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THE RULE THAT A SPOUSE CANNOT FORFEIT  
AT DIVORCE WHAT HE OR SHE HAS  
CONTRIBUTED TO THE MARRIAGE:  
AN ARGUMENT FOR CHANGE

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*Section 9 of the Divorce Act 70 of 1979 allows for an order that one of the spouses may forfeit some or all of the financial benefits of the marriage at the time of divorce. South African courts have interpreted this remedy so as to limit forfeiture to the spouse who contributed least to the joint estate or whose separate estate shows the smaller accrual, while the spouse who had made the larger financial contribution to the marriage is protected from forfeiture. This article provides three sets of arguments questioning this interpretation. First, it shows the existence of Roman and Roman-Dutch authorities to the effect that a spouse could forfeit assets which he or she had contributed to the marriage. It also highlights early South African case law holding that both financial and non-financial contributions should be taken into account when making a forfeiture order at divorce. The article also analyses case law to illustrate how the courts' treatment of marital misconduct and contribution operate to favour the kinds of behaviour typically engaged in by men, while devaluing the behaviour of typical wives. This may amount to discrimination on the basis of gender and may therefore be vulnerable to constitutional challenge. The article concludes by looking forward to a long overdue overhaul of South African family law legislation, specifically the Divorce Act. It examines the role which a general redistributive discretion should play in ameliorating the consequences of the chosen matrimonial property regime at the end of marriage, but cautions that, in sexist societies, judicial discretions are often exercised in ways which benefit men at the expense of women.*

I INTRODUCTION

Unlike other systems of family law, South African law allows parties to choose their matrimonial property system by way of antenuptial contract. Although the financial consequences of the dissolution of marriage follow broadly from the chosen matrimonial property system, certain statutory and common-law mechanisms allow for a variation from the rigours of the applicable property regime. This article concerns one of these mechanisms, namely forfeiture of benefits in terms of s 9 of the Divorce Act 70 of 1979. The focus is upon the scope and interpretation of this remedy, particularly the narrow interpretation of the Divorce Act, which limits forfeiture orders to the spouse who contributed least to the joint estate or whose separate estate shows the smaller accrual. Conversely, the spouse who had made the larger financial contribution to the marriage is protected from forfeiture orders. My goal is to provide arguments upon which an alternative interpretation of the Act could be based, which allows for either spouse to

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forfeit economic benefits at divorce. The reasons for my dissatisfaction with the current rule are also reflected by Heaton in her 2005 article, which argues that:

‘a forfeiture order often is rather an empty remedy. Forfeiture does not entail that a spouse loses his or her own assets. It merely entails that he or she loses his or her claim to the matrimonial property the other spouse contributed . . . In essence, therefore, a forfeiture order is effective only if it is made against the poorer spouse . . . It is arguable that restricting the scope of forfeiture to a spouse’s claim to share in the matrimonial property the other spouse contributed amounts to indirect gender discrimination. Wives generally own and acquire fewer assets and therefore contribute less matrimonial property than husbands do.’<sup>1</sup>

Section 9(1) of the Divorce Act provides that a court may ‘order that the patrimonial benefits of the marriage be forfeited . . . if the court . . . is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefitted’. The Divorce Act therefore contains no explicit indication that a forfeiture order may only be made against the spouse who contributed least to the joint estate or whose accrual is smallest. Instead, this particular application of the forfeiture rule proceeds from the common-law view that the patrimonial benefits of a marriage in community of property or a marriage subject to the accrual system are to be found in the right to share in financial wealth which was generated by the other spouse. Accordingly, the spouse who contributes most to the joint estate or the combined accrual gains no patrimonial benefits from the marriage and cannot therefore be subject to a forfeiture order. This reasoning is explained by Sonnekus as follows:

‘Forfeiture of benefits at divorce arises in matrimonial property law because in all forms of marriage, excepting those which exclude all forms of financial sharing, it is possible that one spouse may at divorce gain financial benefits which were in fact contributed by the other spouse. Because marriage inevitably creates the possibility that one spouse may make a larger contribution than the other, forfeiture of benefits is ordered in those exceptional circumstances where . . . a divorce court must intervene to prevent undue benefit being afforded to one spouse. Marriage and its patrimonial consequences therefore never guarantee the chance of financial gain to one party only, as would a raffle at a funfair.’<sup>2</sup>

<sup>1</sup> Jacqueline Heaton ‘Striving for substantive gender equality in family law: Selected issues’ (2005) 21 *SAJHR* 547 at 557–8.

<sup>2</sup> J C Sonnekus ‘Verbeurdverklaring van voordele: Welke voordele? *JW v SW* 2011 (1) SA 545 (GNP)’ 2011 *TSAR* 787. The text contains my own translation of the original Afrikaans, which reads: ‘Verbeurdverklaring van voordele binne die huweliksvermoënsreg kom by egskeiding, op uitsondering van huwelike met koue uitsluiting, ter sprake ten aansien van elke huweliksvermoënsregtelike bedeling want by elke ander huweliksvermoënsregtelike bedeling bestaan die moontlikheid dat die een party danksy die huweliksbedeling by beëindiging van die huwelik voordele mag geniet wat in der waarheid deur die ander party bygedra is. Trouens, juis omdat huweliksruiting met uitsondering van koue uitsluiting onder elke ander vermoëns-

The remainder of this article consists of three substantive parts. The first of these traces the legal development of forfeiture of benefits from Roman and Roman-Dutch law to pre-Divorce Act South African law. I show how the statements of the old authorities to the effect that a spouse can forfeit assets which he or she had contributed to the marriage were gradually, and by way of questionable arguments, transformed into a consensus that forfeiture cannot be ordered against the spouse who had made the larger financial contribution to the marriage. I also highlight early South African case law, now seemingly forgotten, to the effect that both financial and non-financial contributions should be taken into account when making a forfeiture order at divorce.

In the second part of the article, I deal specifically with the courts' application of forfeiture of benefits in terms of s 9 of the Divorce Act. I argue that the case law illustrates three competing, and often contradictory, principles which undergird forfeiture of benefits, namely punishment of marital misconduct, financial contribution to the marital estate, and *pacta sunt servanda*. I further show how the courts' treatment of marital misconduct and contribution consistently operates to favour the kinds of behaviour typically engaged in by men, while devaluing the behaviour of typical wives.

In the third part, I attempt to show that the current interpretation of the forfeiture rule is neither inevitable, nor legally sound. In order to do this, I first examine the extent to which pre-1979 authorities and arguments should apply to the contemporary legal and social situation, and then proceed to the definitional questions of what constitutes the patrimonial benefits of marriage and what is meant by a contribution to the financial benefits of marriage. I briefly compare the legal phenomena of forfeiture of patrimonial benefits upon divorce, on the one hand, and the application of the 'bloedige hand' rule when the marriage is dissolved by death, on the other hand.

