

# Women's Representation on the Courts in the Republic of South Africa

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# **WOMEN'S REPRESENTATION ON THE COURTS IN THE REPUBLIC OF SOUTH AFRICA**

RUTH B. COWAN\*

The new South African Democracy (the New Democracy), which established following the fall of the apartheid regime, made an unequivocal commitment to gender equality and women's rights, thanks, in part, to the efforts and advocacy of South African women. The fulfillment of this commitment required a transformation of government and society that would reach and penetrate every institution of the New Democracy. The judiciary, though not exclusive in bearing this transformative obligation, was intended to be an important agent of change. The New Democracy, however, inherited a judiciary that had no legitimacy — a problem that required the complete transformation of the judiciary by race and gender. Unfortunately, the record on this score, more than a decade after the inauguration of the New Democracy, has been woeful. This paper explores the reasons why women are so underrepresented in the courts of South Africa, as well as possible solutions to the problem.

## **I. GENDER EQUALITY AND WOMEN'S RIGHTS IN THE NEW DEMOCRACY**

South Africa's first inclusive election, held in 1994, replaced the apartheid regime with a constitutional democracy based on social justice and fundamental human rights. These fundamental human rights, as expressed in the South African Constitution (the Constitution), included a prominent and unequivocal commitment to gender equality and women's rights — they were to be, as Cathi Albertyn expressed it, "a moral touchstone" of the New Democracy.<sup>1</sup>

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In his first State of the Nation address to Parliament, Nelson Mandela also spoke to the importance of gender equality and women's rights, stating that:

[f]reedom cannot be achieved unless women have been emancipated from all forms of oppression. All of us must take this on, that the objectives of the Reconstruction and Development Programme will not have been realized unless we see in visible and practical terms that the condition of women in our country has radically changed for the better, and that they have been empowered to intervene in all aspects of life as equals with any other member of society.<sup>2</sup>

Evidence of the importance of gender equality and women's rights abounds in the Constitution, the supreme law of the Republic.<sup>3</sup> The language of the Constitution, except where specifically assuring the inclusion of women, is non-sexist. Provisions relevant to gender equality and women's rights appear in the very first section of the very first chapter, which lists human dignity and non-sexism among other

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As Scholar-in-Residence at the Women & Politics Institute of American University's School of Public Affairs in Washington, D.C., she has concentrated on the implementation of South Africa's gender rights and its constitutional mandate to transform the judiciary. In April 2005, she coordinated speaking engagements on gender equity between the women justices of South Africa's Constitutional Court and members of the United States Congress in Washington, D.C. She has made presentations about gender representation in South Africa's superior courts at: law conferences in South Africa, Canada and the United States; universities in the United States; bar association programs in the United States; and the 2006 annual meeting of the South Africa Chapter of the International Association of Women Judges, as the keynote speaker. In 2003, as a member of the Judicial Law Delegation sponsored by the People to People Ambassador Program, she met with judges, magistrates, law professors, advocates and attorneys in South Africa. She has attended Judicial Service Commission interviews of nominees for appointment to South Africa's superior courts and has conducted extensive interviews with a majority of South Africa's women judges and with numerous advocates of gender equality in South Africa. She is also a member of the South Africa Study Group. Her account of public interest litigation on behalf of gender equality, *The Women's Legal Centre During Its First Five Years*, appears in the December 2005 issue of *Acta Juridica*, the publication of the University of Cape Town law school. Currently, she is working on a documentary film and book featuring South Africa's women judges.

1. C. Albertyn et al., Univ. of Witwatersrand, *Engendering The Political Agenda in South Africa*, in *ENGENDERING THE POLITICAL AGENDA: THE ROLE OF THE STATE, WOMEN'S ORGANIZATIONS AND THE INTERNATIONAL COMMUNITY* 162, 162 (U.N. ed., 2000).

2. *Id.* at 162-63, (quoting First State of the Nation Address to Parliament (May 24, 1994)).

3. S. AFR. CONST. 1996 ch. 1, §2.

founding values.<sup>4</sup> The Bill of Rights, the second chapter of the Constitution, prohibits both state and private discriminatory action and covers indirect as well as direct discrimination, an acknowledgment that unwritten, institutionalized sexism restricts women's equality.<sup>5</sup> The Bill of Rights also restricts freedom of expression when such expression advocates hate based on gender and incites to cause harm.<sup>6</sup>

The Bill of Rights prohibits the state from discriminating unfairly on seventeen specified grounds that include gender, sex, pregnancy, marital status, sexual orientation and birth.<sup>7</sup> Other provisions of particular importance to women include: the right "to be free from all forms of violence from . . . private sources," which protects against domestic violence; the right "to make decisions regarding reproduction"; the right "to security and control over" one's body; and, given the reality that poverty is a women's issue, socio-economic rights, such as access to adequate housing, health care, sufficient food and water and social security.<sup>8</sup> The Constitution charges the state with the promotion and fulfillment of those rights that are significant to women, even when those rights conflict with customary and religious law, which are important in South Africa and often restrictive of women's rights.<sup>9</sup>

In addition to these enumerated rights, the Bill of Rights also incorporates rights embodied in international instruments and even foreign laws.<sup>10</sup> The Constitution thereby extends to women the rights contained in instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women<sup>11</sup> and the Vienna Declaration on Violence Against Women.<sup>12</sup>

To promote these envisioned rights, the Constitution establishes independent institutions, including the Commission for Gender Equality and the South African Human Rights Commission.<sup>13</sup>

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4. *Id.* at ch. 1, § 1 (a), (b).

5. *Id.* at ch. 2, § 9 (3).

6. *Id.* at ch. 2, § 16 (2) (c).

7. *Id.* at ch. 2, § 9 (3-4).

8. *Id.* at §§ 26 (1), 27 (1).

9. *Id.* at §§ 7 (2), 31 (a), (b).

10. *Id.* at § 39 (1) (b), (c) (stating that courts "must consider international law; and may consider foreign law").

11. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/180 (1979).

12. Declaration on the Elimination of Violence against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., 85th plen. mtg., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993).

13. S. AFR. CONST. 1996 ch. 9, § 181(1).

The Constitution charges the former with promoting “respect for gender equality and the protection, development and attainment of gender equality.”<sup>14</sup> It charges the latter with promoting “respect for human rights and a culture of human rights” and “the protection, development and attainment of human rights.”<sup>15</sup>

In part, the Constitution’s treatment of gender equality and women’s rights resulted from the efforts of women in the African National Congress (ANC).<sup>16</sup> They mobilized in 1989, after which they met in and out of South Africa.<sup>17</sup> Their meeting at the beginning of 1990 in Amsterdam, about a month before the unbanning of the ANC, produced a statement that the struggle for gender equality should be an “autonomous aspect of the national liberation” effort.<sup>18</sup> This meeting also produced a Programme of Action that called for “building a national women’s movement within the context of a non-racial, non-sexist democratic South Africa.”<sup>19</sup> The efforts of the ANC’s Women’s League also gave impetus to a women’s rights movement that subsequently led to the formation of a broadly based Women’s National Coalition, which by 1994 included ninety-two national organizations and thirteen regional organizations.<sup>20</sup>

Although only a few women participated in the negotiation process that produced the Constitution, those women were nonetheless indefatigable in pressing the women’s agenda, with the aid of the Coalition and its members.<sup>21</sup> Albertyn, in emphasizing the importance of these women’s efforts, noted that by the end of the negotiation process, “women had consolidated a powerful victory — the location of gender equality on the political agenda as an enduring principle of the [New Democracy] . . . .”<sup>22</sup>

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14. *Id.* at § 187(1).

