

# Equal Treatment: Addressing Sexual and Gender Discrimination

[Incorporating a discussion of the judgement of O'Regan J in *Brink v Kitshoff* NO 1996 (4) SA 197 (cc).]

**S. Pather**

## Introduction

One of the earliest themes underlying the historical transformation of the South African civil society has been its quest and indeed demand for equality. It has been argued that a fundamental principle underlying humanity is that one person should not be preferred over another, unless there exists sound reasoning based on identifiable criteria for such differentiation<sup>1</sup>. In addressing and redressing the discrimination of the past the Constitution of the Republic of South Africa Act<sup>2</sup> took its first yet bold steps towards justice when it expressed firm commitment to the principles of equality. This concept of equality is also reflected in The Constitution of the Republic of South Africa Act<sup>3</sup>, where chapter two section 9, subsections (3) and (4) reaffirms that persons may not be unfairly discriminated against directly or indirectly on one or more grounds including, *inter alia*, ; race, gender, sex, marital status etc.

Discrimination is not a term given to easy definition. Over the years it has plagued both lawyers and philosophers alike. According to the Oxford dictionary discrimination, in ordinary parlance, is a neutral term given two meanings: benign as in possessing the ability to be discerning and pejorative in the sense of being biased and unfair. The constitution was mindful to point out that what was being prohibited was discrimination that was unfairly prejudicial towards persons.

<sup>1</sup> Sir Berlin 'Equality as an Ideal' in McKean (1985:2n6).

<sup>2</sup> 200 of 1993 (Herein after referred to as the 'Interim Constitution').

<sup>3</sup> 108 of 1996.

Although our history is one in which the most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting our [equality clause], the drafters recognised that systematic patterns of discrimination on the grounds other than race have caused, and ... continue to cause, considerable harm<sup>4</sup>.

In this regard, the struggle for racial equality has been midwife to a feminist movement<sup>5</sup>. For many years in South Africa the call for gender equality was made in the political sphere as opposed to the legal one. Therefore, any discussion on gender and sex in relation to equality must of necessity be situated against the backdrop of the dramatic constitutional-socio-political changes that have occurred in South Africa. It was largely due to the untiring efforts of feminist field workers that legal changes were effected towards achieving the equality of women. For example, when the Matrimonial Property Act<sup>6</sup> brought about the abolition of marital power it was heralded as 'the death of male domination and female subjugation, and the birth of a partnership of equals'<sup>7</sup>. This was one of many reforms towards merging actual equality with that of formal equality<sup>8</sup>. A far cry indeed from the common law approach of ranking married women as 'something better than his dog, a little dearer than his horse'<sup>9</sup>.

<sup>4</sup> Brink v Kitshoff NO 1996 (4) SA 197 (cc) 217 par [41] C-E.

<sup>5</sup> Evans (1980:24). In 1952 the following editorial appeared in the *New York Herald*: 'How did women first become subject to man as she is now all over the world? By her nature, her sex, just as the negro is and always will be, to the end of time, inferior to the white race, and therefore doomed to subjection ...' Hill Kay (1988:1).

<sup>6</sup> 88 of 1984.

<sup>7</sup> Sinclair J (1984:15).

<sup>8</sup> Formal Equality is aimed at achieving the 'eradication of express discrimination based on sex or gender' and including via legal structures, like constitutions, 'equal protection of the law for all and outlawing sex and gender discrimination.' Women have for long 'believed that the achievement of formal equality in the law would guarantee actual equality in society and in their homes. [F]ormal equality in the law...should be regarded as no more than a first stage in the quest for real equality. [W]ithin marriage real meaning for the notion that marriage is a partnership of equals will require much more than bland laws and commendable accompanying platitudes.' J Sinclair 'Family Rights' in Van Wyk, Dugard, De Villiers, Davis (eds) (1994:515).

<sup>9</sup> Hill Kay (1988:1).

