SESSION 6: DELIVERING EQUALITY AND NON-DISCRIMINATION

By: Nikki Naylor

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A. INTRODUCTION

“[E]ach of us is as intimately attached to the soil of this beautiful country as are the famous jacaranda trees of Pretoria and the mimosa trees of the bushveld…a rainbow nation at peace with itself and the world.”

– Nelson Mandela: First speech as President of S.A.

B. BUILDING THE RAINBOW NATION: THE POLITICS BEHIND THE POLITICS OF A BILL OF RIGHTS

1. Emerging from the dark apartheid years

South Africa has emerged from a dark chapter in our history that saw race, culture, gender, religion and the quest for development undermined by race within an apartheid system. The transition to democracy was largely shaped by an extended process of negotiations involving national political actors – the African National Congress (ANC) and the National Party (NP) – during the early 1990s. This moment was crystallised in an Interim Constitution and in subsequent general elections in 1994, followed by the Constitution of the Republic of South Africa in 1996 (hereinafter the “Constitution”). At this historic moment, the new South African Government inherited a number of interrelated challenges. These challenges comprised deep inequality and poverty rooted in the national economy, pervasive racism in the consciousness of South Africans, and minority ideologies claiming rights of self-determination, which threatened to translate into separatist and irredentist movements. Some authors describe the transition process as follows: “the 1996 Constitution was fashioned on the field of political battle, in cross fires produced by forces of transformation and forces of preservation, by notions of constructing new identities and of safeguarding enduring identities.”

Cyril Ramaphosa points out that South Africans discovered over the negotiation period that entering negotiations does not necessarily mean the absence of conflict, violence or hardship. “It does not mean the end of bitterness and racial division. Negotiations were merely another terrain of struggle, which, combined with other elements of struggle, succeeded in bringing about an end to apartheid. Negotiations, by their very nature, are about opposing groups squaring up to find a broadly acceptable solution to their common problem. A democratic constitution was not the objective of all parties to these negotiations. If it had been,

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2 Term coined by Archbishop Desmond Tutu to describe post-apartheid South Africa and was elaborated upon by President Nelson Mandela during his first term in office. The term was intended to encapsulate the unity of multi-culturalism and the coming-together of people of many different races, in a country once identified with the strict division of along racial lines.

then the negotiation process would have been a lot swifter, a lot less arduous and a lot less painful. Contrary to what they have proclaimed, the apartheid government had to be dragged kicking and screaming into the democratic South Africa. The smiles and mutual congratulation which accompanied the adoption of the new Constitution masked a bitter and protracted struggle for political ascendancy which went back generations. This is an important point that has often been lost in the rhetoric of reconciliation and nation-building in South Africa and one which remains relevant in debates to measure just how truly multi-cultural or equal a society we are.

As highlighted by Ramaphosa the Constitution-making process represented an historic compromise between the white regime and liberation movements and in examining the manner in which many constitutional challenges were resolved one must have regard to and appreciate this compromise and the constraints it created, in particular in relation to debates on land reform, the economy, the judiciary, justice, accountability and governance. Since 1994 the construction of a post-democratic South Africa has been done constitutionally, as a “national project,” geared toward realizing Mandela’s dream of forging a truly vibrant sense of nationhood in the form of the ‘rainbow nation,’ which incorporates and respects different genders, races, cultures and religions in the country. The challenges of diversity and multiculturalism have been addressed, primarily, in constitutional terms. This paper aims to examine how successful this rainbow-building project has been at a policy, jurisprudential and human rights level.

2. **Elements of the South African Rainbow Project**

The first striking post-democratic feature has been that of Constitutional sovereignty. Under the previous Constitution, governance was guided by parliamentary sovereignty that accorded the national executive and legislature supremacy over the judiciary. Today, the Constitutional Court bears this authority. Therefore, when the South African state, reflecting certain political interests, is called upon to be adjudicate on matters involving identity, equality or culture in constitutional terms it will be the judges of this Court, rather than the government, who will adjudicate and determine the matter.

The Preamble of the Constitution proclaims that “South Africa belongs to all who live in it, united in our diversity” and the founding values reflect a commitment to one sovereign democratic state founded on values of equality, human dignity and the advancement of human rights and freedoms. These values have been reflected in the Constitution and its amendments. The principles of non-racialism, non-sexism and democracy have been enshrined in the Constitution and its amendments, and these principles have been reflected in the legal system and in the political system.

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are the corner-stones of the Constitution, which is regarded as a transformative Constitution. The Bill of Rights furthermore asserts that the state “must respect, protect, promote and fulfil” the rights in the Bill of Rights.\(^5\) The duty to respect falls within the conception of the state’s obligation to refrain from interfering with rights of individuals. The obligation to protect requires the state to protect individuals from undue interference with the exercise of rights. The obligation to promote and fulfil brings the state’s obligation within the realm of positive fulfilment.

### 2.1 The heart of the Constitution

Equality, it has been held, lies at the heart of the Constitution and is one of its foundational values.\(^6\) The Constitution ascribes a particularly important role to equality, both as a good in itself and as a powerful tool of national reconciliation.\(^7\) It also bears in mind the historical significance of apartheid and the denial of rights in the explicit acknowledgement of this history and the need to redress its effects. In one of the first cases to be heard dealing with equality, the Constitutional Court placed the equality clause in context by stating that: “in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre.”\(^8\) This has been reaffirmed in many subsequent decisions, such as Minister of Finance \(v\) Van Heerdan where it was pronounced that the “achievement of equality goes to the bedrock of our constitutional architecture.”\(^9\) In the latter case it was also emphasised that the “achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which law must be tested for constitutional consonance.”\(^10\) Based on the aforegoing, it is readily apparent that equality is the central foundation and at the core of not only the Bill of Rights but informs all law in South Africa. This means that equality may be invoked by the courts even where the right is not invoked allowing substantive equality principles to form the lens through which application of the law takes place.\(^11\)

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\(^5\) Section 7(2).
\(^6\) National Coalition for Gay and Lesbian Equality \(v\) Minister of Home Affairs 1999 (3) SA 186J-187A. In Fraser \(v\) Children’s Court, Pretoria North 1997 (2) SA 261 (CC) it was similarly held that: “there can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is promised.” At para 20
\(^7\) S \(v\) Makwanyane & Another 1995 (3) SA 391 (CC) at para 155-156
\(^8\) President of the Republic of South Africa \(v\) Hugo 1997 (4) SA 1 (CC) at para 74
\(^9\) 2004 (6) SA 121 (CC) at para 22
\(^10\) Ibid
It is thus clear that post-apartheid South Africa has been founded on the notion of equality and the basic premise that all citizens regardless of race, class or gender should be treated equally. This general premise, however, leads one to the question, equal to whom or what? This philosophical question has been answered with reference to the sameness/difference debate or formal versus substantive equality approach. The Aristotelian concept of equality has been formulated to mean that like cases should be treated alike, and unlike cases should be treated differently in relation to such difference or likeness. Formal equality assumes that inequality is aberrant and that it can be eradicated simply by treating all individuals in exactly the same way. However, this conception has been criticized for reinforcing rather than redressing social disadvantage, as identical treatment may in a particular context result in inequality. Feminists, such as Minow, have pointed out that the meaning of equality is complicated and that formal legal equality does not bring about changes in the lived inequalities of women. In fact, “formal legal equality can disempower women from improving their circumstances.”

