

News & Views

FOR MAGISTRATES

JULY 1998

EDITORIAL

The staff here at the Law, Race and Gender Research Unit will be forgiven for (still) being slightly out of breath in the afterglow of our National Conference. We are very proud of an event that was not only hugely successful in terms of our initial expectations, but also for the acclaim and interest it generated. To the magistrates that contributed so enthusiastically towards transforming a judicial gathering into a sensational happening, we say a sincere thank you.

You will notice in this issue a rather determined effort to diminish the air of solemnity that has darkened the mood of our previous publications. Yes, I am specifically referring to our new cartoon strip that features the characters from our video, 'Court in the Act'. We trust that you will enjoy a 'days of our lives' presentation as much as those who enthused about the actual video! In 'Letters to the Top' you are invited to share, criticize, reflect, ask or just plainly verbally abuse in a free-for-all, letters-of-lament column that is almost guaranteed to make you wish you weren't on this mailing list. You are cordially invited to participate in this mutiny of judicial neutrality, but be cautioned: your silence might just create the impression that magistrates are really unbiased!

On a (only slightly) more serious note we take a look at the latest injustices and developments around the legal table, a kind of a what's hot and what's not approach in dealing with the utterly mundane business of new legislation and research. This issue focuses on lay assessors, as well as our legal system's inability to deal effectively with both perpetrators and victims of abuse. The extremely wide but powerful new definition of 'domestic violence', efforts to force the police to comply with basic legislative prescriptions, and the far-reaching consequences for offenders with restraining orders who now find themselves in the confines of a properly constituted criminal court are to be welcomed.

Other business as usual seems to be a spate of pending judicial disciplinary enquiries against certain magistrates who have incurred the wrath of the powers that be in no uncertain terms. Did anyone mention that ugly independence-word lately? Seems like legal representation has firmly made its way on the checklist before thou shalt cast that first stone...Until next time, defend your rights, but beware of cheap imitations!

Francois Botha

THE MAGISTRATE'S OATH — A BLUEPRINT FOR JUSTICE, MAY 1998

(Supreme Court Justice Patricia Williams from New York, one of the key-note speakers at The Law, Race and Gender Research Unit's first National Conference writes:)

'It has now been more than two full months since I set foot on the soil of South Africa to participate in the first National Conference of Magistrates. As you all probably know, it was also my very first trip to the African continent as well as to South Africa. On the one hand, the mere passage of time in my life as a Judge sitting in a busy trial court of New York State has been more than sufficient to blur the once shiny edges of my experiences in South Africa. On the other hand, however, I remain deeply impressed and excited by the vibrance and energy of the many magistrates and other lawyers and personnel whom I met and talked with during the conference.

In retrospect, I am amazed that I had the nerve to actually accept the invitation to speak at the conference. At the time of that acceptance, what I knew of South Africa generally dated back to the 1960's and before. What I knew of the judicial system of South Africa would have fitted quite comfortably into a very small thimble — and then more than once.

The first night of the conference truly set its tone for all of the participants as well as for me. Minister Dullah Omar spoke quite movingly of the administration's intent with respect to the transformation of the judiciary in general. Minister Omar was also quite forceful in his personal support for the magistrates.

Over the next days of the conference I worked with my small group on the particular issues scheduled — all of which were based upon the video created by your Francois Botha (whom I now think of as our Francois). When the videotape was first shown, I thought that it was not only an incredibly professional piece of work, but one that was truly brilliant. In retrospect, I find no reason to change that view. Although my court has nothing analogous to "the Tea Room", the scenes and the circumstances contained within the video



JUSTICE PATRICIA WILLIAMS

were nevertheless ones with which I found myself able to relate quite easily. In fact, the analyses of the members of my group were not terribly different from those that I would have expected to hear if a similar video depicting similar scenes from an American (and specifically New York) experience were shown to a group of New York judges.

That similarity of views, approaches and experiences was true for just about every phase of the conference itself. Our judicial systems may be somewhat different, but as judges our thinking and behaviour turns out to be pretty much the same. The difficulties we all have — in facing our differences, our prejudices and biases, and attempting to come to terms with them — are the same. The one single thing that I will keep in my mind is the commitment shown by the conference participants to wrestle with those differences, with one's personal and cultural baggage in order to produce a judiciary which is truly fair, impartial and reflective of the precepts and intent of our respective constitutions. I can only hope that my own commitment to that same goal is stronger as a result of my experience at the First National Conference of South African Magistrates. Once again, I thank all of you who participated in the conference — for your friendship, your warmth, your willingness to educate me and just for being you. I wish you all the very best for your individual future endeavours!

