

**CHALLENGES TO GENDER EQUALITY IN THE LEGAL PROFESSION IN
SOUTH AFRICA: A CASE FOR PUTTING GENDER ON THE
TRANSFORMATION AGENDA**

by

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Submitted in fulfilment of the requirements for the degree of

MASTER OF LAWS

in the subject

HUMAN RIGHTS LAW

at the

UNIVERSITY OF SOUTH AFRICA

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FEBRUARY 2019

DECLARATION OF HONESTY

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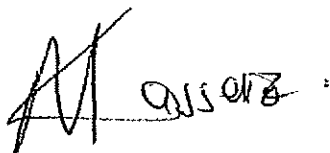
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I declare that my dissertation titled: "**Challenges to gender equality in the legal profession in South Africa: A case for putting gender on the transformation agenda**" is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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Mrs Matilda Elizabeth Kweti Lasseko Phooko

11 February 2019

Date

DEDICATION

For my children.

Resist suggestions that there are things in this world that are only for boys and others only for girls. There can be no fairness in that.

ACKNOWLEDGMENTS

While I was in practice I benefitted from the mentorship of advocates and attorneys, male and female, who shaped my views on the factors that determine the success of female legal practitioners. I engaged, time and again, in discussions about why the firm is not getting gender transformation right. I can list countless practitioners who did not necessarily advertise their commitment to gender transformation but would not think twice before considering changes to their team's working methods and practices to accommodate the lived realities of mothers on the team. Conversely, I have seen practitioners proclaim their transformation commitment yet perpetuate the 'old boys' clubs' in their briefing patterns. My experiences in practice inform the views that I put forward in this dissertation.

I am grateful for the guidance of two esteemed academics in producing this work. I thank Dr Freddy Mnyongani for his guidance with this dissertation and seamlessly facilitating the transfer of my supervision to Dr Safia Mahomed. I am grateful to Dr Mahomed for her patience through the transition and her ongoing guidance.

I am beholden to my sister, Olga Leila Sechero Lasseko, who encouraged me to see this project through to completion. I am similarly beholden to my family that held me up at a time in this year that I felt I had lost too much to go on.

For my husband - who's own stereotypical views on parenthood and gender roles in the home have been continuously called into question in our marriage; most times by circumstances, sometimes by choices - I am eternally appreciative for your love and support. The burdens of gender and sex stereotypes that aim to limit me to what I typically should be are similarly limiting on you. Thank you for encouraging me to write and indulging me in impromptu debates on this topic.

Finally, as a beneficiary of the spouse study benefit, I am grateful to the University of South Africa.

ABSTRACT

This study demonstrates the negative effect of stereotypes in the progression of women in the legal profession in South Africa and that laws, policies and measures that reinforce gender and sex stereotypes are discriminatory on the basis of gender and sex. This notwithstanding, it considers whether gender equality can be achieved where the measures adopted for gender transformation are premised on gender or sex stereotypes. The study analyses the Cape Bar Maternity Policy in concluding that this approach is justifiable and necessary to achieve substantive gender equality.

In addition, this study provides recommendations for the legal profession to achieve substantive gender equality that include: special measures to ensure that the working environment is cognisant of the lived realities of women; requiring practitioners to confront their individual bias by holding them accountable for habits and attitudes that maintain gender inequality; and linking the career advancement of legal professionals to a demonstrable commitment to gender transformation.

KEY WORDS

Equality; Gender equality; Transformation; Substantive equality; Feminist theories; Equal Treatment Theory; Cultural Feminism Theory; Formal equality; Legal practice; Patriarchy; Stereotypes

LIST OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
ANC	African National Congress
CC	Constitutional Court of South Africa
CEO	Chief Executive Officer
CEDAW	The Convention on the Elimination of Discrimination Against Women
CFO	Chief Finance Officer
CGE	Commission for Gender Equality
CCR	Constitutional Court Review
EEA	Employment Equity Act
ECOSOC Committee	the UN Committee on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JSC	Judicial Service Commission
JSAS	Journal of Southern African Studies
NGOs	Non-Governmental Organisations
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
SALJ	South African Law Journal
SAJHR	South African Journal on Human Rights
SAPS	South African Police Service
UDHR	Universal Declaration on Human Rights

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CHAPTER 1

TRANSFORMATION AND THE LEGAL PROFESSION IN SOUTH AFRICA

1.1. Introduction

Chapter 1 will set the background for the study. It will provide the meaning of transformation that is adopted for purposes of this study and set out a brief summary of the legal profession in South Africa. Additionally, the chapter will illustrate the rationale, research question, motivation, limitations, objectives and scope of the study.

1.1.1. Background, Literature analysis and Critique

The place of women in the practice of law in South Africa has come a long way since the case of *Incorporated Law Society v Wookey*,¹ decided in 1912. In this case, society's patriarchal view of women as having a place in domestic life only was first challenged through the court by a woman who sought admission into the legal profession. *Wookey* was refused admission into legal practice with the presiding Judge Solomon stating that the immemorial practice of centuries compelled him to conclude that women could not be admitted into the profession.² Since then, there have been some significant strides in the inclusion of women into the legal practice. Women are now represented in the attorneys' profession as well as the advocates' profession and can also preside as judges.³ Despite the progress made since the case of *Wookey*, the structure of the legal profession and the number of women represented in the legal profession, do not as yet characterise the diversity of South

¹ 1912 AD 623.

² 1912 AD 623.

³ In this dissertation the attorneys' and advocates' professions and the judges' profession will be collectively referred to as the "legal profession".

African society.⁴

Reference to the transformation of the judiciary has several meanings as expressed in legal writing.⁵ Moerane notes various opinions on the meaning of transformation. These include: that judicial appointees espouse and promote the values enshrined as fundamental in the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution); the process of fostering a culture of accountability among the judiciary; the process whereby the courts are made more accessible to litigants and other court users; the re-organising and re-engineering of the structures and branches of the judiciary; and an evolution of the way in which judges perform their work.⁶ Wesson and du Plessis adopt a more inclusive understanding of judicial transformation proposing that it is a response to the negative characteristics of the apartheid judiciary that does not carry a single meaning. Rather, it is a concept that carries various themes.⁷ These themes include: the manner in which judges are appointed; a change in the demographics of the judiciary; a change in the underlying attitudes of the judiciary; creating accountability within the judiciary; and embracing concerns about efficiency and access to justice. Mirroring two of the elements of transformation discussed by Moerane, and Wesson and du Plessis, Budlender is of the view that transformation of the judiciary should not only pertain to a judiciary transformed in demographic terms and in its underlying attitudes, but should also encompass a judiciary that is responsive to the goals of the democratically elected government.⁸

This dissertation adopts the definition of transformation of the judiciary as a process whereby the appointment of judges reflects the broad composition of the South

⁴ Iya PF "From lecture rooms to practice: Addressing the challenges of reconstructing and regulating legal education and legal practice in the new South Africa" 2003 (16) *Third World Legal Studies* 143.

⁵ See Budlender G "Transforming the judiciary: The politics of the judiciary in a democratic South Africa" 2005 (122) *South African Law Journal* 715; See also: Moerane MTK "The meaning of the judiciary in the new South African context" 2003 *South African Law Journal* 708.

⁶ Moerane 2003 *SALJ* 708.

⁷ Wesson M and du Plessis M "The transformation of the judiciary: fifteen year policy review, South African Presidency" http://www.thepresidency.gov.za/docs/reports/15year_review/jcps/transformation_judiciary.pdf (Date of use: 25 October 2016).

⁸ Budlender 2005 *SALJ* 715.

African society, particularly, with regard to gender.⁹ Ordinarily, persons appointed are usually, but not always, selected from the legal practice professions.¹⁰ In the recent past, there has been a move towards being inclusive, in that, judicial ranks are now more diverse with academics being appointed as judges.¹¹ While academics are increasingly being included in the selection pool for judges, this dissertation will limit its reference to the pool of potential judges as including only those in the organised profession of practicing attorneys and advocates.¹² An assessment of the extent to which transformation of the legal profession directly affects the transformation of the judiciary in South Africa, will be analysed.

