

Equality: A tool for social change in promoting gender equality

by

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1 Introduction

Since the advent of democracy in 1994 and the adoption of the 1996 Constitution¹, South Africa has been committed to the promotion of gender equality. This commitment is clearly manifested in the preamble to the Equality Act,² which acknowledges the inequalities and discrimination that remain deeply embedded in social structures, practices and attitudes. Such inequalities continue to undermine the aspirations of our democracy, despite the progress made in restructuring and transforming our society and its institutions.

The Equality Act was passed in response to the constitutional obligation to ensure that national legislation was enacted to give effect to the right to equality, including gender equality.³ There are also a number of other pieces of legislation that have been passed for the same purpose.⁴ Together, the Equality Act and these other pieces of legislation entrench a series of rights, including socio-economic rights,⁵ that have a direct bearing on the improvement of the quality of women's lives.

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¹ The Constitution of the Republic of South Africa Act No 108 of 1996, hereinafter referred to as the "Constitution".

² The Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000, hereinafter referred to as the "Equality Act or PEPUDA".

³ See section 9(4) of the Constitution.

⁴ Such as the Domestic Violence Act No 116 of 1998, hereinafter referred to as "DVA", The Recognition of Customary Marriages Act NO 120 of 1998, hereinafter referred to as the "Customary Act" and the Maintenance Act NO 99 of 1998 that have a direct bearing on the promotion of gender equality, but will not be the focus in this paper.

⁵ See, *In re: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) and *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

Though these other pieces of legislation have the potential to improve the status and the quality of life of women in South Africa, the Equality Act is of particular significance. The focus in this paper will primarily fall on this piece of legislation as it is acknowledged to be a potentially powerful tool for the achievement of gender equality in South Africa.⁶ The importance of the Equality Act lies in its express aim to prevent unfair discrimination and promote equality through the use of special legal and other measures.⁷ The Act thus prohibits unfair discrimination on a number of grounds, including gender, sex, pregnancy and marital status, and requires affirmative action measures to promote the achievement of gender equality.

What is equally important is the establishment of the Equality Courts⁸ within the magisterial sphere. The enforcement of gender equality at the magistrates' court level in South Africa is an important example of the use of the law as a tool for social change.

The purpose of this paper is to assess the Equality Act as a particular example of the use of law as a vehicle for social change. How may the right to equality, through its enforcement in the magistrates' courts, improve the quality of life of women in South Africa? In so doing, this paper will draw on international debates over the use of law as a strategy to promote gender equality.

⁶ See Saras Jagwanth and Christina Murray, "Ten Years of Transformation: How Has Gender Equality in South Africa Fared?", *Canadian Journal of Women and Law*, Volume 14 Number 2002 at 7, as they refer to the importance of this Act as a "constitutional genesis".

⁷ The greatest challenge at this stage for the implementation of the Equality Act is the fact that the promotional regulations have not yet been passed by the Department of Justice and Constitutional Development, but the jurisprudence that has emanated from the Equality Courts, though most of the cases that have gone through these courts, do not have a direct bearing on gender equality as they were more on unfair race discrimination, have at least worked towards the eradication of unfair disadvantages. See the Sliver Club, Edgemead High School, Broederstroom couple, Robin Neo v Ncusane, etc.

⁸ See Chapter IV, section 16 of the Act. There are more than 350 established and launched courts at this stage that are in operation throughout South Africa.

2 Giving meaning to the right to “equality”

The South African Constitution has provided a good framework for addressing the legal and socio-economic structures at the root of gender inequality and, in particular, women’s weak position in law and society. On its face, the entrenchment of the right to equality extends to everyone the right to equal protection and benefit of the law.⁹ The Constitutional Court has, on a number of occasions,¹⁰ given meaning and content to this concept. These decisions serve as a point of reference for the magistrates’ courts in applying, interpreting and enforcing the Equality Act and other gender-based legislation. The Constitutional Court has, for example, firmly rejected the same or identical treatment standard of equality. It has thus recognized that not every instance of differential treatment will result in inequality, and that, conversely, identical treatment may produce serious inequality.¹¹

This jurisprudence requires the magistrates’ courts to move beyond the use of standard measures in relation to the right to equality, and to take into account the socio-economic conditions of the litigants in the cases before them.¹² The conception of equality underlying the equality clause is a substantive one that requires courts to decide cases in a way that actually ensures the equal enjoyment of all rights and freedoms.¹³ This approach is in line with the views of Manfred,¹⁴ who argues that substantive equality demands that law and policy be concerned with actual difference in the social and political conditions of specified groups rather than with the neutral application of formal rules to similarly situated individuals.

