



The constitutional right to marriage for lesbian and gay people

On the 30th November 2003, the Supreme Court of Appeals in *Fourie and Another v Minister of Home Affairs and Another*, Case Number: 232/2003 declared the common law prohibition of same sex marriage unconstitutional, which paves the way for the statutory and regulatory laws to be changed as well.

The case challenged the common law definition of marriage. According to the current common law definition, marriage is a legally recognised union for life between one man and one woman, to the exclusion of all others while it lasts. By defining marriage thus, the common law expressly prohibited two persons of the same-sex from entering into a legally recognised marriage. In handing down its ruling, the Supreme Court of Appeal had special regard for the constitutional obligations of the Higher Courts. In terms of section 173 of the Constitution, the Constitutional Court, the Supreme Court of Appeal and the High Courts are granted inherent power to develop the common law, taking into account the interests of justice. In addition, section 8(3) of the Bill of Rights provides that when applying a provision in the Bill of Rights to a natural or juristic person a court, in order to give effect to a right in the Bill, 'must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right'. Section 39(2) also provides that when developing the common law, a court must promote the spirit, purport and objects of the Bill of Rights. According to the Supreme Court of Appeal, these provisions, taken together, create an imperative normative setting that obliges courts to develop the common law in accordance with the spirit, purport and objects of the Bill



Wendy Isaack
The Equality Project

of Rights. Doing so is not a choice. It is against this backdrop that the appeal succeeded with costs, with the following order being made by the court:

'The common law concept of marriage is developed to embrace same-sex partners as follows: Marriage is the union of two persons to the exclusion of all others while it lasts.'

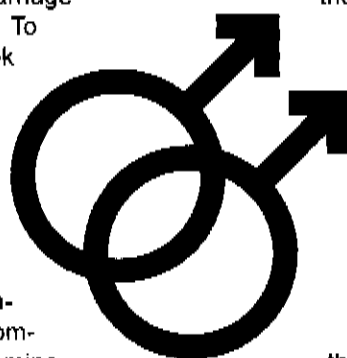
In acknowledging that civil marriages are further regulated by the Marriage Act of 1961, the Lesbian and Gay Equality Project, together with 18 co-applicants have filed a constitutional challenge against the Minister of Home Affairs, the Director General of Home Affairs and the Minister of Justice and Constitutional Development respectively. The purpose of the application is to develop the law so that it recognises, protects and regulates marriages between two persons of the same sex in the same way it does marriage between men and women. To that end, the applicants seek an order declaring section 30(1) of the Marriage Act of 1961 unconstitutional on the basis that it violates the rights of lesbian and gay people to equality, dignity and privacy. It is important to note that the application is not directed at compelling any religious denomination to solemnise marriages that are

considered to be in contravention of any religious laws or teachings. The Lesbian and Gay Equality Project, together with the 18 co-applicants seek the development of the law so that the State, through its officials, is empowered to solemnise same-sex marriages.

Many lesbian and gay people want to get married for the same reasons that drive heterosexual people to get married. These reasons include, love, intimacy, companionship, hope, security and stability. One of the reasons the right to marry is so important is the protection and benefits that the status of marriage offers to the parties. When two people get married, certain legal consequences flow automatically, the right to mutual support, to make certain decisions (for example in a medical emergency), and to inherit each other's property. Marriage often means material security and legal rights to social benefits at work. This security that marriage offers is often a crucial element for the well-being and support of families. A lack of social and legal recognition of same-sex relationships continues to stigmatise lesbian and gay people. In addition to promoting the rights to equality and non-discrimination for all, the full recognition of lesbian and gay marriages will affirm the right to freedom of choice, and will ensure that the law respects relationships which include the recognition of relationships between

two persons of the same sex and the constitutionally guaranteed rights of all South Africans.

Lesbian and gay people therefore are entitled to the right to choose whether to get married or not. This freedom to choose lies at the heart of the values entrenched in the Constitution, the right to equality, dignity and privacy.



