



Challenging Entrenched Marital Power in South Africa

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This Brief examines more than thirty years of legal reform aimed at removing husbands' marital power at the expense of their wives from South African legislation. For decades, marital power relegated wives to a position akin to minors, with devastating effects on women's economic empowerment. Removing the many components of this form of discrimination from national law has required not only a conducive political environment, but also sustained momentum from the women's rights movement and selective, strategic litigation that challenges the varied effects. Such reforms have directly and positively affected women's economic inclusion. While efforts to improve gender equality in South Africa are ongoing, the analysis offers important insights on optimal contexts for change, the role women play in advocacy efforts, and the benefits of reform for economic growth.

The road to gender equality in South Africa

It was South Africa's transition to a multiracial democracy that brought new life to the fight for equal rights. Though the women's movement dates back to the 1950s, the country made few reforms toward gender equality until almost forty years later. *Women, Business and the Law* (WBL), a World Bank Group project measuring the laws and regulations that affect women's economic opportunity in 190 economies, examined South Africa's progress during this time. The eight indicators produced by WBL and that make up its index align with women's interactions with the law as they move through their lives and careers: Mobility, Workplace, Pay, Marriage, Parenthood, Entrepreneurship, Assets, and Pension.

As late as 1990, South Africa's score in the WBL index (38.8) was in the bottom quartile of economies in Sub-Saharan Africa and the lowest among the similarly emerging economies of Brazil, China, India, and the Russian Federation. However, after years of systematic oppression, the dismantling of Apartheid and the adoption of a new constitution presented a chance for women to advocate for meaningful equality in all areas of the law. Over the next 30 years, South Africa would achieve some of the most comprehensive guarantees of women's rights on the African continent (WBL database). The country introduced nearly 20 reforms increasing women's economic inclusion between 1990 and 2020 (see Table 1. For the full list of reforms enacted globally, visit <https://wbl.worldbank.org/en/reforms>). These reforms included removing restrictions on women's work, increasing paid maternity leave, and protecting women from domestic violence and sexual harassment. As a result, South Africa's WBL score rose to 88.1, making it one of the top 10 most improved economies over the last thirty years. Such change toward gender equality in the law is

associated with better development outcomes, a smaller gender wage gap, and higher female labor force participation (World Bank 2021).

Of all the reforms introduced, however, those focused on abolishing marital power perhaps most clearly demonstrate the resilience and persistence of South African women. Beginning in the 1950s and continuing to this day, these changes reveal the many challenges that women, and especially women of color, have faced in their struggle for equality. These efforts have been intertwined with steps to move toward a true multiracial democracy in South Africa. This Brief explores the social, political, and economic context around the passage of reforms affecting marital power. The pioneering efforts of the advocates and supporters offer important insights on the nature of removing discriminatory legislation and the steps and contexts required to implement change.

Eradicating marital power from national law has required not only a conducive political environment, but also sustained momentum from the women's rights movement and selective, strategic litigation that challenges its vestiges. This struggle illustrates a hard truth about reaching gender equality: it is not brought about by one change, one law, or one person. Instead, people from every corner of society must come together to achieve it, piece by piece.

Marital power and women's economic empowerment

The concept of codified marital power in Sub-Saharan Africa can be traced back to legacy legislation brought to the continent by colonial powers (in the case of South Africa, the Netherlands). For centuries, the husband's "unfettered and complete" marital power treated wives as legal minors (Law of SA, Volume 28(2)(3ed)). At the time, marital power was seen as a law of nature: because men

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Table 1 Nearly three decades of reform in South Africa, as measured by *Women, Business and the Law*, 1993–2022

