

# news & views

## FOR MAGISTRATES

LAW, RACE & GENDER  
RESEARCH UNIT

LRG

### FROM THE EDITOR

Warm seasonal wishes and greetings from a slightly subdued Cape Town, still somewhat shaken after the festivities of the season. Our third edition celebrates another event that our readers might find interesting: Ingrid Hale, our former co-ordinator and editor gave birth to a baby girl in November! Apart from our heartiest congratulations, we also hope that the newcomer (of unprecedented beauty, we understand) will follow her mother's fine example in the world of judicial education!

As newly-appointed (October 1997) co-ordinator of the Magistrates' Education Programme, I hope to build and explore the ideals and mission of this Project, and to cherish the relationships my predecessor established. After having been a magistrate for almost eight years (mostly in Mitchells Plain) my secondment to the Unit has not been effortless: daunted by academics, intimidated by electronic information and forsaken by former familiarities, the going has sometimes been tougher than anticipated! Fortunately, there has not been much time to reflect on the past as the new challenges and developments on judicial frontiers tends to be almost overwhelming....

We hope this issue is worth the read, and we look forward to sharing your views, especially on the newly-established family courts.

And finally, our best wishes and compliments for the season: may all your resolutions come true, and hopefully include your continuous participation and support of the much-needed debate around judicial awareness and education!

— Francois Botha

Extracts from the address delivered by Constitutional Court Judge Pius Langa, at our Free State Conference, August, 1997

## Imperatives of our time . . .

**I**t is in the nature of a caring human being who has to pass judgement over fellow mortals to be concerned about his or her decisions and to sometimes have attacks of self-doubt.... It is not just important but vital for judges and magistrates professions to enjoy credibility and legitimacy among the community we serve....

One of the imperatives of our time which affects anyone involved with the administration of justice is the promotion and implementation of the new guarantees of fundamental rights for everyone in this country. We are being challenged to bridge the gap between the ideal of justice and equal protection for all and the reality which confronts women, men and children. Protection

through the courts must be a reality... Presiding officers are in charge in their courts; they now have the opportunity, in that capacity, to change what used to be the forbidding and irate and hurried court atmosphere which seemed too often to be concerned only with statistics and not human beings, into one that is sensitive to the human dignity of all persons. [We should] take pains to go the extra mile with our community by being more transparent and educative in our judgments and in the expression of our sensitivity to the issues and concerns of the community we serve....

After all, failure of the system is really the failure of the functionaries who make up the structure....

*(continued on back page)*



Justice Pius Langa (right) and David Ngobeni, Chief Magistrate, Nelspruit, after dinner at the Aventura Aldam Resort in the Free State

# THE CANADA - SOUTH AFRICA JUSTICE LINKAGE PROJECT

The Canadian government, through the Canadian International Development Agency (CIDA), is assisting South Africa with its Reconstruction and Development Plan by providing assistance in a number of areas. The Canada - South Africa Justice Linkage Project is one element of the "Governance" programme, which is aimed at restructuring and strengthening government and public sector institutions. CIDA has contracted for the Canadian Department of Justice to be the executing agency, and will fund the Project to a maximum of Cdn\$4 900 000 (roughly R15 000 000) over five years.

The Minister of Justice for South Africa has requested that the Project focus on training of Judges, Magistrates and

Prosecutors, in order to improve their overall skill and knowledge, to entrench human rights sensitivity, and to improve the administration and management of the courts. In addition, the Project will contribute to long-term institutional development and capacity building for education of judicial officers in South Africa.

Overall policy direction will come from the Minister of Justice for South Africa, working with a South African Advisory Committee. The members of the South African Advisory Committee are:

- Dr A M Omar, MP, Minister of Justice
- Judge Ian Farlam, High Court of South Africa, Cape Town
- Ms Valerie Gqiba, Chief Magistrate, Mdantsane
- Professor Bongani Majola, National Director, Legal Resources Centre
- Justice Yvonne Mokgoro, Constitutional Court
- Professor Christina Murray, University of Cape Town
- Mr T J Raulinga, Chief Magistrate, Bloemfontein
- Advocate L Roberts SC, Attorney-General, Grahamstown
- Mr F J Stassen, Chief Magistrate, Johannesburg
- Ms M C van Riet, Chief Director, Justice College

A Canadian Advisory Committee, also composed of senior members of the judiciary, legal educators and members of the legal community at large, will ad-

vice on how Canada and Canadians can best respond to the needs and priorities identified by South Africa.

The Project will be jointly administered by two Project Managers, one from Canada and one from South Africa. The Canadian Project Manager is Ms Georgina Pickett, a lawyer and legal educator. The South African Project Manager is Ms Cecille van Riet, Chief Director, Justice College.

