

## South Africa

### 1. Discrimination in the family

#### a) Overarching legal framework for marriage

South Africa has three laws that regulate marriage. The Marriages Act (Act 25 of 1961) regulates civil marriages between heterosexual couples. The Recognition of Customary Marriages Act (Act 120 of 1998) regulates customary marriages. The Civil Union Act (Act 17 of 2006) regulates to same-sex civil unions, as well as other civil partnerships. Common law marriages are not legally recognised.

Forced marriages are legally prohibited. The legal definitions do not explicitly define forced marriage, however under the Recognition of Customary Marriages Act (Act 120 of 1998, Section 3(1)(a)(ii)), and the Civil Union Act (Section 8 (6)), the consent of both partners is required for a marriage to be entered into. The South African Integrated Programme of Action Addressing Violence Against Women and Children notes the need for programmes to prevent forced marriages (Department of Social Development, 2013).

For a marriage to be legally recognised in South Africa it must be registered under one of the three marriage laws: The Marriage Act, the Recognition of Customary Marriages Act, and the Civil Unions Act. Religious marriage officers are able to register as civil marriage officers, thus allowing them to register religious ceremonies under the Marriage Act. Religious marriages that are not registered in terms of The Marriage Act (Act 25 of 1961), or are solemnized by non-registered marriage officers do not offer the same protection for women in terms of their dissolution by death or divorce. In particular, women in Muslim marriages may be particularly vulnerable as a result of customary religious practices that allow men to divorce women by saying the word 'talaq' three times (van Der Merwe, 2016 and Harrington-Johnson, 2015). Following a government drive to increase marriage registration, Muslim marriage officers are now able to register as civil marriage officers, however not all of them are currently registered.

#### b) Child marriage

The legal age of marriage for both women and men is 18 (Children's Act, Act 38 of 2005). The Children's Act (Act 38 of 2005) prohibits child marriage. There is no standalone law that relates to child marriage, however all marriages in South Africa must be registered in terms of one of the three marriage laws. The Marriages Act (Section 35) and the Civil Union Act (Section 14) both provide legal sanctions and fines for solemnizing marriages in contravention of the requirements of the Act, including up to 12 months in prison.

For marriages where both or one of the parties is younger than 18, both parties must consent to the marriage, and thereafter, a Commissioner of Child Welfare must grant permission (Western Cape Government, 2014). If the Commissioner does not grant permission, further intervention may be

sought from a judge of the high court. The Minister of Home Affairs may also be required to condone the marriage if the girl is younger than 15 (Marriages Act, Act 25 of 1961).

The practice of *ukuthwala* has emerged in South Africa as a justification for forced marriage by means of a kidnapping (Girls Not Brides, 2017 and Department of Justice, 2015). This practice contravenes the Recognition of Customary Marriages Act (Act 120 of 1998), the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007), and the Prevention and Combatting of Trafficking in Persons Act (Act 7 of 2013).

### c) Household responsibilities

The South African Constitution (Act 108 of 1996) prohibits discrimination on a number of grounds including sex, gender, sexual orientation, and marital status. In addition, the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000) gives women equal legislative status to men. There is no overt legislative provision regulating choices of where to live, however, the above mentioned legislation requires that women be given equal choices in partnerships.

Parental rights are defined by the Children's Act (Act 38 of 2005). Section 19 of the Children's Act provides biological mothers with full parental rights and responsibilities with respect to the child, regardless of whether she is married to the father of the child at the time of the child's birth. When married, both parents have full parental rights and responsibilities and this continues to apply after divorce.

Despite these legislative provisions for equality, women may face social and legal challenges under customary law: there are reports of women being afforded the legal status of minors, thus limiting their choices around where to live or parental control over their children's lives (Women's Legal Centre, 2010). Another area of concern is women's unequal share of unpaid care work: women in all domestic partnerships in South Africa are more likely than men to undertake household maintenance and cleaning (Statistics South Africa, 2013).

### d) Divorce

The law provides women and men equal rights to initiate divorce and to conclude divorce in all forms of marriage in South Africa. Divorce can only be initiated under set conditions, as specified by the Divorce Act (Act 70 of 1979). A divorce proceeding may only be initiated if there has been an irretrievable breakdown of the marriage or one spouse has become mentally ill or has been declared unconscious for a period of at least six months (The Divorce Act 70 of 1979, Section 4 and 5).