Voice from J.O.A.S.A.

The relationship between magistrates and the Law, Race and Gender Research Unit come in instalments of many kinds. One remembers vividly a class at Justice College, composed of magistrates from different walks of the 'Courts'.

What can be described as the first encounter with the Unit, came in the persons of Ilze Olckers and Debbie Budlender.

For some of us, the first encounter in Pretoria was followed by Kommetjie, the Waterfront and many others. Little did one know that what started as a baptism of fire, would later coagulate into an everlasting partnership culminating in embraces and long-standing friendships. Where only nucleus families existed, we witnessed an extension into a clan and then a society of brothers and sisters.

The introduction of many a concept by the Unit to the magistracy was a real eye-opener. Taking an audit of our past, we now realise the stereotypes we had of each other and about individuals from the communities that we serve who appear in our courts daily. We now have a better understanding of society. The National Conference held in May 1998 in Cape Town came not only as a fulfilment, but also as a beginning of many achievements of the Law, Race and Gender Research Unit. Having put all our biases behind us, we all converged at this magnificently organised conference at the Arthur's Seat Hotel.

The discussions were so open and healing. We could find each other with no difficulty this time. It was quite fulfilling. It was an awareness that we needed so dearly. What is quite satisfying is to see the social norms balanced.

We as magistrates wish to say that the web has since been removed and the future is bright. We walked through social-contextualisation to socio-judicial-contextualisation. How wonderful it is when the sun rises at sunset.

Professor Murray and her team deserve a special pat on the back for a job well done.

TJ RAULINGA
CHIEF MAGISTRATE: BLOEMFONTEIN

WOMEN JUDGES UNITE

INTERNATIONAL ASSOCIATION OF WOMEN JUDGES CONFERENCE 'A NEW VISION FOR A NON-VIOLENT WORLD: JUSTICE FOR EACH CHILD' OTTAWA, CANADA 20-24 MAY 1998

Valerie Qgiba, Magistrate from Mdantsane reports:

The beginnings of the IAWJ date to 1989, when 50 women judges from around the world, representing every continent, were invited to the 10th anniversary meeting of the US National Association of Women Judges in Washington. Those women left Washington with a recognition of the common problems impeding equal justice for women. By speaking with a united voice, it was felt, women judges could advance justice and human rights for all.

The objective of the IAWJ is to benefit all peoples in the world by improving the status of women through the fair administration of justice. Some of the means of meeting the objectives are:

- ◆ Encouraging the formation and growth of women judges' associations worldwide.
- ◆ Developing and implementing legal programs which promote true equality for all people.
- ◆ Encouraging the exchange of information and research on legal issues of vital concern to women judges.
- ◆ Working to expand the number of women judges where they are under-represented, so they may participate equally in developing law.

In South Africa, because we do not have a national body of women judges and magistrates, the invitation to attend the conference was extended to individuals. We nevertheless proceeded there to represent the country. I was requested to present a paper on 'The difficulties inherent in the assessment of the testimony of children'. This was a panel discussion and I shared the topic with judges from Israel, Canada, Japan, Latvia and Argentina.

We were treated to Ottawa's most beautiful sites along the shores of the Rideau River, including the Majestic Supreme Court of Canada where we were formally welcomed by the Chief Justice. The Radisson Hotel, where the conference was held, boasted a revolving restaurant on its top floor – where we enjoyed meals to the panoramic view of the natural beauty of Ottawa in Spring.

It is hoped that we can set up a national body before the next conference which will be in Argentina in the year 2000.

Note: At LRG's May conference, Justice Kate O'Regan addressed a group of women magistrates on the IAWJ. A magistrate was chosen from each province to set up an interim group and, from there, establish a South African branch. For more information contact:

Ms Jacqueline Boshoff, Magistrates' Court, Private Bag X11207, Nelspruit, (Mpumalanga) 1200
Tel: (013) 753-2574 Fax: (013) 755-1629

Ms Carine Boshoff, Magistrates' Court, Private Bag X3, Wynberg, (Cape Town) 7824
Tel: (021) 799-1891 Fax: (021) 762-7842

Lay Assessors: Findings from Research

Dr Jeremy Seekings, Department of Sociology, University of Cape Town, writes:

The Law, Race and Gender Research Unit has finally completed the interim report on our research on the introduction of lay assessors into district magistrates' courts! Over the past two years we have conducted interviews with about sixty magistrates and over two hundred lay assessors, as well as administering a short structured questionnaire to over seven hundred members of the public. Our research took us to the Northern Cape, Gauteng and Mpumalanga as well as the Western Cape. To all of those who helped us: thank you for your assistance, your advice, and your patience.