The right to equality contained in section 9 of the Bill of Rights contemplates both positive and negative aspects of equality. The right provides protection against unfair discrimination and requires positive measures that proactively address the problem of inequality. This is a critical component evidencing that the Bill of Rights embraces the notion of substantive equality, as opposed to formal equality, taking into account differing circumstances in order to ensure equality of outcome. The substantive equality approach, as developed by the Constitutional Court, requires the equality right to be applied in its social context, including the recognition of past and existing social, political and economic disparities and incorporates the value of human dignity. Substantive equality requires the Court to consider the content of the law, its purpose and its impact recognizing that treating all persons alike in a formal manner, in no way

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12 Mubangizi J: Too pregnant to work 2000 (16) SAJHR 690
15 Ibid 908-909. She envisages a more practical equality: “the struggle for gender equality is a struggle that must be waged at the level of assumptions and attitudes and of actual impact in the personal, social and economic lives of women.”
16 Formal equality means the sameness of treatment (the law must treat individuals in the same manner regardless of their circumstances).
17 Albertyn C, Kentridge J, Introducing the right to equality in the interim Constitution 1994 SAJHR 149
18 Jagwanth supra n 11 at 132
alters the pattern of historical inequality in the past. The Constitutional Court has emphasised that:

“[T]he desire for equality is not hope for the elimination of all differences… equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination of difference.”

In Harksen N.O v Lane, considered the locus classicus of equality jurisprudence, the Constitutional Court held that to assess whether discrimination has occurred it considers whether: (i) a provision differentiates between people and if so, whether rationally; (ii) the differentiation is direct or indirect on a listed ground; and (iii) whether it has the potential to impair human dignity. If yes, the court then assesses whether the discrimination is unfair and will focus primarily on the impact of the discrimination. Several factors are considered objectively:

- The position of the complainant’s in society and whether they suffered past disadvantage;
- The nature of the provision and purpose sought to be achieved (the consideration is whether the purpose is primarily directed at impairing the complainant’s dignity or primarily at achieving an important societal goal);
- Any other relevant factor which impairs the dignity of the complainant.

This test has been subsequently reaffirmed in the jurisprudence of the Court and has been codified into equality legislation. Later in this paper I critically analyze the Constitutional Court’s vacillating nature in handling issues of gender equality, in particular, to illustrate the difficulties and tensions inherent in legislating equality.

2.2 Ubuntu

Ubuntu is seen as one of the founding principles of the new South Africa, and is connected to the idea of an African Renaissance. The concept of ‘ubuntu’ has been used in the political sphere to emphasize the need for unity or consensus in decision-making, as well as the need for a suitably

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19 Chaskalson et al: Constitutional Law of South Africa (2001) at 14-4
20 National Coalition of Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC)
21 Ibid para 30; 132
22 1998 (1) SA 300 (CC)
23 Ibid para 54
24 Ibid para 51- 52
25 Loose translation: “A person is a person through other persons;” or “I am a human because I belong, I participate. I share. In essence, I am because you are.”
humanitarian ethic to inform those decisions. In 2007 Archbishop Desmond Tutu explained ‘ubuntu’ as follows:

“One of the sayings in our country is ubuntu - the essence of being human. Ubuntu speaks particularly about the fact that you can’t exist as a human being in isolation. It speaks about our interconnectedness. You can’t be human all by yourself, and when you have this quality - ubuntu - you are known for your generosity. We think of ourselves far too frequently as just individuals, separated from one another, whereas you are connected and what you do affects the whole world. When you do well, it spreads out; it is for the whole of humanity."

There are many who argue that the drafters of the Constitution failed to locate the Constitution on an indigenous moral foundation and a rootedness in local culture. The omission in the final Constitution to the value of African humanism embodied in the concept of ‘ubuntu’ is cited as proof of the Eurocentric nature of the Constitution. Reference to ‘ubuntu’ was contained in the 1993 Interim Constitution and was seen as a positive feature since it acknowledged that African tradition and values would inform the interpretation of an otherwise Eurocentric legal system. The post-amble of the 1993 Constitution stated in this regard that “...there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization.” The omission of ubuntu in the final Constitution of 1996 may therefore be interpreted (as has been done by some scholars) that the Constitution was de-Africanized in the re-drafting process with the cultural values of African people being devalued. Thus, according to Moosa, the desire to formulate a core legal system which encapsulates the multiple value systems in South Africa was not necessarily accomplished in the final Constitution.

It should, however, be noted [and Moosa fails to do so in his argument] that the Constitutional Court has read the concept of ‘ubuntu’ back into the Constitution. The power of the Court in this respect is unparalleled and the role the Court has played in its early days in terms of fleshing out what the Bill of Rights means and stands for in South Africa has been a powerful attestation to the role of the independent judiciary in a post-colonial, democratic society. In a major ruling abolishing the death penalty the

28 Ibid
29 Ibid
Constitutional Court in *S v Makwanyane* made reference to ubuntu as one of the values that informed the Bill of Rights. The court held that in the context of retribution in criminal law the Constitutional imperative which focussed on securing a “foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge” was of utmost importance. The Court then goes on to quote from the Interim Constitution’s reference to embracing ubuntu and not victimization within not only the field of political reconciliation but also principles of human dignity and morality in matters of criminal law. According to Justice Mokgoro of the Constitutional Court, ubuntu translates as humanness, personhood and morality whilst enveloping the key value of group solidarity. It also serves “as the basis for a morality of co-operation, compassion, community spiritedness and concern for the interests of the collective. Its spirit emphasizes respect for human dignity making a shift from confrontation to conciliation.”

More recently in the case of *Dikoko* in the Constitutional Court two judges (Justice Sachs and Justice Mokgoro) relied on ubuntu to argue that what was at stake in the violation of one’s reputation was not money but rather reconciliation of the individuals involved. Again, the link between ubuntu, forgiveness and reconciliation has been emphasized by the Court. It may therefore be argued that the Constitutional Court has played a major role in extrapolating the positive contribution of indigenous and organic values, such as ubuntu, in the overall legal system. However, Bekker argues that after the initial interest that was invoked by the decision in *Makwanyane*, the concept of ubuntu as a constitutional value seems to have withered away to a historical artefact of a newly born democracy whilst being persistently attacked as supposedly untranslatable into a neat judicial principle of constitutional law.

### 2.3 The Truth and Reconciliation Commission (“TRC”)

Closely related to the ubuntu concept was the Truth and Reconciliation Commission, which can similarly be identified as part and parcel of a nation-building exercise on the part of the State. The TRC was brought into being in 1995 in order for the country to confront and deal with crimes of the past.
Amongst the goals of the TRC was the uncovering of past human rights violations, issuing political amnesties, giving victims an opportunity to tell their stories. In addition, and more importantly for purposes of this paper, the underlying mandate of the TRC was nation-building and unification. This was done as a two-fold process: through gathering and documenting memories into one institutionalized national narrative and secondly making room for a uniform identity of ‘victim’ as a common ground for the new South Africa.\(^{35}\) This would then tie in with theories of nationalism giving weight to the role of memory and forgetting in order to forge a new nationalist consciousness. The TRC seemed therefore to subscribe to the notion that “the essence of a nation is that all individuals have many things in common, and also that they have forgotten many things” and from there the potential for a new forged identity emerges.\(^{36}\) Christie has argued that the role of nation building, identity and the sharing of collective memory was crucial if the new South Africa was to succeed in goals of peace and reconciliation.\(^{37}\) However, the process of the TRC has been widely critiqued (and applauded) in a number of respects. For purposes of this paper I will only highlight a few pertinent criticisms in so far as the impact on where we are today in South Africa. This in no way undermines the positive role that the TRC has played in the country in terms of reconciliation, albeit at a superficial level.