What 'Bhe' means for judicial officers

Elmarie Knoetze
Nelson Mandela Metropolitan University

In the previous issue we considered what *Bhe v Magistrate, Khayelitsha* (case CCT 49/03) has to say about the male primogeniture rule of customary law and the legislation regulating it. In this issue, the Court's view on its obligation to develop customary law in terms of section 39(2) of the Constitution is discussed. For the purpose of the discussion a distinction is drawn between the *recognition* and *application* of customary law (in terms of section 1 of the Law of Evidence Amendment Act, 45 of 1988) and the *development* of customary law, as expounded in *Bhe*. In the pre-Constitutional era, section 1 of the Law of Evidence Amendment Act was the main statutory instrument determining the application of customary law. It gives magistrates discretion whether or not to apply customary law when the issue before it arose from black law or custom. This provision has not been repealed by the Constitution. The question is whether *Bhe* impacts on magistrates' discretion in terms of section 1(1).

Recognition and application of customary law

Under section 1(1) of the Law of Evidence Amendment Act '[a]ny court may take judicial notice of ... indigenous law in so far as such law can be ascertained readily and with sufficient certainty ...'. Under subsection(2) any party may adduce evidence of the substance of a legal rule which is in issue at the proceedings concerned. Section 1 has been interpreted as a rule of evidence, meaning that parties are not obliged to prove customary law in each case. However, it must be noted that section 1 is not a mandatory choice of law rule. In terms of this provision a court has a discretion whether or not to apply customary law. Once a court has decided to apply customary law (after consideration of all the facts of the case and all relevant factors), it must take judicial notice of that law, unless the law cannot be ascertained readily and with sufficient certainty. If not readily ascertainable, the party alleging a particular custom must tender evidence according to the principles governing proof of custom or foreign law. This version of the law has to

be specially pleaded. Unfortunately section 1 does not contain any explicit choice of law rules which could assist courts in deciding when to apply customary law. To make this decision a court must take into account what is appropriate and reasonable in the circumstances.

Development of customary law

In its current state, the 'official' version of customary law (as found in textbooks and old case law) often does not reflect the 'living' law. Hence, when the 'living' law contains practices that are more in keeping with constitutional standards, the courts may depart from the 'official' law. Such enabling legislation is found in section 39(2) of the 1996 Constitution which provides that '[w]hen interpreting any legislation, and when developing the ... customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

In the majority judgment of *Bhe*, Langa DCJ opted not to develop the offending rule of male primogeniture, but to strike it down. However, in the minority judgment, Ngcobo J held that the court is obliged to develop the rule in

accordance with the spirit, purport and objects of the Bill of Rights. These different approaches can be explained as follows:

In the majority judgment the Court pointed out that there was insufficient evidence and material before it to enable it to ascertain the true content of customary law (the 'living' version) to develop it. Moreover, the Court held that the difficulty lies not so much in acceptance of the notion of 'living' customary law, but in the *determination of its content*. The Court was also not prepared to allow for flexibility to facilitate the development of the customary law of succession law by using exceptions in the implementation of the male primogeniture rule (e.g. to appoint a wife as representative of an estate or to allow female descendants to benefit from the movable deceased estate) for the following reasons:

- development on a case-by-case basis was too slow;
- the task of preventing the ongoing violations of human rights was urgent;
- to allow development would create uncertainties and there might well be different solutions to similar problems;
- piecemeal development would not guarantee constitutional protection of the rights of the most vulnerable (women and children); and
- more direct action was required to safeguard the foundational values of the Constitution.

Consequently, the Court opted for what it called an 'effective and comprehensive order that will be operative until appropriate legislation is put in place'. In effect, it chose to strike down the rule of male primogeniture in contemplation of future regulating legislation.

Ngcobo J, however, stressed the Court's obligation to develop customary law. He argued that the obligation to develop is 'especially important in the context of customary law', as once a rule is struck down, it signifies its demise. This might be the case while many people still observe the rule, and will continue to do so. Moreover, the rule may already have been adapted to ever-changing circumstances in the society in which it operates, thus reflect the 'living'

law. Ngcobo J also pointed out that the Constitution guarantees the survival of customary law and consequently, it should *develop rather than strike down*.