When the remaining barriers to gender based equality were removed by the constitution, concern was expressed that the disadvantages suffered by women had yet to be eliminated in practice, and in this regard law reform will look to the courts for the pronouncement of equality as a reality for women. Equality does not exist in a vacuum: it needs practical articulation and manifestation - more especially within the context of gender based equality and the notion of constitutional guarantees of equality. In this regard such constitutional guarantees became a reality with the incorporation of the doctrine of the Rule of Law as articulated in Section 2 of the Constitution<sup>10</sup>. In the Diceyan sense, the Rule of Law guarantees procedural equality to all persons in the sense that irrespective of race, class, gender, rank etc., everyone is subject to the jurisdiction of the ordinary courts of the land. In terms of his principle of legality nobody will be deprived of their rights and freedoms through the arbitrary exercise of power. However 'as a legal technique to tame Leviathan'<sup>11</sup> the Rule of Law had little success since formal equality 'leaves untouched the causes and considerations of inequality and it ignores the problem that most women are in no position to act on their newly won competence, to act on their own'<sup>12</sup>. With the introduction of the new constitutional dispensation based on equality, the application of the doctrine to the constitution has undergone serious transformation. The entrenched bill of rights, has effected substantive reforms to the rights of people and women in particular. 'Material equality'<sup>13</sup> in this sense is seen not only as granting women easy access to the legal and judicial system but also to imbue them with the same legal capacity to 'acquire, enjoy and dispose of property'<sup>14</sup>, to inherit freely, to contract freely into and out of marriage' to compete on an equal footing, as men do, for the custody and guardianship of one's children.

Pivotal to this issue of gender equality is the role and function that the courts fulfil and in particular, the role that the constitutional court plays towards this realisation<sup>15</sup>. In *Baloro v University of Bophuthatswana*<sup>16</sup>, Justice Friedman was of

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<sup>10</sup> Section 2 reads as follows 'This constitution is the Supreme law of the Republic; law or conduct inconsistent with it is invalid, and obligations imposed by it must be fulfilled.' The Rule of Law came of age when Parliamentary Sovereignty gave way to Constitutional Supremacy - Section 44(4) stresses that 'when exercising its legislative authority, Parliament is bound by the Constitution and must act in accordance with, and within the limits of, the Constitution.'

<sup>11</sup> GE Devenish (1998:11).

<sup>12</sup> TW Bennett (1995:88).

<sup>13</sup> Bennett (1995:88).

<sup>14</sup> Bennett (1995:89).

<sup>15</sup> 'All courts of law must interpret and apply the laws of the land in accordance with both the letter and ethos of the constitution and the provisions of the Bill of Rights,

the view 'that the court should play a proactive role in changing society in accordance with the aims and spirit of the constitution. Furthermore, he also stated that a court is entitled to have regard to the 'circumstances and events leading up to the adoption of the constitution and the human, social and economic impact that any decision of the court will have'<sup>17</sup>. According to Devenish the 'task of constitutional adjudication was too fundamental'<sup>18</sup> in the realisation of a Human Rights culture not to be entrusted to the constitutional court.

In 1996 the Constitutional Court entered into a detailed discourse on the equality provision within the framework of our evolving human rights culture and focused on gender based equality within the context of the reasoning followed and authorities adopted in: *Brink v Kitshoff* NO<sup>19</sup>. It is interesting to note that the approach of the court was that given our particular history, where inequality was systematically entrenched, equality has now become the recurrent theme of the constitution. Further, the bill of rights, in particular the sections on equality was adopted

in the recognition that discrimination against people who are members of disfavoured groups [like women] can lead to patterns of ... disadvantage and harm. Such discrimination is unfair: it builds and entrenches equality among different groups in our society<sup>20</sup>.

