ultimately takes them outside of the realm of constitutional protection. In both, the concept of 'choice' is based on the idea of autonomous individuals exercising free choice; not one that actually understands the constraints of history or power relations of gender, race and class. As Bonthuys argues:

> If the court recognized women's real choices, then cohabitation and sex work may appear to be rational, although not optimal decisions, and be met with sympathy rather moral and legal condemnation.[102]

Unsurprisingly, in both, context is absent (*Jordan*) or abstract (*Robinson*). Importantly, both are accompanied by minority dissenting judgments, where the application of all or some of the legal prescripts of substantive equality lead to the opposite conclusions.

V Sexual Orientation and Transformation

During the 1990s, the gay and lesbian lobby succeeded in obtaining the inclusion of sexual orientation as a prohibited ground of unfair discrimination in both the interim and final constitutions. This constitutional protection generated a remarkable series of equality cases brought by the organized gay and lesbian movement to secure the recognition of their lives and relationships.[103] Since the first case in 1998, overturning the criminalization of sodomy,[104] the courts have extended a range of rights to gay and lesbian couples under s 9(3) of the Constitution, most recently, the right to marry.[105]

Sexual orientation cases have been influential in the formation of South Africa's equality jurisprudence and are an important indicator of the boundaries and potential of that jurisprudence as a whole. In considering whether these cases have been 'transformatory', one would, inter alia, analyse the extent to which sexual orientation cases show a nuanced understanding of the context and conditions of inequality that shape the lives of gay and lesbian people, including race and class factors. One would also expect a deep understanding of difference that affirms gay and lesbian choices and relationships in a manner that is not constrained by hitherto deeply entrenched and dominant heterosexual norms, and that opens up the possibilities of diverse families and lifestyles in a truly egalitarian society.

101 Note 9 above, para 17.

102 Note 76 above, 24 (in manuscript).

103 S Croucher 'South Africa's Democratisation and the Politics of Gay Liberation' (2002) 28 *JSAS* 315; R Louw 'A Decade of Gay and Lesbian Equality Litigation' in M du Plessis & S Pete *Constitutional Democracy in South Africa 1994–2004* (2004) 65.

104 *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 6 above).

105 *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* (2006) 1 SA 524 (CC).

A necessarily brief review of the cases presents a mixed picture. On the one hand, the cases do include important passages about the right to be different. At the same time, there is a strong normative thread of 'sameness' or formal equality that suggests that gay and lesbian people are 'just like us', and are thus deserving of equal rights.[106] The strongest expression of difference is found in the sodomy case, *National Coalition for Gay and Lesbian Equality v Minister of Justice*,[107] in which the Court stated that '[t]he desire for equality is not a hope for the elimination of all differences' and spoke about how society is 'demeaned' by its failure to understand that all groups are equally deserving or worthy of equal protection by the law.[108] Citing the Canadian Supreme Court, Ackerman J writes

> It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality right we enjoy'.[109]

In that case, the Court's relatively brief contextual discussion, while not explicitly about the experience of the South African gay community, focused on the harms to dignity caused by social and legal exclusion.

Most of the cases that followed concerned claims for rights within gay and lesbian relationships or rights of social recognition.[110] Starting with *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*,[111] there is a slippage in the jurisprudence as it reverts to a more formal equality approach and the right to sameness. Several authors have argued that the extension of rights to these relationships has been subject to the heterosexual norm of marriage, and same-sex couples have been granted recognition and rights to the extent that they conform to an idea of marriage, but are legally prevented from so marrying.[112] This has meant that same-sex couples have secured extensive rights that are largely denied to unmarried, heterosexual couples or co-habitees.

106 These seemingly contradictory themes also reflect different legal and political strategies for rights. The 'just like us' strategy was a conscious political choice and has been politically very important is securing rights akin to marriage. See P de Vos 'The "inevitability" of same-sex marriage in South Africa's post apartheid state' (2007) 23 *SAJHR* (forthcoming).