Finally, I analyse the effect of the constitutional prohibition of gender discrimination on the way in which courts have interpreted forfeiture of benefits. The article concludes by looking forward to a long overdue overhaul of South African family law legislation, specifically the Divorce Act. It examines the role which a general redistributive discretion should play in ameliorating the consequences of the chosen matrimonial property regime at the end of marriage, but cautions that, in sexist societies, judicial discretions are often exercised in ways which benefit men at the expense of women.

sregtelike bedeling dié element van 'n kanskontrak het dat een party meer as die ander mag bydra, word vir verbeurdverklaring voorsiening gemaak in daardie uitsonderlike omstandighede waar . . . die bevoordeling van die nie-bydraer as dermate onbehoorlik geag word dat die egskeidingshof behoort in te gryp. Huweliksluiting en die gepaardgaande vermoënsregtelike gevolge daarvan is dus nooit 'n gewaarborgde wenkaartjie vir net een party soos by 'n kermis se tombolatafel nie.'

## II HISTORICAL BASIS FOR FORFEITURE OF BENEFITS

### (a) Roman law

The concept of financial penalties at divorce for unacceptable marital conduct predates the Divorce Act. Its origins have been traced back to Roman law where, except for marriages subject to *manus mariti*,<sup>3</sup> spouses generally retained their own assets and liabilities for the duration of the marriage, akin to modern marriages out of community of property.<sup>4</sup>

Upon marriage, women would usually be provided by their families with a dowry, or *dos*, as their contribution to household expenses during marriage. According to Jolowitz & Nicholas, it was also possible for a woman who was *sui iuris* to provide her own *dos* from property which belonged to her.<sup>5</sup> Although the *dos* would legally become the property of the husband for the duration of marriage, his rights to manage and dispose of this property were soon restricted by various mechanisms. The provider of the *dos* could stipulate, by way of the *cautio rei uxoriae*, that the *dos* should be returned at the end of the marriage. In Republican times, the praetorian action (*actio rei uxoriae*) extended the right to reclaim the *dos* at the end of marriage also to cases where no such stipulation had been made. A husband faced with a claim for the return of the *dos* at divorce could retain certain portions thereof in favour of the children of the marriage and, significant for this article, could retain one-eighth of the *dos* for minor misconduct of the wife during marriage and one-sixth for major misconduct, using the *retentio propter mores uxoris*.<sup>6</sup> In this way a wife could forfeit certain marital property provided either by her or on her behalf as a result of marital misconduct. Conversely, the husband could also suffer financial penalties for misconduct at divorce. According to Corbett, '[b]y proving his adultery, the divorced woman could exact immediate repayment of that part of the dowry which under ordinary circumstances was recoverably only in instalments, and additional fruits or revenues for the rest'.<sup>7</sup>

During and after the classical period, husbands often made marriage settlements in favour of their wives (*donatio propter nuptias*) in order to

<sup>3</sup> In marriages *cum manu* the wife was subject to her husband's *potestas* and could therefore not own any property, but by the classical period (from the time of Augustus to Diocletian) these kinds of marriages were mostly replaced by so-called 'free marriages'. On the establishment, effects and prevalence of *manus mariti* generally, see Percy Elwood Corbett *The Roman Law of Marriage* (1930) 107–18; Fritz Schultz *Classical Roman Law* (1951) 115–21.

<sup>4</sup> H J Erasmus, C G van der Merwe & A H van Wyk *Lee and Honoré Family, Things and Succession* 2 ed (1983) para 13; H R Hahlo *The South African Law of Husband and Wife* 5 ed (1985) 373; Schultz op cit note 3 at 118; D J Joubert 'Verbeuring van voordele van huwelik na egskeiding' (1982) 15 *De Jure* 217 at 218–19.

<sup>5</sup> H F Jolowitz & Barry Nicholas *Historical Introduction to the Study of Roman Law* 3 ed (1972) 236; Schultz op cit note 3 at 123.

<sup>6</sup> Schultz op cit note 3 at 126–8; Corbett op cit note 3 at 182–4 and 192–3.

<sup>7</sup> Op cit note 3 at 133.

increase the money available to support their widows.<sup>8</sup> Although there seems to be some uncertainty about the exact nature of this donation, it is clear that the Christian Roman emperors enacted legislation, reflected in the *Corpus Iuris Civilis*, to punish spouses who divorced without sufficient reason or who committed adultery, by providing for penalties payable from both the dos and the *donatio propter nuptias*.<sup>9</sup> These punishments were imposed on husbands and wives alike and husbands could, therefore, forfeit assets which they had contributed to the marriage.

I should emphasise that this does not mean either that the punishments for marital misconduct of men and women were the same or that similar norms of marital behaviour applied to husbands and wives. These financial penalties for misconduct co-existed with deeply sexist views of appropriate marital conduct<sup>10</sup> and, at least before the *lex Julia de Adulteriis*, with the husband's right to kill a wife whom he discovered in the act of adultery.<sup>11</sup> My argument is simply that, in terms of Roman law, a wife could forfeit assets brought into the marriage either by her on her behalf, and that the same was true for the husband.

(b) *Roman-Dutch law*

The Roman rules relating to marriage and divorce were not replicated in Roman-Dutch law,<sup>12</sup> which was based on a completely different system. In this system a wife did not usually contribute a dowry to the marriage, and unless an antenuptial contract stipulated the contrary, all pre-marital and subsequently acquired assets and liabilities fell into a joint estate administered by the husband in terms of his marital power.<sup>13</sup> Nevertheless, forfeiture of benefits remained a possibility at divorce.

Significant for the purpose of my argument is Voet's statement to the following effect:

*'Innocent spouse can claim dowry or donatio propter nuptias and one-third of other goods, with some exceptions. —*

Moreover that a sundering of the marriage can be claimed on account of adultery by the innocent spouse has been fully stated in our title on *Divorce*. And that a dowry or donation on account of marriage is taken away from the guilty spouse, and passes to the innocent spouse along with the amount of the third part of the dowry out of the remaining goods, unless there are children in existence, as also in some few other excepted cases has been explained in our title on *The Claim for Dowry on Dissolution on Marriage*.

<sup>8</sup> Schultz op cit note 3 at 120.

<sup>9</sup> Sheldon Amos *History and Principles of the Civil Law of Rome* (1989) 286; Corbett op cit note 3 at 205–10.

<sup>10</sup> For instance, see Corbett op cit note 3 at 219, 244.

<sup>11</sup> See Corbett op cit note 3 at 135; Jolowitz & Nicholas op cit note 5 at 118.

<sup>12</sup> Schultz op cit note 3 at 104–5.

<sup>13</sup> R W Lee *An Introduction to Roman-Dutch Law* 5 ed (1953) 67; Hahlo op cit note 4 at 13; D S P Cronjé & Jacqueline Heaton *South African Family Law* 2 ed (2004) 69–70.