⁹ Section 9(1).

¹⁰ See *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC); *Fraser v Children’s Court*, 1997 (2) BCLR (CC), *Bhe v Magistrate, Khayelitsha and Others* CCT 49/03; *Shibi v Sithole & Others* CCT69/03; and *SAHRC & Women’s Legal Centre Trust v President of the Republic, etc.*

¹¹ See *Harksen v Lane* 1997 (11) BCLR 1489 (CC). Justice Sachs in *National Coalition for Gay and Lesbian Equality v Minister of Justice*. 1998 (6) BCLR 726, reiterated Courts jurisprudence on the centrality of the self-worth to the idea of equality and said that inequality is established not simply through group based differential treatment, but through differentiation which perpetuates disadvantage.

¹² *Ibid.*

¹³ See s 9(2).

¹⁴ Manfred P.C. **Feminist Activism in the Supreme Court: Legal Mobilization and the Women’s Legal Education and Action Fund**, UBC Press, Toronto.

The Constitutional Court has further interpreted the equality clause in a manner that takes into account South Africa's history of exclusions and inequalities. The evolution of our equality jurisprudence, the Court has held, must occur on the basis of a proper understanding of South Africa's history of institutionalized racial and gender discrimination.¹⁵ Like the Court's rejection of the identical treatment standard of equality, this context-based approach must be taken into account by magistrates when applying the Equality Act and other equality legislation.

3 The use of the “rights-based approach” in promoting gender equality

The successful enforcement of the right to equality in South Africa depends on the effectiveness of law in bringing about social change. The Equality Act establishes rights and provides a potential framework for social change, but its success ultimately depends on whether the enforcement mechanisms put in place by the legislature are capable of achieving their stated goals. In this sense, the rights in the Equality Act are not the sort of rights that Justice Madala said in *Soobramoney*¹⁶ were “an ideal and something to be strived for”, but rights whose legitimacy depends on their immediate enforceability.¹⁷

But how do rights produce social change? There are opposing views on this question. Mukhopadhyay argues that, due to the patriarchal nature of both the state and our society, and given the bias in the dispensation of justice by the judiciary and its functionaries relating to gender equality, it is not sensible to expect that the law can ever be a potent force to change existing social structures. He argues that:

¹⁵ See Justice Sachs, in *National Coalition* (note 12) above.

¹⁶ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) at para 42.

¹⁷ This interpretation reduced the quality of the protection given to the fundamental rights of everyone by the Constitution and reflected no considerations of social realities.

‘the hope of ensuring gender equality using the law as an instrument of social engineering is an altogether impossible dream though it is a central legitimating mechanism in the implementation of gender equality.’¹⁸

An example of gender bias in the system of justice itself is provided by the case of *State v Mbuyiselo Hlalatu*,¹⁹ where Justice Plasket of the Eastern Cape High Court reviewed and set aside a decision of the Komga Magistrate’s Court. The accused had been convicted of contravening the terms of a protection order issued under section 7 of the Domestic Violence Act. On review, and without detailing what ensued at the magistrates’ court, Plasket J, found that:

- there were a number of flaws in respect of the manner in which the case was handled,
- the magistrate was hostile towards the accused,
- the questioning of the accused by the court was also very suspect; and
- the state closed its case without leading any evidence.

Examples such as these indicate that Mukhopadhyay is partially correct in identifying biases in the legal system as a barrier to the use of law as an instrument for social change, but a middle way is possible. As Thornton²⁰ notes, the law may not be able to play a “*decisive role*” in producing social change, but it should not be disregarded altogether. There is a need to make society more tolerable to women as well as to transform it. Law has a legitimating role in the construction and maintenance of social relations, a point that Mukhopadhyay also acknowledges. In the end, as Agnes argues,

¹⁸ Swapna Mukhopadhyay, “Law as an Instrument of Social Change: The Feminist Dilemma” Forums, www.hsph.harvard.edu, accessed on 14 March 2006. As Audre Lorde puts it in “The Master’s Tools Will Never Dismantle the House” In *Sister Outsider: Essays and Speeches*, The Crossing Press, New York, 1984 at 454, that the courts will never be able to bring about a genuine change in promoting social justice.