This dissertation will consider the extent to which the attainment of substantive equality in the legal practice profession, as opposed to formal equality, can translate into transformation of the legal profession and create a larger pool of aptly qualified female candidates to be considered for appointment in the judiciary. In this regard, the idea of creating substantive equality within the legal practice profession is based on the understanding that inequality stems from long established political, social and economic differences between men and women within the profession. These inequalities are entrenched in social values and behaviours, the institutions of society, the economic system and power relations.

At the dawn of democracy on 27 April 1994, there were two White female judges, three Black male judges, 160 White male judges and no Black female judges. Since 1994, in line with a constitutionally mandated appointment system, judicial appointments have been formally made through the President as the Head of State, however, the Judicial Service Commission (JSC) advises the President on the appointees.¹³ The JSC makes recommendations regarding the appointment of and the removal from office of judges.¹⁴ When considering candidates to recommend for

⁹ Moerane 2003 SALJ 711.

¹⁰ Moerane 2003 SALJ 712.

¹¹ Corder H "Judicial authority in a changing South Africa" 2004 (24) *Legal Studies* 262.

¹² The election to exclude academics from this discussion is based on the fact that the working environment within which practicing attorneys and advocates are exposed, is significantly different from that in which academics operate. As this dissertation attempts to investigate what conditions within the practicing workspace hinder the advancement of these legal professionals, it is more prudent to assess the situation of similarly placed attorneys and advocates.

¹³ Corder 2004 *Legal Studies* 262.

¹⁴ Joubert WA *et al The Law of South Africa* (Butterworths Durban 2000) 457.

appointment as judges, the JSC is obliged to consider the racial and gender composition of South Africa,¹⁵ as well as the need to appoint a qualified woman or man who is a fit and proper person for appointment as a judge.¹⁶ This implies a constitutional mandate on the JSC to consider the merits of the appointees as well as the mandated need for transformation of the judiciary. The JSC has made significant progress in remedying the disproportionate pre-1994 situation¹⁷ in light of its constitutional mandate. As of 31 March 2017, there were 246 permanent judges in the country, according to statistics on the judiciary collected by the Commission for Gender Equality (CGE). Of these, 162 were Black and 84 were White. In addition, of the total (246), 87 were women and 159 were men.¹⁸

The JSC has actively sought to recommend individuals for appointment that would increase the demographic representation of the country as a whole.¹⁹ The move by the JSC to transform the judiciary has been driven by the legal framework created by the constitutional dispensation. However, in the early years of constitutional democracy, it has been suggested that, one challenge besetting the transformation of the judiciary was that there were too few women who qualified for appointment to the judiciary from the legal practice professions.²⁰ As things stand, the situation has not changed in a significant manner in that fewer women still qualify for appointment to the judiciary for various reasons. These include the fact that fewer law graduates are choosing to practice law as a profession, choosing to work in commerce industry, academia and state enterprises. Those who do practice law, do not make themselves available for appointment to the bench.²¹

This dissertation will consider research conducted within the profession to identify the factors that hinder female law graduates from practicing law as a profession and that hinder their advancement in the profession. However, of the few women who

¹⁵ Section 174(2) of the Constitution.

¹⁶ Section 174 (1) of the Constitution.

¹⁷ Manyathi-Jele L 2015 "Latest statistics on the legal profession" July De Rebus.

¹⁸ Department of Trade and Industry Discussion document on gender transformation in the judiciary and the legal sector Notice 394 of 2018 Government Gazette No 41766 13 July 2018 94.

¹⁹ Moerane 2003 SALJ 712.

²⁰ Jagwanth S and Murray C "Ten years of transformation: How has gender equality in South Africa fared?" 2002 (14) *Canadian Journal of Women and Law* 259.

²¹ Moerane 2003 SALJ 717.

do become qualified for appointment, too few of them make themselves available for consideration. With few suitably qualified women making themselves available as candidates for appointment, the judiciary remains overwhelmingly male and disproportionately composed of White males.

South African society is such that the impact of the apartheid system remains evident in the lives of the majority of the population. However, the fundamental principles contained in the Constitution, including equality, are a foundation on which South Africa can continue to build the future to redress the past.²² The transformation of South African society to address the imbalances of the past, as is envisaged in and contained within various provisions of the Constitution, does not naturally translate into transformation and gender equality in the daily life experiences of women in society.

The most direct way to effect the change necessary for gender equality, and transformation in the judiciary, is by means of enacting robust legislation and policies in this regard.²³ This dissertation nonetheless investigates a proposition that gender equality and transformation of the legal profession can only become a reality in the daily life experiences of women in society when the Constitution, the legislation and other policies formulated for this purpose are translated into certainty and supplemented by social change to positively impact on the lives of women.²⁴ Engagement with the law can bear some fruits to achieve transformation of the legal profession but these cannot address the practical obstacles to participation, nor can it guarantee the achievement of actual social and economic equality.²⁵ Gender transformation of the judiciary can only manifest where there is adequate gender transformation of the legal practice profession. Gender transformation of the legal practice profession, in turn, can only manifest when substantive equality in the legal profession is achieved.

²² Chaskalson A "From wickedness to equality: The moral transformation of South African law" 2003 *International Journal on Constitutional Law* 609.

²³ Jagwanth and Murray 2002 *Canadian Journal of Women and Law* 259.

²⁴ Kaganas F and Murray C "Law and women's rights in South Africa: An overview" 1994 *Acta Juridica* 1.

²⁵ Kaganas and Murray 1994 *Acta Juridica* 36.

It will be argued that as a result, efforts to determine progress in gender transformation, by merely comparing the numbers of women included in the legal practice profession as opposed to men, being the accepted norm on the basis of the patriarchal history of South Africa, falls short as a mode of analysis. The constitutional and legislative commitment to gender equality and transformation in the legal profession requires an analysis of substantive gender equality within the profession. This dissertation proposes to analyse the extent of substantive gender equality within the profession. It will also test the extent to which existing initiatives are aimed at attaining substantive equality.

1.1.2. The legal profession in South Africa

South Africa has made progressive strides in respect of gender representation within the judiciary, in that 87 of the judges serving on the bench are women, which translates to 35% of judges.²⁶ Notably, Judge Mandisa Muriel Lindelwa Maya was appointed in May 2017 as the first female president of the Supreme Court of Appeal, since this court was founded in 1910.²⁷ This staggering transition only took place more than a century after the Supreme Court of Appeal's inception.

As at July 2018, there were 26 701 reported attorneys, of which 11 659 were Black, representing 43% of attorneys in practice and 10 673 of these were women, translating to only 40% of attorneys.²⁸ The General Counsel of the Bar of South Africa's membership statistics as at 30 April 2017, demonstrates that there were 2915 advocates on the roll, of which 1065 were Black, representing 36.5% of advocates and 796 were women, translating to only 27.3%. As at the date of this dissertation, the 2017 statistics in respect of the judiciary and advocates' profession, were the most recent statistics available for consideration. From the information set out above, it appears that whereas there have been significant strides aimed at

²⁶ Department of Trade and Industry Discussion document on gender transformation in the judiciary and the legal sector Notice 394 of 2018 Government Gazette No 41766 13 July 2018 94.

²⁷ Zuma appoints Mandisa Maya as SCA president <http://www.news24.com/SouthAfrica/News/zuma-appoints-mandisa-maya-as-sca-president-20170526> (Date of use: 29 August 2017).

²⁸ Law Society's statistics on the attorneys' profession <http://www.lssa.org.za/about-us/about-the-attorneys--profession/statistics-for-the-attorneys--profession> (Date of use: 6 September 2018).

attaining equal numbers at representations of race and gender within the legal professions, gender representation is still not yet on par with race representation. Race representation remains significantly higher than gender representation in all three fields of the legal profession. If gender equality is considered to mean all persons who are in the same situation being accorded the same treatment,²⁹ there remains marked gender inequality within the profession. Detailed comparative tables of these differences are provided in chapter 3, section 3.4, which seeks to analyse these inequalities further. A formal approach to equality seeks to attain sameness with like being treated the same. This formal approach necessarily requires a comparison between similarly placed persons, usually against the dominant norm. In the case of gender equality, a formal approach to equality calls for a direct comparison of male versus female practitioners to determine whether there is equality before the law.³⁰ As discussed by Fraser,³¹ a formal equality analysis fails to recognise the social and cultural context that necessarily renders it incorrect to have a direct comparison between males, being the dominant norm comparator, and women. While recognising these limitations of a formal application of the concept of gender equality, the figures highlighted in this section demonstrate formal gender inequality in the legal profession.

