



**Convention on the Elimination  
of All Forms of Discrimination  
against Women**

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**Committee on the Elimination of Discrimination  
against Women**

**Concluding observations on the fourth periodic report  
of South Africa**

**Addendum**

**Information provided by South Africa in follow-up  
to the concluding observations\***

[Date received: 23 September 2015]

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*Note:* The present document is being circulated in English, French and Spanish only.

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## 1. Introduction

### 1.1 Purpose

1. In paragraph 48 of the Concluding Observations ([CEDAW/C/ZAF/CO/4](#)) of the Committee on the Convention on Elimination of all Forms of Discrimination against Women (CEDAW), South Africa is requested to provide, within two years, written information on the steps undertaken to implement the recommendations contained in paragraphs 15 and 42 of the Concluding Observations. This report is therefore a response by South Africa to paragraph 15 on the Gender Equality Bill and paragraph 42 on a unified family code.

### 1.2 Background

2. South Africa's combined second, third and fourth periodic reports ([CEDAW/C/ZAF/2-4](#)), which were submitted in January 2009 to the United Nations CEDAW Committee, were considered by the Committee at its 48th session held on 21 January 2011. The Committee subsequently submitted its Concluding Observations on this report by South Africa ([CEDAW/C/ZAF/CO/4](#)) in March 2011.

3. These Concluding Observations cover positive aspects of implementation of the CEDAW instrument in South Africa and outlines principal areas of concern and recommendations for South Africa to implement going forward. The obligation of Member States is to implement the findings of the Committee. Since South Africa submitted the report to the Committee in 2009, steps have been taken at the country level to intensify the implementation of CEDAW, as well as to address the recommendations as stipulated in the Concluding Observation since 2011. Furthermore, the CEDAW Committee expected South Africa to submit its fifth periodic report in February 2015.

4. Paragraph 15 of the Concluding Observations reads as follows: "The Committee calls on the State party to expedite the consultations on the Green Paper towards a Gender Equality Bill in order to submit it as soon as possible for adoption to the Parliament, and achieve *de jure* equality for women and compliance with the State party's international treaty obligations ... to fully incorporate into the Gender Equality Bill the principle of equality between women and men in accordance with article 2(a) of the Convention, as well as to prohibit discrimination on the basis of sex, in line with article 1 [of the Convention] and other relevant provisions of the Convention."

5. Paragraph 42 of the Concluding Observations reads as follows: "The Committee recommends that the State party increase support for law reform, in line with its Constitutional principles, with regard to non-discrimination, and to comply with its international obligations through partnerships and collaboration with religious and community leaders, lawyers, judges, civil society organizations and women's non-governmental organizations. To this end, the Committee urges the State party to:

(a) Expedite discussion of the Customary Law of Succession and Related Amendment Bill, with the aim to adopt it; and

(b) Prepare a unified family code in conformity with the Convention, in which unequal inheritance rights, property and land rights and polygamy are addressed, with the aim of abolishing them, including the option of civil provisions available for all women.”

## **2. Responses to paragraph 15 of the CEDAW Committee concluding observations**

### **2.1 The status of the Green Paper towards the women’s empowerment and gender equality bill**

6. The Women’s Empowerment and Gender Equality (WEGE) Bill is currently non-existent as it lapsed in April 2014. The explanation that follows seeks to provide a response to the request contained in the Concluding Observations.

7. The Women’s Empowerment and Gender Equality Bill sought to provide a premise for the accelerated implementation of the vision of non-racialism and non-sexism, and the protection of freedom, equality and human dignity as espoused by the Bill of Rights in the Constitution of the Republic of South Africa, 1996 (Constitution). Women were specifically targeted in this Bill in all its diversity and categorizations.