In South Africa, women in unregistered religious marriages may face discrimination in terms of divorce. For example, senior religious leaders may not follow what the law says in the adjudications of disputes in Muslim marriages, but there is little recourse for women to dispute this (Commission for Gender Equality, 2010). Furthermore, there are reports that when women seek assistance, religious judicial councils which handle the initiation and adjudications of disputes in Muslim marriages feel that they must abide by the decisions made by the religious leaders. The South African Law Reform Commission has been considering legislation to address the need to register Muslim and

Hindu marriages for more than a decade but, as of 2017, neither of these laws has been introduced to Parliament (CEDAW Committee, 2015).

In terms of parental responsibility, The Children's Act (Act 38 of 2005) focuses on the best interests of the child and grants both parents responsibility in terms of the care of the child. The Divorce Act (Act 70 of 1979) also provides that a divorce may not be granted until the needs of the child are noted.

### e) **Inheritance**

All South Africans are legally entitled to make a will. However, when someone is deceased without leaving a will, his or her estate is dealt with in terms of the Intestate Succession Act (Act 81 of 1987) (South African Department of Justice, 2011).

South Africa's Constitution prohibits discrimination on the grounds of sex and gender. In addition, the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000), and the Reform of Customary Law of Succession and Regulation of Related Matters (Act 11 of 2009) provide that women may not be discriminated against with regards to inheritance, whether they are the daughter or the surviving spouse of the deceased. Primogeniture has been found to be un-constitutional (Women's Legal Centre, 2010).

Section 4 of the Reform of Customary Law of Succession and Regulation of Related Matters Act (Act 11 of 2009) provides that property allotted or accruing to a woman or her house under customary law by virtue of her customary marriage may be disposed of in terms of the will of the woman. Section 5 of the Act provides for the legal resolution of disputes. These laws, which prohibit discrimination on the grounds of sex and gender, take legal precedence over customary law that may disadvantage women according to Constitutional Provisions (The Constitution of the Republic of South Africa, Section 30).

Property grabbing and disinheritance are prohibited by clauses in the Reform of Customary Law of Succession Act that provide that surviving spouses may dispose of their land and property according to their will. However, especially in rural areas, there are reports that women do not enjoy security of tenure, and are often subject to discriminatory practices by customary courts following the death of their husbands (Mathonsi, 2011). In some communities in South Africa, there are also reports that when a man dies his wife and children are inherited by his family (Heinrich Boll Stiftung, 2013).

## **2. Restricted Physical integrity**

South Africa's Constitution provides the right to freedom and security of the person, including the right to be free from violence, torture, and degradation (The Constitution of the Republic of South Africa, Act 108 of 1996, Chapter 2(12)). South Africa has a strong legal framework to prohibit violence, including legislation on sexual offences, domestic violence, harassment, and trafficking. South Africa has signed and ratified the Maputo Protocol and the Southern African Development Community (SADC) Protocol on Gender and Development.

### a) Violence against women

Levels of violence against women and children are a significant challenge for South Africa, in particular domestic violence and sexual offences. Violence against women in South Africa has its roots gender inequality, negative stereotypes about women, and is worsened by substance abuse in South Africa (UN Human Rights Council, 2016). This has a number of costs, including economic costs to the state. KPMG (2014) estimated that the economic cost of gender-based violence in South Africa was at least R28 billion in 2012.

The Department of Social Development introduced the *South African Integrated Programme of Action Addressing Violence Against Women and Children* in 2013 seeking to address the root causes of violence and to improve legal awareness of the right to be free from violence and the forms of redress (Department of Social Development, 2013). However, this plan has not yet secured a budget and expires in 2018. In addition, in 2013 the Department of Women, Children and People with Disabilities (now the Department of Women) established the National Council on Gender-Based Violence (Parliamentary Monitoring Group, 2013) however this Council did not secure enough funds to commence with its work and was dissolved in 2014 following the National Elections (Sonke Gender Justice, 2015a).

Many Non-Governmental Organisations (NGOs) in South Africa have recently called for a National Strategic Plan to address violence against women and children noting that the State response to these crimes has not been coordinated or sufficiently coherent to address the problem (Sonke Gender Justice, 2015b).

Legislation around violence against women in South Africa includes The Domestic Violence Act (Act 116 of 1998), the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007), the Prevention and Combatting of Trafficking Act (Act 7 of 2013), the Protection from Harassment (Act 17 of 2011), and the Children's Act (Act 38 of 2005) which prohibits harmful practices against children including female genital mutilation (FGM). There are regulations relating to the Combating of Trafficking Act, the Protection from Harassment Act, the Criminal Law (Sexual Offences and Related Matters) Amendment Act, and the Domestic Violence Act, which relate to the services required by state actors.

