

## TITLE OF THESIS

The Law Giveth And The Law Taketh Away: Marriages Out Of Community Of Property Excluding Accrual Post 1984/88

## KEY TERMS OF THESIS

Marriages Out of Community of Property Excluding Accrual; Financial Consequences of Divorce; Judicial Discretion; Equitable Redistribution of Assets on Divorce; Spousal Maintenance; Contractual Freedom; Feminisation of Poverty; Substantive Equality; Gender Discrimination; New Property

## SUMMARY OF THESIS

Because women are predominantly responsible for childcare, men are the primary income earners. Having acquired the marital assets, on divorce the husband would retain them in a marriage out of community of property. The wife would be left deskilled, financially dependent, with little likelihood of receiving spousal maintenance and with no marital assets. In 1984 the Matrimonial Property Act and in 1988 the Matrimonial Property Law Amendment Act introduced a judicial discretion to equitably redistribute marital assets in certain marriages out of community. This dissertation argues that the bases for the limitation of the judicial discretion to women married before a certain date are unsound and that the limitation arguably violates the equality clause of the Constitution.

THE LAW GIVETH AND THE LAW TAKETH AWAY: MARRIAGES OUT OF COMMUNITY  
OF PROPERTY EXCLUDING ACCRUAL POST 1984/88

by

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**THE LAW GIVETH AND  
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MARRIAGES OUT OF  
COMMUNITY OF PROPERTY  
EXCLUDING ACCRUAL  
POST 1984/88**

## 1. THE TWO PRINCIPAL FORMS OF MATRIMONIAL PROPERTY SYSTEMS PRIOR TO 1984/88

Prior to the commencement of the Matrimonial Property Act 88 of 1984 for Whites, Coloureds and Indians, and prior to the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 for Blacks, there were primarily two ways in which one could get married: in community of property, with the husband having marital power; or out of community of property, excluding community of profit and loss and excluding the husband's marital power.<sup>1</sup> For Whites, Coloureds and Indians the first marital property system occurred automatically – in other words, unless the parties entered into an antenuptial contract specifically excluding community of profit and loss and the husband's marital power; the second, where the parties invoked the system by entering into an antenuptial contract to the same effect. The reverse applied for Blacks.

### 1.1 THE ADVANTAGES AND DISADVANTAGES OF A MARRIAGE IN COMMUNITY OF PROPERTY

Each system had its advantages and disadvantages. The advantage of a marriage in community of property is that it embodies the marital vows “for better for worse, for richer for poorer, in sickness and in health, to love and to cherish until parted by death” in that the parties share both their good fortunes and their bad ones. Thus the nurse wife who (not on account of her lack of industry) earns significantly less than her doctor husband, at the end of the day shares the spoils with him equally. That she also shares the burden of his misfortunes is arguably a disadvantage. Another debatable disadvantage is that they are jointly responsible for the running of the joint estate and hence the burdening or enhancing of it. Thus they are both required to agree to liability

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<sup>1</sup> One could also marry out of community of property, but with community of profit and loss, although few did. See Visser P J and Potgieter J M *Introduction to Family Law* 2 ed Juta 1998 p86.



for the mortgage bond, which encumbers the family home.<sup>2</sup> This is only an arguable disadvantage, since it offers a large measure of protection to the wife, in as much as it prevents her husband from selling the matrimonial home from under her (as well as, although less usually, *vice versa*).<sup>3</sup>

## 1.2 THE ADVANTAGES AND DISADVANTAGES OF A MARRIAGE OUT OF COMMUNITY OF PROPERTY

An advantage of a marriage out of community of property is that while the parties do not bloom together in times of plenty, neither do they both wilt in times of drought. While this flies in the face of the parties' marriage vows, it does theoretically mean that the errant husband does not erode the prudent wife's assets. Or when the hard-working husband's sole proprietorship fails, the family home – which is in his wife's name – is spared from attachment by angry creditors. Another advantage is that each party administers their own separate estate. They therefore do not require the consent of the other to acquire or encumber their own assets. However, the disadvantages of this form of marriage, in practice, far outweigh the advantages.<sup>4</sup>

Let us envisage the plight of a woman marrying out of community of property pre-1984, for example in 1978. Our nurse wife, aged 24, accompanied her prospective husband, a doctor, to his attorney in order that he may draw up their antenuptial contract. While it was the attorney's professional duty to explain the matrimonial property options to the parties, he may not have done so adequately. This may have been a mere oversight on his part, or, on account of him being the prospective husband's attorney, an omission

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<sup>2</sup> See also Visser and Potgieter *Introduction to Family Law* op cit p87-88.

<sup>3</sup> Section 15(2) of the Matrimonial Property Act provides that neither spouse shall alienate, mortgage or otherwise burden the property without the written consent of the other. Sinclair J assisted by Heaton J *The Law of Marriage* Vol. 1 Juta 1996 p479.

<sup>4</sup> See also Visser and Potgieter *Introduction to Family Law* op cit p88.

informed by a desire to fulfil his client's wishes. However, even if the prospective husband's attorney had explained to the prospective wife what the matrimonial property options were, and she had elected that option which was to afford her the greatest financial security – namely, a marriage in community of property – her prospective husband would simply have refused to marry her in the circumstances. It would have been a case of “marry me on my terms or not at all”. The societal stigma of being a spinster – or, worse, the mother of illegitimate offspring – was sufficient to drive her into a marriage on his terms. Besides, like most women, she had been primed not to work, but to be a wife, mother and homemaker. Hence she had been discouraged from pursuing tertiary studies and a career of her own. When she did obtain tertiary education, she was drawn to a career that was traditionally female-dominated, hence devalued by society and thus poorly paid.<sup>5</sup> Furthermore, it was the very men who did not wish to share the spoils of their marriage with their erstwhile wives, and who desired absolute control over their own estates, who elected to be married in this way.<sup>6</sup> These same patriarchal men who not wish their wives to work assure them that they, as the breadwinners, will provide, and that they “need not worry their pretty little heads about such things as money”.<sup>7</sup> The antenuptial contract, as its name implies, was in any event entered into prior to the marriage. Prior to the marriage the prospective wife had stars

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<sup>5</sup> In respect of the value society attaches to traditionally “women's work”, and the disparity between men and women's earnings see: United States Women's Bureau *The Earnings Gap Between Women and Men* Washington The Bureau 1979; Kemp A A *Women's Work Degraded and Devalued* Engelwood Cliffs N J Prentice Hall 1994; Waring M *Counting for Nothing: What Men Value and What Women are Worth* Sydney Allen and Uwin 1990.

<sup>6</sup> Sinclair notes that “... the accrual system is frequently excluded in the antenuptial contract in situations which reflect the choice of the party whose estate is most likely to increase (the husband), rather than the informed choice of both parties” Sinclair assisted by Heaton, *The Law of Marriage* op cit p143.

<sup>7</sup> Sinclair notes that young women still rely heavily on the dangerous notion that they will marry, have children and be supported throughout their lives by their husbands. Sinclair J *Family Rights in Rights and Constitutionalism: The New South African Legal Order* Juta 1994 p548.

in her eyes.<sup>8</sup> Her prospective husband had promised to keep her and she wanted to trust him. She earnestly believed that this was a marriage “until we are parted by death and thereto I give my word. ... Those whom God has joined together should not be separated by man”. And if their marriage was until death, she had little to worry about. Regrettably, it seldom was.

As a young couple starting out, there was less of a disparity in our nurse wife and her doctor husband’s wealth than became apparent later. As the marriage progressed, the nurse wife – who, after three years of marriage, gave up nursing to look after the children<sup>9</sup> – got poorer and poorer. While she kept house, her doctor husband became increasingly wealthy. With the advances in medicine, the longer she remained out of practice, the more she lost her skills and the less likely it was that she could re-enter the same profession. Her doctor husband, on the other hand, acquired additional qualifications and experience as his reputation spread and expertise soared.<sup>10</sup>

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<sup>8</sup> South Africa Law Commission Report on the Review of the Law of Divorce : Amendment of Section 7(3) of the Divorce Act 1979 Report July 1990 at p11. See 3.1.2.2 on p16.

<sup>9</sup> Koch R J “The Value of a Wife’s Service in the Home” *De Rebus* March 1986 p105 notes that in *Richter v Capital Assurance Co Ltd* 1963 CB (Corbett and Buchanan) 1 101 (E) at 108, “a robust housewife of German stock had been prevented by her injuries from fulfilling her accustomed role. The court awarded as compensation the value of the cost of employing sufficient staff to replace her services: two servants, a labourer and a kwêdien!” See fn 5.

<sup>10</sup> Even when parties like the nurse wife and doctor husband described above **are** married in community of property, in the event of divorce a fair division does not occur due to the law’s failure to recognise that property comprises more than just the family home and its contents. As Weitzman notes: “The courts are not, in fact, dividing property equally. This is partially as a result of major changes in the nature of property that have occurred in our society. Husbands and wives are increasingly investing in careers and human capital – most particularly in the husband’s education and career. The new property resulting from this kind of investment is often the family’s major asset. Yet this property is not typically divided equally upon divorce. In fact, in many states, it is not divided at all. It is simply presumed to belong to the husband. But if the law allows men to retain their career assets – their professional licences, their health insurance and their earning capacities – then their wives are not, in fact, being awarded an equal share of the joint property, despite the equal division rule.” Weitzman L J “Judicial Perceptions and Perceptions of Judges: The Divorce Law Revolution in Practice” p74-113 in Crites L L and Hepperle W L (eds) *Women, the Courts and Equality* Skye Publications 1987 p44-45.

The house he bought (but that she chose, cleaned, renovated and maintained) was registered in his name. So, too, were the car, the holiday cottage and the boat. More importantly, so were the shares, the savings, the retirement annuities and the goodwill attached to his practice. In the event of divorce, she stood to receive nothing. What was his was his; what was hers was hers. So when he went off with his vast estate, she took the contents of her wardrobe and the items on her dressing table. Foolishly, she did not put aside and invest the "pin money" she had earned working a few days a week as a chemist's counter assistant. She spent it on bread, milk, newspapers and paying the gardener who wanted his salary in cash.<sup>11</sup>

In addition to the clothes in her wardrobe and the cosmetics on her dressing table, our nurse wife left the marriage with those items her doctor husband bestowed upon her in the antenuptial contract. These usually consisted of the wedding gifts: the Corningware and Pyrex oven dishes that were cracked and broken long before the marriage started fragmenting.

