

Gender Equality in the Enjoyment of Socio-Economic Rights: A Case Study of the South African Constitution

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*"The nature of gender relations - relations of power between women and men - is not easy to grasp in its full complexity. But these relations impinge on economic outcomes in multiple ways. The complexity arises not least from the fact that gender relations (like all social relations) embody both the material and the ideological. They are revealed not only in the division of labour and resources between women and men, but also in ideas and representations - the ascribing to women and men of different abilities, attitudes, desires, personality traits, behaviour patterns, and so on."*¹

1. Introduction

The new South African Constitution which was adopted on 8 May 1996 and came into effect on 4 February 1997 is the product of the first democratically elected Constitutional Assembly of South Africa.² This Constitution represents the collective vision for a new South Africa society, and a decisive break with the old.

The Preamble of the Constitution proclaims that it has been adopted "so as to -

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights...

Improve the quality of life of all citizens and free the potential of each person..."

The founding values of the Constitution include human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism.³ These values are given concrete expression by the entrenchment of a Bill of Rights in the Constitution containing a comprehensive set of civil, political, economic, social and cultural rights. The inclusion of justiciable socio-economic rights in the Bill of Rights represents a commitment to ensuring that all in South Africa enjoy a standard of living consonant with human dignity.

¹ Bina Agarwal 1997: 1

² The Constitution of the Republic of South Africa Act 108 of 1996 (the 1996 Constitution) replaced the interim Constitution of the Republic of South Africa Act 200 of 1993. Unless the context indicates otherwise all references in this paper are to the 1996 Constitution. The interim Constitution was the product of the multi-party negotiations for a political settlement in South Africa. The process of drafting the 1996 Constitution included a major public participation campaign aimed at raising awareness and participation by civil society in the process of Constitution-making. This process was well-publicised and open. Numerous written and verbal submissions were made by individuals and organisations representing various constituencies.

³ Section 1.

The Constitution aims to reconstitute all aspects of political, economic and social relations in South Africa. This aspiration is reflected in the broad reach of the Bill of Rights. Its provisions are applicable not only to organs of state, but also to private parties.⁴

In all dimensions, it is clear that the Constitution strives to transcend formal liberty and equality, and to promote the achievement of substantive equality, freedom and human dignity. In a vastly unequal society such as South Africa, the commitment to redressing social injustice requires that the state become actively involved in programmes of reconstruction and development. A minimalist or inactive state will only serve to perpetuate the unequal patterns of resource-distribution through the mechanisms of the market and other private institutions. The real challenge is to translate constitutional commitments and rights into real and effective social change.

This paper examines how these constitutional commitments can contribute to advancing effective gender equality in the enjoyment of the socio-economic rights. The paper commences with a contextual examination of poverty and unequal access by women to socio-economic resources in South Africa. In the following section, the nature of the state's constitutional obligations in relation to socio-economic rights and the right to gender equality is explored. The emerging jurisprudence of the Constitutional Court, its implications as well as the available mechanisms for enforcing these rights are considered. The final section focuses on proposals for policy and legislative programmes to achieve gender equality in the enjoyment of socio-economic rights. Attention is also given to the practical aspects and resource dimensions of designing of gender-sensitive social policy and legislation.⁵

2. Contextualising poverty and gender inequality in South Africa

As is well known, under apartheid Black communities were stripped of land and housing rights through successive pieces of legislation. The unequal allocation of resources occurred on systematic basis, and the development of Black communities was deliberately neglected. There is a high incidence of poor housing, over-crowding, and large numbers of South Africans lack access to piped water, modern sanitation, or electricity. An important study has highlighted the deep patterns of poverty and equality in South Africa inherited from our undemocratic and discriminatory past. This study records that, among comparable middle-income developing countries, South Africa has one of the worst records in terms of social indicators (health, education, safe water and fertility) and among the highest income inequality in the world. Nearly 95% of South Africa's poor are African.⁶

However, this widespread poverty also has strong gender dimensions. Female-headed households have a 50% higher poverty-rate than male-headed households.⁷ The general

⁴ In terms of section 8(2) of the Bill of Rights a right binds private parties "if, to the extent that it is applicable taking into account the nature of the right and any duty imposed by the right." For the debates concerning the horizontal effect of the Bill of Rights, and an approach to the interpretation of this provision, see Woolman and Davis 1996: 361; Cheadle and Davis 1997: 44.

⁵ In making these recommendations I draw particularly on my recent experience in conducting research and advocacy together with other organisations on a new child support grant in South Africa, and the inclusion of principles of gender equality in national housing legislation. This research was incorporated in submissions made to the relevant parliamentary portfolio committees on welfare and housing by the Community Law Centre and the Housing and Gender Rights Working.

⁶ World Bank and Southern Africa Labour and Development Research Unit (SALDRU) 1995: 3 - 7.

⁷ World Bank and SALDRU 1995: 4.

inadequacy of service provision impacts disproportionately on women, particularly in rural areas. Twenty percent of African women aged 20 or above have received no formal education compared to 14% African men, and 0% of white women and men.⁸ Women suffer from substantially higher unemployment rates than men (35-38% versus 25%). The rate of unemployment is even higher, at 47% for African women.⁹ Women also predominate in the informal sector of the economy where they are engaged in lower status and lower paid occupations such as street vending, domestic work and scavenging. Even in formal employment more women than men are working in unskilled occupations such as cleaning, garbage collecting and seasonal farm work.¹⁰ The Beijing Conference Report (1994) records that women are concentrated in certain sectors of the economy (for example, in services rather than production), and into particular jobs. The sectors and occupations in which women work are accorded "less value, lower pay and fewer benefits". In many cases there is outright discrimination in pay, promotion and benefit levels.¹¹ South African's first country report under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) records that only 3% of all South African working women are classified as managers and senior officials, and 4% as professionals.¹²

The disproportionate impact of poverty on black women is due to the combined effect of a number of inter-linking factors, including race, gender and class. Large numbers of rural women live under systems of African customary law that severely restrict women's right to acquire, enjoy and dispose of property in their own name.¹³ As Bennett points out, although women in Africa play a vital part in food production and exercise full control over staple foodstuffs, they are denied control over the means of producing food - land and livestock. Even income earned through wages when women are forced to enter the labour market are deemed "house property" and fall under the control of men.¹⁴ Women's lack of proprietary capacity is an extension of the general rule under customary law that equated women's status with that of minors falling under guardianship.

These customary rules have serious implications for the achievement of gender equality in the land reform programme conducted by the Department of Land Affairs. This programme seeks to promote and support redistribution of land with a view to achieving equitable access to land by disadvantaged South Africans. Although the land acquisition and settlement grant of R.15 000 per beneficiary household is formally available to men and women on an equal basis, gender power relations within the household will usually result in the grant being made to the male household head. Evidence from a land reform pilot project indicates that women's participation in the institutions to facilitate the land reform process are low.¹⁵

Apart from customary law, social attitudes based on gender stereotypes regarding women's roles and work are widespread. Violence against women in South Africa is

⁸ These statistics are extracted from the 1995 October Household Survey (Hirschowitz and Orkin 1996) and reproduced in Budlender 1997: 26.

