ARTICLE

Reflecting on Former Chief Justice Ngcobo's Approach to Gender Equality: Revisiting the *Jordan* and *Volks* Judgments

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ABSTRACT

More than a decade ago, Ngcobo CJ upset gender scholars and activists in two judgments for failing to consider the interface between social context and legal rules in relation to women as sex workers, in one instance, and those who are in unmarried permanent life partnerships, in another. These two judgments were the topics of much scholarly work. Further, there have been recent legal developments in relation to these two issues. This article examines these criticisms with a view to reflecting on Ngcobo CJ's jurisprudence on gender equality in relation to *Jordan* and *Volks*. The aim is not to determine the validity or invalidity of these claims, but to highlight the issues raised in order to discuss Ngcobo CJ's legacy in relation to these two judgments. The latest developments since the two cases will also be examined. The article emphasises the significant role of the Legislature and argues that the Legislature has a constitutional duty to protect the rights enshrined in the Bill of Rights: the time has arrived for it to legislate on these issues.

Keywords: gender equality; sex worker; permanent life partner; choice argument; *Jordan*; *Volks*

* I would like to thank the blind peer reviewers for their critical comments on the earlier draft of this article. I would also like to acknowledge Mtende Mhango for his critical eye and support during the writing stages of the article. All errors are mine.

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL/index
Volume 32 | Number 1 and 2 | 2017 | pp.1–33

https://doi.org/10.25159/2522-6800/3569
ISSN 2522-6800 (Online) ISSN 2219-6412 (Print)

Introduction

Chief Justice Sandile Ngcobo penned more than thirty-four judgments during his tenure at the Constitutional Court ('the Court'). Many of these judgments continue to be cited as leading authority that shape South African jurisprudence today.[1] His landmark judgment in *Doctors for Life*[2] continues to shape the law on the separation of powers and the framework for direct access to the Court.[3] It is fair to say that no separation of powers case in South Africa post 2006 is decided without reference to Ngcobo J's judgment in *Doctors for Life*. Equally, his minority judgment in *Glenister II*[4] continues to have a great impact on South African jurisprudence.[5]

However, two of his judgments, *Jordan*[6] and *Volks*,[7] have been criticised by gender scholars.[8] This article examines these criticisms with a view to reflect on Ngcobo CJ's

1 For example, *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) ('*Doctors for Life*'); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) ('*Hoffmann*'); *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) ('*Masetlha*'); *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) ('*Albutt*'); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) ('*Bato Star*').

2 *Doctors for Life* ibid.

3 See, for example, *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) at para 63; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); *2010* (*5) BCLR 457 (CC*) (9 March 2010); and *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) ('*Economic Freedom Fighters*').

4 *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) ('*Glenister II*').

5 See *Economic Freedom Fighters* (n 3), where the Court relied on a principle articulated by Justice Ngcobo's to determine the question of whether the National Assembly breached its constitutional obligation to hold the President to account; and *Democratic Alliance v Minister of International Relations and Cooperation* [2017] ZAGPPHC 53.

6 *S v Jordan (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae)* 2002 (6) SA 642 (CC) ('*Jordan*').

7 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

8 See, for example, Elsje Bonthuys, 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2008) 20 Canadian Journal of Women and the Law 1; Elsje Bonthuys, 'Women's Sexuality in the South African Constitutional Court: *Jordan v S*' (2006) 14 Feminist Legal Studies 391; Anita Cooke, 'Choice, Heterosexual Life Partners, Death and Poverty' (2005) 122 SALJ 542; Denise Meyerson, 'Does the Constitutional Court of South African Take Rights Seriously: The case of *S v Jordan*' 2004 Acta Juridica – The Practice of Integrity: Reflections on Ronald Dworkin and South African Law 138; B Coetzee Bester and A Louw, 'Domestic Partners and "the Choice Argument": *Quo vadis*?' (2014) 17 (6) PER/PELJ 295; Henk Botha, 'Equality, Dignity, and the Politics of Interpretation' (2004) 19 SAPL 724; Rosaan Kruger, 'Sex Work from a Feminist Perspective: A Visit to the *Jordan* Case' (2004) 20 SAJHR 138; Gretchen Carpenter, 'Of Prostitutes, Pimps and Patrons – Some Still More Equal Than Others?' (2004) 19 SAPL 231(focusing on the dissent); Mtendeweka Mhango, 'Transformation and the Judiciary' in Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014) 68; Nicole Fritz, 'Crossing *Jordan*: Constitutional Space for (UN)Civil Sex?' 2004 (20) SAJHR 230, generally supports the decriminalisation of sex work from a feminist point of view; Usha Jivan and Devina Perumal, '"Let's Talk about Sex, Baby" – But Not in the Constitutional Court: Some Comments on the Gendered

jurisprudence on gender equality specifically relating to these two cases.[9] The aim is not to determine the validity or invalidity of these claims, but to highlight the issues raised in order to discuss Ngcobo CJ's legacy in relation to these two judgments. However, I argue that Ngcobo CJ was correct to defer to the Legislature for finality, since these are controversial issues.

The article begins by way of introduction in this section. Then it discusses Ngcobo CJ's opinions and the criticisms by gender scholars in *Jordan* and *Volks.* Next, the article will examine new developments in the aftermath of *Jordan* and *Volks.* Finally, I express my views with regard to Ngcobo CJ judgments on the two cases, particularly in relation to the latest developments on the issues.

The *Jordan* Case

In 1996, three defendants conceded that they had breached certain provisions of the Sexual Offences Act 23 of 1957, which criminalised sex work or commercial sex and brothel-keeping. However, they challenged the provisions in question on the basis that they were unconstitutional and invalid, and should be declared as such.[10] Given that magistrates' courts have no power to declare legislation invalid,[11] the defendants appealed to the High Court to have the provisions of the Sexual Offences Act declared invalid. The High Court held that section 20(1A)(*a*) of the Sexual Offences Act, which outlawed sex work, was unconstitutional.[12] The High Court also held that sections 2, 3(*b*) and 3(*c*) of the Sexual Offences Act (the brothel-keeping provisions) were not

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Nature of Legal Reasoning in the *Jordan* Case' (2004) 17 SA Criminal Justice 368; Chesa Boudin and Marlise Richter, 'Adult, Consensual Sex Work in South Africa – The Cautionary Message of Criminal Law and Sexual Morality' (2009) 25 SAJHR 179; and B Smith, 'Rethinking *Volks v Robinson*: The Implications of Applying a "Contextualised Choice Model" to Prospective South African Domestic Partnerships Legislation' 2010(13)3 PER/PELJ 238.

9 Ngcobo CJ has penned an important dissenting opinion in *Bhe & Others v Khayelitsha Magistrate & Others* 2005 (1) SA 580 (CC), advancing the right of women to inherit their husbands' or fathers' intestate estates. He held at para 190 that '[t]he role that women play in modern society and the transformation of the traditional African communities into urban industrialised communities with all their trappings, make it quite clear that whatever role the rule of male primogeniture may have played in traditional society, it can no longer be justified in the present day and age. Indeed, there are instances where in practice women have assumed the role of the head of the family.' See also C Himonga, 'Reflection on *Bhe v Magistrate Khayelitsha*: In Honour of Emeritus Justice Ngcobo of the Constitutional Court of South Africa' in this volume.

10 *Jordan* para 34.

11 Section 170 of the Constitution of the Republic of South Africa, 1996 stipulates that 'Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.'

12 Section 20 provides: 'Persons living on earnings of prostitution or committing or assisting in commission of indecent acts. – (1) Any person who –. . . (*a*A) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; . . . shall be guilty of an offence.'

unconstitutional. The defendants were granted leave to appeal to the Court, where the order of constitutional invalidity had to be considered.[13]

In a majority judgment penned by Justice Ngcobo, the Court found that the brothel-keeping provisions were constitutionally acceptable.[14] Secondly, Justice Ngcobo found that section 20(1A)(*a*) did not unfairly discriminate against women as advanced by the defendants and *amici*.[15] The central question before the Court was whether the impugned provisions of the Sexual Offences Act, particularly section 20(1A)(*a*), were in conflict with the Interim Constitution Act 200 of 1993 on the basis that they discriminate unfairly against women. The State submitted that the impugned section was not discriminatory and hence constitutionally acceptable because it strikes at both the sex worker and the customer. The appellants and *amici* argued strongly that the impugned section was discriminatory because it focuses only at the sex workers, who are largely women.[16]

Justice Ngcobo found that the impugned provision 'was directed at the [sex worker] and not the customer'. However, he reasoned that to penalise the sex worker only does not constitute unfair discrimination on the basis of gender.[17] In his view, the impugned section was gender neutral because it punished 'any person' who sells sex irrespective of their gender.[18] Consequently, for Ngcobo J, a conclusion had to be drawn that punishing the sex worker only did not result in direct discrimination since both male and female sex workers could suffer the pain of the law on commission of the offending acts. In addition, Justice Ngcobo found that the impugned section did not amount to indirect discrimination.[19] In this regard, Ngcobo J noted that the purpose of the impugned provision was to criminalise commercial sex, and since a sex worker is engaged in that business, the differentiation between a sex worker and a customer was constitutionally acceptable.[20] Ngcobo J further emphasised that the differentiation made by the impugned provision must be regarded against the fact that anyone who pays for sex is guilty of a crime and liable to the same punishment as the sex worker, irrespective of their gender.