Thus, on divorce at the age of 46, our nurse wife is in an unenviable position. Having graduated with a BSc (Nursing) in 1975 and having stopped practising some three years later, and having for 22 years been her husband's companion, friend, lover,

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<sup>11</sup> While our nurse wife could, in terms of Section 3 of the Matrimonial Affairs Act 37 of 1953, recover from her husband all the money she had spent on household necessities, given her earnings relative to her husband's, she earned so little that the extent of her claim was negligible compared with the assets he had accumulated. In any event, she did not keep proof of her expenditure, never imagining as she incurred it that at some time in the future she may wish she had. Sinclair J *An Introduction to the Matrimonial Property Act 1984* Juta 1984 p41-46. For further reading regarding the earning disparity between men and women both during marriage and after divorce as well as the sharing or lack of sharing of family responsibilities during marriage see : Arendell T *Mothers and Divorce: Legal, Economic and Social Dilemmas* Berkeley University of California Press 1986; Braver S L "The Gender Gap in Standard of Living after Divorce: Vanishing Small?" *Family Law Quarterly* Vol 33 No 1 Spring 1999 p111-34; Gilbert L A *Two Careers, One Family: The Promise of Gender Equality* Newbury Park California Sage 1993; Meintjies-Van der Walt L "Levelling the Playing Fields" *ILJ* Vol 19 No 1 1998 p22-34; South African Commercial Catering and Allied Workers Union and South African Committee for Higher Education *Sharing the Load: The Struggle for Gender Equality, Parental Rights and Childcare* Johannesburg Learn and Teach Publications in association with SACCAWU and L A COM 1991.

housemaid, child-minder, driver, nurse, teacher, cook, telephonist, estate manager, gardener, buyer, office administrator, entertainer, function co-ordinator, bookkeeper, locum receptionist in his practice and laundry maid, she is left with nothing but her children. At the time of their divorce there are four children aged 21, 19, 17 and 14. All but the eldest are dependants. Her prospects of re-employment as a nurse are virtually nil. Medicine has changed dramatically since she qualified some 25 years ago. If she were to re-qualify, she would be 51 after doing so: too old to embark on what would be a new career, and unaccustomed to the arduous work nursing entails, such as turning bedridden patients every few hours to prevent them from getting bedsores. Besides, her youngest child cannot practicably be left in the care of his older siblings for the duration of the nightshift from 18h00-06h00. She could acquire fresh skills, but she is intimidated by new technology. Also, she has always been made to feel intellectually inferior to her husband and over the years this has eroded her self-esteem. Rusty with inexperience, she is an undesirable employee. Employers prefer a younger woman, attractive enough to bolster their image, abreast of the most recent technological advances, without children and hence requiring no time off to collect a child from school who missed the bus or take to the doctor to have stitches after injuring himself on the rugby field. In fact, the childcare responsibilities, which she has always borne single-handedly, make it impossible for her to consider anything but a mornings-only job of the most menial kind, with a suitably menial salary.<sup>12</sup> She can remarry, but her prospects are remote. Besides, even if she did, the chances of her second marriage ending in

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<sup>12</sup> Sinclair notes : "Within what is known as 'the public sphere', women universally suffer disadvantage in employment. Preferences for hiring males, the concentration of women in lower-paid jobs and in part-time work, the wage differential between men and women, the higher risk of dismissal and lower chance of promotion, the intractable question of maternity leave: These are some of the crucial issues to be found. Thus the workplace, structured as it is with a bias in favour of the ideal worker – the male with no child-care responsibilities – must be one focus. The oppression of women in the workplace cannot be resolved without confronting the role of women in the home. Their lone domestic responsibility, and the characterization of (unpaid) domestic work as women's work are features of the patriarchal structure of our society and of the system of paid labour that inhibit the achievement by women of their full potential". Sinclair assisted by Heaton *The Law of Marriage* op cit p69.

divorce are higher than her first one. So our nurse wife leaves her first marriage without skills, without assets or income, without savings, with three dependent children and the responsibility that goes with them. She is the new poor and, until her children are self-sufficient, they accompany her into the ghetto.<sup>13</sup>

## 2. THE LEGISLATURE'S ATTEMPT TO IMPROVE THE LOT OF MAINLY WOMEN, MARRIED OUT OF COMMUNITY OF PROPERTY

### 2.1 THE INTRODUCTION OF A JUDICIAL DISCRETION TO REDISTRIBUTE ASSETS IN MARRIAGES OUT OF COMMUNITY OF PROPERTY PRE-1984/88

In a bid to alleviate the plight of women such as our nurse wife, in 1984 section 36(b) of the Matrimonial Property Act inserted section 7(3) of the Divorce Act 70 of 1979, which granted the court a discretion to redistribute the matrimonial property along equitable lines.<sup>14</sup>

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<sup>13</sup> Rhode D L *Justice and Gender Sex Discrimination and the Law* Harvard University Press 1989 p149 notes that according to current projections, about half of all contemporary marriages will end in divorce, and 60% of all children will spend time in single-parent homes. By the late 1980s half of all single-parent families lived in poverty, and divorced or separated women headed 70% of those families. See fn 12 and 99.

<sup>14</sup> Sinclair contends that the discretion should apply to all marriages, regardless of the proprietary system. She contends that undue harshness can flow from unalterable equal sharing in a marriage in community of property, just as it can flow from a complete separation of property. She cites various examples:

1. In a marriage of very short duration in which one spouse suddenly amasses a fortune by virtue of work done, such as the writing of a novel, over an extended period prior to the marriage;
2. where the accrual system has been modified to exclude the major profit-bearing asset; or
3. where the accrual system has not been modified to reflect the changing value of money and inflation has reduced the profit to zero.

In all these cases Sinclair contends there should be a residual judicial power to prevent an injustice occurring. Sinclair *An Introduction to the Matrimonial Property Act* op cit p52 and Sinclair J "Financial Provision on Divorce – Need Compensation or Entitlement?" 98 SALJ 1981 p469.

For further reading in respect of the judicial discretion see : Bronstein V "Divorce: Judicial Discretion" *Annual Survey of South African Law* 1992 p5-8 and p37-40; Clark B Van Heerden B "Asset Redistribution on Divorce: The Exercise of Judicial Discretion" SALJ Vol 106 No 2 May 1989 p243-249; Garrison M "How do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making" *North Carolina Law Review* Vol 74 Jan 1996 p401-552; Golden L J *Equitable Distribution of Property* Colorado Springs, Colorado: Shepard's/McGraw-Hill 1983;

This remedy only applied to Whites, Indians and Coloureds. S7(3) of the Divorce Act at that stage provided: "A court granting a decree of divorce in respect of a marriage out of community of property entered into before the commencement of the Matrimonial Property Act in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded, may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party."

Then, in 1988, section 2 of the Marriage and Matrimonial Property Law Amendment Act, Act 3 of 1988, amended section 7(3) of the Divorce Act so as also to extend its application to marriages entered into by Blacks in terms of Section 22(6) of the Black Administration Act, Act 38 of 1927.<sup>15</sup>

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Goodman E "Property Law Following Dissolution of Marriage: Is There a Future for Judicial Discretion?" *Federal Law Review* Vol 13 Sept 1982 p131-49; Jackson E *et al* "Financial Support on Divorce: the Right Mixture of Rules and Discretion?" *International Journal of Law and the Family* Vol 7 Aug 1993 p230-54; Jordaan R "Redistribution of Assets" *Codicillus* Vol 29 No 1 May 1988 p71-72; Keyser B "Judicial Discretion" *Annual Survey of South African Law* 1989 p20-26.

<sup>15</sup> As a result of this amendment, section 7(3) of the Divorce Act, 70 of 1979, now provides as follows:

"A court granting a decree of divorce in respect of a marriage out of community of property –

- (a) entered into before the commencement of the Matrimonial Property Act 88 of 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; and
- (b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of Section 22(6) of the Black Administration Act 38 of 1927, as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act 3 of 1988,

may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party".

## 2.2 THE INTRODUCTION OF A NEW FORM OF MARRIAGE: OUT OF COMMUNITY OF PROPERTY INCLUDING THE ACCRUAL SYSTEM

The Matrimonial Property Act also introduced a new and third form of marriage which was designed to incorporate the good of both marriages in community and marriages out of community of property (namely, in the former, that the parties shared their good fortunes irrespective of their respective contributions, but in the case of the latter, that if one of the parties fell on hard times, this did not impact on the other). This was a marriage out of community of property and out of community of profit and loss but including the accrual system. This form of marriage, in the event of divorce, gave the spouse whose estate had shown the smaller growth or accrual the right to receive half of the difference between the growths in the estates of the two spouses.<sup>16</sup> This new system allowed the parties to retain their separate estates during the marriage but, on dissolution, share the profits of their union.

Thus for those women married out of community of property pre-1984/88, the Matrimonial Property Act extended a remedy: the court was afforded a discretion to redistribute the matrimonial property along equitable lines **irrespective** of the fact that they had married out of community of property. And, for those women married post-1984/88, another form of matrimonial property system was added: they could still marry in community of property if they chose to; they could marry out of community of property too – excluding any profit-sharing, just as before; or they could marry out of community of property including the accrual system, thereby retaining separate estates during the marriage, but sharing the profits on dissolution.

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<sup>16</sup> See Visser and Potgieter *Introduction to Family Law* op cit p87.



### 3. LEAVING WOMEN MARRIED WITH AN EXPRESS EXCLUSION OF THE ACCRUAL SYSTEM OUT IN THE COLD

The legislature made what is, in my view, a grave error: it recognised the plight of women married out of community of property prior to 1984/88 and granted the judicial discretion to them to remedy it. It gave those women marrying after 1984/88 a better range of choices than they had had previously. But it retained marriages out of community of property with an express exclusion of the accrual system and left those women remediless. Judicial discretion cannot be invoked to relieve the harshness of their situation.<sup>17</sup> Having made their bed, they must lie in it. And who is to say that the women marrying out of community of property pre-1984/88 were any worse off than those marrying out of community of property excluding the accrual system post-1984/88? In my view, their position is no different:

As Helen Suzman queried with incredulity at the time the Matrimonial Property Bill was being debated:

“The question which arises is this: What about those wives who, after the promulgation of the Bill, get married out of community of property and without the accrual system, as they can contract to do by ANC excluding the accrual system? They will then be in the same position as wives who are [in] the position, which the Bill attempts to remedy. Actually they will be in a worse position because of clause 23, because they will not even have the protection previously given them in terms of section 3 of the Matrimonial Affairs Act of 1953”.<sup>18</sup>

The Minister of Justice at the time explained the motivation behind this lacuna:

“What is the philosophy of this Bill? Its philosophy is that we are introducing a system of matrimonial property in which the parties have a choice. As regards

<sup>17</sup> Section 7(3) of the Divorce Act applies only to those Whites, Coloureds and Indians married out of community of property prior to the commencement of the Matrimonial Property Act 88 of 1984 and in terms of section 7(3)(b) to Blacks married before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3, 1988, in terms of section 22(6) of the Black Administration Act 38 of 1927, as it existed immediately prior to its repeal by the Marriage and Matrimonial Property Law Amendment Act. Hence it is of retrospective application only. See fn 15.

<sup>18</sup> House of Assembly Debates 1984 (Hansard) 115 cols 8 481-11 624 11 June-12 July col 9 003. For a description of the provisions of section 3 of the Matrimonial Affairs Act of 1953, see p30.

existing marriages, we are giving people an opportunity of having the new matrimonial property system, including the accrual system, made applicable to their marriage within a period of two years. If they do not do so, the parties in an existing marriage can still apply jointly to the court to alter the system of matrimonial property and make the accrual system applicable to their marriage. However, we as legislators admit that there could be situations in existing marriages in which the wife cannot persuade the husband to alter the system of matrimonial property because there are financial considerations linked to that for him. That is why it is not being made part of our system of matrimonial property, but it is part of our divorce law that in the unnatural event of a divorce, the court may be of assistance to the married couples who do not have an accrual system. That is the philosophy.

Why are we making a distinction between an existing marriage and a future marriage in this regard? That, too, is very logical. Our philosophy is that we do not wish to prescribe to the parties how they should arrange their domestic affairs, their affairs in respect of proprietary rights. That is why our approach is that future spouses ought to know what choices they have. They can make the accrual system applicable to their marriage from the outset **if they wish**. If we were to keep another backdoor open, we would be creating the uncertainty in this new system - ... - that the court could still intervene in the future. What would the purpose of an accrual system be then? The wife could then say that she does not want the accrual system, but that she is going to take that risk.

We want to normalise matters. That is why we do not want to give future marriages this loophole. People who marry in the future must know what they are letting themselves in for. We are not going to assist them or interfere in their domestic affairs. They must decide for themselves whether or not they are going to make the accrual system applicable. If they change their minds later, they must decide to do so jointly. Another very important characteristic of this system is that it is flexible. The parties must concur, however, and the court cannot interfere. That is why we want to phase out the so-called just discretion of the court.”<sup>19</sup>

Regrettably, the Minister of Justice and his advisors vastly underestimated the social reality for women that seldom allow them truly, freely to “decide for themselves”.

