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The role of legislation in promoting equality: a South African experience

A PIETERSE-SPIES*

1 Introduction

There is an ever-increasing reliance on the law as a route, or resource to implement desired change.¹ The law in this context is a complex aggregation of principles, norms, ideas, rules, practices and the activities of agencies of legislation, administration, adjudication and enforcement backed by political power and legitimacy.² Despite this complexity, law is often seen as an entity separate from society and people talk about the law acting upon society, rather than the law as an aspect of society.³

Law in itself is an unlikely means of effecting fundamental social change,⁴ but despite the limitations of law as an instrument of change, it remains a powerful entity in our social fabric:

“Law is quite clearly, an unlikely means of effecting fundamental social change. It is, after all, the law. Its primary purpose – as many legal theorists have pointed out and as patently clear – is to sustain and maintain the status quo and not to promote alternatives. It is wrong to suggest, however, that law is simply a monolithic reflection of the social and political standard and that it therefore must speak the same language and carry the same vision and ethic as that promoted in the social and political spheres. To adopt the position there is no room in law for political manoeuvre whatsoever is to deny the very real impact that legal reform initiatives have had historically on the structure and fibre of social life.”⁵

The relationship between law and social change is specifically relevant in relation to promoting gender equality, as women’s movements and feminist activists see it as an important sphere in which to seek to change women’s status and achieve equality.⁶ For feminist scholars, the power of law lies in both its ability to regulate access to rights, benefits and resources and its power to define an authoritative reality.⁷ Law has practical and normative power. This is seen as the power to include or exclude, to determine who has access to rights and resources and who falls within the boundaries of social and economic recognition or affirmation or beyond them in processes of exclusion, stigmatization and marginalization. It is this possibility

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¹ Anleu *Law and Social Change* (2000) 2.

² Moore “Law and social change: the semi-autonomous social field as an appropriate subject of study” 1973 *Law and Society Review* 719.

³ Cotterrell *The Sociology of Law: An Introduction* (1992) 44.

⁴ Pellatt “Equality rights litigation and social transformation: a consideration of the Women’s Legal Education and Action Fund’s intervention in *Vriend v R*” 2000 *Canadian Journal on Women and the Law* 117 120.

⁵ Pellatt (n 4) 120.

⁶ Anleu (n 1) 2.

⁷ Albertyn “Defending and securing rights through law; feminism, law and the courts in South Africa” 2005 *Politikon* 217.

of using law (and in this particular study, legislation) to redraw these boundaries of inclusion and exclusion that has been attractive to feminist legal activists.

From the outset it is acknowledged that using the law as a tool to achieve gender equality is often disappointing as it is more likely to reproduce existing social and economic relations than to change them. Briefly this can be ascribed to the fact that the law itself is infused with patriarchal and masculine values.⁸ Nevertheless, rights claims can give women an important sense of collective identity, can actively shape public discourse, and is a source of empowerment.⁹ The public nature of rights assertion is especially significant because of the often private nature of discrimination against women.¹⁰

This discussion looks at the limits of the law and, specifically, the limits of the ability of legislation to transform society to achieve gender equality. Key pieces of legislation are analysed. These include the Choice on Termination of Pregnancy Act,¹¹ the Domestic Violence Act,¹² the Recognition of Customary Marriages Act,¹³ and the Promotion of Equality and Prevention of Unfair Discrimination Act.¹⁴ The specific provisions of the relevant acts are not analysed, and I focus on the broad operational structure of the acts, attempting to illustrate that, despite the presence of seemingly sound “law”, the overall purpose of these acts – to steer society towards a certain way of belief and subsequent action – is often a distant and unattainable goal.¹⁵

2 *Legislation as a strategy for change in South Africa*

In 1994 political power shifted from a white minority government to one elected by all South Africans. The adoption of the constitution,¹⁶ and the acknowledgment of the principle of equality as one of its founding values, paved the way for unprecedented change concerning women’s rights.¹⁷ Probably the most significant achievement in relation to the right to equality is the recognition of the right as being substantive and requiring more than mere identical treatment and non-discrimination.¹⁸ This means that the right is to be enforced in its social context, including the recognition of past and existing social, political and economic disparities, and incorporates the value of human dignity.

⁸ Albertyn (n 7) 220; Anleu (n 1) 171.

⁹ Albertyn (n 7) 171.

¹⁰ Anleu (n 1) 171.

¹¹ 92 of 1996.

¹² 116 of 1998.

¹³ 120 of 1998.

¹⁴ 4 of 2000 (hereafter the equality act).

¹⁵ The paper focuses only on legislation as a potential strategy for promoting social change and not on litigation as part of this strategy. It should be noted that the strategy employed in South Africa to achieve gender equality is not limited to enacting a rich body of legislation; relevant legislative provisions are enforced through robust court action and in the absence of legislation, litigation is used as a primary strategy to advocate change. South Africa has a rich jurisprudence promoting gender equality, and justice is done to the analysis of this jurisprudence and its transformative potential elsewhere. See, eg, Albertyn (n 7); Bonthuys “Institutional openness and resistance to feminist arguments: the example of the South African constitutional court” 2008 *Canadian Journal on Women and the Law* 1.