*This law holds good in Holland by custom —*

This also holds good by the customs of today, since it was ordained by the States of Holland that the penalties above described must be inflicted, without prejudice to the innocent spouse of his or her own rights which are available to him or to her in accord with the written law.<sup>14</sup>

Lybrechts<sup>15</sup> and Kersteman<sup>16</sup> support the argument that a person could, in Roman-Dutch law, be ordered to forfeit financial assets which he or she had brought into the marriage by citing a 1545 decision of the Court of Holland holding '[t]hat an adulterous man forfeit in favour of his wife all assets which he had contributed'.<sup>17</sup>

In the matter decided in 1515 between Klemente Klaas and Dirk Hein Thou, the Court of Holland held that the adulterous husband

'forfeited all the assets that he had brought into the marriage and ordered that the defendant husband hand over all these goods to the plaintiff together with any fruits which he had received . . . and to return to the plaintiff all the assets which she had brought into the marriage together with their fruits'.<sup>18</sup>

This provides clear evidence of cases in Roman-Dutch law which ordered a guilty party to forfeit assets which he or she had contributed. These decisions to deprive the adulterous spouse of his or her own assets would resonate with the punitive approach to adultery in Roman-Dutch law. The Political Ordinance of 1 April 1580<sup>19</sup> explicitly acknowledged the religious condemnation of adultery<sup>20</sup> which justified the list of financial and other punishments meted out to different categories of adulterers and concluded:

'Ended dat al onvermindert alsulken recht als de geoffenseerde parthye, 'tzy Man ofte Vrouwe, jegens den Overspeelder competeert, soo tot scheydinghe van den Houwelijke, als andersints near rechen, soo ook by desen verstaen worden in vigeur te blyven alle de straten ende poenen in de Keyserlike ende beschreven Rechten gestatuert, tegens alle crimen van ontschaeken, ontvoeren end bloedschenden, ende diergelijke gequalificeerde hoerereyen.'<sup>21</sup>

<sup>14</sup> Voet 48.5.11, Gane's translation, footnotes omitted. Voet is supported by various authorities, but there are several authorities to the contrary. For a more complete overview of the authorities, see *Celliers v Celliers* 1904 TS 926 at 926–7; *Higgins v Higgins* (1885–7) 5 ECD 344 at 344–5.

<sup>15</sup> *Red Vertoog* 1.12.5 at 168.

<sup>16</sup> *Woordenboek* s v 'dissolutie' at 105–6.

<sup>17</sup> Lybrechts *Red Vertoog* 1.12.5 at 168: (my translation of 'dat een Man, die staande Huwlyk, Overspel hadde gecommiteerd, ten behoeve van zyne Huisvrouw, alle zyne ten Huwlyk aangebragte goederen hadde verbeurd')

<sup>18</sup> *Sententien van de Hooge Raad* cas 8 (1515) 25 at 26: (my translation of 'verbeurd te hebben alle de goederen die hij aan de voorst impetrante ten Huwelyk gebracht heft, en condemneerd die voorst gedaagte die voorst goederen d'impetrante te laten volgen, met de vruchten die hij daar van ontvangen heeft . . . die impetrante te restituieren, all de goeden die zij aan den gedaagde ten Huwelyk gebracht heeft met de vruchten van dien gevallen . . .').

<sup>19</sup> *Groot Placaat Boek* vol 3 504 arts 14–17 setting out the punishments.

<sup>20</sup> Art 14.

<sup>21</sup> Art 18, meaning that the penalties in the Political Ordinance of 1580 co-existed with the rights the innocent party had at divorce.

Indeed, a rule that a guilty party would only forfeit financial benefits to the other spouse if he or she had made a smaller financial contribution to the marriage would be diametrically opposed to the criminalisation of adultery and the severe penalties instituted by the Political Ordinance.

South African authorities disagree about the weight of the common-law authorities on the question whether a guilty party could also forfeit assets which he or she had brought into the marriage. For instance, Joubert interprets the Roman-Dutch authorities as support for the view that a spouse against whom a forfeiture order is made could retain his or her own contributions to the joint estate — an interpretation similar to that usually given to s 9 of the Divorce Act.<sup>22</sup> Hahlo, in contrast, argues that '[t]he courts could go further and order that the defendant forfeit to the plaintiff the whole or part of his or her own estate, or his or her own contributions to the marriage'.<sup>23</sup> Although an exhaustive analysis of the applicable Roman-Dutch law cannot be undertaken in this article, I would argue that the examples I have supplied provide evidence that, if the Roman-Dutch authorities on this issue are contradictory, there is room for questioning and perhaps reforming the rule that forfeiture of benefits only applies to the spouse who had contributed least to the marriage. I will refer to this again in part IV below.

(c) *Pre-1979 South African case law*

The first reported South African case on the issue which I have been able to find was the cryptic summary of the judgment of the Cape Supreme Court in *Dieperink v Dieperink* to the effect that 'the defendant [was] not entitled to her share in the community, except so far as she may have contributed any property towards the community'.<sup>24</sup> A more comprehensive report exists for the 1888 decision in *Mulder v Mulder*,<sup>25</sup> in which Esselen and De Korte JJ reviewed the old authorities and held that 'the Court has the right to declare that all property brought into the marriage by the guilty party shall be forfeited in favour of the innocent spouse'. Although Jorissen J dissented, the majority decision was followed in the same jurisdiction in *Du Toit*<sup>26</sup> in which a husband was ordered to forfeit his part of the joint estate without qualification as to the source of the assets.

<sup>22</sup> Joubert op cit note 4 at 219n9, relying on Van Leeuwen *RHR* 3.3.20, 4.24.10 and 4.37.8; Voet 24.2.9; Schorer *ad Gr* 1.4.20; Kersteman *Woordenboek* s v 'dissolusie' and 'overspel'; Van der Keesel *Th* 88; Van der Linden *Jud Pract* 2.6.7, *Holl Cons* 6 at 321. Lee op cit note 3 at 87–8 and Erasmus et al op cit note 4 para 131 seem to agree with Joubert, citing in addition Arntzenius *Institutiones juris Belgici de conditione hominum* 3.7.15, 18–19 and 28.

<sup>23</sup> Hahlo op cit note 4 at 14 note 79, relying on Van Leeuwen *Cens For* 1.1.5.9; Kersteman *Woordenboek* s v 'dissolutie'; *Sententien van den Hoogen Raad* no 8 at 28.

<sup>24</sup> (1877) 7 Buch 92.

<sup>25</sup> (1888) 2 SAR 238. The case also refers to *Hattingh v Hattingh* 1887 T UR, and *Hetel v Hetel* 1888 T UR, but I have not been able to locate these cases.

<sup>26</sup> (1894) 1 OR 163.



In *Dawson v Dawson* De Villiers CJ discussed the Roman and Roman-Dutch law as follows:

'There is considerable obscurity as to the Roman law and the Dutch law on the subject. In Justinian's time, and before he legislated on the subject, it may be broadly stated that a guilty wife who was divorced forfeited the *dos* contributed by her or on her behalf, and the guilty husband forfeited the *donatio propter nuptias* contributed by him. Justinian provided for the case of marriages entered into without a *dos* or *donatio propter nuptias*, and enacted in effect (Code 5. 17. 11) that in such a case the innocent husband or wife, as the case might be, should acquire one-fourth part of the property of the guilty spouse, provided it did not exceed one hundred pounds . . . Both *Matthaeus* (de Crim 48.3.14) and *Brouwer* (de jure Con. 2.33.24) construe the Political edict. of 1580, art. 18, as reserving Justinian's constitution intact in the law of the Netherlands.'<sup>27</sup>

This analysis acknowledges that in Roman and Roman-Dutch law it was possible for a spouse to forfeit assets which he or she had brought into the marriage. Nevertheless, the Chief Justice held:

'I am not aware of any case in which any South African Court has travelled beyond the broad principle that a husband or wife who is entitled to a decree of divorce on the ground of adultery is also entitled to claim a restitution of all property which he or she may have given by way of donation to the guilty spouse, including property contributed by the innocent spouse to the community.'<sup>28</sup>

The latter part of the dictum represents a considerable narrowing down of Justinian's rule which, according to the court, had been retained in Roman-Dutch law, and it makes no mention of the cases of *Mulder* and *Du Toit*. However, because the question whether a guilty spouse could forfeit his or her own property was not central to the case, these statements were obiter dicta.