Honour crimes are not a significant challenge in South Africa and are not specifically addressed in any legislation.

Pending Hate Crimes legislation introduced in 2017 seeks to address violence and hate speech against vulnerable groups including LGBTIQ persons.

The Department of Social Development allocates budgets for NGOs working in the field of gender-based violence for a variety of services including counselling, victim support, and shelter services. However, this is developed on a provincial basis and varies widely. There has been significant advocacy from NGOs in the past ten years for the development of a standardised funding model for shelter services (Lopes, 2013).

Both the Commission for Gender Equality and the National Department of Social Development have a mandate to monitor the enforcement of legislation around violence against women. In addition, parliamentary committees including the Portfolio Committee on Police, the Portfolio Committee on Justice, the Portfolio Committee on Women and others all conduct regular investigations into the implementation of these laws and expenditure related to this implementation. The provision of sufficient state resources for the implementation of legislation has been a significant challenge for South Africa (Parliamentary Monitoring Group, 2016).

### **b) Domestic violence**

The Domestic Violence Act (Act 116 of 1998) is the primary piece of legislation governing domestic violence in South Africa and covers all persons residing in domestic partnerships. It defines abuse broadly to include physical, economic, emotional, verbal, psychological and sexual abuse, harassment, intimidation, damage to property, unauthorised entry and stalking. It makes provisions for the victim of abuse to seek a protection order to stop the abuse, and provides that the police can refer women to an emergency shelter. There are potential criminal penalties for breaching a protection order, and the law provides for the arrest of the perpetrator should the victim be considered to be in imminent harm.

The South African Integrated Programme of Action Addressing Violence Against Women and Children describes the National Domestic Violence Inter-sectoral Committee as being tasked with the national monitoring of the inter-sectoral implementation of the Domestic Violence Act. However the Programme does not detail particular interventions aimed at addressing domestic violence in isolation.

The Domestic Violence Act provides police with the option to seize the alleged perpetrator's firearms or other dangerous weapons to reduce the immediate harm of the situation. Domestic violence is not classified as a standalone crime, i.e. perpetrators are charged with the nature of their violence, whether it is rape or assault, and sentences are attached accordingly. However, where a protection order is issued by the court, and this is breached, offenders may be fined or can face up to five years imprisonment (The Domestic Violence Act, Section 17).

Despite these legislative provisions, a woman dies from intimate partner violence every eight hours in South Africa (Medical Research Council, 2012). The 2016 Demographic and Health Survey revealed that one fifth of women had experienced physical violence by a partner, and that younger women were more likely to experience violence in the period 12 months prior to the survey than older women (Statistics South Africa, 2017).

The South African Integrated Programme of Action Addressing Violence Against Women and Children includes strategies such as a helpline for women experiencing domestic violence, education and awareness campaigns, and the provision of emergency medical and psychological health care (Department of Social Development, 2013, P. 30). Prevention is one of the key pillars of this strategy.

In 2009 the Department of Justice and Constitutional Development produced guidelines for professionals dealing with victims of crime, and the minimum standards of service they should receive (Department of Justice and Constitutional Development, 2009). However, when domestic violence

complaints are dealt with in traditional courts there is no provision for the use of protection orders, or awareness the duty of the court to provide victims with information regarding their rights (Keorata, 2016).

### c) Rape

The Criminal Law (Sexual Offences and Related Matters) Amendment Act (Act 32 of 2007) is the primary piece of legislation criminalising sexual offences including rape, compelled rape (i.e. where one person forces a second person to rape a third person), sexual assault, compelled sexual assault (i.e. where one person forces a second person to sexually assault a third person), sexual grooming, and other crimes. The definition of rape is “Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape” (The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, Section 3). The definition is therefore based on consent and not force. The law criminalises all non-consensual sexual activity, including marital rape.

Minimum sentences are established for rape, except where substantial and compelling circumstances exist, and certain criteria are excluded from reducing the minimum sentences including the complainant’s previous sexual history, an apparent lack of physical injury, an accused person’s cultural or religious beliefs about rape, or any relationship between the accused person and the complainant prior to the offence being committed (The Criminal Law (Sentencing) Amendment Act, Act 38 of 2007, Section 3 (a)).

