

**IMPEDIMENTS IN THE PROMOTION OF THE RIGHT TO GENDER EQUALITY IN POST-
APARTHEID SOUTH AFRICA**

by

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I declare that **'IMPEDIMENTS IN THE PROMOTION OF THE RIGHT TO GENDER EQUALITY IN POST-APARTHEID SOUTH AFRICA'** is my own work and that all sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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ABSTRACT

The adoption of the 1996 Constitution in recognition of the historic imbalances that South Africa inherited from its past, affirms the commitment to the promotion of human rights including the right to equality. The emphasis on the right to equality in the Constitution and other related laws discussed in the study represents a guarantee for both men and women the right to equal treatment and benefit of the law.

The point of departure is based on the premise that views the law as an instrument that has the potential to effect social change. The primary purpose is to determine various factors that are an impediment to the significance of the law for the promotion of the right to gender equality. The objective is to establish with sufficient certainty the substantive conception of the right to gender equality in post-apartheid South Africa.

This dissertation examines and provides a brief overview of the development and the intersection of the principles of non-discrimination at the international and regional spheres and their influence in broadening the scope for enforcement of gender equality in South Africa. It provides a literature review and an analysis of the equality jurisprudence of South Africa's Constitutional Court and its influence to the lowest structures of the judiciary in promoting the right to gender equality. This undertaking is reinforced by the primary purpose in this study of examining various factors that are an impediment to the promotion of the right to gender equality.

It discovers that the establishment of a "just society" is difficult where the significance of the law is affected by the lack of legal knowledge and other related factors identified in the study. It establishes that the promotion of the right to gender equality is a gradual process that should not be undertaken overnight but on a continuous basis.

It can be drawn from the findings in this study that the law "alone" is limited in its application in addressing socio-legal problems. Despite the limitation, the use of law is not a goal that should be discarded as it lays the framework for the determination of the significance of legal measures for social change.

Key terms: Constitution, international law, human rights, equality, gender equality, women, judiciary, courts, legislature, social change, non-discrimination, domestic violence.

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ACRONYMS

ACHPR	African Charter on Human and People's Rights
AU	African Union
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CGE	Commission for Gender Equality
DVA	Domestic Violence Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OAU	Organisation of African Union
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SLR	Stellenbosch Law Review
UDHR	Universal Declaration of Human Rights

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CHAPTER ONE

BACKGROUND

1.1 Introduction

South Africa is recovering from the historic legacy of institutionalised discrimination and the reinforcement of gender inequalities which still continue to manifest themselves despite the legislative and judicial progress made to eliminate such inequalities since the dawn of democracy in 1994.¹ However, the adoption of the 1996 Constitution² provided a significant step towards a comprehensive strategy to address these historic legacies of inequalities between men and women. Andrews argues that the Constitution was designed to be a key instrument in moving the country from one steeped in minority privilege to one embracing equal rights for all.³ The view was similarly expressed by Moseneke⁴ as he affirms that the Constitution set for itself the object of healing the divisions of the past by establishing a common citizenship in an undivided country which must strive to be united in its diversity. He substantiated his contention by holding that the Constitution reaffirms our common conviction that South Africa belongs to all who live in it, that the choice we make is for a democratic and open society in which every citizen is equally protected by the law.⁵

The Constitution is a sound framework for the generation of a transformation agenda in reinforcing the national, regional and international framework for the promotion of human rights, including the realisation of the right to gender equality in post-apartheid South

¹ See Ackerman J in *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC), at para 20, as he argued that: "Until recently, very many areas of both public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. It is the majority not the minority which has suffered from this legal separateness and disadvantage."

² The Constitution of the Republic of South Africa 1996, hereinafter referred to as the 'Constitution'.

³ Andrews P, 'From gender apartheid to non-sexism: the pursuit of women's rights in South Africa' (2001), Volume 26, *North Carolina Journal of International Law and Commercial Regulation*, at 44.

⁴ See Moseneke D, 'Transformative adjudication in post-apartheid South Africa – taking stock after a decade' (2007) Volume 21 No 1, *Speculum Juris*, at 2-12.

⁵ Ibid at 4.

Africa. Liebenberg⁶ affirms the transformative nature of the Constitution as she views it as an instrument that seeks to facilitate the fundamental change of unjust socio-political relations. The transformative nature of the Constitution that is described as the cornerstone⁷ of South Africa's constitutional order entrenches its supremacy and the rights of all the people in the Republic.⁸ It also obligates the state not only to respect, protect or promote, but also to go beyond the narrow confines and limits of the law and fulfil the rights in the Bill of Rights.⁹ This means that it will not be enough for the state to refrain from interference in the enjoyment of all fundamental rights and freedoms, but must go further and take proactive measures to ensure their fulfilment.

The Constitution provides a clear framework for the advancement of the right to gender equality. It serves as an independent source of reference that is underpinned by the founding values in section 1, which reads as follows:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (1) human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (2) non-racialism and non-sexism.
- (3) supremacy of the constitution and the rule of law”...

The founding provisions put emphasis on the values that underpin South Africa's democracy. They have been given specific reference in section 39(1)(a) which obligates the courts in the interpretation of the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. They give due recognition to the legal and political commitment to prohibit discrimination in all its forms. As argued by Jagwanth *et al*:

⁶ Liebenberg S, 'Needs, rights and transformation: adjudicating social rights in South Africa' (2005), Volume 6 No 4, *ESR Review*, at 13.

⁷ See section 7(1).

⁸ See sections 2 and 3.

⁹ See section 7(2).

“the commitment to the realisation of the right to gender equality in this section was a hard-earned victory for South Africans and that too often the quest for gender equality was seen to be secondary to the struggle against repressive apartheid policies”.¹⁰

The Bill of Rights of the Constitution as well, contains important and specific references to provisions that give effect to the democratic and founding values of the Constitution. The extensive list of the generations of rights in the Bill of Rights that firmly encompass the promotion of equality centralised the right to equality as a key measure to the advancement of the transformation agenda of the country.

The right to equality between women and men is crucial in determining the extent of equal rights, obligations and opportunities in order to be able to analyse the significance of the law in generating social change. Alberdi acknowledges that society can progress in a more positive direction when the competence, knowledge, experience and values of both men and women are allowed to influence and enrich the development.¹¹

The adoption of constitutional and legislative measures and the evolution of the jurisprudence on equality, for the advancement of the right to gender equality is an important step that lays the foundation that would allow and enable women to enforce their rights. The enforcement of the right to gender equality becomes critical in respect of South Africa’s unique history that entrenched systemic inequalities and brought pain and suffering to the majority of its people.¹² The impact of this history becomes important in the interpretation of the equality clause.¹³ Hence, Graycar *et al* argue that it is equally important to engage with the law in the light of South Africa’s history as it was the law that excluded and discriminated and therefore was reversed to include and be responsive to women’s needs as evidenced by the laws.¹⁴

¹⁰ See Jagwanth S and Murray C, ‘Ten years of transformation: how has gender equality in South Africa fared?’ (2002) Volume 14 No 2, *Canadian Journal of Women and Law*, at 256.

¹¹ Alberdi I, ‘Legislative reform lays foundation for advancing gender equality and women’s rights’, a presentation held at the Third Meeting of the Africa-Spain Women’s Network on 12 May 2008.

¹² See the preamble of the Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000, hereinafter referred to as the “Equality Act”.

¹³ Jagwanth S, ‘South Africa: the inequality challenge’ (2000), Volume 15 No 3, *Southern Africa Report Initiative*, at 4.

¹⁴ Graycar R and Morgan J, ‘Law reform: what’s in it for women’ (2005), Volume 23, *Windsor Yearbook on Access to Justice*, at 1.

In other words, addressing the scourge of discrimination and inequality should be understood and undertaken on the basis of South Africa's history of exclusions. The impact of the past cannot be left out of the discussion of systemic inequalities in South Africa because the Constitution serves as the cornerstone upon which the entire democratic process rests. At the heart of addressing the prohibition of unfair discrimination and inequalities in South Africa lies the recognition of the purpose of this country's new constitutional dispensation in seeking to establish a society in which all human beings are accorded equal dignity and respect.¹⁵ Hence Ngcobo J's contention in *Bato Star*¹⁶ that one of the fundamental goals that South Africa fashioned for itself in its Constitution is the achievement of equality. The judge went further and held that the South African constitutional order *is committed to the transformation of our society from a grossly unequal society to one in which there is equality between men and women and people of all races*¹⁷, (author's emphasis).

The legislative and judicial evolution of the principles of non-discrimination is an important instrument for the promotion of the right to gender equality. They serve as the frame of reference in articulating the set of values and principles in South Africa's 1996 Constitution. Of great interest is the judiciary that is an important instrument within the different branches of government¹⁸ in translating such values and principles into substantive reality as entrenched in South Africa's laws. This similarly expressed by Warren as he pointed out that the courts have been more receptive to change, more innovative and more capable of responding to the demands as they arise.¹⁹

What is also interesting with the judiciary is the establishment of the specialist courts within its lowest structure (magistrates' courts) such as the Family Courts²⁰,

¹⁵ See Goldstone J in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1, at para 41.

¹⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (7) BCLR 687 (CC).

¹⁷ *Ibid*, at paragraph 71.

¹⁸ The legislature and the executive.

¹⁹ See Warren M, "Independence of the magistracy: crossing over to judicialism? unpublished paper presented at the Judicial Conference of Australia, 02 October 2004.

²⁰ The establishment of the Family Courts in South Africa is motivated by three broad aims, namely to:

- provide widespread and specialized protection and help to the family as the fundamental unit in society;
- bring about access to justice for all in family disputes; and

Maintenance Courts²¹, the Equality Courts²² and the recently established Indigenous Courts.²³ The specialist courts are established to promote the spirit and purport of the objectives, which respective organic statutes, establishing them, aim to achieve. The manifestation of the spirit of the Bill of Rights in the interpretation and application of the law, as envisaged by the establishment of these specialist courts, is essential in determining a rational connection between the chosen treatment and punishment objectives, in ensuring the achievement of the right to gender equality.

The judiciary, as the guardian and gate-keeper of the law plays an important role in remedying specific injustices that originate from socio-political and cultural factors which compromise the role of the law in effecting social change. Anleu acknowledges that law is not necessarily the most important factor in understanding how society changes as she recognises the structural limitations on the capacity of law to bring about transformative changes.²⁴ The view was similarly expressed by Sachs J in *National Coalition for Gays and Lesbian Equality v Minister of Justice*²⁵ as he argued that the Constitution itself cannot destroy prejudice and discrimination but requires the elimination (*sic*) of public institutions which are based on and perpetuate such prejudice.²⁶

The uniqueness²⁷ of the judiciary rather than the legislature, as an instrument for the promotion and enforcement of the right to gender equality become important as they have been established to create space in expressing the ideas and different interests of various social groups. Hence Gloppen's assertion that the extensive legal and judicial

-
- improve the quality and effectiveness of service delivery to citizens who have family law disputes. Government Communications, accessed at www.info.gov.za on 26 May 2007.

²¹ See Chapter Two of the Maintenance Act.

²² See Chapter Four of the Equality Act.

²³ See section 166(e) and Schedule 6, section 16 of the Constitution. See also Mahlangu L and Baloyi M, 'Redesignation of Courts: bringing justice closer to home' (2009) Volume 1, *Justice Today*, at 4.

²⁴ See Anleu S, 'Courts and social change: a view from the magistrates' courts', Social Change in the 21st Century Conference, 20 October 2005, Queensland University of Technology, Brisbane.

²⁵ 1998 (12) BCLR 1517.

²⁶ *ibid*, at para 130.

²⁷ A term extracted Warren (note 19) above.

reform as part of the democratisation process puts emphasis on law and rights as driving forces of social change.²⁸

The focus of this chapter provides a brief overview on the historic legacy of inequalities, setting the framework for the background on the purpose of this study and the methodology used in examining the impediments in the promotion of the right to gender equality in South Africa.

1.2 The purpose of the research

The emergence of human rights since the dawn of democracy in 1994 requires an exploration of the impact of the human rights norms and standards in relation to the significance of the law through legislative and judicial decisions as the framework for social change for the promotion of the right to gender equality in South Africa. The establishment of the relationship between the law and how the law actually transmits to social change requires a closer examination in ensuring the development of the principles of non-discrimination. As L'Heureux-Dube put it:

“inequality permeates some of our most cherished and long-standing laws and institutions. Our obligation, therefore, is to reconsider our assumptions, re-examine our institutions, and re-visit our laws, keeping in mind the reality by those whom the nature did not place in a dominant position”.²⁹

The present study investigated various factors that may be a barrier to the potential of the law as an important strategy for social change in the elimination of social and legal systemic forms of discrimination, based on gender and other grounds of inequality in South Africa. The objective was to examine the impact they have on the relationship

²⁸ Gloppen S, 'Courts and social transformation: an analytical framework', at 35 in Gargarella R, Domingo, P Theunis R, *Courts and social transformation in new democracies: an institutional voice for the poor?* (2006) Ashgate Publishers, England.

²⁹ L'Heureux-Dube C, 'Making the difference: the pursuit of equality and a compassionate justice (1997) Volume 13 *SAJHR* 335 at 338 quoted in Albertyn C and Goldblatt B, 'Facing the challenges of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) Volume 14 *SAJHR* at 249.

between the use of law, which, Wong refers to as the “*behaviour of law*”³⁰, as a strategy for the promotion of the right to gender equality and its significance for social transformation. In other words, the aim raised the questions whether:

- the use of the law can change the society for the betterment of the societal well-being?
- there are any of the successful or less successful ways to make social change?
- the established specialist courts such as the Equality Courts are about social control or change?
- the law is really an effective tool for social change?

The concept of using the law as a “strategy for social change” is further identified by Kakabadse³¹ as an ideology of justice that encompasses equal accessibility which must lead to the results that are *individually and socially just* (author’s emphasis). Hence Flavia’s argument that the law may be better approached not as an embodiment of justice, but as a strategy for social change³², as it is argued in this study. In addition, Kennedy³³ acknowledges that:

“law has the potential of radically affecting the way in which we relate to each other and the legal systems must learn to adapt to its central legitimating role or else, *they will lose confidence of the general public* (author’s emphasis)”.³⁴

In giving meaning to the intended objective, the study explored and examined the enforcement of various human rights instruments in the quest for the promotion of the right to gender equality in order to effect social change. These instruments include the

³⁰ Wong KC, ‘Black’s theory on the behaviour of law revisited’ (1995) Volume 23, *International Journal of the Sociology of Law*, at 189.

³¹ Kakabadse K, ‘Inequality in discourse: problematic consumption of justice in common legal system’, (2001) Volume 16 Number 3, *Women in Management Review*, at 241.

³² Flavia A, ‘Legal strategies for women’s empowerment: evolving feminist jurisprudence’, *Changing the Man’s World so It’s also A Woman’s Place*. She furthers this assertion that the courts are a ground for expressing skill and legal acumen rather than a forum to attain justice as battles can be won only through carefully worked out legal strategies.

³³ See also Kennedy H, *Just Law: the changing face of justice-and why it matters to us all*, (2005) Vintage Publishers, London.

³⁴ *Ibid* at 318.

Constitution of the Republic of South Africa which forms the bedrock and a sound framework for addressing women's weak position in law and society. Although there are a number of pieces of legislation adopted by Parliament³⁵ in advancing the struggles of gender equality against discrimination and prejudice, the focus in this study primarily fell on the following pieces of legislations:

- The Domestic Violence Act³⁶, which is viewed by Hassim³⁷ as a significant piece of legislation as it recognizes that families are not immune from the democratic norms established by the Constitution and women are entitled to state protection of their rights even in the private sphere;
- The Recognition of Customary Marriages Act³⁸, that gives official recognition to the capacity and equal status of both the husband and wife in a customary marriage as is the case with civil marriages, thereby striking a balance between gender equality and the right to culture that is recognized by certain customary practices;³⁹
- The Maintenance Act⁴⁰, that provides simpler and most effective ways of claiming maintenance as it also provides for a sensitive and fair approach to the determination and recovery of maintenance from defaulting partners; and
- The Promotion of Equality and Prevention of Unfair Discrimination Act⁴¹, that seeks to advance equality in both public and private spheres by providing a framework to tackle all forms of unfair discrimination and works towards the transformation of the society in line with the ideals expressed in the Constitution.⁴²

³⁵ Such as The Employment Equity Act 55 of 1998, The Broad Based Black Economic Empowerment Act 53 of 2003, The Labour Relations Act 68 of 1995, The Skills Development Act 97 of 1998, The Prevention of Illegal Eviction From Unlawful Occupation of Land Act 19 of 1998, *etc.*

³⁶ No 116 of 1998.

³⁷ See, Hassim S, in 'A virtuous circle? Gender equality and representation in South Africa', accessed at www.hsrc.ac.za, on 07 November 2005.

³⁸ No 120 of 1998.

³⁹ *Ibid*, see Preamble.

⁴⁰ No 99 of 1998.

⁴¹ No 4 of 2000, hereinafter referred to as the "Equality Act".

⁴² See Kok A, 'The Promotion of Equality and Equality and Prevention of Unfair Discrimination Act 4 of 2000: proposals for legislative reform' (2008) Volume 24 *SAJHR* at 445-471 as he argues that the Act is one of the most important instruments in a string of legislative attempts to undo the effects of centuries of race-based oppression and marginalisation.

The purpose of selecting these pieces of legislation is the value-laden nature and the sheer ambitions they have, to provide immediate redress for women, whose rights to gender equality have been infringed. They entrench a series of rights including socio-economic rights⁴³ that have a direct bearing on the improvement of the quality of women's lives. These instruments share a common belief in the capacity of the law to gradually change the deeply entrenched attitudes about the role and place of women in society. Jagwanth *et al* assert that the passing of these legal instruments in South Africa is distinct from other jurisdictions where legal debates concerning gender equality focus on judicial interpretation of the laws in attempting to promote gender equality.⁴⁴

The enforcement of these pieces of legislation is an important example of the law as a vehicle for social change as they seek to:

- create new rights that require immediate enforceability and not the sort of rights that are an “ideal and something to be strived for”, as Justice Madala referred to in *Soobramoney*.⁴⁵
- change both the conduct, attitudes, practices and behaviours of both the government, citizens and private bodies;
- express a new moral standard and norms required for the attainment of such new standards;
- change cultural patterns and attitudes; and
- provide remedies for violations of the victims' self-worth.

Lazarus further affirms the significance of the adopted legal instruments in the enforcement of the right to gender equality as he argues that they:

⁴³ See, *In re: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) and *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) on the arguments for the inclusion of socio-economic in the Constitution, which their exclusion could have had negative implications for women who are mostly vulnerable to socio-economic imbalances which continue to thwart the new dispensation.

⁴⁴ See Jagwanth S and Murray C, (note 10) above at 257.

⁴⁵ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) at para 42. See also Ntlama N, 'The limitation of the law in generating social change', unpublished paper presented at the Conference entitled: 'Law and transformative justice in the post-apartheid South Africa', Nelson R. Mandela School of Law, University of Fort Hare, 06-07 October 2006.

- exemplify the interaction between the state and the community norms;
- demonstrate that certain rules and the judicial process of the state are now an integral part of the intersection between the application of the law and its significance for social change; and
- the use of law is a means that is used by both men and women to assert their rights and to resist the structures of domination which characterise their everyday lives.⁴⁶

The review of these instruments is reinforced by the analysis of both the international and regional instruments on the right to equality. The significance of the review is endorsed by Ackerman J in *Prinsloo* as he held that:

“while our country, unfortunately, has great experience in constitutionalising inequality, it is a newcomer when it comes to ensuring constitutional respect for equality. At the same time, South Africa shares patterns of inequality found all over the globe, so that any development of doctrine relating to section 8 [which is section 9 of the 1996 Constitution] would have to take account both of our specific situation and of the problems which our country shares with the rest of humanity”.⁴⁷

The inter-regional development of the instruments on the right to equality is attributed to the adoption of the Universal Declaration of Human Rights.⁴⁸ The UDHR has a specific focus on the development of the principles on equality and non-discrimination. The principles and values entrenched in the UDHR become important in this study as they embody a variety of the conceptions of equality as they will be shown in chapter two. Besides, South Africa is reputed for its role in the quest for equality and has established itself as one of the international role models in the elimination of unfair discrimination and inequalities.⁴⁹

⁴⁶ Lazarus M, ‘Black: why women take men to magistrates’ courts’ (1991) Volume 30 No 2, *Caribbean Kinship Ideology and Law*, at 119.

⁴⁷ See *Prinsloo* (note 1) above at para 20.

⁴⁸ Hereinafter referred to as the “UDHR” which was adopted by the General Assembly Resolution 217 A (III) of 10 December 1948 and see its preamble.

⁴⁹ See Albertyn C and Goldblatt B, ‘The right to equality’, unpublished paper presented at the “Constitutional Law” Conference, 29 March 2006, Constitutional Hill, Johannesburg. They

The development of international principles is essential for South Africa because this country is not only required to respect, promote and protect human rights but mandated by its Constitution to go further and ensure the fulfilment and realisation of these rights including gender equality.⁵⁰ The analysis of the inter-regional development of the principles of non-discrimination is not only important for South Africa but for the international community as well that has seen a brazing wave of discrimination and prejudice against women. The abuses against women are relentless, systematic and widely tolerated, if not condoned. Violence and discrimination against women are global social reality notwithstanding the progress of women's human rights movement in identifying, raising awareness and challenging the impunity of women's human rights violations in the world.⁵¹ The discrimination against women is multi-faceted and present not only in society but in public structures as well.

The interrelationship between the principles and values of equality entrenched in the Constitution with those of the international community is particularly important for the courts in the promotion of the right to gender equality. The courts are mandated by the Constitution to draw lessons from other jurisdictions in the enjoyment of fundamental rights in an attempt to ensure the development of the principles of non-discrimination.⁵² The mandate also requires the superior courts to assist and provide guidance to the lowest structure of the courts as they have limited jurisdiction in enquiring into or rule on the constitutionality of any legislation or any conduct of the executive branch of

emphasise South Africa's role in the development and nature of the jurisprudence on equality as a "fascinating journey" that has established South Africa as the leading jurisdiction in this area.

⁵⁰ See section 7(2) of the Constitution of the Republic of Africa Act 108 of 1996, hereinafter referred to as the "Constitution". See also Liebenberg S, 'Report of a joint workshop organised by the Community Law Centre (University of the Western Cape and the Human Rights Centre (University of Pretoria) (1997) at 17. She endorses this obligation by highlighting that the duty to *respect* human rights implies an immediate action on the state to refrain from legislative or other actions which interfere with people's access to the right to equality. Secondly, the duty to *protect* requires the state to prevent the right from being undermined by the conduct of both private and public actors. Lastly, the duty to *promote and fulfil* requires the state to take legislative and other measures to assist individuals and groups to obtain access to their rights.

⁵¹ See Davis K, 'The emperor is still naked: why the Protocol on the Rights of Women in Africa leaves women exposed to more discrimination?' (2009) Volume 42, *Vanderbilt Journal of Transnational Law*, at 949-992. She argues that the adoption of the Protocol poses difficulties for state parties in relation to its implementation as she highlighted a number of challenges related to budget allocation, the legal systems that waffle indeterminately between statutory obligations and cultural traditions that constrain many countries.

⁵² See section 39 (1) (b)&(c) of the Constitution). See also Church J, Schulze C, Strydom H, *Human rights from a comparative and international law perspective*, (2007) University of South Africa, Pretoria, at 164.

government.⁵³ Hence, Bhagwati's affirmation that the interpretation of the law given by the higher courts must be the one that assists the lowest structure to command legitimacy with people in the enjoyment of human rights. In other words, the courts should also focus their attention on the promotion of gender equality if they are to be consistently found to be dispensing justice according to law.⁵⁴

Despite the limitation on the extent of jurisdiction of the lowest structure of the courts, it is against this background that the pieces of legislation mentioned above, rely to a greater or lesser extent on the lower courts for their implementation. When women are able to bring their disputes before the courts in enforcing their rights, the capacity and potential of the law enhances the respect for the rights which directly contributes to social change. This is borne out by the fact that law is not just a set of formal rules and rights but adds goals and tools to be used in advancing the significance of the law and enhancing society's well-being and legitimacy.

The use of law is a measure and an instrument that is designed and has the potential to translate the formal entrenchment of human rights into substantive reality. In the quest for the achievement of substantive equality, the concept of "gender equality" becomes important in establishing the efficacy of the law in dealing with the socially constructed roles that seek to compromise women's equal worth. The importance of significance role of gender equality in realizing substantive equality is prompted by the Constitutional Court's rejection of the "sameness approach" or "formal equality before the law". The formal conception of the right to equality is not concerned with the recognition of differences between men and women in order to eliminate the consequences of those differences in between them.⁵⁵ Rather the "sameness approach" is more concerned with "identical treatment" as opposed to whether the human rights orientated laws through effective application and proper interpretation are able to eliminate the unequal consequences of difference that result in prejudice and discrimination.

⁵³ See section 170 of the Constitution.

⁵⁴ Bhagwati PN, Discussion Panel: "Creating a judicial culture to promote the enforcement of women's human rights", unpublished paper presented at the Asia / South Pacific Regional Judicial Colloquium, Hong Kong, 20 – 22 May 1996.

⁵⁵ See for example, *Harksen v Lane* 1997 (11) BCLR 1489 (CC) at paras 50-55.

In this regard, the translation of formal equality into substantive equality is defined by Kaufman⁵⁶ as a strategy that is:

“directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society”.⁵⁷

Kaufman’s contention is endorsed by Loewy⁵⁸ as a:

“form of advocacy that consciously strives to alter structural and societal impediments to equity and decency as the [courts] provide legal representation to individuals, groups or interests that holistically have been unrepresented in our legal system or who are fighting the established power or distribution of wealth.”

The interaction between law and society forms the basis not only for understanding gender and law issues, but broader issues relating to equality and social justice.⁵⁹ The significance of the law, particularly the use of human rights approaches in the quest for the promotion of gender equality provides an opportunity to examine social change from the rights perspective. Fernando asserts that the word “social change” implies the existence of social inequalities which are dangerously harmful to the members of our society.⁶⁰

The point of departure in this study is not to theorise the concept of gender equality. Rather, the intention is to strive towards the review of the role of both men and women and how the courts have responded in remedying specific injustices against women in

⁵⁶ Kaufman RE, ‘Women and law: a comparative analysis of the United States and Indian Supreme Courts’ equality jurisprudence’, (2006) Volume 34 Number 3, *Georgia Journal of International and Comparative Law*, at 560.

⁵⁷ Ibid at 616, Kaufman substantiates his contention by noting that formal equality alone, is insufficient to accomplish a meaningful change and that a “protectionist approach” is a “double-edged sword” that recognizes and compensates for women’s subordinated status, but also promotes and perpetuates that vulnerability and that substantive equality offers the best hope for facilitating women’s full and equal participation in society.

⁵⁸ Loewy KL, ‘Lawyering for social change’, (2000) August, *Fordham Urban Law Journal*, at 2.

⁵⁹ See Watt G, ‘The character of social connection in law and literature: lessons from *Bleak House*’ (2009) Volume 5 No 3, *International Journal of Law in Context* at 263-280.

⁶⁰ See Fernando B, of the Asian Human Rights Commission on the paper entitled: ‘Asia: using the law for social change’ unpublished paper presented at the International Human Rights Colloquium, San Paulo, organised by CONECTAS, 03-08 November 2007.

the light of the developments that have taken place in this new constitutional dispensation, failing which, gender equality may remain a distant goal or continue “*swinging in the pendulum*”. The review should serve as a tool for the advancement of social change within the concept of human rights inspired laws in the elimination of the barriers that constitutes the obstacles towards the promotion of the right to gender equality.

1.3 The statement of the problem

1.3.1 Achieving gender equality: beset with problems

South Africa overcame in 1994 a long and pervasive history of institutionalised discrimination and gender inequalities. This history dehumanised many communities and individuals by systematically and for a prolonged time striking out at the core of their human dignity.⁶¹ The systemic inequalities and institutionalised discrimination were regulated and further perpetrated by the direct use of state organs and institutions, including the judiciary. These inequalities were also affected by economic, political and disempowerment against the general majority of the population.⁶²

The impact of the historic inequalities were emphasised by Mahomed DP in *Azapo v President of the Republic of South Africa*⁶³ as he stressed that the legitimacy of the law itself was deeply wounded as the country haemorrhaged dangerously in the face of the tragic conflict which had begun to traumatise the nation. He substantiated his contention as follows:

“fundamental human rights became a major casualty of the conflict between the minority which reserved for itself all control over the political instruments of the state and the majority who sought to resist the domination and where their

⁶¹ See Mokgoro J, in *Minister of Finance and others v Van Heerden* 2004 (11) BCLR 1125 (CC) at para 71.

⁶² See Botha H, ‘Equality, dignity and the politics of interpretation’, (2004) Volume 19, Special Edition, *SA Public Reg/Law*, Verloren van Themaatsentrum/Centre, UNISA, at 735.

⁶³ 1996 (8) BCLR 1015.

resistance was met by the laws that were designed to counter the effectiveness of such resistance”.⁶⁴

The historic prejudice of inequalities and discrimination was further acknowledged by O’Regan J in *Brink v Kitshoff*⁶⁵ that the deep patterns of disadvantage were particularly acute against black women. The apartheid rule allowed the systematic discrimination of black people in all aspects of social life and the deep scars of this appalling programme are still visible in our society.⁶⁶

The institutionalised historic inequalities are further acknowledged in the preamble of the Equality Act⁶⁷ that:

“the impact of the past continues to undermine the aspirations of our democracy, despite the progress made in restructuring and transforming our society and its institutions.”

In harnessing the democratic values and principles in the Constitution, the Constitutional Court has put an emphasis on examining the impact of the past in order to deal with inequalities and discrimination.⁶⁸ The emphasis on the impact of the past is also affirmed by Devi who argues that:

“when tracing the origins of discrimination, history becomes an important weapon in the arsenal of those struggling for acceptance of the principle of non-discrimination”.⁶⁹

The reference to the history of discrimination and prejudice should be used as a point of departure and a guideline for the enforcement of the human rights inspired laws by the courts. The reliance on the importance of the history can give valuable insights into the

⁶⁴ See *Azapo* at para 1.

⁶⁵ *Brink v Kitshoff* 1996 (4) SA 197 (CC) at para 44.

⁶⁶ *Ibid* at para 40.

⁶⁷ See the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁶⁸ See *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC); *Harksen*, (note 55) above, *Fraser v Children’s Court* 1997 (2) BCLR (CC), *Bhe v Magistrate, Khayelitsha* (2005) (1) BCLR 1 (CC).

⁶⁹ Devi UK, *Women’s equality in India: a myth or reality?* (2000), Discovery Publishing, New Delhi, at 34.

genesis of discriminatory practices that remain essentially the same, which would allow societies to acknowledge and forge new tools that would be central to strategies for change.⁷⁰

The scourge of gender-based discrimination is evidenced by women who, as a result of domestic violence and other related inequalities, end-up killing their abusive husbands or partners.⁷¹ Vetten argues that even though by contrast, women are most likely to be murdered by their husbands, violence that women experience differs in both type and form from the violence that men experience, resulting in women killing their partners.⁷² The extent of violence and discrimination against women was affirmed by Coram J in *S v Ferreira*.⁷³ In this case, Mrs Ferreira was convicted by the court *a quo* for having hired people to kill her abusive husband and they were all sentenced to life imprisonment. The case went on appeal and raised important issues concerning the treatment of abused women in society by the legal system and the criminal justice system in particular.⁷⁴

The Supreme Court of Appeal invalidated the sentence imposed by the court *a quo*. It established that the court *a quo* failed to understand the dynamics of unequal power relations in abusive relationships and to properly consider expert's reports on the dynamics of abuse in such relationships.⁷⁵ The case illustrates the unacceptable levels of domestic violence against women in South Africa as the court established that Mrs Ferreira suffered severe and prolonged physical and emotional abuse at the hands of her deceased husband.⁷⁶

The system of inequalities and discrimination against women is also common in other African countries where laws still exist which deny them their right to gender equality. The developed international agenda for the promotion of the right to gender equality is

⁷⁰ Ibid.

⁷¹ See Reddi M, 'Domestic Violence and abused women who kill: private defence or private vengeance?' (2006) *SALJ*, 22-36.

⁷² Vetten L, 'Man shoots wife: intimate femicide in Gauteng South Africa' (1996) Volume 6, *Crime and Conflict*, at 1-4.

⁷³ 2004 (4) All SA 373 (SCA).

⁷⁴ *Ferreira* at para 5.

⁷⁵ *Ferreira* at para 40.

⁷⁶ *Ferreira* at para 6. Mrs Ferreira's experience is endured by other women in South Africa as it was the case with Mrs Rethea Bierman, who hired her gardener and paid him R5000.00 to kill her husband because of the abuse and persecution he was inflicting on her. Mrs Bierman has been sentenced to life imprisonment. The report was on 3rd Degree TV Show, 17 March 2010.

difficult to understand when states use the human rights and equality rhetoric just to keep up appearances. The passing of the Traffic Law Amendment Act of 2004, in Nigeria as late as in 2005⁷⁷, separating women and men from riding in the same buses as it is contrary to public decency undermines the very same principle that guarantees equality and the objectives of the UDHR. This restricts the human rights discourse of women and the framework of equality and non-discrimination.

The Nigerian Traffic Act runs contrary to progressive laws that have been developed in other countries such as South Africa. This may slow down the advances women have made in the fight for equality generally as it accepts and puts men as the source of equal rights for women instead of an entitlement to the rights coupled with the responsibilities guaranteed in international instruments for the evolution of the right to equality.

Women's subordination and minority status is often upheld with reference to African custom, as evidenced by the Supreme Court of Zimbabwe ruling in *Magaya v Magaya*⁷⁸ where the court held that as per the old African cultural customs which are not written down, women should never be considered adults within the family. They are junior males or teenagers and therefore the African society dictates that women are not equal to men especially in family relationships.⁷⁹

Africa generally has seen the entrenchment of women's inferiority status under the rubric of law or custom or religion, which compromises the equal worth of a woman person. The worldwide publicised case of Amina Lawal in Nigeria attests to the number of cases that relegate the equal worth and dignity of a woman to a second-tier status. The relegation of Amina's human rights eroded and compromised the legislative strides taken by the international, regional community including Nigeria itself, to eradicate all forms of discrimination against women.

In this case, Amina Lawal whilst unmarried became pregnant and local villagers had her arrested and brought her before the Katsina Regional Court where she was charged with

⁷⁷ Adopted on the 25th July 2005, hereinafter referred to as the "Nigerian Traffic Act"..

⁷⁸ 1999 (1) ZLR 100 (SC).

⁷⁹ See also Knobelsdorf V, 'Zimbabwe's Magaya decision revisited: women's rights and land succession in the international context', (2006) September 22, *Columbia Journal of Gender and Law* at 26.

adultery. She had no legal representative and there were serious questions whether the nature of the charges were adequately explained to her.⁸⁰ Under Katsina Regional Law, admitting to having a baby out of wedlock amounts to a confession to the crime of adultery. What is interesting in this matter is the fact that the man identified as the father of the baby girl was released. The rationale behind the release was that there was insufficient evidence linking the man to the crime in question unless he had confessed or four (4) other men had witnessed the adultery.⁸¹

The Sharia Court at Bakori in Katsina State sentenced Amina Lawal to death by stoning after she confessed to having a child while divorced. She filed an appeal against her sentence with the help of a lawyer hired by the Nigerian women's rights group. Her sentence was suspended until January 2003 to allow her to care for the baby for two years. On 19 August 2003 a Sharia Court of Appeal in Funtua upheld the sentence of death by stoning imposed on Amina Lawal and was given thirty days to appeal against the decision. Without detailing the sequence of events, Amina Lawal's life was finally saved on the 25th September 2003 by winning the appeal.

Despite South Africa's recent history and other positive experiences from Africa, there are debates relating to the efficacy of the law itself, in bringing about social change. These debates relate to the manner in which the law is applied and used to advance its social change objectives, which is the subject of this study. Mukhopadhyay⁸² argues that, due to the patriarchal nature of both the state and our societies, and given the bias in the dispensation of justice by the judiciary and its functionaries relating to gender equality, it is *not sensible to expect that the law can ever be a potent force* (author's emphasis) to change the existing social structures. He argues that:

⁸⁰ Jesus & Today's Issues, 'Death by stoning in Nigeria: misguided religion', accessed at www.jesusjournal.com, on 22 May 2007.

⁸¹ Ibid.

⁸² Mukhopadhyay S, 'Law as an instrument of social change: the feminist dilemma forums', accessed at www.hsph.harvard.edu, on 14 March 2006. See also Lorde A, *The master's tools will never dismantle the house, in sister outsider: essays and speeches*, 1984, The Crossing Press, New York, at 454. She argues that the courts will never be able to bring about a genuine change in promoting social justice.

“the hope of ensuring gender equality using the law as an instrument of social engineering is an altogether impossible dream for the implementation of gender equality.”⁸³

An example of gender bias in the system of justice itself was illustrated by the majority view on the Constitutional Court judgment in *Masiya*.⁸⁴ The court confined the non-consensual anal penetration to females to the exclusion of males whilst extending the common law definition of rape.⁸⁵ It reasoned that it was not required to consider the extension to include anal penetration of the male by a penis despite its acknowledgment that the consequences are equally the same.⁸⁶ The court’s acknowledgement of the consequences and the evolution of the law relating to rape but not deconstructing the unequal power relations by including males in the extension of the common law definition of rape, carries with it a double-edged sword⁸⁷ for the promotion of gender equality. It has promoted and further perpetuated women’s vulnerability to abuse and prejudice despite its facilitation to full and equal protection of their dignity.⁸⁸

Then the question is: despite the progress made since 1994, what are the factors that continue to undermine the aspirations of our democracy, particularly regarding the enforcement of the right to gender equality at the courts?

1.4 Factors inhibiting the promotion of the right to gender equality

1.4.1 Socio-cultural factors

The development of the legislative framework to advance the legal and social status of women including those in rural areas is often scarcely implemented due to the persistency of socio-cultural practices that are often internalised by women themselves.

⁸³ Ibid, quoted Ntlama N, ‘The Equality Act: enhancing the capacity of the law to generate social change for the promotion of gender equality’, (2007) Volume 1, *Speculum Juris* at 113.

⁸⁴ See *Masiya v Director of Public Prosecutions Pretoria* (The State) and another 2007 (5) SA 30 (CC),

⁸⁵ Ibid, at para 45-46.

⁸⁶ *Masiya* at para 29.

⁸⁷ A term lifted from Mamoon A, ‘Equality: double-edged sword’, (2003) May issue, *Alochona Magazine*.

⁸⁸ Examples such as these indicate that Mukhopadhyay is partially correct in identifying biases in the legal system as a barrier to the use of law as an instrument for social change.

Inglehart highlights that the consolidation of the struggles for the realisation of the right to gender equality requires addressing the socio-cultural problems of women before the transformation of their legal situation.⁸⁹ The significance of using the law in addressing instances of violence and discrimination against women is often conceptualised as a clash between cultural rights and the equality rights of women.⁹⁰ As similarly expressed by Lehnert⁹¹:

“the simultaneous recognition of African customary law and human rights in the South African Constitution has resulted in complex conflict between two different value systems as proponents of the [former] describes (*sic*) the Constitution as a largely Western document which is foreign to Africans and threatens the continued existence of customary law. Human rights activists on the other hand regard customary law as a patriarchal system and thus a severe obstacle to the implementation of human rights”.⁹²

Although the discrimination against women, as argued by Davies, appeared to flow directly from their legal status and law reform was seen as providing a sufficient path to social equality, it was later acknowledged that it was by and large not imposed by the legal status, but was social and cultural in origin.⁹³ The patriarchal nature of the society subjects women to cultural values and norms which compromise their dignity and the right of self-worth as human beings. Albertyn *et al*⁹⁴ endorse this contention as follows:

“South Africa is a deeply patriarchal society in which women have been subordinated in public and private life. All women live in the shadow of gendered stereotype that act as obstacles to their full participation in society. In general,

⁸⁹ Inglehart R and Norris P, *Gender equality and cultural change*, (2003), John F. Kennedy School of Government, Harvard University, Cambridge University Press, at 4.

⁹⁰ See Mamashela M, ‘New families, new property, new laws: the practical effects of the Recognition of Customary Marriages Act’, (2004) 20 *SAJHR* at 617.

⁹¹ See Lehnert W, ‘The role of the courts in the conflict between African customary law and human rights’ (2005) Volume 21, *SAJHR*, 242-277.

⁹² *Ibid* at 241.

⁹³ Davies M, ‘Legal theory and law reform’, (2003) Volume 28, *Alternative Law Journal*, at 169.

⁹⁴ Albertyn C and Goldblatt C, ‘Equality’ in Woolman S, Roux T and Bishop M, *Constitutional Law* (2008) Volume 3, 35-3.

women have less access to economic opportunities than men and are more likely to be poor or dependent upon men to meet their basic needs”.⁹⁵

The socio-economic imbalances of the past contribute significantly to women being submissive to practices that are harmful to their well-being. The custom of “*ukuthwala*”⁹⁶ of young girls which is highly prevalent in the Lusikisiki area in the Eastern Cape which was affirmed by elderly women as an old-age tradition that cannot be discarded is a case in point.⁹⁷ The implications of the custom of “*ukuthwala*” has received serious consideration by the South African Law Reform Commission⁹⁸ which is mandated to investigate the practice, its impact on the girl-child, appropriateness and compliance with the human rights of the girl-child.⁹⁹

These socio-cultural practices that are harmful to women undermine the effectiveness of the law itself which equally compromise the role of the courts in the advancement of the transformation agenda in our societies.

1.4.2 *Lack of legal information*

The high levels of illiteracy, particularly amongst rural women, limit their articulation and involvement in relevant issues that affect them. The lack of knowledge relating to constitutional and legal rights amongst women and on how they can actually be involved in the legislative process is a cause for concern.¹⁰⁰ This poses a threat to the legitimacy of democracy as the publication of the laws in official bulletins in ensuring access to legal information tend not to reach rural women. The lack of legal knowledge is not limited to the legitimacy of democracy but also in the enforcement of the laws at the

⁹⁵ Ibid.

⁹⁶ Forced marriage of girls of marriageable age but is clouded by the subjection of underage girls to marriage under the name of the tradition.

⁹⁷ Reported in the SABC 1 News on 24 March 2009 to an extent this practice of “*ukuthwala*” of young girls, as young as 12 or 14 years to elderly men has left the future of these girls uncertain. See also the report by Chandre’ Prince, ‘Parents sells girls as child brides’, *Sunday Times Newspaper*, dated 31 May 2009.

⁹⁸ Established by the Commissions Act 90 of 1993.

⁹⁹ See Issue No 2443, entitled: ‘Law Reform Commission to host discussion on *Ukuthwala*’, *Legal Brief Today*, 17 November 2009, and held the roundtable discussion on the practice on 30 November 2009.

¹⁰⁰ See Prinsloo M, ‘Literacy in South Africa’ in Wagner D, Street B and Venezyk R, (eds) *Literacy: An international handbook* (1999) Westview Press at 418-423.

courts. In other words, how can rural women who are often cut from the national information flow be able to use the law in changing attitudes and beliefs for social change?¹⁰¹

In order to be able to determine the evolution of the law, particularly the achievement of the right to equality, before examining and assessing the extent to which the courts are able to use the law as an instrument for social change, people have to be aware of their rights. It is only then that people will be able to exercise and enforce them.¹⁰² As pointed out by the court in *Daniels v Campbell*¹⁰³:

“promoting substantive equality requires an acute awareness of the lived reality of people’s lives and an understanding of how real life conditions of individuals and groups have reinforced vulnerability, disadvantage and harm”.¹⁰⁴

Hyponen identifies that the crux of the matter lies in the levels of awareness of legal rights by the beneficiaries of the law as attitudes and beliefs are difficult to change, making legal reform a long term process.¹⁰⁵ It is equally acknowledged that the poor have unequal access to justice and this undermines the possibility of equality in society.¹⁰⁶ The low levels of education amongst rural women further aggravate their difficulty in engaging constructively with laws in official bulletins. In fact, even those who are aware and know about their rights such as the applicant in *Carmichele*¹⁰⁷, find that judicial enforcement of their rights requires a skill that an ordinary person does not possess.

Ms Carmichele claimed damages from the Department of Justice and Constitutional Development after she was brutally attacked by a certain Mr Coetzee, whom she believed should not have been released on bail as he was a threat to the general women

¹⁰¹ Hyponen E, ‘Legal reform - the key to social change: experiences from rural Zambia’, (2000), Discussion paper prepared for the Legal Status of Women and Girls in Zambia, 2000.

¹⁰² Ntlama N, ‘Advancing access to justice through the establishment of the Equality Courts’ (2006) *De Rebus Journal*, January / February issue, at 28.

¹⁰³ Unreported case of the Cape High Court No 1646/03.

¹⁰⁴ *Ibid*, at para 39 quoted in *S v Ferreira* No 245/03.

¹⁰⁵ See Hyponen (note 101) above.

¹⁰⁶ Martin A, ‘Barricades or obstacles: the challenge to access justice’, Governance Resource Centre Exchange, accessed at www.grc-exchange.org, on 11 May 2008.

¹⁰⁷ See *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC).

folk because of his propensity to commit crime. She was subjected to the painful journey through the High Court, Supreme Court of Appeal and the Constitutional Court. Since 1997 she had been fighting this battle and was finally awarded damages in 2002 but in 2008, the Department of Justice was still disputing the amount to be paid to Ms Carmichele.¹⁰⁸

The lack of legal and constitutional knowledge is affected by other factors such as the complexities in the enforcement of the right to gender equality to be further analysed in this study.

1.4.3 *Lack of access to justice*

The vastness of the Republic of South Africa, which is affected by harsh economic conditions due to high levels of unemployment make women more vulnerable to their abusive partners.¹⁰⁹ This makes it difficult to establish instances of misbehaviour before reaching the courts as they are not reported by women.¹¹⁰ The geographical location of the courts poses a challenge for the enforcement of the right to gender equality as they increase the difficulty faced by women, especially those in rural areas, in ensuring access to them. For example, the new Re-Demarcation policy on the magistrates' courts adopted in 2007 in the Eastern Cape¹¹¹ exacerbates the difficulties faced by women in ensuring equal access to courts for both men and women. The policy proposes the Zwelitsha magistrates' courts as the main court and the King William's Town magistrates' courts as the sub-branch of Zwelitsha magistrates' courts.

The implications of the policy means that everyone from the old Ciskei will continue to travel past the King William's Town magistrates' court to the Zwelitsha magistrates' court to enforce their rights. The former court was and still continues to be pre-dominantly

¹⁰⁸ See the report by Ferreira A entitled: 'Carmichele will never recover', *Times Newspaper*, dated 08 April 2008.

¹⁰⁹ See the report entitled: 'Threats to human rights in the Province of the Eastern Cape: the context, challenges and good practice', presented by the UNESCO "Oliver Tambo" Chair of Human Rights: University of Fort Hare at the Conference entitled: "HIV/AIDS, Human rights", University of Limpopo, Pietersburg, 02-04 May 2007.

¹¹⁰ NGO representative from Cape Town, on Radio Umhlobo Wenene News Programme between 18h00-19h00, on 05th July 2007, dismissing the accuracy of statistical information released by the Department of Safety and Security on crime levels in South Africa where she acknowledged that some instances of abuse and crime are not reported particularly by women.

¹¹¹ Re-Demarcation of Magisterial Districts: Eastern Cape.

used by whites. The latter court also continues to be used by blacks as it was the case during the apartheid-era. The reviews and appeals of cases from the King William's Town magistrates' court are heard at the Grahamstown High Court which is about 90km from King William's Town, whilst those from the Zwelitsha magistrates' court are heard in Bhisho which is about 10km from Zwelitsha. The territorial divide in the enforcement of human rights is also affected by the lack of physical access for the disabled and the elderly at the King William's Town magistrates' courts.

The rural and urban divide of these courts limits the rights of women to have access to justice and have their cases settled without delay. The differentiation of those staying in the old, rural and black Ciskei *vis-à-vis* those staying in the former Republic effectively undermines the struggles of the people, particularly women. It compromises the right of women's equal access to justice which entrenches a right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court of law without delay.¹¹² It further defeats the purpose of section 9 of the Constitution which does not only guarantee equal protection and benefit of the law but also entails an enabling environment where women will be able to go beyond access and understand the essence of fair and equal treatment before a court of law.

The further challenge to the equal access to the courts is the lack of understanding of the court procedures and processes which are affected by the language barrier. South Africa's liberal Constitution subscribes to eleven official languages¹¹³ and guarantees the right to be tried in the language of one's choice.¹¹⁴ In reality, however, English and Afrikaans have been used as the only languages at the courts and interpreters are provided even to those who understand English. English, which Alexander refers to as the "language of power"¹¹⁵ is also used as a medium of communication at the courts for the Xhosa speaking people including, at the Zwelitsha magistrates' courts where it is interpreted by interpreters who themselves are grappling with the English language.

¹¹² See section 34 of the Constitution.

¹¹³ See section 6(1) of the Constitution.

¹¹⁴ See section 35(3) (k).

¹¹⁵ Alexander A, 'Languages, class and power in post apartheid South Africa' (2007) Harold Wolpe Memorial Trust Open Dialogue, 27 October, Cape Town at 2.

The concern is not just about the use of English but also about legal language that may further shun women away from the courts. The language structure and its use in the court room may exert a power of its own and through speech styles of participants in a court case one can tell the way the game is played between the powerful and powerless.¹¹⁶ Although the use of legal language is justified, as it acts as a medium through which struggles for social and legal power are conducted, it may further the victimisation of women in the court room if it is used to exert power, as noted by Wanitzek.¹¹⁷

The quest for equity including indigenous languages¹¹⁸ and their development through the court processes is affected by the dragging of the feet approach of the government since the tabling of the Languages Bill.¹¹⁹ To date the Bill has not been translated into a tangible legal reform. The translation of the policy will form the basis for articulating the set of values entrenched in the Constitution in the enforcement of the right to gender equality. The role in this context of the recently established indigenous courts¹²⁰, to ensure the use of indigenous languages at the courts remains to be seen.

The reasoning of the courts in providing appropriate remedies in domestic violence and other related cases of inequality is another area of concern that may also limit equal access to justice and shun women away from using the courts. The judgment of Foxcroft J of the Cape High Court in the case of the *State v BA*¹²¹ is a case in point. In this case,

¹¹⁶ See Wanitzek U, 'The power of language in the discourse of women's rights: some examples from Tanzania' (2002) Volume 49 No 1, *Africa Today*, at 5.

¹¹⁷ See Krieg SH, 'Culture, violence and rape adjudication: reflections on the Zuma rape trial and judgment', (2007) *Internet Journal of Criminology* at 1-22. She analyses the conduct of Mr Zuma at his rape trial as she observed that: "Zuma's descriptions of his private actions turned to a rather patriarchal wording when admitting in Zulu to have entered the accuser's *isibaya sikabab'wakhe* (her father's kraal) without *ijazi ka mkwenyana* (the groom/husbands' coat) while addressing the judges with '*nkos'-yenkantolo* (king of the court)".

¹¹⁸ Defined in section 1(ii) of the South African Languages Bill tabled on 19 July 2000, as: "Languages which, according to the historical record, originated in South Africa".

¹¹⁹ The Bill seeks to: 'provide an enabling framework for promoting South Africa's linguistic diversity and encouraging respect for language rights within the framework of building and consolidating a united, democratic South African nation, taking into account the broad acceptance of linguistic diversity, social justice, the principle of equal access to public services and programmes, respect for language rights, the establishment of language services at all levels of government, the powers and functions of such services, and matters connected therewith.

¹²⁰ After a diligent search, numerous calls to the Department of Justice and Constitutional Development, I could not get any reference to the policy or minutes of the meeting where the introduction on the use of indigenous languages at the courts was discussed.

¹²¹ Case No 88/2000.

Foxcroft J sentenced a 53 year old man, who *raped his own sixteen-year old daughter* to seven years, (author's emphasis). The judge reasoned that, because the man was a first time offender, even though he acknowledged that the rape of one's daughter was naturally a very reprehensible matter, *the damage was not as great as in many cases*¹²², (author's emphasis).

He substantiated his argument by holding that the deterrent element and protection of the public concerns were of minimal concern; these factors justified the departure from life imprisonment as prescribed in the Criminal Procedure Act.¹²³ The case was taken on appeal to the Supreme Court of Appeal.¹²⁴ Even though the sentence was increased to twelve years, Cameron J concurred with Foxcroft J that as much as rape cannot be condoned *but it was not one of the worst cases*¹²⁵ (author's emphasis). He argued that the life sentence ordained by the legislature should be reserved for cases devoid of substantial factors and substantiated his argument by quoting from Davis J in *S v Swartz*¹²⁶ that:

“as controversial a proposition as this is bound to be, as not all murders carry the same moral blameworthiness, so, too, not all rapes deserves (*sic*) equal punishment. That is in no way to diminish the horror of rape; it is however to say that there is a difference even in heart of darkness”.¹²⁷

The reasoning of the court attracted public criticisms¹²⁸ and concerns on the effectiveness of the guaranteed values in the Constitution. It cast a dark cloud about the impartiality of the judges in the enforcement of gender equality claims. It raised concerns on the fairness of the *reasoning* of the court in developing a legal culture that is free from bias and partiality in order to give effect to the values and principles of non-discrimination for the promotion of the right to gender equality. It further raised the questions whether:

¹²² At para 10.

¹²³ Section 282 of Act No 51 of 1977.

¹²⁴ See the report by Ellis E, entitled: 'Fight begins to put rapist dad away for life', *Cape Times*, dated 5 November 2001.

¹²⁵ *S v A* (2001) ZASCA 126 (23 November 2001) at para 29.

¹²⁶ 1999 (2) SACR 380 (C) 386(b-c).

¹²⁷ Cameron J in *BA* at para 29.

¹²⁸ See Pillay K, 'Racism...or inept reporting?' (2000) August *Rhodes Journalism Review*, at 45.

- the women, especially young girls who are the most vulnerable to abuse and prejudice, are treated fairly by the courts?;
- the protection of both young girls and boys is not of major concern as long as rape occurs within the boundaries of the family environment?;
- the courts do make their decisions fairly without being clouded in their judgments? and
- mitigating factors carry more weight and ignore the seriousness of the crime and its effects it has on those who suffered prejudice?

It is therefore, incumbent upon the courts to ensure the high level of sensitivity¹²⁹ in establishing an appropriate balance in the reasoning and the remedies they provide in domestic violence cases. As Sudarshan raises the question:

“how sensitive are judges to the need to bring about social transformation and redress some of the wrongs that are done to the people”?¹³⁰

1.4.4 *Lack of resources to implement gender related laws*

The lack of adequate resources for the proper and effective functioning of the courts has been a thorny issue as it undermines the administration of justice. In order for law reform to be used effectively, it also needs institutional capacity that will ensure the strengthening of women’s capacity to enjoy their rights. One of the basic problems, facing the courts, especially the magistrates’ courts as first time contacts with justice, is the lack of adequate resources, both human and financial, provided for the courts generally. It is also reported that the lack of adequate resources and the harsh working conditions have driven the magistrates at an alarming rate to “alcohol dependency” leading to an investigation by the Magistrates Commission¹³¹, of the four magistrates in the Eastern Cape, of alcohol related crimes in 2008.¹³²

¹²⁹ See Buckler K, Cullen FT, Unnever JD, ‘Citizen assessment of local criminal courts: does fairness matter?’ (2007) Volume 35, *Journal of Criminal Law*, at 524.

¹³⁰ See Sudarshan R, ‘Courts and social transformation in India’ at 157 in Gargarella R, Domingo P and Roux T (eds), *Courts and social transformation in new democracies: an institutional voice for the poor?* (2006) Ashgate Publishers, England.

¹³¹ See (note 98) above.

¹³² See the report entitled: ‘Magistrates are under stress that they are driven to drink’, *Times Newspaper* dated 28 October 2008.

The lack of resources results in increasing delays in court procedures with cases being unnecessarily prolonged. The lack of flow of information between the courts and the South African Police Service (SAPS) is another area of concern that exacerbates the matter. It also leads to the delay in disposing of the cases and requiring parties and witnesses to return to court more often. The situation at these courts is that resources are not available for the officers to communicate with other government departments. The situation is even worse at the maintenance courts where the relevant departments would just deposit money received without any reference as to where the money comes from and for whom it is meant.¹³³

If these courts are not properly resourced in order to carry out their obligations, justice is likely to become crippled and slowly destroyed.¹³⁴ The inadequacy of resource allocation is interfering with the proper functioning of the courts, especially the lowest structure. The challenge is to empower these courts in order to promptly and accurately deal with the increasingly difficult demands made on them.¹³⁵

There are other factors that deepen the quest for the promotion of the right to gender equality. For example, the research conducted in March 2009 at the King William's Town and Zwelitsha magistrates' courts found that there is:

- the lack of a proper record management system of cases decided by the court relating to gender inequalities, race and disability discrimination;¹³⁶
- lack of methods in assessing the effectiveness of the magistrates' courts in dealing with gender equality;¹³⁷

¹³³ Interview with the Office Manager. This is causing impatience and the women would start shouting and swearing at the Officers because they do not understand the problems that the courts experience in relation to the administration of the maintenance payments.

¹³⁴ Medlin J and Biblings RB, 'Judicial independence requires more resources and greatest management flexibility', (2003) *Summer*, at 11.

¹³⁵ Phillip L, 'The magistrates' courts in restoring justice', presentation at the Magistrates' Association Conference, The Mermaid Theatre, London, 12 November 2005. He highlights that the fundamental principle that the Magistrates reflects is that lay people should be involved at the heart of our justice, without adequate resources, to create space for them by building capacity within this sphere, would compromise this principle.

¹³⁶ An interview with the Office Manager highlighted that they record cases according to the cases presented in court per day and are not categorized according to gender, race or whether the claimant was disabled or not or the area where abuses are most prevalent.

¹³⁷ *Ibid.*

- the fact that assessors are not appointed to assist the Magistrate in areas where he or she is lacking gender expertise and in relation to cultural issues further undermines the protection accorded to women by the law¹³⁸; and
- communication problems and insufficient links with the police and other departments are further obstacles faced by the magistrates' courts.¹³⁹

In the light of these challenges, although they do not list all the factors that compromise access to court, the magistrates' courts are failing to provide the quality of service that is expected of them.¹⁴⁰ People handling their matters without a lawyer and enquiring about court processes and the law, further strains the capacity of the court. In conformity with the objectives entrenched in the Constitution and other related laws, the magistrates' courts are required to provide an atmosphere and environment within the court that is as conducive as possible for the advancement of substantive principles of equality.¹⁴¹

Although this study does not propose that the courts do not consider the context and circumstances of the case and endeavour to achieve a just outcome, socio-political forces make citizens and in particular women, unequal in practice as opposed to rigid or formal equality before the law. This should give an orientation to the judges and magistrates to strive towards achieving substantive justice, by deconstructing historical differences which are structural to any society and often discriminatory.

In other words, the fact that the laws are enforced first and foremost at the level of the magistrates' courts constitutes a powerful tool for the quest for the full realisation of human rights that these courts have a duty to uphold the interest of those still subjected to discrimination and prejudice. By upholding and enforcing law which encompasses human rights norms and standards the lower courts are a cornerstone of our democracy

¹³⁸ Interview with the Women's NGO Representative.

¹³⁹ Interview with the Office Manager. See also the report by Sadan M, Dikweni L and Cassien S, 'Pilot assessment: The Sexual Offences Court in Wynberg and Cape Town and related services', (2001) IDASA.

¹⁴⁰ See the Report: Bureau of International Information Programmes entitled: Issues of democracy, access to courts and equal justice for all, US Department of State, August 2004.

¹⁴¹ See Coram J in *Manong v Eastern Cape Department of Roads and Transport & Others* (369/08) [2009] ZASCA 50 at para 37, as he referred to Regulation 10(3) of the Equality Act that the proceedings should, where possible and appropriate, be conducted in an environment conducive to participation by the parties.

in creating the *social bond* without which the quality of our lives would remain undermined.¹⁴²

1.4.5 Gaps in law reform for gender equality

The adoption of instruments seeking to improve the quality of lives of women in South Africa is commendable. The factors identified above are also in one way or another affected by the flaws in these instruments, especially those identified for this study. Since the dawn of democracy, customary law has been recognised as a basic component and amalgam of South Africa's legal system.¹⁴³ There is a big gap that exists in the application of customary law *vis-a-vis* common law principles to ensure the parallel development of these principles alongside each other in resolving issues of domestic violence and other related inequalities. These instruments do not make any specific reference to the role of customary law in the promotion of the right to gender equality. The centrality of customary law as a legitimate source of law aims to abolish its historic subjugation as it was and continues to regulate the lives of many South Africans.¹⁴⁴

The quest for the evolution of the principles of non-discrimination within the traditional justice system is its potential to contribute to social change in line with the purpose of

¹⁴² See Kennedy (note 33 above).

¹⁴³ See section 211 of the Constitution which provides that:

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to or repeal of that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to any legislation that specifically deals with customary law.

Section 211 is further reinforced by section 212 which also provides that:

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and customs of communities observing a system of customary law-
 - (1) National or provincial legislation may provide for the establishment of houses of traditional leaders; and
 - (2) National legislation may establish a council of traditional leaders.

¹⁴⁴ See *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) quoted by Van der Westhuizen J in *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) at para 43.

this study. As the study seeks to establish various factors that may limit or promote the right to gender equality, the development of customary law principles of non-discrimination alongside those of the common law, may be instrumental in the delivery of justice especially for the people who subscribe to the system of customary law.¹⁴⁵ It may be more beneficial to women in rural areas who are subjected and affected by the number of factors already identified above. The development of such principles may also create space for the examination of the impact of the customary law rules and practices on social and economic and political well-being of women in customary law relationships.¹⁴⁶

In furthering the above contention, firstly, both the Domestic Violence Act¹⁴⁷ and the Maintenance Act¹⁴⁸ are enforceable at the magistrates' courts without any opportunity for the traditional courts¹⁴⁹ to deal with issues of violence and maintenance of children.¹⁵⁰ Of grave concern is the Customary Act itself which allows the parties to marry according to customary law¹⁵¹ but the marriage has to be dissolved by the court¹⁵² without any opportunity for the customary law system to play its mediating and consensus-making role. These contradictions are a severe challenge to the envisaged Traditional Courts Bill¹⁵³ which was tabled before Parliament to ensure the transformation of customary law

¹⁴⁵ Although the assertion is controversial as it creates a divide between people of South Africa, it cannot be denied that customary law regulates the lives of many South Africans.

¹⁴⁶ Although the development of the principles of non-discrimination with the framework of customary law may be compromised by the dominant group (men) because of the history which South Africa is recovering from, it has the ability to empower and protect them rather than the formal legal system.

¹⁴⁷ See section 1(iv) which defines the court as any court contemplated in the Magistrates' Courts Act 32 of 1944 or any family court established in terms of an Act of Parliament.

¹⁴⁸ See section 3 which provides that: "Every magistrates' courts shall within its area of jurisdiction be a maintenance court for the purposes of this Act.

¹⁴⁹ See Schedule 6, section 16 of the Constitution which recognises all the courts including the traditional courts that were in existence before the new Constitution took effect.

¹⁵⁰ For example, the resolution of domestic violence is firstly undertaken at family level where the wife will leave her husband for her maiden home. The husband will have to negotiate with the wife's family for her return under the practice called "*ukuphuthuma*". If the violence was so grave to an extent of warranting compensation as a sign of respect to the family and wife, the wife will not be released by her family until the husband pay the damage, which is a cow.

¹⁵¹ See section 1(iii) of the Customary Act.

¹⁵² See section 8(1) which provides that: "A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage".

¹⁵³ Published in Government Gazette No 30902 of 27 March 2008.

and its customs to ensure the promotion of the right to gender equality within the general framework of South African laws.¹⁵⁴

The Customary Act further defeats the ability of customary law as a legitimate source of law to deal with issues relating to the solemnisation of customary marriages. For example, section 12 of the Customary Act requires the parties to a customary marriage to register it, even though the failure does not affect its validity. The validity of customary marriages in terms of customary law is determined by the negotiations between the bride and the groom's family, payment of *ilobola* and other procedural requirements.¹⁵⁵ These procedural requirements were valid determinants of customary marriages. Section 12 introduces the registration of customary marriages and such requirement undermines customary law as a legitimate system of law that is able to regulate its own affairs and development. It supplements the African value system with the Western conceptions of marriage which are foreign to it and undermines its legitimacy.¹⁵⁶ It actually places a burden of proof on women in respect of existence of a customary marriage on its dissolution as they will be required to prove whether the marriage was registered or not, even though the customary law system has its own procedures to determine the validity and existence of a marriage.

South Africa subscribes to the Convention on the Elimination of Discrimination Against Women as recorded in the preamble of the Equality Act. The CEDAW requires the state parties to take into account the problems faced by rural women and to ensure the application of the Convention to women in rural areas.¹⁵⁷ South Africa also subscribes to the Protocol on the Rights of Women in Africa and requires the state parties to modify the social and cultural patterns of conduct of men and women with the aim of achieving the elimination of harmful and cultural and traditional practices. The subscription to the international instruments without allowing for the development of the principles of non-discrimination within the framework of customary law limits the potential for the

¹⁵⁴ See further analysis in Ntlama N and Ndima D, 'The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems' (2009) Volume No 1, *African Renaissance Studies*, at 6-30.

¹⁵⁵ See Maithupfi IP and Bekker JC, 'The existence and proof of customary marriages for purposes of Road Accident Fund claims' (2009) *Obiter* at 164-174.

¹⁵⁶ See also Ngcobo J in *Bhe v Khayelitsha Magistrate* 2005 (1) BCLR 1 (CC) at paras 212, 230 and 235 as he argued that customary law should be allowed to develop within its own value system.

¹⁵⁷ See article 14.

domestication of international principles to develop within the traditional justice system and their transmission at grassroots level. It retains the domestication of international principles at “arms length” without allowing it to filter through at grass roots levels where the lived experiences of those subjected to abuse and discrimination is experienced.

Lastly, the disparity in the application of the law endorses common law as a superior and more legitimate source of law as opposed to customary law which nevertheless has an equal status as envisaged in the Constitution. The legitimacy of customary law is informed by the constitutional recognition of its institutions that may be fundamental in the development of the law for social change.

In essence, these instruments undermine the right of both men and women’s access to justice in order to determine the social and legal response to inequalities and discrimination under customary law. The success or failure of any instrument that is designed to promote the values of non-discrimination should be evaluated in accordance with its impact on the extent to which it improves the quality of lives of all people at grassroots level.

1.5 Assumption underlying the study

The study acknowledges the role of the state in alleviating institutional barriers to women’s human rights and the need to establish socio-political rights to secure gender equality through legal reform and the courts.¹⁵⁸ However, law does not merely exist to secure equality between men and women but also to contribute to the achievement of substantive equality. The transformative role of the law in bringing about social change is indispensable. As the law plays an important role in channeling the debate on promoting the right to gender equality, it does not, however, work as a mechanical device, as it is part of complex and often contradictory social processes.¹⁵⁹ The exploration of theoretical underpinnings of the important concepts of democracy, such as social justice

¹⁵⁸ Riddell-Dixon E, ‘Mainstreaming Women’s Rights: Problems and Prospects within the Centre for Human Rights’ (1999) Volume 5 No 2, *Global Governance*, 149-171 at 153.

¹⁵⁹ Faundez J, ‘Legal reform in developing and transition countries: making haste slowly’, (2001) University of Warwick.

and transformation, can be used to find a way in moving beyond the limitations imposed by the use of law.¹⁶⁰

Although law has a legitimate role in the construction and maintenance of social relations, it may not be able to play a decisive role in producing social change. The established legal framework becomes useful in challenging and identifying the limits of the law as applied and enforced by the courts. It is also acknowledged that law has its own limits as it depends on the tools and measures it has at its disposal and the effect that these will have in promoting social change.

Sarat¹⁶¹ holds that:

“certainly law as a system of rules is a tool of the sovereign, and whoever else can effectively use it to affect human behaviour, is not the sole source of social construct, nor even necessarily the most important source. Nor law is insulated from other sources, be they tradition, morality, or economics. Regardless of which among many definitions of law one embraces, it is inevitably restricted in its authority, its utility and its impact, law is a bound concept, which must be understood in terms of its limits, practical, theoretical, geographical, even temporal”.

In addition, Smith also argues that:

“law is not merely defined by its limits, it is constituted, empowered and legitimated by limits and it involves and renews itself when these limits are pushed in times of crisis or transition”.¹⁶²

Despite the limitations that law may impose in the determination of its efficacy as an instrument for social change, it is the “hidden infrastructure”¹⁶³ which conditions our

¹⁶⁰ Ibid.

¹⁶¹ Sarat A, *The limits of the law*, (2005), Stanford University Press, Stanford, at 367.

¹⁶² Smith DE, ‘The limits of the law’, (2005) Volume 15 No 11, Department of History, Humanities, Philosophy and Political Science, Northwest Missouri State University, at 973.

¹⁶³ Boss M, ‘Constitutional and legal reform in Ireland, 1937 – 1998: The American context, an essay in culture and law’, in Porsdam H (eds) *Folkways and law ways: law in American Studies*, (2001), Odense, Odense University Press, at 122.

society and pervades almost every aspect of our lives. It makes rules, adjudicated upon, and enforced though it can only go so far as it seek to do the best possible with the available tools. These practical limitations should be borne in mind, as the law enforcers should negotiate them in their interpretation and application of the law.

The question may then be asked, whether law, which is often simply the expression of power relations in society, can be used to change these relations in accordance with the Constitution's conceptions of gender equality? How would the intersection of the law and social transformation create opportunities for law to influence and be influenced by socio-political and cultural factors in promoting the right to gender equality?

1.5 The research design or methodology and the limitation of the study

The development of the research agenda that is designed to ascertain in practical terms what people need to know about the courts and how the laws and access to justice can have valuable assistance for them to claim their rights is of great significance for the promotion of the right to gender equality. Moreover, it enhances the potential of the law as a strategy of social change in the elimination of inequalities and discrimination that appear to undermine the equal worth of both men and women in the realisation of their right to gender equality.

In giving effect to the intended objective, the study used various qualitative methods¹⁶⁴ in gathering the information in order to establish various factors that may limit or promote the significance of the law for the promotion of the right to gender equality. The development of the research agenda for the promotion of the right to gender equality focused on qualitative research methodologies to establish:

- the views and opinions on the efficacy of the law for social change;
- the significance of the courts as a vehicle for social transformation;
- the perception of the general public (court users and non-users) on the courts as institutions or agents of social transformation; and

¹⁶⁴ The methods included interviews with court officers, NGO's representatives, members of the Ngxwalane community in King Williams' Town and observation of court proceedings.

- assess the appropriateness of the decisions made by the magistrates through the inspection of their files.

The main intention of the research strategy was to explore the various factors that are an impediment to the promotion of the right to gender equality and the meaning attached to the concept of the “law for social change”. The significance of this methodology lies in the richness of the information collected which focused on the broader approach of the law in order to broaden traditional positivist approach to legal research. The concentration of legal materials tends to duplicate the focus of the magistrates or judges and other scholars and confine the research only to strictly legal materials. As Granfield explains:

“the law is often so complete and engulfing that outside events becomes increasingly irrelevant. The ability to disregard the social context is part of the self alienating ideology associated with legal consciousness”.¹⁶⁵

In furthering this undertaking, an extensive documentary research was conducted in setting the framework for the establishment of the various factors that impede the promotion of gender equality in South Africa. Desktop research, although it did not purport to be a comprehensive one, on written work by scholars on the use of the law and the opposing views relating to the effectiveness of the law in bringing about social change was used. The review of the written work by scholars was undertaken against the background in the preamble of the Constitution which Devenish¹⁶⁶ has broken into four themes as he affirms that it is concerned:

- firstly, with healing the divisions of the past and establishing a new society based on democratic values, social justice and fundamental rights;
- secondly, with the creation of a society based on democracy and openness;
- thirdly, with improving the quality of life of all citizens; and

¹⁶⁵ Granfield R, *Making elite lawyers: visions of law at Harvard and Beyond* (1992) Routledge Publishers, New York, at 53, quoted in Bentzon AW, Hellum A, Stewart J, Ncube W and Agersnap T, *Pursuing grounded theory in law: South-North experiences in developing women’s law*, (1998), Tano Aschehoug Publishers, Norway.

¹⁶⁶ Devenish GE, *The South African Constitution*, (2005), Butterworths Publishers, Durban at 26.

- fourthly, with the commitment to build a united and democratic South Africa.¹⁶⁷

The commitment to establish a “just society” through the promotion of equality was endorsed by Ngcobo J in *Bato Star*¹⁶⁸ as he held that:

“...our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. *We are required to do more than that.* The effects of discrimination may continue indefinitely unless there is a commitment to end it”¹⁶⁹, (author’s emphasis).

Ngcobo J’s argument falls within the requisites of the Equality Act which requires those applying it, (Equality Courts) to take into account:

- (a) the existence of *systemic discrimination and inequalities*, particularly in respect of *race, gender and disability* in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; (author’s emphasis), and
- (b) the need to take measures at all levels to eliminate such discrimination and inequalities.¹⁷⁰

The establishment of a “just society” gives due recognition to the intersection of the law, human beings and the societies in which they live as Sachs J in *National Coalition* established the interdependence of law and social change as follows:

“the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected

¹⁶⁷ Devenish at 26.

¹⁶⁸ See (note 16 above).

¹⁶⁹ Ibid at para 74.

¹⁷⁰ See section 4(2) of the Equality Act.

self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times”.¹⁷¹

The intersection of the development of the principles and values of non-discrimination and a strategy for research for social change is an important tool that seeks to discover new knowledge or factors that may promote or inhibit the right to equal access to justice as guaranteed in section 34 of the Constitution. Freeman says that the realisation of the right to gender equality through research, seeks to establish and understand the basic tenets in the elimination of inequalities and discrimination.¹⁷² It further provides an insight into crucial issues on what mechanisms can be put in place to ensure the realisation of the right to gender equality. As Bentzon *et al*¹⁷³ explains:

“there is a constant interplay between different systems of law and their social, economic and cultural surroundings. Together, these elements shape the environment in which decisions in courts, families, social groups, wherever people live, are made and choices exercised”.¹⁷⁴

They further substantiate their argument by holding that:

“at an essentially practical and activist level, the women’s law researcher must ensure that any recommendations for law reform are rooted in reality. To do this needs to consider the social effects of the current laws and assess the possible impact of reform and whether it is sustainable and appropriate to the needs of the community”.¹⁷⁵

Bentzon *et al* endorse the view that law does not exist in isolation of the socio-political factors that may in one way or another contribute or undermine the promotion of the principles of non-discrimination. Hence the importance of the integration of strategies in

¹⁷¹ *National Coalition* at para 117.

¹⁷² Freeman MA ‘Women, law and land at the local level: claiming women’s human rights in the domestic legal systems’, (1994) Volume 16 No 3, *Human Rights Quarterly* at 560.