¹⁹ Review no: 20050401 and delivered on 21 June 2005. It perpetuated a stereotype that “gender equality” is “women’s equality”. The fact that women are always at the receiving end when it comes to issues of inequality and discrimination cannot be dismissed, but does not mean that men should be treated with indignity, as the respondent in this matter happened to be a man that needed the protection of the court, if the purpose is to advance the strategic goals of harmonising social relations.

²⁰ Margaret Thornton, “Feminism and the Contradictions of Law Reform” *International Journal of the Sociology of Law*, 1991. Volume 19 at 455.

law may be better approached not as the embodiment of “justice” but as a “strategy” for social change.²¹

Before engaging with the rights-based approach as a strategy for social change, it is important to highlight some of the criticisms that have been levelled against it. Due to the lack of legal representation in South Africa, statutory rights are not always implemented in practice. People may also not be aware of their rights and responsibilities as citizens or find it difficult to claim their rights and effectively participate in democratic processes.²² This limits the potential of the law to bring about social change.

Despite these criticisms, Ljungman argues that at the core of the rights-based approach is a ‘two pronged’ strategy²³ that aims to strengthen the duty of the state to fulfil its obligations, and to empower people, and in particular women, to invoke their rights.²⁴ This requires an analysis of the ideals that this approach strives to attain, what vision it represents and how this vision is contrasted with existing practices. The distinct advantage of this approach is that it allows people to demand justice as a “right” not “charity”.²⁵

²¹Flavia Agnes, “Legal Strategies for Women’s Empowerment: Evolving Feminist Jurisprudence”, *Changing the Man’s World so It’s also A Woman’s Place*. She furthers this assertion that the courts are a ground for expressing skill and legal acumen rather than a forum to attain justice as battles can be won only through carefully worked out legal strategies.

²² Rory O’Donnell “Beyond Justiciable Rights – Standards and Quality”, paper presented at the Conference titled “Global Trends in Disability Law – the Context for Irish Law Reform” organised by Human Rights Commission, Law Society of Ireland and the National Disability Authority, 13th September 2003, President’s Hall, Law Society, Blackhall Place, Dublin 7.

²³ The fact that South Africa recognised the impact of the past in relation to inequalities and unfair discrimination and that prompted it to enact the Equality Act is a testimony of the obligation of the state in giving effect to the constitutional right of ensuring that equality includes actual enjoyment. Further, the establishment and the rolling out of the Equality Courts as mechanisms to deal with inequalities strengthen the commitment of the state to eliminate unfair practices. Furthermore, the obligations imposed on the South African Human Rights Commission to educate and monitor and assess the extent to which unfair discrimination, prioritising race, gender and disability as core areas, and report such to Parliament gives effect to the implementation of the right in question. Lastly, the obligations imposed on everyone to promote equality further this two-pronged approach to ensure that people are aware of their rights in order to claim them.

²⁴ Cecilia M. Ljungman, COWI, “A Rights Based Approach to Development” in a Chapter in a book by Briitha Mikkelsen, titled, **Methods for Development Work and Research – A New Guide for Practitioners**, 2ed, Sage Publications, New Delhi, February 2005.

²⁵ A term adopted by Kofi Annan, UN General Secretary, 1998, www.unhchr.ch, accessed on 12 July 2006.

The rights-based approach, in other words, provides a foundation from which to establish a set of demands premised on the intrinsic worth of the individual. The existing need is for the magistrates' courts to move beyond the limits of the law, because law itself is not necessarily the most important factor in understanding how society changes. It cannot resolve problems such as inequality which have their origins elsewhere, in beliefs, ideologies, *etc.*²⁶ The courts become important as they manage disputes and remedy specific injustices that emerge from these problems, which nonetheless resurface in other guises and situations.

In summary, despite its shortcomings, the rights-based approach should continue to be used by women because the key question is not whether to use the law for social change but how to do it and to do it effectively.