The central issue in this case concerned the constitutionality of section 44 of the Insurance Act<sup>21</sup>: did this section discriminate against women? Section 44 provides as follows:

(1) If the estate of a man who has ceded or effected a life policy in terms of section 42 or section 43 has been sequestrated as insolvent, the policy or any money which has been paid or has become due thereunder or any other asset into which any such money was converted shall be deemed to belong to that

encapsulated in chapter 2. All these courts are now involved in and must contribute to the development of a constitutional jurisprudence that reflects the values inherent in the Bill of Rights.' Devenish 1998:230).

<sup>16</sup> 1995 (4) SA 197 (B).

<sup>17</sup> Devenish (1998:231).

<sup>18</sup> Devenish (1998:223).

<sup>19</sup> *Brink v Kitshoff supra*

<sup>20</sup> 217 par[42] D-F

<sup>21</sup> 27 of 1943

estate: Provided that, if the transaction in question was entered into in good faith and was completed not less than two years before the sequestration -

(a) by means or in pursuance of a duly registered antenuptial contract, the proceeding provisions of this subsection shall not apply in connection with the policy, money or other asset in question;

(b) otherwise than by means or in pursuance of a duly registered antenuptial contract, only so much of the total value of all such policies, money and other assets as exceeds R30 000 shall be deemed to belong to the said estate.

(2) If the estate of a man who had ceded or effected a life policy as aforesaid, has not been sequestrated, the policy or any money which has been paid or has become due thereunder or any other asset into which any such money was converted shall, as against any creditor of that man, be deemed to be the property of the said man -

(a) insofar as its value, together with the value of all other life policies ceded or effected as aforesaid and all monies which have been paid or have become due under any such policy and the value of all other assets into which any such money was converted, exceeds the sum of R30 000, if a period of two years or longer has elapsed since the date upon which the said man ceded or effected the policy ; or

(b) entirely, if a period of less than two years has elapsed between the date upon which the policy was ceded or effected, as aforesaid, and the date upon which the creditor concerned causes the property in question to be attached in execution of a judgement or order of a court of law<sup>22</sup>.

The effect of section 44(1) & (2) is that, where a life insurance policy has been ceded to a woman, by her husband more than two years before the estate of her husband is sequestrated, she will receive a maximum sum of R30 000 from such policy. If however, the policy was preceded or taken out less than two years from the day of sequestration the wife will receive no benefit from the policy. Similarly, once two years lapses from the time the policy was ceded to the wife, or effected in her favour, the policy or any money she can receive thereunder, to the extent that it exceeded R30 000 would be deemed, to form part of the husband's estate. The proceeds may be attached by the husband's judgement creditors in execution of a judgement against him. However, if less than two years have lapsed since the date of the cession or taking out of the policy and the date of attachment by the husband's creditors, all the policy proceeds would be deemed to be part of the husband's estate.

<sup>22</sup> 210 par[20] H-I; 210 par[20] A-D.

None of these disabilities affecting a wife applied in a situation where a wife ceded benefits to her husband. For the court the question for decision was framed by O'Regan J as follows:

The question referred to the court in this matter was whether section 44 of the Insurance Act<sup>23</sup> 27 Of 1934 ('the Act') is in conflict with the provision of Chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993 ('the Constitution') insofar as it discriminates against married women by depriving them ... of the benefits of life insurance policies ceded to them or made in their favour by their husbands<sup>24</sup>.

It is interesting to note that O'Regan J emphasised the fact that: 'All parties conceded that section 44(1) and (2) constituted a breach of section 8 of the constitution'<sup>25</sup> Instructive too are these comments of O'Regan J:

- Section 44(1) and (2) of the Act treats married women and married men differently. This difference in treatment disadvantages married women and not married men. The discrimination in section 44 (1) and (2) is therefore based on two grounds: sex and marital status<sup>26</sup>

The discrimination could not be justified on the basis that it was fair.

- [T]he distinction drawn between married men and married women, which is the nub of the constitutional complaint in this case, can [not] be said to be reasonable or justifiable<sup>27</sup>

in an open and democratic society based on freedom and equality. The drafters of the constitution, mindful of the deep scars still visible in our society saw fit

to both proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purpose of section 8 ...<sup>28</sup>.