¹⁷³ Bentzon AW, Hellum A, Stewart J, Ncube W and Agersnap T *Pursuing grounded theory in law: South-North experiences in developing women’s law*, (1998), Tano Aschehoug Publishers, Norway.

¹⁷⁴ *Ibid* at 26.

¹⁷⁵ *Ibid*.

the fight against all forms of discrimination which is further enhanced by the establishment of the specialist courts, as discussed in chapter four.

This study acknowledges the limitation of the law in changing pre-conceived societal stereotypes as well as discriminatory practices through the use of the law in ensuring the promotion of the right to gender equality.¹⁷⁶ It further identifies the difficulties that were encountered in undertaking this research as it examined the relationship between the law and how it advocates for advancement of social change through the promotion and enforcement of the right to gender equality at the courts. The patriarchal nature of the communities and the difficulty in locating instances of misconduct even before reaching the courts became a major challenge in getting the necessary information due to a number of reasons, of which, some are already noted above.

Considering the courts' capacity and scope to contribute positively in the implementation of the laws and the advancement of social change and how the members of the public and in particular women, are able to use the law to enforce their rights, the study focused on the use of the law in promoting social change. The purpose was not to provide or offer a comprehensive review of the literature in this field but to address the question raised for undertaking the study and draw attention to the aspects of the processes that tend to undermine women's access to courts and how best to deal with them.

The analysis of the extent to which the identified pieces of legislation are able to contribute to the advancement of social change takes into account the limitation in the use of the law as an absolute instrument for social change as enforced by the courts.¹⁷⁷ It appreciates the fact that, despite its limitation, it may be a tool towards non-discrimination and the potential impact of the legal enforcement should not be minimised.

¹⁷⁶ See Albertyn C and Goldblatt B, 'Challenges of transformation (1998) Volume 14 *SAJHR* at 249. They argue that the systemic domination which is inscribed in laws and institutions of our society makes it difficult to apprehend such inequalities through the use of the law.

¹⁷⁷ It is therefore, not disputed that the legal and constitutional framework is not the only strategy that informs the essential component on any discussions that involves the promotion of gender equality. International, national bodies and other civil society groups have played a fundamental role in the quest for the promotion of the right to gender equality.

In essence, the use of the research methods and the background on the development of substantive principles of non-discrimination provided a deeper insight into the issues and discovering what affects women's decision to use or not to use the courts. The investigation was also chosen so as to reveal issues such as the relevance of the law that is available in the courts to women and the social or cultural problems they have in accessing the courts.¹⁷⁸

1.7 Sequence of chapters

This study is divided into five chapters:

Chapter one deals with the introduction and the background of the research problem and discussed the methodology followed in order to achieve the stated objectives.

Chapter two introduces and provides a general overview of the international, regional and national instruments that seek to enhance the development of the principles of equality and non-discrimination. The review of these instruments is not meant to determine the extent of translation of the right to equality into substantive reality. It just provides and serves as a frame of reference for the promotion and enforcement of the right to gender equality at the courts. The analysis of these instruments provided a greater insight into the main contending views on the efficacy of the law as an instrument for social change.

Chapter three undertakes an evaluation and a critical analysis of the jurisprudence on equality from South Africa's Constitutional Court in order to establish its likely influence for the interpretation and application of the identified laws that seek to improve both the legal, constitutional and social status of women in South Africa. The analysis is preceded by exploring the importance of international human rights law in the promotion of the right to gender equality at domestic level. It therefore, provided an insight into factors that have the potential to inhibit the enforcement of the right to gender equality and directly or indirectly limiting the significance of the law in generating social change.

¹⁷⁸ This might assist in facilitating a review, not only of the courts that deal with domestic violence but also the law of domestic violence itself.

Chapter four explores the various factors that may have a negative impact on the development of the principles of non-discrimination at the courts. It examines the limitations of the laws to the effective implementation of the strategies developed for the promotion of the right to gender equality. The intention is to analyse the extent to which the courts have affirmed their own institutional standing and legitimacy through interventions such as those of the “specialist courts” at the magistrates’ courts in the promotion of the right to gender equality.

The overall purpose of this chapter is to establish the essence of using legal and constitutional rights as the strategy in the enforcement of the right to gender equality. The objective is to establish the rationale for the contending views on the legitimacy of the law to generate social change. But, the purpose is not to adjudicate on these competing conceptions but to establish a meaningful understanding on the influence and role of the law in generating social change.

Chapter five provides a summary and draws general lessons from the preceding chapters on the various factors that inhibit the use of law as a strategy for social change in promoting the right to gender equality in South Africa.

CHAPTER TWO

THE EVOLUTION OF THE PRINCIPLES OF EQUALITY AND NON-DISCRIMINATION IN INTERNATIONAL AND SOUTH AFRICAN HUMAN-RIGHTS LAW

2.1 Introduction

The affirmation of the dignity and worth of a human person in equal rights for both men and women in the Universal Declaration of Human Rights¹ has led to the entrenchment of the right to equality in a number of international instruments which have also inspired several regional and domestic instruments. The international instruments provide a framework against which the struggles for the realisation of the right to equality may be tested, as the UDHR provides for a common standard of achievement of equality for all nations and people in their respective jurisdictions.² These instruments put an emphasis on the centrality of the principles of equality and non-discrimination at the core of the development of the international human-rights law agenda. The basis for this development has firmly rooted the explicit recognition of equal rights and fundamental freedoms for both men and women.³ The recognition of equal rights has resulted in the development of the international agenda for gender equality, which has developed alongside the other international human rights norms and standards.

Eriksson affirms that the development of the international agenda for equality has formed a conceptual basis of international law by incorporating into legal analysis, among other things, gender perspectives.⁴ In addition, women's rights advocates have strongly influenced the international discourse on human rights to make it more sensitive to women's concerns.⁵ This development will never bear fruit without the domestic

¹ Hereinafter referred to as the "UDHR", which was adopted by Resolution 217 A (III) of the General Assembly of the United Nations on 10 December 1948.

² Ibid - see the preamble.

³ Ibid.

⁴ Eriksson MK, *Reproductive freedom in the context of international human rights and humanitarian law* (2000), Martinus Nijhoff Publishers, Sweden, at 9.

⁵ See Zwingel S, 'Found in translation – how to make international women's rights norms meaningful in domestic contexts', an unpublished paper presented at the Conference of the International Studies Association, Chicago, on 28 February 2007.

incorporation or ratification of the international human rights laws in ensuring the freeing of the potential of each person.⁶

The purpose of this chapter is to provide a brief overview of the most important legal instruments on the right to equality in the international human rights law's theoretical framework in the development of the principles of non-discrimination. The regional influence of this development will be limited to African regional developments and their reception by the South African constitutional framework and mechanisms for the promotion and protection of the right to equality.

The focus of this chapter is not on examining the translation of the right to equality into reality, but rather to highlight that the legislative framework for equality is an important tool and essential measure for social change. This is borne out by the fact that the value of the principles of equality is recognised worldwide, even though all the international human rights instruments are subject to ratification by state parties to the adopted conventions and agreements. The international norms and standards provide an independent frame of reference for ensuring the fundamental rights and freedoms of all persons. At the same time, the international human rights instruments oblige the states to provide for the protection of human rights under their own jurisdictions through constitutional and other measures, as South Africa has done.

The point of departure in this chapter is an assumption regarding the potential of the international human rights law's influence in the development of domestic laws for the promotion of the right to gender equality. The domestic development of substantive equality should not only reflect on the broad principles of equality, but one which ensures the actual substantive translation of the right to equality through national mechanisms and other strategies.

⁶ The ratification becomes important as international human rights law has no legal force or effect until the incorporation of a particular convention into the domestic sphere, and it is where the significance of the enjoyment of the right in question will be tested, and its likelihood for the advancement of social change.

2.2 The international human rights law and the evolution of the principles of non-discrimination

The principle of non-discrimination developed within the international community over a number of decades. It encompasses the protection and promotion of the right to gender equality. Almost all international conventions enshrine the principle of non-discrimination based on the grounds of race, gender, status and other grounds enumerated in the various instruments. The Women's Rights Division of the Human Rights Watch⁷ unequivocally affirms that discrimination and prejudice against women is contrary to the principles of equality. Discrimination against women is nevertheless exacerbated by the fact that many millions of women, throughout the world, live in conditions of deprivation of, and attacks against, their fundamental human rights for no other reason than that they are women.⁸

The international community has progressively developed and found well-suited conventions and the best ways of ensuring the eradication of all forms of discrimination against women. The development of legislation does not *per se* translate into actual enjoyment of the right to equality in practice. It is an essential tool that lays the foundation for the promotion of equal rights for both men and women. As Sachs J put it in *Fourie*:

“it needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The legislature is in the front line in this respect. One of its principal functions is to ensure that the values of the Constitution as set out in the preamble and section 1 permeate every area of the law.”⁹

It is the duty of the government, as a member of the international community, to adopt the internationally recognised human rights conventions. In this context, it is important to note that the concept of “equality” is a critical element in an attempt to secure

⁷ An international non-governmental organisation established in 1978 and dedicated to defending and protecting human rights, accessed at www.hrw.org, on 28 May 2010.

⁸ See the United Nations Division for the Advancement of Women, accessed at www.hrw.org/women/index.php on 13 June 2008.

⁹ See *Minister of Home Affairs and another v Fourie and another*, 2006 (3) BCLR 355 (CC), at para 138.

international peace and stability.¹⁰ The principle of non-discrimination within the international community has become a core focus for the realisation of the right to gender equality. Gender-based non-discrimination is in line with the spirit and purport of equal rights. All human beings have equal rights without distinction for no other reason than that these rights constitute an acknowledgement and appreciation of the human worth of a person. The report released by the Human Rights Education Association affirms the human worth of a person in the enjoyment of human rights by asserting that:

“the realisation of human rights should be distinguished from the idea of positivism that recognises rights only once they have been set forth in national legislations as these rights are based on the fundamental dignity bestowed upon human beings”.¹¹

However, as women are more vulnerable to prejudice and discrimination, the right to equality is the common standard in the interpretation and application of their fundamental human rights. Goonesekere identified a number of factors that have formed the most fundamental elements of international human rights law in the evolution of the principle of non-discrimination. These factors are as follows:

- the international framework gives due recognition to the duties and responsibilities of the states where they are required to ensure the fulfilment of human rights by enabling individuals to enjoy their rights.
- this framework also provides a forum for asserting individual claims of human-rights violation.
- the language of human rights allows legitimate claims to be articulated with a moral authority that other approaches lack.
- the language of human rights has the potential to empower individuals and communities at grass-roots level regarding the fact that the right to non-discrimination is a foundation from which to establish a set of demands based

¹⁰ Symonides J, *The struggle against discrimination: a collection of international instruments adopted by the United Nations System* (1996) at 3.

¹¹ See the report entitled ‘The United Nations human rights system’, accessed at www.hrea.org on 27 May 2008, at 14.

on the intrinsic worth of the individual and therefore that the realisation of these rights is an important goal in itself.¹²

The above-mentioned factors encapsulate the principle of equality that is based on fundamental freedoms that should be enjoyed by everyone without distinction on the basis of race, sex, status and other related grounds. They form the bedrock for the domestication of internationally recognised human rights norms and standards. They strengthen the promotion and protection of international human rights norms and standards. They further serve as the guiding principle for many forms of activism, including the development of strategies for the enforcement of the right to gender equality in the domestic sphere.

The development of the international agenda for equality is acknowledged by Abdullah as not a “rush to do something” or “to be seen to be doing something” by the state parties. It is a principled and institutionalised application of the same and common standards everywhere over a period of time. In order for these norms to filter through to the domestic jurisdictions, they require the development of capacity through constitutions, relevant legislations and mechanisms of accountability within the context of a specific country.¹³ This serves as the pillar upon which the principle of equality is founded in order to eliminate the arbitrary and systematic barriers that form a web, making it difficult for people to enjoy their fundamental rights.

2.3 Sources of non-discrimination laws within the international framework

The evolution of human rights within the international community has seen a significant shift from the regulation of relations among states to the development of legal regimes that also recognise the rights and dignity of human beings.¹⁴ Church *et al* affirm that since the adoption of the UDHR the international legal order evolved beyond that of a

¹² See Goonesekere S, ‘A rights-based approach to realizing gender equality’, accessed at www.un.org/womenwatch, on 27 May 2007, quoted in Ntlama N, ‘The Equality Act: enhancing the capacity of law to generate social change for the promotion of gender equality’ (2007), Volume 1, *Speculum Juris*, at 113.

¹³ See Abdullah AA, *Human rights under the African Constitutions: realizing the promise for ourselves* (2003), University of Pennsylvania Press, Philadelphia, at 3.

¹⁴ See Mubangizi JC, *The protection of human rights in South Africa: a legal and practical guide*, (2004), University of KwaZulu-Natal, Juta Publishers, Landsdown, Cape Town, at 12.

legal order co-ordinating the rights and obligations of state parties. It transformed into an order that resembles a national legal order that differentiates between higher constitutional norms and other legal norms, with human rights forming part of the higher constitutional norms.¹⁵

The development of human rights within the international legal order was necessitated by the need for the protection of human rights where provisions relating to equality and non-discrimination were considered essential due to the “moral demand”¹⁶ to establish international mechanisms that would prevent gross human-rights violations. Zwingel highlights the fact that the innovation behind the necessity was not the idea of human rights *per se*, but the notion that the international community had a responsibility for the life and well-being of all human beings.¹⁷

The idea of recognition of the human worth of a person resulted in a culture of human-rights protection that became a prominent feature of international human rights instruments adopted within the global, regional and domestic spheres. This development reflects the rising awareness, both in governments and in people, in the legal, political and moral necessity of guaranteeing to all individuals the right to equality.¹⁸

However, it should be understood in this context that the realisation and the substantive development of the right to equality carry negative and positive obligations. The basic right of a human person creates obligations for both the states and the individuals in their respective jurisdictions.¹⁹ These obligations do not necessarily mean the elimination and prohibition of negative forms of discrimination. They require a substantive approach to non-discrimination through the introduction and development of positive measures.

¹⁵ See Church J, Schulze C and Strydom H, *Human rights from a comparative international law perspective* (2007), UNISA Press, University of South Africa, Pretoria, at 165.

¹⁶ Extracted from Ssenyonjo M, ‘Women’s rights to equality and non-discrimination: discriminatory legislation in Uganda and the role of Uganda’s Constitutional Court’ (2007), Volume 21 No 3, *International Journal of Law, Policy and the Family*, at 341.

¹⁷ See Zwingel (note above).

¹⁸ See Grant E, ‘Dignity and equality’ (2007), *Human Rights Law Review*, Oxford University Press, at 4.

¹⁹ See Haleem J, ‘The domestic application of international human rights norms’, an unpublished paper presented at the Judicial Colloquium held under the auspices of the Commonwealth Secretariat, London, 24-26 February 1988.

The negative prohibition of discrimination is the corollary of the positive right to equality²⁰ that is owed to an unequivocal commitment in article 1(3) of the United Nations Charter²¹ which seeks to:

“achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”.

The recognition of the “human person” as a subject of international law has enhanced the development of the principles of non-discrimination. The principles of non-discrimination, coupled with the recognition of state accountability for abuses by private actors, require states to show due diligence in preventing and responding to human-rights violations.²² The Human Rights Watch highlights the fact that states may also be held responsible for private acts if they act negligently by failing to prevent violation of rights, or to investigate and punish acts of violence.²³ This principle was articulated and given effect by the Inter-American Court of Human Rights in the case of *Velasquez*. In this case, the state of Guatemala was ordered to adopt effective security measures to protect the life and physical integrity of Santiago Cabrera, although the violation of his rights was initially not imputed to the state.²⁴ The international responsibility was imposed on the state of Guatemala not because of the violation itself, but because of the lack of due care to prevent the violation or to respond to it as required by international human-rights law.²⁵

The recognition of the “human being” as a “legal subject” within the international community has:

²⁰ See Wheatley S, ‘Non-discrimination and equality in the right of political participation for minorities’ (2002), Issue 3, *Journal of Ethnopolitics and Minority Issues in Europe*, at 13.

²¹ Which was signed on 26 June 1945 in San Francisco and came into force on 25 October 1945.

²² See Buergenthal T, Shelton D and Stewart DP, *International human rights in a nutshell* (2002), West Group Publishers, at 14, who affirm the view that early development of human rights was owed to the state of the individual’s nationality because human beings as such did not have rights under international law.

²³ See the Human Rights Watch Report entitled ‘Uganda’s obligations under international and regional law’, accessed at www.hrw.org/2003 on 13 June 2008.

²⁴ See the background in *Bamaca Velasquez*, Order of the Court of August, 29, 1998, Inter-American Court of Human Rights (Ser. E) No 2 (1998).

²⁵ See *Velasquez*, at para 172.

- given purpose to international law to accept human rights and reflect on these changes on the international plane;
- further led to an acknowledgement of human rights as an appropriate measure for ensuring international peace and security²⁶;
- ushered a process that gave recognition to the rule of law that is based on the protection of fundamental and individual rights; this requires the states to act within the framework of clear and general rules that are enforced by impartial courts in accordance with fair procedures.²⁷

The international agenda for the recognition of the human person is enhanced by the requirements of international human rights that impose legal obligations on member states to develop legislations and policies that advance the enjoyment of all fundamental freedoms, including the realisation of the right to gender equality. Haleem refers to this process as the “internationalisation of human rights” as it has greatly reduced, if not made practically insignificant, the domestic-jurisdiction defence that was available to states under international law of the pre-World War II era.²⁸

The internationalisation of these rights²⁹ is found in treaties that include agreements, protocols, covenants, conventions, international customary law, and foreign law or judgments. These treaties encapsulate the concept of the legal protection of human rights³⁰ as a source of non-discrimination. The protection of human rights establishes a firm understanding of:

²⁶ See Mubangizi (note 14 above).

²⁷ See Dicey AV, *An introduction to the study of law of the Constitution* 10th edition (1959) xxxiv, quoted in Curie I and De Waal J, *The Bill of Rights handbook* (2005), at 12.

²⁸ See Haleem (note 19) above. See also Boyle K and Baldaccini A, ‘A critical evaluation of international human rights approaches to racism’ in Fredman S, *Discrimination and human rights: the case of racism* (2001), Oxford University Press, at 143. They highlight the struggles that the United Nations had to bring South Africa in line within the precepts of the international community when this country vehemently opposed the involvement of the United Nations in its domestic affairs when the Indian government lodged a complaint against South Africa for its treatment of persons of Indian descent.

²⁹ See also Kent AD, ‘Custody, maintenance and succession: the internationalisation of women’s and children’s rights under customary law in Africa’ (2007), Volume 28, *Michigan Journal of International Law*, at 509.

³⁰ See Gahamanyi BM, ‘Rwanda: building a constitutional order in the aftermath of the genocide’, in Abdullah (note 13) above, where at 251 he refers to the Afronet meeting in Lusaka in Zambia where the legal protection of human rights was defined as the whole process of using the law to demand and enforce rights.

- the concept of legal protection that assumes and presupposes the existence of a state accepting the responsibility for upholding the authority of human rights and the institutional capacity and political will to effect such protection;
- the treaties as sources of non-discrimination creating international obligations that are within the realm of each state power to interpret and implement within its own exclusive jurisdiction;
- strengthening the people's determination to insist on the protection of their human rights, as the rights are essential for their human existence;
- the states owing their legal obligations as sources of non-discrimination in international human-rights law to other states that are parties to the treaty in question;
- the principles of customary international law despite their limited application in establishing human-rights norms and standards that are premised on state practice that is based on the sense of legal obligation.³¹

Despite these positive aspects in the internationalisation of human rights as sources of non-discrimination, Abdullah argues that it is unlikely to go well for human-rights treaties in practice. Abdullah contends that the beneficiaries are individual persons or groups making claims against the state that is supposed to represent them in the international sphere. He furthers this contention by holding the view that it should be remembered that:

“the rationale of international protection of human rights is that governments *cannot be trusted* to respect the rights of their own citizens, let alone those of citizens of other countries, despite a genuine commitment that might be affected by mixed motives because of unavoidable foreign policy interest of any state”, (author's emphasis).³²

Haleem³³ holds a different view to the fact that states will always remain “suspects” in the establishment of the principles of non-discrimination for the promotion of equality. She argues that all states have a legitimate interest in, and the right to protest against,

³¹ See Abdullah A, ‘Expanding legal protection of human rights in African context’, in Abdullah, at 4-5 (note 13 above).

³² Ibid, at 6.

³³ See Haleem (note 19 above).

human rights violations wherever they may occur, regardless of the nationality of those subjected to discrimination and prejudice. Despite the legitimate interests that states may have in the protection of human rights, Abdullah seems to be partially correct in his analysis of the role of the states in the legal protection of human rights. The international community does not seem to have a strong and deterrent effect on countries such as Zimbabwe, where currently, most serious human rights abuses occur.³⁴

The protection of human rights requires countries such as South Africa that have become international role models in this regard to ensure other states adhere to the precepts of the international community.³⁵ The adherence to international norms becomes important for the actual enjoyment of the rights enshrined in the conventions in the domestic sphere. In the light of this explicit recognition of international human rights law as a source of non-discrimination Church *et al* gave meaning to the interpretation of the “binding and non-binding” effect of international human rights law in the domestic sphere. They note that the former includes human rights treaties that have been ratified and enacted into law, and that the latter constitutes a variety of treaties that have not been ratified. They further emphasise that these sources:

- should be used as tools of interpretation;
- must be considered alongside other tools;
- must provide guidance to the courts even though their ability will depend on the comparability of the instruments concerned.³⁶

These tools and the development of other appropriate strategies should bear some positive results for the realisation of the right to gender equality. Rao further affirms that these sources are no longer about what women’s rights are or about how women are oppressed, but:

³⁴ See the report entitled ‘Rights conditions decline in Zimbabwe’ (2003) June 10, *Africa Policy E-Journal*, at 35. See also Rodriguez-Pinzon D and Martin C, *Handbook for victims and their advocates: the prohibition of torture and ill-treatment in the African human rights system* (2006), OMCT International Secretariat, Switzerland, at 294.

³⁵ South Africa’s role in the signing of the memorandum of understanding between the ruling Zanu-PF Party and the Movement for Democratic Change in Zimbabwe in September 2008 was hailed by the European Union as a progressive step taken by South Africa to ensure stability in Zimbabwe.

³⁶ See Church, Schulze and Strydom (note 15 above), at 214.

- firstly, about what is required to change women’s access to their rights;³⁷
- secondly, this highlights the difference between legislation and the processes by which that legislation makes a difference to women’s lives or not;
- thirdly, it includes an analysis of the deep structures of the institutions or organisations that prevent them from acting strongly for women’s rights;
- lastly, the application of the international framework is applicable at different levels from national, regional and international, as it indicates that in any system there will be actors who are duty bearers at one level and rights holders at another.³⁸

However, Rao strengthens the view that entrenchment of equality in conventions and national constitutions may bear little fruit for the realisation of the right to gender equality. He argues that it needs effective tools and measures to translate those formally entrenched rules into reality. Rao also does not dismiss the potential of the framework, as it provides the basis for the protection and promotion of the right to gender equality. In other words, Rao endorses the view that the internationalisation of human-rights law should be seen and be used not only as a “mere source” of non-discrimination, but also as an effective and strategic source for the realisation of the right to equality.³⁹ In this way international human rights law as a source of non-discrimination should be used as a means of extending constitutional rights rather than as a support for the conclusion that it has been applied to reach a particular decision.⁴⁰

In other words, this advocates for the substantive approach to the realisation of gender equality that focuses not only on the difference of women, but rather on whether the alleged unfair conduct or treatment in law contributes to the historic systemic disadvantage. In the context of this approach, Ahmad points out that equality of opportunity and outcomes are within the ambit of the right to equality despite the fact

³⁷ This is in line with the general purpose of the study to determine the extent to which human rights are able to translate the fundamental freedoms into the actual enjoyment.

³⁸ Rao A and Kelleher D, ‘Human rights, institutions and social change’, an unpublished paper presented at the Helsinki Conference, 2005.

³⁹ See Church, Schulze and Strydom (note 15 above).

⁴⁰ See Hansen TT, ‘Implementation of international human rights standards through national courts in Malawi’ (2002), Volume 46, *Journal of African Law*, at 31.

that equality is also not defined in international instruments. This is given effect by the model or approach upon which inequalities may be established.⁴¹

Generally, in realising the achievement of equality the focus is on difference that does not perpetuate existing inequalities, but on striving towards the achievement and maintenance of a real and effective state of equality. The substantive model of equality aims to eliminate structural discrimination by making no distinction where that discrimination took place - whether in the private realms of family or the public domain. Equality measures do not only address the law, but also the socio-political and cultural dimensions of the vulnerable group. It is against this background that the adoption of international treaties entrench a worldwide acceptance of, and respect for, gender equality as a source of non-discrimination. The promotion of equality is the central element and goal of the international community and non-discrimination is one of the means of achieving this goal.⁴²

2.3.1 The international bill of rights and the basic principles of equality

It is not necessary to discuss the historical background of the establishment of the United Nations⁴³, but rather to conclude that the adoption of the UDHR in 1948, after the tragic denial of equality and freedom during World War II⁴⁴, has seen the development of the right to equality taking on a pivotal role within the international community. The UDHR serves as an important tool and model for the development of subsequent international conventions and declarations that have been incorporated into laws of many countries.⁴⁵

⁴¹ Ahmad S, 'Gender equality under article 8: human rights, Islam and feminisms', accessed at www.malaysianbar.org.my/gender on 11 June 2008.

⁴² Fredman S, 'Less equal than others-equality and women's rights' at 197 in Greaty C and Tomkins A, *Understanding human rights* (1996), Pinter, at 197.

⁴³ See the history in this regard at www.un.org/rights. See also Buergenthal, Shelton and Stewart (note 22 above).

⁴⁴ See Moseneke D, 'The burden of history: the legacy of apartheid judiciary, the legitimacy of the present judiciary', unpublished paper presented at the University of Cape Town Summer School's Series entitled: "Constitutional balancing act". He argues that the establishment of the United Nations and the adoption of the UDHR held great promise as collective antedotes against war, oppression, human cruelty and impunity in order to uphold and advance peace, self-determination and development.

⁴⁵ See the detailed list of documents at www.un.org.za, accessed on 03 June 2008.

Although the UDHR is not a legally binding instrument and relies on the goodwill and good faith of the states⁴⁶, it has placed equality at the top of the international human-rights agenda. In this quest for equality, the UDHR has not defined the right to equality and what it entails or constitutes. It has also not defined “discrimination”⁴⁷ but entrenches the principle of non-discrimination that seeks to advance the goals of equality. The non-definition of these terms in the UDHR should not be seen as constituting a denial of the existence and the need for legal protection of the right to equality. In this regard, Church *et al* referred to the dissenting opinion of Tanaka J in the 1966 case of *South West Africa* that it can be inferred from the provisions of the UDHR that legal obligations are imposed on member states to respect and protect human rights despite the legislative imperfections in their definitions.⁴⁸

The UDHR affirms the commitment to equal rights and inherent human dignity of everyone as follows:

- (1) all human beings are born free and equal in rights and dignity.
- (2) everyone is entitled to all the rights and freedoms set forth in the Universal Declaration of Human Rights without distinction of any kind, such as race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- (7) all are equal before the law and are entitled without discrimination to equal protection of the law.⁴⁹

⁴⁶ See the preamble, where the following is stated: “Whereas member states have pledged themselves and reaffirmed their faith in the Charter in fundamental human rights and have determined to promote social progress and better life standards in larger freedom the UDHR becomes a common standard of achievement for all people and nations to promote the right to equality and all other fundamental freedoms by progressive measures to secure universal and effective recognition, both among member states and among the people of territories under their jurisdiction.”

⁴⁷ See Dickson CJ in *Andrews v Law Society of British Columbia* (1989) 1 S.C.R. 143. The learned chief justice defined “discrimination” as a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limit access to advantages available to other members of the society. He further held that distinction based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will also be classed.

⁴⁸ See Church *et al* (note 15 above), at 166.

⁴⁹ Sokhi-Bulley B, ‘Non-discrimination and difference: the (non-) essence of human rights law’ (2004), University of Nottingham, at 1-12. She affirms that the entrenchment of the right to

The development of friendly relations among the nations⁵⁰ forms the basis for the evolution of the above articles in the advancement of non-discrimination. These norms are further based on the respect for the principle of equality and the promotion of respect for human rights and fundamental freedoms of everyone. They become important as they identify some prohibited grounds of unfair discrimination in advancing the principle of non-discrimination and the promotion of equality. What is of significance in article 2 is the fact that the prohibited grounds of discrimination do not form an exhaustive list of any behaviour that afflicts a disadvantage on the individual.

The inclusion of socio-economic rights in the UDHR⁵¹ acknowledges their interdependence with civil and political rights, including the right to equality. The right to equality and human dignity cannot be enjoyed by any person without a roof over his or her head.⁵² The inclusion of socio-economic rights in the South African Constitution brought South Africa in line with minimal human rights standards of the international community despite its earlier position during the apartheid era, where it refrained from adopting the UDHR.⁵³

Following the UDHR, the interrelatedness of civil and political rights and socio-economic rights was given meaning by the adoption of two overarching conventions, namely:

equality in the UDHR is a deep-rooted principle of human thought that has become a worldwide sacred text of secular religion.

⁵⁰ See (note 1 above).

⁵¹ See article 22, which provides as follows:

“Everyone, as a member of society, has the right to social security and is entitled to realization through national efforts and international co-operation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

Article 25 also provides as follows:

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to social security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

⁵² See an analysis of this contention in *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development and others*, 2004 (6) BCLR 569 (CC) (hereinafter referred to as 'Khosa').

⁵³ See Gleeson K, 'The worldwide influence of the of the Universal Declaration of Human Rights and International Bill of Rights', accessed at www.universalrights.net on 28 May 2010.

- (1) the International Covenant on Civil and Political Rights,⁵⁴ and
- (2) the International Covenant on Economic, Social and Cultural Rights⁵⁵

The two covenants elaborate many of the rights in the UDHR and also address the protection of particular vulnerable groups such as women and children. The covenants, together with the UDHR, form the international bill of rights, as they provide a source for the core standards of international human-rights law.

Although socio-political rights are enumerated in the two covenants, they are not distinct from each other, as they are universal, indivisible, interdependent and interrelated.⁵⁶ The close relationship that exists between the two sets of rights means that they require permanent protection and promotion if they are to be fully realised. The two covenants also do not define “discrimination”, but do provide a scope for the recognition of the right to equality for all. The covenants share a common article on equality between men and women⁵⁷, as well as prohibitions on discrimination on the grounds that were first elaborated in the UDHR. Moreover, article 26 of the ICCPR sets out a free-standing equality clause and echoes the same sentiments expressed in articles 2 and 7 of the UDHR and provides that:

“all persons are equal before the law and are entitled without any distinction to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The ICESCR also contains another source of equality that is contained in article 7(a)(i), which guarantees:

⁵⁴ Adopted by Resolution 2200 A (XXI) of the General Assembly of the United Nations on 16 December 1966, and came into force on 23 March 1976, hereinafter referred to as the “ICCPR”, which South Africa ratified on 10 December 1998.

⁵⁵ Adopted by Resolution 2200 (XXI) of the General Assembly of the United Nations on 16 December 1966, and came into force on 03 January 1976, hereinafter referred to as the “ICESCR”, which South Africa signed only on 03 October 1994, but has not yet ratified.

⁵⁶ See Craven M, *The International Covenant on Economic, Social and Cultural Rights: a perspective on its development* (1995), Oxford University Press, London, at 24.

⁵⁷ See article 3 of both the ICCPR and the ICESCR on the emphasis on gender equality and the enjoyment of civil and political and socioeconomic rights.

“fair wages and equal remuneration for work of equal value without distinction of any kind in particular women being guaranteed conditions of work not inferior to those enjoyed by men with equal pay for equal work.”⁵⁸

The additional source of protection for the enjoyment of the right to equality is again found in article 14 of the ICCPR, which provides that

“all persons are equal before the courts and tribunals”.⁵⁹

The obligations imposed by these provisions broaden the net of inclusion for both men and women in respect of the enjoyment of civil and political and socio-economic rights. These two sets of rights require the protection of the right to equality against its violation. They reinforce the guarantee of non-discrimination through processes at the courts and the essence of equality itself by seeking to ensure that the law guarantees equal protection in the administration of justice.⁶⁰

What further enhanced the realisation of equality is the establishment of the Human Rights Committee with the purpose of playing a supervisory role in the implementation of human rights, including gender equality.⁶¹ Without examining the powers, the duties and the performance of the committee in detail, it is worth noting the basic function entrusted upon it as provided in article 40, which requires:

⁵⁸ Article 7(c) of the ICESCR further secures the right to equal opportunity for everyone in his or her employment to an appropriate higher level subject to no consideration other than those of seniority and competence.

⁵⁹ The importance of this right entails the provision of legal assistance by the state to those accused of violating the rights in the Covenant to ensure equitable access and fairness in the conducting of the proceedings before the court of law. See also section 14(3), which stipulates that “in the determination of any criminal charge against him, everyone shall be entitled to the rights enumerated in 14(3)(a-g)(4-7)”.

⁶⁰ See article 14(3), which gives purpose to this contention and reinforces that although women are always at the receiving end when it comes to prejudice and discrimination, men as well should not be treated with indignity when it comes to the enforcement of their rights, particularly when they are alleged to be the perpetrators of the alleged conduct.

⁶¹ See article 28 of the ICCPR. See also articles 28-31, which provide information about the Committees’ membership.

- (1) state parties to submit reports on measures taken to give effect to the prescripts of the Covenant and on the progress made in the enjoyment of the rights declared by the Covenant⁶²

The requirement for the submission of state reports was given a concrete purpose by the adoption of the Optional Protocol to the ICCPR⁶³ as a distinct instrument that requires a separate ratification.⁶⁴ The optional protocol authorises the committee to receive and consider communications from individuals claiming to be victims of violations by state parties of the covenant. The protocol gives effect to article 2 of the covenant, which requires state parties to put in place measures that will give effect to the enjoyment of all fundamental freedoms. To ensure the realisation of this purpose, article 2(3)(b) entrenches the right of those whose rights have been violated to an effective remedy that must be determined by competent judicial, administrative and legislative authorities. As the covenant provides a benchmark against which domestic laws may be measured, the purpose of the protocol is to strengthen the enforcement mechanisms for the improvement of the promotion of the right to equality.

The commitment to develop measures for the promotion of the right to gender equality led to the further adoption of specific international instruments that formed the basis to the international human-rights approach to combat all forms of discrimination based on gender and race. In this regard, the International Convention of the Elimination of Race Discrimination⁶⁵ and the Convention on the Elimination of Discrimination Against Women⁶⁶ entrench a firm commitment to the struggles for the realisation of the right to

⁶² See further subsection 2, which requires the reports to be transmitted to the Committee for consideration.

⁶³ Adopted and opened for signature, ratification and accession by Resolution 2200 A (XXI) of the General Assembly of the United Nations on 16 December 1966.

⁶⁴ See article 8 of the Protocol. The essence of the ratification of the Protocol is an acknowledgement of state sovereignty where-in states by their own consent become part of international human rights that require them to conform to the prescripts of human rights.

⁶⁵ Hereinafter referred to as "CERD", adopted and opened for signature and ratification by Resolution 2106 (XX) of the General Assembly of the United Nations on 21 December 1965 and came into operation on 04 January 1969 in accordance with article 19, which South Africa ratified on 10 December 1998.

⁶⁶ Hereinafter referred to as "CEDAW", adopted on 18 December 1979 and came into operation on 03 September 1981. CEDAW was supplemented by the adoption of the Optional Protocol on the Elimination of All Forms of Discrimination Against Women on 06 October 1999 and came into operation on 22 December 2000, which South Africa ratified on 15 December 1995.

equality between people of all races and between men and women.⁶⁷ The interdependence of CERD and CEDAW, as they will be discussed interchangeably, becomes important within the South African context against the background of its extreme historic legacy of inequalities.

The adoption of CEDAW is attributed to the work of the Commission on the Status of Women that was established in 1946 to monitor the promotion of women's rights. CEDAW is firmly rooted in the objectives of the UDHR and reaffirms the faith in fundamental rights, in the dignity and worth of the human person and the equal rights of men and women. The adoption of the convention was necessitated by the insufficiency of the protection guaranteeing women's rights. The preamble acknowledges that despite the existence of other instruments, women still do not have equal rights with men as discrimination continues to exist in every society.⁶⁸ The main purpose of CEDAW is to define all forms of discrimination against women as human-rights violations and to discredit the widespread acceptance of discrimination against women as legitimate customs and cultural traditions.

In giving effect to the elimination of gender-based discrimination CEDAW defines "discrimination against women" as:

"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civic or any other field".⁶⁹

CERD defines "racial discrimination" as:

⁶⁷ See Sokhi-Bulley B, 'The Optional Protocol to CEDAW: first steps' (2006) Volume 6 No 1, *Human Rights Law Review*, 143-159. She says that the emergence of new consciousness of women's human rights and the need for improved promotion and protection resulted in the internationalisation of problems that women encounter and has led to global efforts to challenge what can be termed as the gendered power relations that structure the daily lives of women, at 143.

⁶⁸ See Zwingel (note 5 above), in which it is highlighted that the concept of international human rights raised high hopes to make the world a better place and has served as a guiding principle of many forms of activism, including women's-rights activists who have strongly influenced the international discourse on human rights to make it more sensitive to women's concerns.

⁶⁹ See Part 1, article 1, of both CERD and CEDAW.

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect ... on an equal footing ... ”

However, the two instruments, also, do not specifically define “discrimination”. They characterise the alleged unfair discrimination based on a prohibited or any other unlisted ground. It should, therefore, be understood to mean the elimination of any conduct that has the effect of undermining the equal worth of a human person. The prohibition also identifies some factors that stipulate a difference in treatment that has the effect of undermining the enjoyment of human rights and that is not limited to the prohibited grounds listed therein.⁷⁰

The characterisation of the right to equality is supplemented by the requirement for the state to adopt special measures to ensure the advancement of women.⁷¹ These measures should go beyond the legal recognition of fundamental rights of women by ensuring the adoption of special remedial measures as long as inequalities continue to exist.⁷²

Generally, CEDAW and CERD conventions spell out specific goals and measures that are to be taken to facilitate the creation of a human-rights culture for the realisation of equality between men and women.⁷³ What is of essence is article 5 of CERD, which guarantees equality, particularly in respect of the following rights:

⁷⁰ Although the focus of this chapter is not on the substantive translation of the right to equality, the *Lovelace v Canada* (A/36/40) at 166 (1981) judgment by the UN Committee on Human Rights gave effect to the promotion of the right in question. This case involved an application for the promotion of the right to gender equality after Ms Lovelace lost her rights and status after having married a non-Indian man on 23 May 1970. The loss of the status was due to the discriminatory impact of section 12(1)(b) of the Indian Act. She argued that the Act discriminated unfairly against her on the grounds of gender, contrary to article 3, 26, of the ICCPR, as the provision was not equally applicable to a man who marries a non-Indian. Without providing a further background and the reasoning of the Committee, the gender based discrimination under Canada’s Indian Act was declared invalid as it compromised the recognised right to equality as envisaged in the relevant international instruments.

⁷¹ See article 3 of CEDAW and article 1(4) of CERD.

⁷² The adoption of affirmative action in South Africa serves as a positive measure that seeks to strive towards the achievement of equality between men and women.

⁷³ See Chinkin C, ‘Gender inequality and international human rights law’, at 95, accessed at www.oxfordscholarship.com on 17 June 2008.

- (a) the right to equal treatment before the tribunals and all other organs administering justice
- (b) the right to security of person and protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual group or institution ...
- (e) economic, social and cultural rights ...⁷⁴

In addition, article 2(c) of CEDAW requires states to:

“establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”.⁷⁵

These articles entrench the review of laws, policies and any other alleged conduct to ensure that they do not discriminate on the basis of race, which is also intertwined with gender. They also give due recognition to the fact that the realisation of formal equality as entrenched in these instruments do not carry any substantive essence for the realisation of gender equality without their translation into reality. Hence the requirement for not only the remedy, but also adequate reparation for damage suffered.⁷⁶

However, the two instruments carry with them the social-change objectives in line with the general purpose of this study. They put an emphasis on, and expressly recognise the need for change in attitudes through education of both men and women to accept equality rights and responsibilities in order to overcome prejudices and practices that are

⁷⁴ This provision takes account of the inadequacies of legislative measures by requiring states to take appropriate measures to modify social and cultural patterns of conduct in order to remove prejudice and to change attitudes with respect to sexist stereotyping.

⁷⁵ Generally, this article prohibits any kind discrimination and imposes obligations on states to institute with all appropriate means and without delay policies to eliminate in national laws and constitutions and to take steps to ensure the practical realisation of the right. See also article 15 of CEDAW, which requires state parties to accord equality of women with men before the law.

⁷⁶ See also article 6 of CERD, which provides as follows: “State parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other state institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

based on stereotypes against women.⁷⁷ The awareness of human rights and responsibilities becomes important, particularly in rural areas where people are often not have equal access to information flow and where most of the abuses and prejudices always occur. The rural areas are also where cultural practices under the protection of customary law or religion are mostly prevalent, which undermines the well-being of the woman as a human being.

Article 14 of CEDAW affirms the rights of rural women and requires the governments to take account of particular manifestations faced by rural women and the significant roles that rural women play in the economic survival of their families. This provision recognises the urban and rural divide in the enjoyment of fundamental freedoms. It affirms rural women as a special group that has special problems that require special attention and a provision for them to be given opportunities in order to break away from traditional stereotypes that relegate their equal worth.

The right to equality as envisaged in both instruments would remain an empty vessel without the machinery to make these instruments work. In giving effect to the international human-rights treaties is the establishment of international committees and commissions to oversee the reporting and monitoring of the instruments in relation to the steps taken by governments to implement them.⁷⁸ Without providing an overview of this role and how the concept of equality has evolved in this regard it is worth noting that members to serve in the various committees or commissions must be persons of high moral character and recognised standing and competence in the field of human rights. The Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms⁷⁹ also gives effect to the mandate of these bodies, which among other things:

⁷⁷ See article 10(c) of CEDAW, which requires measures to put men and women on the same basis of equality: "The elimination of any stereotyped concept of the role of men and women at all levels and in all forms of education by encouraging co-education and other types of education which will help to achieve this aim and in particular, by the revisions of textbooks and school programmes and adaptation of teaching methods."

⁷⁸ See article 28 of ICCPR, article 18 of ICESCR, article 8 of CERD and article 17 of CEDAW.

⁷⁹ Adopted by Resolution 53/144 of the General Assembly of the United Nations on 08 March 1999.

- (1) recognises and stresses the primary responsibility and the duty of the state to promote the right to equality;
- (2) gives recognition to the role of individuals and NGOs in the quest for the promotion of equality, and, last, but not least;
- (3) acknowledges the limitation of the rights.

Another significance of international human-rights law lies in its influence for the development of legal reform in the regional sphere.

2.4 The development of the agenda for the right to equality in Africa

The international agenda for the realisation of the right to equality has transmitted to, and filtered through, the African regional sphere. The regional sphere has also incorporated the principle of equality between men and women in their legal systems. It established tribunals and other public institutions to ensure the effective protection of women against discrimination, and to ensure the elimination of all acts of discrimination against women.⁸⁰ The development of the African regional agenda for gender equality may be attributed to the establishment of the Organization of African Union,⁸¹ which was later transformed into the African Union⁸² on 09 July 2002.⁸³ Without going into the historical background of the OAU⁸⁴, it may be said that the transformation of the OAU into the AU has seen a significant shift in respect of the manner in which gender issues are dealt with, particularly with regard to legislative reform and gender-policy formulation. This inspiration is attributed to the adoption of the African Charter on Human and People's Rights in 1981,⁸⁵ which is viewed as a premier instrument governing the protection of human rights in Africa.⁸⁶

⁸⁰ See 'Overview of CEDAW', accessed at www.un.org/women on 12 June 2008.

⁸¹ Hereinafter referred to as the "OAU", which was established on 25 May 1963.

⁸² Hereinafter referred to as the "AU".

⁸³ See also article 2 of the Constitutive Act of the African Union on its establishment in line with the requirements of the Act.

⁸⁴ See Ketema M, 'Creation of the OAU', accessed at www.creation-oau.com on 25 July 2008.

⁸⁵ Hereinafter referred to as "ACHPR" or the "Charter", adopted by the 18th Assembly of the Heads of State and Government of the OAU on 27 June 1981 in Nairobi, Kenya, and came into operation on 21 October 1986, and by March 2000 all 53 African states were parties to the Charter. See also Heyns C and Killander M, *Compendium of key human rights documents of the African Union* (2006), 2nd edition, Pretoria University Law Press, Pretoria, at 23.

⁸⁶ See Odinkalu CA, 'Complementarity, competition or contradiction: the relationship between the African Court on Human and People's Rights and Regional Economic Courts in East and

Although the Charter was widely acknowledged to be inadequate in areas in which women need protection and gender equality⁸⁷, it is, among others, based on:

- the fundamental principles of freedom, equality, justice and dignity
- the co-ordination and intensification of co-operation and efforts to achieve a better life for the peoples of Africa
- the promotion of international co-operation, having due regard to the UN Charter and the UDHR;⁸⁸
- the idea embodying the principle of collective rights as it includes people's rights, acknowledging that the rights are not only individualistic, but may also be enjoyed by the group, such as the right to self-determination.

These objectives are essential and necessary for the achievement of legitimate aspirations of the African people. They lay the foundation for the realisation of gender equality as envisaged in article 4(l) of the Constitutive Act of the African Union.⁸⁹ The Charter recognises the importance and fundamental rights of women through its main provisions, which are as follows:

- Article 2, which provides that every individual is entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, gender, sex, ethnic group, or other status.
- Article 3, which also provides that every individual is equal before the law⁹⁰ and is entitled to equal protection of the law.⁹¹

Southern Africa', an unpublished presentation at the Conference of East and Southern African States on the Protocol Establishing the African Court on Human and People's Rights, Gaborone, Botswana, 09-10 December 2003.

⁸⁷ See also the report by Houghton I, entitled 'Reviewing the Protocol on the Rights of Women in Africa', *Pambazuka News*, accessed at www.newsafrika.org on 24 May 2008.

⁸⁸ See the preamble and article 2 of the ACHPR. See also the preamble of the Protocol on Women's Rights.

⁸⁹ Adopted by the 36th Ordinary Summit of the Heads of State and Government of the AU in Togo, July 2000, and came into operation in 2001. See also article 3(a-n) of the Constitutive Act, which contains an explicit commitment on human rights and the obligations for state parties to undertake to promote and protect human and people's rights in line with the prescripts of the African Charter and other relevant human-rights instruments.

⁹⁰ See article 3(1).

⁹¹ See article 3(2).

The significance for the promotion of gender equality is further found in article 18(3), which provides that the state will ensure the elimination of every discrimination against women and also ensure the protection of the rights of woman and child as stipulated in international declarations and conventions. These provisions were given a concrete content by the adoption of the protocol on the Rights of Women in Africa.⁹² The adoption of the protocol was consistent with the prescripts of article 66 of the Charter. This article provides for the establishment of protocols and agreements to supplement the Charter's provisions in order to give effect to the full realisation of women's rights. The adoption of legal reforms and policy changes is consistent with the African government's commitment to promote and protect human rights, including the overall well-being of women. This followed a number of other commitments enshrined in declarations⁹³ attempting to eliminate all forms of discrimination, violence, prejudices against women.

The protocol serves as the landmark instrument in the protection and promotion of women's rights in Africa as it aims to:

- protect the rights to dignity, peace, life, integrity and security of a person.⁹⁴
- ensure equal rights to participate in the political and decision making process.⁹⁵
- ensure the right to education, training, economic and social welfare and health and reproductive rights.⁹⁶
- eliminate all forms of discrimination and harmful practices against women.⁹⁷
- accord special protection to elderly women, women with disabilities and women in distress.⁹⁸

⁹² Adopted on 11 July 2003 at the second summit of the African Union held in Maputo, Mozambique and came into operation on 25 November 2005, after ratification by 15 member states.

⁹³ See, for example, the Declaration on Gender and Mainstreaming and Effective Participation of Women in the African Union, which was adopted in Durban in South Africa on 30 June 2003, the Strategy for Mainstreaming Gender and Women's Effective Participation in the African Union, which was adopted in Dakar on 26 April 2003 and the Solemn Declaration on Gender Equality in Africa by the Heads of States and Government of Member States of the African Union at the Third Ordinary Session in Addis Ababa, Ethiopia, 06-08 July 2004.

⁹⁴ Article 3.

⁹⁵ Article 10.

⁹⁶ Article 12.

⁹⁷ Articles 2, 5 and 6.

⁹⁸ Article 22.

The adoption of the protocol is imperative because it binds African governments to move from the rhetoric with regard to the rights of women to the implementation of programmes that seek to stop all forms of discrimination against women. The protocol also reaffirms the acknowledgment that struggles for the realisation of the right to gender equality are far from won. In the preamble of the protocol it is highlighted that despite the ratification of the African Charter, women continue to be victims of discrimination and harmful practices⁹⁹ and that therefore the effective implementation of the Charter will:

- pave the way for the advancement of gender equality;
- ensure recognition of the need to free women from oppressive and demeaning harmful practices;
- force national commitment to the challenge of the development of women, and, most importantly;
- ensure greater accountability of states to eliminate prejudices and practices that impede women's rights to equality and freedom from discrimination¹⁰⁰

The advancement of gender equality goes beyond the African Charter to the UDHR, where no distinction between men and women was made. The state parties' commitment to gender equality recognised the importance of aligning Africa with international human-rights norms and practices. This development opened up a space not only for Africa to entrench gender-based neutrality in the treatment of men and women, but according to Wolte also for the prohibition of specific and indirect forms of discrimination. It has extended the instruction for the state to include the private or non-state actors in the development of the principles of non-discrimination. It mandates state parties to make active contributions towards creating equality, quota regulations and positive or fair discrimination strategies as permitted by special measures aimed at accelerating formal equality.¹⁰¹

⁹⁹ See further analysis in Davis K, 'The emperor is still naked: why the Protocol on the Rights of Women in Africa leaves women exposed to more discrimination'? (2009) Volume 42 *Vanderbilt Journal of Transnational Law*, at 949-992.

¹⁰⁰ See Odinkalu (note 86 above).

¹⁰¹ Wolte S, 'The international human rights of women: an overview of the most significant international conventions and instruments for their implementation' (2003), December, Eschbon. See also article 14 of CEDAW.

Africa's commitment to the promotion of the right to equality will create a legal black-hole¹⁰² without proper tools to monitor states' compliance with not only the prescripts of the African human-rights instruments, but also international norms. The establishment of the African Commission in terms of article 30 of the African Charter creates a compulsory monitoring mechanism to supervise and monitor all rights, including the economic, social and cultural as well as group rights, as noted above.¹⁰³ The commission is required to promote human rights by conducting promotional work through awareness-raising programmes.¹⁰⁴ It is further required to formulate principles and rules that are aimed at solving legal problems relating to human and people's rights upon which the African governments may base their legislations.¹⁰⁵

The commission's petition procedure requires the party alleging violation of the human rights to exhaust domestic remedies and to file the complaint within a reasonable time from the date of violation or the date upon which the commission was made aware of the violation.¹⁰⁶ The commission receives complaints only from state parties and considers only those cases in which a simple majority of the commissioners so decided.¹⁰⁷ Without dwelling on the shortfalls of the Commission such as lack of funding, lack of capacity for legal analysis, the adoption of the protocol on the Establishment of an African Court on Human and People's Rights¹⁰⁸ may be said to have enhanced the protective mandate of the commission.¹⁰⁹ In its preamble, the court is established solely for the purpose of reinforcing and supplementing the functioning of the commission.

¹⁰² Term lifted from Sachs J in *Fourie*, at para 72.

¹⁰³ See Martin FF, *International human rights and humanitarian law: treaties, cases and analysis* (2006), Cambridge University, New York, at 19.

¹⁰⁴ The strategy for the promotion of awareness in promoting gender equality requires coordinating studies, organising symposia, preparing studies on region-wide violations and assisting state parties in the drafting of national legislation.

¹⁰⁵ See article 45 of the Charter.

¹⁰⁶ See article 50. See also *Prince v President of the Law Society of the Cape of Good Hope* 2001 (2) BCLR 133 (CC) who had to exhaust the domestic remedies before filing his complaint with the African Commission.

¹⁰⁷ See article 55.

¹⁰⁸ Adopted in Addis Ababa, Ethiopia, in June 1998, and came into operation in January 2004.

¹⁰⁹ See article 1 of the Protocol on the establishment of the Court and article 2 on the relationship between the Court and the Commission.

The African Court established in terms of the protocol on the Establishment of the African Court on Human and Peoples Rights has both an advisory¹¹⁰ and an adjudicatory role in relation to the disputes submitted to it concerning the interpretation and application of the Charter and any other relevant human rights instruments ratified by state parties.¹¹¹ Article 5 not only allows the court to accept complaints from state parties, but empowers it to receive complaints from non-governmental organisations with observer status before the commission, individuals and groups of individuals.¹¹² In its adjudicatory role the court can award damages and order provisional protective measures.¹¹³ It can be deduced that the court will deliver legally binding decisions than the commission that only recommends without the mechanisms to ensure state compliance with its recommendations. The African Court will ensure the development of jurisprudence of human rights including gender equality in Africa.

The lack of legal-enforcement mechanisms in respect of the court's orders will result in the lack of effectiveness of the court - hence the requirement for the Council of Ministers to monitor state compliance with its orders.¹¹⁴ The African Court is not the only legal body to ensure the promotion and protection of human rights, including gender equality. The Constitutive Act of the African Union¹¹⁵ supplements the African Court and establishes the African Court of Justice as the primary legal organ of the Union.¹¹⁶ The purpose of the African Court of Justice is to resolve disputes concerning the interpretation and application of the Constitutive Act of the African Union treaties and decisions made by organs of the AU. Of great significance for the court is its potential to affirm the African regional system of human rights, including the promotion of gender equality. Unlike the African Commission, the court will make binding and legally enforceable decisions on the states as it provides an opportunity to advance gender equality and set precedents for national courts. The role of the court is essential, particularly for the substantive translation of the protocol on the Rights of Women in

¹¹⁰ See article 4(1), which extends this role to recognised organs and organisations, and not only limits it to state parties.

¹¹¹ See articles 3, 4 and 7 of the Protocol.

¹¹² See Mubangizi (note 14 above), where he highlights the fact that it is important to note that individual access to the Court is rather limited, as the Court will have the discretion to accept or refuse such access, and also the state concerned must have made a declaration accepting the jurisdiction of the Court to hear such cases.

¹¹³ See articles 27 and 28 of the Protocol.

¹¹⁴ See articles 29 and 30 of the Protocol.

¹¹⁵ Adopted in Togo on 11 July 2000 by the member states of the AU.

¹¹⁶ See article 5(d) on the organs of the Union.

Africa as the interpretation of the latter will set the African agenda for the development and promotion of women's rights in Africa.¹¹⁷

The review of both the regional and the international human-rights instruments shows an important role in the protection of human rights, including the realisation of the right to gender equality. The enjoyment of the right to equality has to be understood in the light of the inherent problems in the enforcement of human rights that to a large extent depends on state parties developing mechanisms incorporating these standards into their domestic spheres.

However, the existence of a comprehensive legal framework of international human rights norms will remain at the level of non-enjoyment by the intended beneficiaries if those instruments are not brought and internationalised within the framework of the domestic sphere.

2.5 The application of the international norms and standards in the domestic sphere

Earlier in this study, it was emphasised that the realisation of the right to gender equality requires positive actions from states to ensure the translation of international norms and standards in their respective jurisdictions. Although the states are not really required to implement all the provisions in the various international conventions, which is attributed to the reservation principle¹¹⁸, the successful protection and implementation of human rights requires a meaningful relationship between international law and the national law in the domestic sphere. In establishing this interrelationship, it is important to note that

¹¹⁷ See the report by Wachira GM, 'African Court on Human and People's Rights: Ten years on and still no justice' (2008) *Minority Rights Group International*, United Kingdom, at 18. The report has also identified that the Protocol enshrines important provisions which eliminate all forms of discrimination against women in Africa as it calls on state parties to take special measures to ensure the protection of the law and economic, social and cultural rights. Such undertaking would inevitably include affirmative action measures to redress the precarious human rights situation of women in Africa.

¹¹⁸ The fact that this principle allows states to select the rights that they wish to protect undermines, for example, socio-economic rights, which do not carry a direct entitlement to their enjoyment owing to their internal limitations, as substantive legal rights. This is further exacerbated by entrenching these rights in directive policies in countries such as Namibia, which do not have an effective judicial enforcement.

though international human-rights law is the law of the community of nations, Buergenthal *et al* has emphasised that state parties need to:

- recognise and accept human rights;
- reflect these rights in their national constitutions and law;
- respect and ensure the enjoyment of these rights through national institutions;
- incorporate these rights in national ways of life.¹¹⁹

The development of the international agenda in integrating this purpose in the domestic sphere is thwarted by the opposing doctrines known as “monism” and “dualism”. In this regard, Mubangizi highlights the fact that there are those who believe that the international legal order and the national system together constitute one legal order within which the national systems take a subordinate position.¹²⁰ The rationale for this belief is based on the assumption that it fosters the unity of law, whose validity derives from one common source. On the other hand, there are those who believe that the two constitute distinct branches of the law that never overlap, as international law should be seen as an external manifestation of the sovereign will.¹²¹ This is based on the claims that international law and national law differ so greatly with regard to their sources, contents and the relationship they govern that they must represent two separate legal systems.¹²²

These two schools of thought make the enforcement of international norms in the domestic sphere quite complex. They further create space for the two systems to compete for acceptance.¹²³ In order to establish the relationship between the two systems Mubangizi argues that it should be understood that:

¹¹⁹ See Buergenthal (note 22 above), at 32.

¹²⁰ See Mubangizi (note 14 above).

¹²¹ *Ibid.*

¹²² See also Dongmo C, ‘Human rights and the status of international law in the application and interpretation of law in Africa’ an unpublished paper presented at the 49th Convention of the International Studies Association (ISA) San Francisco, CA, on 26-29 March 2008.

¹²³ Kirby M, ‘The road from Bangalore: the first ten years of the Bangalore principles on the domestic application of international human rights norms’, accessed at www.hcourt.gov.au on 12 June 2008.

- historically, international law was based on the relationship between states, and not individuals and states remained free to regulate their relationships with their own individuals;
- the nature and obligations of international human-rights law make it difficult for the acceptance of a universal legislative and judicial authority, as they require their incorporation into the domestic sphere; and
- this is distinct from the domestic system where the relationship between states and their individuals flow from the constitutions that are enforced by the national courts.¹²⁴

This background becomes important in establishing the purpose of not only ratification, but also the incorporation of international human-rights laws into the domestic sphere. It explains the existence of what has been referred to as the “double-edged” sword of the demand of human rights on the one hand and the necessity of translation into national law on the other. The earlier demand necessitates the promotion and protection of human rights because member states are thereby forced to implement a common standard as a consequence of the binding effect of international law.¹²⁵ The importance of the domestic incorporation of these norms lies in the functioning of the domestic sphere¹²⁶, which Smith characterises as effective, accessible and enforceable. In this regard, Smith holds that:

- the domestic system is more effective because fewer parties are involved, and political consensus seems to be more forthcoming than on the international level;
- the domestic sphere is by “definition” more accessible, owing to shorter ways and better linguistic comprehension; and

¹²⁴ See Mubangizi (note 14 above).

¹²⁵ See Dongmo (note 121 above), when referring to Hegel (1770-1831) to the effect that the incorporation of international human-rights law into the domestic sphere gives recognition to the fact that it is no longer an outward public law of states that represents the reality of the moral idea and true god on earth.

¹²⁶ Ratification on its own does not have transformative objectives in the domestic sphere unless a separate legislative act is adopted.

- also the domestic system can be easier to enforce than international systems, owing to a greater political will to implement documents and decisions by national bodies.¹²⁷

This justification is reinforced by Von Stein,¹²⁸ who argues, firstly, that despite the limitations of international human-rights law, its incorporation into the domestic sphere proves useful in identifying and clarifying what the norm is and what constitutes its violation. Secondly, when states enter into an international agreement, they alter their behaviour, their relationship and their expectations of one another over time in accordance with its terms. Often the states' failure to comply with international agreements is not a deliberate decision based on the calculation of interests. Rather, it is based on capacity limitations, unforeseeable changes or administrative breakdowns. Thirdly, this is also prompted by the factors that led the state to incorporate the international norms and the likely influence of those norms for future adherence to the precepts of the international community. Lastly, the incorporation is viewed as a constraining mechanism that is based on the following perspectives:

- the states' commitment to international agreements enables leaders to "lock in policies" with the hope of binding future governments on preferred policies;
- attempts to "lock in policies" are successful because international legal commitments create or raise the costs that states will suffer if they renege on their commitment; and
- as long as the costs, such as internal and external sanctions, are higher for noncompliance, the agreement will constrain the state to engage in compliant behaviour.¹²⁹

Zwingel holds that the idea of co-operation among states for the development of the principles of non-discrimination shed a new light on the interrelation of these different spheres. The domestic incorporation of international norms may reshape and reinterpret

¹²⁷ See Smith M, 'Regional protection of human rights as field of research of human rights, comparative politics, international law and international organization theory', an unpublished paper presented at the 49th Annual ISA Convention on 26-29 March 2008.

¹²⁸ Von Stein J, 'Making promises, keeping promises: ratification and compliance in international human rights law', a paper presented at the Annual Meeting of the American Political Science Association, Chicago, on 2-5 September 2004.

¹²⁹ Ibid.

them and at the same time strengthen the international framework because it is integrated in domestic power structures.¹³⁰

The incorporation and basic obligations that govern the adherence of state parties to international treaties cannot be over-emphasised. It is understood that the state's submission to the international legal order in which it assumes various obligations for the purpose of achieving a common purpose ensures the right treaties of recourse for individual claimants, as they cannot rely on them without their incorporation into domestic laws. The ratification of international human rights laws into the domestic sphere allows for the development of an international system alongside that of a particular jurisdiction. It also allows the international system to co-determine the future development of the law of a particular jurisdiction - hence the requirement for it not to conflict with the laws of the domestic sphere.¹³¹

The ratification of international laws is the most effective way to ensure that they are made available to the intended beneficiaries. This is crucial for the production of significant social changes for the promotion of gender equality through appropriate strategies developed by the domestic actors as opposed to those developed externally. The opportunity presented by the incorporation of international law into the domestic sphere was finally seized by South Africa in 2007, when it ratified a number of international human rights, including those noted above¹³², with the exception of the ICESCR, which it has thus far only signed. Although the signing of international treaties carries an acknowledgement of the prescripts of a particular convention, it cannot be relied on, as it does not produce a legal and binding force - in our case, for the enjoyment of the right to equality.¹³³

In the context of South Africa, the Constitution contains an express directive on the manner in which international human-rights law may be incorporated into the domestic sphere in order to ensure its application in the enforcement of equality claims. In this regard, chapter 14 of the Constitution outlines the steps or procedures in the

¹³⁰ See Zwingel (note 5 above).

¹³¹ See Fernandes JM, 'Enforcement of international human rights law in domestic courts in Mozambique and Ghana' an unpublished LLM thesis, University of Pretoria, 2005.

¹³² See South Africa's status of ratification of the international human-rights treaties as of 09 May 2007 at www.dfa.gov.za, accessed on 14 June 2010.

¹³³ See Church, Schulze and Strydom (note 15 above), at 167.

incorporation of international norms in the domestic sphere. In section 231 it provides as follows:

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly ..., but must be tabled in the Assembly and the Council within a reasonable time;
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.”

The essence of this provision encapsulates the dualist system that draws a distinction between the application of international human rights laws and those of the domestic sphere. It further puts an emphasis on South Africa’s obligations under the prescripts of international human rights only to the extent of their compliance with national legislation. To date, South Africa has ratified and incorporated a number of instruments, which shows that their application is subject to their incorporation into South Africa’s laws by virtue of the adoption of a parliamentary enactment. But section 232 broadens the scope of application by confining the application not only to the entrenched international human rights, but also to international customary law, which is qualified by its consistency with the Constitution.¹³⁴ In this manner, the application of international customary law may

¹³⁴ See section 232.

have a persuasive and normative impact on the enrichment of South African national law.¹³⁵

In addition, the application of the binding instruments and non-binding jurisprudence in the advancement of the principles of non-discrimination is reinforced and supplemented by the Equality Act, which provides as follows:

“South Africa also has international obligations under binding treaties and customary international law in the field of human rights which promote equality and prohibit unfair discrimination. Among these obligations are those specified in the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination.”¹³⁶

The provisions noted above have provided a framework and an opportunity for South Africa to incorporate the international instruments into the domestic sphere in order to develop both the international and domestic principles on equality for the advancement of gender equality. Rubin-Marin *et al*¹³⁷ note that the incorporation of international norms in the domestic sphere is inspired by the following factors:

- the influence of international law during the drafting stages of the domestic constitution, [as is the case with South Africa], as its constitutional provisions emulate those of the Canadian Charter of Human Rights;
- the application of international norms as a supplementary strategy of the country’s domestic law by explicit or implicit constitutional directive;

¹³⁵ See Church, Schulze and Strydom (note 15 above), at 164. See also Botha N, ‘Treaty making in South Africa: A Reassessment (2000) Volume 25 *SAYIL*, 69-78, quoted in Dugard J, *International Law: A South African Perspective*, (2008) Juta Publishers, Cape Town.

¹³⁶ See the preamble of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000, hereinafter referred to as the “Equality Act”.

¹³⁷ Rubio-Marin R and Morgan MI, ‘Constitutional domestication of international gender norms: categorisation, illustrations and reflections from the nearside of the bridge’, at 113, in Knop K, *Gender and human rights* (2004), Oxford University Press, New York.

- the blending of international law with domestic law through the process of interpretation, whether it is required by domestic legal system or a matter of judicial discretion.¹³⁸

These factors show the various ways in which the incorporation of these norms may be used and considered as strategies in the application of international norms in the domestic sphere. The significance of these strategies means that the incorporation of international treaties into national law upon ratification by virtue of a constitutional or statutory provision carries a more significant weight and responsibilities for the courts to build and grow the international and domestic jurisprudence on equality.

In other words, without the ratification and incorporation of international norms into the domestic sphere, the international monitoring bodies would be left without effective tools to carry their responsibilities in ensuring the adherence to adequate standards in fulfilling the enjoyment of human rights. This will also affect courts in their own national jurisdictions by leaving them without a potential tool in developing and synthesising the provisions for the development of their own jurisprudence.

The significance of the incorporation of international norms into the domestic sphere is the quest for social transformation and should be understood as an intrinsic part of international human rights. At the same time, the incorporation process should acknowledge the specific dynamics that may not be in harmony with the international order. Zwingel reflects on the debates that view international law as “agreed upon” and should “trickle down” the domestic sphere. She argues that this is a misconception that has produced much frustration.¹³⁹ The debates relate to international discourse and mechanisms being blamed as weak and ineffective and those of the domestic sphere, where international norms have a hard time in tricking down, are characterised as hopelessly backward and inhuman.¹⁴⁰ Zwingel offers a transnational alternative in line with the general purpose of this study that the incorporation of international norms into the domestic sphere is not merely a reference to international law. It is the process of translating international standards into concrete social change. In this regard, the

¹³⁸ Ibid.

¹³⁹ See Zwingel (note 5 above).

¹⁴⁰ Ibid.

incorporation of these standards is their integration into the domestic discourse as it is deemed appropriate within their normative contexts.

The transnational alternative is the process of establishing norms, of adapting them to specific domestic needs, of selecting most suitable norms and, often, of rejecting non-acceptable ones.¹⁴¹ What is important in the transformation of international norms into the domestic sphere is to put them into context without rendering them meaningless. Zwingel highlights the fact that the meaningful translation of these norms coincides with the basic principle that substantive equality can best be achieved within the international framework by establishing an ongoing debate between states' institutions, nongovernmental organisations and civil society.¹⁴² In sum, the core agenda for incorporation lies in seeking and expanding the common ground between such adverse contexts and international human rights and in producing social change along these lines.¹⁴³

2.6 The legislative evolution of the right to equality in South Africa

2.6.1 The essence of the right to equality in the South African Constitution

It was emphasised above that the South African Constitution provides a good framework for addressing the legal and socio-political structures at the root of gender inequality and, in particular, women's weak position in law and society. South Africa's response to the intense discrimination and inequalities of the past was the adoption of legal reforms with social-change objectives that seek to eradicate all forms of socio-political and cultural inequalities. The Constitution forms the basis for the creation of legal instruments and the repeal of apartheid laws and policies relating to equality generally. Vogt affirms that the need for legislation to prohibit unfair discrimination and to set new

¹⁴¹ See Church *et al* (note 15 at 70 above) on the narrow interpretation of the development of common law by the Court in South Africa.

¹⁴² Zwingel (note 5 above).

¹⁴³ See also Axelrod M, 'Implementing customary international law in domestic courts', an unpublished paper presented at the Annual Meeting of the International Studies Association Panel entitled 'Domestic courts as international actors' in San Diego, California, on 22 March 2006.

values was pressing for South Africa and more is needed to eliminate the vast legacy of inequalities that apartheid left behind.¹⁴⁴

Mokgoro strengthens the importance of legislative reform in laying the foundation for the promotion of the right to gender equality because it is important for the struggles of gender equality not to be confined to courtrooms. Mokgoro notes that litigation has its own limitations as it tends to be the privilege of the economically empowered, as noted in chapter one.¹⁴⁵ Andrews also endorses Mokgoro's contention and argues that the promotion of the right to gender equality is derived from the Constitution and other related legislation as they serve as the direct strategies for social change.¹⁴⁶

One of the primary objectives for the achievement of equality is the location and understanding of the law and legal concepts in the lived experiences of men and women.¹⁴⁷ Hence Perumal further contends that equality has to address the actual conditions of human life, and not the abstract concept of identical treatment, which is equally applicable to all.¹⁴⁸

As the Constitution is based and founded on the principle of equality, considerable gains have been made by South Africa since the dawn of democracy in 1994. These gains relate to the adoption of significant legislative and policy changes in addressing the legacy of discrimination and inequalities. The normative impetus behind these legislative changes is section 9 of the 1996 Constitution, which reads as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and

¹⁴⁴ Vogt GS, 'Non-discrimination on the grounds of race in South Africa-with special reference to the Promotion of Equality and Prevention of Unfair Discrimination Act' (2001) Volume 45 No 2, *Journal of African Law*, 196-209.

¹⁴⁵ Mokgoro Y, 'Constitutional claims for gender equality: a judicial response' (2003), *Albany Law Review*, at 567.

¹⁴⁶ See also Andrews P, 'Democracy stops at my front door: obstacles to gender equality in South Africa (2007), Volume 5 No 1, *Chicago International Law Review* at 15.

¹⁴⁷ Perumal DN, 'Stalking the stalker: the judicial pursuit of a remedy in a multi-cultural society', a presentation at the Association of Law Reform Agencies of Eastern and Southern Africa Conference, 2005.

¹⁴⁸ *Ibid.*

other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken.

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 3. National legislation must be enacted to prevent or prohibit unfair discrimination;
- (5) Discrimination on one or more of the grounds listed in subsection 3 is unfair unless it is established that the discrimination is fair.

The essence of this provision in the Constitution is viewed as a commitment that represents a radical rupture with the past based on exclusion and intolerance. It is the movement forward to the acceptance of the need to develop a society based on equality and respect by all, for all.¹⁴⁹ On the face of it, the entrenchment of the right to equality extends to everyone the right to equal protection and benefit of the law. The existence of a free and democratic society depends on the recognition of the right to equality that is equally premised upon the rule of law and is based on the intrinsic worth or dignity of the individual.¹⁵⁰ In other words, the achievement of equality should not be based solely on formality, but should ensure that it also includes the full and equal enjoyment of all the rights and fundamental freedoms in the Bill of Rights as entrenched in section (2).

What is of importance in this provision is the principle of non-discrimination in line with those of the regional and international perspectives, which seek to ensure that no-one, whether the state, a juristic person or an individual, may unfairly discriminate against anyone. This means that everyone, including women and children, cannot be discriminated against based on the grounds listed in section 9(3), including the grounds

¹⁴⁹ See Sachs J in *Minister of Home Affairs and another v Fourie and another*, 2006 (3) BCLR 355, at para 72.

¹⁵⁰ See Ackerman LWH, 'Equality and non-discrimination: some analytical thoughts' (2006) Volume 22, *SAJHR*, at 597-612.

in the Equality Act. The quest for the promotion of equality is the key principle underlying the achievement of the right to gender equality. The struggle for the consolidation of gender equality includes the recognition of other constitutional rights that have a direct bearing on women's lives, such as socio-economic rights protected in the Bill of Rights.¹⁵¹ The effective protection of these rights has the potential to bring about greater gains for the quality of life of women exposed to inequalities.

Andrews highlights the importance of the manner in which language is used in the equality clause. Firstly, she notes that the prohibition against discrimination on the several grounds listed suggests that discrimination against women is just as constitutionally suspect as discrimination on the basis of race. Secondly, the prohibition of direct and indirect discrimination implicitly acknowledges the invidiousness and tenacity of institutionalised discrimination. Thirdly, the inclusion of both sex and gender as grounds for proscribing discrimination has the potential of protecting women from invidious discrimination based not only on biological or physical attributes, but also on cultural or social stereotypes about the perceived role and status of women. Fourthly, section 9 prohibits discrimination by private individuals and obliges the government to enact legislation to prevent or prohibit unfair discrimination. Finally, it provides that discrimination on the grounds listed is unfair unless it is established that the discrimination is fair.¹⁵²

What is of further importance in the equality clause is the requirement for adoption of legislative and other measures to protect the categories of persons disadvantaged by unfair discrimination. This requirement has been given effect by the adoption of the four main pieces of legislation which is the Domestic Violence Act, The Maintenance Act, The Recognition of Customary Marriages and the Equality Act. These instruments affirm South Africa's commitment to eliminate all forms of discrimination in a comprehensive manner, as well as protecting affirmative measures from constitutional challenges.

The legislative evolution of the right to equality will primarily fall on these pieces of legislation because of the express prohibition of unfair discrimination and the quest for

¹⁵¹ For example, section 26(1)-(3) of the Constitution creates both positive and negative duties for the state, in line with section 7(2).

¹⁵² See Andrews (note 145 above).

the promotion of equality through the use of special and legal measures. Pahad acknowledges the uniqueness, particularly of the Equality Act, as it seeks to move beyond the duty to refrain from discriminating to imposing positive duties on government, public and private bodies, entities and the entire South African population to promote the achievement of equality.¹⁵³

The four instruments have also been acknowledged by Kok¹⁵⁴, especially the Equality Act, as having a number of important transformative ideals as they seek to ensure the achievement of equality through the following purposes:

- Parliament may wish to send a strong moral message that it views discrimination as a social evil, a message that necessarily follows the enactment of the law;
- the goal of anti-discrimination Act could be to establish forums where discrimination complaints may be aired and resolved;
- the goal could be to achieved through adjustment in income distribution and unemployment rates of various disadvantaged groups, identified by for example, race, sex, gender, sexual orientation and HIV status, so that these figures become proportionately equivalent to the most privileged group;
- its most ambitious and idealistic, the legislature may wish to reach into the hearts, minds and homes of its subjects, and affect fundamental changes in basic social relationships.¹⁵⁵

These factors have not only shown South Africa's commitment in the ratification of international human rights promoting the right to gender equality as noted above, but also provided an opportunity for the adoption of many of the international human rights norms and standards at the domestic sphere.¹⁵⁶

¹⁵³ Pahad E: former Minister in the Presidency, at the Conference entitled "Conference against racism, racial discrimination, xenophobia and related intolerance", 15 December 2005, www.polity.org.za/speeches. See also sections 24 – 27 of the Equality Act.

