WOMEN AND THE LAW

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Although women comprise about 52% of the South African population[1], it has been acknowledged that they constitute one of the most marginalised and vulnerable groups in this country. Our constitutional dispensation has provided the vehicle for legislative and judicial intervention for the progressive empowerment of women. It has also enabled women's groups to lobby around issues for the advancement of their rights. The years 1997 and 1998 have seen various legal developments to improve the position of women. Sadly, not all of these have had positive implications for them. In this chapter, we focus on some of the more distinctive developments which have affected women's rights directly or indirectly.

EQUALITY

Given the history of our country which was steeped in extreme inequity, grave oppression and massive exploitation, the significance of the values encapsulating equality for South Africa has been clearly expressed by our courts, most notably the Constitutional Court. The test to determine whether the equality clause[2] has been violated has been succinctly tabulated in *Harksen v Lane NO and Others*[3]. One of the components of the test is whether the differentiation arising from the law or conduct amounts to "unfair discrimination". The factors relevant for the determination of unfairness are: a) 'the position of complainants in society and whether they have suffered from past patterns of discrimination'; b) 'the nature of the provision or power and the purpose sought to be achieved by it'; c) 'the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental dignity or constitutes an impairment of a comparably serious nature'[4]. The more vulnerable the groups affected, and the more invasive the nature of the discrimination on

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[1] Statistics South Africa *The People of South Africa Population Census, 1996: Census in Brief* (1998); Central Statistics *Women and men in South Africa* (1998) 3.
[2] Section 8 of the Constitution of the Republic of South Africa Act 200 of 1993; and section 9 of the Constitution of the Republic of South Africa Act 108 of 1996.
[3] Note 36 at 1511E-1512A.
[4] Note 36 at 1510F-1511B.

the relevant individuals, the greater will be the likelihood that the discrimination will be regarded as unfair[5].

Although the long term goal of our constitutional order is to achieve equal treatment, it has been noted that "insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality"[6]. Therefore, the notion of substantive equality has been interpreted to prevent further disadvantage, and to remedy the consequences of unfair discrimination endured by already vulnerable and historically disadvantaged groups[7]. This includes the majority of black women in our country who have suffered triple oppression in the form of race, class/poverty and gender.

In *President of the Republic of South Africa and Another v Hugo*[8], the Constitutional Court reversed the decision of the court a quo[9]. The Constitutional Court held that the Presidential Act[10] which granted special remission of sentences to certain categories of prisoners, including women in prison on 10 May 1994 who had children under the age of 12 years, was not unconstitutional[11].

The respondent, a male prisoner, had a son under the age of 12 years at the relevant date, and would have qualified for remission but for the fact that he was the father, and not the mother of the child[12]. The court a quo found that the Act discriminated against the respondent and his son on the ground of gender in terms of section 8(2) of the interim Constitution[13], and further held that the presumption of unfairness which had been raised in terms of section 8(4) had not been rebutted by the appellants[14].

However, the Constitutional Court felt that the President had in fact discharged the burden of proving that the discrimination was not unfair, and that the impact of the remission was not discriminatory[15]. In arriving at this decision, the Court recognised that mothers are primarily responsible for the care of young children in South African society[16]. As such, the release of mothers would in many cases be of real benefit to young children which was the primary purpose of the special remission, and that the

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[5] Note 8 at 755E.
[6] Note 8 at 755D-E.
[7] Sandy Liebenberg 'Social and economic rights: A critical challenge' *The Constitution of South Africa from a Gender Perspective* (1995) Community Law Centre, University of the Western Cape 82. See also *Brink v Kitshoff* 1996 (4) SA 197 (CC) at 217E-F; *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) at 773B; *Harksen v Lane NO and Others* 1997 (11) BCLR 1489 (CC) at 1523H-I.
[8] 1997 (6) BCLR 708 (CC).
[9] *Hugo v President of the Republic of South Africa* 1996 (4) SA 1012 (D). For a brief discussion of this case, see Christina Murray et al 'Women's Rights' Vol 7 Ch 13 *South African Human Rights Yearbook 1996* (1998) Centre for Socio-Legal Studies University of Natal 294 at 307 et seq.
[10] Act 17 of 1994.
[11] At 712B, 734C.
[12] At 711J, 712A-C.
[13] Act 200 of 1993.
[14] At 712D-E.
[15] At 732E-I.
[16] At 727F.

impact of the remission would give an advantage to those mothers as members of a vulnerable group[17]. Justice Goldstone further acknowledged that:

> "For many South African women, the difficulties of being responsible for the social and economic burdens of child rearing, in circumstances where they have few skills and scant financial resources are immense. The failure by fathers to shoulder their share of the financial and social burden of child rearing is a primary cause of this hardship. The result of being responsible for children makes it more difficult for women to compete in the labour market and is one of the causes of the deep inequalities experienced by women in employment ... It is unlikely that we will achieve a more egalitarian society until responsibilities for child rearing are more equally shared."[18]

In *Fraser v Children's Court, Pretoria North and Others*[19], the applicant, a father of an extramarital child, *inter alia* argued that section 18(4)(d) of the Child Care Act[20] violated the equality provision of the interim Constitution because it dispensed with the need for the father's consent for the adoption of an extramarital child[21]. The relevant section of the Act stipulated that the consent of both parents was required for the adoption of the child if the parents were legally married to each other, but that only the consent of the mother was required in the case of an extramarital child.

The Court felt that strong arguments could be advanced to support the view that the effects of section 18(4)(d) discriminated unfairly against fathers on the basis of their gender and marital status[22]. However, the Court found that the section violated the equality clause on the basis that it impermissibly discriminated between the rights of fathers in certain marital unions in comparison with those in other unions[23]. In this respect, the Court cited the example of Muslim marriages. These marriages are not recognised by South African law and are considered to be contrary to public policy because they are potentially polygamous, even though a particular union may actually be monogamous by nature[24]. With regard to the adoption of children born of Muslim marriages, the fathers would not have the same rights as the mothers because only the consent of the latter would be required[25]. The Court found that this violation of the equality section could not be justified[26], especially when one considers that customary unions in terms of the Black Administration Act[27] are recognised by South African law as legitimate unions, regardless of the fact that they too are potentially polygamous by nature[28]. In these unions, the consent of both parents would therefore be required[29].

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[17] At 732A.
[18] At 727J-728B.
[19] 1997 (2) BCLR 153 (CC).
[20] Act 74 of 1983.
[21] At 158E; 161E-F.
[22] At 163F-G.
[23] At 162E.
[24] ibid.
[25] At 162F-G.
[26] Section 33 of Act 200 of 1993.
[27] Act 38 of 1927.
[28] At 162H.
[29] At 163A-B.

In finding the relevant section to be unconstitutional[30], the Court nevertheless felt that a blanket rule requiring the consent of all fathers of extramarital children in respect of adoption proceedings, would not accord with existing anomalies in South African society[31]. The Court noted, on the one hand, that there are unmarried fathers who show a real interest in the nurturing and development of their extramarital children[32]. On the other hand, the Court recognised that there are also cases where fathers have not shown any or much interest in the support and development of their children, and that there are situations where children are born as a result of rape and/or incestuous relationships[33]. The Court therefore suggested that there may be instances in which the consent of the father should be required, but that there may also be situations where it should not be required[34]. As the Court was not prepared to usurp the function of the legislature, it directed Parliament to rectify the defect in the relevant section within two years of date of judgment, but advised Parliament to consider the varying anomalies in society, as well as the different kinds of parental relationships which exist [35].

In *Harksen v Lane NO and Others*[36], the constitutionality of sections 21, 64 and 65 of the Insolvency Act[37] was considered by the Court.

Section 21(1) provides that, in the event of the sequestration of an insolvent spouse, the property of the solvent spouse automatically vests in the Master, and then in the trustee. The solvent spouse may, however, reclaim the property if she or he proves that it was acquired under one of the categories listed in section 21(2). Section 64(2) provides for the summoning of a solvent spouse to the creditors' meetings at which she or he may be interrogated about all matters concerning the insolvent and solvent spouses[38]. In terms of section 65, the solvent spouse must produce all documentation relating to the financial affairs of both spouses[39].

The applicant's property was attached as a result of the sequestration of her husband's estate[40]. She was summoned to an interrogation, and was required to produce all documentation relating to her financial affairs, as well as those of her husband's[41]. The applicant argued that the impugning sections violated *inter alia* the equality clause in the interim Constitution[42], on the basis that it constituted unequal treatment of solvent spouses, and discriminated against them unfairly on the grounds of marital status and personal intimacy[43].

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[30] At 173J, 174A-B.
[31] At 165B-C.
[32] At 164G, 173B-C.
[33] At 164G, 165A.
[34] At 172I, 173A-B.
[35] At 165E, 173J, 174A-B. The reader is referred to the section on Adoption at p31 of this chapter, to see how Parliament has dealt with this direction.
[36] 1997 (11) BCLR 1489 (CC).
[37] Act 24 of 1936.
[38] At 1498D-G.
[39] At 1498H, 1499G.
[40] At 1493H-I, 1499F.
[41] At 1499G.
[42] At 1495B-C.
[43] At 1505F.

The Court found that the discrimination arising from the sections was not unfair, and that the sections were accordingly not unconstitutional[44]. The Court reasoned as follows[45]: Solvent spouses did not historically suffer discrimination and did not constitute a vulnerable group; the purpose of the sections was to protect the public interest by preventing collusion between dishonest spouses, thereby safeguarding the rights of creditors of insolvent estates; the solvent spouse has legal recourse to reclaim the property; the fact that the solvent spouse may suffer embarrassment in the event of litigation, and that she or he may not be able to afford legal assistance, is an inevitable consequence of a dispute of this nature; since it is not unconstitutional to vest the property in the Master or trustee on a temporary basis, the solvent spouse does not have a legitimate complaint for being interrogated about matters relevant to the insolvent estate. The Court therefore held that the burden on the solvent spouse to resist such a claim did not impair her or his fundamental dignity, or amount to an impairment of a comparably serious nature[46].

In their dissenting judgments, O'Regan J and Sachs J concurred with the finding of the majority in respect of sections 64 and 65 of the Act, but differed with regard to the constitutionality of section 21 on the basis that the discrimination was unfair[47].

O'Regan J felt that the vesting of property in the Master and trustee, which may occur without notice to the solvent spouse, held grave implications for the latter who would be divested of all ownership rights to the property[48]. Thus, it could negatively impact on her or his business or professional career[49]. Even though the purpose of section 21 was to protect creditors against dishonest spouses, it also caught within its net innocent spouses[50]. Yet, the section does not affect anyone else who may have had dealings with the insolvent spouse[51].

Sachs J vehemently opined that section 21 constitutes more than just an inconvenience, because it adversely affects the dignity and fundamental rights of personality of the solvent spouse, as an independent person in the spousal relationship[52]. He said that the section reinforces stereotypical notions of the marital relationship, where the two parties are not seen as individual persons with separate personalities, but as two minds merging into one, where each loses her or his individual existence[53]. Furthermore, the perception is drawn that the estates of the two spouses are joined, irrespective of their living circumstances and individual careers[54]. He stated that the issue in this matter underscores disadvantage, which affects married persons who are trapped by legally entrenched

[44] At 1519F.
[45] At 1515F-1516E, 1517A-C.
[46] At 1516G.
[47] At 1525H-I, 1530F, 1533B.
[48] At 1525H-I, 1526B.
[49] At 1526B.
[50] At 1527H-1528A.
[51] At 1528C.
[52] At 1532G, 1533B.
[53] At 1533C-D, 1535B-C.
[54] At 1533B-C.

notions of marriage inhibiting the capacity of spouses for self-realisation, and to be regarded as free and equal persons in their relationship[55]. He therefore concluded that the offending section is patriarchal in origin, and perpetuates an archaic vision of marriage contrary to the values enshrined in the Constitution[56]. In illustrating his point that women inevitably suffer as a result of patriarchal assumptions about marriage, Sachs J presented the following hypothetical scenario:

> "Take the case of Jill, a cabinet minister, judge, attorney, doctor, teacher, nurse, taxi driver or research assistant. She has a career, income and estate quite separate from that of her spouse Jack, who for his part has his own career, income and estate. If Jack falls down and breaks his financial crown, it is only on manifestly unfair assumptions about the nature of marriage that Jill should be compelled by the law to come tumbling after him. Their marriage vows were to support each other in sickness and in health, not in insolvency and solvency."[57]

We submit that the majority in the *Harksen* case did not advance the cause of women's rights, because it failed to consider the historical reality of South African marital relations, where it is usually the husbands who mass huge estates and make financial decisions affecting the spousal estate(s), irrespective of marital regimes[58]. It is therefore mostly the estates of men which are sequestrated and as a result, section 21 largely impacts on women. A welcomed feature of the *Harksen* case is the minority's support for the struggle for gender equality. This is noted in their recognition that laws can reinforce stereotypical perceptions of marriage from a patriarchal stance which adversely affects the position of women in South Africa.

The other cases discussed indicate that the Constitutional Court has acknowledged the vulnerable position of women in South African society. The decision in the *Hugo* case is significant in that the Court recognises that women are primarily responsible for the care and rearing of young children in our society, and that many of them are the primary breadwinners of their households. This is of special importance for those mothers in the rural areas who are the poorest in our country, and constitute one of the most vulnerable and historically disadvantaged sectors in South Africa. Furthermore, the Court in *Fraser* was clearly concerned about the impact that a blanket ruling allowing the consent of all fathers to be required in adoption proceedings would have on women. The Court gave attention to the fact that not all fathers of extramarital children are deserving of constitutional protection. It indirectly acknowledged that many women need to be protected against those types of men. This is also significant in light of the fact that women often suffer oppression and various forms of abuse at the hands of men. The Court therefore took a cautious approach in recognition of the fact that such a blanket approach would further disadvantage women, and negate the advancement of substantive equality in the South African context.

Ironically, even though the Constitutional Court has been vocal about its advancement of gender equality, it is noteworthy that the only litigants who have invoked the equality

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[55] At 1534G, 1535B.
[56] At 1532G, 1533B.
[57] At 1533E-F.
[58] Debbie Budlender *In Whose Best Interests? Two studies of divorce in the Cape Town Supreme Court* (1996) Law, Race and Gender Research Unit University of Cape Town 53.

clause in the Constitutional Court have been either men or persons of financially privileged backgrounds. Two questions can be raised in this respect: how accessible is the Constitutional Court for the poorest women in our country who cannot afford the cost of constitutional litigation?; and how effective has the equality clause been for those women who really need its protection from daily discrimination and oppression? Even though public interest groups are willing to fund constitutional matters on behalf of indigent litigants, this only happens after very careful screening. Not all constitutional matters will therefore obtain the attention it deserves.

THE TRUTH AND RECONCILIATION COMMISSION (TRC)

The TRC was established in terms of the Promotion of National Unity and Reconciliation Act[59]. Its task was to investigate and document gross human rights violations which had been committed in or outside of South Africa during the period 1960 to 1994[60]. This process reached a finale when a five volume Report was presented to President Nelson Mandela in October 1998.

Three special women's hearings were organised in Cape Town, Durban and Johannesburg during the course of 1997, which focused specifically on the experiences of black (and some white) South African women during the apartheid reign[61]. These hearings were prompted by a submission from the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand. CALS highlighted the occurrence of gender bias which they believed existed in the other hearings, and argued that despite the fact that more than half of those who gave evidence were women, the roles and capacities in which women and men spoke were different[62]. They noted further that unlike the men who spoke as direct victims, the majority of women spoke about their experiences as relatives and dependants of those who had suffered human rights violations[63].

The special hearings therefore gave women the opportunity to testify as direct victims. In this capacity, most of them described their experiences and sufferings which incorporated a full range of abuses including physical, sexual and psychological forms of abuse[64].