WBL year	Score	Indicator	Reform description
1993	41.9	Mobility	South Africa enacted the Domicile Act, allowing a married woman to choose where to live in the same way as a man.
1995	59.4	Assets	South Africa granted spouses equal rights to immovable property.
		Entrepreneurship	South Africa enacted the General Law Fourth Amendment abolishing the husband's marital power and allowing a married woman to sign a legally binding contract, register a business, and open a bank account without her husband's consent.
		Workplace	South Africa allowed a woman to get a job without permission from her husband.
		Marriage	South Africa enacted legislation protecting women from domestic violence.
1997	65.0	Parenthood	South Africa prohibited the dismissal of pregnant workers.
		Pay	South Africa eliminated the ban on women's employment in mining.
1999	67.5	Parenthood	South Africa introduced paid paternity leave.
2000	70.6	Workplace	South Africa prohibited gender discrimination in employment.
2001	76.3	Entrepreneurship	South Africa introduced new legislation that makes access to credit easier for women by prohibiting gender-based discrimination in financial services.
		Marriage	South Africa allowed women to be head of household.
2003	78.8	Parenthood	South Africa increased the duration of paid maternity leave to at least 14 weeks.
2013	81.9	Workplace	South Africa enacted legislation protecting women from sexual harassment in employment.
2015	88.1	Pay	South Africa mandated equal remuneration for work of equal value.
		Workplace	South Africa enacted civil remedies for sexual harassment in employment.
2022	88.1	Current overall score	

Source: *Women, Business and the Law* database.

were considered wiser, women should be subject to their rule. Marital power limited “women’s independent access to family and community resources, including the ownership of property, access to credit, access to reproductive health services, and inheritance” (Mavundla, Strode, and Dlamini 2020). As such, the marriage was a legal unit over which the husband had full control (van Zyl 1990).

Over time, marital power formed part of marriage laws in colonies that would eventually include Botswana, Eswatini, Lesotho, Namibia, South Africa, and Zimbabwe. The effects of such laws on a woman’s economic empowerment could be devastating: without her husband’s permission, she would be unable to sign contracts, open bank accounts, register businesses, or administer assets. This meant that women occupied a “subordinate position at home and in the community” (Law of SA, Volume 28(2) (3ed)). As women’s rights movements gained more visibility globally, however, governments in all regions of the world began to address and remove the many components and manifestations of marital power in national legislation.

In South Africa, this process was initiated by the adoption of the Matrimonial Affairs Act of 1953, otherwise known as Bertha’s Bill (Moshe 2019). The Act was named after Bertha Solomon, an advocate and parliamentarian who after World War II asked the Prime Minister to establish a judicial commission to investigate the position and status of women. More women were entering the workforce following industrialization and had become “increasingly dissatisfied with the status quo” (South African History Online 2021). The commission’s findings confirmed the extent of women’s marginalization in the country, even convincing

a skeptical commission chair to support reforms to marital power. As such, Bertha’s Bill curtailed, but did not abolish, the husband’s marital power over his wife’s property. It also allowed married women to enter into certain limited transactions, such as making deposits into savings accounts without their husbands’ permission.

At the same time, racial and ethnic segregation were being formally institutionalized as Apartheid. Any legislative changes toward women’s rights often excluded Black women, who were also frequently denied entry into political and social circles. They were subject to the Black Administration Act of 1927, which created a separate political regime and legal system for Black South Africans. Black women were also more likely to be relegated to jobs seen as an extension of women’s traditional roles, often with low wages and little to no legal protection (Healy-Clancy 2017). Thus, while all women were disadvantaged by the persistence of marital power, Black women dealt with compounding inequalities due to institutionalized racial segregation (Nolde 1991). The ruling National Party was much more concerned with legislating Apartheid than addressing barriers to women’s equality and empowerment. Consequently, as the structures of Apartheid hardened into place, there would be no more changes to the marital power system for the next thirty years.

When South Africa began moving toward dismantling the edifice of Apartheid, however, gender equality once again became a subject of discussion. Progress was largely achieved due to a combination of factors, from the momentum generated by politics transitioning away from Apartheid in the 1990s, to the active engagement of multiple stakeholders throughout the decades and

historic rulings by the Constitutional Court (“the Court”). These influences came together to become the driving force behind the gradual downfall of legal marital power.

