

GENDER POLICY AND LEGISLATION DURING THE FIRST 20 YEARS OF DEMOCRACY

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1. Introduction

South Africa's progressive legal framework, which provides for both the protection and promotion of the rights of women and attempts to address their historically disadvantaged and subordinate position, has been hailed by both politicians and scholars as one of the country's success stories. Central to this is the South African Constitution (Act 108 of 1996), which gives women unprecedented rights, particularly in its Bill of Rights (chapter 2). In addition, the Constitution makes provision for a Commission on Gender Equality (chapter 9) to promote the attainment of and respect for gender equality.¹⁾ Numerous laws have also been promulgated to ensure that proactive measures are taken to protect women's constitutional rights.²⁾ Labour laws are specifically 'women-sensitive'. The Labour Relations Act of 1995 (section 203(2)) makes provision for Codes of Good Practice. Such a Code on the Handling of Sexual Harassment Cases was issued in 1998 by the National Economic Development and Labour Council. The Basic Conditions of Employment Act of 1997 (amended in 2002 to include the domestic worker sector) guarantees, among other things, maternity leave, job security during pregnancy, minimum wages, housing and health care for previously excluded groups, such as domestic workers, while the Employment Equity Act of 1998 includes women as a 'designated group' to which affirmative action measures apply. In addition, the Broad-Based Black Economic Empowerment Act of 2003 (2) demonstrates its commitment to black women in its aim to increase the ownership and management of existing and new enterprises and increasing

their "access to economic activities, infrastructure and skill straining".

In the socio-personal realm, important legislation includes the Choice on Termination of Pregnancy Act of 1996 (which recognises women's right to abortion without the consent of another person), the Maintenance Act of 1998, the Recognition of Customary Marriages Act of 1998, and the Domestic Violence Act of 1998 (which defines violence as encompassing various forms of abuses and gives broad power to courts to shape the conditions of a protection order).

The introduction of gender machinery (structures in the state mandated with monitoring legislation and policy for gender equality in line with the Beijing Platform for Action, article 201), championed by the National Women's Coalition (NWC) in the early 1990s, has also been noted as a significant milestone in the quest for women's rights in South Africa's early years of democracy. Hailed as one of the most advanced and integrated structures in the world (Gouws 2006: 143), it consisted of a set of which the Office of the Status of Women (established in 1997 and located in the President's Office) formed the apex with Gender Focal Points (GFPs) in National and Provincial Departments at the operational level. The Commission for Gender Equality and the Parliamentary Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women (JMC) formed the other components of the 'gender machinery'.

However, although placing equality on the statute book does serve a normative function, it does not inevitably lead to a change in lived experience. Thus, despite the above robust legal achievements, actual implementation of these measures has not readily occurred (Fester 2004). Notwithstanding women's empowerment on paper and the removal of *de jure* inequalities, "economic and social injustices have to a large extent remained deeply entrenched within the broader societal framework" (Hames 2006: 1317). In addition, it has been argued that despite the nuanced gender rights 'culture' on paper, women still comprise the majority of the poorest and most marginalised in South Africa, and that "patriarchal power underlies the economic marginalisation of women" (Bentley 2004: 248). Several scholars have also pointed to the potential tension in the Constitution in which the Bill of Rights (chapter 2) on the one hand preserves gender equality, but simultaneously guarantees the protection of chieftainship and respect for traditional authority (chapter 12). The institution of traditional leadership is viewed as patriarchal and suggests the protection of patriarchal social relations

of rural women in particular — relegating women to subordinate positions on issues of land ownership and governance (see for example, Szeftel 2004; Bentley 2004; Ntsebeza 2005, Hames 2006). This ambiguity manifested in 2003 and 2004 in two legislative interventions — the Traditional Leadership and Governance Framework Act³⁾ and the Communal Land Rights Act. The latter, which provides for significant decision-making powers for traditional councils over the occupation, use and administration of communal land, was strongly opposed by, among others, the African National Congress (ANC) Women's League, the Commission for Gender Equality and rural communities. Although the Act was declared unconstitutional by the Constitutional Court in 2010, it was declared so on the grounds of a lack of consultation in its drafting and not because of its implications for rural women (The Law, Race and Gender Unit 2010).