As a result of the evidence presented to the TRC, it became apparent that women had been active in all roles during the struggle period - in the full range of different victim roles, and as perpetrators[65]. The TRC concluded that its definition of gross violation of human rights had resulted in a blindness to the types of abuses which were predominantly experienced by women[66]. Women suffered direct gender-specific gross violations of

[59] Act 34 of 1995. See Truth and Reconciliation Commission 'The Mandate' Vol 1 Ch 4 *Truth and Reconciliation Commission of South Africa Report* (1998) 48.
[60] Truth and Reconciliation Commission 'Historical Context' Vol 1 Ch 2 *Truth and Reconciliation Commission of South Africa Report* (1998) 24.
[61] Truth and Reconciliation Commission 'Special Hearing: Women' Vol 4 Ch 10 *Truth and Reconciliation Commission of South Africa Report* (1998) 282 at 283, 316.
[62] Note 61 at 282.
[63] Note 61 at 283.
[64] Note 61 at 284, 316.
[65] Note 61 at 316.
[66] ibid.

human rights which were exploitative and humiliating[67]. In addition to the torture suffered by women in detention, at the hands of the State who deliberately withheld medical attention, food and water from them, the security forces had also abused them in ways which specifically exploited their vulnerabilities as women[68]. For example: threats of rape, rape, other forms of sexual abuse, removal of children from their care, threats against family and children, false stories about illness and/or death of family members and children, abuse and humiliation resulting from biological functions such as menstruation and childbirth[69]. It therefore acknowledged that the ways in which women experienced abuse may have differed from those of men, and that even though women were not the only sufferers, they bore the brunt of suffering[70]. Significantly, the TRC also discovered that women in exile had been further subjected to various forms of harassment and sexual abuse, including rape by male cadres of their own political organisations[71] .

SOCIO-ECONOMIC REFORM

In South Africa, more than half of the population is classified as poor[72]. Ninety-five percent of the poor are black people, and 75% of the poor live in rural areas[73]. In the rural areas where poverty is most acute, 59% of the households are headed by women. These female-headed households have a 50% higher poverty rate than male-headed households[74]. These statistics indicate that black women in the rural areas, constitute the poorest in our country.

In 1998, several poverty hearings were convened in all nine provinces, by the South African Human Rights Commission, the Commission on Gender Equality, and the South African NGO Coalition[75]. These hearings confirmed a number of critical factors which contribute to women's unequal access to socio-economic rights *inter alia*[76]:

- the disproportionate share of reproductive work performed by women, particularly in relation to child care, and elderly and sick relatives;
- the deep social patterns of gender discrimination;
- violence against women;
- entrenched gender roles, for example the rearing of children;
- the migrant labour system which relegated women to rural areas, where they have to make a living for themselves and their dependants;
- customary law practices such as polygamy, and patriarchal inheritance principles;
- traditional leaders who prevent women from acquiring land in their own name.

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[67] Truth and Reconciliation Commission 'Findings and Conclusions' Vol 5 Ch 6 *Truth and Reconciliation Commission of South Africa Report* (1998) 196 at 256.
[68] ibid.
[69] ibid.
[70] Note 61 at 316.
[71] Note 67.
[72] Nadel Human Rights Research and Advocacy Project 'Socio-economic rights: a terrain of struggle for women' *Rights Now* (1998) 8.
[73] Note 72; note 133 at 1.
[74] Note 72.
[75] Commission for Gender Equality, South African Human Rights Commission, South African NGO Coalition *The People's Voices: National Speak Out on Poverty Hearings, March-June 1998* (1998) 1.
[76] Note 75 at 44.

The hearings concluded that for women to be given equal opportunity to share in South Africa's socio-economic life, gender obstacles must be removed by *inter alia*[77]:

- improving the level of social assistance for child support;
- intensifying efforts to make the private maintenance system more effective;
- mobilising private sector resources for child care, and early childhood development facilities;
- measures to eliminate discriminatory practices, such as violence against women, which undermine women's rights.
- giving priority for adopting special policies and measures, that facilitate women's access to resources, such as land, capital, and credit;
- improving the working conditions, social security benefits and job security, of domestic workers, informal sector employees, and those engaged in casual forms of employment;
- the government giving priority for the adoption of policies and measures which will facilitate independent access of women to various resources.

Legislative and judicial developments

The Constitution entrenches basic socio-economic rights, and obliges the state to take reasonable legislative measures to achieve the progressive realisation of these rights[78]. However, there is no guarantee that vulnerable groups, such as women, will benefit from these rights, since the efficacy of legislative steps depend on the availability of resources[79].

A. Health

In 1997, the Department of Health released a White Paper[80], which aims to promote access to health care services through the primary health care system, in an effective, equitable and holistic manner[81]. However, the Paper has been criticised for not dealing with women's health issues consistently throughout the document[82]. Instead, women's health needs have been relegated to a single chapter, within the context of reproductive health[83]. The Paper fails to acknowledge that many of the issues addressed in the other chapters, such as financial and physical resources, development of human resources for health, health research, nutrition, HIV/AIDS and sexually transmitted diseases, have direct implications for women in particular[84]. The Paper also does not give sufficient recognition to violence against women as a health issue[85].

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[77] Note 75 at 46-47.
[78] Act 108 of 1996 - see for example, housing (section 26); health care, food, water and social security (section 27); education (section 29).
[79] See *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC).
[80] Department of Health *White Paper for the Transformation of the Health System in South Africa* 1997.
[81] Karrisha Pillay 'Health and Human Rights - Focus on the White Paper on Health' Vol 1 No 2 *ESR Review* (June 1998) Community Law Centre University of the Western Cape, and the Centre for Human Rights University of Pretoria 8.
[82] Karrisha Pillay 'Women's Health: Reality or Hopeless Dream?' Vol 2 No 2 *Women and Human Rights Documentation Centre: Newsletter* (June 1998) Women and Human Rights Project Community Law Centre University of the Western Cape 6.
[83] Note 80. See Chapter 8 entitled 'Maternal, Child and Women's health'.
[84] Note 82.
[85] Note 82 at 7.

B. Reproductive Rights

Since the 1996 Choice on Termination of Pregnancy Act[86], there have been some judicial and legislative developments in the recognition and fulfilment of the constitutional entrenchment of the rights of persons, to make decisions concerning reproduction, and to security and control over their bodies[87].

In *Christian Lawyers Association of SA v Minister of Health and Others*[88], the Court had to consider the constitutionality of the Choice on Termination of Pregnancy Act. In dealing with the question whether a foetus has the right to life, in terms of section 11 of the Constitution[89], the Court had to consider whether or not the foetus is a legal persona. The Court found that while the status of a foetus is uncertain under common law, for the purposes of the Constitution, the foetus does not have legal personality[90]. In arriving at this conclusion, the Court contended that due weight had to be attached to the silence in the Constitution on the issue of the protection of the foetus. Had the drafters intended to protect the foetus, such protection would have been amplified, especially in section 28, which deals with the rights of the child[91]. Furthermore, if the foetus is a bearer of the section 11 right to life, then a termination of a woman's pregnancy would constitute murder, and not abortion. In the Court's view, the drafters could not have contemplated such far-reaching results, without expressing themselves clearly[92]. The Court also noted that section 12(2) gives everyone the right to make decisions concerning reproduction, and to security in and control over their bodies. These rights are not qualified in the Constitution to protect the foetus[93]. The Court therefore upheld a woman's right to make decisions about her reproductive functions, and to exercise control over her body.

In the area of assisted reproductive techniques, the Human Tissue Act[94] provided that an artificial insemination procedure could only be performed on a married woman, with the prior consent of her husband[95]. This legislative discrimination between married and unmarried women has since been removed by way of regulations[96]. From 17 October 1997, a significant step was taken both for reproductive autonomy, and non-discrimination on the basis of marital status. Unmarried women now qualify for artificial insemination procedures, on the same basis as their married counterparts[97].

With regard to sterilisation, the common law only enabled a person to be sterilised for therapeutic or eugenic reasons[98]. In 1998, this position was changed by the Sterilisation

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[86] Act 92 of 1996.
[87] Section 12(2)(a) and (b) of Act 108 of 1996.
[88] 1998 (11) BCLR 1434 (T).
[89] Act 108 of 1996. Section 11 states that '(e)veryone has the right to life'.
[90] At 1441G; 1443B-C.
[91] At 1442B.
[92] At 1443 B-C.
[93] At 1442F-G.
[94] Act 65 of 1983.
[95] Reg. 8(1) of the Regulations Regarding Artificial Insemination of Persons, and Related Matters, issued by the Minister of Health under section 37 of the Human Tissue Act on 20 June 1986. As cited in note 97 at 161 fn25.
[96] Government Notice R. 1354 published in *Government Gazette* No 18362 of 17 October 1997. As cited in note 97 at 161 fn27.
[97] Julia Sloth-Nielsen and Belinda Van Heerden 'Putting Humpty-Dumpty Back Together Again: Towards Restructuring Families' And Children's Lives in South Africa' 1998 (115) *South African Law Journal* 156 at 161.
[98] Barnard et al *The South African Law of Persons and Family Law* 2nd edition (1986) 27.

Act[99] which provides that no person over the age of 18 years, and who is capable of consenting, may be prohibited from having a sterilisation performed on her or him[100].

C. Water

The 1956 Water Act[101] gave private landowners extensive rights in respect of water resources. Water rights were linked to land ownership. Since black people were systematically stripped of land rights, these principles ensured that white landowners enjoyed immense access to, and use of, water resources[102].

Disadvantaged and vulnerable groups, such as women and children, are disproportionately affected by the lack of access to basic water services. Thousands of children die annually of avoidable diseases, related to lack of clean water and poor sanitation[103]. Quoting from the *White Paper on Water Policy* (1997), the Minister of Water Affairs said[104]:

> 'In South Africa, women are the traditional custodians of water resources in the rural areas. Women spend long hours, at great cost to their health, fetching water for their families. This is time that could be more productively spent. They are also the custodians of family health. Women bear the burden of ill health in the family and in many cases high rates of mortality - related to avoidable water-borne diseases are suffered by their children as a result of lack of access to clean drinking water and sanitation'.

In an attempt to redress the results of past racial and gender discrimination, the 1998 National Water Act ('the NWA')[105], which repeals the 1956 Act, places all water resources under the state's control, to ensure that the country's water resources are used in a sustainable and equitable manner, for the benefit of all[106]. The Minister of Water Affairs indicated that CEDAW[107] was one of the international conventions taken into account in drafting the new legislation[108]. The NWA empowers the Minister of Water Affairs to establish a pricing policy for water charges, to fund the costs of water resource management, and to fund equitable and efficient allocation of water[109]. Provision is also made for financial assistance by way of loans, grants, and land subsidies[110]. These provisions represent significant mechanisms for facilitating water to poorer

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[99] Act 44 of 1998.
[100] Section 2(1).
[101] Act 54 of 1956.
[102] Sandy Liebenberg 'The National Water Bill - Breathing Life into the Right to Water' Vol 1 No 1 *ESR Review* (March 1998) Community Law Centre University of Western Cape, and the Centre for Human Rights University of Pretoria 3.
[103] ibid.
[104] B Whittle 'New South African National Water Bill Highlighted at International Resources Law Conference' *De Rebus* (May 1998) 4 at 5.
[105] Act 36 of 1998. Most of the provisions of the Act came into force on 1 October 1998. However, some provisions especially those dealing with licences and charges, will be put into effect at a future date.
[106] Section 2, read with section 3(1).
[107] Note 154. Article 14(h).
[108] Speaking at the International Resources Law Conference, held in Cape Town in the early part of 1998. Cited in note 104 at 4.
[109] Section 56, read with section 57.
[110] Section 61.

communities[111]. The NWA also prioritises previously disadvantaged groups in the awarding of water licenses[112].

The 1997 Water Services Act[113] makes provision for 'the right of access to basic water supply and basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being'[114]. These rights are entrenched, therefore every water services authority must provide for measures to realise these rights, in their water development plans[115]. Significantly, no-one may be denied access to basic water services merely on the ground of non-payment[116]. These provisions should therefore benefit the poorest in our country, namely, rural women.

D. Housing

The Housing Act[117] directs national, provincial and local spheres of government, to 'give priority to the poor, in respect of housing development'[118]. This Act is therefore, of direct significance for rural women in South Africa. At local level, municipalities are obliged to take reasonable and necessary steps to *inter alia* ensure: access to adequate housing on a progressive basis; the designation of land for housing; the facilitation of housing developments; and the regulation of health and safety standards for housing development[119]. For the purposes of financing housing developments, the Act makes provision for an allocation of funds from national government to the provinces[120]. The provincial governments would then have to allocate monies to the local governments. However, the Act does not provide any guidelines for the equitable allocation of these funds to municipalities. We therefore submit that there is a risk that rural municipalities with chronic housing shortages, may not be adequately funded.

The Prevention of Illegal Evictions and the Unlawful Occupation of Land Act[121] aims to prohibit unlawful evictions, and sets out the procedures for the eviction of unlawful occupiers[122]. More specifically, a court may grant an eviction order if it is of the view that it is just and equitable to do so, and only after considering all the relevant circumstances, including *inter alia* the rights and needs of female-headed households[123]. This provision is in line with the preamble of the Act, which states that special consideration should be given to the rights of vulnerable groups. The provision also accords with section 26(3) of the Constitution[124], which states that '(n)o one may be evicted from their home, or have their home demolished, without an order of court made

[111] Note 102 at 4.
[112] Section 27(1)(b).
[113] Act 108 of 1997.
[114] Section 2(a).
[115] Section 3.
[116] Section 4(3).
[117] Act 107 of 1997.
[118] Section 2(1).
[119] Section 9(1).
[120] Section 11, read with section 12.
[121] Act 19 of 1998.
[122] Section 4.
[123] Section 4(6), read with section 4(7).
[124] Act 108 of 1996.

after considering all the relevant circumstances ... (and that) (n)o legislation may permit arbitrary evictions.'

The Extension of Security of Tenure Act[125] recognises that many people are vulnerable to unfair evictions, because they do not have secure tenure of their homes or the land which they utilise[126]. In line with section 25(6) of the Constitution[127], the Act provides measures, accompanied by state-aided assistance, to facilitate long-term security and tenure of land[128]. It also seeks to regulate the conditions of residence on certain land, as well as the conditions for eviction from land, and the circumstances under which the right of residence may be terminated. Although the Act is of general application, it has significant implications for women farm dwellers. Generally, a male farm labourer would be permitted to occupy land, while he is working for the farmer. However, this occupational right does not extend to his spouse or dependants. The latter would only be allowed to live with the male labourer on the land, for as long as he physically resides there. Thus, if the male labourer vacates the premises for whatever reason, the spouse and dependants would have to leave too. In recognition of their vulnerable status, the Act attempts to protect the position of the spouse and dependants in the situation where the occupier dies. The Act recognises their right of residence in this instance, and only enables the farmer to evict them on 12 months written notice[129]. This means that they would at least have one year to secure alternative accommodation. However, it has been argued that this limited recognition of their right of residence is not sufficient, because the Act does not accord women farm dwellers full occupational rights to farm housing[130]. The Act also fails to acknowledge that certain groups are more vulnerable than others, for example, female-headed households, and women farm dwellers[131].

E. Social Security

Under the Social Assistance Act[132], a state maintenance grant was made available to parents (usually women) for the support of their children, where they were unable to obtain financial relief through the private maintenance system. The state maintenance grant was payable up to a maximum of R700 per month, for a maximum of two children up to the age of 18 years. Even though this grant was intended as a social measure to assist poor people, as a result of bureaucratic obstacles, accompanied by racial discrimination in respect of the scope and levels of the grant, a large number of black women were excluded from access to it[133]. To ensure that the grant reaches as many poor people as possible, and that the basic material needs of children are met, the Lund Committee recommended that the previous state maintenance grant be replaced with a flat rate child support benefit[134]. In 1998, the Welfare Laws Amendment Act[135]

[125] Act 62 of 1997.
[126] Preamble.
[127] Act 108 of 1996. The section states that '(a) person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'
[128] Preamble and section 2(3).
[129] Section 8(5).
[130] Commission on Gender Equality *Audit of Legislation that discriminates on the basis of Sex / Gender* (1998) 54.
[131] ibid.
[132] Act 59 of 1992.
[133] *Report of the Lund Committee on Child and Family Support* (1996) Executive Summary 1.
[134] Note 133 at 87; note 97 at 167.

introduced the new child-support grant[136]. This new grant is payable to the primary care-giver of a child, who is any person 'primarily responsible for meeting the daily needs of the child'[137]. At present, the primary care-giver is entitled to receive R100 per month for any child under the age of seven years [138]. Any primary care-giver will qualify for the grant if the income of the household is below R9 600 per annum, or if the child and the primary care-giver live in a rural area or an informal dwelling, R13 200 per annum[139].

