

Third World Legal Studies

Volume 13 *Women's Rights and Traditional Law: A Conflict*

Article 9

1-9-1995

Social Rights in the Constitution: Towards Effective Equality for Women in South Africa

Sandy Liebenberg

Follow this and additional works at: <http://scholar.valpo.edu/twls>

Recommended Citation

Liebenberg, Sandy (1995) "Social Rights in the Constitution: Towards Effective Equality for Women in South Africa," *Third World Legal Studies*: Vol. 13, Article 9.

Available at: <http://scholar.valpo.edu/twls/vol13/iss1/9>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Third World Legal Studies by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

SOCIAL RIGHTS IN THE CONSTITUTION: TOWARDS EFFECTIVE EQUALITY FOR WOMEN IN SOUTH AFRICA

Sandy Liebenberg*

South Africans are in the process of drafting their final Constitution which, like the interim Constitution, will contain an entrenched and justiciable Bill of Fundamental Rights.¹ One of the central issues under debate is whether social and economic rights should be included in this Bill of Rights as justiciable rights on the same terms as civil and political rights.

There have been submissions from the public to the Constitutional Assembly that social and economic rights should be excluded from the final Bill of Rights or incorporated in a form which is not fully justiciable, such as Directive Principles of State Policy. These submissions have emanated both from organisations representing business interests and from organisations of civil society on the political left.² On the other hand, there have been a number of non-governmental organisations involved in issues of housing, development, health, social welfare, and rights for women that have

*Senior Research Officer, Women and Rights Project, Community Law Centre, University of the Western Cape, July 1995. I wish to thank the Swedish International Development Agency (SIDA) whose generous support for our Project made the research for this paper possible.

¹The interim Constitution of the Republic of South Africa (Act 200 of 1993) was the outcome of the negotiations leading to the political settlement in South Africa [hereafter, the interim Constitution]. It is intended as a transitional Constitution, pending the passing of the final Constitution by the Constitutional Assembly. This must occur within two years of May 1994, the first sitting of the National Assembly in South Africa (s.73(1)). The final Constitution must comply with a schedule of Constitutional Principles attached to the interim Constitution (s.71). One of these Principles requires that "all universally accepted fundamental rights, freedoms and civil liberties" shall be provided for and protected by entrenched and justiciable provisions in the Constitution (Constitutional Principle II, Schedule 4).

²Submissions to this effect were received by the Constitutional Assembly from, *inter alia*, the Council of Southern African Bankers (17 February 1995), the Chamber of Mines (Public Hearing of 1 August 1995) and the Congress of South African Trade Unions (COSATU) (3 June 1995). Not all sectors of the business community are opposed to the inclusion of social and economic rights in the Constitution. Thus at a Public Hearing on Social and Economic Rights hosted by the Constitutional Assembly on 1 August 1995 the National Federated Chamber of Commerce (NAFCOC), representing Black business interests, indicated support for their inclusion in the Constitution.

been actively campaigning for an expanded category of social and economic rights in the final Bill of Rights.³

This paper addresses the question why South African women should be concerned to ensure that a range of social and economic rights are entrenched as justiciable rights in the final Constitution. It also examines what the significance of these rights are for the organisation of women in South Africa.

I. Social Rights and the Struggle for Democracy in South Africa

There has been a political tradition of support for social and economic rights in the national liberation struggle in South Africa. Thus the Freedom Charter adopted by the Congress of the People in 1955 proclaims:

All people shall have the right to live where they choose, to be decently housed, and to bring up their families in comfort and security... The aged, the orphans, the disabled and the sick shall be cared for by the state...

This reflects the reality that the struggle for political liberation in South Africa was inextricably linked to a struggle for the material conditions of a dignified human existence. The history of land dispossession and apartheid did not only deprive millions of Black people of the vote. It also systematically deprived them of the basic social rights enjoyed by citizens in most modern democracies: access to land, housing and security of tenure, a decent education, and equal access to medical care, to name but a few.⁴

³The Ad Hoc Committee for the Campaign on Social and Economic Rights has submitted a petition to the Constitutional Assembly endorsed by fifty-five organisations, representing a wide range of interest groups in South Africa (19 July 1995). See also in this regard, the minutes of the Constitutional Assembly's National Sector Public Hearing for Women held at the World Trade Centre on 4 June 1995, and the written submission of the Women's National Coalition (Western Cape) (5 July 1995). At the time of writing consensus had not yet been reached amongst the political parties as to the final contents of the Bill of Rights.