From the above it is evident that although tremendous progress has been made in 'recognising' women's rights in official discourses, some serious shortcomings were already evident after the first decade of democracy. This article will show that the National Gender Machinery (NGM) has largely failed in fulfilling its mandate of enhancing gender equality by influencing policy from a gender perspective. Given the fact that some of the structures of the NGM pertain to the representation of women in parliament, the first section highlights the achievement of South Africa currently being in the tenth position in the world in this regard (Inter-parliamentary Union 2014). This can be attributed to the country's proportional electoral system and in particular the ANC's commitment to the equal representation of women in parliament.

2. Political decision-making

South Africa's success in meeting the collective demand for recognition has perhaps been most visible in the National Assembly, where after the 2009 election women made up 44 per cent of Members of Parliament (MPs) — thus being accorded the third highest position (at that stage) on the global ranking of female MPs and second in Africa. Equally impressive is the fact that 41 per cent of cabinet ministers and five of the nine provincial premiers were women. This increase in women's political representation can be ascribed to the ANC policy, which committed itself to a 30 per cent voluntary quota representation in 1999 and to a 50 per cent representation of women in 2004.

However, after the 2014 elections women's representation dropped to 40.8 per cent. The country therefore missed its last opportunity to achieve gender parity ahead of the 2015 deadline set by the Southern African Development Community (SADC) Protocol on Gender. Female representation in provincial legislatures also declined from 41 to 37 per cent. Women in cabinet remain at 41 per cent, although the proportion of women premiers dropped from five in 2009 to two in 2014. In the 2011 local government elections women's representation dropped from 40 per cent to 38 per cent. The decline in women's representation can be attributed to the increase in support for opposition parties, which have no informal quota requirement for women on their party lists and the fact that the ANC itself did not adhere to the zebra proportional representation on its party list. Its female representation in parliament decreased from 49 per cent in 2009 to 46 per cent in the recent elections and in provincial legislatures from 50 per cent in 2009 to 44 per cent. The proportion of women in parliament (National Assembly) of the three largest opposition parties in the 2014 elections does not exceed 35 per cent, with the Democratic Alliance (DA) at 30 per cent, the (Economic Freedom Fighters) EFF at 35 per cent and the (Inkatha Freedom Party) IFP at 21 per cent. Both the DA and IFP showed a drop in women's representation from the 2009 elections.

The reluctance to put women forward as party representatives at national, regional and local level and above all the President's unwillingness to an equal representation in parliament, over which he holds the control of appointment, "sends out the sad message that patriarchy is still alive and well" (Lowe Morna as quoted in *Gender Links 2014*). This is particularly ironic given the fact that the majority of voters in South Africa are women, who made up 55 per cent of the registered voters in the 2014 elections.

Despite this drop it cannot be overlooked that women's 'descriptive' representation (Waylen 2007: 522) has come a long way since the first elections in 1994, when women formed 27.7 per cent of the first parliament. However, despite women having achieved 29.75 per cent in the 1999 elections (close to the 'critical mass' of 30 per cent) and 32 per cent in 2004, scholars have pointed to the need for more 'substantive' representation (Waylen 2007), or as Hassim (2005: 338) puts it, "to make the 'voice' of women louder" — that is, to be more "effective in interest articulation and representation". In this shift from vote to voice, which Hassim calls a 'virtuous circle', participation, repre-

sentation and equality outcomes are interlinked, as the number of women in parliament does not necessarily translate into substantive representation. This is particularly so because South Africa's form of government, which to a large extent resembles the parliamentary system, requires strong party discipline and party loyalty, which results in female representatives having to toe the party line.⁴⁾