The completion of our preliminary report was well-timed. The Department of Justice has tabled in Parliament a Bill providing for amendments to the Magistrates' Courts Act; the Law, Race and Gender Research Unit gave written and verbal submissions to the Portfolio Committee on Justice in the National Assembly. Justice College has also begun to run training courses for lay assessors. We hope that our research will be of use in the continuing design and implementation of a system of lay assessors that enhances the quality of justice and democracy in this country.

What are our main findings? First, the introduction of lay assessors has been very uneven across the country. In some districts assessors are used routinely in a wide range of cases. In others, assessors are not used at all. In most, assessors are used selectively, in some but not all cases, and in some but not all stages of proceedings in court. At present the Magistrates' Courts Act gives district court magistrates the discretion whether or not to use assessors, and most magistrates choose to use assessors rarely if at all.

Why have most magistrates been so reluctant to use lay assessors? By and large, magistrates say that the use of lay people on the bench detracts from rather than enhances the quality and efficiency of justice. There are, magistrates point out, many practical problems with the use of lay assessors: assessors may be unreliable in attending, especially when it comes to returning to court for part-heard cases; there might not be the physical space in court for extra people; trials might take much longer; and there is the issue of cost, as assessors are given a small allowance for serving in court. Other magistrates point to assessors' ignorance of the law, their failure to understand and follow court procedures, and their susceptibility to intimidation or prejudice.

We are in no doubt that such objections to lay assessors often reflect magistrates' experiences with lay people who were ill-suited or ill-prepared to serve as lay assessors. But we are also struck by the similarity between magistrates' objections to lay participation in court here with the objections made by legally-trained and qualified 'professionals' all over the world. Through the ages, legal professionals have been remarkably consistent in their opposition to lay participation in the courts. In the opinion of professionally-qualified lawyers, the laws might be legislated by elected representatives of the public, but the laws should be executed by professionally-qualified judges

and magistrates – i.e. people whose professional training has equipped them to understand fully the technical aspects of the law and to transcend prejudice or undue sympathy.

Yet, in most parts of the world, lay people continue to participate in the legal system, and people other than legal professionals generally regard this as being good for justice and good for democracy. In England, for example, almost all criminal cases in the lower courts are presided over by panels of lay magistrates (or 'justices of the peace'). In America, juries are widely used. Indeed, the right to jury trial is enshrined in the American constitution. In most of continental Europe, a high proportion of criminal cases is heard by mixed benches of professional judges or magistrates and lay assessors. Lay assessors also serve in the lower courts of many post-colonial countries in Africa and elsewhere. South Africa stands out in the lack of lay participation in its courts.

The fact that lay participation has been a success in so many other parts of the world suggests that practical problems can be overcome. This is indeed what we found in our research. In many parts of the country, magistrates and lay assessors themselves had together solved many of the practical problems that beset the system.

We believe that criticisms of individual assessors need to be distinguished from criticisms of the system of lay participation itself. We certainly came across many examples of assessors who did not impress us. When we met them, and contrasted them with good magistrates, we too felt more sceptical about lay participation. But we also met many excellent assessors. These were typically people who combined insights from outside the courtroom with a capacity to learn from experience within it; people whose qualities complemented those of the magistrates they sat with. There are, we conclude, good and bad assessors – just as there are good and bad magistrates (and, indeed, good and bad researchers!).

The challenge facing the architects and implementers of any system of lay participation is to ensure that the people who make decisions are competent to do so. This means having a good system for selecting assessors, and mechanisms for dealing with those who do not perform their job adequately.

We feel that, by and large, the right kind of people are selected as lay assessors. Our research shows that assessors are not representative of the general population. Selection committees in most districts have selected as assessors people who are respected and respectable. Most are middle-aged or elderly, with post-matric qualifications. Assessors are drawn from all racial groups (although we worry that there are disproportionately few African assessors). In some districts, the assessors are young; this may raise problems.