⁴A. Rycroft, 'Social Need and State Provision' in N. Steytler (ed), *The Freedom Charter and Beyond: Founding Principles for a Democratic South African Legal Order*, Wyvern Publications, Cape Town (1992), 217.

In 1988 the ANC published its Constitutional Guidelines for a Democratic South Africa in which it endorsed the need for a Bill of Rights for South Africa. The Guidelines proposed that the state and all social institutions should be placed under a constitutional duty to eradicate the social and economic inequalities produced by apartheid. In a separate provision relating to women, the state is also required to take affirmative action to eliminate discrimination against women in all spheres of public and private life. The ANC's Draft Bill of Rights for a New South Africa initially published in 1990 (with subsequent revisions) was intended as the basis of negotiations for a new political dispensation and constitution in South Africa. It contained articles for providing for social, educational, welfare, land and environmental rights. This Draft Bill proposed that power be conferred on the courts to enforce such social rights "as are established by legislation, or identified by the Constitutional Court through interpretation of the Constitution."⁵

The ANC and its allies were opposed to an extensive category of rights in the interim Constitution as the Multi-Party Negotiating Forum was regarded as insufficiently representative. It was contended that the proper forum for the adoption of a final Constitution was the Constitutional Assembly, comprising the legislature elected under the interim Constitution. It was therefore initially envisaged that only those rights essential to the process of political transition and the first free and fair democratic elections would be entrenched during the transition. The outcome was a compromise between this position and the position espoused by the National Party and its allies who envisaged that the interim Constitution would entrench more extensive and permanent guarantees.⁶

The interim Constitution ultimately included an important, albeit limited, core of social rights. These are labour rights, the right to an environment not detrimental to health or well-being, the right of children to security, basic nutrition, basic health and social services,

⁵ANC Draft Bill of Rights, Preliminary Revised Version, produced by the Constitutional Committee of the African National Congress (Centre for Development Studies, February 1993), articles 11, 12 and 17(11).

⁶L. du Plessis and H. Corder, *Understanding South Africa's Transitional Bill of Rights*, Juta & Co., Ltd., Cape Town (1994), 40-46.

and the right to basic education and equal access to educational institutions.⁷

II. Women and the Political Transition

In the face of many obstacles women in South Africa played an active role in a number of key struggles against the apartheid regime.⁸ These included resistance struggles against the pass laws, forced removals⁹ and in trade unions. Subsequent to the unbanning of the liberation movements and during the period of negotiating the interim Constitution women also organised as a constituency. The Women's National Coalition was launched in April 1992 with a membership representing a diverse spectrum of political and civic organisations. The Coalition coordinated a national campaign which mobilised women around the formulation and adoption of a "Women's Charter for Effective Equality." One of the aims of this campaign was to influence the entrenchment of rights in the negotiated Constitution which would entrench real equality for women in South Africa.¹⁰ Many of the provisions in the Women's Charter for Effective Equality adopted in February 1994 demand rights for women in relation to the economy, education and training, development, the environment, social services, the family, custom, culture and religion, health and violence against women. Although the Women's National Coalition ultimately had little direct impact on the Multi-Party negotiations, their interventions raised awareness of the pressing concerns of women among the delegates.¹¹

Despite their significant role in the political changes which led to democracy in South Africa, the majority of Black women remain in a position of acute social and economic disadvantage. The nature of

⁷Chapter 3, interim Constitution.

⁸C. Walker, *Women and Resistance in South Africa*, Onyx Press, London (1992).

⁹For an account of the role of women in resisting state repression in the Crossroads settlement in the Western Cape see, J. Cole, *Crossroads: The Politics of Reform and Repression 1976-1986*, Ravan Press, Johannesburg (1987).

¹⁰Section 2, Constitution of the Women's National Coalition.