### **3.1 ARGUMENTS FOR AND AGAINST EXTENDING THE JUDICIAL DISCRETION TO MARRIAGES OUT OF COMMUNITY OF PROPERTY WITH AN EXPRESS EXCLUSION OF THE ACCRUAL SYSTEM**

In 1990 the South African Law Commission was asked to consider whether section 7(3) of the Divorce Act should be amended to extend to marriages out of community of property with an express exclusion of the accrual system after 1984/88, along with other

<sup>19</sup> House of Assembly Debates op cit, cols 9 005-9 006.

amendments.<sup>20</sup> They considered arguments both for and against the extension. These can be summarized as follows:

### 3.1.1 ARGUMENTS AGAINST THE EXTENSION

#### 3.1.1.1 It does not respect parties' freedom to contract

The legislature wanted to retain parties' freedom to contract. One contributor referred to the universal recognition of the principles of contractual freedom and freedom of choice as set out in the English judgment: *Printing and Numerical Registration Co v Sampson* (1875) LR 19 Eq 462 at p465:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider that you are not likely to interfere with this freedom of contract."<sup>21</sup>

#### 3.1.1.2 Normal contractual remedies apply to antenuptial contracts entered into under coercion *justus error* or fraud

If the contract was not entered "freely and voluntarily" and there was coercion, *justus error* or fraud, the normal contractual principles would apply to render the contract voidable.<sup>22</sup>

One contributor disputed that the purpose of a judicial discretion is to protect those who have contracted, for whatever reason, be it ignorance, coercion or

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<sup>20</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit.

<sup>21</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p130-14.

<sup>22</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p15.

even foolishness, to their disadvantage. He contended that, besides, there would be little chance of ignorance as the notary would have explained alternatives to the parties and, even if he had not, "it has never been the object of the law to protect the foolish".<sup>23</sup>

#### **3.1.1.3 A marital property system excluding any sharing is chosen deliberately**

Another contributor contended that practical experience has shown that since the introduction of the Divorce Act, the only parties who opt for "cold exclusion" do so for clear and well-considered reasons and that such decisions should be respected.<sup>24</sup>

#### **3.1.1.4 The judicial discretion applicable to marriages out of community of property pre-1984/88 is a temporary emergency measure only**

The legislature viewed allowing a judicial discretion to redistribute property equitably in marriages entered into pre-1984/88 as a "temporary emergency measure", applicable to those who, for whatever reason, did not opt for the conversion possibilities under Section 21 of the Divorce Act.<sup>25</sup>

#### **3.1.1.5 A far-reaching discretionary distribution power is against the current judicial trend**

It was argued that even the courts had started to interpret restrictively the existing judicial discretion to redistribute equitably. According to contributor Professor Sonnekus, in *Kretschmer v Kretschmer* 1981 1 SA 566 (W), *Kritzinger*

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<sup>23</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p15.

<sup>24</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p14.

<sup>25</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p13. See p11.

v *Kritzinger* 1989 1 SA 67 (A) and *Katz v Katz* 1989 3 SA 1 (A), the courts did not automatically give the applicant the right to share in the other spouse's assets irrespective of whether a real contribution towards the maintenance or growth of the other spouse's assets could have been proved.<sup>26</sup>

**3.1.1.6 Extending the judicial discretion to marriages out of community of property with an express exclusion of the accrual system would encourage litigation, push up costs and extend the time of litigation<sup>27</sup>**

**3.1.1.7 Extending the judicial discretion to marriages out of community of property with an express exclusion of the accrual system would encourage cohabitation**

One contributor feared that if parties were unable to keep their estates separate during marriage and after divorce, they would opt for cohabitation.<sup>28</sup>

**3.1.1.8 Judicial discretion is foreign to South African Family Law**

Contributor Professor A H van Wyk argued that the discretionary principle contained in s7(3) of the Divorce Act is completely alien to the South African law of matrimonial property. He compared the South African family law system – which is based on a conceptual approach, with a clear internal structure and fixed rules – to the English system, which depends largely on judicial discretion to solve problems. According to him, the amalgamation of such divergent systems is virtually impossible.<sup>29</sup>

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<sup>26</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p13.

<sup>27</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p16.

<sup>28</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p16.

<sup>29</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p16-17.

### 3.1.1.9 Judicial discretion creates uncertainty

Some contributors felt that a judicial discretion creates considerable legal uncertainty.<sup>30</sup>

### 3.1.1.10 An extension of the judicial discretion to marriages out of community of property excluding accrual would ignore the interests of creditors

The Clearing Bankers' Association of South Africa had this concern:

“The proposed amendment ignores the interests of creditors when a spouse, who enjoys certain privileges with regard to his or her assets, divorces his or her spouse who has few or no assets. In such cases the assets of the first-mentioned party will be partially reallocated to the other party, which will result in the creditors having a reduced possibility of recourse. The lacuna in the proposals [to extend the judicial discretion to marriages out of community of property with an express exclusion of the accrual system] is the absence of protection for banks and creditors against the diminishing of the assets of the spouse or spouses, owing to the redistribution order that is made”.<sup>31</sup>

## 3.1.2 ARGUMENTS IN FAVOUR OF THE EXTENSION

### 3.1.2.1 We cannot allow women to contract into poverty for themselves and for their children

Sinclair<sup>32</sup> argues that it is indefensible to allow women to contract into poverty for themselves and their children. She says it cannot be legitimised on the basis of freedom of contract. Nor can one argue that a judicial discretion is legitimate when applied to marriages prior to 1984/88, but not after it. Women married out of community of property with an express exclusion of the accrual system will be in the exact same position as those s7(3)(c) of the Divorce Act was designed to assist. So why should they not be assisted too? In any event, our matrimonial law

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<sup>30</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p17.

<sup>31</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p21.

<sup>32</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p4-5.

allows a judicial discretion in respect of ordering a forfeiture of benefits. Why, then, is a judicial discretion permissible in one respect but not in another? Dillion reminds us that the relief provided by “s7(3) is not designed to protect those who have made an ‘informed choice’ – it is to protect those who contracted, for whatever reason, be it their ignorance, coercion or even foolishness, to their disadvantage”.<sup>33</sup>

### **3.1.2.2 Women entering into an antenuptial contract with an express exclusion of the accrual system are seldom making “an informed choice”**

Practising attorney and notary, Mr K G Mustard, had this to say:

“From practical experience as a Notary, I am of the view that half the time the parties are so starry-eyed at the prospect of getting married that they do not listen to a word that the Notary is saying when he explains the options.”<sup>34</sup>

### **3.1.2.3 There is a power imbalance between the parties**

Glendon notes:

“There is no reason to think that increased use of marriage contracts would enable the economically weaker spouse to bargain for property division and future economic security in case the marriage terminates by divorce. On the contrary, European and American experience and common sense indicate that such contracts, if they did come into wider use here, would probably more often be used by the stronger party to contract out of or to restrict the property division and future maintenance to the limits permitted by law.”<sup>35</sup>

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<sup>33</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p5. For the opposing view see 3.1.2 p12-13.

<sup>34</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p11.

<sup>35</sup> Glendon M A *The New Family and the New Property* Butterworths 1981 p66.

Our law recognises the imbalance between other contracting parties such as employer and employees and has legislated to protect the weaker party. Thus the Basic Conditions of Employment Act 75 of 1997 sets out the minimum time for tea and lunch breaks, the maximum number of working hours, *etcetera*. While these basic conditions can be varied, they can be varied in the main only by a Bargaining Council or Collective Agreement<sup>36</sup>. Furthermore, on termination of the contract of employment by the employer, arguably onerous conditions apply to protect the worker.<sup>37</sup> The individual worker who is driven by the desire to get or retain a job cannot be bullied into accepting anything less than what the legislature believes is acceptable. Why is freedom to contract restricted on account of the parties' power imbalance in labour law, but not in family law? Perhaps it is on account of the public/private dichotomy<sup>38</sup> in terms of which what happens in the family has been kept behind closed doors, deliberately left unregulated by the men who do the regulating. The women, a diverse and fragmented group, have been unable – like the workers, who are mainly men – to take their cries of “Inequality!” into the streets to demand legislative change.

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<sup>36</sup> Chapter 7 section 49 Basic Conditions of Employment Act 75 of 1997.

<sup>37</sup> Chapter 8 Labour Relations Act 66 of 1995.

<sup>38</sup> Goldblatt describes the public/private dichotomy as follows: men inhabit the public realm whereas women remain hidden within the private sphere. Men dominate the state and its institutions and the very nature of the state has been infused with male power and the ideology of male superiority. As a result of women's location within the family, and as the subject of men's power within the family, they are not accorded full status as citizens in society. As the family is firmly located within the private sphere, it has provided the justification of the lack of state interference in the family where men control women and children, often with violence. Goldblatt B “A feminist perspective in the law reform process” SALJ Centre for Applied Legal Studies; p375. For further reading on the public/private distinction : Arniel B *Politics and Feminism* Oxford UK Malden Mass Blackwell 1999; Baker S Anneke van Doorne Huiskas (eds) *Women and Public Policy : The Shifting Boundaries Between the Public and Private Sphere* Aldershot Ashage 1999; Crotty P M *Women and Family Law: Connecting the Public and the Private* New York P Lang 1997. Gavison R “Feminism and the Public/Private Distinction” *Stanford Law Review* Vol 45 Nov 1992 p1-45; Oliver D *The Public/Private Divide* London Butterworths 1999; Olsen F “Constitutional Law Feminist Critiques of the Public/Private Distinction” *Constitutional Commentary* Vol 10 Summer 1993; Thornton M *Public and Private Feminist Legal Debates* Melbourne Vic Oxford University Press 1995.



The Commission was loath to vary the 1982 Law Commission's finding. It was of the view that the previous commission had considered the English system, which provides for an equitable redistribution on dissolution and, after much deliberation, had rather opted for the German approach, which was akin to our accrual system. The previous commission did not want to interfere with existing vested rights but, aware of the hardship of a total separation without the option of accrual, had recommended that the judicial discretion to redistribute assets apply to those parties who had not had the option of the accrual system only. The Commission felt that the judicial discretion to redistribute assets had only been granted as "an outlet valve" to operate retrospectively, not prospectively. To allow it to operate prospectively, it was felt, would be to introduce a new matrimonial property system into our law. The Commission succinctly cited the major disadvantages of a discretionary system as it saw them as being:

"[I]legal uncertainty, infringement of contractual freedom and the possibility that the distribution of assets could be in conflict with the wishes of a party. A simple example is that of divorced people or widowers or widows who decide to enter into a second or third marriage at an advanced age. It is normally the wish of such parties to keep their estates absolutely separate for their respective families and, accordingly, the possibility of a court order with regard to the transfer of assets should be excluded."<sup>39</sup>

The Commission therefore recommended that the discretionary division of assets not be extended to marriages out of community of property with an express exclusion of the accrual system.

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<sup>39</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit p23-4.

#### 4. REMEDIES AVAILABLE TO THOSE MARRIED OUT OF COMMUNITY OF PROPERTY PRE-1984/88

What remedies, then, did our nurse wife have pre-1984/88? Primarily they were as follows: She could allege that she and her husband had established a universal partnership and that on dissolution of the marriage she was entitled to her share of the proceeds; She could claim maintenance for herself and/or she could claim maintenance for her dependent children; She could claim her half-share of the goods they had purchased jointly, as well as the goods he had bestowed upon her in the antenuptial contract. Between 1953 and 1976 she could claim the amount she had spent on household necessities back from her husband; She could enforce a contract of services between them, if he had in fact agreed to employ her, and she could retain savings she had made from housekeeping money. All of these remedies had major drawbacks and I shall examine each in turn.