15. *Id.* at § 184(1) (a), (b).

16. *See, e.g.,* C. Albertyn, *Women and the Transition to Democracy in South Africa*, 1994 ACTA JURIDICA 39.

17. *See, e.g., id.* at 47-49.

18. *Id.* at 48.

19. *Id.*

20. *Id.* at 50-51.

21. *Id.* at 54-57.

22. Albertyn, *supra* note 1, at 170. Of course, the contributions of women did not stop at the constitutional negotiations. Having worked hard to get gender equality and women’s rights into the Constitution, feminists knew that what they had won would not be self-implementing. A group of feminist lawyers therefore wanted to use the courts to breath life into women’s rights. As soon as the constitutional negotiations were under way, they developed a proposal and sought funding to establish an organization that would be dedicated to using litigation on behalf of women’s constitutional rights. They persisted in their

## II. THE IMPORTANCE OF THE COURTS TO THE TRANSFORMATION AND THE ADVENT OF AN INDEPENDENT JUDICIARY

The goals of the New Democracy required a transformation of government and society that would reach and penetrate every institution. The judiciary, though not exclusive in bearing this transformative obligation, was intended to be an important agent of change.<sup>23</sup>

Under apartheid, the judicial system was subordinate to parliament and bound to uphold executive and legislative actions regardless of their egregious human rights violations. Under the new Constitution, however, the judicial system became an independent institution "subject only to the Constitution and the law," which it was mandated to apply "impartially and without fear, favor or prejudice."<sup>24</sup> The Constitution gave the judiciary important powers, including the power of judicial review.<sup>25</sup> The Constitutional Court is thus the final arbiter of constitutional matters — it confirms or rejects lower court decisions and is empowered to determine whether Acts of Parliament and the conduct of the President are consistent with the Constitution.<sup>26</sup> The decisions of the Constitutional Court are binding on all persons and on all courts.<sup>27</sup> The Constitution further orders "organs of state" to "assist and protect the courts" in order to "ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."<sup>28</sup>

Significantly, the rights embodied in the Constitution are justiciable rights. This makes clear the courts' importance in fulfilling the Constitution's promises to women, especially given the familiarity of South Africans with "cause lawyering"— that is, the use of courts to advance human rights causes. South African law schools had taught

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determination and, after almost five years, succeeded in establishing the Women's Legal Centre, which would prove to be a valuable advocate for women's rights in the New Democracy. *See generally*, R.B. Cowan, *The Women's Legal Centre During its First Five Years*, 2005 ACTA JURIDICA 273.

23. With the passage of time, moreover, the judiciary took on an even greater importance as the implementation of women's rights by Parliament and administrative agencies slowed to a frustrating pace. *See generally* C. Albertyn, *Defending and Securing Rights through Law: Feminism, Law and the Courts in South Africa*, 2005 POLITIKON 217.

24. S. AFR. CONST. 1996 ch.8, §165 (2).

25. *Id.* at ch. 8.

26. *Id.* at ch.8, § 167.

27. South African Government Information, <http://www.info.gov.za.aboutgovt/justice/courts.htm> (last visited Mar. 10, 2006).

28. S. AFR. CONST. 1996 ch. 8, §165 (4).

courses on cause lawyering and the Legal Resources Centre — co-founded by Arthur Chaskalson, who was to serve as Chief Justice of South Africa and head of the new Constitutional Court — had trained a generation of lawyers in using the courts in the cause of human rights.

### III. THE CHALLENGES OF THE INHERITED JUDICIARY: APARTHEID'S LEGACY OF JUDICIAL ILLEGITIMACY

The popular perception of the judiciary that the New Democracy inherited from the apartheid regime challenged the New Democracy's intended use of the judicial system as an agent of transformation. The judiciary, in the eyes of many South Africans, simply had no legitimacy. Arthur Chaskalson spoke of this problem in the following statement:

In 1994 when the interim Constitution came into force, and in 1996 when the elected Constitutional Assembly adopted our present Constitution, we were one of the most unequal societies in the world. The past hung over us, profoundly affecting the environment. The great majority of the people . . . had been the victims of a system of racial discrimination and repression which had affected them deeply . . . in almost all aspects of their lives.<sup>29</sup>

Under apartheid, the courts were an often-used and reliable enforcer of repression. In other words, they were "positivist functionaries."<sup>30</sup> Deputy Judge President Jeannette Traverso, the second woman ever appointed to the bench, described the court's role by noting that, under apartheid, judicial officers "merely applied the law without any concern for basic principles of justice and human rights."<sup>31</sup> Edwin Cameron, judge of the Transvaal High Court, in his

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29. A. Chaskalson, Address at the Opening of the Judges' Conference (July 16, 2003), in 120 S. AFR. L.J. 652, 659 (2003).

30. Morne Olivier, *The Role of Judicial Officers in Transforming South Africa*, 118 S.AFR. L.J. 455, 457 (2001).

31. J. Traverso, Transformation of the Judiciary: Changing the Racial and Gender Composition, Presentation at Roundtable Discussion Hosted by the Inst. for Democracy and the Univ. of Cape Town's Democratic Governance and Rights Unit 11 (Oct. 11-12, 2005),

submission to the Truth and Reconciliation Commission, elaborated on this with the following statement:

[D]uring apartheid, the judiciary incontestably played a role in the enforcement of a pernicious system. But its very special role must be adequately understood. The distinguishing feature of apartheid . . . was that it was defined and enforced through an elaborate and sophisticated legal system. At the apex of that system were the judges. . . . [A]partheid was . . . sustained and distinguished by legal regulation and by enforcement through a highly sophisticated legal system. The complicity of all judges who held office under apartheid is therefore incontestable. . . . [The legal system] accentuated the crudity and barbarity of the purposes apartheid sought to achieve.<sup>32</sup>

The apartheid judiciary had thus brought the “administration of justice into disrepute.”<sup>33</sup> Blacks, consisting of Africans, Coloreds and Indians, constituted more than ninety percent of the population. Under apartheid, they had been the targets of apartheid’s repression and depravity. The majority of South Africans, therefore, did not respect the judiciary because of its enforcement of apartheid laws.<sup>34</sup>

The judiciary’s negative reputation, moreover, survived beyond the fall of the apartheid system. One partial explanation for this is that “when provided the opportunity to redeem itself during the [Truth and Reconciliation Commission] Legal Hearings, the judiciary, under ‘new’ leadership, abstained from participating in the proceedings.”<sup>35</sup> In addition, the demographics of the judiciary also reinforced its negative

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transcript available at <http://www.idasa.org.za/gbOutputFiles.asp?WriteContent=Y&RID=1432>.