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<sup>23</sup> 27 of 1943

<sup>24</sup> 210 par[19] G-I

<sup>25</sup> 210 par[32] E-F

<sup>26</sup> 217 par[43] F-G

<sup>27</sup> 218 par[48] J; 219 par[48] A

<sup>28</sup> 217 par [42] E-G

As far as gender based equality is concerned, the court emphasised the notion of equality between men and women by referring to the preamble of the Interim Constitution which provides the following:

[T]here is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races ...<sup>29</sup>

### Gender Based Equality—The Need for Bold Interpretation

(i) Invariably the starting point to any discussion inherent to gender based equality seems to hark back to Aristotle, in whose view, equality in morals means this: those things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness! Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal<sup>30</sup>.

Strict scrutiny of this statement would appear to point in that direction of law being based on a particular model against which a comparison is being made. It is no secret that our legal system has as its basis a male model. On this basis then, if it is argued that the male standard is the standard against which we evaluate equality and since equality lives by comparison, then equality between the sexes needs to be recontextualized to allow real gender based differences to be addressed.

Indeed classical prose appears to reveal a singularly chattel-like status of women:

We have prostitutes for the sake of pleasure, concubines for daily care of body and wives for the purpose of begetting legitimate children and having a reliable guardian of contents of the house<sup>31</sup>.

A remark attributed to Socrates by Xenophon is perhaps closer to the true estimation of women in classical Greece; he is alleged to have said:

[I]t is evident that female nature is not in the least inferior to that of the male. It only lacks intellectual and physical strength<sup>32</sup>.

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<sup>29</sup> 214 par [33] F-H

<sup>30</sup> Aristotle *Nicomachean Ethics* in Van Wyk, Dugard, De Villiers, Davis (1994:197).

<sup>31</sup> [Dem.] 57. 122 Raphael Sealey (1990:3).

<sup>32</sup> [Xen. Symp. 2.9] Raphael Sealey (1990:4).

Aristotle's view of women as indecisive beings is particularly significant since it appears to speak to the reasoning behind why women in Athenian law were considered 'perpetual children'<sup>33</sup>. According to Aristotle, the difference in ages between the bride and the bridegroom is marked, men married between the age of 28 and 35 and women from 15 years<sup>34</sup>. In this way men could always maintain dominance over the women because of seniority, life experience and education.

In Athenian law, women did not marry. An oral contract was concluded by the man and the bridegroom. She was pledged into a marriage union by her father, brother or paternal grandfather for the purposes of producing legitimate offspring. On marriage, guardianship passed from one male (her guardian) to her husband who became the new guardian, as such, he had full control over her dowry, however, if he became insolvent his wife's dowry was distinguished from his property and attempts could be made to save her dowry. Such was the status of the wife, that on divorce, her husband could simply dissolve the union by sending her away from his house and returning her dowry. However, if the wife left her husband because of the perpetual guardianship under which she lived she had to register her leaving and then come under the guardianship of her new *knyios* who represented her through the divorce process. Under Athenian Law the disabilities that women suffered were keenly left in the sphere of contract. The law explicitly forbade a woman to contract for the disposal of anything more than one *medimnos* of barley, which meant that outside of petty transactions she could not engage in trade dealing with immovable property or make a will<sup>35</sup>.

(ii) Through the ages, legal processes have come under the spotlight and women clamoured for change. Intrinsic to the process of reform is the self perception of women. Increased self respect, self-confidence and self-worth have assisted women to develop to their fullest potential and to claim constitutional protection as their human right.

A brief survey of the cross section of women's movements around the world indicates how women, governments and constitutions have dealt with the problem of gender based equality and within this framework to effect reform, both formal and substantive.

In 1975, Mozambique, via its constitution, declared all citizens equal. Article 17 stated that the emancipation of women is one of the state's essential tasks and equal rights in the sphere of political, economic, social and cultural spheres were proclaimed. Constitutional provisions of equality were to be the cornerstone of the

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<sup>33</sup> Raphael Sealey (1990:41).