In our research we were struck, again and again, by the similarities in outlook between magistrates and assessors. Indeed, most of our interviews with assessors reveal that they regard magistrates with great deference and respect. Magistrates and assessors agree with regard to judgment and sentence in almost all cases. It is simply not

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News from Juta Law & Professional Publishers

Magistrates throughout South Africa know the *South African Law Reports (SALR)* and know that they are the comprehensive source of judgments from our courts. Now Juta is proud to introduce a practical new legal tool in the form of the **Translations to the South African Law Reports**. This new series will cover all of the Afrikaans cases published in the *SALR* since 1981, when the previous series of translations ceased publication. Translations for 1995, 1996 and 1997 are now available and we shall soon have the first material of 1994 and 1998.

The current series of translations will cover the current cases in six-monthly volumes, whilst the 1981 to 1995 cases will appear in annual volumes, working back from 1995 to 1981. At current rates of progress, we estimate that the 1981 translations should be completed by 2003. We are also investigating the possibility of simultaneous publication of the translations with the publication of the *SALR*.

In canvassing the needs of members of the legal profession, the Bench, Department of Justice and academic institutions, it became clear that there is an ever-increasing need for translation of Afrikaans judgments for various reasons. Many of those consulted were of the opinion that there were persons entering the legal profession who were being hampered by their inability to read Afrikaans, and that there is a consequent lack of access to an important body of law. Others admitted that although they had been practising law for a number of years, they still experienced real difficulties in reading Afrikaans judgments.

As far as possible we have attempted to retain translations in the format of the *SALR* and, unlike the previous series of translations, this series will not omit English quotations from the judgments. It will therefore not be necessary for the reader to have the original report at hand when reading the translations. For the assistance of the reader, page endings of the original text are indicated in bold in the translations.

The number of pages in each edition will obviously depend on the number and extent of the Afrikaans judgments contained in the volume and each edition is priced accordingly.

Please direct your enquiries with regard to this useful publication to Juta offices in Cape Town (021) 797 5101, Johannesburg (011) 455 4550 or Durban (031) 202 6546.

NEWS FROM

WALKING THE LINE

BY GLENDA BEDWELL - EDITOR, *SOUTH*

The Constitution of the Republic of South Africa Act 108 of 1996 provides in s 211(3) that:

'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

Given this provision, together with s 1(1) of the Law of Evidence Amendment Act 45 of 1988 which allows any court to take judicial notice of indigenous law in so far as such law could be ascertained readily and with sufficient certainty, how have our courts dealt with issues of customary law to be adjudicated by them and to what extent have they used the provisions of the Constitution as tools in their decisions?

In the two cases of *Mthembu v Letsela* and *Another* reported at 1997(2) SA 936 (T) and 1998 (2) SA 675 (T) respectively, the Transvaal Provincial Division had to deal with a rule of African customary law which excluded women from intestate succession. This rule had been recognised by s 23 of the Black Administration Act 38 of 1927 making it applicable in the devolution of deceased estates of black persons. The question asked by the Court was whether this rule of succession unfairly discriminated between persons on the ground of sex or gender and was accordingly in conflict with the provisions of s 8 of the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution). The applicant was an adult Zulu woman who had entered into a customary union with an adult South Sotho male. There had been one daughter born of their union. When the applicant's husband died intestate, her husband's father (the respondent) claimed that the deceased's property devolved on him as the deceased had had no sons or brothers and denied that the applicant and the deceased had ever been married by customary law. In the first case, the Court referred the matter of whether the applicant and the deceased had in fact been married to oral evidence. The Court said (at 945E-946D) that in the rural areas where the particular rule of succession was most applied, the heir upon whom the deceased estate devolved also acquired, at the same time, a concomitant duty of support and protection of the woman or women to whom the deceased had been married by customary law and the children born from such unions belonging to the deceased's household. For this reason it was important for the Court to ascertain whether the applicant had in fact been married to the deceased as claimed. Although *prima facie* discriminatory the Court found that the rights conferred by the rule of succession were not inconsistent with the fundamental rights contained in chapter 3 as they carried with them the concomitant duty of support.

At the hearing of the second case, neither the applicant nor the first respondent presented any evidence to prove or disprove the existence of the customary union between the applicant and the deceased. The Court therefore approached the matter from the viewpoint that the applicant and the deceased had not been married to each other and that the applicant's daughter had been born out of wedlock. Accordingly, the Court was forced to find that the applicant and her daughter were not entitled to any share of the deceased's property according to the rules of intestate