To circumvent the restriction caused by insufficient evidence before the court, Ngcobo J distinguished between two instances of development: firstly, the adaptation of customary law to changed circumstances (the 'living' version thereof) as practiced by traditional communities; and secondly, the development of customary law by bringing it in line with the rights and values in the Bill of Rights. In the latter instance there is no reliance on evidence of the changed social context within which the rule operates. In other words, if there is insufficient evidence of a particular changed custom, the court may still develop it in accor-

dance with the spirit, purport and objects of the Bill of Rights.

As pointed out above, the decision not to develop the customary law of succession prevailed in *Bhe*. It is submitted that this decision may have far reaching implications not only for the recognition and application of the male primogeniture rule *specifically*, but also for the recognition and application of customary law as a system *generally*. These implications relate *inter alia* to the question whether *abolition* of a customary rule can be regarded as *development* under section 39(2). Another issue is which guidelines a court may use to assist it with the development of the law. What do you think? Please send any ideas to the editor, vkarth@law.uct.ac.za or fax 021 6505647.

Victims' charter approved

Cabinet approved the South African Service's Charter for Victims of Crime on 1 December 2004. It contains the following seven victims' rights: the right to information, the right to protection, the right to assistance, the right to be treated with fairness and with respect for your dignity and privacy, the right to compensation and the right to restitution.

It aims to instil in the people of South Africa an improved sense of security, empowerment and trust in the processes played out in our courts.

The Minister of Justice mentioned that the Charter is consistent with the provision of section 234 of the Constitution and is in line with the National Crime Prevention Strategy's victim-centred vision for the criminal justice system. She said the ultimate goal is victim empowerment through meeting victim's needs, be they material or emotional.

In order to strengthen the rights of victims contained in the victims' charter, a document on the minimum standards on services for victims of crime was also developed. The document not only outlines basic rights and principles, but also supplies detailed information to enable victims to exercise their rights and enable service providers to uphold those rights as outlined by the charter.

The setting out of the minimum standards that a victim of crime can expect from service providers, will ensure that everyone involved in the criminal justice system is cooperating to enable victims to access appropriate services. The Charter together with the minimum standards document is intended to make real government's commitment to improving service delivery for victims of crime.

Text courtesy of www.doj.gov.za

What would you do?

By Anashri Pillay
Public Law Department, UCT

The appellant had been convicted in the magistrate's court of the theft of clothing, valued at R 190, from a clothing line. Due to the fact that he had a number of previous convictions, the case was sent to the regional court for a sentence to be handed down. Section 286(1) of the Criminal Procedure Act 51 of 1977 provides:

Subject to the provisions of subsection (2), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person habitually commits offences and that the community should be protected against him, declare him an habitual criminal, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted.

The regional magistrate declared the appellant to be a habitual criminal in terms of this section. Such a declaration results in an indeterminate sentence of up to fifteen years imprisonment. The individual concerned may be placed on parole but only after a period of seven years imprisonment. It was not clear from the record whether the appellant's right to legal representation had been explained to him in the magistrate's court. He was unrepresented during the proceedings before the magistrate. Once he had been convicted and the matter sent to the regional court, however, this right was explained to him. He chose to continue unrepresented. His reaction, upon being advised of his rights, indicated that he was concerned about the proceedings being further prolonged and that he was not aware of how serious the matter was. He addressed the court in mitigation of sentence, after which the prosecutor addressed the court and asked for an order that the appellant be declared a habitual criminal. The regional magistrate made the order.

What would you do? Should the declaration made in terms of section 286(1) have been set aside? Answer on page 7.

16 days of activism – tl

Soma

Vice President Publicati

The South African Chapter of the International Association of Women Judges (IAWJ) was launched in August 2004. One of its aims was to initiate and/or become involved in community outreach efforts in order to, inter alia, raise the profile of the Justice System as well as awareness that the Judiciary is concerned about and active in community affairs. With this in mind, the IAWJ resolved to join with other organisations to strengthen their initiatives during the 16 Days of Activism Against Gender Violence and Child Abuse, from 25 November to 10 December 2004.

Various activities, programmes and workshops were held in KwaZulu Natal

during the 16 days and the IAWJ decided on 1 December 2004 (World Aids Day) to hold its various activities and to highlight the link between gender-based violence/child abuse and HIV/AIDS. The IAWJ joined with various NGOs and CBOs and other institutions to make the day a memorable for all who were present at numerous Court Centres throughout the Province.