¹⁵⁴ Kok A, 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000" court-driven or legislature-driven societal transformation' (2008) Volume 1, *Stellenbosch Law Review* 122-142.

¹⁵⁵ Ibid at 123.

¹⁵⁶ See Kent (note 29 above).

2.6.1.1 *The Domestic Violence Act and the freeing of everyone from all forms of violence*

The interrelationship of the right to equality with the right to human dignity and to have this dignity respected and protected¹⁵⁷ becomes an important tool for the quest to be free from all forms of violence. In the development of the principles of equality and non-discrimination, section 12 of the Constitution specifically protects everyone from violence, even in the privacy of their homes, and provides the following:

- “(1) Everyone has the right to freedom and security of the person, which includes the right ...
- (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right... .”

In the quest for creating a violent-free society, the Domestic Violence Act, in line with the prescripts of the Constitution, is an important tool in addressing the underlying social ills that are a direct consequence of the inequalities between men and women.¹⁵⁸ The importance of the DVA lies in its express commitment to the prescripts of the international community that include the obligations to eradicate all forms of violence against women and children as envisaged in CEDAW and the Convention on the Rights of the Child.¹⁵⁹

The subscription of the DVA to the CRC is important, especially in view of the Constitutional Court’s ruling in *Hugo*¹⁶⁰, and will be further analysed in chapter 3. The recognition of domestic violence in the DVA as a widespread social problem that targets

¹⁵⁷ See section 10 of the Constitution.

¹⁵⁸ See the preamble of the DVA.

¹⁵⁹ Hereinafter referred to as “CRC”, which South Africa ratified on 16 June 1995.

¹⁶⁰ See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

women and children because they are among the most vulnerable members of society.¹⁶¹ The DVA embodies a clear commitment to the elimination of all forms of prejudice and violence that are mostly experienced by black women who suffer multiple forms of discrimination.¹⁶² This is equally important, especially for women in rural areas who are subjected to stereotypical views which are advanced under the rubric of protecting cultural values and systems.

As the DVA affirms the basic human rights of women, and to ensure that women's right to be free from all forms of violence is properly enforced, it broadly defines domestic violence in section 1(viii) as follows:

- “(a) physical abuse which means any conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, health or impair the health of the complainant and includes assault, criminal intimidation;¹⁶³
- (b) sexual abuse which includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of the woman;¹⁶⁴
- (c) emotional, verbal and psychological abuse which include insults, ridicule, humiliation, name calling and insults;¹⁶⁵
- (d) economic abuse which include the unreasonable deprivation of economic or financial resources which the complainant is entitled under any law or which the complainant requires out of necessity. It also includes the unreasonable disposal of household effects or other property in which the complainant has an interest.”¹⁶⁶

This definition gives due recognition to the fact that domestic violence is no longer a family matter, as it undermines the well-being of society. The DVA seeks to provide greater protection to everyone in a domestic relationship, and not only to married couples. The ground-breaking feature of the DVA is the duty it places on the members of the SAPS to inform the complainant of his or her rights, and in the language of his or her

¹⁶¹ Ibid, the preamble of the DVA.

¹⁶² See Reddi M, 'Domestic violence and abused women who kill: private defence or private vengeance? (2005) *SALJ*, 22-37.

¹⁶³ See section (xvi).

¹⁶⁴ See section (xxi).

¹⁶⁵ See section xi (a, b, and c).

¹⁶⁶ See section d (a and b) of the DVA.

choice if that is reasonably possible.¹⁶⁷ The provision for the payment of emergency relief to the complainant, which includes loss of earnings, relocation, medical and travel expenses, are other important features of the DVA.¹⁶⁸ This seeks to ensure that the legitimacy of the law will always be tested in order to determine its efficacy for social transformation, as it was highlighted in chapter one that the lack of financial resources may contribute to the lack of access to justice.

The seizure of arms and dangerous weapons in terms of section 9 of the DVA requires the criminal-justice officials to be proactive and take precautionary measures to protect not only the complainant or the respondent, but also the broader public.¹⁶⁹ The DVA stands to provide for a simple, quick and cost-effective procedure in order to obtain protection from domestic violence. The simplicity of the DVA is given effect by the launch of the guidelines for the implementation of the DVA.¹⁷⁰ The objective of the Guide is to assist and guide the magistrates in implementing the DVA in a manner that ensures both legal consistency and legal uniformity. It does not intend to limit judicial independence or discretion and should be read with the legal obligations of magistrates prescribed by the DVA itself.¹⁷¹ The importance of this guide lies in its extension of the implementation of the principles contained in various policy documents in relation to victims of crime that have been developed, such as the National Crime Prevention Strategy¹⁷², and the National Services Charter.¹⁷³ The guide is a strategic measure in ensuring the effective implementation of the DVA in order to improve service delivery within our courts, especially for women and children in abusive situations.¹⁷⁴ The central purpose of the guide is to provide a clear reading of the DVA with a more gendered perspective and a more specific identification and resolution of gendered challenges in the justice system, particularly the enforcement of the DVA.

¹⁶⁷ See section 2 of the DVA.

¹⁶⁸ See (x).

¹⁶⁹ See a further analysis by Smyth D, 'Missed opportunities: confiscation of weapons in domestic violence cases' (2004) 10 December, *SA Crime Quarterly*, at 19.

¹⁷⁰ Launch by the former Minister of Justice and Constitutional Development, Ms Bridgette Mabandla, on 20 June 2008 of the Domestic Violence Guidelines for Magistrates, hereinafter referred to as the "Guide".

¹⁷¹ See the preamble of the Guide.

¹⁷² Adopted by Cabinet in 1996.

¹⁷³ Adopted in November 2007.

¹⁷⁴ See the media report by Mahlangu P, entitled 'Justice Minister, Ms Bridgette Mabandla to launch Domestic Violence Guidelines for Magistrates', accessed at www.info.gov.za on 18 June 2008.

The obligations envisaged in both the DVA and the Guide affirms the duties and responsibilities of the law-enforcement agencies to ensure the actual translation of the formal entrenchment of the paper law into reality. Law alone cannot be translated into reality without effective tools to make it work. These obligations affirm the rights of those in abusive relationships to protection and redress through the criminal justice system.

2.6.1.2 *The Recognition of Customary Marriages Act and the balancing of customs or customary law with human rights for gender equality*

The centrality of customary law as a legitimate source of law alongside common law has overcome the ills of the past that entrenched unequal power relations between the two systems of law and men and women in South Africa. Customary law has recovered from a subordinate status where it was often brushed aside to apply common law that was seen as the general law.¹⁷⁵ As expressed by Moseneke J in *Elizabeth Gumede (Born Shange) v President of the Republic of South Africa*¹⁷⁶:

“whilst patriarchy has always been a feature of indigenous society, the written or codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable. It is so that patriarchy has worldwide prevalence, yet in our case it was nurtured by fossilised rules and codes that displayed little or no understanding of the value system that animated the customary law of marriage”.¹⁷⁷

The legitimacy of customary law, therefore, gives effect to the democratic and founding values in the Constitution that are based on human dignity, achievement of equality and the advancement of human rights and freedoms.¹⁷⁸

Despite the provisions of chapter 12 of the Constitution¹⁷⁹, section 15 of the Bill of Rights provides for the recognition of marriages concluded under any tradition or a system of

¹⁷⁵ See Rautenbach C, ‘South African common and customary law of intestate succession: a question of harmonisation, integration or abolition’ (2008), Volume 12 No 1, *Electronic Journal of Comparative Law*, at 4.

¹⁷⁶ 2009 (3) BCLR 243 (CC).

¹⁷⁷ Ibid, at para 17.

¹⁷⁸ See the founding provisions in section 1 of the Constitution.

religious, personal or family law or systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.¹⁸⁰ What is of importance is the limitation imposed on these systems not to conflict with the Bill of Rights - particularly the right to equality.

The Customary Act is an important instrument that gives equal recognition to customary and civil marriages and equal status and capacity to the spouses, and regulates the proprietary consequences of the customary marriage.¹⁸¹ The Customary Act is:

- inspired by the dignity and equality rights that the Constitution entrenches and the normative value systems it establishes.
- also necessitated by our country's international treaty obligations, which require member states to do away with all laws and practices that discriminate against women.
- On the other hand, the Customary Act gives effect to the explicit injunction of the Constitution that courts must apply customary law subject to the Constitution and legislation that deals with customary law.¹⁸²

¹⁷⁹ Section 211 of chapter 12 of the Constitution provides for the recognition of traditional leadership in South Africa and reads as follows:

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

This chapter further provides for the role of traditional leadership in section 212, which reads as follows:

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law -

- (1) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

- (2) national legislation may establish a council of traditional leaders.

¹⁸⁰ See section 15(3)(a)(i)(ii).

¹⁸¹ See the preamble of the Customary Act.

¹⁸² See Moseneke J in *Gumede* at para 21.

For a long time, civil marriages were recognised as the only form of marriage that was defined as a voluntary union of a man and a woman to the exclusion of others, while it lasts.¹⁸³ With the retention of the definition of the concept “marriage” in the Marriage Act 25 of 1961, despite it being declared invalid in the *Fourie* judgment and the resultant adoption of the Civil Union Act 17 of 2006, the Customary Act represents a bold attempt on the part of the state to place customary marriages on an equal footing with civil marriages. Maithufi *et al* acknowledge the important effect of this legislation as it changes the whole field of family law, where customary marriages are accorded the same protection by the South African legal system.¹⁸⁴

The purpose of the Customary Act is to provide for the equal status and capacity of spouses in customary marriages. Even though the author has reservations in respect of polygamous marriages, the Customary Act gives due recognition to such marriages¹⁸⁵, subject to the applicable rules of customary law and the prescripts of the Bill of Rights.¹⁸⁶ The legislation defines customary law as:

“the customs and usages traditionally observed among indigenous people of South Africa and which form part of the culture of those peoples”.¹⁸⁷

The definition of customary law is further given effect by the definition of a customary marriage as a “marriage concluded in accordance with customary law”.¹⁸⁸ The significance of this statute lies in the equal status it accords to both spouses in a customary-law marriage relationship in line with objectives envisaged in section 9 of the Bill of Rights. Section 6 of this legislation provides as follows:

¹⁸³ See also the definition in the Marriage Act 25 of 1961, despite the fact that the definition was declared invalid in *Fourie*.

¹⁸⁴ Maithufi IP and Bekker JC, ‘The Recognition of Customary Marriages Act of 1998 and its impact on family law’ (2002), Volume 35 No 2, *Comparative and International Journal of Southern Africa (CILSA)*, at 32.

¹⁸⁵ See also section 2(3) of the Act, which provides as follows: “If a person is a spouse in more than one customary marriage, all valid customary marriages entered into before the commencement of this Act are for all purposes recognised as marriages.”

¹⁸⁶ See also the recommendations of the South African Law Commission Project 90 Report entitled ‘The harmonisation of the common law and the indigenous law on customary marriages’ August 1998, at 40.

¹⁸⁷ See section 1(ii) of the Act.

¹⁸⁸ See section 1(iii) of the Act.

“a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contract and to litigate, in addition to any rights and powers that she might have at customary law”.

This section affirms the equal constitutional and legal status of both parties in a customary marriage. It also gives effect to the elimination of the minority status of women in a marriage relationship where men were given carte blanche status to make decisions on behalf of families, since they were regarded as heads of the household.¹⁸⁹ The provision repealed section 11(3)(b) of the Black Administration Act of 1927, which gave married black women the legal status of children.¹⁹⁰ In fact, the customary-law marriage itself was recognised as a union that was partially recognised and relegated to an inferior status as compared to civil marriages. The equal status of both men and women in a customary law-marriage relationship abolished such inferior status of women as Fredman¹⁹¹ highlights that a marriage was the source of women’s inequality as she argues the impact of their historic subordination as follows:

“a married woman was a perpetual legal minor: her husband had near-absolute control over her property as well as her person. She had no right to custody of their children and no right to testamentary freedom. Her husband even had the power of “domestic chastisement”. Even when this power had come to be doubted, substantial levels of violence perpetrated against wives were tacitly condoned. Nor was a married woman entitled to refuse consent to sexual intercourse with her husband. Indeed, it was not until the last decades of the twentieth century that rape in marriage was recognised as a crime”.¹⁹²

As the general purpose of this legislation is to provide for the requirements for the validity of customary marriages, the statute requires both parties to consent to the

¹⁸⁹ See Mbata L, ‘The two faces of the law’, paper accessed at www.law.wits.ac.za on 23 July 2008.

¹⁹⁰ See (note 78 and 79 in Chapter 1) of this study where it is identified that other countries such as Zimbabwe had also, as late as in 1999, institutionalised the inferior status of women as evidenced by the ruling of the Zimbabwe High Court in *Magaya v Magaya* 1999 (1) ZLR 100 SC.

¹⁹¹ Fredman S, *Discrimination law* (2002) Oxford University Press, New York.

¹⁹² *Ibid*, at 29.

marriage, and both parties must be 18 years old, or older.¹⁹³ The importance of this requirement lies in its express parental, legal-guardian or ministerial consent if either party in the envisaged customary marriage is below the age of 18. This measure may help prevent the kidnapping of under-age girls who are then forced into marriage, as found in the Lusikisiki area in the Eastern Cape, where young girls are subjected to the customary practice of “*ukuthwala*”, as highlighted in chapter one.¹⁹⁴ Despite the concerns the author has on the registration of marriages, the registration of a customary marriage is helpful as proof of the existence of such a marriage, in the case of a dispute regarding the validity of the marriage.¹⁹⁵

The defect in section 7(1) of this legislation, which provided for the continued recognition of the proprietary consequences of customary marriages that were entered into before the commencement of this statute¹⁹⁶ to the exclusion of women and that were governed by customary law was remedied by the Constitutional Court in *Gumede*.¹⁹⁷ This defect had been further entrenched in subsection 2, which read as follows:

“a customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are excluded by the spouses in an ante-nuptial contract which regulates the matrimonial property system of their marriage”.

The exclusion of those who entered into a customary marriage before the adoption of the statute defeated the purpose of section 6 of this legislation, and of the general equality clause in the Constitution. It differentiated unfairly between people who had entered into a customary marriage before the commencement of this legislation and those who had entered into such marriage after that. The court in *Gumede* held as follows:

¹⁹³ See section 3.

¹⁹⁴ See note 71 on page 18 of chapter 1.

¹⁹⁵ See section 4.

¹⁹⁶ The Customary Act came into operation on 15 November 2000.

¹⁹⁷ See *Gumede* (note 175 above).

“the proprietary regime established by the Act is discriminatory against African women only who are subjected by the law, by reason of race and gender to such consequences”.¹⁹⁸

The court further substantiated its finding by noting that this section did not broaden the net of inclusion in remedying the discrimination against African women, as it was the various discriminatory manifestations of customary law that created the prejudice.¹⁹⁹ Without explicitly analysing each of the provisions of the Customary, Andrews affirmed that the passage of this legislation signified “another nail in the coffin” of “legal dualism” that characterised colonial and apartheid South Africa. It also gives effect to the constitutional vision of equality for all the legal systems, including customary law.²⁰⁰ The contention was affirmed by Moseneke J in *Gumede* that:

“the [Customary] Act was assented to and took effect well within our new constitutional dispensation. It represents a belated but welcome and ambitious legislative effort to remedy the historical humiliation and exclusion meted out to spouses in marriages which were entered into in accordance with the law and culture of the indigenous African people of this country. *Past courts and legislation accorded marriages under indigenous law no more than a scant recognition under the lowly rubric of customary ‘unions’*, (author’s emphasis).²⁰¹

2.6.1.3 *The Maintenance Act and the advancement of the right gender equality*

The adoption of the Maintenance Act²⁰² was another milestone in the struggle for the advancement of women and children in ensuring the protection and promotion of their socio-well-being. The preamble of the statute affirms the intention of the state to ensure an effective, proper, fair and equitable maintenance system in South Africa. The adoption of the legislation was the result of the recognition of South Africa’s shortfall of

¹⁹⁸ See *Gumede*, at para 11.

¹⁹⁹ See *Gumede*, at para 16.

²⁰⁰ Andrews PE, ‘Big love: the recognition of customary marriages in South Africa’ (2007), Volume 64, *Washington and Lee Law Review*, at 1483. See also Bekker J, Boonzaaier C, ‘How equal is equal? a legal-anthropological note on the status of African women in South Africa’ (2007), *De Jure*, at 278.

²⁰¹ See *Gumede* at para 16.

²⁰² The Act came into operation on 26 November 1998.

its international obligations towards the recovery of maintenance in order to fulfil the various and numerous socio-economic rights in the Bill of Rights.²⁰³

What is of importance in this legislation is the emphasis it puts on the rights of the child to maintenance as envisaged in the CRC.²⁰⁴ South Africa's subscription to the precepts of the international community, particularly with the ratification of the CRC without any reservations, which was incorporated into the Maintenance Act:

- ensured the obligations of the state to adopt proactive measures in order to ensure the fulfilment of the best interest of the child, and also
- affirmed the basic principle that both parents have a common responsibility towards the social well-being of the child, and that they should contribute to the maintenance of their child according to their means.²⁰⁵

The definition of "child" in the CRC as any human being below the age of 18, unless a particular nation's laws set an earlier age for attaining the majority status²⁰⁶, is in line with the South African Constitution that also defines a child as a person under the age of 18 years.²⁰⁷ The Maintenance Act seeks to bridge the gap in respect of socio-economic imbalances, which leave women more vulnerable, coupled with the responsibility of looking after the children. It reinforces the provisions of section 27(1)(c) of the Constitution, which provides as follows:

"Everyone has the right to have access to ... social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

Children are further protected in terms of section 28(1)(c), which provides as follows:

²⁰³ See the preamble.

²⁰⁴ See the preamble of the Maintenance Act on South Africa's commitment in giving due recognition to the rights of children, which is also evidenced by its signing of the World Declaration on the Survival, Protection and Development of Children, agreed to in New York on 30 September 1990 and its accession of the CRC on 16 June 1995.

²⁰⁵ See also article 18 of the CRC.

²⁰⁶ See article 1 of the CRC.

²⁰⁷ See section 28(1)(g)(i) of the Constitution.

“Every child has the right ... to basic nutrition, shelter, basic health care services and social services:”

Section 28(1)(2) endorses these provisions by entrenching the following:

“A child’s best interests are of paramount importance in every matter concerning the child.”

It is worth noting the distinct phrasing of these rights in the Constitution, as they are not subjected to an internal limitation, as is the case with the general socio-economic clause in section 27(2), which provides as follows:

“The state must take reasonable legislative and other measures, *within its available resources*, to achieve the progressive realisation of each of these rights.” (the author’s emphasis).²⁰⁸

The Maintenance Act places emphasis on the primary responsibility of the parents to support and maintain their children. Section 15(1) provides as follows:

“without derogating from the law relating to the liability of persons to support children who are unable to support themselves, a maintenance order for the maintenance of a child is directed at the *enforcement of the common law duty of the child’s parents to support that child*, as the duty in question exists at the time of the issue of the maintenance order and is expected to continue”, (author’s emphasis).

Section 15(3)(a) further says that the maintenance court must take into account the following consideration before an order is made:

- (1) that the duty of supporting a child is an obligation that the parents have incurred jointly

²⁰⁸ See also section 27(1), which provides as follows: “Everyone has the right to have access to -
(a) health care services, including reproductive health care;”

- (2) that the parents' respective shares of such obligation are apportioned between them according to their respective means, and
- (3) that the duty exists, irrespective of whether the child is born in or out of wedlock or is born of a first or subsequent marriage

Section 15 affirms the primary responsibility that requires the state to develop the legislative framework, as done by the adoption of the Maintenance Act²⁰⁹, to enhance and enforce the promotion of the rights of the child. The adoption of this legislation indirectly or otherwise improves the socio-economic status of women and relieves them of the socio-political and cultural challenges in ensuring the well-being of the children as in most cases, they are resident parents.

Again, without giving a detailed account of the provisions of the Maintenance Act, the enforcement of maintenance claims is another important aspect of this statute. Chapter 3 of the Maintenance Act provides for the functioning and powers of the maintenance officers in the enforcement of maintenance claims. Section 6 requires the maintenance officer to take steps and investigate a complaint and after that institute an enquiry.²¹⁰ The investigation of the complaint includes obtaining statements under oath from persons with information regarding the complainant, investigating the identity or whereabouts of the alleged defaulter and any other relevant information for the purposes of the maintenance enquiry.²¹¹ The maintenance officer may subpoena witnesses and request maintenance investigators to assist him or her in this regard.²¹²

What is of significance is the enforcement of maintenance orders after the enquiry having been finalised. The legislation makes provision for civil and criminal remedies against defaulters. Chapter 5 makes provision for maintenance orders to be enforced by civil execution,²¹³ including execution against property,²¹⁴ the attachment of

²⁰⁹ See the preamble on the reference to article 27 of the CRC, which requires the states to recognise the right of every child to a standard of living that is adequate for the child's physical ... to take all appropriate measures in order to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child.

²¹⁰ See section 6(1)(a)(b)(2) of the Act.

²¹¹ See section 7 of the Act.

²¹² See section 9 of the Act.

²¹³ See section 26 of the Act

emoluments,²¹⁵ and debts.²¹⁶ Failure to comply with a court order is also a criminal offence for which the defaulter can be ordered to pay a fine, or can be sent to prison.²¹⁷

In short, the Maintenance Act was adopted to:

- improve the maintenance system through legislation, administration and other reforms.
- ensure that all persons involved in the delivery of maintenance services attend professional-development programmes to improve their skills, diversity, awareness, attitudes and commitment to customer care.
- develop an integrated policy framework of maintenance.
- provide efficient and effective service delivery.²¹⁸

The entrenchment of socio-economic rights, including maintenance for both women and children, in the Constitution has forced the state to take positive action to realise these rights, with the necessary mechanisms to enforce the rights, which will be of direct benefit for the promotion of the right to gender equality.

2.6.1.4 *The Equality Act and the express prohibition of unfair discrimination and inequalities*

The Equality Act serves as a platform and a basic minimum standard for the prevention of discrimination and inequalities. It serves as a primary measure and supersedes the DVA, the Customary Act and the Maintenance Act in furthering the social-change objectives entrenched in the Constitution. It is meant to make the prohibition of discrimination more effective.²¹⁹ Gutto explains that equality and non-discrimination law

²¹⁴ See section 27 of the Act.

²¹⁵ See section 28 of the Act.

²¹⁶ See section 30 of the Act.

²¹⁷ See chapter 6 of the Act.

²¹⁸ See Naidoo SD, Mokolobane K, 'Coming to court for child support – the policy, the practice and reality: a case study of black women in the maintenance system at the Johannesburg Family Court' (2004), Volume 17 No 2, *Criminologica*, at 143, quoted in Khunou G, 'Maintenance and changing masculinities as sources of gender conflict in contemporary Johannesburg', a thesis submitted at the University of the Witwatersrand in fulfillment of the requirements for the degree of Doctor of Philosophy, 2006.

²¹⁹ See Vogt (note 143 above) at 197.

is centred on the constitutional notions of substantive equality in all fields of life and relationships. He contends that the Equality Act was adopted on a broad understanding of all the elements of section 9 of the Constitution as well as other elements from the Bill of Rights that have a direct bearing on equality and non-discrimination as he defines it as a “social legislation” that is:

“directed at normalising the abnormalities of the past and extending the boundaries of the policies, law and practices in line with the national agenda of building a progressive and caring society where social inequalities are reduced to a minimum and democratic values permeate all social relations”.²²⁰

Kok substantiate Guttos’ contention by pointing out that while the Equality Act seeks to ensure the achievement of equality, it is primarily aimed at transforming the South African society as it attempts to do one or both of the following:

- create a more egalitarian society where socio-political disparities between different communities are eradicated or at least somewhat levelled.
- change the hearts and minds of the broader South African community so that racism, sexism, homophobia, xenophobia and the like become anathema.²²¹

In giving effect to the promotion of equality and the objectives of the Equality Act, “discrimination” is defined as any act or omission, including a policy, rule, practice, condition or situation, that directly or indirectly:

- (a) imposes burdens, obligations or disadvantages on, or
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.

The Equality Act also gives effect to CERD and CEDAW,²²² owing to the overlap of race and gender, as noted above. The ratification of, among others, these two instruments

²²⁰ Gutto S, *Equality and non-discrimination in South Africa: the political economy of law and law making* (2001) New Africa Books, Claremont, Cape Town, at 7 quoted in Kok (note 153 above).

²²¹ See Kok (note 153 above) at 124.

²²² See the preamble of the Act.

was seen, nationally and internationally, as a progressive move in the elimination of inequalities and discrimination against women. In essence, this ratification meant South Africa's:

- incorporation of the principle of "equality" for people of all races, as had been the case with the adoption of the Equality Act.
- furthering the affirmation of the role of the Equality Courts and other already established public institutions such as the SAHRC to ensure the effective promotion of racial equality among people of all races.²²³
- ensuring the effective elimination of all "overt" acts of discrimination against people of all races.

The intersection of gender and race is manifested in the Equality Act and it acknowledges that the two grounds of discrimination continue to be the basis for the most pervasive and entrenched forms of discrimination. Section 6 of the statute provides as follows:

"neither the state nor any person may unfairly discriminate against any person".

But section 7 expressly and firmly prohibits unfair discrimination on the basis of race and identifies instances that are subject to prohibitions.²²⁴ This is further endorsed in section

²²³ This also gives effect to section 34 of the Constitution, which entitles anyone who has a dispute that can be resolved by application of the law to have it decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

²²⁴ This section provides that no person may unfairly discriminate against any person on the ground of race, including:

- (a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of any person, including incitement to, or participation in, any form of racial violence;
- (b) the engagement in any activity which is intended to promote or has the effect of promoting, exclusivity, based on race;
- (c) the exclusion of persons of a particular race group under any rule or practice that appears to be legitimate but which is actually aimed at maintaining exclusive control by a particular race group;
- (d) the provision or continued provision of inferior services to any racial group, compared to those of another racial group; and

8, which provides that no person may unfairly discriminate against any person on the grounds of gender, including:

- (a) gender-based violence;
- (b) female genital mutilation;
- (c) the system of preventing women from inheriting family property;
- (d) any practice, including traditional, customary or religious practices, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
- (e) any policy or conduct that unfairly limits access of women to land rights, finance and other resources
- (f) discrimination on the grounds of pregnancy;
- (g) limiting women's access to social services or benefits such as health, education and social security;
- (h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons;
- (i) systemic inequality of access to opportunities by women as a result of the sexual division of labour.²²⁵

The prohibition of gender discrimination is extended by the prohibition in respect of any other ground where discrimination on that other ground:

- (i) causes or perpetuates systemic disadvantage.
- (ii) undermines human dignity.

(e) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons”.

²²⁵ See Coram J in *Manong v Eastern Cape Department of Roads and Transport* (369/08) [2009] ZASCA 50. He affirmed that it can be drawn from [this provision] that the legislature intended to promote the restructuring and transformation of our society and its institutions, away from the deeply embedded systematic inequalities and unfair discrimination that still prevail and to affect practices and attitudes that undermine the best aspirations of our constitutional democracy, at para 52.

- (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).²²⁶

The Equality Act further affirms the role of the SAHRC and CGE in the consolidation of the struggles for the achievement of equality. It requires the SAHRC to request equality plans from state organs on the measures they have taken towards the promotion of equality. The role of the SAHRC is envisaged in section 25(2), which reads as follows:

“South African Human Rights Commission and other relevant constitutional institutions may, in addition to any other obligation, in terms of the Constitution or any law, request any other component falling within the definition of the state or any other person to supply information on any measure relating to the achievement of equality including, where appropriate, on legislative and executive action and compliance with legislation, codes of practice and programmes”.²²⁷

The obligation imposed in terms of section 25(2) cannot be limited to the SAHRC requesting equality plans on the promotion of equality from state organs.²²⁸ The equality plans received must be analysed and evaluated in terms of the SAHRC's duty to monitor and assess the extent to which inequalities and discrimination still persist. In the affirmative case, after having carefully considered the information received and verified what has been put on paper, the SAHRC reports to Parliament under section 28(2) on the extent of realisation of substantive equality. Section 28(2) reads as follows:

²²⁶ See (xxi)(a) and (b) of the Act.

²²⁷ The organs of state referred to in this section are defined in section 239 of the Constitution as:

- (1) any department of state or administration in the national, provincial or local sphere of government; or
- (2) any other functionary or institution -

- (1) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
- (2) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;”

²²⁸ Section 25(5)(a) requires all the ministers to submit these plans to the SAHRC within two years after the commencement of the Act.

“the South African Human Rights Commission must, in its report, referred to in section 15 of the Human Rights Act No 54 of 1994, include an assessment on the extent to which unfair discrimination on the grounds of race, gender and disability persists in the Republic, the effects thereof and recommendations on how best to address the problems”.

The Equality Act further places a number of obligations on the SAHRC - such as, but not limited to, the following:

- assisting complainants in instituting proceedings in an Equality Court, particularly complainants who are disadvantaged.²²⁹
- conducting investigations into cases and making recommendations as directed by the court regarding the persistent contravention of the Equality Act or cases of unfair discrimination, hate speech or harassment referred to them by an equality court.²³⁰
- requesting from the Departments, in the prescribed manner, regular reports regarding the number of cases and nature and outcome thereof”.²³¹

The mandate imposed on the SAHRC as envisaged in these provisions broadens the scope of checks and balances in the promotion of human rights. The establishment of the Commission for Gender Equality²³² in terms of section 181(1)(d) of the Constitution also enhances the greater promotion and protection of gender equality. The functions of CGE are clearly spelt out in section 187 of the Constitution, which provides as follows:

- “(1) the Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality;
- (2) the Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality;

²²⁹ Section 25(3)(a).

²³⁰ Section 25(3)(b).

²³¹ Section 25(3)(c).

²³² Hereinafter referred to as “CGE”.

- (3) the Commission for Gender Equality has the additional powers and functions prescribed by national legislation”.

The functioning of CGE and the obligations of the SAHRC in the Equality Act give effect to the establishment of the SAHRC in terms of section 181(1)(b), which is required to:

- (a) promote respect for human rights
- (b) promote the protection, development and attainment of human rights
- (c) monitor and assess the observances of human rights in the Republic.²³³

The establishment of, and the obligations imposed on, these bodies constitute a strategic partnership with the state, as it cannot be left solely to the government to adopt laws, and also to identify gaps, by itself in the implementation of its laws. The emphasis on these bodies, to which De Vos refers as “soft protection”²³⁴, recognises the fact that it is not exclusively through the courts that the right to equality is to be realised and achieved. The introduction of this additional “soft mechanism” seeks to limit the burden on the courts of the floods of cases that may at least be able to have been settled out of court through interventions that they may take.

However, the mandate of these bodies is intertwined, interrelated and interdependent with establishment of the Equality Review Committee in fulfilling the same purpose.²³⁵ All these institutions seek to ensure the efficient enforcement mechanisms that are required to advance the struggles for the realisation of gender equality. The essence of the mandate of these bodies is to engage in a process that seeks to establish whether there is progress or not, in relation to the constitutional obligations imposed on the state to adopt positive measures in order to advance not only gender equality, but also the realisation of human rights for all.

This ensures that the principles of checks and balances are adhered to, even though the state professes commitment to the promotion of the right to equality. In fulfilling this role,

²³³ See section 184(1).

²³⁴ See section 172(1)(b) and also De Vos, P, “Pious wishes or directly enforceable human rights? Social and economic rights in South Africa’s 1996 Constitution” (1997) 13 *SAJHR*, at 67.

²³⁵ Established in terms of section 32 of the Act to ensure that the Equality Act is effectively implemented.

these bodies have to ensure that the state is able to give a detailed account of the extent to which it has fulfilled the right to equality. The principal value of this undertaking is to enable the people to determine to what extent the state has, or has not, performed, as well as how it is likely to perform in the future. In the final analysis they have to ensure that the developed legislative framework bears fruit for those in favour of whom such special measures were developed.

The Equality Courts²³⁶ constitute another important tool as an enforcement mechanism in redressing the decades of discrimination and inequalities. The establishment of these courts was endorsed by Coram J in *Manong*²³⁷ as a:

“a *special animal* that could be described as a *special purpose vehicle* that was designed and structured to ensure speedy access to judicial redress and to enable the most disadvantaged individuals or communities to walk off the street, as it were, into the portals of the Equality Court to seek redress against unfair discrimination, through less formal procedures”, (author’s emphasis).²³⁸

These courts are located within the ordinary magistrates’ courts and are structured in a manner that renders them user-friendly and less formal. They are specifically empowered to apply the values and principles entrenched in the new equality laws in order to address the inequalities and discrimination.²³⁹ The important aspect of the functioning of these courts is their social change approach for the promotion of the right to equality. The court’s decision, to direct individuals to the most appropriate advice and support centres becomes a pillar in undoing a decade of social orientation and stereotyping.²⁴⁰ This is the most significant role of these courts in adopting therapeutic

²³⁶ See chapter 4 of the Act.

²³⁷ *Manong* (note 224 above).

²³⁸ Ibid at paras 53-57. Coram J further characterised the Equality Courts as the added tool to promote the transformation of our society in realisation of our best aspirations. They are the separate and distinct courts with powers specified in its empowering statute, at para 62.

²³⁹ Ntlama N, ‘Equality: a tool to promote social change for gender equality’, a presentation at the Conference of the Law Society of the Northern Provinces entitled “The Improvement of the Quality of Life, Status, Justice and Constitutional Development of Women” held at the South African Reserve Bank Conference Centre, Pretoria, on 02 August 2006.

²⁴⁰ See Bohler-Muller N, ‘The promise of Equality Courts’ (2006), 22 *SAJHR*, at 380. See also Van der Walt A and Kituri P, ‘The Equality Courts’ view on affirmative action and unfair discrimination: *Du Preez v The Minister of Justice and Constitutional Development* 2006 4 SA 592 (EqC) (2006), *Obiter*, at 674.

perspectives in order to align adjudication with punishment objectives as they seek to take into account the interests of both parties in remedying the causes of the behaviour that resulted in a dispute.

The significance of the Equality Act in undoing the decades of discrimination and prejudice in order to fulfil the process of eliminating and correcting the historic imbalances remains a key to the achievement of equality in South Africa.

2.7 Legal reform and gender equality?

Above, it was emphasised that the examination of the existing measures for the realisation of the right to gender equality in this chapter is not meant to determine the extent to which this legal framework has been translated into reality. The discussion serves as a tool that provides and lays the foundation for the achievement of equality. It was also noted that the international and regional community have taken great strides in giving recognition to the equal worth of both women and men. As noted, the mere existence of the legislative framework that regulates the nature of the right, administrative matters, legitimate limitations and enforcement mechanisms does not mean that the right to equality will be easily fulfilled in the manner in which it is envisaged.²⁴¹

The evolution of the concept “equality” within the international and regional community has provided great opportunities for South Africa, despite its past, to progressively adopt legislation that is aimed at ensuring the integration of women into the socio-political and cultural development. What is of essence is the affirmation of equality as a constitutional right and as a value that seeks to eliminate all forms of discrimination through special and legal measures, as envisaged in the Equality Act to ensure their effective implementation.

But all this effort may fail to become reality if women are unaware of how to enforce their rights. In chapter one it was noted that the rural and urban divide, which is also affected

²⁴¹ See Couso A, ‘The changing role of law and courts in Latin America: from an obstacle to social change to a tool of social equity’ at 61-79 in Gargarella R, Domingo P and Roux T (eds), *Courts and social transformation in new democracies: an institutional voice for the poor?* (2006) Ashgate Publishers, England.

by low levels of awareness, harsh socio-political and cultural imbalances and information relating to the enforcement of the right to gender equality, is one of the factors that affect the significance of the law in bringing about social change. The constitutional recognition of the right to access to information in terms of section 32 serves as a central pillar in nurturing South Africa's democracy.²⁴² Section 32 of the Constitution reads as follows:

- (1) Everyone has the right of access to -
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The Promotion of Access to Information Act 2 of 2000 seeks to provide a coherent legislative framework for the rights of access to information held by both private and public bodies. Access to information enhances the right of access to justice, as the awareness becomes a tool of empowerment for people to demand accountability for good public service.²⁴³ Awareness is also an important instrument towards the promotion of the right to gender equality that will contribute directly to the advancement of social change where people will be able to uplift themselves from poverty and disempowerment. Basically, access to information provides an opportunity for both men and women to obtain information which, Arko-Cobbah refers to as "real information" which is useful, practical and capable of helping everyone to make informed opinion on an issue relating to the enforcement of the right to gender equality.²⁴⁴

The proactive publication of information can also promote the constitutional right to just administrative action, in line with the requisites of section 33 of the Constitution, which provides as follows:

²⁴² See Arko-Cobbah A, 'The Right of Access to Information: opportunities and challenges for civil society and good governance in South Africa' (2008) Volume 34, *IFLA Journal*, at 180-191.

²⁴³ See Govender K, 'Social and economic rights in the Western Cape' (2000), *HRC Quarterly Review*, at 6 quoted in Ntlama N, 'The effectiveness of the Promotion of Access to Information Act 2 of 2000 for the protection of socio-economic rights' (2003), Volume 14 No 2, *Stellenbosch Law Review*, at 273.

²⁴⁴ See Arko-Cobbah (note 242 above) at 181.

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must -
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.”

Burns *et al* contend that the implication of this provision in relation to administrative law means that:

- the right to just administrative action is guaranteed to each and every person as a fundamental right.
- all administrators have a duty to comply with all the requirements for valid administrative action when taking decisions or performing their functions as a requirement of administrative legality.
- just administrative action is ensured by the promotion of administrative openness and accountability via the requirement that written reasons for administrative action must be given by administrative decision-makers.
- judicial review of administrative action is retrospective, whereas administrative justice or just administrative action is prospective. This means that the principles of administrative justice or legality must be applied at the time when the action is performed or discretion exercised.²⁴⁵

To give effect to this constitutional disposition, the Promotion of Administrative Justice Act 3 of 2000 was passed to regulate the conduct of public administration and in particular to ensure that where action taken by the administration affects or threatens

²⁴⁵ Burns Y & Beukes M, *Administrative Law under the 1996 Constitution*, (2006) 3rd Lexis Lexis, Durban.

individuals, the procedures followed should comply with the constitutional standards of administrative justice.²⁴⁶

Both the right of access to information and just administrative action seek to fulfil important obligations imposed on the state by coupling the enforcement of rights with other initiatives such as advocacy, training, education and information.

2.8 Summary

The framework discussed in this chapter for the realisation of the right to gender equality is commendable but does not guarantee an automatic translation of the right to equality into substantive reality. A number of factors such as awareness, access to courts and the ability to enforce the rights, freedom of information and other related factors are designed to facilitate and promote the realisation of the constitutional values and imperatives on gender equality. The past apartheid system not only entrenched the social and legal subordination of black people but also ensured that the state machinery and even the courts were used as tools to uphold the repressive and oppressive laws.²⁴⁷ To overcome this legacy, further transformation and development strategies will have to be defined.

Gender discrimination remains a principal stumbling block for the realisation of the right to equality owing to the structural and systematic disadvantages suffered by women. The right to equality without proper enforcement mechanisms will remain nothing more than a “hollow slogan”²⁴⁸ for South African women. The enjoyment of the right to equality starts with the basic knowledge of the existence of the concept of these rights. It is only when people are aware of their rights that the significance of the law will be able to be

²⁴⁶ See Plasket C, ‘Administrative action: the Constitution and the Promotion of Administrative Justice Act 3 of 2000’ unpublished paper presented at the Legal Resources Centre Seminar on the Promotion of Administrative Justice Act 3 of 2000, Johannesburg, 23 October 2001.

²⁴⁷ See Arko-Cobbah (note 242 above), on the evolution of oppressive laws during the apartheid era, regulating access to information in South Africa, at 182-183.

²⁴⁸ Extracted from Sharoni S, ‘The myth of gender equality and the limits of women’s political dissent in Israel, Middle East Report No 207 entitled: Who paid the price? 50 years of Israel, (1998) at 24, Published by the Middle East Research and Information Project Stable, accessed at www.jstor.org/stable on 25 July 2008.

tested as to whether it achieves its objectives. In this regard, education is essential in the exercise of these rights, as shown by the struggle experienced by Ms Carmichele.²⁴⁹

²⁴⁹ See *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC).

CHAPTER THREE

THE JUDICIARY: EQUALITY AND THE SUBSTANTIVE APPROACH FOR THE REALISATION OF THE RIGHT TO GENDER EQUALITY

3.1 Introduction

The affirmation of the right to equality in the South African Constitution, regional and international instruments in the quest for the elimination of all forms of discrimination and inequalities has been emphasised in chapter two. It has been further emphasised that the affirmation of the right to equality attaches great importance to the protection of human rights including women's rights for the promotion of the right to gender equality.

The importance and centrality of the right to equality is not only reflected in the Constitution and in the adopted legislation discussed in chapter two, but also from the jurisprudence that emanates from the Constitutional Court¹ in South Africa. The court was crafted in the shadow of a discredited legal order and judiciary. It was designed to reflect and promote a post-apartheid vision of South Africa founded on the values of dignity, equality, non-racialism, non-sexism, supremacy of the Constitution and the rule of law.²

Gutto³ acknowledges the role and the strides taken by the court in upholding the values and principles envisaged in the South African Constitution when he contends that:

“the historic and revolutionary role that played in South Africa's political and legal history necessitated the establishment of the Court. The dawn of democracy presented an opportunity for the Court to restore some legitimacy and confidence through its functioning within the judiciary. This has further enhanced the

¹ See section 167 of the Constitution on the composition, role and powers of the Court.

² See Dugard J, 'Court of first instance? Towards a pro-poor jurisdiction for the South African Constitutional Court' (2006) Volume 22, *SAJHR* at 262.

³ Gutto SB, 'The challenges facing the justice system *vis-à-vis* some constitutional imperatives', Centre for Applied Legal Studies (CALs), Wits, 10 October 2000, (unpublished lecture).

development of sound foundations for constitutional and human rights jurisprudence since the first democratic Constitution in 1994”.⁴

The court has itself acknowledged its role in the development of the jurisprudence on equality around the concept of unfair discrimination in *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁵ as it held that:

- it engages in a structured discourse centred on respect for human rights and non-discrimination.
- it reduces the danger of over-intrusive judicial intervention in matters of broad social policy, while emphasising the court’s special responsibility for protecting fundamental rights in an affirmative manner.
- it also diminishes the possibility of the court being inundated by unmeritorious claims, and best enables the court to focus on its special vocation, to use the techniques for which it has a special aptitude, and to defend the interests for which it has a particular responsibility, and finally.
- it places the court’s jurisprudence in the context of evolving human rights concepts throughout the world, and of our country’s own special history.⁶

The jurisprudence of the court transformed the formalistic interpretation of the right to equality in favour of a more substantive approach for the promotion of the right to gender equality. It has signalled the intention of the court to move beyond the narrow confines of the right to equality to its broader meaning for the substantive development of the principles of non-discrimination. The development of the jurisprudence on equality requires the courts to examine the socio-political and cultural conditions of groups or individuals in deciding the cases of discrimination placed before them.⁷ The emphasis put on the role of the courts has ushered a new process which has endorsed the

⁴ Ibid. See also Roux T, ‘The constitutional framework and deepening democracy in South Africa’ (2005) Volume 18 No 6, *Policy, Issues & Actors* at 1-17. He affirms that the court has become an authoritative voice in democratic politics, and has undoubtedly contributed to the deepening of the democracy, at 17.

⁵ 1998 (1) BCLR 1517.

⁶ *National Coalition* at para 123.

⁷ See Swart M, ‘Left out in the cold? crafting constitutional remedies for the poorest of the poor’ (2005) Volume 21 *SAJHR* at 215-240.

recognition that the right to equality should not be limited to the formal entrenchment of the right to equality in these instruments.

Baines *et al* observe that the idea of substantive equality does not seek to classify women differently from men. It is rather a strategy that seeks to identify patterns of subordination and suppression of women on the understanding that gender discrimination originates from a long history of women's inequality. They argue that the difficulty with "formal equality" is not that it is based on erroneous notions of similarity between men and women, but that it does not go far enough to eliminate the inequalities⁸ which still manifest themselves despite the legislative and judicial progress made in South Africa.

The substantive conception to the realisation of the right to equality is based on a premise that "formal equality" alone will not bring about concrete results in the elimination of discrimination and prejudice against women.⁹ The rigidity of the formal conception of the right to equality is further characterised by Partington *et al* as a "thick-skinned approach" that ignores the reality of deep-rooted structural inequality.¹⁰ They contend that equality as a value and as a right lies at the heart of the South African Constitution and substantiate their argument by holding that:

"substantive equality is concerned with equality of outcome and as such it necessitates a proactive approach. It requires an investigation into the social conditions of groups and individuals in order to ensure equality is achieved, and not merely ultered down corridors of convenience".¹¹

The court has endorsed that the idea of substantive equality that underlies the Constitution as well as international instruments and other related adopted legislations

⁸ Baines B and Rubio-Marion R, *The gender of constitutional jurisprudence*, (2004) Cambridge University Press, Cambridge, England at 356.

⁹ See Bonthuys E, 'Institutional openness and resistance to feminist arguments: the example of the South African Constitutional Court' (2008) Volume 20 No 1, *Canadian Journal of Women and the Law* at 1.

¹⁰ See Partington J and Van der Walt J, 'The development of defences of unfair discrimination' (PART 1) (2005) *Obiter* 357-370.

¹¹ *Ibid* at 359.

requires an approach that focuses on the impact of the alleged conduct or law, on the vulnerable group. Gloppen classifies the role of the court in this regard as follows:

- the court is concerned with the ability of the marginalised groups to effectively voice their claims or have them voiced on their behalf;
- the court is willing to respond to the concerns of the marginalised group;
- the ability of the judge to give legal effect to social and other rights in ways that significantly affect the situation of the marginalised group; and
- the extent to which the judgments are authoritative, properly implemented and reflected on them in policy and legislation.¹²

In giving effect to the substantive approach to the interpretation of the right to equality, Albertyn and Goldblatt argue that a legal commitment to substantive equality requires a retreat from legal formalism. They opine that the assessment of the context and impact of the alleged unfair discrimination should be guided by the purpose of the right and its underlying values as it is not the fact of difference that is the problem, but rather the harm that may flow from it.¹³

The evolving jurisprudence of the Constitutional Court affirms South Africa's break from its discriminatory past to a new reality that is based on the principles and values of equality and non-discrimination. It is this shift away from the dispensation of justice where the judicial system was instrumentalised and used as a tool to enforce repressive laws¹⁴, which were particularly prejudicial against women.¹⁵ It affirms the centrality of the right to equality within the substantive conception of the development of the principles of

¹² Gloppen S, 'Courts and social transformation: an analytical framework' at 36 in Gargarella R, Domingo P, Roux T (eds), *Courts and social transformation in new democracies: an institutional voice for the poor?* (2006) Ashgate Publishers, England.

¹³ Albertyn C and Goldblatt B, 'Equality' in Woolman S, Roux T and Bishop M, *Constitutional Law* (2008) Volume 3, 35-7.

¹⁴ See Chaskalson A, 'The role of the judiciary in translating human rights law into practice' unpublished paper presented at the 8th Commonwealth Secretariat Judicial Colloquium entitled: 'The domestic application of international human rights norms', Bangalore, India, 27 – 30 December 1998.

¹⁵ The effects of the historic prejudice against women still manifest themselves as demonstrated by the case of *Beverly Whitehead v Woolworths (Pty) Ltd* 1999. Ms Whitehead was discriminated against on the basis of her pregnancy after she was offered a full-time employment the offer was withdrawn and instead offered a fixed five months contract. This case raised the residual unfair labour practice under Schedule 7 of the Labour Relations Act No 66 of 1995.

non-discrimination for gender equality as Kriegler J held in *President of the Republic of South Africa v Hugo*¹⁶:

“in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution’s focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred”.¹⁷

The dawn of democracy and the adoption of the Constitution have provided an opportune moment for the courts to restate their judicial authority. They have been provided with constitutional powers to enquire into laws or conducts which invade and transgress fundamental rights of each individual in our society without justification.¹⁸ The justification of any law or conduct which is alleged to undermine the principles of non-discrimination requires an approach where the promotion and enforcement of the right to equality at the courts will be used as a tool and a strategy in order to eliminate the real disadvantage and prejudice suffered by the vulnerable group, including women.

Against this background, this chapter seeks to examine the approach of the South African Constitutional Court in the interpretation and the enforcement of the right to equality. The examination is done by providing an overview of the role of the international human rights law in the interpretation of the equality clause in the South African Constitution. To achieve this purpose, the chapter:

- determines the potential of the substantive approach of the right to equality to advance the struggles for the realisation of gender equality;
- assesses the impact and the extent to which the Constitutional Court has utilised the international human rights instruments in the promotion of the

¹⁶ 1997 (4) SA 1 CC.

¹⁷ Ibid at para 74.

¹⁸ See Mahomed I, ‘The impact of a Bill of Rights on law and practice in South Africa’, June 1993 *De Rebus* at 460 quoted in Plasket C, ‘Representative standing in South African Law’, unpublished paper, Rhodes University.

right to equality in order to ensure the guaranteed right to gender equality;
and

- how the jurisprudence can guide the analyse of future issues of discrimination and inequality in the enforcement of gender equality claims.

The proposition is not to provide an exhaustive engagement with the jurisprudence from the court but rather seeks to examine the substantive conception of the right to equality that underlies the court's interpretation of the equality clause. Effectively, the purpose is to establish the significance and efficacy of the substantive approach for the realisation of the right to gender equality in order to improve the lives of women in South Africa. This undertaking is centred on the strategic position of the courts in the socio-political and cultural ties between private individuals, the state and civil society or *vice-versa*. The courts are the central institutions, particularly the Constitutional Court, considering South Africa's history of inequalities, in shaping the contestation between the right to equality litigants in the enforcement of their claims. The vesting of judicial authority in the courts¹⁹ allows them to analyse and understand the nature and the extent of the impact of the discrimination and prejudice against women for the advancement of the right to gender equality.²⁰

It is important to note that the "right to equality" and "gender equality" will be used interchangeable as general principles and values of equality, so as to show their interrelationship and the manner in which they influence each other in the promotion of substantive equality for the advancement of social change.

¹⁹ See section 165 of the Constitution.

²⁰ See Albertyn and Goldblatt (note 13 above) as they argue that the legal standing of substantive equality proceeds from the recognition that inequality not only emerges from irrational legal distinctions, but is often more deeply rooted in social and economic cleavages between groups in society.

3.2 The importance of international human rights in the development of the domestic principles of non-discrimination

3.2.1 Theoretical framework for the application of international human rights norms and standards in the domestic sphere

The Constitution contains an express directive on the application of international human rights and international customary law in South Africa. The incorporation of international human rights has also put an obligation on the courts to consider international law as it provided a model for the interpretation of the Bill of Rights.²¹ This obligation is based on the premise that international human rights law is not self-executing but should be used to reflect a common understanding of the people of the world. In this regard, section 39(1) of the Constitution provides that:

“When interpreting the Bill of Rights, a court, tribunal or forum:

- (b) must consider international law; and
- (c) may consider foreign law.”

Section 232 provides that:

“customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act Parliament” and

Section 233 provides that:

“when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.

These provisions affirm an acknowledgement of the role of international law in the promotion of human rights including the effective promotion of the right to gender

²¹ Grant E, ‘Human rights, cultural diversity and customary law in South Africa’ (2006) Volume 50 No 1, *Journal of African Law*, 2-23 at 5.

equality at the domestic sphere. This was given effect, particularly in *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*²² as the court held that:

“international law is particularly helpful in interpreting the Bill of Rights where the Constitution uses language similar to that which has been used in international instruments as it assist in understanding the nature of duties imposed on the state”.²³

The relevance of international law at domestic level requires the courts not only to consider international law but to synthesize and give it a meaningful content in order to determine what is relevant or not for the realisation of the right to equality.²⁴ Grant argues that the peremptory terms of the provisions relating to international law provides a strong direction to courts and is clearly intended to ensure widespread exposure to and application of international law in the courts.²⁵

The significance of these provisions does not entail a mere reference to international law but section 39(1) (b) actually obliges any Court interpreting the Bill of Rights to consider international law. Although section 39(1)(b) and (c) are framed differently and in so far as (c) imposes a discretion and not necessarily an obligation to apply the norms of international law, the courts are still required to use international law as an interpretative tool not only of the Bill of Rights but of all adopted legislations including international customary law.

The provisions in section 39 and 233 endorse the various ways upon which the development of international human rights norms and standards may be used and considered as strategies for the promotion of the right to gender equality in the domestic sphere.

The non-incorporation of international norms into national law is not a barrier for the courts to use them. The courts have the discretion to use their judicial independence to

²² 2002 (6) BCLR 625 (W).

²³ Ibid at para 15.

²⁴ See *S v Makwanyane* 1995 (6) BCLR 665 at para 33, on international human rights law as a source of non-discrimination for the development of the jurisprudence on equality.

²⁵ See Grant (note 21 above) at 5-6.

use international customary law in order to guide their decision-making in the enforcement of equality claims in the domestic sphere. The normative impetus behind the development of judicial discretion in the use of international customary law can be attributed to a number of factors that must be viewed in the context of broader legal and political developments.²⁶ These factors include:

- the express constitutional and statutory acknowledgement of the relevance of international human rights in the exercise of the judicial discretion²⁷;
- the judicial consideration granted both under common law and statute within the accepted methods for utilising international norms; and
- the legitimacy of international human rights standards as a reflection of the values adopted and espoused by individual judges in carrying out their judicial functions.²⁸

These factors affirm that the exercise of a judicial discretion in the consideration of international norms is within the confines and limits of the laws of a particular jurisdiction. The exercise of the judicial discretion for the application of international customary law is of great importance as it may have an indirect impact in the interpretation and application of domestic law.²⁹ Emerton *et al* note that the courts can use both the binding instruments and non-binding jurisprudence from other jurisdictions as:

- an aid to constitutional and statutory interpretation, either generally or in order to resolve an ambiguity;
- a relevant consideration to be taken into account in the exercise of an administrative discretion by a decision-maker;
- giving rise to a legitimate expectation that the provisions of the treaty will be applied by a decision-maker unless a hearing is given to the person affected;

²⁶ Lacey W, 'Judicial discretion and human rights: expanding the role of international law in the domestic sphere', (2004) Volume 4, *Melbourne Journal of International Law*, at 34.

²⁷ See section 39(1)(c) of the Constitution.

²⁸ See Kirby M, 'Comparative Constitutionalism: an Australian perspective', unpublished paper presented at the Conference entitled: Constitutionalism in the Middle East, University of Chicago, 23-25 January 2004, quoted in Lacey (note 26 above).

²⁹ Emerton R, Adams K, Brynes A and Connors J, *International women's rights cases*, (2005) Candevis Publishers, United Kingdom at xiv. They acknowledge the considerable freedom the courts have on the sources they may draw in informing their decision-making.

- a relevant factor in the exercise of a discretion conferred by legislation on judges;
- a factor that may be taken into consideration in the development of the common law, where the common law is unclear;
- a factor that may be taken into account when identifying the demands of public policy.³⁰

In other words, the judicial discretion allows the domestic court to:

- take cognisance of the developments within the international sphere as it provides for the double protection and advancement of the principles of non-discrimination at the domestic level;
- take into account that this has the potential to facilitate the use of best practices at the domestic courts; and also
- provides an opportunity to devise strategies for a more creative and widespread approach of these norms and standards contained in international instruments at the domestic level.

Haleem affirms that the extension of international norms for their application at the domestic sphere as an opportunity and a contextual basis for the implementation of constitutional values beyond the minimum requirements of national constitutions.³¹ He further contends that the extension of international norms is informed by the following factors:

- international human rights norms are in fact part of the constitutional expression of the liberties guaranteed at national level;
- the exercise of judicial review to create an order of liberties on a higher level than the respective constitutions is now considered to be part of the judicial power;

³⁰ Ibid.

³¹ Haleem J, 'The domestic application of international human rights norms', unpublished paper presented at the Judicial Colloquium under the auspices of the Commonwealth Secretariat, London, at Bangalore, India, February 24-26 February 1998 at 4.

- the application of international norms enables the domestic courts to extend to citizens *via* state constitutions, greater protection of internationally recognised human rights;
- the emerging jurisprudence also gives effect to the fact that the citizen of a particular state is no less a citizen of all other state and that each citizen is entitled to the due process of law and the equal protection of laws from all governments; and
- this legal revolution does not inhibit the independent protective force of domestic law, for without it, the full realisation of the rights cannot be guaranteed.³²

The application of international norms at the domestic sphere falls within the requirements of the Bangalore Principles that were adopted at the Judicial Colloquium in India.³³ These principles recognise the importance of international human rights within the domestic sphere in providing guidance in respect of cases concerning human rights and freedoms including gender equality.³⁴ Article 4 of these principles provides:

“...there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where domestic law – constitutional, statutory or common law, is uncertain or incomplete.

The principles are reinforced by the adoption of the Bangalore Principles of Judicial Conduct.³⁵ The Principles of Judicial Conduct affirm the importance of international principles as sources of non-discrimination standards in the adjudication of equality claims. These principles give effect to the Vienna Declaration on Human Rights³⁶ which endorses the view that the application of international human rights in the domestic

³² Ibid.

³³ Judicial Colloquium entitled: ‘The domestic application of international human rights norms’ held in Bangalore, India, on 24 – 26 February 1998. See also Commonwealth Secretariat, ‘Human rights jurisprudence’ (1989) Volume 3 No 151, *African Journal of International and Comparative Law*, at 345.

³⁴ See preamble of the Bangalore Principles.

³⁵ The Bangalore Principles of Judicial Conduct, 2002, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002.

³⁶ Adopted at the World Conference on Human Rights in Vienna on 25 June 1993.

sphere equips the judges with comprehensive awareness of international standards that are vital to the conformity of the states with international obligations.³⁷

The objective for the domestication of international norms is the development of a principled approach in the enforcement of gender equality and the promotion of the values of non-discrimination.³⁸ The interdependence of the domestic *vis-à-vis* international human rights gives purpose to the underlying domestic objective that aims to protect and advance gender equality. Hathaway³⁹ refers to this process as the enforcement of international law by the state against itself where:

- individuals use the state's courts to enforce it through litigation;
- the courts and other institutions pressure their own government to live up to the promises it has made; and
- individuals and interests groups pressure the political branches of government to live up to international legal commitments they have made.⁴⁰

These factors are emphasised by Haleem, who argues that the use of international human rights norms is their “substantiation” within the larger process of reconciling law and equity, justice and mercy, equity and freedom.⁴¹ The substantiation of international norms is similarly expressed by Moon as the “uniqueness” of the court which considers the wide range of sources in foreign jurisdictions as sources of ideas in its constitutional analysis of the equality clause.⁴² The characterisation of the interdependence of international norms with those of the domestic sphere by Haleem and Moon emphasises the comparative experience of legal authority that the court may draw upon and rely on in the resolution of constitutional and equality disputes.⁴³

³⁷ Ibid.

³⁸ See also Kirby M, ‘Domestic application of international human rights norms’ (1999) Volume 27 No 19, *Australian Journal of Human Rights*, at 4.

³⁹ Hathaway OA, ‘*Hamdan v Rumsfeld*: domestic enforcement of international law’, (2007) *International Law Stories*, Foundation Press at 16.

⁴⁰ Ibid.

⁴¹ See Haleem (note 31 above).

⁴² Moon C, ‘Comparative constitutional analysis: should the United States Supreme Court join the dialogue?’ (2003) Volume 12, *Journal of Law and Policy* at 229.

⁴³ See Saunders C, ‘The use and misuse of comparative constitutional law’, unpublished paper delivered at a Public Lecture, Indiana University School of Law, 2005 April at 37.

The reference to international sources for purposes of constitutional adjudication requires the court to interpret the Bill of Rights in the light of the obligations that arise from international human rights.⁴⁴ The intersection of international norms with those of the domestic sphere is viewed by Thomas *et al* as a strategy that has the potential to strengthen the domestic judicial-decision making in the development of the jurisprudence on equality.⁴⁵ The strategy has the potential to develop the international jurisprudence on equality and the international extension of the promotion of the right to gender equality within the domestic sphere. The extension is of great importance for the protection of women's rights as it seeks to strengthen their constitutional status in the affirmation of both the international and domestic jurisprudence on equality.

Despite the centrality of international human rights norms in the development of domestic principles and values on equality, there are debates regarding their legitimacy in constitutional interpretation.⁴⁶ These debates relate to the nature of the relationship of states with the international community. The debate on the efficacy of international norms at the domestic sphere is highlighted by Hovell *et al*, arguing that:

- international human rights oversteps the legitimate role of the judiciary as it amounts to an amendment of the Constitution in disregard of the domestic amendment procedures; and also the fact that
- its application requires special expertise.⁴⁷

These concerns do not carry much weight for South Africa. The significance of application of international norms for the enforcement of gender equality in South Africa is deeply rooted and evidenced by the incorporation of the provisions of CEDAW and

⁴⁴ See section 233 of the Constitution.

⁴⁵ Thomas C, Oelz M and Beaudonnet X, 'The use of international law in domestic courts: theory, recent jurisprudence, and practical implications' (1998) Volume 37, *International Labour Review* at 249.

⁴⁶ See Annus T, 'Comparative constitutional reasoning: the law and strategy of selecting the rights arguments' (2004) Volume 14, *Duke Journal of Comparative & International Law* at 301. See also Choudry S, *Ackerman's higher lawmaking in comparative constitutional perspective: constitutional moments as constitutional failures?* (2008) Oxford University Press, New York University School of Law, at 18.

⁴⁷ Hovell D and Williams G, 'A tale of two systems: the use of international law in constitutional interpretation in Australia and South Africa', (2005) Volume 3, *Melbourne University Law Review* at 13.

CERD in the Equality Act.⁴⁸ Effectively, this means that there are no debates about the legitimacy and application of international human rights in South Africa. Equally, it is important for the court in its adjudicative role to consider international law in line with the provisions of section 233 of the Constitution. It has established an independent judiciary to ensure adherence to the obligations envisaged in these instruments. In essence, the concerns do not have any bearing on the accepted principle in the Constitution in considering the foreign experience in the adjudication of cases that come before the court. Of utmost importance is the manner and an approach in which the international norms and standards are incorporated and their influential role in the development of the principles and values of non-discrimination at the domestic sphere.

3.2.2 The strategic approaches for the use of international norms in the development of the jurisprudence of the principles of non-discrimination at the domestic sphere

The Constitutional Court has demonstrated its commitment to the Bill of Rights by seeking guidance from international law and its case law in order to deal with the issues of discrimination and inequality that came before it. The court endorsed and gave content to the application of international norms and standards at the domestic sphere in *S v Makwanyane*⁴⁹ under the 1993 Constitution⁵⁰ that:

“the context of 35(1) of the Interim Constitution, public international law would include non-binding as well as binding law. Both may be used under this section as tools of interpretation. International agreements and customary international law provides a framework within which Chapter 3 can be evaluated and understood and for that purpose, decisions of the UN Committee on Human Rights, the Inter-American Court of Human Rights and the European Court of Human Rights, and in appropriate circumstances reports of international agencies such as the International Labour Organizations may provide guidance as to the correct interpretation of particular provisions of Chapter 3.⁵¹

⁴⁸ See section 2(h) on the objects of the Promotion of Equality and the Prevention of Unfair Discrimination Act No 4 of 2000, hereinafter referred to as the “Equality Act”.

⁴⁹ 1995 (6) BCLR 665 CC.

⁵⁰ Act 200 of 1993.

⁵¹ See *Makwanyane* at paras 33-39.

The foundation laid down by the Court in *Makwanyane* was a growing significance of the domestication of these values in constitutional litigation and the development of a specialist capacity in the formulation of the principles of non-discrimination within the domestic sphere. The “transnational legal process of human rights” as referred by Carrillo⁵², has the potential to become a strategic focus of women’s rights in seeking protection and legal remedies for the violation of their rights at the domestic level. It allows the courts to exercise their discretion and make reference to them as tools in the interpretation of the equality clause.

The transnational process allows the international norms to be used firstly, as a primary source in the interpretation of the equality clause at the domestic sphere, in line with the provisions of section 39(1)(b) of the Constitution. The use of international human rights in the interpretation of the equality clause may lead to the direct application of these laws at the domestic sphere. Thomas *et al* note that this is the most obvious form to be used by the courts when there is no existing legislation or the applicable legislation is uncertain or less applicable.⁵³ The importance of a direct application of the principle of international law which binds South Africa was endorsed by the court in *Brink v Kitshoff*.⁵⁴ The court held that the prohibition of discrimination is an important goal of both the national and international governments and the application of international norms which:

- illustrates that the various conventions and national constitutions are differently worded and the interpretation of national constitutions reflects different approaches to the concept of equality and non-discrimination; and that
- the different approaches adopted in the different national jurisdictions arise not only from different textual provisions and historical circumstances, but also from different jurisprudential and philosophical understandings of equality.⁵⁵

⁵² Carrillo JA, ‘Bringing international law home: the innovative role of human rights clinics in the transnational legal process’ (2004) Volume 6 No 21, *Colombia Human Rights Law Review* at 527.

⁵³ See (note 45) above.

⁵⁴ 1996 (6) BCLR 752 (CC).

⁵⁵ *Ibid*, at para 39.

The importance of international human rights in South Africa and its influence on the development of the principles of non-discrimination was endorsed by the Supreme Court of Appeal in *Van Eeden v Minister of Safety and Security*⁵⁶ saying that:

“the state is obliged by section 39(1)(b) of the Constitution, read with the preamble of the UDHR, article 4(d) of Declaration on the Elimination of Violence Against Women and article 2 of CEDAW to consider international law in the protection of women against violent crime and against gender discrimination which is inherent in violence against women”.⁵⁷

The direct use of international instruments by the domestic courts is based on an assumption that the legislature did not intend to legislate contrary to the requirements of the international community.⁵⁸ The direct use of international human rights seeks to strengthen the development of international principles alongside those of the domestic sphere, which in turn, contributes to the meaningful and universal jurisprudence of human rights based on the common understanding, which the UDHR aspires.⁵⁹

The specific use and the location of international human rights within the context of advancing the struggles for the realisation of gender equality at the domestic sphere was applied by the court in *Bhe v Magistrate, Khayelitsha*.⁶⁰ This case involved the complexity of the right to gender equality and succession in customary law which entrenched the discriminatory rule of “male primogeniture” against women.⁶¹ In this case, the court referred to the African Charter on the Rights and Welfare of the Child⁶², the Convention on the Rights of the Child⁶³ and the ICCPR. These instruments

⁵⁶ 2002 (ZASCA) 132.

⁵⁷ Ibid, at para 15 with reference to *S v Baloyi* 2000 (1) BCLR 86.

⁵⁸ See Thomas, Oelz and Beaudonnet (note 45) above.

⁵⁹ See also Part II A, article 6 of the Vienna Declaration on Human Rights and Programme of Action: World Conference on Human Rights, 1993.

⁶⁰ 2005 (1) SA 580 (CC).

⁶¹ See Grant (note 21 above) at 3. He endorses the complex nature of domesticating international human rights laws as he contends that: “The apparent consensus regarding the application of international human rights norms in South Africa masks a rather more complicated reality. South Africa is a cultural diverse society. Moreover, it is a society in which the culture of the majority, including the legal culture, has over a long period of time, been disparaged and subjected to a minority “Western” culture, first under colonialism and subsequently under apartheid”.

⁶² Adopted by the OAU, CAB/LEG/24.9.49 (1990) and entered into force on 29 November 1999.

⁶³ Adopted by the General Assembly Resolution 44/25, 20 November 1989 and entered into force on 02 September 1990.

encompass the right to equality without any distinction⁶⁴, thus determining the effects of the Black Administration Act⁶⁵ on women and children in the distribution of the deceased's estate. The court also took judicial notice of the jurisprudence developed in other African countries such as Ghana, Tanzania⁶⁶ and those of the European Court and the US Supreme Court⁶⁷ in dealing with the customary law rule of male primogeniture, which subjugates women.

The significance of these instruments in the interpretation of the domestic norms on equality is viewed by Lacey as appropriate measures that seek to locate the realisation of gender equality within their socio-political and cultural contexts.⁶⁸ She holds that these instruments:

- make specific reference to the struggles of women in rural areas;
- their substantive nature is located within the overall commitment to the achievement of equality between men and women;
- they have a distinct advantage that advances the rights framework for the realisation of gender equality.⁶⁹

What is equally worth highlighting is that the direct application of international human rights does not mean that they will take precedence over the domestic laws. Mokgoro holds the view that the application of international norms does not imply their “wholesale importation” to the domestic sphere.⁷⁰ The view was affirmed by Yacoob J in *Government of the Republic of South Africa v Grootboom*⁷¹ as he held that the relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary.⁷² The court affirmed the

⁶⁴ See *Bhe*, at paras 52-55.

⁶⁵ No 38 of 1927.

⁶⁶ See the minority judgment by Ngcobo J in *Bhe*, at paras 192-205.

⁶⁷ See *Bhe*, at para 56.

⁶⁸ Lacey N, 'Feminist legal theory and the rights of women', at 54 in Knop K *Gender and human rights* (2004) Oxford University Press and article 14 of CEDAW.

⁶⁹ *Ibid*, at 54.

⁷⁰ Mokgoro Y, 'The customary law question in the South African Constitution', (1997) Volume 41, *Saint Louis University Law Journal* at 1279.

⁷¹ 2000 (11) BCLR 1169.

⁷² *Ibid*, at para 26.

discretion of the courts in the consideration of international norms in their decision-making.⁷³

Although this might be viewed as a factor that limits the reception of international norms by the courts, the court will not automatically apply these norms blindly and solely by reason of international obligations even where a specific treaty such as CEDAW has been ratified by South Africa.⁷⁴ The contention was similarly endorsed by the court in *Union of Refugee Women and others v The Director of the Private Security Industry Regulatory Authority and others*.⁷⁵ In this case, an association of refugee women was denied registration within the security industry to offer security services, as they were neither citizens nor permanent residents⁷⁶ as required by section 23(1) of the Private Security Industry Regulation Act.⁷⁷ In its reasoning, the court acknowledged the requirements of the UN Convention on the Status of Refugees⁷⁸ and the Refugee Act.⁷⁹ These instruments accord a special status on refugees as they acknowledge the plight of women refugees⁸⁰, but the court held that section 23(1)(a) of the Security Act did not infringe their right to equality. It held that:

“the Security Act, however, concerns an industry which by its nature involves serious risks. It is not a negation of our international duties towards refugees. It affirms these obligations but reserves to the host country the right to set appropriate qualifications. At the same time, care must be taken to ensure that qualification is imposed by the Act in as flexible a manner as possible in order to be consistent with our international obligations”.⁸¹

⁷³ See also Kapindu RE, *From global to the local: the role of international law in the enforcement of socio-economic rights in South Africa*, (2009) Community Law Centre, University of the Western Cape, Cape Town.

⁷⁴ See also Mahomed DP in *Azapo v President of the Republic of South Africa* 1996 (4) 671 (CC) at para 26. He argued that it should be understood that the lawmakers of the Constitution should not be lightly presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law.

⁷⁵ 2007 (4) BCLR 339 (CC).

⁷⁶ See *Women Refugees*, at para 19.

⁷⁷ No 56 of 2001, hereinafter referred to as the “Security Act”..

⁷⁸ Adopted by the UN General Assembly on 28 July 1951.

⁷⁹ See section 3 of Act No 130 of 1998.

⁸⁰ See *Women Refugees*, at paras 28-29.

⁸¹ *Ibid*, at para 31.

The general approach of the court in the *Women Refugee* case demonstrates that even a mandatory obligation to consider the application of international law in the domestic sphere will not preclude the court from giving preferential effect to the Constitution and related laws, in order to respond to what it deemed to be local needs.

International human rights can also be used as a source of law to supplement the existing national legislation in order to strengthen a solution primarily based on national rules and regulations. The use of international norms to supplement the national legislation was affirmed by the court in *Baloyi*.⁸² Although the court in this case did not deal directly with gender equality but indirectly did so by protecting the developed measure in prohibiting domestic violence⁸³, it focused:

- on the complexity of striking a balance between the state's constitutional duty to provide effective remedies against domestic violence; and also
- its simultaneous duty to respect the constitutional rights to a fair trial of those who might be affected by the measure taken in the enforcement of domestic interdicts⁸⁴ in terms of the Prevention of Family Violence Act.⁸⁵

In undertaking the appropriate balancing of these competing interests, the court in *Baloyi* relied on both the UDHR and CEDAW and the African Charter. The purpose was to establish the discriminatory nature and the ripple effects of domestic violence in the quest for the promotion of the right to freedom and security of the person.⁸⁶ It reasoned that the adoption of the Prevention of Family Violence Act, in seeking to remedy the injustices in relation to the pervasiveness of domestic violence was the legislatures' compliance with South Africa's international obligations.⁸⁷ It affirmed its reasoning by noting that these instruments, although the UDHR is not binding on member states, impose positive obligations on states to pursue policies of eliminating discrimination

⁸² See *S v Baloyi* 2000 (2) SACR 443, CC.

⁸³ See La Forest J in *Andrews v Law Society of British Columbia* (1989) 1 S.C.R. 143. He argued that the promotion of the right to equality may have a significance that extends beyond the protection from discrimination through the application of the law. Nevertheless, *all legislative classifications need not be rationally supportable before the courts as the right to equality was not intended to be a tool for wholesale subjection of legislation to judicial scrutiny*, (author's emphasis).

⁸⁴ *Ibid* at para 1.

⁸⁵ Act No 33 of 1993, which was replaced by the adoption of the Domestic Violence Act.

⁸⁶ See *Baloyi*, at paras 11-13 and section 12 of the Constitution.

⁸⁷ *Ibid*, at para 12.

against women by amongst other things, adopting legislative and other measures which prohibit discrimination.⁸⁸

The approach in *Baloyi* was adopted in *Hoffman v South African Airways*⁸⁹, where the court relied on the International Labour Convention 111: Discrimination (Employment and Occupation) Convention⁹⁰ in its interpretation of the right to equality in order not only to seek the prevention of unfair discrimination but to eliminate such effects as well. It referred to item 4 of the Southern African Development Community (SADC) Code of Conduct on HIV/AIDS and Employment⁹¹ stating that HIV status should not be a factor in job status, promotion or transfer.⁹² It reasoned that these instruments have values that are also found in the Constitution. These values seek to restore the dignity of the person who has been discriminated against and removes the barriers that have operated in the past which had undermined the human rights and fundamental freedoms of everyone.⁹³

The use of international human rights as the primary source in the interpretation of the equality clause is strengthened by section 39(1)(c) of the Constitution which requires the courts to consider foreign jurisprudence as a secondary source. The efficacy of the application of international norms in the domestic sphere was endorsed by Ackerman J in the *National Coalition* case.⁹⁴ He acknowledged the significant changes in societal and legal attitudes in other countries regarding the promotion of the right to equality as he held that:

“the reference to such other jurisdictions gives expression to the norms and values in other open and democratic societies based on human dignity, equality and freedom, which gives clear expression to the growing concern for an understanding and sensitivity towards diversity in general. *This is an important*

⁸⁸ Ibid, at para 13.