The South African and Canadian Advisory Committees have approved a work plan which will see, inter alia, development of courses for Magistrates in the areas of Constitutional and Human Rights Law, Judgment Writing, Judicial Ethics and Accountability, and Social Context and Diversity training.

In addition, a programme is being launched to develop Bench Books as a ready reference for both Criminal Court and Civil Court Magistrates. We expect to see the first of these courses and books available soon.

The Project Office is located at Justice College in Pretoria. Further information on the Project can be obtained from Ms Pickett or Ms van Riet at:  
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## Profile: SA's first woman magistrate

The late Olga Ruth Mann was appointed as South Africa's first woman magistrate in March 1963. Born in Ladysmith, KwaZulu-Natal, she achieved a number of "firsts" in her legal career. She had joined the Department of Justice in 1943 as a short-hand typist and had studied part-time for her legal qualifications. In 1959 she was appointed as the first woman regional prosecutor in the Johannesburg Court.

When asked for her response to being appointed the first ever woman magistrate in South Africa, she merely responded "I worked for it". She served for five years on the civil bench and then

went to the district court bench and was also a juvenile magistrate for four years. In 1969 she married a colleague, Arend Brink and this was the first case of two magistrates marrying in South Africa. In 1972 Ms Mann (Brink) was appointed the first woman Commissioner for Child Welfare for the District of Johannesburg; she held this post until her retirement in 1976.

She was also unusually multilingual for the time and could speak English, Afrikaans and Zulu fluently. She died in February 1997 after a brave struggle against cancer.



Olga Mann

# RACE, GENDER AND PRE-SENTENCE REPORTS

Dr Michele Burman, a visiting researcher in the Unit, worked on race and gender issues in pre-sentence reports. This is a summary of her main findings.

**F**ocusing on aspects of the routine workings of the criminal justice system is one means of investigating the question of equality of treatment of offenders of differing gender and from different racial backgrounds. This study examined the contents of 146 pre-sentence reports (116 on male offenders and 30 on female offenders) submitted in the Wynberg (Cape Town) district court to see whether, and to what extent, such reports are influenced by race and gender considerations on the part of the report-writer. Pre-sentence reports provide a wide variety of personal and social information about the background, criminal history and current circumstances of offenders and offer a recommendation for sentence based, primarily, on the report-writer's perception of the offender and his or her situation. Report writers try to compile a social history of the offender, provide some information on the offender's culpability and give reasons for the offending behaviour.

## Gender Issues?

Reports invariably begin by situating the offender within the context of his or her family – as 'husband', 'wife', 'daughter' etc. – and attention is given to their roles within the structure of the home. Underpinning accounts of family and home life is a very gendered model of family life which attaches specific gender roles to individual family members. In relation to family background and personal history, the contrast between reports for male and female offenders is much greater than that between reports on offenders from different ethnic groups. Reports endorse the caring responsibilities and home-centredness of women. In reports on females who are mothers, detailed information about the children is routinely provided. In reports on males, this type of information is rarely given.

Major differences were found between reports for men and women in the types of reasons for offending put forward by the report writer. Reports on women not only contain more detailed discussion of possible explanations for the offence than the reports on men, re-

gardless of ethnic background; but explanations for the offending behaviour of women frequently involves depression or psychological difficulties.

Gender distinctions are also evident in the recommendations made in the report. Along with the marked use of psychological explanations for offending by women, there is an emphasis on therapy-based recommendations. Where community service was recommended, placements are specified always for women, rarely for men.

Fines are frequently ruled out for married women on the basis that their husbands will have to pay the fine, and married women in particular are seen to be in a position of economic dependency within the household situation. Reports on married female offenders also refer to the ways in which their husbands would be able to ensure they would comply with community service or suspended sentence conditions.

## Racial Bias?

Generally speaking, analysis of the contents of pre-sentence reports found little evidence to suggest that report writers intentionally discriminate in their use of information in relation to offenders of different racial backgrounds. There is relatively little use of overtly racist language or racist assumptions. However, there are often practical difficulties confronting report writers which, indirectly can have a discriminatory effect. Report writers often encounter difficulties in conducting home visits and in locating family members to interview, and these difficulties are more acute where black offenders are concerned.

For example, if the offender's home is in a squatter area, it may be difficult to locate; the report writer may be wary of entering certain areas; family members may be difficult to track down as they do not reside in the local area. These difficulties may also affect the type of recommendation given. Correctional services are frequently not rendered in squatter areas; in the case of young adult offenders, NICRO requires an interview with a family member or significant other for as-

essment for community service. The majority of reports on black offenders were compiled on the basis of speaking only to the offender, who was usually in custody at the time. For white and 'coloured' offenders report writers are more easily able to undertake home visits and include the views of family members and other significant people. As a result, reports on black offenders tend to contain less information than those for offenders from other ethnic backgrounds and, consequently, judicial sanctioning is carried out in the absence of potentially relevant information. Where information is unobtainable or difficult to access, there is also the possibility that what is presented in pre-sentence reports is based on the report writers' own racialised or stereotypical notions of offenders and the areas in which they live.