Firstly, the narrative of the TRC that was constructed was one of nationwide pain – a narrative that was used to construe all South Africans (black and white) as victims and thereby form the basis of a new identity. The TRC played a role in this in terms of its narrow focus on individual murders and kidnapping and torture as opposed to looking at the pervasive human rights violations perpetrated by the system and the apartheid state. Mass forced removals, pass laws, Bantusans etc were all shifted outside of the ambit of the TRC. Mamdani\(^{38}\) points out that this narrow mandate blinded the Commission to the experiences of a minority – perpetrators, state agents and victims / political activists. Responsibility for apartheid was thus placed in the hands of a few select foot soldiers and some members of the elite apartheid state. Most significant was the absence of corporations that had aided and abetted the apartheid government by providing arms and ammunition to the armed forces, fuel and military technology to the armed forces.


\(^{36}\) Renan E “What is a nation?” Nation and Narration London, Routledge (1990) at p. 11


forces and the banks that provided the funds to make these purchases are culpable of enabling the apartheid government to commit acts of gross human rights violations. Today civil society has launched a class action in the US in order to attempt to obtain redress from corporations who may be said to have aided and abetted the apartheid government in terms of human rights violations.\textsuperscript{39}

This silence around the stories of the masses has been a contributing factor in the persistent social amnesia and denial of responsibility by the vast majority of South African whites. In many respects the TRC prevented the ascription of blame to the collective white population and allowed the white population to collectively characterize themselves as victims of a deep dark evil called apartheid for whom no-one was responsible. Surprisingly, this has never been seen as a critique of the TRC and has been hailed as its benefit in terms of bridging divides so that the majority of South Africans could forge a united and common identity. In my view it was a major shortcoming of the entire process. Victims of apartheid became victims of the past, construed as widely as possible in order to pave a path of nation-building.

In the final analysis I would agree with Hein Marais in his commentary that “the role played by the TRC in creating a homogenized internal identity for South Africa has in fact led one to question whether the instrument that was intended to build one unified nation has not merely legitimised the formation of increasingly deracialized insiders and persistently black outsiders.” This uniform identity has been represented back to the nation in the form of a myth of itself, i.e. a rainbow nation living in internal peace.\textsuperscript{40}

\subsection*{2.3 Multiculturalism on the agenda}

South Africa continues to grapple with the demands of a multicultural society. Multiculturalism has its own significant South African meaning as an object of policy. Multiculturalism, as it is used in this paper, is as per the definition by Kallen\textsuperscript{41} who sees multiculturalism in three distinct senses: (i) as a description of the state of cultural diversity in society; (ii) as an ideology aimed at legitimising the incorporation of diversity in the general structure of society; or (iii) as public policy designed to create national unity in diversity. The latter is perhaps the most relevant in terms of South Africa’s past and current status in terms of democratic rule. In this sense ‘state nation policies’ articulate the need to create a sense of belonging and patriotism (in this case

\begin{footnotesize}
\textsuperscript{39} For more detail on the Khulumani case – \url{www.khulumani.net}
\textsuperscript{40} Vahlji N supra n 35
\end{footnotesize}
the Bill of Rights and Constitution) while simultaneously creating institutional safeguards for respecting and protecting politically salient socio-cultural diversities.

How states respond to demands relating to culture and diversity ultimately determines the basis on which groups construct their relationship with the State, impacts on the quality of life and the development agendas of communities and invariably goes to the nature and stability of the democracy building process. The sense of ‘we’, of belonging and a shared patriotism will certainly flounder when and if the state is unreceptive to the demands that increasingly emerge in multicultural societies. \(^{42}\) Many commentators have argued that the Constitutional drafting process and subsequent analysis by the Constitutional Court of the equality provision in the light of African customary law highlights the manner in which South Africa has attempted to grapple with this notion. In this regard, the rights to equality, culture, religion and language – though recognised in the Constitution may not be exercised in a manner inconsistent with any provision in the Bill of Rights. This has resulted in the Constitution having to be tolerant of ‘multiple moral centres’ subject to ultimate scrutiny by the Constitutional Court. \(^{43}\) The challenge has been articulated by Justice Sachs of the Constitutional Court in the following terms: “The Constitution should be seen as providing a bridge to accomplish in a principled yet emphatic manner, the difficult passage from State protection of minority privileges, to State acknowledgement and support of minority rights. The objective should not be to set the equality principle against that of cultural diversity but rather to harmonise the two in the interests of both. Democracy in a pluralist society should accordingly not mean the end of cultural diversity, but rather its guarantee, accomplished on the secure basis of justice and equality.” \(^{44}\)

The difficulties of harmonising the two principles comes to the fore most explicitly in the realm of African customary law. A concern has been raised by African customary law scholars such as Nhlapo \(^{45}\) who argues that multiculturalism will only work when it is accompanied by a commitment of genuine tolerance to difference, as required by notions of substantive

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\(^{43}\) Ibid

\(^{44}\) Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995 1996 (3) SA 165 (CC) at para 52 (dissenting judgment)

equality. If, however, it manifests itself as “implacable resistance to living with any cultural variation that is unfamiliar to the received value system” then it would simply be tantamount to a defence of privilege – the privilege of the elites.46 He goes on to caution that in South Africa we either have a genuine attempt at making multiculturalism work (a process requiring genuine tolerance of difference) or an implacable resistance to living with any cultural variation that is unfamiliar to the received value system. Thus, even as we applaud the attribute of culture that we call dynamic, we may be fixated on a particular result of such dynamism, i.e. we may expect the end result to be progressive and conform to some (Western normative) ideal that we have in mind. For instance we may be happy to leave indigenous cultures alone, secure in the knowledge that slowly they will become more like us.47 The tensions in the context of culture, African customary law, xenophobia toward black Africans from outside South Africa and equality for women have illustrated this point and will be discussed later in this paper. Suffice at this juncture to highlight the tensions.

In the final analysis any approach to multiculturalism must take into account the history of apartheid and an acknowledgment that special measures will be required in order to achieve substantive equality as opposed to formal equality for the various claims that may emerge from a genuine commitment to multiculturalism.48 In practice this means that if there is a real commitment to creating a healthy multicultural society we must take into account context and prevailing environment when devising policies and programs to advance multiculturalism.

4. The darker, ominous side of the Rainbow Nation

Many commentators have critiqued the notion of the ‘rainbow nation’. Jeremy Cronin, for example, cautions as follows: "identity formation as well as the myth of the ‘rainbow nation’ and its performative intention have served to discursively create a national identity that has been top-down in its constitution and implementation. As a result, true reconciliation has been foregone in place of a simplified and somewhat candy-coated myth of peace that has served to reconcile those on the inside whilst pitting them against those on the outside. Allowing ourselves to sink into a smug rainbowism will prove to be a terrible betrayal of the possibilities for real transformation, real reconciliation, and real national unity that are still at play in our contemporary South African reality."49

46 Ibid
48 Kollapen, supra n 42
It may be argued that South Africa has consolidated an identity of “corporate multiculturalism,” that is, the acceptance of certain rights that flow from the recognition of cultural differences, but not those rights that would challenge or upset entrenched systems of economic power or lead to substantive equality. The commodification of a corporatist reconciliation has been seen, most commonly in the media industry where there is a concerted effort to capitalize on the “feel good” sentiment of the rainbow nation myth. Today’s youth are fed a steady stream of advertisements portraying a racially mixed and mingling South Africa. But this steady diet of candy-coated national unity by a demographic who has never adequately engaged with the historical legacy of apartheid has meant that youth do not see the relevance of the past, or of their racial identity, in terms of who they are and their life circumstances.\textsuperscript{51}

Vahlji argues that in many ways the application of the thin bandage of ‘rainbow nation reconciliation’ has merely allowed the wounds of the past to fester beneath the surface. Racially-motivated incidents today are treated as deviant extremes, isolated from their context in a broader spectrum of problematic relations.\textsuperscript{52} In the same way that one would be hard pressed to find a South African who voted for the National Party in the past, it is equally improbable that any South African would openly admit the influence of a racialised past on their own attitudes and behaviour. This is not to say that the demonization of racism is not a progression or that a common moral denunciation of such attitudes is not positive. However, when coupled with a failure to address the legacy of historical racism, an unwillingness to see racism in its everyday manifestations means, ironically, that this legacy is only preserved through a premature celebration of reconciliation.