<sup>34</sup> Aristotle argued that men should marry when 37 years of age and women at 18!

<sup>35</sup> Raphael Sealey (1990:37).



new Nation and traditional structures that opposed women were to be read in light of these constitutional directives. In an effort to eliminate traditional structures that exploited women and maintained them as a group of 'second class' citizens the government launched campaigns against traditional customs and practices that were considered discriminatory as far as gender based equality was concerned, these included Lobolo, polygamy, premature and forced marriages, initiation rites and female circumcision. However, despite the introduction of the constitutional guarantees of equality for women the male model was still being maintained as the norm against which women had to be measured - women had to be 'emancipated to be more like men'<sup>36</sup>.

The introduction of formal equality in a constitution brings little or no real change without support structures to assist women becoming empowered<sup>37</sup>. In 1990 the Constitution, mindful of the chasm between de facto and de jure reform in the legal position of women, saw fit to include support structures and initiatives as instruments towards stimulating and enhancing women's role in society<sup>38</sup>. This network of support has generated a global debate in which true liberation of women is being discussed.

(iii) The laws of a country are said to be a reflection of its society. In India, as it is with most countries of the world, women are considered as being inferior to men. A women's life revolves around her husband. In India, Religion has a strong bearing on morality which in turn plays a pivotal role in sexuality. According to Kate Millet relationships between the sexes are in fact relationships based on dominance and subordination<sup>39</sup>. Very early on in childhood men and women are socialised into their respective roles and because of poor educational opportunities for the girl child she is perpetually locked into subservience and partial slavery.

Hindu Women's position in society was pathetic. Neither the constitution nor the abolition by the British could stop the practice of *Sati* from becoming

<sup>36</sup> *Women and the Law in Mozambique* Women and the Law in Southern Africa Research Project Working Paper 4 June 1992 Zimbabwe 67.

<sup>37</sup> What this approach does is devalue women in terms of there agricultural status and overlooks the fact that women are responsible for the majority of the country's agricultural production like family farm labour. The traditional household division based on sex and gender (like motherhood and home affairs) leaves little for the realisation of substantive equality.

<sup>38</sup> Alternate court systems like the local popular tribunal has had a significant effect in unlocking the legal system for women, especially with regard to custody issues, maintenance and wife abuse.

<sup>39</sup> Kate Millet in Lotika Sarkar and B Sivaramayya (eds) (1994:31).

entrenched<sup>40</sup>. As recently as 10 years ago the custom of *sati* was still being practised. The case of Roop Kanwar aroused a heated and passionate outcry when an 18 year old girl was forced to commit to the practise<sup>41</sup>. Given the widespread publicity that this case received women's groups campaigned tirelessly until the government passed the Sati Prevention Act in 1987 abolishing the practise throughout India.

Another equally horrifying practise that has surfaced of late is female foeticide. In a society where parents of the girl child have to produce a dowry, even in the face of poverty, it is easier before birth to have an amniocentesis performed or an ultra-sound scan performed to discover the sex of the child. Once it is discovered that the woman is bearing a girl child the women aborts the foetus. An outcry from women's movements has caused the Central Government to produce documentation to the effect that such practices will indeed be abolished.

Another 'scourge' on Indian womanhood is the dowry system<sup>42</sup>. A Hindu bride herself does not marry. She is given away in marriage by her parents to the husband<sup>43</sup>. So the more inferior the social class or the girl - the greater must be the compensation. Given the inferior status of the female person in India, and that her status can only be improved by marriage many girls and parents are easy prey to

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<sup>40</sup> *Sati* is a practise whereby the widow decides voluntarily or through harsh persuasive measures to be burnt with her husband's corpse. The custom of *sati* is also found in Greek writings. If the woman did not follow suit she was forced to remain a widow and as an impious woman, in disgrace, was not allowed to take any part in religious rites. In the *Malavikagnimitra* of Kalidasa this custom was regarded as 'normal and natural', Saroj Gulati in Lotika Sarkar and B Sivaramayya (eds) (1994:131-2 note 6 and 7).