In addition, through amendments to sentencing legislation, the law provides minimum sentences for sexual offences perpetrators including a life sentence for rape where the victim is under 16, or suffers a physical or mental disability, or where there were multiple perpetrators of a rape, or where rape happened multiple times, or where the perpetrator was knowingly HIV positive (Criminal Law (Sentencing) Amendment Act 38 of 2007). Where the rape has occurred with aggravating circumstances as described above, the minimum sentence is life (Criminal Law Amendment Act 105 of 1997, Section 51). In cases where aggravating circumstances do not occur include minimum sentences of imprisonment not less than 15 years for a first offender, not less than 20 years for a second offender, and not less than 25 years for a third offender in a case of rape.

Despite these extensive legislative provisions, conviction rates for sexual offences are low. In 2015/16, less than 10% of reported cases resulted in a conviction (51 895 sexual offences were reported to the police, only 7 098 cases were finalised, and of those only 4 978 resulted in a conviction) (National Director of Public Prosecutions, 2016, p.40.)

Challenges in implementation of the law, social stigma surrounding rape, and a lack of dedicated budgeting around services for survivors still exist. In 2013, a Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters recommended the re-establishment of specialised sexual offences courts in South Africa to address the need for specialised services for survivors of sexual violence, and to provide for speedier recourse to justice (MATTSO, 2013). As of March 2017 there were 54 specialised sexual offences courtrooms (Department of Justice, 2017). As of May 2017, the Department of Justice committed to providing full courts rather than courtrooms (Davies, 2017).

In addition to sexual offences courts, there are also a number of “victim-friendly” services that have been introduced in South Africa. These include 1027 “victim-friendly rooms” at police stations, satellite police stations, contact points, airports, railway stations and Family Violence, Child Protection and Sexual Offences Units (FCS Units) (South African Police Services, 2016). FCS Units include specially trained detectives to investigate crimes in this field, aiming to provide sensitive service and good investigation of these crimes. There are also 54 Thuthuzela Care Centres, which are one-stop facilities based in public hospitals, that include medical treatment, police services, psychosocial containment counselling, and representatives from the national prosecuting authority all in one building to reduce the trauma of sexual offences survivors. They are linked to sexual offences courts to improve conviction rates. In addition, to improve access to justice there is a Sexual Offences and Community Affairs (SOCA) unit within the National Prosecuting Authority, the prosecuting body of the Department of Justice (The South African Integrated Programme of Action Addressing Violence Against Women and Children, 2013).

The South African Integrated Programme of Action Addressing Violence Against Women and Children sets targets of increased prosecutions for sexual offences by increasing the number of sexual offences courts to 80 by 2018 (The South African Integrated Programme of Action Addressing Violence Against Women and Children, 2013, p. 47).

Prior to June 2017 sexual offences other than rape had a time limit on reporting of 20 years. Following a High Court ruling in June 2017, all sexual offences may now be reported at any time after the crime (Thorpe, 2017).

#### **d) Sexual harassment**

Sexual harassment is prohibited under several pieces of legislation in South Africa, including the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) (Act 4 of 2000) and the Protection from Harassment Act (Act 17 of 2011). Harassment is prohibited in all public and private spaces, and is defined as a form of unfair discrimination (Department of Labour Code of Good Practice for Handling Sexual Harassment in the Workplace, 2005).

The Protection from Harassment Act also extends protection to online spaces, and prohibits cyber harassment. When a victim of harassment applies for a protection order and granted, and where a breach occurs, offenders may be fined or subject to imprisonment for not longer than five years. Where private data is revealed via cyber harassment, offenders may be fined or subject to imprisonment for no longer than two years (The Protection from Harassment Act, Act 17 of 2011, Section 18). The Protection from Harassment Act also provides for fines to be issued to telecommunications service providers who have not provided the necessary information to the courts to investigate crimes of harassment (The Protection from Harassment Act, Act 17 of 2011, Section 18).

Although The South African Integrated Programme of Action Addressing Violence Against Women and Children notes sexual harassment as a challenge, it does not include strategies to address it. In March 2017 the South Africa Labour Appeals Court ruled that employers can be held liable for sexual harassment where they do not prevent harassment in the workplace or respond to complaints sufficiently (Polity, 2017).