BETWEEN CUSTOM AND CONSTITUTION

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succession. Aside from the finding on the facts, the Court went further to consider the legal issue of the constitutional validity of the rule of succession in order to make a final determination in that regard. The applicant's counsel had urged the Court to develop the stated customary rule of succession in terms of s 35(3) of the interim Constitution in order to allow male and female descendants to participate equally in the event of intestacy. The Court was of the opinion however, that the rule of succession could not be viewed in isolation but had to be looked at in the perspective of the whole system of customary family laws within which it played an integral role. The Court again referred to the very important duty of support which accompanied the devolution of the deceased estate in the case of intestacy. The Court accordingly found that the child had no right to inherit from the deceased as she was illegitimate and that the situation would have been the same had she been male. She was accordingly not excluded from inheriting because she was female and the system of primogeniture was applied in customary law. The Court declined to develop the customary law and stated that it should rather be undertaken by Parliament. In response to this, the applicant's counsel argued that the customary rule was contrary to public policy, and therefore excluded from consideration by s 1 of the Law of Evidence Amendment Act 45 of 1988, and that the Court should rather apply s 1 of the Intestate Succession Act 81 of 1987 in terms of which even an illegitimate descendant could inherit upon intestacy. The Court was unwilling to do this and stated (at 688B-D) that:

'If I were to accede to [the] request and declare the customary law rule of succession invalid because it offends against public policy, I would, I believe, be applying western norms to a rule of customary law which is still adhered to and applied by many African people. ...[B]ecause [the child] is an illegitimate child of the deceased, such a declaration would also have an effect on the customary family rules, I do not think that public policy, or the interim Constitution, requires me to do that. I think that I would be adopting a paternalistic attitude towards many black people in the country if I hold in the present case that the customary law rule of succession falls foul of [public policy].'

The Court therefore dismissed the application.

The most definitive judgment to date must be the soon to be reported judgment of *Prior v Battle and Others*, Case No 1954/95 decided in the Transkei High Court on 11 December 1997. The applicant, an adult woman, had contracted a civil marriage with an antenuptial contract excluding community of property with her husband in the former Republic of Transkei. As a result, their marriage was governed by the Transkei Marriage Act 21 of 1978 (the Act), which provided that the husband would have marital power over the applicant. The parties did not have the option of having marital power excluded from their marriage. The applicant applied to Court to have the offending provisions of the Act declared inconsistent with the provisions of the interim Constitution and accordingly invalid as they violated her fundamental rights articulated.

The application was opposed by various tribal authorities who submitted that the Act codified customary law and that the marital power referred to in the Act was therefore inseparable from marital power as it was understood in customary law. Accordingly, should reasons exist for the termination of marital power in civil marriages between white persons, those reasons would not necessarily justify the termination of marital power in civil marriages between black persons, as the most important consideration was one of culture and participation in cultural life was also a right guaranteed by the Constitution. The concept of marital power as it was experienced in civil marriages was submitted to be very different from marital power in customary marriages and was not prejudicial to black women. The respondents argued that a pronouncement by the Court that the guardianship and marital power of a husband over his wife under customary law was unconstitutional would destroy a fundamental element of customary marriage. The Court found that the imposition of marital power did violate the fundamental rights of the applicant. The inferior legal status of the applicant brought about by her being subject to marital power was clearly discriminatory as it was imposed purely as a result of her gender. Furthermore, the Court found that the provisions of the Matrimonial Property Act 88 of 1984, which had been made applicable to the Transkei, were clearly in conflict with the offending provisions of the Act, which led to the conclusion that the rules entrenched by the Act were not reasonable nor justifiable in an open and democratic society based on freedom and equality. However, the Court did state that it could not merely equate the marital power in civil marriages with the marital power in customary marriages. The fact that s 31 of the Constitution provided each person with the right to participate in the cultural life of his or her choice had to be considered seriously. Accordingly the Court expressly stated that its order on the matter would have no effect upon the marital power as it existed in customary law nor upon the provision dealing with the status of the wife in the event of the male partner to a customary marriage becoming party to more than one marriage. The striking down of the common law rule relating to marital power would regularise the existing conflict in the area of jurisdiction of the Court between the provisions of the Matrimonial Property Act and the Transkei Marriage Act in so far as they related to marital power in civil marriages. Accordingly the Court declared the offending provisions to be inconsistent with the Constitution and as such invalid.

As customary law now seems set to firmly define its place in our legal system and command the recognition it deserves, it has become increasingly important for our courts to be prepared to deal with issues of customary law if and when they arise. The above cases provide clues as to how to how matters involving customary law should be dealt with but, ultimately, a decision on any issue of customary law will depend on the prevailing circumstances of the matter and the nature of the customary law in issue, underscored in all circumstances by the competing provisions of the Constitution.