¹⁶ The Constitution of the Republic of South Africa, 1996.

¹⁷ S 1(a) of the constitution states “the Republic of South Africa is one, sovereign, democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms”.

¹⁸ Jagwanth “Expanding equality” 2005 *Acta Juridica* 131.

Within this context the connection between substantive equality and the concept of transformative constitutionalism is important, as the term has been central in post-apartheid constitutional and jurisprudential discourse.¹⁹ Klare,²⁰ explains transformative constitutionalism as follows:

“By *transformative constitutionalism* I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.”

It is within this framework that most post-apartheid laws were drafted – to transform an inherently unequal and violent society. The favourable constitutional and political environment, including its electoral system of proportional representation which allows parties to use quotas,²¹ and strong civil society organizations have meant that women were able to advocate for policies and laws that enshrined rights that benefited women and that gender issues were firmly on the legislative agenda.²²

The first women-specific laws that were passed legalized abortion, criminalized violence against women and tightened up regulations to ensure that defaulters on maintenance payments could be prosecuted.²³ Interestingly, these specific laws touched on difficult issues of private inequalities and women’s reproductive rights, often seen to be the areas least likely to get government attention.²⁴ Subsequently, other key laws were enacted, including the Sterilisation Act,²⁵ the Recognition of Customary Marriages Act, the Employment Equity Act,²⁶ and the Equality Act.

These progressive laws are testament to the strong alliance between women’s movements and political structures. But, despite the fact that women in South Africa enjoy significant political and legal equality in the form of political participation and entrenched human and legal rights, there is growing evidence that the material conditions of the majority of women remain unchanged and are even worsening in some areas.²⁷ Poverty is deepening, violence has maintained consistently high levels and patriarchal cultural norms continue to hold women in positions of subordination in the family and community.

In seeking to understand the deepening inequality in the context of significant political and legal gains, analysts have identified a number of obstacles to gender equality. Many of these analyses focus on economic resources, institutional capacity and political will, clearly all confined to the public sphere. They do not pay attention to the private sphere or the connection between the two.²⁸

¹⁹ Van Marle “Haunting (in)equalities” in Hunter (ed) *Rethinking Equality Projects in Law* (2008) 125.

²⁰ Klare “Legal culture and transformative constitutionalism” 1998 *SAJHR* 146.

²¹ Hassim “The gender pact and democratic consolidation: Institutionalizing gender equality in the South African state” 2003 *Feminist Studies* 505 506.

²² Albertyn “Contesting democracy: HIV/Aids and the achievement of gender equality in South Africa” 2003 *Feminist Studies* 595 604.

²³ See the Choice on Termination of Pregnancy Act (n 14) the Domestic Violence Act (n 15) and the Maintenance Act 99 of 1998; Hassim (n 21) 506.

²⁴ Hassim (n 21) 506.

²⁵ Sterilisation Act 44 of 1998.

²⁶ Employment Equity Act 55 of 1998.

²⁷ Albertyn (n 22) 604.

²⁸ Albertyn (n 22) 604.

2.1 The Choice on Termination of Pregnancy Act

In 1996, two years into the newly defined democracy, the South African parliament passed the Choice on Termination of Pregnancy Act, entrenching the right to reproductive autonomy for the first time in South African law.²⁹ The act protects the constitutionally enshrined right to freedom and security of the person, specifically the right to make decisions concerning reproduction and to security in and control over one's body,³⁰ and the rights to dignity,³¹ freedom of religion, belief and opinion,³² and privacy.³³

In terms of the act, abortion on request is available during the first twelve weeks of pregnancy.³⁴ From 13 to 20 weeks, abortion requires more than the mere request and consent of the woman.³⁵ During this period, an abortion would be available in consultation with a medical practitioner (a) if the pregnancy poses a risk of injury to the woman's physical or mental health, (b) if there is a substantial risk that the fetus would suffer a severe physical or mental abnormality or (c) the pregnancy would significantly affect the social and economic circumstance of the woman.³⁶ After 20 weeks two medical practitioners need to agree, that the continued pregnancy would endanger the woman's life, result in a severely malformed fetus, or pose a risk of injury to the fetus.³⁷ The act further provides that women seeking terminations must have the available information,³⁸ that terminations should take place at approved facilities,³⁹ that neither spousal nor parental consent is required,⁴⁰ and that the state must endeavour to provide counselling.