Women’s rights activists\textsuperscript{53} have similarly argued that there appears to be a darker, more malevolent side to the rainbow nation. Whilst South Africa has the most progressive constitutional and legislative provisions in relation to protecting women from violence, such as the Domestic Violence Act, Sexual Offences Act and the Bill of Rights itself providing for the right to be free from all forms of violence, the reality is that levels of violence against women have reached endemic proportions with statistics leading one to

\textsuperscript{52} Ibid
\textsuperscript{53} Combrinck H: The Dark Side of the Rainbow in Murray C & O’Sullivan M (eds.) \textit{Advancing Women’s Rights} Juta & Co, Cape Town, 2005 at 171-199
conclude that despite progressive provisions there exists a dichotomy between the relatively progressive nature of the formal legal dispensation and the practical realities experienced by women on a day-to-day basis. A study released by the Medical Research Council (MRC) in June 2009 showed that of 1,738 men interviewed 27.6 percent had perpetrated the rape of a woman or girl.55

One of South Africa’s peculiarities is that legally-speaking, it is one of only seven countries in the world that allows same-sex marriage; its progressive Constitution and laws were intended to protect lesbian, gay, bisexual, transgender and intersex (“LGBTI”) people but fear and violence reign in the LGBTI community with an increase, in particular, of the rape and killing of black lesbian women in South Africa. In the last year there have been over 30 cases across South Africa that involve rape, assault and murder of LGBTI people.56 The rise of violence against minority groups or “outsiders” and a process of “othering” has been more rife than ever before in South Africa. It is not only evident in the raping and killing of black lesbian South African women but also in the rise of violent xenophobic attacks on African immigrants present in South Africa.

On May 11 2008 the township of Alexandra in Gauteng, South Africa saw the eruption of xenophobic attacks and violence directed primarily at nationals from other African States including Mozambique, Zimbabwe, the Democratic Republic of Congo and Somalia. This xenophobic violence was committed by South Africans against foreign nationals and quickly spread to other locations within the province and then to other provinces around the country. The violence resulted in 62 deaths, hundreds being injured and over one hundred thousand being displaced in the worst violence South Africa has experienced since 1994 elections.

Since the violence, very little has been done to prevent future attacks from taking place. It should also be noted that this was not the first time attacks of this nature have taken place with reported attacks having occurred since 1994, but not on as large a scale as the violence in 2008. Threats of violence against non-nationals in some poorer communities are common and attacks on non-nationals traders and business owners continue across the country. South Africa’s progress report to the African Peer Review

54 Ibid
56 Statistic from the 07-07-07 Campaign (available online at http://www.womensnet.org.za/campaign/07-07-07-campapign-against-hate-crimes)
Mechanism in January 2009 provides a shallow analysis of the causes of the xenophobic violence and provides no insights as to the mechanisms it is to put in place to prevent further violence.\textsuperscript{57}

The scale and intensity of the violence in May 2008 was unusual and caused widespread shock. Inquiries by human rights organizations have highlighted, as contributing factors, strong xenophobic sentiments amongst the South African population; feelings of resentment towards and competition with foreigners over jobs, housing and social services, combined with anger and frustration over the slow pace of delivery of these services and the persistence of high unemployment levels particularly amongst younger people; perceptions of corruption amongst the police service and Department of Home Affairs officials in relation to refugees and migrants, and a lack of effective policies on migration.

From all of the aforegoing it is apparent that the process of nation-building on the one hand has led to a process of “othering,” a process of creating “them” and “us” in terms of non-South Africans and minority groups, such as gays and lesbians and women. This shows that sometimes strong nationalist sentiment and rhetoric can be dangerous when feeding into a myth of a collective personality, creating expectations in the minds of citizens and casting non-citizens on the far outer realm of society.\textsuperscript{58} It can also create difficulty in accepting difference and plurality and creating boundaries separating kin and alien. The complete lack of peace, love, ubuntu and an embracing of diversity are starkly apparent in the violent attacks of recent years in South Africa and can be contrasted with the mythical notion of a rainbow nation at peace with itself.

\section*{C. IMPLEMENTING EQUALITY IN THE RAINBOW NATION: THE ROLE OF INSTITUTIONS AND THE JUDICIARY}
\subsection*{1. The Role of the Constitutional Court: An analysis of its equality jurisprudence}
In this section I address the vacillating nature of the Constitutional Court when dealing with gender equality in South Africa and the role that a judiciary can play in developing notions of equality. Having placed our faith in the judiciary and the rule of law and more importantly in institutions such as the Constitutional Court it is important to analyze the role that this Court

\textsuperscript{57} Submission by the Consortium for Refugees and Migrants in South Africa (CoRMSA) and Lawyers for Human Rights (LHR) to the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants at the 45th Ordinary Session of the African Commission on Human and People’s Rights, May 2009, pg 1
can play in terms of advancing an agenda of equality and also stifling it. In particular, I wish to contrast, from a feminist perspective, the approach of the Court when dealing with two different cases, one involving women as mothers in the Hugo judgment\textsuperscript{59} and women as sex workers in the Jordan decision\textsuperscript{60} (hereinafter referred to as Hugo and Jordan respectively). Because of the limitations in terms of this paper it is not possible to exhaustively examine all equality jurisprudence and I therefore have to concede in having selected two extremities in order to make a few salient points on the role of the Court and the judiciary in a multicultural society. The approach of the Court is critically analyzed in relation to whether it has resulted in real relief for women or merely a reinforcement of stereotypical notions of women living in a patriarchal state. In conclusion, it is argued that the two decisions cannot be reconciled thereby highlighting the danger of legislating equality and nation-building and relying in all instances on a supreme Constitutional Court.

In the Hugo decision\textsuperscript{61} the Court was tasked with assessing the constitutionality of a presidential pardon granted to women prisoners with children younger than 12. The Court had to assess whether the provision discriminated against male prisoners, such as Mr. Hugo, who had a child under the age of 12. It was common cause that but for the fact that he was a father, not a mother, he would have qualified for the pardon. It was argued that Mr. Hugo was unfairly discriminated against.\textsuperscript{62} The Constitutional Court per Goldstone J, for the majority, found the primary motivation of the President was concern for the best interests of the child who was being deprived of “the nurturing and care which … mothers would ordinarily have provided.”\textsuperscript{63} The state relied on the “special role” that mother’s play and argued that targeting mothers, as a special category, was reasonable and rationally explicable, based on the generally accepted notion that children bond with their mothers at an early age.\textsuperscript{64}

The majority of the Court accepted that there was discrimination and then considered the fairness thereof. In doing so, the assertion that mothers bear more responsibility for child rearing in society was accepted as fact. However, the Court finds that this cannot be a basis for fair discrimination\textsuperscript{65} and thus adopts a substantive equality approach recognizing that equality

\begin{thebibliography}{9}
\bibitem{} President of South Africa v Hugo 1997 (4) SA 1 (CC)
\bibitem{} S v Jordan & Others 2002 (6) SA 642 (CC)
\bibitem{} Hugo, supra n 59
\bibitem{} Ibid summarised from para 1-4; 32-33
\bibitem{} Ibid para 36
\bibitem{} Ibid
\bibitem{} Ibid para 37, 38
\end{thebibliography}
cannot be achieved by insisting upon identical treatment in all circumstances. The Court found that whilst fathers were deprived of early release they did not have any legal entitlement to presidential pardon and since the impact of the pardon advantaged mothers and children, as previously disadvantaged vulnerable groups in society, the discrimination was fair.