107 Note 6 above.

108 Ibid para 22.

109 Ibid.

110 *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC) (unfair exclusion of same sex couples from the provisions of the Judges Remuneration and Conditions of Employment Act 88 of 1989); *Du Toit v Minister for Welfare and Population Development* 2003 (2) SA 198 (CC) (finding provisions of the Child Care Act 74 of 1983 unconstitutional for limiting joint adoption to married people to the exclusion of same sex couples); *J v Director-General, Department of Home Affairs* 2003 (5) SA 621 (CC) (unfair exclusion of include same-sex partners as parents of children conceived by way of artificial insemination under the Children's Status Act 82 of 1987).

111 2000 (2) SA 1 (CC) concerning the issue of immigration permits under s 25(5) of the Aliens Control Act 96 of 1991 to the permanent life partners of same-sex couples.

112 See the discussion in *Home Affairs* ibid paras 42–53. See also P de Vos 'Same-sex Sexual Desire and the Re-imagining of the South African Family' (2004) 20 *SAJHR* 179; Louw (note 103 above); Albertyn (note 4 above).

Despite the contradictory results of sexual orientation cases and *Volks NO v Robinson*,[113] the underlying jurisprudence shows remarkable consistency. In both instances, there is a direct or indirect valorization of marriage and a similar notion of choice, namely that the law should enforce the agreements of 'free, autonomous individuals … [and] eliminate the obvious constraints on individual choice and opportunity that emanate primarily from the state or from bad motivations of other individuals'.[114] In *Robinson*, the Court was concerned about the choice 'not to marry' of the claimant and (particularly) her partner, while in the sexual orientation cases the Court is concerned with overcoming legal prohibitions on the choice to marry. It grants rights to same-sex couples to eliminate the consequences of the state's legal prohibition to those relationships that are otherwise 'the same as' marriage. In both instances, the result is a society in which social inclusion is based on sameness, rather than difference, and which limits choice unless exercised within the (re)stated boundaries of acceptable relationships.

In *Minister of Home Affairs v Fourie*, the Court recognized the right of same sex couples to marry. Although a hugely important case, it is primarily a case about allowing gays and lesbians into the protected social institution of marriage without challenging its position and the wider idea of family in our law.[115] This case also affirms the centrality of the notion of dignity to equality jurisprudence: the right to be treated with equal dignity and to equal concern and respect, or equal moral worth. This use of dignity across the sexual orientation judgments is one that has generated important, but fairly abstract, discussions of context — an exploration of the stigma and harm caused by the non-recognition of gay and lesbian intimate relationships, rather than an exploration of systemic inequalities that give rise to this, and their differential impact on different groups.[116] The use of dignity and 'equal concern and respect' is consistent with the overall idea of sameness and social inclusion, and thus is not transformatory of norms and institutions. While the cases extend the net of recognition and rights, they do not immediately shift the dominant norms and institutions, and do not fully embrace a future based on difference.

These cases thus demonstrate the powerful tug of formal equality and social inclusion of selected groups into the existing institutions and norms. As a result, although successful in extending rights, they tend to be more inclusive than transformatory.[117] In many instances, this was the nature of the claim to which the courts responded. Strategically, the idea that those who are per-

113 Note 8 above.

114 Heads of argument of the amicus curiae (Centre for Applied Legal Studies) in *Volks NO v Robinson* ibid.

115 B Goldblatt 'Case Note: Same-sex Marriage in South Africa — the Constitutional Court's Judgement' (2006) 14 *Feminist Legal Studies* 261.

116 See eg *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 6 above) paras 20–27; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 100 above) para 54.

117 C Albertyn (note 4 above) 233.

ceived as 'different' are in fact 'just like us' is a powerful one and perhaps far more likely to succeed. Equality is classically about the inclusion of outsider groups into the status quo through the extension of legal rights, protections, benefits etc. This is why *Khosa v Minister of Social Development*,[118] widely hailed as a milestone in equality protection for providing relief to destitute permanent residents, is in fact an easy equality case: It merely brought a classic outsider group into an existing system of benefits. What makes such cases transformatory, however, would be an articulation of the nature of the group's exclusion and inequality within an overall understanding of the systemic inequalities of our society, and a positive expression of a more egalitarian society that dislodges the current hierarchies, dominant norms and institutions. In the sexual orientation cases, it would entail a way of thinking about relationships and family law that was not governed by heterosexual marriage norms nor by libertarian ideas of choice, but by consistently transformative ideas of diversity, human agency, context and choice.