### e) Female genital mutilation

The Children's Act (Act 38 of 2005) prohibits female genital mutilation (FGM) of children, but there is no law regarding FGM and adult females. The Children's Act (Section 305) provides that any person (whether parent, medical practitioner or otherwise) responsible for committing FGM is guilty of an offence, and may be subject to a fine or imprisonment of up to ten years, or both, for a first time offence. Repeat offenders may be sentenced to up to twenty years imprisonment or a fine or both.

Children's courts have been established in South Africa and can consider cases related to the abuse of children including FGM. These courts have the same status as an ordinary magistrates court (The Children's Act, Section 15). There is no provision for seeking compensation.

Section 30 of the Constitution provides for the exercise of cultural or religious rituals only in so far as they do not conflict with the Bill of Rights. This includes the right to be free from all forms of violence, both publicly and private, and to security in and control over their body (The Constitution, Section 12). FGM is not widely practiced, however there are reports of the practice among the *Tsonga*, *VhaVenda* and *Sotho* populations, and among refugee populations in South Africa (Maluleke, 2012 and Kitui, 2012).

### f) Abortion

Abortion has been legal in South Africa since 1998 under the Termination of Pregnancy Act (Act 92 of 1996). A woman may seek an abortion without restrictions up to 12 weeks of pregnancy. Thereafter, abortions may take place up to 20 weeks with the consent of a medical practitioner, if the pregnancy will cause injury to the woman's physical or mental health, or the foetus would suffer from a severe mental or physical abnormality, the pregnancy was a result of rape or incest, or the pregnancy would significantly affect the social or economic circumstances of the woman (The Termination of Pregnancy Act, Section 2 (b)). In addition, abortions can take place after the twentieth week of gestation if a medical practitioner, after consultation with a second medical practitioner or registered midwife, is of the opinion that the continued pregnancy would endanger a woman's life, would result in severe malformation of the foetus, or would pose a risk of injury to the foetus (The Termination of Pregnancy Act, Section 2 (c)).

Although pregnant minors are encouraged to inform their parents of their decision to seek an abortion, they may not be denied an abortion if they choose not to do so (The Termination of Pregnancy Act, Section 5 (3)).

The Constitution (Act 108 of 1996, Section 27) provides that all persons have the right to access health care, including reproductive health care. The Children's Act (Act 38 of 2005, Section 13) provides children the right to access health care information on the prevention of disease, sexuality and reproduction.

Contraception is provided for free by the government including male and female condoms, contraceptive tablets, the contraceptive patch and injection, Intrauterine Devices, and the contraceptive implant (Department of Health, 2012). Emergency contraception is also available for free. Public health clinics also offer sterilisation. Children older than 12 are not required to seek the



permission of their parents to access contraception, and cannot be denied access to condoms should they seek to buy them. Other forms of contraception are available to children 12 or older, following a consultation with a health care practitioner (The Children's Act, Section 105). Children are entitled to confidentiality when accessing contraception.

### *More*

Virginity testing is prohibited for girls younger than 16. Virginity testing of girls older than 16 requires their consent and that they receive counselling (The Children's Act 38 of 2005, Section 12 (5)). The results of the virginity test may not be publicly disclosed, and the child's body may not be marked.

In South Africa, there are reports that hate crimes against LGBTI persons are increasingly common. For example, 'corrective rape' involves the rape of lesbian women aimed at modifying their sexuality, and often involves violent assault and sometimes murder (Koraan and Geduld, 2015). This issue was brought to the attention of government in 2011, following which a National Task Team on Gender and Sexual Orientation Based Violence Perpetrated against Lesbian, Gay, Bisexual, Transgender, and Intersex Persons was established to consider, among other things, the need for hate crimes legislation and the establishment of a rapid response team to address cases where potential hate crimes could have occurred (South African Department of Justice, 2014). In 2016, a draft Hate Crimes law was introduced by the Department of Justice for Public Comment.

## **3. Restricted Access to productive and financial resources**

South Africa has extensive legislation promoting equality in productive and financial resources.

### **a) Secure access to land and assets**

South Africa has not ratified International Labour Organisation Convention 169 on Indigenous and Tribal Peoples.

Although the Constitution provides equal rights to women and men to own, manage, and use land, the Government reports that these rights have not been realised for many women in South Africa, particularly in rural areas (Department of Performance Monitoring and Evaluation, 2014). Married women have the same rights as married men to own, buy, use as collateral and make decisions about land, both in customary and civil marriage (Recognition of Customary Marriages Act, Section 6; Promotion of Equality and Prevention of Unfair Discrimination Act, Section 8; and The Constitution of the Republic of South Africa, Section 9 and 25). Unmarried women also have the same rights as unmarried men with regards to land, and this is governed by the Constitution (Section 3 and Section 25).