⁹ World Bank and SALDRU 1995: 4; 1995 October Household Survey in Budlender 1997: 26

¹⁰ The 1995 October Household Survey estimates that 75% of African workers in the informal sector are women (Budlender 1997: 26).

¹¹ Beijing Conference Report: 1994 Country Report on the Status of South African Women: 37.

¹² First South African Report, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1997: report on article 11 (employment).

¹³ Bennett 1995: 80 - 95.

¹⁴ Bennett 1995: 86

¹⁵ Budlender 1997: 176 - 178.

endemic and this inhibits their free and equal participation in political, economic and social life.¹⁶

This context reveals the urgency of addressing the conditions of poverty and inequality of South African women. A key question is how constitutional rights can contribute to the achievement of real and effective gender equality in the socio-economic realm.

3. Socio-economic rights and the right to gender equality: Constitutional obligations

This section examines the nature of the obligations imposed on the state by the provisions in the Bill of Rights dealing with socio-economic rights and gender equality. In doing so, it is necessary to consider the contribution of both international human rights law and the jurisprudence Constitutional Court to the interpretation of these rights.

3.1 Socio-economic rights

The socio-economic rights incorporated in the Bill of Rights are formulated in two different ways. Like all other rights in the Bill of Rights they may be enforced in the courts, and are subject to the general limitations clause.¹⁷ One set of socio-economic rights impose an immediate obligation of result on the state with relatively few internal qualifiers. These rights include: the right to an environment that is not harmful to health or well-being; children's socio-economic rights to basic nutrition, shelter, basic health care services and social services; the right against arbitrary eviction and demolition of one's home; the right not to be refused emergency medical treatment; the right to basic education, including adult basic education; and the right of detained persons to the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.¹⁸

The second set of rights are formulated as a right of everyone "to have access to" adequate housing, health care services, including reproductive health care, sufficient food and water, and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.¹⁹ The positive duties imposed by these rights are qualified by a second subsection which requires the state to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."²⁰ The qualifications applicable to the state's positive obligations to protect the environment and to make further education 'progressively available and accessible' are formulated differently.²¹

The interpretation of these rights and the obligations they impose have not yet received any detailed consideration from our Constitutional Court. The development of a coherent

¹⁶ Human Rights Watch/Africa, Human Rights Watch Women's Rights Project 1995.

¹⁷ Section 38 (enforcement of rights) and section 36 (limitation of rights). Section 36(1) reads as follows:
"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

¹⁸ Sections 24(a), 28 (1)(c), 26(3), 27(3), 29(1)(a) and 35(2)(e) respectively.

¹⁹ Sections 26(1) and 27(1)(a), (b) and (c) (referred to as 'the access rights').

²⁰ Sections 26(2) and 27(2).

²¹ Section 24(b) and 29(1)(b).

jurisprudence relating to socio-economic rights and effective remedies when the rights are violated remains a key challenge.

The Constitution accords a significant role to international law in the interpretation of the rights in the Bill of the Rights.²²

Section 7(2) of the Bill of Rights places an express obligation on the state to “respect, protect, promote and fulfil” all the rights in the Bill of Rights. This typology has been used by the UN Committee on Economic, Social and Cultural Rights and by many international human rights scholars to understand and analyse the nature of the obligations imposed by socio-economic rights.²³ This typology conceives of all rights imposing a combination of negative obligations (prohibitions) and positive obligations on the state. The positive obligations include the adoption of a particular course of conduct or the achievement of a particular result. This analysis has been used by South African commentators to interpret the socio-economic rights in the Constitution.²⁴

In essence the obligation ‘to respect’ the socio-economic rights requires the state not to act in ways which are inconsistent with the enjoyment of the rights. This generally arises in the following types of situations:

- a) People are deprived of the access they enjoy to socio-economic rights (e.g. arbitrary forced evictions and the arbitrary termination of social security benefits);
- b) State action of whatever form that has the effect of denying or obstructing access to the rights by particular individuals or group (e.g. laws which obstruct the building of low-income housing);
- c) In extending access to socio-economic benefits the state unfairly discriminates against particular individuals or groups.

The duty to protect human rights arises when third parties are in a position to deprive others of their enjoyment of the relevant rights. In fact many socio-economic rights would be undermined if they did not place a duty on the state “to regulate private interactions to ensure that individuals are not arbitrarily deprived of the enjoyment of their rights by other

²² Section 39(1) of the Bill of Rights reads as follows:

“When interpreting the Bill of Rights, a court, tribunal or forum -

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and
- (c) may consider foreign law.”

The provisions of international instrument protecting socio-economic rights clearly influenced the drafting of the relevant sections of the Bill of Rights. In particular, the use of the concepts of ‘progressive realisation’, the restriction of ‘available resources’ and the obligation on the state to take ‘legislative and other measures’ were derived from article 2 of the International Covenant on Economic, Social and Cultural Rights (1966). International treaties containing socio-economic rights to which South Africa is a party are: the Convention on the Rights of the Child (1989) (instrument of ratification deposited on 16 June 1995), the Convention on the Elimination of All Forms of Discrimination against Women (1979) (instrument of ratification deposited on 15 December 1995) and the African Charter on Human and Peoples’ Rights (1981) (adherence on 9 July 1996). On 3 October 1994 South Africa signed, but has not yet ratified, the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). In terms of section 231(4) of the Constitution, “any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

²³ Craven 1995: 109-114; Scott and Macklem 1992: 72 - 84; Byrnes and Connors 1996: 708 -715.

²⁴ De Vos 1995: 233; Liebenberg 1997: 256, 294, 342, 354; De Vos 1997: 67.

individuals.²⁵ This is particularly important as the socio-economic rights both in international law and under the South African Constitution do not necessarily require the state to be the direct provider of the rights. The state may rely on the private sector provided this sector is capable of delivering the right effectively, equitably and in accordance with human rights norms and standards.²⁶ Private individuals and institutions are expressly placed under a duty not to discriminate unfairly.²⁷ Under the Constitution, one of the primary regulatory mechanisms is legislation. However, regulation of private relations also occurs through the whole body of common and customary law. It is accordingly critical that this body of law be developed to offer more effective remedies to groups who are denied access to socio-economic rights through the conduct and practices of more powerful parties in society.