The normally austere and solemn High Courts in Durban and Pietermaritzburg as well as the various Magistrates' Courts were transformed almost beyond recognition. Large banners sponsored by members of the legal profession and other institutions and bearing brightly coloured and appropriate slogans adorned the exterior walls and immediate surroundings of the courts. The Office of the Family Advocate as well as NGOs set up helpdesks and brightly coloured tables from which advice was given and appropriate literature was distributed to the public.

The IAWJ ensured intensive participation in the white ribbon and pledge postcard solidarity campaigns. White ribbons, which are synonymous with the 16 Days of Activism, were distributed to every person who was present. The postcards, which were a pledge for supporting the principles of the 16 Days of Activism, were also distributed to all present for completion. Returned postcards will form part of a National Wall of Solidarity in Pretoria. The sounds of music uncharacteristically filled the air when school choirs and young violin soloists entertained the bemused and almost disbelieving crowds that had gathered, with theme – appropriate songs and music. The Department of Correctional Services displayed the art and crafts of inmates of prisons, which were also theme appropriate. Institutions such as the SAPS, State Attorney's office, the office of the Director of Public Prosecutions and members of the legal profession played

*16 days of activism:
A poem by Atlantis
regional magistrate
Sabrina Sonnenberg*

Tell girl tell

When he take or touch
And your no! don't count
Shout!

When the uncle flirts
And it hurts

Tell girl tell

Secrets must be sweet
When you worry and sweat
Tell girl tell

Somebody will listen
As soon as you tell

If gold and silver
Swore you to silence
You're postponing the pain
'tis not time to be shy

If he steals your soul you'll die
Tell girl tell.



Left: Judge Theron addressing the crowd
Below: Office of the Family Advocate at their table



KWAZULU NATAL

The Kwazulu Natal effort

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ns, IAWJ (South Africa)

a pivotal role in the organisation and execution of the programmes for the day. The Durban High Court boasted a gathering of many dignitaries, amongst whom were the DPP for KZN, Chief Prosecutors of the Province, Senior Counsel and members of the print and national visual media.

Judges and magistrates, court managers, administrative and security personnel were very visible and active at all court centres. Refreshments and snacks were served to members of the public. Each court centre invited guest speakers to address those that were present. The Judge President of Kwa Zulu Natal, the Honourable Justice Vuka Tshabalala and the speaker of the Ethekwini (Durban) Municipality, Councillor Nomusa Dube, spoke at the Durban High Court, while the former Provincial Minister of Health, Dr Zweli Mkhize and his wife addressed the public at the Pietermaritzburg High Court.

Magistrates Court Centres such as Durban, Empangeni, Ladysmith, Port Shepstone, Ramsgate and Verulam, to name a few, were equally abuzz with various activities such as setting up help desks, entertainment by various people and the display of banners. The initiative at the Durban Magistrates Court included lighting candles and praying for those lost to HIV/AIDS, as well as displaying an Aids Remembrance Quilt. Durban and Ladysmith arranged wonderful outreach programmes at primary schools. Durban Magistrates Court boasted a joint effort by the IAWJ, the Prosecution Authority, NGO's Family Advocate SAPS and various other organisations when they visited a local school where, amongst other things, a mock trial (focusing on children in conflict with the Law), an anti-drugs campaign, an HIV/AIDS awareness programme and addresses by numerous speakers from different organisations were held. Food hampers and 'goodie bags' were given to each child. Similar initiatives were arranged in Ladysmith and Verulam.

The local press, radio stations and

some national television stations covered the various activities. The programme held at the Durban High Court was featured in national television news bulletins throughout the day.

The IAWJ and all other organisations and institutions who collaborated with each other for the 16 Days of Activism, can be justifiably proud that their efforts in Kwa Zulu Natal went a long way to

strengthening the solidarity movement whose aim it is to raise awareness around gender-based violence, to ensure better protection for the survivors of violence and to continue working towards the elimination of violence against vulnerable persons such as women and children.

A report on the initiatives in the rest of the country will follow in the next issue.