##### 4.1 UNIVERSAL PARTNERSHIP

This was a primary method used prior to the introduction of a judicial discretion to redistribute assets to ameliorate the harsh effects of a complete division of assets. Our nurse wife could allege that, in terms of the law of contract, a universal partnership had been established between her and her doctor husband.<sup>40</sup>

4.1.1 The requirements for a universal partnership were set out in *Mühlmann v Mühlmann* 1981 (4) SA 632 (T) (and confirmed on appeal 1984 (3) SA 102 (A) :

- a) each party must bring something into the partnership, or bind him/herself to bring something into it;
- b) the venture should be carried on for the joint benefit of the parties;
- c) the object should be to make a profit; and
- d) the partnership contract should be valid.<sup>41</sup>

<sup>40</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p278-283.

<sup>41</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p279. See also *Pezzutto v Dreyer* 1992 (3) SA 379 (A).

The contract may be tacit or express. Whether or not a tacit agreement has been reached is determined on a balance of probabilities.<sup>42</sup>

4.1.2 This remedy was used with limited effectiveness before one could approach a court to order a redistribution of assets and there is no reason to believe it will be used more effectively now for the following reasons:

4.1.2.2 It is extremely difficult to establish that a tacit agreement to share profits did, indeed, exist. If it did, the obvious question is: why did the parties not enter into an express agreement to this effect? Surely the reason why the parties married out of community of property was because, certainly the economically more powerful party, had the express intention of **not** sharing the profits of their relationship;

4.1.2.3 few women endeavouring to assert that a universal partnership has been established can afford the cost of litigation to do so. Also, where the value of the estate is not considerable, the cost of litigation will outweigh the benefits she is likely to receive. Given the difficulty of establishing that a universal partnership has been established, and the cost of doing so, unless the value of the estate is significant, few legal aid lawyers would embark on such litigation;

4.1.2.4 it has been argued that a conservative court might find upholding such a contract to be *contra bonos mores* in as much as it might be tantamount to compensating a woman for the rendering of sexual services.<sup>43</sup>

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<sup>42</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p279.

<sup>43</sup> Sinclair assisted by Heaton *The Law of Marriage* p279-280. However, most writers agree that in the light of changing social values, this is an unlikely event.

## 4.2 SPOUSAL MAINTENANCE

### 4.2.1 SPOUSAL MAINTENANCE PRIOR TO 1984/88

There is a reciprocal duty of support between spouses. While it is ordinarily the husband who is ordered to support his wife, this is solely on account of his usually being the breadwinner. The duty usually ceased on divorce, but could continue if an order in terms of Section 10(1)(1) of the Matrimonial Affairs Act 37 of 1953 were granted. Here the court could order the guilty spouse to maintain the innocent one.<sup>44</sup>

This was based on the principle that no one could escape his legal obligations by his own wrongdoing.<sup>45</sup> Thus, if he deserted his wife without just cause or forced her to flee on account of his misconduct, he was obliged to continue to support her and *vice versa*.<sup>46</sup> He would also have to support her if she was unable to support herself and they did not enter into an agreement in terms of which he would **not** be liable to support her.<sup>47</sup> However, if his wife fled on account of his misbehaviour and then committed adultery, his duty to maintain her may cease, depending on how the court exercised its discretion.<sup>48</sup> While a husband was not liable to pay a wife arrear maintenance, unless they had entered into an agreement to this effect, if she had incurred debt in order to live, he was obliged to repay these.<sup>49</sup>

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<sup>44</sup> Boberg P Q R *The Law of Persons and the Family* Juta 1977 p250. I deliberately consulted the 1997 edition of Boberg here, which dealt with the pre-1984/88 position in respect of the duty of support between husband and wife. The more recent edition : Van Heerden, Cockerell, Keightley (eds) *Boberg's Law of Persons and the Family* 2ed Juta 1999 deals with the current law that pertains to the duty of support between husband and wife at p235-239.

<sup>45</sup> Hahlo *The South African Law of Husband and Wife* 5 ed Juta 1985 p136.

<sup>46</sup> Hahlo *The South African Law of Husband and Wife* op cit p136.

<sup>47</sup> Hahlo *The South African Law of Husband and Wife* op cit p136-137.

<sup>48</sup> Hahlo *The South African Law of Husband and Wife* op cit p137.

<sup>49</sup> Hahlo *The South African Law of Husband and Wife* op cit p137.

#### 4.2.2 SPOUSAL MAINTENANCE POST-1984/88<sup>50</sup>

With the movement away from a fault-based system of divorce heralded by the amendments to the Divorce Act in 1979, to a “no-fault” divorce system, the liability of the ex-husband to support his ex-wife diminished rapidly. There was also a move towards encouraging the parties to effect a “clean break”, by severing their responsibilities to each other entirely at the time of the divorce. Simultaneously, along with women’s apparent liberation, came the misguided view that shortly after a divorce a woman was able to achieve self-sufficiency. To assist her to re-acquire the skills she would need to become self-sufficient, the court would grant her “rehabilitative maintenance” or maintenance for a limited duration of time.<sup>51</sup> The longer the marriage, the older she was and the more deskilled she had become over time, the more likely she was to receive maintenance. The court could grant her maintenance until her death or remarriage, but seldom did.<sup>52</sup>

Weitzman<sup>53</sup> reports a parallel trend in California. She notes that although there was a misperception that alimony was awarded far more frequently than it in fact was,<sup>54</sup> with

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<sup>50</sup> For further reading regarding the present position in respect of spousal maintenance see: De Jong M “New Trends Regarding the Maintenance of Spouses on Divorce” *THRHR* Vol 62 No 1 February 1999 p75-87; Van Zyl L “Spousal Support An Update” *THRHR* Vol 55 No 2 May 1992 p297-300; Van Zyl L “Post Divorce Support Theory and Practice” *De Jure* Vol 22 No 1 1989 p71-84.

<sup>51</sup> Van Zyl L “Maintenance” in Clark B (ed) *Butterworths Family Law Service* 2000 paragraph 29 p22-23.

<sup>52</sup> Weitzman L J “Alimony Its Premature Promse and Recent Resurgence in the United States” in Crites L L and Hepperle W L (eds) *Women The Courts and Equality* Skye Publications 1987 p250-252. See fn 98.

<sup>53</sup> Weitzman L J “Alimony Its Premature Demise and Recent Resurgence in the United States” op cit p247-262 and Weitzman L J *The Divorce Revolution The Unexpected Social and Economic Consequences for Women and Children in America* The Free Press New York Collier Macmillan Publishers London 1985.

<sup>54</sup> Weitzman L J “Alimony Its Premature Demise and Recent Resurgence in the United States” op cit p247 and p258-260.

the introduction of a no-fault divorce system there was a decline in the number of alimony awards that were made, they were effective for a shorter period and women were assumed to be able to become self-sufficient quicker.<sup>55</sup>

Judges assumed homemakers could readily find well-paying jobs fairly soon after divorce. Weitzman quotes one judge as having said about a woman who had not taught in 20 years, nor had the appropriate teaching qualifications for the state in which she lived:

“Just because she’s been married 20 years doesn’t mean she can be a sponge for the rest of her life. If she was once a teacher, she can always get a job teaching... just because she hasn’t taught in 20 years doesn’t mean she can’t teach. She is a teacher.”<sup>56</sup>

This prevalent attitude did not take cognisance of the social reality. Women frequently gave up or delayed their own education and job opportunities to assume home-making and child-rearing responsibilities and thereby permanently impaired their future earning capacity.<sup>57</sup> Weitzman refers to research that shows that for each year out of the paid labour market, a woman suffers a permanent lifelong reduced earning capacity of 1,2%. For college-educated women, the decrease can be as much as 4,3% each year. A two-

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<sup>55</sup> Weitzman L J *Alimony Its Premature Demise and Recent Resurgence in the United States* op cit p250-252.

<sup>56</sup> Weitzman L J *Alimony Its Premature Demise and Recent Resurgence in the United States* op cit p254.

<sup>57</sup> Rhode shows how the changing social climate clearly affected the way courts exercised their discretion, and how, among some judges, feminist strategies provoked an ill-disguised backlash. She cites the example of a Florida judge in 1972 reversing the modest alimony award to a 48-year-old homemaker. The judge held that a woman could now be regarded “as fully equipped as a [man] to earn a living and provide for her essential needs... In this era of women’s liberation, we now have almost universally come to appreciate the fallacy of treating the demure members of our society as anything but on a basis of complete equality with the opposite sex”. She wryly notes, however, that in avoiding that “fallacy” the court embraced another: the inequalities in men’s and women’s status following divorce. Rhode D L *Justice and Gender: Sex Discrimination and the Law* Harvard University Press 1989. See fn 101.

to four-year break will permanently lower an average woman's earnings by 13% and a five-year break will lower earnings by 19%.<sup>58</sup> In addition to this loss of earnings, single parenthood after divorce leads to more interrupted work patterns, part-time employment and jobs with low prospects of promotion. This further curtails women's earning potential. While, happily for Californian women, Weitzman can report that recognition of these factors has resulted in a resurgence of alimony awards,<sup>59</sup> the same cannot be said for South Africa. The position of women in South Africa is even bleaker than for their Californian counterparts. Our nurse wife will face not only the impediments described above, but a colossal unemployment rate. And, if she is white, the additional barrier of employers being unable to employ her on account of affirmative action employment requirements.

#### 4.3 MAINTENANCE FOR THE DEPENDENT CHILDREN

In a discussion about the judicial discretion to redistribute assets between spouses, mention of the support of children seems misplaced. Regrettably, however, the financial plight of a wife on divorce becomes the financial plight of the children, as in most instances, it is the wife who receives custody of the children.<sup>60</sup> Having custody of the children affects a wife on divorce adversely in principally three ways:

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<sup>58</sup> Weitzman L J *Alimony Its Premature Demise and Recent Resurgence in the United States* op cit p254.

<sup>59</sup> Weitzman L J *Alimony Its Premature Demise and Recent Resurgence in the United States* op cit p254. See fn 12.

<sup>60</sup> Rhode notes that after divorce most men become single and most women become single parents. Three-fifths of all divorces involve minor children and the mothers receive custody in 90% of all cases. Rhode *Justice and Gender Discrimination and the Law* op cit p151. For further reading regarding the hardships experienced by divorced single parents to maintain their children see : Armstrong A *Struggling Over Scarce Resources: Women and Maintenance in Southern Africa* Harare Zimbabwe University of Zimbabwe Publications 1992; South African Law Commission Review of the Maintenance System Issue Paper 5 Project 100 South African Law Commission 1997; South African Law Commission Interim report on Maintenance South African Law Commission Pretoria 1998.

4.3.1 By being principal caregiver, her prospects of having full-time employment with benefits such as medical aid, pension and promotion, are dramatically reduced.<sup>61</sup>

4.3.2 Even if her husband does pay maintenance, it seldom covers the actual cost of rearing a child. Rhode<sup>62</sup> notes:

“Few of these women [who receive custody] have obtained child support awards sufficient to meet the actual cost of child-rearing. In one survey, two-thirds of fathers had support obligations that were less than their monthly car payments. Not only have support awards been set at unrealistically low levels, their value has quickly fallen through inflation and non-compliance”.

4.3.3 In most instances, the husband pays less maintenance than he should or not at all. As Rhode reports<sup>63</sup>: Over half of all divorced men have failed to meet their spousal and child-support obligations. Arrearages have averaged between one-half and three-fourths of the amounts due. Few decrees have required assistance for children over 18, and fathers have been less likely than mothers to provide it voluntarily, despite higher income levels. For many women, the legal cost of enforcing awards has been prohibitive. Only when non-payment reaches substantial levels have formal proceedings made sense, and at that point many judges have been willing to forego criminal sanctions or reduce amounts due in order to secure limited compliance. Because few courts require husbands to pay their wives' legal fees, legal remedies have cost more than they are worth.

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<sup>61</sup> Rhode *Justice and Gender Sex Discrimination and the Law* op cit at p151 see fn 12.

<sup>62</sup> Rhode *Justice and Gender Sex Discrimination and the Law* op cit at p151.

<sup>63</sup> Rhode *Justice and Gender Sex Discrimination and the Law* op cit at p151.