¹¹C. Albertyn, 'Women and the transition to democracy in South Africa,' in C. Murray (ed), *Gender and the New South African Legal Order*, Juta & Co., Cape Town (1994), 39.

the disadvantage experienced by South African women varies according to factors such as their race, whether they live in the urban or rural areas, the standard of education received, whether they are employed in the formal, regulated sector of the economy, whether they are governed by the norms of African customary law, and the nature of their ties to a particular cultural or religious community. However, there can be no doubt that poverty, illiteracy, discriminatory civil and customary laws and practices impact disproportionately on Black women in South Africa.¹²

Brigitte Mabandla argues persuasively that the integration of social and economic rights in the South African Constitution responds to the intersection of race, class and gender oppression experienced by Black women in South Africa.¹³ However, there is clearly no automatic relation between legal rights and social benefit to the most disadvantaged in society. In fact, judicial officers seldom interpret the law in ways which challenge prevailing social and political values and priorities. In the South African context, it is hardly realistic to expect that the courts will succeed in delivering to the poor where the government has failed.

Nonetheless, it will be argued that there are compelling reasons for women in South Africa to seek to maximise their opportunities to obtain redress for social and economic disadvantage through both political and legal channels.

III. Women, Political Participation and the Courts

At a recent Conference on Social and Economic Rights in the Constitution, a representative of the business community argued against the inclusion of social and economic rights in the Constitution on the following basis:

¹²*Beijing Conference Report: 1994 Country Report on the Status of South African Women* [hereafter the 'Beijing Country Report']. This report is a collaborative report of the government and non-governmental sector in South Africa. This report draws on studies and statistics from a wide variety of sources. Its conclusions are endorsed by the South African government through the Ministry responsible for the Reconstruction and Development Programme (RDP); D. Budlender, 'Women in Economic Development' in G. Moss and I. Obery (eds) *South African Review: From 'Red Friday' to CODESA*, Ravan Press, Johannesburg (1992).

¹³B. Mabandla, *A Feminist Critique of "The Charter for Social Justice-A Contribution to the South African Bill of Rights Debate"*, Community Law Centre, University of the Western Cape (1992), 6.

The proper role of the courts is to serve as guarantor of liberty in a political system of representative democracy, and to ensure the fairness of the legal system. The legislature with its abundant legitimacy and policy-making capacity, serves as the guardian of society's welfare, and the champion of the poor.

He contended that the courts lack the necessary political accountability and institutional capacity to make the complex policy choices and trade-offs involved in maximising socio-economic welfare in society.¹⁴

This proposition of political theory does not reflect the practical realities or complexities of the operation of political processes in representative democracies. The alignments of political power in society are manifestly neither fixed nor constant. In a federal system there may be a shifting balance of power between the national and provincial legislatures, or between the different provincial governments. Power may be concentrated in the executive and administrative organs of government at the expense of Parliament, and sometimes the judiciary may enjoy greater legitimacy and power. Finally, the outcome of political policy on many issues is frequently determined by powerful interest groups in civil society such as organised business lobbies, the media, and sometimes even trade unions.

Whatever form these alignments take, the poor exert minimal power as an interest group on the formulation and implementation of political policies. Moreover, the organisation and functioning of political institutions in society will tend to reflect the interests of those that have access to them, those with resources, status and power. It is highly unlikely that socially marginalised groups will succeed in persuading Parliament to adopt programmes and legislation which

¹⁴S. Malherbe, 'Dealing with Social Welfare in the South African Constitution' (1995) (unpublished paper on file).

threaten the vested interests of more powerful constituencies.¹⁵ As Frank Michelman observes:

Maldistribution of formal political power obviously removes or weakens a basic institutional safeguard against systematic maldistribution of status and the resources that support it. Conversely, and perhaps more importantly, inequalities of resources and statutes, especially insofar as visibly correlated with salient group identification, almost certainly constitute a fundamental bias in the functioning of majoritarian political institutions.¹⁶

As we have noted above, Black women in South Africa are disproportionately affected by poverty and social marginalization in our society. The interaction of race, gender, poverty and discriminatory cultural practices combine to exclude the majority of women from effective participation in political decision-making in our country. Women are seriously under-represented in the legislative, executive and judicial branches of government. The fact that almost a quarter of the members of the National Assembly are women is attributable to a decision by the ANC to establish a 33.3% quota of women on their party lists. There is significantly unequal representation of women in the Senate (the second house of Parliament), the Cabinet, Provincial Legislatures and the public service generally.¹⁷

Apart from inadequate representation in government, millions of Black women face serious constraints to successful intervention and participation in the formulation of policies affecting their lives. These constraints include illiteracy, geographic isolation,¹⁸ preoccupation

¹⁵M. Jackman, 'Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law', vol. II, no. 1, *Review of Constitutional Studies* (1994), 76, 95-105.