⁸⁹ 2000 (11) BCLR 1235.

⁹⁰ Adopted on 25 June 1958 by the General Conference of the International Labour Organisation and entered into force on 15 June 1960.

⁹¹ Adopted by the Council of Ministers in September 1997.

⁹² See *Hoffman*, at para 51.

⁹³ Ibid, at para 52.

⁹⁴ 2000 (1) BCLR 39 (CC).

source from which to illuminate our understanding of the Constitution and the promotion of its informing norms”,⁹⁵ (author’s emphasis).

The application of international customary law includes the consideration of the decisions of foreign courts such as the American Court and European Court on Human Rights and other international bodies such as the UN Committee on Human Rights, which may provide guidance on the correct interpretation of the particular provisions of the Bill of Rights.

In giving effect to the constitutional obligation, the court in *Makwanyane* held that the consideration of the jurisprudence developed in other jurisdictions in the interpretation of the equality clause is of value because:

- they analyse arguments for and against the elimination of inequalities and show how they have dealt with the issue; and
- they should be considered because of their relevance to section 39 which requires the promotion of the values which underlie an open and democratic society based on freedom and equality, which shall, where applicable, have regard to public international law and may have regard to comparable foreign case law.⁹⁶

The influence of international customary law in the development of the domestic jurisprudence on equality as argued in *Makwanyane* is the basis for the persuasive and not the abstract reasoning of the foreign court that may have a negative impact on the domestic court in reaching its own decision. The court in *Carmichele*, for instance, declined to follow the interpretation of the 14th Amendment of the American Constitution where the US Supreme Court⁹⁷ held that it did not impose positive obligations on the state to take positive action in order to prevent harm.⁹⁸ It contended that:

⁹⁵ Ibid, at para 48.

⁹⁶ See *Makwanyane*, at para 34.

⁹⁷ See *DeShaney v Winnebago County Department of Social Services* 489 US 189(1989) in *Carmichele*, at para 45..

⁹⁸ See *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 938 (CC) at para 45.

“our Constitution is differently worded from the US Constitution as it is not merely a formal document regulating public power but it embodies an objective normative value system, which acts as a guiding principle and stimulus for the legislature, executive and the judiciary”.⁹⁹

The approach in *Carmichele* endorsed the contention of the court in *Van Heerden* as it affirmed that our Constitution says more about equality than do comparable constitutions because it imposes a positive duty on all organs of state to protect and promote the achievement of equality, a duty which binds the judiciary as well.¹⁰⁰ The *Van Duivenboden* judgment further affirmed that even if there are no similar constitutional imperatives in other jurisdictions, the state has a positive duty to act in the protection of the rights in Bill of Rights in line with the provisions of section 39(1)(b).¹⁰¹

The use of international human rights norms as guiding and interpretative tools in the struggle for the consolidation and enhancement of the values and principles of equality represents a sound framework which is very specific to the realisation of the right to gender equality. Baines *et al* refers to this process as the “adaptation of the legal process”¹⁰² where the interpretation and application of existing domestic constitutional law is influenced by international jurisprudence. The reference to international customary law is based on the premise that the international sources are presumed to have been an inspiration and an additional reasoning in informing the interpretation of the domestic provisions.

The intersection of section 232 and section 233 with section 39(1) requires the interpretation that should consider both the binding and non-binding instruments of international law¹⁰³ as was the approach of the court in *Baloyi*. The interdependence of these provisions means that even though the main source of international human rights shall be the treaty or convention, it does not exclude the non-binding instruments, which

⁹⁹ *Ibid*, at para 54.

¹⁰⁰ See *Minister of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) at para 24.

¹⁰¹ See *Minister of Safety and Security v Van Duivenboden* (209/2001) [2002] ZASCA 79, at para 20 quoted in *Van Heerden* at para 14.

¹⁰² Baines and Rubin-Mario (note 9 above).

¹⁰³ See *Makwanyane*, at para 33.

Emerton *et al* refer to as “soft law”¹⁰⁴ that may become binding upon states as international customary law.¹⁰⁵

The interdependence of foreign law and its jurisprudence with those of the domestic sphere is viewed by Baer as a “constructivist approach” which enables the court to analyse them with gender competence.¹⁰⁶ In this manner, international human rights do not only serve as a mere point of reference but express the envisaged common standard in the protection of the right to equality. The development of a common understanding from the respective jurisdictions in the advancement of the shared values and principles of non-discrimination enhances:

- the limited application of the guaranteed international human rights norms and standards at the domestic level;
- the non-substantive nature of these guarantees in order for them not to remain at the level of non-realisation; and
- allows the Court to improve the effectiveness of the measures developed by the states in order to make them work.¹⁰⁷

¹⁰⁴ See Emerton, Brynes and Connors (note 28 above).

¹⁰⁵ See Dugard J, *International law: a South African perspective*, (2000) Juta Publishers at 157, quoted by Olivier MP, Khoza JF, Jansen van Rensburg L and Klinck E, ‘Constitutional issues’ at 59 in Olivier MP, Smit N and Kalula ER, *Social security: legal analysis*, (2003) Butterworths Publishers, Durban, as he defines “soft law” as “as imprecise standards, generated by declarations which have been adopted by diplomatic conferences or by resolutions of international organisations, that are intended to serve as guidelines to states in their conduct but which lack the status of “law”.

¹⁰⁶ See Baer S, ‘Citizenship in Europe and the construction of gender by law in the European Charter of Fundamental Rights’ at 85 in Knob K, (note 67 above).

¹⁰⁷ The case of *Mohamed and another v President of the Republic of South Africa and others*, 2001 (7) BCLR 685 CC, is a case in point in which the government compromised every recognised human right, both locally and internationally, by not affording Mr Mahomed an opportunity for legal representation when he was interrogated at the OR Tambo International Airport by the Immigration Branch, about his involvement in the bombing of the US Embassy in Tanzania, see para 1. He was then handed over to the agents of the United States Federal Bureau of Investigation (FBI) and was removed two days later to stand trial in New York, without an assurance that there was no possibility of the death penalty being imposed on him by the American Court. This conduct limited the rights entrenched in international and domestic instruments and violated the foundational values and principles, which are based on equality, human dignity and freedom and security, at para 67. The unlawful and illegal conduct by the government in the quest for the protection of human rights has broadened the scope of the court which shows that it is the one that has competence to analyse the extent and limitation of the enjoyment of fundamental freedoms in the Bill of Rights, not the government.

The Constitutional Court therefore, may rely on a variety of sources in the interpretation of the equality clause in order to determine its meaning and scope for the proper realisation of the right to gender equality. It is within this framework that the concept of “substantive equality” is examined in order to contribute to a better understanding of the use of both the international human rights and domestic laws in the protection and promotion of the right to gender equality in South Africa.

3.3 The jurisprudence of substantive equality for the promotion of the right to gender equality in South Africa

3.3.1 The development of the value-based approach to the interpretation of the right to equality

The importance of the right to equality in the Constitution strengthens the value-based approach for the promotion of the right to gender equality. Albertyn *et al* draw a distinction between equality as a “value” and as a “right”. They contend that “equality” as the former gives substance to the vision of the Constitution whilst as the latter provides the mechanism for achieving substantive equality, legally entitling groups and persons to claim the promise of the fundamental value and providing the means to achieve this.¹⁰⁸

The right to equality as a “value” broadens its scope on enforcement and has ensured the promotion of constitutional values which have the potential to be used as strategies for the protection of the right to gender equality.¹⁰⁹ The value-laden nature of the right to equality is found in various sections of the Bill of Rights, most importantly the following:

- section 7(1) makes reference to the fundamental values enshrined in the Constitution and affirms the rights of all people in our country based on democratic values of human dignity, equality and freedom;

¹⁰⁸ Albertyn C and Goldblatt B, ‘Facing the challenges of transformation: difficulties in the development of an indigenous jurisprudence of equality’ (1998) Volume 14 *SAJHR* 248-276 at 260.

¹⁰⁹ See Vogt GE, ‘Non-discrimination on the grounds of race in South Africa-with special reference to the Promotion of Equality and Prevention of Unfair Discrimination Act’ (2001) Volume 45 No 2, *Journal of African Law* at 196-209. He characterizes equality as a positive and negative interpretation to be applied by the courts through the concept of non-discrimination.

- section 36 requires the court to establish whether the limitation of fundamental rights is reasonable and justifiable in an open and democratic society based on values of human dignity, equality and freedom in determining whether a particular limitation of the right passes the *litmus* test¹¹⁰; and
- section 39(1)(a) requires the Court to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

It is within the framework of substantive equality as a “guiding value” that section 38 of the Constitution gives competence to anyone to approach a competent court to seek relief when a right in the Bill of Rights has been infringed and this relief may be claimed by:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act on their own name;
- (c) anyone acting as a member of or in the interest of a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

This provision is not limited to individuals who are victims of human rights violations. It entails the extension of legal standing before the courts to anyone or any organization which might wish to bring action against human rights violations.¹¹¹ The entrenchment of the right to equality, as a foundational value in section 1(a) of the Constitution has affirmed the extended role and its importance in the promotion and protection of fundamental freedoms in the Bill of Rights.

The broadening of the scope for legal standing in the enforcement of the right to gender equality is supplemented and framed within the spirit and purport of the Bill of Rights

¹¹⁰ See section 36 (1) of the Constitution.

¹¹¹ See further analysis by Plasket C, ‘The ANNALS of the American Academy of Political and Social Science’ (2009) Volume 622 No 1 at 256-268, accessed at www.sagepublications.com on 08 June 2009.

which guarantees equal access to have any dispute resolved by the application of the law before a court of law.¹¹² As Budlender points out it:

“access to justice should be a core concern of the courts, for it goes to very essence of their function. If people in need are not able to bring their cases to court and present them effectively, then the courts cannot satisfactorily perform their function entrusted to them by the Constitution”.¹¹³

The significance of equal access to justice was similarly expressed by Kishindo who contends that the right to have the dispute resolved by a court of law [as entrenched in section 34 of the Constitution] allows:

- an opportunity to bring the claim and to be resolved through fair processes by the courts;
- an opportunity for those alleged to have violated the right in question to defend themselves; and also
- provides an opportunity for both parties to receive advice which may help them for future engagement with the law.¹¹⁴

The quality of protection accorded to the right of equal access to justice is compromised by the lack of access to the courts themselves even before people can actually lodge their claims. The lack of access to the courts has the potential to limit the significance of the law for social change as it may shun women away from the courts and incidents of abuse and discrimination may go unreported. The guaranteed right of access to justice is affected by a number of factors, which include, but not limited to the following:

Firstly, the adoption of the new Re-Demarcation Policy of the Magistrates¹¹⁵, which according to the former Minister of Justice: Enver Surty will improve access to justice for

¹¹² See section 34 of the Constitution.

¹¹³ Budlender G, 'Access to courts' (2004) Volume 121 *South African Law Journal*, 339 at 355, quoted in Heywood M and Hassim A 'Remedying the maladies of lesser "men or women": The personal, political and constitutional imperatives for improved access to justice' (2008) Volume 24 *SAJHR* at 263-280.

¹¹⁴ Kishindo P, 'Language and the law in Malawi: a case for the use of indigenous languages in the legal system' (2001) Volume 32 No 1, *Language Matters*, at 1.

¹¹⁵ See (note 111 in chapter one).

many communities and especially for women¹¹⁶, is a cause for concern. Although it appears to address the underlying problems in the enforcement of the right to gender equality, it effectively undermines the struggles for equal access to justice. The adoption of the policy acknowledges the:

- challenges identified in chapter one of this study such as the poor transport system which requires people in rural areas to endure a great deal of hardship by travelling long distances in order to reach the courts;
- the historic imbalances that the demarcation of the districts magistrates' courts were geared towards serving the white minority and black communities were marginalised; and
- the weaknesses in the jurisdiction of these districts courts which was also limited to criminal matters and the fact that no civil cases such as maintenance, and domestic violence, were provided for at these courts, limited the right of access to justice for which they were established.¹¹⁷

The acknowledgment of these factors means nothing if the policy does not translate them to the substantive enjoyment of the right to equal access as guaranteed in section 34 of the Constitution. The re-demarcation of the magistrates' courts is long overdue as the policy was adopted in 2007 and as magistrates alluded to the delay, they attributed it to the lack of the "*political will*" on the part of the government.¹¹⁸ In addition, the greatest flaw of the policy is its re-demarcation of the Zwelitsha magistrates' courts as the main court and the King William's Town magistrates' courts as the sub-branch of the Zwelitsha magistrates' courts. The new policy does not solve the resulting problems raised in chapter one as it still subjects all those from the old Ciskei, to travel past the King William's Town sub-branch to the Zwelitsha main court as it used to be in the past. It actually reinforces the rural and urban divide of the apartheid era.

The dedication of the King William's Town magistrates' courts as a sub-branch raises a question whether it will not be nothing more than the periodic-courts that were

¹¹⁶ See the report by Mahlangu L and Baloyi M, 'Redesigning of the courts: bringing justice closer to home' (2009) Volume 1, *Justice Today*, at 4.

¹¹⁷ *Ibid*, at 4.

¹¹⁸ Interview with the magistrate, Zwelitsha, 24 March 2009.

established during the apartheid-era such as the Dimbaza periodic-court¹¹⁹ in the old Ciskei, which was serviced by the Zwelitsha magistrates' courts. The New Re-Demarcation policy further raises capacity issues at the sub-branch courts which may undermine the right of access to justice as it may have a negative impact on the speedy resolution and disposal of cases.¹²⁰ What is equally striking is that the Department has already identified with the assistance of the Magistrates Commission, the magistrates who must be transferred to the sub-branch courts to provide the much needed capacity. The questions which arise from this arrangement:

- why would the functioning of the sub-branch courts depend on the human capacity of the main courts?
- does this mean that sub-branch courts will never be able to function independently, though with reporting obligations to the main courts, to ensure the delivery of justice in a more meaningful way?
- further, does it mean that the functioning of the sub-branch courts is confined to magistrates with minimal supporting staff?
- which cases will fall within the jurisdiction of the main or sub-branch court?
- does this mean that the functioning of these courts will depend on the types of crimes committed in order to determine which court will have jurisdiction to preside over the matter?
- does it mean those within the jurisdiction of the King William's Town sub-branch will have to travel and enforce their rights at the main court leaving the sub-branch which is closer to them?
- does it mean that the main court will be overwhelmed by cases that could have been dealt with at the sub-branch, which may also bring the administration of justice to the continued era of backlogs?
- what implications does it have for the poor transport system identified by the Minister which is also equally expensive? and

¹¹⁹ The estimate distance is between 15km from Zwelitsha and 13 km from the King William's Town magistrates' courts.

¹²⁰ This is clearly evident even before the policy is implemented, as the officer from the Zwelitsha magistrates' courts had to go assist the King William's Town magistrates' courts in fulfilling its objectives. The researcher received this information by chance as she phoned the Zwelitsha court for further enquiries on her research, 30 April 2009.

- whether the adoption of the policy is just the rhetoric of bringing justice closer home¹²¹ whilst it effectively endorses the rural and urban divide of the apartheid system?

The policy leaves more questions than answers in terms of ensuring that the right of access to justice is not based upon the concept of “urban and rural divide” as most people that continue to be affected by the lack of a “reasonable” access to the courts are those particularly in rural areas. It does not seem to eliminate the struggles, especially of women, as the Minister affirmed. It further waters down an argument in this study and by Mokgoro, as noted in chapter one, that the promotion and the greatest achievement for the right to gender equality has been through legislation and policy.

Secondly, there is “very minimal” access to the building of the King William’s Town magistrates’ courts for the disabled and the elderly. The situation is compounded by the fact that the building belongs to the Department of Public Works¹²², which is the one that is required to effect the necessary changes to ensure the provision of a ramp for those in wheelchairs or walking in crutches, as the front and the back entrances of the building are not accessible *at all* to the offices and the court venues within the building.

The situation is made worse by the dedication of the building as the “heritage site” which also houses the Amathole Museum.¹²³ The museum houses the rich history of King William’s Town and its areas including the statue of the Woman Prophete, “Nontetha Nkwenkwe”, which is situated right in front of the court building. Nontetha, was first locked up at the King William’s Town magistrates’ courts on 06 December 1922 for “being troublesome”. The authorities then feared that her popularity would threaten white rule, as she had been establishing churches preaching temperance, after surviving the 1918 flu epidemic.¹²⁴

The treasure, not only of the history, but the dignity and the role played by the “Woman Prophete” in contributing to the social change objectives, as envisaged in this study,

¹²¹ See Mahlangu and Baloyi (note 116 above).

¹²² Interview with the Court Manager on 23 March 2009, as he highlighted that they did write the memorandum to the Department of Public Works but it has not come to fruition.

¹²³ See the history of the Museum at www.museum.za.net.

¹²⁴ See the history at www.heritage.times.co.za, accessed on 29 April 2009.

through her religious teachings, is not in any way under attack. It is not disputed that a need exists to treasure the history of those who suffered brutality under the hands of the apartheid government. The statue of Prophete Nontetha signifies the struggles of women who still continue to suffer extreme prejudice for no other reason than being women, which in the past was coupled by being black. The issue in this regard, is the lack of flexibility in the structuring of the building which could have, at least, provided equal access to the court through the back entrance, without tampering with the front entrance where the Prophete's statue is.

The lack of access to the court has negative implications for the constitutionally protected right of ensuring that the enforcement of rights will be decided in a fair, public hearing without any hinderances that may have a negative influence on the significance of the law for social change.¹²⁵ The Constitution guarantees equal access without any distinction as it was confirmed by the Port Elizabeth Equality Court in the case of *Willie Bosch v Minister of Safety and Security; Minister of Public Works*.¹²⁶ Mr Bosch, a disabled man, walking with the aid of crutches, was denied access to the second floor of the Kabega Police Station in Port Elizabeth when he went there to pay his fire-arm licence renewal fee. The matter was heard and the court made an order that:

- offices that assist the elderly and the disabled should be moved to the ground floor; and within two financial years a lift should be installed in the building and
- the Department to issue an unconditional apology to the complainant and disabled persons generally.¹²⁷

Another interesting case on disability rights and their right of equal access to court buildings is that of *Esthe' Muller v Department of Justice and Constitutional*

¹²⁵ Thoughts shared with the magistrate as he hoped that the functioning of the Equality Courts could have been put into test by the number of cases that they could have dealt with in ensuring the equal access to the courts especially for the disabled, as he attributed the lack of flow of cases to these Courts by the lack of knowledge of the Equality Act by members of the general public.

¹²⁶ See the report by Reyneke D entitled: 'Police station access difficult, court hears' *Herald Newspaper*, dated 18 May 2006. The record of this case could not be found as the researcher phoned the court several times without success.

¹²⁷ The order was granted on the 29th May 2006.

Development and Department of Public Works.¹²⁸ The parties reached an agreement which was made an order of court. The terms of the order were as follows:

- the courts in which the applicant primarily practices would be made accessible to people with disabilities;
- one courtroom would also be made accessible together with one bathroom;
- the respondents were further required to draw a plan within six months with respect to other court buildings in South Africa; and
- the plan must be submitted to the SAHRC.¹²⁹

These cases had set the tone for the promotion of the equal rights of the disabled to justice as they had not only granted an order but prescribed the time-frames upon which these orders may be implemented. They further reinforced the mandate of the SAHRC to play its oversight role in ensuring the implementation of these orders. The Equality Courts have not misplaced the constitutional mandate of the SAHRC as it happened with the orders granted by the Constitutional Court in, for example, socio-economic rights judgment, by leaving this role to its discretion whether to find its monitoring role reasonable necessary to ensure the implementation of court orders, as discussed in this chapter.¹³⁰

Furthermore, they give effect to the Equality Act and endorse the specialist role of the Equality Courts in the elimination of inequalities and discrimination. They also give effect to the innovative strategies of affirming the intersection of the law with socio-political factors in the development of principles of non-discrimination.

But, with the jurisprudence that has grown in the area of unequal access to court buildings due to disability, it is a worrying factor that the Department of Public Works has

¹²⁸ Germiston Equality Courts, 01/03.

¹²⁹ See the report entitled: 'South Africa: justice sector and the rule of law: a review by AfriMap and Open Society Foundation for South Africa' (2005) Open Society Foundation for South Africa, at 109. See also the report by the South African Human Rights Commission entitled: 'The Equality Courts' impact on persons with disability and women: the experience of the South African Human Rights Commission', 16 October 2006 at 9.

¹³⁰ It remains to be seen the extent to which these orders may transmit to substantive development of the right to equality as the SAHRC struggles to deal with the enforcement of the order and there is minimal support from the government.

adopted a “dragging of the feet approach” since these cases were decided, to revamp the inaccessible buildings such as the King William’s Town magistrates’ courts. Why would the general public have to enforce their rights through litigation, before their equal right to the enjoyment of the rights in the Bill of Rights can be realised? The right to equality is an important instrument in the interpretation of other rights such as the right to equal access to justice which may not be limited by beauracrtic administrative arrangements. As Mokgoro J argued in *Lesapo v North West Agricultural Bank*¹³¹ that the right of access to courts is:

“indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a *bulwark* against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of *cardinal* importance. As a result, powerful considerations would be required for its limitation to be reasonable and justifiable”¹³², (author’s emphasis).

The right of access to courts in order to prevent the resort to self-help without application of the law¹³³ is reinforced by section 165 of the Constitution which endorses the independence of the courts as access without the latter will bring the administration of justice into disrepute. Section 165 entrenches the independence of the courts in the determination of the alleged unfair discrimination against both men and women and provides that:

- (2) the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice;
- (3) no person may interfere with the functioning of the courts;
- (4) organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts; and

¹³¹ 1999 (12) BCLR 1420.

¹³² *Lesapo* at para 22.

¹³³ *Lesapo* at para 11.

- (5) any order or decision issued by a court binds all persons to whom and organs of state to which it applies.

The development of the principles of independence and impartiality by the courts as entrenched in section 165 does not only give effect to the Constitution but to the international instruments as discussed in chapter 2, which include, article 10 of the UDHR providing that:

“everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

The UDHR is further supplemented by article 14(1) of the ICCPR which provides that:

“...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...”

The values of independence and impartiality identified in the Constitution and in these international instruments seek to ensure that the right to gender equality is protected and should serve as an empowering function that should enhance the independence of the courts including the magistrates' courts.¹³⁴ These values guarantee the independence and impartiality of not only the higher courts but of the lowest structure of the courts as well as they seek to:

“ensure that the human rights and fundamental freedoms guaranteed under the constitution are vigorously protected and any violation is duly addressed. Independence of the judiciary is expected to overcome any intrusion upon individual rights by other individuals and branches of the government and therefore it should be given a certain degree of independence and autonomy in its functioning”.¹³⁵

¹³⁴ See Kumar CR, 'Rights, justice and empowerment' at xxxiii in Kuma CR, Chockalingam K, *Human rights, justice and constitutional empowerment*, (2007) Oxford University Press, New Delhi.

¹³⁵ Ibid.

The intersection of equal access to justice and independence of the courts was endorsed by Langa CJ as he observed that:

‘if we did not have the rule of law then it would be the law of the jungle, the survival of the fittest... some of our people... have been weakened by the previous system of government here and they cannot afford to face and get fairness when pitted against, the strongest among us. That is why the rule of law is very important because it is an equalising process between those who are in authority and the ordinary citizens’.¹³⁶

The anchoring of equality within the framework of equal access and independence of the courts in promoting the foundational values of equality is essential for the interpretation and limitation of fundamental rights is concerned. It takes into account the socio-political and South Africa’s historical context which was and continues to be characterised by inequalities and discrimination. Albertyn *et al* give purpose and content to the context-based interpretation of the right to equality as they argue that it shifts the legal enquiry from an abstract comparison of ‘similarly situated’ individuals¹³⁷ to an exploration of the actual impact of the alleged rights violation within the existing socio-economic and political circumstances.¹³⁸

The value based approach to the right to equality may be used by the courts even where the right is not directly invoked in establishing an appropriate balance in the interpretation and limitation of fundamental rights. The indirect use of the right to equality would in turn, allow the substantive principles on equality to form the lens through which the application of the law should take place.¹³⁹ The centrality of equality as a foundational value was endorsed by the Court in *Van Heerden* as it held that:

¹³⁶ Langa CJ, ‘Confidence in the judicial system is a fragile asset, says the Chief Justice’ Business Day 21 October 2008, quoted in Heywood M and Hassim (note 113 above) at 263.

¹³⁷ See Dickson CJ in *Andrews v Law Society of British Columbia* (1989) 1 S.C.R. 143 as he contended that the “similarly situated should be similarly treated” approach will not necessarily result in equality nor will every distinction or differentiation in treatment necessarily result in inequality.

¹³⁸ See Albertyn and Goldblatt B (note 108 above) at 260.

¹³⁹ Jagwanth S, ‘Expanding equality’, at 131 in Murray C and O’Sullivan M, *Advancing women’s rights*, (2005) Juta Publishers, Faculty of Law, University of Cape Town.

“thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance”.¹⁴⁰

The value-based approach of the right to equality is viewed as a progressive and transformative tool that does not only seek to remedy the injustices and historic ills of the past. It also seeks to ensure the development of affirmative measures in order to pave the way forward for the future in the quest for the achievement of equality.¹⁴¹ Hence, the court in *S v Mhlungu*¹⁴² held that:

“the introduction of fundamental rights and constitutionalism in South Africa represented more than merely entrenching and extending existing common law rights, such as might happen if Britain adopted a Bill of Rights. The Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction. It embodies compromise in the form a Government of National Unity, and orderly reconstruction of the constitutional order in terms of the two-phase process of constitution-making which it provides for. It is a momentous document, intensely value-laden. To treat it with the dispassionate attention one might give to a tax law would be to violate its spirit as set out in unmistakably plain language. It would be as repugnant to the spirit, design and purpose of the Constitution as a purely technical, positivist and value-free approach to the post-Nazi Constitution in Germany would have been”.¹⁴³

It was within the spirit of healing the injustices of the past and the affirmation of the foundational values of South Africa’s democratic order that the court in *Van Heerden* held that:

¹⁴⁰ See *Van Heerden*, at para 22.

¹⁴¹ See Langa P, ‘Transformative constitutionalism’ (2006) Volume 17, *Stellenbosch Law Review* at 351.

¹⁴² 1995 (7) BCLR 793.

¹⁴³ See *Mhlungu*, at para 111.

“of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework”.¹⁴⁴

The development of the foundational value of equality expands the role of the right to equality to be relevant beyond the content and ambit of the right itself.¹⁴⁵ This is the distinct character of the Constitution which was affirmed in *Shabalala and others v Attorney-General of the Transvaal and another*¹⁴⁶ as follows:

“the Constitution is not simply some of kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that of the past which is unacceptable. It constitutes a decisive break from apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights. The aspiration of the future is based on what is justifiable in an open and democratic society based on freedom and equality. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitutions must therefore be interpreted so as to give effect to the purpose sought to be advanced by their enactment”.¹⁴⁷

The emphasis on the promotion of foundational values gives effect to the purpose of the new constitutional democratic order in establishing a society in which all human beings are accorded equal dignity and respect, regardless of their membership of particular groups.¹⁴⁸ The court in *Hugo* further acknowledged that the achievement of such a society in the context of our deeply discriminatory past will not be easy, but that is the goal of the Constitution that should not be overlooked.¹⁴⁹

¹⁴⁴ See *Van Heerden* at para 25.

¹⁴⁵ Jagwanth, (note 139 above).

¹⁴⁶ 1995 (12) BCLR 1593.

¹⁴⁷ *Ibid*, at para 26.

¹⁴⁸ See *Hugo*, at para 41.

¹⁴⁹ *Ibid*.

The value-based approach in extending the right to equality beyond the content of the right itself endorses the interdependence of socio-economic rights with civil and political rights as a strategic advancement of the right to gender equality.¹⁵⁰ The extension of the right to equality beyond its content was endorsed by the court in *Grootboom* as it held that:

“our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2”.¹⁵¹

The interrelationship of these rights within the context of the value-based approach for the promotion of the right to gender equality requires the consideration of the socio-political, cultural and historical framework in the development of the substantive principles of non-discrimination. The court in *Van Heerden* endorsed the view that:

[“the substantive conception of equality requires the courts to scrutinise each equality claim in order to assess the fairness or otherwise but flexible situation-sensitive approach which is essential to determine the shifting patterns of hurtful discrimination and stereotypical response in our evolving democracy]”.¹⁵²

The value-based framework for the promotion of the right to gender equality alters the systemic and structured inequalities and discrimination and power relations in society which threaten to defeat the purpose of substantive translation of the right to equality.¹⁵³ The value of achieving equality, which has been used by the court to develop a powerful and progressive jurisprudence, underwrites broad aspirations about the constitution of a

¹⁵⁰ See Liebenberg S, ‘South Africa’s evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty’ (2002) Volume 2, *Law, Development and Democracy*, at 159.

¹⁵¹ See *Grootboom*, at para 23.

¹⁵² *Van Heerden* at para 27.

¹⁵³ See Domingo P, ‘Weak courts, rights and legal mobilization in Bolivia’ at 233 in Gargarello (note 12 above).

future society because it enables a democratic dialogue about the nature and goals of transformation.¹⁵⁴

3.4 The “differentiation approach” for the promotion of the right to gender equality

The development of the “differentiation approach” in *Harksen* in establishing the factors that may be used to determine the extent of the discrimination is an important strategy that seeks to bridge the gap in the elimination of historic and current prejudices suffered by the vulnerable group, including women. It entails the consideration of the “differentiation” which is:

- directed at the enquiry to establish whether the impugned provision does differentiate between people or categories of people¹⁵⁵;
- directed at establishing whether the differentiation complained of bears no rational connection to a legitimate government purpose¹⁵⁶; and
- whether the differentiation does amount to unfair discrimination under section 9(3) which involves a further two stage enquiry to determine:
 - whether the differentiation amounts to “discrimination”; and if it does
 - whether it amounts to unfair discrimination?¹⁵⁷

The three-stage approach requires an assessment of the impact of the discriminatory conduct or law which includes the determination of the:

- position of the complainants in society and whether they have suffered in the past from patterns of disadvantage and also whether the discrimination in the case under consideration is on a specified ground or not;
- nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a

¹⁵⁴ Albertyn *et al* (note 108 above) at 267.

¹⁵⁵ See *Harksen*, at para 42.

¹⁵⁶ *Ibid*, at para 44.

¹⁵⁷ *Ibid*, at para 45.

worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question; and also

- with due regard to the above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.¹⁵⁸

The development of the “differentiation approach” that has been established by the court is in line with the provisions of section 14(2) of the Equality Act. This section provides that in determining whether it has been proved whether the discrimination is fair or unfair, the following factors must be taken into account:

- (a) the context;
- (b) the factors referred to in subsection (3) (below);
- (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned;

These factors are further outlined in section 14(3) of the Equality Act which requires the establishment of:

- (a) whether the discrimination impairs or is likely to impair human dignity;
- (b) the impact or likely impact of the discrimination on the complainant;
- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- (f) whether the discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;

¹⁵⁸ Ibid, at para 51.

- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; and or
 - (ii) accommodate diversity.¹⁵⁹

These factors were substantiated and given meaning by Sokhi-Bulley¹⁶⁰ as she explains that:

“human rights law is seriously flawed if understood as extending the interpretation of the principle of equality beyond equality of human rights to equality of human beings. Human rights norms do not treat people as if they were equal because they are not. They demand that people be recognised as having equal rights as they accord to everyone equal opportunities for free and full development”.¹⁶¹

This differentiation is similarly explained by Sachs J in *National Coalition* that at the heart of equality jurisprudence:

- is the rescuing of people from a *caste-like status*;
- is putting an end to their being treated as lesser human beings because they belong to a particular group;
- is the determination of the indignity and subordinate status that may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream; and

¹⁵⁹ See Ben-Gallim D, Campbell M and Lewis J, ‘Equality and diversity: a new approach to gender equality in the UK’, (2007) Volume 3 No 1, *International Journal of Law in Context*, at 19-33. They argue that the concept of “difference” has the potential to advance equality as it offers a new approach to gender equality, by celebrating and respecting the multiple forms of difference that an individual may experience, at 19.

¹⁶⁰ See Sokhi-Builley B, ‘Non-discrimination and difference: the (non-) essence of human rights law’ (2004) University of Nottingham, at 1-12.

¹⁶¹ *Ibid*, at 4.

- which may also be derived from the location of difference as a problematic form of deviance in the disadvantaged group itself, as happens in the case of the disabled¹⁶², (author's emphasis).

However, as it has been highlighted elsewhere¹⁶³, the question which arises is the manner in which the court has or will develop the concept of “difference” in the interpretation of the equality clause in giving effect to this determination. The test developed by the court in *Harksen* and the application of the factors in section 14 of the Equality Act are designed to ensure that the equality clause is interpreted in the proper socio-political, cultural and historical context. Fredman endorses the “differentiation approach” as a key insight of substantive equality which is not primarily based on race or gender but the attendant disadvantage arising from the alleged unfair discrimination.¹⁶⁴ The contention was similarly affirmed by Goldstone J in *Hugo* as he argued that it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.¹⁶⁵

The focus on such difference includes the duty to provide if substantive equality is to be effective.¹⁶⁶ The positive duties envisaged in the development of substantive principles of non-discrimination through a justified legitimate purpose were expressed in *National Coalition* as follows:

“particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated,

¹⁶² See Sachs J in *National Coalition* at para 129.

¹⁶³ See Ntlama N, ‘The Equality Act: enhancing the capacity of the law to generate social change for the promotion of gender equality’ (2007) Volume 1, *Speculum Juris*, at 113.

¹⁶⁴ Fredman S, ‘Providing equality: substantive equality and the positive duty to provide’, (2005) Volume 21 *SAJHR* 163-190.

¹⁶⁵ *Hugo*, at para 43.

¹⁶⁶ See Fredman (note 164 above).

and unless remedied, may continue for a substantial time and even indefinitely”.¹⁶⁷

The development of positive duties is essential for the rationality of the principles of non-discrimination in fulfilling a legitimate government purpose as envisaged in section 7(2) of the Constitution and affirmed in *Prinsloo v Van de Linde*¹⁶⁸ as follows:

“it must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so *without differentiation and without classifications* which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element”¹⁶⁹, (author’s emphasis).

But, as argued elsewhere¹⁷⁰, there are opposing views developed by the court in the interpretation of the equality clause in order to give purpose to the new constitutional dispensation. Moseneke J in *Van Heerden* developed a three-stage enquiry in establishing the substantive basis for the achievement of equality in terms of section 9(2) of the Constitution. These are:

- to establish whether the programme of redress is designed to protect and advance a disadvantaged class¹⁷¹;
- the second question is whether the measure is “designed to protect or advance” those disadvantaged by unfair discrimination¹⁷²; and
- whether the measure “promotes the achievement of equality”.¹⁷³

¹⁶⁷ *National Coalition* at para 60.

¹⁶⁸ 1997 (6) BCLR 759.

¹⁶⁹ *Ibid* at para 24.

¹⁷⁰ See Ntlama N, ‘A brief overview of the Civil Union Act’ 2010 Volume 13 No 1 *Potchefstroom Electronic Law Journal*, 191.

¹⁷¹ See *Van Heerden*, at para 38.

¹⁷² *Ibid*, at para 41.

¹⁷³ *Ibid*, at para 44.

The reliance on this approach entails the development of “legislative and other measures”¹⁷⁴ which are meant to advance the achievement of equality through law reform. The development of these measures allows the enforcement of gender equality claims within the established legal framework without having to resort to the provisions of section 9(3) of the Constitution. Section 14(1) of the Equality Act gives effect to section 9(2) of the Constitution which is in line with the approach adopted by Moseneke J in *Van Heerden* in establishing the differentiation of the developed measure and its possibility for the advancement of equality. This section provides:

“it is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons”.

The adoption of legislative and policy measures in line with the requirements of section 9(2) of the Constitution as argued by Moseneke J in *Van Heerden* is taken within the context and against the background of affirming the legitimacy of the development of measures that are designed to protect the persons or categories of person disadvantaged by unfair discrimination.¹⁷⁵ It takes into account South Africa’s history and prejudices that the disadvantaged group including women, find themselves in - even in the new constitutional dispensation.¹⁷⁶ Effectively, it gives due recognition to the fact that the elimination of systematic discrimination against the disadvantaged people cannot be achieved without positive action being taken by the state.¹⁷⁷ These positive measures are adopted with a focus from a specific-rights perspective in order to protect the rights of all people who are often, and most, vulnerable to discrimination and persecution.

The quest for the adoption of positive measures was given effect by the test adopted in *Van Heerden* which strikes at the heart of the prohibition of unfair discrimination. The test requires the court to consider the context and the extent upon which the developed measure may be examined in order to give effect to the struggles for the realisation of gender equality. The purpose is to establish its underlying objective as a tool that is

¹⁷⁴ Section 9(2).

¹⁷⁵ See also s 14(1) of the Equality Act.

¹⁷⁶ See the preamble of the Civil Union Act 17 of 2006.

¹⁷⁷ See also Ngcobo J in *Bato Star Pty Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR 687 (CC) at par 74.

designed to assist those disadvantaged by unfair discrimination.¹⁷⁸ Hence, Ngcobo J in *Bato Star* contended that the purpose of the developed measure as an affirmative tool for the proper realisation of equality is to improve the quality of life of those disadvantaged and not to perpetuate the privileges of the advantaged.¹⁷⁹

Moseneke J's reliance on section 9(2) of the Constitution advances the quest for the development of legislative measures. This in turn, requires the court not only to ensure that the state acts in a manner that would not violate the rights but also to take pro-active and positive measures for the realisation of the right to gender equality. This was affirmed by the Constitutional Court in *Carmichele* that:

“there is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. 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”.¹⁸⁰

But Mokgoro J disagrees with the reliance on section 9(2) of the Constitution as the court recognised that it is not only the courts that are responsible for vindicating the rights in the Bill of Rights. She argued that the basis for the determination of unfair discrimination lies solely with the approach adopted by the court in *Harksen* which focuses on the disadvantaged and vulnerable group as firmly embodied in section 9(3) of the Constitution.¹⁸¹ She contended that:

- the approach adopted by Moseneke J is forward looking as it requires an assessment of the challenged measure on the basis of the perspective of the goal intended to be achieved;¹⁸²

¹⁷⁸ See Coram J in *Manong v Eastern Cape Department of Roads and Transport* (369/08) [2009] ZASCA 50 as he argued that the context determines whether discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria and the extent to which it achieves its legitimate purpose, at para 47.

¹⁷⁹ *Ibid*, at para 74.

¹⁸⁰ See *Carmichele* at para 44.

¹⁸¹ See *Harksen* at para 51

¹⁸² Mokgoro J in *Van Heerden* at para 78.

- it will be important to draw a distinction between the equality jurisprudence developed by the court within the context of section 9(3) as opposed to an analysis based on section 9(2) which focuses unduly on the position of the complainant as envisaged in section 9(3);¹⁸³ and
- section 9(2) relieves the state of the burden to prove that the designed measure is fair which might have been unfair on the basis of the listed grounds in section 9(3).¹⁸⁴

She substantiated her argument by holding that in the context of South Africa's history one of the requirements of the developed measures is to enhance the category of persons disadvantaged by unfair discrimination.¹⁸⁵ *Albertyn et al* argue that the difference of judicial opinion in the interpretation of the equality clause in *Van Heerden* goes to a more substantive disagreement about the level of scrutiny that the court will impose on legal reform for gender equality. They draw a distinction between the reliance on section 9(2) of the Constitution by the majority and section 9(3) of the Constitution by the minority. They contend that the former signifies a more deferential approach to positive measures, setting the threshold for compliance at low level leaving significant space for the legislature to address patterns of subordination and disadvantage in South African society. In contrast, the latter draws the lines of interpretation differently as they referred to Mokgoro J arguing that:

“section 9(2) [of the Constitution] is an instrument of transformation and the creation of a truly equal society, is powerful and unapologetic. It would therefore be improper and unfortunate for section 9(2) to be used in circumstances for which it was not intended. If used in such circumstances where a measure does not in fact advance those previously targeted for disadvantage, the effect would be to render constitutionally compliant a measure which has the potential to discriminate unfairly”.¹⁸⁶

¹⁸³ Ibid at para 80.

¹⁸⁴ Ibid at para 89.

¹⁸⁵ Ibid at para 87.

¹⁸⁶ *Albertyn* at 35-35 (note 13 above) quoting Mokgoro J in *Van Heerden* at para 87.

Albertyn *et al* substantiated their argument by making reference to Nair¹⁸⁷ as he argued that the Indian Supreme Court of Appeal which has narrowed its approach to the definition of disadvantage after it became apparent that preferential policies had only benefited small and privileged elite within the defined groups.¹⁸⁸

The caught-in-between of the scholars on the difference of judicial opinion favouring Mokgoro J's approach on the interpretation of the equality clause give credence to Cameron J's argument in *Fourie v Minister of Home Affairs*¹⁸⁹ that:

“legislative developments have ameliorated but not eliminated the disadvantage suffered by the vulnerable groups or individuals”.¹⁹⁰

However, it is not denied nor disputed the fact that the positive measures may not have contributed to significant changes in establishing a just society due to a number of factors, some of which have been identified in chapter one of this study. It is submitted that it is not the law that is problematic unless otherwise is proved, but the lack of a comprehensive and coherent strategy in the proper application and enforcement of the law itself. The case of *Du Preez v Minister of Justice*¹⁹¹ is a case in point. The bone of contention in this case was the criteria used in the short-listing and appointment of two black women magistrates, each with less than two years experience, for the Port Elizabeth Regional magistrates' court. The criteria used included experience, qualifications, race and gender to which each was afforded a specific weighting.

Mr Du Preez (white male) challenged the criteria used as he was not even short-listed for the two vacant positions despite the fact that he has 19 years of experience on the bench and is holding three degrees.¹⁹² He averred that the Magistrates Commission discriminated unfairly against him on the basis of race and gender. The court established that the differentiation against Mr Du Preez was unfair as he does not belong to a group

¹⁸⁷ Nair V, 'Search for equality through the constitutional process: 'The Indian experience' in Jagwanth S and Kalula E (eds), *Equality law: reflections from South Africa and elsewhere* (2001) Juta Publishers, Cape Town at 255.

¹⁸⁸ Albertyn (note 13 above) at 35-36.

¹⁸⁹ Supreme Court of Appeal 232/2003.

¹⁹⁰ See Sachs J *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC), at para 17.

¹⁹¹ [2006] 3 All SA 271 (SE).

¹⁹² *Ibid*, at para 2.

that has suffered intense discrimination in the past. Erasmus J argued that the development of affirmative measures as envisaged in section 9(2) must not:

“however be interpreted in isolation. Like all law, it must be viewed through the prism set by constitutional values and objectives. This is especially so in the case of legislation such as the Equality Act which was enacted with the specific purpose of giving effect to a constitutional dictate”.¹⁹³

Without a further background on the reasoning of the court, the judge then ordered the re-advertisement of the positions so that Mr Du Preez could once again, be afforded an opportunity to apply and if short-listed, to present himself before the selection committee. However, the judgment did not deny nor dispute that the achievement of equality and the fair treatment of employees and applicants must be applied in a manner that advances the legitimate goals of affirmative action. The criteria used by the committee in *Du Preez* subjects affirmative measures to unnecessary tensions and court challenges. It failed to give due recognition to the historical imbalances that South Africa inherited from its past, against black women in particular. In the writer’s view, the privileged members of our society and those who are economically empowered are all too often able to benefit from the loopholes in the implementation of affirmative measures and capitalize on them, which in turn, derails the progress made in ensuring the promotion of not only gender equality but equal representation in the administration of justice.

Black women were and still continue to be subjected to persecution based on race, gender and class, as emphasised in this study. The potential and capacity of the two women magistrates was not tested before the court to establish whether their appointment will weaken the judicial integrity of the bench. The empowerment of black women must not be compromised at the expense of a white male who had a privileged status in the past and had access to quality education as evidenced by his three degrees and the fact that he was able to challenge the criteria used in a court of law, as opposed to the potential (financial and otherwise) of black people generally.

The lack of overall plans in the implementation of affirmative measures undermines the potential and the specific objectives of the social change orientated laws such as the

¹⁹³ Ibid, at para 17.

Equality Act. Lacking implementation compromises the Equality Act itself as the legislation was designed to ensure that:

“the prohibition of unfair discrimination and the promotion of the achievement of equality requires the development of special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure such consequences”.¹⁹⁴

Although the court itself, in *Fourie* acknowledged that the reliance on section 9(2) of the Constitution, which puts an emphasis on legal reform, may not automatically and of itself eliminate stereotyping and prejudice, but legal reform serves as a great teacher. Legal reform establishes public norms that become assimilated into daily life and protect vulnerable people from unjust marginalisation and abuse. The significance of section 9(2) lies within the legislative framework in ensuring that the values in the Constitution permeate every area of the law.¹⁹⁵ As emphasised by Watson¹⁹⁶:

“when law develops from precedent, the law must always wait upon events and at that, on litigated events, it will always be retrospective. The scope for development of legal principles-especially in the short term is very restricted and there can be no systematic development. *Legislation operates differently. It can and generally does provide primarily for the future. It can be very systematic, general in its purpose and removed from individual particular cases. It can make drastic speedy reforms. Development by legislation can have a very satisfactorily explicit or implicit theoretical base and can thus point the way to further reform*”, (author’s emphasis).¹⁹⁷

South Africa’s history of inequalities plays a great part in the development of legal reform and the manner in which courts have to interpret the equality clause in giving effect to the substantive translation of the right to equality. But these opposing views, both from

¹⁹⁴ See preamble, Equality Act.

¹⁹⁵ See *Fourie*, at 138.

¹⁹⁶ Watson A ‘Comparative law and legal change’ (1978) *Cambridge Law Journal*, 313-324.

¹⁹⁷ *Ibid*, at 323-324 quoted in Kok A, ‘The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: court-driven or legislative-driven societal transformation? (2008) Volume 1, *Stellenbosch Law Review*, at 122-142.

the court and legal / academic scholars is open to interpretation how the right to equality may be interpreted as there is no agreement on whether the focus should fall on legal reform as envisaged in section 9(2) or section 9(3) which characterises the grounds of discrimination as laid down in *Harksen*. The opposing views create uncertainty and fail to acknowledge the court's own development of the "differentiation" principle which lies at the heart of the equality jurisprudence in determining the existence of unfair discrimination on the group as noted by Jwaganth.¹⁹⁸

All the same, despite these views, the *Van Heerden* judgment is important in the interpretation of the equality clause as it:

- firstly, establishes the intersection of section 9(2) and section 9(3) as well as section 9(5) which assumes that the discrimination is unfair unless otherwise is proved;
- secondly, the development of the substantive approach to the realisation of the right to gender equality requires the adoption of affirmative measures, which are envisaged in section 9(2) and are necessary for the achievement of the long-term goal of a just society in order to be able to determine the efficacy of law as an instrument for social change;
- thirdly, the court in *Fourie*¹⁹⁹ held that it is the legislature that is in the front-line for the development of affirmative measures that are designed to advance gender equality in line with Moseneke J's reliance on section 9(2), as it is not only through the courts that the rights in the Bill of Rights are vindicated (as argued by Mokgoro J in her interpretation of the equality clause), and
- lastly, the court was eager to find a standard which remained true to a substantive equality approach without abdicating its judicial responsibility.²⁰⁰

Of utmost importance in the interpretation of the equality clause is the analytical approach developed by the court in *Makwanyane* in establishing the limitation of

¹⁹⁸ See Jagwanth (note 139 above).

¹⁹⁹ See *Fourie*, at para 125.

²⁰⁰ See Fredman (note 163 above) at 183.

fundamental rights as envisaged in section 36 of the Constitution.²⁰¹ Mokgoro J held that:

“the Constitution contains a fully fledged limitation clause in the Bill of Rights, which provides courts with sets of criteria to be applied when competing rights and interests have to be balanced”.²⁰²

The limitation of the right and its analysis is important for the court in establishing the essence of the challenged measure in the realisation of the competing demands in the light of the diverse values and equally diverse historic experience. As Sarkin²⁰³ argues:

“given South Africa’s history of human rights abuse and difficult challenges relating to transformation, [the] human rights culture requires a stricter test to apply to the limitation of rights, one which should offer strong protection in order to prevent the abuse of state [and individual] power”.²⁰⁴

In other words, the stricter test in the interpretation of equality both as a value and a right in the limitation of rights has or should enhance the development of fundamental principles on equality and non-discrimination. The jurisprudence of the court has qualified equality as a foundational value in the interpretation and development of other rights and laws for the substantive achievement of equality. It is important to examine the extent to which the right to equality has fared in this regard.

3.5 Equality and the interpretation of legislation and other rights in the Constitution for the promotion of the right to gender equality

3.5.1 Equality and the right to freedom and security

A synthesis of the theoretical framework provided in chapter two, provides the affirmation of equality both as a value and a right in informing the interpretation of the

²⁰¹ See *Makwanyane* at paras 98-104.

²⁰² See Mokgoro (note 69 above).

²⁰³ Sarkin J, ‘The drafting of South Africa’s Constitution from a human rights perspective’ (1999) Volume 47 No 1, *American Society of Comparative Law*, 67-87.

²⁰⁴ *Ibid*, at 79.

developed measures and other rights entrenched in the Constitution. The decision of the court in *Omar v Minister of Justice and Constitutional Development*²⁰⁵ is a case in point. The court held that the right to freedom and security of the person²⁰⁶ must be understood in conjunction with the right to dignity, life, *equality, which includes the full and equal enjoyment of all rights and freedoms*, and privacy.²⁰⁷ In this case, the court was faced with the challenge relating to the constitutionality of section 8 of the Domestic Violence Act, which it was contended, the mandatory issue of a warrant of arrest at the time of the grant of a protection order in terms of section 8(1)(a), was in breach of several of the complainant's constitutional rights which include his right to freedom and security of the person.²⁰⁸ This section provides:

- (1) whenever a court issues a protection order, the court must make an order
 - (a) authorising the issue of a warrant for the arrest of the respondent, in the prescribed form; and
 - (b) suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7...
- (6) whenever a warrant of arrest is handed to a member of the South African Police Service in terms of subsection (4)(a), the member must inform the complainant of his or her right to simultaneously lay a criminal charge against the respondent, if applicable, and explain to the complainant how to lay such a charge.

In finding that this section fall within the framework of the Bill of Rights and therefore remains valid, Van der Westhuizen J considered the purpose as well as the scheme and contents of the DVA before considering the applicant's claim in order to gain an

²⁰⁵ 2006 (2) BCLR 253 (CC).

²⁰⁶ See section 12 of the Constitution which provides that it includes the right:

- (c) to be free from all forms of violence from either public or private sources;
- (e) not to be treated or punished in a cruel, inhuman or degrading way; and
- (2) everyone has the right to bodily and psychological integrity..."

²⁰⁷ See *Omar*, above at para 17 and author's emphasis.

²⁰⁸ *Ibid*, at para 2.

understanding of the social context upon which DVA was developed.²⁰⁹ Firstly, he characterised domestic violence as “brutally offensive” to the values and rights in the Constitution.²¹⁰ The distinct nature of domestic violence affirms the inhuman treatment that it carries which was characterised in *Makwanyane* as arbitrary and constitutes a serious inequality and the impairment of the dignity of the human person.²¹¹ L’Hereux-Dube’ also affirms that the protection against domestic violence is as much a matter of equality as it is an offence against human dignity and a violation of human rights.²¹² The inhumanness of domestic violence is affirmed by its hidden, immeasurable and repetitive character which has serious repercussions for family life and the quest for gender equality.²¹³

Secondly, the judge highlighted the unacceptable high incidents of domestic violence and the fact that the criminal justice system has not been effective in addressing family violence for a number of reasons. He then, held that because of the nature of domestic violence, it requires:

- (1) an adequate legal response as was recognised by the adoption of the DVA; and also
- (2) the gendered nature and effects of violence as it mostly occurs in the family and the unequal power relations between men and women disempowers women and children who are the most vulnerable members of our society.²¹⁴

The honourable judge substantiated his reasoning by referring to Ackerman J and Goldstone J in *Carmichele* where the court held:

“South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by

²⁰⁹ Ibid, at para 10.

²¹⁰ At para 17.

²¹¹ See *Makwanyane*, at para 26.

²¹² See L’Hereux-Dube’ C, ‘Applying women’s international human rights’, Judicial Colloquium in Bangalore, India, entitled: Developing human rights jurisprudence, Volume 8, Interights Publishers, 27-30 December 1998 at 25.

²¹³ *Baloyi*, at para 11.

²¹⁴ At paras 13-14.

women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights”.²¹⁵

The importance of the reasoning in *Omar* shows the significance of international human rights in the promotion of gender equality at the domestic sphere.²¹⁶ It develops the language of substantive equality in the protection and promotion of women’s international and national human rights against domestic violence which also contains a greater element of criminality. If violence, domestic, emotional, physical, financial and otherwise, is not treated sensitively by the courts, it furthers the victimisation of women. The protection of the measures that have been designed to advance the struggles for the realisation of the right to gender equality limits any potential for the minimal approach towards determination of the significance of the law for social change.

It should also be highlighted that the characterisation of domestic violence as “brutally offensive” in *Omar* does not assist in eliminating the discrimination and persecution of women. The characterisation addresses the consequence of violence and does not go deeper and examine the underlying social networks in addressing the root causes of domestic violence. The minimalist approach defeats not only the purpose of the developed measure in eliminating the discrimination against women, but the Constitution itself which Phakola characterises its adoption as a:

“turning point in history of South Africa as it protects the rights of all people regardless of race, gender or sex as it is founded on values of equality, freedom, dignity and respect for the rule of law”.²¹⁷

The lack of addressing the underlying social networks fails to establish the intersection of race and gender discrimination which is experienced by women in rural areas. The two grounds of discrimination are a central core in understanding the social relations in South African history.²¹⁸ The failure may also be attributed to the gaps in law reform as identified in chapter one as one of the factors that are an impediment to the promotion of

²¹⁵ Ibid.

²¹⁶ See the reference in *Baloyi* to section 1 and section 9 of the Constitution at para 12.

²¹⁷ Phakola N, ‘Women’s rights entrenched’ (2008) Volume 3, *Justice Today* at 5.

²¹⁸ See Erlank N, ‘Gendering commonality: African men and the 1813 Commission on Native Law and custom’ (2003) Volume 29 No 4, *Journal of Southern African Studies*, 937-953 at 953.

the right to gender equality. In this regard, for example, the DVA is limited to an acknowledgement of the high incidents of domestic violence in South Africa²¹⁹ and the enforcement through the application for a protection order. The extent to which the DVA will contribute significantly and address the root causes of domestic violence remains uncertain.

3.5.2 Equality and the enforcement of maintenance claims

The founding and constitutional value of the right to equality as an interpretative tool in the enforcement of maintenance claims was examined by the court in *Daniels v Campbell*.²²⁰ This case concerned the declaration of certain provisions of the Intestate Succession Act²²¹ and the Maintenance of Surviving Spouses Act²²² unconstitutional and invalid for failing to include persons married according to Muslim rites as “spouses” for the purposes of these two pieces of legislation. The court reasoned that the constitutional values of equality, tolerance and respect for diversity point strongly in favour of giving the word “spouse” a broad and inclusive construction as the purpose is

²¹⁹ See preamble of the DVA.

²²⁰ 2004 (5) SA 331 (CC).

²²¹ See section 1 of Act No 81 of 1987 which provides:

(1) If after the commencement of this Act a person (hereinafter referred to as the “deceased”) dies intestate, either wholly or in part, and—

- (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
- (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
- (c) is survived by a spouse as well as a descendant —
 - (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and
 - (ii) such descendant shall inherit the residue (if any) of the intestate estate;

²²² See section 2 (1)(2) of Act No 27 of 1990, which provides:

- (1) If a marriage is dissolved by death after the commencement of this Act the survivor (which is defined in section 1 as the surviving spouse in a marriage dissolved by death) shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefore from his own means and earnings.

to remove the strain imposed by past discriminatory interpretation in favour of its ordinary meaning.²²³

The court's analysis of the word "spouse" in the two pieces of legislation was centred on the contextual basis in order to examine the substantive approach for the achievement of gender equality as it held that:

- (1) the value of non- sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed social practices;
- (2) this, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women; and
- (3) the reality has been and still in large measure continues to be that in our patriarchal culture men find it easier than women to receive income and acquire property.²²⁴

It consolidated its analysis by referring to the case of *Amod v Multilateral Vehicle Accidents Fund*²²⁵ that the exclusion of Muslim women from inheriting their deceased's husband's estates was inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself even before the adoption of the Interim Constitution.²²⁶ The foundational values of equality in the interpretation of the right to equality have also been extended to women married according to the Hindu custom to inherit their late husband's estates. Ms Govender in *Amod* was disqualified to inherit her husband's estate because South African law does not recognise Hindu marriages. Moosa AJ held that there is a positive duty to extend the definition of "spouse" in the Intestate Succession Act to include persons married according to Hindu religion in line with the prescripts of the Constitution to ensure religious and cultural equality.²²⁷

²²³ See *Campbell*, at para 21.

²²⁴ See *Campbell*, at para 22.

²²⁵ 1997(1) BCLR 77.

²²⁶ See *Campbell*, at para 24.

²²⁷ See the report in the *Legal Brief Today*, entitled: 'Right to inherit extended to women in Hindu marriages', dated 07 November 2008.

The essence of the right to equality in the enforcement of maintenance claims was reinforced in *Mngadi v Beacon Sweets and Chocolates Provident Fund and Others*.²²⁸ The Cape High Court in this case ordered the withholding of a lump-sum benefit to pay an outstanding or arrear maintenance, as well as to secure future maintenance obligations. The court reasoned that the law has never shrunk from interdicting a debtor from dissipating funds to thwart the rights of creditors, otherwise, the plaintiff would not have justice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is getting rid of such funds to defeat his creditors.²²⁹

The enforcement of maintenance claims in promoting the right to gender equality is intertwined with the “best interests of the child”. The use of the right to equality in the protection of the best interests of the child in promoting the right to gender equality was followed by the court in *Bannatyne v Bannatyne*.²³⁰ The values of equality were used as interpretative tools or strategies in giving effect to the provisions of section 28(2) of the Constitution which requires that the best interests of the child be of paramountcy in all matters affecting children.²³¹ The bone of contention in this matter was that the Supreme Court of Appeal failed to have due regard to section 28(2) and the state of the maintenance system in South Africa and its effect on gender equality.²³²

The court reasoned that it is the responsibility of the courts to ensure that all rights are protected in order to secure for vulnerable children and disempowered women their small but life-sustaining legal entitlements. It held that the systemic failures in the maintenance system discredit the constitutional promise of human dignity and equality.²³³ Mokgoro J noted the gendered nature of the maintenance system which is affected by logistical difficulties, which in turn undermine the achievement of gender equality as a social change objective in the Constitution. She held that:

²²⁸ 2003 (5) SA.

²²⁹ Ibid, at paras 398E-397A.

²³⁰ 2003 (2) BCLR 111 (CC).

²³¹ Ibid, at para 1.

²³² Ibid, at para 17.

²³³ Ibid at para 27.

“the enforcement of maintenance payments therefore not only secures the rights of children, it also upholds the dignity of women and promotes the foundational values of achieving equality and non-sexism”.²³⁴

The protection of the best interest of the child, through the enforcement of maintenance claims “minimalises” the vulnerability of women to socio-economic deprivation as well. The Constitutional Court in *Grootboom* commented that:

“the protection of children’s rights leads to a corresponding improvement in the lives of other sections of the community, because it is neither desirable nor possible to protect children in isolation from their families and communities²³⁵, [*which include women*], (author’s emphasis).

The court substantiated its reasoning by holding that:

“through legislation and common law, the obligation to provide shelter is imposed primarily on the parents or family and only alternatively on the state. The state thus incurs the obligation to provide shelter to those children, for example, who are removed from their families”.²³⁶

Bonthuys argues against the approach of the court in using the right to equality as an interpretative tool of other rights to shelve the equal protection of the group in the other vulnerable group as developed in *Bannatyne* and *Grootboom*. She opines that the inclusion of the best “interest principle” has given rise to two sets of tensions.²³⁷ The first tension arises:

- on a case-by-case application of the best interests principle and the general principled application of human rights and constitutional norms.

She substantiates her contention by arguing that:

²³⁴ Ibid at para 30.

²³⁵ At para 74.

²³⁶ See *Grootboom* at para 77.

²³⁷ Bonthuys E, ‘The best interests of children in the South African Constitution’, (2006) Volume 20 No 1, *International Journal of Law, Policy and Family Law*, at 23.

“the current application of the principle stresses the fact that the best interests of the child would depend on the surrounding circumstances and that each case should be decided on its own merit”.

The second tension arises from:

- the need to balance the rights and interest of children with the rights and interests of other family members and the needs of the society in general.

She contends that the development of the right to equality which confines the rights and best interests of the child within the framework of the rights of other family members, such as women in this instance, raises the question whether:

“children should have the status of litigants in matters which affect them and whether independent legal representatives should be engaged to protect their fundamental rights”?

The essence of Bonthuys argument is that the protection of children’s rights should be argued independently of the framework of the rights of other members of the society. In that manner, it allows the development of the “best interest principle” within the framework of the “rights of the child” themselves. It limits any potential of the rights of the child to be confined in a particular “closet” in order for them to carry or make any significant contribution towards the promotion of human rights in general. Bonthuys’ argument is in line with Ntlama’s contention in the development of customary law as the latter argues that the principles of substantive equality must be allowed to develop within the framework of customary law itself, rather than to import other principles such as those of common law, to ensure its development.²³⁸

The development of the right within the framework of the right itself gives effect to an understanding of the law in the promotion of human rights which would in turn be in a better position to determine in a more meaningful way its significance for social change.

²³⁸ See Ntlama N, ‘Equality misplaced in the development of customary law: lessons from *Shilubana v Nwamitwa* 2009 2 SA 66 CC’, (2009) Volume 20 No 2 *Stellenbosch Law Review Journal* at 333.

3.5.3 Equality and the promotion of socio-economic rights

The use of the right to equality as an interpretative tool of other rights has carried great significance in the area of socio-economic rights considering the historic socio-economic imbalances that South Africa inherited from its past. It has been noted above²³⁹, that the right to equality plays a significant role in the interpretation of other fundamental human rights which include socio-economic rights. The strategic approach of the court in the adjudication of socio-economic claims under the rubric of equality as a foundational value, gives effect to the interdependence of socio-political rights. The interdependence of these rights enables the determination of the lived experiences of women in order to examine the social power relations and women's material conditions to survive and develop their capabilities as individual and social beings.²⁴⁰

As Liebenberg further argues, the intersection of these rights:

- create a more holistic and realistic picture of multiple, overlapping sources of disadvantage.
- challenge the conventional wisdom that the [promotion of the right to gender equality] is not a question of public responsibility but a private matter for family.
- create opportunities for the voices of those who are marginalised to be heard in judicial processes when political processes are indifferent or hostile to their claims.
- create opportunities for the transformation of common law and customary law rights and duties to be more responsive to power imbalances in social relations.²⁴¹

The intersection of these rights with gender equality was given effect by the court in *Grootbom* as it held that:

²³⁹ See Fredman (note 164 above).

²⁴⁰ See Liebenberg S, 'The value of human dignity in interpreting socio-economic rights' (2005) Volume 21 *SAJHR*, 1-31 at 31.

²⁴¹ Liebenberg S, 'Towards a transformative adjudication of socio-economic rights' (2007) Volume 21 No 1, *Speculum Juris*, at 41-59 at 45-46.

“the realisation of socio-economic rights is also a key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential”.²⁴²

The interdependence of these rights goes back to the *Certification*²⁴³ process when arguments were raised against the inclusion of socio-economic rights in the Constitution that they will:

- have budgetary implications for the state;
- interfere with the doctrine of separation of powers; and also they are not
- universally accepted.²⁴⁴

These arguments were rejected²⁴⁵ as they viewed the promotion of socio-economic rights, which in turn, would promote gender equality, as a matter for the legislature and not judicial adjudication.²⁴⁶ The rejection of such arguments was therefore, endorsed by the court in the *Minister of Health v Treatment Action Campaign*²⁴⁷ case as it held that:

- the primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice;
- where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so;
- in so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even

²⁴² See *Grootboom*, at para 23.

²⁴³ See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) at paras 78-79.

²⁴⁴ See *Certification*, at para 78.

²⁴⁵ *Ibid*, at para 77.

²⁴⁶ See *Gloppen* (note 12 above) at 34 in *Gargarella* (note 12 above).

²⁴⁷ 2002 (10) BCLR 1033.

simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications; and

- government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.²⁴⁸

The importance of the *Grootboom* judgment lies in its development of the “reasonableness principle”²⁴⁹ in determining the extent of government’s compliance with the progressive realisation of socio-economic rights as they depend on the availability of resources for their implementation. The significance of the “reasonableness” approach²⁵⁰ lies in its express intersection of equality and human dignity with socio-economic rights as the court held:

“the proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen”.²⁵¹

²⁴⁸ See *TAC*, at para 99.

²⁴⁹ See *Grootboom*, at para 54. See Steinberg C, ‘Can reasonableness protect the poor’ a review of South Africa’s socio-economic rights jurisprudence’, *SALJ* at 264-284. She argues that the reasonableness principle is capable of providing a good doctrinal basis for a transformative interpretation of socio-economic rights.

²⁵⁰ See Liebenberg (note 238 above). She also views the principle of reasonableness as a key strength in socio-economic adjudication because of its potential to be a flexible, context-sensitive tool for assessing state’s compliance with its socio-economic rights obligations, at 43.

²⁵¹ *Grootboom*, at para 83. See also Fredman S, ‘Providing equality: substantive equality and the positive duty to provide’ (2005) Volume 21, *SAJHR*, at 163-190, Erasmus G and Strydom H, ‘Judgments on the Constitution and fundamental rights’ (1995) Volume 2, *Stellenbosch Law Review*, 264-272. They contend that reasonableness is a central requirement in assessing whether the contravention of a guaranteed right has occurred, at 266.

The interdependence of socio-economic rights with the right to equality as the court held in *Grootboom*, was reinforced in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*.²⁵² But, this case is distinct from *Grootboom and TAC*, as section 27 of the Constitution raised the question of the prohibition of unfair discrimination in section 9(3). The bone of contention in this matter was the challenge on section 3(c) and section 4(b)(ii) of the Social Assistance Act²⁵³ which limited access to social grants to citizens, to the exclusion of permanent residents.²⁵⁴ It was argued that these provisions discriminated unfairly against *Khosa* as they undermine the provisions of section 9(3) of the Constitution. This was equally applicable to section 27 of the Constitution which implicitly makes reference to “everyone” being entitled to equal access to such right as it is also informed by the foundational value of equality in the constitutional adjudication of these rights.²⁵⁵

In reaching its decision, the court had examined the reasonableness of “citizenship” as a criterion of differentiation, as adopted in *Harksen*, in the context of the challenged legislation.²⁵⁶ Without engaging with the *Harksen* approach as discussed above, the court held that the exclusion of permanent residents from the scheme of social security limited their rights in a manner that affects their dignity and equality. It then stressed that dignity and equality are the founding values of the Constitution which lie at the heart of the Bill of Rights.²⁵⁷

The court’s approach in these cases gives the right to equality a more prominent role in the interpretation of both the legislation and other rights in the Constitution. The contention was similarly expressed by O’Regan J in *Dawood v Minister of Home Affairs*²⁵⁸ as she argued that:

“the Constitution asserts [equality] to contradict our past in which the [right to equality] for black South Africans was routinely and cruelly denied. It asserts it

²⁵² 2004 (6) BCLR 569 (CC).

²⁵³ No 59 of 1992.

²⁵⁴ See *Khosa*, at para 1. See also Seekings J, ‘Deserving individuals and groups: the post-apartheid state’s justification of the shape of South Africa’s system of social assistance’ (2008) Volume 68, *Transformation*, at 28-52

²⁵⁵ *Ibid*, at para 42.

²⁵⁶ *Ibid*, at para 53.

²⁵⁷ *Ibid*, at para 85.

²⁵⁸ 2000 (3) SA 936 (CC).

too to inform the future, to invest in our democracy for the respect of the intrinsic worth of all human beings”.²⁵⁹

The prominence of the right to equality has actually shaped the ambit of these other rights and does not only ensure the realisation of these rights but moved beyond the limitations of the formal approach and took into account the context and experiences of women affected by unfair discrimination. The interpretation of fundamental rights within the ambit of equality requires the adoption of an approach that will ensure their examination within the context and interests they are designed to advance.²⁶⁰

What is of importance is the affirmation of the role that the state must play in the enforcement of gender equality claims such as being free from domestic violence, the improvement of women’s livelihoods through an effective social security system as guaranteed in section 27. In other words, the failure of the state to ensure the advancement of the struggles for the realisation of gender equality, may also lead to the state being held accountable as evidence by *Carmichele*²⁶¹ and *Ms K*.²⁶²

3.5.4 *Equality and human dignity for gender equality*

The right to equality is of great significance in the development of the principles of non-discrimination within the framework of “human dignity”.²⁶³ The centrality of dignity in the Constitution is the significance of the lessons drawn from the historic past of inequalities. The past inequalities, which continue to manifest themselves in this new dispensation, makes the right to dignity the cornerstone and foundational value which seeks to reconstruct the future and the life of the general public. Dignity is an underlying value that underpins the concept of substantive equality.²⁶⁴ It has been given a central place,

²⁵⁹ Ibid, *Dawood* at para 35.

²⁶⁰ See Pieterse M, ‘Possibilities and pitfalls in the domestic enforcement of social rights: contemplating the South African experience’, (2004) Volume 26, *Human Rights Quarterly* 882-905 at 886.

²⁶¹ *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC).

²⁶² *K v Minister of Safety & Security* 2005 (6) SA 419 (CC).

²⁶³ See section 10 of the Constitution provides: “everyone has inherent dignity and the right to have their dignity respected and protected”.

²⁶⁴ Fredman S *Discrimination law* (200) Oxford University Press, New York at 116.

not only as a right but a foundational value which is intertwined with the right to equality.²⁶⁵

The entrenchment of human dignity as a foundational value gives weight to the role the court may play in the development of the substantive principles on equality. The court in *Makwanyane* attached great importance to human dignity as an acknowledgement of the intrinsic worth of human beings which are entitled to be treated as worthy of respect and concern.²⁶⁶ The essence of dignity as a “value” was given effect by the court in *S v Jordan*²⁶⁷ as it held that:

“our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic”.²⁶⁸

This is of particular significance in South Africa, as the court in *Makwanyane* held that the:

“respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new constitution”.²⁶⁹

It further held in *Prinsloo*²⁷⁰ that:

²⁶⁵ See section 1(a), section 7(1) and section 39(1)(a) of the Constitution. See also Pieterse M, ‘Eating socio-economic rights: the usefulness of rights talk in alleviating social hardship revisited’ (2007) Volume 29 No 3, *Human Rights Quarterly*, 796-822. She argues that the right to equality is empowering and affirms the inherent dignity of rights bearers and awards political legitimacy to their demands for the satisfaction of their, otherwise, overlooked, material needs, at 797.

²⁶⁶ See *Makwanyane*, at para 328.

²⁶⁷ 2002 (11) BCLR 1117.

²⁶⁸ Ibid, see O’Regan J and Sachs J, at para 74.

²⁶⁹ Ibid, at para 329.

²⁷⁰ See (note 169 above).

“given the history of this country we are of the view that discrimination has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity. Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender. In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.²⁷¹

The affirmation of dignity in the Constitutional Court jurisprudence has formed the core of equality litigation which has manifested itself in ways that determine whether:

- there is discrimination on a ground that is not specified under the non-discrimination provision of the equality clause.
- discrimination on a specified ground is unfair.
- unfair discrimination, found in a law of general application, is nevertheless justifiable under the limitation clause.²⁷²

The Constitutional Court jurisprudence has placed human dignity at the heart of the right to equality which is justified by an argument that equality is a comparative concept which has:

- no substantive meaning on its own.
- affinity between human dignity and indigenous concept of ubuntu.

²⁷¹ Ibid, at para 31.

²⁷² See Cowen S, ‘Can dignity guide South Africa’s equality jurisprudence?’ (2001) Volume 17 *SAJHR* at 34-57.

- the court's understanding that the evil of apartheid consisted first and foremost in the systematic denial of the inherent and worth of the majority of the population, and
- the notion that every human being should be treated as an end in herself rather than as a means to an end, avoiding an instrumentalist approach which would reduce human beings into objects or treat them as expendable.²⁷³

The court affirmed the importance of dignity in the interpretation of other rights, in order to establish a differentiation that has the potential to impair the fundamental rights of everyone. In *Dawood v Minister of Home Affairs*²⁷⁴ the court held that:

“human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour”.²⁷⁵

It is within the framework of human dignity and equality that Sachs J in *National Coalition for Gay and lesbian Equality v Minister of Justice*²⁷⁶ established the interdependence of these rights as he held that:

“the equality principle and the dignity principle should not be seen as competitive but rather as complementary. Inequality is established not simply through group-

²⁷³ Botha H, ‘Equality, structural power’ (2009) *SAJHR* at 3.

²⁷⁴ *Dawood*, (note 273 above).

²⁷⁵ *Ibid*, at para 35.

²⁷⁶ 1998 (1) BCLR 1517.

based differential treatment, but through differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth associated with membership of the group. Conversely, an invasion of dignity is more easily established when there is an inequality of power and status between the violator and the victim”²⁷⁷.

The concept of human dignity as a value has enabled the court to interject it with other rights in developing the substantive framework for the realisation of the right to gender equality. In essence, the court in *Hoffman* strongly held that:

“prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted. Our constitutional democracy has ushered in a new era - it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly. SAA, as a state organ that has a constitutional duty to uphold the Constitution, may not avoid its constitutional duty by bowing to prejudice and stereotyping”²⁷⁸.

The use of dignity as an interpretative value of the right to equality is criticised by Fagan, arguing that such an approach is nothing more than a “rhetorical flourish”.²⁷⁹ He argues that the court’s analysis of dignity in developing the principles of non-discrimination lacks a solid foundation because dignity *does not at all lie* at the heart of unfair discrimination (author’s emphasis).²⁸⁰ He substantiates his argument by contending that the reasoning of the court in *Hugo* which focused on dignity was *misplaced* and *wrong* because the President’s Act (author’s emphasis):

²⁷⁷ Ibid, at para 125.