There have been a number of legislative 'victories', but few are relevant to women's empowerment. Hassim (2005: 346-347) argues that these are "limited to women's concerns rather than gender concerns" (such as the Maintenance Act), and are made on the basis of "family failures and addressing children's needs". An exception is the Termination of Pregnancy Act (1996), which, according to Albertyn (2003: 106), is the first law passed to address issues of women's subordination. However, the real test is when women's gender needs challenge the power of groups such as traditional leaders, and here the passing of the Communal Land Rights Bill is an example. Despite strong reactions by women's organisations and land non-governmental organisations (NGOs) to protect the rights of rural women, the Bill was passed. Though the ANC women's caucus also voiced its objection, there were no abstentions from female MPs when it came to voting for the Bill (Hassim 2005: 349-355).

3. Institutional mechanisms for the advancement of women — the National Gender Machinery (NGM)

Unfortunately, the structures of the NGM have not lived up to the high expectations that accompanied their establishment. In investigating whether women's policy machinery is actually feminist in nature, Stetson and Mazur (1995a: 16) provide two analytical angles: state capacity — the extent to which women's policy machinery influences feminist policy; and state-society relations — the extent to which "women's policy machinery develops opportunities for society-based actors — feminist and women's advocacy organisations — to have access to the policy process". However, as Stetson and Mazur (1995b: 290) state, "women's policy machinery will only reach high levels of state feminism when the state is defined as a site of social justice and has the capacity to institutionalize new demands for equality", and "when society sustains widely

supported feminist organizations that challenge sexual hierarchies". Without such conditions politicians may establish women's policy offices; however, "they will have a hard time in either influencing women's equality policy or empowering women's interests in society, or both".

Several problems pertaining to the above two analytical requirements resulted in the abolishment of most of these original structures by 2009. Since new structures came into place (which were hardly an improvement) brief mention of the major problems will suffice.⁵⁾ These included overlapping mandates and poor communication between the various structures; limited achievements of gender mainstreaming (particularly through the gender focal points); uneven engagement with civil society organisations; the lack of gender expertise; and the lack of acknowledgement of NGM structures.

The Office of the Status of Women (OSW) in the President's Office, led by the Minister in this Office, was confronted with several obstacles. An underlying problem was the fact that the Minister (Essop Pahad) "was not a feminist" and had little understanding of the underlying causes of women's subordination (Govender 2007:170). The main task of the OSW was the promotion of gender mainstreaming in government departments through facilitating, training, monitoring, implementing and liaising with civil society and international bodies. However, it lacked authority, since the most senior position was at the lowest entry level of management (director). Without authority, technical expertise and financial resources to carry out its mandate, it was essentially reduced to an administrative function. Its activities were mainly related to reporting and to participation in and hosting of meetings external to the ministries and departments. Despite its mandate to network with women's organisations in civil society, the OSW has also isolated itself from the women's movement (Hassim 2006; Watson 2009). It undertook very few activities related to facilitating gender mainstreaming in departments. It did, however, produce the 'National Policy Framework for Women's Empowerment and Gender Equality' in 2000 (one of its main briefs), although this was never elevated to an Act. By 2007 it was virtually inoperative and became dysfunctional in 2009 with the establishment of a Ministry of Women, Children and People with Disabilities (MWCPD).

The GFPs in each department at national and provincial level were required to ensure that departments comply with gender mainstreaming requirements in their policies and programmes. However,

GFPs equally lacked authority, since few were established at management level. They were therefore not able to influence policy. In addition, most were not devoted to gender alone but fulfilled various other functions. They also lacked an understanding of gender, of their roles and how to implement their responsibilities. No training on gender mainstreaming (which was mainly conceived of as incorporating women) was offered. Most of the GFPs became dysfunctional in 2009 though they were not formally disbanded.

