



SOUTH AFRICA

COUNTRY PROFILE

The Constitution of the Republic of South Africa makes no mention of the right to family. The Constitution does guarantee the right to equality and protection from unfair discrimination on the grounds of sex, gender, sexual orientation and marital status.²³⁵

Treaty	Date of ratification	Reservations/Declarations
CEDAW	27 March 1997	None
African Charter	9 July 1996	None
Maputo Protocol	17 December 2004	“Reservations - Article 4(j): does not find application in the Republic of South Africa as the death penalty has been abolished. - Article 6(d): South Africa does not consider itself bound by this Article that a marriage be recorded in writing and registered in accordance with national laws in order to be legally recognised. - Article 6(h): South Africa enters a reservation on this Article, which subjugated the equal rights of men and women with respect to the nationality of their children to national legislation and national security interests, on the basis that it may remove inherent rights of citizenship and nationality from children. Interpretative declarations - Article 1(f): definition of “discrimination against women” in the Protocol has the same meaning and scope as provided for in and interpreted by the Constitution of South Africa from time to time. - Article 31: The South African Bill of Rights shall not be interpreted to offer less favorable protection of human rights than the protocol, which does not expressly provide for such limitations.”²³⁶

²³⁵ Section 9 of the Constitution of the Republic of South Africa 1996, amended 2023. Available at <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-04-feb-1997> (accessed 17 April 2024)

²³⁶ [https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA.pdf](https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLES%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf) (accessed 16 April 2024)

MAIN TRENDS ON FAMILY LAW

The Constitution gives South African courts the power and obligation to declare law or conduct inconsistent with the Constitution invalid,²³⁷ and to both interpret and develop the common law to be in line with the rights contained in the Bill of Rights.²³⁸ As a result, South African family law has undergone significant reform to give effect to the values of equality and dignity. There is an overwhelming trend towards progressive reform: In December 2023, a draft marriage bill was published in the Government Gazette with notable changes introduced. These include: all marriages to persons under 18 will be criminalised, with no exception (Chapter 7);-polygamous marriages will be recognised (Chapter 3) and equal legal status and capacity of spouses (Chapter 6).²³⁹ At the time of publishing this Report, the Portfolio Committee for Home Affairs had opened the Bill for public comment.²⁴⁰

The Matrimonial Property Act abolished marital power as early as 1984, repealing the common law rule granting husbands power over the person and property of their wives.²⁴¹

A diverse array of partnerships are recognised and protected by the law, including customary marriages²⁴² and same-sex marriages.²⁴³ Opposite and same-sex permanent life partnerships are not regulated by statute, but are recognised under the common law and the courts have extended statutory protection to those partnerships, such as those protections found within the Maintenance of Surviving Spouses Act and Intestate Succession Act, on the grounds that there are many valid ways to form families and all are worthy of equal protection of the law.²⁴⁴ Nonetheless, this piecemeal development of the common law is not ideal and the legislature should intervene to confer full protection of permanent life partners.

In all partnerships, women are guaranteed equal status, capacity and protection of the law as men.²⁴⁵ Children are also guaranteed a range of rights under the Constitution and the Children's Act, and their best interests are paramount.²⁴⁶

Customary law in South Africa is also subject to the provisions of the Constitution. South Africa's customary legal systems have historically been governed by the principle of male primogeniture, in terms of which the deceased is succeeded by his eldest son and women are ineligible to inherit. In *Bhe vs Magistrate, Khayelitsha*,²⁴⁷ the Constitutional Court held that Section 23 of the Black Administration Act (a remnant of apartheid legislation), which applied the system of male primogeniture, was inconsistent with the rights to equality and dignity and thus unconstitutional. In *Shilubana vs Nwamitwa*,²⁴⁸ the Constitutional Court held that observance of customary law by traditional authorities must be in accordance with applicable legislation, customs and the prescripts of the Constitution. In *Shilubana*, the Court held that custom and practice had developed to allow for women to succeed to the position of chieftainship.