Moreover, Ngcobo J further reasoned that the common law or the Riotious Assemblies Act 17 of 1956 renders anyone criminally liable for the same punishment whether they are a customer or a sex worker.[21] To further augment his point concerning the validity of the differentiation, Justice Ngcobo reasoned that if the sex worker is seen as being more blameworthy than the customer, and a conviction carries a profound stigma on

13 At para 36.
14 At para 31.
15 At paras 8–20.
16 At para 8.
17 At para 9.
18 ibid.
19 At para 10.
20 ibid.
21 At para 15. See also Jivan and Perumal (n 8) 374, criticising Ngcobo J for invoking 'the provisions of a discredited apartheid statute, namely, the Riotous Assemblies Act 17 of 1956, and the common law, to illustrate the neutrality of the law.'

the sex worker for that reason, 'that is a social attitude and not the result of the law'.[22] In his view, the dishonour that attaches to the sex worker is because of the conduct they engage in and not because of his or her gender.[23] Ngcobo J was not persuaded by one of the arguments advanced that gender discrimination endured because there are more females engaging in the business of selling sex than males.[24] To sum up his conclusion that section 20(1A)(*a*) of the Sexual Offences Act was gender neutral, and hence, constitutionally permissible, Ngcobo J remarked as follows:

> In my view, a gender neutral provision which differentiates between the dealer and the customer, a distinction that is commonly made by statutes, and which is justifiable having regard to the qualitative difference between the conduct of the dealer and that of the customer, and which operates in the legal framework that punishes both the customer and the dealer and makes them liable to the same punishment, cannot be said to be discriminating on the basis of gender, simply because the majority of those who violate such a statute happen to be women.[25]

In view of the fact that the High Court had not considered other grounds for possible invalidation of the Sexual Offences Act, the Court took it upon itself to consider other possible constitutional grounds for setting aside the impugned sections of that Act. Two other grounds were found relevant to the case, namely the right to economic activity[26] and that to privacy[27]obtained in the Interim Constitution.

In relation to the possibility that the impugned section breached the right of a person to engage in economic activity, Justice Ngcobo was persuaded by the State's contention that the legislation was designed to provide for the protection or improve the quality of life of because sex workers because '[sex work] is associated with violence, drug abuse and child trafficking'.[28] He reasoned correctly that

> the legislature has the responsibility to combat social ills and where appropriate to use criminal sanctions [in this regard, and once] the legislature has done so, courts must give effect to that

22 At para 16.
23 ibid.
24 At para 17.
25 At para 18.
26 Section 26 of Interim Constitution, 1993 states:
'(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.
(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.'
27 Section 13 of the Interim Constitution, 1993 provides that '[e]very person shall have the right to his or her personal privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.'
28 At para 24.

> legislative choice and may not enter into the debate as to whether the choice made is better or worse than others not chosen.[29]

The suggestion in this reasoning is that those are political choices that are not suitable for courts to make. Ngcobo J further noted that the means chosen by the State in this case were to criminalise commercial sex and brothel-keeping.[30] In his view, this was sanctioned by section 26(2) of the Interim Constitution because '[m]easures intended to eliminate the harmful effects of [sex work] and brothel keeping are clearly measures designed to protect and improve the quality of life.'[31] In deference to the political branches of state, Justice Ngcobo remarked that 'it is not for this court to pass judgment on the effectiveness or otherwise of the choice made by the legislature' because 'we are not entitled to set aside legislation simply because we may consider it to be ineffective or because there may be other and better ways of dealing with the problem.'[32] Hence, Ngcobo J concluded that sex work and brothel-keeping are not protected by section 26 of the Interim Constitution.

Lastly, Justice Ngcobo dealt with the effects of the impugned section on the right to privacy. He found that the right to privacy was not implicated in this case. His reasoning was that this case was about the commercial exploitation of sex, and he rejected the argument that 'a person who commits a crime in private, the nature of which can only be committed in private, can necessarily claim protection of the privacy clause.'[33] In his view, the law should apply to crimes that are committed in private as it is with crimes that are committed in public.[34] Without going through the analysis under the limitation clause in the Interim Constitution, Justice Ngcobo conclusively stated that even if there were a limitation of the right to privacy, the limitation is acceptable based on the legitimate State interests in proscribing sex work and brothel-keeping.[35]

The Criticism of *Jordan* by Academics

Gender activists have criticised Justice Ngcobo's judgment in *Jordan* on three main grounds. First, activists have criticised Ngcobo J for fatally omitting to apply the equality test that the Court has established to determine equality issues.[36] In *Harksen*,

29 At para 25.
30 At para 26.
31 ibid. One of the transformative aspects in the preamble to the Interim Constitution was to achieve 'equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.'
32 At para 26.
33 At para 28.
34 ibid.
35 At para 29.
36 See, for example, Botha (n 8); Meyerson (n 8) and Jivan and Perumal (n 8).

the Court developed a test to determine allegations of breaches of the right to equality.[37] According to the Court, the test involves the following enquiry:

a. Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
b. Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
    b.i. Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
    b.ii. If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
c. If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.[38]

According to one critic, the *Harksen* judgment devised a complex five step inquiry to the equality analysis,[39] and yet Ngcobo J collapsed this inquiry and merely found that since the impugned sections of the Sexual Offences Act were acceptable there was no indirect discrimination. To highlight the contradiction in Ngcobo J's jurisprudence, Meyerson noted that pursuant to the equality inquiry, 'if a law is discriminatory the fact that it may be rationally related to a legitimate government purpose' is immaterial, except if such discrimination is found, through the lens of the above inquiry, not to be unfair.[40] Yet, Meyerson critically notes that Ngcobo J held that since the Sexual Offences Act

37 *Harksen v Lane* 1998 (1) SA 300 (CC) ('*Harksen*'). See also *President of the Republic of South Africa & Another v Hugo* (CCT11/96) [*1997*] ZACC *4*; *1997* (6) BCLR 708; *1997* (*4*) *SA 1* (18 April *1997*) ('*Hugo*'); *Prinsloo v Van der Linde* 1997 (3) SA 1012.

38 At para 53.

39 Meyerson (n 8) 145.

40 ibid para 146.

pursued a legitimate government purpose, the impugned provision in that Act, even if discriminatory is not unfair.

In addition, Meyerson observed that even in the absence of *Harksen* and its progenies, Ngcobo J's approach to equality in *Jordan* trivialises the equality guarantees and does not depict a truthful comprehension of the right to equality.[41] Accordingly to Meyerson, the constitutional framework on equality and the equality jurisprudence makes it impossible to infer the absence of indirect discrimination merely because an impugned section of a law is acceptable. Meyerson takes issue with Ngcobo J's deferential attitude towards the state's argument that the purpose of outlawing commercial sex is constitutionally legitimate.[42] For Meyerson, Ngcobo J took for granted that the purpose of the Sexual Offences Act was legitimate and did not interrogate this assertion further as he should have done under the limitation analysis.

In addition, critics of *Jordan* find it hard to understand Ngcobo J's reasoning in relation to previous equality jurisprudence of the Court. In this regard, Botha argues,

> It is hard to square this reasoning with the Court's understanding, as articulated in previous judgments, that the Constitution seeks to achieve substantive equality and aims to redress systemic discrimination and past patterns of disadvantage. The majority's emphasis on the gender neutrality of section 20(1)(*a*A) and the way in which it divorces the law from social attitudes and separates the inquiry into the constitutionality of the provision from questions of its enforcement, smack of a formal understanding of equality and a failure to situate its inquiry within a broader context of systemic gender discrimination.[43]

My views coincide with the criticism concerning Ngcobo J's omission to apply the *Harksen* test to address the issues in *Jordan*. The Court began to develop an equality test in *Hugo*, which was later refined in *Harksen.* Since then, the Court has applied this test to determine allegations of unfair discrimination.[44] It is not clear why Ngcobo J omitted

41 ibid.

42 ibid.

43 Botha (n 8) 727. See also Bonthuys, 'Women's Sexuality in the South African Constitutional Court' (n 8) 392, arguing that *Jordan* 'followed after a series of enlightened judgments in which the Court acknowledged the need for a substantive understanding of equality and articulated the links between legal and social disadvantage affecting different groups of women' and therefore it came as surprise that the majority will come to this conclusion'; Jivan and Perumal (n 8) 37, arguing that 'the majority judgment shows a marked unwillingness to go beyond the strictures of formal legalism and engage with the unfairness of the sex worker, as opposed to the client, being labeled a criminal'; and Carpenter (n 8) 249, arguing that Ngcobo J was 'less sensitive to "systematic motifs of discrimination" and "patterns of systemic disadvantage" and their impact on vulnerable groups or classes of persons.'