32. Edwin Cameron, *Submission on the Role of the Judiciary under Apartheid*, 115 S. AFR. L.J. 436, 436-37 (1998) (memorandum sent to the Truth and Reconciliation Commission, Sept. 23, 1997).

33. Norman Arendse & Vuyani Ngalwaria, *The Underrepresentation of Blacks and Women at the Bar*, CONSULTAS, May 1998, at 74.

34. See, e.g., *id.*

35. MELANIE LUE-DUGMORE, SOUTH AFRICA: AN EXAMINATION OF INSTITUTIONAL MODELS AND MECHANISMS RESPONSIBLE FOR: THE ADMINISTRATION OF JUSTICE AND POLICING, THE PROMOTION OF ACCOUNTABILITY AND OVERSIGHT; AND A REVIEW OF TRANSFORMATION STRATEGIES AND INITIATIVES DEVELOPED IN RELATION TO THE ADMINISTRATION OF JUSTICE AND SAFETY AND SECURITY 23 (2003), available at [http://www.policeaccountability.co.za/File\\_Uploads/docs/File\\_Download.asp?ThisFile=cajpap.pdf](http://www.policeaccountability.co.za/File_Uploads/docs/File_Download.asp?ThisFile=cajpap.pdf).

reputation. In 1994, for instance, one hundred and sixty-one of the one hundred and sixty-six superior court judges were white males. There were only two women judges, one of whom the apartheid government had appointed as it departed.<sup>36</sup> The almost all white, all male apartheid judges were, by agreement, to remain in their positions, and many of these judges maintained, as one report documented, “the values and attitudes that aided and abetted a system of injustice.”<sup>37</sup>

In addition to the issue of illegitimacy, the judicial system that the New Democracy inherited faced functional problems as well. The inherited superior court system consisted of High Courts and the Supreme Court of Appeal, consisting “of 11 establishments, each with separate and disparate administrations, systems and distribution of resources.”<sup>38</sup> The court buildings were in disrepair, some without such basic equipment as “desks, chairs and telephones.”<sup>39</sup> In rural areas, some court buildings were without electricity or water.<sup>40</sup> In addition, the New Democracy also had to deal with the fact that many South Africans had relied on traditional courts and “community dispute resolution structures,” rather than “the state’s ‘western’ courts” during the apartheid years.<sup>41</sup> These systems relied on customary law that often conflicted with “with constitutional protections such as equality and due process.”<sup>42</sup> These challenges, however, were arguably ancillary to the judiciary system’s perceived illegitimacy, which represented its most salient defect.

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36. *Debating the Transformation of the Judiciary: Rhetoric and Substance*, ePOLITICS SA (Inst. for Democracy in S. Afr.), May 13, 2005, at 2.

37. LUE-DUGMORE, *supra* note 35, at 16. Similar problems plagued the lower courts, which handle approximately ninety-five percent of the court cases in South Africa. *Id.* at 25. Prior to 1993, magistrate judges were civil servants in the executive branch, who were “appointed by the Minister of Justice, and mainly from the ranks of the public service.” *Id.* at 25, 26. This changed in 1993, with the creation of the Magistrates Commission, “a statutory control body for magistrates.” *Id.* at 26. Even after the fall of the apartheid regime, however, the Commission remained a “conservative, exclusively white body that deliberated in Afrikaans.” *Id.* Only after 1998, was the Commission “reconstituted to make it more representative of South African society.” *Id.*

38. *Id.* at 11. The High Courts and Supreme Court of Appeal were previously named the Supreme Courts and the Appellate Division, respectively.

39. *Id.*

40. *Id.*

41. *Id.* at 18.

42. *Id.*

#### IV. IMPERATIVE FOR TRANSFORMATION OF THE JUDICIARY BY RACE AND GENDER

The perceived illegitimacy of the inherited judicial system required the complete transformation of the judiciary by race and gender. This meant eliminating all manifestations of the courts' historic racism and sexism, a change mandated by the Constitution and considered essential by many prominent South Africans. In the words of the Honorable L. Mptia, Deputy President of the Supreme Court of Appeal, "measures [were needed] to improve the image of the courts and . . . ultimately make them acceptable to the majority who had for decades viewed them as illegitimate."<sup>43</sup>

What measures were needed to accomplish this goal? The Department of Justice, early in the life of the new government, prepared a strategic plan of action, *Justice Vision 2000*, based on extensive consultations with "a range of role players from civil society" during 1994 and 1995.<sup>44</sup> The plan suggested training programs for sitting judges and for "aspirant judges" (i.e., those who would be interested in serving as judges), transformation of the professional legal organizations from which judicial appointees are drawn, and changes in legal education.<sup>45</sup> The plan also called for greater representation on the bench of blacks and women. It thus recognized that the judiciary could not consist of ninety-seven percent white male judges and expect legitimacy. Justice, in other words, had to be seen to be believed.

The Constitution reflects this understanding. It stresses the "need for the judiciary to reflect broadly the racial and gender composition of South Africa" and then mandates that this need "be considered when judicial officers are appointed."<sup>46</sup>

The Constitution also provides a new, open, broadly representative system for appointing judges to the superior courts.<sup>47</sup>

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43. Honorable L. Mptia, Transformation of the Judiciary - A Constitutional Imperative, Inaugural Lecture, Univ. of the Free State 22 (Oct. 6, 2004), *transcript available at* <http://www.law.wits.ac.za/sca/speeches/mpati.pdf>.

44. LUE-DUGMORE, *supra* note 35, at 12. The new Minister of Justice, in 1999, further refined this plan, producing a streamlined *10 Point Millennium Plan*. *Id.*

45. *Id.* See also DEPARTMENT OF JUSTICE, JUSTICE VISION 2000: DRAFT STRATEGIC PLAN FOR THE TRANSFORMATION AND RATIONALIZATION OF THE ADMINISTRATION OF JUSTICE (1996), *available at* <http://www.info.gov.za/otherdocs/1996/justice.htm#top>.

46. S. AFR. CONST. 1996 § 174 (2).

47. *Id.* at §§ 174, 178.

Under apartheid, the judicial appointment “system” involved a behind-closed-door process that included the President and the Minister of Justice. It was this process, violative of the New Democracy’s values of transparency and accountability, which produced the almost all white Afrikaner, almost all male judiciary.