This legislative initiative has both positive and negative aspects. On the one hand, the wide definition of primary care-giver takes cognisance of the reality that in many communities, the primary care-giver is not always the parent of the child. Any primary care-giver who complies with the means test, whether related to the child or not, would be able to access the grant for the benefit of the child. This is significant for women if one considers that the role that women play as primary care-givers is 'a root cause of women's inequality in our society'[140]. The new grant therefore marks a step forward to marginally improving the economic difficulties women suffer in society. Furthermore, the removal of the limitation in respect of the number of children means that the grant will benefit many more children than previously. On the other hand, the steep reduction of the amount of the grant, and the significant lowering of the age limit for the child, will increase the burden borne by many indigent households. However, the Lund Committee argued that since many of the poorest sections in South Africa had never previously received the state maintenance grant, many black people especially in the rural areas, would be receiving the benefit for the very first time[141]. Furthermore, the goal of the new grant is to target 3 million children by the year 2005, compared with 300 000 children who were receiving the state maintenance grant[142].

VIOLENCE AGAINST WOMEN

South Africa has the highest statistics for violence against women in the world (for a country not at war)[143]. Violence against women occurs in different instances including, domestic violence, battery, rape, other forms of sexual assault and femicide. The violence that women experience differs from the type of violence experienced by men for example, women are susceptible to domestic violence and sexual assault in a way that men are not[144]. Compared to men, women are more likely: to be victimised by men; to know their attacker; to be attacked in their own homes; and to be blamed for their

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[135] Act 106 of 1997.
[136] Section 4.
[137] Section 1.
[138] Section 2(d). See also regulations 3, 9(3) in Government Notice R. 418 published in *Government Gazette* No 18771 of 31 March 1998.
[139] Reg. 16 in Government Notice R. 418 published in *Government Gazette* No 18771 of 31 March 1998.
[140] Note 8 at 743C.
[141] Note 133 at 91.
[142] Minister of Welfare and Population Development Departmental Briefing Document *Briefing to the Portfolio Committee on the Lund Report on Child and Family Support* (1997).
[143] Masimanyane CEDAW Working Group *NGO Shadow Report to CEDAW: South Africa: Violence Against Women* (1998) 3.
[144] R. Emerson Dobash and Russell P. Dobash *Women, Violence and Social Change* (1992); John H. Laub 'Patterns of Criminal Victimisation in the United States' in Arthur J. Lurigo et al (eds.) *Victims of Crime* (1990); John Lea and Jock Young 2nd edition *What is to be Done About Law and Order?* (1993); J. Campbell '"If I Can't Have You, No One Can": Power and Control in Homicide of Female Partners' in J Radford (eds.) *Femicide: The Politics of Woman Killing* (1992).

victimisation[145]. More often than not, the violence experienced by women is at the hands of men whom they know[146]. The nexus between violence against women and poverty means that African women who constitute the poorest sector in South Africa, are at greater risk of being subjected to violence than any other group in our society[147].

Domestic Violence

Prevention of Family Violence Act 1993

The NICRO Women's Centre conducted a research project at seven courts in the Western Cape in which they collected information from 100 women, who had applied for and been granted Prevention of Family Violence Interdicts, in terms of the Prevention of Family Violence Act[148]. These were some of the results[149]:

- 51 women were granted final interdicts, 42 temporary interdicts and seven were given notice to appear in court;
- In only 10 cases the magistrates were not prepared to grant all the protection asked for in the application. Six of these 10 cases concerned eviction orders;
- 40 women asked for eviction orders, of which 33 were granted. Only 12 of these were fully obeyed by the respondent;
- 46 women received their final interdicts on the same day they applied, and waited an average of just over two hours for them to be processed. Three women could only pick theirs up after three days, and two had to wait a week. For temporary interdicts, women generally had to wait between one and four weeks;
- The courts sent the interdict papers to the sheriff in only 20 cases. Seventy of the remaining 80 women said they took the interdict themselves to the sheriff for delivery;
- 26 women could not afford to pay for the sheriff, and a further eight had to borrow money. Only six were informed about possible financial assistance from the court;
- In 20 cases, the sheriff delivered the interdict within one day. In other cases it took longer. In one case it took 30 days for the sheriff to deliver the interdict;
- 55 of the women were abused again after being granted interdicts - 31 received physical abuse, 12 sexual abuse, and practically all verbal and emotional abuse. Twenty-three women reported the abuse to the police. In nine cases, the police warned the respondent but did nothing further. In one case, the respondent bribed the police. Only four of the respondents were convicted;
- The 100 women had 230 children among them, many of whom would have been affected by the violence.

Domestic Violence Act 1998

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[145] Allison Morris *Women, Crime and Criminal Justice* (1987).
[146] Note 143 at 3; Dawn Blaser *NICRO Western Cape: Support for Abused Women Project: Available statistics on violence against women* (1998) NICRO Women's Support Centre. Also available from http://www.womensnet.org.za/pvaw/understand/nicrostats.htm#dvsa.
[147] Noreen Callaghan et al *A Triad of Oppression: violence, women and poverty* Centre for the Study of Violence and Reconciliation from http://www.wits.ac.za/csvr/artgend.htm.
[148] Act 133 of 1993.
[149] As at October 1997.

In light of the above, it is not difficult to comprehend that the remedies offered by the Prevention of Family Violence Act ('the old Act') are ineffective. In recognition of this fact, Parliament passed the Domestic Violence Act ('the new Act')[150] in 1998[151]. The content of the new Act is largely accredited to submissions made at the Violence Against Women Hearings, which were jointly conducted in 1997 and 1998 by the Justice Portfolio Committee and the Ad Hoc Committee on Improvement of the Quality of Life and Status of Women[152].

The new Act conveys South Africa's national[153] and international[154] commitments to the elimination of domestic violence for the achievement of gender equality[155]. It notes that domestic violence is a serious crime in our society, and constitutes a grave obstacle to the achievement of gender equality[156]. Research shows that although men are sometimes the victims of domestic violence, the large majority of victims of this socio-economic evil are women[157]. Studies indicate that one in every six women in South Africa is regularly battered by her husband, partner or boyfriend[158]. In about 46% of domestic violence cases, children are also abused by the batterer[159]. In fact, domestic violence and other related crimes against women and children have increased to such an extent over the past number of years, that the South African Police Services (SAPS) was forced to declare these types of crimes a policing priority[160].

A. Definition of "domestic relationship"

Unlike the old Act which offered protection only to abused parties in a marital or cohabitational relationship, the new Act extends its remedies to all victims who are or were in a "domestic relationship" with the abuser[161]. It includes parties: who either are or were married to each other by custom, religion or any law; who live or lived together in a heterosexual or homosexual relationship; who share or recently shared the same residence; who are or were in a relationship of any duration, including those of an actual or perceived romantic, intimate or sexual nature; parents of a child or persons who have

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[150] Act 116 of 1998. This new Act has not come into operation yet.
[151] Preamble.
[152] A total of 32 written submissions were received. Some of these include: Commission on Gender Equality 17 August 1998 from http://www.womensnet.org.za/news/domvi.htm; Women and Human Rights Project (Community Law Centre University of the Western Cape), Rape Crisis Cape Town, ANC Parliamentary Women's Caucus 30 May 1997 from http://www.womensnet.org.za/pvaw/laws/dvsum.htm; Women on Farms Project 20 March 1998 from http://www.womensnet.org.za/pvaw/laws/farms.htm; South African Human Rights Commission March 1998; Gender Advocacy Programme 20 March 1998; NICRO Western Cape Support for Abused Women Project 6 June 1997.
[153] By having regard to the constitutional entrenchment of the rights to equality (section 9 of Act 108 of 1996), and to freedom and security of the person (section 12 of Act 108 of 1996).
[154] Convention on the Elimination of All Forms of Discrimination against Women GA Res 34/180 (1979), ratified by South Africa in September 1995.
[155] Preamble and Memorandum.
[156] Memorandum.
[157] People Opposing Women Abuse (POWA) *Women Abuse: The Basic Facts* from http//www.womensnet.org.za/pvaw/help/abusefac.htm - they state that 95% of the time, women are the victims of violent abuse in their homes.
[158] Note 146; note 157.
[159] Jane Keene and Clare Vale *An investigation into the effectiveness of interdicts granted in terms of the Prevention of Family Violence Act (133) 1993* (1997) National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO Western Cape) 15.
[160] NEDCOR Institute for Security Studies Volume 2 No 4 *Crime Index* July - August 1998.
[161] Section 1(vii).

or had parental responsibility for that child; and family members related by consanguinity, adoption or affinity. The amendment therefore recognises that abuse does not just occur within the confines of a marriage or a similarly perceived relationship.

B. Definition of "domestic violence"

"Domestic violence" in the new Act is defined as: physical abuse, sexual abuse, economic abuse, psychological or emotional abuse, verbal abuse, intimidation, stalking, harassment, damage to property, entry into the complainant's residence without consent (where the parties do not live together), as well as any other controlling or abusive behaviour towards the complainant[162]. This broad definition is a welcome extension to the old Act which appeared to be limited to physical abuse only[163]. It gives recognition to the fact that domestic violence manifests itself in many forms[164].

C. Police participation

The new Act widens police participation in the prevention and handling of domestic violence. It places a duty on the SAPS to assist a complainant, where necessary, to find suitable shelter and to obtain medical treatment[165]. The police must inform the victim of her or his rights, including the right to lodge a criminal complaint where applicable[166]. Police are authorised to arrest the respondent without a warrant, at the scene of domestic violence, if there is a reasonable suspicion that an offence containing an element of violence has been committed against the complainant[167]. The new Act also makes provision for the issuing of national guidelines which must be observed when dealing with incidents of domestic violence. Failure to comply with those guidelines will result in disciplinary action being taken against police officers[168]. The amendments reflect a legislative attempt to define the role of the SAPS more clearly in light of their problematic implementation of the old Act[169]. Nevertheless, it has been argued that these changes will be ineffective if the dismissive attitudes of police officers to domestic violence cases remain unchanged, and if they do not receive adequate training[170].

D. The protection order

The new Act makes provision for a complainant to apply to court for a protection order (similar to an interdict under the old Act)[171]. An application may be brought outside of ordinary court hours, if the court is satisfied that the complainant requires urgent intervention[172]. All proceedings must be held *in camera*, to protect the interests and the identity of the victims of domestic violence[173]. The protection order is enforceable

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[162] Section 1(viii).
[163] Note 156.
[164] South African Human Rights Commission *Submission on Violence Against Women* (1998).
[165] Section 2(a).
[166] Sections 2(b) and (c).
[167] Section 3.
[168] Sections 18(2) and (4).
[169] Note 156.
[170] Note 164.
[171] Section 4(1). In its submission to the South African Law Commission on 'Domestic Violence' *Discussion Paper* No 70 (1997) 3, the Gender Unit at the Department of Justice suggested that another term be used instead of 'interdict', so that it could be better understood by the community, and would be more expressive of the relief being sought.
[172] Section 4(5).
[173] Note 156; sections 11(1)(a) and (b), 11(2)(a).

throughout the Republic[174]. This is beneficial to a complainant who moves to another jurisdiction and is followed by the respondent. Because victims of domestic violence are disempowered people, the new Act retains the provision that the application can be brought on behalf of the complainant, by a third party who has a material interest in the well-being of the complainant[175]. This has been extended to include members of the SAPS as well[176]. Furthermore, a minor or any person on behalf of a minor, may also apply for a protection order without the assistance of the parent or guardian[177].

E. Interim protection order

The old Act only allowed a court to grant a final interdict. The new Act now directs the court to grant an interim protection order, if it is satisfied that there is a *prima facie* case of domestic violence, even though the respondent may not have been notified of the proceedings[178]. This will prevent courts from refusing to grant interim orders on the basis that the respondent did not receive notice thereof[179]. A suspended warrant of arrest must be issued contemporaneously with the interim order, in anticipation of the respondent breaching the conditions set out therein[180]. If the warrant is lost, destroyed or already executed and cancelled, the clerk of the court must issue a further warrant of arrest[181]. Unfortunately, police officers have a discretion to decide whether or not to arrest the respondent[182]. Although certain factors are outlined to guide them in their decision-making[183], we submit that the discretion could be abused by police officers who have received insufficient training, and who are gender insensitive to domestic violence cases.

F. Final protection order

On the return date specified in the interim order, the court must grant a final order, if it finds, *on a balance of probabilities*, that the respondent is committing or has committed an act of domestic violence[184]. If the respondent fails to appear, the court must still issue a final order, provided it is satisfied that proper service has been effected on the respondent, and that *prima facie* evidence exists that the respondent is committing or has committed an act of domestic violence[185]. The court may not refuse to grant protection orders merely because there are other legal remedies available to the complainant[186]. Furthermore, the court cannot amend or set aside a protection order, unless it is satisfied that the complainant has made application freely and voluntarily[187]. This provision recognises the fact that the complainant may be manipulated by the respondent[188]. The

[174] Section 12(3).
[175] Section 4(3).
[176] ibid.
[177] Section 4(4).
[178] Sections 5(2)(a) and (b).
[179] NICRO Western Cape Support for Abused Women Project *Changes proposed by the SA Law Commission in respect of the Prevention of Family Violence Act 133 of 1993* (1997).
[180] Section 8.
[181] Section 8(3).
[182] Section 8(4)(b).
[183] Section 8(5).
[184] Section 6(4).
[185] Section 6(1).
[186] Section 7(7).
[187] Section 10.
[188] Note 156.

new Act also does not place a time limit on the duration of the final protection order. This is a welcome change, because in certain magisterial districts, such as Mitchell's Plain (Western Cape), interdicts granted under the old Act were only valid for one year[189].

G. Relief granted in terms of interim and final protection orders

Unlike the old Act which provided for limited relief only, the new Act grants the court wide powers in respect of both interim and final protection orders[190]. It may prohibit the respondent from[191]:

- committing any act of domestic violence;
- enlisting the assistance of any other person to commit an act of domestic violence;
- entering a residence shared by the complainant and the respondent;
- entering a specified part of such shared residence;
- entering the complainant's residence (if they do not live together);
- entering the complainant's place of employment;
- or committing any other act specified in the protection order.

The court may also order the seizure of dangerous weapons in the possession, or under the control of the respondent, and that a police officer accompany the complainant to assist with the collection of personal property[192]. Significantly, to alleviate financial hardships borne by the complainant, the court may order the respondent to pay the rent or mortgage, as well as emergency monetary relief to the complainant[193]. Where a child is involved, the court may refuse the respondent any contact with that child, if the court is satisfied that this would be in the best interests of the child[194]. This provision offers protection to children, and prevents respondents from gaining control over complainants through their children[195].

H. Legal representation

Applicants in certain magisterial districts are sometimes denied legal representation[196]. However, the new Act clearly provides for legal representation at all stages of the proceedings[197]. If the complainant is not legally represented, the clerk of the court must inform the victim of available relief, and of the right to lodge a criminal charge against the respondent[198].

I. Breach of order

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[189] Note 179.
[190] Note 156.
[191] Section 7(1).
[192] Section 7(2).
[193] Note 156, sections 7(3) and (4).
[194] Section 7(6).
[195] Note 156.
[196] Women and Human Rights Project (Community Law Centre University of the Western Cape), Rape Crisis Cape Town, ANC Parliamentary Women's Caucus (1997) *Violence Against Women in Relationships: Summary of Proposals* from http://www.womensnet.org.za/pvaw/laws/dvsum.htm.
[197] Note 156, section 14.
[198] Section 4(2).

Under the new Act, it is an offence to breach the conditions of a protection order. On conviction, the respondent is liable to a fine or imprisonment not exceeding a period of five years[199]. This is a considerable increase in penal jurisdiction, because the old Act only allowed courts to impose a period of imprisonment not exceeding 12 months[200]. It is regrettable that the recommendation that the court be directed to make an additional order for rehabilitative counselling was not included, as this could assist in remedying the problem of domestic violence in South Africa[201].

J. The new Act in relation to rural women

Rural women experience a number of problems in respect of interdicts under the old Act. We submit that these would be equally applicable under the new Act. They include[202]:

- Applications for interdicts are difficult to access because often women have to go to the urban areas to obtain them;
- Women have to utilise costly and unreliable transport systems. This means that an application could take an entire day, resulting in a loss of a day's wages;
- Violations of orders usually involve contacting the police telephonically, but telephones are a limited resource on farms;
- The work and accommodation of women on farms is dependent on them having a relationship with a male labourer. They automatically lose their work, an income, and accommodation, if the man is arrested and loses his job;
- There are few support services for these women, and no safe accommodation if they have to leave their homes. This is not surprising when one considers that there are only 29 shelters for women in South Africa, of which 20 are for battered women, and nine for destitute women[203].