The question remains whether the act has been able to positively affirm women's bodily and moral autonomy and whether this affirmation has been accepted by society.⁴¹ While a substantial number of abortions have already been performed in terms of the act, an array of factors impedes its implementation and operation.⁴² Effective implementation has been tied up with the broader task of transforming the health system and establishing basic primary health-care services.⁴³ According to a report by the department of health evaluating the implementation of the act,

²⁹ Albertyn, Artz, Combrinck, Mills and Wolhuter "Women's freedom and security of the person" in Bonthuys and Albertyn (eds) *Gender, Law and Justice* (2007) 369.

³⁰ s 12(2) of the constitution.

³¹ s 10 of the constitution.

³² s 15 of the constitution.

³³ s 14 of the constitution.

³⁴ s 2(1)(a) of the Choice on Termination of Pregnancy Act.

³⁵ The Choice on Termination of Pregnancy Act as discussed by Engelbrecht, Pelsar, Ngwena and Van Rensburg "The implementation of the Choice on Termination of Pregnancy Act: some empirical findings" 2000 *Curatiosis* 4.

³⁶ s 2(1)(b).

³⁷ s 2(1)(c).

³⁸ s 4.

³⁹ s 3(1).

⁴⁰ s 5(1)-(3). In terms of the act minors should be advised to consult with their parents, guardian, family or friends.

⁴¹ Albertyn *et al* (n 29) 364.

⁴² By 1995 only 2 463 legal abortions had been performed annually under the Abortion and Sterilisation Act 2 of 1975, compared to a total of 731 193 terminations that have been reported to the national department of health, epidemiology and surveillance directorate since the implementation of the act in 1997. Statistics obtained from Albertyn *et al* (n 29) 368; Department of Health, Republic of South Africa *Report 2009*, <http://www.doh.gov.za> (8-04-2013).

⁴³ United Nations International Research and Training Institute for the Advancement of Women *Engendering the Political Agenda: The Role of the State, Women's Organizations and the International Community* (2000) 223.

the most substantial barrier to accessing safe abortions is the lack of knowledge of the law.⁴⁴ Problems have been exacerbated by the resistance of staff to carry out terminations, lack of contraceptives and appropriate drugs and the unsympathetic attitudes of healthcare personnel.

The willingness and attitude of personnel are of specific concern, as their actions reflect social perceptions that are out of step with constitutional values promoting women's right to choose. Although health workers can refuse to perform abortions because of their beliefs or opinion,⁴⁵ staff are reportedly often exceptionally rude and unhelpful towards women seeking terminations.⁴⁶ These attitudes are clearly reflected in the number of abortions obtained outside the legal framework.⁴⁷ It is also of interest to note that according to the latest annual report from the department of health,⁴⁸ the number of community health centres that provide termination services decreased from 45% in 2008/2009 to 25% in 2009/2010. According to the department the main challenge was the high turnover rate among nurses trained to provide first trimester termination of pregnancies. It would be interesting to establish the reasons for the high turnover rate, as the report does not specify the exact reasons for the lack of skilled nurses in providing terminations. Changing inherent beliefs or opinions is not the purpose of the act. However, staff members who choose to work in institutions that provide terminations should treat patients with the necessary respect and respect the relevant choices made. Service providers should develop strategies to provide services in a manner which reduces women's exposure to hostile members of staff by making sure that recruited staff are aware of and accept their relevant duties and responsibilities in terms of the act.⁴⁹

Social attitudes are further reflected in the legal challenges that were brought against the act, which could be said to be deeply rooted in moral and religious beliefs. The act was first challenged in *Christian Lawyers Association v Minister of Health (1)*,⁵⁰ as violating the rights of the unborn fetus. The plaintiffs sought an order declaring the act unconstitutional in its entirety, arguing that the right to life⁵¹ applies to unborn children from the moment of conception. The high court found that there was no cause of action, as a fetus is not a subject of constitutional rights and that the constitution protected women's right to reproductive-decision making.⁵² The second case, brought by the same applicants, was *Christian Lawyers Association v Minister of Health (2)*.⁵³ This was a challenge to the provision that minors could obtain an abortion without parental consent. According to the plaintiff, young women or girls are not capable, on their own, of making an informed decision on whether or not to terminate a pregnancy.⁵⁴ The case was rejected on the basis that

⁴⁴ Department of Health, Republic of South Africa *Report 2000*, <http://www.doh.gov.za> (8-04-2013).

⁴⁵ S 15(1) of the constitution provides that everyone has the right to freedom of conscience, religion, thought, belief and opinion. O'Sullivan "Reproductive rights" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2008) 37-21.

⁴⁶ Department of Health *Report* (n 44) 94.

⁴⁷ Reportedly a third of cases attending hospital on a daily basis were self-induced – Department of Health *Report* (n 44) 93.

⁴⁸ Department of Health *Report 2009/2010*, <http://www.doh.gov.za> (8-04-2013).

⁴⁹ Department of Health *Report* (n 44) 94.

⁵⁰ *Christian Lawyers Association v Minister of Health* 1998 11 BCLR 1434 (T).

⁵¹ See s 11 of the constitution.