²⁷⁸ See *Hoffman*, at para 37.

²⁷⁹ See Fagan A, ‘Dignity and unfair discrimination: a value misplaced and a right misunderstood’ (1998) Volume 14 *SAJHR* 220-247.

²⁸⁰ Ibid at 222.

“infringed neither of any independent constitutional rights held by imprisoned fathers nor any constitutionally grounded egalitarian principles of the all or none-kind, the act did not impair the father’s dignity and *dignity is an independent right and can be impaired without the violation of any independent rights*” (author’s emphasis).²⁸¹

Albertyn *et al* also argue against the use of dignity in the interpretation of the right to equality as they contend that it reinforces an individualised disadvantage and the systemic nature of inequality.²⁸² They contend that:

“the right to equality is defined by the value of dignity rather than the value of equality as it tends towards a concern with individual personality issues rather than an understanding of more material systemic issues and social relationship”.²⁸³

On the other hand, Botha rejects the notion that the use of dignity is “individualistic”, arguing that the complex nature of the right to equality cannot be reduced to a single value. It is underpinned by at least three interdependent, yet constantly shifting values, namely, dignity, equality and democracy. Botha argues that the weight to be attached to each of these values must depend on a particular context. He explains his own understanding of the value of equality *vis-à-vis* dignity, which the author finds difficult to disagree with, as he points out that:

“the value of equality closely traces definitions of equality in terms of the need to eradicate material disadvantage and structural inequality, whilst dignity corresponds to the Constitutional Court’s use of the term”.²⁸⁴

The broader approach to the development of the principles of non-discrimination within the concept of the right to human dignity is further identified by Botha as having several advantages which include the following:

²⁸¹ Ibid at 223.

²⁸² Albertyn and Goldblatt (note 107 above).

²⁸³ Ibid at 259.

²⁸⁴ Botha (note 273 above) at 7.

- it makes sense of section 39(1)'s injunction to interpret the rights in the Bill of Rights in view of the values underlying an open and democratic society based on human dignity, equality and freedom. It promises a holistic constitutional jurisprudence which avoids a simplistic opposition between individual rights and public interests.
- it is likely to result in a nuanced approach which can detect and interrogate subtle forms of discrimination which lie at the intersection of misrecognition, material disadvantage and political marginalisation.
- it resists the assimilation of difference to sameness precisely because it emphasises plurality and dissent.²⁸⁵

The criticism fails to acknowledge the broader approach the court has developed in the interpretation of the right to dignity which focuses on the impact of the history that not only discriminated the majority of South Africans but stroke at the core of their human dignity.²⁸⁶ The broader approach to the interpretation of human dignity as a foundational value ensures an inclusive approach on issues of discrimination considering the limitation of the law that is attributed to many factors relating to the enforcement of equality claims, especially gender equality. Hence, the author favours the judicial approach that the constitutional norm of human dignity is paramount and central to the development and implementation of the right to equality.

3.6 The development of common law for the realisation of the right to gender equality

The intersection of the right to equality and its potential for the development of common law is another important aspect in the quest for the promotion of the right to gender equality, as the application of the Bill of Rights is not limited to instances where the Constitution is directly invoked. Long before the dawn of democracy, Chemerinsky pointed out that the principle of equality standing alone cannot be determinative because

²⁸⁵ Ibid at 18.

²⁸⁶ See Seekings J, 'Deserving individuals and groups: the post-apartheid state's justification of the shape of South Africa's system of social assistance' (2008) Volume 68, *Transformation* at 28-52.

it is necessary to decide which inequalities are acceptable and which are intolerable.²⁸⁷ The transformative nature of the Constitution, therefore, does not only require the direct application of the Bill of Rights in respect of equality. Instead, it requires the substantiation of the right to equality beyond the instances in which the parties use the direct application of this right, in the enforcement of equality claims.

Currie and De Waal give synthesis of the approach and the principle laid down in *Mhlungu* that where it is possible to decide a case, without reaching a constitutional issue, that should be the course to be followed.²⁸⁸ Currie and De Waal opine that the principle has a number of important consequences which include:

- before the Bill of Rights is applied directly, the court must apply the provisions of an ordinary law to resolve the dispute, especially in as far as the ordinary law is intended to give effect to the fundamental rights contained in Chapter 2 of the Constitution;
- this equally applies to the ordinary principles of common law that must first be applied and if necessary developed with reference to the Bill of Rights, before a direct application is considered; and
- when the Bill of Rights is directly applied in a dispute governed by legislation, the implementation of the statute must be challenged before the provisions of the statute itself.²⁸⁹

The Constitution makes it the responsibility of the court to develop common law when it falls short in protecting the rights in the Bill of Rights as envisaged in section 39(2). In this regard, Moseneke J in *S v Thebus*²⁹⁰ put an emphasis on the role of the court in the development of common law in line with the provisions of section 39(2) and section 173 of the Constitution in ensuring the full realisation of the rights entrenched in the Bill of Rights.²⁹¹ The honourable judge held that:

²⁸⁷ See Chemerinsky E, 'In defence of equality; a reply to Professor Western' (1983) Volume 81 No 1, *Michigan Law Review*, 575-599 at 575.

²⁸⁸ See *Mhlungu* at para 59.

²⁸⁹ Currie I and De Waal J with De Vos P, Govender K and Klug H, *The new constitutional and administrative law*, (2001) Juta Publishers, Lansdowne, Cape Town at 329.

²⁹⁰ 2003 (10) BCLR 1100 (CC).

²⁹¹ See also section 7(2) of the Constitution.

“common law is the law of the courts as they are its protectors and expounders. The superior courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of the society. That power is now constitutionally authorised and must be exercised within the prescripts and ethos of the Constitution”.²⁹²

Moseneke J substantiated his argument by contending that the need to develop common law under section 39(2) could arise in the following instances:

- the first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency; and
- the second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the “objective normative value system” found in the Constitution.²⁹³

The judge distinguished these possibilities from the direct application of the Bill of Rights in the development of common law in enforcing equality claims by referring to the test developed by Kriegler J in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*.²⁹⁴ Kriegler J held that the direct application of the Bill of Rights requires the:

- examination of the content and scope of the relevant protected right;
- determining the meaning and effect of the impugned provision to see whether there is any limitation on the protected right.²⁹⁵

Moseneke J noted that the direct application is given effect by section 39 and provides guidance on the interpretation of both the rights and the enactment, which essentially requires them to be interpreted so as to promote the value system of an open and

²⁹² See *Thebus*, at para 31.

²⁹³ *Ibid*, at para 28.

²⁹⁴ 2002 (7) BCLR 663.

²⁹⁵ *Ibid*, at para 26.

democratic society based on human dignity, equality and freedom.²⁹⁶ Ackerman J and Goldstone J in *Carmichele*, held that the influence for the development of common law falls within the framework of fundamental constitutional values, including the right to equality as mandated by section 39(2).²⁹⁷ They argued that:

“this requires not only a proper appreciation of the Constitution and its objective, normative value system, but also a proper understanding of the common law. We have previously cautioned against overzealous judicial reform. The proper development of the common law under section 39(2) requires close and sensitive interaction between, on the one hand, the High Courts and the Supreme Court of Appeal which have particular expertise and experience in this area of the law and, on the other hand, this court. Not only must the common law be developed in a way which meets the section 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm”.²⁹⁸

The above contention by Ackerman J is important for the development of common law as it requires the courts to determine the compliance of common law with the constitutional values and translates it in a manner that will ensure the promotion of the Bill of Rights in giving effect to the rights in a particular matter. Hence, the court in the case of *K* had to consider what constitutes the “development of common law” for purposes of section 39(2) and held that:

“we need to bear in mind that the common law develops incrementally through the rules of precedent. The rules of precedent enshrine a fundamental principle of justice: that like cases should be determined alike. From time to time, a common-law rule is changed altogether, or a new rule is introduced, and this clearly constitutes the development of the common law. More commonly, however, courts decide cases within the framework of an existing rule”.²⁹⁹

²⁹⁶ Ibid, at para 26.

²⁹⁷ See *Carmichele*, at para 54.

²⁹⁸ Ibid, at para 55.

²⁹⁹ See *K*, at para 14.

It further established the two possibilities that exist in the development of common law.

These are:

- firstly, a court may merely have to apply the rule to a set of facts which it is clear fall within the terms of the rule or existing authority. The rule is then not developed but merely applied to the facts bound by the rule;
- secondly, a court may have to determine whether a new set of facts falls within or beyond the scope of an existing rule. The precise ambit of each rule is therefore clarified in relation to each new set of facts. A court faced with a new set of facts, not on all fours with any set of facts previously adjudicated, must decide whether a common-law rule applies to this new factual situation or not. If it holds that the new set of facts falls within the rule, the ambit of the rule is extended. If it holds that it does not, the ambit of the rule is restricted, not extended.

It went further and examined whether these possibilities can be characterised as the “development of common law”. It then held that:

- the overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution;
- it is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law;
- courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution are relevant are therefore also bound by the terms of section 39(2); and
- the obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.³⁰⁰

³⁰⁰ Ibid, at para 17.

In the light of the above approach, the centrality of constitutional values in the development of common law is within the domain and framework of the courts. Such development requires the court to consider the significance of promoting the right to gender equality and in particular, the right to be free from all forms violence that undermines the equal worth of women.³⁰¹ This is essential for women, especially those in same-sex relationships, who are more vulnerable and still subjected to social stereotyping, stigmatisation and persecution as evidenced by the brutal murder of Ms Zoliswa Nkonyane (a woman in such a relationship) in Khayelitsha in Cape Town.³⁰²

Most recently, the stigmatisation of same-sex relationships was further institutionalised by the Minister of Arts and Culture: Ms Lulu Xingwana, as she walked out on an exhibition because it featured paintings of naked same-sex couples. Ms Xingwana was due to speak at the opening of a show by young black women at Constitutional Hill in Johannesburg.³⁰³ She advanced the reasons of her walking out as follows:

“our mandate is to promote social cohesion and nation-building. I left the exhibition because it expressed the very opposite of this. It was immoral, offensive and going against nation-building”.³⁰⁴

The decision of Minister Xingwana illustrates that very much opposing interpretations can be given to the ideals of “*building social cohesion*”. The Minister’s conduct leaves the question open whether it is possible to build harmonious relations whilst such

³⁰¹ Ibid at para 14. See also Maseko T, ‘The impact of the principle of separation of powers on the development of common law and the protection of the rape victim’s rights’ (2008) *Obiter*, at 53-68.

³⁰² See the statement released by Valentine M, entitled: ‘Statement on the trial of Zoliswa Nkonyane- 21 April 2008, accessed at www.jwg.org.za on 18 February 2010. See also the report by Ndlovu S, ‘Lesbianism shuts school hostel’, accessed at www.iol.co.za, dated 26 February 2010 where it was nationally reported that the South Coastal High School in Durban has been closed after allegations of girl pupils being involved in same-sex relationships. The uneasiness over same-sex relationships has further resulted in another school in the North West transferring two boy learners without their consent to another school for being in a same-sex relationship, reported on SABC 1 programme: “Cutting Edge” on 26 February 2010, at 21h30.

³⁰³ See the report by SAPA entitled: Lulu Xingwana describes lesbian photo immoral’ *Mail & Guardian*, 03 March 2010.

³⁰⁴ Ibid, as her spokesperson Lisa Combrink justified the Minister’s walking out as follows: Minister Xingwana was also concerned that there were children present at the event and that children should not be exposed to some of the images on the exhibit.

opposing views on its foundational values continue to exist, so as to permit denying equal rights in the fight against historic subjugation of same-sex-couples.³⁰⁵

The stigmatisation of same-sex relationships by Minister Xingwana has not only gone to the core of the women's right to gender equality and human dignity. It has dug deeper to the thrust of South Africa's liberal Constitution which serves as a frame of reference in undoing the historic legacy of inequalities and discrimination as is the case with the conduct of the Pan African Congress.³⁰⁶ It is striking that organisations such as the Azanian People's Organisation (Azapo) and the Pan African Congress (PAC) that have played a fundamental role in freeing South Africa from the atrocities of the past can downthrottle the Constitution itself in their objection to same-sex-relationships. For example, the President of the Azanian People's Organisation: Mr Mosibudi Mangena cautioned his party supporters against the wholesale acceptance of the pronouncements of the Constitutional Court in relation to same-sex couples' issues. He notes that:

“we should indicate what our view in on the question of same-sex marriages, more fundamentally, whether it is acceptable for the judiciary to determine issues of morality, norms, values and culture, or do we believe that whatever the court says is law and should be [respected]”.³⁰⁷

The caution fuelled hatred against same-sex couples which may have serious repercussions for women as the youth wing of the Pan Africanist Congress states that:

“*we are saying to hell with the SA Constitution* for giving rights to gays and lesbians. Homosexuality is totally immoral and there is no place for gays and lesbians here, (author's emphasis)”.³⁰⁸

³⁰⁵ See Cameron E, 'Constitutional protection of sexual orientation and African concepts of humanity', (2001) Volume 118 No 4, *SALJ*, 642. He highlights the struggles of couples in same-sex relationships to enjoy their equal rights as they have been the subject of public controversy and political discussion as they have been severely criticised for their lifestyle and conduct.

³⁰⁶ Hereinafter referred to as “PAC”.

³⁰⁷ See Gqola, 'Welcome to slippery slope' *Mail & Guardian Newspaper*, dated 29 September 2006 at 26, quoted in Juma L, 'From “Repugnancy” for “Bill of Rights”': African customary law and human rights in Lesotho and South Africa' (2007) Volume 21 No 1, *Speculum Juris*, 88-112 at 89.

³⁰⁸ See the report by SAPA entitled: 'PAC in trouble over hate speech', *Sowetan Newspaper*, dated 28 January 2010, and a complaint of hate speech has been laid with the South African Human Rights Commission in Mpumalanga.

Similarly, the King of Abathembu: Buyelekhaya Dalindyebo in the former Transkei in the Eastern Cape, on his plan to create an independent state from South Africa for his subjects, went further and vowed to rule like Robert Mugabe of Zimbabwe *where no man will be allowed to sleep with another man in his state*, (author's emphasis).³⁰⁹ Such perceptions undermine the development of common law within the framework of the highly disputed right to equality. It is a drawback for the promotion of constitutional values including those of the right to equality, in the development of common law for the promotion of the right to gender equality which was endorsed by the adoption of the Civil Union Act.³¹⁰

The adoption of the Civil Union Act was in response to the landmark judgment in the area of promoting equal rights for same-sex couples in *Fourie*. The bone of contention in this case was the exclusion of same-sex couples in the common law definition of marriage in the Marriage Act.³¹¹ The Marriage Act defines marriage as a "union of one man and one woman to the exclusion, while it lasts, of all others".³¹²

The court had to establish whether the denial to those in a same-sex relationship of the right to marry each other amounted to unfair discrimination because of their sexual orientation and if it does, what would be the appropriate remedy?³¹³ In its extension of the rights of those in same-sex relationship to marriage, the court held that:

"the task of applying the values in the Bill of Rights to the common law, which involves the creative and declaratory function, thus requiring the courts to put its faith in both the values themselves, as well as in the people whose duly elected representatives created a visionary and inclusive constitutional structure that offered acceptance and justice across diversity to all".³¹⁴

³⁰⁹ See the report by Hans B, 'I'll lead like Mugabe, says king of Thembu', *Daily Dispatch Newspaper*, 23 March 2010.

³¹⁰ 17 of 2006. See further analysis in Ntlama (note 170 above).

³¹¹ No 25 of 1961.

³¹² The declaration of the marriage definition as invalid in *Fourie* and the resultant adoption of the Civil Union Act did not have a bearing on the marriage definition as still remains the same and the Civil Union Act itself does not define, what is "marriage" within the framework of those in same sex relationships.

³¹³ See *Fourie* at para 5.

³¹⁴ *Ibid*, at para 14.

The court further held that the aspirations of the egalitarian society embrace everyone and accept people for who they are and affirm the respect for difference as human rights requires the affirmation of self-worth which is an acknowledgement and acceptance of difference.³¹⁵ The increasing endorsement of the right to equality in the development of common law was also emphasised in *K*'s judgment. The issue in this case was the development of the common law principle of vicarious liability when the applicant was brutally raped by three policemen on official duty. She contended that the test of vicarious liability should be developed in the light of the obligations imposed by section 39(2) and that the state should be held responsible for its failure to protect her from harm.³¹⁶ It was argued that the court should consider the applicant's constitutional right to freedom and security, to be free from all forms of violence as well as her dignity and the right to substantive equality.³¹⁷ The court had to establish whether this matter raised a constitutional issue and reasoned that the cumulative effect of the affected constitutional values requires the creation of an expressly normative legal system founded on the norms articulated in the Constitution.³¹⁸

But the development of common law within the framework of the Bill of Rights in order to give effect to the substantive realisation of gender equality was seriously compromised, as argued elsewhere³¹⁹, by the majority view in *Masiya*.³²⁰ In this case, the court extended the common law definition of the crime of rape to include anal penetration of young girls to the exclusion of boys. Although the court acknowledged the equal consequences for both "boys and girls", it reasoned that:

- it was not required to consider the extension to include non-consensual anal penetration of the male by a penis;³²¹

³¹⁵ Ibid, at para 60.

³¹⁶ See *K*, at para 11.

³¹⁷ Ibid, at para 14.

³¹⁸ See *K* at para 15.

³¹⁹ See Ntlama N, '*Masiya*: gender equality and the role of common law' (2009) Volume 3 No 2, *Malawi Law Journal*, at 303-318.

³²⁰ See the statement released by the Commission on Gender Equality entitled: 'Response to Constitutional Court judgment on *Masiya* rape case' 10 May 2007. The Commission, as a gender-sensitive body, expressed its disappointment as it would have liked to see the definition of rape being extended to include non-consensual anal penetration of men as well.

³²¹ See *Masiya* at para 45-46.

- its role in developing common law is distinct from its other role when considering whether the legislative provision is consistent with the Constitution;³²² and
- its limitation in the extension of the common law crime of rape not to include males was its prescription to the doctrine of “separation of powers” which requires the Court not to use its power in a codified fashion.³²³

Although the court was much divided on this matter, the reasoning is disappointing as it limits the advancement of gender equality within the framework of “women’s equality”. As much as it seeks to advance the struggles of women for gender equality, it has entrenched the unequal power relations between men and women which, are based on power and dominance. The reasoning of the court did not take into account the impact of the historic inequalities which continue to manifest themselves and may shun women away in exercising their right to equal access to courts. This view was similarly endorsed by the court in *Mohlomi v Minister of Defence*³²⁴ held that:

“South Africa is a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons”.³²⁵

The failure of the court in *Masiya* to acknowledge the high levels of illiteracy and lack of capacity for both men and women to bring cases before the courts endorses the view by Kok³²⁶ that the courts are unlikely to make any significant contribution to the role of human rights in advancing social change. The exclusion of boys from the extension of the common law definition of rape equally questions the significance of the law and the concept of “human rights” in effecting social change. It limits and reduces the protection

³²² Ibid, at para 31.

³²³ Ibid.

³²⁴ 1997 (1) SA 124 (CC).

³²⁵ Ibid at 14.

³²⁶ See Kok (note 190 above).

accorded by the foundational and constitutional values in using the law and the reflection on law's interface with society as an envisaged instrument for social change. It furthers the systemic prejudice and discrimination against, both men and women. This contention is endorsed by Langa CJ as he held that:

“the limitation of the definition to female survivors might entrench the vulnerable position of women in society by perpetuating the stereotype that women are vulnerable, which in turn enforces the dangerous cycle of abuse and degradation that has historically led to placing women in this intolerable position”.³²⁷

Langa's contention is similarly expressed by Bonthuys as she argues that the exclusion of boys from the definition:

“reverts to and reinforces patriarchal stereotypes and dichotomies and that it misunderstands, in a profound way, central concepts such as sex and gender and the gendered nature of rape. Instead of the judgment being an aberration of gender equality, it actually fits into a pattern of conservative judgments about gender and sexuality by the South African Constitutional Court”.³²⁸

The conservative approach of the court did not only undermine the foundational values of equality as envisaged in the Constitution but also the reception of international norms and standards in the domestic sphere in the development of the principles of non-discrimination. The view is given credence by Dyani who argues that although the courts have the discretion to consider the international sources of law, that discretion should not be exercised in an arbitrary manner.

In this particular case, she contends that the court should have referred to the case of *Akayesu*³²⁹ and *Furundzija*³³⁰, which defined the crime of rape in gender-neutral terms.³³¹

³²⁷ *Masiya*, at para 85.

³²⁸ Bonthuys E, 'Putting gender into the definition of rape or taking it out? *Masiya v Director of Public Prosecutions (Pretoria) and Others* (2008) Volume 16, *Feminist Legal Studies* at 249-260.

³²⁹ *Prosecutor v Akayesu* Case No ICTR-96-4-A, Judgment, 2 September 1998.

³³⁰ *Prosecutor v Furundzija* Case No IT-95-17/IT, Judgment, 10 December 1998

³³¹ See Dyani N, 'An opportunity missed for male rape survivors in South Africa: *Masiya v Director of Public Prosecutions and Another* (2008) Volume 52 No 2 *Journal of African Law* at 284, quoted in Ntlama (note 319 above).

What is similarly disturbing is the fact that anal penetration of boys was already a punishable criminal offence in terms of the Criminal Procedure Act³³², even before the adoption of the Criminal Law (Sexual Offences) Act³³³ in 2007. The court itself did acknowledge the equal consequences of the invasion of privacy of young boys but:

- could not deconstruct the unequal power imbalances between men and women;
- it failed to take into account the widespread abuse of young boys who are also vulnerable and being subjected to inhuman treatment due to the violation of their dignity;³³⁴ and
- failed to build and entrench the substantive approach for equality between men and women as it reinforced the societal prejudices and enhanced the negative effects of such prejudices on women.

The limitation deviated from the inclusive approach it adopted in *Fourie*, which is a lack of consistence in its approach in the adjudication of equality claims before it. In the *Fourie* case, the court included gays in the extension of marriage benefits despite the fact that they were also not party to the proceedings.³³⁵ The rigidity of the court's approach in *Masiya* defeats its purpose of occupying a special place in this new constitutional dispensation as argued by Chaskalson P in *Pharmaceuticals Manufacturers*, as he held that:

“the Constitutional Court was established as part of that order as a new court with no links to the past, to be the highest court in respect of all constitutional matters, and as such, the guardian of our Constitution”.³³⁶

The court, instead of allowing the incremental development of the common law in giving effect to the substantive enjoyment of the right to equality, it deferred the extension of non-consensual anal penetration of boys to the time when the matter might be brought by the boy or man himself before the court. However, it may be conceded that the court

³³² No 51 of 1977.

³³³ No 6 of 2007.

³³⁴ See the report in *SA(News24)*, dated 29 July 2008 entitled: 'Boys forced to have sex-study'.

³³⁵ See the further analysis in Ntlama (note 319 above).

³³⁶ See *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa and Others* 2000 (3) BCLR 241 at para 55.

simply wanted to show its respect for the legislature, by relying on the coming into effect of the then anticipated Criminal Law (Sexual Offences and Related Amendment Bill).³³⁷ The statute deals with the legal aspects relating to sexual offences by repealing the common law definition of rape to include both men and women. The objective of this legislation is to:

“comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute, by repealing the common law offence of rape and replacing it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender; repealing the common law offence of indecent assault and replacing it with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent; creating new statutory offences relating to certain compelled acts of penetration or violation”.³³⁸

The additional concern arising from the *Masiya* case is the limitation imposed on the development of the common law for the achievement of gender equality within the framework of section 39(2) by an unmitigated application of the doctrine of separation of powers. This is not to deny that the major engine for law reform should be the legislature, but the fact that the court restricted its duty to develop the common law purely from the conservative viewpoint of the separation of powers doctrine, is regrettable. O'Regan J in *Fourie* in her minority judgment argued strongly that the doctrine of separation of powers is important in our Constitution. But this does not mean that it can be used to avoid the obligation of the court to provide an appropriate relief that is just and equitable, to litigants who successfully raise a constitutional complaint.³³⁹ It is noted above, that the court in *Thebus* emphasised that the development of common law is the role of the court and the common law itself is the law of the court and therefore the court is not required to go beyond what is expected in aligning the common law within the framework of constitutional values.

³³⁷ Hereinafter referred to as the “Sexual Offences Bill”, published in Government Gazette B50-2003), which the provisions of Chapter 1-4 and 7 came into operation on 16 December 2007 in line with the provisions of section 72 of the Bill.

³³⁸ See preamble of the Sexual Offences Act.

³³⁹ See *Fourie* at para 170.

Section 39(2) makes it the responsibility of the court to develop common law in a manner that is most appropriate for the advancement of common law in line with the provisions of the Bill of Rights. But the abdication of judicial responsibility and the deference of judicial authority to the legislature to develop common law undermine the requirements of section 39(2).³⁴⁰ The court has shown a tendency of deferring its role to the legislature as it did in *Fourie*, where, instead of inserting the “reading-in word” in the common law definition of “marriage” to include same-sex couples, it opted to prescribe a number of options that the legislature might undertake instead of being firm to ensure the immediate enforceability of the right to equal access to marriage.³⁴¹

The “deference approach” reduces the quality of the protection accorded to everyone which entails the immediate enforceability of their rights in line with the social change objectives entrenched in the Constitution. It undermines the potential of the law to effect social transformation. It limits the express aim to prevent the continual unfair discrimination as stipulated by the Equality Act which seeks to restore and protect the equal worth of everyone and heal the divisions of the past in order to establish a caring and just society.³⁴²

As pointed out above, the development of common law within the framework of the Bill of Rights is affected by the struggles that are experienced by those enforcing their rights. The *Carmichele* case, as noted above, is a case in point where the Knysna magistrate court failed to protect Ms Carmichele by releasing Mr Coetzee on bail who had a history of sexual assault and violence against women. Mr Coetzee was released on bail despite the fact that there were calls from interested parties who attempted to persuade the police and the prosecutor that he should not be released on bail or warning pending his rape trial. It was while he was at liberty, awaiting trial that he assaulted Ms Carmichele with a pickle-axe. She instituted the action against the Minister of Safety and Security and Justice alleging that:

³⁴⁰ See Meyerson D, ‘The rule of law and the separation of powers’ (2004) Volume 1, *Macquarie Law Journal* at 1-5 as she argues that: “there is no doubt that there cannot be total separation of legislature and executive but the values served by the separation of powers suggest that there must be limits on the extent to which judicial power can transferred to the legislature.

³⁴¹ See *Fourie* at paras 139-141.

³⁴² See the preamble of the Equality Act.

“members of the Police Service and the public prosecutor at Knysna had negligently failed to comply with a legal duty owed to her to take steps to prevent Coetzee from causing her harm”.³⁴³

She substantiated her claim that:

- although Coetzee had a history of sexual assault and that information was at the disposal of the investigating officer, it was not made available to the magistrate;
- the investigating officer did not have a reason to believe that Coetzee should not be released on bail and recommended as such; and lastly
- the prosecutor did not place before the magistrate any information concerning Coetzee's previous convictions and the magistrate himself did not oppose the release on his own cognisance.³⁴⁴

This case shows the discrepancies in the enforcement of claims by women at the magistrates' courts which may deter them from bringing their claims. The conduct of these officers compromised every recognised human right that is entrenched not only in the national laws, but compliance with those of the international community as well. It is regrettable that the information that could have assisted the court to ensure the prevention of harm to Ms Carmichele was rendered meaningless as the investigative office did not see a reason to believe that Mr Coetzee should not be released.

Another severe impediment in the development of the common law for the advancement of the right to gender equality is the reality that only those who are economically empowered effectively manage to challenge the deficiencies in our laws. The confinement of gender equality to those who are able to take their matters to the High Courts, limits the potential of the law for the advancement of social transformation. It means that common law will remain undeveloped as the magistrates' courts are constrained in the development of the common law by the provisions of section 170 of the Constitution and the doctrine of precedent as argued in *Masiya*.

³⁴³ See *Carmichele* at para 2.

³⁴⁴ *Ibid*, at paras 25-28.

The development of the common law is not only affected by the manner in which it may be applied and interpreted within the framework of the Constitution, but by the struggles endured by women when enforcing their rights as evidenced by *Carmichele*. It becomes difficult to determine the intersection of these competing interests as they are determined by those who are able to endure the pain of being rejected by the system that has a legal and constitutional mandate to protect the rights of those subjected to abuse and prejudice.

3.7 The intersection of customary law and the promotion of the right to gender equality

The centrality of equality as a foundational value as entrenched in Constitution can be used as a strategy to advance the struggles for the realisation of the right to gender equality within the framework of customary law rules and principles. The majority of women, particularly black women, were exposed and still continue to suffer under the rubric of upholding African norms and customs, which makes the struggles for gender equality more complex.³⁴⁵ The impact of historic subjugation of customary law, which in turn, limited its development in the protection of the right to gender equality, was similarly expressed by Moseneke J in *Gumede v The President of the Republic of South Africa*³⁴⁶ as follows:

“during colonial times, the great difficulty resided in the fact that customary law was entirely prevented from evolving and adapting as the changing circumstances of the communities required. It was recorded and enforced by those who neither practised it nor were bound by it. Those who were bound by customary law had no power to adapt it. *Even when notions of spousal equality and equity and the abolition of the marital power of husbands over wives were introduced in this country to reform the common law, ‘official’ customary law was left unreformed and stone-walled by static rules and judicial precedent, which had little or nothing to do with the lived experience of spouses and children within customary marriages*”, (author’s emphasis).³⁴⁷

³⁴⁵ See Langa DCJ in *Bhe* at para 89, as he argued that customary law has been distorted in a manner that emphasises its patriarchal features than its communal ones.

³⁴⁶ 2009 (3) BCLR 243 (CC).

³⁴⁷ *Ibid* at para 20.

Of great significance is that the dawn of democracy and the intersection of the right to culture in the advancement of customary law and the right to gender equality in the Constitution seek to eliminate the historic subjugation of women. The Constitution acknowledges the tensions between the recognition of customary law and gender equality; hence it limits the exercise of the right to cultural practices within the framework of the Bill of Rights. It does not elevate common law principles over those of customary law and view human rights as offering the best chance for the development of customary law. It draws an appropriate balance in the development of non-discrimination within the framework of both the customary and common law systems, as the Constitution reinforces the accommodation of legal diversity.³⁴⁸

Similarly, the intersection of the two competing value systems is essential as endorsed by Moseneke J in *Gumede* that it serves a number of important constitutional principles that this process:

- firstly, would ensure that customary law, like statutory law or the common law, is brought into harmony with our supreme law and its values, and brought in line with international human rights standards.
- secondly, the adaptation would salvage and free customary law from its stunted and deprived past.
- lastly, it would fulfil and reaffirm the historically plural character of our legal system, which now sits under the umbrella of one controlling law – the Constitution.³⁴⁹

In addition, the recognition of customary law has put the role of the court at the centre stage to deal with the conflict between customary law and common law in relation to the promotion of the right to gender equality. The central provision which regulates the role of the court in the development of customary law within the framework of the Bill of Rights as envisaged in section 39(2) of the Constitution is section 211(3). This provision requires the court to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with it.

³⁴⁸ See Juma (note 305 above) at 90.

³⁴⁹ See *Gumede* at para 22.

The significance of this provision is based on an understanding that the use of foundational values and principles of equality in the development of customary law must not be used in a manner that will undermine those of customary law. Instead, the right to equality may be used as an appropriate measure to harmonise the cultural values with those of common law in the development of the right to gender equality. The harmonisation of customary law and the right to equality was developed by Kriegler J in *Walters*³⁵⁰ as he held that when there is a constitutional challenge based on legislation or customary law as a primary source of law there has to be a:

- (a) threshold enquiry aimed at determining whether the rule of customary law constitutes a limitation on one or more other guaranteed rights.

This enquiry entails examining:

- (i) the content and scope of the relevant protected rights;
 - (ii) the meaning and effect of the impugned customary law rule to determine whether there is any limitation of the protected rights.
- (b) if there is indeed a limitation, the court will have to weigh-up the nature and importance of the rights to determine the extent of the limitation as against the importance and the purpose of limiting the rights [of women to Chieftaincy].³⁵¹

The enquiry entails nurturing of South Africa's rich diversity and the proper balancing of the interpretation of indigenous values with those entrenched in the Constitution. This does not only mean that customary law must be developed in a way that meets the objectives of section 39(2). Instead, it must be done in a way that is most appropriate for the development of customary law within its own paradigm.³⁵² Mokgoro endorses this view by noting that the inconsistency of customary law values with those of the Bill of Rights cannot be simply nullified in the name of developing the principles of equality and non-discrimination.³⁵³

³⁵⁰ See *Walters*, at paras 26 – 28.

³⁵¹ See section 36 of the Constitution.

³⁵² See also *Carmichele*, at para 55.

³⁵³ See Mokgoro (note 69 above).

It is also worth noting that the court in *Bhe* held that the development of customary law should not be undertaken in a piecemeal fashion as it would provide inadequate development of the rules of customary law.³⁵⁴ The essence of this contention means that the court cannot simply replace customary law with common law *dicta* whenever there is a challenge to it based on the Constitution. This is against the spirit and purport of the Bill of Rights as far as the development of customary law is concerned.

This argument was seriously compromised by the Supreme Court of Appeal in *Mthembu v Letsela*³⁵⁵ by upholding the discriminatory rule of male primogeniture which entrenched the women's subordination and minority status. In this case, the court endorsed the view that women married under customary law are excluded from inheritance under a customary matrimonial property regime.³⁵⁶ The judgment undermined the argument by Mokgoro that African customary law, which by its nature is characterised by patriarchy and has been interpreted in a way that allocates crucial benefits according to the male primogeniture rule, has had a detrimental effect on the socio-economic empowerment and well-being of women, particularly those in rural areas.³⁵⁷

The *Mthembu v Letsela* judgment actually reinforced social stereotyping and stigmatisation which are manipulated under the name of cultural norms and standards, making women more vulnerable to practices that are harmful to them. The court actually used traditional values in a manner in which Govender refers as a “*stick to beat women*” (author's emphasis).³⁵⁸

It is evident in the case of *Themba Mgobongo*³⁵⁹ that cultural norms may be used in a manner that undermines equal rights of women. The issue in this case was that Mr Mgobongo kept his wife, Avela Mbali and their three children, captive in a shack near Ndevana Location in King William's Town in the Eastern Cape, for almost four years

³⁵⁴ See *Bhe*, at para 113.

³⁵⁵ 2000 (3) SA 867 (SCA).

³⁵⁶ See *Mthembu*, at paras 31-32.

³⁵⁷ Mokgoro Y, 'Constitutional claims for gender equality in South Africa: a judicial response' (2003) *Albany Law Review*, at 567.

³⁵⁸ See Govender P, 'When 'traditional values' are a stick to beat women', *Sunday Times*, 28 February 2010.

³⁵⁹ 73/08/08, Zwelitsha magistrates' courts. This is the reference of the Ndevana Police docket as the Zwelitsha magistrates' court record could not be found despite the fact that Mr Mgobongo was found guilty and convicted.

since 2005, without access to most basic necessities such as water. He did not want to see her with people and even when they ran out of water in their shack, they had to wait for him to come back wherever he was, so that he could go and fetch the water for them. She could not take bath without being told to do so or else she would be physically assaulted as she was accused of doing so to be seen by other men.

This case came to the attention of the Khanyisa Wellness Centre only on the 15th August 2008 through the assistance of neighbours who saw Mr Mgobongo sharpening an axe and overhearing him saying that, he was going to “finish them that evening”.³⁶⁰ As she relayed her story to the Khanyisa Coordinator, the fact that her husband did not want her to be seen by other men, was viewed as an expression of the love that he had for her, as alleged by the husband. The organisation assisted her with lodging the case with the Ndevana Police. Mr Mgobongo was found guilty for assault to do grievous bodily harm and sentenced on the 03 March 2009 to three years’ imprisonment or a fine of R3000. He is currently serving the sentence at the Middledrift Central Prison in the Eastern Cape.

It may be inferred from this case that:

- women are ignorant of the law to an extent of stripping themselves of “all the dignity” bestowed on them for no other reason than being human beings; and or
- women may stay in abusive relationships “for the sake of children”; or
- the fear of retribution or reprimand from family members may keep them away from using the law through the courts.³⁶¹

The fear of retribution is reinforced by the social practice and orientation towards the concept of “*umfazi uyanyamezela*” (the wife does not disclose her family secrets or dirty linen in public). This approach fosters the acceptance of abusive and prejudicial conditions as it entrenches a “real wife” syndrome that does not react to the hardship that the husband inflicts on her. The test of the “real wifeness” syndrome is the extent to

³⁶⁰ Interview with Khanyisa Coordinator, 31 March 2009.

³⁶¹ The thoughts the researcher shared with the maintenance officer during the interview at the Zwelitsha magistrates’ courts, on 30 March 2009.

which she absorbs the abuse inflicted on her by the husband.³⁶² Hence Reddi's affirmation that domestic violence is pervasive in South Africa where cultural values and norms are used in order to serve, reinforce and condone abusive practices against women who often accept coercive and sometimes violent sex as "normal".³⁶³ The question is: how long will women continue to endure pain for no other reason than showing that they are women of character and integrity whilst effectively undermining their equal worth and dignity?³⁶⁴

The "*umfazi uyanyamezela*" concept is simplified by Kok³⁶⁵ as follows:

"like other people who have lived under injustice for a long time, many women tend to see themselves through the eyes of their oppressors, having internalised patriarchal views of women's proper roles which justify and legitimate their situation. They often see their situation as the product of 'natural forces' which cannot and even should not be changed".³⁶⁶

"*Umfazi uyanyamezela*" concept is also intertwined with the "*indoda ayikhali*" concept ("a man does not cry"). The concept of "*indoda ayikhali*" views a man who reports an

³⁶² The thought the researcher shared with the Coordinator at the Khanyisa Centre, Zwelitsha, 31 March 2009.

³⁶³ See Reddi M, 'Cultural marriage practices and domestic violence against women: tears or triumph for women in South Africa and India?' (2007), *Obiter*, 502-517.

³⁶⁴ Of further concern in this case was the brutal erosion of the best interests of the children as they were kept captive, with their mother. As the Coordinator shared the impact of the abuse on the kids, she highlighted that they had had no interaction with other children, thus becoming very scared of people. It took them long before they could adjust as they tended to hide behind cupboards and underneath tables and would not look at people. The Constitution guarantees the constitutional protection of the rights of the child which are affirmed as of paramount importance. The Constitutional Court in *Grootboom* further gave effect and affirmed the parental responsibility to ensure the well being of the child. It is very discomfoting for a father who shares a primary responsibility to protect the child from maltreatment and abuse, will be instrumental in eroding not only the constitutional values, but the traditional or African values that promote "*ubuntu*".

³⁶⁵ See Kok (note 190 above) at 128.

³⁶⁶ See O'Regan J in *Harksen* as she argued that: "historically, many of the laws governing marriage were based on an assumption that women were primarily responsible for the maintenance of a household, and the rearing of children, while men's responsibilities lay outside the household. These rules therefore both reflected and entrenched deep inequalities between men and women. Not infrequently women's experience of marriage therefore was (and sometimes still is) one of subordination, both in relation to the rules regulating matrimonial property (whether customary or common law) and in relation to the division of labour within the household. A strong social expectation that married women would not work outside the household also translated into patterns of discrimination against married women outside of the marriage relationship, particularly in the labour market", at para 94.

incident of abuse and domestic violence as weak and unable to hold the household together.³⁶⁷ It is further viewed as an embarrassment for a man to allege “discrimination” as it undermines the integrity of the general men folk. The essence of “*indoda ayikhali*” entrenched in “manhood” lies in embracing pain without showing weakness.³⁶⁸ The improvement of social relations for both men and women is limited by the social orientation that is entrenched in these concepts. These concepts have the potential to limit the significance of the law in undoing the social stereotypes and stigmatisations which appear to devalue the equal worth of both men and women in the enforcement of their right to gender equality.

The two concepts (*umfazi uyanyamezela* and *indoda ayikhali*) are a manifestation of historically unequal power relations between men and women which Reddi attributes to the following factors:

- socio-economic forces;
- the family institutions where power relations are enforced;
- fear of and control over female sexuality;
- belief in the inherent superiority of men; and
- legislation and cultural factors that have traditionally denied women an independent legal and social status.³⁶⁹

It can be drawn from these factors that the fear of retribution as evidenced in the case of *Themba Mgobongo* cannot only be blatantly attributed to women’s endurance of the pain. It must also be attributed to other factors such as unequal access to resources, as identified in chapter one: legal and constitutional information and functioning of the courts or other institutions such as chapter 9 institutions, in enforcing their rights. The view was similarly expressed by the court in *Moise v Transitional Local Council of Greater Germiston*³⁷⁰ that:

³⁶⁷ Discussion on the SABC 3 *Talk Show* hosted by Ms Nolleen Sangqu-Maholwana entitled: ‘Men in abusive relationships’ on 17 February 2010 at 15h00.

³⁶⁸ SABC 1 programme entitled: Cutting edge, on 18 February 2010 at 21h30.

³⁶⁹ See Reddi (note 365 above).

³⁷⁰ 2001 (8) BCLR 765 (CC).

“many potential litigants are poor, sometimes illiterate and lack resources to initiate legal proceedings within a short period of time. Many are not even aware of their rights and it takes time for them to obtain legal advice. Some come by such advice only fortuitously”.³⁷¹

The manifestation of subjugation of women in *Mthembu v Letsela* which promoted other social stereotyping of women as evidenced in *Themba Mgobongo*, severely compromised traditional values and principles by weakening the arguments for the alignment of customary law with the Bill of Rights. The development of foundational values and prescripts of equality as an interpretative tool for the advancement of the right to gender equality within the customary law framework was undermined. The court affirmed the lack of sensitivity of the rule of male primogeniture in respect of the right to gender equality, thus compromising the development of these competing rights alongside each other.

In remedying the effects of the *Mthembu* judgment, the Constitutional Court in *Carmichele* developed a much more solid framework for the balancing of customary law values with those equality embodied in the Constitution. It held that:

“where a rule of indigenous law deviates from the spirit, purport and objects of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation. This obligation is especially important in the context of indigenous law. Once a rule of indigenous law is struck down, that is the end of that particular rule. Yet there may be many people who observe that rule, and who will continue to observe it. And what is more, the rule may already have been adapted to the ever-changing circumstances in which it operates. Furthermore, the Constitution guarantees the survival of indigenous law. These considerations require that, where possible, courts should develop rather than strike down a rule of indigenous law”.³⁷²

But the court deviated from this approach in *Bhe*. Although the court remedied the discriminatory impact of the male primogeniture rule, as it affirmed the equal worth of

³⁷¹ Ibid at para 14.

³⁷² See *Carmichele*, at para 116.

women and children in succeeding their deceased male estate within the indigenous patrimonial property regime, it failed to develop customary law. The flaw in this judgment is that it derogated from the rule, instead of allowing the right to equality to develop within the framework of customary law rule itself. It failed to determine the content of customary law in relation to the application of the rule of succession in inheritance as it hid behind the lack of sufficient evidence to test the rule against the prescripts of the Bill of Rights.³⁷³

The court imported the common law conceptions of intestate succession rather than allowing the development to occur within the rule itself to include women, as Ngcobo J argued in his minority judgment.³⁷⁴ The court reasoned that the common law principles as envisaged in the Intestate Succession Act³⁷⁵ are the basic mechanisms for determining the content of the interim regime that would ensure that extra-marital children, women who are survivors in monogamous unions, unmarried women and all children will not be discriminated against.³⁷⁶

The importation of common law principles in resolving customary law disputes cast doubt on the essence of section 211(3) of the Constitution which requires the courts to apply customary law. The obligation entails a proper and effective application of customary law and not its “mere” recognition if it has to deal with its own deficiencies in promoting human rights of women. As Bennett argues:

“the application of customary law entails a broad meaning of customary law which would encompass it as an integral part of the community to which it applies”.³⁷⁷

The reception of common law principles in the development of customary was further endorsed by the court in *Shilubana*.³⁷⁸ In this case, the court extended the right to succession of chieftaincy to women and equally, as it did in *Bhe*, outlawed the

³⁷³ See Langa DCJ in *Bhe* at para 109.

³⁷⁴ Ngcobo J in *Bhe* at para 215.

³⁷⁵ See section 1, No 81 of 1987.

³⁷⁶ See *Bhe*, at para 121.

³⁷⁷ Bennett TW, *Customary law in South Africa*, (2004) Juta Publishers, Cape Town at 88 quoted in Grant (note 21 above).

³⁷⁸ *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC).

customary law rule of male primogeniture. Without a further background in this case and as argued elsewhere³⁷⁹, the court:

- firstly, compromised both the principles of equality and those of customary law by being inconsistent in its approach in determining a constitutional challenge based on customary law;
- secondly, the court did not balance the extent to which the patrilineal system of succession to chieftaincy undermines the right to equality and its effects on Ms Shilubana in line with the approach it adopted in *Harksen* to establish the discriminatory impact of the alleged rule or conduct; and
- thirdly, the court abdicated its judicial responsibility by deferring its role in the development of customary law to that of the traditional community in the resolution of customary law disputes.³⁸⁰

The inconsistency of the court in its approach in the interpretation of the Bill of rights risks undermining its judicial authority. As noted above, Kriegler J in *Walters* adopted a strategy for the determination of the impugned provision, whether it is based on legislation or customary law, which would enhance the proper balancing of these competing interests. It further adopted a “differentiation and the socio-historical” approach in *Harksen* in order to establish the essence of the differentiation which negatively impacts on women’s right to gender equality. The conception of the strategy adopted by Kriegler in *Walters* and the “differentiation approach” in *Harksen* within the framework of succession to chieftaincy, could have established the extent to which the principles of equality to include women, may be developed within the customary law rules and principles in line with the Bill of Rights.

What is equally striking is that the court itself rejected the importation of common law principles in *Gumede* in the adjudication of disputes arising from customary law. The case concerns a claim of unfair discrimination based on gender and race in relation to women who are married under customary law as codified in the Natal Code of Zulu

³⁷⁹ See further analysis in Ntlama (note 238 above).

³⁸⁰ See further analysis in Mailula D, ‘Abdication of judicial responsibility, cultural self-determination and the development of customary law: lessons from *Shilubana*’ (2008) Volume 23 *SA Public Law/Reg* at 215.

Law³⁸¹ and KwaZulu Act on the Code of Zulu³⁸² and the Customary Act. The first two pieces of legislation firstly, provide that in a customary marriage, the husband is the family head and owner of all family property, which he may use in his exclusive discretion. This plainly means that in terms of codified customary law in KwaZulu-Natal a wife to an 'old' customary marriage will not have any claim to the family property during or upon dissolution of the marriage.³⁸³ Secondly, the Customary Act does not recognise marriages that were concluded before the coming into effect of the Act on 15 November 2000 whilst the Gumedes' marriage was concluded in 1968. This means that marriages concluded before the coming into effect of the Customary Act were not protected as it was the case with Mrs Gumede on the dissolution of her customary law marriage both in terms of the Zulu Law and the Customary Act.

Confirming the historic subjugation of customary law that has been emphasised in this study, the court rejected an argument that Mrs Gumede's challenge was premature and the Customary Act did provide relief for her in terms of the Divorce Act.³⁸⁴ In affirming the argument made in this section in relation to the development of customary law, the court held that:

- the [Customary] Act must be given a meaning that extends optimal protection to a category of vulnerable people who, in this case, are women married under customary law, in order to give effect to the equality and dignity guarantees of the Constitution. That, after all, is the primary purpose of the [Customary] Act.
- *properly understood, customary marriages should not be seen through the prism of the marital proprietary regimes under the common law or divorce legislation that regulates civil marriages. They must be understood within their own setting which does not place a premium on the dichotomy between marriages in and out of community of property, (author's emphasis).*
- lastly, section 8(4)(a) of the [Customary] Act rightly confers equitable jurisdiction to a divorce court seized with the dissolution of a customary marriage. This power that the court exercises is, in my view, more consonant

³⁸¹ Published in Proclamation R151 of 1987, GG No. 10966.

³⁸² 16 of 1985.

³⁸³ See *Gumede* at para 11.

³⁸⁴ 70 of 1979 and *Gumede* at para 38.

with the underlying ethos of customary law which strives for equity in resolving conflict.³⁸⁵

These factors reinforce the general purpose of the Customary Act as Moseneke J in this case held that it seeks to salvage the indigenous law of marriage from the *stagnation of official codes and the inscrutable jurisprudence of colonial 'native' divorce and appeal courts*, (author's emphasis).³⁸⁶ They affirm that the adoption of the Customary Act was not a mere recognition of customary marriages but an instrument that was designed to put an end to the humiliating rejection of these marriages as true marriages and the concomitant hardship this institutionalized prejudice meted out to a large section of South African society.³⁸⁷

However, the lack of a consistent and a coherent strategy in fulfilling the purpose of aligning the development of customary law within the general framework and spirit of the Bill of Rights is not in line with the legitimate role that customary law has to play. It limits the development of the principles of equality and non-discrimination within the framework of customary law. It legitimises the dominance of the common law principles over those of customary law as it was the case under the Black Administration Act. It defeats the whole purpose of developing the principles of customary law within the much disputed right to equality as emphasised by Ndima as follows:

“unless we become honest and deal with African customary law as a customary system, and adopt a shared vision of the system's development with its adherents, we are not going to deal with the colonial legacy effectively”.³⁸⁸

The importation of common law principles limits those of customary law which could have been enhanced by drawing an appropriate balance between these competing value systems. Besides, the essence of the principles of equality is based on an understanding that any contestation between customary law and its practices and the

³⁸⁵ See *Gumede* at para 43.

³⁸⁶ *Ibid* at para 24.

³⁸⁷ Bekker J and Van Niekerk G, '*Gumede v President of the Republic of South Africa*: harmonisation, or the creation of new marriage law in South Africa?' (2009), Volume 24, *SAPR/PL*, 206-222 at 206.

³⁸⁸ Ndima D, 'Judicial review and transformation of South African jurisprudence with specific reference to African customary law', (2007) Volume 21 No 1, *Speculum Juris*, 75-87 at 86.

right to equality, they should supersede any aspect of either customary law or common law that violates them. This is the gist of the equality clause in the analysis of the competing rights, which is misplaced by the arguments that the right to equality is supreme and therefore trumps the right to culture because of its internal limitations.³⁸⁹ Though this might be partially correct because of the framing of the right to culture in the Constitution³⁹⁰, it should be understood that the issue is not whether the right to equality will negatively influence the development of customary law. It is the manner in which the contestation between the two rights is interpreted, that will determine the likely influence of the right to equality in the development of customary law.

The manner in which the fundamental principles of equality as interpretative tools for the advancement of customary law have been used by the court to undermine those of customary law, subjects the court to criticism. It is within the spirit of the Constitution that both customary law and common law in the development of the principles of non-discrimination must be tested and interpreted in a manner that balances the values they seek to nurture for a future South Africa³⁹¹, without sacrificing either one of them.

At this stage, even though the courts did provide relief to the applicants in *Bhe*, *Shilubana* and *Gumede*, it fell short in giving effect to the role of customary law as a legitimate system of law. It has actually left the system of customary law “hanging in the balance”. It did not provide any guidance on how the deficiencies in its application should be remedied in terms of customary law itself in order to operationalise it once again for gender equality.

3.8 Equality and the implementation of court orders for the promotion of the right to gender equality

The great challenge in the enforcement of gender equality is the manner in which the court orders have been implemented. The lack of a comprehensive plan to implement such orders undermines the positive aspects for the realisation of the right to gender equality. The enforcement of the right to gender equality through the courts is to improve

³⁸⁹ See Bekker and Van Niekerk (note 389 above).

³⁹⁰ See section 36 which further subjects the right to culture to reasonableness and justification based on human dignity, equality and freedom.

³⁹¹ See *Qozoleni v Minister of Law and Order* 1994 (3) SA 625(E).

the situation and quality of protection accorded to the rights on the ground which requires relevant authorities to comply with the judgment and political action be taken to implement the court order.³⁹²

The implementation of court orders, particularly those of a compensatory nature remains a big challenge and a cause for concern for the substantive translation of the right to gender equality. In this regard, the case of *Carmichele* is a case in point. Ms Carmichele, after a painstaking eight year-long battle to enforce her rights against the state since 1995 until she finally got a judgment in her favour in November 2003³⁹³, and in November 2008, she was still waiting to be paid the damages she suffered. The Department of Justice and Constitutional Development disputed the amount to be paid to her.

Ms Carmichele sought compensation against the state for failing to protect her under the circumstances in which the enforcement agencies which included the Police and the magistrates' courts could have protected her but failed. This case took its course from the Kynsna magistrates' courts, to the Cape Town High Court and then to the Supreme Court of Appeal and finally the Constitutional Court from where it was referred back to the Supreme Court of Appeal and back to the Constitutional Court to determine the amount to be paid for damages.³⁹⁴ This case is an example of the struggles experienced by women and the limitation of the law in the enforcement of fundamental rights generally. It further shows that even those who are aware of their rights might find that judicial enforcement of their rights requires a skill that an ordinary person does not possess.

The lack of implementation of court orders is a cause for concern as it compromises an argument for the substantive achievement of the right to gender equality. This is similarly expressed by Lacey that the issue of enforcement reminds us that instituting rights in legal doctrine, irrespective of its advantages is not necessarily to secure their

³⁹² Sudarshan R 'Courts and social transformation in India' at 161 in Gargarello (note 12 above).

³⁹³ See the report by Klass Looch Associates, entitled: 'Carmichele will never recover', *Legal Brief Today*, accessed on 08 November 2008.

³⁹⁴ Ibid.

implementation and may even lead to a counter-productive ‘centre-ing’ of law in our political strategies.³⁹⁵

The obligation of the judiciary to develop “just and equitable” remedies is without doubt, the essence of moving beyond the court order to ensure its implementation. Section 172 of the Constitution provides:

- (1) when deciding a constitutional matter within its power, a court -
 - (a) must declare any conduct or law that is inconsistent with the Constitution invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of the invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

This provision was given substance by the Constitutional Court in *Fose v Minister of Safety and Security*³⁹⁶ as it held that:

“appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights”.³⁹⁷

The argument for the development of appropriate remedies was given effect by O’Regan J in *Fourie*³⁹⁸ that the court is empowered and has a duty to protect constitutional rights

³⁹⁵ Lacey N, ‘Feminist legal theory and the rights of women’ in Knop K, *Gender and human rights* (2004) Oxford University Press, New York at 30.

³⁹⁶ 1997 (7) BCLR 851 (CC).

³⁹⁷ Ibid, at para 19.

³⁹⁸ 2006 (3) BCLR 355 (CC).

through effective and appropriate remedies and it should not shrink from this duty.³⁹⁹ But this argument and the appropriateness of the remedies to grant relief to those subjected to prejudice and discrimination is not disputed. It is the lack of a comprehensive implementation and monitoring plans that is the challenge.

Another area of concern about the lack of implementation of court orders is in the realm of socio-economic rights which seek to improve the socio-economic status of women.⁴⁰⁰ Generally, socio-economic rights are not immediately implementable as they have to be realised progressively over a period of time. Courtis⁴⁰¹ argues that the lack of implementation of court orders in respect of these rights in promoting the right to gender equality may be attributed to a number of factors which include, but not limited to the following:

- the long-standing view of social rights as non-enforceable has delayed judicial efforts to define and build principles to aid the interpretation and [enforcement of these rights].
- the rhetorical value ascribed to these rights and the lack of interpretive practices on the part of the judiciary and legal academia, few principles have been developed to cope with rights such as education, health, adequate housing and food.
- the constitutional recognition of these rights is not backed up by a legislative, judicial or doctrinal effort to develop their conceptual basis and content.⁴⁰²
- the inadequate development of the content of social rights poses problems both for the channelling of the voice of [women subjected to prejudice and discrimination].
- the limitation imposes additional burden of defining the content of these rights and forcing the courts to adopt an activist stance they may not be able or willing to take.⁴⁰³

³⁹⁹ See *Fourie* at para 171.

⁴⁰⁰ See Ntlama N, 'Unlocking the future: monitoring court orders in respect of socio-economic rights', (2005) Band 68 Nommer 1, *THRHR Journal* at 81.

⁴⁰¹ Courtis C, 'Judicial enforcement of social rights: perspectives from Latin America' in Gargarello (note 12 above).

⁴⁰² Hence the non-ratification of the ICESCR by South Africa.

⁴⁰³ *Ibid* at 171.

These factors and the progressive nature in the enforcement of socio-economic rights, the lack of implementation of court order manifested themselves in the case of *Tshabile v The Chief Executive Officer of the South African Social Security Agency*.⁴⁰⁴ This case involved the application for a social grant to the agency by three women. After each of the applicants submitted their applications in 2006, they were informed to return within few weeks to enquire about the outcome of their respective applications, which they did.⁴⁰⁵ After a number of enquiries without success, the applicants approached Jako Visser Attorneys for assistance and gave them powers to take any steps that may be required in law to assert their right for social grants they had applied for.⁴⁰⁶ Without providing a further background and power dynamics played by the agency and the lack of credible information it submitted to the court in this matter, the court found that:

“the agency’s conduct for failing to provide the applicants with the outcome of their applications has had a concomitant effect of prejudicing their inalienable rights under section 27 of the Constitution”.⁴⁰⁷

Although this judgment is commendable as Sibeko J characterised the agency’s conduct as deplorable and discourteous in the extreme⁴⁰⁸, and ordered the agency to notify the applicants of the outcome of their applications within 15 days of the order, it is flawed in some respect. The court left open the following-up mechanisms should the agency fail to adhere to the order. As argued here, the enforcement of socio-economic rights court orders, considering the power-play by the agency, requires monitoring of such court orders. The purpose of such monitoring has to give content and meaning to the jurisprudence on equality in respect of socio-economic rights as Moseneke⁴⁰⁹ argues that:

⁴⁰⁴ (227/2008) [2009] ZANWHC.

⁴⁰⁵ Ibid at para 6.

⁴⁰⁶ Ibid at para 8.

⁴⁰⁷ Ibid at para 21.

⁴⁰⁸ Ibid at para 36.

⁴⁰⁹ Moseneke D, ‘Transformative adjudication’ (2002) Volume 18 No 3, *SAJHR* at 309-319, delivered at the Bram Fischer Memorial Lecture on 25 April 2002, arguing that the Constitution enjoins the judiciary to uphold and advance the transformative design of the Constitution, quoted in Davis DM, ‘Socio-economic rights: do they deliver the goods?’ (2008) *International Journal of Constitutional Law Advance Access*, 1-25.

“a creative jurisprudence of equality coupled with substantive interpretation of socio-economic rights should restore social justice as a premier foundational value of our constitutional democracy side by side, if not interactively with, human dignity, equality, freedom and accountability, responsiveness and openness”.⁴¹⁰

The proper and effective monitoring of such orders will determine the government's compliance with its constitutional obligations.⁴¹¹ This, in turn, will advance the right to gender equality as the court established the interdependence of civil and political rights (equality and human dignity) *vi-a-vis* socio-economic rights (access to housing in *Grootboom*). Monitoring of court orders carries more weight for the enforcement of such orders where the government has been found to have abdicated its responsibility. The implementation of court orders provides a:

- framework for determining what the government owes to vulnerable groups [women] as a matter of rights, rather than as a matter charitable support, economic efficiency or any other form of welfare-based policy.
- positive vision of social justice, which is more robust, precise and developed in protecting the needs and improve the impoverished status of the disadvantaged group.⁴¹²

Monitoring requires a pro-active approach from the court to ensure that its role does not remain at the level of the analysis of the challenged law or conduct but to ensure that its orders are properly implemented. Davis argues:

“if the role of the court remains solely at the level of the analysis of the invoked right without being a watchdog for litigants who want to exercise their full

⁴¹⁰ Ibid, at 309.

⁴¹¹ See Swart M, 'Left out in the cold? crafting constitutional remedies for the poorest of the poor' (2005) Volume 21, *SAJHR* at 215-240.

⁴¹² See O'Conneide C, 'Bringing socio-economic rights back into the mainstream of human rights: the case of the European Committee on Social Rights as an example of rigorous and effective rights adjudication' (2009) 27 July, accessed at www.ssrn.com on 25 February 2010.

citizenship, the promise of socio-economic rights may remain at the level of the worst of negative rights – the right to assert without any meaningful remedy”.⁴¹³

It is submitted and acknowledged that the judiciary does not have the institutional capacity to monitor its own orders hence it is essential that it affirms the role of the Chapter 9 institutions and civil society. The lack of such affirmation may subject the essence of socio-economic rights to nothing more than being questioned by scholars whether they do deliver the goods [for gender equality].⁴¹⁴ As argued elsewhere⁴¹⁵ the lack may further subject the implementation of court orders to the willingness of the institutions supporting constitutional democracy. These institutions are obliged to investigate and monitor the promotion of human rights, including the implementation of court orders. Their role cannot be relegated to their willingness. The appropriateness of the remedy as envisaged in section 172 should go beyond the court order to ensure its translation to the real life experiences of those vulnerable in order to enhance the argument for the substantive advancement of the formal conception of these rights into reality.

The abdication of the judicial responsibility to ensure that its orders are implemented by, for instance, making it an order that the monitoring institutions fulfil their mandate undermines the progressive and transformative nature of the Constitution in promoting the right to gender equality. It undermines the capacity of the law to change and alter inequalities and power relations in society in ways that reduce weight of morally irrelevant circumstances such socio-economic status, race, gender or sexual orientation.⁴¹⁶ It further defeats the whole purpose of the right to equality and its jurisprudence as endorsed by Kriegler J in *Hugo* as follows:

“the importance of equality in the constitutional scheme bears repetition. The South African Constitution is primarily and emphatically an egalitarian constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular

⁴¹³ Davis D, ‘Socio-economic rights in South Africa: the record after ten years’ (2004) Volume 2 No 1, *New Zealand Journal of Public and International Law*, at 47-66.

⁴¹⁴ See (note 400 above).

⁴¹⁵ Ntlama N, ‘The development of jurisprudence of equality in respect of socio-economic rights’ (2006) Volume 1 Jaargang 39, *De Jure* at 88-101.

⁴¹⁶ Gloppen (note 12 above) at 38 in Gargarello (note 12 above).

history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred".⁴¹⁷

Secondly, despite the landmark nature of these socio-economic judgments in advancing those disadvantaged by the historic past, lack of proper enforcement and monitoring mechanisms undermines the legitimacy of the court order which does not flow from the status of the court itself but from the fact that it gives effect to the provisions of the Constitutions.⁴¹⁸ The *Grootboom* judgment is a case in point where the legitimacy of the court was seriously undermined as Ms Grootboom died without a house despite the judgment in her favour eight years earlier. It is the failure of the entire legal system as was acknowledged by her own legal representative who failed to follow-up after the judgment was given in her favour.⁴¹⁹

The enforcement of equality claims, coupled with the implementation of any orders to that effect, is important to determine their significance for the advancement of social transformation. Only the proper implementation of court orders through an established monitoring system allows for the conscientiously development of the law that should foster the values consistent with the Constitution.⁴²⁰ The essence of the implementation of court orders in the promotion of human rights, including the right to gender equality, is endorsed by Bhagwati J as follows:

“what is necessary is to have judges who are prepared to fashion new tools, forge new methods, innovative new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep-sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half-hungry millions

⁴¹⁷ Para 74.

⁴¹⁸ See O'Regan J in *Fourie*, at para 56.

⁴¹⁹ See the report by Joubert P entitled: 'Grootboom dies penniless', *Mail & Guardian Newspaper*, dated 08 August 2008.

⁴²⁰ See *Jordan*, at para 72.

of [South Africans] who are continually denied their basic human rights. *We need judges who are alive to the socio-economic realities of [South Africa] life, who are anxious to wipe every tear from every eye, who have faith in the Constitutional values and who are ready to use law as an instrument for achieving the Constitutional objectives. This has to be a broad blueprint of the appointment project for the higher echelons of judicial service*", (author's emphasis).⁴²¹

The conception of "equality" within the framework of other rights such as dignity, the adopted legislation and the effective implementation of court orders in the development of the substantive jurisprudence on equality has the potential to contribute significantly in the elimination of discriminatory conducts for the advancement of the right to gender equality. It effectively bolsters the role of the courts as an:

- arena in which concerns of marginalised groups can be raised as legal claims and the provision of legal redress in ways that have implications for law, policy and or administrative action.
- serve as a bulwark against the erosion of existing pro-poor institutional arrangements.
- bolstering pro-poor state policies in the face of attacks from other social interests.⁴²²

As George says:

"the role of the court in enforcing and effectively applying the provisions in the Bill of Rights, gets its highest bonus when its orders wipe some tears from some eyes".⁴²³

⁴²¹ *The First Judges Case* 1981 Supp SCC 87, 222, quoted in Sudarshan (note 395 above).

⁴²² See Gloppen (note 12 above at 38) as he argues that Courts may contribute to social inclusion in other indirect ways such as enabling [women] to more effectively fight for social change in other arenas through securing effective political participation, rights to information and collective action.

⁴²³ George JV, 'Social change and public interest litigation', IMC India, accessed on 01 October 2007, at www.india.indymedia.org.

3.9 The “differentiation approach”: *strategy for gender or women’s equality?*

The Constitutional commitment to gender equality and the spate of legal developments since the dawn of democracy raises some questions on the “differentiation approach” in establishing the fairness or unfairness of the discrimination. This approach was expressed by Sachs J in the *National Coalition* judgment as follows:

“equality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not pre-suppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a leveling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society”.⁴²⁴

Botha, therefore, questions whether law recognises difference and registers disadvantage while at the same time, avoid the reification of identities and retaining a sense that things could be different?⁴²⁵ He argues that the ‘comfortable’ difference embraced by the court in areas as diverse as sex, family, marriage and affirmative action reminds us that law, as an instrument of social ordering, relies on processes of categorisation to filter out complexity. It thus seeks to tame the disruptive potential of social contingency and seeks to assimilate what is different to “tried and trusted” categories and schemata. He further contends that it is not only law’s compulsion which stands in the way of transformative equality jurisprudence but:

- a seductive power of commonplace social categories.
- the unquestioning equation of identity with difference.
- the widespread assumption that differences are natural and exist independently of social institutions and arrangements.

⁴²⁴ See Sachs J in *National Coalition* at para 132.

⁴²⁵ Botha H, ‘Equality, plurality and structural power’ (2009) Volume 25 *SAJHR* at 1-37.

- the failure to see that supposedly markets are based upon the background rules which reflect contestable cultural presuppositions; and
- slippage between the generality of law and particularity of the concrete case all contribute to the domestication and reitification of difference.⁴²⁶

These factors and the legitimacy of the law as identified by Botha, in affirming the principles of “difference” within the framework of the socio-political and historical contest in the advancement of the principles of gender equality, are not disputed. It is the “differentiation” that entrenches the “victim-hood” approach in the development of the principles of non-discrimination that is a cause for concern. Albertyn has identified that although the differentiation gives due recognition to “difference”, as a positive feature of our society, it does not address the underlying social frameworks of inequalities and discrimination except broadening the net of inclusion.⁴²⁷

The language of “victim-hood”, which Botha refers as the “dilemma of difference”⁴²⁸, tends to be used in a complacent manner, and as he argues, difference cannot be reduced to broad social categories such as race, gender or sexual orientation. This construction of difference often negates and reduces it to sameness, as it starts from the baseline of cultural norms and presuppositions which are rooted in the worldview of a middle-class and professional elite which is still predominantly white (or at least westernised) and male.⁴²⁹

The complacency in the affirmation of “difference” as a significant strategy in the development of the principles of non-discrimination is evident in the *City Council of Pretoria v Walker*.⁴³⁰ The central issues in this case was whether the use by the council of differential tariffs in the recovery of service charges and the selective enforcement of debt recovery in the historically disadvantaged townships (Atteridgville and Mamelodi)

⁴²⁶ Ibid at 36.

⁴²⁷ Albertyn C, ‘Substantive equality and transformation in South Africa’ (2007) Volume 23, *SAJHR* at 254.

⁴²⁸ Extracted from Minnow M, *Making all the difference: inclusion, exclusion, and American law* (1990).

⁴²⁹ See Botha (note 425 above) at 18. See also Sachs J in *Walker* at para 98 arguing that the Court reinforced the discriminatory practices of the past that were designed to and did benefit the white community whilst inflicting disadvantage on the black community.

⁴³⁰ 1998 (3) BCLR 257.

and, historically privileged suburbs of Pretoria (Constantia Park), in the circumstances of this case, constituted a breach of the equality provisions in the interim Constitution.⁴³¹

The majority view found that the selective enforcement of the collection of arrears amounted to indirect unfair discrimination as the council did not intend to cause harm to Mr Walker and other ratepayers of old Pretoria.⁴³² The court failed to take into account the historic disadvantage and prejudice suffered by the majority of South Africa's population which were denied the quality of service by the apartheid system. It actually perpetuated the privilege of the economically empowered, which runs contrary to the purpose of equality as advanced by Ngcobo J in *Bato Star*.⁴³³ Effectively, it has undermined its own reasoning in this case (*Walker*) as it held that:

“courts should however always be astute to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of the privileged at a price which amounts to the perpetuation of inequality and disadvantage to others on the other”.⁴³⁴

The threading of the court in the interpretation of the equality clause was laid down by court itself in *Prinsloo* as it held that:

“while our country, unfortunately, has great experience in constitutionalising inequality, *it is a newcomer when it comes to ensuring constitutional respect for equality*. At the same time, South Africa shares patterns of inequality found all over the globe, so that any development of doctrine relating to section 8 would have to take account both of our specific situation and of the problems which our country shares with the rest of humanity. *All this reinforces the idea that this court should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely*. This is clearly an area where issues should be dealt with incrementally and on a case by

⁴³¹ Ibid at para 11.

⁴³² *Walker* at para 91.

⁴³³ *Bato Star*, (note 177 above).

⁴³⁴ *Walker* at para 48.

case basis with special emphasis on the actual context in which each problem arises”, (author’s emphasis).⁴³⁵

Another concern in the “differentiation approach” is the categorisation and classification of people according to their status, which Albertyn *et al* refer to as “clinical commercialism”⁴³⁶ rather than moving beyond the personality and address the basic principles in the enforcement of the right to gender equality. The contention can be drawn from the determination of the impact of the discrimination developed by the majority view in *Harksen*. The court focused on the socio-economic status of Mrs Harksen in the interpretation and adjudication of equality claims. Goldstone J argued that the impact of section 21 of the Insolvency Act 24 of 1936 was not as severe to Mrs Harksen as to warrant a finding of unfair discrimination as she was not a victim of past discrimination.⁴³⁷ The Judge did not see her as a potential citizen of the country entitled to equal rights in enforcing her rights in order to develop the substantive and basic principles on the adjudication of equality claims. Even though the court did acknowledge that even those who are economically empowered may not have sufficient funds to litigate, it still found the provisions of the Insolvency Act not discriminatory against Mrs Harksen.⁴³⁸

Albertyn *et al* classify the approach of the court as having categorised Mrs Harksen as a:

“litigant that was unlikely to evoke sympathy as she was an extremely businesswoman and flamboyant woman married to a controversial businessman and not an ideal litigant to represent the difficulties experienced by women in general”.⁴³⁹

They argue that the court failed to take into account the implications of the judgment on the great majority of solvent spouses and the court could have found it difficult if the

⁴³⁵ *Prinsloo* at para 20.

⁴³⁶ See Albertyn and Goldblatt (note 107 above) at 262.

⁴³⁷ *Harksen* at para 66.

⁴³⁸ *Ibid.*

⁴³⁹ Albertyn and Goldblatt (note 107 above) at 263.

challenge was enforced by a poor, black woman with her own hairdressing business, whose equipment had been confiscated.⁴⁴⁰

It is quite striking that the court will categorise people based, on their socio-economic status when adjudicating and developing a proper concept of “differentiation”. The categorisation of people into classes brings to the fore the impact of the apartheid system as it was envisaged in the Black Administration Act 38 of 1927 as Sachs J in *Moseneke v The Master* held that:

“it is painful that the Act still survives at all. The concepts on which it was based, the memories it evokes, the language it continues to employ, and the division it still enforces, are antithetical to the society envisaged by the Constitution. It is an affront to all of us that people are still treated as blacks rather than as ordinary persons seeking to wind up a deceased estate and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin or skin colour”.⁴⁴¹

The foundation of “victim-hood” which classifies people according to their socio-economic status and level of vulnerability to the alleged conduct or law was reinforced by the court in *Daniels v Campbell* as it argued that:

“the value of non- sexism is foundational to our Constitution and requires a hard look at the reality of the lives that women have been compelled to lead by law and legally-backed social practices. This, in turn, necessitates acknowledging the constitutional goal of achieving substantive equality between men and women. *The reality has been and still in large measure continues to be that in our patriarchal culture men find it easier than women to receive income and acquire property, (author’s emphasis).*⁴⁴²

⁴⁴⁰ Ibid.

⁴⁴¹ *Moseneke* at para 21.

⁴⁴² *Daniels* at para 22.

The classification of people according to their socio-economic well-being is characterised by Pieterse⁴⁴³ as follows:

“while there is no correlation between the characteristics of individual plaintiffs and the outcome of their matters, there may be reason to suspect that an applicant’s *chances of success are significantly enhanced where she displays all or some of the features of ‘appropriate victimhood’* – ie. Where she is the typical victim of discrimination, is economically vulnerable, is untainted by criminality or perception of immorality and finds herself in a predicament beyond her individual control”, (author’s emphasis).⁴⁴⁴

The Constitution endorses the equal worth of all human beings regardless of their position in society which requires the protection of the inherent dignity of every human being. Hence the court in *Hoffman* held that at the heart of prohibiting unfair discrimination, the greatest interest is the fact that the Constitution protects the weak, marginalised social outcast and those subjected to prejudice and stereotyping.⁴⁴⁵ It further referred to *Makwanyane* that it is when the inherent dignity of these groups is protected that we can secure that our own rights are protected⁴⁴⁶, rather than reducing the equal worth and dignity of the person to “victimhood”. The “victimhood approach” in the advancement of gender equality enhances the social stereotyping and orientation regarding the role of men *vis-à-vis* women in the enjoyment of the right to equality.

The “victimhood differentiation” advances the divisions and enforces stigmatisation between men and women and people of all races which are entitled to equal worth as “human beings”. It undermines the basic concepts of substantive equality for the promotion of the right to gender equality as laid down in *Roberts v Minister of Social Development*⁴⁴⁷ as follows:

“the particular type of equality found in our Constitution has been described ...as substantive equality...contrasted with the formal notion of equality which

⁴⁴³ Pieterse M, ‘Finding for equality for the applicant? individual equality plaintiffs and group based disadvantage’ (2008) Volume 24 *SAJHR* 397.

⁴⁴⁴ Ibid.

⁴⁴⁵ See *Hoffman*, at para 27.

⁴⁴⁶ See *Makwanyane* at para 88.

