



WOMEN & HUMAN RIGHTS DOCUMENTATION CENTRE

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DIVORCE IN MUSLIM PERSONAL LAW: A HUSBAND'S RIGHT, A WIFE'S FATE?

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Do Muslim women have a right to institute divorce? What are the legal implications of divorce in Muslim personal law? These were some of the questions dealt with at a workshop recently hosted in Gatesville, Cape Town, by the Women & Human Rights Project and the Athlone Divorce Support Group.

The workshop was based on research by Prof Najma Moosa, associate researcher at the Women & Human Rights Project, examining the provisions of Muslim personal law, the 1996 Constitution and experiences in other countries regarding the position of Muslim women and divorce. The workshop was aimed at initiating and encouraging discussion among members of the Divorce Support Group and other similar community-based organisations.

Prof Moosa explained that an Islamic marriage contract may be dissolved by the death of one of the spouses or by the act of divorce (*talaq*). While Islam disapproves of the notion of divorce, it is recognised as a necessary social evil and tolerated under certain circumstances. In general *talaq*, which literally means 'to set free', can take place by repudiation or legal process. (This refers to a legal or judicial process in terms of Muslim personal law.) A husband may pronounce divorce without specified

reasons and in the absence of his wife.

While the right to institute divorce is regarded as the unilateral right of the husband, he may delegate this right to his wife, either as a condition of the marriage contract or by agreement during the course of the marriage. Another option available to a wife is divorce by mutual agreement (*khul'*), which implies that the wife wishing to be released from the marriage agrees to return part or all of her dower. Compared to the delegated divorce, this is less advantageous to women.

The conclusion reached by Prof Moosa is that Muslim women have *equitable*, if not equal, rights of divorce. This raises the further question of whether this position accords with the 1996 Constitution, which allows for the recognition of Mus-

lim marriages - provided that such recognition is consistent with constitutional provisions, including the guarantee of equality.

A significant theme emerging from the workshop was the importance of empowering women by informing them of their rights, both in terms of religious law and the Constitution. The workshop discussion also emphasized that the debate around divorce should be considered in the formulation of legislation regarding Muslim marriages (at present, the Department of Justice is preparing draft legislation on the recognition of marriages contracted in terms of Muslim personal law).

■ The legal nature of Muslim marriages was recently considered in *Ryland v Edros* 1997 1 BCLR 77 (C) and *Amod v Multilateral Motor Vehicle Fund* 1997 12 BCLR 1716 (D).

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The Employment Equity Bill has been the subject of months of negotiation and heated debate. This legislation is expected to be finalised by Parliament soon, and to come into operation in two phases in February and June respectively. In this edition, we analyse whether the Employment Equity Bill adequately addresses gender concerns, and we also pose some questions for the Presidential Jobs Summit scheduled to take place at the end of October.

MORE WOMEN, MORE JOBS

Dana Roach

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On 21 September 1998 the Joint Committee on the Improvement of the Quality of Life and Status of Women held a meeting with business, labour and government structures to discuss the Presidential Jobs Summit and the position of women. The purpose of the Jobs Summit, which will be held on 30 October 1998, is to confront South Africa's significant levels of unemployment. At this meeting, proposals were heard on how to address the problem of women being the majority of the poorest, the unemployed and those in the lowest paying sectors.

Business South Africa proposed training women to be involved in tourism as a short-term solution to women's subordinated economic status, and also emphasized the importance of improving schools and developing training programs to create an environment of economic growth and wealth creation.

The Community Chamber at NEDLAC offered several suggestions, including -

- compiling public census results on the informal sector
- encouraging Parliament to amend the Small Business Enabling Act

■ considering ways to create opportunities for survivalists to become economically viable.

COSATU suggested a range of policy interventions which included the development of a national housing program, the establishment of more progressive taxation and the formulation of massive job training programs.

The Minister of Trade and Industry, Alec Irwin, emphasized that the purpose of the Jobs Summit is to speed up and improve government initiatives, and that the summit should include many diverse viewpoints to sufficiently address unemployment issues in South Africa. He advocated building viable frameworks rather than solely generating financial resources.