The Commission for Gender Equality (CGE), is an independent statutory body established in terms of the Commission on Gender Equality Act (No 39 of 1996). As a Chapter 9 institution⁶⁾ the CGE is accountable to parliament, which has oversight powers over its functioning. It is mandated to monitor and evaluate policies and practices of state organs at any level, as well as those of statutory and public bodies and private institutions, in order to promote gender equality and make recommendations that it deems necessary. As Hicks (2010: 126-127) argues, with its substantive powers of subpoena and litigation, the CGE occupies a key role in ensuring state accountability and delivery on legislative commitments — that the political, civil and socio-economic rights and freedoms become a 'lived reality' for the most marginalised women. In executing its functions the CGE Act also requires the CGE to liaise and interact with organisations promoting gender equality and other sectors of civil society.

By the end of its first term in mid-2000 the CGE was plagued by serious internal conflicts: these included low staff morale (more than 27 staff members had resigned); debate over which feminist goals should be given priority; conflict over personal issues; and conflict over relations between commissioners and the broader South African women's movement. In addition, the quality of research was perceived as weak and was characterised by a simplistic understanding of gender and a lack of empirical depth. The CGE did not challenge legislation, let alone direct and propose policy and legislation. It was also reluctant to challenge the government (Seidman 2003: 548; Meintjes 2006: 271). Despite its internal disarray the CGE initiated a wide range of projects and programmes related to research, advocacy, monitoring and interventions in the period 2002-2004. It developed a strategic focus and a plan of action focusing on five priority areas — governance; gender-based violence; gender and poverty; tradition, culture, religion and sexuality; and gender and HIV/AIDS — and was relatively successful in all these

areas. The CGE also took a critical stance on the Communal Land Rights Bill of 2004 and the Traditional Leadership and Governance Bill in 2003 with the parliamentary JMC (Gouws 2006: 154).

In parliament's review of Chapter 9 institutions in 2007 to establish the extent to which these institutions had transformed society and entrenched human rights, the CGE did not fare well. Criticisms raised in this review (Parliament 2007:150-161), include :

- Its unwillingness to take a public stand on controversial issues such as service delivery, the impact of poverty on women and the roll-out of antiretroviral drugs for people living with HIV and AIDS.
- Poor understanding of its legal and constitutional mandate.
- Lack of efficiency and effectiveness, which brings into question the CGE's relevance.
- Unsatisfactory relationship with civil society.
- Unsatisfactory oversight function.
- Internal conflict between commissioners since the inception of the Commission and tensions between commissioners and staff.

The CGE has to some extent managed to revive itself since then and is moving towards undertaking activities to fulfil its mandate. It is engaged in advocacy intervention and is utilising its investigative power in strategic issues that fall within its mandate. In the period 2011–2013, for example, over 20 policy and legislative submissions were made, partnerships with civil society organisations increased and close to 600 complaints on various issues such as gender discrimination, maintenance and gender violence were received and managed by CGE offices across the country. A recent important initiative is the introduction of policy dialogues, the findings and recommendations of which are presented to various policymakers. Such hearings have been undertaken on gender mainstreaming in the water sector, in the land reform programme and in the private sector, as well as on gender equality in the national curriculum and equality and widowhood (CGE, Annual Reports)

However, the body is still confronted with three challenges. The first is its relatively small budget, which is significantly less than other Chapter 9 institutions. This questions the government's commitment to gender equality and its understanding of the nature of gender work, and limits the CGE's ability to reach out to the remote parts of the country

where gender inequality is most severe. Secondly, most commissioners do not have any gender training, which compromises their ability to fulfil their functions. Lastly, the majority of commissioners are political appointments, and reluctance to challenge the government persists.