⁴⁴⁷ Case No: 32838/05.

presumes that everyone starts from the same point and that by removing arbitrary differences, equality will result”.⁴⁴⁸

The court substantiated its reasoning and argued that:

“the formal conception of the right to equality has been criticised for failing to acknowledge the actual social and economic disadvantages that certain groups experience and how these disadvantages may be reinforced through laws, policies and practices that seem to be neutral but in fact maintains other group’s position of privilege. Affirmative action and other forms of remedial equality cannot be accommodated in a formal equality approach. Substantive equality, by contrast, recognises that inequality is embedded in social and legal differentiation, often along the lines of race, gender and class but also other forms of systemic under-privilege”.⁴⁴⁹

The *Hugo* judgment is another case that entrenched “victimhood” and reinforced systemic prejudice against women. The challenge on this case was on the legitimacy of the Presidential Pardon to release from prison women with children under the age of twelve years, to the exclusion of men with children with the same age. The court argued that the effect of discrimination on men was not to deny or limit their freedom as their freedom was curtailed as a result of their conviction not as a result of the Presidential Act.⁴⁵⁰

The court addressed the plight of women and considered that the further incarceration could have a negative impact on the best interest of the child. However, it compromised the eradication of the underlying systematic forms of discrimination based on gender and other grounds of inequality. The reasoning it used against men equally applies to women who are in prison as a result of their own deeds as is the case with men. It can, therefore, be drawn that the exclusion of fathers from the release from prison under the “closet” of enhancing the bond between the mother and the child entrenched “victimhood” and serves:

⁴⁴⁸ Ibid at para 42.

⁴⁴⁹ Ibid.

⁴⁵⁰ *Hugo* at para 47.

- as a primary source in the perpetuation of inequalities between men and women;
- it reinforced the image of women as mothers or wives or care-givers as it created the identity of women as duty-bearers which creates a divide between men and women;
- the court's approach in the interpretation of the equality clause which continues to project women in a stereotyped manner plays a role in maintaining the unequal power relations between men and women; and
- it also does not acknowledge the diversity of men's experience beyond them being the heads of the households' duties.⁴⁵¹

The jurisprudence of "victim-hood" undermines the significance of legal reform as a strategic tool to advance gender equality for both men and women. The importance of legal reform has been identified by Frohmann *et al* as a strategy that is more accessible and a direct tool for the enforcement and advancement of gender equality claims.⁴⁵² As argued elsewhere⁴⁵³, victimhood as affirmed by the court in *Hugo* for example, advances the contention by Faundez that legislative changes are a "fatal attraction" and a backward sphere that is miles away from social realities, closed onto itself, blind and not attentive to the broader society in which it operates.⁴⁵⁴

The "*Hugo approach*" was further endorsed in *Masiya*, as argued elsewhere.⁴⁵⁵ In this case, it reasoned that it cannot determine the question of gender equality in a piecemeal fashion as the matter relating to boys was not before the court despite its acknowledgement of equal consequences. This reasoning developed into a cloud and cast doubts over the effectiveness of the law as an instrument to bring about social change, considering the challenges that have been identified in chapter one which are aggravated by the gap between the law and its implementation. The "*Hugo approach*"

⁴⁵¹ See Clarke L, 'Harassment, sexual harassment, and the Employment Equality (sex discrimination) Regulations 2005 (2006) Volume 35 No 2, *Industrial Law Journal*, 161-178 at 178 as she argues that [discrimination and persecution] is an obstacle to women achieving their full potential and is particularly pervasive and damaging experience.

⁴⁵² See Frohmann and Mertz Elizabeth, 'Legal reform and social construction: violence, gender and the law' (1994) Volume 19 No 4, *Law & Social Enquiry* at 829-851.

⁴⁵³ See Ntlama (note 244 above).

⁴⁵⁴ Faundez J, 'Legal reform in developing and transition countries: making haste slowly', (2000) Volume 1, *Law, Social Justice and Global Development (LGD)* at 1.

⁴⁵⁵ See further analysis in Ntlama (note 315 above).

casts doubt on the extent to which law and the use of the rights framework can actually challenge the existing socio-political and cultural realities so as to improve the conditions of women as a discriminated and disadvantaged group.

It can be drawn from the approach of the court that the concept of gender equality is fused within the framework of women's equality. There is no established basis for the equal enjoyment of the right to equality between men and women as the "protectionist approach" of the court in favour of women seeks to do more harm as it furthers their subjugation in our respective communities. The development of the jurisprudence on equality which entrenches women as "victims of prejudice and social stereotyping", not as "citizens entitled to equal rights and responsibilities", undermines the social change objectives entrenched in the Constitution. It limits the potential for the determination of instances of discrimination for the promotion and achievement of the right to gender equality without being perceived as a "*typical victim of the kind of discrimination that is being challenged*", (author's emphasis).⁴⁵⁶ The "victim-hood approach" undermines the transformation of our societies through legal and constitutional adjudication as it reinforces inequalities of the past and creates inequality of treatment and benefit of the law between men and women.

This chapter acknowledges the historic prejudice and discrimination which continue to be experienced by women in South Africa's new constitutional dispensation. But, it can be drawn from the cases discussed in this chapter that the court has failed to develop a conceptual framework for the promotion of the right to "gender equality" not "women's equality". This is evident from the manner in which the court reasoned and approached the concept of gender equality in *Hugo, Bhe, Masiya, Shilubana* and other related cases as discussed in this chapter. The court narrowed and confined the right to gender equality to women's equality which furthers the systemic abuse and discrimination against women. It has actually confined the development of the right to gender equality to what Sajo' refers to as the "protection of the status *quo*".⁴⁵⁷ As reinforced by Radacic⁴⁵⁸:

⁴⁵⁶ Pieterse (note 445 above) at 401.

⁴⁵⁷ Sanjo A, 'Social rights as middle-class entitlements in Hungary: the role of the Constitutional Court' at 83-105 in Gargarella (note 12 above).

⁴⁵⁸ Radacic I, 'Gender equality jurisprudence of the European Court of Human Rights' (2008) Volume 19 No 4, *The European Journal of International Law*, 841-857.

“gender equality is proclaimed as one of the key underlying principles of the [Constitution]. Notwithstanding these pronouncements, inequality [between men and] women in [South Africa] persists. The court’s jurisprudence has been largely impotent in challenging gender discrimination and achieving gender equality...as the case law has addressed only a limited number of problems owing to the court’s interpretation of equality and sometimes in a manner that might undermine rather than enhance gender equality”.⁴⁵⁹

The court’s failure defeats the proposition in this study that the law has a potential to effect social change. As Nicholson argues:

“the law as an agent of social change, must meet the demands of a diverse population. To this end, the South African Constitution requires that laws be developed that give recognition to the rich diversity within society, creating unique challenges for jurists to bridge the gap between the western national legal systems and a body of indigenous customary laws applicable to the majority of the population”.⁴⁶⁰

Dugard⁴⁶¹ equates the failure of the court in promoting [the right to gender equality] to the judiciary during the apartheid rule which failed to meaningfully confront racially divided South Africa, wherein, socio-political rights were denied to the majority of the people of South Africa. He argues that the judiciary is untransformed not because of race and gender composition, but, because, it remains institutionally unresponsive to the problems of the poor and fails to advance transformative justice.⁴⁶² As Hlophe predicted:

“I know that the role of judges, particularly in the new South Africa, will soon be very controversial. In fact, I foresee even disagreements among the judges themselves. Clearly, some members of the judiciary are likely to be ahead of their counterparts when face to face with claims involving the liberty of the

⁴⁵⁹ Ibid at 842.

⁴⁶⁰ Nicholson C, ‘A critical analysis of the role of traditional leadership in modern South African law’ paper presented at the 3rd International Conference on Therapeutic Jurisprudence, 07-09 June 2007, Perth, Western Australia.

⁴⁶¹ Dugard J, ‘Courts and the poor in South Africa: a critique of systemic judicial failures to advance transformative justice’ (2008) Volume 24, *SAJHR* 214-218.

⁴⁶² Ibid, at 215.

subjects, whilst others, regrettably, *will continue to drag their feet*, thereby resisting any real changes necessitated by the effluxion of time” (author’s emphasis).⁴⁶³

The controversy, which is equally evident from the approach of the court in the interpretation of the right to equality in the cases that came before it and as has been emphasised above, the issue is therefore, not the entrenchment of the right to equality in the Constitution but it is the manner in which the court has shaped the contest between the competing values and principles of non-discrimination. Hence, both Dugard and Hlophe expressed their concern on the level of judicial scrutiny by the court in the affirmation of constitutional values in promoting the right to gender equality as it:

“institutionalised the social construction of gender distinctions and presented a huge challenge to any gender mainstreaming efforts as [the promotion of the right to gender equality] is likely to be met with considerable resistance”.⁴⁶⁴

As similarly expressed by Meintjes⁴⁶⁵:

“the struggle for gender equality is not just about empowering women but also about changing power relations in society, it is about providing space for women, but is also about changing ideas about who should make decisions and the roles traditionally assigned to men and women”.⁴⁶⁶

In essence, the failure of the court to develop the framework for the promotion of the right to gender equality advances an argument by Kok that broadly, law is a limited

⁴⁶³ Hlophe J, ‘The role of judges in a transformed South Africa – problems, challenges and prospects’ (1995) Volume 112 No 1, *SALJ*, 22-31 at 22.

⁴⁶⁴ See Bakari S and Leah F, ‘Hijacking equal opportunity policies in a Nigerian College of Education: the micropolitics of gender’ (2007) Volume 30, *Women’s Studies International Forum*, 85-96 at 94. See also Epstein CF, ‘Symbolic segregation: similarities and differences in the language and non-verbal communication of women and men’ (1986) Volume 1 No 1, *Sociological Forum*, 27-49.

⁴⁶⁵ Meintjes S, ‘Gender equality by design: the case of South Africa’s commission on gender equality’ (2005) Volume 32 No 2, *Politikon*, at 259-275.

⁴⁶⁶ *Ibid*, at 273.

instrument in effecting social transformation, regardless of which legal institution, namely, parliament or the courts, is utilised to drive such an endeavour.⁴⁶⁷

3.10 Summary

The substantive translation of the right to equality in the Constitution and the manner in which international human rights have influenced this development are commendable. The court's approach in developing the concept of substantive equality in addressing issues affecting women, with its origins in international law, enabled it to reach decisions that are also in accord with international law. The great concern highlighted in this chapter is the court's lack of consistence in its approach in determining instances of unfair discrimination in the advancement of the promotion of the right to gender equality. Its "biasness" towards women leaves much to be desired to an extent of undermining the equal worth and protection of everyone. The court has actually failed to integrate women outside the context of the family household which views the social status of women through the eyes of the men.⁴⁶⁸

As evident from the analysis of the jurisprudence on equality in this chapter, the substantive nature of the right to equality reviewed in this chapter depends on the extent to which it is able to permeate and be transmitted at grass-roots level in order to claim with certainty the gains that have been achieved since the dawn of democracy. The extent to which this victory may be enjoyed depends on how the citizens of the country are able to actually gain access to justice, without hindrance by approaches that have left the lowest structure of the courts without guidance on how to deal with instances of discrimination.

The development of guiding principles should go beyond women's equality and embrace gender equality. There is a critical need to constantly review the ability of the court to effect a meaningful social change through the jurisprudence on equality in addressing both the legal and social inequalities.

⁴⁶⁷ See Kok (note 190 above).

⁴⁶⁸ See Bruckner H, *Gender inequality in the life discourse: social change in West Germany 1975-1995*, (2004) Walter de Gruyter Inc, New York at 1.

CHAPTER FOUR

GENDER EQUALITY: A DISTANT DREAM FOR SOCIAL CHANGE

4.1 Introduction

The idea of the right to equality is central and serves as a core foundational value in establishing a just society as envisaged by the Constitution.¹ Instances of unfair discrimination continue to be the great challenge for the establishment of such a society and yet there is no consensus on the approach to be adopted in order to give a proper meaning to the essence of the right to equality. It was assumed in chapter one that the use of human rights instruments and their enforcement by the courts has the potential for the advancement of social change. This is essential for the enforcement of the right to gender equality especially at the lowest structure of the courts as the first time points of contact with justice. The examination of how due recognition to the difference between men and women is given is important in order to get a clear understanding of the claims brought before the courts. The struggle for the promotion and enforcement of the right to gender equality in the courts is deeply rooted in the country's constitutional and legal system as an expression of the cultural emancipation for both men and women.²

The analysis of the jurisprudence that emanates from the Constitutional Court in chapter three showed that the court has failed to draw an appropriate balance in the development of the principles of the concept of "gender equality" for non-discrimination. The lack of balance in the development of the principles of the right to equality may also, have a negative influence on the approach of the lowest structure of the courts in the enforcement of the right to gender equality. This may further fuel the conflicting views³

¹ See Beal J, Gelb S and Hassim S, 'Fragile stability: state and society in democratic South Africa' (2005) Volume 31 No 4, *Journal of Southern African Studies*, 681-700. They argue that the dawn of democracy in South Africa carried high hopes for the promotion of the [right to gender equality] as it appeared to offer the scope to build a new society in [eliminating the causes and consequences of difference between men and women], at 682.

² Baines B and Rubio-Marin R, *The gender of constitutional jurisprudence*, (2005) Cambridge University Press, New York, at 3.

³ See Fox DR, 'Law against social change' (1991) paper presented at the Annual Convention of the American Psychological Association, San Francisco. He argues that legal reform in keeping with values such as dignity, privacy, justice and equality are often misguided because law exists

that have emerged and have the potential to weaken the significance of using the law in the enforcement of human rights, including the right to gender equality, in the quest for the advancement of the law for social change.

The central concern of this chapter is to address and explore the various factors that may influence the development of the principles of non-discrimination in post-apartheid South Africa. The discussion examines the quest for public confidence in the courts and how indigenous languages may be a useful tool in eliminating consequences of discrimination between men and women in the enforcement of the right to gender equality. The objective is to determine other general factors, especially within the lowest structure of the courts that may inhibit the promotion of the right to gender equality, other than the narrow approach developed by the Constitutional Court in adjudicating equality claims' disputes as discussed earlier in chapter three.

The discussion is supplemented by providing a brief theoretical background on the significance of the constitutional and institutional independence of the magistrates' courts. The review will examine other inhibiting factors within the institution of the magistracy itself, as first time contacts with access to justice. This may provide an opportunity to determine the essence of judicial intervention by the specialist courts within the magistracy in the struggle for the realisation of the right to gender equality.

In essence, the review seeks to establish the link between public confidence, alignment of judgments with popular concepts of justice and the effectiveness of implementation for social change.

to serve the status *quo* as it inhibits the systemic, radical social change that is necessary for societal well-being.

4.2 Public views and confidence on the role of the courts in the promotion of the right to gender equality

4.2.1 Public confidence and the courts

The development of public confidence in the courts is important in order to determine the level of confidence the general public has in the courts. Botha affirms this contention, arguing that, the promotion of public confidence in the courts is seen as a good value and goal for the legitimacy and effectiveness of the courts that seek to enhance public participation in the administration of justice.⁴

The lack of such confidence especially in the lowest structure of the court may result in women not using the courts. Public confidence determines how the public view the magistrates' courts as courts of first instance in ensuring the intersection of their relationship with the communities they serve. A report released by the Center for Sex Offender Management affirms the importance of public opinion and views on the functioning of the criminal justice system including the courts. It identifies three primary reasons for public confidence in the courts, or to the lack thereof:

- public opinion creates boundaries within which the society will support, or at least accept the legislation or policy or decision of the court;
- public opinion about the courts is at times misinformed as a result of misperceptions, causing the public to have low levels of confidence in the criminal justice system; and
- after learning about a criminal justice issue and having a chance to deliberate over it, the public is much more open to change than conventional wisdom would suggest.⁵

The rationale for shaping up public confidence in the courts is supplemented by the factors that may be used to determine the levels of confidence in the courts. Although

⁴ Bonta J, 'Public confidence in the criminal justice system' (2004) Volume 9 No 6, *Corrections Research Summaries*, at 2.

⁵ See the report entitled: 'Public opinion and the criminal justice system: building support for sex offender management programs', (2000) April. See also Smith D, 'Confidence in the criminal justice system: what lies beneath?' (2007) Volume 7, *Ministry of Justice Research Series*, 1-20.

measuring the extent of public confidence in the courts may prove difficult, Benesh *et al*⁶ have identified factors that may be used as a yardstick to evaluate the levels of confidence on the courts. These are:

- the perceptions of equal treatment by the courts which entails an assessment whether the courts exacerbates or ameliorate the existing inequities in our societies;
- the level of responsibility that members of the public attribute to the courts to resolve dispute which may be affected by negative publicity about the magistrates' courts, particularly in the delay in prosecuting the offending behaviour;
- the public often perceives that the wheels of justice move very slowly, leaving them unprotected and in turn develop loopholes that would also allow those accused to have violated their human rights to go unpunished⁷; and
- whether the court officials are considered to exercise due care and diligence towards the complainants as the importance of bringing the dispute before the court is not only about winning but to ensure that processes will be just.⁸

These factors determine how confidence in the courts facilitates the effectiveness of the law for the advancement of social change through the change of attitudes towards the conceptualisation of the right to gender equality.

The growth of public confidence and positive views can enhance the role of the courts and has a potential for the law to be reflective of the views of the broader society.⁹ As Kriegler J argued in *Mamabolo*, it is the people who have to believe in the integrity of the judges including the magistrates and without such trust, the judiciary cannot function

⁶ Benesh SC and Howell SE, 'Confidence in the courts: a comparison of users and non-users', (2001) *Behavioural Science and the Law*, at 199.

⁷ See the statement released by the End Hate 07-07-07- Campaign entitled: 'Justice delayed is justice denied' dated 21 April 2008 after the gruesome murder of a lesbian woman by a group of nine men in Khayelitsha on the 19 February 2006. This case has been dragging since then and is still scheduled for 20 March 2009, telephonic interview with Ms Valentine on 04 March 2009.

⁸ Benesh and Howell (note 6 above), at 199.

⁹ See Singer LE, 'Improving public confidence in the criminal justice system: an evaluation of a communication authority' (2009) Volume 48 No 5, *The Howard Journal of Criminal Justice*, 485-500.

properly and the rule of law will ultimately die.¹⁰ The judicial integrity therefore, evokes the skills and qualities of a high order, unquestioned integrity of character in order for citizens to have confidence and trust the institution that is charged with promoting the rule of law.¹¹

4.2.2 *The exercise of public power in the development of public confidence for gender equality*

Another focus on developing public confidence in the courts is on the exercise of public power in promoting gender equality for social change. The development of such confidence in the courts also falls within the exercise of the public function by the judiciary itself which is entrenched in the rule of law.¹² The rule of law strengthens the consolidation of the democracy requiring the state not only to act in accordance with pre-announced, clear and general rules but also for the courts to function in accordance with such rules, supplemented by fair procedures.¹³ O'Connor defines the rule of law as nothing less than the rule of reason by the courts as it requires legal rules to be publicly known, consistently enforced and even handedly applied.¹⁴ The key elements of the rule of law as a rule of reason have been classified by Gutto¹⁵ as:

- the making or existence of laws, including human rights laws that are relevant to the social needs and aspirations of society and that are reasonable and fair to all sectors and groups in society at national, regional and international levels.

¹⁰ *S v Mamabolo* 2001 (5) BCLR 449 (CC) at para 19.

¹¹ Brennan G, 'Why be a judge?' (1996) presented at the Judges Conference, Dunedin, 12-13 April 1996.

¹² See O'Donnell G, 'The judiciary and the rule of law' (2000) Volume 11 No 1, *Journal of Democracy*, 25-31. See also Fix M and Randazzo KA, 'Public trust in courts as a facilitating mechanism in democratisation', (2008), paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, note that it comprises a set of formal written rules which are subject to procedural fairness and to be applied by independent judges.

¹³ See Currie I and De Waal J, *The bill of rights handbook*, (2005), Juta Publishers, Cape Town, at 10.

¹⁴ See O'Connor SD, 'Vindicating the rule of law: the role of the judiciary' (2003) *Chinese Journal of International Law* at 1.

¹⁵ Gutto SB, 'The rule of law, human and peoples' rights and compliance / non-compliance with regional and international agreements and standards by African states' presentation at the African Forum Envisioning, 26-29 April 2002, Nairobi, Kenya.

- reasonable degrees of understanding and general commitment in the society as a whole to the principle of governance in accordance with the law.
- presence of institutions for law enforcement that have the capacity to enforce the laws and that are independent and impartial.
- the presence of a critical mass of professionals in various organs of institutions of law enforcement such as the police, prosecution authorities, the courts who have the capacity to enforce the laws and who are reasonable, fair, independent and impartial.
- the existence of organized and active formations in civil society, especially in the professions and among academic, women, youth, workers, employers, who are conscious and committed to human rights, social justice and the rule of law, and
- reasonable degrees of understanding and commitment in society as a whole to the need for continual reform and improvement in the laws and the enforcement mechanisms at national, regional and international levels.¹⁶

These factors signify the interdependence of the rule of law with the promotion of the right to gender equality as they are integral to a democracy and support for the courts which is essential to the operation of the rule of law.¹⁷ Given the vulnerability of the courts as institutions, they need public support to function adequately.¹⁸ Hence, Chaskalson CJ, in *Pharmaceutical Manufacturers Association of South Africa: In re ex parte President of the Republic of South Africa*¹⁹ judgment established the limits placed by the rule of law on the use of public power by both the government and its institutions including the courts. The judge drew an appropriate balance in the exercise of public power and the development of public confidence in the courts, as he held that:

“it is a requirement of the rule of law that the exercise of public power by the executive and other functionaries [including the courts] should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this

¹⁶ Ibid, at 6-7.

¹⁷ Benesh SC, ‘Understanding public confidence in American Courts’ (2006) Volume 68 No 3, *The Journal of Politics*, 692-707 at 697.

¹⁸ Ibid.

¹⁹ 2000 (2) SA 674 (CC) quoted in Currie and De Waal (note 13 above).

requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action”.²⁰

Saller argues that the central feature of a functioning democracy is the judicial institution as guardian of the rule of law and protector of basic human rights, which include the right to gender equality. Such a judiciary does not only serve the immediate interests of individuals but also promote a stable society governed by an efficient system of civil and criminal law.²¹ The significance of Saller’s contention is that the development of public confidence may have great significance for the promotion of the right to gender equality because the courts are not in a better position to enforce their decisions and as Stoutenborough notes, there is no guarantee that their decisions will be enforced.²² The lack of enforcement of such decisions is evidenced by the lack of implementation of such orders as discussed in chapter three. Hamilton also endorses the limited role of the courts in the enforcement of their own judgments as he emphasises that:

“the judiciary has no influence over either the sword or the purse...It may be truly said to have neither force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgment”.²³

Public confidence provides an opportunity to establish whether the law carries significance for the advancement of social change. It is essential for the courts that they gain confidence of the general public in order to retain their integrity and legitimacy as institutions of high standards and norms in the promotion of the principles of the new

²⁰ *Pharmaceutical*, at para 85.

²¹ Saller K, *The judicial institution in Zimbabwe*, (2004), Siber Ink Publishers in association with the Faculty of Law, University of Cape Town, at 1.

²² Stoutenborough JW, Haider-Markel DP and Allen MD, ‘Reassessing the impact of Supreme Court decisions on public opinion: gay civil rights cases’ (2006) Volume 59, *Political Research Quarterly*, 419.

²³ Hamilton A, ‘A view of the constitution of the judicial department in relation to the tenure of good behaviour’, (1987) Penguin Middlesex, at 437, quoted in Strelein L, ‘The “courts of the conqueror”: the judicial system and the assertion of indigenous peoples’ rights, (2000) Volume 22, *Australian Indigenous Law Reporter*, at 2.

constitutional dispensation.²⁴ It is also necessary for the public to believe that the courts are a legitimate component of the three structures of governance rather than a biased political actor.²⁵ Understanding what drives public confidence in the courts is essential for establishing the effectiveness of the institution as an important tool in consolidating the struggles for the realisation of gender equality.

Developing public confidence in the courts does not mean that they should succumb to unjustified public concerns or views or be scandalised in any way. Kriegler J in *Mamabolo*²⁶ acknowledged that even though judges, including the magistrates, should be accountable to the general public, the law does place limits on criticisms of judicial officers in the administration of justice for which they are responsible.²⁷ Accountability of judicial officers equally applies to the influence of the general public on the adjudication of matters before the courts that should not be taken over by emotions²⁸ but by the principles and values entrenched in the Constitution. This contention was endorsed by the court in *S v Makwanyane*²⁹ as it held that:

“public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour”.³⁰

This argument was re-affirmed by Newstrom as he emphasised that the obligation of the courts is to define the liberty of all and not to mandate their own moral code. The moral visions of both, the members of the court and those of the public, should not be used as tools to measure the extent of the right to equal treatment by the courts.³¹

²⁴ See O'Donnell (note 12 above), as he observed that the courts decisions are obeyed in the absence of a regular security force as people take it as entirely natural that the court's as guarantor of human rights, their decisions ought to be obeyed, at 25.

²⁵ Herron ES and Randazzo KA, 'The relationship between independence and judicial review in post-community courts', (2003) Volume 65 No 2, *The Journal of Politics*, at 423.

²⁶ See (note 10 above), at para 1.

²⁷ *Ibid*, at para 1.

²⁸ Sachs J in *Fourie* at para 92, acknowledged the role played by religion in public life which may have a direct influence on the development of public confidence on the courts but he strongly held that the courts will be out of order if they employ the religious sentiments of some as a guide to trample on the constitutional rights of others.

²⁹ 1995 (6) BCLR 665.

³⁰ *Ibid*, at para 88.

³¹ Newstrom L, 'The horizon of rights: lessons from South Africa for the post-*Goodridge* analysis of same-sex marriage' (2007) Volume 40 No 3, *Cornell International Law Journal* at 782.

4.2.3 *Exerting the authority of the courts for public confidence: a question for gender equality?*

The development of public confidence and the effectiveness of the courts and the approach in exerting their authority in the enforcement of gender equality have an important role and impact on the significance of the law in our societies. Firstly, exerting the judicial authority in a manner that compromises the integrity of the court and degrades the dignity not only of women but of men as well may weaken the public confidence. The dragging of women out of the Johannesburg magistrates' courts by members of the South African Police Service on 05 March 2009 is an example in point. This tension arose after women staged a silent sit-in at the court in protest of the postponement of a rape case which had been dragging and had been post-poned twenty times since 2005. The reason for the protest was the absence of the magistrate and the case was further postponed indefinitely as the complainant had to leave the court without a definite date upon which her case would be heard.³² The delay in the resolution of matters of gender equality leads to the frustration of those subjected to abuse and persecution. The forcible dragging of women some lifted up in the air, in exerting the authority of the court offended their human rights and their dignity, and thus undermined the principles and values of judicial integrity.

Similarly, the assault of women, one, by a senior maintenance officer³³ and the case of one victim who was brutally assaulted by the Court Orderly to an extent of having to be hospitalised³⁴, at the East London magistrates' courts, undermines the judicial integrity of the courts. The behavior of the two officers attests to the lack of respect for the dignity of women and for the law by court officials, which impacts on public confidence in these courts. The code of conduct for magistrates (Regulation 54A) requires the magistrates not only to maintain and promote the independence of the magistrate as a judicial office but also to uphold the high standards of conduct in both their professional and personal

³² SABC 1 19h30 News report, on 05 March 2009.

³³ See the report by Denver D entitled: 'Court officer on assault rap', *Daily Dispatch Newspaper*, dated 26 March 2006.

³⁴ See the report by Hennop J entitled: 'Cop beats woman at EL court!', *Daily Dispatch Newspaper*, 26 January 2010. The woman stood up in court representing her relative who could not attend such proceedings. When the court adjourned, the woman was followed and beaten by a stick by the policeman.

capacities.³⁵ It further requires the maintenance of public confidence in the courts in order to enhance public respect for the institution of the magistracy and to protect the integrity of the individual magistrate and of the institution itself.

The code of conduct is enforced by the Magistrates' Commission which is established in terms of section 2 of the Magistrates Act.³⁶ The objects of the commission are related to the position and functioning of judicial officers in the lower courts. These include:

- the duty to ensure that the appointment of judicial officers take place without fear or prejudice³⁷;
- ensure that no influencing or victimization of judicial officers in the lower courts takes place³⁸;
- compile a code of conduct for judicial officers in the lower courts³⁹;
- advise the Minister regarding the appointment of judicial officers in the respective lower courts⁴⁰;
- establish committees as it may deem necessary, which would include the performance by the committees of functions in relation to the appointment of magistrates.⁴¹

The commission plays a fundamental role in enforcing the code of conduct for magistrates in ensuring the quality of service in the dispensation of justice. The case of magistrate TVD Matyholo at North End New Law Courts in Port Elizabeth attests to the significance of the commission in the delivery of justice. Magistrate Matyholo absented himself from work without authority and was on sick leave for 48 days between 07 August 2006 and 06 December 2006 and vacation leave for 15 days between 30 August 2006 and 22 December 2006. Magistrate Matyholo was finally dismissed after 9 months

³⁵ See the preamble of the Magistrates Act No 90 of 1993. See also Kelly WFB, 'An independent judiciary: the core of the rule of law' International Centre for Criminal Justice Reform and Criminal Justice Policy, Vancouver, Canada, at 1-20. He argues that a society where people know their rights are guaranteed by fair laws which apply in the same way to all citizens equally and are applied in an open and public way by an independent and impartial judiciary in ensuring a stable and secure society, at 20.

³⁶ 90 of 1993, hereinafter referred to as the "Commission".

³⁷ See section 4(a) of the Act.

³⁸ *Ibid*, section 4(b).

³⁹ *Ibid*, section 4(d).

⁴⁰ *Ibid*, section 4(g).

⁴¹ *Ibid*, section 6(1)(b).

of absence from work whilst he continued to draw his salary of R350 000.00 per annum.⁴² Of further concern was his conduct to the senior magistrate: Mr Makaba, as he shouted at him, when applying for leave, without giving him an opportunity to explain the reasons for the refusal of the extended leave and said that:

“he (the senior magistrate) is a black man but *not respecting the African traditions and acting as a white*”, (authors’ emphasis).⁴³

Another interesting case is the one of magistrate MC Dumani of the Graaf Reinet magistrates’ courts who was suspended for sexual harassment of four women and junior colleagues: clerk of the court, cleaners (2) and a security officer, during the period of December 2008 and January 2009. Although Mr Dumani denies the allegations, he was suspended by the commission, for conducting himself in an unbecoming and embarrassing manner as it was inappropriate for him to perform his functions whilst the investigation was under way.⁴⁴

The two cases are examples of the problems faced by women at the magistrates’ courts in the enforcement of the right to gender equality. The absence of a magistrate from office denies the protection accorded to all, including women, in ensuring equal access to justice. It exacerbates the delays in the disposal of cases and systematically furthers the abuse of women by the legal system itself. The delay in the disposal of cases involves incurring further costs as women will have to go to court more often, only to find the magistrate not at work as it happened in the case of Ms Zoliswa Nkonyana where women had to be dragged out of court as aforementioned.

Secondly, the language of authority used all too often in magistrates’ courts in the enforcement of the right to gender equality is another factor that impacts on the levels of public confidence in the courts. The language used may discourage people to use the

⁴² See the report by Nombembe P, ‘SA Magistrate goes AWOL’ *The Times*, dated 09 December 2007.

⁴³ See the affidavit by Makaba LV: Senior Magistrate, Port Elizabeth, dated 14 June 2007, Affidavit by Senior Magistrate: Civil Section: Mbude JZ, dated 20 June 2007 and Chief Magistrate: Rothman PR, dated 23 August 2007, all submitted to the Magistrates Commission on the conduct of magistrate Matyholo.

⁴⁴ See the suspension letter dated 16 September 2009 from the Minister of Justice and Constitutional Development: Mr Jeff Radebe.

courts. A high level of sensitivity is required by the court officials to ensure an environment that is conducive to the enforcement of gender equality claims. The credibility of the magistrate in the maintenance of high standards was left in doubt at the Zwelitsha magistrates' court in the case of Dr Mxenge on a claim of defamation against a woman who had accused him of rape. In reference to the woman it is reported that the magistrates said that:

“her actions showed a disregard of the law and a “*devil-may-care attitude*” towards the claims against her”⁴⁵, (author's emphasis).

The remark by Coram J of the Supreme Court of Appeal in *Visser v The State*⁴⁶ similarly raises the concern about the use of language in the courtroom. The judge justified the magistrates' description of Mr Visser, on an application to appeal against the sentence for the deliberate failure to pay maintenance, which emanated from the Stellenbosch magistrates courts, as a:

“*n skelm, wat doelbewus nie onderhoud betaal nie*”⁴⁷, (meaning a “*thief*” that does not want to pay maintenance), (author's translation and emphasis).

It is not denied that the failure to pay maintenance with contempt requires the courts to act promptly and punish such offenders accordingly, but the power of language of the court to exert its authority has the potential to affect public confidence in a negative way. This case has gone from the magistrates' courts, Cape High Court and landed at the SCA and Coram J of the SCA affirmation of the compromising language of the courtroom is a cause for concern. Forceful language of this kind may shun women away from the courts as it may contribute to the perceptions of gender bias by the courts. It may reduce the levels of confidence in the courts, especially the lowest structure of the courts as the right to equal treatment and benefit of the law is not limited to those enforcing their rights but extends protection to those accused of having committed crimes, to ensure that the principles of administrative justice are upheld.

⁴⁵ See the report by Jika T, entitled: 'Defamed doctor claims all assets', *Daily Dispatch*, 21 July 2008.

⁴⁶ Case No: 361/2003.

⁴⁷ *Ibid* at para 14.

Using a strong language has the potential to demean the human worth of a person and raises a question about the judicial integrity of the courts in exerting their authority in the administration of justice. The authority of the court must be exerted in a careful manner and must be managed in order to maintain impartiality, public respect and confidence in the administration of justice.

The achievement of public confidence in the courts is a delicate balance between the application of the law and the development of principles of non-discrimination and the responsibility to uphold the principles of judicial independence without external pressure.⁴⁸ It is of particular importance to the commitment in the Constitution to the promotion of the right to gender equality and the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court.

The public confidence in courts must be viewed in the light of South Africa's diversity, particularly the lack of use of indigenous languages in the magistrates' courts, for the promotion of the right to gender equality.

4.3 The development of indigenous languages at the magistrates' courts for the promotion of the right to gender equality

4.3.1 Protecting indigenous languages in the Constitution

The development of substantive principles of equality is influenced by the significance of "language" as an important tool for the promotion of the law within the spirit and purport of the Bill of Rights. The use of language in turn depends on the extent to which the constitutional and legal framework protects the language rights in the dispensation of justice.

⁴⁸ See Clawson RA and Waltenburg EN, 'Support for a Supreme Court affirmative action decision: a story in black and white', (2003) Volume 31, *American Politics Research*, 251. They acknowledge that even though the courts give meaning and establish the rules for social order, its substantial impact remains weak when it comes to the construction of the way in which the public understands its articulation of fundamental values.

Kelleher points out that language is at the very heart of the human identity.⁴⁹ The essence of Kelleher's resemblance of "language" as a "human identity" is further clarified by Maja who identifies at least six grounds of the "humanness"⁵⁰ of language. She pointed out that language is important because:

- it is a medium of communication, mirrors one's identity and is an integral part of the culture;
- it is a means of expression and can be used as a medium of fostering a democratic culture;
- it serves as a valuable collective of human accomplishments and on-going manifestations of human creativity and originality;
- it can be used as a source of power, social mobility and opportunities;
- it can be used as tool to preserve the wealth of information that will be lost as the language is lost; and
- it can also serve both as a reason for brutal conflict and as a touchstone of tolerance.⁵¹

The equal recognition of nine indigenous languages in the Constitution in addition to English and Afrikaans which dominated the legal system in the past provides an opportunity for the evolution of these language rights in the courts. Section 6 of the Constitution which gives official recognition to these rights provides that:

- (1) the official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.
- (2) recognising the historically diminished use and status and advance of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages;

⁴⁹ Kelleher S, 'Defending minority language rights in Quebec and Latvia', (2005) Volume 14, *Adalah's Newsletter* at 1.

⁵⁰ Extracted from Mokgoro J in *S v Makwanyane*, at para 300, on her analysis of the concept of "ubuntu" as a value that underpins the new constitutional dispensation.

⁵¹ Maja I, 'Towards the human rights protection of minority languages in Africa' (2008) *GlobaLex*, at 4.

- (3)
- (a) the national government and provincial government may use any particular official languages for the purpose of government taking into account the usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned, but the national government and each provincial government must use at least two official languages...”;
- (4) the national government and provincial government, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection 2, all official languages must enjoy parity of esteem and must be treated equitably...”.

Despite the internal qualifier on the use of indigenous languages that makes them subject to practicability, the essence of this provision is its equal affirmation of these languages in South Africa as it also acknowledges their historic marginalisation, especially for their use in the courtroom. It requires the state to take practical and positive measures to elevate the status on the use of these languages. The equal status of indigenous languages with the dominant English and Afrikaans does not only seek to contribute to the linguistic diversity in a practical way but also to the appreciation of the value of the South African diversity.⁵²

Cardi has classified the constitutional protection of indigenous languages into different categories which may enhance their development and the promotion of the right to gender equality. She notes that this classification which also falls squarely within the framework of the language rights in South Africa, includes:

- the proclamation of the legal status of one or several languages (section 6(1) of the Constitution);
- provisions including language in the reasons that prevent discrimination or proclaiming the equality of all citizens or individuals (section 6(4));

⁵² Blake J, ‘The international legal framework for the safeguarding and promotion of languages’ (2008) Volume 60 No 3, *Museum International*, at 14.

- norms expressing the requirement regarding the knowledge or the study of a specific language-the official one-that are compulsory for every citizen or for those may that may hold some specific positions to develop some specific public functions (6(3)(a)&(b));
- provisions expressing the linguistic rights that some specific group of people or individuals that belong to them must be granted (section 6(2));
- clauses that foresee the need for linguistic assistance in the cases in which a prosecuted or arrested person does not know the language in which the lawsuit against him or her is brought (section 35(4));
- provisions in which the linguistic regime of a specific institution is referred to (section 6(5));
- constitutional declarations in favour of linguistic pluralism or the protection and conservation of some specific linguistic realities (section 6(3));
- provisions that define which is the institutional sphere that is fundamentally responsible for linguistic policy in relation to all or some of the languages spoken in the state (section 6(5));
- regulation of the legal regime of languages or to some specific partial use (section 6(4)); and or
- other provisions related to linguistic issues which cannot be easily classified under any of the previous categories.⁵³

She further identified that the classification falls within two broad categories of language rights that can be granted by law. These form the regime of linguistic:

- tolerance, which includes rights that protect speakers of minority languages from discrimination and assimilation; and
- promotion which creates certain positive rights key to public service such as the relationship with public power including the enforcement of the rights at the courts.⁵⁴

⁵³ *Cardi V*, 'Regional or minority language use before judicial authorities: provisions and facts' (2007) Volume 6 No 2, *Jemie*, at 1.

⁵⁴ *Ibid.*

It is encouraging that the government Department of Justice and Constitutional Development launched a first pilot project at the rural Msinga magistrates' court in KwaZulu on the use of indigenous languages in the courtroom.⁵⁵ The project has been extended to the North West Province at the Lehurutse magistrates' courts where proceedings were also conducted for the first time in Setswana.⁵⁶ The initiative strives towards the harmonisation of indigenous languages within the framework of all language rights and the spirit and purport of the Bill of Rights in eliminating the consequences of exclusion relating to being able to understand the court proceedings.

It further takes into account that the exclusive use of English as a communication and reporting tool in the dispensation of justice at the court does not fulfill the objectives for the achievement of a just society envisaged in the Constitution. The Head of KwaZulu-Natal Department of Justice, Bridgette Shabalala said that:

“the project will enable people who cannot understand or speak English or Afrikaans well, to gain equal access to justice by making court processes more accessible and understandable to ordinary citizens, with particular emphasis on the poor and vulnerable group of our societies”.⁵⁷

The launch of the project for the use of indigenous languages was further hailed by the Zwelitsha magistrates' courts' senior magistrate as an important initiative that will:

- contribute to the decrease of court backlogs as the use of English resulted in court proceedings taking longer;
- develop a culture of understanding, tolerance and dialogue in the court;
- ensure cases are finalised efficiently because the court will use the language understood by the community as the court proceedings will become more user-friendly;

⁵⁵ See report entitled 'Rural court set to make history', *Mercury*, dated 11 February 2009.

⁵⁶ See the report entitled: 'Justice has a new language', *Sowetan*, dated 24 February 2009.

⁵⁷ See report entitled 'Rural court set to make history', in the *Mercury*, dated 11 February 2009.

- restore the confidence of the community in the justice system as people have not been reporting cases due to the period it takes to complete the proceedings.⁵⁸

It is within the framework for equal recognition of these rights that this section will pursue of the strategies for the advancement of indigenous languages. The questions arising are:

- why is the equal recognition of the language rights in the courtroom important for the promotion of the right to gender equality?
- how would these rights enhance the role of the court in dealing with justice in a manner that will ensure its translation to social change?
- how would these rights improve public confidence in the courts by eliminating instances of unfair discrimination and inequalities in the promotion of the right to gender equality?
- does the quest for the development of indigenous languages not perpetuate the institutionalised discrimination against those who may not be familiar with the language in question? and
- will the envisaged development limit the articulation and integration of those not coming within a particular jurisdiction who may not be conversant with the dominant language?

These questions are prompted by the fact that the exclusive use of English or Afrikaans:

- is coupled with the legal language of the courtroom which places limited value in the use of indigenous languages;
- it may limit the articulation by both men and women in the processes of the court; and may further
- limit the development of public confidence in the courts.

⁵⁸ See the report by Magadani N of the Department of Justice and Constitutional Development entitled: 'Zwelitsha's indigenous language court to reduce backlog', dated 27 February 2009, accessed at www.justice.gov.za on 01 March 2009.

The lack of development of indigenous languages at the courts reduces these languages to what Anchimbe refers to as:

“simply home languages or better still native languages or rather national languages of “*no portfolio*”⁵⁹, (author’s emphasis).

The positive focal points of the use of indigenous languages acknowledge the challenges identified in the background study of this research in the enforcement of the right to gender equality. The launch for the use of indigenous languages at the courts came at a time when their use at the courts started gaining the momentum on the extent to which they may be used over English. Despite their inclusion in the Constitution as official languages the courts still prefer the use of English and Afrikaans, both as the communication and reporting tools.

The question of promoting indigenous languages in the courts is not only of South African concern, but is gaining momentum within the international community as well. Dunbar acknowledges that even though at domestic level linguistic minorities are widespread, they have received much less attention in international law.⁶⁰ Whilst within the international community, the concern is on the extinction of minorities’ language rights in the respective jurisdictions, South Africa has a different challenge.⁶¹ What makes South Africa’s case unique is the historic past that marginalised indigenous languages of the great majority of the country. As Finlayson *et al*⁶² emphasise:

⁵⁹ See Anchimbe EA, ‘Functional seclusion and the future of indigenous languages in Africa: the case of Cameroon, (2006) selected proceedings of the 35th Annual Conference of African Languages at 94.

⁶⁰ Dunbar R, ‘Minority language rights in international law’ (2001) Volume 50, *International and Comparative Law Quarterly*, at 90.

⁶¹ See Ajulo SB, ‘Myth and reality of law, language and international organization in Africa: the case of African Economic Community’ (1997) Volume 41 No 1, *Journal of African Law*, 27-42 as he focuses on the challenges facing the development of indigenous languages in Africa. See also Van der Rheede C, ‘South Africa: economic value of indigenous languages’ (2009) NGO Pulse, accessed at www.africafiles.org, 03 March 2010.

⁶² Finlayson R and Madiba M, ‘The intellectualisation of the indigenous languages of South Africa: challenges and prospects’ (2002) Volume 3 No 1, *Current Issues in Language Planning*, 40-61.

“during the apartheid regime, indigenous languages were only important in so far as they served as the tools for the division of African people into conflicting and competing so-called ethnic groups”.⁶³

The historic marginalisation of these languages had a negative impact on their development in the new constitutional dispensation⁶⁴, despite their entrenchment as official languages in the Constitution. As acknowledged by Hlope J, their inclusion:

“created a legitimate expectation for the parties in a dispute that their use in courts would mean a fair hearing that both parties were entitled to and before any decision may be taken”.⁶⁵

The expectation provides an opportunity to examine the extent to which indigenous languages may be used as an important tool in the elimination of difference between men and women in the courtroom.

4.3.2 *Understanding the language of the courtroom*

The right to a fair trial encompasses a clear understanding of the court processes in line with the foundations and basic principles of the rules of natural justice. In the light of the current challenges facing the development of indigenous languages, this right put the role of the interpreter at the centre stage as it has been in the past. In fact, the right to a fair trial is intertwined with the right to have an interpreter if the parties do not sufficiently understand the language of the courtroom.⁶⁶ This is one of the basic tenets of the due process for the promotion of the right to gender equality in the quest for the establishment of the significance of the law for social change.

⁶³ Ibid at 40.

⁶⁴ See the analysis by Ramphela M, entitled: ‘Here, mother tongue clashes with her mother’s tongue’, *Sunday Times Newspaper* dated 08 March 2009. She argues that the children are paying a price for the constant erosion of African languages, which their performance is misguided by language policies.

⁶⁵ See the report by Inggs M, ‘South Africa: Hlope champions court’s use of indigenous languages’ *Business Day*, 10 July 2009.

⁶⁶ See section 35(3)(k) of the Constitution.

Using indigenous languages is particularly important for the promotion of the right to gender equality where women are affected by domestic violence and other underlying social ills in a vulnerable group. They are the group that is more likely to seek help from the courts as they become more aware of their rights as opposed to men, as for instance the enforcement of maintenance claims against their defaulting partners. The struggles of women for gender equality are affected by high levels of illiteracy, where the use of indigenous languages become essential for eliminating the prejudice that women may experience in the courtroom.

The right to understand entails the fairness of the court proceedings which may be undermined if a party is unable to understand the language of the courtroom. The fairness of the court processes is a basic human right which is intertwined with the right of the litigants to understand the proceedings.⁶⁷ The right to a language which the person “understands” in a courtroom is entrenched in section 35(3)(k) of the Constitution which provides that:

“every accused person has a right to a fair trial, which includes the right to be tried in a language that the accused understands or if that is not practicable, to have the proceedings interpreted in that language”.

This provision is further supplemented by section 6(2) of the Magistrates’ Courts Act⁶⁸ which provides that:

“if in a criminal case, evidence is given in a language with which the accused is not in the opinion of the court sufficiently conversant, a competent interpreter shall be called by the court in order to translate such evidence into a language with which the accused professes or appears to the court to be sufficiently conversant, irrespective of whether the language in which the evidence is given, is one of the official languages or of whether the representative of the accused is conversant with the language used in evidence or not”.

⁶⁷ See Miti LM, ‘Language rights as a human rights and development issue in Southern Africa’ (2008) Volume 2 No 3, *Openspace*, at 7-18 as he argues that the enjoyment of certain human and people’s rights is dependent on language rights.

⁶⁸ No 32 of 1944.

These provisions apply equally to civil and criminal proceedings and also to the application of indigenous languages that have been endorsed in the Constitution as official languages. They are further supplemented by the right to have the proceedings translated in a language which the parties understand as endorsed in section 35(4) of the Constitution which provides that:

“whenever this section requires information to be given to a person, that information must be given in a language that the person understands”.

The understanding given by the court in the past on the right to understand and the right to a fair trial did not necessarily entail the use of the indigenous language of the parties. Rather, the focus was on the language which the accused understands, whether it was English or Afrikaans. In *S v Ngubane*⁶⁹ the court held that the accused had a right to be tried in a language which he understands as he was not provided an opportunity to have the proceedings translated to him in a language which he fully understood.⁷⁰

The essence of the “right to understand” was given effect, even before the new dawn of democracy despite the fact that the focus was on English and Afrikaans. In *Matemane v Magistrate, Alberton*⁷¹, the Supreme Court developed the following principles for the development of the concept of the “right to understand”:

- the use of official languages (English and Afrikaans, which today must be read to include the use of indigenous languages) in the courts for all parties including the officers of the court does not only entail a thorough understanding of such languages but also the development of fluency in the use of languages;
- the multi-ethnic society of South Africa acknowledges that not everyone had equal opportunity to achieve the required standards but a duty exists to achieve the ideal;

⁶⁹ 1995 (1) SACR at 384.

⁷⁰ *Ngubane* at 385.

⁷¹ 1991 (4) SA 613 (W).

- the essence of the right to understand also encompass a duty on legal practitioners and prosecutors to conduct the proceedings in a language in which he or she is more competent; and
- a party, including an accused or a witness, has the right to use a language of his choice whether it be an official language or not.⁷²

These principles bode well for the development of indigenous languages for the improved realisation of the right to gender equality at the courts, as the new dispensation retains the good from the past. They acknowledge South Africa's diversity even before the new dawn of democracy in 1994 and the entrenchment of indigenous languages as official languages in the Constitution. They seek to advance the parties' language to the dispute without confining them to the pre-dominantly language of the courtroom. They further give effect to the development of the values and principles of indigenous languages within the framework of the legal language environment.

Effectively, these principles do not only provide for the use of indigenous languages at the courts but also for an efficient system of the criminal justice that is sensitive to South Africa's diverse population. Considering the high levels of violence against women⁷³, the use of indigenous languages has the potential to enable the court to dispose more cases as it would minimise the necessity for the translation of the proceedings into one or more languages. As Mahomed puts it:

“the introduction of indigenous languages forms part of the review of the criminal justice system as it will further minimise the possibility of human error during translation of court proceedings and prevent delays resulting from the unavailability of interpreters”.⁷⁴

The introduction of these languages limits the risk of mistakes by interpreting services. The case of the accused, who was charged for breaking the terms of the protection order issued in terms of section 7 of the Domestic Violence Act at the King William's

⁷² See *Matemane* at 614.

⁷³ See De La Rey C and Boonzaier F, 'He's a man, and I'm a woman': cultural constructions of masculinity and femininity in South African women's narratives of violence' (2003) Volume 9 No 8, *Violence Against Women*, 1003-1029.

⁷⁴ See the report by Mahomed I in Staff Reporter entitled: 'Regional Court breaks language barrier' *Cape Argus Newspaper*, dated 03 March 2009.

Town magistrates' courts, is an example. The accused (Coloured man) spoke English directly to the magistrate but the interpreter interrupted by interpreting English to an English speaking person. On the discussion with the interpreter in this regard, he justified his interference by alleging that he was just explaining to the accused what he (the accused) could not hear properly.⁷⁵ What was equally striking is that the interpreter, in another case of a young man, also Coloured, charged for assault and had his case post-poned for the 07th May 2009, also spoke directly to the magistrate in English and was again interrupted and ended up mixing English and IsiXhosa as he said "*uyabona*" (you see: *author's translation*).

The use of indigenous languages seeks to limit the deficiencies in the interpreting services in the same manner as English and Afrikaans would also not need to be interpreted to those who understand either of the two dominant languages of the courtroom. A failure to understand the legal process renders the administration of justice incomprehensible as Mahomed notes that "*inkundla mayiphakame*" (Rise in the Court) has ushered a new process for the right of equal access to justice for both men and women.⁷⁶

The principles established in *Matemane's* case affirm the relevance of using the law in the quest for the promotion of the right to gender equality as they also seek to establish the interdependence of indigenous languages within the framework of the legal language of the courtroom. Stoeltje argues that research on gender struggles conducted within the context of litigation will benefit from the recognition that legal language is a medium of social power, a discourse in which language and legal concepts are interwoven.⁷⁷ In addition, Wanitzek points out that legal language acts as a medium through which the struggles for social power are conducted between individuals. Legal language also acts as a medium through which the state imposes its interpretation and appropriations. It then helps us understand the ways in which gender struggles are conducted within the context of litigation.⁷⁸ The right to understand entails more than mere access to the

⁷⁵ Discussion with the interpreter on the 26 March 2009.

⁷⁶ See Mahomed in (note 74 above).

⁷⁷ Stoeltje BJ, with Firmin-Seller K and Ogwang O, 'Introduction to special issue: women, language and law in Africa' (2002) *Africa Today* at vii-xx.

⁷⁸ Wanitzek, 'The power of language in the discourse on women's rights: some examples from Tanzania' (2002) Volume 49 No1, *Africa Today* at 14.

courts but to ensure that gender struggles too are constructed within the framework and purport of the Bill of Rights.

The idea of using indigenous languages in the courts was first mooted by Hlophe J of the Cape High Court in *Manekati Goqa kunye Nombuso*⁷⁹ when the proceedings were actually conducted and reported in IsiXhosa. The case dealt with an appeal on the sentence imposed by the regional court for the crime of rape. The court affirmed and endorsed the ten year sentence imposed by the regional court and established beyond reasonable doubts that the appellant did commit the crime of rape. It effectively promoted the human rights of women and ensured the significance of the law for the promotion of the right to gender equality at the courts.

The quest for the use of indigenous languages in the courts as the language of the courtroom was tested on the insistence of the Scottsburgh magistrate, to conduct the proceedings in IsiZulu for the murder of an Austrian footballer. This case attracted international attention as it occurred during the preliminary draw of the Fifa World Cup in Durban. It also transpired that the magistrate had previously conducted and questioned the accused in IsiZulu in at least five cases that came before him.⁸⁰ The Durban's chief magistrate remarked that the Scottsburgh magistrate will be commended by those who are proud not only of the IsiZulu language but other indigenous languages as well.

Moeketsi *et al* highlight that South Africa's apartheid past which actively promoted Afrikaans as an official language alongside English, "*minotirised*" indigenous languages, subjecting these languages to functional difficulties.⁸¹ South Africa's history undermined the linguistic repertoire as Kontra⁸² argues that people need linguistic human rights in order to prevent their languages from becoming a problem or from causing problems. She substantiates her argument by contending that people need to be able to exercise language rights in order for their linguistic repertoire to be treated as or to become a

⁷⁹ Case No: A639/2003.

⁸⁰ See the report in entitled: 'IsiZulu finds legal favour', *Mercury Newspaper* dated 28 February 2008.

⁸¹ Moeketsi R and Wallmach K, 'From *spaza* to *makoya!*: A BA degree for court interpreters in South Africa', (2005) Volume 12 No 1, *The International Journal of Speech, Language and the Law*, at 77.

⁸² Kontra M, 'Conceptualising and implementing linguistic human rights' in Kontra M (eds) *Language: a rights and a resource: approaching linguistic human rights*, (1999) quoted in Maja (note 51 above), at 6.

positive, empowering resource.⁸³ She argues that substantive equality and equity of languages can be achieved through an enabling legal environment that guarantees linguistic diversity and allows people to assert their identity and culture and freely express themselves.⁸⁴

4.4 The jurisprudence of language rights

4.4.1 *The general approach to language rights at the courts*

In line with the aim of this study, the importance of language rights lies in its intersection of the individual (women) and the interaction with the court for the purpose of advancing the social change objectives entrenched in the Constitution. It also enhances the language diversity which may in turn form an integral part in the development strategies of utilising indigenous languages in the legal system, which to date, has received minimal attention in the courtroom for the promotion of the right to gender equality. Arzoz highlights that the regulation of both the human conduct and state behaviour through the application of the law involves language use. The regulation of human and state behaviour, in turn is concerned with the rules that public institutions, including the courts, adopt with respect to language use in a variety of different domains.⁸⁵

Generally, the use of languages has been the subject of contestation through court challenges thus affirming their importance and their actual translation into reality.⁸⁶ The *Governing Body of Mikro primary School v Western Cape Minister of Education*⁸⁷ is a case in point on the contest between English and Afrikaans and was decided more on a point of procedure than the enforcement of language rights. The bone of contention in this matter was the language policy of the primary school that was and still continues to be reserved exclusively for Afrikaans speaking learners. A group of about 40 English speaking learners could not be afforded an opportunity to be admitted and be taught in English as the school was a single medium school for Afrikaans.

⁸³ Ibid, Maja (note 51 above).

⁸⁴ Ibid.

⁸⁵ Arzoz X, 'The nature of language rights' (2007) Volume 2 No 6, *Jemie* at 1.

⁸⁶ See Nyika N, 'Language complaints as an instrument of language rights activism: The case of PanSALB as a guardian of the right to mother-tongue education' (2009) Volume 40 No 2, *Language Matters*, 239-260.

⁸⁷ 2005 (2) All SA 37 (C).

In this case, the Department of Education, after several attempts to persuade the school to change its language policy and admit English speaking learners, since 2002, had failed, it ordered the school to admit those learners. The instruction gave rise to an urgent application for an interdict at the Cape High Court⁸⁸ which then came to the Supreme Court of Appeal.⁸⁹ The Department was ordered to stop interfering with the functioning of the school as it was considered not reasonably practicable that the English learners be afforded an opportunity to be taught in English in a single medium Afrikaans school.⁹⁰

The case was about language rights in education, as provided for in section 29(2)⁹¹ of the Constitution. It illustrates the challenges that South Africa faced for in the development of measures that will ensure equal regulation and monitoring of the use of official indigenous languages. The exclusion of the English speaking learners was based on a provision in the Schools Act⁹² that gives powers to the school governing body to determine the admission and language policy of the school. Section 5 of the Schools Act provides:

“subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school”.

Section 5 is further supplemented by section 6 which provides that:

- (2) the governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ See Bray E, 'Macro issues of Mikro Primary School' (2007) Volume 1 *PER* at 1.

⁹¹ This section provides that: 'everyone has the right to receive education in the official language(s) of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to and implementation of this rights, the state must consider all reasonable education alternatives, including single medium institutions taking into account:

- Equity
- Practicability
- The need to redress the results of past racially discriminatory laws and practices.

⁹² The South African Schools Act No 84 of 1996, hereinafter referred to as the "Schools Act".

The Schools Act further affirms the development of the principles of non-discrimination as it provides in subsection 3:

“no form of racial discrimination may be practised in implementing policy determined under this section”.

Although the Schools Act appears to advance the principles of non-discrimination, it remains questionable as far as its substantive conceptualisation is concerned and its meaning for the practical development of languages alongside each other. In addition, although English and Afrikaans have been dominant in the past as official languages⁹³, the judgment created a further difficulty for the development of indigenous languages to be at par with the other official languages by creating a “gated community”⁹⁴ that is reserved exclusively for a particular language group. It limited the benefits associated with the development and the greater promotion of language tolerance in South Africa’s diverse population.⁹⁵

The exclusion of English speaking learners undermined their language rights as the admission and language policy of the school was reserved exclusively for the Afrikaans speaking learners. Besides, the challenge could have been more on the admission policy as entrenched in the Schools Act and its effects which differentiate unfairly between groups of learners. The focus on the impact of the differentiation on the groups of learners could have established the substantive translation of the right to equality in line with the differentiation approach adopted by the court in *Harksen* as argued in chapter three. In turn, it could have established with sufficient certainty the justification of the exclusion of the English speaking learners and be balanced with the legitimate government purpose in the fulfillment of the right to basic education.

The use of indigenous languages has still not received their equal recognition as is the case with English and Afrikaans. The case of *Ntombenhle Nkosi (CEO of the PanSALB)*

⁹³ See Van Rooy B and Pienaar M, ‘Trends in recent South African linguistic research’ (2006) Volume 24 No 2, *Southern African Linguistics and Applied Language Studies*, at 191-216.

⁹⁴ Extracted from the South African Human Rights Commission Report entitled: “Road closures, security booms and related measures”, released on 10 March 2005.

⁹⁵ See the South African Human Rights Commission report entitled: ‘Report of the public hearing on the right to basic education’, (2006) at 43.

*v Durban High School*⁹⁶ is another case illustrating the marginalisation of indigenous language rights in South Africa. The bone of contention in this matter was the use of IsiZulu as a second language for the Zulu speaking learner at Durban High School. This meant that the IsiZulu speaking learners were not afforded an opportunity to learn the high level class in IsiZulu. The Equality Court in finding for Mrs Nkosi held that:

“offering Afrikaans as a higher leveled class superior to isiZulu constituted discrimination against students in the first class in secondary system in South Africa, whose language is IsiZulu”.⁹⁷

The recognition of the equal status of indigenous languages has ushered a new process that requires the courts to be more sensitive to a broad range of social issues which may be advanced by the development of these languages for the promotion of social justice.⁹⁸ The constitutional and legal recognition of indigenous languages has provided an opportunity for the development of new tools and strategies with which the people may affirm their rights in court. Mrs Nkosi’s case demonstrates that clarity was needed on the use of indigenous languages and to ensure the implementation of the use of the IsiZulu at the school as a measure that will facilitate the multi-interdisciplinary approach in South Africa’s education system, which may then develop to their use in the courtroom for the promotion of gender equality without any difficulties.

Therefore, as Chan notes:

“the importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. Language bridges the gap between isolation and community, allowing human to delineate the rights and duties they hold in respect of one another and thus to live in society”.⁹⁹

⁹⁶ Durban Equality Court decided on 30 September 2008.

⁹⁷ See the report entitled: ‘Durban school taught “kitchen” Zulu’, *Mail & Guardian Newspaper*, dated 21 November 2008.

⁹⁸ See Justice JB Shongwe, ‘The role of the judiciary in a democratic South Africa’, unpublished key note address at the University of Venda Spring Graduation on 15 September 2007.

⁹⁹ See Chan PCW, ‘Important decisions of Hong Courts in 2002 (Part 1): language rights, foreign offenders and immigration and refugee laws’, (2005) Volume 4 No 1, *Chinese Journal of International Law*, 219 at 220 as he refers to the Supreme Court of Canada in *Manitoba Language Rights*, (1985) 1 SCR 721 at 744.

The bridging of this gap is affected by governments' "dragging of the feet approach" in the development of indigenous languages despite the adoption of the Language Bill in 2000 and Policy in 2002.¹⁰⁰ The empowerment of the ordinary citizens of the country through the constitutional recognition of indigenous languages puts the burden on ordinary citizens to enforce their language rights as evidenced by Mrs Nkosi. The enforcement of the rights does not only entail the knowledge to use the courts but requires the provision of resources that will ensure that the guaranteed rights do not remain words in a paper. The lack of adequate resources for the proper functioning of the courts is one of the barriers to the promotion of gender equality as identified in chapter one.

4.4.2 The review of court processes on the use of indigenous language rights for gender equality

In *S v Matomela*¹⁰¹, the court dealt with an automatic review of a sentence on a conviction for failure to comply with a maintenance order. The evidence in the proceedings was recorded in IsiXhosa due to the shortage or unavailability of interpreters. In this matter, the magistrate, the prosecutor and the accused were all proficient in IsiXhosa hence the conduct of the proceedings in IsiXhosa. Without providing a comprehensive background on the reasoning of the court, Tshabalala J held that:

*"all official languages must enjoy parity of esteem and be treated equitably but for practical reasons and for better administration of justice one official language of record will resolve the problem. Such a language should be the one which can be understood by all court officials irrespective of mother tongue"*¹⁰², (author's emphasis).

¹⁰⁰ See Beukes A, 'Language policy incongruity and African languages in post-apartheid South Africa' (2009) Volume 40 No 1 *Language Matters*, 35-55. She argues that the language policy and planning in South Africa have become trapped in a gap between 'intention' and 'performance', at 37.

¹⁰¹ 1998 (2) All SA 1 (Ck).

¹⁰² At para 12.

The approach in *Matomela* was followed by Yekiso J in *S v Damoyi*¹⁰³ which also involved the automatic review of the proceedings that were also conducted in IsiXhosa by the Bishop Lavis magistrates' court in Cape Town. Yekiso J affirmed the validity of these proceedings as the magistrate, the prosecutor and the accused were all Xhosa speaking and there were no compelling reasons to delay the proceedings in the absence of the interpreter.¹⁰⁴ The delay could have undermined the speedy resolution of the matter and fuelled the scepticisms against the administration of justice. He therefore, held that:

“the solution to problems on the use of indigenous languages could be the introduction of one language of record in court proceedings. I am of the opinion that the recommendation by Tshabalala J in *S v Matomela* is the route to follow, and, in my view, such a course would not only be economical but would be in the best interest of justice. After all English already is a language used in international commerce and international transactions are exclusively concluded in the English language. Although some stakeholders would take it with a *pinch* of salt, *sanity would tip the scale in favour of English as the language of record* in court proceedings, particularly in view of its predominance in international politics, commerce and industry”¹⁰⁵, (author's emphasis).

Although the court endorsed the validity of the proceedings and affirmed the official status of the IsiXhosa language, it also furthered the argument by Mutasa that indigenous languages within the courtroom remain an “uneasy marriage”.¹⁰⁶ Both, the reasoning of the courts and Mutasa's argument raise a concern that implies a lack of reasoning and objectivity of those advocating for the use of indigenous languages at the courts. The contention is deduced from Yekiso J's reasoning (as highlighted by the author's emphasis in the quote above) on his elevation of English as the dominant language of the courtroom and questioning the intellectual integrity and capacity of the people justifying the use of the indigenous languages.

¹⁰³ 2003 [JOL] 12306 (C).

¹⁰⁴ See *Damoyi* at paras 1-2.

¹⁰⁵ *Damoyi* at para 18.

¹⁰⁶ Mutasa D, 'Language policy and language practice in South Africa: an uneasy marriage', (1999) Volume 30 No 1, *Language Matters*, at 83, as he argued for the exclusive use of English in the courts as an international language.

The court further argued that the use of indigenous languages has the potential of costly implications in the administration of justice.¹⁰⁷ This argument is difficult to understand. What would make it difficult for the state to marshal its resources for the development of indigenous languages as it did develop Afrikaans alongside English before the new constitutional dispensation? Besides, the argument of budgetary constraints was rejected by the Constitutional Court in the *Certification*¹⁰⁸ judgment. This makes this judgment more relevant in this context as it also dealt with the inclusion of socio-economic rights in the Constitution. The relevance of the *Certification* judgment is borne by the fact that the enforcement of gender equality which is intertwined with the language of the courtroom, particularly on matters relating to maintenance claims, contributes to the social security of both women and children. It is therefore, an appropriate tool that will limit any articulation regarding budgetary allocations in the development of indigenous languages by the courts.

The elevation of English above indigenous languages undermines the role of these languages and the struggles of women who are more prone to socio-political imbalances.¹⁰⁹ The relegation of indigenous languages as argued by Anchimbe¹¹⁰, to the sphere of no national relevance is particularly concerning for the courts that have to establish an appropriate balance for the development of these languages that will enhance a more meaningful participation of women in court. The balance in the interpretation for the development of these languages will not only ensure mere access to the courts but a guaranteed right to equal access and benefit of the law which may be beneficial to both men and women.

The essence of access to justice within the framework of language rights further entails a firm understanding of the court processes which may not be limited by the language barriers. Wanitzek argues that the concept of using indigenous languages at the courts and how they translate to the affirmation of the right to equal access to justice for the promotion of the right to gender equality is:

¹⁰⁷ *Damoyi*, at para 19.

¹⁰⁸ *In re: Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253, at para 78.

¹⁰⁹ See Bernard R, 'Preserving language diversity' (1997) *Cultural Survival Quarterly*, at 15-18.

¹¹⁰ Anchimbe, (note 59) above.

- not simply a set of norms, but as a discourse and action for the promotion of the right to gender equality;
- an explanation of a social structure including its gender specific aspects; and
- the understanding of the context of particular professional and institutional practices of the courts.¹¹¹

The right to equal access entails a fundamental principle that the litigants should not be given mere access to the courts and application of the law. They should understand what they are expected to conform to in the consolidation of the struggles for the advancement of the right to gender equality for social change. The lack of the development of indigenous languages at the courts amounts to the denial of the right to equal access to justice which is more prejudicial to women who are more likely to use the courts to enforce their right to gender equality. The essence of the development of indigenous languages is to empower women as citizens of the country that are entitled to equal rights by making the legal process more reasonable and practicable.

The use of indigenous languages at the lowest structure of the courts carries much substance as it limits the potential of not using the courts due to the challenges associated with the enforcement of the rights at the higher courts which Dunbar has identified as follows:

- litigation can be expensive and minority language communities are also economically and socially marginalised which are least often or willing to pursue their rights through the courts;
- even if they do pursue the case, the protracted litigation against intransigent public bodies creates a sense of “battle fatigue”¹¹²; and
- litigation can be very risky, a poorly prepared case, a weak factual situation or unsympathetic judiciary could result in defeat for the community or could

¹¹¹ See Wanitzek (note 78 above).

¹¹² Concept extracted from Bridges WP, ‘Rethinking gender segregation and gender inequality: measures and meanings’ (2003) Volume 40 No 3, *Demography*, 543-568 at 547.

result in principles which could limit the scope of the right or duty with respect to such languages.¹¹³

The use of indigenous languages at the magistrates' courts can create great confidence and awareness of language issues and can engender a sense of activism and energy in the community.¹¹⁴ The language rights jurisprudence has the potential to advance women's struggles for gender equality. It serves as a tool with which the new strategies may be developed for the advancement of social change. It also furthers the credibility of the courts in the enforcement of claims which may not be limited to the use of the dominant languages (English and Afrikaans). It may also ease the burden on the interpreters as they are required to uphold the high standards in their offering of the interpreting services at the courts. This role is further affirmed by the levels of competences that are required to deliver justice. The question is therefore, on the extent to which the right to understand may extend to include a duty to develop indigenous languages in the context of the promotion of the right to gender equality.

4.5 The general and institutional barriers to the promotion of indigenous languages for gender equality

The significance of the right to understand the court processes is fundamental, but section 35(3)(k) of the Constitution carries the risk to affirm the privileged status of the dominant languages of the courtroom of the pre-constitutional dispensation. It may allow for the raising of concerns over the practicality of using indigenous languages. These concerns as highlighted by Cardi, may be related to the:

- fear for delays in the proceedings;
- fear of being seen as a troublemaker;
- lack of adequate terminology; and
- lack of information.¹¹⁵

¹¹³ Dunbar R 'Minority language legislation and rights regimes: a typology of enforcement mechanisms', unpublished paper presented at the World Congress on Language Policies, Barcelona, 16-20 April 2002, accessed at www.linguapax.org/congress, on 11 February 2009.

¹¹⁴ Ibid.

¹¹⁵ Cardi (note 53 above).

The concerns are supplemented by the fears that the use of indigenous languages at the courts has the potential to:

- exclude those not conversant with the language in question;
- limits the development and integration of the diverse population as it reserves the functioning of the indigenous courts to a particular racial or ethnic group; and
- further limits the employment opportunities as the interpreting services will not be required when all the participants speak and understand the language to be used in court.¹¹⁶

The concerns and fears on the significant use of indigenous languages for the enforcement of the right to gender equality at the courts may be justified by the lack of an effective and proper reporting and record management system as identified in chapter one of this study.¹¹⁷ The case of *Manekati Goqa* discussed above is a case in point. Although the judgment is encouraging for the development of indigenous languages for the promotion of the right to gender equality, it undermined the diversity and the role of the court by failing to develop these languages in a more meaningful way. The lack of consistency in the reporting of the judgment may fuel the fears regarding the use of indigenous languages at the courts, leaving the development of these languages in the judicial domain uncertain. An excerpt from the fore-mentioned judgment may illustrate this concern:

¹¹⁶ The thoughts the researcher shared during the period of field research, with magistrates, prosecutors, clerks that the use of indigenous was not well received particularly by the white and coloured colleagues as they felt that they were being driven away from the courts. See also the report entitled: 'Justice Department should reconsider its court language policy' *Herald Newspaper*, dated 30 April 2008, on the fears that they may as well be justified in relation to the functional difficulties in the promotion of indigenous languages as evidenced by the Port Elizabeth magistrate who addressed the accused in a civil matter in IsiXhosa to the irritation of his lawyer who then walked out, leaving an uncertainty on how the lawyers will understand the communication with their clients if they are addressed in a language that the representatives do not understand.

¹¹⁷ Interview with the magistrate on 24 March 2009, as he alluded that the fears attest to the lack of access to legal information for both officers of the court which he attributed to the lack of resources and the general public which may in turn contribute to the limitation of the law for the advancement of the right to gender equality. The lack of resources undermines the proper and effective functioning of the courts as they do not have nor minimal access to information with the latest developments on issues of national interests as envisaged in the adopted laws and policies. In general, it directly undermines the capacity of the courts to deliver justice in a more meaningful way.

“malunga nombaba wokuba efumaneka enetyala wagwetywa egwetywelwa ukudlwengula asikho isibheno. Silapha ke sizijaji, mna noMhlekezi lo uZondi esichophele kunye esisibheno, siye sayifunda yonke irekhodi, sanelisekile yinto yokuba lo mhlekazi wadlwengula nyani. Naxa sijonga *ijudgment* yenkundla yeRegional Court, icacile loo nto ukuba *ijudgment* isemgangathweni iyabonisa into yokuba wadlwengula umhlekezi. Ngokucacileyo ngoko ke asinakho ukuthetha ngento yokuba wadlwengula okanye akazange kuba icacile wadlwengula. Inye qha into esinokuthetha ngayo namhlanje, imalunga nesentence.”¹¹⁸

The lack of consistency in this judgment and the mix of English and IsiXhosa risk losing the essence of the language in translation. For instance, the court refers to “rekhodi”, which means in IsiXhosa, “ingxelo”, “judgment” referring to “isigqibo senkundla”, “sentence” referring to “isigwebo” and “Regional Court” referring to ‘inkundla kamantyi’. The lack of proper recording and reporting systems as evidenced by the excerpt above, has already affected the newly established indigenous court at the Zwelitsha magistrates courts. The Zwelitsha magistrates’ court dedicated “Court E” as an indigenous court within the framework of ‘*Inkundla mayiphakame*’ (“Rise in the court”) where at least three cases a day would have to be conducted in IsiXhosa.¹¹⁹ As the researcher observed the proceedings in this court being conducted in IsiXhosa, the case of the *Ntentseni* brothers was recorded in English. The question which arises from this recording, is whether indigenous languages will ever develop if even those who speak the language are unable to adhere to the prescripts of the Bill of Rights in giving effect to the parallel development of all languages as entrenched in section 6 of the Constitution?

The inconsistent manner in which cases are handled through communication and reporting systems perpetuates the idea that English must remain a reporting language whilst indigenous languages must be relegated to subsidiary communication tools due to the challenges that will be encountered when the matter goes on appeal or review. The recording of the IsiXhosa proceedings in the *Ntentseni* matter in English strengthened the view of those whom the researcher had interaction with at both courts including officers, of the courts that the use of IsiXhosa is, as I quote one of the officers:

¹¹⁸ *Goqa* at para 1-2.

¹¹⁹ Interview with the Court Manager on 25 March 2009.

“a drawback which will limit the articulation of our children as English has become an international language”.

Although the magistrates (King William’s Town and Zwelitsha) and the three rights based organisations interviewed for this study, were more positive on the use of indigenous languages¹²⁰, the view that the use of these languages is a “draw back”:

- fails to take into account that indigenous languages also suffered a “major casualty”¹²¹ during the apartheid era as was the case with all the human rights related concerns;
- it further strengthens the argument by Prof. Ngugi wa Thiong’o that parents are the ones encouraging their children to speak English as they indoctrinate them by creating an impression that they are better-off when they speak it¹²²;
- the relegation of indigenous languages to communication but not reporting tools as well risks increasing the divide between educated and uneducated women in the enforcement of their rights;
- it does not take into account the high levels of illiteracy, especially amongst rural women, which is also the concern of the maintenance investigators who deal with them on a daily basis, as they are threatened even by the court environment itself.¹²³ These levels of illiteracy are as a direct result of the historic imbalances that the government is trying to correct as the use of indigenous languages is one of the measures that seek to bridge the gap in ensuring a proper understanding of the court proceedings for an effective and fair system of the administration of justice; and
- it also fails to take into account that the use of indigenous languages at the courts allows the parties to become part of the court itself as they articulate in a language that is understood by all the parties as evidenced by the *Ntentseni* case as the elderly brother spoke directly to the magistrate.