Statistics demonstrating inclusion in the legal profession of women by comparing their numbers against their male counterparts are prized as an indicator of gender transformation in the profession. Such figures and statistics are a good starting point in an attempt to bring about gender transformation in the profession. However, this dissertation postulates that the legal profession should adopt a more reflective manner in which to determine the progress and extent of gender equality, and therefore transformation, within the legal profession, to one that extends beyond formal equality.

The preferred approach to understanding gender equality is substantive equality. This approach calls for a consideration of the impact of measures and policies aimed at attaining gender equality and is said to be manifested through legal mechanisms

²⁹ Smith A "Equality Constitutional Adjudication in South Africa" 2014 (14) *African Human Rights Law Journal* 612.

³⁰ Smith 2014 *AHRLJ* 612.

³¹ Fraser N "From Individual to Group" in Hepple B and Szyszczak E (eds) *Discrimination: The limits of the Law* (Cambridge University Press London 1992) 102-103.

such as affirmative action.³² That substantive equality is intentionally asymmetrical is found in the fact that it focuses on the disadvantaged group rather than requiring equal treatment for its own sake.³³ An analysis of the extent of gender equality, or lack thereof, within the legal profession would therefore require consideration of the extent to which legislative and non-legislative measures within the profession assist in creating equality of opportunity, eliminating barriers, which exclude women from participating and advancing in the profession and equality of outcomes, being an equal distribution of social goods.³⁴ This type of analysis of the extent of gender equality reflects the four dimensions suggested by Albertyn and Fredman as components of substantive equality; redressing social and economic disadvantage, addressing stigma, prejudice, humiliation and violence, accommodating and affirming difference, diversity and identity through structural changes and enhancing voice and participation.³⁵

1.1.3. Transformative imperative of equality in South Africa

The Constitutional imperative that the judiciary be transformed to reflect broadly the racial and gender composition of South Africa, is contained in section 174(2) of the Constitution. This section provides that: “[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.”

The Constitutional prerogative to cause transformation in the legal profession, as within South African society as a whole, is captured in section 9(2) of the Constitution.³⁶ This section provides that:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and

³² Smith 2014 *AHRLJ* 613.

³³ Albertyn C and Fredman S “Equality beyond dignity: multi-dimensional equality and Justice Langa’s judgments” 2015 *Acta Juridica* 434.

³⁴ Smith 2014 *AHRLJ* 613.

³⁵ Albertyn and Fredman 2015 *Acta Juridica* 439.

³⁶ Section 9(1) is a holding section that affirms the right to the equal protection and benefit of the law. The Promotion of Equality Act and Prevention of Unfair Discrimination Act 4 of 2000 gives legislative effect to section 9(3) which provides the right to be free from unfair discrimination on the basis of listed and analogous grounds. For a view on the interpretation of section 9(3), see Govender K “The developing equality Jurisprudence in South Africa” 2009 (120) *Michigan Law Review* 107.

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

Section 9(2) of the Constitution ought to be read within the context of the values enshrined in the Constitution.³⁷

The nature of equality as envisaged in the Constitution is that of substantive equality as opposed to formal equality. Formal equality is premised on the view that equality is achieved when all persons in the same position are treated the same. Substantive equality recognises that sameness of treatment may not result in equality among individuals and that it is necessary to treat people differently to attain equality.³⁸ The focus of substantive equality is on the impact or consequence of the discriminatory measure.³⁹ The Constitutional Court of South Africa has, in a number of cases, pronounced on whether equality as envisioned in the Constitution, is formal equality or substantive equality. In these cases, the courts have adopted varying views on equality. To demonstrate the stark contrast in the oscillating nature of the court's judgments dealing with the distinction in the meaning of equality, some of the Court's pronouncements in *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others*⁴⁰ and *Jordan and Others v State*⁴¹ will be discussed.

In the *National Coalition* case, the court ruled that the sodomy laws that criminalised sexual acts between consenting males violated the right to equality. The majority judgment held that the Court encapsulated the notion of substantive as opposed to formal equality.⁴² In undoing the concept that sameness can be equated to equality, the court held that the concept of unfair discrimination should recognise that while the goal is attaining a society which affords each human being equal treatment on the basis of equal worth and freedom, this goal cannot be achieved by insisting upon identical treatment in all circumstances, before that goal is achieved. In a concurring

³⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) [72-73] and quoting section 1(a) of the Interim Constitution and its Preamble.

³⁸ Currie I and de Waal J *The Bill of Rights Handbook* 5th ed (Juta & Co Cape Town 2005) 232-233.

³⁹ Jagwanth S "Expanding Equality" 2005 *Acta Juridica* 131.

⁴⁰ *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999(1) SA 6 (CC) (hereinafter the *National Coalition* case).

⁴¹ *Jordan and Others v State* 2001(6) SA 642 (CC) (hereinafter the *Jordan* case).

⁴² *National Coalition* case [66].

judgment, Justice Sachs ventured to opine that equality is in fact about acknowledging and accepting difference.⁴³

In the *Jordan* case, the court was called upon to determine the constitutionality of a section of the Sexual Offences Act⁴⁴ which criminalises a sex worker for prostitution but not the client, nor the keeping and management of a brothel from which sex trade is conducted. The majority held that the section, which was gender neutral on its plain reading, was not discriminatory. This judgment has been criticised as demonstrating a failure by the court to apply its own substantive equality jurisprudence, and reflecting a mechanical and abstract reasoning.⁴⁵ The minority judgment in this case however adopted a substantive equality approach. The minority judgment recognised that by the challenged provision criminalising sex workers, who are overwhelmingly women, this results in unfair sex discrimination.⁴⁶ The Justices behind the minority judgment further recognised the inequalities of society that underpin sex work and the choices that women can make.⁴⁷ The minority found that the section was discriminatory in that it brands the prostitute as the primary offender of the actual offence.

The effect of branding a prostitute as the primary offender is that it creates a difference in social stigma that will attach to the prostitute and the customer.⁴⁸ The Justices found that the difference in social stigma as arises from the section, was evidence of a pattern of applying different standards to the sexuality of men and women.⁴⁹ This stigma, was found to be prejudicial to women, and to run along the fault lines of archetypal presuppositions about male and female behaviour. This results in the propagation of stigma and stereotyping which reinforces gender inequality. The differential treatment of the prostitute and the client under the section stems from and perpetuates gender stereotypes in a manner which causes discrimination. In conclusion, the minority found that discrimination of this kind and

⁴³ *National Coalition* case [132].

⁴⁴ 23 of 1957.

⁴⁵ Albertyn C "Substantive equality and transformation in South Africa" 2007 (23) *South African Journal on Human Rights* 269.

⁴⁶ Paragraphs [63] to [66] of the judgment sets out analysis by the minority judgement of the application of substantive gender equality in relation to the facts of this case.

⁴⁷ Albertyn 2007 *SAJHR* 269.

⁴⁸ *Jordan* case [63].

⁴⁹ *Jordan* case [64].

differential treatment that perpetuates gender stereotypes, impairs the fundamental human dignity and personhood of women.⁵⁰

Bearing in mind the contextual approach that substantive equality calls for, the notion that female sex workers exercised 'choice'⁵¹ in engaging in sex work takes them out of the realm of the constitutional protection of equality and is problematic in that it fails to acknowledge the constraints of history or power imbalances in respect of gender, race and class.⁵²

As a legislative imperative for the transformation of the legal profession, the Legal Practice Act⁵³ was enacted to, *inter alia*, provide a legislative framework for the transformation and restructuring of the legal profession into a profession which is broadly representative of South Africa's demographics under a single regulatory body.⁵⁴ In considering the provisions of the Legal Practice Act, the measures that are in place in it are aimed at ensuring racial and gender representivity within the various bodies created by the Act. Nevertheless, there is no specific mention of any measures that are directed at entrenching gender equality in the profession in general.

