THE RIGHT TO EQUALITY IN THE SOUTH AFRICAN CONSTITUTION

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When the young Frenchman, Alexis de Tocqueville, visited the United States of America in the early 1830s, he was fascinated by the idea of democracy and the role of law and lawyers within it. He went to America dismayed by the weak state of democracy in Europe and in France, in particular, in order to observe how democracy was faring in the United States of America. One of his observations was that lawyers had an important role to play in the development of a democracy. "I should like to get this matter clear," he wrote, "for it may be the lawyers are called on to play the leading part in the political society which is striving to be born."[1]

If one considers De Tocqueville's remarks in relation to the question of gender equality, there can be little doubt that Justice Ruth Bader Ginsburg has been a lawyer who, in the different roles she has played as a lawyer, a professor, and a judge, has played the leading part in the legal struggle for gender equality and it is a great honour to have been invited to participate in this symposium today in her honour.

South Africa, like so many countries around the world, has watched and learnt from the US dialogue about law and gender equality over the last forty years. The richness of that dialogue, just like the richness of Justice Ginsburg's contribution, has not been limited to jurisprudence emanating from the courts, but has included legislation both at the federal and state levels in different areas of the law (even if it does not, sadly, include the Equal Rights Amendment), including employment and labour law, as well as family law, discrimination law and social welfare law. It has also included the extraordinary output of the American academy, of which Columbia Law School is an eminent representative. That output, in turn, analytical, empirical, challenging and with a deep international perspective, is a rich global resource which lawyers and social activists everywhere may mine. It has without doubt enriched constitution-making, legislation, jurisprudence and social activism the world over. And South Africa is no exception.

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1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1832), *cited in* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 3 (Harvard Univ. Press, 1994).

South Africa's constitutional text on the question of equality is different from the United States' text. This is not surprising. It was drafted only fifteen years ago. I am glad that it is different because it reflects South Africa's challenges in seeking to remake our society. It is thus a transformative Constitution. This transformative purpose is expressed in the Preamble to our Constitution as follows: the Constitution is adopted so as to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" in which the quality of life of all citizens will be improved, and the potential of each person will be freed.[2] The Constitution's charisma arises in part from the tantalising prospect it holds out: of a healed society in which all citizens will reach their full potential. But the achievement of this vision remains a distant promise still, nearly twenty years into our new democratic era.[3]

Equality is a central theme of our new Constitution. It permeates the constitutional text. Right at the start, in Section 1, the Constitution provides that the founding values of our Constitution are (amongst others): human dignity, the achievement of equality, the advancement of human rights and freedoms, as well as the principles of non-racism and non-sexism.[4]

The pervasiveness of equality is evident elsewhere as well: Section 39, a provision which guides the interpretation of the Bill of Rights stipulates that in interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[5] Given the open-textured character of the Bill of Rights, these are important principles that guide the process of interpretation. Again, the structure of our Bill of Rights, like the Canadian Charter, provides for a two-stage model of rights adjudication. The first question is whether a right has been limited by a challenged legal provision, the second is whether if a right has been limited, that limitation is justifiable. And again the value of equality is repeated. A limitation may be constitutionally acceptable if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[6]

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2 S. AFR. CONST., 1996.

3 South Africa had a two-stage constitution-making process with an interim Constitution that came into effect on April 27, 1994, S. AFR. (INTERIM) CONST., 1993, followed by a "final" Constitution, the Republic of South Africa Constitution of 1996 that came into effect on February 4, 1997. The 1996 Constitution is thus just fifteen years old, although the new constitutional era is now eighteen years old.

4 *See* S. AFR. CONST., 1996, ch. 1, § 1.

5 *Id.* at ch. 2, § 39.

6 *See id.* at ch. 2, § 36.

The emphasis on equality is not surprising given our history: a history of legislated inequality, of exclusion and of disadvantage on the basis of race. But equality is more than a value, it is also a right. So Section 9 of our Constitution provides:

> (1) Everyone is equal before the law and has the right to equal protection of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote, the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.[7]

Deciding whether a Section 9 challenge is good requires the Court to decide whether discrimination has taken place on a listed ground, such as sex or gender or pregnancy, and if it has, then unfairness is presumed and the state must establish that the discrimination is fair.[8] The test for fairness is based on the principles of substantive equality, and is effectively asymmetrical. If the discrimination has resulted in a pattern of disadvantage along group lines, then it will be harder for the state to show that further discriminatory treatment is justified. Time does not permit a fuller elaboration of this approach, save to add that the pioneering work in formulating it was done by the Canadian Supreme Court, and indeed by Claire L'Heureux-Dubé, who is with us today.

The equality clause has been the basis for successful constitutional challenges to legislation, on my count, just over twenty times in the first seventeen years of the Court's jurisprudence. Four of those cases were gender-related, three related to race, and nine of them were related to discrimination based on sexual orientation, a prohibited ground of discrimination. Most of the gender-based challenges related to disabilities imposed upon married women, both by civil law and by indigenous law.

I need to explain, though, that not many challenges are brought directly under Section 9 of the Constitution because South Africa has adopted comprehensive equality

7 *Id.* at ch. 2, § 9.