As a replacement for apartheid’s closed process, the Constitution established the Judicial Service Commission (JSC).<sup>48</sup> The JSC is chaired by the Chief Justice of South Africa who also heads the Constitutional Court. Its members include: the President of the Supreme Court of Appeal; a Judge President of a High Court selected by his Judge President peers (the masculine pronoun is accurate since the Judge Presidents are all male); when there are matters before the JSC regarding a specific High Court, the Judge President of that court and the Premier of that province; the Minister of Justice and Constitutional Development or her/his designee; presidential appointees; members of Parliament’s National Assembly, some of whom must be from the Assembly’s opposition parties; members of Parliament’s National Council of Provinces, who must have the support of at least six of the provinces; practicing advocates nominated by their peers; practicing attorneys nominated by their peers; and a university law professor selected by her/his peers.<sup>49</sup>

Every office and institution involved in the judicial appointment process — the President, the Chief Justice, the Minister of Justice and Constitutional Development, members of the JSC, the Judge Presidents and Deputy Judge Presidents who constitute the courts’ leadership, and leaders of the organizations representing the legal profession — have more than once asserted the necessity for increased representation of blacks and women in the courts. The JSC gave this necessity prominence in its first annual report, calling on “[t]he Commission [to pay] particular attention to this requirement when it considers applications for judicial appointment.”<sup>50</sup> Carmel Rickard, the legal editor for the *Sunday Times* has recognized — and lauded — the importance given to diversity in the JSC’s guidelines for questioning candidates:

Diversity . . . is a quality without which the Court is unlikely to be able to do justice to all the citizens of the

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48. *Id.* at § 178.

49. *Id.* at § 178 (1) (a - k).

50. JUDICIAL SERVICE COMMISSION, ANNUAL REPORT 2 (1994).

country. . . . [I]t is a component of competence. The court will not be competent to do justice unless, as a collegial whole, it can relate fully to the experience of all who seek its protection.<sup>51</sup>

Many, if not all, of those who have considered the topic endorse the necessity of appointing more blacks and women. The JSC devoted its entire meeting in October 1999 to the transformation of the judiciary, as did the Heads of Court in April 2005. Numerous conferences, formal discussions and symposia have addressed the importance of the transformation of the judiciary by race and gender. Pius Langa, for instance, the current Chief Justice of South Africa, has recognized the significance of a judiciary characterized by "a white unwelcoming face with black victims at the receiving end of unjust laws administered by courts alien and generally hostile to them."<sup>52</sup> In apartheid's all-white judiciary, the Chief Justice declared,

[t]he language of the courts was not that of the majority. Nor was the culture and social practices of the judicial officers that of the racial majority. The white face of justice was not only overwhelming and part of an oppressive discriminating system; it also failed to recognize the humanity of the victims of the apartheid system.<sup>53</sup>

Advocate Dumisa Buhle Ntsebeza realized that such concerns applied not only to race, but also to gender. He recognized that an almost all-white judiciary could not:

pretend that it [could], with legitimacy, deliver justice to a majority black population. No judicial system that holds sacrosanct values of equality between the sexes is going to remain white and black male without having

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51. Carmel Rickard, *The South African Judicial Service Commission 5* (Univ. of Cambridge, Document No. 879, 2003) (from the conference "Judicial Reform: Function, Appointment and Structure," held by the Centre for Public Law on Oct. 4, 2003), available at [http://www.law.cam.ac.uk/docs/view\\_doc\\_info.php?doc=879](http://www.law.cam.ac.uk/docs/view_doc_info.php?doc=879).

52. Mpati, *supra* note 43, at 21 (quoting Justice P. Langa, Judging in a Democracy: The Challenge of Change, Address in Johannesburg, Mar. 20, 2004).

53. *Id.* at 21-22 (quoting Justice P. Langa, Judging in a Democracy: The Challenge of Change, Address in Johannesburg, Mar. 20, 2004).

white and black women sufficiently swelling the ranks of the judiciary.<sup>54</sup>

Transformation was justified, according to Ntsebeza, because blacks and women would “hand down judgments which [would] be respected by the society they serve.”<sup>55</sup> Others have expanded on this.<sup>56</sup> Sir Sydney Kentridge, for example, in a 2004 lecture, argued that:

a generally more diverse bench with a wider range of backgrounds, experience and perspectives on life, might well be expected to bring about some collective change in empathy and understanding for the diverse backgrounds, experience and perspectives of those whose cases come before them.<sup>57</sup>

Of course, these justifications are ultimately superfluous.<sup>58</sup> The South Africa Constitution condenses all such arguments in its unequivocal call for broader racial and gender representation. In South Africa, in other words, the only justification needed is the one provided by the country’s highest authority — the Constitution. The Constitution, however, could not affect this transformation on its own. As Judge C.J. Howie, the President of the Supreme Court of Appeal, observed, “[t]he advent of the liberating and empowering provisions of the Constitution did not act, as might have been expected like the flick of an attitudinal switch . . . .”<sup>59</sup>

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54. Dumisa Buhle Ntsebeza, *Why Majority Black Bench is Inevitable*, SUNDAY TIMES, 25 July 2004, as reprinted in Mpati, *supra* note 43, at 23.

55. *Id.* at 25.

56. See MTK Moerane, The Meaning of Transformation of the Judiciary in the New South African Context, Address given at National Judges’ Symposium (July 16, 2003), in 120 S. AFR. L.J. 708, 712 (2003).

57. Sir Sydney Kentridge, The Highest Court: Selecting the Judges, Sir David Williams Lecture at Cambridge (May 10, 2002), in 62 CAMBRIDGE L. J. 55 (2003) (quoting Lady Justice Hale, 2001 P.L. 489, 501).

58. Chief Justice Pius Langa, in a conversation regarding the representation of women in the judiciary, dismissed these justifications as “given.” Conversation with Chief Justice Pius Langa, in Johannesburg (Dec. 8, 2005).

59. Judge C.J. Howie, The Judiciary in a Changing Terrain, Remarks at the IDASA Conference 2 (Oct. 11, 2005), transcript available at <http://www.idasa.org.za/gb/OutputFiles.asp?WriteContent=Y&RID=1429>.

## V. THE RECORD

Just as there is agreement about the necessity for women judges, there is agreement that the record, more than a decade after the inauguration of the New Democracy, is woeful. Chief Justice Arthur Chaskalson, in his retirement speech at the end of May 2005, observed this, noting that:

[c]lose to 50% of the judiciary are now black, but only about 15% are women. . . . [W]e still have a long way to go to free the potential of black and women aspirant judges and to achieve the transformation that the Constitution demands.<sup>60</sup>

In 2004, only twenty-eight (13.3%) of the 210 judges in the superior courts of South Africa — the twenty-four High Courts, the Supreme Court of Appeal and the Constitutional Court — were women.<sup>61</sup> Among the Heads of Court, there was no female Judge President and there was only one Deputy Judge President.<sup>62</sup> In the Constitutional Court, as of May 2005, only two of the eleven justices were women<sup>63</sup> (a third has since been appointed) and on the Supreme Court of Appeal, only two of the twenty judicial officers were women.<sup>64</sup> There were no women in four of the thirteen regional High Courts and four additional courts had but one woman.<sup>65</sup>

The experiences of many of those few women judges, moreover, reflect badly on the commitment of the male judges to non-sexism. One of the women in one of the one-woman courts serves amidst fifty-four male judges,<sup>66</sup> more than a few of whom resent her

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60. Arthur Chaskalson, Farewell Speech (June 2, 2005), *transcript available at* <http://www.constitutionalcourt.org.za/site/farewell>.