44 The *Harksen* test was developed under the equality provision in s 8 of the interim Constitution. The Court has affirmed on a number of occasions that the equality analysis under s 8 of the interim Constitution applies equally to the equality provision found in s 9 of the Constitution and has applied the *Harksen* test consistently: see *Sarrahwitz v Martiz* 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC) paras 50–68; *Ngewu & Another v Post Office Retirement Fund & Others* 2013 (4) BCLR 421 (CC); *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) para 42;

this test from being applied in *Jordan*. The minority judgment by Sachs and O'Regan JJ also disagreed with Ngcobo J's holding that section 20(1)(*a*A) was gender-neutral and referenced Burchell and Milton[45] that '[i]t has generally been accepted in our law that section 20(1)(*a*A) criminalises only the conduct of the [sex worker] and not that of the client.'[46]

Secondly, the omission by Ngcobo J to engage in a proper analysis under section 33 of the Interim Constitution (the forerunner to section 36 of the Constitution, 1996) leaves a lot to be desired among his critics. Underneath Ngcobo J's analysis in *Jordan* is the notion that an infringement of the rights implicated in that case was saved by the State's legitimate objective to outlaw commercial sex. The criticism from gender scholars is that this approach renders the limitation clause without any force.[47] Accordingly, the point of section 33 is to hold the State to the high standard of justification.[48] Put differently, section 33 fosters a culture of justification by permitting the limitation of rights only when 'it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'[49] To augment her point, Meyerson critically notes that in *Makwanyane*, the State was held to the highest standard of justification as contemplated in the limitation clause, but Ngcobo J's judgment in *Jordan* imposes no such high burden on the State in relation to the Sexual Offences Act.[50] This was problematic for Meyerson because it demonstrated that the Court did not take the limitation enquiry seriously.[51]

It must also be recalled that the minority judgment of Sachs and O'Regan JJ found that section 20(1A)(*a*) constituted a limitation of section 8(2) of the Interim Constitution (equality clause) 'insofar as it renders criminal the conduct of the [sex worker] but not that of the client'.[52] In this regard, the minority judgment found that the State did not attempt to justify the limitation of this provision nor did they argue that there was a legitimate government purpose for criminalising the conduct of the [sex worker]. The minority judgment therefore disagreed with Ngcobo J's view that the State was justified in criminalising the sex worker's conduct and disregard that of the buyer.[53] However,

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National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (1) BCLR 39 (CC) para 15; and *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) paras 42–69.

45 JM Burchell and JRL Milton, 'Crimes Against Sexual Morality' in *Principles of Criminal Law* (2edn, Juta 1997) 630:
It is noteworthy that the section does not penalize the person who gives the reward in return for the sexual intercourse. In short, the prohibition is directed only at [sex workers] and not their customers. This feature of the section reflects a form of discrimination against [sex workers]. The discrimination lies in the fact that the customer's role in the act is not penalized while that of the [sex worker] is.

46 *Jordan* para 41.

47 Meyerson (n 87) 147.

48 ibid.

49 See s 36 of the Constitution. See also Mhango (n 8) 90.

50 Meyerson (n 8) 147 and 154.

51 ibid 147.

52 At para 96.

53 ibid. See also Meyerson (n 8), agreeing with the minority judgment on this issue.

the minority did not find that the rights to dignity and privacy of the sex workers were breached in this case.[54]

Finally, gender scholars have criticised Ngcobo J's judgment in *Jordan* for its fatal omission to consider the interface between social context and legal rules.[55] This criticism emanates from Ngcobo J's holding that 'the Sexual Offences Act was constitutional because it pursues a legitimate purpose, namely to outlaw commercial sex.'[56] In this regard, Ngcobo J relied on and was persuaded by the following explications from the State as to why commercial sex should to be outlawed:

> First, the business is said to breed crime which is not confined to the sale of sex but which extends into violent crimes. Second, the business results in the exploitation of women and children. Third, it leads to trafficking in children. Fourth, it leads to the spread of sexually transmitted diseases. The appellants and *amici* contended that these social ills can be eliminated by decriminalising and regulating commercial sex. In my view these arguments must be addressed to the legislature.[57]

As acknowledged by Ngcobo J above, gender activists submitted contradictory research in support of the view, among others, that the link between commercial sex and social ills is not that obvious.[58] Ngcobo J disregarded these submissions and accepted the State's submissions.[59] As one commentator has reflected, the social stigma and blame that attaches to sex workers rather than clients was also dismissed by Ngcobo J as a 'social attitude and not the result of the law'.[60] The effects of this disregard of the law and pernicious social context are that they enhance the risk that courts 'will fail to alleviate the oppression of the majority of women.'[61]

54 See Bonthuys, 'Women's Sexuality in the South African Constitutional Court' (n 8) 399, who is critical of the minority in this sense: 'Like the majority, who refused to admit the connection between the legal rules and social stigma, in their discrimination argument the minority decision in relation to bodily integrity failed to acknowledge that the legal response to sex work rendered sex workers vulnerable to exploitation, violence, rape and coercion by clients, pimps and by members of the police force who, as has been widely documented, sometimes demand sex in return for not arresting sex workers.'

55 Bonthuys, 'Women's Sexuality in the South African Constitutional Court' (n 8) 18; Kruger (n 8) 145–6; and Carpenter (n 8) 249, arguing that 'there is general agreement that many [sex workers] should be regarded as victims rather than villains. The statement in the majority judgment that "[sex workers] knowingly accept the risk of lowering their standing in the eyes of the community" not only flies in the face of reality: it also reveals the "hidden assumptions" and "inarticulate premises" of the majority, who must surely be aware that most [sex workers] are women and thus vulnerable to abuse and exploitation by pimps, "madams" and customers.'

56 *Jordan* para 15.

57 At para 15n11.

58 Kruger (n 8) 146.

59 *Jordan* paras 24–5.

60 Bonthuys, 'Women's Sexuality in the South African Constitutional Court' (n 8) 29.

61 ibid.

The *Volks* Case

In this case, the Court held that the fact that the Maintenance of Surviving Spouses Act 27 of 1990 discriminated on the basis of marital status in the provision of maintenance benefits was not unconstitutional. The facts that gave rise to this issue were as follows. The first respondent, Mrs Robinson, and the deceased were in a permanent life partnership which lasted for sixteen years (until his death). During their relationship, they occupied a flat jointly and shared household expenses. Importantly, the deceased had supported Robinson by depositing money into her bank account, and by registering her as his dependant with his medical scheme. Robinson reciprocated by contributing towards the general expenses and by nursing and caring for him, as he suffered from bipolar disorder. In his will, the deceased bequeathed certain assets to Robinson.[62]

During the winding-up of the deceased's estate, Robinson submitted a claim for maintenance in terms of the Maintenance of Surviving Spouses Act, which in section 1 defines a survivor as the 'surviving spouse in a marriage dissolved by death'. The executor rejected Robinson's claim on the basis that she was not a spouse in terms of the Maintenance of Surviving Spouses Act.[63] Robinson then 'applied for an order declaring herself a "survivor" for purposes of the [Maintenance of Surviving Spouses] Act.'[64] In the alternative, she 'sought an order declaring that the exclusion of the survivor of a domestic partnership from the [Maintenance of Surviving Spouses] Act was unconstitutional' as it unfairly discriminated against her on the ground of marital status and also violated her right to dignity.[65]

The High Court found in favour of Robinson.[66] On appeal to the Court, however, the majority judgment, which for our purposes includes Ngcobo J's concurring opinion (referred to here collectively as the 'majority decision'), held that the impugned provisions of the Maintenance of Surviving Spouses Act were not in conflict with sections 9 and 10 of the Constitution. Skweyiya J reasoned that the Maintenance of Surviving Spouses Act was a mere extension of the reciprocal duty of support between married couples to the estate of a deceased spouse.[67] He observed that this extension should be viewed as a qualification to the right to freedom of testation.[68] However, since no reciprocal duty exists between unmarried couples, he ruled that it would be unfair to impose such a duty on the estate of the deceased.[69] On the question whether the Maintenance of Surviving Spouses Act breached Robinson's right to human dignity, Skweyiya J had this to say:

62 *Volks* (n 7) paras 3–7.
63 At para 9.
64 At para 12.
65 ibid.
66 *Robinson v Volks NO* 2004 (6) SA 288 (C).
67 *Volks* (n 7) para 56.
68 At para 57.
69 At para 60.