## Conclusion

Pre-sentence reports reflect an acceptance of quite different images of men and women and of male and female offending. Gender considerations are very influential in the type of sentence recommendation given by the report writer. Women are seen not only in relation to their offending behaviour but also in relation to their conformity to gendered notions of appropriate female behaviour. The implications of this are that the sentence recommendations for female offenders are more related to their gender role than to the actual offence.

Whilst in general the contents of reports are not overtly racist, there is scope for racial bias to occur in the preparation of reports through the practical difficulties faced by the report writer. Courts are not only sites in which formal legal rules are endorsed but are also arenas in which informal social rules are reflected and social divisions reproduced.

The manner in which offenders are presented in court tends to re-articulate the social divisions of class, race and gender which dominate outside the courtroom. In many ways, then, what occurs in the courtroom can best be understood in terms of the wider context of society of which the court is a part.

### Impact of the new constitutional era

The distance travelled between the past and the present is marked by a variety of milestones which include: firstly, the dominant position occupied by the bill of fundamental rights; secondly, the implication for our people of the core values of "an open and democratic society

based on equality, freedom and human dignity"; and, lastly, the real consequences, which we all have to come to terms with, of the transition to constitutionalism....

There must be truth in the observation that there is no future in the past. We must never be afraid to move forward and, although we should look behind us for reference, we cannot afford to move

backwards. The practice of law is not static, it is subject to development and evolution.... We retain from the past that which is worthwhile but we reject that which is no longer consistent with the new value system introduced by the new constitutional order, and it is the role players in the justice system who drive this process forward.

## BITS AND PIECES

### The Prevention of Family Violence Act, 1993

Another interesting development in the innovate administering of this much criticised Act has been the rather bold approach of some magistrates. Applicants in section 3(4) enquiries, who are merely witnesses, have been allowed legal representation on the grounds of equity and natural justice. In the absence of a prosecutor these measures can certainly cure some of the glaring procedural imbalances of the enquiry, but might raise questions about non-compliance with legislative prescriptions. Or does legislative shortsightedness call for urgent measures? Your views, comments and descriptions of your own court practices will be most welcome!

### Creative sentencing?

A recent sentence by a regional magistrate for sexual assault on a minor has received the stamp of approval from Nicro. Apart from the 'normal' conditions of suspension in this four year imprisonment sentence the following more inventive conditions were imposed:

- The accused is to subject himself to a detailed programme of treatment, including, possibly, injections.
- A written quarterly report by the psychiatrist administering the treatment, to the Senior Prosecutor regarding

the treatment, the prognosis for improvement, the risk involved for the protected party and the co-operation of the accused during therapy and treatment is required.

- The accused must pay the cost of the victim's psychiatrist (as well as specific arrangements concerning the manner of payment and the treatment programme of the victim.
- The accused is to pay R10 000 to the father of the victim, to cover transport cost to and from the psychiatrist, and as partial covering for pain and suffering by the victim.

According to Rosemary Shapiro of Nicro "it is imperative that magistrates use their discretion and creativity to sentence in a way that ensures that offenders are accountable for their actions, and take responsibility to take steps to prevent them from recommitting crime. This sentence is a good example of this."

### The Hague Convention

South Africa acceded to The Hague Convention on Civil Aspects of International Child Abduction in July 1997 and Act 72 of 1996 (The Hague Convention on Civil Aspects of International Child Abduction Act) makes the Convention part of our domestic law. This means that, when faced with an application for the return of a child wrongfully removed to or retained

in this country by a state that has accepted our accession, the South African High Court will be obliged to apply the principle of immediate return. This is an important development in our law, and is a deviation from the common law as the High Court will not be able to enter into the merits of the custody dispute underlying the removal or retention.

### Family Courts at last?

The Department of Justice has finally launched into the much-neglected field of family law in Magistrates' Courts, and decided to set up pilot projects in Cape Town, Johannesburg, Port Elizabeth, Durban and Lebowagomo. The existing maintenance court, domestic violence court, children's court and divorce court will be drawn together to function under one roof as a family court. The divorce court will be regulated by the now deracialised divorce court rules of the Black Administration Act (Act 38 of 1927). Although the status of the court seems unlikely to be upgraded immediately, indications of future adjustments are possible.

At present a National Task Team based at the Department of Justice's Head Office is overseeing the setting up of all the pilot courts. Each court has a Local Steering Committee to manage and establish the project. The positions for judicial officers in this new forum have been advertised.



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LRG gratefully acknowledges the financial support of SIDA (Swedish International Development Cooperation Agency), without which this publication would not have been possible.