61. Brigitte Mabandla, Minister for Justice and Constitutional Development, Address at the International Association of Women Judges' Conference (Aug. 7, 2004), *transcript available at* <http://www.info.gov.za/speeches/2004/04082016151005.htm>. Numbers coming from the same source (i.e., the Department of Justice and Constitutional Development) differ. This accounts for the discrepancy between the 13.3 percent of women judges cited by Minister Mabandla and the fifteen percent cited by CJ Chaskalson.

62. *Id.* Mabandla notes that the Lower Courts only have 467 women out of 1,779 magistrates. *Id.*

63. Chaskalson, *supra* note 60.

64. *Debating the Transformation of the Judiciary: Rhetoric and Substance*, *supra* note 36, at 4.

65. *Id.*

66. HORTORS LEGAL DIARY 176 (2006).

presence. Another woman judge recalled her non-collegial treatment by her fellow male judges in the following statement:

Normally, among judges who will hear a case together, you talk beforehand about issues you will want to raise when the matter is argued in court. In the first few *years* they would not talk to me and even once we were in court, on the Bench, I would sit there like a spare wheel.<sup>67</sup>

Others recount experience of near non-existence in the eyes of her fellow male judges. During her interview before the JSC, one female candidate commented that after her appointment as an acting judge, she felt as though she were “wearing a cloak that made her invisible to her male colleagues”<sup>68</sup> Women South African judges reiterate these experiences in private conversations. It is their observation that many — too many — male judges and lawyers in the courts believe that women just do not belong.<sup>69</sup>

More than a decade after apartheid and despite the constitutional commitment to transforming the judiciary, men continue to constitute a large majority of the judges. A paucity of appointment opportunities, moreover, has not impeded the appointment of women. More than a dozen vacancies occur twice a year.<sup>70</sup> In the year ending in June 2004, for example, there were seventeen vacancies — two in the Constitutional Court, one in the Supreme Court of Appeal and fourteen in the High Courts.<sup>71</sup> Only four women, however, were appointed.<sup>72</sup>

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67. Carmel Rickard, *Women Judges Tell of Struggle for Acceptance*, SUNDAY TIMES (S. Afr.), Apr. 10, 2005, <http://www.sundaytimes.co.za/Articles/TarkArticle.aspx?ID=1423125> (emphasis added).

68. *Id.*

69. Conversations with female judicial candidates at three-day annual meeting of the South African Chapter of the International Association of Women Judges (Aug 2006).

70. Rickard, *supra* note 51, at 5.

71. JUDICIAL SERVICE COMMISSION, ANNUAL REPORT 2004, at 4 (2004), available at [http://www.doj.gov.za/2004dojsite/reports/judicial\\_ar\\_2004.pdf](http://www.doj.gov.za/2004dojsite/reports/judicial_ar_2004.pdf) [hereinafter 2004 JSC ANNUAL REPORT].

72. *Id.*

## VI. OBSTACLES TO WOMEN'S APPOINTMENT TO THE SUPERIOR COURTS

Women graduate from South Africa law schools in significant numbers. In many of the country's nineteen law schools, they constitute a majority of their class and shine as the best students. Why then are women so underrepresented in the courts of a country that mandates affirmative action in making appointments?

A. *Continuing Patriarchy and Sexism*

One reason women are underrepresented is the persistence of patriarchy and sexism. Patriarchy and its resultant gender discrimination relegated women to motherhood and confined them to the home under male dominance. Women were thus discouraged from the legal profession, which was neither an extension of motherhood nor of home.<sup>73</sup> An often-quoted decision by Judge Solomon, and Melius de Villeurs' subsequent comment about that decision, illustrate this attitude. Judge Solomon concluded that women should not be admitted to the practice of law because of "the immemorial practice of centuries" emanating from the law of nature — a higher law than the law of men.<sup>74</sup> De Villeurs, once Chief Justice of the Orange Free State, later defended that decision. Writing in *The South African Law Journal*, he argued that:

[a] revolt against nature is involved in any proposal to allow women to enter into the legal profession . . . . Their entrance into the profession is incompatible with the idea and duties of Motherhood. . . . At a certain period of life women cease to be capable of exercising the functions of Motherhood; when that time comes the chief objection to their becoming practicing lawyers falls away. Whether at that period of time a woman would care to start a legal practice seems questionable.<sup>75</sup>

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73. See Felicity Kaganas & Christina Murray, *Law and Women's Rights in South Africa: An Overview*, 1994 ACTA JURIDICA 1, 17, 28 (discussing patriarchy in South Africa and underrepresentation of women in professional occupations).

74. *Incorporated Law Society v Wookey* 1912 A.D. 623 (S. Afr.).

75. Melius De Villiers, *Women and the Legal Profession*, 35 S. AFR. L.J. 289, 290-91 (1918).

According to R.P.B. Davis, who was to become an acting appellate judge, “[t]he law of nature destines and qualifies the female sex for the bearing and nurture of the children.”<sup>76</sup> This is “a radical and sacred duty,” and were women to practice law they would be violating this duty, departing from “the order of nature; and when voluntary, treason[ing] against it.”<sup>77</sup> These views, embedded in conventional wisdom, were also incorporated into legislation, as well as into common law and authoritative commentary.

Other countries, of course, are familiar with such patriarchy and sexism, but in South Africa customary and religious law also embodies patriarchy and sexism. These laws apply to African and Muslim women — the overwhelming majority of the female population — and further obstruct the advancement of women. Traditional and religious law comprehensively subordinates women to male authority by consigning women to the home and establishing motherhood as their primary role. Thandabantu Nhlapo, a South African authority on customary law, summarized this in the following statement:

What is it about custom that is inimical to women’s rights? It is everything that emanates from an attitude to women in marriage and in the family which sees them solely as adjuncts to the group, means to the anachronistic end of clan survival, rather than as valuable in themselves.<sup>78</sup>

The challenge to these views does not have a long history in South Africa. Albertyn, writing in 1994, noted that:

[i]t has only been in the immediate past, with the onset of the transition and the breaking down of the racial divisions of apartheid, that equality for all women has been identified as an autonomous aspect of the achievement of democracy<sup>79</sup>

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76. R.P.B. Davis, *Women as Advocates and Attorneys*, 31 S. AFR. L.J. 383, 384 (1914).