Court by surprise

Glencoe Magistrates Court

By Vanja Karth and Magistrate Foyster, Glencoe court

The Glencoe Magistrates Court breaks the usual mould of a drab, unfriendly austere building. Instead it is painted in warm colours of 'cinnamon toast', 'clay-oven' and 'herb green' which together with pot plants creates a warm and welcoming yet professional look.

Following an upgrade of the building which took place in 2001, Magistrate Foyster approached all the staff members for a contribution in order to establish a garden. Virtually everyone made a contribution and with the funds they planted 9 palm trees down the side of the building, 14 iceberg roses in front as well as a square yard filled with vegetables and other plants.

Advocates, attorneys and other litigants who visit the court for the first time never fail to compliment and congratulate the staff on the inviting look and spotless building.

When the renovations were taking place, instead of a huge entrance and exit being built as is so common with our courts, Magistrate Foyster instead insisted that ¼ of the space be used for a new office for the maintenance and domestic violence clerk. The result is a space that has been converted into a friendly, spacious office with toilets and baby changing facilities directly opposite.

As well as this, on International Human Rights day (10 December) the court held an info-day aimed at informing women of their rights. Magistrate Foyster believes in prioritising all aspects of family violence at their court, following up on all cases and holding regular info-days in the townships. And perhaps other courts could heed Mrs Foysters words 'this is a family oriented court. It needs a human touch.'

Congratulations to the Glencoe team for proving that it doesn't have to take lots of money to change a court, but rather that all it takes is a bit of inspiration, some innovation and some caring to make our courts into user-friendly places for the public – a true example of 'batho pele' in action!

The criminal justice system

How much transformation has taken place during the first decade of constitutional democracy?

Extracts from a paper delivered at the Conference on the Future of Criminal Justice, 7-8 February 2005, by

Judge D M Davis



In a recent contribution to evaluation of the criminal justice system Wilfried Scharf and Boyane Tshehla (2003 *Acta Juridica* 160 at 161) wrote 'In the early stages of democratization one of the biggest challenges in respect of the criminal justice system is the time-lag between the dismantling of the old South African system and the construction of the new'.

In an assessment of the progress which has been achieved during the first decade of constitutional democracy, account must be taken of this time-lag and the causes therefore. In the first blush of freedom during the 1990's there was unquestionably an underestimation of the extent of the obstacles posed by a lack of State capacity, poor planning and management, ideological divisions, limited resources, and inadequate training of the existing personnel in the assessment of the transformative potential of the system.

Not only was structural change mandated within the context of all these obstacles, but the social and economic instability brought by decades of apartheid rule ensured that crime, particularly of a violent nature, would increase at a significant pace as social and political transformation was initiated...

Not surprising therefore public perception of the criminal justice system deteriorated markedly. Prof. Kotze conducted a study in 2001. (see 2003 (16) *SACJ* 38)From this evidence at least two important conclusions can be tentatively drawn, being

1. There is serious widespread disquiet across the population notwithstanding party political allegiances regarding the criminal justice system, albeit that the elite appear to be more concerned than the public while the former are also better disposed towards due process than the public.
2. Flowing from this, is the problem that the due process model of criminal justice which has been constitutionally entrenched in the 1996 Constitution is under significant pressure from the alternative crime control model.

With these considerations, it is now possible to consider a number of key challenges which will need to be met over the next decade if the criminal justice system has not to be further impaired, both on efficiency and legitimacy grounds.

1. There is a key challenge to preserve the due process model which ... is the chosen constitutional model for our crim-

inal justice system. It is important that the major advantages of this model are adequately presented to the public so that public discourse is not entirely commanded by advocates of the crime control model. Part of the problem with the shape of current public discourse turns on the nature and use of crime statistics...

2. Public discourse thus has the potential to subvert the constitutional scheme. Take for example the death penalty. It is ten years since the death penalty was declared to be unconstitutional by the Constitutional Court (*S v Makwanyane and Another* 1995(3) SA 391 (CC)). [yet]...its reintroduction has consistently been raised by expedient politicians... There is no serious empirical research which can support the argument that the death penalty would better serve the objective of deterrence than a well functioning sentence of life imprisonment; and yet public discourse fuels irrational advantages of the death penalty.

3. After almost eight years it should now be clear that, notwithstanding the introduction of minimum sentences (Act 105/97), the power afforded the courts to depart from the tariff, in the event that it finds that substantial and compelling circumstance exist means that the introduction of a tariff does not invariably result in consistency of sentencing practice...