8. South Africa has recorded great strides in the attainment of women’s empowerment and gender equality. Nevertheless there is marked persistence of inequality between women and men, compounded by the continuing practices of patriarchy and sexism, in the country. In order to accelerate and expedite the transformation of women’s lives in the country, it was thought prudent that a legal instrument be enacted to ensure accountability, responsibility and enforcement for women’s empowerment and gender equality. Thus, a Green Paper was developed which outlined challenges that were still being experienced in the country in this regard and proposed actions that needed to be taken to overcome these challenges going forward. The Green Paper towards the Women’s Empowerment and Gender Equality Bill therefore set the context within which the Bill was to be drafted.

9. The objects of the Bill were contained in clause 3 thereof, which read as follows:

“3. The objectives of this Act are to —

(a) give effect to the letter and spirit of the Constitution, in particular —

(i) the equal enjoyment of all rights and freedoms by every person;

(ii) the promotion of equality, specifically gender equality; and

(iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;

(b) facilitate compliance ... with the country’s commitments to international agreements, including —

(i) the Convention on the Elimination of All Forms of Discrimination Against Women (December 1979);

(ii) the Beijing Declaration and Platform for Action (September 1995);

- (iii) the Millennium Declaration and Development Goals (September 2000);
  - (iv) the Protocol to the African Charter on Human and Peoples' Rights and the Rights of Women in Africa (2003);
  - (v) the Solemn Declaration on Gender Equality in Africa (July 2004); and
  - (vi) the SADC Protocol on Gender and Development (August 2008);
  - (vii) The United Nations Convention on the Rights of Persons with Disabilities, 2008.
- (c) align all aspects of the laws and the implementation of the laws relating to women empowerment and the appointment and representation of women in decision-making positions and structures;
- (d) facilitate the development and implementation of plans and measures by designated public bodies and designated private bodies for the promotion of women empowerment and gender equality, and the submission of those plans and measures to the Minister for consideration, review and guidance;
- (e) provide for the implementation of measures to achieve the progressive realisation of a minimum of 50 per cent representation and meaningful participation of women in decision-making positions and structures including Boards by designated public bodies and designated private bodies, as contemplated in section 7;
- (f) provide for the implementation of gender mainstreaming by designated public bodies and designated private bodies as contemplated in section 8; and
- (g) provide for the development and implementation of public education programmes by designated public bodies and designated private bodies on practices that unfairly discriminate on grounds of gender as contemplated in the applicable legislation and in international agreements in order to promote gender equality and social cohesion;
- (h) address the pervasive discriminatory patriarchal attitudes and the lingering effects of apartheid faced by women in the education system, and to ensure that women's childbearing responsibilities are not the cause for drop out or exclusion."

## **2.2 Steps undertaken to expedite the consultations on the women's empowerment and gender equality bill towards adoption by parliament**

10. It is important to take note that the Green Paper was indicated in South Africa's responses to a list of issues raised by the CEDAW Committee ([CEDAW/C/ZAF/Q/4](#)) in consideration of the combined second, third and fourth periodic reports of South Africa ([CEDAW/C/ZAF/2-4](#)), and at that time the name of the proposed Bill was the Gender Equality Bill. It was changed, following several consultations held in the country, to the Women's Empowerment and Gender Equality Bill.

11. South Africa has identified gender equality as one of the national priorities and all institutions in society remain conscious of the need to mainstream gender

transformation in their policies and programmes. The President, HE Mr Jacob Zuma, in his address to the High-level event on women's access to justice on the margins of the United Nations General Assembly in New York on 24 September 2012 said: "We commit ourselves to pass into law by 2013 the Women Empowerment and Gender Equality Bill, in support of achieving 50/50 gender equality across government, public and private sectors, particularly at leadership and decision-making levels."