1.2. Rationale of the Research

On the basis of the exposition in sections 1.1.1 to 1.1.3 above, and where transformation of the judiciary is seen as the process whereby the appointment of judges reflects the broader composition of South African society, *prima facie*, gender

⁵⁰ *Jordan case* [65].

⁵¹ *Jordan case* [17] where the majority judgment reasoned as follows in failing to take cognisance of the systematic, social and cultural realities of many women in the sex trade: "It was not suggested that prostitutes have no choice but to engage in prostitution. It was accepted that they have a choice but it was contended that the choice is limited or "constrained". Once it is accepted that section 20(1)(aA) is gender neutral and that by engaging in commercial sex work prostitutes *knowingly* attract the stigma associated with prostitution, it can hardly be contended that women prostitutes are discriminated against on the basis of gender" [*own emphasis*].

⁵² Albertyn 2007 SAJHR 270.

⁵³ Act 28 of 2014 (hereinafter referred to as the Legal Practice Act).

⁵⁴ Preamble and section 3(a). The Legal Practice Act is in force but it is not yet in effect, as at the date of this dissertation. Section 120 of the Act provides that chapter 10 (National Forum) will come into operation on a date to be fixed by proclamation. Chapter 2 (South African Legal Practice Council) will only come into operation 3 (three) years after Chapter 10 and the rest of the Act will come into operation on a date to be proclaimed after the commencement of Chapter 2 of the Act.

representation in the judiciary does not reflect the broader composition of society. This situation is not peculiar to the legal profession generally or the judiciary in particular - the composition of women in the workplace generally does not reflect the broader composition of South African society.⁵⁵ However, the constitutional dispensation calls for gender transformation in the workplace. This dissertation intends to interrogate, from a feminist perspective, the challenges that inhibit the attainment of transformation in this sense. That the first judge president of the Supreme Court of Appeal was appointed in 2017, over one hundred years since the court's inception, speaks to the direct need to address the pace of gender transformation in the country. By reference to the legal profession, this dissertation seeks to establish the role that patriarchy and gender stereotypes play in the attainment of substantive gender equality in the profession. The dissertation questions the extent to which the pursuit of a formal approach to gender equality that fails to take into account the cause and effect of gender stereotypes in society, can result in transformation of the workplace, in general and the legal profession, in particular. This study will add to the body of knowledge on the profession in that it takes the inquiry a step further than documenting the challenges that women face in advancing in professions and careers, by exploring the cause of and effect that patriarchy and gender stereotypes play in these experiences. This enquiry is important in determining if measures that professions should then put in place to address gender transformation must target the underlying patriarchal and stereotypical considerations that hinder the success and advancement of women in the profession. The outcomes of this enquiry will then be of significance as the final chapter of the dissertation considers recommendations for the successful implementation of substantive gender transformation in the legal profession.

1.3. Research Question

⁵⁵ SB Kahn & RP Motsoeneng "Gender equality in the South African public service: ideal or reality?" 2014 (49) *Journal of Public Administration* 1060. See also Haffajee F "Gender equality? Eish!" 2006 (26) *Rhodes Journalism Review* 19 and Botha D "Barriers to career advancement of women in mining: A qualitative analysis" 2017 (41) *South African Journal of Labour Relations* 15; Steyn R and Jackson L "Gender-based discrimination during appointments, promotions and remuneration: views of South African managers" 2014 (38) *South African Journal of Labour Relations* 49.

In view of the above exposition, this dissertation asks the following broad question: What is required of the legal profession that will result in substantive gender equality, which is necessary to achieve gender transformation?

1.4. Objectives

In answering the above research question, the objectives of this research are:

- (a) To consider the theoretical framework for gender equality in South Africa.
- (b) To analyse the current composition of the legal profession in South Africa from the perspective of gender and race.
- (c) To discuss the challenges to gender transformation in the legal profession in South Africa from a feminist perspective.
- (d) To consider measures that would be required to address challenges to gender transformation and encourage substantive gender transformation in the legal profession in South Africa.
- (e) To analyse the extent to which the Cape Bar Maternity Policy, as an existing transformation initiative, implemented on the basis of an existing gender stereotype, encourages substantive gender transformation in the legal profession.

1.5. Scope of the Study

The scope of the dissertation covers issues relating to transformation and the advancement of female lawyers (attorneys/advocates) across all races in the legal profession in South Africa, thereby increasing the gender representation of women in the judiciary. While acknowledging that the experiences of female lawyers vary between the various race groups in South Africa, as well as the socially construed category of 'class', it is beyond the scope of this study to isolate and distinguish the race and 'class' specific gendered experiences of women within the legal profession. This study does not deviate from the assumption that there is no appreciable difference between privileged and historically marginalised women.

1.6. Research Methodology, Motivation and Limitations

This research is a normative study in that it is based on desktop and library based research. No new data will be collected or analysed. The research will not involve human participants. The typical qualitative research method and standards applicable to legal research will be employed. The study discusses findings from legal sources which will be analysed. This will primarily involve the interpretation and critical analysis of the most important texts, postings, and laws to answer the research question. A detailed review, critical analysis, and interpretation of legislation, the Constitution, practice rules and regulations, policy, case law, and academic literature will be conducted. Reliance on existing research reports and findings recording the experiences of women in the legal profession will be extensively dealt with in Chapter 3 as there will be no direct interviews conducted with female practitioners. As the research considers the lived experiences of female legal practitioners who are in practice, there is reliance on periodical publications that are specific to the legal profession. In the absence of empirical research for this dissertation, these periodicals are referred to where they have record of legal practitioners' experiences. This discussion will also include my own experiences practicing in a large corporate law firm in South Africa. Statistical information will be extracted from a discussion document Gazetted by the CGE.⁵⁶ In considering Feminist Legal Theory, this dissertation limits the frame of analysis to the Cultural Feminist Theory and the Equal Treatment Theory.

1.7. Summary of chapters

The foregoing background serves as an introduction to this research. Chapter 2 provides a contextual analysis for the ensuing discussion by considering the international law, constitutional, legislative and policy frameworks within which equality in general, and gender equality in particular, is analysed in the South African context.

⁵⁶ Commission for Gender Equality "Discussion document on gender transformation in the judiciary and the legal sector" Notice 394 of 2018 Government Gazette No 41766 13 July 2018.

Chapter 3 focuses on the gender and race composition of the legal profession with a view to considering factors that impede gender transformation of the legal profession. This chapter considers the current demographics of the legal profession from a feminist legal theory perspective. The chapter will argue that the challenge lies with the approach adopted by the legal profession to attaining transformation in the profession. Further, it will be demonstrated that part of the challenge is the fact that the legal profession has resolved to address transformation by adopting formal equality as a key to achieving gender transformation as opposed to substantive equality. Chapter 3 further sets out the role that gender stereotyping plays in the transformation of the legal profession. Seeing as substantive equality considers measures discriminatory is interpreted in the light of whether it reinforces pre-existing group disadvantage, stereotyping and prejudice,⁵⁷ this chapter considers if there is theoretical justification in relying on the very gender stereotypes, that may pose as a challenge to the attainment of substantive equality in the profession, to explain and justify transformation initiatives.

Chapter 4 considers what is required in the legal profession to facilitate substantive equality. It will provide an analysis of the extent to which the Cape Bar Maternity Policy as an existing example of an initiative that is already being implemented by the legal profession in various parts of the country for purposes of transformation, encourages substantive gender transformation of the legal profession. This will be done by considering the extent to which the initiative relies on gender stereotypes as a justification for the initiative and whether such reliance on a gender stereotype, although discriminatory, can be justified.

Chapter 5 will consist of the key findings of the study and will provide recommendations and a conclusion.

⁵⁷ Jagwanth 2005 *Acta Juridica* 131.

1.8. Ethical clearance

Ethical clearance for this study was obtained and approved. Enclosed as Annexure 1 herein, is the ethical clearance certificate bearing the clearance number: ST 32/2017.

1.9. Conclusion

This chapter has set out the background for this research. It has outlined the meaning of transformation that is adopted for purposes of this study and set out a brief summary of the legal profession in South Africa. In exploring the broad question that this research asks - What is required of the legal profession that will result in substantive gender equality, which is necessary to achieve gender transformation? - this dissertation must first investigate the source of the obligation to achieve gender transformation at the outset. Chapter 2 will therefore consider the theoretical framework for gender equality in South Africa, as a foundation for the ensuing analysis of gender equality in this dissertation.