LETTERS  TO THE 'T'

Those who wish to make a contribution to this page, note that the following prerequisites are to be carefully complied with. Entries must come from participants who are, or who have been:

1. Acting and/or fulltime magistrates
2. Male and/or female
3. In possession of their personal files
4. A18(3)-ed at least twice in their professional careers
5. Currently not in possession of a fire-arm
6. Familiar with the concept of 'lonend in diens'

Dear Mr T.

I have been a criminal magistrate for just over 10 years in a medium-sized office with very limited facilities in terms of the whole spectrum including parking, law-library, and annual leave-forms. I need assistance and advice to make reasons for sentence interesting or convincing. I have worked with the Zinn-decision extensively over the last few years, developing the trilogy in an understandable format, so that even the court orderly can use it when I am not around. So do you perhaps know of any other decisions in this regard? (no longer than 2 pages please)

M from the East-Rand

Dear M

I'm afraid I am freshly out of user-friendly sentences. I know there is a pamphlet out on C-Max, but that is mostly for regional court guys. Did you know that Zinn has got its own web-site now? [Http://www.Zinnfun.zap.com](http://www.Zinnfun.zap.com), and it features over 20 000 possible combinations of making old-fashioned starts like 'the court has considered the expectations of community, the personal circumstances of the offender...' sound really fresh. The nicest feature is that some of these combinations (also available on CD-Rom)

are so confusing that neither you nor the accused will be able to make head or tail of it! - Mr T

Dear Mr T.

I have a very specific, almost unique problem and hope you can help me. I have not been on the bench for very long now (2 months to be more exact), and my main problem is one of establishing the necessary authority in the courtroom. I am in particular referring to things like tone of voice, facial expression, dignified reaction to unexpected funny lines and, of course, body language. I am concerned that my response to a whole array of situations has thus far not contributed much to maintaining court decorum (not to mention plain ridiculous behaviour). Raucous bouts of hysterical, unqualified laughter, smiling or frowning in wrong situations are examples of the kind of almost uncontrolled behaviour that have turned my court into a circus. Handing down a judgment nowadays sounds like soundbytes from a sitcom. You know things are not what they should be if a full-house starts clapping and cheering when the court orderly shouts: 'all rise!' Can you help?

H from Mpumalanga

Dear H

This sounds pretty serious. I was in the fortunate position of role-modeling on an elderly magistrate who held a doctorate in facials, and a masters in movement. Consider the following:

1. Facials:

1.1 **Laughter/giggling** or other obvious outwardly physical expressions of amusement: This category deals with probably the most dangerous and unforgivable transgression for a judicial officer. Judges, magistrates, and in fact, any major decision-makers simply **do not** (my emphasis), break into any kind of uncontrolled expression of humour; neither in nor outside

of court. In one weak moment you drag the whole profession, and those pioneers who resisted this temptation for so many years, into disrepute. Consider the following for those trivial temptations:

Draw a graphic illustration of magistrates' salary adjustments over the last couple of years (one is careful not to use the word 'increases' because that would imply or suggest the notion of an entity becoming bigger in size). Use the old Z-15 paper (for longer record life). A quick reference to this on the bench is almost guaranteed to flush away the most joyous or hilarious moment in an instant. In particularly trying circumstances I have heard of a technique called 'sudden death', where the spreadsheet also includes a comparative analysis of salaries from the private sector. This is however a particularly nasty exercise and may lead to severe bouts of depression. Only to be used in emergencies.

1.2 **Smiling:** This terminology is unfortunate, where the more apt description of this facial expression could have been 'grin' and/or 'grinning'. 'Smiling' would suggest a mode of happiness or even amusement, which would obviously be a distorted reflection of the reality. The 'grin' or even more correct, 'grimacing' at the appropriate moment, for example just before a particularly harsh sentence, can be highly effective and certainly contribute to the accepted high standards of a solemn atmosphere and the triumphant moment of retribution. Pay extra caution for this experiment not to be confused with a gesture of friendliness or even worse, affection!

In the next issue I will run an in-depth discussion around 'Magisterial Movements: Body language to avoid, and how to make a lasting impression without having to brush your teeth before sentence'. Until then, dear Mr H, avoid eye-contact with anyone who is not a close relative. I'll be back!

(Contd from page 3)

true that the use of lay assessors will inevitably lead to war behind the bench, as they seek to impose their views on reluctant magistrates.