The matter was again considered in *Celliers v Celliers*,<sup>29</sup> in which the court analysed the Roman-Dutch authorities together with the cases which were decided differently<sup>30</sup> and held that, despite the lack of clarity on the issue in Roman and Roman-Dutch law,<sup>31</sup> the weight of authority and past practice in South African courts dictated that a court would not order a guilty spouse to forfeit property which he himself or she herself had brought into the marriage. Solomon J declared that 'even if it had been at one time part of the law of Holland to decree a forfeiture of one-fourth of the share of the guilty party in the community of property, it is quite clear that that law had become obsolete'.<sup>32</sup> In his separate concurring judgment, Mason J dealt specifically

<sup>27</sup> (1892) 9 SC 446 at 447–8.

<sup>28</sup> *Ibid* at 448. See also *Higgins v Higgins* supra note 14 at 344.

<sup>29</sup> *Supra* note 14.

<sup>30</sup> The majority decision referred to both *Mulder* supra note 25 and *Du Toit* supra note 26 at 931–3, but held that they had interpreted the old authorities incorrectly. It preferred the interpretation in *Dawson* supra note 27.

<sup>31</sup> *Celliers* supra note 14 at 930.

<sup>32</sup> *Ibid* at 931.

with the Roman authorities who held that a guilty wife could forfeit both her dos and a portion of the property which she brought into the marriage. He nevertheless held that '[t]he dowry in Roman law was a very special thing. It was property which the wife agreed, before marriage, to contribute for the support of the marriage.'<sup>33</sup>

The Roman-Dutch authorities which support forfeiture of benefits that had been brought into the marriage by the guilty party were said to reflect only:

'their opinion as to how the Roman law should be applied. When, however we come to the practice of the court, we find that they acted on the doctrine (which seems a doctrine of common sense and a doctrine of equity) that the guilty spouse . . . should not get a profit out of the marriage — that that guilty spouse should not, by dissolving the marriage, get a benefit by a wrong act.'<sup>34</sup>

Mason J's reasoning does not, however, address the authorities to the effect that a guilty husband could forfeit the *donatio propter nuptias* which he had contributed; this, therefore, directly contradicts the idea that a person could not forfeit financial benefits which he or she had contributed to the marriage. It also directly contradicts Voet's explicit statement that the rule allowing forfeiture of the dos and the *donatio propter nuptias* was applied in Holland,<sup>35</sup> and the cases to which I referred above.<sup>36</sup> *Celliers* nevertheless represents the emergence of a judicial consensus that forfeiture can only be ordered against the spouse whose financial contribution to the marriage was smaller.<sup>37</sup>

Another significant issue in the pre-1979 South African cases was raised by *Gates v Gates*.<sup>38</sup> Although the court followed the accepted view that a guilty party cannot be ordered to forfeit his or her own financial contributions, it added that, in establishing the contributions made by the guilty and innocent spouses respectively:

'it seems to me indisputable that although a wife may not, in a positive sense, actually bring in or earn any tangible assets or money during the marriage, her services in managing the joint household, performing household duties, and caring for children, have a very real and substantial value, which may well, and usually does, exceed the bare cost of her maintenance . . . [I]f the wife did not herself perform them, her husband would normally be obliged to employ someone else to do so for a remuneration, and thus the joint savings would presumably be to that extent diminished . . . Moreover, if a wife were entitled to receive no credit for such services, it would seem to follow that a wife who,

<sup>33</sup> *Ibid* at 934.

<sup>34</sup> *Ibid* at 934–5.

<sup>35</sup> See the quote from Voet 48.5.11 cited in II(b) above.

<sup>36</sup> See the cases cited by Lybrechts and Kersteman and the 1515 case discussed in II(b) above.

<sup>37</sup> Applied in *Ferguson v Ferguson* 1906 ECD 218; *Murison v Murison* 1930 AD 157; *Anthony v Anthony* 1946 CPD 871; *Allen v Allen* 1951 (3) SA 320 (A). Cf *Ex parte de Beer* 1952 (3) SA 288 (T) and *Steenberg v Steenberg* 1963 (4) SA 870 (C).

<sup>38</sup> 1940 NPD 361.

instead of devoting herself exclusively to the performance of the domestic duties of the household, went out to work, and thus earned monetary remuneration, would be in a better position in regard to a division of the community . . . than the wife who attended exclusively to domestic duties, for she would, I think, clearly be entitled to be credited with the amount of her earnings in any computation of the value of her contributions to the joint estate; whereas the wife who had devoted herself entirely to domestic duties, and in so doing perhaps worked equally hard, would be entitled to be credited with nothing on that account.’<sup>39</sup>

In *Oppenman v Oppenman*<sup>40</sup> the court referred to a dictum from *Ex parte de Beer*<sup>41</sup> to the effect that contributions to a marriage ‘include not only wind-falls such as bequests and gifts, but also acquisitions made as a result of industry, economy or investment.’

Although these cases typically refer to contributions resulting from ‘industry or thrift’, except in *Gates*, the contributions seem to have been of a monetary nature, rather than the domestic work and childcare which women usually undertake. Nevertheless, the principle that non-patrimonial or indirect contributions should be taken into account in calculating the spouses’ contributions for the purposes of forfeiture of benefits seems to have been accepted in some of the pre-1979 cases.

### III FORFEITURE OF BENEFITS IN TERMS OF SECTION 9 OF THE DIVORCE ACT

#### (a) *The application of s 9*

Academic authors have argued that the court’s discretion to order forfeiture of benefits in terms of s 9 of the Divorce Act differs substantially from the common-law power to order forfeiture. Indeed, according to Hahlo, ‘[t]he forfeiture rule of s 9(1) has little in common with the pre-Divorce Act forfeiture rule, except the word “forfeiture”’.<sup>42</sup> The main reasons for this distinction between forfeiture in terms of the common-law and forfeiture in terms of the Divorce Act seem to be, first, that divorce in terms of the Divorce Act is no longer fault-based and, consequently, that factors other than adultery or misconduct may lead to a forfeiture order in terms of s 9. Furthermore, courts have a wider discretion to order or withhold forfeiture and can order full or partial forfeiture in terms of s 9, which appears not to have been possible in terms of the common law.<sup>43</sup>

Despite the increased ambit of courts’ discretion when ordering forfeiture based on the Divorce Act, the courts have not been willing to question the pre-Divorce Act understanding that a party cannot be ordered to forfeit

<sup>39</sup> Ibid at 365–6.

<sup>40</sup> 1962 (1) SA 456 (SWA) at 457D–F.