CHAPTER 2

THEORETICAL FRAMEWORK TO CONTEXTUALISE THE ANALYSIS OF GENDER EQUALITY IN SOUTH AFRICA

2.1. Introduction

Chapter 1 provides a background for the subject of this dissertation. This background illustrates the rationale, research question, motivation, limitations, objectives and scope of the study. Chapter 2 offers an introduction to the legal profession and provides a summary of the transformation imperatives of the legal profession in South Africa. In considering the constitutional imperative of equality in the legal profession, Chapter 1 mentioned two cases, the *National Coalition* case and the *Jordan* case, in which the Constitutional Court of South Africa assigned diverging meanings to the constitutional guarantee to equality. Chapter 2 will canvass the constitutional, legislative and policy measures put in place in South Africa to address the concept of equality at the turn of democracy. It will also contain an indication of the international framework on equality that binds South Africa, thus providing the international law source of the obligations on gender equality. This chapter also provides a discussion on other relevant international and national instruments that have a bearing on gender equality in South Africa. This information sets out the context within which to analyse transformation efforts undertaken in the legal profession. Before setting out the legal context within which to analyse transformation, this chapter will start by considering the manner in which marginalisation of women in society tends to manifest. This consideration of the South African social context for an equality discussion, ensures that this research takes into account the actual realities of women's lives, their perceived place within the community and the power, resources and interests implicated by calling for gender transformation.⁵⁸

⁵⁸ Albertyn C "The Stubborn Persistence of Patriarchy: Gender Equality and Cultural Diversity in South Africa" 2009 (2) *Constitutional Court Review* 184.

2.2. Social context: Patriarchy at the centre of women's experiences in South Africa

This year (2018), has seen the resignation of a well-respected male Chief Executive Officer (CEO) of Imperial Holdings, a Johannesburg Stock Exchange listed company, (considered a veteran of South African business) following an adverse judgment in a case brought by a dismissed employee, Ms Adila Chowan, whom he called a "female employment equity candidate". This case sets the tone for the consideration of the legal framework on equality in this chapter in that it aptly demonstrates the social context within which the legal framework for gender equality is intended to operate. In this case,⁵⁹ Mr Lumberti, the CEO of the company, in a meeting with several male executives, arranged by Ms Chowan to address her dissatisfaction at being repeatedly overlooked for promotion to Chief Financial Officer (CFO), despite continuous undertakings that she was up for promotion, was advised that as: "a female, employment equity, technically competent, [sic] they would like to keep her but if she wants to go she must go, others have left this management and done better outside the company, and that she required three to four years to develop her leadership skills".⁶⁰

When Ms Chowan lodged a grievance, she (the complainant) was suspended and subsequently dismissed. In court, her main claim was on the basis that her dismissal was a result of her disclosure of the discriminatory treatment by Mr Lumberti which dismissal was therefore contrary to the Protected Disclosures Act.⁶¹ The court found in favour of Ms Chowan on all her claims. The court stated that:

There is a great public interest in ensuring that the existence of systemic discrimination and inequalities in respect of race and gender be eradicated. As blatant and patent as discrimination was in the days of apartheid, so subtle and latent does it also manifests itself today.⁶²

⁵⁹ *Chowan v Associated Motor Holdings (Pty) Ltd and Others* (22142/16) [2018] ZAGPJHC 40 (23 March 2018) (hereinafter the *Chowan case*).

⁶⁰ *Chowan case* [20].

⁶¹ 26 of 2000.

⁶² *Chowan case* [60].

In testimony, Ms Chowan stated that she had built her career, been a CFO and acted as a CEO, yet all her achievements were not being recognised, apart from the fact that she was being objectified in terms of being a female empowerment equity candidate.⁶³ Her case brings to the fore the deficiencies in the company's broader gender relations culture that were evidenced in the proceedings as being gender biased. The company's senior group leadership was described in testimony as being a "hard environment" that was "White male dominated". Bearing in mind that Mr Lembergi acknowledged Ms Chowan's technical capabilities for the senior position, it appears then that the only reason that her male counterparts were repeatedly promoted over her, was her unsuitability to lead in the "hard environment" by reason of being a woman. Mr Lembergi's perception that a female employment equity candidate, albeit wholly technically competent, would not be a suitable candidate for promotion was informed by stigma and stereotypes around character traits borne by women that ill-equip them to excel in "hard" male dominated spaces. These archetypal presuppositions about male and female behaviour that results in propagation of stigma and stereotypes, reinforces gender inequality in public and private life. Ms Chowan's case demonstrates a manifestation of this inequality in public life.

Other instances of inequality in public life are outlined in cases of sexual harassment in the workplace. Sexual harassment as experienced in the workplace is an indication of the hold that patriarchy and gender stereotypes have in the workplace. Sexual harassment as gender discrimination has been developed over the years. It is a form of sex discrimination when it reflects or perpetuates gender stereotypes in the workplace.⁶⁴ It perpetuates, enforces and polices a set of gender standards that aim to feminize women and masculinize men.⁶⁵ The treatment of harassment as a form of unfair discrimination in section 6(3) of the Employment Equity Act 55 of 1998 (hereinafter referred to as the EEA) recognises that such conduct poses a barrier to the achievement of substantive equality in the workplace. The Labour Appeal Court has noted that by its nature sexual harassment creates an offensive and very often

⁶³ *Chowan case* [21].

⁶⁴ Eskridge WN and Hunter ND *Sexuality, gender and the law* (Foundation Press New York 2011) 652.

⁶⁵ Eskridge and Hunter *Sexuality, gender and the law* 652.

intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace.⁶⁶

Similarly, there are several scenarios that demonstrate the manifestation of this inequality that arise from archetypical presuppositions about male and female behaviour in private life in South Africa. However, most notably, this is in instances of violence against women. The perception of women as being inferior to their male counterparts, which is founded on patriarchy in societies, is seen as the root of violence against women.⁶⁷ Cultural practices that are male dominant, such as polygamy practiced by various cultural groups in parts of South Africa, has been found to be a factor in explaining violence against women in South Africa.⁶⁸ The Constitutional Court has noted that because of the systemic, pervasive and overwhelming gender-specific nature of domestic violence, it is a phenomenon that both reflects and re-enforces patriarchal domination in a particularly brutal form.⁶⁹ The high incidents of rape in South Africa are of grave concern to many in our society. The gendered construction of men and women's sexuality is seen as the root of the high rate of sexual violence.⁷⁰ From this perspective, patriarchal social conditioning results in the perception that a good woman would not easily consent to sexual intercourse and it is the role of the man to persuade her to engage in sexual activity with him.⁷¹

The idea of the universal wife, a good wife who is obedient and will not challenge accepted gender roles is carried through from interactions in the domestic front into the workspace.⁷² These perceptions have patriarchy as their root. A good wife should therefore, for example, endure in a marriage in which she is continually subjected to domestic violence by her husband. Despite her professional achievements in the workplace, when in the private space of her home, to be a good

⁶⁶ *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) [19-21].

⁶⁷ N de Wet *Violence against young women in South Africa: An analysis of the current prevalence and previous levels of youth mortality, 1997-2009* at 50 in YK Djamba & SR Kimuna (Eds) *Gender-Based Violence: Perspectives from Africa, the Middle East and India* Springer.

⁶⁸ de Wet in *Violence against young women in South Africa: An analysis of the current prevalence and previous levels of youth mortality 1997-2009* 50.

⁶⁹ *S v Baloyi (Minister of Justice & another Intervening)* 2000 (2) SA 425 (CC) [12].

⁷⁰ Banda F *Women, the law and human rights: An African Perspective* (Hart New York 2005) 171.

⁷¹ Banda *Women, the law and human rights: An African Perspective* 171.