4 The specialised Equality Courts: agents for social change?

Without providing a comprehensive review of the role of the ordinary magistrates' courts in promoting gender equality, it is clear that the operation of these courts was seriously flawed, thereby compromising women's struggle for equality in South Africa.²⁷ The ordinary magistrates' courts were simply not equipped to apply the values and principles entrenched in the new gender laws in a manner that would address the systemic discrimination and disadvantage experienced by vulnerable groups, particularly women.

The decision to establish specialised magistrates' courts was taken against this background. These courts have benefits that the ordinary magistrates' courts cannot offer, including:

- The appointment of a special magistrate and clerk to deal with matters of equality for the effective implementation of the legislation in question. As soon

²⁶ See, Sharyn Roach Anleu, "Courts and Social Change: A View from the Magistrates' Courts, Social Change in the 21st Century Conference, 28 October 2005, Queensland University of Technology, Brisbane at 4.

²⁷ For example, the *Bhe* (note 11 above) decision is a case in point where the Khayelitsha Magistrates' Court upheld and rigidly applied the customary rule of male primogeniture that acted as a barrier for women and children to inherit the estate of their family relatives, despite the legislative guarantee on equality as entrenched in the Customary Act.

as the magistrate undertakes his duty after being trained, his or her expertise and understanding on the subject matter will grow as s/he becomes more familiar with the process and how to dispose of equality cases.

- Secondly, as the magistrate's expertise grows, his or her comprehensive understanding of equality will provide greater consistency in the decision-making processes.
- Thirdly, the magistrate's in-depth knowledge of the area in question will enable him or her to identify the important issue in a case during the "directions hearing"²⁸ and thereby give the parties concerned a more informed decision.
- Fourthly, these courts should reduce the delay in the disposal of cases as the Act prescribes time periods in which the matter should be resolved.²⁹
- Fifthly, the fact that rules of evidence are relaxed at these courts favours the required context-sensitive approach to the right to equality, and moves the trial away from an adversarial approach towards a more inquisitorial one.
- Lastly, specialised magistrates' courts are able to direct individuals to the most appropriate sources of support and advice. For instance, in the *Edgmead High School* case, the Blue Downs Equality Court ordered the applicant to go for counselling after hearing evidence of an exchange of racial insults between her and her fellow school-mate and her mother. The Court also ordered the respondent to go for diversity training and ordered the South African Human Rights Commission to monitor the implementation of this order.

The *Edgmead* decision shows the potential of the Equality Courts to empower individuals and communities at grass roots level. The court selected measures or remedies that enhanced the psychological and physical well-being of the applicant. It also acknowledged the worth of the respondents as human beings and referred them for diversity training, thus addressing the root cause of the problem. At the same time, the court did not compromise the

²⁸ At these hearings the magistrates identifies what is not in dispute before he proceeds with the actual trial.

²⁹ The clerk of the Equality Court must within seven days after receipt of the complaint, notify the respondent of the complaint lodged against him and the respondent has ten days within which to respond to the allegation. A copy of the response must be sent to the complainant within seven days after the clerk has received the response from the respondent. All these documents pertaining to the matter must be sent to the Magistrate within three days after the clerk has collected the necessary information.

core values of the justice system, and interpreted the Equality Act in a manner that ensured that justice was not only done but also effectively seen to be done.

Equality Courts are, of course, not without their shortcomings. The “directions hearings”, for example, provide an opportunity for magistrates to impose a preconceived perspective on the matter before them, instead of allowing the issues to be refined in the pleadings and through the hearing of evidence. The number of cases flowing through the Equality Courts is also problematic, and more cases are required for these courts to play their appointed role in transforming unequal power relations in South Africa.³⁰

5 Litigation: an answer to inequalities?

At this stage it is too early to say whether the attempt in South Africa to use law as an instrument for social change has been successful. Albertyn has argued that the Constitution has provided a significant opportunity for using litigation as a transformative strategy, but that it has not yet been a primary strategy for change in practice. Use of the Constitution as a vehicle for social change has tended to be limited to individual organizations and alliances, and has generally not been located in broader strategies for change.³¹ This limitation cuts both ways. On the one hand, women living in traditional or tribal systems have limited ability to participate in social change litigation. On the other, the state’s enforcement mechanisms have limited influence on these sectors of society, resulting in the continuation of local customary practices. Many matters of concern simply never reach the courts, meaning that the effectiveness of the law is never tested.