Maintenance defaulting is a worldwide phenomenon.<sup>64</sup> Clark<sup>65</sup> notes that it is estimated that in the United States in 2000 AD, virtually all Americans living in poverty will be women and children and that the main cause of such poverty is inadequate child support.

In America, Germany, England, Australia and New Zealand, attempts have been made to address this problem.<sup>66</sup>

Weitzman's<sup>67</sup> research in California revealed two major problems with child support: low awards and inadequate enforcement. The US Census shows that the average award for two children in the United States is much less than half of the cost of raising them. In California, the average child support award is less than the average cost of daycare alone. The major burden of childcare is thus placed on the mother, even though she normally has fewer resources and much less ability to pay. Furthermore, even though child support awards are modest to begin with, they are frequently not paid because many divorced fathers simply ignore court orders. This is **not** because they **cannot** afford to pay. Most could, without seriously jeopardising their own standard of living. They do not, however, in large part because enforcement is so lax that non-compliance rarely incurs a penalty. Judges are excessively lenient, fail to order a direct deduction from the husband's salary and frequently waive arrears. They are also very disinclined to order imprisonment for non-compliance. As Weitzman wryly notes: "The present

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<sup>64</sup> Van Zyl "Post-divorce Support – Theory and Practice" op cit p77, who notes that statistics from several countries show that on average, fewer than half of all maintenance orders are fully complied with.

<sup>65</sup> Clark B "Child Support: Public or Private" *THRHR* 1992 p277-286 at p278.

<sup>66</sup> Clark B "Comparative Legal Developments in Child Maintenance and Their Possible Effect on South Africa" *CILSA* 1993 p376-384.

<sup>67</sup> Weitzman L J *Judicial Perceptions and Perceptions of Judges* op cit p92-99.

legal system provides virtually **every incentive** for fathers not to pay child support.<sup>68</sup> An additional cause is the unequal division of marital property on divorce.<sup>69</sup>

The South African situation is, if anything, considerably worse than the Californian one Weitzman describes. In the South African Law Commission's Issue Paper on the Review of the Maintenance System in 1997<sup>70</sup> the problems are summarized:

"... Complaints range from the treatment, attitudes and facilities encountered at maintenance courts by persons wishing to lay complaints, to the seeming impunity with which persons manage to evade their legal duty to maintain their dependents, even where maintenance orders are in force. The underlying problem seems to be a social attitude that believes there is no responsibility on persons to support their dependents, especially where children are brought up in single parent households. The low measure of social disapproval with which a non-custodial parent's failure to support his or her children is met (especially if the non-custodial parent is the father) is indicative of this attitude. This attitude has pervaded not only society in general, but also the administration of the maintenance system".<sup>71</sup>

Just as in California, although non-compliance constitutes a criminal offence, the courts have developed a tradition of routinely suspending sentences for the failure to comply with maintenance orders, irrespective of whether the sentence is a fine or period of imprisonment. The rationale behind this approach is a reluctance "to kill the goose that lays the golden eggs".<sup>72</sup> But the consequence is that defaulters know that it is unlikely that they will receive anything more serious than a suspended sentence.<sup>73</sup> Similarly,

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<sup>68</sup> Weitzman L J *Judicial Perceptions and Perceptions of Judges* op cit p92-99.

<sup>69</sup> Weitzman L J *Judicial Perceptions and Perceptions of Judges* op cit p102-103. See fn 10.

<sup>70</sup> South African Law Commission Issue Paper 5 op cit.

<sup>71</sup> South African Law Commission Issue Paper 5 op cit p5-6.

<sup>72</sup> South African Law Commission Issue Paper 5 op cit p50.

<sup>73</sup> South African Law Commission Issue Paper 5 op cit p11.

although provision is made for interest to be charged on arrears, this is seldom, if ever, ordered.<sup>74</sup>

While the court can also issue a warrant of execution in respect of property, as well as a garnishee order authorizing payment against salary, these two remedies are also seldom granted.<sup>75</sup>

One of the major problems is the attitude of the maintenance court officials themselves. As a seasoned ex-magistrate with experience in maintenance matters commented<sup>76</sup>:

“...Attorneys, prosecutors and magistrates alike, are of the belief that they are wasting their talents and time in the Maintenance Court ... It has been my experience that, as a result of the impression created by senior officials and possibly inadvertently, by the Department itself, that maintenance enquiries are not really difficult or important, few ambitious prosecutors or magistrates wish to be part of these proceedings ... Combine this with the prospect of the typical legal personality being required to enter into a more personal and emotional field, and the result is that officials moreover have to be compelled to work at the maintenance section – often to serve as a *quid pro quo* for some mistake they have made in another section”.

The stark reality, therefore, is that our nurse wife may well battle to get her doctor ex-husband to support the children. And even if he does, the maintenance awarded will be considerably less than it really costs her to keep them. Freed of the physical and financial responsibility of the children that weighs her down, he becomes free to soar.<sup>77</sup>

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<sup>74</sup> South African Law Commission Issue Paper 5 op cit p11-12.

<sup>75</sup> South African Law Commission Issue Paper 5 op cit p12.

<sup>76</sup> South African Law Commission Issue Paper 5 op cit p8.

<sup>77</sup> Sinclair proposes the following solutions to the post-divorce poverty of women and their children:

1. Laws and policies which inhibit the attainment of their potential in employment must be removed;
2. the system of paid employment must be restructured to assist mothers discharge their child-care responsibilities;

#### 4.4 CLAIMING HALF OF THE GOODS SHE AND HER HUSBAND PURCHASED JOINTLY

In spite of parties being married out of community of property excluding any sharing, the parties could invoke sharing by registering property, for example, in both their names. In this case, in terms of the law of contract, the property belongs to both of them jointly. Hahlo asserts that where both spouses have contributed to the purchase of the matrimonial home on the understanding that it should belong to them jointly, but it was conveyed into the name of one spouse only, that spouse will be the legal owner, but as between spouses, joint ownership principles will apply. Few women, let alone attorneys, would have known that this principle applied. And even if they did, few women would have been in the financial position to institute the legal action required to assert their rights. Furthermore, the plaintiff, being the woman in this case, would bear the onus of proof in this instance, which would be a difficult one to discharge.<sup>78</sup>

Another fact, which may be better known to lawyers but is no better known by lay people, is that if the spouses are joint possessors of a thing and if one of them illicitly takes exclusive possession of it against the other's will, the latter has a spoliatory action against the former.<sup>79</sup>

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3. fathers should learn to accept that they too are parents and should share child-care responsibilities;
  4. our law should provide for a more equitable distribution of property on divorce to ensure financial security for dependent women and their children;
  5. better enforcement of duty of support between spouses and parents of their children, or the state pay and the creditor and state pursue the debtor;
  6. judges must be circumspect of the expectation that women can achieve financial independence imposed by the clean break principle;
  7. girls must be taught from the time they are girls to pursue their talents and that being a housewife is a luxury few can afford and the law cannot encourage;
  8. social security should cushion the effect of divorce and relationships.

<sup>78</sup> Hahlo HR *The South African Law of Husband and Wife* 5ed Juta 1985 p291.

<sup>79</sup> Hahlo HR *The South African Law of Husband and Wife* op cit p291.

#### 4.5 CLAIMING THOSE GOODS HE HAD BESTOWED ON HER IN THE ANTENUPTIAL CONTRACT

Whilst what a husband bestowed upon his wife in the antenuptial contract varied from marriage to marriage, it was invariably relatively valueless goods such as the contents of the matrimonial home, whose value was not amortised over time. While the moveables value depreciated over time, the value of the home appreciated. Regrettably, however, if the value of the house or its contents were not amortised in the antenuptial contract, their value to the wife diminished over time, just as the value of money did.

#### 4.6 CLAIMING BACK THE AMOUNT SHE HAD SPENT ON HOUSEHOLD NECESSARIES (APPLICABLE ONLY BETWEEN 1953 AND 1976)

In terms of the common law, both spouses had a duty to contribute to the cost of necessities *pro rata* their means. A spouse who bore more than his or her *pro rata* share could recover the excess with a right of recourse. Section 3 of the Matrimonial Affairs Act 37 of 1953 was enacted with the intention of making both spouses jointly and severally liable to the trader for debts for necessities, regardless of who incurred it. However, the legislature went beyond the reciprocity of the duty of support, which the common law provided and gave the wife married out of community of property a full and unconditional right of recourse for money spent by her on household necessities. This allowed women who spent their money on household necessities to build up a claim against their husbands over many years for a refund of the full amount disbursed. This "mischief", which allowed for a wife to be reimbursed for doing no more than discharging her marital duty of support, was terminated in 1976 when the Matrimonial Affairs Amendment Act 13 of 1976 restored the common law position. For the period of its existence, however, it did give women a powerful negotiating tool to enforce a favourable divorce settlement.<sup>80</sup>

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<sup>80</sup> Sinclair J D *An Introduction to the Matrimonial Property Act* Juta 1984 p41-46.

## 6.1 ENFORCING AN EMPLOYMENT CONTRACT BETWEEN HER AND HER HUSBAND

A husband's promise to pay his wife maintenance, an allowance or housekeeper's wage did not normally give rise to an enforceable contract. Also, in the absence of an express agreement, a wife who had worked as her husband's receptionist or bookkeeper had no claim against him. However, if he seriously undertook to employ his wife at a salary, then there was an enforceable contract between them.<sup>81</sup>

## 4.8 RETAINING HER SAVINGS FROM HOUSEKEEPING MONEY

Where a marriage was in community, savings made and articles purchased by the wife out of her household allowance belonged to the joint estate. Where they were married out of community, they belonged to the husband unless the wife could show that he donated them to her. However, once she put the savings into a bank or building society account, only **she** could dispose of them.<sup>82</sup>

Although deficient, all the remedies cited above - save that of reclaiming back from her husband what she had spent on household necessities - **still** apply. In fact, one new one has been added, where the cause of dissolution of the marriage is the death of her spouse rather than divorce. Prior to the enactment of the Maintenance of Surviving Spouses Act 27 of 1990, where the parties were married out of community of property with an express exclusion of the accrual system, a husband dying, by virtue of freedom of testation, could leave his wife penniless.<sup>83</sup> Since the reciprocal duty of support

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<sup>81</sup> Hahlo *The South African Law of Husband and Wife* op cit p291.

<sup>82</sup> Hahlo *The South African Law of Husband and Wife* op cit p136.

<sup>83</sup> To add insult to injury, if his estate could not meet the cost of the last illness and the funeral, then his wife had to pay for them – the last gesture of a reciprocal duty of support. Hahlo *The South African Law of Husband and Wife* op cit p303.

between spouses terminates on death, she could not even claim maintenance from his deceased estate. Section 2(1) of the Maintenance of Surviving Spouses Act 27 of 1990 remedies this. It provides:

“[I]f a marriage is dissolved by death after the commencement of this Act, the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefore from his own means and earnings.”<sup>84</sup>

## 5. THE WAY FORWARD

How then can we rescue our nurse wife married out of community of property with an express exclusion of the accrual system post-1984/88?

### 5.1 LEGISLATIVE AMENDMENT TO EXTEND THE JUDICIAL DISCRETION TO MARRIAGES OUT OF COMMUNITY OF PROPERTY WITH AN EXPRESS EXCLUSION OF THE ACCRUAL SYSTEM AFTER 1984/88

In spite of the defects of the existing redistribution remedy,<sup>85</sup> which I shall discuss in due course, extending it to women married out of community of property excluding accrual would somewhat alleviate their plight. It appears unlikely that the legislature will do this of its own volition: this option was canvassed when the Matrimonial Property Act was drafted as well as subsequently by the Law Commission in 1992,<sup>86</sup> and on both occasions was rejected. This leaves us to pin our hopes on the Constitutional Court holding the arbitrary denial of this remedy to women married out of community of property excluding accrual solely by virtue of the date of their marriage to be in conflict with the equality clause in the Constitution.<sup>87</sup>

<sup>84</sup> See Cronje D S P and Heaton J *South African Family Law* Butterworths 1999 p137-138.