⁵² the *Christian Lawyers (1)* case (n 50) as discussed by Albertyn *et al* (n 29) 372.

⁵³ *Christian Lawyers Association v Minister of Health* 2005 1 SA 509 (T) (hereinafter the *Christian Lawyers (2)* case).

⁵⁴ s 5(1)-(3) of the Choice on Termination of Pregnancy Act.

the test for informed consent was not age, but the capacity to consent.⁵⁵ In addition, the autonomy of minors was supported by the fact that all persons have the right to reproductive decision making in terms of the constitution. The legal challenges to the act could be an indication that society still views abortion as morally and religiously offensive.

The future development of the right to reproductive autonomy may turn on the question to what extent the state can limit a woman's right to an abortion.⁵⁶ The limitations placed by the act on the right to an abortion are a clear indication that the legislature perceives society to have an interest in potential life in the later stages of pregnancy that trumps the right of women to exercise choice freely.⁵⁷ In the *Christian Lawyers (2)* case the court stated:

“Like all other constitutional rights, the right to termination of pregnancy is not absolute. The state has a legitimate role, in the protection of pre-natal life as an important value in our society, to regulate and limit the woman's right to choose in that regard. However because the right itself is derived from the Constitution the regulation thereof by the state may not amount to the denial of that right. Similarly any limitation of the right constitutes a limitation of a woman's fundamental right and is therefore valid only to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (s 36(1) of the Constitution).”⁵⁸

The enactment of the legislation has shifted the public meaning of abortion from a crime to an exercise of women's fundamental rights, but how this change is implemented and accepted by society seems to be where the real challenge lies.⁵⁹

2.2 Domestic Violence Act

Domestic violence is a lived reality for many South African women; it is a social evil that is embedded in our history, and our present unequal social, economic and cultural relations.⁶⁰ Domestic violence legislation has become an important instrument with which to challenge the social and legal understanding of women's experiences with domestic violence and to ensure that the criminal justice system responds to these experiences.⁶¹ Nonetheless, despite progressive legislation, the incidence of domestic violence remains alarmingly high, questioning the practical relevance of law in addressing this social phenomenon.

The Domestic Violence Act replaced the Prevention of Family Violence Act⁶² with the aim of addressing some of its shortcomings and to give effect to the constitutional rights to equality and freedom and security of the person.⁶³ The Domestic Violence

⁵⁵ the *Christian Lawyers (2)* case (n 53) as discussed by Albertyn *et al* (n 29) 372.

⁵⁶ Bishop and Woolman “Freedom and security of the person” in Woolman *et al* (eds) *Constitutional Law of South Africa* (2008) 40-81.

⁵⁷ Bishop and Woolman (n 56) 40-81.

⁵⁸ 527D-F.

⁵⁹ Albertyn “Law, gender and inequality in South Africa” 2011 *Oxford Development Studies* 139.

⁶⁰ Albertyn *et al* (n 29) 323.

⁶¹ Artz and Smythe “Bridges and barriers: a five year retrospective on the Domestic Violence Act” 2005 *Acta Juridica* 200.

⁶² Prevention of Family Violence Act 133 of 1993.

⁶³ See s 12 and 9 of the constitution; Combrinck “The dark side of the rainbow: violence against women in South Africa after ten years of democracy” 2005 *Acta Juridica* 171; according to Albertyn *et al* (n 29) 323 these shortcomings include the fact that the act had not been sufficiently informed by the nature and context of domestic violence and rather emphasized family unity than the abused woman.

Act intends to provide accessible, speedy relief to complainants of domestic violence in a wide variety of relationships and in respect of a broad spectrum of violence.⁶⁴ However, research has shown that the act has not affected the incidence of domestic violence, and that its implementation is extremely problematic.⁶⁵ Problems range from courts having reservations about the broad definition of domestic violence (for example, how cases of alleged emotional abuse should be dealt with); police displaying reluctance to effect service of documents; and uncertainty about how to respond to breaches of domestic violence.⁶⁶ The ability of the act to achieve its goals has been marred by the everyday constraints facing courts as well as the limitation of what an act can reasonably provide victims of domestic violence.⁶⁷ There is little indication that the majority of women have enjoyed protection under the act and more specifically protection supposedly provided by the criminal justice agencies charged with the act's enforcement.⁶⁸

The problems concerning the operation and implementation of the Domestic Violence Act have been described as being symptomatic of the limits of the law in transforming the unequal gender power relations inherent in a patriarchal society such as South Africa's. A purely legalistic response to a social phenomenon such as domestic violence will be incapable of effecting the real social transformation needed to curb domestic violence.⁶⁹ The constitutional court has contributed to an understanding of domestic violence in its broader social context and acknowledges that the state has a direct obligation to protect persons from domestic violence, but does not give much guidance on addressing the broader issues outside the legislative framework.⁷⁰ As Albertyn, Artz, Combrinck, Mills and Wolhuter state:

“The development of a truly effective response to domestic violence has little to do with the enactment of legislation, the imposition of legal duties or any number of purely legal reforms. The phenomenon of domestic violence is complex, but it is also a symptom of the unequal gender relations that pervade South African society. Its elimination thus requires a transformation that proceeds, not

⁶⁴ s 1 of the Domestic Violence Act. Artz and Smythe (n 61) 201 n 3 discussed the provision that a domestic relationship includes people who are or were married to each other (living together or not); people in a same-sex relationship (living together or not); any person who is or was in an engagement; dating or a customary relationship; intimate or sexual relationships of any duration; parents of a child; and people who share or recently shared the same residence. The legal definition of domestic violence further provided in s 1 of the act specifically reflects women's experience of violence and includes physical, sexual, emotional, verbal, psychological and economic abuse, intimidation, harassment, stalking, damage to property, entrance into the complainant's residence without consent where he or she is not living with the abuser, and any other controlling behaviour which harms, or may cause imminent harm to the safety, health or well-being of the complainant.

⁶⁵ Empirical research have highlighted serious concerns with the implementation of the act which is extensively discussed in Parenzee, Artz and Moutl *Monitoring the Implementation of the Domestic Violence Act: First Research Report 2000-2001* (2001); Artz “Better safe than sorry: magistrates' view of the Domestic Violence Act” 2004 *SA Crime Quarterly* 1; Curran and Bonthuys “Customary law and domestic violence in rural South African communities” 2005 *South African Journal on Human Rights* 607; Jewkes, Penn-Kekana, Levin, Ratsaka and Schriber *He Must Give Me Money, He Mustn't Beat Me: Violence Against Women in Three South African Provinces* (1999); Mathews and Abrahams *Combining Stories and Numbers: An Analysis of the Impact of the Domestic Violence Act 116 of 1998 on Women* (2001); Smit and Nel “An evaluation of the implementation of the Domestic Violence Act: What is happening in practice?” 2002 *Acta Criminologica* 45.

⁶⁶ Albertyn *et al* (n 29) 328.

⁶⁷ Artz (n 65) 1.

⁶⁸ Albertyn *et al* (n 29) 323.

⁶⁹ Albertyn *et al* (n 29) 323.

⁷⁰ *S v Baloyi* 2000 2 SA 425 (CC). The case involved a challenge to the constitutionality of the procedures for the enforcement of domestic violence interdicts in terms of the Prevention of Family Violence Act (n 68).

from above, but from within the hearts of those who harbour patriarchal values, those who engage in domestic violence, as well as those who are charged with its prevention and punishment. Such a transformation has not occurred in the six years of the Act's existence and it is possible that it is a theoretical ideal, the actualisation of which remains elusive.⁷¹

What the act has achieved is a clear message to the criminal justice system how domestic violence cases should be treated. Positive legal duties are placed on magistrates, clerks of the court and police to perform certain functions in relation to domestic violence. But the responses of relevant role players are inconsistent at best, and the lack of proper checks to ensure effective implementation diminishes the impact of the act, ultimately questioning its potential for social transformation.⁷²

2.3 Recognition of Customary Marriages Act

The constitution protects cultural rights and the rights of cultural, religious and linguistic communities, as long as these rights are exercised in a manner consistent with the rights in the bill of rights.⁷³ In this context the Recognition of Customary Marriages Act gives expression to a number of constitutional objectives. It endeavours to recognize and value traditional African culture; it is concerned with regulating customary marriages within the context of a state bureaucratic system; and it attempts to address women's rights under customary law.⁷⁴

Specifically, the act brought an end to the uncertainties and doubtful nature of customary marriages and recognizes monogamous and polygamous customary marriages concluded before and after the act, subject to compliance with certain requirements.⁷⁵ In promoting gender equality, the act includes provisions that bring the customary law of marriage in line with the constitutional provisions on equality and non-discrimination.⁷⁶ These include requiring the consent of both the parties to the marriage;⁷⁷ securing equal legal capacity for spouses;⁷⁸ providing for registration of customary marriages (although failure to register does not affect their validity);⁷⁹ regulating the proprietary consequences of the marriage;⁸⁰ allowing

⁷¹ Albertyn *et al* (n 29) 335.

⁷² Albertyn *et al* (n 29) 335.

⁷³ s 30 and 31 of the constitution.

⁷⁴ Bronstein "Confronting custom in the new South African state: An analysis of the Recognition of Customary Marriages Act 120 of 1998" 2000 *SAJHR* 558.

⁷⁵ See s 2-3 of the Recognition of Customary Marriages Act. For a discussion of these requirements see Jansen "Customary family law" in Rautenbach, Bekker and Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2010) 47.

⁷⁶ The equality provision is provided for in s 9 of the constitution; Himonga "Transforming customary law of marriage in South Africa and the challenges of its implementation with specific reference to matrimonial property" 2004 *International Journal of Legal Information* 260.

⁷⁷ s 3(1)(a).