Seizing political momentum

Facing local and international pressure, including political violence and growing inequality, the government of South Africa began to take steps to end Apartheid by the 1980s. Transitions like these are periods of intense politicization and are often associated with increased sociopolitical crisis. Yet however critical or contentious, these junctures can also enable new ideas and institutions to play an active role in political life (World Bank Group 2017). Additionally, they offer a unique window into how social structures underlie political practices (Jaquette and Wolchik 1998).

In February 1990, then-President F.W. de Klerk of the National Party took the first significant steps toward formal negotiations to end Apartheid when he announced a repeal of the ban on the African National Congress (ANC) and the release of its leader, Nelson Mandela, from prison. As discussions around this post-Apartheid political system proceeded, and it became clear that the country was headed toward its first general election that included citizens of all races, the National Party rebranded itself as a civic nationalist and conservative organization representing all South Africans. President de Klerk was acutely aware of the hurdles the Party would have to overcome to maintain its power in the coming years. Thus, while still operating in a white Apartheid state, Party members put forward several bills aimed at removing discriminatory legislation in an attempt to gain followers. For women in particular, this included a consideration of laws on employment equity, domestic violence, and marital power, perhaps more to encourage their support of the National Party than to address longstanding issues of gender equality.

The reforms to marital power stuck first. On October 6, 1993, the General Law Fourth Amendment was enacted, replacing sections of the Matrimonial Property Act and for the first time definitively stating that “the common law rule in terms of which a husband obtains the marital power over the person and property of his wife is hereby repealed.” This reform led to a substantial increase in South Africa’s score in the WBL index, from 41.9 in 1993 to

59.4 in 1995 (see Figure 1). The Amendment allowed a majority of women to be head of household and to get a job, sign a legally binding contract, register a business, and open a bank account without the permission of their husbands. It also granted them the same rights to immovable property as men. This would permit millions of women to make effective choices and transform them into economic outcomes, enter the labor force, and contribute to South Africa’s growing economy.

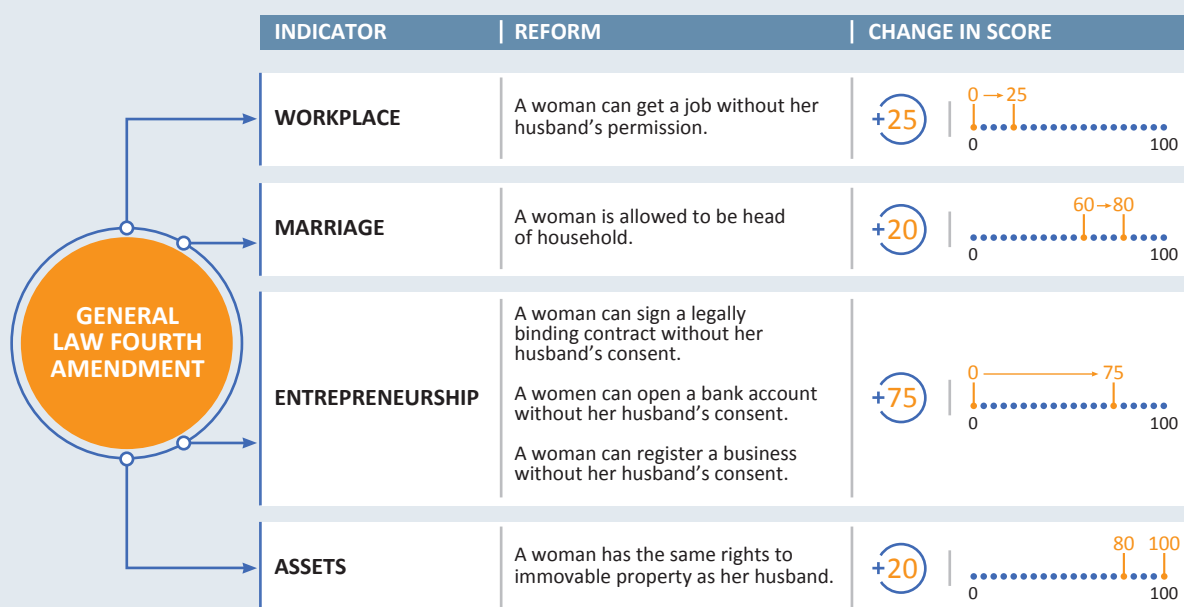
Earlier reforms, including the 1984 Matrimonial Property Act and a 1988 amendment, had already slowly begun removing marital power from national law. However, it is the General Law Fourth Amendment that demonstrates the importance of seizing opportunities afforded by political transition to advance legal reforms aimed at addressing persistent and historic gender gaps. The end of Apartheid and the National Party’s bid to retain power created the perfect storm of opportunity for changes that could benefit women’s economic empowerment.