Participants in the parliamentary meeting generally agreed that in order to solve the unemployment and underemployment of South African women, one needs to create extensive training programs for women without concentrating women in particular sectors. Issues such as child care and the undervaluing of women's skills and jobs should be addressed. Neither the government nor any other individual role player should be solely responsible for the changes in women's employment status. It was resolved that the dia-

logue and exchange of proposals to address the institutionalized inequality of women in the employment market must continue beyond the Jobs Summit.

In October 1995:

■ 46% of South African women 15 years and older were classified as economically active, compared to 63% of men;

■ 47% of economically active African women were unemployed, compared to 29% of African men, 38% of white women and 23% of white men;

■ 3% of South African women recorded as working were classified as managers and senior officials, and 4% as professionals;

■ 48% of South African women recorded as working (whether as employers, employees or in self-employment) were working in the community, social and personal services sector;

■ 52% of economically active women in the Northern Province, 48% in Mpumalanga and 47% in the Eastern Cape were unemployed.

[Source: Hirschowitz and Orkin (1996) *Living in South Africa: Selected Findings of the 1995 October Household Survey*]

The employment status of South African women and recent government initiatives in this area are set out in the South African government's first annual report under the Convention on the Elimination of All Forms of Discrimination Against Women (1997).

This report can be accessed at: <http://www.sacs.org.za/gov/welfare/docs/cedaw1.htm>.

WORKING ON EQUAL TERMS: THE EMPLOYMENT EQUITY BILL

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The principal object of the Employment Equity Bill is to achieve equity in employment through promoting equal opportunities and implementing affirmative action to redress disadvantage experienced by people from designated groups. The term 'designated groups' incorporates black people, women and people with disabilities.

During public hearings held in July 1996 by the National Assembly Portfolio Committee on the contents of the proposed legislation, the Women and Human Rights Project submitted recommendations specifically relating to women. Although the Employment Equity Bill was subsequently amended in a manner that addressed some of these proposals (for example, regarding sexual harassment and the definitions of pregnancy and family responsibility), a number of concerns remain.

Indirect discrimination

Indirect discrimination should be defined, and the difficulties that women and other people from disadvantaged groups face in proving discrimination should be addressed in this definition.

Positive measures: 'reasonable accommodation'

A critical measure to advance substantive equality in employment is the imposition of a duty on employers to take positive measures as an aspect of the prohibition against unfair discrimination. Such positive measures may include adjustments

or modifications to the work environment or reassignment of duties. In Canada, these measures are usually described as the duty of reasonable accommodation. An example of reasonable accommodation in the sphere of pregnancy includes adapting work and break schedules to accommodate the needs of pregnant employees. Reasonable accommodation is usually incorporated in the form of a requirement which employers must comply with in order to defend themselves successfully against a discrimination challenge. The definition of unfair discrimination should therefore include the failure to make reasonable accommodation.

Inherent requirements of a job

The Bill states that "it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of the inherent requirements of a job." If this defence is interpreted too widely, it may disadvantage women because of stereotypes about men and women's respective capacity and abilities.

Equal pay for work of equal value

A failure to pay equal remuneration for work of equal value is a form of discrimination. The problem of enforcing pay equity exists not only in relation to the situation where a woman performs the same work as a man but is paid less, but also through discrimination which typically operates at a less obvious, less pervasive level in the context of job evaluation. Certain jobs (such as

nursing, secretarial work, child care work, domestic work) or certain types of skills (such as communication, empathetic or domestic skills) are seen as 'feminine' or 'women's work'. These are dominated by women workers and underpaid in comparison to similar occupations that require similar skills. It is therefore important for legislation to guarantee *equal remuneration for work of equal value*.

It is interesting to note that the amendments effected by the Labour Portfolio Committee did not substantially affect the conceptual framework of the legislation. For example, the section dealing with unfair discrimination was not amended. The reluctance of the committee to tamper with the conceptual framework of the Bill was probably linked to the fact that the Bill had been previously negotiated at the National Economic, Development and Labour Council (NEDLAC).