<sup>41</sup> It is believed that she ran away from her husband's home and hid in some fields, where she was unfortunately located, dragged off and burnt against her will.

<sup>42</sup> The dowry system must be seen in historical context as well as in terms of present day reality. A dowry was to ensure that the girl (bride) was taken care of financially, in her marriage, by her husband because her father or guardian has provided accordingly. A need for such provision is because she is not in a position to do so herself, having not been equipped with the necessary economic and financial skills. Her duties extend to being a mother, a wife, a caretaker of the home and dutiful daughter-in-law, but not a financial supporter. Since the worth of a woman was measured by her dowry - the greater the dowry the better protected she was from the wrath of her husband and his family. Today the dowry is being used to bolster the husband's and his family's sagging economy. If it is not forthcoming in plentiful supply, the woman suffers horrifically at their hands.

<sup>43</sup> The Hindu marriage is a *Kanyadan* - *Kanya* meaning something no different from any other thing worth giving away and *Dan* meaning a gift.

husband's and in-laws demands. Very often life is made so unbearable for these women that they either commit suicide or are brutally murdered, by burning, the husband's parents. In 1961 the Dowry Prohibition Act was passed. Since it failed to bring relief, to the many young women suffering torture under this system, it was amended in 1984. In terms of this act, any property or large amounts of money given in connection with marriage is forbidden and punishable as an offence. Any dowry received must be returned to the girl within three months if not, criminal offences attach. In 1986 the Act was further amended<sup>44</sup> to include dowry deaths (S.304B of the Indian Penal Code - lays down a presumption that if a married woman dies unnaturally within seven years of her marriage, and it is shown that she was being harassed for her dowry-her husband or his relatives are said to have caused such death. However, despite these legal, formal changes, very little is changed substantively. The inferior status of the girl child continues. As long as she is still regarded as a burden to her family, to be auctioned off, violations to her human rights, like female infanticide, foeticide and the dowry practice will continue.

The enactment of the Indian constitution breathed a welcome puff of life into the legal status of women. Not only did the preamble resolve to secure equality of opportunity and status for all but the document (besides the equality provision) also contains three Directive principles which are women specific. They deal with maternity leave, equality between men and women in remuneration packages and health care of workers<sup>45</sup>.

Given the patriarchal society that women grow up within, their lack of formal education and a lack of awareness of the content of the laws the plight of the majority of women, especially the younger women has not improved over the years. The views that are expressed by Sarkar and Sivaramayya are alive today as they were years ago. The law works at various levels and through various agencies:

much of the law is still not codified and in the name of religious freedom every antiquated anti-woman custom is preserved because we still do not have one civil code. These inequalities are to be found in the law relating to marriage, divorce, inheritance, succession, custody, guardianship and maintenance. In a basic sense these laws are designed to preserve the present family system based on male dominance and control of female sexuality<sup>46</sup>.

<sup>44</sup> Dowry Prohibition (Amendment) Act, 1986.

<sup>45</sup> Article 15(3) makes special provision for women and children which will not violate the principle of equality and non-discrimination. See further Lotika Sarkar and B Sivaramayya (eds) (1994:3).

<sup>46</sup> Nandita Haksar in Lotika Sarkar and B Sivaramayya (1994:35f).

Christine Littleton further emphasises that disadvantages faced by women arise not only as a result of their unique biological characteristics but also those resulting from social traits and characteristics including cultural and psychological influences<sup>47</sup>. It is submitted that if one unpacks these concepts of sex and gender - what emerges is a relationship based on biological traits as in sex, on the one hand, and cultural, social, psychological characteristics as in gender on the other hand. It is arguable that both these factors, from time immemorial, led to women occupying subservient roles in society.