This situation is further compounded by rural women’s lack of awareness of and inability to exercise their constitutional and legal rights. Cumbersome

³⁰ South African Human Rights Commission, Unpublished Report on the Monitoring of the Equality Courts in the Gauteng Province, July 2005.

³¹ Catherine Albertyn “Defending and Securing Rights through Law: Feminism, Law and the Courts in South Africa”, *Politikon* (November 2005) 32 (2) at 219.

procedures and court processes and a lack of respect by law enforcers and the courts thwart women's ability to use the law.³² The insufficiency of training among prosecutors and law enforcers, lack of basic equipment and knowledge of professional methods in gathering evidence and social attitudes, alienate many women from instituting their claims at the magistrates' courts. As Justice Mokgoro has observed, litigation as a strategy tends to be the privilege of the economically empowered.³³

Acknowledging this limitation, Coomber argues that litigation by privileged groups may nevertheless have lasting effects beyond the individual case where the impact is obviously maximised.³⁴ Women's engagement with litigation, particularly in the Equality Courts, must seek to change public attitudes and perceptions, and empower vulnerable groups to understand the importance of the law, and the potential role of the courts in bringing about social change.

Agnes endorses this view in arguing that the purpose of litigation is to transform both the processes that take place in court as well as social relations outside it.³⁵ Positive legal precedents have multiplier effects that go beyond the immediate parties to the litigation.

The question still remains whether the types of remedies imposed by Equality Courts are capable of producing the social changes required. For instance, one of the remedies that these courts may order is an unconditional written apology to the survivor of unfair discrimination. What would the order of apology do to somebody who hasn't shown any remorse for his actions?³⁶ Though the Equality Act sets out clear objectives in dealing with inequalities,

³² The assault of a woman by the Maintenance Officer at the East London Magistrates' Courts attests to the lack of respect of the dignity of women and of the law by the court officials. See the report by Donian Denver, Daily Dispatch Newspaper, 24 March 2006;

³³ Justice Yvonne Mokgoro, "Constitutional Claims for Gender Equality in South Africa: A Judicial Response" *Albany Law Review*, Volume 67.

³⁴ Andrea Coomber, "Strategic Litigation of Women's Property Rights in Africa: Practical Considerations", in *Strategic Litigation of Race Discrimination in Europe: From Principles to Practice*, Interrights, International Centre for the Legal Protection of Human Rights, 2003.

³⁵ Flavia Agnes, in "Legal; Strategies for Women's Empowerment: Evolving Feminist Jurisprudence", *Changing the man's World so It's Also... A woman's Place*, at 14.

³⁶ See, Sunday Independent Newspaper, 18 June 2006.

the mindset of the South African population has to be acknowledged. The payment of damages in monetary terms and orders to attend diversity training may not have their intended effects. For instance, the order by the British Equality Court for the *Broederstroom Couple*³⁷ to attend diversity training may prove difficult for an ordinary South African to understand.

Litigation is in any case not the only method or tool for social change. In order for it to be effective, it needs to be used in conjunction with other strategies such as advocacy, media and civil society initiatives. The difficulty with litigation in this sphere is that the decisions of Equality Courts are not made public, with the exception of the high-profile cases³⁸, as they are not recorded in the South African Law Reports. It is therefore important to use other strategies to publicize and monitor cases that come before these courts.

7 Conclusion

The establishment of the Equality Courts in terms of the Equality Act is an important initiative, the impact of which is yet to be fully determined. Women's groups have thus far not devised appropriate strategies to make use of this legislation, and the Act's implementation accordingly remains patchy. An important constraint on the success of the Equality Courts is the urban/rural divide, and the fact that some of the worst abuses occur in areas of the country where there is little access to law, and little state capacity to enforce the new legislation. This assessment calls for a redoubled effort on the part of women's groups to devise strategies that bridge the urban/rural divide. Before such strategies have been devised and attempted, it is too early to say whether the use of law as a tool for social change in South Africa has been successful.

³⁷ 10 May 2005.

³⁸ As evidenced by the publication of the decision of the Pretoria Central Magistrates' Courts where the Chairperson of the South African Human Rights Commission was denied a cut of his black hair at the Salon in Centurion on racial grounds. See Info update No 12, 01 April 2005.

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