In conclusion, it should be noted that there is a link between employment equity legislation and the anti-discrimination legislation required under the equality clause of the 1996 Constitution. In order to fully realise the constitutional guarantee of substantive equality, the anti-discrimination provisions need more detail to enable courts to interpret them in a fair manner. It is therefore suggested that detailed provisions concerning discrimination in the employment sector should be included in the anti-discrimination legislation.

Full copies of the submission to the Labour Portfolio Committee may be obtained from the Women and Human Rights Documentation Centre at a reasonable cost to cover photocopying and postage charges. Please contact Farahnaaz Safodien at (021) 959 3703.

'TO HAVE AND TO HOLD': PROPOSED AMENDMENT TO MAINTENANCE, CUSTOMARY MARRIAGES AND

Coriaan de Villiers

Parliamentary Researcher, Joint Standing Committee on the Improvement of the Quality of Life and the

During the third Parliamentary session this year, the Maintenance Bill, the Recognition of Customary Marriages Bill and the Amendment of Customary Law of Succession Bill were introduced. It is anticipated that these three bills

will address the most pressing problems that women face in recovering maintenance.

One of the major difficulties lies in securing the attendance of the respondent at court, since respondents often evade service of court documents. Where service is suc-

cessful, the respondent must be criminally convicted of non-payment of maintenance before such an order can be issued.

A further innovation in the Bill is the introduction of procedures which allow for a warrant of execution to be issued in respect of maintenance orders.

The Maintenance Bill was introduced to alleviate some of the most pressing problems that women face in recovering maintenance.

cessful, respondents frequently ignore subpoenas calling on them to appear at court. The result is that many women eventually abandon the attempt to recover maintenance.

Maintenance Bill

The South African Law Commission (SALC) is currently engaged in a process of review of the maintenance system. An issue paper was released by the SALC in 1997, raising preliminary aspects for consideration. This issue paper outlined

various options for reform such as the introduction of an administrative (as opposed to judicial) system to determine a person's liability to pay child support as well as to collect and disseminate payments.

Many women eventually abandon the attempt to recover maintenance.

As an interim measure, the current Maintenance Bill was recently introduced by the Justice Department to effect a few key amendments to the existing judicial maintenance system in order to alleviate some of the

The Maintenance Bill introduces two mechanisms to address this situation. In relation to evasion of service, the Bill provides for the appointment of dedicated maintenance investigators who will have the power to serve court documents and trace respondents. If a subpoena has been served and the respondent does not appear on the hearing date, the court can make an order in the respondent's absence.

Due to problems experienced with the determination at a court enquiry of the respondent's full financial position, it is also proposed that maintenance investigators have the power to gather information concerning the financial position of both parties to ensure that all the relevant information is placed before the court.

In addition, the Bill seeks to address the enforcement of compliance with maintenance orders by providing that, when the order for maintenance is made, the court can order an employer to deduct maintenance from a respondent's salary. This is a significant improvement: as the

Recognition of Customary Marriages Bill

There has been much debate in South Africa about the recognition of customary law within the framework of the Constitution, since it is widely recognised that there are aspects of the customary law of marriage that are discriminatory and conflict with the constitutional guarantee of equality. For example, women married under customary law have minority status and do not have standing to sue, or contractual and proprietary capacity. Practises such as lobola and polygamy are also controversial from a perspective of gender equality.

Lobola and polygamy are controversial from a perspective of gender equality

The Recognition of Customary Marriages Bill now provides that the wife in a customary marriage has a status equal to that of her husband in all respects. Although the Bill does not state this explicitly, this provision presumably confers on married women the capacity to litigate, to own property and to enter into contracts. Importantly, this provision applies to marriages entered into both before and after the commencement of the legislation.