The new Act laudably takes a more gender-sensitive approach to the problem of domestic violence. Its application is substantially broader than the old Act. This is made possible *inter alia* by the widening of the definitions of "domestic violence" and "domestic relationships", and the extension of legal remedies, as well as greater police involvement in cases of domestic violence. However, to ensure the effective interpretation and application of the new Act, police and court officials must receive mandatory training about the causes and effects of domestic violence[204]. Furthermore, we submit that rural women who constitute one of the most vulnerable groups to domestic violence[205], will most likely not be significantly affected by the changes brought about in the new Act. However, their problems fall squarely within the socio-economic domain, and unfortunately cannot be addressed in legislation of this nature. Socio-economic

[199] Section 17(a).
[200] Note 156.
[201] Note 196.
[202] Women on Farms Project *Submission on Domestic Violence, Access to Justice, Maintenance* (1998) from http://www.womensnet.org.za/pvaw/laws/farms.htm.
[203] Institute of Criminology University of Cape Town *Victim Survey* (1998).
[204] Note 164; note 196.
[205] Note 202. Also, in a study conducted in the rural Southern Cape, it was found that about 80% of women were victims of domestic violence - see Lillian Artz Gender Project Institute of Criminology University of Cape Town (1997). Referred to in Lillian Artz *Submission by the Institute of Criminology: Gender Analysis* (1998) Institute for Security Studies: Cape Town Crime Survey 4).

upliftment is therefore required to address their needs, so that this type of legislation will have its desired effect in all sectors of our society, including the rural women.

Rape

Table 1
Source: Crime Information Management Centre, South African Police Service, Quarterly Crime Report 1/8 *The Incidence of Serious Crime January to December 1997* (1998)

	Reported rapes (RSA)		% Difference in cases reported
1994	42 429	**1995/94**	+12.0%
1995	47 506	**1996/95**	+6.3%
1996	50 481	**1997/96**	+3.3%
1997	52 160	**1997/94**	+22.9%

Table 1 indicates that there has been a steady increase in the number of reported rapes in South Africa over the past few years. Not reflected in this table is the fact that during January to June 1998, 23 374 rapes were reported, reflecting just under half the number of rapes reported for the year 1997[206]. Since these figures are only for the first six months of 1998, it is anticipated that once the national statistics for the entire year of 1998 are released, they will again reflect an increase from the previous year.

It is estimated that in South Africa, one woman is raped every 35 seconds[207], and one in every three women will be raped in their lifetime[208]. Yet, there is massive under-reporting of rapes, since only one in about every 35 rapes is reported[209], and police estimated that in 1994, less than 3% of rapes had been reported[210]. Thus, the figures for reported rapes are not a true reflection of the number of rapes that actually occur.

Schedule 6 of the Criminal Procedure Act
Rape is listed in Schedule 1 and Schedule 2 Part 2 of the Criminal Procedure Act[211] as a serious offence. When the accused has been previously convicted of rape, or allegedly committed rape while out on bail for a rape charge, the offence is then listed in the more serious category of Schedule 5[212]. In 1997, a new Schedule 6[213] was added, which lists offences of an even more serious nature. This category includes rape committed under the following circumstances:

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[206] Crime Information Management Centre, South African Police Service Quarterly Report 3/98 *The Incidence of Serious Crime January to June 1998* (1998).
[207] Note 209. See also Mary Robertson *An overview of rape in South Africa* Centre for the Study of Violence and Reconciliation from http://www.wits.ac.za/ csvr/artrapem.htm.
[208] Note 143 at 3.
[209] ANC Women's Caucus Campaign to End Violence Against Women and Children, People Opposing Women Abuse (POWA), Sexual Harassment Education Project (SHEP), Rape Crisis and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) *Domestic Violence Facts Presented to Members of Parliament* from http://www.womensnet.org.za/pvawtest/resources/domviol.htm.
[210] Central Statistics *Women and men in South Africa* (1998) 38; P. Govender et al *Beijing Conference Report: 1994 Country report on the status of South African women* (1994) Office of the President; Crime Information Management Centre South African Police Service Quarterly Report 3/98 *The Incidence of Serious Crimes January to December 1996* (1998).
[211] Act 51 of 1977.
[212] Note 211. Schedule 5 was added by section 14 of Act 75 of 1995, and substituted by section 9 of the Criminal Procedure Second Amendment Act 85 of 1997.
[213] Note 211. Schedule 6 was added by section 10 of Act 85 of 1997.

- where the victim is raped more than once;
- where the victim is raped by more than one person;
- where the victim is raped by a person who is charged with two or more counts of rape;
- where the victim is raped by a person who knew that he has AIDS / HIV;
- where the victim is under 16 years of age, or is physically disabled, or is mentally ill;
- when the rape involves the infliction of grievous bodily harm.

Bail and sentencing

Recent changes effected in bail applications include the following: Where the accused is charged with rape in terms of Schedule 5, he must be denied bail, unless he can satisfy the court that 'the *interests of justice* permit his release'[214]. Where the accused is charged with rape in terms of Schedule 6, the burden is more onerous, because he will only be entitled to bail if he can satisfy the court that '*exceptional circumstances* exist which *in the interests of justice* permit his ... release'[215]. Furthermore, a bail application for rape as a Schedule 6 offence can only be heard at regional court level[216].

Minimum sentences in respect of rape convictions have also been introduced. When an accused as a first offender, is convicted of rape in terms of Schedule 2 Part 2, a regional court or high court must sentence him to a period of not less than 15 years direct imprisonment[217]. If the convicted person is a second offender, a sentence of not less than 20 years direct imprisonment must be imposed, and if he is a third or subsequent offender, he must not receive less than 25 years direct imprisonment[218].

The Cautionary Rule

It has been estimated that about 15% of reported rape cases reach court, and that approximately 32% of these result in convictions thereafter[219]. We submit that the criminal justice system failed to aid rape victims as a result of *inter alia*, the stereotyped assumption that women lie about being raped - thus, they do not make credible witnesses, hence the prior application of the cautionary rule[220]. In terms of this rule, the rape victim's past sexual history could be admitted as evidence, and she had to show that she promptly complained of the rape, and that her evidence was corroborated[221]. Yet, studies have indicated that just under 2% of all rape reports are false, which is less than false reporting of other violent crimes[222]. This should therefore put to rest the mythical assumption that women tend to lie about being raped.

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[214] Note 211. Section 60(11)(b), as amended by Act 85 of 1997.
[215] Note 211. Section 60(11)(a), as amended Act 85 of 1997.
[216] Note 211. Section 50(6), as amended by Act 85 of 1997.
[217] Note 211. Section 51(2)(a)(i), as amended by the Criminal Law Amendment Act 105 of 1997.
[218] Note 211. Section 51(2)(a)(ii)-(iii), as amended by Act 105 of 1997.
[219] Note 143 at 4.
[220] Jonathan Burchell and John Milton *Principles of Criminal Law* (1991) 435 at 447.
[221] ibid.
[222] People Opposing Women Abuse (POWA) *Myths and Misconceptions About Rape* from http://www.womensnet.org.za/pvawtest/help/mythrape.html.

In the case of *S v M*[223], the Court questioned the unfettered application of the cautionary rule. The Court found it highly problematic to automatically assume that women lie about being raped[224]. It felt that judicial cognisance of police statistics could be taken, which indicate there is a much greater incidence of unreported rape in South Africa[225]. To ensure that justice is done, the Court said that the cautionary rule should be carefully evaluated, so that rape victims are not deterred from approaching courts to tell their stories truthfully[226]. In light of the constitutional injunction to develop and apply the common law in terms of the spirit, purpose and object of the Constitution, the Court noted that the cautionary rule should be applied in such a way that it would not undermine the constitutional commitment to gender equality[227].

In *S v Jackson*[228], Counsel for the State argued that the basis, meaning and ambit of the cautionary rule needed to be revisited, because its application was discriminatory towards women[229]. In its landmark judgment, the Supreme Court of Appeal noted that "(t)he notion that women are habitually inclined to lie about being raped is of ancient origin ... (and that) judges have attempted to justify the cautionary rule by relying on "collective wisdom and experience""[230]. The Court held that the cautionary rule in sexual assault cases is based on irrational and out-dated perceptions[231]. Instead, the Court found that empirical research refutes the perception that women are intrinsically unreliable witnesses, or that they lie more easily or more frequently than men[232]. The Court recognised that it is not easy for a woman to bring a charge of rape because:

> "Few things may be more difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility; she may be seen as unchaste and unworthy of respect; her community may turn its back on her; she has to undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed *ad nauseum*; she (but not the accused) may be required to reveal her previous sexual history; she may disqualify herself in the marriage market, and many husbands turn their backs on a "soiled" wife."[233]

The Court also stated that the rule increased the State's burden of proof, thereby placing an additional burden on the rape complainant[234]. Thus, in a feat of judicial activism for the advancement of women's rights, the Court ousted the common law cautionary rule in respect of rape complainants[235].

The Wynberg Sexual Offences Court

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[223] 1997 (2) SACR 682 (CPD).
[224] At 685D. The Court referred to a study undertaken by Prof Susan Estrich entitled *Real Rape* (1987) 54-55.
[225] At 685E.
[226] ibid.
[227] At 685H-I.
[228] 1998 (4) BCLR 424 (SCA).
[229] At 428D.
[230] At 428J-429A.
[231] At 430H.
[232] At 429B.
[233] At 429G-430A.
[234] At 430H.
[235] ibid.

In 1993, the first specialised sexual offences court, dealing exclusively with sexual offence cases involving adult and child complainants, was launched as a pilot project at the Wynberg Regional Magistrates' Court in Cape Town[236]. The project included associated services provided by the South African Police Services (SAPS), the Health Department, and the Welfare Department[237]. The broad objectives of this project included: the reduction or elimination of secondary victimisation of sexual offence complainants; the development of an integrated and co-ordinated system, to process and manage sexual offence cases; and the improvement of the reporting, prosecution, and conviction rates for sexual offences[238].

In 1997, a comprehensive report[239] was compiled in respect of this project, summarising the findings from the first phase of its evaluation, and detailing women's experiences at the court, as well as their experiences of the SAPS and the district surgeon. Although the report recommended the retention of the project[240], it identified *inter alia*, the following problems:

- Wynberg Sexual Offences Court

As a result of its court roll being about three times that of other regional court rolls, not all rape trials have been held at the special sexual offences court[241]. In order to allow prosecutors to have adequate time to consult with the complainants and prosecute cases, two prosecutors, instead of one, were assigned to work in this court[242]. However, some women were only consulted by the prosecutor a day before the trial; some just before giving evidence; and others were not consulted at all[243]. Although the court has a special waiting room for complainants, many women were unaware of its existence, and waited outside the courtroom before giving evidence, often in the presence of the accused[244].

- Victim Support Services Co-ordinator (VSSC)

A VSSC has been provided for sexual offence complainants[245]. This associated service is located at the Wynberg Sexual Offences Court, and the position is filled by a social worker accountable to the Department of Welfare[246]. However, the VSSC has performed primarily a management role, instead of a clinical one[247]. Many women were never informed of her existence, hence the employment of a court social worker has failed to provide a crucial support service to complainants[248].

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[236] Note 239 at 1, 46.
[237] Note 239 at 44.
[238] Note 239 at 1.
[239] Sharon Stanton et al *Improved Justice for Survivors of Sexual Violence? Adult survivors' experiences of the Wynberg Sexual Offences Court and associated services* (1997) Rape Crisis Cape Town, African Gender Institute (University of Cape Town), Human Rights Commission.
[240] Note 239 at 167.
[241] Note 239 at 150-151.
[242] Note 239 at 46.
[243] Note 239 at 151.
[244] Note 239 at 46, 151.
[245] Note 239 at 46.
[246] ibid.
[247] Note 239 at 151-152.
[248] ibid.

- Rape Unit and District Surgeons

An associated service in the form of a rape unit was established at Victoria Hospital in Wynberg[249]. However, trained support staff, such as nurses and counsellors, have not been specifically allocated to the unit[250]. Also, some district surgeons involved in the project appear to be insensitive to rape complainants[251].

- SAPS:

There should be two trained police rape specialists at each of the 20 police stations which fall under the jurisdiction of the Wynberg Sexual Offences Court[252]. However, these rape specialists have not received adequate training, and not all of the 20 police stations are equipped with the requisite rape specialists[253]. Police officers also remain insensitive in their handling of rape victims[254].

Subsequent sexual offences courts[255]

As a result of the increase in case load[256] of the Wynberg Sexual Offences Court, a subsequent court was opened at the Wynberg Regional Court, by the Minister of Justice on 1 August 1997. This court has a permanent magistrate, two prosecutors, and its own intermediary room for child complainants to testify. The introduction of the second court has successfully led to a reduction in the number of outstanding sexual offence cases[257]. In 1997, a National Task Team was set up by the Deputy Minister of Justice to evaluate the sexual offences courts. The Task Team regarded the project as a success, and by the end of 1998, the Wynberg Sexual Offences Courts were given official recognition. The success of these courts led to the initiation of another sexual offences court in Bloemfontein, which will officially be launched on 1 February 1999.

Comment

The judiciary has expressed the view that rape constitutes "... a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim"[258]. The ousting of the cautionary rule is therefore a vindicatory step for the dignity of women. The inclusion of rape into the various Schedules of serious offences also reflects a legislative recognition that rape is a serious offence. The amendments in respect of bail and sentencing are further acknowledgements that rape is a serious attack on society, and must be dealt with severely. The establishment of sexual offences courts with associated services for rape complainants is a positive development, because it identifies the distinctive nature of the crime and the special needs of its survivors. Certainly more of these courts are required throughout the country. At the same time, the objectives in

[249] Note 239 at 45.
[250] ibid.
[251] Note 239 at 150.
[252] Note 239 at 44.
[253] Note 239 at 149.
[254] Note 239 at 150.
[255] The following information was obtained from Advocate Lynette Myburgh (Directorate: Organised Crime and Public Safety). She is a member of the National Task Team which evaluated the Wynberg Sexual Offences Courts (1998).
[256] The case load increased substantially as follows:
December 1993:- 139 sexual offence cases outstanding; December 1996: - 164 sexual offence cases outstanding; December 1997:- 534 sexual offence cases outstanding.
[257] By the end of 1998, only 570 sexual offences cases were outstanding for both courts combined.
[258] *S v Chapman* 1997 (2) SACR 3 (SCA) at 5B.

respect of the establishment of these courts will not be realised if the problems identified are not addressed. Despite these positive steps, a number of changes still need to be effected in the area of rape for example, the definition of rape must be revisited[259].

Femicide

Femicide is the term given to women who are murdered by their intimate male partners, which includes husbands, boyfriends or common-law partners, as well as men from whom they are estranged, separated or divorced[260]. It is reported that in South Africa, at least one woman is killed every six days by her male partner, and one in every six women is murdered by her male intimate[261]. About 41% of female homicides are perpetrated by the woman's spouse or partner[262]. These figures indicate that just under half of all the women killed in South Africa, lose their lives at the hands of men whom they know, and who supposedly loves them. What is more frightening is the manner in which the criminal justice system has handled the perpetrators of this heinous crime.

In *S v Ramontoedi*[263], the accused killed his wife in the Maintenance Office at the Johannesburg Magistrates' Court. After being charged with murder, he pleaded self-defence[264]. The Court rejected his testimony, convicted him, and sentenced him to a mere three years correctional supervision[265]. During sentencing, the Court acknowledged that the sentence for inter-family murder would normally merit a long period of imprisonment, given the increase in South Africa of inter-family violence resulting in death[266]. However, in this matter, the Court imposed a lighter sentence, based on its deduction that the accused had been provoked over a long period of time. The Court arrived at this conclusion in light of the accused's testimony that he had suspected his wife of conducting an extra-marital affair, and that the child born during the course of the marriage was not his. We submit that the Court's deduction was unsubstantiated, given that the accused had not pleaded provocation at all. In fact, the Court admitted that it was "in the dark as to what that provocation actually was and the degree of it"[267].

The Court accepted evidence that the accused had accosted the deceased en route to the Maintenance Office, prior to the murder[268]. The Court even said that "(b)ecause the deceased feared the accused ... it is noteworthy, ... that (she) thought it necessary to obtain a police escort on the morning of the maintenance hearing"[269]. Despite the fact that the accused had displayed violent tendencies, and that the deceased feared him, we

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[259] The common law definition of rape is the 'intentional unlawful sexual intercourse with a female without her consent'. See Jonathan Burchell and John Milton *Principles of Criminal Law* (1991) 435.

[260] Karen Stout ' "Intimate Femicide": Effect of Legislation and Social Services' *Femicide: The Politics of Woman Killing* (1992) J Radford and Diana E.H. Russell (eds) 133. Lisa Vetten also uses this definition in her article entitled *Man Shoots Wife* from http://www.womensnet.org.za/pvaw/understand/manshoots.html. See also The Joint Committee on the Improvement of the Quality of Life and Status of Women *Violence Against Women Hearings* (1998).