Of course, there are respects in which the views of lay assessors and magistrates differ. We found that assessors see themselves as more in touch with public sentiments. They are also far more distrustful of the police than magistrates. Sometimes the different views of assessors and magistrates raise difficult issues of law - for example, where does one draw the line in rules of evidence? But, overall, we are persuaded by the view put forward by many of the small number of magistrates who have used assessors extensively: their presence poses a challenge to magistrates, who are kept on their toes, but this is the kind of challenge which is good for the administration of justice.

For many magistrates, the benefits of such a challenge are outweighed by the risks involved. Many magistrates avoid using assessors. We urge such magistrates to think again: use lay assessors, help to build up a corps of experienced assessors of high quality, and co-operate in developing mechanisms that ensure that the system is well and independently administered and able to deal with the problems raised by individual poor performers. The experience will not be easy. You will no longer be able to rely on a monopoly of power behind the bench, but instead will have to earn the respect of assessors through the weight of your arguments and the humanity of your conduct in and out of court. We are confident that most magistrates can and will earn such respect, and anticipate that justice will be the beneficiary.

A copy of the report has been posted to all magistrates courts. Further copies are available from The Law, Race and Gender Research Unit. Contact Veronica De Beer. Tel: (021) 650-3914

'I left my heart in Mpumalanga'

Patricia Williams, Justice of the Supreme Court of the State of New York remembers this visit:

'Where and what is Mpumalanga? That was my very first thought when I learned that this was one of the places that it was anticipated I would visit after the Magistrates' Conference was over. To my American ear the name itself sounded mysterious and wonderfully 'African'.

It was only once I arrived in South Africa that I began to learn how very special a place I was scheduled to visit. Thus, every time I mentioned where I was headed after the conference, someone would positively coo with both envy and enthusiasm. Accordingly, by the time I was at the end of the scheduled visits which occupied the first three days of the week following the conference, I was truly looking forward to this last portion of my trip.

And what a truly lovely spot it is! The opportunity to see as much of this beautiful part of a beautiful country as I did was in and of itself an unexpected benefit to me. Although I had met Magistrate Jacqueline Boshoff at the conference, it was only once I was in her home province that I was to learn what an impressive person she is. And what a taskmaster! I was presented that first evening with what was quaintly titled "Programme". Actually, it was a schedule which had me moving from 7:45am until noon of the next day; with visits to two schools, two magistrates' courts and a tribal court. It was much easier than it sounded since the travel time between appearances was not inconsiderable.

The highlight of my trip to Mpumalanga was the visit to Chief Mbuyani's court. All of his Ndunas were present (some twenty or more men). Our party (myself, Waheeda Amien, Magistrate Bruce Langa and the Chief of Language Services, Mr Mobeng) were warmly welcomed by the Chief. It was only after Chief Mbuyani mentioned at the

end of his greetings that they were eagerly awaiting my "address", that I realized two things: a) I was ignorant of and had not made any inquiry as to what the appropriate and suitable formalisms might be for addressing a Chief and b) I had not considered the likelihood that I would be expected to make a formal address of any kind. Nevertheless, I forged ahead and explained that, rather than make an address, I wished to be enlightened about the way in which the Chief's Court worked and what the Ndunas did as well as the manner in which they are selected. I also inquired as to whether Ndunas could be female. The Chief was most gracious in answering my questions and after a round of mutual thanks he and the Ndunas agreed that I might take pictures of them. I did.

During the course of the picture taking, Chief Mbuyani told his Ndunas that now they knew why he had called them together – to meet his new wife – ME. That comment created some amusement among the Ndunas and, when it was translated for me, I tried to be amused as well although I was not quite sure what the joke was. Indeed, I was certain that a Chief's wife would be far more knowledgeable about protocol than I. In addition, I was reasonably certain that the wives of a Chief were selected with great care from suitable families. Accordingly, I felt deeply complimented. I left the beautiful circular building that is Chief Mbuyani's Court feeling not merely complimented but also quite comfortable and in fact, at home. Indeed, I felt a certain sense of propriety in the knowledge that various of the traditional ways of South Africa have been retained and have become part of the fabric of South Africa's jurisprudence.'

SEEN THE MOVIE? NOW READ THE STRIP!



In the next issue of News and Views:

We embark upon the first of a series of visits to a strange variety of magistrates' courts in all corners of the country. If you think your office has got what it takes, drop us a line for a full disclosure, and lots of cheap publicity. (Or run the risk of a surprise visit from our researcher for the kind of in-depth interviews that will force the whole staff into witness protection programmes!)