12. Progress was made with regard to the development of the Bill since reporting to the United Nations CEDAW Committee in January 2011. At the National Gender Machinery consultation held on 7 October 2010, 13 Issues Papers were tabled. These discussion papers outlined and engaged with various issues that led towards conceptualizing a Gender Equality Bill. The Issue Papers (see annex A) comprised the following discussion issues:

- Towards a Gender Equality Bill;
- Gender responsive implementation and service delivery;
- Closing the Gender Equality Gap between Theory and Practice;
- Partnerships that deliver gender responsive services;
- Unpacking Patriarchy and Institutionalized sexism;
- Financing Gender Equality;
- Women and Health;
- Women in Education;
- Role of Men and Boys in Gender Equality;
- Addressing Violence against Women and Girls;
- Young women and gender equality;
- Women Empowerment and Representation in Local Government;
- The Challenges of Co-ordination in Implementation of the National Policy Framework for WEGE;
- Strengthening Institutional Arrangements for women's empowerment and gender equality;
- Rural women and Development; and
- Assessing Gaps in existing Legislation and Policies.

13. Following the engagement with these documents, a discussion document entitled "Policy Considerations for Gender Equality Legislation" (see annex B) (Policy Considerations document) was compiled which thereafter served as the base document for engagement with different stakeholders. The intention was to identify the core issues that would be included in a Bill and on the reviewing of the South African National Policy Framework for Women's Empowerment and Gender Equality (2000) to take cognizance of changes in both institutional arrangements and in transformation issues or lack thereof.

14. As a result of the several consultations on the Policy Considerations document, the National Policy for Women's Empowerment and Gender Equality

was crafted, and the Department undertook several consultations on this document. A report outlining a comprehensive consultative process, detailing who was consulted, when (dates), where (venues), was developed and the report contains and provides a summary of issues raised during these consultations. This report is attached as annex C.

15. The following consultations took place:

- A National Gender Machinery consultation on a draft paper titled “Towards a Gender Equality Bill” on 14 April 2011;
- Three Provincial Consultations (Gauteng on 5 May 2011; North West on 6 May 2011, and Northern Cape on 1-2 November 2011);
- A Policy Considerations Paper was developed by DWCPD and presented at a consultative meeting on 27 May 2011;
- National Young Women’s Consultative meeting on 22-23 July 2011;
- National Consultations with Women with Disabilities on 13 August 2011;
- National Women’s Conference on 31 July-3 August 2011;
- Policy consulted with the Congress of South African Trade Union (COSATU) National Gender Committee meeting on 12 October 2011;
- National Policy developed and consulted with Executive Committee of the Progressive Women’s Movement South Africa (PWMSA) on 25 October 2011;
- Consulted policy with the National Disability Summit on 16 March 2012;
- Consultations with Rural Women on 12 April 2012;
- Consulted with ANC Women’s League Governments and Administrative cluster on 10-11 June 2012;
- Consulted with Economic Sectors and Employment Director-Generals’ Cluster on 4 April 2012;
- Consulted with Governance and Administration (G&A) Director-Generals’ Cluster on 12 April 2012;
- Consulted with Social Cluster Director-Generals’ Cluster on 18 April 2012;
- Consulted with JCPS Director-Generals’ Cluster on 08 May 2012;
- Presented policy at the Ordinary Session of the Development Chamber of National Economic Development and Labour Council<sup>1</sup> (NEDLAC) on 7 June 2012;
- Presented policy for adoption at the Social Sector Director-Generals’ Cluster on 13 June 2012;
- Presented policy at the G&A Working Group on 21 June 2012; and
- The Bill was consulted at the Infrastructure Development (ICTS) Director-Generals’ Cluster on 03 July 2012.

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<sup>1</sup> NEDLAC consists of four chambers namely the Public Finance and Monetary Policy Chamber; Trade and Industry Chamber; Labour Market Chamber; and Development Chamber and its purpose is to consider significant changes in social and economic policies.

16. The Bill was published in the *Government Gazette* on 29 August 2012 for public comment for a period of 30 days. A copy of the Bill as it appears in the *Government Gazette* is attached as annexure D. Comments and submissions were received from about 40 organizations in the country and analysed and issues, where appropriate, were incorporated into the Bill.

17. The Bill formed the subject of consultations with the South African National Economic Development and Labour Council (NEDLAC), which took place from 7 June 2012 to 4 May 2013 in preparation for the final submission to Cabinet. In May 2013 NEDLAC withdrew the Bill from its schedule.