Rights to land after divorce are governed by the marriage contract that is undertaken (i.e. in community of property or out of community of property) and the divorce ruling that is made. This applies in both civil and customary marriages (Matrimonial Property Act, Act 88 of 1994, and Recognition of Customary Marriages Act, Section 7). The Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000) prohibits unfair discrimination, and lists unfair discrimination in the provision of housing bonds, loans, or financial assistance on the basis of race, gender, or other

prohibited grounds. In the Constitution discrimination is prohibited on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth (The Constitution of the Republic of South Africa, Section 9 (3)).

The Marital Property Act (Act 88 of 1984) abolishes ‘marital power’ as previously defined in common law, which provided men with full decision-making rights in marriage, and prevented women from litigating or contracting (The Marital Property Act (Act 88 of 1984), Section 11 – 13). However, the Act does not affect the rights of men to household headship, guardianship, and domicile. Where marriage takes place in community of property, spousal consent is required from both parties for major financial decisions (The Marital Property Act (Act 88 of 1984), Section 15). However, in many traditional settings, these rights may be curtailed by prevailing cultural gender norms, which require women to get permission from their husbands for major household decisions (Women’s Legal Centre, 2010).

The Deeds Registries Act (Act 47 of 1937, as amended) provides for joint land titling within marriage. It is possible for friends and for couples to purchase property together and jointly register it (Sampson, 2013). In addition, legal measures exist for both customary and civil marriages to protect surviving spouses’ inheritance to both property and land. The Intestate Succession Act Succession Act governs inheritance where no will has been left, and ensures that surviving spouses inherit the estate. The Reform of Customary Law of Succession Act ensures that a surviving spouse, including any other women who have been married to the deceased in a customary union, are entitled to inherit a portion of the estate (Section 2).

The Department of Trade and Industry Integrated Strategy on Development and Promotion of Cooperatives (2010 - 2020) encourages the formations of women’s cooperatives to promote women’s participation in rural economies.

The disjuncture between Constitutional and customary rights has often resulted in practical barriers for women in securing access to land and assets. Under certain customary systems, women are regularly excluded from obtaining rights to land in their own capacity, and traditional authorities favour requests from adult, married men to land allotments (Women’s Legal Centre, 2010). In addition, the lack of legal literacy of women in rural areas as well as an absence of programmes to address this makes it more difficult for women to claim their rights to land (Women’s Legal Centre, 2010, and Heinrich Boll, 2013).

#### **b) Secure access to formal financial resources**

The Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000) prohibits discrimination on the grounds of sex, gender and marital status, and lists unfair discrimination in the provision of housing bonds, loans, or financial assistance on the basis of race, gender or other categories as an unfair practice (Schedule, Illustrative list of unfair practices within certain sectors). In addition, women’s equal access to bank accounts, credit and financial support are promoted by the Broad Based Black Economic Empowerment Act (Act 53 of 2000), The National Credit Act (Act 34 of 2005) and the Home loan and Mortgage Disclosure Act (Act 63 of 2000), which encourage financial

institutions to provide financial support to women, in particular to previously disadvantaged and black women.

In addition to legislation, South Africa has a number of programmes that promote women's access to credit including the Isivande Women's Fund, and the Women's Entrepreneurial Fund (Department of Women, 2015). Nevertheless, lack of awareness of these programmes is a challenge to improving women's access to better credit (Mathonsi, 2011). Women are less likely to access credit than men and face greater difficulty in doing so, not necessarily for customary, traditional or religious reasons, but more often because of a lack of financial literacy, the unaffordability of bank products and services, and asset-based lending practices which require ownership of assets in order to obtain credit (Mathonsi, 2011). Women continue to use informal credit sources such as stokvels, burial societies, and loans from friends and family or informal lenders (Mathonsi, 2011).

### c) Workplace rights

South Africa has ratified International Labour Organisation Convention 100 on Equal Remuneration, 111 on Discrimination, and 189 on Domestic Workers.

The Employment Equity Act defines employment policies and practices including recruitment, advertising, selection, appointment, job classifications and grading, remuneration, employment benefits, terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation, promotion, transfer, demotion, disciplinary measures other than dismissal. Thus, this Act requires equal remuneration and benefit for men and women in the same positions. Despite this the gender wage gap has increased over the past decade (Department of Women, 2015).