Finally, the obligation to fulfil the rights places a duty on the state to take positive legislative and other measures to ensure that those individuals and groups who currently lack access to the rights gain access to them. In respect of the first group of socio-economic rights referred to above the state is under a direct obligation of result to ensure that the stipulated beneficiaries enjoy a basic level of the rights. In relation to the second group of socio-economic rights (the 'access rights'), the obligation of the state to achieve the result of full access to the rights is expressly qualified as has been noted above. It is important to note that it is only the positive dimension of the state's duties which are qualified in this manner. The duty to respect the rights is immediately applicable.²⁸

The primary positive duty on the state is to create accessible institutions and fair processes which facilitate access to the rights. A fair distribution of opportunities and resources in society must be promoted through legislative and other measures. Local initiatives and efforts by communities to meet their own needs should be supported and assisted. The state is given a wide latitude regarding the nature of the measures adopted. It must, however, be in a position to demonstrate that the measures it has chosen are reasonable in relation to the objective of achieving the full realisation of the socio-economic rights. Policies and legislation must accordingly be carefully designed and targeted at ensuring full and equal access to the rights, particular by groups in disadvantaged and vulnerable circumstances.

When individuals or groups are unable to gain access to the rights through their own efforts, a duty of direct assistance arises. In the South African context, many groups are unable to gain access to socio-economic rights without direct forms of state assistance. These groups experience deep disadvantage and lack of power owing to the systematic patterns of racial and gender discrimination.

The UN Committee on Economic, Social and Cultural Rights has interpreted the International Covenant on Economic, Social and Cultural Rights to impose "a minimum core obligation" on states parties to ensure that everyone at least enjoys minimum essential levels of the socio-economic rights. In order for a state party to rely on a lack of resources to justify its failure to meet this minimum core obligation, "it must demonstrate that every

²⁵ Craven 1995: 112. For example, the right to an environment which is not harmful to health or well-being (s 24(a) of the Bill of Rights) cannot be secured without state regulation of commercial and industrial activities.

²⁶ See General Comment No.3 of the UN Committee on Economic, Social and Cultural Rights (Fifth session, 1990), UN doc. E/1991/23, 'The nature of States parties obligations (art. 2, para. 1 of the Covenant)' para. 8.

²⁷ Section 9(4) of the Constitution. Anti-discrimination legislation must be enacted within three years of the Constitution taking effect: schedule 6, item 23(1).

²⁸ De Vos 1997: 93.

effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, these minimum obligations.”²⁹ This core obligation places the state under a duty to prioritise its resources and to adopt programmes aimed at ensuring that the basic socio-economic needs of vulnerable groups are met.³⁰ It is also arguable that access to minimum subsistence needs is essential to give full meaning and effect to the rights to human dignity and life in the South African Constitution.³¹

3.1.1 *The enforcement and monitoring of socio-economic rights*

In its first judgement on the Certification of the Constitution, the Constitutional Court rejected a challenge to the inclusion of socio-economic rights as justiciable rights in the Constitution. The opponents argued that socio-economic rights breached the doctrine of separation of powers between the judiciary, legislature and executive, and were incapable of enforcement by a court. The Court pointed to the fact that many civil and political rights (including the right to equality) may also have budgetary implications and require the courts to interfere with the policy choices of the legislature and executive. Moreover, it held that the rights are “at least to some extent, justiciable” and can, “at the very minimum,” be “negatively protected from improper invasion.”³²

Through the Certification judgment the Court has signalled its willingness to enforce at least the duty to respect and protect the socio-economic rights. The extent to which the Court will be prepared to enforce and grant relief in respect of the positive dimensions of the socio-economic rights is not yet clear. However, in a judgment concerning the constitutionality of certain provincial legislation governing education, the Court observed that the right to basic education in section 32(a) of the interim Constitution “creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.” This right was contrasted with the ‘defensive right’ created in section 32(c), guaranteeing “a freedom to establish educational institutions based on a common culture, language or religion.”³³ This suggests that a judicial remedy may be granted at least with regard to the first group of rights discussed above in which the obligations are relatively unqualified. Although the second group of ‘access rights’ are also subject to judicial enforcement, one can anticipate difficulties in obtaining a judicial remedy in practice. This is due to the highly qualified nature of the positive obligations imposed by these rights. As has been noted, the

²⁹ General Comment No.3, note 26: para. 10. The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights refers to the obligation on states parties “to ensure minimum subsistence rights for all.” (1987: para. 24). According to the Limburg Principles and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights a state party will be in violation of its obligations if it “fails to meet a generally accepted international minimum standard of achievement which is within its powers to meet.” (Limburg Principles 1987: para. 72; Maastricht Guidelines 1997: para. 15(i)).

³⁰ General Comment No. 3, note 26: para. 12; General Comment No. 4 of the UN Committee on Economic, Social and Cultural Rights (Sixth session, 1991), UN doc. E/1992/23 ‘*The right to adequate housing (art. 11(1) of the Covenant)*’ para. 11.

³¹ This would accord a substantive obligation to these rights entrenched in sections 10 and 11 of the Constitution.

³² *In re the Certification of the Constitution of the Republic of South Africa* 1996(10) BCLR 1253 (CC), paras. 76 - 78. The Constitutional Court was required to certify that the 1996 Constitution complied with the 34 Constitutional Principles in the interim Constitution before it could come into force (Section 71 read with Schedule 4 of the interim Constitution Act 200 of 1993).

³³ *In Re The School Education Bill of 1995 (Gauteng)* 1996(4) BCLR 537(CC), para. 9 (per Mahomed DP).

state is expressly permitted to achieve the full realisation of these rights 'progressively' and 'within its available resources'.

A significant mechanism for monitoring the progressive realisation of socio-economic rights is provided through the South African Human Rights Commission.³⁴ Section 184(3) of the Constitution places an obligation on the South African Human Rights Commission to request information from relevant organs of state on an annual basis "on the measures that they have taken towards the full realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security and the environment." The Commission is intended to be a more flexible and accessible institution for the protection and promotion of human rights in South Africa. It has a number of powers which can be used to assist people to obtain individual relief when their socio-economic rights have been violated. In addition, it can recommend legislative and policy changes to give effect to these rights. This mechanism accordingly provides a valuable complement to the judicial enforcement of the rights.³⁵

The socio-economic rights in the Constitution thus require the state to play an active role in ensuring that the basic needs of those under its jurisdictions are met. Given the disproportionate burden of poverty on women, these rights potentially offer significant advantages to women.³⁶ To fulfil this potential it is vital that the principles of gender equality are integrated in legislative and other measures adopted to realise socio-economic rights.

3.2 *The right to gender equality*

Section 9 ('the equality clause') of the 1996 Constitution contains a general guarantee of equality before the law, equal protection and benefit of the law. In terms of section 9(2) equality includes "the full and equal enjoyment of all rights and freedoms." The state is expressly permitted "to promote the achievement of equality" by taking "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination". Both the state and private parties are prohibited from unfairly discriminating "directly or indirectly" against anyone on one or more grounds, including a specified list of grounds. The grounds of race, gender, sex, pregnancy and marital status are included in this list. A presumption exists that discrimination on one or more of the listed grounds is unfair unless it is established that the discrimination is fair. The Constitutional Court has developed a jurisprudence on the interpretation of the right to equality and non-discrimination in five key cases.³⁷ The four cases which are examined in this section involved alleged unfair discrimination on the ground of sex, gender or marital status. In each of the cases the Court had to grapple with the interpretation of the concepts of equality and "unfair discrimination" under section 8 of the interim Constitution.³⁸

³⁴ The Human Rights Commission is one of the 'state institutions supporting constitutional democracy' established in terms of chapter 9 of the Constitution.