18. The Bill was simultaneously going through the Cabinet adoption processes. An Inter-Ministerial Task Team was set up by the Cabinet to discuss the possible overlaps and duplications with other existing pieces of legislation pertaining to women's rights issues, but also to determine how Government departments could cooperate to ensure that women benefitted from the full and effective implementation of all such existing legislation.

19. The Bill was approved by the Cabinet for tabling in Parliament as a Section 75 Bill on 23 October 2013 and tabled on 6 November 2013 in Parliament. The Bill, and related documents (the Regulatory Impact Assessment, the Objectives Statement and the Chief State Law Adviser's Report) are attached as annex E. The Bill was tagged as a Section 76 Bill by Parliament on 14 November 2013 and was referred to the National House of Traditional Leaders on 19 November 2013.

20. The Bill was published by the Parliamentary Portfolio Committee on Women for public hearings in national newspapers across the country as follows: *The Sunday Times* on 1 December 2013; the *Rapport* on 1 December 2013 and in the *Sowetan* on 3 December 2013. Public hearings were held on 28 and 29 January 2014. This included the participation of many women's organizations, civil society organizations and entities in the private sector, including the Business Unity South Africa (BUSA). The Department responded to the public hearings on 5 February 2014.

21. The Portfolio Committee on Women, Children and People with Disabilities deliberated on the Bill on 18 February 2014. However, the deliberations were stopped due to the argument that clause 7(2) in the Bill was considered unconstitutional and the deliberations were thereafter postponed to 25 February 2014. The Bill was adopted by the Portfolio Committee on 26 February 2014.

22. The Bill was debated in the National Assembly on 4 March 2014 and thereafter referred to the National Council of Provinces (NCOP) and a briefing was provided to the National Select Committee in Parliament. The mandate of the Bill was discussed on 19 March 2014 and the National Select Committee adopted the Bill on 25 March 2014. The NCOP adopted the Bill on 26 March 2014, where eight of the nine provinces supported the Bill. The Western Cape Province, an opposition run province, was the only province that did not support the Women Empowerment and Gender Equality (WEGE) Bill.

23. Following the processes mentioned above, the Bill was sent back to the National Assembly with inputs from the NCOP in April 2014. This process had delayed the adoption of the Bill, and by this time Parliament had risen for the national elections in April 2014. Consequently, the Bill lapsed.

## 2.3 The current status of the bill

24. Following the National Elections in 2014, the President of the Republic created the Ministry in the Presidency Responsible for Women as champion of the socioeconomic empowerment of women in the country. The decision was taken to hold off on reviving the Bill processes, or even redrafting the Bill, in lieu of ensuring that existing legislation is fully and effectively implemented. This decision is also based on the fact that the Bill had areas of overlapping responsibilities with more than one Government Department which would affect its implementation. It is important to mention upfront that women empowerment and gender equality in the country are well covered by the Constitution and several legislative frameworks that are in place to protect women against discrimination, violence, including sexual violence and promote women empowerment and rights of women. Most of the legislation and its impact on the life of women have been well elaborated on in South Africa's Combined 2nd, 3rd, and 4th periodic reports to CEDAW. They include, but are not limited to, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); the Employment Equity Act, 1998 (Act No. 55 of 1998); the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000); the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); the Labour Relations Act, 1995 (Act No. 66 of 1995); the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997); Home Loan and Mortgage Disclosure Act, 2000 (Act No. 63 of 2000); the Maintenance Act, 1998 (Act No. 99 of 1998); the Domestic Violence Act, 1998 (Act No. 116 of 1998); the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998); the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009 (Act No. 11 of 2009); the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act No. 19 of 1998); and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007).

25. It is therefore not necessary in this report to repeat how these Acts impact on the prevention of discrimination against women. However, further information on some of the Acts is provided below for further understanding on their impact on women.

26. **Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000) (PEPUDA):** makes affirmative action mandatory. It gives effect to section 9 of the Constitution by providing for the —

- equal enjoyment of all rights and freedoms by every person;
- promotion of equality (including gender equality);
- values of non-racialism and non-sexism contained in section 1 of the Constitution;
- prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution; and
- prohibition of advocacy of hatred, based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution.