⁷⁸ s 6.

⁷⁹ s 4.

⁸⁰ s 7. All monogamous customary marriages are perceived to be in community of property. However, this was not always the case, as the act distinguished between marriages that were concluded before and after the act. Marriages concluded before the act were according to s 7(1) governed by customary law where most practices followed a regime of out of community of property. A marriage concluded after the commencement of the act was a marriage in community of property (s 7(2)). In *Gumede v President of the Republic of South Africa* 2009 3 BCLR 243 (CC), s 7(1) was declared unconstitutional as far as it related to monogamous customary marriages. The patrimonial consequences of monogamous customary marriages entered into before and after the commencement of the act are now the same. A polygamous customary marriage entered into before the commencement of the act is still governed by customary law. These marriages are not necessarily viewed as being in, or out of community of property. Polygamous customary marriages entered into after the commencement

dissolution only by a court order;⁸¹ and granting courts the jurisdiction to decide on custody rights and maintenance upon the dissolution of the marriage.⁸²

Although the act is commendable for providing legal certainty, its practical implementation seems to be out of step with the social realities of the women to whom it applies. The women to whom customary law applies are most often Africans living in rural areas. African rural women are one of the most disadvantaged groups in our country, and it is therefore important to evaluate the effects of customary rules in the context of great female poverty.⁸³

One of the problems women encounter is the proposed registration of customary marriages. Under the act spouses have a duty to register their customary marriage, but, as noted above, non-registration does not affect the validity of the marriage. In fact, the act does not explain what the purpose of registration is.⁸⁴ In practice, registration certificates are required by the master's office in order for the office to be able to act as executor of a deceased's estate, if the deceased dies without a will.⁸⁵ If the relevant spouse is not appointed as executor, a family member will be appointed (usually an uncle or brother), and often the customary law wife and children are not taken into consideration.

Most women are not aware of this process, and fail to register their marriages. As a result, when their husband dies, they are left in the precarious position of not being able to access their inheritance. In addition, the act's regulation of the proprietary consequences of customary marriages could be described as being practically untenable. Specifically this refers to section 7, which provides that spouses may themselves regulate the proprietary consequences of their marriage by concluding an ante-nuptial contract if they do not want to be subjected to the regime that the act suggests. It is highly unlikely that couples will change their property regimes due to the complexity of the procedures concerned, and the legal costs associated with legal representation in such cases.⁸⁶ Practicalities such as the great distances that people in rural areas must cover to reach the nearest court to process their matrimonial property contract applications, the costs incurred in travelling and the notorious delays in the hearing of cases by the courts are not taken into account.

A further requirement is that polygamous marriages concluded after the commencement of the act should be accompanied by a contract regulating the proprietary consequences of the marriages. The act does not make any provision for the consequences of polygamous marriages that have no contract, and it is uncertain whether the same arrangement as with the registration of customary marriages will be applicable in the marriage.⁸⁷

of the act are regulated by s 6 and 7 of the act that requires a husband who wishes to enter into a further customary marriage to make an application to court to approve a written contract which will regulate the future matrimonial property systems of the marriages. For a discussion on the proprietary consequences of polygamous customary marriages see Jansen (n 75) 86.

⁸¹ s 8(1).

⁸² s 8(4).

⁸³ Mbatha, Moosa and Bonthuys "Culture and religion" in Bonthuys and Albertyn (eds) (n 29) 158-162; the researchers also acknowledge that not all African women to whom customary law applies are poor but that it does alert us to the importance of evaluating poverty and the application of the act.

⁸⁴ s 4.

⁸⁵ Dhever "The Customary Marriages Amendment Bill" (Joint submissions of the Legal Resources Centre and the Impact Litigation Unit of the Legal Aid Board to the Department of Home Affairs on the draft Recognition of Customary Marriages Amendment Bill, 2009, delivered 29-05-2009).

⁸⁶ Himonga (n 76) 267.

⁸⁷ Himonga (n 76) 269.

Because of these complexities and impracticalities, especially in relation to polygamous marriages, people continue marrying as they always have done – as though the act does not exist. Ultimately, this negates the protection that the act was supposed to provide to women, and questions the ability of legislation to affect the lived reality of the people whom it is supposed to benefit.