⁷² Banda *Women, the law and human rights: An African Perspective* 159.

wife requires that she plays the role of the universal wife by submitting to her husband and not to be impertinent. Her professional role is to be left behind at the office. These traditional gender roles that are primarily determined by reference to women's sexual and reproductive capacity result in women remaining in inferior power positions and dependent upon men for status and resources.⁷³

It is therefore evident that historical, patriarchal notions of a woman's "place" are often carried through from a private environment, into the work environment. With the demonstrable social environment within which women in South Africa must manoeuvre in the workplace and in the private sphere, the legal framework which requires that gender equality is attained in the workplace is of paramount importance. A discussion on the various international instruments relevant to gender equality, now ensues.

2.3. International Conventions on gender equality

Gender equality has been codified in several international human rights documents. Section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights, a court must consider international law.⁷⁴ This provision indicates the importance of understanding the meaning ascribed to human rights from an international law framework relevant to an analysis of the South African human rights framework. This section will consider the key international instruments that are binding on South Africa, and consider whether the definition of equality that is intended in these documents is that which requires the implementation of formal equality or substantive equality.

2.3.1. The Universal Declaration on Human Rights

The Universal Declaration on Human Rights (UDHR)⁷⁵ acknowledges equality of all men and women. Article 1 provides (in a very gender neutral language) that: "all

⁷³ Albertyn 2009 CCR 5 171.

⁷⁴ *Road Accident Fund v Masindi* 2018 (6) SA 481 (SCA) at para 12. See also *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 178 fn 28 and *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 26.

⁷⁵ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

human beings are born free and equal in dignity and rights". The UDHR is not binding on member states. However, this document codifies the human right to equality as an international law norm. The UDHR makes no specific mention of special measures for women in acknowledgment of the differing life experiences of men and women in society.

2.3.2. International Covenant on Civil and Political Rights

Article 3 of the International Covenant on Civil and Political Rights (ICCPR)⁷⁶ provides that states undertake "to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant". That it is intended that the observance of this obligation by member states will result in the attainment of substantive equality as opposed to formal equality, is captured by the Human Rights Commission's interpretation of Article 3 in its General Comment No 4. In the General Comment, the Human Rights Commission criticised member states for under reporting on their compliance with Article 3 and called for state reports to contain more information regarding the role of women in practice with a view to ascertaining what measures, in addition to purely legislative measures of protection, have been or are being taken to give effect to the precise and positive obligations on gender equality. Recognising that substantive gender equality cannot be attained by simply enacting laws, the Human Rights Commission noted that states are required not only to have measures of protection but also affirmative action designed to ensure the positive enjoyment of rights."⁷⁷

2.3.3. International Covenant on Economic, Social and Cultural Rights

Article 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷⁸ contains the "equality guarantee" in very similar language to that

⁷⁶ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

⁷⁷ Human Rights Committee, General Comment 4, Article 3 (Thirteenth session, 1981), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 4 (1994).

⁷⁸ International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976.

contained in the ICCPR. Article 3 places an obligation on member states to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant. On a plain reading of this provision it is difficult to determine the precise definition of equality as envisaged in the Covenant. In its interpretative role, the UN Committee on Economic, Social and Cultural Rights (the ECOSOC Committee) endorsed the perspective that member states undertake to ensure that their citizens enjoy substantive and formal equality in the enjoyment of the rights contained in the Covenant.⁷⁹ The essence of Article 3 of ICESCR is that the rights set forth in the Covenant are to be enjoyed by men and women on a basis of substantive equality. This means that while expressions of formal equality may be found in constitutional provisions, legislation and policies, Article 3 also mandates the equal enjoyment of the rights in the Covenant for men and women in practice.⁸⁰

Taking the consideration of the lived experiences of women into account in its interpretation of Article 3, the ECOSOC Committee further noted that the obligation undertaken by member states in this article calls on them to address gender-based social and cultural prejudices, provide for equality in the allocation of resources, and promote the sharing of responsibilities in the family, community and public life.⁸¹ Article 7 (a) of the ICESCR, speaks particularly to the work context. It requires member states to recognize the right of everyone to enjoy just and favourable conditions of work. Article 3, requiring gender equality in the work environment, requires that member states take steps to reduce the constraints that are faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare.⁸²

2.3.4. The Convention on the Elimination of Discrimination Against Women

⁷⁹ UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant) paragraph 6.

⁸⁰ UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant) paragraph 6.

⁸¹ UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant) paragraph 22.

⁸² UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant) paragraph 24.

The Convention on the Elimination of Discrimination Against Women (CEDAW)⁸³ focusses on non-discrimination against women.⁸⁴ Article 3 on equality must be read together with Articles 2, 4 and 5. They require that measures are put in place by member states to attain formal equality and substantive equality.

Article 3 forms the core of the obligation on member states to effect gender transformation. It provides a framework for the measures for structural transformation that are set out in Articles 4 and 5 and reinforces the means by which this is to be done.⁸⁵ Article 3 provides that:

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4 introduces the concept of special measures aimed at achieving substantive equality. Article 4 provides that:

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 4(2) highlights that special measures aimed at protecting maternity are not considered as discriminatory. This provision is key in understanding the need for the integration of special programmes such as the Cape Bar Maternity Policy that will

⁸³ Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

⁸⁴ Chinkin C and Freeman MA "Introduction" in Marsha A et al *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford London 2013) 17.

⁸⁵ Chinkin C "Article 3" in Marsha A et al *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford London 2013) 114.

be considered in section 4.4, Chapter 4 hereunder. Raday states, and I agree, that in order for substantive equality to materialise, it is legitimate and necessary to make provision for the role that women play in procreation and to put in place special measures as required to address their specific needs in this role despite these measures only targeting women in their reproductive roles.⁸⁶ In contrast however, is the question of child-rearing, which is a non-biological aspect of maternity. Raday states that Article 4(2) of CEDAW allows for special measures to protect maternity which includes child-rearing. He however, further states that this protected measure would be available to men and women on a gender neutral basis, so as to counter the stereotypically imposed gendered division of labour that currently predominantly allocates child-rearing to women.⁸⁷ Phooko and Radebe have suggested specific measures that may achieve the purpose of countering imposed gendered division of labour for the legal profession as a whole.⁸⁸ These include paternity leave so that the parenting responsibilities are equally shared between men and women; a flexible and clear transfer policy for judges that does not require them to apply to the JSC when requesting to be transferred to another division of the high court, where their family members are based and flexible working hours for both female and male legal practitioners.⁸⁹

Holtmaat's assessment is that Article 5 of CEDAW acknowledges that the foundation of gender discriminatory practices affecting women in society are gender stereotypes and fixed parental gender roles.⁹⁰ It therefore follows that eliminating gender discrimination requires that these root causes of gender discrimination are eradicated.⁹¹ Article 5 of CEDAW creates obligations on member states to take steps towards modification of mind sets on stereotypes and predetermined gender roles in society. It provides that:

⁸⁶ Raday F "Article 4" in Marsha A *et al* *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford London 2013) 137.

⁸⁷ Raday in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* 139.

⁸⁸ Phooko R and Radebe S "Twenty-three years of gender transformation in the Constitutional Court of South Africa: progress or regression" 2016 *Constitutional Court Review* 306.

⁸⁹ Phooko and Radebe 2016 CCR 313.

⁹⁰ Moltmaat R "Article 5" in Marsha A *et al* *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford London 2013) 145.

⁹¹ Moltmaat in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* 145.

States Parties shall take all appropriate measures:

- (1) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.
- (2) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

The key provisions in understanding gender equality, Articles 2, 3, 4 and 5 of CEDAW, indicate that CEDAW requires member states to take measures towards attaining a change in access to opportunities for men and women, a change in the value systems of institutions and systems to enable them to shift away from historically determined male paradigms of power and life patterns.⁹²

2.3.5 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Article 2 of the African Charter on Human and Peoples' Rights (the African Charter)⁹³ guarantees gender equality by recognising an entitlement to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind, such as sex. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Women's Protocol)⁹⁴ expounds on this right further. Acknowledging that addressing gender stereotypes is central to attaining gender equality, Article 2(2) of the Women's Protocol calls on member states, in fulfilling their African Charter obligation to address gender inequality, to:

commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other

⁹² Raday in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* 140.

⁹³ The African Charter on Human and Peoples' Rights <http://www.achpr.org/instruments/achpr/> entered into force Oct. 21, 1986.