The parliamentary JMC, which became dysfunctional in 2009 with the introduction of the Women's Ministry, was established in August 1996 as an *ad-hoc* committee but later became a fully-fledged committee. It was a joint committee constituted by both members of the National Assembly and the National Council of Provinces and was mandated to monitor and evaluate progress in relation to the international instruments which the country has signed. Since its inception until 2002, the Committee, which was under the leadership of Pregs Govender (a feminist activist), played an important role in initiating legislation that was crucial for the empowerment of women. The Committee actively shaped legislation such as the Domestic Violence Act, and Recognition of Customary Marriages Act. It also facilitated numerous public hearings such as the impact of HIV/AIDS on women and girls. At that point the Committee was by far the most effective institution of the NGM. However, after the resignation of Govender from parliament in the first half of 2002 the Committee practically became dysfunctional and was described as "an empty shell, dogged by the lack of understanding of its mandate, absenteeism and a lackadaisical attitude among committee members to the cause of women's empowerment" (Van der Westhuizen 2009). The Committee, for example, made no input into the controversial Communal Land Rights Bill, nor the Criminal Law (Sexual Offences and Related Matters) Amendment Bill before it was passed in 2007. After the establishment of the Ministry of Women's Affairs it was replaced by the Portfolio Committee on Women, Children and People with Disabilities.

In December 2007 the ANC's Polokwane Conference adopted a resolution for the creation of a Ministry of Women's Affairs, which was subsequently established in 2009 as Ministry of Women, Children and Disabled People.⁷⁾ As mentioned, the OSW ceased to exist, as did the JMC. Provincial offices were to be set up, and GFPs were to be replaced with gender units in each of the national departments. The new ministry came as a surprise to gender activists given the already existing comprehensive NGM structures and the fact that the establishment of a Ministry of Women had been rejected as an option by the NWC (initiated by the ANC's Women's League) 20 years ago. Women's ministries

have not been very successful elsewhere in the world, since they are (among other things) marginalised and excluded from key economic discussions and are worse resourced than most other ministries. Furthermore, lumping together women, children and disabled people as 'vulnerable groups' in one ministry means that the focus on women is lost.

The ministry was to mainstream gender in all government policies and programmes through the establishment of relevant structures, mechanisms and catalytic projects. However, it received the smallest portion of the budget (from which the CGE was also funded), which is a clear indication of the lack of seriousness attached to it.

Since its existence it achieved little in terms of promoting gender equality. Besides the department's engagement in a few awareness-raising campaigns, the annual reports of 2011/2012 and 2012/2013 provide few tangible outcomes — the most significant being the establishment of a National Council on Gender-Based Violence,⁸⁾ the drafting of a National Rural Women's Development Strategy and the South African National Policy for Women's Empowerment and Gender Equality — which was passed by the National Assembly and subsequently withdrawn. The Portfolio Committee (on Women, Children and People with Disabilities — WCPD) that monitors the Department of Women, Children and People with Disabilities (DWCPD) was also very critical of the minister and her department, commenting on, among other things, the state of the offices in her department, misleading parliament with inconsistencies in targets and discrepancies in reports, spending R25 million on the retrenchment packages of four people and bonuses of R14 million for no performance. After the 2014 elections the President unbundled the DWCPD and established a Ministry of Women's Affairs located in the President's Office under Susan Shabangu.⁹⁾

The activities of the Portfolio Committee during the fourth Parliament (May 2009 — March 2014) can also hardly be described as contributing to substantive women's rights. It focused 60 per cent of its time each year on the following themes: violence and socially vulnerable groups (2009), poverty and maternal health (2010), education and skills development (2011), employment (2012) and review of the DWCPD and the CGE (2013). 'Oversight visits' seem to be the essence of the activities within the above themes. The only activities of significance in this five-year period were the public hearings on the implementation of the Domestic Violence Act (2009)(though little came of this)(see for

example, Taranto, *et al* 2013: 1-2).