However, while the law now applied to all civil marriages, regardless of when they were contracted, women in customary and religious marriages still faced constraints on their agency and decision-making ability. In addition, the law clearly stated that the abolition of marital power “shall not affect the legal consequences of any act done or omission or fact existing before such abolition,” such as certain provisions of the Black Administration Act. The Amendment also did not apply to women in the Transkei, an area originally set aside for Black South Africans that ostensibly operated as an autonomous parliamentary democracy.

Despite the National Party’s attempts to win over women voters with these reforms, the 1994 general election was instead a major victory for the ANC. Their Government of National Unity immediately set to work drawing up a new constitution. Women in more than 500 towns and cities organized to press the government to consider gender issues in any version of the document, and with its passage in 1996, they succeeded. This was the first time that women were formally recognized as equal before the law and with the right to equal protection from discrimination and enjoyment of all rights and freedoms (Constitution of the Republic of South Africa 1996). These guarantees of equality encouraged the women’s rights movement, giving new hope to the possibility of pursuing an agenda of further reforms at the national political level.

Figure 1

Enactment of the General Law Fourth Amendment had a significant and positive impact on South Africa’s Women, Business and the Law 1995 score



Source: Women, Business and the Law database.

Note: The change in score measures differences between 1993, when the Amendment was enacted, and 1995.

Expanding activism for women’s rights

Activism for women’s rights has historically led to the creation of structures that promote gender equality during periods of transition to democracy (Gouws and Coetzee 2019). Such female protagonism is a powerful tool for change. In fact, women’s increased participation and leadership in political and public life is widely recognized as crucial to achieve the Sustainable Development Goals (UN Women 2020) and to influence outcomes related to investments in social services and welfare (Hessami and Fonseca 2020).

The active participation of South African women in the fight for democratic change and the recognition of their rights was no small feat. Political momentum and changing social norms and attitudes during democratization offered an important platform for the creation of a national representative structure for the women’s movement. By the 1980s, a powerful campaign emerged, determined to insert gender equality concerns into the heart of the country’s democratic debates. Women from across the political, economic, racial, religious, and cultural spectrum came together to demand change (Hassim 2002). When they began, marital power was still the default system for property administration within marriage. Couples could opt out of this arrangement by choosing to marry in community of property, which implies that any property brought into the marriage, as well as that acquired during it, are considered joint property in case of divorce. However, just 4 percent of couples did so (la Cock 1984).

As more women engaged in gender debates and pursued an agenda of reform, however, the movement was able to witness success in 1984. Though it did not affect South Africa’s WBL score, the Matrimonial Property Act abolished marital power prospectively (that is, for all civil marriages that were contracted after its enactment) (De Rebus 1982; South African Law Commission 1982). Still, at the time, the law did not apply to marriages between Black people, and only white women benefited from the repealing of the old rule.

As calls for racial equality grew, an amendment in 1988 abolished marital power for marriages between Black people contracted after December 2, 1988. For couples married before that time, a two-year window was provided in which they could change their marital property regime with the consent of both spouses. It did not, however, apply to marriages contracted under customary law. The women’s rights movement was again engaged during the passage of the General Law Fourth Amendment, with their involvement ensuring support needed during critical moments of negotiation. Though the reforms were initially proposed with the purpose of shoring up political support for the National Party, it was the participation of women from a wider coalition that broadened the societal reach of the reforms and gave them the necessary momentum to pass under difficult circumstances, ultimately leading to a rise in WBL score of nearly 20 points.