³⁵ On the role and powers of the SA Human Rights Commission in exercising its mandate under section 184(3), see Liebenberg 1997 (forthcoming).

³⁶ See Liebenberg 1994-1995: 225; Liebenberg 1995: 79.

³⁷ *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC); *Fraser v The Children's Court, Pretoria North & others* 1997(2) BCLR 153 (CC); *The President of the Republic of South Africa and the Minister of Correctional Services v Hugo* 1997 (6) BCLR 708 (CC); *Prinsloo and Van der Linde and Another* 1997(6) BCLR 759 (CC); *Harksen v Lane NO and others* Case CCT 9/97, 7 October 1997, unreported.

³⁸ Section 8 is in many respects similar, although not identical, in formulation to section 9 of the 1996 Constitution. The following grounds of discrimination listed in section 9 of the 1996 Constitution are not

In the case of *Brink v Kitshoff NO* the Constitutional Court declared certain sections of the Insurance Act (No. 27 of 1943) unconstitutional. These provisions were held to discriminate unfairly against married women by depriving them, in certain circumstances, of all or some of the benefits of life insurance policies ceded to them by their husbands. No similar deprivation occurred in respect of a policy ceded to a husband by a wife. In the course of its judgement, the Court recognised gender discrimination as a key source of women's disadvantage in South Africa:

“Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on ground of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated is a key message of the Constitution.”³⁹

In *Fraser v Children's Court, Pretoria North and Others* the Court was faced with a challenge to a provision in the Child Care Act 74 of 1983 which requires consent for the adoption of a child by both parents of the child, or, if the child is illegitimate, only by the mother of the child.⁴⁰ The applicant, an unmarried father, alleged that this provision discriminated unfairly against him by dispensing with his consent for the adoption of his child. While conceding that the provision did discriminate unfairly, the Court considered whether the right to equality demanded identical treatment in respect of the consent requirement. The effect of this interpretation would be that the father's consent for the adoption of the child would become necessary in all circumstances thus giving him an effective veto right over the adoption of the child. The court referred to the anomalous and unfair consequences for women of this “blanket rule”.⁴¹ A father could withhold his consent to an adoption even if the child was born as a result of the rape of the mother or an incestuous relationship.⁴² He may take no steps whatsoever to support the mother through pregnancy and childbirth, to contribute to the maintenance of the child, or to develop a relationship with the child.

The court ultimately ruled that the particular provision was inconsistent with the Constitution and therefore invalid. However, it suspended the declaration of invalidity for a period of two years to allow Parliament to correct the defect. It recognised that a variety of legislative alternatives were available to Parliament to deal with the question of adoption in a more nuanced fashion. An appropriate legislative response would entail giving unmarried fathers a say in adoption proceedings in appropriate circumstances while not exacerbating “the deep disadvantage” experienced by the single mothers in our society. Parliament was encouraged to be “acutely sensitive” to the position of single mothers in correcting the defect as it had a direct bearing on the question of gender equality.⁴³

In the subsequent case of *President of the Republic of South Africa and Another v Hugo*, the Court was faced with the question whether an advantage conferred on a certain group of women unfairly discriminated against men in a similar situation on the basis of sex or gender. A special remission of sentence was granted to certain categories of prisoners in terms of a Presidential Act of pardon. One of these categories referred to “all mothers in

included in section 8 of the interim Constitution: pregnancy, marital status and birth. Section 8 also does not contain an express provision binding private parties.

³⁹ Per O'Regan J, para. 44 G - H.

⁴⁰ Section 18(4)(d) of Act 74 of 1983.

⁴¹ Per Mahomed DP, para. 28B

⁴² Per Mahomed DP, para. 27A.

⁴³ Per Mahomed DP, paras. 43 D - F and 44.

prison with minor children under the age of 12 years” at the relevant date. It was common cause that the respondent would have qualified for remission, but for the fact that he was the father (and not the mother) of his son.⁴⁴

The Court recognised that women generally bear the greater burden of child care responsibilities in our society. While child rearing could be rewarding it also imposed social and economic burdens on women, particularly those with few skills and scant financial resources. The unequal burden of child care was one of “the root causes” of women’s inequality and disadvantage in our society. For example, prime responsibility for children made it more difficult for women to compete in the labour market. A more egalitarian society would not be achieved until responsibilities for child rearing were more equally shared.⁴⁵

According to the Court, at the heart of the prohibition against discrimination was the constitutional goal to establish a society in which “all human beings would be accorded equal dignity and respect regardless of their membership of particular groups.”⁴⁶ However, the concept of unfair discrimination developed should recognise that this goal would not be achieved by “insisting upon identical treatment in all circumstances before the goal is achieved.” Each case required a careful analysis of the impact of the discriminatory action on the particular people concerned “to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.”⁴⁷

In the light of this analysis the majority of the Court held that the effect of the discrimination in this case against prisoners who were the fathers of children under 12 years was not unfair. It did not deprive them of their rights or obligations as fathers in any permanent manner nor did it fundamentally impair their human dignity or sense of equal worth.⁴⁸

In a dissenting judgement Kriegler J disagreed with the reasoning of the majority in respect of the equality challenge, and held that the benefit accorded only to women prisoners with young children amounted to unfair discrimination on the grounds of sex and gender. In his view, the President relied on a stereotype concerning women’s roles which was both “a result and a cause of prejudice.” This stereotype was “a relic of patriarchy” which the Constitution “vehemently condemns”. Respect for equal dignity requires society to protect the basic choices people make about their own identities.⁴⁹ The fact that reliance on this generalisation resulted in some advantage to a small group of women did not outweigh the broader disadvantage to “womankind in general” flowing from the perpetuation of a discriminatory stereotype concerning women’s proscribed roles as childminders. Furthermore, the advantage to the particular women was not related to any “compensable past disadvantage.”⁵⁰

In a further separate judgement, O’Regan J (concurring with the majority) elaborated on the concept of “unfair discrimination”. She observed that “insisting on equal treatment in

⁴⁴ The Court first has to consider whether this power granted to the President by section 82(1)(k) of the interim Constitution (historically forming part of the executive’s prerogative powers) was reviewable under the Constitution. In this regard, the Court held that it did have jurisdiction to review the exercise of the President’s power for conformity with the Bill of Rights (per Goldstone J, paras. 28 and 29).

⁴⁵ Per Goldstone J, paras 37 - 38 (delivering judgment for the majority).

⁴⁶ At para. 41 A - B.

⁴⁷ At para. 41 F -H.

⁴⁸ At para. 47.

⁴⁹ At para. 80.