⁹⁴ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa <http://www.achpr.org/instruments/women-protocol/> entered into force Nov. 25, 2005.

practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

On this basis, Article 2(2) of the Women's Protocol supplements the equality clause contained in the African Charter and intends for the realisation of substantive gender equality rather than formal equality. I now turn to discuss the relevant national legislation that has a bearing on gender equality in South Africa.

2.4. South African Constitutional Framework

2.4.1. South Africa's historical context with regard to the recognition of the right to equality

Pre-1994, South Africa was a repressive regime characterised by a widespread system of political, economic and social discrimination and disenfranchisement.⁹⁵ However, gender inequality can be traced *inter alia*, in the historically, yet universally existing patriarchal systems and structures that have existed for many years, placing males at the centre of decision making, headship and occupation of the political and production arenas of societies - African and non-African.⁹⁶ South Africa, like many countries that attained independence as a result of liberation struggles, officially recognised the contribution of women in the struggle for independence.⁹⁷ This recognition should have led to the elimination of the legal trials affecting women, primarily through the inclusion of equality and non-discrimination clauses in the national Constitution.⁹⁸

Equality was poised in the Interim Constitution of South Africa as a tool to augment the process of transforming a nation deeply divided by its past, characterised by strife, conflict, untold suffering and injustice, into one based on democratic values,

⁹⁵ Rapatsa M "The right to equality under South Africa's transformative constitutionalism: A myth or reality?" 2015 (11)2 *Acta Universitatis Danubius Juridica* 2. Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

⁹⁶ Akala B and Divala JJ "Gender Equity tensions in South Africa's post-apartheid higher education: in defence of differentiation" 2006 (30)1 *South African Journal of Higher Education* 1.

⁹⁷ Banda *Women, the law and human rights: An African Perspective* 25.

⁹⁸ Banda *Women, the law and human rights: An African Perspective* 26.

social justice and the respect and protection of human rights for all.⁹⁹ South African women with diverse backgrounds were involved in the constitutionalisation of women's rights, including gender equality in South Africa.¹⁰⁰ This was achieved by ensuring that women's participation in the process was initiated well before the constitutional process embarked in earnest, with a series of workshops and conferences in which a Charter for Women's Rights was workshopped.¹⁰¹ Through this process, a counter-conservative group of lobbyists calling for the retention of male authority in the home and recognition of traditional rule and customary law as superior to gender equality came about and sought to similarly inform the post-apartheid constitution-making process.¹⁰² Despite this conservative group's agenda, gender equality was secured by the fact that parties in the negotiations counsels were required to have a female negotiator and advisor. The women selected as negotiators in the constitution making process organised themselves into a women's caucus to address issues of concern specific to women. Their participation in the process can largely account for the recognition of gender issues in the constitution-making process.¹⁰³

2.4.2. *Equality in the Constitution*

Post-1994, the Constitution pursued constitutional transformation from the pre-1994 dispensation, by affirming the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of, *inter alia*, gender.¹⁰⁴

Equality amongst all our people lies at the heart of the Constitution.¹⁰⁵ Section 1 of the Constitution promotes the values upon which the Republic of South Africa is founded, including human dignity, the achievement of equality and the advancement of human rights and freedoms. Equality is one of the three foundational

⁹⁹ Rapatsa 2015 *Acta Universitatis Danubius Jurdica* 2.

¹⁰⁰ Mabandla B "Women in south Africa and the Constitution-making process" in Peters J and Wolper A (eds) *Women's rights: human rights* (Routledge London 1995) 68.

¹⁰¹ Mabandla *Women's rights: human rights* 68.

¹⁰² Mabandla *Women's rights: human rights* 68.

¹⁰³ Mabandla *Women's rights: human rights* 68.

¹⁰⁴ Rapatsa 2015 *Acta Universitatis Danubius Jurdica* 2.

¹⁰⁵ See *President of the Republic of South Africa and another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC) (hereinafter the *Hugo* case [74]).

constitutional values captured under section 7(1) of the Constitution.¹⁰⁶ Section 7(1) provides that:

This Bill of Rights, is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.¹⁰⁷

The right to equality is contained and explained in section 9 of the Constitution. It provides that:

9. (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 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.¹⁰⁸

Despite attempts at grasping the meaning of equality and what it entails, this research finds that there has been no consensus on a comprehensive definition. Holistically, equality is enshrined in the Constitution as a legal right and as a value. Section 9 provides for the legal right providing procedural and remedial action for enforcement. The preamble to the Constitution and section 7(1) articulate the value system that informs the legal right. Read in this way, although the Constitution does

¹⁰⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 [23] where Justice Yacoob described them as the foundational values of our society by stating that: "There can be no doubt that human dignity, freedom and equality, the foundational values of our society...".

¹⁰⁷ Section 7(1) of the Constitution.

¹⁰⁸ Section 9 of the Constitution.

not contain a definition for the term “equality” on various grounds, it was intended that equality, as contemplated therein, was to provide substance to transformative constitutionalism that will, in turn, transform the past and present, to build a better future.¹⁰⁹

Existing jurisprudence provides an indication of the meaning of gender equality as required by the Constitution. In addition, the case law as outlined in Chapter 1 adopts a diverging view on the content of equality. Although the Constitutional Court of South Africa has in a number of cases pronounced that equality as envisioned in the Constitution, is substantive equality as opposed to formal equality, section 1.3 of Chapter 1 sets out the stark contrast in the oscillating nature of the constitutional court’s judgments in dealing with the distinction in the meaning of equality as envisaged in the Constitution. The judgements of the *National Coalition* case and the *Jordan* case demonstrate that often times while the intention is to effect substantive equality, the outcomes of the judgment does, in fact, not achieve this.

Equality as meaning, acknowledging sameness - with equal importance and equal value - was first captured in *President of the Republic of South Africa and Another v Hugo*¹¹⁰ as according all human beings equal dignity and respect regardless of their membership of particular groups.¹¹¹ Albertyn suggests that equality in this sense is measured by dignity which requires that women are affirmed as autonomous human beings, not property of another, whose bodies are owned and disposed of by others, or glorified as wives and mothers defined only on the basis of their reproductive and sexual roles as relative to the role of men.¹¹²

Equality in the Constitution has to also be understood to entail a remedial and redistributive aspect captured as a legal right in section 9(2) of the Constitution. The recognition of sameness and the redistributive aspect of equality are nonetheless not mutually exclusive.¹¹³ Section 9(1) serves to recognise sameness and the dignity of women, however, this alone will not result in substantive equality. Redistribution through substantive equality addressed in section 9(2) of the

¹⁰⁹ Rapatsa 2015 *Acta Universitatis Danubius Jurdica* 8.

¹¹⁰ *President of the Republic of South Africa and another v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC) (hereinafter the Hugo case) [73].

¹¹¹ *Hugo case* [41].

¹¹² Albertyn 2009 CCR 188.

¹¹³ Fredman S “Redistribution and Recognition: Reconciling Inequalities” 2007 (3) *South African Journal on Human Rights* 223.

Constitution is necessary to address the systemic inequality which would otherwise be left untouched by a mere prohibition of gender discrimination.¹¹⁴

The redistributive element of substantive equality calls into question the extent to which the implementation of special measures aimed at achieving equality result in the limitation of the equality rights of men in the legal profession. To answer this question, requires a consideration of the circumstances under which the limitation of the equality rights of men in the legal profession is justifiable. Section 36 of the Constitution provides for the limitation of rights, including the right to equality. The right to equality is a non-derogable (protected) right with respect to *unfair* discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language (*own emphasis*).¹¹⁵ The right to equality in respect of gender is derogable and hence subject to limitations. Sex is a prohibited ground of discrimination that renders differential treatment on the basis of physical characteristics of either being a man or a woman automatically unfair discrimination. Sex is more concerned with physical characteristics of men and women, gender is more concerned with social and cultural construction of men and women.¹¹⁶ The limitation of rights as captured in section 36 of the Constitution is a reflection of the international Siracusa Principles on the Limitation and Derogation provisions in the International Covenant on Civil and Political Rights¹¹⁷ that provide for circumstances under which human rights contained in the ICCPR can be limited. One of the principles which has received international acceptance is that the provisions allowing for restrictions or limitations of rights must be narrowly and strictly

¹¹⁴ Ngwenya C "Western Cape Forum For Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education" (2013) 1 *African Disability Rights Yearbook* 144.