<sup>41</sup> Supra note 37 at 289. See also *Ferguson v Ferguson* supra note 37 at 224, 226, 227; *Smith v Smith* 1937 WLD 12 at 128; *Anthony v Anthony* supra note 37 at 877.

<sup>42</sup> Hahlo op cit note 4 at 373. See also Erasmus et al op cit note 4 at 131.

<sup>43</sup> Joubert op cit note 4 at 220–1.

benefits which he himself or she herself had contributed. Instead, the pre-1979 position on this issue was explicitly confirmed after the adoption of the Divorce Act.<sup>44</sup>

The s 9 requirement that a court should order forfeiture if one spouse would be ‘unduly benefitted’ in the absence of such an order, characterises forfeiture as a mechanism to achieve fairness and justice in property distribution at divorce. On further analysis, there appears to be three competing, and sometimes contradictory, principles underlying the implementation of this mechanism. On the one hand, the common-law principle of imposing financial penalties for moral and sexual misconduct remains one of the strongest foundations for ordering forfeiture. However, as in the pre-1979 South African cases, the principle of punishment is trumped by the principle of contribution, articulated in the rule that a guilty spouse cannot forfeit what he or she had brought into the marriage — the subject of this article. The application of the principle of contribution means that only the spouse who had made the smaller financial contribution will be penalised for morally and sexually reprehensible conduct.

In several cases, the rationale of preventing undue benefit by way of forfeiture has been extended to argue that a spouse would be unduly benefitted merely by obtaining a share of financial benefits which he or she did not contribute — in other words, that the principle of contribution is the only, or the most significant, indication of fairness in property distribution. In *Engelbrecht*,<sup>45</sup> for instance, where the spouses had been married in community of profit, the husband argued that his current wife should forfeit half of the matrimonial home because he had bought the house with the proceeds of a policy on the life of his former wife. Although there was no misconduct on the part of the wife, the argument seemed to be that a right to share in assets which she did not contribute in itself constituted an undue benefit which should be forfeited.<sup>46</sup> These arguments have repeatedly been rejected by the Supreme Court of Appeal.<sup>47</sup> As the court explained in *Engelbrecht*:

‘Joint ownership of the other spouse’s assets is acquired when parties marry. In the absence of an order of forfeiture of benefits, the spouse who had contributed less will always benefit at the dissolution of marriage, unless both spouses’ contributions to the joint estate (either before or during marriage) had been of exactly equal value. This is an inevitable consequence of their matrimonial property regime.’<sup>48</sup>

<sup>44</sup> *Rousalis v Rousalis* 1980 (3) SA 446 (C) at 450E; *Khoza v Khoza* 1982 (3) SA 462 (T) at 464–5; *Singh v Singh* 1983 (1) SA 781 (C) at 790B–D; *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C); *JW v SW* 2011 (1) SA 545 (GNP) paras 20–23.

<sup>45</sup> *Supra* note 44.

<sup>46</sup> For similarly based claims, see *Watt v Watt* 1984 (2) SA 455 (W); *Matyila v Matyila* 1987 (3) SA 230 (W); *Binda v Binda* 1993 (2) SA 123 (W); *Botha v Botha* 2006 (4) SA 144 (SCA).

<sup>47</sup> *Wijker v Wijker* 1993 (4) SA 720 (A) at 731F; *Botha v Botha* *supra* note 46.

<sup>48</sup> *Engelbrecht* *supra* note 44 at 601F–G, my translation of the original Afrikaans: ‘Mede-eienaarskap van die ander gade se goed is ’n reg wat elk van die egliede by die

In rejecting the abovementioned application of the principle of contribution, the courts resorted to a third, dominant principle of South African matrimonial property law — the contractual principle of *pacta sunt servanda*, which dictates that spouses are entitled to the financial benefits as stipulated by their chosen matrimonial property regime.

My analysis illustrates the relationship between the policies and values which underlie what our law considers to be fair property allocation at divorce. Foundational to our system is the idea that parties should make choices about the financial consequences of their marriage before they enter into marriage, and that these choices should be enforced at divorce. This is qualified by the ancient principle that moral or sexual guilt should be met with financial punishment which, in turn, is limited by the logic of contribution, protecting the party who had made the larger financial contribution from the adverse consequences of his or her misconduct. Contribution, however, does not trump the fundamental value of *pacta sunt servanda*, since it does not provide a guilty spouse in a marriage in community of property with a right to more than half of the joint estate, even if the guilty spouse had in fact contributed all of the assets. I will return to the problems associated with the principle of contribution and the need for a general redistributive mechanism for marital property in the parts of the article that follow.

(b) *Contributions*

A consequence of the particular application of forfeiture of benefits in post-1979 cases is that a court has to evaluate the spouses' respective contributions in order, first, to ascertain whether one of them would be unduly benefitted by a property distribution according to their matrimonial property regime, and secondly, in order to determine whether the party against whom a forfeiture order is granted, is protected against such an order by having made the larger contribution. Most frequently, spouses' respective contributions have been defined in purely financial terms. The only post-1979 case which cursorily refers to the extended definition of spouses' contributions, as articulated in *Gates*,<sup>49</sup> is *Singh*. However, in this case, the contributions of the wife were clearly disparaged and entitled her to only twenty per cent of the joint estate:

'[T]he defendant has done very little to establish her contribution save to show that she looked after the children when they needed looking after, kept house,

huweliksluiting verwerf. Tensy die partye (hetsy voor of tydens die huwelik) presies gelyke bydraes tot die boedel gemaak het, sal die een wat minder bygedra het by ontbinding van die huwelik bo die ander bevoordeel word as verbeuring nie beveel word nie. Dit is 'n onafwendbare gevolg van die partye se huweliksgoedereregbedeling.'

<sup>49</sup> *Supra* note 38.

helped to build it in the first place (to a very small extent), and contributed some uncertain sums of money at various times towards food.<sup>50</sup>

(c) *Moral guilt*

It is worth analysing the actual ways in which courts apply the factors which, according to s 9, could lead to an order for forfeiture of benefits. They are ‘the duration of the marriage, the circumstances which gave rise to the break-down thereof, and any substantial misconduct on the part of either of the parties . . .’<sup>51</sup>

Reflecting the shift from guilt to irretrievable breakdown in our divorce law,<sup>52</sup> these factors represent a considerably wider discretion for judges than the adultery or malicious desertion to which the common-law rule of forfeiture was limited. Nevertheless, a review of the cases illustrates that moral guilt remains the most important consideration when judges exercise their discretion to order forfeiture. It is particularly in judges’ understanding and articulation of these moral norms and standards that we discern most clearly the gendered expectations and double standards of appropriate behaviour by wives and husbands.

Take, for instance, the attitudes towards domestic violence which, in the recent case of *JW v SW* was regarded as substantial misconduct because:

‘[d]omestic violence, in particular against women, strikes at the foundation and premise of a non-sexist and democratic order. It is a repulsive phenomenon which has no place in a society founded on the values of freedom, dignity, honour and security.’<sup>53</sup>

Leaving aside the court’s ultimate refusal to order forfeiture of benefits in this case, it is helpful to compare earlier courts’ treatment of domestic violence. In *Singh* the wife’s adultery and desertion of the home was regarded as serious misconduct for the purposes of forfeiture of benefits, but her allegations that she had left her home to escape her husband’s regular assaults and threats to kill her were dismissed as merely a part of ‘the cat-and-dog life of the parties’.<sup>54</sup> In *Wijker*<sup>55</sup> the wife’s refusal to give her husband shares in her business was adjudged just as reprehensible as the assaults by her husband, while in *Soupionas* the evidence of repeated assaults by the husband was accepted, but the court held that:

‘[t]he importance of these assaults are mitigated by the fact that the marriage was

<sup>50</sup> *Singh* supra note 44 at 790D–F.