With the country’s first constitutional guarantees of equality in 1996, more possibilities for women, and particularly women of color, again arose to challenge remaining discriminatory legislation. Section 15(3) of the new constitution authorized parliament to pass legislation recognizing customary marriages. Consequently, in 1998, the Recognition of Customary Marriages Act was passed to abolish marital power for all marriages contracted under customary law throughout the country. This was an attempt to ensure that customary marriages were contracted in accordance with the equality principles of the constitution.

The active engagement of women of all backgrounds in the public discourse indicated that things in South Africa were slowly changing. The ability to articulate demands, despite the challenges faced at the time, was crucial to advance the conversation on pressing legal changes that were necessary to move toward a more equitable society. As gender equality increasingly became an important global development issue, women’s success in demanding reforms to discriminatory legislation also multiplied. Often, change occurred through strategic litigation and the use of the court system to strike down unequal laws and regulations.

Advancing strategic litigation

The court system has played an important role in amplifying the voices of South African women, and as a result, changing the law. When deep-rooted inequalities persist, and the pace of legal reform is slow, strategic litigation can serve as a key tool to bring about change (TAP Network 2019). It can also serve as a complement to political transition and the strong voice of the women’s movement, which alone may not be sufficient to ensure the rights of all women. Litigation is an opportunity to offer an adequate rationale—based on research, data, and internationally recognized best practices—and accompanying legislative language to judges and magistrates, to achieve meaningful and long-lasting reform outcomes. In the case of South Africa, the courts have not hesitated to appropriate remedial language, effectively rewriting the law where they see fit.

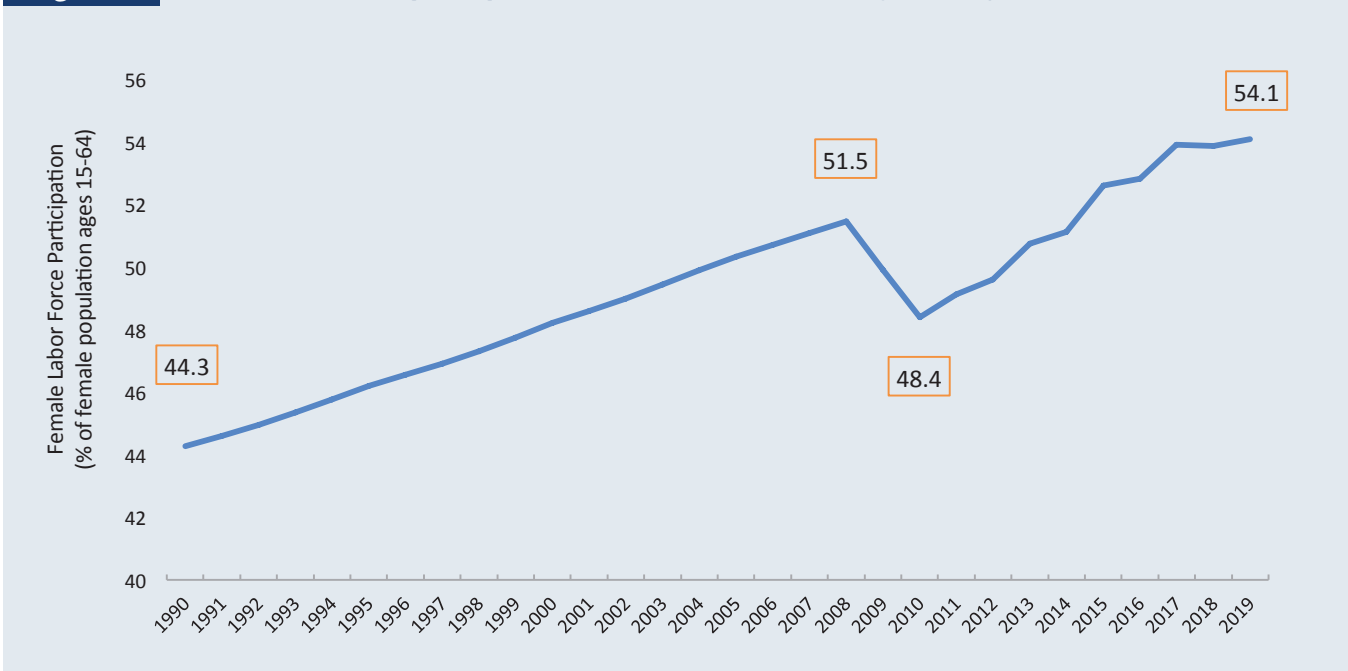
For women in the Transkei, for instance, marital power was still law even after the passage of the General Law Fourth Amendment, forcing the wife to remain “under the guardianship of her husband for the duration of her marriage” (Barker 1999). These provisions were challenged in court in *Prior v. Battle and Others* (1999), in which the plaintiff asked the Constitutional Court to consider them invalid and unconstitutional. The Court agreed that the law violated women’s rights to human dignity, to life, to freedom of trade, to occupation and profession, and to housing, calling it “outmoded and anachronistic” (Constitutional Court of South Africa 1999). Marital power was therefore outlawed in the Transkei, five years after the territory itself was reincorporated into South Africa.