4. In a few highly publicized cases particularly stemming from the lower courts, sentences are metered out so as justifiably trigger public criticism of gross insensitivity to questions of race and gender. Although these cases are, in my view, few in number, the fact remains that far more needs to be done to ensure consistency of principle in sentencing practice. Judicial education does take place in the area of sentencing. My experience in this connection is obviously limited to the superior courts...the occasional seminar...is insufficient to deal with this critical issue...

5. Of critical concern is the absence of viable alternatives to the carceral option. The reduction of the awaiting trial population notwithstanding, far too many accused become short term prisoners in our prisons. There must be provision for additional facilities in the form of parole officers, community service and other non carceral options to ensure that prison only becomes an option for seri-

ous offences where a long term of imprisonment is necessitated. ...

6. The criminal justice system must absorb more from the principles of restorative justice...Courts in South Africa have been viewed within the so-called triad adopted from the decision in the *S v Zinn* 1969(2) SA 537(A) at 540 G whereby the sentencing officer must be concerned with the offender, the crime

tool of policing. Far too many cases make no use of DNA or other expert evidence. Sadly even with the improvements over the past few years, from time to time sloppy police investigation results in acquittals or discharges in cases where this should not occur...

9. As has been mentioned already the prison population is distressingly high. At present there would appear to be

184 806 prisoners forced into cells built to hold 114 747. Four out of every 1000 South Africans are in prison! The prison system cannot be transformed by the simple expedient of building a few more prisons.

10. Of equal concern is the power of prison gangs. As Jonny Steinberg has noted in his recent book *The Number*, it is remarkable that the basis of this gang culture particularly as developed by Nongoloza in the late 19th and early 20th century 'has been preserved in the prison gangs of today – the 26s, 27s and 28s...' The combination of overcrowding and dominant gang culture is an explosive mix which can only reproduce patterns of violent crime.

Conclusion

Whatever steps are taken to meet these challenges, the criminal justice system is located in the broader socio economic environment of this country. Without speedy delivery of housing, education and communal facilities for the vast majority of South African population, this country will continue to encounter significant crime rates...the delivery of basic goods is inexplicably linked with the problem of transformation of the criminal justice system.



and interest of society. The victim as a specific element in the decision making is significantly omitted. The concerns of the victim need to be considered in the process of sentencing in particular, and in the broader construction of the trial.

In this regard consideration should also be given to the role of indigenous justice in the debate concerning restorative justice as appears to have been done by the South African Law Commission in its Discussion Paper 87 concerning community dispute resolution structures. ...

7. [T]he decline in the number of awaiting trial prisoners from 63964 in 2000 to 48346 in July 2004 is to be welcomed. However there are still far too many awaiting trial prisoners living in horrendous conditions, waiting far too long to come before a court to be confronted with a series of remands. It is clear that bail will have to be used far more imaginatively than at present and cannot simply be an excuse for reinforcing race and class in the criminal justice system.

8. There is still too much reliance on confessional policing, and too little investigation employed as the critical

What would you do? (from page 2)

The answer!

The High Court set aside the declaration that the appellant was a habitual criminal. The court found that it was clear that the appellant was thinking about the time he had already spent in prison before sentence was handed down when he chose not to exercise his right to legal representation. Further, his notice of appeal clearly showed that he did not consider the matter to be serious as the offence, in itself, was relatively minor. The court held that, in light of these circumstances, the regional magistrate should have informed the appellant of the grave nature of the matter and encouraged him to exercise his right to legal representation as soon as the prosecutor had indicated that he intended to apply for a declaration under section 286(1) of the Criminal Procedure Act. Even if the appellant had still chosen not to exercise this right, the fact that he was not given an opportunity to respond to the prosecutor's statement meant that a substantial injustice had occurred. The court set aside the declaration and substituted it with a sentence of 18 month's imprisonment. Although imprisonment is unusual for less serious offences, the court found it to be appropriate because of the appellant's previous convictions. The court also directed that the appellant be informed that the provisions of section 286(1) could be applied, irrespective of the nature of the offence, if he committed any further offence.