> I do not agree that the right to dignity has been infringed. Mrs Robinson is not being told that her dignity is worth less than that of someone who is married. She is simply told that there is a fundamental difference between her relationship and a marriage relationship in relation to maintenance. It is that people in a marriage are obliged to maintain each other by operation of law and without further agreement or formalities. People in the class of relationships to which she belongs are not in that position.[70]

Justice Ngcobo wrote a concurring opinion to Skweyiya J's majority judgment in *Volks*. His judgment was substantially similar to Skweyiya J's majority judgment: Ngcobo J found that the differentiation between survivors of marriages and survivors of permanent life partnerships was made pursuant to a legitimate government purpose, namely to provide maintenance and support for the survivors of marriages. Therefore, for Justice Ngcobo, the issue became 'whether the differentiation between survivors of marriages and survivors of permanent life partnerships constitutes discrimination.'[71]

Given that the differentiation was on the grounds of marital status, Ngcobo J accepted that the differentiation constituted discrimination and was presumed unfair under section 9(5) of the Constitution.[72] As a consequence, Ngcobo J correctly turned to the methodology on the equality analysis set out in the *Hugo* and *Harksen* cases, where dignity is the underlying consideration in the determination of unfairness.[73] He drew attention to the fact that 'it is the impact of discrimination on the survivors of permanent partnerships that is the determining factor regarding the unfairness of the discrimination in this case.'[74]

In determining the fairness of the discrimination, Ngcobo J began with an analysis of the constitutional and international framework that recognises the obligation on South Africa to protect the institution of marriage.[75] In the light of this recognition, Ngcobo J found that it was appropriate and permissible for the State to distinguish between married people and unmarried people by affording legislative protection to married people that is not afforded to unmarried people.[76] Turning to the impugned provisions of the Maintenance of Surviving Spouses Act, Justice Ngcobo, like his counterpart Skweyiya J, found that the purpose of that Act was not aimed at impairing the dignity of the survivors. Instead, the impugned provisions were directed at ensuring that surviving spouses who are unable to support themselves and in need of maintenance do procure

70 At para 62.
71 At para 75.
72 At para 76.
73 At para 29.
74 At para 79.
75 At paras 81–5.
76 At paras 86–7. See also *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC).

such maintenance.[77] In sustaining the legitimacy of the government's purpose, Ngcobo J reasoned that the consequence of marriage is that it generates the reciprocal duty of support (under both statutory and indigenous laws) during the subsistence of the marriage.[78] And that what the Maintenance of Surviving Spouses Act does 'is to ensure this duty continues after the death of one of the spouses … by transferring the duty to the estate of a deceased spouse.'[79]

While the right to receive maintenance and support from the deceased spouse is protected by the Maintenance of Surviving Spouses Act, and not extended to surviving partners of a permanent life partnership, in Ngcobo J's view this is not an unfair disadvantage because the law 'does not prevent partners in a permanent life partnership from leaving sums of money to each other in their respective wills, which can be used for maintenance.'[80] Furthermore, Ngcobo J noted that 'the law places no legal impediments to heterosexual couples involved in permanent life partnerships from getting married' so as to subsequently enjoy the protections under the Maintenance of Surviving Spouses Act.[81] Ngcobo J also acknowledged the existence of the law that puts

> in place a legal system that regulates the rights and obligations of those heterosexual couples, who have chosen marriage as their preferred institution to govern their intimate relationships.[82]

Consequently, 'their entitlement to protection under the [Maintenance of Surviving Spouses] Act depends on their choice to marry or not.'[83] Accordingly, the decision to marry and maintain such relationship signifies the readiness to assume the reciprocal duty to support one another (during and after death) placed on married couples.[84] According to Ngcobo J, marriage is a matter of choice, which brings into being, among other things, these legal consequences.[85] In the final analysis, Ngcobo J rejected the argument that the dignity of the surviving life partners was infringed because the Maintenance of Surviving Spouses Act denies them the protection it affords to surviving spouses. He also found that the discrimination was not unfair. Hence, the Maintenance of Surviving Spouses Act was found to be constitutional and therefore valid.

Criticism of *Volks* by Academics

77 At para 88.
78 At para 89.
79 At para 88.
80 At para 90.
81 At para 91.
82 ibid.
83 ibid.
84 ibid.
85 At para 92.

Gender scholars have criticised the judgment in *Volks* primarily on two grounds. First, they criticised the premise on which *Volks* was decided. Recall that *Volks* was predicated upon the fact that people choose to get married or not, and depending on that choice the law affords them protection relative to the choice.[86] If they choose to marry, the Maintenance of Surviving Spouses Act protects them by ensuring that they are afforded survivors' benefits after their spouse's death. Such protection is deliberately denied to survivors of life partnerships, who chose not to marry. This is based on the 'choice argument'.[87] As explained by Sachs J in his dissenting opinion in *Volks*, the proponents of the choice argument believe that:

> By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage, a person cannot complain if she is denied the legal benefits she would have had if she had married. Having chosen cohabitation rather than marriage, she has to bear the consequences. Just as the choice to marry is one of life's defining moments, so, it is contended, the choice not to marry must be a determinative feature of one's life.[88]

The criticism from gender scholars is that the majority decision does not take into account the many social reasons why people in life partnerships do not marry.[89] Instead, the majority decision incorrectly assumed that all life partners consciously choose not to marry.[90] In other words, gender scholars point out that in the South African context, poverty, ignorance of the law and gender inequality all operate against the existence of a real choice to marry or not to marry.[91] One gender scholar, Bonthuys, has dealt with this issue at some length.[92] In her study, Bonthuys draws attention to a feminist viewpoint that courts have universally used the liberal choice argument as validation for the exclusion of women from legal protection.[93] She argues that rather than extending protection to women, in cases such as *Volks* and *Jordan*, the choice argument simply underpins existing discriminatory legal rules by sustaining the legal illusion that women

86 See, for example, at para 93, where Ngcobo J holds that 'marriage is a matter of choice. Marriage is a manifestation of that choice and more importantly, the acceptance of the consequences of a marriage.'

87 See Coetzee Bester (n 8), arguing that the 'choice argument cannot provide a suitable foundation for the future regulation and recognition of domestic partnerships.'

88 At para 154.

89 Cooke (n 8) 553, arguing that this kind of reasoning is problematic as 'it does not take into account the many different reasons why cohabitants do not marry, and assumes that they are a uniform group who have all deliberately and consciously chosen not to marry.' See also Sach J's minority judgment at para 164, explaining some of the social realities pertaining to opposite-sex couples in a permanent relationship that 'the social reality would have been that in a considerable number of families the man would have regarded himself as the head of the household with the right to take all major decisions concerning the family.'

90 Cooke (n 8) 553.

91 Bonthuys, 'Women's Sexuality in the South African Constitutional Court' (n 8); Cooke ibid.

92 Bonthuys ibid.

93 ibid 23.

choose to be subjected to their unfavourable circumstances.[94] She points out that the majority decision in *Volks* was conservative and had this effect on women in South Africa. Like other gender scholars, Bonthuys highlighted other weaknesses in the choice argument by arguing that choices between privileged and disadvantaged women are different and that the law should take this into account.[95] This point leads us into the last major criticism levelled at *Volks*.

Aside from criticising the reliance on the choice argument, Bonthuys is critical of the majority decision's refusal to rely on research into the social and economic situation of disadvantaged women on whom the judgment in *Volks* would have had an impact.[96] She notes that as an aftermath of rebuffing evidence of the socio-economic context of the most disadvantaged women (who are less empowered to make meaningful choices), the majority decision founded its judgment on the socio-economic context of privileged women.[97] Aside from other criticisms that were predicated upon dissenting views in *Volks*,[98] the above arguments depict the main critical arguments levelled against *Volks.*

Revisiting *Jordan* and *Volks*

Women in vulnerable positions still find themselves in those same positions. There has not been a change in the laws on sex workers or on unmarried same-sex couples in a permanent relationship with reciprocal duties. It is also important to note that, subsequent to *Jordan*, the Legislature amended the Sexual Offences Act to include a provision that expressly prohibits both the selling and the buying of sex.[99] Most importantly, the South African Law Reform Commission (SALRC) has recently published its report recommending the criminalisation of sex work and rejecting its legalisation.[100] Further, on the choice argument in *Volks*, the Court has recently handed down a judgment on a similar issue which concerned an unmarried same-sex couple in

94 ibid.
95 ibid 20.
96 ibid 19.
97 ibid 20.
98 See also the dissenting opinion by Mokgoro and O'Regan JJ, where they found that the exclusion of cohabiting partners in s 2(1) of the Maintenance of Surviving Spouses Act was unconstitutional and invalid as it unfairly discriminates against surviving cohabiting partners on the basis of marital status; Coetzee Bester (n 8); Cooke (n 8); Kruuse (n 8) and Smith (n 8).
99 See s 11 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, which stipulates that:
A person ('A') who unlawfully and intentionally engages the services of a person 18 years or older ('B'), for financial or other reward, favour or compensation to B or to a third person ('C')—(a) for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or (b) by committing a sexual act with B, is guilty of the offence of engaging the sexual services of a person 18 years or older.
100 South African Law Reform Commission, *Sexual Offences, Adult Prostitution* (*Project 107) Report* (June 2015) (first published 2017).

a permanent relationship. Although the Court deemed a cohabiting surviving partner to be a surviving partner, the Court failed to overturn its decision in relation to the choice argument in *Volks*. I deal with these latest developments below.