⁵⁰ At paras 82 - 84.

circumstances of established inequality may well result in the entrenchment of that inequality”⁵¹ She disagreed with Kriegler J that the President’s conduct disadvantaged women. The disadvantage flows from “the social fact of the role played by mothers in child rearing and the inequality which results from it.”⁵² When generalisations result in greater disadvantages for mothers this would unquestionably amount to unfair discrimination. However, the approach of Kriegler J to the circumstances which would justify conferring advantages on women was too narrow. According to O’Regan J, this narrow approach “may well make the task of achieving the equality desired by the Constitution more difficult.”⁵³

The final case to be considered, *Harksen v Lane NO and others* concerned the constitutionality of certain provisions of the Insolvency Act which automatically vests the property of a solvent spouse in the Master and thereafter a trustee of the sequestrated estate of his or her insolvent spouse.⁵⁴ The applicant contended that the relevant provisions discriminated unfairly in that their effect was to impose severe burdens and disadvantages on solvent spouses which were not applicable to other persons with whom the insolvent spouse had dealings or close relationships.

The Court took the opportunity to crystallise its equality jurisprudence. In doing so, it was concerned to make a critical distinction between what it termed “mere differentiation” in legislative programmes on the one hand, and “unfair discrimination” on the other.⁵⁵ A differentiation between people or categories of people in law will violate the guarantee 8(1) of equality before the law and equal protection of the law only if it is arbitrary, and bears no rational connection to a legitimate government purpose.⁵⁶ However, if the differentiation passes this test, it may nonetheless amount unfair discrimination.

The determination of unfair discrimination requires a two stage analysis:

1. Firstly does the differentiation amount to discrimination? If it is on a listed ground, discrimination will have been established. If it is not on a listed ground, discrimination is present when, objectively considered, “the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparable serious manner”.
2. Secondly, is the discrimination in question ‘unfair’? If it is on a listed ground unfairness will be presumed. If it is not on a listed ground, various factors must be considered to ascertain whether the provision has impacted unfairly on the complainant and others in her situation including:
 - (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;
 - (b) the nature of the provision or power and the purpose sought to be achieved by it. If the purpose of the discriminatory provision is aimed at achieving “a worthy

⁵¹ At para. 112.

⁵² At para. 113 J.

⁵³ At para. 112 A-C.

⁵⁴ Section 21(1) of Act 24 of 1936. The solvent spouse can apply to the trustee for the release of his or her property if it falls into a number of specified categories (s 21(2)). In terms of sections 64 and 65 of the Act, the solvent spouse can be summoned to a meeting of creditors of the insolvent estate and be interrogated regarding his or her property, business or affairs if these are relevant to the sequestration of the insolvent’s estate. The Court rejected a challenge to these provisions based on the property clause (section 28) of the interim Constitution.

⁵⁵ This was also the central concern of the Court in *Prinsloo v Van der Linde and Another*. The conclusion which the Court sought to avoid was the obligation to review each and every legislative classification or distinction.

⁵⁶ Per Goldstone J, para. 42 - 22; *Prinsloo v Van der Linde and Another* at para. 24 - 26.

and important societal goal, such as, for example, the furthering of equality for all”, this purpose could have a significant bearing on whether the complainants suffered the impairment in question.

- (c) “with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of the complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.”⁵⁷

Finally, if the discrimination is found to be unfair, the respondents have an opportunity to justify the provision under the general limitations clause.⁵⁸

Applying this analysis to the facts of the case, a narrow majority of the Court concluded that the inconvenience and burden placed on solvent spouses by the insolvency legislation did not constitute unfair discrimination in that “it did not lead to an impairment of fundamental dignity or constitute an impairment of a comparably serious nature”⁵⁹

In her dissenting judgment, O’Regan J held that the extent of the impairment of the solvent’s spouse’s interests is substantial and sufficient to constitute unfair discrimination on the grounds of marital status.⁶⁰ Moreover, she held that the provision was not justifiable under the general limitations clause as there were other less invasive methods available to achieve the legislature’s purpose of protecting the interests of creditors of insolvent spouses against collusion between spouses.⁶¹

In his dissenting judgment, Sachs J held that the relevant provisions were based on stereotypical and outdated assumptions about the marriage relationship in which the independent identities and work of the spouses are merged.⁶² He emphasised the importance of paying special regard to “the patterns of advantage and disadvantage experienced in real life which might not be evident on the face of the legislation itself”. This made it necessary to “evaluate in a contextual manner how the legal underpinnings of social life reduce or enhance the self-worth of persons identified as belonging to such groups.”⁶³ He concluded that the impact of the provision in question constituted a serious invasion of the choices and identities of parties to a marriage relationship, inhibiting “the capacity for self-realisation of the spouses.”⁶⁴ Accordingly it constituted unfair discrimination.

The equality jurisprudence articulated in these judgments have a number of implications for policy and legislation. Firstly, “mere neutrality” in a situation of vast gender inequality will not advance the achievement of real equality for women. Secondly, to ascertain whether a measure discriminates unfairly it is necessary to examine the impact or effect of a measure on the interests of the person or group concerned. This requires looking beyond the four corners of the particular legal provision to the situation of the relevant groups in the real world. If the impact of the provision is to compound the disadvantages experienced by marginalised groups it will constitute unfair discrimination. However, if the object of a

⁵⁷ At paras. 51 - 53.

⁵⁸ Section 33, interim Constitution; section 36, 1996 Constitution.

⁵⁹ At para. 67. The Court was divided 5 - 4 on the question.

⁶⁰ As has been noted above, marital status is not one of the listed grounds of unfair discrimination under the interim Constitution. Two other judges concurred in the judgment of O’Regan J, and Sachs J delivered a separate dissenting judgment.

⁶¹ At paras. 102 - 111.

⁶² At para. 120.

⁶³ At para. 123.

⁶⁴ At para. 124.

measure is to alleviate the burden of disadvantaged groups and to promote the achievement of effective equality, it will not constitute unfair discrimination even if it extends special advantages to this group.

Reliance on a stereotype concerning women's roles to exclude women from socio-economic benefits will inevitably amount to unfair discrimination. However, the caution sounded by Kriegler J in the *Hugo* decision is worth heeding. Even when the law confers special advantages or privileges on women, care should be taken to avoid reinforcing stereotypical notions about women's roles and capabilities. This may have longer-term implications for women and obscure the deeper structural and social changes necessary to achieve real gender equality.

3.2.1 *The enforcement and monitoring of the right to gender equality*

Apart from enforcement of the right to gender equality through the courts, the Commission on Gender Equality has the mandate to "promote respect for gender equality and the protection, development and attainment of gender equality."⁶⁵ To perform its functions the Commission has a number of powers, including the power, "to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality."⁶⁶

In addition to the Commission, a number of other structures have been established. These include the Office on the Status of Women and Gender Desks in national and provincial departments. Their mandate is to integrate gender equality in all government policies and programmes. Parliamentary structures such as the Ad Hoc Joint Committee on the Improvement of the Quality of Life and Status of Women have also been established. The terms of reference for this Committee are to monitor and oversee progress with regard to the improvement of the quality of life and status of women in South Africa with specific reference to the government's commitments under the Beijing Declaration and Platform for Action and the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women.⁶⁷

4. Gender equality in the enjoyment of socio-economic rights: Proposals for policy, legislation and programmes

As we have noted the jurisprudence of the Constitutional Court in relation to socio-economic rights is in its infancy. Furthermore, the Court has not yet had occasion to apply its emerging equality jurisprudence to a situation where disadvantaged women are denied equal access to socio-economic benefits.