¹²⁰ The rights based organisations motivated by the fact that they deal mostly with rural women who have little understanding, not only of the law but of English as well.

¹²¹ Extracted from *Azapo*, at para 1.

¹²² Presentation at the Conference in New York on the 28 March 2009 and reported in SABC 1 News at 19h30.

¹²³ Interview with the maintenance investigator, King William’s Town magistrates’ courts, 26 March 2009.

The case of *Ntsebeza*¹²⁴ is an interesting case where again the record is mixed in English and IsiXhosa. Mr Ntsebeza was charged for “*ukubetha ngenjongo yokwenzakalisa*” (assault with intent to do grievous bodily harm: *author’s translation*) and the verdict in the record shows “*withdrawn by PP*”. The courts are required by law to set the tone for the proper use and development of all languages including indigenous languages. The mixing of languages in the recording of court processes downplays the parallel development of languages alongside each other as it is clearly evident in the *Ntsebeza and Goqa* cases.

The lack of a proper recording system was again evident in the case of *Nathanael Mokhotho v The Learned Magistrate and Others*¹²⁵ as Ramodibedi J reflected on the inconsistency in the paragraphs of the complainants’ founding affidavit, stating:

“proceedings have been recorded in English language yet they were conducted in Sesotho and English and never used an interpreter”.¹²⁶

The judge further held that the lack of a recording system permits a litigant to take advantage of the missing record in such a situation would no doubt result in a miscarriage of justice.¹²⁷ The case of *Mgobongo*¹²⁸ is a case in point. The record with the case number could not be found in the computerised system until the investigator from the Ndevana Police Station came to the assistance and provided the researcher with the case number found in the police docket, in order for the court to be able to trace the record. Even though the researcher forwarded the case number to the clerk of the court, the record could still not be found. It is highly irregular that the record of a person (accused) who has been convicted and sentenced to imprisonment, cannot be found. This is one of the flaws or impediments that undermine the significance of the law and minimised the role of the magistrates’ courts in their effective management of cases, including those that deal with gender equality.

¹²⁴ E1701/08, withdrawn on 26 February 2009.

¹²⁵ C of A (CRI) 10A/08 at para 1.

¹²⁶ *Ibid* at para 7.

¹²⁷ *Ibid*.

¹²⁸ Case No: 73/08/08.

The loopholes in the record management system require the courts to be innovative and adopt an own record system to deal with issues that are not directly related to the interpretation of the law but which may have a negative impact on the promotion of the right to gender equality. The lack of proper record and reporting systems:

- creates an impression that the lessons to be learnt and their impact may be lost for lack of proper and effective reporting; and
- the development of the indigenous languages remains a distant dream.

Another area that is of great concern is the lack of the reflection on the reasoning of magistrates in reaching a particular decision. The files inspected by the author in both courts (King William's Town and Zwelitsha) do not show any rationale that led the magistrate handing down his or her judgment. In a proper record system showing the reasons of the courts, researchers could be enabled to determine with sufficient certainty the extent to which the law has been interpreted in giving effect to the constitutional rights which guarantee the right to gender equality.

The case of *Nceba Ngogo*¹²⁹ decided at the King William's Town magistrates' courts attests to the deficiencies in the reporting system. Mr Ngogo pleaded guilty to the charge of rape and was found guilty and sentenced to eight years imprisonment on that charge. But, the record does not show any synthesis of the law relied on and how the court reached its decision as it normally happens with cases reported in law reports by the superior courts. The fact that the law is not contextualised by the magistrates, and is thus not reflected in the records of the courts, risks undermining and questioning the credibility of the entire criminal justice system in the promotion of the right to gender equality.

Another interesting case is that of *Nontlanganiso Tshatshu v Fezile Tshatshu*¹³⁰. The record shows that a garnish order was granted against Mr Tshatshu in terms of section 30 of the Maintenance Act and further reports the agreement of the parties as follows:

- defendant to pay half of the school fees;

¹²⁹ Case no KRC 2/08.

¹³⁰ 14/3/2-265/08 decided on 11 March 2009.

- defendant to pay R2475.00 for the child's transport;
- respondent to pay R500.00 for the child's groceries; and
- respondent to pay R300 for Mbasa Tshatshu.

This record does not show an understanding of the approach of the court in the determination of the order. It limits the determination of the extent to which the magistrate is able to interpret and apply the law in a manner that gives effect to the social change objectives as entrenched in the Constitution towards the advancement of gender equality.

The lack of a proper recording and management systems at the magistrates' courts generally is a serious concern as further evidenced by the case of Judge Ntsikelelo Poswa. The dispute arose over the paternity of the child in the case of the Pretoria High Court Judge Ntsikelelo Poswa with his former girlfriend, Ms Yolisa Maya, a special legal advisor to the former Minister of Foreign Affairs: Dr Nkosazana Zuma. This case attracted a lot of attention, as Poswa J rejected the DNA test results which showed a 99.99% probability that he was the father of Ms Maya's son. He initially accepted the results and started paying maintenance of R1000.00 a month but after four months he stopped payments as he alleged that he had been advised that the blood tests were not a conclusive proof of paternity.

After Poswa J refused to accept the DNA results of his fathering Ms Maya's son, the latter went back to the maintenance court for further relief but she was met with another barrier. The magistrate, who presided over the first hearing could not recall what transpired during the 2001 enquiry and suggested that the matter be heard by another presiding officer. He added that the court record could not be found and he had lost his own handwritten notes.¹³¹ Why would the hand written notes not be included in the court file?

The lack of a proper record management system increases the risk of case dockets being lost as in the Judge Poswa's case. It has insidious effects for the entire system of the administration of justice as Ramodibedi J expressed it in *Nathanael Mokhotho*:

¹³¹ See the report in (note 65 above).

“there can be no doubt that if [the problem of the lack of the proper record management system] is not addressed decisively and as a matter of urgency, our whole system of justice will fall into disrepute, if it has not done so already”.¹³²

The judge further held that:

“it behoves the courts and all those entrusted with the safety of records to step their resolve to fight this scourge. Those who are guilty of this sordid practice, which bears all the hallmarks of an orchestrated racket, must not be allowed to get away with defeating the course of justice”.¹³³

The lack of a proper reporting system further casts doubt on the discretion of prosecutors to institute or withdraw proceedings. It is greatly acknowledged that prosecutors are the central tenets to the administration of justice and as Ma¹³⁴ puts it:

“their responsibility is not limited to demonstrating their legal expertise in fitting charges to different situations. They are expected to take into consideration a broad range of factors, including evidentiary sufficiency, the extent of the harm caused by the offence, the disproportion of the authorised punishment in relation to the particular offence of the offender, co-operation of the accused in the apprehension or convictions of others and the cost of prosecution to the criminal justice system.”¹³⁵

The importance of prosecutors in the administration of justice is similarly expressed by Hanna¹³⁶ as follows:

¹³² See note (125 above) at para 1.

¹³³ Ibid.

¹³⁴ Ma Y, ‘Prosecutorial discretion and plea bargaining in the United States, France, Germany and Italy: A comparative perspective’ (2002) Volume 12, *International Criminal Justice Review*, at 22.

¹³⁵ Ibid, at 22.

¹³⁶ Hanna C, ‘No right to choose: mandated victim participation in domestic violence prosecutions’ (1996) Volume 109, No 8, *Harvard Law Review*, 1849-1910.

“prosecuting domestic violence cases effectively, requires a good deal of patience and perseverance as [magistrates and judges] need to be educated about the effects of violent relationships, police to develop better investigative practices. Prosecutors have to practice trying these cases in order to develop a real sense of what works and this development requires a long term commitment by people willing to do unglamorous work and to risk being held back in their prosecutorial careers because of their specialisation.”¹³⁷

In affirming the essence of the prosecutorial role in order to eliminate any possibilities of prosecutorial decisions subject to suspicion; the decision to withdraw or institute proceedings requires the provision for reasons as to the decisions taken. The provision of such reasons contributes to a greater transparency and accountability. As Levine argues, it affirms efficiency, credibility and the achievement of substantive justice.¹³⁸ It equally advances a consistent policy of enforcing the law regardless of the social status of the defendant or the nature of the relationship between the parties. It further dispels the misconception that domestic violence cases are not worth pursuing criminally because it is a private matter not a crime.¹³⁹

The case of *Athenkosi Ntsebeza*¹⁴⁰ who was charged for assault to do grievous bodily harm was withdrawn by the prosecutor without providing any reasons for such a decision. The failure to provide reasons on prosecutorial decisions questions the credibility of the prosecutorial process. The failure is rendered worse by the lack of judicial supervision over the withdrawal or institution of proceedings which leaves questions open as to the legitimacy of such decisions which may be susceptible to abuse.¹⁴¹

It is not disputed that prosecutorial discretion is an essential component of the prosecutorial services as it requires proper exercise of prosecutorial functions. This

¹³⁷ Ibid, at 1906.

¹³⁸ Levine KL, ‘The intimacy discount: prosecutorial discretion, privacy and equality in the statutory rape caseload’ (2006) Volume 55, *Emory Law Journal*, at 691-732.

¹³⁹ See Hanna (note 136 above) at 1907.

¹⁴⁰ E1701/08, withdrawn on 26 February 2009.

¹⁴¹ See Lawson TF, ‘A shift towards gender equality in prosecutions: realising legitimate enforcement of crimes committed against women in municipal and international criminal law’ (2009) Volume 33, *Southern Illinois University Law Journal* at 1-35.

discretion must be exercised without fear or favour as envisaged in section 179(4) of the Constitution which is further supplemented by the adoption of the National Prosecuting Authority Act¹⁴², affirming the role of prosecutors as it provides in section 25(1) as follows:

“a *prosecutor* shall exercise the powers, carry out the duties and perform the functions conferred or imposed on or assigned to him or her-

- (a) under this Act and any other law of the Republic; and
- (b) by the head of the Office or Investigating Directorate where he or she is employed or a person designated by such head; or
- (c) if he or she is employed as a *prosecutor* in a lower court, by the *Director* in whose area of jurisdiction such court is situated or a person designated by such *Director*”.

The essence of this provision in determining the extent to which prosecutors have carried out their function in line with the basic principles in exercising a prosecutorial discretion is seriously undermined when the record does not provide the reasons for the withdrawal of the prosecution. The Constitution makes the exercise of the prosecutorial discretion subject to its provision and the Prosecuting Authority Act.

The provision of reasons in the record seeks to eliminate the loss of memory as experienced by magistrates Mr Von Reich of the Pretoria magistrates' courts in the case of Judge Poswa which further subjected Ms Maya to another long quest for the finalisation of her maintenance claim. Without wishing to pronounce on the merits of the matter, the decision in *Zuma v NPA*¹⁴³, set the tone for the provision of written reasons on the exercise of the prosecutorial discretion to withdraw the charges. It also provides an opportunity to be able to analyse the extent to which the law is developing in order to be able to determine its effectiveness for social change.

¹⁴² No 32 of 1998.

¹⁴³ 2009 (1) All SA 54 (N). See also the statement released by the National Director of Public Prosecutions on 05 April 2009, entitled: ‘Statement regarding Zuma charges dropped’.

The lack of proper and effective record and reporting management systems undermines not only the role of the courts in the development of indigenous languages but also the functioning of other state institutions such as the Pan South African Language Board established in terms of section 6(5) of the Constitution¹⁴⁴ and the Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities established in terms of section 181(c) of the Constitution.¹⁴⁵

The Language Board is required in terms of national legislation to:

- (a) promote and create conditions for the development and use of:
 - (i) all official languages;
 - (ii) the Khoi, Nama and San languages; and
 - (iii) sign language and

- (b) promote and ensure respect for:
 - (i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu an Urdu; and
 - (ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

The adoption of the Language Board Act No 59 of 1995 as amended by Act No 10 of 1999¹⁴⁶ gives effect to section 6(5) by providing for the recognition and the implementation of multilinguism in South Africa. The objectives of the Language Board as entrenched in the Language Act seek to:

“make provision for the measures designed to achieve respect, adequate protection and furtherance of the official languages and for *the advancement of those official languages which in the past did not enjoy full recognition*, in order to promote the full and equal enjoyment of the official South African languages and

¹⁴⁴ Hereinafter referred to as the Language Board.

¹⁴⁵ Hereinafter referred to as the “Cultural Commission”.

¹⁴⁶ Hereinafter referred to as the “Language Act.”

respect for other South African languages used for communication and religious purposes”¹⁴⁷, (author’s emphasis).

The recent report¹⁴⁸ by the Language Board attests to its specific mandate to ensure the promotion of languages including indigenous languages in South Africa.

The Cultural Commission also, is further required in terms of section 185 of the Constitution to:

- (1)(a) promote respect for the rights of cultural, religious and linguistic communities;
- (b) promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association...”.¹⁴⁹

The significance of these institutions is to ensure the creation of an enabling environment for the development and promotion of indigenous languages where they will progress to a higher level in terms of status, functions and domains for their operation.¹⁵⁰ The establishment of these institutions provides a platform to enhance a “justified differentiation” for the substantive translation of the right to equality, which seeks to give effect to the legitimate government purpose as discussed in chapter three in the *Harksen* judgment.

The use of indigenous languages at the courts is an affirmative and practical measure that seeks to give effect to the mandate of these bodies which may be undermined by the preference of English and in turn diminish the use and status of these languages. It provides a firm basis and is in line with mandate of these institutions to conduct research

¹⁴⁷ See the preamble of the Act.

¹⁴⁸ See the 2008/09 Annual Report.

¹⁴⁹ See also Commission for the Promotion and Protection of the Rights of the Cultural, Religious and Linguistic Communities Act No 19 of 2002.

¹⁵⁰ Marivate C, ‘The contribution of PANSALB in the promotion of the African languages in South Africa’, (1998) unpublished paper presented at the workshop entitled: The role of the African languages in democratic South Africa, 05-06 March, University of Pretoria, Pretoria.

that will conceptualise the use of the law for social change through an effective system such as the administration of justice, for the development of these languages for gender equality.

Despite what appears to be the limitations of indigenous languages their development has the potential to advance them within the framework of the legal language of the courtroom. It requires the balancing of majority *vis-a-vis* the minority language rights within the jurisdiction. The inclusion of indigenous languages in the Constitution and the initiative for their use in the courtroom provide an opportunity for their development alongside the dominant languages of the courtroom, which will become particularly relevant to gender equality. Even though an understanding of English as an international language remains a priority, the flexibility that comes with the recognition of indigenous languages in the Constitution, including their use in the courtroom provides an obligation on the courts to provide resources for their development.¹⁵¹

The significance of using indigenous languages in the application and enforcement of the law lies in the affirmation of the complainant, witness or the accuseds' rights to a firm understanding of the processes of the courts. The courts have a duty to ensure that if the accused is not conversant with the language of the courtroom, to make a provision for an interpreter. What makes this responsibility more essential is the requirement not only for the provision of an interpreter but a "*competent interpreter*".¹⁵² Interpreters have at times played a fundamental role in the dispensation of justice. They facilitate an "accurate" communication between the court and the parties to the dispute, even though the extent of such accuracy may be in doubt at times. The extent and quality these services continue to impact on the advancement of gender equality, considering the low literacy levels of women.

At this stage, it is too early to draw conclusions for the development of the indigenous languages and their effective use at the courts. The effort striving towards achieving an intended societal goal goes beyond the personal aspirations as the argument for the use of indigenous languages is not one for the demise of English or Afrikaans but for the

¹⁵¹ See further analysis by Varennes F, 'Indigenous people and language' (1995) Volume No 2 Number 1, *Murdoch University Electronic Journal of Law*, at 3.

¹⁵² See section 6(2) of the Magistrates' Act.

parallel development of these languages together with the traditional dominant languages of the courtroom in the administration of justice. As expressed by Reaume¹⁵³:

“in order to support a broad and positive interpretation of language rights in the courts, what is needed is an understanding that goes beyond effective communication and recognises the intrinsic value to the members of the community as an expression of the communal accomplishment that is the community’s language and culture”.¹⁵⁴

4.6 The constitutional and institutional independence of the magistrates’ courts

4.6.1 The general purpose and significance of the magistrate’s courts

The efficacy of the law in dealing with the inequalities of the past and how they resurface in the new constitutional dispensation is analysed mostly by examining the landmark decisions of the higher courts, particularly the Constitutional Court.¹⁵⁵ The use of the law as a strategy at these courts is often pursued as a tool to bring about social change in dealing with inequalities and discrimination that South Africa inherited from its past.¹⁵⁶ With the focus on the easily accessibility of the case law of the superior courts, which has been the limitation of this study as well, very little attention has been paid to the magistrates’ courts in determining the relationship between them and the use of the law as a strategy for social change. The focus on the superior courts overlooks that the majority of the South African population, at first, come into contact and have their cases

¹⁵³ Reaume DG, ‘The demise of the political compromise doctrine: have official language use rights been revived?’ (2002) Volume 47, *McGill Law Journal*, 593-624 at 622.

¹⁵⁴ *Ibid*, at 622.

¹⁵⁵ See Roux T, ‘Tactical adjudication: how the Constitutional Court of South Africa survived in the first decade’, unpublished paper accessed at www.saifac.org.za on 18 February 2008, where he highlights that this may be due to a number of reasons such as its commitment to reasoned adjudication and its reputation. See also, De Vos P, ‘*Grootboom*: the right of access to housing and substantive equality as contextual fairness’, (2001) *SAJHR* at 256, Albertyn C and Goldblatt B, ‘Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality’, (1998) *SAJHR* 248-276.

¹⁵⁶ Dugard J and Roux T, ‘The record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004’ in Gargarella R, Domingo P and Roux T, *Courts and social transformation in new democracies: an institutional voice for the poor*, (2006) Ashgate Publishers, England at 107-125.

heard and considered at the lower courts.¹⁵⁷ This was acknowledged in the remark by the late Chief Justice Mahomed that the magistrates' courts are the "coal face" and "engine room" of justice where the continuous struggle for the legitimacy and efficacy of the instruments of justice is substantially won or lost.¹⁵⁸

Anleu *et al* substantiated the significance of the magistrates' courts in the enforcement of all rights including gender equality that it requires a close interaction with the officers of the court. The interaction requires the officers not only to maintain a certain emotional display but to ensure that any doubt on the judicial integrity through the lack of control should be avoided at all cost.¹⁵⁹ They affirm that the daily work of the lower courts fulfils two of the central tenets in the administration of justice, which they refer to as, "emotional labour". They contend that the administration of justice through the enforcement of the rights at the magistrates' courts must ensure that the parties feel and view the process as fair and the outcome deserved rather than feeling hostile, defiant and angry.¹⁶⁰ To this end, the enforcement involves:

- direct or face to face contact with the parties; and
- behavioural and feeling obligations on the magistrate which require the magistrate to manage the emotions in order to remain impartial.

The setting of the tone for the enforcement of the right to gender equality at the magistrates' courts enables the determination of the extent to which people may use the courts to enforce their rights. The magistrates' courts have their origins in the Magistrates Court Act¹⁶¹, which is supplemented by section 166(d)¹⁶² and item 16 of

¹⁵⁷ See also Anleu S, 'Courts and social change: a view from the magistrates' courts', Social Change in the 21st Century Conference, 20 October 2005, Queensland University of Technology, Brisbane.

¹⁵⁸ See Mahomed J, Address at the Second Annual General Conference of the Judicial Officers Association of South Africa, Pretoria, 26 June 1998.

¹⁵⁹ Anleu S and Mack K, 'Magistrates' everyday work and emotional labour' (2005) Volume 32 No 4, *Journal of Law and Society*, at 590.

¹⁶⁰ *Ibid.*

¹⁶¹ No 32 of 1944, hereinafter referred to as the "Magistrates Act".

¹⁶² Section 166 outlines the judicial structure of the Republic starting from the Constitutional Court to any other court established in terms of an Act of Parliament.

Schedule 6¹⁶³ of the Constitution. The importance of the magistrates' courts lies in South Africa's transition into democracy in 1994 which brought about the restructuring of the judicial system. The restructuring was guided by the adoption of new progressive and human rights inspired laws.¹⁶⁴

The powers of the magistrates' courts are regulated by section 110 of the Magistrates' Act as amended by the Magistrates' Courts Second Amendment Act.¹⁶⁵ This section provides that:

- (1) A court shall not be competent to pronounce on the validity of any law or conduct of the President.
- (2) If in any proceedings before a court it is alleged that:
 - (a) any law or any conduct of the President is invalid on the ground of its inconsistency with a provision of the Constitution; or
 - (b) any law is invalid on any ground other than its constitutionality, the court shall decide the matter on the assumption that such law or conduct is valid...

Section 110 gives effect to section 170 of the Constitution which also provides:

"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 conduct of the President".

The magistrates' courts also do not fall within the prescripts of section 173 of the Constitution which requires the higher courts to take into account the interests of justice in the adjudication and regulation of their own processes and the development of

¹⁶³ This section provides for the recognition of every court including those of traditional leaders that were in existence before the adoption of the Constitution of the Republic of South Africa 1996, hereinafter referred to as the "Constitution".

¹⁶⁴ See Huebner MS, 'Who decides? restructuring criminal justice for a democratic South Africa' (1993) Volume 101 No 4, *Yale Law Journal*, at 961-990.

¹⁶⁵ No 80 of 1997.

common law. The limitation of the powers of the magistrates' court was given effect by the Constitutional Court in *Masiya*.¹⁶⁶ Although the court acknowledged that the magistrates' courts are at the heart of the application of the common law on a daily basis as courts of first instance, it argued that there are legitimate reasons why they have limited jurisdiction not included in section 173, which include:

“being constrained by the doctrine of precedent as their pronouncements on the validity of common law would create a fragmented and possibly incoherent legal order”.¹⁶⁷

The court substantiated its argument by holding that an effective operation of the development of common law principles depends on the maintenance of a unified and coherent legal system which is aimed at:

- avoiding uncertainty and confusion;
- protecting vested rights and legitimate expectations; and
- the dignity of the judicial system.¹⁶⁸

The court endorsed the constitutional jurisdiction of the magistrates' courts as recommended by the South African Law Commission as appropriate to their position in the court structure in South Africa. The commission acknowledged that the magistrates' courts represent the primary means of access to justice for most South Africans. It further held that the exclusion of constitutional jurisdiction would be inappropriate, more particularly with the interactive growth between common law and our developing constitutional law and jurisprudence.¹⁶⁹

The constitutional jurisdiction of the magistrates' courts is an important tool for the development of their own institutional independence. The development of the values of

¹⁶⁶ See *Masiya v Director of Public Prosecutions Pretoria* (The State) and another 2007 (5) SA 30 (CC), that the magistrates' courts do not have jurisdictional competence to develop common law in line with the prescripts of the Bill of Rights.

¹⁶⁷ *Masiya* at 69.

¹⁶⁸ *Ibid.*

¹⁶⁹ The South African Law Commission Report, Project 111, 'Constitutional jurisdiction of the magistrates' courts, 1998, November, at para 34.

institutional independence is not limited to the application and enforcement of the rules of law but also the sensitivity towards all the parties in the dispute.¹⁷⁰ In the light of the historic manipulation of the courts by the apartheid authorities, these values further require high levels of awareness of human rights issues in the enforcement of gender equality claims by the higher courts which may have a direct influence on the quality of protection accorded to these rights by the magistrates' courts.

The institutional independence of the magistrates' courts was an unlikely development due to their historic attachment with the then Department of Justice and which was later transformed into the Department of Justice and Constitutional Development. Devenish asserted and reduced the potential of affirming the institutional independence of the magistrates' courts to an "*ideal that was unlikely going to be achieved in the near future*"¹⁷¹, (author's emphasis). But, the institutional independence of the magistrates' courts was affirmed by the Constitutional Court in *Van Rooyen and others v The State*¹⁷², which directly gave effect to the recommendation made by the Law Commission. Although Chaskalson CJ in this case, acknowledged that the magistrates' courts have less extensive jurisdiction than that of the superior courts¹⁷³, he held that:

"the constitutional protection of the core values of judicial independence accorded to *all* courts by the South African Constitution means that all courts are entitled to and have the basic protection that is required. Section 165(2) of the Constitution pointedly states that "the courts are independent". Implicit in this is recognition of the fact that the courts and their structure, with the hierarchical differences between higher courts and lower courts which then existed, are considered by the Constitution to be independent. This does not mean that particular provisions of legislation governing the structure and functioning of the courts are immune from constitutional scrutiny. *Nor does it mean that lower*

¹⁷⁰ See Mayeda G, 'Taking notice of equality: judicial notice and expert evidence in trials involving equality seeking groups' (2009) Volume 6 No 2, *Journal of Law and Equality*, 201.

¹⁷¹ Devenish GE, *The South African Constitution*, (2005) Butterworths Publishers at 349.

¹⁷² 2002 (8) BCLR 810 at para 22. See also Okpaluba C, 'Institutional independence and the constitutionality of legislation establishing lower courts and tribunals' (2003) Volume 28 No 2, *Journal of Juridical Science*, at 109.

¹⁷³ *Van Rooyen* at para 28.

*courts have, or are entitled to have their independence protected in the same way as the higher courts.*¹⁷⁴ (author's emphasis).

Although the Constitutional Court drew a distinction between the levels of protection of the magistrates' courts *vis-à-vis* the superior courts, it still acknowledged the protection that is necessary for institutional independence of these courts even if not in the same form as in higher courts.¹⁷⁵ The distinction on the levels protection of all the courts not the higher court raises the following questions:

- why would the lower courts not be protected in the same manner as superior courts considering the enormous pressure of these courts as *first-time contacts* for the enforcement of human rights?
- does this mean the institutional independence of the magistrates' courts, which may in turn contribute to the development of public confidence by the general public, is less worthy of protection?

These questions leaves uncertainty on the quality of protection accorded to the specialist courts within the magistracy.

4.6.2 *Specialist courts within the magistracy*

The establishment of the specialist courts within the magistracy reinforces the significance of the institutional independence of the ordinary magistrates' courts. Berman refers to these courts as "problem-solving courts".¹⁷⁶ They are an important initiative that seeks to provide a significant opportunity for using litigation as a transformative strategy in the promotion of the right to gender equality.¹⁷⁷ These courts are divided within the structure of the magistracy into:

¹⁷⁴ *Van Rooyen*, at para 22.

¹⁷⁵ *Van Rooyen*, at para 28.

¹⁷⁶ Berman B, 'Problem-solving courts: a brief primer', (2001) Volume 23 No 2, *Law and Policy*, at 1.

¹⁷⁷ See Albertyn C, 'Defending and securing rights through law: feminism, law and the courts in South Africa' (2005), *Politikon*, at 219.

- firstly, the family courts which are established in terms of section 2(k) of the Magistrates' Amendment Act No 120 of 1993;¹⁷⁸
- secondly, the maintenance courts which are established in terms of section 3 of the Maintenance Act¹⁷⁹ designating every magistrate courts as such a court;
- thirdly, the domestic violence courts in terms of section 1(iv) of the Domestic Violence Act as contemplated in the Magistrates' Court Act No 32 of 1944;
- fourthly, the equality courts which are established in terms of 16 of the Equality Act and to ensure the prohibition of all forms of inequalities and discrimination;¹⁸⁰ and
- lastly, the indigenous courts.

These are the five types of the courts, referred to as “specialist courts” throughout this section which Babb defines as the:

“forum with which to adjudicate the full range of issues, based on the notion that the courts’ effectiveness and efficiency increases when the court resolves legal and social problems in as few appearances as possible”.¹⁸¹

Altbeker, referring to these courts as “dedicated courts”¹⁸², notes that:

- firstly, the jurisdiction of these courts is defined by the law which created them, and is limited to a pre-determined range of issues;
- secondly, it is these laws that also create the source of the legal dispute over which these courts have jurisdiction; and
- thirdly, the rationale for their establishment is to ensure that people deemed to have appropriate skills, could be employed in courts that have

¹⁷⁸ These courts seek to provide an integrated and specialised service to the family as the fundamental unit of the society.

¹⁷⁹ No 99 of 1998.

¹⁸⁰ These courts were first established and launched at the Johannesburg Magistrates’ courts on 16 June 2003.

¹⁸¹ Babb B, ‘Where we stand: an analysis of America’s family law adjudicatory systems and the mandate to establish unified family courts’, (1998) 32, *Family Law Quarterly* 31 at 35.

¹⁸² Altbeker A ‘Justice through specialisation? The case of specialised commercial crime court’, (2003) No 76, *Monograph* at 1.

the definite social policy objectives *such as the advancement of gender equality for social change in the Equality Act*,¹⁸³ (author's emphasis).

The envisaged development of substantive principles of equality within the framework of the specialist courts in the elimination of systemic prejudice and discrimination raises a number of questions, which are, but not limited to:

- what factors have justified the establishment of these courts?
- how will their operation contribute to the promotion of gender equality?
- what are the benefits associated with the establishment of these courts?
- whether these courts promote social control or social change? and
- how likely are they to develop the research agenda for the promotion of gender equality?

The essence of these questions is the quest for the determination of the relevance of these courts as an appropriate strategy for the advancement of social change through the promotion of the right to gender equality at the magistrates' courts. Secondly, these questions are borne by an underlying assumption of this study that despite the limited role of the law in addressing the underlying social ills and those of the magistrates' courts themselves it nevertheless determines the discourse and the scope of human rights. In this regard, Kennedy asserts that:

“almost nothing has more impact on our lives than the application of the law. The law is entangled with our everyday existence, regulating our social relations and business dealings, controlling conduct which could threaten our safety and security, establishing the rules by which we live”.¹⁸⁴

The focus on the development of the principles of non-discrimination by the specialist courts through their constitutional, legislative and jurisprudential framework is informed *firstly*, by the social and historical factors that have contributed to their emergence as an important tool in addressing the socio-legal challenges in the promotion of gender

¹⁸³ Ibid.

¹⁸⁴ See Kennedy H, *Just law: the changing face of justice and why it matters to us all*, (2005) Vintage Publishers, London at 3.

equality. Kim¹⁸⁵ highlights that the establishment of the specialist courts is informed by the following factors:

- instability among social institutions that have traditionally addressed problems such as domestic violence;
- social and policy trends emphasizing accountability for public institutions, combined with technological innovations that have made it easier to document and analyse court outcomes;
- shifts in public legislation and policies, particularly in the affirmation of the right to gender equality; and
- rising caseloads and general frustration felt by the public, practitioners and court officials themselves, particularly within the magistracy, with the standard approach to case processing and outcomes.¹⁸⁶

Secondly, the focus on the specialist courts is achieved by the institutional rules and factors that define their role in the quest for the promotion of the right to gender equality. These rules regulate the court's internal processes, procedures and functions that broaden access to them.¹⁸⁷ For example, the Equality Act provides for the relaxation of the rules of evidence at the Equality Courts, which favours the required context-sensitive approach, in line with Babb's definition of these courts¹⁸⁸, to the right to gender equality. The approach seeks to move the trial away from an adversarial approach towards a more inquisitorial system for the determination of the alleged unfair conduct or law.¹⁸⁹ The holding of the "directions hearings"¹⁹⁰ in terms of the Equality Act, to determine the issues that are or may not be relevant to the enquiry is another strategy that strives

¹⁸⁵ Kim K, 'The problem-solving courts as a coordinating idea', unpublished paper presented at the Midwest Political Science Association Annual National Conference, Chicago, 03-06 April 2008.

¹⁸⁶ *Ibid*, at 4.

¹⁸⁷ Ruibal AM, 'The search for the legitimacy and redefinition of the institutional role of the Supreme Court in Argentina', unpublished paper presented at the Annual meeting of the American Political Science Association, 28-31 August 2008.

¹⁸⁸ See Babb (note 181 above).

¹⁸⁹ See section 16 of the Act on the role to be played by the Clerk of the Court, section 19 on the rules and procedures and section 20 on the rules of access to the Court.

¹⁹⁰ See Kok A, 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: proposals for legislative reform' (2008) Volume 24, *SAJHR*, 445-471. He highlights that the directions hearings include the discovery of documents, admission of facts or documents, the manner of service of documents, amendments, the filing of affidavits and giving of further particulars, at 449.

towards the inquisitorial approach which seeks to limit the burden of proof during trial for both the litigants and the court itself. The Equality Act has further lessened the burden of proof on the complainant by shifting it to the respondent to dispute any allegations of unfair discrimination as section 13 provides that:

“if the complainant makes out a *prima facie* case of discrimination:

- the respondent must prove, on the facts before the court, that the discrimination did not take place as alleged; or
- the respondent must prove that the conduct is not based on one or more of the prohibited....”¹⁹¹

The flexibility of the institutional rules is further supplemented by the consideration of whether the matter should be heard at the court or be referred to an alternative forum in terms of section 20(3), but before making such a decision for referral of all relevant factors must be considered including:

- (a) the personal circumstances of the parties and particularly of the complainant;
- (b) the physical accessibility of any contemplated alternative forum;
- (c) the needs and wishes of the parties and particularly of the complainant;
- (d) the nature of the intended proceedings and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of the law; and
- (e) the views of the appropriate functionary at any contemplated alternative forum.¹⁹²

Furthermore, the acknowledgement of the role of assessors whose jurisdiction is limited only on the facts, in order to assist the court to reach a just decision, is another tool that

¹⁹¹ See section 13(1) of the Equality Act. See also Mayeda (note 170 above). He argues that the shift should have regard for equality implications of the equality seeking groups.

¹⁹² See section 20(4) of the Equality Act.

limits the rigidity of the court processes as is normally experienced at the ordinary magistrates' courts as it provides in section 22(1) of the Equality Act:

“in any proceedings in terms of or under this Act, the court may, at the request of either party, or of its own accord if the presiding officer considers it to be in the interests of justice, summon to its assistance one or two persons who are suitable and available and who may be willing to sit and act as assessors”.

The recognition of the role that assessors may play in the dispensation of justice through the specialist courts gives effect to section 180 of the Constitution which provides that:

“national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution including:

- the participation of people other than judicial officers in court decisions”.¹⁹³

In giving effect to this provision, Seekings *et al* point out the benefits that are associated with the use of assessors at the magistrates' courts which are, amongst others:

- the introduction of lay assessors representing a fundamental reform of the country's lower courts – and it is these lower courts which handle the over-whelming majority of criminal trials in the country;
- the use of lay assessors also serves to deprofessionalise the courts, removing the monopoly over judicial authority which professional magistrates and judges since the abolition of juries in 1969; and
- the reintroduction of a democratising element in the judiciary as a contribution to the participatory nature of the South African state.¹⁹⁴

¹⁹³ See Rautenbach C, 'Therapeutic jurisprudence in the customary courts of South Africa: traditional authority as therapeutic agents' (2005) Volume 21, *SAJHR* 323-335. She argues that the appointment of such officers from the same cultural, social and educational background of the offender can be seen as a healing agents working towards a better or more trustworthy adjudication of criminal [and civil] committed within a particular socio-cultural background, at 324.

¹⁹⁴ Seekings J and Murray C, *Lay assessors in South Africa's magistrates' courts*, (1998) Published by the Law, Race and Gender Research Unit, University of Cape Town, at 2.

Seekings *et al* have established in their research that the idea of using lay assessors was not well-received by the magistrates, as they say:

“most magistrates believe that the only value of assessors *is in enhancing the legitimacy of the courts through changing public perceptions*. The quality of justice is not improved very much, although the assessors can assist the magistrates by providing advice on the culture and background of the accused. As far as most magistrates are concerned, there is nothing wrong with the quality of justice which magistrates administer; it is just the public that does not recognise the high quality of this justice. Almost all magistrates believe that magisterial authority must be upheld in order to maintain this high quality of justice, *as only legally trained and qualified professionals are in a better position to apply the law in a just and equitable manner*”¹⁹⁵, (author’s emphasis).

Despite the total rejection of the use of assessors by the magistrates as they invoked their legal expertise¹⁹⁶, they still acknowledge the role of assessors in building the public profile of the courts. Assessors enhance the use of the law which would then enable the determination of the extent to which the law permeates through to grassroots level for the generation of social change. Seekings *et al* further endorsed this contention by holding that the use of assessors in the bench:

“brings a variety of perspectives, rooted in sometimes different conceptions of justice. It is this mix of perspectives which seems to be the strength of the mixed bench that is provided for under existing legislation in South Africa”.¹⁹⁷

The use of assessors as provided for in the Equality Act seeks to ensure the inclusive approach in the administration of justice to eliminate any potential for “*us and them*” in order to affirm the integrity of the judicial process and also for the development of public confidence at the lowest structure of the courts.

¹⁹⁵ Ibid at 100-101.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid, at 191.

Similarly, the holding of a maintenance enquiry in terms section 8 of the Maintenance Act which requires the maintenance officer to request any person prior or during the enquiry to appear before the magistrate for “examination” concerning any relevant information on the case, is a move away from the standard approach of the ordinary magistrates courts. It provides an opportunity to determine the factors that may be of further assistance and value in the determination of the maintenance order.

The development of the Guidelines for the Implementation of the Domestic Violence Act for Magistrates¹⁹⁸ is another strategy for the relaxation of the rules of procedure, requiring the magistrates to be more flexible in considering applications that may even be made after working hours. The guidelines acknowledge the social and legal context of domestic violence and are based on the experiences of magistrates presiding over domestic violence cases and who are therefore cognisant of the day to day realities of magistrates in courts.¹⁹⁹

In the light of these factors, the significance of these courts lies in the recognition of the minimal role of a “one size fits all”²⁰⁰ approach by the ordinary magistrates’ courts, in the realisation of the right to gender equality. The importance of these courts is affirmed by Bohler-Miller who asserts that they seek to incorporate human relations and not merely the reliance on the mechanical application of rules to solve legal and social problems.²⁰¹ Socio-historical factors in the context of institutional rules are of utmost importance in the establishment of the role of these courts for the removal of impediments for gender equality as:

- they seek to ensure the immediate enforcement and effective remedial strategies in the elimination of inequalities and discrimination for the advancement of gender equality for social change;
- they seek to serve as an important tool in the development and transformation of the concept of “justice” in this new constitutional dispensation; and

¹⁹⁸ Launched on the 23rd June 2008, hereinafter referred to as the “Guide”.

¹⁹⁹ See the preamble of the Guide.

²⁰⁰ See Bakht N, ‘Problem solving courts as agents of change’, unpublished paper of the National Judicial Institute, Ontario Court of Justice.

²⁰¹ Bohler-Muller N, ‘What the equality courts can learn from Gilligan’s ethics of care: a novel approach’, (2000) Volume 16, *SAJHR*, at 623.

- further give recognition to the challenges faced by the magistrates' courts in the enforcement of gender equality related laws.²⁰²

Hence Berman's argument is endorsed that these courts seek to broaden the focus of legal proceedings from simply adjudicating past facts and legal issues to changing the future behaviour of the litigants and ensuring the well-being of the communities.²⁰³

4.8 Specialist courts and the enforcement of gender equality

The promotion of the right to gender equality within the role of the specialist courts serves an important purpose as the idea behind the right to equality covers a broad range of issues. These issues include the right to maintenance which include the right to social security, prohibition of sexual exploitation, domestic violence and any other issue that may involve the application, interpretation and enforcement of discriminatory customary law rules. The centrality of the right to equality in these matters is informed by an integrated approach on the role of these courts to ensure the promotion of the right to gender equality in the determination of the alleged unfair discrimination that comes before them. The broad framework of the right to equality within the specialist role of these courts is a response to the special needs of vulnerable groups, including both women and children.²⁰⁴

The disadvantages suffered by women prompted a particular focus on them for the establishment of the specialist courts, dedicated to resolve instances of inequality and discrimination which may undermine the promotion of the right to gender equality. The specialist courts were not only established to address the rising caseloads at the magistrates' courts but also the distinct suffering of women. Hence Perelman assertion that:

²⁰² See Bohler-Muller N, 'Developing a new jurisprudence of gender equality in South Africa' (2005) Doctor Legum, Faculty of Law, University of Pretoria. She argues that the adherence to formal rules, extant legal texts and a legalistic culture is violently exclusionary and thus it is necessary to enter into critical discourses that lead to transformative jurisprudence. She further noted that different voices have been silenced in the past and it is essential that the stories of women and other outsiders are listened to in order to (re)introduce new futures and new possibilities for South Africans struggling to find a home for themselves in the post-apartheid context.

²⁰³ Berman (note 176 above).

²⁰⁴ See Rautenbach C, 'Gender equality and religious family laws in South Africa', (2003) Volume 3 No 2, *QUT Law & Justice Journal* at 169.

“the very notion of human rights implies that there exists rights that may be attributed to every member of the various groups and that these rights relate to the very quality of being “human”. The doctrine of human rights proclaims that every person possesses a dignity proper to itself and merits respect insofar as that person is a free moral agent who is simultaneously autonomous and responsible”.²⁰⁵

The above contention falls within the framework of the promotion of the right to gender equality within the role of the specialist courts. The rationale for such is an acknowledgement of the historic prejudice and discrimination against women, which is not mitigated by the rigidity of the criminal justice system. Generally, the ordinary magistrates’ courts are concerned with the application of the “rules of the game” without actually moving beyond such limitation to establish the underlying social networks that tend to undermine the values in the Constitution.

The contention to go beyond the law to establish the underlying social networks that have potential to inhibit the achievement of the right to gender equality was emphasised by O’Regan J and Sachs J’s minority judgment in *S v Jordan*.²⁰⁶ They affirmed the intersection of the law and social values as they argued that law is thus partly constitutive of invidious social standards which are in conflict with the Constitution. The Constitution itself make it clear that the law must further the values of the Constitution. It is no answer to say constitutional problems lie in social values, when the law serves to foster those values. The law must be conscientiously developed to foster the values consistent with our Constitution.²⁰⁷

They supplemented their argument by the Canadian Supreme Court judgment in *R v Turpin*²⁰⁸ which held that:

“it is important to look not only at the impugned legislation which has created a distinction . . . but also to the larger social, political and legal context... [I]t is only

²⁰⁵ Perelman CH, ‘The safeguarding and foundation of human rights’, (1982) Volume 1, *Law and Philosophy*, at 119.

²⁰⁶ 2002 (11) BCLR 1117.

²⁰⁷ *Jordan* at para 72.

²⁰⁸ (1989) 39 CRR 306.

by examining the larger context that a court can determine whether differential treatment results in inequality... A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged".²⁰⁹

The limitation of the integration of the law with the underlying social networks has the potential to inhibit the promotion of the respect of the right to human dignity which may in turn, contribute to the unequal benefit of the law for the realisation of the right to gender equality. As they argued, the determination of the significance of the law for social change cannot be isolated from its social setting.

The distinct character of the specialist courts for the realisation of the right to gender equality is their results-orientated approach for the elimination of discrimination. They provide a broad standing for the enforcement of the right to gender equality, which in terms of the Equality Act²¹⁰ is further extended by the inclusion of the SAHRC and CGE in the institution of proceedings at these courts.²¹¹ These two institutions are not only there to assist in the enforcement of the right to gender equality at the courts but they serve as alternative forums for the promotion of the right to equality.²¹² They also serve as monitoring institutions to ensure that the specialist court's orders are properly implemented.²¹³

The case of Ms Zandile Mpanza that was launched by the Commission on Gender Equality, at the Umlazi Equality Court after she was stripped naked by four men in Umlazi T-Section Township in Durban, is a case in point. Ms Mpanza was assaulted and paraded on the streets for wearing trousers in the area in question and her shack burnt down. Ms Mpanza and CGE were seeking a declaratory order restraining unfair discriminatory practices against women in T-section. In addition to the relief they sought

²⁰⁹ *Turpin* at para 335-6 in *Jordan* at para 68.

²¹⁰ See section 20 of the Equality Act.

²¹¹ See section 20(1) of the Equality Act.

²¹² See section 20(5) of the Equality Act.

²¹³ See the case of *Mkhize v Edgemead High School*, Blue Downs Equality Court, Western Cape, 06 October 2003. The Court ordered the South African Human Rights Commission to monitor the implementation of its judgment as it ordered that the respondents in this case to go for diversity training.

an order for specific steps to be taken in T-section to eradicate the ban on women wearing trousers, as well as consequent harassment of women who refuse to obey the said ban. CGE argued that:

“conservative mindsets and patriarchal attitudes seeking to determine and violently enforce what behaviour and dress is deemed appropriate for women serve to oppress, intimidate and marginalise women and, as such cannot be tolerated.”²¹⁴

This case attracted a lot of attention which transmitted to the international community as BBC Radio and Reuters interviewed CGE Commissioners on the issue which resulted on CGE receiving widespread publicity on its involvement on the matter.²¹⁵ As reported by Powys, the community reacted with a great deal of disdain towards the intervention of CGE to an extent of resorting to issuing threats of violence towards the Deputy Chairperson, Commissioner Shozi.²¹⁶

CGE’s involvement in the matter is in line with the provisions of section 20(9) of the Equality Act which provides that:

“the state and constitutional institutions must, as far as reasonably possible, assist any person wishing to institute proceedings in terms of or under the this Act, amongst others, by ensuring that the person is directed to the appropriate functionary in order to take the necessary action in the furtherance of the matter in question”.

The court ruled on 10 April 2008 that women are free to wear pants and the ban on them wearing pants compromised their right to equality, dignity and no-discrimination. The essence of this judgment is the remedial strategies that were adopted by the court that give effect to the Equality Act for harnessing the democratic values in the establishment of a “just society”. The court made an order in terms of section 21(2) of the Equality Act for:

²¹⁴ See the statement released by CGE Communications Officer: Boikanyo M, entitled: ‘CGE in Equality Courts case on Umlazi trousers incident, Durban’, dated 12 March 2008.

²¹⁵ Ibid.

²¹⁶ Ibid.

- an unconditional apology which focuses not only on the past but for the future harmonisation of the relations;
- the South African Police Service to inform the residents of the order within a month; and
- further, to report to CGE any incidents related to the ban on women wearing pants.²¹⁷

The judgement demonstrates the ability of these courts to empower individuals and communities at grassroots level for the effective harmonisation of socio-legal relations in the development of the principles of non-discrimination. It further shows an inclusive approach in the application and enforcement of constitutional values in the enforcement of gender equality. CGE has also acknowledged the role played by the Senior Public Prosecutor at the court in co-ordinating the communication between the institution and the SAPS which at first was met with reluctance from the Police until the intervention of the prosecutor. The intervention improved relations and the Police Commissioner requested CGE to hold a meeting in Umlazi concerning the matter.²¹⁸

The improvement of relations is of utmost importance for the enforcement of the right to gender equality as the specialist courts seek to use their authority to forge new responses to chronic social, human and legal problems that have proven resistant to conventional solutions.²¹⁹ The elimination of systemic prejudice and discrimination within the framework of the specialist courts is in line with the immediate enforceability of the rights entrenched in the laws that created them. These laws and the processes of the court are designed to put the parties to the dispute more at ease in order to ensure the effectiveness of the court and support to both parties. Freiberg summarises the importance of these courts in the development of substantive principles of the right to gender equality as follows:

²¹⁷ See Phakola M (Department of Justice and Constitutional Development), 'The right to culture and the role of the Equality Courts', (2008) May/June, *Justice Today*, at 6. The four accused also faced criminal charges of assault, two counts of malicious damage to property, intimidation and indecent assault.

²¹⁸ E-mail communication with Taryn Pows from CGE dated 06 March 2009.

²¹⁹ Bergman (note 176 above).

- they seek to achieve tangible results for all the parties in the dispute and also for the well-being of the society;
- re-engineer how government systems respond to socio-political problems as they seek to promote the reform outside of the court as well as within;
- rely upon the active use of judicial authority to solve problems and to change the behaviour of litigants. Instead of passing off cases to other judges, they stay involved with the case throughout the post adjudication process;
- they employ a collaborative approach, relying on both government and non-profit partners to help achieve their goals; and
- engage in unfamiliar roles as well, asking them to convene meetings or broker relationships with community groups or social service providers.²²⁰

These factors highlights the focus of the courts in addressing the underlying causes of the offending behaviour as they seek to move beyond their own court orders to ensure that their orders are properly implemented. Ms Mpanza's case shows that the specialist courts have the benefits that the general magistrates' courts cannot offer as the latter courts deal with a broader, range of issues than the refined specialist matters dealt with by the former courts. They have:

- firstly, the potential to strive towards ensuring the efficiency in the dispensation of justice by attracting and utilising persons with appropriate expertise in the prosecution and adjudication of matters in which the specialist knowledge is required; and
- secondly, their specialist character has a further potential for the consistence in decision-making, which may have the effect of the formation of the corps specialists' magistrates familiar with the workings of the court and therefore better able to manage the cases more efficiently.²²¹

Although Ms Mpanza's case is an affirmation of the specialist role of the courts in the promotion of the right to gender equality, it still raises a number of questions. These questions are related, *firstly*, to the period upon which the case was finally disposed. The

²²⁰ Freiberg A, 'Problem oriented courts: innovative solutions to intractable problems?', unpublished paper presented at the AIJA Magistrates' Conference, Melbourne, 20-21 July 2001 at 4.

²²¹ See Altbeker (note 182 above) at 2.

judgement of the Equality Court came after two years of the incident having happened. The quest for the courts to speedily resolve issues of inequality and discrimination remains challenged and slow responses may further add to the burden on the experiences of women at the ordinary magistrates' courts. The delays that are experienced may compromise the efficiency of these courts whilst they have been hailed as an important instrument in the elimination of discrimination and prejudice.

The case of Ms X, that was lodged at the King William's Town Equality Court on 07 February 2007 attests to the difficulties and slow responses and delays in the enforcement of the Equality Act as experienced in *Mpanza's* case. Ms X lodged a complaint for harassment against Grey Hospital after she was shouted at by the senior nurse and staff member and a woman, calling her "*lo mntu*"²²² ("this person", author's translation) on 16 January 2007. The magistrate ordered that the Department of Health must hold its internal enquiry on the matter. The Department then developed a dragging of the feet approach in resolving the matter. Ms X constantly enquired from the clerk of the court and the magistrate and they found themselves unable to do anything in forcing the Department to speedily resolve the matter.

The first hearing was scheduled for 10 October 2008 at Grey Hospital in King William's Town and failed because there was no provision for audio-services. The calling off of the hearing resulted in a fruitless expenditure as Ms X was flown from Pretoria to King William's and had to come back to Pretoria without the objective of the hearing being achieved. The hearing was finally held on 23 February 2009 at the same venue mentioned above. What is quite striking with the manner in which this case was handled is the holding of the hearings in February but the outcome was only made available to Ms X on 08 September 2009.²²³

As Ms X undertook this case in her personal capacity without the assistance of the lawyer, she had to wait for the "mercy" of the Department and respect the order of the court as well. The outcome of this case was only made available to Ms X when she enquired from the representative of the Department: Ms Phila Simanga, despite the fact

²²² The reference in *IsiXhosa* is very derogatory as it does not give respect to the person.

²²³ See the report in the case between the *Department of Health-Eastern Cape Province v Philiswa Chirwa* 18 March 2009.

that the case was finalised and reported on 18 March 2010.²²⁴ Even when Ms X received the decision and had concerns on the reasoning of the committee and the distortions on the facts presented at the hearing and informed the magistrate accordingly, she was advised to take the matter to the high court. The magistrate held that the Equality Court no longer has jurisdiction on the matter. The struggle in enforcing equality claims, both by the court and the department makes a mockery of the new dispensation and makes the struggles of women more difficult.

Secondly, in the light of the challenges facing the general population, particularly on changing the mind sets and attitudes, the success of an actual order of an unconditional apology as made in the afore-mentioned *Mpanza's* case remains to be seen. Uncertainty arises from the reluctance of the residents of the T-section to resolve the matter in an amicably way. During the process of trying to resolve the matter, CGE tried to convene a meeting with the hostel dwellers in T-section even before launching the case with the Equality Court and the residents refused to attend such meeting. It is reported that the headmen of the T-section said that:

“the meeting could have been a waste of time because it would not have changed the law at the hostel that all the residents have agreed to. He further added that he viewed the efforts to address the pants ban as a sign of victimisation because residents were content with the situation”.²²⁵

The attitude of the T-section residents attests and may be attributed to the lack of information on the nature and character of violence against women and the role of government and its institutions in the fight against discrimination. It actually promotes social stereotyping against the equal worth of women as responsible citizens entitled to equal rights in South Africa. The case of Nwabisa Ngcukana gives credence to the difficulties faced by women in the enjoyment of their rights. Ms Ngcukana was sexually harassed and assaulted by taxi drivers (men) at Noord Street in Johannesburg on 17 February 2008 for wearing a mini skirt. One of the reasons that prompted the attack was

²²⁴ See the statement on the disciplinary hearings dated 18 March 2009 which is in Ms X's possession. The Nurse was given a three months verbal warning as the enquiry reasoned that the nurse did not have intention to hurt Ms X.

²²⁵ See the report by Mfusi N entitled: 'Pants ban: women to live under oppression', accessed at www.iol.co.za, dated 13 August 2007, on 18 February 2009.

that it is against culture for women to wear a miniskirt and therefore Ms Ngcukana needed to be taught a lesson.²²⁶

Although SANTACO²²⁷ apologised unconditionally for the conduct of the taxi drivers²²⁸, this case raised a lot of controversies regarding the use of culture and its values in promoting the social construct of women as legitimate victims of violence. The abuse of women under the auspices of culture does not only exacerbate the marginalisation and exclusion of women but may shun women away from cultural institutions either out of fear of compromises of confidentiality, or because they will view the institution as failing to provide an appropriate context in which to raise the specific and controversial issues of domestic violence.²²⁹ Equally, it also views the equal rights of women through the eyes of the men that blame women for provoking men to violence.²³⁰ It institutionalises male domination and women's subordinate status as it raises the alarming incidents of violence against women and defeating the objectives of the new constitutional dispensation that has witnessed the liberation of the country from the atrocities of the apartheid rule.²³¹

The behaviour of the taxi drivers (men) in this case, which Quinn refer to as "girl watching"²³², undermines the mediation of social construction of rights by creating a political and social space for more inclusive and equitable change and as further clarified by Juma²³³ that mediation :

²²⁶ See Vincent L, 'Women's rights get a dressed down: mini skirt attacks in South Africa' (2008) Rhodes University on her analysis of the historical and cultural construction of the ban on women wearing miniskirts in Africa.

²²⁷ South African National Taxi Council.

²²⁸ See the report by SAPA, 'Taxi body offers apology over miniskirt attack, Johannesburg, South Africa' 03 September 2008.

²²⁹ See Burman E, Smailes SL, and Chantler K, 'Culture as a barrier to service provision and delivery: domestic violence services for minoritised women' (2004) Volume 24 No 3, *Critical Social Policy*, 332-357.

²³⁰ See So-Kum Tang C, Wong D and Cheung FM, 'Social Construction of women as legitimate victims of violence in Chinese societies' (2002) Volume 2, *Violence Against Women*, 968-993.

²³¹ Mphahlele M, 'Gender violence: a perception that the law discriminates in favour of women' (2009) Volume 6 No 2, *US-China Law Review*, 51-62 at 51.

²³² See Quinn BA, 'Sexuality and masculinity: the power and meaning of "girl watching" ' (2002) Volume 16 No 3, *Gender and Society*, 386-402.

²³³ Juma L, From "Repugnancy" "to "Bill of Rights": African customary law and human rights in South Africa and Lesotho' (2007) Volume 21 No 1, *Speculum Juris*, 88-112.

- involves the equitable recognition of the various normative systems within a cultural society that have traditionally provided formalistic definition of rights.
- requires that these systems be engaged through dialogue, bearing in mind the cultural dynamics of change, to find concrete and practical value of rules within them and to evolve the conception of rights that is acceptable across cultures.²³⁴

The abuse of equal rights of women under the name of culture compromises the legitimacy of customary law as a system that regulates the lives of many people of South Africa.²³⁵ It brings to the fore the objections that were raised during the *Certification*²³⁶ process for the inclusion of cultural rights in the Constitution.²³⁷ As highlighted elsewhere²³⁸, Beall *et al* acknowledge that the new constitutional dispensation has ushered a new process and gives equal recognition to cultural rights²³⁹ including the significance of the institution of traditional leadership and the development of customary law alongside common law.²⁴⁰ Traditional leaders remain the core and a central source of communal unity and custodians of African norms and values.²⁴¹ It is therefore, quite striking that traditional leaders, would be subjected to unnecessary pressure to justify not

²³⁴ Ibid, at 108.

²³⁵ See Kane M, Oloka-Onyango and Tejan-Cole, 'Reassessing customary law system as a vehicle for providing equitable access to justice for the poor' presented at The World Bank Conference entitled: 'The frontiers of social policy', 12-15 December 2005.

²³⁶ See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC).

²³⁷ See Sithole MP, 'State democracy warming up to culture: an ambivalent integration of traditional leadership into the South African governance system' at 41-53 in Jackson P, Muzondiya J, Naidoo V, Ndletyana M and Sithole MP, *South African governance in review of anti-corruption, local government, traditional leadership* (2009) Democracy and Governance Research Programme, Human Sciences Research Council.

²³⁸ Ntlama N and Ndima D, 'The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems' (2009) Volume 4 No1, *International Journal of African Renaissance Studies-Multi-Inter-and Transdisciplinarity*, at 6-30.

²³⁹ See section 30 and 31 of the Constitution.

²⁴⁰ See Beall J and Ngonyama M, 'Indigenous institutions, traditional leaders and elite coalitions for development: the case of Greater Durban, South Africa' (2009) Crisis States Working Papers Series No 2, Working paper No 55, Destin Development Studies Institute. They highlight that even though the institution of traditional leadership has survived huge social and political change and remains important both as a socio-cultural and political system, South Africa's transition into democracy in 1994 subjected the institution to heated debates on its significance and still remains a matter of contention, at 3.

²⁴¹ See section 211(1) of the Constitution providing that the institution, status and role of traditional leadership according to customary law, are recognised subject to the Constitution. Subsection 2 further endorses that a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to or repeal of, that legislation or those customs...".

only the existence of the African customs and their values, but of the institution of traditional leadership itself.²⁴²

The institution of traditional leadership has survived the historic colonial and apartheid subjugation and still remains a custodian of the morals, values and cultural systems of many of the people of South Africa.²⁴³ The distortion of African values is as a result of the lack of understanding of traditional law itself and the role of traditional leaders in the new constitutional dispensation. The Constitution gives due recognition to the institution of traditional leadership and provides for the continued authority and functioning in accordance with the general framework of customary law in line with South Africa's constitutional imperatives.²⁴⁴

Without much background on the role and functioning of traditional leaders, as examined and argued elsewhere²⁴⁵, the institution is equally obliged to ensure full compliance with the constitutional values and other relevant factors than having to justify its existence and the significance of the customs and values of the great majority of South Africa. Of great concern is the use of culture in promoting stigmatisation against women, creating an unnecessary pressure and challenges on the concept of gender equality *vis-a-vis* customary law rules and values. It reinforces the historic subjugation of women as identified in chapter one and further discussed in chapter three that the equal recognition of the right to gender equality and the right to culture creates tensions between the application and enforcement of the two competing values. It actually, also undermines the role of the chapter 9 institutions and especially the Cultural Commission, with its vision and mission to:

²⁴² See the media statement released by Linda M on behalf of the National House of Traditional Leaders in various newspapers: *Sowetan*: 28/02/2008, *Citizen*: 28/02/2008, *City Press*: 20/08/2008 and *The Times*: 27/02/2008, defending the abuse of human rights under the name of culture and calling on the nation at large to unite against archaic men who take advantage of culture as a means of assaulting women.

²⁴³ See Logan C, 'Traditional leaders in modern Africa: can democracy and the chief co-exist?' (2008) Working Paper No 93, AfroBarometer: IDASA, as she affirms that traditional leaders still play an important role in the lives of many Africans and play a pre-eminent role as mediators of violent conflict.

²⁴⁴ See Chapter 12 of the Constitution, Traditional Leadership and Governance Framework Act 41 of 2003.

²⁴⁵ See Juma (note 233 above). See also Ntlama N, Equality misplaced in the development of customary law of succession: lessons from *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC), (2009) Volume 20 No 2, *Stellenbosch Law Review*, at 333-356.

- contribute meaningfully and constructively to social transformation and nation building for the attainment of a truly united South African nation.
- promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities.²⁴⁶

The factors noted above, are attributed to the lack of change of attitudes and information regarding the essence of gender equality, especially for people in rural areas. The researcher relayed the case of *Ntenti v Ntenti*²⁴⁷, which she observed at the Zwelitsha magistrates' courts, of two brothers, fighting over the common home, to community members at Ngxwalane location in King William's Town. Her interaction with the community members vouched truth to the lack of the national flow of information on the concept of gender equality. In turn, the lack of information contributes to the lack of change of attitudes in promoting the right to gender equality. The younger brother was charged for assaulting the older brother with intent to do grievous bodily harm. According to their own perceptions, it is normal for brothers to fight and the brotherly fighting cannot be reduced to domestic violence.

Similarly, the adoption of the Domestic Violence Act was viewed as an instrument that was carefully designed to be used by women to undermine men²⁴⁸ as men will always resolve the differences as "men" (*njengamadoda*). The dismissal of domestic violence by the "manly" (*njengendoda*) approach exacerbates the vulnerability of women to abuse. The vulnerability of men to abuse leads to high incidents of domestic violence and drug abuse as evidenced by high levels of such incidents in Breidbach and Schornville Townships which are Coloureds areas near King William's Town.²⁴⁹

The question which arises from the lack of understanding is what would make violence, domestic or otherwise normal? The misconception of violence generally, contributes to the resistance against the change of attitudes and mindsets to accept the concept of

²⁴⁶ See (note 144 above).

²⁴⁷ *Ntenti v Ntenti* E1045/08, which was postponed to 21 April 2009.

²⁴⁸ These were also the views shared on the SABC 1 show: *Cutting edge*, with the topic entitled: 'Men in abusive relationships', at 21h30 on 17 February 2010. See also Mphahlele (note 227 above).

²⁴⁹ Information shared with the Police Reservist and the Prosecutor at the King William's Town magistrates' courts on 23rd March 2009, as they made an example of a woman who was raped, murdered in a gruesome manner by having her throat slit and dumped in a river, as one of the few incidents that make the work of both the police and the courts difficult.

gender equality. The “man on man” violence which is reduced to nothing more than the idea of “brotherly fighting”, results in violence not being reported so as not to contradict the concept of “the man does not cry”.

Powys on behalf of CGE in the KwaZulu-Natal provincial office²⁵⁰ explained the challenges that CGE encountered in trying to resolve the *Mpanza* case as she explains that even though the institution quickly prepared its papers for the Equality Court:

- the respondents delayed the matter and initially elicited legal representation from the Legal Aid Board in Umlazi and then proceeded to discontinue legal representation;
- this happened on at least three or four occasions for all the accused at different times of the appearances in the Equality Court as well as in the criminal proceedings pertaining to the matter; and
- the delaying tactics employed by the respondents and the consistent support that they received from members of the T-section community, some of which were endeavours to undermine the confidence of the complainant and break her spirit.²⁵¹

Thirdly, the women themselves are partly to blame as they argue that it is the outsiders who want to impose their rules on them and the ban on women wearing pants in the section is the law and a decision that is supported by everybody.²⁵² As Powys further highlighted it was the women that supported the four men in court leading her to propose that the attitudes of women need to be analysed and understood further, by asking the following questions:

- what did the actions of women supporting the respondents mean for women supporting the plight of other women, subjected to unfair discrimination in our communities;
- could their actions be explained by fear of reprisal from men or

²⁵⁰ Telephonic interview and e-mail message response from Ms Taryn Powys: Legal Officer, CGE, 06 March 2009.

²⁵¹ Ibid.

²⁵² Ibid.

- was it just a case of a blind belief in the practice of banning females from wearing pants?²⁵³

The conflicting behaviour of women also became evident in the much publicised rape case against former Deputy President: Jacob Zuma (who subsequently became the President of South Africa) in *S v Gedleyihlekisa Zuma*.²⁵⁴ Without detailing the facts and the reasoning of the court in this case, it displayed the power imbalances between the complainant and the accused in the enforcement of the right to gender equality. Bevan observes that:

“the few protesters against the abuse of women were drowned out by the noisy Zuma crowd who focussed some of their attention on humiliating the complainant in the case when burning her picture and holding placards screaming ‘*Burn this bitch*’” (author’s emphasis).²⁵⁵

Krieg further emphasises that:

“the power imbalances between the two parties was already reflected in their support and could well be observed in the way the two parties accessed the courts: whereas Zuma arrived in expensive state-issue cars accompanied by armed security and cheered by his supporters, the accused sneaked in under police escort staying anonymous and faceless for own protection. *Note that the supporters on both sides were women*”, (author’s emphasis).²⁵⁶

The behaviour of the women supporting the respondents in the *Mpanza* and *Zuma* cases, which displayed a conformist and unknown vested interests attitude, is a worrying factor in the context of establishing the essence of the law through the rights based

²⁵³ Ibid. See also Malik NM and Lindahl KM, ‘Aggression and dominance: the roles of power and culture in domestic violence’ (2006) Volume 5 No 4, *Clinical Psychology: Science and Practice*, 409-423. They argue and endorse Powys concerns that these questions may determine the impetus of domestic violence on the quality of protection accorded to women and result in a better understanding of the complexity and attitudes of women themselves on domestic violence.

²⁵⁴ Unreported case of the Southern Gauteng High Court No: 8/5/2006.

²⁵⁵ Bevan S, ‘South Africa: a trial that both sides will lose’, *New statesman*, (2006) Trident at 21 quoted in Krieg SH, ‘Culture, violence and rape adjudication: reflections on the Zuma rape trial and judgment’ (2007) *Internet Journal of Criminology*, at 1-22.

²⁵⁶ Ibid, Krieg .

strategies at the courts. It counters the assumption of the potential of the law to generate social transformation for the promotion of the right to gender equality as envisaged in this study. It shows that despite the legal framework to ensure the promotion of the right to gender equality, women are still faced with extreme levels of social discrimination not only from men but from other women as well, manifested itself in high incidence of violence both in public and private spheres.²⁵⁷ Such violence enhances the reluctance towards a change of attitudes for the advancement of the foundational values of the Constitution in the enforcement of the right to gender equality. It attests to the limitation of the law as a tool for transformation, as in the words of the former Deputy Minister of Justice and Constitutional Development, Jonny de Lange:

“the laws are important, but they depend on the change of the mindset and if the attitudes are not changing, South Africa is faced with the challenge of promoting awareness of these laws for the advancement of human rights ‘*until cows come home*’”²⁵⁸, (author’s emphasis).²⁵⁹

The attitudes of the women supporting the respondents in these cases (*Mpanza* and *Zuma*) is a disappointing setback in view of the new constitutional order that has provided major developments in gender-based legislation as highlighted in chapter one of this study, and through the judicial developments of substantive principles of non-discrimination. These developments have far reaching implications for the promotion of the right to gender equality but the realisation of these objectives can be frustrated if they are reduced to norms and sanctions imposed by the society for gender specific behavioural expectations that in turn will limit the contribution of the law for social change.

²⁵⁷ See Reddi M, ‘Cultural marriage practices and domestic violence against women: tears or triumph for women in South Africa and India? (2007) *Obiter* at 502-517.

²⁵⁸ See the media release statement by Dreyer N of the South African Human Rights Commission at the launch of the Guide on the Promotion of Access to Information Act No 2 of 2000, dated 01 March 2005, accessed at www.sahrc.org.za, on 03 March 2009.

²⁵⁹ See also Kok (note 190) above. He argues that law is a limited instrument in effecting social transformation, regardless of which legal institution is utilized to drive such a project, at 121.

The two cases (*Mpanza and Zuma*) further fuel the misconceptions and myths²⁶⁰ as to the reasons why women, are using the courts to enforce their rights. The misconceptions are evident in the enforcement of domestic violence complaints and maintenance claims, as domestic violence is not limited to physical assault but to broader issues such as emotional or financial and other psychological abuses, including the non-payment of payment.

The case of judge Ntsikelelo Poswa, discussed above, is a case in point that has such a negative influence on the enforcement of the right to gender equality as it demonstrated “power dynamics” at the expense of the rights of the child.²⁶¹ Ms Maya was subjected to several painstaking journeys as Judge Poswa lost one application after another at the Pretoria High Court²⁶² when the magistrate ordered that the matter be heard afresh as he did not have sufficient notes or recollection of his earlier rulings, in March 2002. The frustration that women have to endure in the enforcement of maintenance claims, which in this case is the battle of the legal minds, is shown by Ms Maya as she is reported as having pointed out that:

‘she is frustrated by the delaying tactics applied by Judge Poswa as he is walking all over the law, claiming that he will only admit responsibility if the results reflects 100% probability of his paternity, something she had never heard of’.²⁶³

The judge’s case illustrates the historical power imbalances between men and women which continue to be manifest in the new constitutional dispensation. These power imbalances undermine and complicate the struggles for the enforcement of the right to gender equality as evidenced in *Carmichele*. The case has directly or indirectly generated deep anxiety of women reinforcing the historic subjugation of women to men’s sexual fidelity as it affirmed the men’s right to reject paternity solely on the basis of an

²⁶⁰ See Bridge SJ, ‘Gender myths’ (2004) *Special Issue, Gender and Development in Brief*, at 1-6.

²⁶¹ See the report by Mkwanazi S: ‘Poswa remains unmoved’, accessed at www.iol.co.za on 05 May 2009.

²⁶² See the report by Venter Z, ‘Judge in court over paternity’, *The Saturday Star*, dated 23 February 2008.

²⁶³ See the report by Fourie J, ‘Judge embroiled in child pay row’, accessed at www.zajustblog.com, on 05 May 2009.

alleged inability to determine with sufficient certainty their genetic affiliation.²⁶⁴ It equally compromises the levels of awareness of human rights by women who may, in one way or another, as their use of the courts and the outcomes of their claims may be beneficial to other women who wish to enforce their rights in support of social change.

Power dynamics between men and women have a negative effect on women with little education and especially those in rural areas, as the enforcement of human rights, particularly the right to gender equality, requires a skill that ordinary women do not have. Judge Poswa's power play, to an extent that Judge CHG Van der Merwe had to be dispatched from the Free State High Court to preside over this case during an application for the review of the magistrates' decision disrespects the laws that he is supposed to interpret in the execution of his duties as a judge. As Judge Van der Merwe ordered a new maintenance hearing, it is reported that he remarked that he hoped "*sanity would prevail*" and that "*some progress will be made*", (author's emphasis).²⁶⁵

Judge Van der Merwe's remark may be interpreted to mean that there is no substance in Judge Poswa's contention of the likelihood not being the father to Maya's son. Secondly, Judge Poswa's attitude displayed the arrogance and hostility of those in a position of power and holding highly respected positions as officers of the court if they use their status to frustrate the struggles for gender equality. The courts may therefore, not be viewed by women as ideal and appropriate forums that can deal with their matters in a more positive way. It can be drawn from Judge Poswa's case that the effectiveness of the use of law in generating social change:

- firstly, will remain uncertain, especially in rural areas, that are affected by low levels of understanding of legal and constitutional rights;
- secondly, will be affected by manipulation of the justice system by those who may be in a position to do so such as Judge Poswa;
- thirdly, the attitudes, particularly the hostility shown by Judge Poswa and others who are in a position of power, may affect the extent to which the courts may be used for the promotion of the right to gender equality.

²⁶⁴ See Fredman S, *Discrimination law*, (2002) Oxford University Press, New York at 28.

²⁶⁵ Ibid.

Judge Poswa's arrogant attitude that he displayed reinforced the perception that women were given but a useless tool, through legal reform in the enforcement of the right to gender equality.²⁶⁶ Prejudice will hold that women go to court for "money" which in IsiXhosa is referred in a derogatory manner. The use of derogatory terms in reference to the enforcement of maintenance claims undermines the equal worth and dignity of both women and children as it fails to:

- take cognisance of the underlying social networks that have prompted women to enforce their rights in a court of law;
- take into account the significance of using the courts and their role that will ensure the evaluation of the facts presented before the courts in a fair and reasonable manner and without any undue influence; and
- further show a lack of change in attitudes and behaviours which equally undermines the role of the law itself for gender equality.

Prohibition of the use of derogatory language in the enforcement of the right to gender equality was upheld by Pickering J in *Ryan v Petrus*.²⁶⁷ The issue in this case arose after Mr Rodwin Petrus insulted Mrs Mieta Ryan and reduced her to nothing more than a "*bitch that engages in sexual activity with man for payment*" (author's emphasis). Mrs Ryan was in the company of Mr Vernon Petrus, with whom she had an adulterous relationship, when Mr Rodwin Petrus, found his father, Mr Vernon Petrus, in the company of Mrs Ryan. An argument ensued between Mrs Ryan and Mrs Rodwin Petrus who uttered the following words:

"Jou teef. Jy is 'n naaier. Jy naai saam met my pa en jy en my pa maak van my ma 'n poes. Jou kaffir, jy is 'n hoer", (*a bitch, kaffir and a whore that engages in voluntary sexual activity with a man for payment*).²⁶⁸

The court gave meaning and content to the words uttered by the defendant and the context in which they were used starting with the highly offensive word "kaffir": It

²⁶⁶ See De La Rey and Boonzair (note 73 above).

²⁶⁷ Case No: CA 165/2008.

²⁶⁸ Ibid, translated in pages, 6, 8 and 9 of the judgment.

established that as far back as 1976 in *Ciliza v Minister of Police*²⁶⁹ the use of the word “kaffir” was prohibited as it was characterised as referring to a person who is uncivilised, uncouth and coarse and constitutes an injury to the dignity of the person.²⁷⁰ The court further held that the use of the word “whore” constitutes an unlawful aggression upon Mrs Ryan’s dignity as it refers to a prostitute, which means a “person, typically a woman, who voluntarily engages in sexual activity with man for payment”.²⁷¹ The court held that to call a woman a whore, regardless of whether or not that woman is conducting an adulterous affair is absent any innocuous context, to degrade and humiliate her.²⁷²

The court established that, even though Mrs Ryan by her own account was actually involved in an adulterous relationship with the defendant’s father, whilst, she is a God-fearing widow and lives according to Christian values, the use of the words:

“arising out of extremely vulgar language couched in crude gynaecological terms addressed by the defendant to the plaintiff constituted a serious violation of the latter’s dignity”.²⁷³

It further reasoned that irrespective how aggrieved the defendant was, by Mrs Ryan’s conduct, that did not afford him the licence to speak to her in redolent of the gutter, [even] if she was a valueless and worthless member of the society. The derogatory language defeats the purpose of the new constitutional dispensation which has provided an impetus for a sweeping reconstruction and transformation of the society.²⁷⁴

Derogatory language, undermining the equal worth of women was further evident in the case involving the President of the African National Congress Youth League: *Julius Malema v Sonke Gender Justice Network*.²⁷⁵ The case arose out of the remarks made by Mr Malema while addressing students at the Cape Peninsula University of

²⁶⁹ 1976 (4) SA 243 (N).