(iv) As far as the economic subordination of women is concerned it is interesting to note the approach of the United States court in *Kahn v Shewin*<sup>48</sup>. In this case the court embraced what was referred to as its old doctrine of benign preferences. It upheld a Florida law that granted widows a tax exemption as a means of lessening the financial burden that arose from the loss of the spouse. In other words it perceives this as lessening the impact 'upon the sex for which the loss imposes a disproportionately heavy burden'<sup>49</sup>. It is arguable that this protection afforded to women constitutes what one could term benign purpose - besides being paternalistic this notion of benign purpose could not and did not withstand the feminist onslaught for equality between the sexes. Women are no longer as dependent on their husbands for support, economic, or otherwise. It has now been soundly established that providing remedies for women, especially married women, will only pass judicial as well as constitutional muster if they fall squarely within the remedial goals of equality. (In other words if provision is made for women, like provision must be made for men). Romantic paternalism is regarded as subordination and subjugation in its worst form - that of sexist attitudes and stereotyping<sup>50</sup>. Justice Bradley's view in *Bradwell v Illinois*<sup>51</sup>, of man being regarded as women's protector and defender is no longer tenable or defensible.

It is submitted that the position adopted by O' Reagan J supports feminist views on equality when the judge indicated that legal rules that discriminate against women, as do section 44(1) and (2) are in breach of the equality provisions of the

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<sup>47</sup> Littleton (1991:35-6). According to Ann Oakley (1994:31), 'sex is a word that refers to the biological differences between male and female: the visible difference in genitalia, the related difference in procreative function. *Gender*, however, is a matter of culture: refers to social classification into masculine and feminine'.

<sup>48</sup> 416 US 315 (1974).

<sup>49</sup> Tribe (1988:1577).

<sup>50</sup> Tribe (1988:1566).

<sup>51</sup> 83 US 130 141 (1872).

constitution. In advancing the feminist struggle closer to the reality of substantive equality, it is submitted that O' Reagan J was correct in her view that in South African society, discrimination on the grounds of sex although not as visible or as widely condemned as discrimination on the grounds of race, has nevertheless resulted in deep patterns of disadvantage. In other words, given the plurality of South African society, millions of women had to grapple with oppression and subordination because of being black. Therefore the gendered struggle within our society must be approached from different platforms. The application in *Brink v Kitshoff*, was what can be termed the 'first world' feminist battle but for scores of black women gender-based equality is fought on the plane of basic survival. Despite the universal women being a misnomer 'women of all origins in South Africa face and share a common background, that of being inferior to men'<sup>52</sup>. In between the white male legal standard the feminist white female standard and the African male customary law yardstick- the African female was almost without recourse. According to Bennett:

while the struggle for political equality of the sexes began at the turn of the century, it was a campaign conducted by white women, who drew their inspiration from Europe and America with little regard for Africans. A more representative, indigenous women's movement began only in 1954<sup>53</sup>. But no sooner had this movement started than the politics of liberation demanded that women's rights be subordinated to the higher aim of overthrowing apartheid<sup>54</sup>.

The constitution, while bringing relief in terms of formal equality is not a panacea to all ills. Women, all women, need to take ownership of the constitution, of the spirit and purport of the philosophy of constitutionalism and in particular of the rights conferring clauses in the bill of rights. To this end, gendered affirmative action would begin to recreate and remould the tradition of law and the paternalism entrenched in

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<sup>52</sup> A Petersen (1989:333), 'enquiring whether there can be anything like a woman's standpoint or perspective, refers to the "fractured identities" of black women, Asian women, Native American women, working class women, lesbian women. These differences among women may force the abandonment of the idea of "universal" woman. See further Van Wyk, Dugard De Villiers and Davis (eds) (1995:517).

<sup>53</sup> When the federation of South African Women, a forum for women's interests within the broadly based Congress Alliance, drew up the Women's Charter. The manifesto demanded equal rights with men (Albertyn 1994:43f). See further T.W. Bennett (1995:82n14).