VI Concluding Remarks — Transformation And Substantive Equality

This article suggests that substantive equality is an important mechanism of legal and social change, but that it has seldom been applied in a manner that is fully 'transformatory'. While courts can be powerful institutions for achieving social inclusion, this had tended to occur within clearly defined institutional, doctrinal and normative boundaries that limit the possibilities of fundamental shifts in power relations in society. In this final section, I briefly summarise and discuss the manner in which the prescripts of substantive equality have been applied, and assess the difference that substantive equality makes and the extent to which it generates transformation.

a) Context, difference and values

The Constitutional Court's emphasis on context and impact enables a transformatory approach by constituting a legal requirement for investigating the social and economic position of a claimant and his or her group. Elsewhere,[119] I have suggested that the Constitutional Court's approach to context and impact is one that fluently describes our history and the broad fault-lines of our society. Some of the Court's most detailed contextual analyses concern the egregious impact of apartheid and racism in our society.[120] In addition, discussions on the gendered division of labour, the exclusion and denigration of gay and lesbian people, the vulnerability of non-citizens and the impact of poverty[121] show that the Court has begun to address the context of inequal-

118 Note 14 above.
119 Albertyn (2007) (note 4 above) 101–105.
120 See eg *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC).
121 *Khosa v Minister of Social Development* (note 14 above).

ity in our society in a manner that has contributed to progressive results, for example, in the sexual orientation cases.

However, the above review of gender and sexual orientation equality cases suggests that the Court's depiction of the context from which it will assess the equality problem is limited by its reference to conventional ideas of choice, marriage, sexuality and gender roles. This has led to cases where a contextual analysis has been ignored, partially applied or applied in an abstract or socially conservative manner. Given that much of the contextual analysis is derived from judicial notice and selected references to evidence and research,[122] the extent to which context is addressed is largely dependant upon the judges themselves and their approach to adjudication. The opposing majority and minority judgments in *Jordan* and *Volks* suggest that the approach to context, if not a conscious choice, is strongly influenced by judicial attitudes.[123] However, it is also influenced by the nature of legal arguments and strategies, as well as the issue before the court.

A substantive approach to equality recognises that equality does not entail the elimination of difference. This has been accepted by the Constitutional Court and has been referred to particularly in relation to the cases on sexual orientation. However, the recognition of difference as part of equality, while crucial to a substantive understanding of equality, is not necessarily evidence of transformative ends. For this to occur, the courts would need to embrace an idea of difference that was open to dismantling dominant norms and institutions. To achieve this, courts need to avoid the use of dominant norms as comparators for assessing equality needs. This has proved to be particularly difficult to imagine. For example, the Constitutional Court has continued to use marriage as a dominant, and privileged norm within an understanding of difference in gender and sexual orientation cases. Unlike *Robinson*, the sexual orientation cases represent a significant shift away from a formal approach that valorises marriage as the only institution that can confer particular benefits. Nevertheless, they still promote a dominant heterosexual marriage norm.

In addition, some of the cases on gender equality show the difficulties of developing an idea of difference that is not tied to disadvantage. In both *Hugo* and *Masiya*, the Court has tended towards a protective attitude concerning women's disadvantage (the burdens of motherhood and gender based violence) which, although defensible, demonstrates the difficulties of articulating a more egalitarian world based on an affirmation of gender difference, and thus reinforces stereotypical ideas of women as mothers or victims.

One of the most important indicators of a transformative approach is the extent to which equality judgments contribute to the dismantling of systemic inequalities and the establishment of new norms and conditions. Clearly,

122 For a revealing discussion on this, see the Court's rejection of the research by the amicus curiae in *Volks NO v Robinson* (note 8 above) paras 31–35. But see the Court's apparent use of this evidence in paras 63–68.