<sup>51</sup> Section 9(1) of the Divorce Act.

<sup>52</sup> Erasmus et al op cit note 4 para 131 opine that ‘[i]n terms of the new divorce law the relative guilt or innocence of the spouses in the breakdown of their marriage is in principle irrelevant and forfeiture of benefits has thus acquired the entirely different function of preventing a spouse from acquiring a morally indefensible financial advantage from his failed marriage.’ I think that this is an overstatement, given the retention of ‘substantial misconduct’ in s 9.

<sup>53</sup> *JW v SW* supra note 44 para 29.

<sup>54</sup> Supra note 44 at 785B–C.

<sup>55</sup> Supra note 47.

contracted after living together for a long period and the plaintiff must have been well aware that she was marrying a man of violent temper and thus voluntarily exposed herself to assault'.<sup>56</sup>

My point is this: sexist attitudes about domestic violence, patriarchal double standards about sexual infidelity, and gendered norms about the behaviour of wives and husbands which are broadly held in society also colour judges' evaluations of spouses' behaviour which, in turn, influence the exercise of the discretion to order forfeiture of benefits. This means that misconduct by wives would often furnish reasons for ordering forfeiture against them, while misconduct by husbands may be overlooked or dismissed as being less serious. Gendered evaluations of misconduct operate in conjunction with definitions of marital contribution which favour the economic contributions which men typically make and with the rule that the spouse who had contributed most cannot be subject to forfeiture of benefits. The combination of these three features of forfeiture of benefits means that it is more likely to be used to punish wives who transgress sexual and social norms. Husbands, by contrast, are protected against forfeiture orders, first by sexist definitions of marital misconduct; secondly, by courts failing to take cognisance of the kinds of non-monetary contributions which wives typically made; and, finally, by husbands usually having made larger financial contributions during the marriage.

#### IV CHALLENGES TO THE RULE THAT A SPOUSE WHO HAD CONTRIBUTED MOST CANNOT FORFEIT

Having sketched the history of forfeiture of benefits and its current application by the courts, the this part of the article aims to argue that the rule which protects a spouse who had made the larger financial contribution to a marriage against a forfeiture order is not as inevitable as it first appears. I contend that there is space for a different interpretation, and present some legal and policy considerations to justify my argument.

##### (a) *Historical basis*

In the part II(a) above I have shown how, in Roman law, a guilty wife could forfeit her *dos* and a guilty husband his *donatio propter nuptias* at divorce. In both cases this would constitute forfeiture of financial benefits brought into the marriage by the spouses. The argument that the *dos* was somehow not brought into the marriage by the wife, but constituted a donation before the marriage<sup>57</sup> seems questionable and, in any event, does not explain forfeiture of the *donatio propter nuptias* by the husband.

Roman-Dutch law may indeed contain contradictory authority on the issue, but there is evidence that courts ordered the guilty spouse to forfeit assets which he or she had brought into the marriage. In addition, some early

<sup>56</sup> *Soupionas v Soupionas* 1983 (3) SA 757 (T) at 758–9.

<sup>57</sup> See the discussion of Mason J's judgment in *Celliers* supra note 14 at 934 in part III(c) above.

South African cases held that a spouse could forfeit assets which he or she had contributed to the marriage.<sup>58</sup> These cases reflect the religious condemnation of adultery and the punitive measures contained in the Political Ordinance of 1580. The old authorities and early cases are therefore not unanimous on the issue, but instead provide alternatives to the rule that was later adopted by the South African courts.

Moreover, and despite my great enjoyment of consulting the old authorities in this area, I cannot resist questioning the weight which should be attached to Roman and Roman-Dutch authority in contemporary South African family law. Amongst the Roman-Dutch rules in this area which amuse and astonish us are, for instance, that a divorced person may not subsequently marry the person with whom he or she had previously committed adultery,<sup>59</sup> that the adulterous party may only re-marry after the innocent party had remarried,<sup>60</sup> and the imposition of heavier criminal penalties on a wife who had committed adultery with a Jewish man.<sup>61</sup> We recognise that our changed views and circumstances oblige us to relinquish certain rules of ancient family law, even though they are clearly part of our legal heritage. More than two centuries of social and political change and a large continent separate us from the cultural and philosophical contexts in which our common law is rooted. What the Romans and the Dutch thought and practised in Europe in the distant past can surely not be decisive, and may even be wholly irrelevant, in contemporary South Africa, particularly given the constitutional prohibition of gender-based discrimination, to which I return below.

(b) *What are the patrimonial benefits of marriage in community of property?*

Underlying the interpretation of the forfeiture rule in marriages in community of property is a definition of those benefits subject to forfeiture as being the spouse's opportunity to share in financial benefits which he himself or she herself did not generate.<sup>62</sup> This definition thus excludes those financial benefits which he or she did generate from being subject to forfeiture.

There is, however, another plausible possibility. One could instead argue that the patrimonial benefit of a marriage in community of property is the right to one half of the joint estate upon dissolution, irrespective of the proportion contributed by each spouse before or during the marriage. Supporting such an argument is the fact that a husband who had contributed all the assets in the joint estate only has the right to half of the joint estate at dissolution. It is this right to half of the joint estate which can be totally or partially forfeited by either spouse, irrespective of their contributions to the growth of the joint estate. Such a view would allow either spouse to forfeit

<sup>58</sup> *Mulder v Mulder* supra note 25; *Du Toit v Du Toit* supra note 26.

<sup>59</sup> Kersteman *Woordenboek* s v 'dissolutie' at 107.

<sup>60</sup> *Ibid.*

<sup>61</sup> Kersteman *Woordenboek* s v 'dissolutie' at 105.

<sup>62</sup> See, for instance, the quote from Sonnekus op cit note 2 cited in part I above.



financial benefits, irrespective of the proportion of the joint estate which they had contributed and would, in effect, also allow a spouse to forfeit assets which he or she had generated.

I would argue that this interpretation is viable because it resonates with the legal treatment of the joint estate during the subsistence of a marriage in community of property. The joint estate includes all the separate assets and liabilities which the parties brought into marriage, except for those which were specifically excluded by the parties or by operation of law. Both spouses are joint co-owners of this estate, described by Erasmus et al as 'tied up/bound co-ownership' because of the limits on each spouse's capacity to dispose of the jointly owned assets.<sup>63</sup> Although divorcing spouses may have a right of recourse in respect of certain impermissible transactions during the marriage,<sup>64</sup> their rights to recourse are only effective if, at the dissolution of the marriage, the joint estate contains sufficient funds to recompense them. Moreover, these are rights to compensation, not to particular assets. In the case of insolvency of a spouse who is married in community of property, the joint estate is sequestered, irrespective of which spouse had contributed what to the joint estate and even 'separate' assets of the spouses are liable to sequestration.<sup>65</sup> All of these rules point to the fact that, during the subsistence of a marriage in community of property, there is a single joint estate and that the law does not favour a rigid bookkeeping of who contributed what during and before the marriage.