S v Dyani 2004 (2) SACR 365

LRG

New look website

LRG's website has been updated. The website can now be found at www.lrg.uct.ac.za. There is a news/events section on the homepage which is updated twice a week with media articles relevant to the judiciary, recent court decisions, news about legislation etc. These are archived and the archive is searchable on the website.

In the course of this year we intend adding online resources for magistrates to the site as well. We hope that our website is informative and a useful resource to all of you who have internet access.

Staff changes

As many of you may know, Tandazwa Ndita of LRG was offered a position as an acting judge in the Cape High Court late in 2004 and will then be taking up a position as senior magistrate in the Mitchell's Plain Court. In her place we welcome Karam Singh who is a graduate of Georgetown, Washington and the University of Cape Town's law schools. Karam has worked in human rights education and training for the past 4 years and also has 9 years experience in human rights litigation and advocacy.



Karam Singh

Women in prisons

A report compiled by Judge Johannes Fagan, has revealed that many women are being held in jail because they cannot afford to pay the fines or the bail.

Of 986 awaiting-trial women, 330 of them cannot pay their bail – which in some cases is as low as R200. A total of 4 152 women are in prison, of whom 3 166 have been convicted, reports Die Burger.

Women constitute 2.3% of the country's prison population, a low percentage compared to other countries. Women

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prisoners are concerned the most about lack of contact with their families, says the report. Of the total in jail, 63% are held more than 100km away from their families.

— *Legalbrief* 11/02/2005

More rural courts

More courts are being opened in rural areas and townships to make the justice system more accessible, said Justice Minister Bridget Mabandla. She said the apartheid legacy of having courts in predominantly White areas was being reversed, and the department aimed to improve efficiency in the justice system in the next five years. She said: 'New courts are being built where none existed before. Those that existed, but are now dilapidated, are being upgraded.' She added: 'The overall staff complement of the justice system is also being increased to facilitate quicker access to, and the resolution of, justice-related matters.'

— *Legalbrief* 4/2/2005

Judge hits out at 'discriminatory' child rape law

A Pretoria High Court judge has slated legislation that 'discriminates' between child rape victims, with the rapists of boys facing far less severe sentences than those who raped girls.

Judge Eben Jordaen described the discrimination between male and female child rape victims as 'ridiculous' and said it cannot be countenanced in a constitutional dispensation such as South Africa's.

He described the indecent assault on a boy (in a case he was reviewing) as 'male rape' and said there is no difference between the trauma experienced by male and female child victims of sexual assault.

The Minimum Sentences Act at present prescribes life imprisonment for the rape of a girl under the age of 16 years, but only prescribes a 10-year sentence for the indecent assault of young boys.

— www.mg.co.za 11/02/2005

Mbeki vows to improve justice system

President Thabo Mbeki in his State of the Nation address, said the government had completed the terms of reference for a comprehensive review of the criminal justice system, launched the Service Charter for Victims of Crime and started training those who would provide the services that derive from the Charter. The monitoring of case loads would be improved to reduce case cycle time, and the performance of justice officers would be improved through the revitalisation of the Justice College.

He also said 'We have also launched three community courts and started eight pilots in six provinces and have started phasing in units of the police service for improved border control.'

He said these and other programmes would continue including:

- Speeding up the creation of community courts beyond the pilot projects so as to have at least two such courts per province.
- Strengthening partnerships with business and communities, including the expansion of the coverage of closed-circuit television in more metropolitan centres.
- Rapidly reducing the number of children in police and prison custody, with emphasis on KwaZulu Natal, Western Cape and Gauteng.
- Completing four new prisons by April 2007 while introducing a new ethos in the treatment of offenders in order to reduce recidivism.
- Bringing into operation more sexual offences courts, taking into account that the conviction rate in these courts – 62 per cent was much higher than in ordinary courts at 42 per cent and improving the capacity of all dedicated courts, including those dealing with car hijacking.

— www.epherald.co.za 15/2/2005

Judicial Matters Amendment Bill

The Judicial Matters Amendment Bill, which will give crime victims more of a say when a perpetrator is considered for parole, has been tabled in Parliament. The Bill also provides for the identity of a complainant to be confidential.

— *Legalbrief* 9/2/2005