Conversely, the minority decision finds the pardon provisions amount to unfair discrimination. Whilst Kriegler J concedes that the act is praiseworthy, he finds that it cannot be upheld on generalized assumptions of parental roles, which stereotype women as mothers and nurturers, as this was a “relic and feature of patriarchy” and could never amount to a justification for discrimination. Furthermore, the Act’s main purpose was not to remedy past discrimination, but rather the interests of children and not women (women, in their own right, were not being granted pardon, only in their capacity as nurturers). Insofar as impact was concerned Kriegler J finds that:

“[T]he benefits in this case are to a small group of women – the 440 released from prison – and the detriment is to all South African women who must continue to labour under the social view that their place is in the home…In truth there is no advantage to women qua women in the President’s conduct, merely a favour to perceived child minders. On the other hand there are decided disadvantages to womankind in general in perpetuating perceptions foundational to paternalistic attitudes…”

Whilst one may criticize the judgment for its perpetuation of the patriarchal standard, such analysis is devoid of any regard for the real lives of women in South Africa. From this perspective it may be argued that the majority attempted to base the finding on the realities of South African mothers. But does this answer the concern that the decision only benefits 440 women and disadvantages an entire population of women? In answering this question it is important to note that freeing women from childrearing duties will not in itself eliminate discrimination in other spheres of women’s lives. Allocating women as being solely responsible for childrearing certainly contributes to women’s societal powerlessness but this is only one component of the total “power picture.”

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66 It is beyond the scope of this essay to consider the ramifications of grouping women and children together.
67 Hugo, para 41, 46, 47
68 Ibid para 73, 77, 80
69 Ibid para 81
70 Ibid para 83
71 Ibid 23
Thus, focusing on different treatment can be beneficial but also dangerous to women. However, this does not mean one should discard “difference” or substantive equality, as substantive comparisons recognizing impact pose fewer of the dangers that abstract Aristotelian comparisons do. Rather the contextual nature of equality is its strength since “what it seeks is always real, because it is real for someone.”\textsuperscript{72} Albertyn\textsuperscript{73} (correctly it is submitted) argues that the focus should be the actual lived lives of women and not an abstract concept of identical treatment.

In the case of Jordan\textsuperscript{74} the Constitutional Court was faced with a constitutional challenge to the Sexual Offences Act,\textsuperscript{75} which criminalises providing sex for reward (sex work) and brothel keeping. The court a quo declared the provision criminalizing sex work unconstitutional and this declaration of invalidity was referred to the Constitutional Court for confirmation.\textsuperscript{76} For present purposes I focus only on the aspect of the decision dealing with whether criminalization of sex work amounts to gender discrimination.\textsuperscript{77} The majority found criminalization of sex work and brothel keeping was consistent with the Constitution. It had been argued that since the Act criminalized the sex worker only, not the customer, this impacted on women, as sex workers and amounted to gender discrimination. Ncgobo J, for the majority, relied on the gender neutrality of the provision in the Act in that it penalized “any person” meaning both male and female prostitutes.\textsuperscript{78} No direct or indirect discrimination was found and it was held to be legitimate for the Legislature to single out the prostitute, as repeat offender, rather than the customer.\textsuperscript{79} Ncgobo J continues:

“And if there is discrimination, such discrimination can hardly be said to be unfair. The Act pursues an important and legitimate constitutional purpose, namely, to outlaw commercial sex...Gender is not a differentiating factor...In the circumstances any discrimination resulting from the prostitute and customer being dealt with [differently] cannot be said to be unfair. If the public sees the recipient of reward as being more to blame than the client, ... that is a social attitude and not the result of law. The stigma that attaches to them attaches to them not by virtue of their gender but by virtue of the

\textsuperscript{72} MacKinnon C: Reflections on Sex Equality under Law 100 Yale Law Journal 1281 (1991) at 1326
\textsuperscript{73} Albertyn C & Goldblatt B: Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality 1998 14 SAJHR 248 at 252
\textsuperscript{74} Jordan, above n 58
\textsuperscript{75} Act 23 of 1957
\textsuperscript{76} Summary of para’s 34-38
\textsuperscript{77} The judgment deals with other allegations re: free economic activity, security of the person, dignity and privacy, not considered here.
\textsuperscript{78} Jordan, para 9
\textsuperscript{79} Ibid para 10
conduct they engage in…by engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community, thus undermining their status and becoming vulnerable…I am not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes…”

These comments are problematic since the Court fails to contextualise women, as sex workers and vulnerable members of a previously disadvantaged group, worthy of protection. The court reverts to a formalistic Aristotelian conception of equality failing to deal with direct / indirect discrimination or the context of a society plagued by poverty, unemployment and violence against women. The majority also fails to see that the stigma attaching to sex workers does not only arise from social attitudes but that law plays a significant role in reinforcing stigmatization and gender stereotypes.

By contrast, the minority dissenting judgment of O’Regan and Sachs J examines reasons why women engage in sex work, the discrimination they face as a group and the double standards of the criminal justice system in terms of who to punish. The judges consider that “the effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping which is itself in conflict with the principle of gender equality.” In dealing with the fact that the sex worker is regarded as primary offender the minority, correctly, finds that:

“The female prostitute has been the social outcast, the male patron has been accepted or ignored. She is visible and denounced, her existence tainted by her activity. He is faceless, a mere ingredient in her offence rather than a criminal in his own right, who returns to respectability after the encounter. In terms of the sexual double standards prevalent in our society, he has often been regarded either as having given in to temptation, or as having done the sort of thing that men do. Thus, a man visiting a prostitute is not considered by many to have acted in a morally reprehensible fashion. A woman who is a prostitute is considered by most to be beyond pale. The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women…To the extent therefore that prostitutes are directly criminally liable…while customers, if liable at all, are only indirectly criminally liable, the harmful social prejudices against women are reflected and reinforced. Although the difference may on its face appear to be a difference in form, it is in our view a difference of substance, that stems from and perpetuates gender stereotypes in a manner which causes discrimination [and] such

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80 Ibid para 15, 16, 17
81 As highlighted by minority at para 72
82 Jordan para 60
discrimination, therefore, has the potential to impair the fundamental human dignity and personhood of women.”

It is apparent that gender laws that govern sexuality and their interpretation by the highest Court of the land are being built around a system of rules directed towards women in either their procreative (mothering) or perverse (sex work) capacities. Society has many beliefs about sex workers but generally these are preconceived on the notion of the “quintessential bad girl” whereby good girls meet men’s need for nurturers/mothers and bad girls meet men’s needs for sexual objects. This powerful good-girl / bad-girl myth means that men differentiate between women to be respected and protected and women whom they can fuck with carefree abandon. The respected woman represents the mother, wife or lover and the sex worker is placed in direct opposition to her by being categorized as “whore, tramp or slut”. Within this paradigm all women are seen to exist to serve men, either as nurturer or sex worker, with norms of behavior being judged in terms of chastity or promiscuity. Just as society places women along the good girl / bad girl continuum, so too the law and in this case the Constitutional Court has perpetuated the dynamic which can be illustrated by having regard to the Court’s differential manner of treating “good” women, as worthy of protection, in the Hugo case and “bad” women as not worthy, in the Jordan case.