[261] Note 143 at 3.

[262] NICRO Women's Support Centre *Statistics on Violence Against Women in South Africa and Internationally* from http://www.womensnet.org.za/pvaw/understand/nicrostats.htm#dvsa.

[263] Unreported Case No: 188 / 96 Witwatersrand Local Division 23 June 1996.

[264] At 2 of the judgment.

[265] In terms of section 276(1)(i) of Act 51 of 1977. At 5-6 of the sentence.

[266] At 2-6 of the sentence.

[267] At 3 of the sentence.

[268] At 8 of the judgment.

[269] At 8-9 of the judgment.

submit that the Court did not investigate the possibility that the murder had been a culmination of violent behaviour by the accused. Instead, the Court was intent on finding some type of 'plausible' justification for the actions of the accused, hence the Court's insistence that the accused had been provoked.

We submit that the sentence imposed in this case clearly sends a message to abusive men that the courts will 'understand' if they are provoked into killing their wives, and will give them a lighter sentence. We submit further that even if provocation is proven, it is unacceptable that courts should consider provocation as any type of justification for a violent outburst resulting in femicide.

This case constitutes a blow for the advancement of women's rights in South Africa. It highlights the Court's ignorance and lack of understanding of the phenomena surrounding this type of violence against women in our society, for example, the Battered Women Syndrome. Given the increasing statistics for intimate femicide, strong arguments can be advanced for the imposition of more stringent sentences as a deterrent for these types of crimes[270].

FAMILY LAW

Family Courts

The most significant development in family law was the proposed introduction of family courts in South Africa. In 1997, the Hoexter Commission[271] handed its final report to the President in which it recommended the establishment of family courts. The Commission proposed that these courts should be presided over by family court judges, and assisted by family court commissioners. It was suggested that the courts be located in the magistrates' court, and function according to the magistrates' court tariff in order to reduce litigation costs. The criteria for appointment as a presiding officer would include an appropriate legal qualification, experience in and a predilection for family law work, as well as a compassionate personality. The commissioners would preside over *inter alia* undefended divorces, maintenance cases, interlocutory applications, and pre-trial and mediation conferences[272].

The Commission also recommended the promulgation of a Family Advocate and Family Counselling Service Act, to empower the Family Advocate to intervene in all divorces[273]. The Family Advocate would provide the family courts with reports on custody matters, and would co-ordinate mediation and counselling services[274]. While the extension of the duties of this Office would be welcomed, we are concerned that the rationale behind the augmentation of its functions may not be realised, given its existing limited resources[275].

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[270] Lisa Vetten quoted in *The Sunday Times* 2 August 1998 editorial page.
[271] Hoexter Commission Third and Final Report *The Commission of Enquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court* (1997).
[272] B Whittle 'Family Courts Receive the Nod from the Hoexter Commission' (February 1998) *De Rebus* 7.
[273] ibid.
[274] B Whittle 'Attorneys Must be Included in the Family Courts Pilot Project' (January 1998) *De Rebus* 10.
[275] Felicity Kaganas *Family Advocate* (1996) Law, Race and Gender Research Unit University of Cape Town 12.

The Department of Justice initiated pilot projects by setting up six family courts in various city centres throughout the country, namely in, Cape Town, Port Elizabeth, Johannesburg, Lebowagomo, Durban and Pretoria. In 1998, regulations were passed to formally give effect to the establishment of these family courts in South Africa[276]. The recommendations of the Commission have been incorporated, with the exception that these courts can also preside over undefended as well as defended divorces at regional court level. These courts are competent to consider all applications in connection with divorce actions which are heard in the High Court. These include *inter alia* applications for edictal citation and substituted service, urgent applications, and interim applications for maintenance, contribution towards costs, custody and access to children[277].

The regulations also make provision for interrogatories to secure evidence of witnesses who do not reside in the district where the case is heard. The magistrate who presides over the matter may direct that another magistrate of the district where the witness resides, elicits evidence from that witness to be transmitted to the court hearing the matter and entered as evidence[278]. We submit that this provision will reduce the cost of securing the attendance of witnesses before court, and expedite proceedings in respect of those witnesses who find it difficult to attend court in another district. At the same time, we are concerned that the magistrate presiding over the matter will be unable to make a credibility finding in respect of the absent witness.

The perception may be drawn that the transfer of divorces to magistrates' court level could reduce the seriousness of divorce proceedings, because magistrates' courts operate on a lower level than high courts. However, we submit that the status of the court is irrelevant. A specialised court with a separate administration system and well trained officials would be in a better position to expedite legal proceedings, and would be more accessible to vulnerable parties such as women and children.

Divorce

Black divorce courts

Special divorce courts created to serve only black persons[279] were deracialised by the Divorce Courts Amendment Act[280] to make them accessible to all persons. These courts are competent to adjudicate on the validity of a marriage, hear divorce suits, and to decide any question arising from them including maintenance, custody and access[281]. The rules for these courts have been amended to bring them in line with the Constitution, to rid them of anomalies, and to introduce procedures that were previously lacking. For example, black divorce courts could previously only make interim orders for contributions towards the cost of the divorce action. The amended rules which mirror Rule 43 of the Uniform Rules of Court, now enable these divorce courts to also make orders for interim relief in respect of maintenance and custody and/or access to any child,

[276] See Government Notice R. 1454 published in *Government Gazette* No. 19458 of 9 November 1998.
[277] Note 276. Rules 17(10), 32 and 33(9).
[278] Note 276. Rule 10.
[279] Note 27. Section 10.
[280] Act 65 of 1997, which came into operation on 6 April 1998.
[281] Koos and Pieter Stassen 'Nuwe Wetgewing' *De Rebus* (June 1998) 31.

pending the resolution of the matrimonial action[282]. We submit that these amended rules are significant for women who approach these courts, because it has been shown that women are more likely than men to access Rule 43 in divorce matters[283].

Pension-sharing on divorce

The problems relating to pension-sharing on divorce prompted the South African Law Commission (SALC)[284] to investigate a legislative solution. The SALC identified three main shortcomings in the law: pension sharing is effected indirectly through matrimonial property law, which brings about unsatisfactory results; there is no uniformity in the manner in which the shareable amount is calculated; and preference is given to an exchange of assets, in lieu of a share of the pension benefits, instead of making provision that the share be payable by way of a deferred pension. We submit that given the unequal economic position between men and women in marriage, it is usually men who are the holders of pension funds. On divorce, women generally have to institute a claim for a portion of the benefit. It is therefore evident that the shortcomings inevitably affect women negatively.

The SALC recommended *inter alia* that:

- Legislation be enacted to regulate the sharing of pension and retirement funds on divorce so that a spouse would be entitled to a proportionate share of the benefits accumulated during the marriage. The spouse's right to a share in the pension funds should not depend on the matrimonial property regime regulating the marriage. Furthermore, marriages concluded according to customary or religious law should be recognised for the purpose of the proposed legislation;
- The formulae for calculating the proportion of the benefit accruing to the spouse should be clearly determined;
- On divorce, a direct payment should be made to the spouse by the relevant fund on maturation of the benefit. However, spouses should have the freedom to enter into settlement agreements for the transfer of assets from one spouse to another, in lieu of the share that she or he would have received from the other's pension fund;
- Spouses should also be free to contractually regulate their rights and obligations over each others pension funds, including a waiver of rights, in the event of divorce[285].

We submit that most of these recommendations may help to equalise the economic position between parties on divorce. However, since women usually enter into pre- and post nuptial agreements from positions of unequal bargaining power, on divorce, they are usually financially worse off than men. We are therefore concerned that giving parties an unfettered right to contractually regulate their respective rights and obligations over each other's pension funds, will reinforce existing disparities in the proprietary consequences of divorce. Furthermore, we submit that statutory regulation of pension benefits will only

[282] Cheryl Loots "Divorce Courts Rules and Tariffs" (August 1998) *De Rebus* 22.
[283] Note 58 at 44.
[284] South African Law Commission 'Sharing of Pension Benefits' *Discussion Paper 77 Project 112* (1998).
[285] Willie Henegan 'SALC calls for comments on pension sharing and review of the Child Care Act' *De Rebus* (July 1998) 14.

be successful if there is consultation between government and the insurance industry. The latter would invariably have to re-work their respective fund rules.

Access, Custody and Guardianship

The 1997 Natural Fathers of Children Born out of Wedlock Act[286] emanated from a South African Law Commission Report on the rights of fathers in respect of extramarital children[287]. Section 2 of the Act simply codifies the common law position, by providing that fathers may make application to court for an order granting them access to, custody and guardianship of, their extramarital children. The best interests of the child remains the paramount consideration. Accordingly, the court has a discretion[288] to grant the order provided it is in the best interests of the child, and as long as it considers the Family Advocate's Report where an enquiry is instituted by the latter[289]. Fathers of extramarital children therefore still do not have an inherent right of access to, custody and guardianship of, those children, and bear the burden of showing, on a balance of probabilities, that the order should be granted[290].

This statutory position accords with arguments advanced against the granting of such inherent rights. In South Africa, single mothers are burdened with the maintenance of children in conditions of poverty, and where traditional support structures have broken down[291]. They find it difficult to gain access to court given their current socio-economic circumstances[292]. If fathers had been granted those inherent rights, mothers would have had to confront the double burden of approaching the court, and bearing the onus to show why the application should not be granted[293]. It has therefore been contended that the retention of the status quo reflects a recognition of the vulnerable position of those mothers, and an attempt not to further exacerbate their disadvantaged socio-economic position[294].

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[286] Act 86 of 1997. This Act came into force on 4 September 1998.

[287] South African Law Commission 'Rights of a Father in Respect of his Illegitimate Child' *Project 79* (1994).

[288] In terms of section 2(5)(a)-(g) of the Act, prior to making the order, the court must consider: the relationship between the father and the mother and particularly, whether a history of violence exists between the parties and in relation to the child; the relationship of the child with the father, the mother, or proposed adoptive parents; the effect of separation of the child from the father, mother or proposed adoptive parents; the attitude of the child; the degree of commitment displayed by the father toward the child, particularly the extent he contributed to the lying-in expenses incurred by the mother as well as any maintenance payments made by him; and whether the child was born of a customary union or of a marriage in terms of any religious precepts; and any other fact which, in the opinion of the court, should be taken into account.

[289] Section 2(2)(a) and (b).

[290] Prior to the Act, the Supreme Court upheld the common law position that fathers of extramarital children do not have an inherent right of access to, custody or guardianship of those children. See *Edwards v Fleming* 1909 TH 232; *Docrat v Bhayat* 1932 TPD 125; *Rowan v Faifer* 1953 (2) SA 705 (E); *Short v Naisby* 1955 (3) SA 572 (D); *September v Karriem* 1959 (3) SA 687 (C); *Ex parte Van Dam* 1973 (2) SA 182 (W); *Douglas v Mayers* 1987 (1) SA 910 (ZHC); *F v L and Another* 1987 (4) SA 525 (W); *F v B* 1988 (3) SA 948 (D); *W v S* 1988 (1) SA 475 (N); *D v L and Another* 1990 (1) SA 894 (W); *B v P* 1991 (4) SA 113 (T); *B v S* 1995 (3) SA 571 (D); *T v M* 1997 (1) SA 54 (A); *W v F* 1998 (9) BCLR 1199 (N).

[291] JC Sonnekus and A Van Westing 'Faktore vir die erkenning van 'n sogenaamde reg van toegang vir die vader van 'n buite-egtelike kind' 1992 (2) *TSAR* 243.

[292] Brigitte Clark and Belinda van Heerden 'The legal position of children born out of wedlock' *Questionable Issue - Illegitimacy in South Africa* (1992) Sandra Burman and Eleanor Preston-Whyte (eds.) 57; Vivienne Goldberg 'The right of access of a father of an extramarital child: Visited again' 1993 (110) *South African Law Journal* 271.

[293] Brigitte Clark 'Should the Unmarried Father have an inherent right of access to his child?' 1992 (8) *South African Journal of Human Rights* 569.

[294] Note 97 at 163.

Adoption

Section 18(4)(d) of the Child Care Act[295] provided that the consent of both parents was required for the adoption of their child where the parents were legally married to each other, but that only the consent of the mother was required in the case of an extramarital child. The Constitutional Court in *Fraser v Children's Court Pretoria North and Others*[296] held that section 18(4)(d) was unconstitutional, and gave Parliament two years from date of judgment, to remedy this defect. The Court advised Parliament to take cognisance of anomalies which exist in various parental relationships, for example, some natural fathers display a commitment toward their extramarital children, whereas others do not. The Court therefore took the view that a blanket rule requiring the consent of all natural fathers of extramarital children in respect of adoption proceedings should not be allowed. We submit that the Court's approach indirectly acknowledged that a blanket rule would impact negatively on women, especially single mothers, who may have borne their children as a result of rape, and who experience economic hardship as a result of men who do not shoulder their parental responsibility.

The Adoption Matters Amendment Act[297] is the legislative response to the Court's directive to remedy the defect, in respect of the requisite consent of parents in adoption proceedings. With regard to parents who are not married to each other, this Act provides that the consent of both parents is required, on the condition that the natural father acknowledges his paternity in writing. This proviso is only applicable in instances where the whereabouts of the natural father are known. However, the consent of the natural father is not required where he fails to acknowledge paternity of the child; or does not fulfil his parental duties without good cause; or where the child was conceived as a result of an incestuous relationship, or as a result of rape or assault of the mother. It is therefore clear that the legislature has not made provision for a blanket rule requiring the consent of *all* natural fathers of extramarital children in adoption proceedings.

Maintenance

In recognition of the increasing problem of parties, usually men, failing to meet their maintenance obligations, the South African Law Commission (SALC) is in the process of investigating the reform of the entire maintenance system in South Africa. The new Maintenance Act[298] which was passed in 1998, as a result of a Discussion Paper[299] published by the Department of Justice, incorporates some of the recommendations of the SALC[300]. The Preamble of the Act reflects South Africa's constitutional commitment to the establishment of a society based on *inter alia* social and economic justice by establishing a fair and equitable maintenance system[301]. Although the Act notes South

[295] Act 74 of 1983.
[296] Note 19. For a further discussion of this case, the reader is referred to the section on Equality at p3 and p6 of this chapter.
[297] Act 56 of 1998. See sections 4 and 5.
[298] Act 99 of 1998. This Act has not come into operation yet.
[299] Department of Justice 'Maintenance Law Reform: The Way Ahead' *Discussion Paper* (1997).
[300] South African Law Commission 'Review of the Maintenance System' *Issue Paper 5 Project 100* (1997).
[301] Preamble.

Africa's international commitments to the rights of the child[302], it acknowledges that this country has possibly fallen short of its international obligations, specifically with regard to taking all appropriate measures to secure the recovery of maintenance for children, from parents or other persons who have financial responsibility for those children[303]. This Act repeals the former legislation in its entirety, but is regarded as an interim measure during the reform of the maintenance system[304]. Since it is usually men who default in respect of maintenance payments, this Act has significant implications for women.

We have to note that the Act is not the easiest legislation to read and understand. It contains ambiguities thus, the interpretation which the writers offer in some parts, may not necessarily be the correct one. Although the Act includes some positive innovations, it also has some draw-backs. Furthermore, we are concerned that the existing infrastructure with concomitant lack of resources, may not be sufficient to sustain the changes introduced by this Act.

Under the old Act[305], the definition of a "maintenance order" was narrow as it related only to 'periodical payment of sums of money'[306]. This excluded payments which were not of a recurring nature such as medical expenses, education etcetera.[307]. While the courts identified the lacuna and opted to define "maintenance" widely, the problem remained[308]. The new legislation still does not take a definitive stance in this regard[309].

At present, there are vast disparities in the types of maintenance awards made in different magisterial districts[310]. It has been suggested that one way of alleviating these disparities would be to introduce a standardised inquiry procedure which would include the determination of the levels of income of interested parties, the needs in respect of maintenance of interested parties etcetera[311]. Notably, this has not been catered for in the new Act, and will hopefully be incorporated in subsequent legislation.