South African Law Reform Commission not sold on the Decriminalisation or Legalisation of Sex Work: Revisiting *Jordan*

It must be recalled that the majority in *Jordan per* Ngcobo J deferred to the Legislature to deal with the social issues that were brought before the Court.[101] Indeed, these issues have been canvassed by the SALRC for many years.[102] The recently released report of the SALRC is as a result of that research. As a brief background, the SALRC was established by the South African Law Reform Commission Act 19 of 1973, as amended. Section 4 of the Act lists the objects of the SALRC as follows:

> The objects of the [SALRC] shall be to do research with reference to all branches of the law of the Republic and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernization or reform thereof, including –
>
> a. the repeal of obsolete or unnecessary provisions;
> b. the removal of anomalies;
> c. the bringing about of uniformity in the law in force in the various parts of the Republic;
> d. the consolidation or codification of any branch of the law; and
> e. steps aimed at making the common law more readily available.

The SALRC's research on sex work initially formed part of a broader project on sexual offences, which gave birth to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('Sexual Offences Amendment Act').[103] However, the SALRC felt the need to delink this investigation on sex work from that project in order to give thorough attention to it. The aim of the research was two-fold: first, 'to review the fragmented legislative framework that currently regulates adult sex work within the larger framework of all statutory and common law sexual offences'; and secondly, 'to consider the need for law reform in relation to adult [sex work] and to identify alternative policy and legislative responses that might regulate, prevent, deter or reduce [sex work].'[104]

101 See also Boudin (n 8) 195, who argues that *Jordan* 'has made it clear that this is a legislative decision; now the legislature must take the law reform processes forward.'

102 The project started in 2002. See South African Law Commission, *Sexual Offences: Adult Prostitution (Project 107) Issue Paper 19* (2002); and the South African Law Reform Commission, *Sexual Offences: Adult Prostitution (Project 107) Discussion Paper 1* (2009).

103 SALRC Report para 3.

104 ibid para 2.

As expected, the SALRC received numerous submissions from different sectors of society and also held numerous workshops to discuss this issue extensively.[105] One of those submissions comes from the Commission on Gender Equality (CGE),[106] which advocates 'a rights-based approach [decriminalisation of] sex work' in order to 'fulfil South Africa's constitutional and human rights commitments'. The CGE prefers to use the term 'sex work' rather than 'prostitution'. In this regard, the CGE argues that

> Sex work and prostitution are, strictly speaking, not the same concept. Prostitution is viewed as coerced sex work where women have no choice in the matter and is necessarily demeaning and women are victims. Sex work, on the other hand, indicates agency and therefore allows for women's decision-making power in capitalist systems.[107]

In a nutshell, the CGE's arguments for the decriminalisation are as follows:

i. Decriminalisation will deliver sex workers' constitutional and human right to free choice of work. …
ii. Decriminalisation will deliver sex workers' constitutional and human rights to form unions and challenge unfair labour conditions. …
iii. Decriminalisation will deliver sex workers' constitutional and human rights to freedom from discrimination. …
iv. Decriminalisation will deliver sex workers' constitutional and human rights to the highest attainable standard of health. …
v. Decriminalisation will deliver sex workers' constitutional and human rights to freedom and security of the person, which includes the right to be free from arbitrary arrest and detention, the right to be free from violence, and the right to bodily and psychological integrity. …
vi. Decriminalisation will preserve sex workers' fundamental right to human dignity.[108]

The CGE's position is influenced by the outcomes of its consultative dialogues held with various stakeholders, where it was found that

> the current legal regime that criminalises sex work in South Africa has failed sex workers. It is not only difficult to implement and enforce but has also failed to reduce the levels of sex work and violence against sex workers.

105 ibid paras 1.10–1.12.

106 The CGE is a 'State Institution Supporting Democracy' in terms of Chapter 9 of the Constitution and established by the Commission for Gender Equality Act 39 of 1996 'to promote respect for gender equality and the protection, development and attainment of gender equality' (s 187(1) of the Constitution).

107 Commission for Gender Equality *Decriminalising Sex Work in South Africa: Official Position of the Commission for Gender Equality* (2013) 2 ('CGE Position') <http://www.cge.org.za/wp-content/uploads/2014/05/CEG-Decr.pdf> accessed 17 November 2017.

108 CGE Position at 7.

The CGE concluded that the existing laws criminalising sex work

> [harm] the interests of sex workers by denying them their human and constitutional rights to protection as well as preventing access to legal assistance and enjoyment of their labour rights [and it] has led to harassment and abuse of sex workers at the hands of the police.[109]

In this regard, CGE argued that

> [l]egislation in relation to sex work should be based on the principle that sex work is work, and should allow the industry to be subjected to existing labour and business laws aimed at preventing unsafe, exploitative and unfair business practices.[110]

In its report, the SALRC elected to use the term 'prostitution' rather than 'sex work' 'to connote a specific subcategory of the overall concept of the commercial sex industry, which may include masseurs and lap dancers.'[111] In this regard, the SALRC's definition of the term 'prostitution' means

> the conduct of any person who engages the sexual services of a person 18 years or older for financial or other reward, favour or compensation or such person 18 years or older who offers or agrees to provide a sexual service for financial or other reward, favour or compensation, irrespective of whether the sexual act occurs or not.[112]

109 ibid 6.

110 ibid. See also Sex Worker Education and Advocacy Taskforce ('SWEAT') *Position Paper on Sex Work* <http://www.sweat.org.za/wp-content/uploads/2016/02/Position-Paper-on-Sex-Work-in-South-Africa-2015-1.pdf> accessed 18 November 2017, arguing that 'the selling and buying of sexual services as a work matter [has] implications for labour law and occupational health and safety rights.'

111 SALRC Report 21.

112 ibid 26. See also the SALRC's broader definition of the term 'prostitution' as follows:
Prostitution involving a person 18 years or older in the broader sense means the actions of any person who (a) offers or accepts to engage or provide sexual services with another person for a financial or other reward, favour or compensation irrespective of whether the sexual act occurs or not; (b) offers or accepts to engage or provide the sexual services of a person 18 years or older to a third person for a financial or other reward, favour or compensation – a. for the purposes of the commission of a sexual act with another person; b. by inviting, persuading or inducing a person to allow another person to commit a sexual act with him or her; c. by participating in, being involved in, promoting, encouraging or facilitating the commission of a sexual act with a person by another person; or d. by making available, offering or engaging a person for purposes of the commission of a sexual act with the person by another person; or (c) owns, leases, rents, manages, occupies or has control of any movable or immovable property and intentionally allows or knowingly permits such movable or immovable property to be used for purposes of the commission of a sexual act with a person by another person; (d) intentionally receives financial or other reward, favour or compensation from the commission of a sexual act with a person, by another person; (e) intentionally lives wholly or in part on rewards, favours or compensation for the commission of a sexual act with a person, by another person; (f) including a juristic person, who – a. makes or organises any travel arrangements for or on behalf of a third person, whether that other person is resident within or outside the borders of the Republic, with the intention of facilitating the commission of any sexual act with a person 18 years or older, irrespective of whether that act is committed or not; or b. prints or publishes, in any manner, any

The SALRC arrived at certain conclusions and recommended various legislative and non-legislative measures on the issue of sex work. For the purposes of this discussion, the SALRC Commission came to this conclusion:

> The [SALRC] is of the opinion that in South Africa, [sex work] in its many guises – albeit when ostensibly voluntary – is clearly exploitative of women and men who provide sexual services. Even what appears to be chosen or self-initiated involvement in [sex work] is usually a symptom of the inequality and marginalisation which are the daily lived experience of many impoverished women. In the [SALRC]'s view, the exploitation of a person's lack of alternatives does not amount to a considered exercise of choice. Most [sex work] in South Africa can be considered an aspect of male violence against women and children. The [SALRC] is of the view that legalising [sex work] would increase the demand, both locally and internationally, for more [sex workers], and would set up a culture in which [sex work] and sexual coercion become normalised. Changing the legislative framework could be an extremely dangerous cultural shift juxtaposed against the high statistics of sexual crimes against women. Women would be considered even more expendable than at present. South Africa is grappling with high levels of violence against women, with sexual assault and intimate partner violence contributing to increased risks for HIV infection. The [SALRC] is of the opinion that due to the systemic inequality between men and women in South Africa, no form of legalisation of [sex work] would magically address the power imbalance between the buyer and the [sex worker]; nor would it reduce the demand by buyers for unsafe or high-risk sex.[113]

Consequently, the SALRC recommended that

> the prohibitions contained in sections 19 and 20(1A)(*a*) [of the Sexual Offences Amendment Act] be retained, but that these sections be repealed and re-enacted with the necessary changes to the language of the prohibition.[114]

The SALRC also recommended a diversion programme for those many sex workers who are found to have violated the law but who may 'find themselves in a vulnerable position before they engage in [sex work] and also during their engagement in [sex work].'[115] The proposed diversion is to follow the processes found in the Child Justice Act.[116] The SALRC also recommended the criminalisation of buyers of sex work as this will send 'out a clear message to society that buying sexual services that are mainly

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information that is intended to promote or facilitate conduct that would constitute a sexual act with a person.

ibid 25–6.