Whereas in the Hugo case one dealt with women who were similarly convicted criminals, of lower social standing in the eyes of the community and members of a vulnerable, previously disadvantaged group, the Court was able to render such women worthy of protection by virtue of their nurturing abilities. In a similar context, albeit the “deviant immoral whore,” the Court is unable to make the substantive equality leap it did with ease in Hugo. No mention is made of disproportionate impact, context, vulnerability or dignity of the sex worker. Whereas the Court has at all times referred to the centrality of dignity to any enquiry in relation to discrimination, in the context of the deviant sex worker, this analysis is blatantly absent.

I highlight these two very different judgments from the same Court to point out a number of things in relation to the role of the Constitutional Court in developing equality. Firstly, we may safely conclude that in the sphere of

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83 Jordan para 64, 65
84 I refer to sex workers as women but recognise that male sex workers also operate.
86 Ibid 38
87 Ibid 39, 42
88 S v Makwanyane 1995 (3) SA 391 (CC) para 328
equality it is wrong to assume that a standard expressed as an ungendered norm (neither preferencing women or men) will result in legal equality. By the same token, preferencing women will not always further the goal of substantive equality. In furthering the goal of substantive equality the basis for providing women with “special protection” should be scrutinized in order to ensure that the rationale meets the constitutional standard of eradicating gender stereotypes and not perpetuating sexist notions. Furthermore, in dealing with the principle of difference it is useful to “assess the specificity of every individual in their own particular situation, rather than try to make them fit an abstract universal model of subjectivity/personhood.”

In my view the Constitutional Court in Hugo and Jordan has, to use Cockrell’s critique, merely paid lip-service to the concept of substantive equality and has struggled to fully internalize the substantive vision of the law. Ultimately, in my opinion, the future of equality jurisprudence needs to be less focused on the philosophical, legal and semantic conception of equality but rather on the power of the Court to utilize the equality provision so as to bring about real transformative change in the lived lives of women. The notion of substantive equality requires the judiciary to adopt a new approach to the construction of gender equality and woman. This approach should ensure that the vulnerable and marginalized, (be it sex worker / mother) is invited into the jurisprudence of the Constitutional Court to ensure that she is not ignored or silenced or her social reality glossed over in the name of compliance with elusive legal principles.

The act of judging and who does the judging within a constitutional democracy also needs to be unpacked with the notion of the neutral, impartial Judge as Supreme Being not prone to bias or prejudice needing to be dismantled. When Justices of the Constitutional Court take the oath into office they are required to put aside their own personal views about matters and instead do their best to determine what the law is and then to apply that law impartially. This is in essence the fallacy of the process of judging – can a Judge ever be impartial? What about the role of the judge in a democracy where one is developing jurisprudence and interpreting a very new Constitution? Is this done according to that specific Judge’s sense of fairness or justice. What role does the “will of the people” play in developing and applying the Constitution? Looking at the two conflicting judgments of the Constitutional Court highlighted above the notions of independence and impartiality of the judiciary, whilst important to uphold, need to be

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90 Cockrell A: Rainbow Jurisprudence (1996) 12 SAJHR 1 at 37
vigorously challenged and unpacked for all its realities and possibilities in terms of what they mean in a democracy.

A further point worth mentioning at this juncture is that the lofty ideals of the Constitution and the Bill of Rights cannot and will not ever be a replacement for tackling equality at a community level and at the level of the lived realities of all South Africa citizens. This is the challenge of true democracy and equality. Bearing in mind the inherent inaccessibility of the Constitutional Court to ordinary citizens and the fact that there is no principle of direct access the development of the jurisprudence of this Court has been dependant on public interest pro bono lawyers themselves dependant on donor funding, restricted to a few sexy test cases and determined by the agendas of public interest lawyers, as opposed to vulnerable and marginalized communities.

2. The Role of the Equality Court

Bearing in mind the limitations and inaccessibility of the High Courts and Constitutional Court the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (“PEPUDA”) was enacted to serve ordinary citizens when it comes to issues of unfair discrimination and equality. This piece of legislation is intended to provide an easier method for citizens to challenge unfair discrimination by the State/private institutions/individuals, through the creation of a system of equality courts, pitched at the level of the lower courts in South Africa.

The Preamble to the Act sets out that the history of inequality in South Africa has being brought about by “colonialism, apartheid and patriarchy.” It emphasizes the need to build a “united, non-racial and non-sexist society” committed to facilitating “a transition to a democratic society marked by human relations that are caring and compassionate, and guided by principles of equality, fairness, equity, social progress, justice, human dignity and freedom.” The Act prohibits unfair discrimination in public and private spheres and across all sectors of society. It prohibits unfair discrimination on a number of grounds. These prohibited grounds are: (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or (b) any other ground where discrimination based on that other ground:

(i) causes or perpetuates systemic disadvantage;

(ii) undermines human dignity; or

91 Preamble to the Act
92 Sec 5(1) and Sec 5(3)
(iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner.

Discrimination on the basis of race, gender and disability has been further expanded upon in the Act itself as has the provision dealing with hate speech. The Act is enforced by the Equality Courts, which are special courts within the Magistrates Courts and High Courts, subject to their own procedures, which in essence seek to make the Court accessible and relatively informal. These courts became operational in 2004. Section 13 and 14 set out the test for determining unfair discrimination and is largely taken from the Constitutional Court jurisprudence. This has meant that the equality jurisprudence of the Constitutional Court has been codified. The Act also includes a list of innovative remedies that provide courts with a wide choice in addressing unfair discrimination and seeks to balance the use of corrective or restorative measures with measures of a deterrent nature. Some of the remedies listed in the Act are unconditional apologies, orders for costs, special measures to address the offence in question, interim and declaratory orders, and payment of damages. The presiding officer is further empowered to combine remedies and make “any other appropriate order to ensure effective relief to a complainant.” The remedies should be seen in the context of the spirit of reconciliation and the explicit decision by the legislature to not criminalize discrimination but rather facilitate a less adversarial and reconciliatory dialogue between parties.

It is perhaps useful to analyse two of the high profile cases of the Court. In the first case, heard in 2004, filed by the then Human Rights Commission Chairman, unfair discrimination was alleged when barbershop workers turned him away, claiming they did not know how to cut “ethnic” hair. The Equality Court ordered the shop owner to unconditionally apologize, to train his staff to be able to cut hair of people of all races, and to pay monthly installments of R500 to charities of the complainant’s choice. The case conveys the wide nature of remedies ordered by the Court and the approach of the Court in dealing with discrimination in a non-punitive manner.