The discretionary power of maintenance officers to decide whether or not to institute an enquiry for the determination of maintenance payments, is retained by the new Act[312]. The SALC listed this discretion as one of the major problems of the former maintenance system, because it allows maintenance officers to refuse to undertake an enquiry without furnishing adequate reasons[313]. Unless maintenance officers receive specialised training,

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[302] Preamble. Refers to Article 27(1) of the Convention on the Rights of the Child GA Res 44/25 (1989), ratified by South Africa in June 1995.
[303] Note 302. Refers to Article 27(4).
[304] Note 301.
[305] Maintenance Act 23 of 1963.
[306] Section 5(4)(a)(i) of Act 23 of 1963.
[307] The effect of the exclusion is that an order for the payment of medical expenses cannot be enforced in terms of sections 11 and 12 of Act 23 of 1963. See June Sinclair *Law of Marriage* (1996) 468 fn198.
[308] *Schmidt v Schmidt* 1996 (2) SA 211 (W).
[309] See section 1(1)(vii) which defines "maintenance order" as "any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic... ".
[310] Note 133 at 55.
[311] Note 300 at 4; note 313 at 65.
[312] Section 6(2).
[313] Brigitte Clark 'The New Maintenance Bill - Some Incremental Reform to Judicial Maintenance Procedure' (December 1998) *De Rebus* 63 at 64.

it has been argued that the discretion should not be allowed, to safe-guard the interests of complainants and children[314].

The lack of training of maintenance officers was identified as a root problem[315]. In order to fulfil their task adequately, maintenance officers need to be given basic social training so that they can understand the stresses of family life, the costs of raising a family, gender-sensitivity issues, and accounting issues[316]. The new Act therefore stipulates that policy directions be introduced to determine the functions of maintenance officers, to establish uniform norms and standards for maintenance officers, and to build a more experienced pool of trained and specialised maintenance officers[317]. Although the new Act specifically states that only public prosecutors are maintenance officers[318], we may still have the problem, due to a lack of resources, especially in rural areas, where clerks continue to perform the functions of maintenance officers, in situations where parties agree on the amount of payment. This is problematic because clerks do not have the required training needed to deal with maintenance matters.

The new Act also makes provision for maintenance investigators who are tasked with *inter alia*, locating the whereabouts of respondents or any other persons[319]. This is a significant addition because the provision assists women who are unable to afford tracing agents, to locate the whereabouts of defaulting parties. In order to deal with the rampant problem of persons failing to appear before court[320], the new Act provides for default orders to be made against persons *in absentia*, provided that the court is satisfied that the person had knowledge that he was required to appear before court[321]. This is an important change because in the past, the court could not make a maintenance order without the defaulting party being present.

Welcome additions incorporate the types of orders which a court can grant. Where applicable, the court can order that the child be registered as a dependant of the defaulting party's medical scheme[322]. Where an order has been made, or substituted by another order, or where the defaulting party is convicted for failing to pay maintenance, the court must order, where applicable, that a third party satisfy the maintenance order, if such third party owes or would in the future owe the defaulting party a payment of money on a periodical basis[323]. In cases of default of a maintenance order, the court can grant a garnishee order, or a warrant of execution including the attachment of pension, annuity, gratuity or compassionate allowances, or an emoluments attachment order, provided the court is satisfied that the respondent is in the service of an employer, and that it is not impracticable to make the order[324]. The new Act provides that a garnishee or

[314] Note 313 at 65.
[315] Note 133 at 54.
[316] Some of these needed skills are identified by Brigitte Clark - see note 313 at 65.
[317] Section 4(1)(a)-(b).
[318] Section 4(1).
[319] Section 5(1) and 7(2).
[320] Note 300 at 15-16.
[321] Section 18.
[322] Section 16(1)(a)(i).
[323] Section 16(2)(a)(iii).
[324] Sections 26(1); 26(2); 26(4); 27; 28; 30.

emoluments attachment order made against a person liable for maintenance, has priority over any other order of court[325]. Despite these crucial amendments, we submit that the court will not be able to make these orders against persons employed in the informal sector, such as hawkers. This means that a significant percentage of men in South Africa will not be affected by this provision[326].

When a person is convicted for failing to pay maintenance, the court can still impose a fine, or a prison sentence with a maximum of one year, or such prison sentence without the option of a fine[327]. The maintenance officer may now also furnish the personal particulars of the convicted person to a credit rating or credit granting company[328]. This is an important addition because it holds punitive consequences even for those employed in the informal sector.

Paternity

In *D v K*[329], the applicant, a woman, brought an application against the respondent to compel him to undergo a blood test, to expedite a maintenance matter in which the respondent had denied paternity[330]. The applicant argued that our courts have held that, as a procedural matter, it is within their inherent jurisdiction to order a party to undergo a blood test[331]. The Court, however, found that the ordering of blood tests for the purpose of establishing paternity fell within the realm of substantive law, and was accordingly not within the Court's inherent jurisdiction to regulate its own procedure[332]. The Court also referred to section 2 of the Children's Status Act[333] which creates a presumption that a failure by a man to submit to a blood test in a paternity dispute, raises the inference that his refusal is aimed at concealing the truth[334]. The Court held that the Act did not compel an adult to submit to a blood test, because if the legislature had intended to do this, it would not have relied on a presumption[335].

In maintenance matters, many men rely on a denial of paternity to escape maintenance obligations. Even though the law has created a rebuttable presumption, which raises a negative inference if men refuse to undergo blood tests, the presumption can be discharged by using secondary evidence, which is less conclusive than blood tests. If men are not ordered to undergo blood tests, we submit that women are placed in the disadvantageous position, where they would carry the full cost of bearing and rearing the child. The new Maintenance Act[336] ameliorates the situation, to the extent that the court can make a provisional order, directing the state to bear the costs of a blood test where

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[325] Section 29(3).
[326] Note 1. Lists a significant number of South African men who may be employed in the informal sector.
[327] Section 31(1).
[328] Section 31(4).
[329] 1997 (2) BCLR 209 (N).
[330] At 211B.
[331] At 212J-213A. The applicant relied on the following cases: *Seetal v Pravitha and Another NO* 1983 (3) SA 827 (D) at 831; *M v R* 1989 (1) SA 41 (O).
[332] At 218B.
[333] Act 82 of 1987.
[334] At 218E-J.
[335] At 218H.
[336] Act 99 of 1998.

the parties are unable to afford this[337]. Still, this can only be done when both parties are willing to submit to such a test[338]. We submit that the Children's Status Act and subsequent maintenance legislation should be amended, to compel parties to submit to blood tests in instances of paternity disputes. Such an amendment would also allow the courts to meet their constitutional obligation, by regarding the best interests of the child as the paramount consideration[339].

Customary Law

Prior to 1994, there was a multiplicity of legal regimes operating within the territories of the former Republic of South Africa. The legislative assemblies of the TBVC states[340] passed their own legislation dealing with marriage, divorce, succession etcetera. With the coming into force of the Constitution in 1994, and the incorporation of the former independent and self-governing territories into the Republic of South Africa, Parliament was faced with the challenge of unifying all the different laws. It responded by passing the Justice Laws Rationalisation Act ('the JLR')[341]. The aim of the JLR was to extend the operation of certain pre-1994 legislation to the former homelands and self-governing territories, by substituting or repealing their existing laws[342].

However, in repealing, amending and extending legislation, Parliament failed to adequately reconcile conflicting provisions in the legislation of the former territories, vis-à-vis the legislation of the Republic. This resulted in a number of lacunae and anomalies in the law. For example, the JLR applies the whole of the former Republic's Matrimonial Property Act ('the MPA')[343] throughout South Africa (including the former territories)[344]. The MPA abolished the marital power of the husband as a consequence of marriage[345]. However, the JLR, while repealing certain provisions of the Transkei Marriage Act ('the TMA')[346], did not repeal the provision which includes the marital power of the husband[347]. As a result of this legislative oversight, a dual system with conflicting effects on the status of women, existed in Transkei[348]. This anomaly was recognised in the case of *Prior v Battle*[349], and partially resolved when the Court declared that the sections of the TMA, providing for the marital power, were anachronistic and inconsistent with the interim Constitution, as they violated a woman's rights to equality, dignity, freedom of security of the person, access to court, to engage freely in economic activity, to acquire and hold rights in property, and to dispose of such rights[350]. The anomaly will be wholly resolved with the introduction of the Recognition of Customary Marriages Act[351]

[337] Section 21(3)(a) of Act 99 of 1998.
[338] Section 21(1)(b) of Act 99 of 1998.
[339] Section 28(2) of Act 108 of 1996.
[340] Transkei, Bophutatswana, Venda, Ciskei.
[341] Act 18 of 1996. This Act came into force on 1 April 1997.
[342] See long title of Act 18 of 1996.
[343] Act 88 of 1984.
[344] Schedule 1 of Act 18 of 1996.
[345] Sections 11 and 12 of Act 88 of 1984.
[346] Act 21 of 1978.
[347] Sections 37 and 39 of Act 21 of 1978.
[348] Chuma N. Himonga 'A Legal System in Transition: Cultural Diversity and National Identity in Post Apartheid South Africa' *Recht in Afrika* (1998) 18-19.
[349] 1998 (8) BCLR 1013 (Tk).
[350] At 1019F-1020E.
[351] Act 120 of 1998.

(discussed immediately hereafter), which expressly repeals the conflicting provisions in the TMA.

A further inconsistency was that the JLR, while extending the application of the MPA to former territories, failed to extend the provisions of the Marriage Act ('the MA')[352] as well. While the MA does not permit polygamy and has certain provisions formalising marriages, the TMA permits polygamy and has its own provisions, inconsistent with those of the MA, to formalise marriages in Transkei. This lacuna was identified by the legislature with the passing of the Marriage Act, Extension Act ('the Extension Act')[353], which came into force on 12 November 1997. The Extension Act extends the provisions of the MA retrospectively to 27 April 1994 in respect of the whole of South Africa, including the former TBVC states. However, the retrospectivity of the Extension Act raises questions about the validity of marriages concluded in terms of the TMA, between 27 April 1994 to 12 November 1997. It is possible that those marriages may be considered invalid, as their formalisation in terms of the TMA does not comply with the provisions of the MA.

Customary marriages

In 1997, the South African Law Commission (SALC) recommended that customary unions be given full legal recognition as valid marriages, subject to the satisfaction of certain essential requirements, such as the consent of the spouses[354]. The SALC recommended that there should be a single system of family courts which should administer a common code of divorce law[355]. It also proposed that parties to customary unions should have equal capacities and powers of decision making; that both parties have full capacity to acquire, own and possess property; and that full ownership in individual acquisitions on property be recognised by legislation[356].

Parliament responded by passing the Recognition of Customary Marriages Act[357]. The Act extends full recognition to marriages entered into under indigenous law or traditional rites, and provides for the registration of those marriages[358]. It regulates consent and minimum ages for spouses[359]; the proprietary consequences of customary marriages, including community of property and ante-nuptial contracts[360]; judicial regulation of divorce[361]; equal status of spouses, including the capacity to acquire and dispose of assets, and to contract and litigate[362]. One of the salient features of the Act is that it provides that all divorces take place by a decree of court, and that only an 'irretrievable breakdown of marriage' constitutes a ground for divorce[363].

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[352] Act 25 of 1961.
[353] Act 50 of 1997.
[354] Note 355 at paras 3.1.9 and 4.1.10. As cited in note 97 at 158 fn7.
[355] South African Law Commission 'The Harmonisation of the Common Law and the Indigenous Law' *Discussion Paper 7, Project 90* (1997) at para 7.1.
[356] Note 355 at paras 6.2.2.20, 6.2.2.21 and 6.3.1.16. As cited in note 97 at 158 fn7.
[357] Act 120 of 1998.
[358] Section 4.
[359] Section 3(1)(a)(i)-(ii).
[360] Section 7(2).
[361] Section 8.
[362] Section 6.
[363] Section 8.

While the Act recognises polygamous marriages under customary law, it denies parties to a civil marriage the right to enter into a second marriage[364]. The restriction is based on the view that conversion from a monogamous marriage to a polygamous marriage is prejudicial to the wife's position, whereas the reverse is not[365]. The Commission for Gender Equality is of the opinion that the recognition of polygamy exacerbates the already tenuous position women suffer in achieving equality[366].

This Act is a positive step in achieving the constitutional aim of recognising marriages concluded under traditional law[367]. However, by only dealing with African marriages, it falls short of the constitutional commitment to recognise religious marriages as well[368]. By implication, it excludes those marriages from the definition of customary marriages[369].
The selective application of the Act remains a stumbling block to achieving equality for women in religious unions. Consider *Amod v Multilateral Motor Vehicle Accident Fund*[370]. In this case, a woman's loss of support claim was repudiated on the ground that the marriage between her and her deceased husband, concluded under Islamic Law, had not given rise to a legal duty of support[371]. The Court held that under common law, the plaintiff had to prove the existence of a lawful marriage in a loss of support claim[372]. However, Appellate Division authority dictated that potentially polygamous unions celebrated under the tenets of the Muslim faith, were contrary to public policy and invalid[373]. With reference to section 39(2) of the final Constitution, the Court found that even though it was empowered to develop the common law, it had not been intended that courts should 'eliminate or alter existing principles of the common law'[374]. The Court concluded that it was not prepared to alter established law by importing a principle for a duty of support not founded on a lawful marriage[375].

We submit that in light of the promulgation of the Recognition of Customary Marriages Act, and if one considers the differential treatment argument adopted by the Constitutional Court in the *Fraser*[376] case, there may be a constitutional argument for the legislative recognition of religious marriages. We submit that legislative recognition of religious marriages is imperative for the advancement of gender equality, so that women in these marriages can also be afforded equal protection of the law.

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[364] Section 10(4).
[365] Koos and Pieter Stassen 'New Legislation' (November 1998) *De Rebus* 62.
[366] *Sunday Times* 22 November 1998.
[367] Section 15(3)(a)(i) of Act 108 of 1996.
[368] Section 15(3)(a)(i) of Act 108 of 1996.
[369] Section 1 of the Act defines a 'customary marriage' as 'a marriage concluded in accordance with customary law'. 'Customary law' is defined as 'customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.'
[370] 1997 (12) BCLR 1716 (D).
[371] At 1719.
[372] At 1724A.
[373] *Ismail v Ismail* 1983 (1) SA 1006 (A).
[374] At 1723I.
[375] At 1725B.
[376] Note 19. For the facts of this case, and the judgment of the Court, the reader is referred to the section on Equality at p3 of this chapter.

Customary succession

In *Mthembu v Litsela*[377], the constitutionality of a customary rule of succession (primogeniture) excluding African women and their illegitimate off-spring from intestate succession, was placed in dispute[378]. The applicant alleged that she had entered into a customary union with the deceased, and that a daughter had been born of that union. When the deceased died intestate, his father (the respondent) claimed that the deceased's property devolved on the respondent as the deceased had no sons or brothers. The respondent denied the existence of a marriage between the applicant and the deceased[379].

In dealing with the applicant's argument that primogeniture breached sections 8 and 14 of the Constitution[380], the Court, at the first hearing, concluded that the rule was not inconsistent with the fundamental guarantees contained in the Constitution[381]. It pointed out that, in terms of customary law, 'the devolution of the deceased's property onto the male heir involves a concomitant duty of support and protection of the woman ... to whom he was married by customary law and of the children procreated under that system and belonging to a particular house'. The Court opined that the duty of support was sufficient to refute the initial presumption of discrimination. However, the Court acknowledged that the justification for the duty of support cannot be sustained if the 'counter-balance of the right to support falls away'[382].

At the second hearing, the Court decided that a customary union had not been concluded, hence the daughter had been born out of wedlock[383]. After considering the customary rules of succession, the Court concluded that neither the applicant nor the daughter were entitled to a share of the deceased's property[384]. Since illegitimacy was a bar to intestate inheritance, and the customary restriction applied irrespective whether the potential heir was male or female, the Court found that the rule was not discriminatory on the grounds of sex or gender[385]. The Court stated that it was not prepared to declare the primogeniture rule offensive to public policy, because it did not want to appear paternalistic by 'applying western norms to a rule of customary law' which would impact on customary family law rules[386]. The Court declined to develop the customary law, and expressed the sentiment that this be reserved for Parliament[387].