27. The Act also provides for enforcement mechanisms, which include Equality Courts, Parliamentary Procedures and applies to all employment issues that are excluded from the Employment Equity Act. This includes contract work and the Judiciary. Section 28(1) thereof provides that “[i]f it is proved in the prosecution of



any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentencing”.

28. PEPUDA also provides for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment and to provide remedies for victims of unfair discrimination. The Schedule to PEPUDA provides useful insights on existing systemic inequalities in various sectors to be given priority in the promotion of equality, including gender equality.

29. **Broad-based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003):** This Act was amended in 2013 specifically to include women and people living in rural areas, among others, in the definition of “broad based black economic empowerment”. The amendment also included the creation of incentive schemes to support black owned and managed enterprises in the strategy for broad based black economic empowerment and established a Broad Based Black Economic Empowerment Commission to monitor the implementation of the Act. It further creates offences and penalties for non-compliance.

30. **Housing Act, 1997 (Act 107 of 1997):** This Act obliges national, provincial and local governments to promote measures that prohibit unfair discrimination on the grounds of gender by all role-players in the housing development sphere.

This Act addresses the historic discrimination against Black women, who were not allowed to own property; even where the property was purchased by them, it would be in the name of their husband, child or male relative.

31. **Prevention of Illegal Eviction from and the Unlawful Occupation of Land Act, 1998 (Act 19 of 1998):** This Act was not included in South Africa’s combined second, third and fourth periodic CEDAW report. The Preamble to this Act makes specific reference to women and notes that special consideration should be given to the rights of certain vulnerable groups, which include female-headed households.

32. **Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007):** This revises the law relating to sexual offences, including the Sexual Offences Act, 1957 (Act 23 of 1957), in order to bring it into line with South Africa’s the new constitutional dispensation and to provide maximum protection to victims of sexual offences, who are mostly women and children. It also provides a mechanism in terms of which victims of sexual offences (mostly women) can apply to have the alleged sex offender tested for HIV. The Act broadened the definition of rape, and addressed the problem of single witness indirect customary rule, and the administrative procedures to be followed in Courts in order to protect witnesses from secondary victimization by the criminal justice system.

#### **Redundancy of proposed WEGE Bill**

33. There have been several opinions across the political, government, private sector and civil society that have been voiced on the duplication and the redundancy of the proposed WEGE Bill based on the fact that South Africa has several laws that protect women from discrimination in line with CEDAW. This legislation has been quoted in the South Africa’s CEDAW report as well as in this response to the CEDAW Concluding Observation. The country needs to strengthen the existing laws and ensure their full implementation rather than emerging with another policy.

34. Even if there would be a future need for Gender Equality Act, the need is not urgent. Monitoring and evaluating the full implementation of existing Acts, which already have resources and enforcement mechanisms, as well as identifying the root causes of the continued gender equality gaps, implementation challenges and inconsistencies within the Acts should receive urgent attention.

35. National Government departments are the custodians of these Acts. Integrated and collaborative measures to maximize and monitor the implementation of these Acts for effectiveness in protecting and promoting women's rights and empowerment and in achieving gender equality, are the fundamental tenets on which the mandate of the Department of Women is premised.

### **3. Responses to paragraph 42 of the UN CEDAW Committee concluding observations**

#### **3.1 The Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009 (Act No. 11 of 2009)**

36. The Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009 (Act No. 11 of 2009) was assented to on 19 April 2009 and commenced on 20 September 2010. The Long Title of the Act reads as follows:

“To modify the customary law of succession so as to provide for devolution of certain property in terms of the law of intestate succession; to clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law; and to amend certain laws in this regard; and to provide for matters connected therewith.”

#### **3.2 Marriage and family relations**

37. Government has put in place a White Paper on Families which contain proposals on how South African families should be supported, in order to flourish and function optimally. It calls for families to play a central role in the national development pursuits of the country and the building of a better South Africa. This was preceded by the Green Paper on Families, which is a consultative document.