77. *Id.*

78. T.R. Nhlapo, *The African Family and Women’s Rights: Friends or Foes?*, 1991 ACTA JURIDICA 135, 138–39.

79. Albertyn, *supra* note 16, at 42–43.

Given that the women's lobby only recently emerged around the time of the constitutional negotiations, their success in establishing non-sexism as a foundational value and in incorporating the extensive list of women's rights represents an enormous achievement.<sup>80</sup> But, this important success did not carry with it either the promise or the expectation that habits long entrenched in custom and law would quickly change. The assumptions, attitudes and beliefs embedded in patriarchy persist, and illustrations of this abound.

Primogeniture prevailed, for example, until 2004, when the Women's Legal Centre won a decision in the Constitutional Court, which found primogeniture unconstitutional.<sup>81</sup> Discrimination against women married under Muslim rites prevailed until that same year when the Women's Legal Centre again won a favorable decision in the Constitutional Court — this time entitling widows married under Muslim rites to the same maintenance benefits accorded widows married under common law.<sup>82</sup> An African woman magistrate, in a conversation with the visiting Judicial Law Delegation in 2003, related that she needed the permission of her father-in law, who was a tribal leader, before she could accept a judicial appointment and — as the appointment required — use the family surname and wear non-traditional clothes.<sup>83</sup>

A more recent example of the lingering patriarchic attitude toward women is provided by the rape trial of former Deputy President Jacob Zuma. His supporters gathered in front of the court house as the court considered the case. One day, as a woman entered the court house — a woman that Zuma's supporters mistook for the complainant — his supporters hurled stones at her. On another day, as the *Mail & Guardian* reported, his supporters shouted words of abuse.<sup>84</sup> Their behavior provoked the bishops of the Methodist Church to express their "disgust" and call on the police "to bring order and charge people

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80. See *supra* note 22 and accompanying text.

81. *Bhe & Others v. Magistrate, Khayelitsha, & Others* 2004 (2) SA 544 (CC) (S. Afr.).

82. *Daniels v. Campbell NO & Others* 2004 (5) SA 331 (CC) (S. Afr.).

83. Interview with anonymous magistrate, in South Africa (Mar. 2003) (the name of the magistrate and the exact location of the interview has not been listed at the request of the magistrate, who wishes to remain anonymous).

84. *Bishops' Disgust at Conduct at Zuma Trial*, MAIL & GUARDIAN ONLINE (S. Afr.), Mar. 8, 2006, [http://www.mg.co.za/articlePage.aspx?articleid=266159&area=/zuma\\_report/zuma\\_news/](http://www.mg.co.za/articlePage.aspx?articleid=266159&area=/zuma_report/zuma_news/).

responsible for actions which incite violence and publicly degrade the dignity of any citizen.”<sup>85</sup>

These assumptions, attitudes and beliefs persist in the courts, as well as in other societal institutions. The examples previously given relate to the treatment of women judges by male members of the Bench. But these assumptions, attitudes and beliefs are evident in judicial decisions as well. A candidate for appointment to the High Court, while serving as Active Judge, asserted with pride that he had exercised judicial discretion in not imposing the minimum sentence prescribed by law on a repeat offender who had raped three girls: ages seven, eight and nine. The candidate, in justifying his decision not to impose the minimum sentence, stated that he had no evidence before him that the children had suffered any physical injury, that the rapist was a frail seventy-one year old grandfather and that the rapist had not used a gun.<sup>86</sup>

Another judge, participating in a discussion on how to advance the appointment of women, revealed a more subtle vestige of sexist attitudes. He started by asserting his “sympathy” for what he called the “fast tracking” of women judges. The judge qualified his expression of “support,” however, with the following statement:

What I would urge is that the exercise be implemented with sensitivity and care. An attractive destination on a cheap ticket is something we would all like. That is a fine thing in the world of travel. Nobody wants that route to a prized professional position.<sup>87</sup>

An assumption that women are not as qualified as men lies buried, though not far from the surface, in this call for “sensitivity and care.”

These assumptions, attitudes and beliefs may well even be present in the JSC, the agency charged with advancing the transformation of the judiciary by race and gender. This is more than suggested by an exchange during one of its October 2005 interviews. After one JSC member had asked a woman judicial candidate what would be necessary to keep her in the country if she did not get the

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85. *Id.*

86. Interview of Mr. Dumisani Hamilton Zondi by the JSC, in South Africa (Oct. 19, 2005) (transcript on file with the *University of Maryland Law Journal of Race, Religion, Gender and Class*).

87. Howie, *supra* note 59, at 16.

appointment, another JSC member responded, "[w]hat about a boyfriend?"<sup>88</sup>

### *B. Gender Equality Subordinate to Racial Equality*

Another reason for the underrepresentation of women is that gender equality continues to be subordinate to racial equality as a concern among those engaged in the transformation of the judiciary. Although feminists won significant gains with respect to the Constitution's treatment of gender equality, their achievements on paper were not subsequently matched by deeds in the New Democracy. In the New Democracy, the focus has been and continues to be on race, often at the expense of gender considerations.

Before the New Democracy, during the decades of struggle against apartheid, women's equality demands were subordinated to the goal of political liberation. This was reflected in the Freedom Charter, written in 1955 by the national liberation organizations, and again, thirty-three years later, in the Constitutional Guidelines prepared by the ANC.<sup>89</sup>

The women in the national liberation struggle wanted to prevent the classic post-struggle invisibility of women that had occurred in other African countries.<sup>90</sup> Following the presentation of the Constitutional Guidelines, women in the ANC, as previously indicated, held a number of meetings, concluding with a conference in Amsterdam that proclaimed that gender equality should be an autonomous aspect of national liberation.<sup>91</sup>

Five months after Amsterdam, the ANC National Executive Committee issued a policy statement that responded to the position urged by the women at Amsterdam. It acknowledged, as Albertyn explained, that:

the emancipation of women had to be addressed "in its own right." This statement represented a substantial shift in the ANC position on women. It was the first official acceptance of the independent nature of

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88. Interview of Professor P. Andrews by the JSC, in South Africa (Oct. 18, 2005) (transcript on file with the *University of Maryland Law Journal of Race, Religion, Gender and Class*).

89. Albertyn, *supra* note 16, at 45–46.

90. *Id.* at 49, n.46.