It is strange that in this constitutional era, the Court adopted a passive approach on constitutional issues, by distancing itself from, and refusing to grapple with, the negative effects that traditional laws have on women in our society. The case is indicative of an 'us and they' mindset, where the Court was unwilling to intervene in a clear instance of discrimination and hardship. This case is a crystal-clear example of the Court perceiving

[377] 1997 (2) SA 936 (T); 1998 (2) SA 675 (T).
[378] For a description of the primogeniture rule, see S A Jazbhay 'Recent Constitutional Cases' (August 1998) *De Rebus* 50.
[379] 1997 (2) SA 936 (T) at 938-939.
[380] Act 200 of 1993.
[381] 1997 (2) SA 936 (T) at 946A.
[382] 1997 (2) SA 936 (T) at 945E-946D.
[383] 1998 (2) SA 675 (T) at 679H.
[384] 1998 (2) SA 675 (T) at 680 D-E.
[385] 1998 (2) SA 675 (T) at 686G.
[386] 1998 (2) SA 675 (T) at 688B-D.
[387] 1998 (2) SA 675 (T) at 686I-687A.

itself as an institution insulated from the effects of traditions and customs impacting on African women. We submit that a new brand of judicial activism is needed, where our courts, in certain instances, are willing to elevate the rights of individuals guaranteed in our Constitution, above customary doctrinal issues. This argument is also applicable to unions solemnised in accordance with religious laws.

Furthermore, in light of the Recognition of Customary Marriages Act, we submit that although the status of women has been placed on par with those of men in customary unions, the anomaly now exists that when their husbands die, women are reverted to an inferior status as a result of the norms of customary law of succession. The primogeniture rule precludes them, as well as their daughters and extramarital children, from inheriting intestate. Legislative intervention is therefore needed to rid our society of these anomalies, in line with the constitutional guarantee of equality. To this extent, the Amendment of Customary Law of Succession Bill[388] which proposes to extend the Intestate Succession Act[389] and the Administration of Estates Act[390] to all persons, and to repeal section 23 of the Black Administration Act[391] is a step in the right direction.

LABOUR LAW

In South Africa, women are underemployed in relation to men. Black women in particular, constitute the largest group in the unemployed sector[392]. Factors contributing to their lack of economic power include: lack of education[393]; years of exploitation as sources of cheap labour; systematic relocation into rural areas; inaccessibility to land; and patriarchal structures in traditional societies which perpetuate notions that the function of women is to rear families[394]. Those who are employed are generally denied executive appointments. They are mostly relegated to gender-stereotyped positions within the service sector, where they are subjected to low wages and long hours, for example, nurses, teachers, secretaries, domestic employees, etcetera[395]. Even though our current democratic dispensation has witnessed a greater mobilisation of women into positions previously not occupied by them, gender barriers remained. This necessitated legislative intervention, to protect them from further exploitation, and to redress past wrongs.

The Basic Conditions of Employment Act 75 of 1998 ('the BCEA')

The BCEA is the second[396] in a triad of legislation, intended to transform the South African labour dispensation[397]. It came into operation on 1 December 1998. It aims to improve basic conditions of employment, thereby giving effect to the right to fair labour

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[388] B109-98.
[389] Act 81 of 1987.
[390] Act 66 of 1965.
[391] Act 38 of 1927. Section 23 authorises the President to make regulations prescribing the manner in which the estates of deceased black persons should be administered and distributed.
[392] Note 1 - states that black women constitute 52% of the unemployed.
[393] Note 1.
[394] *Women and the Jobs Summit: Notes for a Labour Presentation* (1998) presented to the Joint Committee on the Improvement of the Quality of Life and Status of Women from http://www.cosatu.org.za/docs/1998/wom-jobs.html.
[395] ibid.
[396] The Labour Relations Act 66 of 1995 was the first piece of legislation, and the Employment Equity Act 55 of 1998 is the third piece of legislation.
[397] The Act replaces *inter alia* the Basic Conditions of Employment Act of 1983, and the Wage Act of 1957.

practices enshrined in the Constitution[398]. The BCEA also purports to comply with South Africa's obligations as a member state of the International Labour Organisation[399]. It covers domestic workers, public sector employees, temporary and part-time employees, and contract workers[400].

A. Working time and overtime

The BCEA sets out *inter alia*, basic standards of working time and overtime. It stipulates that an employee may not work more than 45 hours a week[401], and may not work overtime for more than three hours a day, or ten hours a week[402]. The regulation of working time and overtime is a significant improvement for women, especially in the service sector, which is characterised by long working hours[403].

B. Maternity leave

While the BCEA generally regulates leave periods, it specifically acknowledges and entrenches a woman's right to a minimum of four months maternity leave, thereby securing her employment for that period[404]. This means that during maternity leave, women are entitled to receive all their employment benefits, including promotions and bonuses[405]. In this respect, the BCEA is in accordance with article 11(2) of CEDAW[406].

In the event of a stillbirth or miscarriage during the third trimester, women are also entitled to maternity leave for a period of six weeks[407]. We submit that this reflects an enlightened attitude toward women, because it takes cognisance of the physical and emotional changes which accompany pregnancy, as well as the trauma resulting from the loss of a foetus.

The BCEA also provides that during maternity leave, women employees must be remunerated in terms of the Unemployment Insurance Act[408]. However, we submit that anticipated legislative intervention must ensure that women receive full salaries, and not just a proportion thereof[409].

C. Alternative employment before and after birth

During pregnancy, and for six months after birth, the BCEA obliges an employer, where practicable, to offer a woman employee alternative employment, if she performs night

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[398] Section 23(1) of Act 108 of 1996.
[399] Section 2.
[400] Section 1, read with section 3.
[401] Section 9(1)(a).
[402] Section 10(1)(b)(i)-(ii).
[403] Note 394.
[404] Section 25(1).
[405] In *Joint Affirmative Management Forum v Pick 'n Pay Supermarket* (1997) 18 ILJ 1149 (CCMA) at 1150. The Commissioner held that maternity leave should not be regarded as an interruption of a contract of employment, thereby preventing the employee from being considered for promotion or a bonus.
[406] Note 154.
[407] Section 25(4).
[408] Act 30 of 1996. Sections 34 and 37 thereof. The Act provides benefits for maternity leave to a current minimal standard of 40% of the total wage for three months, whereas the BCEA provides for four months maternity leave.
[409] Legislative amendments will be proposed to Cabinet to improve remuneration for women during maternity leave. See *Basic Conditions of Employment Act 75 of 1997* Juta's Pocket Statutes (1998) 22.

work, or the work poses a health risk to herself or her child[410]. We submit that the prerequisites for securing alternative employment are too narrow. For example, some women may prefer to work half days after returning from their maternity leave, to enable them to spend more time with their babies. The provision excludes this type of possibility.

Furthermore, the qualification *'where practicable'* is broad, and the wording of the provision seems to consider only the interests of the employer. We submit that when the courts are called upon to interpret the qualification, they must first consider the primary objective of the provision, which is to protect women. Their secondary consideration should then be to not unduly burden the employer.

D. Special precautions before and after birth

The BCEA directs employers to take special precautions, to protect the health and safety of pregnant women and lactating mothers[411]. Recently, the Minister of Labour published a *Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child*[412]. The *Code* outlines measures to be implemented by employers, to minimise the risk of harm to pregnant and breast-feeding employees[413]. It also identifies and assesses the various types of potential hazards in the workplace[414], and the manner and degree to which pregnancy may affect the employee's ability to work[415]. It is commendable that these regulations were available at the same time that the BCEA became operable. Not only does this legislative step accord with the obligation set out in CEDAW[416], for member states to provide special protection to pregnant women against hazardous work conditions, it goes further to protect lactating mothers as well.

E. Family responsibility leave

The BCEA entitles an employee, subject to certain qualifications[417], to three days paid leave, on the birth, sickness, or death of that employee's child[418]. The employee is also entitled to the same leave period on the death of *inter alia*, her or his spouse or life partner, parents, grandparents, grandchildren, and siblings[419]. It is noteworthy that the reference to life partner would include same-sex couples. Thus, substance is given to the constitutional commitment not to discriminate unfairly on the ground of sexual orientation[420]. Although this section is beneficial to mothers in general, we also note that

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[410] Section 26(2).
[411] Section 26(1).
[412] Government Notice R. 1441 published in *Government Gazette* No 19453 of 13 November 1998. In terms of section 87(1) of the Basic Conditions of Employment Act 75 of 1997, the Minister of Labour is obliged to issue a Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child. Section 87(3) provides that any person applying or interpreting the Act must take into account the Codes of Good Practice issued in terms of the BCEA.
[413] Regulation 5.
[414] Regulation 6, read with Schedule 1 of the *Code*.
[415] Regulation 7.
[416] Note 154. Article 11(2)(d).
[417] The relevant section applies to employees who have been in employment with the employer for longer than four months, and who works at least four days a week for that employer. This leave must be taken during the employee's annual leave cycle. See sections 27(1) and (2).
[418] Sections 27(2)(a), (b), (c)(ii).
[419] Section 27(2)(c).
[420] Section 9(3) of Act 108 of 1996.

it ignores the realities of rural African family structures, where an African woman's extended family is considered tantamount to her immediate relatives[421].

The Employment Equity Act 55 of 1998 ('EEA')

The EEA, which is expected to come into operation in April 1999, attempts to achieve equity in the workplace[422]. It recognises that there are disadvantaged groups affected by income, employment, and occupation disparities in the South African labour market, resulting from discriminatory laws during the apartheid era[423]. The EEA therefore aims to eliminate unfair discrimination in employment by redressing the effects of discrimination, and achieving a diverse workforce representative of the South African population[424]. This legislation seeks to promote the constitutional right of equality, and to give effect to South Africa's obligations as a member state of the International Labour Organisation[425].

A. Mechanisms employed to achieve the aims of the EEA

The EEA adopts a two-pronged approach[426]. Firstly, it obliges employers to take positive steps to eliminate unfair discrimination in employment policies or practices[427], and it prohibits unfair discrimination in the workplace. Secondly, it utilises affirmative action as the vehicle to redress past discrimination in the workplace. The elimination and prohibition of unfair discrimination applies to all employees and employers. However, the provisions relating to affirmative action measures specifically target 'designated groups', namely 'black people, women and people with disabilities', and 'designated employers' who *inter alia* employ 50 or more employees, or have an annual turnover equivalent to, or more than that specified in Schedule 4 of the EEA[428].

B. Unfair discrimination

The EEA prohibits direct and indirect forms of unfair discrimination against employees, in respect of any employment policy or practice[429]. Where unfair discrimination is alleged, the employer bears the onus of proving that the discrimination is fair[430]. Section 6(1) of the EEA lists a number of direct grounds of unfair discrimination, which are identical to those listed in the Constitution[431]. Additionally, two further grounds are included namely, 'family responsibility' and 'HIV status'. Family responsibility is defined as 'the responsibility of employees in relation to their spouse or partner, their

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[421] TW Bennett *Human Rights and African Customary Law* (1995) 5, 97, 101.
[422] Preamble and section 2.
[423] Preamble.
[424] ibid.
[425] ibid.
[426] Section 2, read with sections 5 and 6.
[427] Employment policies or practices include *inter alia*, 'recruitment procedures, advertising and selection criteria; appointments and the appointment process; job classification and grading; remuneration, employment benefits and terms and conditions of employment; job assignments; the working environment and facilities; training and development; performance evaluation systems; promotion; transfer; demotion; disciplinary measures and other than dismissal; and dismissal.' See section 1.
[428] Section 4 read with section 1.
[429] Section 6(1).
[430] Section 11.
[431] The grounds listed in section 6(1) are: 'race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.' See also section 9(3) of the Constitution of the Republic of South Africa Act 108 of 1996.

dependent children or other members of their immediate family who need their care or support'[432]. We submit that 'family responsibility' is an especially important ground for the protection of women, who are often discriminated against, because they are either married or single mothers. The reference to 'partner' is also progressive since it includes lesbian and gay relationships. However, the narrow definition for 'family responsibility' fails to consider rural African women who, in terms of customary traditions, have to care for members of their extended family, as if they were their immediate relatives.

Harassment of an employee is also prohibited as a form of unfair discrimination on any of the grounds listed in section 6(1)[433]. This is significant for several reasons. Firstly, the legislature explicitly distinguishes between policies and practices in the workplace which result in unfair discrimination, and the behaviour of the employer toward the employee which results in unfair discrimination. We submit that this distinction is an additional form of protection for the employee, because while the general employment practices and policies of the workplace may not constitute unfair discrimination, the employee may be subjected to specific attitudes or behaviour of the employer which are discriminatory. Secondly, the legislature broadly identifies 'harassment' as not just sexual harassment, but also any other type of harassing behaviour of the employer, which is experienced by the employee. Thirdly, by recognising harassment as a form of unfair discrimination, the employee merely has to allege harassment on one or more of the listed grounds. The evidentiary hurdles become less burdensome for the employee, because the employer bears the onus of proving that the discrimination is not unfair.

C. Sexual Harassment

In *Reddy v University of Natal*[434], the Labour Appeal Court held that sexual harassment infringes the rights to human dignity and privacy[435] enshrined in our Constitution[436]. Nevetherless, the Court noted that not every act of sexual harassment would lead to a dismissal[437]. However, the Court did not flesh out the instances when sexual harassment would not justify dismissal. The 1998 *Draft Code of Good Practice on the Handling of Sexual Harassment Cases*[438] is therefore welcomed, as it *inter alia*, crystallises a definition of what constitutes sexual harassment; lists forms of sexual harassment; and outlines the procedures to be adopted when instances of sexual harassment are reported in the workplace[439]. The *Draft Code* furthermore obliges employers to issue a policy statement voicing their abhorrence for sexual harassment in the workplace[440].

D. Instances which do not constitute unfair discrimination

The EEA identifies two exceptions which do not constitute unfair discrimination. Firstly, affirmative action measures adopted by the employer, which are consistent with the

[432] Section 1.
[433] Of the EEA. See also section 6(3) of the EEA.
[434] 1998 (19) ILJ 49 (LAC).
[435] Act 108 of 1996. Sections 10 and 14 respectively.
[436] At 52H.
[437] At 52 H-I.
[438] Introduced by NEDLAC in Government Notice R. 1367 published in *Government Gazette* No 19049 of 17 July 1998. The text of the *Draft Code* has been reproduced in Cheadle et al *Current Labour Law* (1998) 124.
[439] Regulations 3, 4 and 7 respectively, of the *Draft Code.*
[440] Regulation 6 of the *Draft Code.*

objects of the EEA (discussed in the paragraph below). Secondly, an employer who discriminates against a person on the basis of the inherent requirements of the job[441]. It is feared that if the second exception is interpreted loosely, it may lead to the perpetuation of gender-stereotyped perceptions of the capabilities of men and women[442]. Furthermore, it may also allow employers to use the exception, to camouflage instances of direct discrimination. For example, in *Swart v Mr Video (Pty) Ltd*[443], the employer refused to hire the applicant, on the basis that she was three years above the age limit specified in the advertisement. Although the employer attempted to justify the age limit as an inherent requirement of the job, it later became apparent that he did not want to employ her because she was married and had children. The arbitrator therefore found that the employer had committed an unfair labour practice, by discriminating unfairly on the basis of marital status and family responsibility.

E. Affirmative action

In order to facilitate and promote affirmative action, the EEA compels employers to implement prescribed measures which include[444]: the identification and elimination of employment barriers which adversely affect people from designated groups; the promotion of diversity in the workplace; providing reasonable accommodation for designated groups, to ensure equal opportunities and equitable representation in the workforce; ensuring equitable representation of suitably qualified people from designated groups in all occupational categories in the workforce; and the retention and development of those people, as well as the implementation of appropriate training measures. We submit that the accommodation of affirmative action in the EEA, reflects the legislature's commitment to give teeth to the constitutional gateway for remedies, to protect and advance groups disadvantaged by unfair discrimination[445]. Significantly, the targeting of women as a designated group, is indicative of the legislature's recognition that women constitute a historically disadvantaged and vastly exploited group in South Africa. There is a concern, however, that since most black women are employed in the informal sector or are unemployed, the affirmative action provisions will assist mostly black men, white women and white people with disabilities, and may result in less black women being employed[446].

F. Wage differentials

The EEA obliges an employer to address wage differentials in respect of male and female employees, through *inter alia* collective bargaining, and measures provided for in the BCEA[447]. Employers must also submit a periodic report to the Director-General, of the progress made in achieving employment equity in the workplace. They are required to submit a further report to the Employment Conditions Commission, on the remuneration

[441] Section 6(2)(a) and (b) of the EEA.
[442] Michelle O'Sullivan 'Working on Equal Terms: The Employment Equity Bill' Vol 2 No 3 *Women and Human Rights Documentation Centre: Newsletter* (October 1998) 3.
[443] This case is discussed in Cheadle et al *Current Labour Law* (1997) 60.
[444] Section 15(2).
[445] Chapter III of the EEA, and section 9(2) of Act 108 of 1996.
[446] Joint Committee on Improvement of Quality of Life and Status of Women *The Employment Equity Bill: A Gender Analysis* (1998) from http://www.womensnet.org.za/parliament/empeqbill.htm.
[447] Section 27(3).

and benefits received by employees in each occupational category[448]. It is hoped that the Employment Conditions Commission will add tangible substance to the doctrine of "equal pay for equal work", by vigorously pursuing those employers who differentiate between their male and female personnel, in the assessment of their remuneration packages.