2.4 The Promotion of Equality and Prevention of Unfair Discrimination Act

In 2004 the equality act was passed to meet the constitutional requirement for national legislation prohibiting unfair discrimination, and to provide for a more accessible legal mechanism for claims of discrimination.⁸⁸ The act was arguably put into place to effect large-scale social transformation in South Africa.⁸⁹ The act prohibits unfair discrimination in the public and private spheres and across all sectors of society, with the exception of those fields subject to the Employment Equity Act.⁹⁰ The act is enforced by equality courts, which are special courts within the magistrates' and high courts, and which are subject to their own informal procedures.⁹¹ Although the definition of discrimination in the act is closely modelled on the constitutional court's equality jurisprudence, it goes further and prohibits discrimination not only on the listed grounds in the constitution but also on any other ground that causes or perpetuates systemic disadvantage.⁹²

The act has a special focus on addressing past patterns of oppression, which is especially important for women and particularly for women who suffer from various intersecting forms of discrimination.⁹³ Generally, the act has been heralded as a progressive piece of legislation with the potential to transform South African society. But the question is whether the Equality Act has lived up to its expectations. Sadly, the answer is no as few cases have been heard and the operation of the equality courts is fraught with difficulties.⁹⁴ Although all magistrates' courts have now been designated equality courts,⁹⁵ matters heard by these courts have only marginally

⁸⁸ Albertyn "Equality" in Bonthuis and Albertyn (eds) (n 29) 82 112.

⁸⁹ Kok "The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: court-driven or legislature-driven societal transformation" 2008 *Stellenbosch Law Review* 122.

⁹⁰ s 5 of the Equality Act.

⁹¹ s 4, 5, 16 and 19 of the Equality Act.

⁹² s 13-14; Jagwanth and Murray "Ten years of transformation: how has gender equality in South Africa fared" 2002 *Canadian Journal on Women and the Law* 255 269.

⁹³ Jagwanth and Murray (n 93) 269; Gender equality is one of the key themes of the act. S 8 prohibits unfair discrimination on the grounds of gender and states no person may unfairly discriminate against any person on the ground of gender, including – (a) gender-based violence; (b) female genital mutilation; (c) the system of preventing women from inheriting family property; (d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child; (e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources; (f) discrimination on the ground of pregnancy; (g) limiting women's access to social services or benefits, such as health, education and social security; (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons; (i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.

⁹⁴ Albertyn (n 88) 113; Liebenberg and O'Sullivan "South Africa's new equality legislation: a tool for advancing women's socio-economic equality?" 2001 *Acta Juridica* 70 103.

⁹⁵ Previously only certain magistrates courts were designated equality courts, however, all magistrates courts have now been designated as equality court, see "Designation of magistrates' courts as equality courts; defining the area of jurisdiction; and appointment of places for the holding of equality court sittings" GN R859 in GG 32516 of 28-08-2009.

increased from 447 in 2008/09 to 508 in 2009/10 (an increase of 61 matters).⁹⁶ Considering that the equality courts were specifically implemented to provide access to all South Africans to have matters relating to on unfair discrimination, harassment and hate speech adjudicated, it is disconcerting that only 508 matters were heard countrywide during the relevant year.⁹⁷ The small number of cases heard by these courts limits their ability to act as a meaningful catalyst for social change.⁹⁸ It is also not clear from the latest statistics how many of these matters relate to gender equality: however, the 2007/08 statistics indicate that only two matters were related to gender equality, while unfair discrimination related to race made up the majority of claims.⁹⁹ Some of the challenges faced by these courts include the fact that, despite the act being drafted to facilitate unrepresented complainants, a lack of representation is an obstacle to complainants because respondents are often better resourced and represented; training provided to magistrates on the act is insufficient; and there is a general lack of awareness about the equality courts and their procedures.¹⁰⁰

The possible impact that the act will have on gender discrimination is still largely untested, and so it is too early to make a finding on its transformative potential. The equality act (and courts) can play a useful role in addressing systemic discrimination, and future matters might give a clearer indication as to the legislation's impact in relation to achieving actual change.¹⁰¹

3 *Strategy rethought*

The problem with these laws is not their content, but their interpretation and implementation. The barriers to implementation are multifaceted and complex, but what stands out is the lack of knowledge and understanding on how to access and enforce rights in terms of the relevant pieces of legislation. Identifying and addressing these barriers to implementation will require careful empirical research combined with a detailed understanding of the context of service delivery.¹⁰²

In relation to the social construction of law, if women are to benefit from proactive legislation, it is critical that it is designed and implemented to take account of the real conditions of women's lives and the gender power relations at work in society. Albertyn poses the question whether the failure to reduce concrete gender inequalities is the result of the inevitable structural difficulties of transforming a fundamentally unequal society, or whether it signifies a deeper problem of according a low priority to gender equality in our democracy. Does it also point to a failure of the state to

⁹⁶ Department of Justice and Constitutional Development *Annual Report 2009*, <http://www.justice.gov.za> (8-04-2013). The equality court statistics for the year 2007/2008 reflects only 169 cases heard by the courts. The accuracy of the statistics is, however, questionable as the department itself noted that the gathering of these statistics was fraught with difficulties; see Department of Justice and Constitutional Development *Annual Report 2007/08*, <http://www.justice.gov.za> (8-04-2013) 57.

⁹⁷ Kaersvang "Equality courts in South Africa: legal access for the poor" 2008 *Journal of the International Institute* 4.

⁹⁸ Kruger "Small steps to equal dignity: the work of the South African equality courts" 2011 *Equal Rights Review* 27 39.