237 Section 2 of the Constitution of the Republic of South Africa 1996, amended 2023

238 Section 39 of the Constitution of the Republic of South Africa 1996, amended 2023

239 https://static.pmg.org.za/B43-2023_Marriage_Bill.pdf (accessed 15 April 2024)

240 <https://businesstech.co.za/news/lifestyle/767324/new-marriage-laws-for-south-africa-take-the-next-big-step/> (accessed 15 April 2024)

241 Section 11 of the Matrimonial Property Act 1984. Available at https://www.gov.za/sites/default/files/gcis_document/201503/act-88-1984.pdf (accessed 17 April 2024)

242 The Recognition of Customary Marriages Act 1998. Available at <https://www.justice.gov.za/legislation/acts/1998-120.pdf> (accessed 17 April 2024)

243 The Civil Union Act 2006. Available at https://www.saflii.org/za/legis/consol_act/cua2006139/ (accessed 17 April 2024)

244 See *Gory vs Kolver N.O. (Starke and Others Intervening)* [2006] ZACC 20 and *Bwanya vs Master of the High Court* [2021] ZACC 51. Available at <https://www.saflii.org/za/cases/ZACC/2006/20.html> (accessed 17 April 2024)

245 See for example Section 6 of the Recognition of Customary Marriages Act 1998. Available at <https://www.justice.gov.za/legislation/acts/1998-120.pdf> (accessed 17 April 2024)

246 See Section 28 of the Constitution of the Republic of South Africa 1996 and the Children's Act 2008

247 [2004] ZACC 17

248 [2008] ZACC 9

KEY GAPS AND CONTESTATIONS

(i) Non recognition of religious marriages:

Religious marriages are not recognised in South African law, largely as a result of the discriminatory apartheid regime. There have been some steps towards recognizing Muslim marriages, to protect vulnerable parties (especially women) from financial destitution in the event of divorce or death. In 2010, parliament drafted a Muslim Marriage Bill, however the Bill has not been passed into law. In the time being, the courts have interpreted the Intestate Succession Act and the Maintenance of Surviving Spouses Act to include spouses married in terms of Muslim rites, in both monogamous and polygamous marriages.²⁴⁹ In 2022, the Constitutional Court of South Africa held that the Marriage Act and the Divorce Act are inconsistent with the Constitution of South Africa in that they do not afford Muslim marriages recognition. The Court directed that the existing legislation be amended and updated or new legislation be initiated and passed to ensure recognition and protection of Muslim marriages, within a period of 24 months from the date of the judgment.²⁵⁰ While this is progress for Muslim marriages, other religious marriages such as Hindu marriages, Khoi and San marriages, and Jewish marriages are no closer to recognition, leaving other women vulnerable to the consequences of non-recognition and non-regulation.

(ii) Polygamy:

While the Marriage Act and Civil Union Act prohibit polygamy, polygamy is permitted under customary law and the Recognition of Customary Marriages Act. While polygamy is a part of religious and cultural customs, some argue that polygamy violates women's rights to equality within marriage. The Maputo Protocol, for example, obliges States to adopt measures to ensure that monogamy is encouraged as the preferred form of marriage.²⁵¹ South African law confers significant protection on women married in polygamous marriages. South Africa has also toyed with the idea of

legalising polyandry, to allow women to marry multiple spouses in the interests of full equality. The South African government, through the Department of Home Affairs, however rejected this proposal in 2022.²⁵²

(iii) Child marriage:

A further issue is that of child marriage. While minors cannot marry in terms of the Civil Union Act²⁵³ they may marry under the Marriage Act. The Marriage Act allows minors to marry with parental consent, though boys under 18 and girls under 16 may not marry except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable.²⁵⁴ The Recognition of Customary Marriages Act, though it sets the minimum age of marriage of 18, contains similar exceptions allowing minors to marry with the permission of the Minister.²⁵⁵ While child marriage is not an endemic problem in South Africa, this loophole should be closed and the minimum age of marriage across all statutes should be regularised to 18.