¹⁶F.I. Michelman, 'Welfare Rights in a Constitutional Democracy', *Wash. U.L.O.* (1979) 659, 675.

¹⁷*The Beijing Report*, *supra* note 12, 5-13; T. Madonsela, 'Beyond putting women on agenda', *Agenda* (1995), 27. For example, there are only 16 women in a Senate comprising 90 people. Of the 27 Cabinet posts there are two held by women (Health and Public Enterprises). Furthermore, the mere presence of women in Parliament does not in itself signify that they have a powerful voice.

¹⁸Women consistently predominate in economically disadvantaged areas in South Africa, particularly the rural areas: Central Statistical Services, *Current Population Survey* (1990), cited in Budlender, *supra* note 12, 352.

with the day-to-day struggle for survival and the roles assigned to women by cultural norms and broader social expectations. These social conditions combined with a lack of resources not only militate against effective lobbying of government, but also undermine their ability to engage in sustained political organisation. The claims of poor and socially disadvantaged social groups excluded from effective political influence must surely be addressed in a Constitution committed to achieving substantive equality in South Africa.¹⁹

On the other hand, it can hardly be claimed that the judiciary in South Africa is more accessible and responsive to the claims of disadvantaged Black women. Nonetheless under certain conditions, legal remedies have worked to the advantage of groups systematically excluded from political participation. During the apartheid era legal strategies were frequently used, particularly in the context of forced removals and demolitions, security laws and labour rights. As a result of the claims of the South African legal system to formal equality of all before the law, Black people at least had access to the courts, unlike Parliament. The resort to law and the courts did not always have the effect of promoting organisational strength and capacity. Frequently, the opposite was true. However, where the courts were used as part of an overall political strategy, objectives could be achieved beyond the relatively minimum gains made in substantive legal rights.²⁰

In the new order of constitutional democracy in South Africa the courts are vested with a great deal of power, particularly where the fundamental rights of people are at stake.²¹ An era of constitutional democracy in South Africa must surely change the significance of legal

¹⁹The commitment to equality as a key concept informing the drafting of the final constitution is reflected in Constitutional Principles I, III and V, schedule 4 to the interim Constitution.

²⁰Strategic legal battles served to mobilise community solidarity around injustices, garner public support through media coverage and win a space within which political forces could be rallied against the state. On the use of legal strategies in rural land struggles, see A. Claasens, 'Rural Land Struggles in the Transvaal in the 1980's' in C. Murray and K. O'Regan (eds) *No Place to Rest*, Ravan Press, Johannesburg (1990), 33.

²¹A recent judgment of the Constitutional Court in South Africa has declared the death penalty to be in violation of the right to life in s.9 of the interim Constitution, and hence unconstitutional. *The State v. T. Makwanyane and M. Mchunu*, 6 June 1995 (unpublished at the time of writing). (Editor's note: 1995 (3) SA 391 (CC). Available as of 3/96 at <http://www.law.wits.ac.za/lawreps.html#makwanyane>.)

strategies for civic organisations from the more limited role they played under apartheid. In particular, a Bill of Rights creates the potential for the courts to provide public forums where claims of right can be made founded on the fundamental values of our new democratic society. The issues of pressing concern to impoverished women in South Africa are obtaining access to adequate income, credit, health care, education and housing. The courts are more likely to be responsive to these claims of disadvantaged women where social and economic rights are visibly reflected in the Constitution, and they are given an unequivocal mandate to uphold these rights. In the absence of these rights, there is no guarantee that the courts will interpret rights such as the right to life, to security of the person and to equality in ways aimed at the alleviation of social and economic disadvantage.²²

The diversity of political processes in a representative democracy therefore calls for a more flexible framework to govern the interaction between the various organs of governments. Such an approach is suggested in the Constitutional Principles to South Africa's interim Constitution. Thus Constitutional Principle VI requires a separation of powers between the legislature, executive and judiciary, "with appropriate checks and balances to ensure accountability, responsiveness and openness." For those whose exclusion from political power is largely due to socio-economic deprivation, the inclusion of social and economic rights in the Bill of Rights will create opportunities to hold government accountable in a judicial forum for neglecting their basic needs. It will also make the judiciary more responsive to their claims.