⁹⁹ Department of Justice and Constitutional Development *Annual Report 2007/08* <http://www.justice.gov.za> (8-04-2013) as interpreted by Keehn *The Equality Courts as a Tool for Gender Transformation* (2009) 10.

¹⁰⁰ Keehn (n 99) 10.

¹⁰¹ Albertyn (n 88) 119.

¹⁰² Liebenberg and O'Sullivan (n 94) 76.

address unequal power relations in the private sphere?¹⁰³ The latter seems to be a key factor in spurring the necessary social change advocated by the laws discussed in this article. Merely removing structural constraints will not achieve the necessary transformation. It seems that the power relations that exist in the private sphere and the cultural norms that sustain them need to be adequately addressed in a public forum.

The South African women's movement needs to move beyond the success of its constitutional and legal gains and engage the social and cultural spheres in a sustained manner. With a strong set of basic rights in place, it is necessary to institutionalize democratic norms of women's equality, autonomy and freedom within society as a whole. As Albertyn states:

“This means that politics can no longer be located solely in a ‘traditional’ understanding of the public sphere as the state, where much has been won. The social and cultural domains must be subject to political struggles so that gender equality and women's autonomy can be validated as core political and social values. This entails bringing private issues into the public and redefining what is ‘public’ and the subject of public discussion. It also entails an ‘engendered’ notion of democracy that deepens the participation of women in defining and giving meaning to the norms and values that govern our social and cultural life, as well as our political life.”¹⁰⁴

The existing constitutional framework is a good starting point to engage the private sphere, as it makes key issues in the private domain such as culture, religion, violence and reproductive choice subject to public democratic values. To use this platform strategically will be key in extending the limits of law to effect social change. At this stage I am not certain how this will be done, or what form public discourse should take.

SAMEVATTING

DIE ROL VAN WETGEWING IN DIE BEVORDERING VAN GELYKHEID: 'N SUID-AFRIKAANSE ONDERSOEK

In die artikel bespreek die outeur die beperking van wetgewing om 'n transformerende impak op die samelewing te hê ter bevordering van geslagsgelykheid. Daar word gefokus op die Wet op Keuse oor die Beëindiging van Swangerskap, die Wet op Gesinsgeweld, die Wet op Erkenning van Gebruiklike Huwelike en die Wet op die Bevordering van Gelykheid en die Voorkoming van Diskriminasie.

Die Wet op Keuse oor die Beëindiging van Swangerskap beskerm die grondwetlike reg tot vryheid en sekerheid van die swanger vrou. In die besonder het dit betrekking op haar reg op liggaamlike en psigiese integriteit, waarby inbegrepe is die reg om besluite oor eie voortplanting te neem asook haar reg op sekerheid van en beheer oor haar eie liggaam. Die vraag word gevra of die wet wel vroue se reg tot liggaamlike en psigiese vryheid beskerm en of die uitoefening van hierdie regte aanvaar word deur die breër samelewing.

Die Wet op Gesinsgeweld is as 'n belangrike medium gesien waardeur alle persone betrokke in 'n gesinsverhouding, maar in die besonder vroue, gesinsgeweld kon aanspreek met 'n spesifieke fokus op die strafregtelike prosedures. Ten spyte van progressiewe wetgewing in die verband toon statistiek dat gesinsgeweld teen vroue steeds hoog is en toeneem wat eendelik die effektiwiteit van die betrokke wetgewing bevraagteken.

Die Wet op Erkenning van Gebruiklike Huwelike gee uiting aan die grondwetlike reg om aan 'n kulturele lewe van eie keuse deel te neem en reguleer gewoonteregtelike huwelike. Alhoewel die wet regsekerheid skep met betrekking tot gewoonteregtelike huwelike, blyk die praktiese implementering daarvan problematies te wees met geen inagneming van die sosiale werklikhede van hierdie vroue nie.

Met die Wet op die Bevordering van Gelykheid en die Voorkoming van Diskriminasie word daar voldoen aan die grondwetlike vereiste wat spesifieke wetgewing vereis ten einde gelykheid te bevorder.

¹⁰³ Albertyn (n 22) 596.

¹⁰⁴ Albertyn (n 22) 606.

Die wet bevorder gelykheid op alle vlakke en verbied onbillike diskriminasie. Van besondere belang is die gelykheidshoue wat ingestel is om te verseker dat daar aan die gestelde wetlike vereistes voldoen word. Weereens blyk daar probleme met die implementering daarvan te wees, en die impak spesifiek in verband met die bevordering van geslagsgelykheid is onseker.

Die inhoud van die besproekte wetgewing blyk toepaslik te wees, hoewel die implementering en behoorlike interpretasie daarvan te kort skiet. Die vraag word gevra of die wetgewing wel 'n positiewe impak het op die daaglikse lewens van vroue en tot watter mate dit steeds nodig is om die publieke of private verdeling aan te spreek ter bevordering van geslagsgelykheid.