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93 Sec 7, 8, 9, 10  
94 Sec 16(1)(a)  
95 Sec 21  
96 This analysis is taken from a recent article by Emily N. Keehn “The equality Courts as a tool for gender transformation.” 8 September 2009 Published by Sonke Gender Justice Accessible via www.ngopulse.org/article/equality-courts-tool-gender-transformation (last accessed October 2009)  
97 Kollapen v Du Preez 2004
The Equality Court system has also been utilized for gender equality in the case of Z. Mpanza v Sibusiso Cele, also referred to as the Umlazi T-Section case. In 2008, Ndunas (informal male leaders) in Umlazi, a township outside of Durban, issued an edict that prohibited women from wearing trousers in the community.\(^98\) The Ndunas argued it was not traditional for women to wear trousers, and that doing so contributed to moral degeneration and incidences of rape. Shortly thereafter, a resident of Umlazi, Zandile Mpanza, was chased by a mob of men who assaulted her, stripped her pants off, and made her walk home partially naked for violating the “code” prohibiting women from wearing pants. She was not the only woman who had been subjected to violence and harassment for wearing pants in violation of the supposed code. With legal representation provided by the Commission for Gender Equality, Mpanza took her complaint against the men who instituted the ban to the Equality Court. The magistrate overseeing the case ruled in favor of Mpanza, and ordered the removal and prohibition of the ban on women wearing pants because it unfairly discriminated against women under the Act. The Court ordered that the Umlazi police were to convene a community meeting to notify T-Section residents of the court order, and to notify the Commission on Gender Equality on pending or reported cases involving the ban. Lastly, two of the respondents, Thulani and Sibusiso Cele were ordered to unconditionally apologize for implementing the ban.\(^99\) The four men who attacked Mpanza are currently facing criminal charges in the criminal courts for assault, malicious damage to property, intimidation, and indecent assault.

Whilst these cases seem to illustrate the potential impact that these Courts may have as speedy accessible avenues for relief, it should be noted that the Courts are still relatively new with very few cases being brought.\(^100\) Scholars, such as Kaersvang, argue that lack of legal representation has also posed an obstacle for complainants as well as a lack of awareness of the Equality Court’s existence and procedures.\(^101\) In addition, training provided to designated magistrates, judges and clerks of the Court has been limited with

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\(^{99}\) Ibid

\(^{100}\) Only 169 cases were heard during the reporting period of 2007-2008. This number has increased in the 2008-2009 year, with 427 cases heard to date. 40 of the 2007-2008 cases, only two were related to gender equality, while unfair discrimination based on race made up the majority of claims. Dept of Justice and Constitutional Development, Annual Report 2007-2008, at pg.57

the 2-3 days training proving to be insufficient when navigating the complexities of discrimination law.\textsuperscript{102} The availability and quality of services of the Court has also been inconsistent and in some cases where Courts are overburdened by existing criminal and civil cases the equality court function has been hampered. Notwithstanding the foregoing critique the courts do have the potential for going a long way in addressing the ordinary concerns of marginalized community members in the area of discrimination and South Africans no longer have to attempt to approach the lofty chambers of the Constitutional Court and wait years for their equality cases to be heard.

3. \textbf{The Role of Chapter 9 institutions}

Within the Bill of Rights equality clause it is clear that “legislative” and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken to promote the achievement of equality. In addition, the Constitution provides for the establishment of state institutions to strengthen constitutional democracy in the Republic.\textsuperscript{103} These institutions are independent and subject only to the Constitution and the law.\textsuperscript{104} Section 181(5) goes on to provide that these institutions are accountable to the National Assembly and must report on their activities and the performance of their functions once a year.

From the outset the South African government has been determined to ensure that rights would not just remain rights on paper, but would be actively realised, promoted and entrenched in the interests of all the people, particularly the poor and the marginalised. In order to achieve this goal, a range of institutions were established in the Constitution itself and in national legislation, the purpose of which was to strengthen constitutional democracy in South Africa by the active promotion of a culture of human rights and the protection, development and attainment of those rights, including monitoring and assessing their implementation and observance. Each of the institutions was meant to focus on a particular sector of society where the need for transformation was felt to be greatest (i.e. gender, language, human rights).

Chapter 9 of the Constitution therefore established six key institutions, often referred to as the Chapter 9 Institutions. They are the: (i) Public Protector, (ii) South African Human Rights Commission, (iii) Commission for Gender Equality, (iv) Auditor-General, (v) Electoral Commission and (vi) Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. These institutions have come to play

\textsuperscript{102} Ibid
\textsuperscript{103} Sec 181(1)
\textsuperscript{104} Sec 181(2)
a vital (and also controversial) role in the development and consolidation of democracy in South Africa.

In relation to the notion of independence the Constitutional Court has had an opportunity to pronounce on this issue in the case of *NNP v Minister of Home Affairs* where it held that independent bodies supporting democracy require more than financial independence. For these bodies to perform without fear, favour or prejudice the administrative independence of these institutions should be safeguarded, meaning that these institutions must have control over all matters that are directly connected to their functions under the Constitution and relevant legislation. In practice this means that the National Assembly is given the constitutional authority to deal with the independent institutions and has a constitutional duty to hold these institutions to account.

Civil society groups applauded the initiative to set up institutions of this nature, eager to see new institutions emerge, bearing in mind the legacy of the apartheid State and its institutions. The Chapter 9 institutions were seen to be crucial in terms of strengthening the voice of marginalized groups. For present purposes I propose to focus on the Human Rights Commission and the Gender Commission in more detail in terms of its role, function and mandate.

3.1. **The Gender Commission**

At the time of drafting the Constitution there was agreement by women’s rights activists about the critical need to establish a separate body to deal with the distinctive needs to women in South Africa and to prevent the marginalization of women. The 1993 Interim Constitution created an independent Commission for Gender Equality to deal specifically with the promotion of gender equality and to advise and make recommendations relating to gender equality and the status of women. Legislation to establish the Commission was enacted by Parliament in 1996, namely, the Commission on Gender Equality Act 39 of 1996. This Commission was seen as forming part of the national gender machinery.

The Commission has a broad mandate to achieve gender quality in South Africa with its legal mandate derived from the Constitution and legislation such as the Commission on Gender Equality Act and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. In particular, the Commission must promote respect for gender equality and the protection, development and attainment of gender equality. The Commission has the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality. The functions of the
Commission can be grouped into five categories: (i) monitoring and evaluating the practices of organs of state at any level, statutory bodies or functionaries, public bodies, and even private businesses, enterprises and institutions in order to promote gender equality; (ii) carrying out information and education campaigns to foster public understanding of gender equality and the Commission’s role; (iii) reviewing laws and policies likely to affect gender equality and the status of women; (iv) investigating any gender-related issues of its own accord or on receipt of a complaint; (v) monitoring South Africa’s compliance with international agreements adopted by the State relating to gender.

With the enactment of PEPUDA the mandate of the Commission was extended in order to successfully implement the provisions of this Act as well. For example, Section 20 of the PEPUDA allows the Commission to institute proceedings under the Act in an equality Court on behalf of any aggrieved person or group. A presiding officer of the equality court may also refer any matter to the Commission for investigation, mediation, conciliation or negotiation.

3.2. The Human Rights Commission

The Human Rights Commission has a broad mandate encompassing almost every aspect of civil, political, social and economic rights. The legal mandate is derived from the Section 184 of the Constitution, which requires the Commission to promote respect for human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa. In order to achieve this legislation has been adopted in the form of the Human Rights Commission Act 54 of 1994; the Promotion of Access to Information Act 2 of 2000 and PEPUDA. Essentially the Commission is required to investigate and report human rights abuses; to take steps to redress human rights violations; and to educate society around human rights. In addition, the Commission is required by Section 184(3) to monitor the implementation of socio-economic rights protected in the Constitution.