After public hearings the Committee also adopted the controversial Women Empowerment and Gender Equality Bill in January 2014. Dorothy Ramodibe, chairperson, asserted that: "After considering up to 41 submissions from relevant organisations and individuals and working on several drafts, the Committee is now certain that it has produced a Bill that will surely deliver on the promise of empowerment and equality to many women in the country" (Parliament 26/2/2014). The Bill, which was passed by the National Assembly in March 2014, did not address the concerns expressed during the public hearings (see for example Vetten, 2014 and Legal Resource Centre, 2014). It was withdrawn in July 2014 by the new Minister of Women in the Presidency. She said that the Bill was tabled without "sufficient consultation", and that after this has taken place it would be re-tabled (*Business Day Live*, 10/7/2014).

It is therefore evident that in its various permutations the NGM has, contrary to high hopes, largely failed to set a gender agenda and to mainstream gender in policies and programmes.

4. Conclusion

The liberal approach to women's rights in South Africa through constitutional provisions, an elaborate and progressive legislative framework and the representation of women in political decision-making positions was a critical starting point in transforming women's subordination. Together with the establishment of institutional mechanisms, particularly the National Gender Machinery for women's advancement, these frameworks and institutions symbolise the state's commitment to the ideals of gender equality. However, despite these advancements (the NGM was at its inception one of the most acclaimed structures, and it was hoped that it would influence policy-making from a gender perspective), optimism has waned. Numerous problems characterised the first 'set' of institutions, ranging from a lack of a centralised structures to limited engagement with civil society organisations and the lack of dedicated, skilled gender activists. The short-lived Ministry of Women, Children and People with Disabilities, which replaced the Office of the Status of Women, fared no better. The substitution of the gender focal points with gender desks never materialised. It is therefore hoped that the newly established Ministry of Women in the Presidency will resur-

rect the dysfunctional gender focal points (or establish gender desks) in departments at both national and provincial level. An integrated NGM (which includes the CGE and civil society organisations) as envisaged in the 1990s, can provide the impetus for the much-needed substantive improvement of the majority of women's lives in both the public and private spheres.

Women's equality on paper over the past 20 years has not resulted in the liberation of black African women and rural women in particular. Women's subordination, which is reflected in (for example) the gender gap in employment, the poverty of women, and the failure of laws to address the high rate of violence against women, can mainly be attributed to the enduring patriarchal norms that underlie the uneven power relations between men and women. Without understanding and deconstructing these barriers substantive improvements to women's lives will not be realised.

Endnotes

1. The tasks of the CGE are outlined in the Commission on Gender Equality Act No 39 of 1996.
2. See, for example, O'Sullivan and Murray (2005: 1-3) for an elaborate overview of the legislation.
3. The Act deals with the functions and roles of traditional leaders, some of which could perpetuate traditional gender inequalities, particularly in terms of the succession to leadership positions in as far as there is no 'tradition' of female authority in community decision-making.
4. Hassim (2005: 343) provides a good example: women in the ANC worked hard to ensure that women were recognised as a disadvantaged group in the employment equity legislation. However, women in the DA had to vote against it as a result of their party's opposition to it.
5. These problems have been documented extensively. See Gouws (2006); African Development Bank (2009); Report to CEDAW committee (2010); South Africa's Compliance with Beijing Declaration (2010).
6. In order to strengthen constitutional democracy in South Africa six institutions were established in terms of Chapter 9 of the Constitution: These are: The Public Protector; The South African Human Rights Commission; The Commission for Gender Equality; The Auditor-General; The Electoral Commission, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
7. The Department was soon jokingly referred to as the "Department for

- everyone except able-bodied men".
8. The Council, which was launched in December 2012, is considered by organisations such as Rape Crisis as "not a solution to the epidemic of rape and violence". What is needed is more resources and not a "special Council, directive or plan". In addition, the Council has been described as "hamstrung by an incoherent mandate and shambolic organisation" (Daily Maverick, 28/5/2013).
 9. Former Minister of Mineral Resources.

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