123 This raises important questions about the transformation of the judiciary. For a discussion on this see Bonthuys (note 85 above).

this is part of a much larger and longer transformation of society, but one would expect equality cases to begin to articulate a more egalitarian world, especially through giving meaning to the values and purpose of the right. I have argued elsewhere that the Court's interpretation of dignity has limited the transformative potential of the right.[124] In the cases under review in this article, there is little evidence of the development of equality ideals in anything other than fairly abstract terms, such as 'equal concern and respect'. Again, this perhaps demonstrates difficulties with balancing a comprehension of disadvantage and a positive expression of the constitutional vision.

Giving more concrete and transformative content to constitutional values remains a significant challenge in equality cases. Certainly, one might look for a different idea of agency and choice to that expressed in the cases under review, a dismantling of patriarchal and heterosexual norms, the breaking down of the public/private divide, as well as ideas of equal participation within society.

b) Substantive equality: inclusion or transformation?

Does substantive equality make a difference? The answer is undoubtedly in the affirmative,[125] evidenced most powerfully by the opposing results of the majority and minority judgments in the cases of *Jordan* and *Robinson*. The ability of the Court to extend significant rights to gay and lesbian couples is also witness to the positive features of substantive equality. It is a far more difficult to asses the inclusionary or transformatory nature of substantive equality. As argued above, overall with few exceptions,[126] the cases are examples of an inclusionary rather than a transformatory approach. The jurisprudence, and its application, has not yet reached a point where it can be said to be transformatory and it is probable that a truly transformatory jurisprudence will prove to be elusive.

Yet, much is to be said for the power of inclusionary judgments. Cases such as *Jordan* and *Robinson* are regressive in that they embed us in a vision of society in which the real concerns of vulnerable groups are not deemed worthy of constitutional protection. By contrast, groups defined by their sexual orientation, their gender or their permanent residence status have been granted a significant array of rights and benefits by the courts. The mere act of bringing groups into the constitutional community is indubitably significant — bringing practical relief and social affirmation. It also changes the nature of the debate as new voices are heard and might in fact 'assist in setting democratic norms that may eventually shift the social norms'.[127] However, as long

124 See most recently in Albertyn & Goldblatt (note 33 above) 8–14.
125 See also on this Jagwanth & Murray (note 100 above).
126 An exception is Sachs J's minority judgement in *Volks NO v Robinson* (note 8 above).
127 Albertyn (2005) (note 4 above).

as the terms of inclusion are not radically changed,[128] social hierarchies will not be dismantled and important groups will remain excluded — in this case sex-workers and co-habitees, as well as gay and lesbian families that do not conform to heterosexual norms.

c) Continuing change

South Africa's substantive equality jurisprudence has made significant steps, and some regressive moves. Change, and particularly transformatory change, is incremental. The law is an imperfect mechanism for social and economic change. Yet, it is also clear that South Africa's equality jurisprudence has not reached its full potential, and a greater consistency of theory and application could strengthen equality as a transformative right.

A particular feature of the cases discussed above is the inconsistency of the jurisprudence — not only in application, but also in applying theory to concepts. The theory of substantive equality presupposes a particular understanding of the world, of inequality that is group-based and systemic, in which people's individual choices/agency are constrained by wider power relations in society. It also points to an idea of change that dismantles unequal power relations. Any hope of (partly) achieving this through law must be based on the development of a jurisprudence that thoroughly reflects this philosophical approach. To the extent that this is not achieved in South Africa — as our courts still struggle with legal formalism and the social consequences of a more radical approach — our equality jurisprudence remains contradictory and limited.

In this respect, this article suggests broad areas that could nudge equality jurisprudence in more transformative directions. Firstly, it would be particularly important to engage jurisprudentially the Court's interpretation of key concepts such as choice, difference, gender roles and family to promote more transformative meanings. Secondly, it remains important to generate more extensive debates on the interpretation and meaning of values, with a particular emphasis on how they define a future society in which existing power relations and hierarchies are dismantled.

128 The Court might argue that it is not their task to change the terms of the debate — as indeed the majority did in both *Jordan* and *Robinson*. This is incorrect — the courts remain the guardians of the Constitution and are critical participants and arbiters in giving it meaning. Indeed, such is the interpretive power of the Court that it gives the Constitution meaning even as it refrains from doing so.