However, one can draw on the jurisprudence examined above to explore the implications of the constitutional obligations arising from a joint reading of the sections dealing with socio-economic rights and the right to gender equality. The focus in this section will be on the implications for policy and legislation. There are a number of advantages to incorporating human rights principles in legislation. Concrete policies and legislation giving effect to human rights can make a significant contribution to social change and justice.

⁶⁵ Section 187(1), 1996 Constitution. The Commission on Gender Equality is another "state institution supporting constitutional democracy" established under chapter 9 of the Constitution.

⁶⁶ Section 187(2).

⁶⁷ These structures are integral components of the "national machinery" for the advancement of women in South Africa: see Report of the Commission on Gender Equality Information and Evaluation Workshops 1997: 51 - 107.

They have a wider impact than individual court decisions and can promote political and structural changes in society. The norms and values contained in legislation can also have a substantial influence on social attitudes.

Matthew Craven observes that there is an integral relationship between socio-economic rights and the notion of equality.⁶⁸ The obligations imposed by socio-economic rights should be read in close conjunction with the equality clause. While equality in a formal sense is compatible with an equal measure of deprivation for all, the positive dimensions of socio-economic rights require the state to ensure substantive equality by promoting access to socio-economic rights. A substantive interpretation is supported by section 9(2) of the Constitution which defines equality as including "the full and equal enjoyment of all rights and freedoms."

Conversely, it is also critical that the principles of equality are integrated in the three tiers of obligations imposed by socio-economic rights. The implications of this approach for policy and legislation are elaborated below.

4.1 *Gender equality in the duty to respect socio-economic rights*

The duty to respect gender equality in the enjoyment of socio-economic rights requires that the state refrain from adopting policy or legislation with the purpose or effect of denying women access to the rights. A housing subsidy programme that excluded applications by women for its benefits would clearly violate the Constitution. In addition, the state should not permit common law or customary law rules with a similar exclusionary effect to remain in place. This constitutional obligation is also reinforced by the government's obligation under the Convention on the Elimination of All Forms of Discrimination against Women "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."⁶⁹ For example, customary law provisions which restrict a woman's capacity to own, control and inherit rights in property in her own name are incompatible with the state's obligations to ensure equality in access to land and housing.⁷⁰ However, it is insufficient that the law in question does not directly discriminate against women. As we have noted, the equality clause also prohibits 'indirect' unfair discrimination. The test of unfair discrimination focuses primarily on the *impact or effect* of the discrimination on particular groups. The jurisprudence of the Constitutional Court regarding the necessity for a contextual analysis focusing on the situation of different groups of women in the real world is particularly significant. A law which may appear on its face neutral, may have the effect of making it more difficult for women to gain access to a socio-economic right. For example, a legal provision requiring an employee to have an extended period of uninterrupted service in order to qualify for full benefits under a social insurance scheme will discriminate indirectly against many women in the South African context. Employers in the private sector do not generally make adequate provision for employees with child care and other domestic responsibilities. This in turn makes it more difficult for women to gain access to the more favourable forms of social security tied to formal, uninterrupted employment (such as social insurance schemes). This difficulty is

⁶⁸ Craven 1995: 157.

⁶⁹ Article 2(f).

⁷⁰ Section 25(5) read with section 26(1) of the Bill of Rights.

integrally related to their unequal share of caring and other domestic responsibilities.⁷¹ Similarly a policy to “deinstitutionalise” the care of persons with physical and mental disabilities without creating viable alternatives is likely to have the effect of increasing the burden of care on women, making their participation in the formal economy even more difficult.

In a recently adopted General Comment, the UN Committee on Economic, Social and Cultural Rights refers to the disproportionate impact of the practice of forced evictions on women:

“Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.”

It goes on to comment that the non-discrimination provisions of the Covenant place additional obligations upon governments to take appropriate measures to avoid these discriminatory consequences when evictions occur.⁷²

Policy and law should therefore be carefully designed to ensure that it does not have the direct or indirect effect of perpetuating the exclusion of women from social-economic rights and benefits.

4.2 Gender equality in the duty to protect socio-economic rights

The obligation to protect the socio-economic rights requires the enactment of anti-discrimination to prevent and prohibit discrimination against women in the private sector. Discrimination in this sector can take many forms, including the refusal by banks to grant home loans to women, dismissal from employment due to pregnancy, and the exclusion of women’s health risks from the medical cover provided by private insurance companies.

The Constitution specifically requires anti-discrimination legislation to be enacted within three years of the date on which the new Constitution came into effect. In the absence of effective anti-discrimination legislation, the courts are obliged to apply or develop the common law to give effect to constitutional rights.⁷³ Under CEDAW the government is also obliged “to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.”⁷⁴

There is an international trend towards the privatisation of many public services. In this context it is critical that women have access to effective legislative and other remedies against discriminatory practices by non-state entities.⁷⁵

⁷¹ This unequal burden was recognised by Goldstone J in the *Hugo* decision discussed above. See also the Beijing Declaration and Platform for Action 1995: Critical Areas of Concern (A) ‘Women and Poverty’: para. 52.

⁷² General Comment No. 7 (16 May 1997) on ‘The right to adequate housing (Art.11(1) of the Covenant): forced evictions’ para. 11.

⁷³ Sections 8(2) and (3).

⁷⁴ Article 2(e) and article 13.

⁷⁵ The UN Committee on Economic, Social and Cultural Rights has made a similar observation in relation to persons with disabilities: General Comment No. 5 (Eleventh session, 1994) ‘Persons with Disabilities’: UN doc. E/C.12/1994/13, para. 11.

4.3 *Gender equality in the duty to promote and fulfil socio-economic rights*

The duty to promote and fulfil socio-economic rights requires the state to take positive legislative and other measures to advance and improve access to socio-economic rights. The patterns of gender discrimination and disadvantage are deeply ingrained in South African society. Given this fact, the goal of gender equality in the enjoyment of socio-economic rights will not be achieved without positive and proactive measures. Substantive and procedural proposals for the design of policy and legislation to facilitate the achievement of this objective are made below.

4.3.1 *Mainstreaming the principles of gender equality*

A primary objective is the “mainstreaming” of the principles of gender equality in legislation and policy.⁷⁶ This requires a close examination of the entire structure of the particular policy and legislative programme to ascertain how it will affect different groups of women, particularly the most disadvantaged. How will its provisions operate in the real world? Will it facilitate or obstruct women’s access to the particular benefits?