Assigning courts a role in upholding the economic and social welfare of the country's citizens is consequently not antithetical to democracy. On the contrary, it may enrich our concept of

²²See T. Allen, "Commonwealth Constitutions and Implied Social and Economic Rights," vol. 6, pt. 4 *African Journal of International and Comparative Law* (1994), 555; Martha Jackman demonstrates that the courts in Canada, particularly the lower courts, are generally reluctant to invoke the rights to equality and security of the person in the Canadian Charter of Rights and Freedoms to support social welfare rights: M. Jackman, "Poor Rights: Using the Charter to Support Social Welfare Claims," 19 *Queen's Law Journal*, 65 (1993).

participatory democracy.²³ Through framing the major determinants of women's disadvantage in South Africa as rights in the Constitution, the Constitutional Assembly will impart legitimacy to political activity aimed at the practical realisation of these rights. The participation of women in the political process is more likely to be promoted by the availability of both political and legal remedies in areas where they are most vulnerable to discrimination and exploitation.

In conclusion, to restrict the content of a Bill of Rights to civil and political rights on the basis that the guarantee of only this group of rights is essential to the equal and fair operation of the democratic political process is to seriously discount the interdependency of political participation and economic and social welfare.²⁴

IV. Women, Economic Growth and "Private" Power in South Africa

An analysis of the significance of social rights for South African women must also take into account their location in the broader socio-economic processes and structures of our society.

South Africa is a society in transition engaged in the dual projects of social reconstruction and the integration of the national economy into the international economic order. The growth of the South African economy is regarded as essential to meet the government's commitment to employment, health care and education for the millions of South Africans previously denied these benefits under apartheid. The key goals of economic policy are accordingly the attraction of foreign investments to South Africa, and building the capacity of local enterprises to compete successfully on the global

²³N. Haysom, "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights," 8 *South African Journal on Human Rights* (1992), 451, 461.

²⁴The logical consistency of this argument for restricting the content of the Bill of Rights only to civil and political rights breaks down with the inclusion of labour rights, and the protection of rights in property in the Constitution (ss. 27 and 28 of the interim Constitution). Constituencies generally opposed to the inclusion of social rights as fully justiciable rights in the final South African Constitution are at the same time also unwilling to exclude economic rights which protect their interests. See *supra* note 2.

markets.²⁵ The government's Reconstruction and Development Programme seeks to balance these goals with the achievement of social equity and democratic participation in all sectors of the economy.²⁶

The commitment to meeting the basic needs of the most disadvantaged sectors of South African society is currently high on the political agenda. However, these social goals will come under increasing pressure with growing demands to create a competitive economy in a global environment increasingly committed to economic deregulation and privatisation. South Africans should not be tempted into believing that economic progress alone will necessarily lead to greater welfare for all in society. As development studies have shown, it may lead to a greater disparities in the distribution of income and resources in society.²⁷ This is more likely to be the case where development occurs against a background of gross disparities in the distribution of wealth.

Massive structural inequalities along race, class and gender lines exist in South Africa as the legacy of apartheid policies. The transformation of our society will not occur without active state involvement at all levels. One of the objectives of economic policy set by the government in its White Paper on the Reconstruction and Development Programme is the achievement of gender equality. However, it identifies the following obstacles to the attainment of this goal:

Market failure often exacerbates discrimination which already exists within the Government and the wider society, leading among other things, to artificial notions of "women's work" and "men's work"; employment discrimination in public works projects; unpaid labour by women; credit constraints for women with limited collateral; insufficient resource allocation to early child care and education; poor

²⁵White Paper on Reconstruction and Development Programme: Government's Strategy for Fundamental Transformation (September 1994), Ch. 3, paras. 3.2, 3.5. [hereafter the "RDP White Paper"].

²⁶RDP White Paper, *supra* note 26, para. 3.2.