<sup>85</sup> See fn 14 and p40-48.

<sup>86</sup> Law Commission Report on the amendment of section 7(3) of the Divorce Act op cit.

<sup>87</sup> Constitution of the Republic of South Africa Act 108 of 1996.

## 5.2 CONSTITUTIONAL CHALLENGE ON ACCOUNT OF THE FAILURE TO EXTEND THE JUDICIAL DISCRETION TO REDISTRIBUTE ASSETS TO WOMEN MARRIED OUT OF COMMUNITY OF PROPERTY EXCLUDING THE ACCRUAL SYSTEM VIOLATES EQUALITY GUARANTEE IN THE CONSTITUTION

Heaton<sup>88</sup> argues that using the date of a marriage as the criterion for affording or denying a remedy violates the equality clause in the Constitution. Because the exclusion of accrual is normally at the insistence of the party whose estate will grow most, usually the husband,<sup>89</sup> it is invariably the woman who leaves the marriage empty-handed. Furthermore, women's factual situation pre- and post-1984 is no different.

Sinclair agrees:

"... many couples are marrying after the two commencement dates, with antenuptial contracts which, by excluding the accrual system, are creating marriages in which no sharing of family assets takes place. Such a system was regarded by the legislature as unsatisfactory and sufficiently dangerous for and unfair to women for its harshness to have to be mitigated via the introduction of the discretion. Now there is developing *another* group of people, more often than not women, equally at risk, but who are denied the relief granted to their counterparts who married, *fortuitously*, before the cut-off dates. What argument can be advanced to justify the different treatment of people in identical circumstances? What can be adduced to palliate the sense of unfairness that women feel who are now emerging impecunious from broken marriages from which the accrual system was excluded?" (my italics)<sup>90</sup>

<sup>88</sup> Heaton J "Family Law and the Bill of Rights" in *Bill of Rights Compendium* Butterworths 1998 at 3C-36-3C.

<sup>89</sup> See fn 6.

<sup>90</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p143-144. Dillon N D C "The Financial Consequences of Divorce S7(3) of the Divorce Act 1979 – A Comparative Study" *CILSA* Vol XIX 1986 p271-289 p276-277, observes that S7(3) of the Divorce Act only extends to those marriages entered into before November 1984 and thus in time will become defunct. Why this is so, he says, is difficult to understand. "The judicial discretion granted to the courts by S7(3) should, it is hoped, assist a spouse who finds him or herself bound by a contract made perhaps some 20 years ago, entered into without proper, if any, legal advice, the consequences of which either of them did not comprehend or even contemplate. However, post-1984 spouses who find themselves in the same position will find no assistance from S7(3). The legislators have recognised a social evil that existed before 1 November 1984 and have acted to eradicate that evil. Why have they not done the same for those spouses married after 1984? The mere introduction by the Matrimonial Property Act of an alternative, statutorily defined matrimonial regime – that of the community of accruals – does not prevent persons from choosing, or from being badly advised to choose, a regime of strict separation of property (expressly excluding the



Those who believe the limitation of the judicial discretion will withstand constitutional scrutiny believe that it can be justified in terms of the limitation clause on two counts. First, on the basis of contractual freedom.<sup>91</sup> Sinclair is skeptical of this.<sup>92</sup> She caustically notes that the legislature did not hesitate to interfere with the parties' contractual freedom in 1984 or 1988, so it should not hesitate on this score now.<sup>93</sup> The only difference between the position of women married out of community of property pre-1984/88 and those married out of community of property with an express exclusion of the accrual system post-1984/88 is that in the latter case, women had an additional option available to them.<sup>94</sup> But having more choices in no way means that women post-1984/88 better able to exercise them than their predecessors<sup>95</sup>. The parties are not in an equal bargaining position and the wishes of the person (usually the prospective husband) who is in the superior financial positions will usually prevail.<sup>96</sup> Sinclair is unequivocal:

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regime of accruals). It is submitted, with respect, that there is very little difference between choosing to be under a regime of separation of property (excluding accruals) before the Act or after it. They both require a deliberate choice. The introduction of the statutorily defined regime of accruals merely informs the marrying public, for those who do not already know, of a further option in matrimonial property regimes that they choose in preference to the two more traditional regimes. Consequently, there appears to be no good cause for maintaining that the relief afforded by S7(3) shall become obsolete merely with the introduction of the optional new accrual regime.

"Van Wyk believes that the imposition of the system of accrual-sharing will force couples to consider both the demerits and merits of total separation, which should lead to a 'more informed choice'. Undoubtedly this shall be so. However, the form of relief provided by S7(3) is not designed to protect those who have made an 'informed' choice – it is to protect those who contracted, for whatever reason, be it ignorance, coercion or even foolishness, to their disadvantage. In all probability, such ill-informed choices will continue to be made after 1 November 1984."

<sup>91</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p145.

<sup>92</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p143.

<sup>93</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p146.

<sup>94</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p146-7.

<sup>95</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p147. See p2-4.

<sup>96</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p147.

"The date of the marriage cannot serve to differentiate between people in identical circumstances. The Constitutional Court should strike down this criterion because it is arbitrary; it unfairly discriminates against people married according to the system of complete separation of property on the ground of the date of their marriage. The discrimination takes the form of denying to those people a remedy to relieve an injustice that is granted to persons married with an identical system, but earlier. That the differentiation has a disparate unfair impact on women is a further possible ground for attack, but a harder one to substantiate."<sup>97</sup>

One could argue that women have become more aware of their rights in the years since 1984/8 and that they are now able to make an informed choice. Is it not paternalistic to assert that women require a judge to be able to exercise his or her discretion and come to their aid where they have entered into an agreement that is to their disadvantage? I do not think this view is correct. While women have attained formal equality on many levels,<sup>98</sup> the substantive reality for many women remains unchanged.<sup>99</sup> Fineman<sup>100</sup>

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<sup>97</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p147-8.

<sup>98</sup> De Jong points out that formal equality for women in South Africa started gradually at first but very rapidly from the end of 1993 onwards:

"For example, the General Law Fourth Amendment Act of 1993 finally abolished the marital power *in toto* and achieved formal equality between men and women in a number of spheres. Similarly, the Guardianship Act of 1993 accorded equal status to mothers in regard to guardianship of their children. And in the employment sphere, labour legislation such as the Wages Act, the Basic Conditions of Employment Act and the Labour Relations Act has outlawed unfair discrimination based on sex. Of course, the interim Constitution of 1993 and the final Constitution of 1996 are also of great significance in this regard."

De Jong M "New Trends Regarding the Maintenance of Spouses Upon Divorce" (62) *THRHR* 1999 p77-78.

<sup>99</sup> Albertyn chronicles women's inequality in South Africa:

"Women in South Africa tend to be poorer than men. They own less property, earn less income per capita and are more likely to be unemployed. When they are employed women are concentrated at the bottom of the employment scale. They generally earn less than their male counterparts and receive unequal benefits, subsidies and recognition on the basis of gender and marital status. The universities and civil service are perhaps the more visible example of this ... Women predominate in marginal and unprotected spheres of work. For example, many African and working class women are employed as domestic servants in the rural areas, in part-time work and in the informal sector where such employment benefits as job security, pensions and maternity benefits are not available to them.

points out that after more than two decades there is no evidence that the situation has become much better for the majority of women. In fact, she says there are indications that it has become, or will get, worse. She cites the findings of Victor Fuchs<sup>101</sup> who says that:

“My most important empirical finding is that the gap between women and men in economic well-being was no smaller in 1986 than in 1960 ... The women/men ratio of money income almost doubled, but women had less leisure while men had more, an increase in the population of adults not married made women dependent on their own income, and women’s share of financial responsibility for child-care rose. A striking exception is the experience of young, White, unmarried, well-educated women who made large gains relative to their male

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Women’s labour in the home is unpaid and unrecognized ... It is not recognized in writing divorce agreements or in sums awarded in damages claims. It is not recognized in the Gross Domestic Product, yet it frees male workers to be productive and fuels the economy.

Despite women’s inferior economic status statistics tell us that women work harder than men whether they are housewives or job holders in the ‘double shift’ in the workplace and at home. According to the Humphrey Institute of Public Affairs in the USA, women who represent about 50% of the world’s population, perform nearly two-thirds of all the working hours, receive one-tenth of the world’s income and own less than 1% of the world’s property ...

... [W]omen are more likely to be the victims of violence often by their male partners. It is estimated that one in six women is battered by her male partner and that one in three women is raped or sexually assaulted in her lifetime ...

Women are less likely to occupy positions of power in the workplace, the home, in the street or in the public world of politics and culture”.

Albertyn C *Achieving Equality for Women The Limits of a Bill of Rights* Centre for Applied Legal Studies University of the Witwatersrand June 1992 p3-6.

Kaganas and Murray also warn against the equating of formal with substantive equality. They point out that Hahlo made this inaccurate assumption: noting women’s franchise, the opening up of the universities and professions and women’s increased activity in the workforce, he appeared to believe that gender equality had largely been achieved. But, they warn, formal equality is insufficient to eliminate women’s disadvantages and the assumption that it does prejudices them. It has led to the withdrawal of protection or assistance previously offered to women. Thus a woman who can support herself on divorce must not expect to receive maintenance. Even if a woman has devoted herself to home and family for years, the courts are loathe to give her lifelong maintenance. They give her ‘rehabilitative maintenance’ for a limited period of time until she can re-enter the job market. The truth is for the many reasons discussed elsewhere in this dissertation, this is very difficult for her to do. *Gender and the New South African Legal Order* Bennett TW *et al* (eds) Juta 1994 p11 and 14.

<sup>100</sup> Fineman M A *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* University of Chicago Press Chicago and London p37.

<sup>101</sup> Fineman M A *The Illusion of Equality* op cit p37-38.

counterparts ... Most of these women are childless; those who are mothers frequently live under great pressure".<sup>102</sup>

<sup>102</sup> Fineman cautions against the premature assumption of women's independence. She records the transition from a patriarchal view of the family where the husband was responsible for the financial well-being of his family to an egalitarian or equality one where the husband and wife share responsibility. With this new attitude comes the view of marriage as a partnership rather than as a relationship where one partner is dependent on the other. As far as the rules of property division go, this change in attitude has resulted in *entitlement based on earnings*, or material contributions, be they economic or homemaking rather than need becoming the most important consideration. Fineman expresses concern that making contribution paramount and expecting the parties to contribute equally, we are disregarding the material circumstances of women. While she acknowledges the reasons why liberal feminist legal reforms wish to shed the view of a dependent woman as victim, which is demeaning, she feels that the polar extreme – that of the equal partner in an egalitarian marriage does not take into account the range of other alternatives in between:

"If one rejects the comprehensiveness of either or both of the conflicting images of marriage that the stereotypes of women are equal and woman as dependent represent, one must confront the reality that many women whose mixed circumstances may require remedial rules are neglected. The stereotypes of dependency and partnership are polar opposites. Thus no single, typical result can be fairly reconciled with the goal of doing justice to both. A woman who operates in both the marriage and the market as an equal might be better off under the old common law system, where she keeps her separate property, and her ex-husband is liable only for child support. The true dependent, by contrast, might by her very circumstances have been able to claim all of the property and still be found in need of continued support for herself. In either case, it would seem that what is desirable in the way of reform is the creation of a range of acceptable economic outcomes which could accommodate a variety of differences among women in various circumstances. The focus on the stereotypes of dependency and equality and the futile attempt to reconcile them tend to narrow rather than expand the definition of acceptable results".