The next case relating to marital power was not brought until 2019, when Agnes Sithole achieved the latest victory in a decades-long fight to increase gender equality and finally remove the remnants of marital power that have long lingered in South Africa (F.W. de Klerk Foundation 2021; Harrisberg 2020). When her marriage began to fall apart in 2019, Mrs. Sithole’s husband threatened to sell their home without her consent, leaving her destitute. Although hers was a civil marriage, it remained subject to legal uncertainty. She had heard of the legislative changes to marital property and had assumed her 1972 marriage was automatically converted to a regime of community of property. However, she and her husband had not registered their marriage as such in the two-year window provided by the amendment to the Matrimonial Property Act of 1988, which otherwise did not apply to marriages conducted before that date.

This fact, taken together with provisions of the Black Administration Act automatically considering marriages between Black people to be out of community of property unless explicitly repealed, meant that the law maintained her husband as her legal guardian and that he had the power to administer their joint assets against her wishes. This would leave her vulnerable to economic insecurity and poverty during and after the dissolution of her marriage (Broughton 2021).

In light of these circumstances, Mrs. Sithole sought assistance from the Legal Resources Centre and the Commission for Gender Equality, both of which helped prepare her case. On April 14, 2021, the Constitutional Court acknowledged that although the General Law Fourth Amendment had fully abolished marital power with respect to all civil marriages, the discriminatory effect of the Black Administration Act had persisted by not converting “the default position of marriages of Black people so that they were automatically in community of property like those of other races” (Constitutional Court of South Africa 2021). The Court found that any provision that maintains and perpetuates such discrimination is unconstitutional. This confirmed the judgment of the High Court (the superior court of law in South Africa), which had previously stated that “the discrimination the impugned provisions perpetrate is so egregious that it should not be permitted to remain on our statute books... The recognition of the equal worth and dignity of all Black couples of a civil marriage is long overdue.”

Other economies in Sub-Saharan Africa have also pursued reforms through strategic litigation. In Lesotho, for example, women could not engage in court proceedings without their

Figure 2 Female labor force participation in South Africa has risen significantly since the 1990s

Source: World Bank Data 2019 (database).

Note: The dip from 2008–11 corresponds to the global financial crisis.

husbands' consent until 1990, when the court ruled in favor of a wife who was seeking to bring an action for adultery damages. In Eswatini, the High Court recently ruled that depending on the husband's consent to sell livestock violated women's rights to equality and dignity.