Both the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000) and the Employment Equity Act (Act 55 of 1998) prohibit discrimination on the grounds of gender and marital status, and provide remedies for women who believe that they have been subjected to unfair discrimination in employment policies and practices.

The prohibition of discrimination allows women to enter all professions, and to work the same night hours as men.

The Basic Conditions of Employment Act (BCEA) (Act 75 of 1997) mandates four months maternity leave for women, however there is no legal requirement that this is paid. Women are however able to access money from the Unemployment Insurance Fund (Unemployment Insurance Act, Act 63 of 2001, Section 24). Women's job security is maintained by the prohibition of discrimination in termination practices in the Employment Equity Act. Paternity leave is not legislated, apart from the parental leave provision in the Basic Conditions of Employment Act for three days paid family responsibility on the birth of a child. In 2016 a campaign to increase paternity leave to a minimum of 10 days was launched by Sonke Gender Justice, an NGO in South Africa (Sonke Gender Justice, 2016).

The Constitution provides all South Africans with freedom of trade or profession (Section 22). In addition, the Matrimonial Property Act (Act 88 of 1984) does away with the requirement that a wife must seek permission from her husband to contract and litigate.

There are several formal institutions that have been established to protect women's equality in the workplace, and to investigate complaints. These remedies can include approaching the Commission for Gender Equality, the Commission for Conciliation, mediation and Arbitration, the Labour Court, or the Equality Courts. Labour Courts may enforce penalties including compensation to an employee by the employer, payment of damages, and an order directing an employer to take steps to further prevent unfair discrimination (The Employment Equity Act, Section 50).

If companies employ more than 50 employees, they are required to produce employment equity reports each year that report on their compliance with employment equity, and they are required to establish an employment equity plan (The Employment Equity Act, Act 55 of 1998, Section 12 – 20).

One area where women are still limited in entering the profession is traditional leadership, where new leaders are nominated rather than elected, and hence women are frequently unable to occupy this position (Turley, 2012).

### *More*

The Preferential Procurement Act (Act 5 of 2000) provides for preferential procurement for government tenders from businesses that include high levels of women's representation. These are regulated by Preferential Procurement Regulations (2017).

## **4. Restricted Civil liberties**

### **a) Citizenship rights**

Citizenship is determined by the Constitution (Chapter 2, Section 20) which states that no citizen may be deprived of citizenship. In addition, Section 2 of the Constitution provides that all South Africans are equally entitled to the rights, privileges and benefits of citizenship, and equally subject to the duties of citizenship (The Constitution of the Republic of South Africa, Section 2). According to the South African Citizenship Act (Act 88 of 1995), citizenship is acquired by birth, descent, or naturalisation (Section 2 – 5). Loss of citizenship only occurs when a person takes up citizenship of another country, and the Citizenship Act specifies that marriage does not affect citizenship.

Women have the same rights as men to confer nationality onto their children at birth. According to the Citizenship Amendment Act (Act 17 of 2010) children born to foreign nationals who have the status of permanent residents can be given South African nationality, as long as the birth is registered with the Department of Home Affairs. The Citizenship Amendment Act (Section 2 (3)), however, does not provide for refugees or asylum-seekers. These children retain the nationality of their parent(s).

All children in South Africa must have their births registered within 30 days of their birth regardless of the parents' relationship or marital status (Births and Deaths Registration Act (Act 51 of 1992, and Department of Home Affairs, 2017a). Men and women can register their children in terms of the Births and Deaths Registration Act (as amended), and a mother can register the child on her own, or with a father if the couple is unmarried. The child will then be registered with the mother's surname (Department of Home Affairs, 2017a). Late registrations are allowed after 30 days (Department of Home Affairs, 2017a).

There is little evidence of discrimination against women in terms of accessing nationality or changing nationality, and discrimination on the grounds of gender or marital status are prohibited in terms of the Constitution (Chapter 2, Section 9) and the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000). Neither the CEDAW Committee Report nor CEDAW shadow reports make reference to evidence of discriminatory practices.

Since 1994 all South Africans have had access to the right to freedom of movement, the right to leave the republic, the right to remain in and reside in the republic, and the right to a passport (The Constitution of South Africa, Act 108 of 1996, Chapter 2 (21)). All South African citizens over 16 are able to apply for an identity card (South African Identification Act, Act 68 of 1997, Section 14), and all South Africans of any age are entitled to a passport (The Constitution of the Republic of South Africa, Section 21 (4)). In order to get a passport for a minor, both parents' consent is required (The Department of Home Affairs, 2017b).