91. *Id.* at 47–48.

women's liberation. It was also significant in its acknowledgment of the material, cultural and ideological context of gender oppression and facilitated a far more sophisticated policy and strategy on gender in the mass democratic movement than previously.<sup>92</sup>

Despite the seeming acceptance that women's rights should be incorporated into the Constitution, and the demonstration of politically important numbers behind the call for gender equality, few women were included among the delegates who were to negotiate the new constitution. In the 1992 negotiations, only twenty-three of the 400 delegates were women and in the next round of negotiations women were also few in number.<sup>93</sup>

In addition to the disadvantage of numbers, the women delegates, constituting a women's lobby, had to confront strong opposition from the traditional and religious leaders. During the debate on the Bill of Rights in August 1993, for instance, Chief Nonkonyana — a member of one of the traditional leaders' delegations — objected to the equality provisions, stating that, as a traditional leader, he did not support equality for women.<sup>94</sup>

On the other hand, "South African feminists . . . made it clear," as Felicity Kaganas and Christina Murray observed, "that they [were] not prepared to offer up women's rights to the cause of protecting an institution distorted by colonialism, apartheid, and the opportunism of powerful men."<sup>95</sup> The attempt by traditional leaders to erect a wall between customary law and the Bill of Rights was, as Albertyn reported, "one of the most bitterly fought battles in the [negotiation] process."<sup>96</sup>

Although the members of the Women's Lobby achieved only partial success regarding their objectives in the negotiations — as Albertyn observed, their achievements were "tempered by several levels of marginalization and exclusion . . ."<sup>97</sup> — it was undeniable that "women . . . made significant gains in the struggle for gender

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92. *Id.* at 49.

93. *Id.* at 54–55.

94. *Id.* at 57 (citing *Equality for Women? No Thanks*, SUNDAY TIMES (S. Afr.), Aug. 8, 1993).

95. Kaganas & Murray, *supra* note 73, at 19–20.

96. Albertyn, *supra* note 16, at 40.

97. *Id.* at 56.

equality.”<sup>98</sup> As noted by Nhlapo, the Women's Lobby prevented “an outright victory of the traditionalists”<sup>99</sup> by achieving a compromise that gave constitutional recognition to customary and religious law, but restricted these laws from violating the rights extended to women.<sup>100</sup> Such achievements during the negotiations were sufficient to place the South Africa Constitution, in its treatment of gender equality, way ahead of the constitutions of other countries.

The autonomous status that the feminists sought for their emancipation and that they achieved in words, however, was not matched by deeds. Although “race” and “gender” became linked, as if one word, the subsequent focus has been and continues to be on race. Not infrequently, this is to the exclusion of gender considerations. Various reports that purport to deal with the subject of the transformation of the judiciary either defer consideration of gender until late in the document or omit any reference to gender altogether.<sup>101</sup> When this observation was made to a male advocate for more women judges — an advocate important in the judicial appointment process — he implicitly acknowledged this assessment when he asserted that this was understandable given South Africa's apartheid and colonial past.<sup>102</sup> “Gender” is thus tagging along behind “race.” As the Legal Editor of the *Sunday Times* stated it:

[t]here's tremendous pressure on the JSC from politicians, from the President and Minister of Justice down, to speed up the number of black judges appointed. . . . [T]hough I have to say that while politicians are concerned about colour, there's very little expression of concern about gender and there still are hopelessly few women on the Bench.<sup>103</sup>

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98. *Id.* at 60.

99. Thandabantu Nhlapo, *African Customary Law in the Interim Constitution*, in *THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE* 157, 157 (Sandra Liebenberg ed., 1995).

100. S. AFR. CONST. 1996 ch. 2, §§ 7 (2), 31 (a), (b).

101. Wyndham Hartley, *Judge Seeks 'Revolutionary Change'*, *BUSINESS DAY* (S. Afr.), Apr. 5, 2005, available at <http://www.businessday.co.za/Articles/TarkArticle.aspx?ID=1414659>.

102. Conversation with Chief Justice Pius Langa, *supra* note 58.

103. Rickard, *supra* note 51, at 6.

*C. Underrepresentation of Women at the Bar*

A third reason for the underrepresentation of women in the superior courts is that they are even more woefully underrepresented in the legal pool from which candidates are selected.

The legal practitioners in South Africa divide into advocates and attorneys. The advocates, like barristers in the United Kingdom, are the court specialists. Their clients are the attorneys who brief them. The attorneys, like the solicitors in the United Kingdom, are the lawyers who work directly with the plaintiffs or defendants. Advocates and attorneys differ typically in their legal education and certainly in their experience as lawyers. They go through different qualifying processes and belong to different professional organizations. The advocates' organizations are the General Council of the Bar and its constituent Bars; the attorneys' organizations are the Law Societies. Since 1994, attorneys have been permitted to argue in the superior courts, but this has made little difference in the predominance of advocates there.

The Bar and the Bench have been, and continue to be, closely linked. Appointments to the High Court were, in the pre-democracy years, almost exclusively selected from the senior ranks of the Bar. Although the Minister of Justice under the New Democracy enlarged the pool to include attorneys and magistrates, the advocates still dominate appointments because of the preference for their education and courtroom experience and from the bias of habit in the selection process.

Women represent a small minority of advocates. This is striking given that women represent a majority of students in many of the law schools and are often reported to be among the brightest students. Yet, they are not at the Bar in numbers that reflect their engagement in law schools. In April 2004, eighty-four percent of the 1871 advocates were males.<sup>104</sup> Similarly, 311 of the 324 (ninety-six percent) of the senior advocates who constitute the prime pool for judicial appointments were males.<sup>105</sup>

The numbers improve for women if one were to reduce the years of experience, but not to an impressive level. Only twenty-six

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104. *Debating the Transformation of the Judiciary: Rhetoric and Substance*, *supra* note 36, at 4.

105. *Id.*

percent of the 513 advocates with less than five years of experience were women. As one member of the Bar stated:

[A]t all levels of the profession the female population of the Bar is disproportionately small, commencing at the stage of . . . intakes. . . . The proportion of [the Cape] Bar [one of the constituent Bars] that [is made up of] women is increasing only at an unacceptably slow rate. Over the past two years it has increased less than 1% where the Bar has increased in size by 10%. Over ten years, the proportion of female members . . . has increased by only 4.8% [while the] Bar has increased by over 50%.<sup>106</sup>

#### *D. Women's Invisibility*

A fourth reason offered here to account for the absence of women from the Bench is their invisibility. Anna-Marie de Vos, a lone woman serving on a court with fifty-four men, referred to her low profile when interviewed by the JSC in October 2005 for the position of Deputy Judge President.<sup>107</sup> Another woman judge, as noted previously, spoke of her invisibility.<sup>108</sup> This is partly a result of the small number of women, who easily get lost in the crowd of men, and partly because more visible posts, such as Judge Presidents, Deputy Judge Presidents, and heads of professional association committees, are held by men. Many women judges stress in conversations the need for greater visibility so that women in judicial robes can become part of the cultural consciousness and become perceptually normalized.

#### *E. Lackluster Effort of Judicial Gatekeepers*

The JSC and the Judge Presidents are important gatekeepers positioned at the doors to the courts. The JSC, although designated to advance the mission of a more representative judiciary, may be blocking appointments of women rather than advancing them.

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106. Susannah Cowen, *Breaking through Glass Ceilings*, ADVOCATE, Dec. 2005, at 47.