113 SALRC Report para 2.496.

114 ibid para 2.501.

115 ibid.

116 ibid. According to the SALRC, the diversion will present 'an opportunity to address the vulnerability and marginalisation of [sex workers] through skilling and education programmes that would equip them to participate in the formal economy.'

provided because of poverty, inequality and unemployment is exploitative, and therefore illegal.'[117]

The crux of the SALRC's Report is the protection of the sex workers, especially vulnerable women, 'due to the systemic inequality between men and women in South Africa.'[118] Further, because of this systemic inequality which leads to poverty, women find themselves being sex workers for survival. The SALRC notes that entering sex work 'may not have been a result of a voluntary choice'.[119] Therefore, it seems that there are two opposing schools of thought: the first advocates the decriminalisation of sex work in order to protect women; the second advocates the criminalisation of sex work also in the name of protecting women who are exploited or abused because the nature of their work is not regulated and therefore leaves them in a vulnerable position.

The SALRC has been rightly criticised for this move. Several civil organisations that work in this area are reported to have rejected the criminalisation of sex work on the basis that the SALRC 'has ignored the far-reaching impact of ongoing criminalisation on South Africa's public health.'[120] It is argued that '[t]he full decriminalisation of sex work is the only model that respects the rights of sex workers with the potential to address the HIV crisis facing South Africa.'[121] In addition, Sonke Gender Justice[122] has rejected the SALRC's Report on the basis that its 'recommendation for on-going criminalisation is not based on evidence or South African realities and does not respect the human rights of sex workers.'[123] Indeed, the SALRC missed the point of the submissions by

117 SALRC Report para 3.132.

118 ibid para 2.515.

119 ibid para 1.35.

120 Nicola Daniels, 'Sex Work Report on Prostitution Rejected' *IOL* (Johannesburg, 30 May 2017) <https://www.iol.co.za/capetimes/news/sex-work-report-on-prostitution-rejected-9438555> accessed 11 November 2017).

121 ibid. See also Goitsemang Tlhabye, Shaun Smillie, Sameer Naik and Rabbie Serumula, 'Legal Blow for SA Sex Trade' *IOL* (Johannesburg, 27 May 2017) <https://www.iol.co.za/saturday-star/news/legal-blow-for-sa-sex-trade-9380126>; Errol Naidoo, "Prostitution in SA? Law Reform Commission Says No!" *Joy! Digital* (31 May 2017) <http://www.joydigitalmag.com/news/prostitution-sa-law-reform-commission-says-no/>; Ashley Furlong, 'Doctors Say Commission Ruling on Sex Work is Bad for HIV Prevention' *GroundUp* (31 May 2017) <https://www.groundup.org.za/article/doctors-say-commission-ruling-sex-work-bad-hiv-prevention/>; and NACOSA, Press Statement (26 May 2017) <http://www.nacosa.org.za/wp-content/uploads/2017/05/NACOSA-Statement-on-Law-Reform-Commission-Report-on-Sex-Work.pdf> accessed 11 November 2017.

122 Sonke Gender Justice was founded in 2006 as 'a nonpartisan, non-profit organisation, based in South Africa, whose vision 'is a world in which men, women and children can enjoy equitable, healthy and happy relationships that contribute to the development of just and democratic societies'. See Sonke Gender Justice, Annual Report March 2015 – February 2016 (27 February 2017) 5 <http://www.genderjustice.org.za/resources/annual-reports-capacity-statements/> accessed 18 November 2017.

123 Sonke Gender Justice, Press Release, 'Sonke Rejects the SA Law Reform Commission's Recommendations for Continued Criminalisation of Sex Work' *Sonke Gender Justice* (26 May 2017) <http://www.genderjustice.org.za/news-item/sonke-rejects-sa-law-reform-commissions-recommendations-continued-criminalisation-sex-work/> accessed 17 November 2017.

institutions such as the CGE, which argue that the decriminalisation of sex work should be rights-based in relation to the business of selling and buying sex. Further, the SALRC has taken a narrow view on this issue and focused on crimes and human rights violations that are committed against sex workers and did not take into account the arguments that sex work is to be considered work protected by labour laws and practices. Further, it is argued that the vulnerability and exploitation of sex workers stem from the lack of regulation of sex work.[124] It seems to me that the SALRC used the same arguments that were employed by the State in *Jordan*.[125] However, the Legislature is still the ultimate decision-maker on the criminalisation or decriminalisation of sex work. Currently, despite these many years of debating the legalisation and decriminalisation of sex work, sex workers remain unprotected.

The Return of the 'Choice Argument' for Opposite-sex Couples in a Permanent Relationship by the Court: Revisiting *Volks*

It must be recalled that in the light of the call by the Court in *Volks* for parliament to regulate cohabitation relationships, the Department of Home Affairs issued a draft Bill on domestic partnerships in 2008.[126] The long title of the draft Bill states that it is 'to provide for the legal recognition of domestic partnerships; the enforcement of the legal consequences of domestic partnerships; and to provide for matters incidental thereto'. Originally the regulation of domestic partnerships was included in the Civil Union Bill, 2006, which was as a result of the Court decision in *Fourie*.[127] However, because of the pressures of a deadline granted by the Court, the final draft of the Bill – passed as the Civil Union Act – omitted all provisions dealing with domestic partnerships.[128] The draft Bill on domestic partnerships is yet to be revived, which leaves unmarried opposite-sex couples legally unprotected. The recent judgment of the Court in *Laubscher NO v Duplan* also did not change this status in relation to the reciprocal duty of support between same-sex couples.[129]

124 See the CGE Position at 6, arguing that '[d]iscussions about the decriminalisation of sex work should take place within a broader framework that places it within the same variety of activities falling under adult entertainment including sex work, adult shops, strip clubs, adult film theatres, escort agencies and massage parlours.'

125 See *Jordan* para 15n11.

126 Domestic Partnerships Bill (draft), GN 36 of 2008, GG 30663 (14 January 2008).

127 *Minister of Home Affairs & Another v Fourie & Another* 2006 (1) SA 524 (CC), where the Court found that both the common law and the Marriage Act, 1961 were constitutionally defective for failing to provide the same status afforded to opposite-sex marriages to same-sex marriages. The Court deferred this to the Legislature to cure the defects.

128 For further discussion on domestic partnerships see Brigitte Clark and Beth Goldblatt, 'Gender and Family Law' in E Bonthuys and C Albertyn, *Gender, Law and Justice* (Juta 2007) 195, 207ff; and Ntombizozuko Dyani, 'Distribution of Death Benefits in terms of Section 37C of the Pension Funds Act – Rejecting the Dominant-servient Test in Cases of Cohabitation' (2010) 24(1) Speculum Juris 36.

129 2017 (2) SA 264 (CC).