8 *Id.*

legislation, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (somewhat like Title VII).[9] This Act, under the doctrine of constitutional subsidiarity, is the primary legal basis for non-employment related claims relating to discrimination by government officials, or by private actors, such as landlords or educational institutions. If the Equality Act does not provide adequate protection for the constitutional right to equality, then the Act must be challenged constitutionally. The Equality Act is enforced by Equality Courts that are established throughout the country. Proceedings in the Equality Courts are relatively speedy and inexpensive.

The main circumstance in which a litigant may bring a challenge based on Section 9 of the Constitution, rather than the Equality Act, is where he or she considers that law (either the common law or legislation passed by Parliament, the national legislator or a provincial legislator) to be in conflict with Section 9. Constitutional challenges of this sort must, save in exceptional circumstances, commence in the High Court, and proceed only on appeal to the Constitutional Court, first by way of the Supreme Court of Appeal.

My judicial sister for fifteen years, Yvonne Mokgoro, (we were the only two women on the Court for most of those fifteen years) shall describe the important jurisprudence relating to family law in the field of traditional indigenous law and customary law that has raised some of the most challenging and sensitive gender equality cases considered by the Court.

But I am going to turn to a different issue: the worrying persistence of gender inequality despite a Constitution so committed to its eradication. Despite the fine language of the Constitution and the development of a gender-sensitive jurisprudence by the courts, gender violence remains a pervasive problem in South Africa, where we have one of the highest rates of reported rape and sexual violence in the world. The deep material inequality of women persists as well. Women still work harder, earn less, own or control less property, and overwhelmingly bear the burden of child rearing in our society. An example of the worrying trend, is the that South Africa is one of twelve countries worldwide where rates of maternal mortality are rising, probably as a result of the HIV/AIDS epidemic.[10]

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9 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.).

10 See the Development Indicators 2010 published by the Presidency in South Africa. NAT'L PLANNING COMM'N SECRETARIAT & DEP'T OF PERFORMANCE MONITORING AND EVALUATION, DEVELOPMENT INDICATORS 2010 (2010), http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/NationalPlanningCommission4/Development%20Indicators2010.pdf.

What permits such deep inequality to persist despite the powerful constitutional commitment to promoting gender equality, and the panoply of legislation enacted since 1994 to promote it? In my view, the answer lies in the fact that the intersection between poverty and deeply entrenched patriarchal attitudes radically undermines legal interventions that seek to address inequality. For as long as we fail to address poverty, it is likely that women will not find ways to assert their rights to be treated as equal citizens. Although we know, from experience in the developed world, that eradicating poverty is not enough to promote gender equality, eradicating poverty certainly improves women's lives immeasurably and enhances the prospect of women being treated as equal citizens.

Understanding the intersection between poverty and patriarchy means that courts need to understand that many cases might have a gender-effect even if they are not, on their face, gender equality cases. It requires courts to be alert to the gender implications of all cases before them. There have been many such cases in South Africa, perhaps most importantly under the social and economic rights entrenched in the South African Constitution. Time only permits me to mention one—perhaps the most famous social and economic rights case so far decided in South Africa. It is the *Treatment Action Campaign* case,[11] where the government had developed a policy that only permitted the prescription of Nevirapine, an anti-retroviral drug that inhibits mother to child transmission of HIV, to pregnant mothers living with HIV at only two clinics per province.

The policy was challenged on the basis of Section 27 of the Bill of Rights, which entrenches the right of all to have access to health care.[12] In particular, the challenge was based on the government's positive obligation to take reasonable steps within its available resources to progressively achieve the right of access to health care.[13] The policy was not formulated in legislation, but had been adopted by the Department of Health,[14] despite the fact that Boehringer Ingelheim, the manufacturers of Nevirapine, had offered Nevirapine to the government free of charge for a period of five years;[15] and despite the fact that the World Health Organisation had issued guidelines stipulating that Nevirapine was an appropriate intervention to prevent mother to child transmission of HIV, and so should be administered without limitation.[16]

11 *Minister of Health v. Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).

12 *Id.* at para. 26.

13 *Id.* at paras. 28–29.

14 *Id.* at para. 40.

15 *Id.* at paras. 19, 48.

16 *Id.* at para. 12.

The Court held that in the circumstances the policy adopted by government was not a reasonable policy and stipulated that the policy should be expanded to include all clinics in all provinces where adequate counselling and testing facilities existed for the administration of Nevirapine. The Court concluded, however, by noting that government would be free to introduce a different policy to reduce the risk of mother to child transmission of HIV "if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV."[17] This judgment, of course, had a material impact on the lives of women and children. It was not based on the gender equality provisions of the Constitution, or on legislation addressing gender issues, but its gender implications were profound.

Gender inequality is persistent and pervasive, as Justice Ginsburg has always acknowledged.We now know that good law and sensitive jurisprudence is simply not sufficient to eradicate gender inequality. So de Tocqueville was not entirely right. Lawyers might have a leading role to play in developing a democracy but it cannot be *the* leading role. The struggle for gender equality needs to be waged on many fronts, and will require us to focus not only on equality law but on taking steps to eradicate deep poverty. For judges and lawyers, the first ambition must be to do what we can to make sure the law is not a hindrance but a help in the achievement of gender equality. But as citizens we need to do more. For achieving social change requires ongoing struggle and commitment from all of us in all aspects of our lives. Adopting our constitution, though a moment of great importance, was only the first step on the road to achieving the society towards which the Constitution points: a society in which human dignity, equality and freedom are the lived experience of every person.

17 *Id.* at paras. 135, 4.