107. Interview of Judge Anna-Marie de Vos by the JSC, in South Africa (Oct. 19, 2005) (transcript on file with the *University of Maryland Law Journal of Race, Religion, Gender and Class*).

108. See *supra* note 68 and accompanying text.

Except for the President's appointees, the Constitution identifies the positions of the members and the processes for their selection. The Constitution, however, requires no affirmative action, as is clear from the membership. In 2004, only four (17.4 percent) of the twenty-three members were women.<sup>109</sup> At some JSC meetings, there can be as many as thirty participants since the Constitution provides that the Judge President of a High Court and the Premier of the province within which the court is located may also serve when candidates are being interviewed for a judicial vacancy on that court.<sup>110</sup> When the few women members are interspersed among thirty interviewers, their presence is diminished.

Reference was previously made to the exchange between JSC members when considering a candidate who was living outside of South Africa.<sup>111</sup> Carmel Rickard commented on this in the *Sunday Times*. She advised that the:

[n]ext time the Judicial Service Commission indulges in its periodic soul-searching over the lack of women on the Bench, in the legal profession or on its short list of candidates to interview, members should reflect on that exchange. For one thing, it illustrates that judges are not the only people who should undergo sensitivity training — those choosing them could also do with some help.<sup>112</sup>

She further compares the treatment of women being interviewed by commission members with the treatment of male interviewees, noting that it provided:

repeated evidence of just how much gender-related prejudice still flourishes. And the answers to many of the questions about what prevents women advancing in the profession were played out in public. . . . [T]heir indifferent response to the realities raised by [one of the women candidates] illustrates why the perception

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109. 2004 JSC ANNUAL REPORT, *supra* note 71, at 7.

110. S. AFR. CONST. 1996 § 178 (1) (a - k).

111. *See supra* note 88 and accompanying text.

112. Carmel Rickard, *Judging Women Harshly*, SUNDAY TIMES (S. Afr.), Oct. 23, 2005, available at <http://www.sundaytimes.co.za/Articles/TarkArticle.aspx?ID=1735237>.

continues that the Bench and the profession remain hostile to women.<sup>113</sup>

The Judge Presidents, all of whom are male, have not demonstrated their commitment to women's advancement to the Bench. They are key to the appointment of women as Acting Judges and as Acting Judge Deputy Presidents — both of which are significant appointments in evaluations for appointments as Judge or as Deputy Judge President. The Minister of Justice and Constitutional Development made an implicit, though indirect, acknowledgment that the Judge Presidents have been less than aggressive in fulfilling their obligation to transform the judiciary regarding gender. She reported at the launching meeting of the South Africa Chapter of the International Association of Women Judges (IAWJ) that the Judge Presidents "have indicated to me that they are committed to the transformation of the judiciary and to enabling the progression of women to the Bench. There will be more acting positions for women aspiring to become judges."<sup>114</sup>

## VII. INTERVENTIONS FOR CHANGE

What is being done to get more women — of course, *qualified* women — onto the Bench? There are proposals for long-range efforts similar to those enumerated in the *10 Point Millennium Plan*.<sup>115</sup> Although these are important, there are also interventions that can increase the number of women judges and women judicial leaders now.

Even though the numbers of women judges and advocates are small, there are twenty-four women judges from whom Judge Presidents and Deputy Judge Presidents could be selected, and there are 122 women — advocates as well as additional women attorneys and magistrates — who are qualified for appointment as judges. The pool, small though it is, is large enough to provide the small number of women appointees that could double the number of women judges, making a dramatic increase of 100 percent.

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113. *Id.*

114. Mabandla, *supra* note 61.

115. See *supra* note 44.

One intervention that the newly established South Africa chapter of IAWJ was considering was the preparation of a directory that would include the women "in the pool."<sup>116</sup> The directory would identify the women and describe their qualifications. The Heads of Court, leaders of the General Counsel of the Bar, the Minister of Justice and Constitutional Development and others in positions to help advance women's legal careers, but who claim they cannot find any women, could turn to the directory. The directory could also be used by journalists to provide the greater visibility so needed for the women already in the pool.

An effort to accelerate the learning process for aspirant judges through a training program for women only has been promised by the Chief Justice. An effort is also underway to increase the number of women advocates. Susannah Cowen, an advocate, is taking on the challenge of increasing the numbers for women. She is mobilizing women advocates with the goal of identifying:

a large pool of successful, largely African, senior female advocates from which the JSC can pick the best and most suitable when selecting South Africa's judges. . . . While the Bar is no doubt not the only good place from which to secure judges, it is a superb training ground.<sup>117</sup>

Cowen has also identified the difficulties that discourage and preclude women from remaining at the Bar, some of which are easily eliminated where there is the will and support to do so.<sup>118</sup>

Are there other avenues to change? The Chairman of the General Council of the Bar, the national professional organization of advocates, has asserted over his years as a leader of the Bar, the necessity for changing the composition of the Bar so that it retains its favored position as the recruitment source for the judiciary — something he and, one can presume, most advocates desire. If the Bar does not change voluntarily, then he foresees a threatening reality of parliamentary intervention.<sup>119</sup> Perhaps ultimately the will to assist and

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116 As of the date of this article, the IAWJ has not been able to proceed with this initiative.

117. Cowen, *supra* note 106, at 47.

118 *Id.* at 47-49.

119. Arendse & Ngalwaria, *supra* note 33, at 75. .

enable women to stay in the Bar will materialize in combination with the threat of parliamentary action and the mobilization of women advocates.

## VII. CONCLUSION: THE SYMBOLIC IMPORTANCE OF WOMEN IN COURTS

In South Africa, the appointment of women judges has a symbolic importance that it does not have in other countries. Those who were in “the struggle” and who contributed to the vision of a society based on non-racialism and non-sexism, made a gender balanced judiciary part of the social contract. Success in moving toward a judiciary that broadly reflects the gender composition of South Africa symbolizes that the government has the will and capability to keep that part of the social contract. By extension, it also symbolizes that it has the will and capability to move toward keeping the other social contract promises. Conversely, insufficient advancement toward a gender balanced judiciary weakens confidence in the will and capability to consolidate democracy. The presence of women on the bench in South Africa tells a story of promises kept or promises broken. “Failure to move forward towards gender equality,” the President of the Republic of South Africa stated plainly in 2002, “can only mean that we are not advancing significantly toward the creation of a new South Africa.”<sup>120</sup>

The account of South Africa's progress regarding the transformation of the judiciary by gender is important to activists in other countries where the ideal of a human rights-based society is alive. For people in those countries, the Republic of South Africa is an exemplar. How South Africa moves toward its ideals has the power to encourage or discourage what happens elsewhere in the world.

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120. Thabo Mbeki, *Gender Equality the Litmus Test for Social Change*, ANC TODAY (S. Afr.), Aug. 8, 2002, <http://www.anc.org.za/ancdocs/anctoday/2002/at32.htm>.