Whilst the Commission is not a court a law and cannot make binding decisions in terms of complaints it receives it can, however, investigate individual complaints or systematic infringements of human rights, make recommendations and ‘name and shame’ the parties found to be violating the rights of others. It can also mediate disputes and take cases to court in either its own name or on behalf of an aggrieved party. As in the case of the Gender Commission the Human Rights Commission is expected to play a key role in the successful implementation of and functioning of PEPUDA.
3.3. **Review and Critique of Chapter 9 institutions**

As a testimony to the robustness of the developing South African democracy and the enormous expectations of a liberated South African society, these institutions have been the subject of criticism by politicians and civil society. Accordingly, in 2007 (after ten years) government authorized a review of these institutions to assess the extent in which society had been transformed and human rights entrenched through the operation of these institutions. The review also took place within the context of numerous criticisms being levelled against these institutions and a report was presented to Parliament with recommendations on how to strengthen these institutions. The specific mandate of the review Committee was to assess whether the current and intended constitutional legal mandates of these institutions are suitable for South Africa; whether the consumption of resources by them is justified in relation to their outputs and contribution to democracy; and whether a rationalization of function, role or organization would be desirable or diminish the focus of the various bodies.

In relation to the Gender Commission the Committee found that “the Commission represents a lost opportunity as until now it has failed to engage in a sustained and effective manner with the policies, approaches and mechanisms that exist in the country so as to eliminate all forms of gender discrimination and promote gender issues in South Africa.” It also found that the Commission had failed to fulfil its legal and constitutional mandate in a number of respects. By contrast the findings in relation to Human Rights Commission were favourable. The Committee found that “over the past decade, the Commission has built up a reputation amongst human rights activists and members of the public as an active and passionate defender of rights...[and] has made a real difference to the promotion and protection of human rights in the areas it focused on.”

Some of the key overarching conclusions of the Committee was in relation to a lack of consistency and coherence in approach by the various Chapter 9 institutions, which undermined the general thrust and purpose of these institutions. In addition, the institutions were found to be largely inaccessible to the public, being urban-based, with very little public education campaigns to educate citizens. In the final analysis the Committee recommended as follows: “The Committee finds that the multiplicity of institutions created to protect and promote the rights of specific constituencies in

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106 Ibid
107 Ibid
108 Ibid at 172
South Africa has in practice resulted in an uneven spread of available resources and capacities, with implications for effectiveness and efficiency. This has created fragmentation, confounding the intention that these institutions should support the seamless application of the Bill of Rights. The Committee therefore proposes the establishment of an umbrella human rights body to be called the South African Commission on Human Rights and Equality, into which the National Youth Commission, the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities (together with the Pan South African Language Board) and the Commission for Gender Equality should be incorporated together with the Human Rights Commission.  

The Commission’s finding largely corroborate what civil society had been saying for years. For example, the Human Rights Institute of South Africa (HURISA), an independent NGO, embarked on a project in 2007 to research how well the Chapter Nine institutions in South Africa were fulfilling their constitutional and legislative mandate. The study found that in the first instance these institutions are not accessible to the poor and marginalized people in rural areas and that external influences, such as political influence, often limits the power of the institutions and their authority in terms of carrying out their mandate. In addition, the Chapter 9 institutions are often reactive rather than proactive in their work and that in the case of the Public Protector the body is often obedient to the interests of the government and the majority party.

D. MAKING A DIFFERENCE OR THE ILLUSION OF DIFFERENCE?  
IN SEARCH OF THE ELUSIVE POT OF GOLD

In Xhosa cosmology the rainbow signifies hopes and the assurance of a bright future. This image of hope and positive values does however have the potential to eclipse a more sinister one such as that suggested by the mythic narrative of the elusive pot of gold at the end of the rainbow where a people wonder about aimlessly and without direction for something that they will never find. The multiple colours of the rainbow reflect the diversity of a multicultural society with the said colours symbolizing the diversity of a unspecified cultural or ethnic group. What has perhaps not been considered is how national identity of the new South Africa intersects with the individual identities of people in South Africa.

\[109\] Ibid

In this paper I have argued that comprehensive and progressive constitutional rights and the standards they set coexist with difficulty when attempting to translate these into effective policy and action in the lives of ordinary South African citizens, particularly in circumstances of vulnerability and in different cultural, racial and/or religious contexts. We also know that endemic levels of violence against women and LGBTI’s, the feminization of poverty and rising levels of xenophobia in South Africa indicate that there is a huge disjuncture between law, policy and lived reality in relation to some of the most progressive rights contained in the Constitution as well as the equally progressive judgments by the Courts.

Investing in developing the rule of law and constitutional law reform initiatives has proved to be very successful, with our Constitutional Court being hailed a success. Accordingly, one should not abandon the Constitutional Court but rather recognize the politics of judging and the act of judging which means a definite bias of a Court at a particular political and social time in history in terms of how that Court interprets rights of women, abortion, LGBTI’s or issues relating to refugees and migrants. Furthermore, whilst Constitutional Court cases provide us with very strong pronouncements the greatest challenge and limitation to date has been the inability of these pronouncements to filter down to the intended vulnerable beneficiaries. Thus, in engaging the law, human rights litigators today need to do so for purposes beyond mere law reform and come up with non-legal strategies avoiding the temptation of seeing the law as the promise of a solution.  

As Constitutional Court Justice Kate O’Regan has said:

"Without doubt the purpose of the constitutional enterprise is change … in deep patterns of inequality which characterize our society. An important step in that direction has been the adoption of a new Constitution and the entrenchment of human rights. Lawyers, however, have a bad habit of mistaking law and litigation for the real world. It is a habit we must break. What happens in the courts, even in the Constitutional Court is important, but it is not determinative of social reality. In particular, change in law and success in Courts will not necessarily result in the change the Constitution (and South Africa) so evidently seek. The involvement of all society is necessary for that change to be effected."  

As highlighted above, the Bill of Rights recognises the need to protect marginalized and previously disadvantaged people of South Africa. Fifteen years into South Africa’s democracy it is apparent that repealing

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111 Smart C: Feminism and the Power of Law (London: Routledge, 1989) at 165
discriminatory provisions and enacting new laws will not in and of itself give effect to the rights protected in the Constitution. Relying on the jurisprudence of the Courts or Chapter 9 institutions will also not bring about this reality. However, this does not mean that one should do away with the judiciary and the mechanisms that have been put in place but rather create more checks and balances and systems of governance and accountability to ensure that these mechanisms work.

E. CONCLUSION

For those of us who have followed recent events in South Africa’s history the new South Africa did not automatically become a peace-loving nation after President Mandela took office. We did not become a violent-free society nor did we free ourselves of racism and anger. The dream of a beautiful rainbow nation of peace, harmony and unity has been a shaky one, at many times disappearing behind dark, violent ominous clouds. Violence, class struggles and socio-economic divisions continue as each day the country continues to struggle with its divisive legacy of the past. Alex Boraine has pointed out that perhaps we have been taking Archbishop Tutu too literally and that when he spoke of a Rainbow Nation this was “not a language of fact but of faith. In other words that, in describing the new South Africa as he did, he was not perpetrating a falsely optimistic view of what is, but rather challenging society to become what [it could be] and what it is called to be. The image embodies a promise of what is possible in the future.”

Ultimately, I believe that the actual existence of a rainbow or not is of less value to us than the description of such an image and the hope it invokes. Perhaps it is time to ensure that as an image the rainbow begins to performatively (or transformatively) propel society in the right direction. This in itself is a long, arduous road. Forging real transformation takes time – any short facile route to a forged national identity will only exhibit the worst excesses of a constructed and manipulated nationalism – such as we have seen in the rise of xenophobia and violence against women and gays and lesbians.