²⁷⁰ Ibid at 243, quoted at 6 in *Ryan*.

²⁷¹ Ibid at 8.

²⁷² Ibid at 9.

²⁷³ Ibid at 12.

²⁷⁴ Andrews PE, ‘Violence against women in South Africa: the role of culture and the limitations of the law’ (1999) Volume 8 No 425, *Temple Political and Civil Rights Law Review*, 425-257 at 426.

²⁷⁵ Lodged at the Johannesburg Equality Court, March 2009.

Technology concerning the woman²⁷⁶ who lodged a claim of rape against Mr Jacob Zuma in 2005. Mr Malema said that the woman had a *nice time with Jacob Zuma as the woman who didn't enjoy it, could have left in the morning. Those who had a nice time will wait until the sun comes out, request breakfast and ask for taxi money*, (author's emphasis).²⁷⁷

Without detailing the background on the *Zuma*²⁷⁸ case, what is striking in the case against Mr Malema was the use of derogatory words against the members of the Sonke Gender Justice Network organisation.²⁷⁹ Mr Malema referred to the organisation as a *"puppet of the white minority who want to make sure they embarrass the leadership of the African National Congress"* (author's emphasis).²⁸⁰

The Sonke Gender Justice Network was vindicated when Johannesburg Equality Court found Mr Malema guilty of hate speech and harassment as prohibited grounds of discrimination in the Equality Act.²⁸¹ Magistrate Colleen Collis said that the court was satisfied that the utterances by Mr Malema amounted to hate speech. Mr Malema was then ordered to pay R50 000.00 and to make an unconditional apology within two weeks and pay the amount to a centre for abused women within one month.²⁸²

Although Mr Malema is appealing the judgment, the ruling is significant in holding that the type of language he used had long-term and harmful effects and further undermines women's dignity and entrenches gender inequality in the enforcement of the right to gender equality.²⁸³ Cohen cautions the nation for applauding the *Malema's* judgment as he questions whether the reliance by the court on an expert on domestic violence

²⁷⁶ Referred to as Ms K and see *Zuma* (note 252 above).

²⁷⁷ See further analysis in Keehn E, 'The equality courts as a tool for gender transformation' (2009) *Sonke Gender Justice Network*, at 1-14.

²⁷⁸ See (note 252 above).

²⁷⁹ The organization seek to strengthen government, civil society, and citizen capacity to support men and boys to take action to, promote gender equality, prevent domestic violence and reduce the spread and impact of HIV/AIDS, accessed at www.genderjustice.org.za on 16 March 2010.

²⁸⁰ See Keehn (note 277 above) at 11.

²⁸¹ See the report by Khumalo F, 'The "softie" who took Malema to court... and won' *Sunday Times*, 21 March 2010.

²⁸² See the report by SAPA, entitled: Malema ordered to pay R50000.00, accessed at www.iol.co.za, dated 15 March 2010.

²⁸³ See the report by Rabkin F, 'Malema to appeal on hate speech' *Business Day*, 16 March 2010.

against women²⁸⁴. Ms Lisa Vetten²⁸⁵, was firstly, sufficient to find Mr Malema guilty and secondly, whether it does not equally negate the right to freedom of expression.²⁸⁶

Without engaging with Cohen's caution, the use of experts in constitutional litigation is essential in ensuring that the court moves beyond its own limitation of legal interpretation and establish the underlying facts which will form the basis for the outcome of the case. Hence the emphasis on the use of assessors in dealing with questions of facts as affirmed in the Equality Act and discussed in chapter two. Similarly Equally, the quest for freedom of expression is not an absolute right as it has its own internal qualifier²⁸⁷, even before considering the general limitation clause in the Constitution.²⁸⁸

The conduct in the *Petrus* and *Malema* cases demonstrate the historic and social stereotypes about women that undermine key constitutional values which are foundational to the establishment of a "just society". The stereotypes compromise the equal dignity for everyone as long established before the dawn of democracy in *Minister of Police v Mbilini*²⁸⁹ as follows:

"every person has an inborn right to tranquil enjoyment of his peace of mind, secure against aggression upon his person, against impairment of that character for moral and social worth to which he may rightly lay claim and of that respect and esteem of his fellow-men of which he is deserving, and against degrading

²⁸⁴ Cohen T, 'Think before you applaud the *Malema* judgment' *Business Day*, 16 March 2010.

²⁸⁵ Director: Tshwaranang Legal and Advocacy Centre, Johannesburg.

²⁸⁶ See section 16(1) of the Constitution which provides that: everyone has the right to freedom of expression, which includes:

- (a) freedom of the press and other media.
 - (b) freedom to receive or impart information or ideas.
 - (c) freedom of artistic creativity; and
 - (d) Academic freedom and freedom of scientific research.
- (2) the right in subsection (1) does not extend to:
- (a) propaganda for war.
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

²⁸⁷ See (note 284 above) on section 2(c).

²⁸⁸ See section 36 of the Constitution.

²⁸⁹ 1983 (3) SA 705 (A).

and humiliating treatment and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such a right".²⁹⁰

The use of derogatory language undermines the development of an effective and proper basis for eliminating instances of domestic abuse and discrimination against women. It compromises the objectives of the new constitutional dispensation that the quest for equality is not just a consequence of democratization but it is part of a broad cultural change that seeks to transform the minds and attitudes towards women in our respective societies.²⁹¹ In essence it:

- marginalises women and make them invisible and creating the impression of a male dominated society.
- patronizes women, treating them as sexual material.
- reinforces stereotypical gender roles about a woman should behave.²⁹²

Similarly, it fails to acknowledge that the enforcement of the right to gender equality does not only seek to enforce the law but to assist in the development of a caring society through the revival of the principles such as "*ubuntu*".²⁹³ The principle of "*ubuntu*" is endorsed by Thomas as a principled basis for judicial decision-making that can contribute to the evolution of the rights discourse in South Africa and lead to greater realisation of constitutional rights for all.²⁹⁴

The development of such principles (*ubuntu*) ensures the interaction between the law and society which does not only form the basis for understanding the law itself but also

²⁹⁰ Ibid at para 24-25, quoted in *Petrus* (note 265 above), at 4.

²⁹¹ See Inglehart R, Norris P and Welzel C 'Gender equality and democracy' (2004) Institute of Social Research, University of Michigan, 1-48 at 3.

²⁹² See Tolstokorova A, 'Gender equality in language and communication: human rights perspective', at 2, presented at the Annual Meeting of the International Communication Association, Sheraton, New York on 16 March 2010.

²⁹³ See Mokgoro JY, 'Ubuntu, the Constitution and the rights of non-citizens' public lecture delivered at the University of Stellenbosch, 13 October 2009.

²⁹⁴ Thomas CG, 'Ubuntu: the missing link in the rights discourse in post-apartheid transformation in South Africa' (2008) Volume 3 No 2, *International Journal of African Renaissance Studies*, 39-62.

the general issues relating to equality and social justice.²⁹⁵ The contention was similarly expressed by Sachs J in *Port Elizabeth Municipality v Various Occupiers*²⁹⁶ that the interdependence of law and social justice requires:

“the court[s] to go beyond [their] normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. ...have and pay due regard to the circumstances of the [parties] and broader considerations of fairness and other constitutional values, so as to produce equitable results”.²⁹⁷

The judge reinforced such interdependence as he argued that:

“thus, [the law] expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution confirms that *we are not islands unto ourselves*. The spirit of “*ubuntu*”, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern”, (the author’s emphasis).²⁹⁸

Sachs J’s affirmation of the principle of “*ubuntu*” was already acknowledged by Hoffman that it has long been inculcated within the African traditional value system.²⁹⁹ Rautenbach has also affirmed that the value of “*ubuntu*” is a significant concept of

²⁹⁵ See Peacock D and Levack A, ‘The men as partners program in South Africa: reaching men to end gender-based violence and promote sexual and reproductive health’ (2004) Volume 3 No 3, *International Journal of Men’s Health*, 173-188.

²⁹⁶ 2004 (12) BCLR 1268 (CC).

²⁹⁷ *Ibid* at apar 36.

²⁹⁸ *Ibid*, at para 37. See also Mokgoro J in *S v Makwanyane* 1995 (6) BCLR 335, at para 300.

²⁹⁹ See Hoffman J, ‘What motivates intergenerational practices in South Africa?’ (2003) Volume 1, *Journal of Intergenerational Relationships*, at 173-176.

customary law that refers to the key values of group solidarity, namely, compassion, respect, human dignity and conformity to the basic norms of the collectivity.³⁰⁰

The enforcement of the right to gender equality within the framework of the principles of “*ubuntu*” dispels the myths about using the courts. It seeks to restore the moral fibre that serves as a frame of reference for the social bond that keeps families together. As endorsed by Mokgoro J in *Makwanyane*, explaining this concept in an African traditional context:

“generally, “*ubuntu*” translates as “*humaneness*” which describes the significance of group solidarity on survival issues central to the survival of communities³⁰¹, (author’s emphasis).

She further acknowledged that these values may operate differently in diverse community settings but they give meaning and texture to the principles of society based on freedom and equality.³⁰² The African traditional system promotes the values of parental responsibility for both men and women. The Constitution has affirmed these values and extended them to the state to ensure the protection of the rights of the child in which the society places much store in the well-being and protection of children who are ordinarily not in a position to protect themselves.³⁰³ The idea behind the responsibility of the state is to ensure that it does not only provide the legal framework but to ensure that “justice is not only done but has to be seen to be done” within the framework of access to an effective system of the administration of justice.

A further case was in point relates to the enforcement of a maintenance claim in *Bannatyne v Bannatyne*.³⁰⁴ The parties in this matter were married in 1986 and divorced in 1999 at the Pretoria High Court. Without engaging with the terms of the maintenance order at the High Court, Mr Bannatyne failed to honour his obligations. Mrs Bannatyne approached the maintenance court in March 2000 and as result Mr Bannatyne paid the arrears but fell into arrears again. But the enforcement of the order became a nightmare

³⁰⁰See Rautenbach C, ‘Therapeutic jurisprudence in the customary courts of South Africa: Traditional Authority Courts as therapeutic agents’ (2005) Volume 21, *SAJHR*, 324-335, at 330.

³⁰¹ See *Makwanyane* at para 308.

³⁰² Ibid.

³⁰³ See *Bhe* at para 93.

³⁰⁴ 2003 (2) BCLR 111, (CC).

for Mrs Bannatyne as she had to approach the maintenance court several times to enforce it.³⁰⁵

Although Mrs Bannatyne eventually found relief in the Constitutional Court, the role of the prosecutor at the maintenance court is a serious cause for concern. As the matter kept on being postponed, a final postponement was granted until 01 February 2001, but the prosecutor in Louis Trichardt, at the instance of Mr Bannatyne, arranged with the prosecutor in Pretoria for further postponement. This was done on 31 January 2001 without notification of Mrs Bannatyne who only received a message from Mr Bannatyne that the matter had been postponed to 20 February 2001. She, however, attended the court on 01 February 2001, only to find that the application had been removed from the roll.³⁰⁶

The court in *Bannatyne* failed to take cognisance of the gendered nature and speedy resolution of maintenance claims and in addition to ensure that Mrs Bannatyne was part of the court itself. The significance of becoming part of the court entails an inclusive approach in the court processes that will not only enhance access to courts but also the remedial strategies in resolving the offending behaviour. It further failed to take into account of what Probert calls, 'equality in the family home'.³⁰⁷ The principle of equality entails the guarantee to be given the same treatment and not relax the rules to the substantial disadvantage to the other party. Mokgoro J also acknowledged this weakness and the problems associated with the maintenance system as she held that they undermine the achievement of equality which is the founding value of the Constitution.³⁰⁸ The judge held that effective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of the right to gender equality.³⁰⁹

³⁰⁵ Ibid, at para 9.

³⁰⁶ See the background in *Bannatyne* at para 11.

³⁰⁷ See Probert R, 'Equality in the family home', (2007) Volume 15, *Feminist Legal Studies*, at 341.

³⁰⁸ *Bannatyne* at para 26.

³⁰⁹ *Bannatyne* at para 30.

The Commission on Gender Equality³¹⁰ also released a report on the implementation of the Maintenance Act in South African Magistrates' Courts³¹¹ and established that:

- the participants in their study did not know about the Maintenance Act at all.
- the beneficiaries of maintenance carry a great responsibility and in many cases, the maintenance is the only source of income.
- the amount the father is willing to pay is the determinant in enforcing maintenance claims rather than the best interest of the child.
- the lack of clear guidelines as well as lack of training of maintenance staff in determining the calculations used to enforce payment.
- the lack of financial resources as well as trained and caring staff which impact negatively on the quality of service to be provided to women.
- problems experienced by many women are exacerbated by unhelpful (or possibly untrained or overworked) staff when they come to collect their money.
- many women reported that men gave up their jobs on purpose when women claimed maintenance so as to avoid helping with the child.
- other groups of women also said that perception of corruption which favoured men *prevented many women from using the courts*, (author's emphasis).³¹²

These factors and the approach of the maintenance court in *Bannatyne* did not take into account of:

- its specialist nature and character as the conduct of the prosecutors may further fuel the debates on the relevance of these courts for the advancement of gender equality;
- the conduct of the court officials also failed to acknowledge the gendered nature of maintenance claims and logistical difficulties associated with their enforcement as noted by Mokgoro J in *Bannatyne*;

³¹⁰ See section 181(1)(d) on the establishment of the Commission and its functions in section 187 of the Constitution. See also Meintjes S, 'Gender equality by design: the case of South Africa's commission on gender equality' (2005) Volume 32 No 2, *Politikon*, at 259-275.

³¹¹ See 2004/2005 Annual Report.

³¹² *Ibid*, at 13.

- it may further limit not only their potential but the significance of the law for the advancement of gender equality for social change; and
- may also concretise the arguments against their establishment and the specific role for which they have been established and to undertake.

As Mokgoro J argued:

“the systemic failures to enforce maintenance orders have a negative impact on the rule of law... It is a function of the state not only to provide a good legal framework but to put in place systems that will enable these frameworks to operate effectively. Our maintenance courts and the laws that they implement are important mechanisms to give effect to the rights of children protected by section 28 of the Constitution”.³¹³

The limitations discussed in this section on the enforcement of the right to gender equality and their potential to shun women away from the courts, require the reflection on the critical goal of transforming our societies and whether the establishment of the specialist courts is about social control or change.

4.8 Specialist courts: social control or social change?

Despite the shortfalls and the positive aspects identified above, regarding the specific role of the specialist courts in the enforcement and promotion of gender equality, their establishment has not gone unchallenged. Cappalli³¹⁴ argues that:

“when the judge moves out of the box of the law and into working with individual defendants, transforming them from law-breaking citizens into law-abiding citizens, we have to worry. Because what has always protected the [courts] has been the law. Whenever a [magistrate] is approached by a disgruntled individual saying “How could you do that”? the [magistrate] always says “That wasn’t me speaking-that was the law”. If we take the mantle of the law’s protections off the

³¹³ See *Bannatyne*, at paras 27 and 28.

³¹⁴ Cappalli R, ‘Judges and problem-solving courts’ (2002), Temple Law School, quoted in Plotnikoff J and Woolfson R, ‘Review of the effectiveness of specialists courts in other jurisdictions’, (2005) DCA Research Series 3/05.

judges and put them into these new [problem-solving] roles, we have to worry about judicial neutrality, independence and impartiality”.³¹⁵

Burton highlights the criticisms against the establishment of the specialist courts that they offend the due process values in so far as they compromise at least the appearance of judicial impartiality, if not in fact reality. He substantiates his argument by holding that the allegations of bias seem to stem from the perceptions that judges who are specially trained in domestic violence are less likely to believe the stereotypes traditionally used by defendants to justify themselves.³¹⁶

In addition, it is submitted elsewhere that these courts have the potential to provide an opportunity for the magistrate to impose a pre-conceived perspective on the matter before him.³¹⁷ Altbeker identified the weaknesses in the development of the specialist jurisprudence on equality at these courts. He asserts that these courts have:

- the potential for over-familiarity which can lead to a loss of perspective;
- there is the likelihood for the development of “cosiness”;
- the particular area of law may develop in ways that are out of step with the overall development of the law; and
- may be affected by corruption if the same individuals such as the magistrates, prosecutors, police are involved in a number of cases presided over by the courts.³¹⁸

The question which arises is whether the specialist courts are about social control or social change? This question follows from the purpose of this study which seeks to examine various factors that are an impediment to the promotion of the right to gender equality in order to determine the significance of the law for social change. This investigation raises another question: on the extent of the laws’ application towards its

³¹⁵ Ibid.

³¹⁶ Burton M, ‘Judicial monitoring of compliance: introducing ‘problem solving’ approaches to domestic violence courts in England and Wales, (2006) Volume 20, *International Journal of Law, Policy and the Family*, at 366.

³¹⁷ See Ntlama N, ‘Equality Act: enhancing the capacity of the law to generate social change for the promotion of gender equality’ (2007) Volume 21 No 1, *Speculum Juris*, 113-128.

³¹⁸ Altbeker, (note 182 above).

transmission to the lived realities and experiences of the general population, particularly the vulnerable groups, which include women and children.

The challenges faced by the magistrates courts in the enforcement of gender equality requires “forward looking” as opposed to the “backward looking”³¹⁹ approaches for the advancement of social change. The establishment of the courts did not emerge from a “vacuum”³²⁰ but in response to a number of socio-legal problems such as gender discrimination, scourge of domestic violence and abuse, challenges relating to the enforcement of equality claims, which tend to limit the rights of everyone to equal dignity, protection and benefit of the law.

In taking this debate forward, the lack of development of the specialist jurisprudence on equality through the specialist courts may limit the broad-based outcomes in permeating every “facet” of inequality and unfair discrimination for the advancement of social change. The deep-rooted idea behind these specialist courts is their orientation towards restorative justice. Marshall describes restorative justice as a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future”.³²¹ The concept of restorative justice is similarly defined by Rosiers as an:

“interdisciplinary approach that focuses on the process of adjudication from beginning to end and not only on the result”.³²²

The idea of restorative justice may also be traced back to the traditional justice system, despite its own challenges³²³, which was modelled towards consensus-making as a

³¹⁹ Blagg H, ‘Problem-oriented courts’ a research paper prepared for the Law Reform Commission of Western Australia, Project 96, March 2008, at 2.

³²⁰ Ibid.

³²¹ Marshall T, ‘The evolution of restorative justice in Britain’ (1996) Volume 4 No 4, *European Journal on Criminal Policy and Research*, at 21, quoted by Blagg (note 317) above.

³²² See Rosiers ND, ‘From telling to listening: a therapeutic analysis of the role of the courts in minority-majority conflicts’ (2000) Volume 37, *Court Review*, 54-55, in Rautenbach (note 298) above.

³²³ See Himonga C, ‘The advancement of African women’s rights in the first decade of democracy in South Africa: the reform of customary law of marriage and succession, at 82 in Murray C and O’Sullivan M, (eds) *Advancing women’s rights: the first decade of democracy*, (2005) Juta Publishers, University of Cape Town, Cape Town.

systematic response to the alleged unfair conducts.³²⁴ The ideal of consensus-making which embraces the concept of “reconciliation” is essential and as argued by Rautenbach, bears in mind the importance of the principle of “*ubuntu*”.³²⁵ The principle of “*ubuntu*” encapsulates the significance of restorative justice as it put an emphasis on the impact of the law as a social force that produces therapeutic results.

Although Rautenbach acknowledges that the concept of restorative justice is a fairly new concept in South Africa, she affirms that:

“the roots of this new judicial approach [restorative justice] can be traced back to indigenous and [traditional] justice systems”.³²⁶

The constitutional recognition of traditional courts³²⁷ is essential for the promotion of the right to gender equality as they may address the problems identified in chapter one of this study, relating to equal access to justice. These courts have benefits that the ordinary magistrates’ courts do not have as highlighted by Rautenbach as follows:

- most members of a traditional community are acquainted with their customs and traditions as people experience a sense of belonging.
- customary courts embrace the community of principle of “*ubuntu*” and the legitimacy of customary courts rests on the acceptance of the community whose affairs it regulates.
- litigants and offenders can interact in their own language with people from their own community.
- the maintenance of customary courts is relatively inexpensive and does not impose a heavy burden on the state.

³²⁴ See Nhlapo T, ‘The judicial function of traditional leaders: a contribution to restorative justice?’, unpublished paper presented at the Conference of the Association of Law Reform Agencies of Eastern and Southern Africa (ALRAESA), Vineyard Hotel. Cape Town, 14-17 March 2005 at 1.

³²⁵ See Rautenbach (note 300 above) at 330.

³²⁶ *Ibid*, at 325.

³²⁷ See section 166(e) and Schedule 6, section 16 of the Constitution. See further analysis on the origins and the benefits associated with the significance of traditional courts and their role in dispensing traditional justice in Ntlama N and Ndima D, ‘The significance of South Africa’s Traditional Courts Bill to the challenge of promoting the African traditional justice system’ (2009) Volume 4 No 1, *International Journal of African Renaissance Studies*, 6-30.

- the utilisation of some of the features of therapeutic jurisprudence in customary courts is on par with developments in other jurisdictions and should be encouraged in other courts as well.³²⁸

King³²⁹, therefore, affirms the benefits associated with the establishment of the specialist courts including traditional courts³³⁰ as he argues that they:

- offer a personalised remedy or intervention plan assisting both parties to enhance their self-esteem or counter-balance some of the disadvantage or discrimination;
- adopt a social agency orientation emphasising assistance, guidance and treatment that differs from the traditional legal image of judicial neutrality; and
- demonstrate the ways in which some judicial officers and their courts should respond to socio-economic changes indicated by shifts in the types of problems presenting every day in court.³³¹

The case of *Black v Broederstroom Vakansie-Oord*, at the Brits magistrates' courts³³², although it was on race discrimination rather than gender equality, attests to the socio-legal approach for the elimination of inequalities and discrimination. The *Black's* case relates to an incident that happened on 05 March 2005, where the owners of a resort (Mr and Mrs Pretorius) evicted Mr Black and his family because they had two black children that accompanied them. The stated policy of the defendants did not allow black people into the resort, resulting in Mr Black lodging a complaint with the SAHRC which initiated proceedings at the Brits magistrates' court.

But before the matter could be heard, the parties reached an out of court settlement which was endorsed by the Equality Court as they had agreed as follows:

³²⁸ See Rautenbach, (note 300 above) at 334.

³²⁹ King M, 'Innovation in court practice: using therapeutic jurisprudence in a multi-jurisdictional regional magistrates' courts', unpublished paper presented at the 21st Annual Conference of the Australian Institute of Judicial Administration, Fremantle, 20 September 2005, quoted in Ntlama (note 315) above.

³³⁰ See section 166(e) which recognises any court established in terms of legislation and Schedule 6, section 16 of the Constitution which recognises traditional courts that were in existence before the Constitution took effect.

³³¹ Ibid.

³³² 05 March 2005, Brits magistrates' courts, North West.

- the resort to make a public apology for the alleged discriminatory conducted³³³;
- the resort to pay R10000.00 to Mr Black, who will in turn donate it to the charity of his choice, the Nkosi Johnson Aids Foundation³³⁴;
- the resort to change its admission policy immediately and allow access to the people of all races³³⁵; and
- the SAHRC to monitor the implementation of the non-discriminatory admission policy.³³⁶

It was further reported that in their letter of public apology, the resort owners said:

“a very unfortunate racial incident caused the dignity of two little children to be tarnished and Mr and Mrs Pretorius hereby accordingly extend their unconditional apologies to the individuals and their family and friends” .³³⁷

The *Black's* case is an important precedent for the intersection of race and gender discrimination as it has been emphasised that the two grounds of discrimination complement each other in the entrenchment of systemic forms of discrimination.³³⁸ Moreover, even though it will be difficult to measure the extent of the change of attitudes as reflected in the letter of apology by the resort owners, their acknowledgement of their conduct that degraded the dignity of Mr Black which is the foundational value in the Constitution is commendable. The case affirmed the social change approach to the realisation of substantive equality rather than social control. It further endorsed the alternative dispute settlements mechanisms for the achievement of substantive equality.

The specialist courts deal with the underlying social problems which may have contributed to the offending behaviour, as they seek to address:

³³³ See section 21(2)(j) of the Equality Act.

³³⁴ See section 21(2)(e) of the equality Act.

³³⁵ See section 21(2)(f) of the Equality Act.

³³⁶ See section 21(2)(m) of the Equality Act. See also the report by Edwin Tshividzo entitled: 'Victory over racial discrimination dispute', dated 11 May 2005, *BuaNews* online accessed at www.buanews.org.za, on 02 March 2009.

³³⁷ Ibid, *Broederstroom*.

³³⁸ See *Solidarity obo Mrs RM Barnard v South African Police Service*, Case No: JS455/07.

- the substantive issues that the court is being asked to resolve which are generally organised by case type, due process requirement and or the process by which the court resolves the issues; and
- under the law, most offending behaviours being prosecuted in these courts are not really instances of inequality and discrimination, but their underlying social problems³³⁹ [*such as the lack of change of attitudes towards other racial or ethnic groups that have resulted in such discrimination as in the Broederstroom case*], (author's emphasis).

The recent establishment of the specialist courts in South Africa, *ie*, the family courts, maintenance courts, domestic violence courts, equality courts and the more recently established indigenous courts focus on the ways in which the law can be strategically used to eliminate all forms of discrimination and inequalities for both men and women. The influence of superior courts in the interpretation of the right to gender equality in respect of the few cases that have gone through to the specialist courts has enhanced the purposive approach to constitutional interpretation which focuses on the values of the constitution than the intention of legislature of the apartheid rule. This approach is an acknowledgement by the state of the role to be played by the specialist courts that social problems may require the integration of social and legal strategies, even though Freiberg affirms the use of social rather than legal solutions.³⁴⁰

In essence, the specialist nature of these courts allows the magistrate to understand more deeply a narrower but complex area of law, enabling him to develop an expertise which may inform a more meaningful interpretation in the application of the law for the enforcement of the right to gender equality.³⁴¹ The development of innovative strategies provides an opportunity to review or examine the law as a socio-legal solution that encourages the involvement of both parties to the dispute to various services that may be available to enhance the social relations. As evidenced above in the *Mpanza* and *Black's* cases, the role of CGE and SAHRC is of utmost importance towards the integration of these approaches as they play a more "mediating" role than the ordinary magistrates' courts.

³³⁹ Spinak JM, 'Romancing the court', (2008) Volume 46 No 2, *Family Court Review*, at 258.

³⁴⁰ See Freiberg (note 219 above).

³⁴¹ Hanson R, 'The changing role of a judge and its implications', (2002) *Court Review* at 10.

The importance of the innovative strategies of the specialist courts as Anand says, acknowledges that “law” alone can no longer “go it alone” but must be illumined by ethics and allied field of knowledge.³⁴² The analysis of the jurisprudence of the Constitutional Court in chapter three and the role of the specialist courts show the significance of the right to equality as a “value” that does not only affirm equality as an end of justice but as an important tool and strategy in the consolidation and development of substantive principles of equality for the realisation of the right to gender equality.

4.9 Specialist courts: denouncing the arguments against the use of law for social change?

The establishment of the specialist courts and their approach for innovative strategies that may advance the struggles for gender equality is a means for the affirmation of effective remedies for social change. Ackerman J in *Fose v Minister of Safety and Security*³⁴³ said that:

“given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an *appropriate remedy must mean an effective remedy*, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country *where so few have the means to enforce their rights through the courts*, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The *courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies*, if needs be, to achieve this goal”³⁴⁴, (author’s emphasis).

³⁴² Anand CL, *Equality and reverse discrimination*, (1987) Mittal Publishers, New Delhi, India at 21.

³⁴³ 1997 (7) BCLR 851.

³⁴⁴ *Fose* at para 69.

Ackerman J's argument for the courts to provide effective remedies fall within the location of the specialist courts at the magistrates' courts as it is incumbent upon them to ensure the development of innovative strategies for the realisation of the right to gender equality. The importance of such location within the lowest structure in the hierarchy of courts cannot be over-emphasised as it is essential for the evaluation of the views and debates on the use of the law for social change. The quest for effective remedies in addressing the social values of gender equality is based on a perspective that regards the law as a social force that often transmits to the harmonisation of social relations.³⁴⁵

The fundamental question remains whether the law can play a significant role in the improvement of the lives of women through the courts. As argued, the law has been a central focus for the realisation of the right to gender equality, which then serves as an important tool that has been invoked not only by women but men as well, to enforce their rights. Law has been used as an essential tool for social engineering and to cover a broad range of issues of those disadvantaged and marginalised by unfair discrimination and prejudice.

The extent to which the law is understood affects the approach upon which it is used and applied by the courts to ensure effective remedies. As argued in this chapter, the development of legal reform to advance the struggles for the realisation of gender equality is an attempt to improve women's socio-political and cultural imbalances. The analysis of the various factors towards the formal conception of the right to equality *vis-à-vis the* substantive approach to the realisation of the right to gender equality might lead to a focus on the need to improve the access to legal institutions. This is evidenced by the establishment of the specialist courts and how they have developed the innovative remedies for social change.

Although Fox acknowledges that legal reform may work, he argues against the use of law as a strategy for the advancement of social change as he says that.

- firstly, law is coercive as it is a hidden infrastructure which carries a powerful stick: the threat of force;

³⁴⁵ Took G, 'Therapeutic jurisprudence and the drug courts: hybrid justice and its implications for modern penalty', (2005) *Internet Journal of Criminology*, at 1.

- secondly, law opposes social change through assumptions about human behaviour;
- thirdly, it inhibits social change through the central myth that the law is “legitimate”;
- fourthly, by blunting appeals for substantive justice by focusing instead on procedural justice;
- fifthly, by insistence that the “rule of law” is superior to non-law”; and
- sixthly, be the self-defeating character of legal solutions, despite their seductive appeals as he breaks it down to the following:
 - reform is seductive because it assumes that law can be transformed so significantly that it will operate at a "higher principled level,";
 - law exist to maintain rather than change the status quo, to protect some at the expense of others, to control rather than liberate;
 - reform efforts may succeed, but at the cost of unpredicted "side-effects" that complicate other problems or lead to long-term failure. A systems perspective must acknowledge that social problems are interconnected rather than isolated; and
 - the very success of legal solutions makes things worse, because legal solutions reduce people's ability and motivation to work together with others on community solutions to social problems.³⁴⁶

Kok, reinforces Fox’s argument as he dismisses any opportunity to ensure the promotion of the right to gender equality through the use of law as he says:

“be it legislative or court driven”, law does not have the potential to contribute to social change”.³⁴⁷

Although the two scholars may be partially correct, their argument has the potential to limit the role of the law in addressing the underlying social problems for the achievement of the right to gender equality. As noted above in the *Broederstroom* case that it is difficult to measure the extent of the change of attitude on inequality claims, Kok and

³⁴⁶ Fox, (note1 above).

³⁴⁷ See Kok (note 190 above).

Fox's argument is supported by the lack of implementation of the court order in this case. The order of the specialist court for a person who has been found to have undermined the rights of another to attend diversity training or undergo an audit of specific policies or practices or offer an unconditional apology, as determined by the court³⁴⁸, becomes a cause for concern, in so far as it is unclear whether such measures can and will address the underlying manifestations of inequality and prejudice.

The difficulty with these orders is to determine the extent to which they can contribute to the change of attitudes as it is evidenced by the attitude of the resort owners in the *Broederstroom* matter. The implementation of the order was disappointing as it attests to the lack of change of attitudes as the SAHRC established that the resort owners never changed their policy when subsequently three of the employees booked for accommodation. The SAHRC then:

- instituted contempt of court proceedings but before the matter could be finalised, Mrs Pretorius died;
- they needed to inform the administrators of the estate but decided against that route and instituted proceedings afresh;
- the SAHRC went back to the resort in 2008 as it puts it: the approach of the owner (elder son) who took over from his late mother his approach was singular – “he does not want blacks in his property”, as he has to do with it as he pleases; and
- the SAHRC has since written to the North West Premier for the suspension of the trading licence but has since failed to inform the commission on any developments in this regard.³⁴⁹

The “results-orientated approach” of the specialist courts is undermined by attitudes, as demonstrated by the resort owner in the *Black's* case, that are difficult to change in order to harness the democratic values for the development of the right equality. It limits any potential of the “outcome based approach” in serving as a “revolving door” in an attempt

³⁴⁸ See section 21(2)(k) of the Equality Act.

³⁴⁹ E-mail message dated 12 May 2009 from Daniel Selala of the SAHRC.

to address the issues which lead to anti-social behaviour.³⁵⁰ The innovative strategies developed by the specialist courts in changing the offending behaviour and the public confidence at the courts are likely to be undermined by the attitudes displayed by the owners of the resort which leaves uncertain the efficacy of the order of unconditional apology for an ordinary South African. It further waters down an argument by King that:

“the development of court processes with a view to promoting the well-being or at least limiting any negative impact upon well-being can advance justice system goals linked to or dependant on well-being such as rehabilitation and health relations”.³⁵¹

The attitude of “*no blacks in my property*” fuels the debate on the significance of the specialist courts whether they are about “social control” or “social change”. These debates question whether the envisaged “outcome-based approach” of the specialist courts is an appropriate tool in remedying the underlying social ills in an attempt to advance the struggles for gender equality, striving towards the attainment of change for the advancement of the societal well-being. Furthermore, these debates, which in the resort case were fuelled by the resort owner’s attitude, making it difficult for the use of the specialist courts to succeed and considering that the enforcement of the right to equality is not about “winning or losing” but to serve the achievement of a “just outcome”.

At the same time, Fox’s argument and the attitude displayed by the resort owners, do not take into account the changes that have occurred requiring the integration of legal and social solutions in resolving social problems. As emphasised above, social problems resulted in the adoption of the law which seeks to regulate and address the challenges that have the potential to undermine everyone’s equal worth and dignity. Addressing social problems cannot be taken in isolation from the application of the law or *vice-versa*. The establishment of the specialist courts to address the widespread persistence of inequalities and discrimination, despite the shortfalls identified above, is essential to deal with the issues raised by Fox in addressing discrimination and prejudice against women

³⁵⁰ See Gray I, ‘Specialist court jurisdiction’, accessed at www.magistratescourt.vic.gov.au, on 26 February 2009.

³⁵¹ King MS, ‘Applying therapeutic jurisprudence in regional areas-the Western Australian experience’, (2003) Volume 10 No 3, *Murdoch University Electronic Law Journal*, at 1.

Since the dawn of democracy in South Africa in 1994, overwhelming attention has been given to legislation and judicial decisions as sources for the generation of social change. The adoption of legal reform and the establishment of institutions such as the specialist courts to address social problems are strategies that are deemed appropriate for the translation of the formal conception of the law as informed by the social change objectives in the Constitution and international human rights laws.

Although it is acknowledged in this chapter that the adoption of law reform and the development of jurisprudence on equality may be difficult to measure, the use of law as a strategy for social change cannot be discarded. Its limitations are evidenced by the factors which continue to persist as identified in chapter one and by the further analysis of the jurisprudence on equality of the Constitutional Court in chapter three and various factors identified in this chapter, in so far as they inhibit the potential of the law for realisation of the right to gender equality.

As noted above, the specialist courts have special benefits that the ordinary magistrates and superior courts do not have, as they seek to limit the delays in the adjudication of matters that come before them. The challenges associated with the enforcement of the right to gender equality at the ordinary magistrates' courts including those identified on the role of the specialist courts, act as an impediment for the use of the law as an important tool for the advancement of social change.

4.10 Summary

The effectiveness of the courts including the newly established specialist courts, in the determination of the significance of the law for social change depends on the understanding of the factors that are the subject of substantive realisation of the right to gender equality. To ensure the promotion of gender equality at the courts and how the law deals with it as a specific problem, it is necessary to understand the factors or elements that may undermine the significance of the law and of the magistrates' courts themselves.

The development of public confidence at the courts may be attributed to many factors as discussed in this chapter to strengthen the role of these courts as appropriate

instruments in the development of the principles of non-discrimination. The establishment of the specialist courts with their social change objectives seeks to enhance the effectiveness of the law in permeating every aspect of non-discrimination in order to ensure the harmonisation of relations between men and women. At this stage, it is too early to make conclusive findings about the effectiveness of these courts as there are only few cases thus far and those finally disposed have taken time before they could be finalised. In addition, even those finalised, have encountered resistance to the implementation of the court orders, as shown by the case of the *Broederstroom* couple. Despite the change of the law and legal reform, it still remains to be seen how the prevailing mindset of the populace, especially on race and gender discrimination will evolve. At the same time, it still remain open whether the envisaged Traditional Courts Bill, tabled before Parliament will strive towards transforming the traditional justice system.

Despite this limitation, the progress that has been achieved so far is that a great emphasis on harmonising the social relations serves as an important instrument in the quest for the promotion of the right to gender equality, as shown in this study.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The development of substantive principles of equality for the advancement of the right to gender equality is of utmost importance for the determination of the ways in which women may be able to use the law to enforce their rights. It further determines the ways in which courts can assist people who will use the law for social change. In this study, an assumption was based on the premise that the law and the legal system can be used as strategic tools for overcoming the impediments in the realisation of the right to gender equality. It was further contended that this could be achieved through the judicial enforcement of the right to gender equality.

This study examined various factors that impede the promotion of the right to gender equality in post-apartheid South Africa. The research has established that there are a number of factors that compromise the equal enjoyment and benefit of the law and especially against women. These factors outweigh the benefits associated with the use of law as an instrument of change. They are attributed to many challenges such as the:

- lack of access to legal and constitutional information,
- lack of human and financial capacity in the enforcement of gender equality laws,
- struggle for the change of mindsets towards the concept of gender equality,
- inconsistency of the judiciary in the interpretation of the equality provision,
- inconsistency in the application of the various legal systems in South Africa and equality in general.
- failure of the judiciary, especially the Constitutional Court, to develop and give a proper meaning and context to the concept of “gender equality”.

These challenges were identified in chapter one as the root cause of the problem in the quest for the promotion of the right to gender equality. Their effect on the promotion of the right to gender equality is not equivocally positive for the elimination of systemic forms of discrimination against women for social change. Furthermore, they affirm the view that passing of legislation alone and the use of courts are not enough to deal with issues of

violence, discrimination, abuse and persecution against women.¹ This does not bode well for the promotion of the right to gender equality. The translation into social reality of the formal entrenchment of the right to equality requires an effective institutional framework to use the law to change existing inequalities between men and women. It further requires higher levels of awareness of the intended beneficiaries in respect of their legal and constitutional rights in order to determine the extent to which the use of law can contribute to the improvement of women's lives in our respective societies.

In the absence of a comprehensive strategy for the elimination of high illiteracy rates and for the building of capacity of the enforcement agencies in ensuring the achievement of the right gender equality and the protection of both men and women against instances of violence and abuse, there will be little value in the fine wording of the Constitution alone in bringing about positive effects for social change.

This chapter, therefore, brings together and draws conclusions from the preceding chapters of this study on the development of the principles of non-discrimination for the promotion of right to gender equality at the courts. It then makes recommendations, although the intention is not to propose a comprehensive list of interventions, but rather to ensure the possible review of the strategies that may be instrumental in the enforcement of the right to gender equality at the courts countrywide.

5.2 Summary: law reform and various factors inhibiting the promotion of the right to gender equality

The focus in this study was to examine various factors that impede the promotion of the right to gender equality in the post-apartheid South Africa. The objective was to determine the effect they have on the elimination of social and legal systemic forms of discrimination based on gender and other grounds of inequality in South Africa. The basis for this examination is the Constitution of the Republic of South Africa which is classified by Albertyn *et al* as a:

“political and legal foundation for the democratic transformation of South Africa. Enshrined in its text are both the means and end. It articulates the vision of a new

¹ See Kevane M, 'What are the effects of moving to gender equality? Using CEDAW in cross-country regressions', presented at the Foundation for Advanced Studies in International Development Seminar, Tokyo, Japan, 10 March 2004.

society and it invites us to engage actively with the values and rights contained in the Constitution to build that new society”.²

South Africa’s historic past of inequalities and discrimination continues to be embedded in the social structures, practices and attitudes of the general public and undermines the aspirations of the new constitutional dispensation. The setting of the framework for this study in chapter one has provided an opportune moment for the determination of the significance of the law for social change in the quest for the promotion of the right to gender equality.

Generally, this study focused on the positive and negative aspects relating to the enforcement of the right to gender equality. The legislative evolution of the principles of non-discrimination within the domestic sphere is highly commendable. The domestic principles are reinforced by the incorporation of international principles which provide an opportunity for the intersection and development of these principles alongside each other. The incorporation of these principles at domestic level serves as a powerful instrument for the promotion of the right to gender equality as it seeks to introduce the enforcement agencies to the legal system of the international community. It further seeks to provide an insight and a deeper understanding of the ways in which the international principles may be used at domestic level in order to improve the lives of men and women.

The analysis of international human rights law, especially with the approach adopted by the Constitutional Court in ensuring its domesticisation at national level has proved valuable for the enforcement of the right to gender equality. It broadens the scope of reasoning in establishing the fairness or the unfairness of the alleged discriminatory conduct. Although, international human rights law, generally, is limited in its application at domestic level, the Constitutional Court has affirmed its importance in the interpretation of the right to equality. The essence of international human rights is further affected by the factors identified in the study that seek to undermine the extent to which it may be an important instrument, in collaboration with the national legislations, for the promotion of the right to gender equality.

The development of these principles endorses the view in this study that law is an arena and a significant tool that cannot be discarded in the enforcement of the right to gender equality. As further emphasised in this study, the formal entrenchment of the right to equality does not, by itself change the real and lived experiences of those subjected to abuse and

² Alibertyn C and Goldblatt B, ‘Facing the challenges of transformation: difficulties in the development of an indigenous jurisprudence of equality’ (1998) Volume 14, *SAJHR* 248-276 at 248.

persecution. It is acknowledged that the development of legislation is a significant step that has to ensure that it brings about substantive equality for both men and women.

The review of legislative evolution on the right to gender equality was undertaken in chapter two. This chapter provided an overview of the development of the international, regional and national human rights laws. It set the tone for the determination of the efficacy of the law in the protection of the right to equality. The purpose was not to determine the extent to which these instruments have been translated into substantive equality but rather to provide a frame of reference for the application, interpretation and enforcement of the right to gender equality. Secondly, to establish the interdependence of the domestic laws with those of the international community in order to determine a meaningful recognition of the right to equality which should not only be limited to the national sphere but also, be transmitted to the international community. The rationale for this intersection is that the international community has a history of regulation of the relationship between the states themselves with little attention to the rights of the individuals in the international arena. In addition, since South Africa is still recovering from the protracted and violent struggle for the recognition of the right to equality, it was imperative and reasonable for this study to make reference to the international community. The significance of such reference was to determine South Africa's commitment to the developments that have taken place internationally and equally, to affirm its role within the family of nations as envisaged in preamble of the Constitution.

It was found that the development of legal and other measures adopted by South Africa has actually put it in a better place than in many other countries as it is reputed for being an international role model in the quest for the promotion of the right to equality. The analysis of the pieces of legislation in this chapter has actually set the framework for the examination of the question posed in this study whether these measures actually contribute towards the advancement of the right to gender equality for social change. It was also noted that although South Africa has to date not yet ratified the ICESCR in ensuring the equal protection of socio-economic rights, such failure is not a bar to the use of other laws to ensure that the rights entrenched in the Constitution do not remain words on paper.

The legislative evolution of the principles of inequality is affirmed by the role of the judiciary in the enforcement of the equality provision. The judiciary is an amalgam and forms an integral part in the enforcement of the right to gender equality without compromising its own

institutional and personal independence. The significance of the judiciary in this regard is emphasised by Armytage³ as follows, that:

“the issue of equality is emblematic of the need for the judiciary, *as a formative social institution*, to lead or at least reflect the change in prevailing social values...provide and demonstrate legal and social accountability”, (author’s emphasis).⁴

The judiciary is equally commendable for its role in the intersection of international *vis-à-vis* domestic principles in the interpretation of the equality clause. The judiciary in South Africa and especially the newly established Constitutional Court has ensured the recovery of its judicial teeth in the fight against repressive laws and conducts against women. It has not only given effect to the prescripts of the Bill of Rights, but has actually ensured that it domesticates international principles in the interpretation of the equality provision. It has ensured the development of a “special expertise skill” in the linkage of the domestic values with those of the international community in the fight against discrimination and persecution. It enabled the provision of relief to the aggrieved parties, especially women, who endured the pain and suffered intense discrimination and abuse in the enforcement of the right to gender equality.

The significance of the judiciary in the promotion of the right to gender equality was undertaken in chapter three with more emphasis on the Constitutional Court. The purpose was to determine the extent to which it has developed the formal conception of the right to equality to a more substantive approach that actually translates to the enjoyment of all the fundamental freedoms as entrenched in section 9(2) of the Bill of Rights. This analysis was coupled with the manner in which the court has domesticised international human rights laws for the promotion of the right to gender equality.

It was found that the discretion it used to incorporate international human rights in the development of the domestic principles of equality has given effect to the substantive translation of the right to equality in order to bridge the socio-political imbalances that South Africa inherited from its past. It was also established that although the court has protected and given effect to the rights of women to equal protection and benefit of the law:

- it has reduced the right to gender equality to a mere “women’s equality”.

³ Armytage L, ‘Gender equality in the courts: leadership and role of education’ (1995) *The Modern Law Review*, 1-17.

⁴ *Ibid*, at 3.

- it has failed to develop the principles of “gender equality” other than “women’s equality” as evidenced by the analysis in this chapter and especially with *Hugo, Harksen, Masiya, Shilubana*.
- the reasoning of the court in reaching a particular decision in promoting the right to gender equality has actually undermined the human worth of women, as “human beings” as for example, in *Hugo*, confining them to primary care givers.
- the court has not been consistent in its approach in establishing the “differentiation” which undermines the legitimate government purpose in developing the principles of non-discrimination.
- reduced women to nothing more than “victims” of discrimination instead of “human beings” or “citizens” of the country entitled to equal protection and benefit of the law.
- confined women to a particular “closet” of “victimhood” that furthers the stigmatisation and discrimination against them.
- failed to develop customary law as a legitimate system of law that seeks to contribute to the national and international agenda for the promotion of the right to gender equality as evidenced by *Bhe* and *Shilubana*.

The lack of consistency and the relegation of gender equality to women’s equality do not bode well for the improved harmonisation of social relations for gender equality. It further limits the role of the courts and leaves especially the lowest structure of the courts, without a proper guidance as they have a limited jurisdiction in enquiring into constitutional issues and the development of common law. At present, the lack of consistency in the approach to the interpretation of the equality clause leaves the lowest structure without a specific direction for the development of the principles of non-discrimination. The lack of guidance further leaves these courts to depend on those who are economically empowered to challenge any constitutionality of the law or conduct alleged to have a discriminatory impact on the enjoyment of human rights.

Equally, the historic subjugation of customary law as discussed in chapter three attest to the manner in which the court has downplayed the equal recognition of customary law *vis-a vis* common law in the new constitutional dispensation. Although it is acknowledged that the court did provide relief to the aggrieved parties in the enforcement of the right to equality, it did not provide an opportunity or guidance for the development of common law principles within the framework of customary law itself. Instead, the court imported common law principles in remedying the discriminatory impact of customary law rules as evidenced in

Bhe and *Shilubana*. What is equally striking is that the court itself rejected the importation of common law principles in resolving customary law disputes as evidenced by Moseneke J in *Gumede*.

The court has also disappointed in the area of socio-economic rights and especially with the enforcement and monitoring of its orders. The implementation of court orders requires a proper guidance from the court on how for example the institutions supporting constitutional democracy may undertake this role without leaving it to their discretion. This view is reinforced by the fact that the court does not have an own capacity to monitor the implementation of its orders. Hence it is essential that in the adjudication of socio-economic claims, the remedy should not only be limited to the victory against the state or offending juristic person. It should ensure that its order goes beyond the remedy and as noted in chapter three, to ensure that it wipes tears from the eyes.

In chapter four, the focus was on those factors, which carry the gist of this study and are intertwined with the findings on the failure of the court, highlighted in chapter three, that may affect the credibility and legitimacy of the judiciary in the administration of justice for the improved realisation of the right to gender equality. It was established that the development of public confidence at the courts is of fundamental importance in gauging the extent to which they may be used to enforce the right to gender equality. The analysis of the constitutional protection of indigenous languages alongside the dominant traditional languages used in the courtroom was established as an achievement in terms of ensuring the right of equal access to justice, as most people using the magistrates' courts are affected by high levels of illiteracy. The use of indigenous languages has the potential to allow the parties to the dispute to become part of the court itself as the right to understand is not limited to English and Afrikaans which are still predominantly used as official languages of the courtroom. Even though at this stage, a conclusion cannot be made on the introduction of these languages at the courts it is a valid assumption that their use will make a greater inroad towards the advancement of gender equality.

In addition, the examination of the constitutional and institutional independence of the magistracy in the enforcement of the right to gender equality is essential for the newly established specialist courts. The extent to which the role of the specialist courts may enhance the development of the principles of gender equality is another factor that is of great significance for the promotion of gender equality. The specialist courts seek to limit any barriers that may be associated with the enforcement of gender equality at the magistrates' courts. The specialist courts have the potential to limit the barriers and arguments against

the use of the law as an appropriate strategy for social change. Notwithstanding the positive impact that these courts may have on the promotion of the right to gender equality, there are a number of factors, as discussed in the study, that may contribute to the insufficient use of the law for social change at the courts. Some of these factors are generated by the courts and others by the general public, such as for example, the:

- reasoning of the court in dealing with domestic violence.
- use of derogatory language as an obstacle to the enforcement of the right to gender equality.
- conduct of women against other women in the enforcement of the right to gender equality.
- power dynamics in the enforcement of the right to gender equality.
- conduct of the officers of the court.
- lack of proper reporting and recording tools.
- the extent to which the courts exert their authority and other related factors as established and discussed in the study.

Nevertheless this study has established that the positive effects on the significance of the law and the judicial enforcement of the law itself for the promotion of the right to gender equality are outweighed by the negative effects and other factors that undermine the significance of using the courts for the advancement of gender equality. These factors include a number of problems raised in chapter one, as noted above, that do not seem to be addressed by the practicalities at grassroots level, despite the pro-active legislative framework that has been adopted for the consolidation of the struggles for the achievement of the right to gender equality. As discussed in the study, they do not provide a positive framework that will enable the determination of the significance of the law for social change.

Generally, although this study is concerned with the efficacy of the law for the promotion of gender equality through the courts and established various factors that limit this objective, it must be noted that the first duty regarding the implementation of the right to equality lies with the state. The state is required to develop legal and other measures to ensure the promotion of the right in question as the courts become involved only once it is alleged that the right has been violated. It is further acknowledged that it is not only through the courts that the right to gender equality may be realised. There are other bodies such as the chapter 9 institutions and civil society groups which play an important role in the quest for the promotion of the right to gender equality. The intersection of the role of the state and that of

constitutional institutions and civil society has the potential to minimise the negative impact on the extent to which the law may be used for the advancement of the right to gender equality. As the formers' role has been noted above, the latter has also played a fundamental part in research and advocacy strategies for raising awareness of the problem of inequalities and discrimination and has further influenced the adoption of legislative changes in the quest for the promotion of substantive principles of equality.

The adoption of the Domestic Violence Act including its guidelines for implementation at the magistrates' courts was hailed as a potent weapon to address abuse against women, but its effectiveness is undermined by the deficiencies or factors, as identified in the study, that have resulted in the DVA not living up to the expectations upon which it was established. It goes the same for the Equality Act as it was also viewed as an overarching instrument in the elimination of discrimination and inequalities but to date has not lived up to the intended objectives as shown by the lack of flow of cases to the Equality Courts. The significance of the Equality Act is not only affected by the lack of flow of cases or knowledge but by the institutional response to the cases that have come before these courts. It has been shown that the specialist courts have not been effective in affirming their authority in ensuring the speedy resolve of the two cases that were lodged in ensuring the development of substantive principles of the right to equality.

The intersection of domestic and international human rights is compromised by the lack of funding or the provision of resources for the state machinery (magistrates' courts) in ensuring the building of capacity to the courts in order to address the inequalities in a more positive way. The lack of human and financial capital has the potential to constrain the already drained officials in dealing with issues of inequality as it results in lack of sensitivity and apathy amongst these officials. It further questions the legitimacy of the state's commitment to the elimination of inequalities and discrimination and as noted above, the legal framework is not enough to ensure the achievement of the intended objectives without the necessary support that will give effect to the effectiveness of the law for social change. In addition, women as well are their own worst enemies as they will either suffer in silence until it's very late or they will withdraw their claims against their abusive partners. Although the change of heart may not be viewed negatively, it presents real complications for the functioning not only of the courts but of other state institutions such as the police.

In essence, the factors identified in this study affecting the right to gender equality in a negative way attest to the limitation of the law but this does not mean that the law must be discarded in the promotion of social cohesion and harmony.

5.3 Possibilities for law reform and institutional development

The legislative and judicial evolution of the right to equality in South Africa is commendable. It gives due recognition to the South Africa's historic past in which the existence of inequalities and discrimination against women impact negatively on the objectives of this new constitutional dispensation. It has established the realisation that gender inequalities and discrimination are a violation not only of the Constitution and other national laws but of international human rights laws as well. All these positive efforts are outweighed by the lack of commitment and other related factors, in ensuring the substantive translation in the lived experiences of South Africa's population of gender equality.

It is imperative to note that eliminating instances of discrimination in South Africa is not an overnight process. It is a gradual process that should be undertaken in ensuring the elimination of the factors identified in this study that inhibit the significance of the law to generate social change. However, it is therefore, not possible within the scope of this study to make detailed recommendations but the following should be taken into account:

1 *Legislative evolution*

The significance of the law is not doubted, but the manner in which the laws have been applied gives an impression of equality rhetoric. A need exists therefore for a parallel development of both common and customary law in the interpretation of the law in giving effect to the right to gender equality.

Firstly, South Africa subscribes to a dual legal system: common law vs customary law. The safeguarding of the two systems requires the courts not to develop one over the other but to ensure the parallel development of both systems. It is evident, as argued in this study, that customary law principles and rules have not really found their space in the new constitutional dispensation. The court has not allowed these principles to develop within the framework of customary law itself in addressing issues of discrimination within the much contested right to equality. The court tended not to consider the lived real experiences of the people other than relying on official accounts of customary law. The cases discussed in this study that involved the application of the customary law rules *vis-a-vis* the right to equality such as *Bhe* and *Shilubana*, affirm the contention that the court actually outlawed the customary law rule of male primogeniture instead of allowing it to develop within the general framework of the prescripts of the new constitutional dispensation.

The lack of guidance by the court in the adjudication of customary law claims *vis-a-vis* common law is spelt out by Lehnert⁵:

“one of the major problems of the courts applying customary law in South Africa is the lack of expertise, sensitivity to the differing nature and content of customary...which is attributed to the colonial and apartheid period...where most judges and magistrates were not appropriately trained in the subject...were equally not in touch with the circumstances of people who live according to customary law because of their own societal background that confines them to the urban middle class”.⁶

Hence, the call by the Ngcobo CJ of the Constitutional Court in South Africa is reiterated and affirmed in this study for future development, that a need exists for the review of the curriculum in institutions of higher learning that will form the basis for future adjudication of customary law disputes *vis-a-vis* common law.⁷ It should be noted that it is not as if in some universities customary law courses are not offered but the weakness is the lack of a proper emphasis as these courses are sometimes couched under “legal philosophy”. Even those who teach customary law courses find that these courses are of a secondary status as opposed to other mainstream courses. This does not provide a firm basis for the development of a “specialist crop” that will ensure the articulation of the values of customary law within the general framework of South Africa’s legal system. The review of the curriculum requires the legislature to forge new tools in developing an appropriate legal measure that will ensure the achievement of the intended goal as required by section 9 of the Constitution and the Equality Act.

Furthermore, as the court outlawed the customary law rule of male primogeniture under the pretext of promoting the right to gender equality whilst effectively affirming women’s subordinate status, it left customary law inoperative and especially in the area of succession to chieftaincy by women. A need exists for the legislature to bridge the “void” left by the invalidity of the rule to ensure that customary law rules are operative and conform to the basic minimum standards required in the new dispensation. In this endeavour, consideration should be given to the lived experiences of the people, whenever the appointment of assessors or experts in the adjudication of disputes which trigger a conflict between

⁵ Lehnert W, ‘The role of the courts in the conflict between African customary law and human rights’ (2005) Volume 21, *SAJHR*, 242-277.

⁶ *Ibid*, at 263.

⁷ See Ngcobo S (CJ), ‘Justice Ngcobo praises indigenous law’ (2009) Volume 6 No 10, *ukzndaba*, 4.

customary law and common law disputes will be endorsed in order to provide insight and a deeper understanding of the issues affecting the majority of South Africa's population. The basis for this proposal is the factor identified in chapter one that one of the primary reasons in fighting discrimination and prejudice against women is not legal but social and cultural in origin.

Secondly, the factors identified in this study inhibiting the promotion of the right to gender equality may be attributed to the limitation of the law and on the gaps identified in chapter one on the significance of legal reform. The Equality Act, Domestic Violence Act, Maintenance Act and the Customary Act are flawed when considering the goal of gender equality. They are enforceable at the magistrates' courts, without an opportunity for the traditional justice system, through the institution of traditional leadership to ensure the promotion of the right to gender equality at grassroots level and the institution itself to exercise its legitimate role as affirmed by the Constitution. The rejection of the importation of the common law principles remains uncertain as their application is reinforced in these pieces of legislation. For example:

- the Equality Act does not provide for the simultaneous development of common law *vis-a-vis* customary law as a legitimate system of law which requires the courts including traditional courts to develop and apply it.⁸
- the DVA, recognises domestic violence as a "social evil" but does not provide an opportunity for the communal focus through the involvement of traditional leadership in addressing the underlying causes of domestic violence.
- the Maintenance Act does not provide for the communal responsibility on issues of domestic violence, custody of minor children to be resolved within the communal focus before going to the main courts. The Maintenance Act destroys communal principles that are enforceable through the values of "ubuntu" which are characterised by the principles of "ukuphuthuma"⁹, "ukuthleka"¹⁰ in relation to domestic violence and the payment of "inkomo yesondlo"¹¹ for the custody of minor children; and
- Furthermore, the application of the Customary Act:

⁸ See section 39(2) and 211(3) of the Constitution.

⁹ Relates to the retention of the wife when she has left her husband due to violence and the husband in return, would have to go the wife's family home and plead for forgiveness, showing respect not only to the wife but the family as well.

¹⁰ When the husband has failed to pay or finish paying *ilobola* and the wife will then be retained by her family until the husband comes and negotiate the settlement of the outstanding *ilobola*.

¹¹ When the children grew with the maternal family and the husband wants to have them in his custody, would have to pay a cow for each child, which today will be calculated in monetary terms.

- creates a rural, urban and racial divide confined to the people subscribing to the system of customary law.¹²
- limits its jurisdiction within a particular racial and ethnic group.
- allows parties to marry and conclude their marriage according to customary law but it imports common law values and requires the registration of customary marriages.¹³
- acknowledges that non-registration is not a determinant of the validity of the marriage, leaving the significance of customary law values uncertain, should a dispute arise.
- requires the disputes arising from customary marriages be resolved through the application of common law rules as entrenched in the Divorce Act 70 of 1979, Matrimonial Property Act 88 of 1984
- prioritises the dissolution of a marriage through the common law principles instead of affirming the mediating role of any person, including traditional leaders, in resolving such disputes as envisaged in section 8(5) of the Customary Act itself.

Generally, the Customary Act undermines the vision of social cohesion in a multi-racial nation, which the Constitution aspires to achieve. The importation of common law principles in resolving customary law disputes is foreign to customary law values and undermines customary law as a stand-alone system capable of regulating its affairs within the framework of the new dispensation. It is imperative that the legislation be reviewed and be extended to anyone who wishes to have his or her dispute resolved or conclude his or her marriage in terms of customary law, be allowed to do so and not confine its application to a particular racial or ethnic group.

Thirdly, as discussed in this study, the Equality Act is an essential instrument in outlawing and preventing discrimination in almost every sphere of society. It is therefore, recommended that the legislation be reviewed due to the following:

- the Equality Act entrenches socio-economic rights as indirectly enforceable rights and that are not listed as prohibited grounds of discrimination. It is therefore, recommended that these rights be included as directly enforceable rights other than being couched as indirectly prohibited grounds of discrimination because:.

¹² See section 1(i-iv) of the Customary Act.

¹³ See section 4 of the Act.

- the inclusion of these rights as prohibited grounds of discrimination in the Equality Act will eliminate the lack of “political will” or “dragging of the feet approach” on the side of government in ratifying and incorporate the ICESCR in the national law rather than a mere acknowledgement of its provisions.
 - in addition, the inclusion of socio-economic rights in the legislation as directly and prohibited grounds of discrimination is likely to improve the socio-economic status of women in the enforcement of maintenance claims and other related inequalities.
- also, the Equality Act gives effect to both CEDAW and CERD which affirm the rights of women in rural areas, providing an opportunity for the domestication of international laws at grassroots level. This is equally applicable to the Protocol on the Rights of Women in Africa which seeks to ensure the immediate redress of the plight of women. The Equality Act, however, does not address the plight of women who are affected by the number of factors identified in this study such as equal access to justice. CEDAW requires the states to raise awareness and educate their citizens on the significance of eliminating discrimination and inequalities. It is therefore, suggested that:
 - the application of the Equality Act be reinforced by the revival and reinforcement of the traditional justice system in order to:
 - enhance the capacity of the traditional courts where they are already operative. Although there are objections to the adoption of the Traditional Courts Bill¹⁴, and
 - as argued elsewhere¹⁵, these courts have the potential to affirm the legitimacy of the traditional justice system as the Bill seeks to ensure the protection of women in the adjudication of disputes within the system itself. As Rautenbach noted there is no legal system that does not have its own challenges, hence the intersection of the two through the adoption of the Traditional Courts Bill will provide relief and minimise the struggles of women

¹⁴ See the report by Carlisle A, ‘Traditional Courts ‘will hurt rural women more’ *Daily Dispatch* 18 March 2010 on the objection by the Human Rights Commission itself represented by Pregs Govender and a Commissioner at the SAHRC.

¹⁵ See Ntlama (note 238, chapter 3 above).

and the delays in the disposal of cases at the ordinary magistrates' courts.

- this further requires the state to marshal, pump and invest its resources by:
 - drawing up a carefully planned educational and awareness programme that will ensure that those applying the envisioned Traditional Courts Bill will be conversant of the dictates of the new constitutional dispensation.
 - building human and financial capacity of the institutions supporting constitutional democracy such as CGE, which has vehemently opposed the Traditional Courts Bill and the SAHRC to undertake this responsibility with ease.

Fourthly, emphasis in this study was placed on the significance of indigenous languages and their use in the courts as having a potential to promote public confidence and the development of these languages alongside the dominant languages of the courtroom. Since the adoption of the Language Policy in 2000, followed by the Language Bill 2002, the state has not put any legislation in place that will provide a proper guidance on how to ensure the equitable development of South Africa's official language. This has resulted in a number of court challenges relating to the use or non-use of indigenous languages as discussed in chapter four, which has created unnecessary tensions amongst South Africa's diverse groups. It is therefore, imperative that South Africa adopts a legal reform to regulate the use of indigenous languages, which may be beneficial for their use in the courts and eliminate the unequal power imbalances between the litigants as they will be addressing the court in the language that they all understand including the officers of the court.

Lastly, the South African Schools Act also, needs to be reviewed so as to give concurrent powers to both the government and school governing bodies. The purpose for such a review will be to limit the opportunity for monopolisation of decisions on the adoption of admission and determination of language policies by school governing bodies which may undermine the aspirations of the new democracy in building a social cohesion. This is the case in the former Model C' Schools who are able to raise funds and take the government to court just to protect their vested interest as evidenced by the number of cases that have gone to court including the *Mikro Primary School* case discussed in this study. This in turn, will also provide an opportunity for indigenous languages to develop alongside the dominant languages given state protection during the apartheid era.

It is proposed that it may become essential to review these pieces of legislation if the purpose of the new dispensation and the objectives which they seek to fulfil is to be achieved. The review should allow the parties to resolve their differences and exhaust the remedies within the traditional justice system itself before taking their matters to the ordinary magistrates' courts, if customary law is to develop in line with the dictates of the new dispensation. It must be noted that this proposal does not mean the wholesale importation of civil and criminal offences to these courts without considering the gravity and nature of the offence which compromises the right to gender equality.

2 *Institutional development*

As it has been emphasised in this study, legal reform bears no fruit without the machinery to make it work and ensure the full and equal enjoyment of all the rights and fundamental freedoms in the Constitution. The enforcement of the right to gender equality at the lowest structure of the courts as first time contacts with justice is commendable. Due to the volume of work that these courts undertake, it is essential that they are provided with adequate resources that will ensure the efficiency and smooth running of the administration of justice. Magistrates should also be involved in training that will help them to cope with the emotional stress that comes with the work they undertake as they are exposed to issues of domestic violence and other inequalities.

The Magistrates Commission, as an oversight body over the work of these courts, should also sharpen its monitoring tools. This role should not be limited to the appointment and impeachment of magistrates. It is essential that it ensures the efficient and effective system in the administration of justice.

The magistrates including the judges, should be constantly exposed and attend programmes that enhance their level of sensitivity to issues of domestic violence and other related inequalities. The newly established specialist courts, although they seek to fulfil the purpose, their specialist capacity remains doubtful as shown in the delay and disposal of specialist cases they have been established to deal with. In order to eliminate bias and over-concentration of magistrate, they should be rotated in undoing the "business as usual" approach in their specialist capacity. The delay may be attributed to the respondents against which the claims have been lodged against, and especially government departments, such as the Department of Health in the Eastern Cape, that played power dynamics in the Ms X case. The Equality Act, especially, as an overarching instruments in the fight against discrimination, should be amended so as to ensure that the government departments

against which the claim have been lodged, the Minister, MEC and the Director-Generals as head of government, are personally liable for contempt of court if they do not respond to the allegations against them timeously, including the implementation of court orders. The lack of sensitivity by government departments became evident in the case of *Du Preez, Esther Muller*, as the Department of Public Works, has never yet revamped the court buildings such as the King William's Town magistrates' courts. These buildings remain inaccessible for the elderly and the disabled, compromising their right to equal access to justice.

It is therefore, essential that the courts too should do address some of the concerns raised in this study, and the Magistrates' Commission should spearhead this process in ensuring an efficient system of justice. This role should be extended to the traditional courts as the latter courts are equally recognised in the Constitution as legitimate instruments in the dispensation of justice. This will enable the determination of the areas with high prevalence of domestic violence, which would in turn, require an appropriate intervention by the state, chapter 9 institutions and civil society.

The institution of traditional leadership is another focus area that should be vigorously addressed in programmes that advances the prescripts of the new dispensation. Traditional leaders remain closer and more attached to the lived experiences of all people including women. Considering the historic past where the institution was manipulated by colonial and apartheid rule, a need exist to re-affirm their legitimacy as an essential instrument in conducting and regulating public affairs including the enforcement of the right to gender equality through the traditional justice system.

However, as the decisions of traditional courts are not recorded and filed it is essential to ensure that there are appropriate measures in remedying the flaws in the system and ensure that the law does protect the beneficiaries it was intended to protect. The development of such measures will provide an insight into the content of customary law in affirming the values of the community which prescribes to it. It will further limit the "judicial avoidance" as evidenced by the Constitutional Court in *Bhe* and *Shilubana*, in giving due recognition of the lived experiences of the people in the adjudication of disputes that come before it. The reforms on the functioning of traditional courts should be coupled with an assessment on an annual basis of their operation *vis-a-vis* the ordinary magistrates' courts and the superior courts.

The chapter 9 institutions and Non-Governmental Organisations¹⁶ are other focus areas that should not be left behind in the building of capacity in ensuring the promotion of the right to gender equality. For example, CGE and SAHRC should be well resourced in the fight against discrimination. They are better placed to advocate for the promotion of the right to gender equality not mere women's equality. These institutions are not only required to investigate and monitor progress made in the promotion of the right to gender equality. They are required also to analyse and synthesise such information in order to determine how far the country has gone in ensuring the substantive translation of the right to equality in South Africa.

NGO's are another sector that is faced with many challenges such as lack of funding and capacity issues. These factors impact negatively on their role in building the interplay between their mediation role and the enforcement of the right to gender equality at the courts. They play a fundamental role in the dissemination and transmission of legal and constitutional knowledge in order to minimise the potential for lack of legal knowledge in the development of substantive principles of the right to equality. The role of the Sonke Gender Justice Network as discussed in this study is commendable, as it promotes the rights of both men and women. The organisation seeks to ensure the building of harmonious relations in ensuring that no empowerment is undertaken at the expense of the other party.

The programmes such as take a "girl child" to work and the "international days of no violence against women" have a negative impact on the development of substantive principle of equality, hence, a need exist for the broader approach for the development of substantive principles of the right to equality. As argued in this study, these programmes confines women to victim-hood. They enhance the promotion of women's rights leaving behind the men in terms of educational drives and initiatives in dealing with the historic subjugation of women. However, if the state is serious in eliminating discrimination and prejudice, it should redirect its focus and ensure the development of a social cohesion that is inclusive of both men and women. In essence, these programmes should be abolished as they create a negative perception about the equal rights of women and as argued in this study, confines them to a particular closet of "historical victims" of discrimination.

Lastly, there is an area that needs future research, which has also been the limitation of this study. There is a misconception that the disputes arising out of customary law rules *vis-a-vis* the rights to equality are conflicts between customary law and human rights. This view

¹⁶ Hereinafter referred to as "NGO's".

creates a misunderstanding that customary law rules and values are not human rights. It further undermines the values and principles of customary law as human rights, which is quite contrary to the spirit and purport of the Bill of Rights. It misconstrues customary law as just another system of law which is not equivalent to the other legal systems in South Africa. This misconception has been fuelled by scholars¹⁷ who argue that the system of customary law conflicts with human rights instead of focussing on the conflict between two legal systems in South Africa. The background to this misconception needs to be properly researched in order to determine the impact of the colonial and apartheid rule on this system of law in this dispensation.

Another area that might be of interest is the categorisation of people and confining them into particular “closets”. As argued under “differentiation” in chapter three, the classification of people subjects them to stigmatisation, limiting the achievement of a just society to the privileged group that is able to come out of a particular “silo” and claim human rights as human beings, and not as victims of discrimination. It will be essential for a study to be conducted around this area to determine the effectiveness and impact of legal reform in eliminating prejudice and discrimination against men and women.

In sum, the proposals for law reform and the building of institutional capacity affirm the significance of the intersection of the law and society in resolving issues of gender equality, which in turn, will require higher level of sensitivity through training and other related programmes that the state may adopt for social change as intended in this study. This is assumed to have the potential for the creation of social harmony among various and diverse groups in South Africa.

5.4 Summary

The effectiveness of the law depends on the understanding of the dynamics which are the subject of gender equality. For a deeper understanding of the significance of the law to deal with specific problems relating to inequalities and non-discrimination, it is of utmost importance to take into account the factors that may undermine its significance. The importance of both national and international legal instruments remains constrained in their ability to improve the lives of women. The legal framework is good but its translation to substantive and practical realities remain unclear. It further leaves the question open on how to break the cycle of gender discrimination and inequalities.

¹⁷ See various scholars in chapter three under the section on equality and development of customary law.

As it has always been recommended by earlier writers, a need exists for the continued education and training to change traditional and discriminatory attitudes, training of court officers on constitutional and legal rights, the development of a framework for the advancement of legal literacy, proper financial and human capacity support for state institutions. This role may not be limited to the state but also to continue to use NGO's as they have an important role in fostering change and making sure that it is sustainable.¹⁸

¹⁸ See also O'Flaherty M, 'Sexual orientation, gender identity and international human rights law: contextualising the Yogyakarta principles, (2008) Volume 8 No 2, *Human Rights Law Review*, at 207.

ANNEXURE A



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18 February 2009

TO WHOM IT MAY CONCERN

RE: Doctoral research questionnaire

I am a registered student for an LLD degree (student number: **43205321**), attached to the afore-mentioned Department at UNISA. My research focuses on: **“Impediments in the promotion of the right to gender equality in post-apartheid South Africa”**.

The primary purpose of this study is to examine the various factors that are an impediment to the significance of the law for the promotion of the right to gender equality. This study seeks to review and determine the extent to which the judicial enforcement of human rights inspired laws contributes to the advancement of the right to gender equality for social change. The objective of focusing primarily on the judiciary instead of the legislature is because the courts act as independent arbiters in the determination of the alleged unfair or fair discrimination and inequalities. The judiciary is also the entry point for access to justice as they deal with broader issues in the adjudication of disputes than technical matters addressed in a particular legislation.

This study acknowledges the limitation of the law in the promotion of social change but it is envisaged that the research will contribute to a better understanding of the factors that

undermine the significance of the law for social change through the promotion of the right to gender equality.

Attached is the research questionnaire which seeks to determine the extent to which the magistrates' courts as institutions entrusted with the responsibility to deliver the high quality standards in the dispensation justice for the promotion of gender equality, which may directly or indirectly contribute to the advancement of social change.

At all times, the identity of those interviewed will be treated with confidentiality and shall be used strictly for the purpose of the research.

Thank you in advance for your participation in this research that will undoubtedly contribute to the promotion of gender equality *by* and *through* the courts.

Should you require further clarity, please do not hesitate to contact me.

Your's sincerely

Nomthandazo Ntlama (Ms)

Professor Andre' Thomashausen (Supervisor)

Chair of the Department

ANNEXURE B

The impediments to the promotion of gender equality in post-apartheid South Africa

1 Structure of the questions

1.1 *Primary informants*

- What are the key issues to consider in the enforcement of gender equality claims?
- What are the expectations for the enforcement of gender claims?
- What are the problems associated with maintenance claims?
- What about customary law?
- How do we reconcile the application of customary law and common law through enforcement at the court?
- What factors do you think limit the rights of women to access the courts?
- What do you think is the important role of the specialised courts in the enforcement of equality claims?
- How do they contribute to the advancement of social change?
- What do you understand about the concept of “therapeutic jurisprudence”?
- What role does public confidence play in the dispensation of justice?
- How is it likely to enhance the role of the court in the affirmation of its legitimacy?

1.2 *The secondary informants: other role players: NGO's, CBO's*

- Why the importance of gender equality?
- What relevance does it have for the promotion of social change?
- What is the role of your institution in the promotion of gender equality?
- What is the role of the courts in the promotion of gender equality?
- What strategies should be developed for the enforcement of gender equality at the courts?
- What is the relationship between the role of the courts and your institution in the promotion of gender equality?

- How is this relationship likely to influence or play a role in the advancement of social change?
- What factors tend to limit or promote the enforcement of gender equality?
- How are these factors likely to contribute to the advancement of social change?
- What other factors that may be taken into account in the enforcement of gender equality?
- Are there other measures to resolve disputes which your organisations promotes and why?

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1.5.2 Regional and international instruments

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Constitutive Act of the African Union
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Convention on the Rights of the Child
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International Convention on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
Protocol on the establishment of the African Court
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