38. It has become apparent to policymakers, academics and civil society actors over the years that there was no policy framework that specifically addressed the family in South Africa. Given the history of the country and the nature of its political economy, as well as the multiplicity of social ills from the past, which continue to confront the country, the absence of a policy framework in this area was identified as a critical policy shortcoming that needed to be addressed urgently. On the other hand, it is evident that the detrimental effects of the policies of colonial apartheid on the family, for example, land dispossessions, and the migrant labour and homeland systems, have a connection with contemporary South Africa.

39. *The family and marriage:* Social science research demonstrates two almost incontestable conclusions: stable marital structures provide profound benefits for men, women and children, while, on the other hand, the breakdown of stable, marital structures imposes significant social costs upon individuals and society.

“Marriage is more than the union of two persons, it is a social institution ‘culturally patterned and integrated into other basic social institutions ...’ (Wilkins, Brigham Young University, 2004).

40. Marriage in South Africa is honoured by the Constitution. The Constitution also prohibits marriage discrimination based on sexual orientation. The South African legal system recognizes different forms of family: extended families, nuclear families, one-parent families, same-sex families. Marriage is also safeguarded by legislation, such as the Marriage Act 1961 (Act No. 25 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), and the Civil Union Act, 2006 (Act No. 17 of 2006). These Acts allow for the legal standing of marriages and civil unions between persons, regardless of their sexual orientation or gender. Broadly speaking, family law supplements the roles of these Acts. It covers substantive and procedural family law rules and norms. These are important in the protection and preservation of families, because they deal with different aspects of the law that have a bearing on family life. Family law governs domestic or family-related issues that pertain to marriage or a legal status similar to marriage, the dissolution of marriage, and aspects relating to children and death.

### 3.3 Inheritance

41. The right to inherit is not expressly provided for in the Constitution. However, cases regarding racial, gender and other forms of discrimination have been dealt with satisfactorily within the existing Bill of Rights and through court decisions. Section 9 on equality and the right against unfair discrimination, has been the basis of inheritance claims involving discrimination. For example, in *Bhe v Magistrate Khayelitsha and others 2005 (1) BCLR 1 (CC)* the intestate succession scheme under the Black Administration Act, 1927 (Act No. 38 of 1927) (Black Administration Act) preventing succession by women and extra-marital children was declared invalid. The Act and associated regulations (applicable only to persons governed by ‘Black law and custom’) were intended to give effect to the customary law principle of male primogeniture. The Constitutional Court declared the Act, the regulations and the rule of male primogeniture invalid, as they infringe on the right to equality.

42. The case of *Shilubana and others v Nwamitwa 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC)* raised issues about a traditional community’s authority to develop their customs and traditions so as to promote gender equality in the succession of traditional leadership, in accordance with the Constitution. A woman was appointed to a chieftainship position for which she was previously disqualified by virtue of her gender. The Court was called on to decide whether the community has the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination, even if this discrimination occurred prior to the coming into operation of the Constitution. The matter also raises issues regarding the relationship between traditional community structures and courts of law envisaged by our constitutional democracy. This Court had to consider how courts of law are to apply customary law as required by the Constitution, while acknowledging and preserving the institution and role of traditional leadership and the functioning of a traditional authority that observes customary law.

43. The Legal Resources Centre represented parties in the Constitutional Court cases reported as *Kambule v Master of the High Court and Others* (85) [2007] ZAECHC 2; [2007] 4 All SA 898 (E). The Legal Resources Centre obtained a judgment, which provided that a customary marriage, though not registered under the Transkei Marriages Act was still valid, helping to ensure legal benefits for the surviving spouse.