If the Bill is passed, all existing cus-

ENTS TO THE LAW REGARDING CUSTOMARY LAW OF SUCCESSION

Status of Women

tomary marriages will be legally recognised. The proprietary consequences of these marriages will, however, continue to be governed by the customary law rule that women do not own property. A woman in an existing customary law marriage will have to persuade her husband to apply to the High Court in order to acquire an interest in the estate of her husband.

The Recognition of Customary Marriages Bill now provides that the wife in a customary marriage has a status equal to that of her husband in all respects.

Monogamous customary marriages entered into after the commencement of the legislation will be in community of property unless the spouses enter into an ante-nuptial contract.

The Bill allows for polygamy under customary law, and provides that a party wishing to enter into a further marriage or marriages must apply to the High Court for a suspension of the matrimonial property regime of the existing marriage(s), to effect a division of the property and to approve a written contract which would regulate the future matrimonial dispensation of all the spouses. Concern has been expressed that this procedure is too complicated, inaccessible and expensive. It may have the effect that polygamy remains underground and unregulated, leaving women vulnerable. (However, the SALC discussion paper on this topic suggests that polygamy is seldom practised and will eventually fall away completely, and

the procedure outlined above may contribute to this process.)

In relation to the validity of marriages, both spouses must be above the age of 18 years and the consent of both spouses is required. These requirements are in keeping with various international instruments. The marriage must also be entered into and celebrated in accordance with customary law. It is

not clear what this requirement entails and whether it would include the payment of lobola. A court may dissolve the marriage on the ground of irretrievable breakdown.

Parties in existing monogamous customary marriages may enter into civil marriages under the Marriage Act 1961, (thereby dissolving the customary law marriage). Parties in existing polygamous customary unions cannot enter civil marriages.

Amendment of Customary Law of Succession Bill

The formal customary law of succession is patrilineal, universal and intestate. Essentially, women are excluded from inheriting.

The Bill is neither a harmonisation of customary law and common law, nor a codification of customary law. The proposed legislation simply seeks to extend the existing South African

law of testate and intestate succession to all persons. It will have the effect of overriding the existing customary law of succession, thus providing some relief to women.

The Bill proposes that women married in terms of customary law will be entitled to a statutory share of the estate of an intestate husband as provided for in the Intestate Succession Act of 1987. The Maintenance of Surviving Spouses Act of 1990 will also be applicable to women married under Customary law once such unions are formally recognised. This means that women will have a maintenance claim against the estate of the deceased in respect of their reasonable maintenance needs.

■ The South African Law Commission's website (which inter alia provides access to Issue Paper No 5 on Maintenance and Discussion Paper 74 on the Harmonisation of Common Law and Indigenous Law: Customary Marriages) can be found at: <http://www.law.wits.ac.za/salc/salc.html>.

■ Bills introduced in Parliament can be located at <http://www.parliament.gov.za>. [Note: This site also houses a useful summary of the South African legislative process.]

■ The judgment in *Mthembu v Letsela* (1997 2 SA 231 (W)) offers an interesting discussion of the relationship between customary law of intestate succession and the constitutional guarantee of gender equality.

■ The Joint Standing Committee on the Improvement of the Quality of Life and the Status Women can be contacted at (021) 403 3831.

Report Back

■ IN the June edition of the newsletter, Loretta Feris analysed the pending challenge to the Choice of Termination of Pregnancy Act 92 of 1996.

On 10 July 1998, McCreath J found in favour of the defendants that the exception to the plaintiffs' action should succeed. He reached the conclusion that the plaintiffs had failed in their argument that section 11 of the Constitution (which guarantees the right to life) should be interpreted as affording protection to the life of a foetus. The judgment in *Christian Lawyers Association of South Africa and Others v Minister of Health and Others* (Case No 16291/97, Unreported) can be accessed at: <http://www.law.wits.ac.za/docs/christian.html>.

■ Heléne Combrinck explained that a draft Declaration on the Prevention and Eradication of Violence Against Women and Children was formulated at a regional conference held in March 1998. This document sets out specific commitments to be undertaken by SADC member states in order to address violence against women.