To regard the benefits of a marriage in community of property as the right to share in half of the joint estate at the dissolution of the marriage seems to me a logical consequence of the legal treatment of the joint estate during the marriage. The opposite view and the one which underlies the interpretation of forfeiture of benefits which I take issue with, namely that the benefits of a marriage in community of property consist of the right to share in assets which a spouse had not generated, appears contrived by comparison.

*(c) Public policy in succession*

A different argument arises when one compares marriages which end as a result of divorce with marriages which are ended by the death of a spouse. According to Sonnekus, the latter event is twice as likely to end the marriage as the former.<sup>66</sup>

The common-law rule relating to forfeiture of benefits embodies the public policy that no one should receive financial benefits from their own wrongdoing.<sup>67</sup> In the law of succession, this broad principle also underlies

<sup>63</sup> Erasmus et al op cit note 4 para 80.

<sup>64</sup> Section 15(9)(b) of the Matrimonial Property Act 88 of 1984.

<sup>65</sup> Sonnekus op cit note 2 at 789–90 and the authorities cited there.

<sup>66</sup> Ibid at 788.

<sup>67</sup> Cronjé & Heaton op cit note 13 at 131n33.

the rule 'de bloedige hand neemt geen erfenis',<sup>68</sup> which prevents people who have murdered their spouses from benefitting by intestate or testate succession from the deceased spouse. In marriages in community of property, however, *Ex Parte Vonzell*<sup>69</sup> and *Nell v Nell*<sup>70</sup> held that the surviving spouse remains entitled to a half share of the property where the marriage was in community of property, but forfeits any inheritances or legacies. This rule was not applied only to the spouse who had contributed less to the joint estate, and thus conflicts with the application of the forfeiture rule at divorce.

There is, however, contrary authority. In *Leeb v Leeb*<sup>71</sup> the court held that a wife who had murdered her husband in a marriage in community of property could, on the basis of public policy, be required to forfeit her entitlement to that part of the joint estate which she did not contribute, akin to the application of the forfeiture rule at divorce. The matter has not yet been decided by the Supreme Court of Appeal, resulting in a potential anomaly between the position of a person who ends a marriage in community of property by killing his or her spouse, and a person who ends the marriage through misconduct leading to divorce. If the *Vonzell* and *Nell* cases were followed, the murderous spouse would be entitled to half the joint estate, irrespective of his or her contribution to the joint estate, while at divorce, he or she could forfeit a part or the whole of the joint estate if he or she had contributed less than the other spouse.<sup>72</sup>

#### (d) Contributions

The current focus on *financial* contributions at the expense of domestic work and childcare typically contributed by women is understandable in the light of the fact that non-financial contributions are not easily quantified in monetary terms, nor can they, once made, easily be returned in kind by husbands.

An argument which would not negate, but merely temper, the rule that a spouse cannot forfeit that which he or she has contributed, flows from the cases in which non-monetary contributions have been taken into account in calculating the spouses' respective contributions.<sup>73</sup> If such contributions were unfailingly to be taken into account, the childrearing and housekeeping work which wives usually undertake and their contributions towards their husbands' careers would offset at least some of the financial contributions

<sup>68</sup> Michael Cameron Wood-Bodley 'Forfeiture by a beneficiary who conspires to assault with intent to do grievous bodily harm: *Danielz NO v De Wet* 2009 (6) SA 42 (C)' (2010) 127 *SALJ* 30 at 30.

<sup>69</sup> 1953 (1) SA 122 (C).

<sup>70</sup> 1976 (3) SA 700 (T). See also *Casey NO v The Master* 1992 (4) SA 505 (N), in which the same ruling was made in relation to a man who had negligently caused the death of his wife.

<sup>71</sup> [1999] 2 All SA 588 (N).

<sup>72</sup> This point was made in *Leeb* *ibid* at 595–6.

<sup>73</sup> See the discussion of *Gates* *supra* note 38; *Oppenman* *supra* note 40; *Ex Parte De Beer* *supra* note 37; and *Singh* *supra* note 44 in parts III(b) and III(c) above.

which husbands make. Extending the recognition of women's typical contributions from redistribution to forfeiture orders would diminish (although not entirely erase) the gendered impact of the current rule.<sup>74</sup>

In addition to the authority provided by the cases cited in part 11 (b) above, there are two other considerations in favour of this argument. The first is that non-patrimonial contributions are considered when redistribution orders in terms of s 7(3) of the Divorce Act are made. This results from the explicit wording of s 7(4), which requires a court to be:

'satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner'.

Although s 9 contains no reference to such contributions, and despite the judgments which hold that the factors in s 9 constitute a *numerus clausus* beyond which courts may not look in ordering forfeiture of benefits,<sup>75</sup> the respective contributions of the spouses are in any event taken into account in applying the rule that forfeiture will not be ordered against the spouse who had made the larger contribution. If courts already take contributions into account in relation to forfeiture of benefits, it makes sense that the wider notion of contribution, as applied to redistribution orders, should also apply in respect of forfeiture orders. Both redistribution and forfeiture are methods of ameliorating the unfairly strict application of the chosen matrimonial property regime at divorce and consistent definition of key concepts such as the spouses' contributions to the marriage seems both necessary and logical. By way of contrast, a narrow focus on financial contributions in relation to forfeiture would be incongruous and would constitute indirect gender discrimination because it undervalues the kinds of work which women typically perform within families in favour of the accumulation of financial assets, which is typically required of husbands.<sup>76</sup>

Finally, in calculating third-party liability for causing the death of a wife, non-financial contributions have been included for some time.<sup>77</sup> The third party is legally liable to the surviving spouse for the loss of support provided by the deceased spouse, which, in turn, rests on the reciprocal common-law duty of support between spouses. This duty includes not only the provision of financial support, but extends to non-financial contributions of the kind typically made by wives.<sup>78</sup> As in the case of redistribution orders, consistency

<sup>74</sup> See the discussion in part IV(e) below.

<sup>75</sup> *Wijker* supra note 47 at 731E–H; *Botha* supra note 46 para 8.

<sup>76</sup> Brigitte Clark & Beth Goldblatt 'Gender and family law' in Elsje Bonthuys & Cathi Albertyn (eds) *Gender, Law and Justice* (2007) 195 at 201–2. The discrimination argument is pursued further in part IV(e) below.

<sup>77</sup> *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 669; *Abbott v Bergman* 1922 AD 53.

<sup>78</sup> *Union Government (Minister of Railways and Harbours) v Warneke* supra note 77 at 669.

would require that, where the law not only recognises but demands non-financial contributions from spouses as part of their reciprocal duties of support, these kinds of contributions should not be disregarded or minimised in the context of forfeiture of benefits.

Nevertheless, it should be borne in mind that courts regularly underestimate the value of the work typically done by women,<sup>79</sup> as is illustrated by the court's disparaging statements and tone in *Singh*.<sup>80</sup> Taking account of women's work would therefore reduce, but not eradicate, the advantages which husbands generally obtain from the courts' ordering forfeiture of benefits only against the spouse who had made the smaller financial contribution.