### 3.4 Property ownership of women

44. The case of *Gumede v President of the Republic of South Africa and Others* 2009 (3) BCLR 243 (CC) deals with the unfair customary law rule that women could not own property. Mrs Gumede brought a claim of unfair discrimination on the grounds of gender and race in relation to women who are married under customary law as codified in the province of KwaZulu-Natal. The case brought into sharp focus the issues of ownership, including access to and control of family property by women during and upon dissolution of their customary marriages. On one level it underlines the stubborn persistence of patriarchy and conversely, the vulnerability of many women during and upon termination of a customary marriage, while at another level the case poses intricate questions about the relative space occupied by pluralist legal systems under the umbrella of one supreme law, which lays down a common normative platform. The Constitutional Court declared, inter alia, that the provisions of section 7(1) of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), which regulate the proprietary consequences of a customary marriage, are inconsistent with the Constitution and therefore invalid.

## 4. Unified family code

45. The uniform family code recommended by the CEDAW Committee aims to promote equal treatment of all individuals in the family, whatever their race, gender or social origin. This in principle means that South Africa should have one marriage law. In any country which does not have the history of South Africa, this would be ideal. However, historically speaking South Africa where other marriages, whether customary or religious, had an unequal status to the marriage concluded under legislation, where the system of customary marriage was viewed as 'inferior' to common law and legislation. The opinion that customary marriages was a cultural practice and thus not a matter of law, was based on a concept of 'repugnancy' defined by Western, colonial and Christian values. For example, customary unions were not fully recognized because as marriages, being 'potentially polygamous', they were 'against good morals' (European morals). This inequality between customary law and civil law also reflected a cultural imperialism that denigrated African customs, cultures and values, and regarded these as 'inferior'.

46. Customary unions, as codified in the Black Administration Act, and as interpreted in the courts, were also institutions in which women suffered an unequal status and rights. The Black Administration Act treated all women, regardless of age, capacity and marital status, as minors [section 11(3) (b)]. As a result, women were not allowed to own property, sue or be sued in court, or to exercise the power to contract. Women could not negotiate or terminate their marriages, nor could they

have legal custody of their children. In addition, women were ineligible for rights to communally held land and disqualified from inheriting immovable property.<sup>2</sup>

47. Thus customary law enshrined both ‘internal’ and ‘external’ inequalities. As a system of law that was the personal law of the majority of the population in urban and rural areas, it was unequal to the civil system of law in South Africa. However, customary law was also a major source of gender based discrimination for women who were subject to it. Both of these inequalities (the fact that customary unions were treated unequally by the law and the inequality of women in these unions) drove the reform process after the advent of democracy in 1994.

48. The founding principles of the Constitution elevate human rights, equality and freedom for everyone in South Africa.

49. Gender equality is a founding principle and core right entrenched in the South African Constitution. Section 9 of the Constitution protects the rights of all persons to equal protection and benefit of the law, and to freedom from unfair discrimination on the basis of gender, sex, pregnancy and marital status.

50. In addition to singling out non-sexism as one of the core values upon which the new South Africa is founded, the Constitution champions the achievement of equality, including gender equality, throughout its provisions and particularly section 9 thereof. It is stated in section 9 that neither the state, nor any person, may discriminate directly or indirectly on the grounds of, inter alia, gender, sex, pregnancy, marital status or any other ground or combination of grounds listed or unlisted in section 9(2). To clarify its approach to equality, the Constitution further states that:

*“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”*

51. Equality is also given prominence in the Preamble to the Constitution where it is stated that —

*“South Africa belongs to all who live in it, united in our diversity.”*

52. The reference to diversity includes racial, gender and other forms of human diversity such as cultural, religious, etc. However, the drafters of the Constitution recognized and made it clear that the realization of equality, including equality between women and men, was an ideal to be pursued and achieved through the implementation of the Constitution. In the Preamble to the Constitution the following is stated:

*“We [the people of South Africa] therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to —*

*Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*

<sup>2</sup> For an extensive discussion of women’s inequality in customary marriage see the research by the CALS Gender Research Project, K. Robinson, “The minority and subordinate status of African women under customary law” (1995), 11 SAJHR 457.

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.”