The *Sithole* judgment is thus only the latest step in a slow, but steady movement toward fully abolishing marital power in South Africa. As of mid-2021, legislation had not been passed affecting such dynamics in religious marriages, and in particular Muslim marriages. However, like the reforms seen over the last 30 years, continual follow-up and advocacy will be necessary to sustain pressure on parliament, or to use the court system, to enforce the equal rights of all South African women to empower themselves and their communities both within and outside of marriage. It took years of cases brought before the Constitutional Court so women like Mrs. Sithole, and many others who came before her, could finally see the removal of constraints and compromises associated with marriage in South Africa. Her battle represents the importance of the judicial system in setting the legal reform agenda and bringing about systemic change. Through such advances, South Africa can continue to move closer to a more equal society.

The fruits of reform

As demonstrated here, many factors can influence the attainment of legal reform. South Africa's transition to a multiracial democracy illustrates the importance of timing and the role that politics can play in providing opportunities to push for change. As women increasingly engage in politics and with civil society, their voices are more likely to be heard and represented, both in court and throughout the legislative process. This effort, however, must be sustained over generations to meaningfully achieve desired goals.

If successful, such reforms can have significant effects. Today, South Africa scores higher than China, India, and Russia, and is the second-highest-scoring economy in Sub-Saharan Africa as measured by the WBL index. It was also a leader in the region. Most economies in Sub-Saharan Africa did not begin implementing substantial reforms until the 2000s, after passage of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol). South

Africa's relatively early reforms not only allow for more comprehensive analysis of their effects, but also provide an important example to other economies in the region pursuing reforms related to gender equality.

In the years since the first reforms to marital power were passed, women's standing in South African society has changed greatly. Female labor force participation has risen significantly since the 1990s. In fact, the biggest increase in female labor force participation rates in South Africa happened in the period following democratization and the passing of the General Law Fourth Amendment. It reached an all-time high of 54 percent in 2019 (World Development Indicators) (see Figure 2). Women now fill more than half of professional and technical positions (Mastercard Index for Women Entrepreneurs 2020). The environment for female business owners has also changed; reports indicate an improvement in women's overall entrepreneurial activity and a more supportive environment for female business ownership. Additionally, evidence suggests a long-term narrowing of the gender wage gap, from 40 percent in 1993 to about 16 percent in 2014 (Mosomi 2019a, 2019b). With regard to representation, the proportion of seats held by women in the South African national parliament has almost doubled, from 25 percent in 1997 to about 47 percent in 2020 (World Development Indicators). These developments show that legal reform influences what happens on the ground, highlighting that when societies move toward equality, economies can become more resilient.

Yet persistent gender-related obstacles remain. Women in South Africa still experience deep-rooted inequalities. Moreover, initial reforms missed opportunities to comprehensively tackle the cross-cutting issues of marital power and benefit women from all walks of life. The first reforms to marital power, for example, failed to include Black couples or marriages conducted under customary law.

The story of the abolition of marital power in South Africa thus reveals that achieving fair and legal gender equality can take lifetimes, sometimes with long stretches of very little change. In the areas measured by WBL, South Africa has yet to introduce paid parental leave or establish a mandatory contributory pension system, both of which would further increase women's economic security and empower them in the workplace and at home.

Such laws also require meaningful implementation and enforcement to be effective. For example, though there have been victories toward abolishing marital power for all women throughout the last several decades, some women may still be unaware of their rights or of recent changes to applicable laws. In other areas, including domestic violence, incidence remains high despite comprehensive legislation (World Bank Group 2018).

Achieving gender equality in South Africa and all over the world will require a concerted effort from a variety of actors, including government, civil society, international organizations, and ordinary citizens. Reforms must reflect the context of each country and include well-functioning mechanisms to implement and enforce legal measures. By looking at the successes and failures

of the past, other countries hoping to reform in these areas can ensure that reforms are executed in a way that is inclusive of all women and cognizant of the intersectional discrimination that many face.

Though obstacles to achieving gender equality are likely to be in place for years to come, the story of marital power in South Africa shows that over time, they can be removed. The work is far from over, but lessons can be drawn from the South African legal reform experience and its movement toward abolishing marital power in all its forms. This story of resilience and a continuous commitment to gender equality, in even the most difficult of circumstances, is key to building a world in which all women are equal and empowered.

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