<sup>54</sup> T.W. Bennett (1995:82).

the legal process<sup>55</sup>. It is submitted that it is this kind of discrimination which needs to be eradicated from our society. Indeed this constitutes a key principle of the constitution. The approach of the court, by refusing to reinforce irrelevant differences between men and women, is to be welcomed because it is only then that stereotyping can be eradicated and substantive equality achieved. Catherine Albertyn argues that '[c]onstitutionalism and rights provide the necessary framework and tools for the attainment of substantive political, social and economic equality by women'<sup>56</sup>. Given our history and the deep enduring scars that it left on our society, the courts by infusing the constitution with this concept of equality must, it is submitted, be prepared to act affirmatively by '[c]ombating the inequities that result when we all too casually allow biological differences to justify the imposition of legal disabilities on women'<sup>57</sup>.

It is further submitted that the discrimination against women as contained in section 44(1) and (2) is both blatant and overt. From the perspective of legal certainty there is merit in the view that one must always challenge the constitutionality of discriminatory provisions. However it is submitted that where the discrimination is blatant and overt especially where it concerns discrimination against women - thought should be given to simpler, cheaper and more flexible mechanisms to impugn such unconstitutional measures. The content of our laws must of necessity reflect an increased awareness and sensitivity towards gender classifications. In this regard, the Commission for Gender Equality is at the coal-face of the policy making process as far as gender based equality is concerned<sup>58</sup>.

### 3. Conclusion

In the creation of a just society, the constitutional reshaping of equality highlights the vexed issue of gender-based equality. If rights are to be used effectively and cost effectively at that, the task of corrective action is not only that of the courts, as justice O' Regan pointed out '[t]here appears to be no reason either why Parliament could not enact a provision similar to section 44(1) and (2) which does not den against married women'<sup>59</sup>.

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<sup>55</sup> Section 9(2) of the South African Constitution specifically mentions that 'legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.

<sup>56</sup> Albertyn (1994:62).

<sup>57</sup> Tribe (1988:1577).

<sup>58</sup> Section 187 of the South African Constitution.

<sup>59</sup> 219 par[49] D-E.

This approach by the court suggests the introduction of legislation specifically enacted to promote socio-economic justice for women, but also, introduces the notion of a policy-making mindshift as far as gender-based equality is concerned. This mindshift seems to have far reaching consequences for women since draft legislation would appear to have already been prepared which contains provisions similar to section 44(1) and (2) but which do not discriminate against married women. It is further submitted that in pursuit of substantive equality, formal mechanisms, like legislative changes, must be implemented for true equality to be recognised by women. When the classification of gender is so interwoven with the social understanding of women that it finds expression in the very laws of our country, the credibility of our judiciary as well as our entire legal system will be determined by the manner in which they can transform those laws in keeping with constitutional change. Inherent to this process of Judicial activism is the realisation that law is designed to facilitate and improve the quality of life of people, in other words, Executive minded entrenchment of formal justice must of necessity be tempered with substantive justice. As Vicky Schultz asserts:

In ... early race discrimination cases, the courts acknowledge that human choices are never formed in a vacuum .... [These cases] illustrate what the courts can accomplish when they have the vision to acknowledge their own power and responsibility to dismantle oppressive ... arrangement<sup>60</sup>.

Accordingly, in dismantling the systematic subordination of women that has, over the years, built itself into the laws of our country, the role of the judiciary, must of necessity, be pro-active as well as transformatory.

Faculty of Law  
University of Durban-Westville

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<sup>60</sup> Schultz (1992:300). See further Farganis (1994:63). Strict scrutiny of this statement would appear to point in the direction of law being based on a particular model against which a comparison is being made. It is no secret that our legal system is based on a male model. On this basis then, if it is argued that the male standard is the standard on which we evaluate equality and since equality lives by comparison, then women are being measured against the yardstick of men. In this sense, equality between the sexes needs to be contextualised to allow real gender-based differences to be addressed.

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