Too often legislative programmes are designed on the assumption that the principle of gender equality is fulfilled by merely avoiding provisions that directly discriminate against women. Alternatively, women and other disadvantaged groups are “tagged-on” to legislative programmes without considering how the “mainstream provisions” of the policy or legislation affect them. The achievement of real equality will not be advanced by dealing with the situation of women and other disadvantaged groups in isolation from the main institutions and mechanisms created by the policy or legislation.⁷⁷

Unequal gender relations mediate women’s access to and control over socio-economic resources at every level, including the household, the community, the market, and all levels of government - local, provincial and national.⁷⁸ Programmes must therefore be designed to take account of these relations and the constraints experienced by women at all levels. The allocation of benefits to households, for example, assumes that women’s interests are adequately protected in the domestic context. However, the unequal, gendered distribution of resources within households has been highlighted in a number of studies.⁷⁹ Without independent access to socio-economic resources, women’s dependency and unequal status in the household is reinforced. Unless the reality of unequal gender relations are taken into account in designing legislation and policy, women’s equal participation in socio-economic institutions and benefits will remain an illusive goal.

4.3.2 *Incorporating gender-sensitive rights in legislation*

The mainstreaming of the principles of gender equality will also be advanced by incorporating ‘gender-sensitive rights’ in legislation. Rights of this nature are sex-neutral rights, but are not ‘gender-blind’. As explained by Julia Sohrab, gender sensitive rights “would involve policies that are aimed at men and women but which favour a redistribution of resources towards women in order to ensure a greater equality in

⁷⁶ Beijing Declaration and Platform for Action 1995: Critical Area of Concern (H) ‘Institutional Mechanisms for the Advancement of Women’: paras. 204 and 205.

⁷⁷ In her book, Martha Minow calls for a focus on the social arrangements and institutions that makes certain differences of groups from the norm a source of stigma and disadvantage. Minow 1990: 79 - 97.

⁷⁸ Housing Rights and Gender Working Group submission 1997: 5 - 6.

⁷⁹ Agarwal 1997.

outcomes”⁸⁰ In other words, they should be designed to enable women to gain maximal advantage from the extension of the benefit without reinforcing traditional gender stereotypes and roles.

This will require policy-makers to pay attention to how a more equitable distribution of the burdens and rewards of reproductive and caring work in society may be achieved. As the Constitutional Court observed, the disproportionate burden of child care on women is a root cause of gender inequality in our society.⁸¹ This burden involves not only child care, but also taking care of elderly and ill persons, as well as exhausting domestic work. Men must be encouraged to take up their fair share, but the responsibility of social reproduction should also be shared by society as a whole.⁸² These are the outcomes which legislation and policy should encourage.

A recent example in the South African context of a “gender-sensitive right” is the introduction of a new child support grant by the government aimed at providing a basic level of social assistance as a contribution to the care of impoverished children.⁸³ This grant will be payable to the “primary care-giver” of the child who is defined as the person, “whether or not related to the child, who takes primary responsibility for meeting the daily care needs of a child.”⁸⁴ The advantage of this legislative provision is that it is sex but not gender-neutral. It will primarily benefit women who are predominantly the primary care-givers of children in poor communities without excluding those men who take on the responsibilities of child care. The use of the concept of the primary care-giver is also not premised on the nuclear model of the family. This model fails to accommodate the large variety and fluidity of household structures and child care arrangements encountered in South Africa.⁸⁵ Finally, as a social assistance programme the child support grant represents a sharing of the burden of child care by society as a whole (albeit at a low level).

The government’s current initiatives to extend a supply of clean water to poorer communities throughout South Africa is another programme that will make a major impact on women’s lives. It has been estimated that rural women in South Africa spend more than 4 hours a day collecting water and wood.⁸⁶ These policy and legislative proposals are designed to give effect to everyone’s right to have access to sufficient water.⁸⁷

4.3.3 *Special benefits and programmes for women*

I have argued primarily for integrating the principles of gender equality in mainstream policy and legislation, and the use of gender-sensitive rights. However, the patterns of social relations and economic structures which operate to exclude women from equal

⁸⁰ Sohrab 1996: 76 - 77.

⁸¹ *Hugo* decision, note 45.

⁸² The preamble of CEDAW recognises that “the upbringing of children requires a sharing of responsibility between men and women and society as a whole.” Also see Wright 1992: 241.

⁸³ A grant of R100 per month per child will be paid to children under 7 years. Eligibility will be determined through a means test.

⁸⁴ Welfare Laws Amendment Bill B90B-97, clause 3(h).

⁸⁵ The payment of the grant to the ‘primary care-giver’ was initially recommended by the Lund Committee on Child and Family Support 1996 based on the principle that the grant should “follow the child”: 87 - 88; Also see the seminar report of the Community Law Centre on the concept of the primary care-giver 29 August 1997.

⁸⁶ World Bank and SALDRU 1994: 4.

⁸⁷ Section 27(1)(b). The Ministry for Water Affairs and Forestry estimates that between 12 and 14 million people are without access to safe water and over 20 million without adequate sanitation: White Paper on Water Policy for South Africa 30 April 1997: para. 2.2.3.

participation in socio-economic benefits are deeply ingrained. Without special measures designed specifically to benefit women, the unequal distribution of social power and resources will persist. These measures can take a number of forms, including government-sponsored projects designed to build the skills and capacity of women, shelters to assist women to recover from violent relationships, affirmative action programmes in employment, education etc. Provided these measures are designed to assist women in achieving equality they will not constitute unfair discrimination under the South African Constitution.⁸⁸

An identity of interests between differently-situated women should not be presumed. Rural women, for example, will experience a different set of problems in gaining access to socio-economic rights and their priorities will be different to those of women living in urban areas. As far as possible programmes and legislation should attempt to accommodate this diversity of interests and needs.⁸⁹ In a situation of resource scarcity, special programmes should be adopted that prioritise the needs of women in particularly vulnerable situations. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has also recognised the multiple, overlapping constraints experienced by women in securing and maintaining their right to housing and land. These constraints "are particularly acute for women who also face discrimination on one or more other grounds, including race, ethnicity, creed, disability, age, socio-economic status and marital status."⁹⁰

When conferring special benefits on women, care should be taken to avoid perpetuating stereotyped notions of women's roles and work. By conferring benefits on women "as mothers" or "as domestic workers" these social perceptions about women's roles are reinforced. This will make the long-term goal of more equal gender relations in society more difficult to achieve.

Special anti-poverty programmes focusing on the developmental needs of women in poverty should also be a priority strategy for the state. The Beijing Platform for Action draws a direct link between women's poverty and their lack of access to economic opportunities and resources, and their minimal participation in decision-making.⁹¹ The central aim of these programmes should therefore be to enhance women's skills and facilitate their access to, and control over socio-economic resources such as land, property, capital, credit and employment.⁹²

While women's inequality and poverty remain acute, special programmes targeting poor women are an essential complement to on-going efforts to ensure that mainstream policies are gender-sensitive.