²⁷D. M. Trubek, "Economic, Social and Cultural Rights in The Third World: Human Rights Law and Human Needs Programs" in T. Meron (ed) *Human Rights in International Law: Legal and Policy Issues*, Clarendon Press, Oxford (1984), 205, 227-230. Trubek cites by way of example the World Bank Special Report on Brazil (1979), 229.

nutrition; gender discrimination in law enforcement and treatment of perpetrators of domestic violence; discriminatory treatment on the basis of marital status or pregnancy, and insufficient public health services.²⁸

Thus, the RDP acknowledges the pervasive sources of systemic discrimination against women in spheres in which there is no or minimal public regulation. In South Africa, the work performed by the majority of Black women is concentrated in the home, in domestic service, casual labour, and in the informal and subsistence sectors of the economy. This work is not only largely unprotected, but is also unrecognised.²⁹ Without proper management, economic growth during a period of transition holds the danger of deepening these gender divisions in the economy, and reinforcing the economic marginalisation of women.³⁰ As Maxine Molyneux has observed in her study of post-Communist States in East and Central Europe, the over-zealous embrace of unrestrained market-based policies has manifested itself in increased unemployment and poverty. Women who face change from a position of structural disadvantage are most adversely affected by economic restructuring and the diminished role of the State. A significant trend has been the intensification of gender segregation in the economy and society as a whole.³¹ In this context she argues as follows:

At issue here is the task of redefining the role of the State and advancing a concept of rights which allows for their satisfaction in ways which do not recreate the problems of overcentralized and bureaucratic States. The new States, while wishing to avoid replicating the problems of the past,

²⁸*Supra* note 26, para. 3.2.8.

²⁹The Beijing Country Report, 36-43 and Budlender, 359, *supra* note 12; J. Theron and D. Budlender, "Working from Home: The plight of home-based workers," vol. 19, no. 3, *South African Labour Bulletin* (1995), 14.

³⁰R. Kadalie, "Women in the New South Africa: From Transition to Governance" vol. 1, no. 2 *Social Politics: International Studies in Gender, State and Society* (1995). This paper discusses the relevance of the theories of Maria Mies for South Africa: M. Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (1986).

³¹M. Molyneux, "Women's Rights and the International Context: Some reflections on the Post-Communist States," vol. 4, 11, *Beyond Law* (1994), 39, 42-54.

and recognizing the need to "retreat," must at the same time recognize that they need to retain some role as regulator and facilitator of the conditions under which adequate provision can be made on the basis of an agreed set of social rights.³²

Similar considerations motivate the need for affirmative state action to combat the pervasive forms of discrimination against women which occur in spheres usually designated as "private" and insulated from direct state interference. Thus, the barriers to women's advancement are often not manifest in the formal content of laws, but in the interactions of women's daily lives in their homes, workplace and cultural and religious communities.³³ These interactions are shaped to a large extent by social and cultural expectations and roles. The fear of social ostracism, material deprivation and violence experienced by the majority of women represent real barriers to their willingness to challenge the manifestations of male power.

The extent to which the civil law confers legal authority on traditional authorities and customary norms has critical implications for the attainment of effective equality by women in South Africa. The conversion into law of customary norms (which were in the process of evolving and adapting to changed circumstances) had the effect of entrenching unequal access by African women to property, independent legal status and capacity, and personal autonomy.³⁴ The unequal status of African women was sanctioned by the law not only in relation to men, but also in relation to white women who enjoyed greater rights under the civil law. This subordinate legal position placed African women in a particularly disadvantaged social position in the context of the destruction of the structures and economy of traditional society.³⁵ In this context, the need for positive appropriate state action "to modify and abolish existing laws, regulations, customs

³²*Supra* note 32, 60.

³³For an account of the impact of the politics of ethnic identity in South Africa on the roles and status of women, see: S. Hassim, "Family, motherhood and Zulu nationalism: the politics of the Inkatha Women's Brigade," 43 *Feminist Review* (1993) 1.

³⁴R. T. Nlapo, "The African family and women's right: friends or foes? *Acta Juridica* (1991), 135; T.W. Bennet, *A Sourcebook of African Customary law for Southern Africa*, Juta & Co., Cape Town (1991), 328-331.