(e) *Discrimination and substantive equality*

The courts' interpretation of s 9 of the Divorce Act means that forfeiture as a financial penalty for marital misconduct can only be imposed on the spouse who had made the smaller financial contribution to a marriage — in effect this is generally the poorer spouse. Although socio-economic status is not one of the prohibited grounds for discrimination listed in s 9 of the Constitution, and the onus to prove that the differentiation amounts to unfair discrimination therefore rests upon the party alleging discrimination, it may nevertheless be argued that the application of the forfeiture rule constitutes direct unfair discrimination against the poorer spouse. In *Harksen v Lane NO*<sup>81</sup> the majority of the Constitutional Court held that 'there will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings'.

Dignity is also an important aspect of a court's enquiry into the fairness of an alleged discriminatory act or legal provision.<sup>82</sup> When determining whether discrimination is unfair, a court should take account of:

- '(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination . . . is on a specified ground or not;
- (b) the nature of the provision or power and the purpose sought to be achieved by it.'<sup>83</sup>

It would, no doubt, be argued that the rule protecting the wealthier spouse against forfeiture of benefits simply has the objective of achieving fairness between the spouses by protecting the financial benefits contributed by a particular spouse from being unduly awarded to the other spouse. However, nowhere else in family law is there a rule which similarly protects a spouse

<sup>79</sup> Elsje Bonthuis 'Labours of love: Child custody and the division of matrimonial property at divorce' (2001) 64 *THRHR* 192 at 204.

<sup>80</sup> See the quote from *Singh* supra note 44 discussed in part III(b) above.

<sup>81</sup> 1998 (1) SA 300 (CC) para 47.

<sup>82</sup> *Ibid* para 52.

<sup>83</sup> *Ibid* para 53.

merely on the basis that he had made a larger financial contribution. Neither in delictual claims between spouses, nor in respect of the right of recourse at the dissolution of marriage is it a defence that a spouse had made a larger contribution. Nor can it be said that this limitation of the poorer spouse's rights to forfeiture 'is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' in terms of s 36 of the Constitution.

The argument for indirect discrimination on the basis of gender is probably even stronger. It is trite that, compared to men, women in South Africa have been educationally and economically disadvantaged. Their economic disadvantage is exacerbated on marriage when social expectations that they should bear primary responsibility for childcare and homemaking impact negatively on their ability to work and amass assets.<sup>84</sup> Although the rule that the wealthier spouse cannot be ordered to forfeit in terms of s 9 of the Divorce Act appears to be gender neutral, the fact that it will most often preclude wives from claiming forfeiture means that it discriminates indirectly on the basis of gender.

When considering the history and purpose of the rule, it becomes clear that, at least at common-law, it echoed and confirmed gendered double standards of sexual conduct which punish women, especially wives, more severely for extra-marital sex. A similar legal embodiment of sexual double standards is the common-law rule relating to the paternity of extra-marital children which had the objective of punishing such mothers and children by depriving them of rights against fathers.<sup>85</sup> Although adultery is no longer the only ground for forfeiture orders, marital misconduct remains one of the grounds for such orders. Moreover, I have shown that gendered double standards persist when courts tend to regard the kinds of misconduct in which men most frequently engage, like domestic violence, more leniently.<sup>86</sup>

Bhana observes of the common-law rules of contract that '[t]he classical (private) common law structures, . . . although seemingly "value neutral" when considered in the abstract, implicitly endorsed the carefully engineered patterns of wealth and power in the apartheid society in which they applied'.<sup>87</sup> This is equally true of the common-law rules of family law, particularly the application of forfeiture of benefits only to the spouse who made the smaller financial contribution. I would therefore suggest that the time has come to reconsider this rule on the ground that it discriminates unfairly on the grounds of gender and socio-economic status.

<sup>84</sup> Clark & Goldblatt *op cit* note 76 at 205; Heaton *op cit* note 1 at 550–1.

<sup>85</sup> Clark & Goldblatt *op cit* note 76 at 227.

<sup>86</sup> See part III(c) above.

<sup>87</sup> Deeksha Bhana 'The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution' (2013) 29 *SAJHR* 351 at 353.

## V CONCLUSION: FIXED MATRIMONIAL PROPERTY REGIMES OR WIDER JUDICIAL DISCRETIONS?

In her 2005 article, Heaton recommends that the existing judicial discretion to deviate from the chosen matrimonial property regime at dissolution of civil marriages should be replaced by a wider discretion, applicable to all marriages and aiming at substantive gender equality in the distribution of marital assets.<sup>88</sup> She also advocates a statutory definition of marital property, which includes non-financial contributions and contributions to the other spouses' career prospects.<sup>89</sup>

I agree with both of her recommendations. The Divorce Act has been in place for more than 30 years and, as a result of the adoption of the Constitution, legal culture in South Africa has undergone a fundamental shift, while social practices around marriage and divorce have changed drastically. It can no longer be assumed that dividing property in accordance with the matrimonial property regime chosen at marriage would invariably lead to fair and just results between the spouses at dissolution, and a simplistic reliance on *pacta sunt servanda* cannot satisfy the constitutional requirement of substantive gender equality in family law. Moreover, the introduction of a general discretion to order a just property redistribution in customary marriages out of community of property by the *Gumede* judgment<sup>90</sup> raises the question whether the lack of such a discretion in civil marriages amounts to discrimination against spouses in civil marriages.

A general redistributive power at the end of marriage can, I believe, co-exist with a choice of matrimonial property regimes by the spouses. For the duration of the marriage, spouses and creditors benefit from the legal certainty associated with the chosen property regime. However, holding spouses to their antenuptial contract or, as in South Africa, giving courts a very narrow discretion to deviate from the stipulated property consequences, is not optimal, nor does it lead to fairness at the dissolution of marriage.

Marriage can be a very long-term relationship during which the circumstances of the contracting parties change drastically. In other long-term contractual relationships, parties will usually include detailed provisions for contingencies in their contract, including mechanisms for dispute resolution. In antenuptial contracts, prospective spouses do not make similarly detailed arrangements, assuming either that their marriages will last harmoniously until death or that courts will make a fair division of assets in the event of divorce. In the case of marriages in community of property, the matrimonial property regime is often not even negotiated between the prospective spouses beforehand. These factors justify the creation of a statutory discretion for courts to deviate from the agreed upon property consequences at dissolution to a greater extent than has been hitherto allowed.

<sup>88</sup> Op cit note 1 at 562.

<sup>89</sup> Ibid at 573.

<sup>90</sup> *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC).

Nevertheless, we should also remember that the creation of a more general statutory judicial discretion may not suffice because judges can always exercise discretions in sexist ways. The common-law rule preventing the poorer spouse from claiming forfeiture of benefits is one example of such a (possibly unconscious) sexist interpretation. Another can be found in the ways in which misconduct by men tends to be regarded with less censure than that of women. Where a judicial discretion is granted, therefore, it should be sufficiently clearly circumscribed and described to force judges to value women's typical contributions to marriage as highly as they do the (financial) contributions of men.