At the September Summit of the Heads of States, it was resolved that the draft Declaration be adopted as an addendum to the 1997 Declaration on Gender and Development.

Forthcoming

■ AT the time of going to press, the Parliamentary Portfolio Committee on Justice is considering draft legislation aimed at amending the Prevention of Family Violence Act 133 of 1993 in the form of the Domestic Violence Bill (B 75-98). The Women & Human Rights Project, in association with Rape Crisis, Cape Town, and the Institute of Criminology (UCT) presented detailed submissions to the Portfolio Committee.

The draft legislation proposes amendments to the definition of a 'domestic relationship' (which at present excludes, for example, same-sex relationships) and provides a detailed definition of 'domestic violence'. The draft Bill also attempts to address some of the shortcomings in the implementation of the present Act. It is expected that this legislation will be passed during the November session. The next edition of the newsletter will feature an in-depth discussion of the amendments.

Stop Press

■ ALSO in the June newsletter, Pierre de Vos discussed the judgment in *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Another* (now reported as 1998 6 BCLR 726 (W)).

In this case, the Witwatersrand Local Division of the High Court held that the common law prohibition of same-sex sexual conduct in the form of the criminal offence of sodomy, as well as section 20A of the Sexual Offences Act and other legal provisions, constituted an unjustifiable violation of the equality guarantee, and were therefore inconsistent with the 1996 Constitution.

The essence of this finding has subsequently been confirmed by the Constitutional Court in a judgment dated 9 October 1998 (Case Number CCT 11/98, Unreported). The judgment can be accessed at: <http://www.law.wits.ac.za/judgements/1998/gayles.html>.

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AFRICAN WOMEN'S RIGHTS AND THE INFORMATION REVOLUTION

Compiled by Helène Combrinck, Farahnaaz Safodien and Gill Kerchhoff

The introduction of the Internet has placed an explosion of information and opportunities for networking at the disposal of organisations doing human rights research, education and advocacy in Africa. The difficulty, of course, lies in the familiar African dichotomy: the possibilities for empowerment created by technology, counter-balanced by the unavoidable disempowerment resulting from lack of access to technologies and infrastructure. This is even more acutely applicable to women's rights.

Against this background, a conference on women's information held in Amsterdam during August 1998 provided some interesting opportunities for an exchange of ideas in the international forum. Gill Kerchhoff, consultant to the Women and Human Rights Documentation Centre, attended this conference, which was hosted by the International Information Centre and Archives for the Women's Movement (IIAV). The aim of this conference was to discuss what has been achieved in the field of women's information since the United Nations Fourth World Conference on Women in Beijing, 1995. Gill coordinated a workshop on 'Women's Information and Human Rights', and presented a paper with the same title.

In order to examine some of the challenges facing documentation centres in Africa, Farahnaaz Safodien (documentalist at the Women and Human Rights Documentation Centre) attended a training course on hu-

man rights documentation and information handling held in Tunisia during September 1998. This workshop, co-hosted by the African Centre for Democracy and Human Rights in Gambia and the Arab Institute for Human Rights in Tunisia, brought together participants from 16 African countries working in the areas of children's rights, women's rights and refugee rights.

The programme consisted of lectures from experts in the field of human rights, providing a background understanding of human rights issues and the relevant international and regional instruments. The importance of human rights information (standing at the core of the work of NGO's involved in advocacy, education and research) was

highlighted. In addition, participants were introduced to techniques used in documentation and information handling.

Participation in these two initiatives emphasized that the documentation and dissemination of women's rights information in Africa is a rapidly developing area of specialisation, requiring strategies on the one hand to increase communication and networking via electronic means, but also on the other hand to ensure that information obtained in this way is available to everyone. The Women and Human Rights Documentation Centre will continue to stress these goals in the development of collaborative projects with other women's rights organisations and projects.

Human Rights Web Sites and Organisations

A website setting out useful information on organisations active in the field of women and human rights was compiled by Gill Kerchhoff as part of the South African Women'sNet initiative. The site contains an annotated list of relevant websites and organisations, and also provides links to these sites. This website offers access to information on -

- human rights organisations
- women's rights organisations
- women with disabilities.