³⁵See further in this regard: T.W. Bennet, *Human Rights and African Customary Law Under the South African Constitution*, Juta & Co., Ltd., Cape Town (1995) at 80-85.

and practices which constitute discrimination against women" becomes imperative.³⁶ Only through the active involvement of the state in the creation of more equitable power relations in society will the social, economic and cultural status of women improve. The determined political battle fought against the traditionalists by the women's lobby at the Multi-Party Negotiations supported by rural women's organisations attests to the importance of this issue for women. One of the more significant achievements of women during the negotiations was the exclusion of a proposed clause in the Bill of Rights which would have given African customary law a limited immunity from challenges under the equality clause. An even more far-reaching exemption was sought by delegates of the traditional leaders at the negotiations.³⁷

The effects of these social and cultural constraints is arguably more pernicious as a result of the apparent neutrality of the state and the law. As Hester Lessard demonstrates, the striking down of legislation criminalizing abortion by the Supreme Court of Canada³⁸ did not guarantee women's access to reproductive services. Public authorities no longer relied on the coercive sanction of the criminal law to control women's reproductive choices. Instead, they were complicit in restricting women's access to safe abortions on demand through deference to medical expertise, community autonomy or through the imposition of "onerous but ostensibly neutral criteria for the delivery of abortion services."³⁹

³⁶Convention on the Elimination of All Forms of Discrimination against Women (1979), 1249 United Nations Treaty Series 13, article 2(f).

³⁷The outcome of this contest is a tension reflected in the text of the interim Constitution. Thus although the courts are required to apply indigenous law and the common law "subject to the fundamental rights contained in the Constitution," one of these fundamental rights is the right "to participate in the cultural life of his or her choice" (Constitutional Principle XIII; s.31). There is no explicit statement in the Constitution indicating that the rights of women to equality, dignity and security of the person enjoy precedence over the right to culture. Courts will have to resolve this tension through interpretation of the Constitution, particularly the general limitations clause (s.33). Constitutional recognition is also extended to traditional authorities and leaders (Chapter 11). See further in this regard: F. Kaganas and C. Murray, "Equality and Culture in South Africa's interim Constitution," *V The Oxford International Review* (1994), 17.

³⁸*R v. Morgenthaler* (1988) 1 S.C.R. 30.

³⁹H. Lessard, "Creation Stories: Social Rights and Canada's Social Contract" in J. Bakan and D. Schneiderman (eds) *Social Justice and the Constitution: Perspectives on a Social Union for Canada*, Carleton University Press, Ottawa (1992). Lessard argues that it is essential that a social rights strategy

A constitutionally-sanctioned duty on the state to ensure equal access by all to basic health care, education and housing is therefore necessary to prevent the enjoyment of these benefits by women being undermined by powerful social forces. State involvement is more likely to be secured through such a constitutional duty than by relegating the delivery of essential social rights solely to political and social processes. This is particularly the case in relation to those groups who are marginalised from effective participation in political decision-making.

Internationally accepted social and economic rights have a vital role to play in this context.⁴⁰ These rights place an obligation on the state to regulate the economic and social processes in such a way that the basic needs of the most vulnerable sectors of the population are met.⁴¹ For the majority of women in South Africa who lack access to the formal sources of political power, the significance of these rights lies in ensuring that the state not abdicate responsibility for their socio-economic development in the period of transition.

V. Deconstructing and Reconstituting the Rights Dialogue

The deconstruction of the public/private divide in political discourse is a critical project for feminists. It should, therefore, be of concern to South African women that our Constitution does not implicitly reproduce this divide through separating civil and political

is located in the context of a broader challenge to the "ostensibly neutral constitutional structures which enforce a system of privileging and marginalization" and reflect underlying assumptions concerning "the naturalization of globalized markets."

⁴⁰Particularly relevant in this regard is the International Covenant on Economic, Social and Cultural Rights (1966) 999 United Nations Treaty Series 171. This Covenant was signed on behalf of South Africa on 3 October 1994, but has not yet been ratified. The wide number of ratifications this Covenant has received in the international community supports the contention that the rights it protects are "universally accepted" for the purposes of Constitutional Principle II, *supra* note 1.

⁴¹General Comment No. 3 adopted by the UN Committee on Economic, Social and Cultural Rights on the nature of States parties obligations under the Covenant (Fifth session, 1990), UN doc. E/1991/23, para. 12. In its General Comment on the social rights of persons with disabilities, the Committee on Economic, Social and Cultural Rights made the following observations: "In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities." General Comment No. 5 (Eleventh session, 1994), UN doc. E/C.12/1994/13.

rights from economic and social rights, according the latter a lesser form of protection and hence a devalued status. This is important at both a symbolic and practical level. State responsibility for human rights violations in the "private sphere" will not be accepted on equal terms to the "public sphere" with the exclusion of social rights from constitutional protection. In the words of Celina Romany:

The patriarchal narrative that separates the economic and social framework from the political and civil generates a story of "civility" and citizenship that neglects the socioeconomic structures in which women's subordination occurs. It informs the public and private demarcation of social spheres. It creates a coerced exile of the experiences of women in the rights framework. This narrative must be the subject of a reconstituted dialogue that highlights the ideological nature of such constructions and that creates conditions for a reasoned construction of alternatives.⁴²

Deconstructing and reconstituting the dialogue of human rights requires a recognition of the interdependency of the political, social and cultural dimensions of human welfare. This recognition should extend beyond rhetoric and be reflected in the practice of equal protection to civil, political, economic, social, and cultural rights.⁴³

The first step toward constitutional protection of social rights is the realization that social rights do not impose legal obligations of a qualitatively different nature from civil and political rights. All rights involve a combination of positive and negative state action, and a commitment of resources. For example, the right of freedom of expression in the South African Constitution includes a positive obligation on the state to regulate all media under its control "in a manner which ensures impartiality and the expression of a diversity of opinion" (s.15.2). Conversely, the UN Committee on Economic,

⁴²C. Romany, "State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law" in R.J. Cook (ed) *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia (1994), 85, 109.

⁴³This was affirmed in the Vienna Declaration and Programme of Action adopted by consensus by the 171 states participating in the UN World Conference on Human Rights (June 1993), Part I, para. 5.

Social and Cultural Rights has interpreted the right to adequate housing in article 11 of the International Covenant on Economic, Social and Cultural Rights to include an obligation to refrain from forced evictions "except in the most exceptional circumstances and in accordance with the relevant principles of international law."⁴⁴

More significantly, it involves an understanding that social rights, as is the case with civil and political rights, do not primarily create an entitlement to the delivery of a commodity on demand from the state. In the context of the Constitution, they entail a right of judicial review of government action or inaction. Thus, the constitutional right to basic education contained in section 32 of the interim Constitution requires positive legislative and executive action to give effect to the right. The legislature has a large measure of discretion regarding the most appropriate methods of realising this right. However, in the event of a failure to act, or action that is unreasonable and misdirected, a constitutional remedy exists. The burden of justification rests on the government to demonstrate that its acts or omissions are reasonable and appropriate given the constitutional commitment to these rights.⁴⁵ Furthermore, any withdrawal or reduction of social benefits conferred through legislation or administrative action and protected by the constitution would have to pass the test of the general limitations clause in the South African constitution, section 33. This clause provides that the fundamental rights in the constitution may be limited by law of general application only to the extent that it is reasonable, justifiable and, in some cases, necessary in an "open and democratic society based on freedom and equality." Moreover, such limitations may not "negate the essential content of the right in question."

There are important parallels in this regard with the nature of the states parties' obligations under the International Covenant on

⁴⁴General Comment No. 4 (Sixth session, 1991), UN doc. E/1992/23, para. 18.

⁴⁵E. Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" 8 *South African Journal of Human Rights* (1992), 464, 472; For a comprehensive discussion of the justiciability of social rights, and the institutional capacity of the courts and international tribunals to deal with them, see: C. Scott and P. Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution," vol. 141, no. 1 *University of Pennsylvania Law Review* (1992), 1; M. Scheinin, "Economic and Social Rights as Legal Rights" in A. Eide, C. Krause and A. Rosas (eds) *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff Publishers, Dordrecht (1993) 41.

Economic, Social and Cultural Rights. Thus the Committee on Economic, Social and Cultural Rights has held that "any deliberate retrogressive measures...would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."⁴⁶

If social rights are conceptualised and formulated in this manner, they create a dynamic relationship between the legislative, executive and judicial organs of government, and between government and civil society. There is scope for political debate on the most appropriate methods of implementation of social and economic rights. It requires Parliament to be the main initiators of policy and legislation to give effect to the rights while at the same time increasing accountability where the fundamental social and economic welfare of citizens are at stake. Finally, social rights send a constitutional signal that all South Africans are entitled to participate in the formulation and implementation of policies affecting their social and economic welfare.

In these ways social rights enhance the potential for democratic participation, especially by disadvantaged groups in society. The inclusion of social rights in the final Constitution is a strategy for the attainment of effective equality for women in South Africa which cannot be neglected.

⁴⁶General Comment No. 3 on the nature of the obligations imposed by article 2 (1) of the Covenant, *supra* note 41.