4.4 Practical dimensions of policy development and implementation

On a practical level, designing gender-sensitive policy and legislation requires that a prior situational analysis be conducted. The purpose of this analysis is to identify the constraints experienced by different groups of women in gaining access to socio-economic rights. A thorough understanding of these constraints is necessary to ensure that women are able to

⁸⁸ Section 9(2).

⁸⁹ CEDAW has special provisions dealing with the rights of women in rural areas: article 14.

⁹⁰ Resolution 19/1997 on 'Women and the right to adequate housing and to land and property' UN Doc. E/CN.4/Sub.2/1997/L.11/Add.1.

⁹¹ Beijing Declaration and Platform for Action 1995 Critical Area of Concern (A) 'Women and Poverty': para. 51.

⁹² Beijing Declaration and Platform for Action 1995 Critical Area of Concern (F) 'Women and the Economy': para. 166 (c).

take full advantage of the institutions and mechanisms established for extending access to socio-economic rights. This in turn requires proper consultation with the beneficiaries of programmes regarding their needs, and promoting women's full and active participation in the policy-making process. Effective integration of gender equality in mainstream policy and legislation requires that the impact of the programme be monitored and reviewed on a regular basis. Collecting gender-disaggregated statistics and information are also indispensable for the monitoring and design of policy. Without access to information of this nature, gender and other inequalities in access to socio-economic rights will be hidden from view, and policy-makers will be operating in the dark.⁹³ Mainstreaming of gender concerns also requires that policy and legislation ensure that women have effective representation in the main institutions responsible for delivering the rights. These institutions include local government, water committees, housing boards, research councils, and a host of others.⁹⁴

The goal of sustainable development and empowerment of women should be a central component of anti-poverty programmes. This requires co-ordinated planning between various government departments and across sectors. In the absence of these measures, special programmes will offer only short-term relief to beneficiaries and will not fulfil their developmental potential. In addition, clear linkages should be established between various anti-poverty programmes to ensure that women do not either fall between the gaps of various programmes or find themselves excluded prematurely from state support.

4.5 *Resource allocation*

While the focus of this paper has been on proposals for gender-sensitive policy and legislation in the socio-economic sphere, the process of resource allocation is clearly vital. The national budget must reflect key gender policy objectives and priorities. Sufficient resources must be allocated for the transformation of the main institutions and processes through which access to socio-economic benefits are gained. Equal participation by women in the formal institutions of the economy requires that they be restructured to accommodate the needs of all workers with family and domestic responsibilities. Positive measures must be adopted to encourage employers and society at large to share the burden of caring work. These include, for example, tax breaks or other incentives for employers who maintain crèches at the workplace, and the establishment of a network of state-subsidised centres providing support to people with dependants in need of care (e.g. day-time care).

Given the systematic and systemic nature of gender inequality, the distribution of resources must favour women to promote equality in socio-economic outcomes. It has been argued that these outcomes are promoted through supporting gender-sensitive rights which do not rely on gender stereotypes. In addition, sufficient resources must be allocated for special programmes targeting women as their main beneficiaries.

⁹³ Beijing Declaration and Platform for Action 1995 Critical Area of Concern (A) 'Women and Poverty': para. 68; Critical Area of Concern (H) 'Institutional mechanisms for the advancement of women' paras. 206 - 207. For example, the Housing Bill [B 82B-97] requires the establishment of a national housing data bank and information system. This information system must "collect, compile and analyse" data in respect of housing development at least according to gender, race, age and geographical location: clause 6(1)(f).

⁹⁴ The Department of Water Affairs and Forestry in South Africa has set a minimum quota of one-third representation by women on local water supply and sanitation committees established in terms of the Water Laws Rationalisation and Amendment Act No. 32 of 1994.

Macro-economic models and budgeting processes are premised on the sexual division of labour and the invisibility of the work largely performed by women in the sphere of social reproduction. This entire sphere is largely absent from traditional macro-economic models. Consequently women's contribution to development is seriously underestimated and unrecognised by society.⁹⁵ The goal of gender equality at all levels will be greatly advanced when the contribution of women's unpaid work in the economy is made visible and integrated in macro-economic models and accounts. Governments must accordingly act on their commitments in terms of the Beijing Platform for Action to develop mechanisms to measure and reflect the value of women's unremunerated work in the economy (e.g. through time-use studies and the use of satellite accounts which are separate from but consistent with core national accounts).⁹⁶

5. Conclusion

The inclusion of both socio-economic rights and the right to gender equality in the South African Constitution offers a strong normative framework for achieving gender equality in the enjoyment of socio-economic rights. These human rights commitments create a basis for holding government accountable for their realisation. The network of institutions which has been created for monitoring and enforcing these rights has a number of advantages. By providing for judicial enforcement, individuals and groups can seek concrete relief for violations of these rights. It will also contribute to developing their core normative content. The monitoring powers of the Human Rights Commission and the Commission for Gender Equality provide a valuable complement to judicial enforcement. These institutions can identify and make recommendations to government for the removal of structural barriers which impede women's equal access to socio-economic rights.

However, integrating human rights values and principles in policy and legislation will address the problem of inadequate and unequal access to socio-economic rights at its source. Based on the emerging jurisprudence of the Constitutional Court and international human rights law, a number of recommendations have been made regarding the design of policy and legislation to facilitate gender equality in the enjoyment of socio-economic rights.

Existing policy frameworks and legislative provisions must be closely scrutinised to ensure that they don't impose hidden burdens on women, or have the effect of excluding them from socio-economic institutions and benefits. This in turn requires a contextual analysis of the situation of different groups of women in society, and a study of the likely impact of the provisions on their socio-economic circumstances. The predominance of the market in allocating socio-economic resources requires the adoption of anti-discrimination legislation and other regulatory mechanisms. This legislation must provide effective remedies against discriminatory practices which exclude women from gaining access to these resources. Policy or legislation aimed at extending or improving access to socio-economic rights must be designed so that women are able to take full advantage of their benefits. A combination of approaches are necessary to achieve this objective. These include: the mainstreaming of the principles of gender equality in policy and legislation, the use of 'gender-sensitive

⁹⁵ Beijing Declaration and Platform for Action Critical Area of Concern (F) 'Women and the Economy': para. 156.

⁹⁶ Beijing Declaration and Platform for Action Critical Area of Concern (H) 'Institutional Mechanisms for the Advancement of Women': para. 206 (f) and (g). Some progress has been made in this direction. The Central Statistical Service in South Africa is planning to conduct a time use study to provide data for reflection in satellite accounts- see Budlender 1997: 27 - 28.

rights', and special developmental programmes aimed at impoverished women. Some of the practical dimensions and resource implications of this three-fold approach have also been examined.

In the final analysis women's equal access to socio-economic rights will largely depend on a more equitable sharing of reproductive and caring work between men and women and society as a whole. It is critical that legislative and other measures encourage this outcome, and avoid perpetuating stereotyped notions of women's roles and capabilities. Legal measures alone are insufficient to achieve these goals. The legal strategies I have outlined in this paper must be located in a broader political project aimed at transforming unequal gender relations at all levels.

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