BITS & PIECES BITS & PIECES BITS & PIECES

JUSTICE FOR ALL

Women who kill their intimate partners are likely to end up with substantially longer prison sentences than men who do so. Imaginary speculation by feminist lawyers? Not according to the horrifying case studies that were explored at a recent conference hosted by Tshwaranang, Legal Advocacy Centre, an NGO actively pursuing an end-to-violence-against-women campaign in Gauteng. Amongst the more disturbing examples were the cases of Sandy Ramontoedi and Meisie Kgomo. Ramontoedi, a prison warden, shot his wife in cold blood at the Johannesburg Maintenance Court. Evidence of his long-standing prior abuse of the deceased seemed to have miraculously escaped the attention of the court and Mr Ramontoedi walked away with a paltry three year correctional supervision. Meisie Kgomo received the wrath of justice in full swing by a death sentence in 1993. She was found guilty of inciting the murder of her husband who was beaten to death by her brother (who knew about the regular incidents of battering the accused was subjected to). This case illustrates how the current defenses of provocation and self defense are inadequate in relation to battered women, explains Lisa Vetten from the Sexual Harassment Education Project. In both femicide and battered women-who-kill cases, the introduction of expert witnesses, especially on 'battered women syndrome', and a more lenient (not to mention rational) approach towards allowing similar fact evidence is now urgently and eagerly awaited by those of us who claim to be concerned with fair and equal justice.

IN THE PIPELINE

DOMESTIC VIOLENCE BILL

This Bill places a positive duty on any police officer, at the incident of domestic violence, or when the incident of domestic violence is reported, to inform the victim of her (or his) various rights and the obligations of the police. The police officer must then hand a printed copy of the explanation to the victim in the official language of the victim's choice. The positive duty on the police officer and the clerk of the court to inform the applicant of the right to lodge a concurrent criminal complaint against the respondent is also outlined. The Bill makes provision for the abuser to be arrested without a warrant at the scene of domestic violence if the peace officer reasonably suspects the abuser of having committed an offence containing an element of violence. The Bill further allows the court to order a police officer to seize any dangerous weapon in the possession of the respondent if certain information is alleged in the applicant's affidavit. Finally, it allows for proceedings to be held in camera, however, any party to the proceedings may request the presence of specified persons.

CRIMINAL PROCEDURE AMENDMENT BILL

This Bill is an interim measure, pending the recommendations of the Law Commission on a separate juvenile criminal justice system. It allows juveniles of 16 years and older to be detained in prison after their first appearance in court and any juvenile to be held for 48 hours before being brought to court. The Bill also makes it possible for juveniles who are 16 or 17 years of age to be held in prison after their first appearance in court in respect of offences listed in Schedule 8 of the Act. It removes the discretion of presiding officers to detain children for non-scheduled offences and obliges them to enter reasons for ordering the detention of juveniles. It further sets out the criteria which need to be complied with before a juvenile can be detained. Finally, the presiding officer is still required to reconsider orders of detention every 14 days and now, in addition, must provide reasons for ordering further detention.

MAGISTRATES' COURTS AMENDMENT BILL

This Bill ensures that a court will have the power to enforce a notice to a judgment debtor to appear in court for the purpose of a financial enquiry and to attend court proceedings.

AND PIPING HOT:

JUDICIAL MATTERS AMENDMENT ACT 34 of 1998

amends, among others, the **Criminal Procedure Act 51 of 1977**

The list of skills required to prove certain facts by means of affidavits is extended. And a judge other than the judge who convicted an accused is empowered, in the absence of the latter judge, to sentence the accused and to dispose of any matter remitted to the court of first instance.

BASIC HUMAN RIGHTS DOCUMENTS FOR SOUTH AFRICANS

This booklet is the latest in LRG's series of occasional papers. Section 39 of the Constitution states that courts **must** consider international law in interpreting the Bill of Rights. *Basic human rights documents for South Africans* contains the most important international human rights documents as well as five important South African ones. Each section starts with an introductory overview and gives a list of basic books on the documents included.

Basic human rights documents for South Africans was put together by Waheeda Amien and Paul Farlam for LRG and is intended to provide a handy (it is under 200 pages) and inexpensive (it costs R25.00) reference source for judicial officers, students, lawyers and activists. Contact Waheeda Amien at LRG (tel 021 650-3914, fax 021 685-5773, or e-mail Amien@LAW.UCT.AC.ZA) if you would like a copy.

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Tel: 021 650-3914 Fax: 021 685-5773 E-mail: botha@law.uct.ac.za

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