### **b) Voting**

Voting rights apply to all South African citizens regardless of gender. All South Africans have the right to vote and to stand for public office (The Constitution, Chapter 2, Section 19 (3 and 4)). If voters require special assistance due to disability or otherwise, they can request it (Electoral Act 73 of 1998, Section 39). There is no evidence of discriminatory practices that limit women's ability to vote.

### **c) Political voice**

The Constitution provides every citizen the right to run for political office (The Constitution, Chapter 2, Section 19 (3 and 4)). South Africa's political system is a Proportional Representation system whereby political parties make lists of those they wish to be elected, and, depending on the percentage of the vote they receive, are allocated seats in the National Assembly. The Constitution also makes provisions for women to occupy positions in the legislature, judiciary, and executive. In particular, with regards to the judiciary the Constitution makes reference to the need to address gender equality in these positions (The Constitution of the Republic of South Africa, Section 174). However achieving gender equality at the level of the judiciary remains slow and has been investigated by the Commission for Gender Equality on the grounds that it is failing to meet its constitutional requirement of being representative (Commission for Gender Equality, 2016).

South Africa is a signatory to the SADC Protocol on Gender and Development (2008), which requires a 50% representation of women in political leadership, however no branch of government has an equal gender representation as of 2017. No special incentives or measures exist to promote gender equality (CEDAW Committee, 2015).

No legislated quotas exist for women's representation at a national or provincial level of South African Government. Many political parties have opted for voluntary quotas, which has resulted in a high representation of women in the legislature (Inter Parliamentary Union, 2017) and executive (South African Government, 2016). At a local government level, the Local Government Municipal Structures Act (Act 117 of 1998) requires that political parties seek to ensure that 50% of the candidates on the party list are women, and that men and women candidates are equally distributed throughout the party list.

Despite this, the South African CEDAW report notes that women in local government continue to face discrimination from their male colleagues, including the withholding of resources (South African Government, CEDAW Report).

#### **d) Access to justice**

Women and men have equal rights to litigate in South Africa, including in all forms of marriages. The Recognition of Customary Marriages Act and the Matrimonial Property Act both make provision for women to sue and be sued. Unmarried women are provided with equality under the law in accordance with the Constitution (Section 9 (1)).

The Constitution prohibits discrimination on the grounds of sex, gender, and marital status, and equality under the law (Section 9). Women's testimony thus holds equal weight as men's in civil and criminal proceedings, and other legal matters. In addition, the Constitution also provides the right to access to courts (Section 34). This right is supported by state support such as legal aid, which aims to provide legal counsel and support to those South Africans who might not otherwise have been able to afford it (Legal Aid Act, Act 30 of 2014).

There are a number of specialised courts that women can access including Equality Courts (as established by PEPUA) and Sexual Offences Courts. To improve access to justice in rural or peri-urban areas the justice system includes community courts, circuit courts, and traditional courts.

In addition to specialised courts women are able to report complaints of gender discrimination to the Commission for Gender Equality (CGE) and the South African Human Rights Commission. The CGE is tasked with monitoring government's compliance with gender equality targets both nationally and internationally, responding to complaints of gender discrimination, providing public education and information on gender equality, commissioning research, and monitoring compliance with international treaties and conventions (CGE, 2014).

Gender disaggregated statistics are regularly collected by the Statistics South Africa in accordance with the Statistics Act (Act 6 of 1999).

The Traditional Courts Bill was reintroduced in 2017. The previous versions of the bill received significant criticism from gender scholars and activists. The main criticisms of the previous version including the lack of consultation with women, the lack of representation of women on traditional courts, the denial of women's ability to represent themselves at traditional courts, the lack of option to appeal unfair decisions, and the lack of mechanisms to address harmful cultural practices in traditional courts (Centre for Law and Society, 2012). The new version of the Bill seeks to address these criticisms through inclusions of clauses requiring women's equal representation and participation (Griffin, 2017).

#### **More**

The Department of Women was established in 2014, from the former Department of Women, Children and People with Disabilities. The Department has been tasked with addressing women's economic empowerment (Department of Women, 2014). In 2017, the Department received the smallest

financial allocation in terms of budget (National Treasury, 2017) and it has been widely criticised by gender activists within South Africa (Davis, 2014).

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