The issue before the Court was

> whether Dr Rasmus Laubscher (applicant), in his personal capacity or Mr Eric Duplan (respondent), who had lived with Mr Cornelius Daniel Laubscher (deceased) in a permanent same-sex relationship until the latter's death, is entitled to inherit from the intestate estate of the deceased.[130]

The matter concerned

> the intestate succession rights of unmarried same-sex partners in a permanent same-sex partnership, in which the partners have undertaken reciprocal duties of support.[131]

The deceased and the respondent had lived together since 2003 until the death of the deceased in 2015. During this time the deceased and the respondent had undertaken a reciprocal duty of support. The couple did not solemnise or register their partnership in terms of the Civil Union Act 17 of 2006 ('CUA'). The dispute between the brother of the deceased – the only surviving heir of their parents – and the respondent was whether the respondent was entitled to inherit the deceased's intestate estate.[132]

The applicant relied on *Volks* and argued that 'permanent sex partners have a choice to enter into civil unions and are afforded the same legal protection as opposite-sex partners.'[133] The applicant further argued that the *Gory*[134] judgment did not apply in this case as continuing to force *Gory* 'when the same protection does not extend to permanent opposite-sex partners, would be unfairly discriminatory.'[135] He argued that that *Gory* was an interim measure only until parliament resolved the underlying mischief: '[Consequently, the enactment of the CUA] remedied the constitutional defect that *Gory* sought to cure [and] that CUA had repealed the *Gory* order.'[136] It must be recalled that *Gory* concerned

> the constitutional validity of section 1(1) of the Intestate Succession Act 81 of 1987 [ISA] to the extent that it confer[red] rights of intestate succession on heterosexual spouses but not on permanent same-sex life partners.[137]

During this time, same-sex partners were not legally entitled to marry. It therefore made sense for the Court to hold that same-sex partners in a permanent relationship

130 At para 1.
131 At para 2.
132 At para 3.
133 At para 12.
134 *Gory v Kolver NO* 2007 (4) SA 97 (CC). See also Helen Kruuse, '"Here's to You, Mrs Robinson:" Peculiarities and Paragraph 29 in Determining the Treatment of Domestic Partnerships' (2009) 25 SAJHR 380 (comparing *Volks* and *Gory*).
135 *Gory* para 12.
136 At para 11.
137 At para 1.

could inherit from each other even if one dies intestate. The Court found this exclusion to discriminate unfairly against same-sex partners and therefore unconstitutional and invalid. Consequently, section 1(1) of the Act was amended

> to be read as though the following words appear therein after the word 'spouse,' wherever it appears in the section: 'or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support.'[138]

It must also be recalled that soon after the *Gory* judgment was handed down, parliament passed the CUA, which legally permits same-sex partners to marry. In this regard, section 13(2)(*b*) of the CUA stipulates that '[w]ith the exception of the Marriage Act and the Customary Marriages Act, any reference to . . . (*b*) husband, wife or spouse in any other law, including the common law, includes a civil union partner.'

The respondent rejected the applicant's arguments on three grounds:

> First, he submitted that the *Gory* order was not an 'interim remedy' that expired when CUA came into force. In his contention, *Gory* amended section 1(1) of ISA and the amendment endures indefinitely until Parliament amends or repeals it. Secondly, CUA did not repeal *Gory*. The two positions, stemming from *Gory* and CUA, are not incompatible and they can and do live side by side. Thirdly, the argument that *Gory* had fallen away under the *cessante ratione legis cessat ipsa lex* rule was incorrect. The reason being that the purpose of *Gory* was to qualify same-sex permanent partners to inherit from one another intestate despite not being 'married'. The respondent accordingly submitted that the purpose had not fallen away, since only some of the people protected by Gory are now also protected under CUA. In his view, the question whether same-sex permanent partners who are not partners in a civil union should continue to be protected was a choice that this Court left to the Legislature.[139]

The Court had to consider the following aspects in order to come to a conclusion as to whether or not the applicant was entitled to inherit from the deceased's intestate estate:

1. Was the reading-in remedy in *Gory* an interim measure? 2. The interplay between the *Gory* order and CUA. 3. Are the principles stemming from *Volks* applicable to this matter?[140]

The Court rejected the applicant's contention that *Gory* was an interim order that was cancelled by the enactment of CUA and reasoned that the *Gory*'s interim order was indefinite until such time that parliament amends it.[141]

On the second ground, the Court adopted a two-stage approach: a contextual approach in addressing whether the CUA cured the mischief in *Gory*, and an interpretive approach in relation to the ISA. In the first approach, the Court did not agree with the contention

138 At para 66.
139 At para 13.
140 At para 19.
141 At para 24.

that *Gory* fell away with the enactment of CUA. In this regard, the Court reasoned as follows:

> I agree that an inequality may exist between opposite-sex permanent partners and their same-sex counterparts by virtue of the *Gory* order. The question is whether same-sex permanent partners ought to be deprived of the *Gory* benefit or whether the benefit should be extended to include opposite-sex permanent partners. The respondent refers to this process as 'equalising up' versus 'equalising down' and contends that it is a task perhaps best left to Parliament. In my view, the Legislature is competent to adopt either a generous or a more restrictive approach to its recognition of permanent relationships, which it has done in the past. … In my view, the Court in *Gory* had clearly foreseen the enactment of CUA and had envisioned that same-sex permanent partners would continue to be protected despite not concluding a 'marriage' (or union as it turned out to be), under the new dispensation. Any indication to the contrary is best left to Parliament to decipher.[142]

The Court further reasoned that CUA was additional to the protection in *Gory* in that those same-sex partners that have not registered in terms of the CUA but have undertaken reciprocal duty of support were protected by the *Gory* order, whereas those who registered their partnership in terms of CUA were protected by CUA. In other words, 'the *Gory* order contemplated the inclusion of *all permanent same-sex partners* within the ambit of section 1(1) of ISA.'[143]

On the interpretive approach, the Court had to deal with the question whether or not CUA had amended ISA. The Court reiterated its previous decision 'against inferring that the law has been impliedly repealed'.[144] In this regard, the Court held that

> [t]he applicant was unable to demonstrate how the position in terms of CUA and the position as a result of the *Gory* order resulted in an irreconcilable conflict. Furthermore, considering that CUA was enacted a week after the *Gory* order, it is highly unlikely, if not impossible, that the Legislature considered the effect of the *Gory* order and that the enactment of CUA repealed it.[145]

Therefore, the Court concluded that CUA did not replace the amendment in ISA.

Finally, the Court addressed the application of the *Volks* principles to this case. In this regard, the Court rejected the contention that the *Volks* principles were applicable, on the following grounds:

> (i) *Volks* concerned a surviving permanent life partner's right to benefit from maintenance under section 2(1) of the Maintenance of Surviving Spouses Act, whilst the present matter before this Court concerns a right to benefit in terms of section 1(1) of ISA; (ii) there was a will in *Volks,*

142 At paras 31–2. (Footnotes omitted).

143 At para 33. (Emphasis in original).

144 At para 39.

145 ibid; see also para 38, where the Court emphasises that '*Gory* stated that "unless specifically amended, section 1(1) will then also apply to permanent same-sex partners who have undertaken reciprocal duties of support but who do not "marry" under any new dispensation."'

> whereas the deceased in this case died intestate; and (iii) the *Gory* order expressly provides for the protection of same-sex permanent partners' intestate succession rights. Furthermore, this case is not concerned with an equality challenge, but is based on the interpretation of the *Gory* order in light of the subsequent enactment of CUA.[146]

The Court therefore held that *Volks* was distinguishable not only from the facts, but also from the legal mechanism used.[147] *Volks* dealt with the maintenance of surviving spouses in terms of the Maintenance of Surviving Spouses Act, which does not depend on the existence of a will, whereas this case dealt with intestate succession.[148]

It is also worth noting that, just as in *Volks*, the Court deferred the protection of unmarried opposite-sex couples in a permanent relationship to the Legislature. In this regard, the Court concluded as follows:

> For the reasons set out above, I am of the view that the enactment of CUA, particularly section 13(2)(*b*), did not specifically amend section 1(1) of ISA as was required by Gory. Civil unions concluded under CUA constitute a new category of beneficiary for purposes of ISA and are distinguishable from same-sex permanent life partnerships. As a result, same-sex permanent partners will continue to enjoy intestate succession rights under section 1(1) of ISA, as per the *Gory* order, until such time that the Legislature specifically amends the section. It is not for this Court to proscribe protections it previously extended when there is no clear legislative indication that the proscription is mandated. To do so would undermine the aspirations of the human rights culture that we seek to cultivate. Whether to provide 'equality of the graveyard or the vineyard' to permanent same-sex partners, is a matter best left to the competencies of the Legislature.[149]

This case has been criticised for advancing the choice argument as in *Volks* and for perpetuating the unfair discrimination against unmarried opposite-sex couples in a permanent relationship. In this regard, De Vos correctly argues that 'the legal situation remains that same-sex couples enjoy better legal protection than heterosexual couples and that partners in the latter are not appropriately protected.'[150] The minority judgment penned by Froneman J also criticised the majority judgment (penned by Mbha AJ). Froneman J's starting point was that the CUA 'removed the impediment to "marry" for same-sex couples.'[151] Therefore, those same-sex couples who chose not to marry after the impediment was removed should be accorded the same treatment as the opposite-sex couples and therefore be excluded from inheriting in the absence of a will.[152] Froneman J

146 At para 46.
147 At para 50.
148 At para 48.
149 At para 55.
150 Pierre de Vos, 'Moralistic View of Marriage Leaves Unmarried Couples Unprotected' *Constitutionally Speaking* (5 December 2016) <https://constitutionallyspeaking.co.za/moralistic-view-of-marriage-leaves-unmarried-couples-unprotected/> accessed 11 November 2017.
151 At para 71.
152 ibid.

disagreed with the majority judgment in distinguishing *Volks* from the case in question. In this regard, Froneman J reasoned as follows:

> It seems to me that the difference between the subject-matter of intestate succession and post-death maintenance of spouses does not adequately explain why this principle of legitimate legislative choice, preferring the formality of marriage, should apply in one case but not the other. Both are predicated on the existence of a reciprocal duty of support. In *Volks* a crucial point of distinction was that marriage created a legal duty of support, unlike the possible factual duty in the unmarried relationship at stake there. In *Gory* the existence of a factual duty of support was the justification for removing the formal impediment of marriage in order to attain the blessing of legal validation of that factual duty.[153]

Froneman J also noted that *Volks* reflects the views of that time. However, time has changed and that requires courts to rethink the validity of *Volks*—discrimination against unmarried couples who do not wish to marry should not stand. In this regard, Froneman J held that this case departed from the *Volks* reasoning because

> [w]ith hindsight I think we can now acknowledge that it is clearly wrong to attempt to eradicate unfair discrimination by creating another form of unfair discrimination.[154]

Indeed, *Laubscher* is unfortunate as it does perpetuate unfair discrimination against unmarried opposite-sex couples in a permanent relationship.