Fineman warns of the dangers of adhering to the concept of equality. Equality demands sameness of treatment and differentiation in any sphere may be seen as an acknowledgement of inferiority. A commitment to equality encourages its proponents to minimize or deny difference. This results in the minimizing or denying of the differences between men and women's needs on divorce in spite of startling statistical evidence to the contrary.

In order to ensure true equality often, on divorce, women need to receive more than the strict division that the equality concept will allow. Thus equality has superceded equity. As Fineman records:

"Simplistic, rule – equality changes in divorce laws premised on an unrealized egalitarian marriage will tend to further impoverish women and their children. Under such laws, divorced women are to assume sole economic responsibility for themselves and joint economic responsibility for their children. Theoretically, this requirement is fair because divorced women will assume this responsibility under the same terms and conditions as their ex-spouses. Equal treatment in divorce, however, can only be fair if spouses have access to equal resources and have equivalent needs. Realistically, many women do not have such economic advantages. In addition, they continue to care for children."

Fineman M A *The Illusion of equality* op cit p38, 40, 42, 45-47, 52. See fn 127.

For Rhode neither the equality, nor the equitable model offer a solution. She concurs with Fineman that equality in form does not equate equality in fact. She says that both formulations, namely that divorces statutes should presumptively mandate "equal" division of marital assets or that courts should retain discretion to make "equitable" allocations, are defensible in *theory* but neither are in *practice*. Judges, when exercising their discretion, have done so in an

A second justification for retaining the limited judicial discretion is that not to do so would result in uncertainty regarding the outcome on divorce. Both Heaton<sup>103</sup> and Sinclair<sup>104</sup> comment that uncertainty is preferable to the “irremediable harshness” of a complete separation of property. Furthermore, since 1984/88 there has not been a flood of litigation arising out of the granting of judicial discretion.<sup>105</sup> What it has done is equalise the parties’ negotiating positions so that at roundtable conferences and divorce mediation sessions, the fruits of both their labour are shared more equally.

Our constitution provides the basis on which to transform our society into a more egalitarian one. What is required in order to do this is a complete restructuring of society through the redistribution of power and resources, as well as through the eradication of systemic disadvantage.<sup>106</sup> The Constitutional Court has delivered several

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idiosyncratic, gender biased fashion, whereas the ‘equal’ division ignores unequal needs, responsibilities and opportunities confronting men and women. She proposes that state assume greater responsibility:

“... we [cannot] continue denying public responsibility to reduce the private suffering that divorce entails. Many couples lack adequate assets to maintain two separate households. Most men remarry usually within a few years after divorce, and incur new family obligations. When the pie is sufficiently small, changing the size of the slices is an inadequate approach. As experience in other countries suggests, even with more equitable property allocation standards and efficient child support mechanisms, many single-parent families will still need government assistance. The difficulties of divorcing women cannot be met solely through divorce law. They reflect broader societal problems calling for broader societal responses concerning employment, welfare, childcare, and related issues”.

Rhode *Justice and Gender, Sex Discrimination and the Law* op cit p154.

<sup>103</sup> Heaton *Family Law and the Bill of Rights* op cit p36-37.

<sup>104</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p145.

<sup>105</sup> Sinclair assisted by Heaton *The Law of Marriage* op cit p145-146; Heaton “Family Law and the Bill of Rights” op cit 3C 37-38.

<sup>106</sup> Direct sex discrimination is any policy or action, which discriminates overtly on the basis of sex. Indirect sex discrimination occurs where a policy or action may be gender-neutral in appearance, but have very different effects on women and men. Systemic sex discrimination is discrimination that has seeped into the very fabric of our society. Historical and cultural assumptions about the proper roles of women and men in society have a continuing effect in

judgments in which it has indicated that equality must be understood substantively rather than formally.<sup>107</sup>

If the Constitutional Court is to be true to the spirit of the Constitution – that is, to ensure that **real** equality is to be achieved – then it must find that **because** women and men are in reality not equal bargaining partners, inequality will be wrought if they are to be formally treated as such. While the Constitutional Court cannot transform the social reality, it can take it into account. By recognising the social inequality between men and women and, thereby, the legislature's failure to extend the judicial discretion after 1984/88, it will call for a greater measure of justice to be done between the parties.<sup>108</sup>

While I believe that extending judicial discretion to marriages will go some way towards alleviating the plight of women married out of community of property excluding accrual, I do not want to suggest that I perceive it to be a panacea. In its existing form, it has serious limitations.

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shaping expectations. When the dominant view is that women are subordinate to men, women may be led to accept less than their entitlements. This enables long-standing inequality to be perpetuated. It infects every aspect of one's life. Australian Law Commission Discussion Paper 54 1993 entitled "Equality Before the Law" paras 3.24-3.26; as well as para 3.11-13.

<sup>107</sup> Albertyn and Goldblatt refer to *Brink v Kitshoff* 1996 (5) BCLR 752 (CC) where O'Regan J spoke of group disadvantage, thereby acknowledging systemic discrimination (at p256); *Harksen v Lane NO* 1998 (1) SA 300 (CC) in which O'Regan J, when examining whether section 21 of the Insolvency Act 24 of 1936 was unconstitutional, looked at the impact it would have on married people. She considered the discrimination suffered by married women in particular because of gender stereotypes and inequalities (at p203); *President of the RSA v Hugo* 1997 (4) SA 1 (CC) where Goldstone J and O'Regan J concurred that women's disproportionate childcare responsibility is one of the major causes of women's inequality in our society (at p264). Albertyn C and Goldblatt B "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality" *SAJHR* 1995 p248-276.

<sup>108</sup> For further reading regarding the attainment of substantive equality for women using the Constitution see : Albertyn C *Achieving Equality for Women : The Limits of a Bill of Rights* Centre for Applied Legal Studies University of Witwatersrand 1992; Bekker J C "Interaction Between Constitutional Reform and Family Law" *Acta Juridica* 1991 p1-17; Camerer S "Equal Before the Law: A Woman's View of a Bill of Human Rights" *De Rebus* No 305 May 1993 p422-425; Van der Walt A J and Botha H "Coming to Grips with the New Constitutional Order : Critical Comments on *Harksen v Lane*" *SA Public Law* Vol 13 No 1 1998 p17-41.

## 6. LIMITATIONS OF THE EXISTING REDISTRIBUTION PROVISION

### 6.1 THE LIMITS IMPOSED IN SECTION 7(3) OF THE DIVORCE ACT ITSELF

In the first instance, the judicial discretion is limited by the requirements of s7(3) itself.

A court can only exercise its discretion where:

6.1.1 the spouses (Whites, Coloureds and Indians) were married before 1 November 1984 in terms of an antenuptial contract which excludes community of property and community of profit and loss without any type of accrual system; or

6.1.2 the spouses (Blacks) were married before 2 December 1988 in terms of s22(6) of the Black Administration Act 38 of 1927; and

6.1.3 the parties to these marriages have not reached an agreement on the distribution of their assets.

### 6.2 THE REQUIREMENTS OF SECTION 7(4) OF THE DIVORCE ACT

In the second instance, before a court can exercise its discretion, it must be satisfied that the spouse in favour of whom the order is granted must have made a direct or indirect contribution to the maintenance or increase of the estate of the other spouse. The contribution may be made "by the rendering of services, or the saving of expenses, which would otherwise have been incurred, or in any other manner". The court must be

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further satisfied that on account of the contribution, it is “equitable and just” to order the redistribution of assets.<sup>109</sup>

What constitutes a contribution was considered by the Appellate Division in *Kritzinger v Kritzinger* 1989 (1) SA 67 (A) to be<sup>110</sup>:

“some positive act by means of which one spouse puts something into the maintenance or increase of the estate of the other spouse, whether by way of money or property, labour or skill” (at 88 C-D).

Mr Kritzinger claimed that by virtue of foregoing a promotion, which would have taken him out of the country, in order to prioritise his wife’s career advancement, he was entitled to a share of her estate in terms of Section 7(3) of the Divorce Act. The trial court awarded him a share of her estate.<sup>111</sup> The Appellate Division, however, overruled this decision. Milne J A held that by foregoing the promotion he had given up nothing

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<sup>109</sup> Sections 7(4) and (5) of the Divorce Act provide:

“(4) an order under subsection (3) (see fn 15) shall not be granted unless the court is 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.

(5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3), the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account –

- (a) the existing means and obligations of the parties including an obligation that a husband to a marriage as contemplated in subsection 3(b) of this section may have in terms of section 22(7) of the Black Administration Act 1927 (Act No. 38 of 1927);
- (b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;
- (c) any other factor which should in the opinion of the court be taken into account.”

<sup>110</sup> *Annual Survey of South African Law* 1989 Juta p202-26. For further reading on how the courts have interpreted what constitutes a contribution see : Bedil S “What is a contribution?” *Annual Survey of South African Law* 1987 p104-106.

<sup>111</sup> *Kritzinger v Kritzinger* 1983 (4) SA 85 (C).



(at 86H) on account of having enjoyed a higher standard of living with his wife than he would have, had he accepted the promotion.

Lind feels that, on the face of it, this argument is appealing.<sup>112</sup> However, "... the sacrifice he made related to the potential for his own separate estate to increase ...

"Even though Mr Kritzinger decided to turn down the overseas promotion because he felt he would enjoy a higher standard of living with his wife, his separate estate did not benefit from that decision. Therefore, he gave up the actual – not speculative – prospect of earning more and thereby building up a larger estate. This was an actual sacrifice that enabled his wife to accumulate the estate she accumulated during the remaining years of their marriage".<sup>113</sup>

Milne J A stated further that a sacrifice did not qualify as a contribution to the maintenance or increase of the estate of the other spouse as required by the Act for the judicial discretion to come into operation. He asserted that what the legislature meant by a contribution was some positive act be done by way of assistance.<sup>114</sup>

However, as Lind points out,<sup>115</sup> the discretion is an equitable one. Its purpose is to do justice between the parties where it would be unfair to strictly apply the matrimonial property regime chosen by the parties at the time of the marriage. He concludes that Milne J A's approach is too narrow. Lind laments<sup>116</sup>:

"A regrettable feature of our legislation is that it allows for an equitable discretion only where a contribution is made. There may be circumstances where equity would demand a redistribution even where there was no contribution at all. To

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<sup>112</sup> Lind C "Divorce – and property sharing" Vol 18 *Businessman's Law* 1989 p231-234 at p233.

<sup>113</sup> Lind C "Divorce – and property sharing" op cit p233.

<sup>114</sup> Lind C "Divorce – and property sharing" op cit p233.

<sup>115</sup> Lind C "Divorce – and property sharing" op cit p233.

<sup>116</sup> Lind C "Divorce – and property sharing" op cit p234.

limit the discretion to redistribute property even further, as Milne JA does, is to deprive the court of the opportunity of doing justice where there is a demand for it. What is the court going to say to the wife who has made no contribution to her husband's estate, except for 20 years, to bow to his whim that she remain at home embroidering during the day, ready to play the piano and sing to him at night when he has enjoyed the dinner prepared for him by his servants? Is she to be denied a share of his fortune when he tires of her?"

Sinclair<sup>117</sup> believes that need, rather than contribution, should be the pre-eminent criteria for redistributing marital property. A contribution should be used to determine the extent of the redistribution only.<sup>118</sup> She notes that, otherwise, "only healthy women, who can work in the home and save their husband's expenses that would otherwise have been incurred, or who can participate in the labour market, may benefit from the new dispensation".<sup>119</sup>

Clark and Van Heerden<sup>120</sup> agree. In their view, the **only** precondition to the exercise of the discretion should be that on the facts of the individual case, a redistribution order is necessary to do justice between the parties. In its present form, they warn:

"A spouse who sacrifices his or her career to advance that of the other spouse, in the expectation of sharing in the financial benefits gained by the other in the course of such career, may find that his or her sacrifice goes unrewarded, even in a case where justice requires that some sharing should take place."<sup>121</sup>

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<sup>117</sup> Sinclair *An Introduction to the Matrimonial Property Act 1984* op cit p50.