The extract below is an example of the information listed.

Women'sNet Women'sNet Women'sNet Women'sNet Women'sNet Women'sNet Women'sNet Women'sNet

Trafficking in Women and Girls

A research project mapping out organisations working against trafficking in women and girls is being undertaken by Q Web Sweden and the Foundation of Women's Forum in a research project on trafficking in women and girls. Research will be carried out into which NGO's, networks and government institutions work against trafficking in women and girls in the Baltic States, Russia and the Nordic Countries. The focus is on preventative and rehabilitation work.

The South African Women'sNet website is situated at : <http://www.womensnet.org.za>.
The IIAV Conference website can be accessed at: <http://www.iiav.nl/knowhow/index/html>.

The following items are some of the latest acquisitions in the Women and Human Rights Documentation Centre which are of particular interest. They represent only selected publications out of many more new acquisitions in the Centre. A comprehensive list of new acquisitions is now available from the Centre.

Loud Proud & Passionate : Including Women with Disabilities in International Development Programs

Edited by Cindy Lewis and Susan Sygall Eugene :
Mobility International USA (MIUSA), 1997

The purpose of this book (published by the American organisation Mobility International USA) is to link development organisations with women with disabilities working locally and internationally. There are recommendations for practical strategies, contacts and resources for increasing opportunities for women with disabilities to be included in development programs. The book also features comments and recommendations from organisers and activists in each section. In the final section there is an extensive list of published materials for and about women with disabilities.

Human Rights and Legal Status of Women in the Asian and Pacific Region

Studies on Women in Development
Geneva : United Nations, 1997
ISBN 9211197686

This publication is a regional study of the ESCAP "Promotion of women's rights as human rights" project of the United Nations. It examines the issues that the Asian and Pacific region faces in adopting the human rights discourse and formulating its legal implications for women's rights. The first section of the study deals with the reception of the general normative standards on gender equality in international law in national constitutions and international monitoring, and the second section looks particularly at the relevance of substantive and domestic laws. Lastly, there is also a special section on women and violence.

Gender Equity in Education : A Report by the Gender Equity Task Team

AnnMarie Wolpe, Orla Quinlan, Lyn Martinez
Pretoria : Department of Education, 1997
ISBN 0797035761

The Gender Equity Task Team (GETT) was set

up in South Africa to recommend guidelines for the establishment of a Gender Equity Unit within the national Department of Education. The work was extremely complex and had to rely on a great deal of original research, but this book is remarkable for the fact that it analyses all different levels of education - from early childhood development to adult basic education and training - from a gender perspective. The inequities within education in South Africa also include the issues of sexual harassment and violence against women. In accordance with their brief, the GETT succeeded in providing detailed and extensive guidelines and recommendations for the Department of Education regarding the initiation of gender equity within education.

Access to Justice for All Rural Women: Special Focus on Violence Against Women

Lillian Artz
Institute of Criminology in cooperation with Black Sash,
Knysna

This report (prepared for the Black Sash) is the first of two reports on access to justice for rural women. Its purpose is to highlight problems and concerns about access to justice for organisations in order to assist and inform service delivery to rural women. The second report is intended to be more comprehensive and to build a framework for an integrated analysis of law, gender and social development with the understanding that violence and oppression are entrenched in society.

Women and Law in East Africa : An Annotated Bibliography

Njeri Karuru and Agatha Kabuga
Nairobi : Women and Law in East Africa, 1997
ISBN 9966930000

The bibliography is one of very few tools making information on socio-legal issues in East Africa region more accessible. It is a compilation of different materials, including articles in academic journals, books, theses and dissertations, reports and conference papers. These were collected according to six themes, namely women and environment; divorce, maintenance and marriage; property ownership and inheritance; women in development; women and health and women's rights and law. It is envisaged that the bibliography will be updated every two years in an attempt to keep the information current, and to possibly also add new themes.