53. Implied in the last part of the Preamble of the Constitution is a commitment to comply with international law and human rights standards. In fact the Constitution is aligned with and also serves as an instrument for facilitating South Africa’s compliance with its international human rights obligations. Many of the international human rights standards and resultant obligations relate to women’s human rights and the duty of Parties to take measures to eradicate inequality between women and men in all spheres of life, including the justice system, the family, societal practices and the economy. Indeed South Africa has specifically committed itself to comply with the provisions of various international instruments, which either specifically promote gender equality or have this as one of the critical compliance responsibilities.

#### **4.1 The development of customary and religious marriage laws**

54. The guiding principle in the development of customary and religious marriages has been the Bill of Rights.

55. The Constitution is the supreme law of the land. In terms of section 8 of the Constitution, the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. The development of legislation relating to customary and religious marriages had to comply with the provisions of the Constitution. These are:

- Section 9 — the right to equality, including the right to freedom from unfair discrimination;
- Section 10 — the right to human dignity;
- Section 15 — the right to freedom of religion, belief and opinion;
- Section 30 — the right to language and culture; and
- Section 31 — the rights of cultural, religious and linguistic communities.

#### **4.2 Culture and custom**

56. The right to practice one’s culture is entrenched in section 30 of the Constitution, which provides as follows:

“Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”

57. In addition, section 31 of the Constitution states that a community may not be denied the right to enjoy their culture, as long as this is not done in a manner that is inconsistent with the Bill of Rights.

58. The right to practice one's culture includes the right to marry according to its customs. This means that customary marriages can be recognized by law as long as they do not violate the rights in the Bill of Rights.

59. The need to eradicate the former colonial and apartheid prejudices against African cultural and other religious institutions such as those of the Muslims and Hindus suggests that customary law and the excluded religious laws deserve new respect. Balancing considerations of a uniform, national standard and the pluralism implicit in recognizing customary and religious laws involved a lot of debate. Ideals, however, had to be compromised. Plans to unify substantive laws soon foundered on the problem of which law to take as the basis for a new regime: the received European law or an indigenous system? And, if indigenous law, which one? The South African Constitution provides that we can be united in our diversity and we do not have to compromise for the sake of formal equality. Therefore, African law and religious law are to be treated as a national heritage, something to be protected and cultivated.

60. The Recognition of Customary Marriages Act, 1998 (Act 120 of 1998), gives full legal recognition to customary marriages. In addition, the Act sets out the following main objectives to —

- Recognize customary marriages;
- Set out the requirements for a valid customary marriage;
- Provide for registration of customary marriages;
- Provide for equal status and capacity of spouses;
- Regulate the proprietary consequences of customary marriages;
- Regulate the dissolution of customary marriages.

61. The same applies to the Muslim Marriages Bill which has not yet been promulgated as law. Its main objective is to —

- Recognize Muslim marriages;
- Set out the requirements for a valid Muslim marriage;
- Provide for registration of these marriages;
- Provide for equal status and capacity of spouses;
- Regulate the proprietary consequences of Muslim marriages;
- Regulate the dissolution of Muslim marriages; and
- Provide that custody of the children is determined by the 'best interests of the children'.

62. In 2009 the South African Law Reform Commission has issued a Discussion Document on Hindu Marriages. The main objective of the proposed Bill is similar to the Act and Bill discussed above in order to promote equality between the spouses in any marriage.

63. For South Africa, a unified family code might result in achieving formal equality which in many instances discriminates against others indirectly. The aim of recognizing diversity is to ensure substantive equality for all.

## 5. Conclusion

64. South Africa has translated the attainment of equality and human rights chiefly through the achievement of equity with concerted focus on policy, legislative measures and programmatic interventions. Several gains and many milestones have been achieved in this process. Legislative measures are imperative to create a conducive environment, to foster a society capable of eradicating the many practices that constrain the advancement and empowerment of women. However South Africa acknowledges challenges with regard to implementation of the Acts to benefit the majority of women, particularly women in rural areas.

65. The sharing of the CEDAW concluding observation in South African gives direction to the work of civil society organization towards the implementation of CEDAW.

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