<sup>118</sup> Sinclair *An Introduction to the Matrimonial Property Act 1984* op cit p50-52.

<sup>119</sup> Sinclair *An Introduction to the Matrimonial Property Act 1984* op cit p52.

<sup>120</sup> Clark B and Van Heerden B J "Asset Redistribution on Divorce – The Exercise of Judicial Discretion" *SALJ* Vol 106 1989 p243-249 especially p246-7.

<sup>121</sup> Clark and Van Heerden "Asset Redistribution on Divorce" op cit p249.

Thus, doing justice between the parties should be the overriding consideration, and **not** the strict entitlement of the parties.<sup>122</sup>

In *Kritzinger v Kritzinger* 1989 (1) SA 67 (A), by expressly rejecting the notion that the husband's career sacrifices constituted a "contribution", the court flew in the face of a universal trend to broaden the definition of property.<sup>123</sup>

Weitzman<sup>124</sup> notes that research in the United States indicates that most divorcing couples have very little property. But they do have another form of wealth: career assets – their earning capacities and the benefits and entitlements of their employment such as their pensions, medical insurance and social security. These assets are often more valuable than the tangible assets they acquired in the course of the marriage. She notes that today people invest in human capital and careers. The "new property" that results from these investments includes enhanced earning capacities, pensions and job-related benefits. She argues that since these forms of property are often the major assets acquired during marriage, they should be recognised as part of marital property and divided on divorce because they are joint property. It is impossible to have an equitable division of marital property if they are **not** divided as they are acquired through joint time, energy and money. Usually the wife abandons her own education to help her husband establish his career. She may leave her job to move with him, use her skills to assist him unpaid, or assume the major share of the child-rearing responsibility. Thus, both parties make an investment in the husband's career. Career assets are also a

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<sup>122</sup> Sinclair J D, "Divorce and the Judicial Discretion – In Search of the Middle Ground" *SALJ* Vol. 106 1989 p249-59.

<sup>123</sup> See Sinclair *An Introduction to the Matrimonial Property Act 1984* op cit p69-72.

<sup>124</sup> Weitzman L J "Marital Property: Its Transformation and Division in the United States" in *Economic Consequences of Divorce* Weitzman L J and McClean M (eds) Clarendon Press Oxford 1992 p85-142 at p105-108. See fn 10.

form of deferred compensation for work performed during the marriage. Career assets such as pension benefits accrue only later on in the marriage. Most importantly, marriage is a partnership, so that usually the husband's career is a product of the parties' **combined** effort. Had she not sacrificed her career to assume family responsibilities that he otherwise would have to undertake, for example, he would not have achieved the lofty heights he did. Another example of a career asset, the accolades for which must go to **both** parties, is a professional degree. While a university education is expensive in terms of investing one's time and resources, it yields a valuable return in future income. Especially when undertaken during the marriage or when undertaken beforehand, but paid for during the marriage, both parties contribute to its acquisition and hence both should reap the rewards. If a division does not occur, usually the husband will receive a windfall of the entire benefit of the couple's **joint** investment of both time and money.<sup>125</sup> The sacrifices in her own career she made at the time **can never** be recouped.

Although in South Africa in terms of S7(7)a of the Divorce Act, the pension interest of a party is deemed to be part of his or her assets, thereby recognising this career asset for what it is, regrettably the same cannot be said for career assets such as other retirement benefits, a professional education, enhanced earning capacity, goodwill of husband's business and his entitlement to company goods and services.

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<sup>125</sup> O'Sullivan M "Stereotyping and Male Identification: Keeping Women in Their Place" 1994 *Acta Juridica* p185-201 p123-134 generally p123-125 particularly.

### 6.3 ADDITIONAL LIMITATIONS OF THE EXISTING REDISTRIBUTION PROVISION

Alex Costa<sup>126</sup> points out other failings in the existing redistribution provision. He questions why it should be necessary to show that the estate of the other spouse has been maintained or increased. He believes that it is inequitable that one spouse should be prejudiced simply because the other spouse has diminished his estate, for example, by gambling. He also believes the laudable intent of redistribution can be circumvented where a wealthy husband creates a trust for the benefit of his children and thereby pegs the value of his estate. He argues that such structures should be ignored for purposes of a redistribution order.

For me, less obvious than the defects in the redistribution provision itself, is the way in which it has been applied by the courts.<sup>127</sup> From analysing excerpts of seven divorce

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<sup>126</sup> Costa A, "A plea for the Reform of Section 7(3) of the Divorce Act 70 of 1979 as Amended" 1990 *De Rebus* p921.

<sup>127</sup> Scutt examines how judicial bias, as a result of their socialization, causes judges to value husbands' and wives' contributions differently (p211-212). Judges' failure to equate men and women's contributions are, she says, more a product of their having been raised in a sexist society that is a result of malice (p212). This is compounded by our society's attitude towards money resulting in monetary contributions being seen as more valuable than non-monetary contributions, and paid work being more valuable than unpaid work (p212). Even where the wife works in the husband's business, her contribution is devalued. Scutt uses *Mallett v Mallett* (1984) 156 CLR 605 as an example (p216-218). When 'hostessing', Mrs Mallett is seen as having fun at dinner parties, whereas many a business deal is done over dinner (p217). 'Doing the books' and 'answering the phone', and 'keeping a business diary' are all essential to the running of the business, yet all of these contributions by Mrs Mallett were considered unremarkable (p217-218). While it was her efforts during these 'unremarkable functions' that kept the operation going, her husband got all the recognition for his entrepreneurial flair ( p218). Scutt (p246-247) says one of the reasons women's work is devalued is on account of 'the myth of women's dependency':

"This myth of dependence has succeeded in establishing women who work (hard) in the home, for no monetary reward, as 'dependents'. For a woman who cleans, cooks, washes, vacuums; plays the efficient and charming hostess to business colleagues and family friends; uses her energies and resourcefulness in building up a business or farm; cares lovingly and effectively for the children, often on a 24-hour basis; psychologically supports and ministers to her spouse, the idea that she is a 'dependent' is a wry jest.

The myth of dependency renders assessments of women's contribution to the marital assets less than those made of men's contribution. As men are accepted as independent beings, it follows naturally in traditional thought that they should be assumed to do all the work on their own; build up the business alone; work the farm without wifely assistance; contribute all the business acumen (which women are seen to be lacking, falsely of course). This ignores two realities: first, the reality that women work hard at home, and

judgments, O'Sullivan<sup>128</sup> concludes that judges reward women "...for whom motherhood is the only appropriate goal, who remains at home participating in a limited range of activities in the domestic sphere, who does not assume positions of authority and whose chastity is unassailable",<sup>129</sup> and disadvantage other women. Career women are positively punished. In *Kritzinger v Kritzinger* 1983 (4) SA 85 (C) at p91, Berman J described Mrs Kritzinger:

"Plaintiff, on the other hand, was – in the modern idiom – something else. At first sight, and initially when examined by her counsel, she came across as an attractive, sweetly smiling, soft-spoken ordinary housewife in her late 30s. Such a description, however, completely belies the truth of the matter... She created – whilst in the witness box (and left when she stood down) – an impression of a formidable and resolute lady, who not for nothing had been chosen as Businesswoman of the Year on her appointment as managing director of Clicks, a very large and enterprising chain of retail stores; she is – in the best sense of

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often work equally hard in the paid workforce; that men give little assistance at home, mostly expending their energies in the paid workforce alone. And secondly, the reality that men do not 'do it alone', do not possess business acumen in isolation from their discussions about business with their wives, in isolation from the psychological support, comfort and care they receive daily on the home ground, which makes their life in the paid workforce easier to organize and sustain (p246).

... For the woman in part-time employment, the dependency myth ensures that the part-time work is seen as trivial, of little moment (rather than the hard work it really is, with inadequate return) and thus not worth any proper assessment in considering contribution to marital assets ...

For women engaging in full-time paid employment, it is not recognized that they are required to carry out two full-time jobs: that in the home, that in the paid workplace; whilst the husband is in legal interpretation entitled to have his contribution seen as exceptional when he engages in business alone (and as founded upon his own entrepreneurial flair and skill) failing to make an equal contribution to the home and family life through housework, homecare, childcare.

... Women must again work positively to renounce this falsified picture of women, marriage and the real world ... Women contribute on psychological levels, by hard work in the home, by caring, by injection of finances (large proportions of women engage as women always have, in paid work, many part-time). Marriage is an interdependent relationship: the parties are each dependent upon the other in various ways; the ways may vary, the situations may vary, the personalities may vary, but marriage is about interdependency between two adult human beings living together in a family; it is not about one person being a 'dependent', the other being quite independent' (p247). Scutt *J Women and the Law Commentary and Materials* The Law Book Company Ltd 1990.

<sup>128</sup> O'Sullivan M "Stereotyping and Male Identification" op cit p185-201.

<sup>129</sup> O'Sullivan M "Stereotyping and Male Identification" op cit p190.

the latter-day epithet – Thatcherese, a woman more to be admired than loved.”<sup>130</sup>

O’Sullivan observes that there is a judicial perception that women cannot simultaneously conduct successful careers and maintain the role of a good wife. This results in the judges attributing the breakdown of the marriages to the wives. However, there is also a class dimension: whilst there is a strong disapproval of middle-class wives engaging in careers in the public sphere, there is a presumption that lower-class and working class women should be employed.<sup>131</sup>

O’Sullivan concludes:

“The result of gender bias in the drafting, application and interpretation of law is that women suffer discriminatory treatment at the hands of the justice system. A system that suffers from gender bias fails in its primary duty to administer justice fairly and impartially. As a consequence, the whole of the justice system suffers as its legitimacy is brought into question...[F]ormal legal recognition of equality will not automatically achieve equality in practice. Positive steps have to be undertaken to ensure that formal legal equality promotes equality in practice in women’s lives”.<sup>132</sup>

## 7. CONCLUSION

The legislature, recognising the enormous hardship wrought upon women and children by a complete separation of property, threw them a lifejacket in the form of a judicial discretion to redistribute benefits to them. Having rescued them, however, they removed the lifeboats from the water and sailed away, leaving the women married in precisely the same way, only later, to drown.

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<sup>130</sup> O’Sullivan M “Stereotyping and Male Identification” op cit p194-195.

<sup>131</sup> O’Sullivan M “Stereotyping and Male Identification” op cit p196.

<sup>132</sup> O’Sullivan M, “Stereotyping and Male Identification” op cit p200.

And while I concede there are difficulties with the existing redistribution provision, it is certainly better than nothing at all. The first prize for women married out of community of property excluding the accrual system would be for the Constitutional Court to declare that the redistribution provision's applicability to women married out of community of property prior to 1984/88 only, violates the right of everyone to be equal before the law and to have the right to equal protection and benefit of the law<sup>133</sup> and to suspend the declaration of invalidity to allow a competent authority to rectify the deficiency.<sup>134</sup>

This would afford the legislature not only an opportunity to extend the redistribution remedy to women married out of community excluding accrual after 1984/88 – and arguably *to every situation where an injustice may arise if judicial discretion did not exist* – but also to address the many other deficiencies with the existing redistribution provision that I have referred to elsewhere.

I echo a final plea by Costa:

*“Marriage must be seen as a form of partnership in which the spouses contribute their respective skills, functions and talents to the association. It is or ought to be contrary to public policy to permit a spouse to exclude by contract his financial obligations, which ought to flow on termination of the marriage (whether by death or divorce) having regard to what is fair and equitable. The primary objective must be to do justice between the spouses...”* (my italics)<sup>135</sup>

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<sup>133</sup> Section 9 of the Constitution op cit.

<sup>134</sup> Section 172 of the Constitution op cit.

<sup>135</sup> Costa, “A Plea for the Reform of S7(3) of the Divorce Act op cit p921.