Despite the criticism above, *Volks* remains good law which says that opposite-sex partners in a permanent relationship do not owe each other a duty to maintain in terms of the Maintenance of the Surviving Spouses Act once one partner dies. The choice theory for opposite-sex couples in a permanent relationship still applies, whereas it does not apply to same-sex partners in a similar position.

Concluding Remarks

Former Chief Justice Ngcobo's judgments in *Jordan* and *Volks* have been criticised for not having taken into account those in vulnerable positions, especially women. The criticisms by gender scholars and academics are valid, as the plight of many women is still dire today. However, these were controversial issues that needed the to be raised in the Legislature. As has been demonstrated in the SALRC Report, the issue of sex work is controversial and the SALRC's conclusion that it should be criminalised reopens this debate: it is up to the Legislature to finalise this issue. Furthermore, the Court's recent judgment in *Laubscher* missed the opportunity to deal with the choice theory once and for all. It is disheartening that after more than a decade after *Volks*, the Legislature has still not dealt with the plight of opposite-sex couples in a permanent relationship.

153 At para 77.
154 At para 86.

However, I argue that one cannot fault the deference that Ngcobo J extended to the political decision to decriminalise and legalise sex work and to regulate unmarried opposite-sex couples in a permanent relationship. These are highly debated and perhaps controversial issues that require the Legislature to canvass society at large. The Legislature plays a significant role with respect to the development or reform of the law; it therefore makes sense for the Court to defer to it. Indeed, Nkabinde J has reasoned that

> in a constitutional democracy such as ours the Legislature, and not the courts, has the major responsibility for law reform and the delicate balance between courts' functions and powers on one hand and those of the Legislature on the other should be recognised and respected.[155]

I therefore agree with Ngcobo J's view in *Jordan* that:

> In a democracy those are decisions that must be taken by the legislature and the government of the day, and not by courts. Courts are concerned with legality, and in dealing with this matter I have had regard only to the constitutionality of the legislation and not to its desirability. Nothing in this judgment should be understood as expressing any opinion on that issue.[156]

Further, Skweyiya J has also reasoned that

> [t]he vulnerability of [women in a permanent heterosexual relationship] is, … part of a broader societal reality that must be corrected through the empowerment of women and social policies by the legislature. It is a widespread problem that needs more than just implementation of what, in their case, would be no more than palliative measures.[157]

The Court has also reminded us in *My Vote Counts NPC* that '[i]t is for Parliament to make legislative choices as long as they are rational and constitutionally compliant'.[158] In other words, this does not mean that courts may not get involved. Indeed, and according

155 *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* 2007 (5) SA 30 (CC) para 30.

156 At para 30. See also Sandile Ngcobo, 'Why Does the Constitution Matter?' Public Lecture Series, Human Sciences Research Council (Gallagher Estate, Johannesburg, 30 June 2016) 24 <http://www.hsrc.ac.za/uploads/pageContent/7058/HSRC%20Public%20Lecture%20(FINAL)%20-%20Why%20The%20Constitution%20Matters%20(v%2020%20July%202016).pdf> accessed 18 November 2017, where he argues that '[i]t is important, as the decisions of the Constitutional Court indicate, to understand that there are matters that, for good reasons, are reserved for political branches of government. This is essential to an understanding of what can legitimately be expected of the judiciary.'

157 *Volks* para 66; see also para 67, where Skweyiya J holds that '[b]oth dissenting judgments make it plain that there are many ways in which these relationships can be regulated. It is not for us to decide how this should be done.'

158 See *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 (30 September 2015) para 155.

to the late Chaskalson CJ, 'the court's role is to ensure that the implementation of any political decision to undertake such policies conforms with the Constitution'.[159]

The role of the Legislature in relation to these issues is significant because it has a constitutional mandate to protect the rights in the Bill of Rights in terms of section 7(2) of the Constitution. In this respect, recent Court jurisprudence may provide credence to this argument by holding that section 7 of the Constitution imposes positive obligations on the state to respect, protect, promote and fulfil the constitutional rights.[160] Section 7(2) of the Constitution provides that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights.' Relatedly, section 8(1) of the Constitution provides that 'the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state.' These provisions have been construed by the Court to mean that

> in some circumstances there would be a positive component which obliges the state and its organs to provide appropriate protection [of rights] to everyone through laws and structures designed to afford such protection.[161]

Further, the Court revisited this notion of the State's positive obligations in *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail,* where it held that 'in some circumstances, the correlative obligations imposed by the rights in the Bill of Rights will require positive steps to be taken to fulfil the rights.'[162]

159 *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC) para 180. See also *Doctors for Life*, *per* Ngcobo J, para 37, confirming that '[c]ourts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.' See also *Glenister II* para 67, where the Court, *per* Ngcobo CJ, reaffirms that '[u]nder our constitutional scheme it is the responsibility of the executive to develop and implement policy. It is also the responsibility of the executive to initiate legislation in order to implement policy. And it is the responsibility of Parliament to make laws. When making laws Parliament will exercise its judgment as to the appropriate policy to address the situation. This judgment is political and may not always coincide with views of social scientists or other experts. As has been said,—"[i]t is not for the court to disturb political judgments, much less to substitute the opinions of experts."'

160 See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) ('*Carmichele*') para 44, holding that 'in some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection'; *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) ('*Rail Commuters*') para 69, where it was held that 'in some circumstances, the correlative obligations imposed by the rights in the Bill of Rights will require positive steps to be taken to fulfil the rights'; and *Glenister II* paras 189–190, where it was held that s 7(2) of the Constitution imposes a positive obligation on the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.

161 See *Carmichele* para 44.

162 *Rail Commuters* para 69.

Glenister v President of the Republic of South Africa[163] finally developed this notion and elaborated on the source and scope of the positive constitutional obligations imposed on the State. As a brief background, the Court had to consider whether the Constitution imposes a positive duty on the State to establish an independent anti-corruption unit.[164] The Court held that section 7(2) of the Constitution 'imposes a positive obligation on the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.'[165] It reasoned that implicit in section 7(2) is a positive constitutional obligation and requirement that the steps the State takes 'to respect, protect, promote and fulfil the rights in the Bill of Rights' must be reasonable and effective.[166] The Court found that the steps taken by parliament and the Executive to create an anti-corruption unit called the Directorate for Priority Crime Investigation (popularly known as the Hawks) that is not adequately independent from political actors would not constitute a reasonable step.[167] The Court further reasoned that since the Bill of Rights binds the Legislature, through the instrument of section 8(1) of the Constitution, it followed that parliament must give effect to the positive obligations section 7(2) imposes on the State.[168] The same obligation is imposed on the Executive so that when it initiates legislation, in terms of section 85(2)(*d*) of the Constitution, it gives effect to the rights in the Bill of Rights.[169] It has been over almost two decades and over a decade, respectively, since the *Jordan* and *Volks* judgments were handed down by the Court. Parliament is constitutionally obliged to protect the rights in the Bill of Rights. It is up to the public to lobby the Legislature to deal with this issue once and for all. In *Merafong Demarcation Forum v President of the Republic of South Africa,* Skweyiya J held that

> if voters perceive that their democratically elected politicians have disrespected them or believe that the politicians have failed to fulfil promises made by the same politicians should be held accountable by the voters.[170]

163 *Glenister II* paras 189–90.

164 ibid.

165 ibid para 189.

166 ibid paras 189 and 194.

167 ibid para 194.

168 ibid; see also *Rail Commuters* para 69; *Carmichele* para 44; and *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2000(1) SA545 (CC) para 21, where the Court ruled that 'all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution [because the] Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.'

169 See *Glenister v President of the Republic of South Africa & Others* (*Glenister I*) 2009 (1) SA 287 (CC).

170 *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008

The time has arrived to hold the Legislature to account in relation to the issues raised in this article.

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