THE JUDICIARY

Magistrates and Prosecutors

Table 2:1997

Source: *Convention for the Elimination of All Forms of Discrimination Against Women: First South African Report* (1997) 7-9; Central Statistics *Women and men in South Africa* (1998) 43.

	Men	Women
Chief Magistrate	34	2
Senior Magistrate	167	7
Magistrates	1119	56
Attorney General	10	0
Senior Prosecutor	52	28
Prosecutors	927	679
Senior Family Advocate	1	3
Family Advocate	7	7

It is evident that by June 1997, women constituted the minority in most judicial officer positions in South Africa. Women comprised 4% of the chief and senior magistrates, and only 5% of the ordinary magistrates[449]. At lower levels, women's participation increased, by constituting 35% of senior prosecutors, and about 42% of ordinary prosecutors[450]. The one area in which women outnumbered men was in respect of the Family Advocates[451]. These figures seem to suggest that in the legal field, women appear largely on the lower rungs of the judicial ladder, and predominate in areas which are traditionally associated with the female role for example, family law matters.

Table 3:1998

Source: Department of Justice 1 September 1998[452]

	White Men	White Women	Black Men	Black Women
Special Grade Chief Magistrate	0	0	1	0
Chief Magistrate	7	1	20	1
Regional Court President	5	0	2	0
Regional Magistrate	143	8	16	5
Senior	65	4	80	5

[448] Section 27.
[449] Note 154 at 7-9; Central Statistics *Women and men in South Africa* (1998) 43.
[450] ibid.
[451] ibid.
[452] The Department of Justice indicated that these figures are about 95% correct. This is due to the fact that not all magistrates indicate which race group they fall under on their application forms.

Magistrate				
Magistrate	524	184	360	75

Table 3 lists statistics obtained in 1998, reflecting the division of magistrates throughout South Africa in terms of rank, race and gender. In the case of ordinary magistrates, the number of women has increased significantly since 1997, which suggests that transformation has begun to take place at this level. However, they still only constitute about one-third vis-à-vis their male counterparts. It is evident that all the ranks in the magistracy are still dominated by men. In fact, in two of the very senior ranks, women do not feature at all. Not only are women in the minority throughout all the ranks, the disparity also extends to race where white women, in certain ranks, outnumber black women.

Judges

Table 4: **1997**
Source: *Convention for the Elimination of All Forms of Discrimination Against Women: First South African Report* (1997) 7-9;
Central Statistics *Women and men in South Africa* (1998) 42-43

	Men	**Women**
Supreme Court of Appeal	17 *(all white)*	0
Constitutional Court	9 *(6 white; 3 black)*	2 *(1 white; 1 black)*
High Court	144 *(129 white; 15 black)*	6 *(5 white; 1 black)*
Labour Court	2	1
Land Claims Court	4	1

Of a total of 186 judges in 1997, only 10 (6%) were women. Of these, seven women were white and only three were black. Notably, the two highest courts in our country were severely under-represented in terms of gender: the Supreme Court of Appeal had no women and the Constitutional Court had only two women. The Land Claims Court had one woman out of five judges, while the Labour Court had one woman out of three judges. Additional information not reflected in this table, is that the Transvaal Provincial Division of the High Court had four women out of 55 judges; the Cape Provincial Division had one woman out of 25 judges; the Natal Provincial Division had one woman out of 22 judges; and the other six divisions - with 48 judges between them - had no women at all[453]. Race also enters as a component of under-representation in respect of women, because black women judges number even less than white women judges.

Table 5: **1998**
Source: Department of Justice, 1998

	White Men	**White Women**	**Black Men**	**Black Women**
Supreme Court of Appeal	15	0	1	0
Constitutional Court	5	1	3	1
High Court	120	5	24	2

[453] Note 154 at 7-9.

Labour Court	2	1	2	0
Land Claims Court	2	0	2	1

Table 6: 1998
Source: Department of Justice, 1998[454]

	White Men	White Women	Black Men	Black Women
Cape Provincial Division	19	1	5	0
Northern Cape	4	0	1	0
Eastern Cape	14	0	2	0
Free State	12	0	0	0
Transvaal Provincial Division	45	3	4	2
Natal	16	1	5	0
Bophutatswana	3	0	3	0
Transkei	4	0	2	0
Ciskei	3	0	2	0

It is clear that during 1998 the representation of women judges has not really improved since 1997 (with only 11 out of a total of 187 judges being women). With the passing of Justice Didcott, there is now one position vacant at the Constitutional Court, and it remains to be seen by whom it will be filled. Even if it is filled by another woman, this will still place women in the minority at the top rung of the judicial ladder. The position with respect to High Court Divisions also remains relatively unchanged, with only seven of the 151 judges being women, and only two of those seven being black women. The spread of women judges is extremely uneven with six of the nine Divisions not having any women representatives at all. Not surprisingly, the representation of women in the Land Claims Court remains unchanged, and while the Labour Court shows an increase in the number of men, their number of women remains the same. This deplorable situation is compounded even further when one considers that at all levels of the higher courts, not a single woman occupies a senior position. Overall, women constitute a dismal minority among the judges throughout the country, and black women number even less than white women.

Table 7: 1998
Source: Judicial Services Commission, 1998

	White Men	White Women	Black Men	Black Women
Magistrates' Commission[455]	7	2	6	2
Judicial Services Commission	12	0	8	3

The Magistrates' Commission and the Judicial Services Commission are responsible for recommending the appointment of magistrates and judges respectively, in South

[454] An alternative source can be found in December 1998 (2) *South African Criminal Law Reports*. The reader is directed to note that there are some differences reflected in the two sources, but nothing which substantially changes the arguments contained in this chapter.
[455] In terms of section 3 of the Magistrates' Act 90 of 1993, 27 members of the restructured Magistrates' Commission have to be appointed. At the time of writing this chapter, only 17 were appointed. The remaining 10 must therefore still be appointed.

Africa[456]. One would therefore expect these two bodies to be suitably representative of the South African population. Yet, it is apparent that women are still very much in the minority in respect of both bodies. It is therefore not surprising that the judiciary as a whole is severely unrepresentative, particularly with regard to black women who remain in the extreme minority.

It is unacceptable that during this period of transformation, very little effort has been made to make the judiciary more representative of the population. Magistrates and judges, as decision-makers, play a pivotal role in the daily lives of people. Given that women comprise more than half the entire population, and that black women in our rural areas constitute the poorest and most marginalised group, it is deplorable that their lives are influenced by mainly white male judicial officers, who are not in a position to fully comprehend their current circumstances resulting from historical disadvantage. Certainly more women, and especially more black women, need to be appointed to the bench at all levels. But transformation at only this level is not sufficient - all judicial officers need to also undergo continuous training on social context issues, so that they can be more aware of, and empathetic towards the concerns of those who appear before them.

GENDER IN PARLIAMENT

The information in this section is largely based on South Africa's first report to CEDAW, and *The Third Women's Budget*[457].

Parliament

Prior to the 1994 elections, only 3% of parliamentary seats were occupied by women[458]. As a result of political lobbying by women, approximately one quarter of our legislators at national level are now women[459]. By 1997, 111 (27%) of 400 National Assembly seats, were held by women[460]. In the National Assembly, the Speaker, Deputy Speaker and Deputy Chief Whip of the ANC are women[461]. The dramatic increase in the representation of women in the National Assembly, places South Africa among the top ten countries of the world[462].

In 1996, the Senate was replaced by the National Council of Provinces (NCOP). This change, as well as the manner in which NCOP delegates are elected, led to a reduction in the number of women, with only six (11%) of 54 permanent delegates being women[463]. It is therefore not surprising that the NCOP has not clearly identified gender issues as specific areas of focus[464].

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[456] For the Magistrates' Commission, see sections 2 and 4(g) of Act 90 of 1993. For the Judicial Services Commission, see sections 174(6) and 178 of Act 108 of 1996.
[457] Note 154; note 463 at 266-299.
[458] Note 154 at 7-2; Central Statistics *Women and men in South Africa* (1998) 39.
[459] Note 154; note 463 at 272.
[460] Note 458.
[461] Note 154; note 463 at 279.
[462] Note 154; note 463 at 272.
[463] Natasha Primo 'Parliament, Offices of the President and Deputy President, South African Communications Service and Premiers' Votes' Chapter 9 in Debbie Budlender (ed.) *The Third Women's Budget* (1998) Idasa 266 at 273.
[464] Note 463 at 274.

Although women constitute about 30% of ministers and deputy ministers[465], and several have secured senior positions, a number of women parliamentarians feel alienated by the male-dominated culture in Parliament[466]. The main obstacles experienced by women parliamentarians include: their unfamiliarity with the legislative process; difficulty in combining their parliamentary and domestic responsibilities; and the burden for achieving gender equality is placed squarely on their shoulders, despite male resistance and domestic demands[467]. This has caused many of the women parliamentarians to feel invisible, unheard and devalued, and they cannot see their impact as individuals[468]. As a result, many of them do not plan to return to Parliament after the 1999 elections[469].

Parliamentary committees

These committees are the primary vehicles for vigorous debate in Parliament thus, they have immense power to change or reject legislation[470]. The Parliamentary Monitoring Group has noted a skewed participation between women and men, depending on their membership to different kinds of committees[471]. For example, men predominate in "hard" committees such as Defence, whereas women are more vocal in "soft" committees such as Welfare and Population Development[472]. Furthermore, of 45 parliamentary committees, only eight are chaired by women[473]. It has been noted that the commitment of parliamentary committees to gender issues, is linked to the outlook of the chairperson[474].

Joint Committee on Improvement of Quality of Life and Status of Women

This Parliamentary Committee includes mostly women representatives[475]. In 1996, it was constituted as an *Ad Hoc* Committee[476]. This status hindered its work, because it was denied a budget and a full time committee clerk, and it also had to contend with the perception that it had less power than a full committee[477]. After petitioning the Rules Committee, it was elevated to the status of full Parliamentary Committee in 1997[478]. Some of its tasks include[479]:

- assessing the input into South Africa's first CEDAW report, and alerting Parliamentary Committee Chairs to the commitments made by the South African government with regard to CEDAW, as well as the Beijing Platform for Action;

[465] Note 458.
[466] Note 463 at 279, 280.
[467] Hannah Britton *Parliamentary Whip* 18 April 1997; Note 463 at 280.
[468] ibid.
[469] ibid.
[470] Note 463 at 274.
[471] Note 463 at p281.
[472] Parliamentary Monitoring Group Report on the meeting of the Welfare and Population Development Committee 22 October 1997, 10 October 1997; Parliamentary Monitoring Group Report on the meeting of the Defence Committee 6 May 1997, 10-11 April 1997; see also note 463 at 281.
[473] Note 154; note 463 at 275.
[474] Note 463 at 282.
[475] Note 154.
[476] ibid.
[477] Note 463 at 276.
[478] ibid.
[479] Note 154.

- analysing the budget, to assess the extent to which various departments use their budgets, to prioritise and implement provisions which would lead to an improvement in the lives of women;
- identifying priorities for improving the quality of life and status of women within existing legislation and proposed legislation, and identifying any gaps which might exist.

Provincial Legislatures

At provincial level, men outnumber women by a ratio of three to one[480]. Women comprise 102 (24%) of the 425 members[481]. Of the nine provinces, only one of the provincial premiers is a woman[482]. The Speaker of the Free State provincial legislative assembly is a woman, and the deputy speakers of Gauteng, Northern Province and Western Cape are women[483]. Most of the women's caucuses operate informally, and only a few provinces have standing committees or sub-committees on gender[484].

Local government

Women comprise 19% of those elected in rural and urban areas, and 14% of the positions at executive level are held by women[485]. The local government elections therefore reflect a decline in the representation of women[486].

Parliamentary Women's Group (PWG)

This multi-party group was established in 1994 by women parliamentarians, to assist them in their work, and to make the environment in Parliament more gender sensitive[487]. Its activities include[488]: capacity building for women in Parliament; lobbying and caucusing around key legislation for women; mobilising women in Parliament across party lines, in respect of gender issues; assisting the provinces in establishing similar structures; and providing a link between women in government and civil society. However, in light of the fact that the PWG has not been formally recognised, does not receive any funding from Parliament, and is understaffed, its work is hampered[489].

The Gauteng Women's Empowerment Unit (WEU)

The WEU is located in the Office of the Deputy Speaker of the Gauteng provincial legislature[490]. Its function is to "identify and address the specific factors that hinder women from participating fully in the law making process", and to "identify appropriate intervention strategies"[491]. Its programme of action consists of three phases[492]:

- setting up of the WEU and completing a needs assessment (phase one);

[480] Note 154 at 7-2; Central Statistics *Women and men in South Africa* (1998) 40.
[481] ibid.
[482] ibid.
[483] Note 154.
[484] ibid.
[485] ibid.
[486] ibid.
[487] ibid.
[488] Note 154; note 463 at 272.
[489] Note 154.
[490] Note 463 at 277.
[491] Note 463 at 277; Commission for Gender Equality (1997) 67.
[492] Note 463 at 277.

- delivery of training and capacity development programmes based on needs assessment, and the development of manuals to be used by parliamentarians (phase two);
- delivery of comprehensive training for new Members of Parliament and Members of the Provincial Legislatures after the 1999 elections (phase three).

The Public Education Department (PED)

This parliamentary institution was established in 1995, with the aim of publicising Parliament through countrywide public awareness campaigns[493]. It does this through media and communications, educational tours, public outreach and participation programmes, democracy education, and facilitating people's participation within the law-making process[494]. Its public participation programme aims to educate target communities about Parliament, so that they can become more effectively involved in the law-making process[495]. For example, rural women of South Africa were targeted, to assist them in taking more control of their lives by increasing their participation in the legislative process[496]. During the 1997/8 budget vote, although the PED was allocated about R5,6 million (2.8% of the total budget for parliament), only R822 000 was budgeted for the rural women's project, during the period April 1997 to March 1998[497]. This project did not get off the ground because most of the available staff had been drawn into the youth parliament project[498].

Comment

Despite the increase in the number of women parliamentarians at national and provincial levels, if one considers that about 52% of the population consists of women[499], it is evident that they are severely under-represented. Furthermore, the figures in the NCOP and at local government level, reflect even less representation of women. In Parliament itself, an enabling environment has not been created for women parliamentarians. This has prevented them from delivering their full potential in the law-making and policy-making process. Several women parliamentarians have called for a transformation of Parliament, in which a system can be introduced to empower and develop their skills, to ensure that their experiences help shape legislation, policy and the budget[500]. This type of transformation requires an appropriate budget allocation, and so far, this has not been provided for[501].

Parliamentary structures directly representing the interests of women at large, have not received the full support of Parliament. This is evident from the fact that the Joint Committee on Improvement of Quality of Life and Status of Women, struggled to obtain full status as a parliamentary committee, and that the Parliamentary Women's Group still

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[493] ibid.
[494] Note 463 at 277; *Cape Times* 8 September 1997.
[495] Note 463 at 278.
[496] ibid.
[497] Note 463 at 278; Public Education Department of Parliament *Budget Proposal: Programme and Activities of the PED* (1997) Cape Town.
[498] Note 463 at 278.
[499] Note 1.
[500] Note 463 at 282.
[501] ibid.

has not been formally recognised. Even where there is formal recognition, structures like the Public Education Department has not prioritised its budgetary allocations to further women's issues.

The parliamentary budget also does not adequately make provision for women's issues. It is interesting to note that the 1997/8 budget of about R23 million for the Office of the President, is greater than the combined budgets of specific programmes aimed at transforming gender relations in South Africa[502]. This suggests that programmes which are intended to benefit the poor and marginalised women in our country, are extremely under-funded, and that an ameliorative rather than a transformative approach is being undertaken[503].

[502] For example, the Commission on Gender Equality is allocated about R4.4 million, the maternal and child health service programme of the Department of Health is allocated about R10,5 million, and the Department of Welfare and Population Development's pilot Flagship Programme for unemployed women with young children is allocated about R1,5 million. See note 463 at 285. See also Commission on Gender Equality *Excerpts from Forthcoming Annual Report of the Commission on Gender Equality* 3.
[503] Note 463 at 285.