(iv) Violence against women:

One of the greatest challenges facing women in South Africa, within and outside of family structures, is gender-based violence. The State has taken progressive steps to curb gender-based violence, including the enactment of the Domestic Violence Amendment Act²⁵⁶, Criminal and Related Matters Amendment Act²⁵⁷, Criminal Law (Sexual Offences and Other Related Matters) Amendment Act²⁵⁸, which among other things repealed the common law offences of rape and indecent assault and replaced them with new expanded statutory offences of rape and indecent assault, applicable to all forms of sexual penetration or violation without consent, irrespective of gender. The Act also created an expanded list of sexual offences and eliminated the differentiation drawn between the age of consent for different consensual sexual acts. Notably, section 56(1) states that it is not a valid defence for a person accused of rape to contend that a marital or other relationship exists or existed between

249 See *Daniels vs Campbell and Others* (CCT 40/03) [2004] ZACC 14 and *Hassam vs Jacobs NO and Others* [2009] ZACC 13. Available at <https://www.saflii.org/za/cases/ZACC/2004/14.html> (accessed 17 April 2024)

250 *Women's Legal Centre Trust vs President of the Republic of South Africa* (CCT 24/21). Available at <https://www.saflii.org/za/cases/ZACC/2022/23.html> (accessed 17 April 2024)

251 Article 6(c) of the Maputo Protocol.

252 Polyandry in SA: Govt says no to women with multiple husbands. <https://www.ecr.co.za/news/news/polyandry-in-sa-govt-says-no-to-women-with-multiple-husbands/>

253 See Section 1 of the Civil Union Act 2006

254 Sections 24-26 of the Marriage Act 1961. Available at https://www.gov.za/sites/default/files/gcis_document/201505/act-25-1961.pdf (accessed 17 April 2024)

255 See Section 3 of the Recognition of Customary Marriages Act, 1998, <https://www.justice.gov.za/legislation/acts/1998-120.pdf>

256 Domestic Violence (Amendment) Act 2022. Available at https://static.pmg.org.za/Domestic_Violence_Act.pdf (accessed 17 April 2024)

257 Criminal and Related Matters (Amendment) Act 2022. Available at https://static.pmg.org.za/Crim_and_Related.pdf (accessed 17 April 2024)

258 Criminal Law (Sexual Offences and Related Matters) Amendment Act 2022. Available at https://static.pmg.org.za/Crim_Law.pdf (accessed 17 April 2024)

him or her and the complainant, thus prohibiting marital rape. The Protection from Harassment Act²⁵⁹ defines and criminalises sexual harassment while the Promotion of Equality and Prevention of Unfair Discrimination Act²⁶⁰ classifies gender-based violence and female genital mutilation as prohibited instances of unfair discrimination. The State has also adopted a National Strategic Plan on Gender-Based Violence and Femicide²⁶¹ which provides for comprehensive and multi-sectoral responses to gender-based violence. Unfortunately, many of these services are under-resourced and overburdened. As such, violence against women, femicide and rape including intimate partner violence and domestic abuse persist.

RECOMMENDATIONS

Legal reforms:

- ▶ South Africa must legislate protections of permanent life partners.
- ▶ It must require all marriages to be registered under civil law.
- ▶ South Africa must ensure sufficient protection for women in polygamous customary or religious marriages.
- ▶ South Africa must adopt 18 as the uniform minimum age of marriage.

Institutional reforms:

South Africa must improve its criminal justice response to gender-based violence and fully resource and implement the National Strategic Plan on Gender-Based Violence and Femicide.

259 Protection from Harassment Act 2011. Available at <https://www.justice.gov.za/legislation/acts/2011-017.pdf> (accessed 17 April 2024)

260 Promotion of Equality and Prevention of Unfair Discrimination Act 2000. Available at <https://www.justice.gov.za/legislation/acts/2000-004.pdf> (accessed 17 April 2024)

261 <https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf> (accessed 17 April 2024)