¹¹⁵ Table of Non-Derogable Rights as set out in the Bill of Rights.

¹¹⁶ Bizimana A *Gender Stereotyping in South African Constitutional Court Cases: An Interdisciplinary Approach to Gender Stereotyping* (LLM dissertation University of Pretoria 2015).

¹¹⁷ Siracusa Principles on the Limitation and Derogation provisions in the International Covenant on Civil and Political Rights UN Doc E/CN.4/1985/4 (1985)
<https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> (Date of use: 3 February 2018).

construed.¹¹⁸ This is premised on the idea that the protection of human rights is a general rule and human rights limitations are a mere exception to the rule.¹¹⁹

In the case of *Pretoria City Council v Walker*,¹²⁰ the Constitutional Court was faced with determining the validity of a situation comparable to the situation where women in the legal profession would be beneficiaries of special measures in line with the equality requirements set out in the Constitution and equality legislation. In this case, Walker sought a declaration that *inter alia*, a policy by the City Council to charge residents of a formerly 'white area' in the suburbs, rates based on consumption tariffs where consumption was measured by meters on the property and residents of formerly 'black areas' in the townships, a flat rate per household regardless of actual consumption, unconstitutional for being unfair discrimination. The Court found, on this particular point, that the action of the City Council was discrimination but that such discrimination was held to be fair. This measure of differentiating the tariffs was found to be a reasonable limitation on the right to equality of other groups. The court found that the discrimination did not have an unfair impact on the residents of the suburbs who had not been disadvantaged by the racial policies and practices of the past. From an economic point of view, the victims of the discrimination were neither disadvantaged nor vulnerable.¹²¹

In *Parks Victoria (Anti-Discrimination Exemption)* an Australian case,¹²² the tribunal was also faced with determining the validity of a situation comparable to the situation where women in the legal profession would be beneficiaries of special measures in line with the equality requirements set out in the Constitution and equality legislation. In this case, Parks Victoria wanted to advertise for and employ Indigenous people to care for Wurundjeri country. The Tribunal held that the purpose of the activity was to provide employment opportunities to Indigenous people, to increase the number

¹¹⁸ See Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights UN Doc E/CN.4/1985/4 (1985). Article 3 provides that 'all limitation clauses shall be interpreted strictly and in favour of the right at issue'.

¹¹⁹ Nyane H "Limitation of human rights under the constitution of Lesotho and the jurisprudence of superior courts" *Lesotho Law Journal* (2015)23 8.

¹²⁰ *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) (Hereinafter the *Walker* case).

¹²¹ *Walker* case [47].

¹²² Papaelia L "Tribunal considers special measures and discrimination under the Charter and new Equal Opportunity Act" *Human Rights Case Summaries* <https://www.hrlc.org.au/human-rights-case-summaries/tribunal-considers-special-measures-and-discrimination-under-the-charter-and-new-equal-opportunity-act> (Date of use: 3 February 2018).

of Indigenous people employed by Parks Victoria, to provide opportunities for connection and care for the Wurundjeri country by its traditional owners and also for the maintenance of the culture associated with the country. The Tribunal was satisfied that the measure was proportionate because at the time the application was made, only 7.6% of Parks Victoria's workforce was Indigenous. This measure of limiting the employment opportunity to Aboriginal people was found to be a reasonable limitation on the right to equality of other groups.

Similarly, it is arguable that should a limitation of the right to equality of men within the legal profession be proposed, by the intentional action of increasing the number of women in the legal profession, this would be justifiable in accordance with the criteria in section 36 of the Constitution and therefore constitutionally valid.¹²³ In addition, the purpose of the limitation would not constitute *unfair* discrimination based on sex or gender, as the goal of such limitation would be to balance and proportionally allow for the adequate representation of women in the legal profession. Furthermore, section 9(5) of the Constitution outlines that discrimination is unfair unless it is established that the discrimination is fair. It is my submission that such discrimination would not be "unfair" but would rather allow for the realisation of the right to equality, in a just and fair manner, as enshrined in the Bill of Rights.

The legitimacy of the laws that enable these special measures is determined by considering if it is a law of general application and is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹²⁴ All forms of legislation and common law qualify as 'a law of general application' but policies or practices do not.¹²⁵ On this basis, I consider the laws in South Africa that are in place to promote the attainment of equality in the legal profession.

2.5. South African Legislative Framework

Section 9(2) of the Constitution requires the state to put in place legislative and policy measures to promote the attainment of equality. There are several laws which

¹²³ Currie and de Waal *The Bill of Rights Handbook* 164.

¹²⁴ Currie and de Waal *The Bill of Rights Handbook* 168.

¹²⁵ Currie and de Waal *The Bill of Rights Handbook* 169.

give effect to the right to equality in various arenas in South Africa. Some of these laws operate to regulate women's private life experiences, such as the recognition of customary marriages under the Recognition of Customary Marriages Act,¹²⁶ and others operate to regulate women's public life experiences. In the context of employment law, the EEA provides the legal framework for the advancement of women within employment. All other gender relationships and interactions in society, not bound by the equality provisions of the EEA, are regulated under the Promotion of Equality and Prevention of Unfair Discrimination Act (hereinafter referred to as PEPUA).¹²⁷ The Women Empowerment and Gender Equality Bill was passed by the National Assembly in March 2014. However, following receipt of comments from various civil society organisations working on human rights in general and women's rights in particular, the Bill was referred for further consultation to Parliament.¹²⁸ The Bill's stated objective was:

To give effect to section 9 of the Constitution of the Republic of South Africa, 1996, in so far as the empowerment of women and gender equality is concerned; to establish a legislative framework for the empowerment of women; to align all aspects of laws and implementation of laws relating to women empowerment, and the appointment and representation of women in decision making positions and structures; and to provide for matters connected therewith.¹²⁹

The Bill sought to impose a quota system of a minimum of 50% gender representation in institutions. This in itself was a source of criticism against the Bill, as it could result in a new form of inequality. The Centre for Constitutional Rights submitted the view that pursuit of achieving a minimum of 50% representation of women in various walks of society is paradoxical, as anything more than 50% representation will, in effect, create a new inequality.¹³⁰ The Legal Resources Centre

¹²⁶ 120 of 1998.

¹²⁷ 4 of 2000.

¹²⁸ Nomadolo L "Gender-based discrimination in the workplace in south Africa" *Joburg Post* 28 July 2017 <https://www.joburgpost.co.za/2017/07/28/gender-based-discrimination-workplace-south-africa/> (Date of use: 9 March 2018).

¹²⁹ Women Empowerment and Gender Equality Bill https://www.juta.co.za/media/filestore/2013/11/B50_2013.pdf (Date of use: 24 April 2018).

¹³⁰ CFR An Analysis: The Women Empowerment and Gender Equality Bill <http://www.cfc.org.za/index.php/latest/264-article-an-analysis-the-women-empowerment-and-gender-equality-bill> (Date of use: 22 April 2018).

in its submission to Parliament noted that this model would not amount to substantive equality, but rather formal equality.¹³¹

2.5.1. *Employment Equity Act (EEA)*

The purpose of the EEA is to:

Achieve equity in the workplace by (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.¹³² (own emphasis)

Tapanya distinguishes broad representivity and demographic representivity as a means to be adopted in the attainment of equality.¹³³ He argued, in May 2017, that the EEA adopts a standard of affirmative action measures, not reflected in section 9(2) of the Constitution, that reads in equitable representation as a requirement of substantive equality. The practical effect of this standard is the potential application of the concept of demographic representivity - a mechanism that operates the same way as racial quotas.¹³⁴ Broad representivity on the other hand, is the standard required under section 174(2) of the Constitution in the appointment of judicial officers. This standard only requires the presence in an employer's workforce, of the race and gender classes, which are represented in South Africa's national demographic profiles.¹³⁵

The EEA applies to all employers and employees except to members of the National Defence Force, the National Intelligence Agency and the South African Secret Service.¹³⁶ The implementation of affirmative action measures is not by choice

¹³¹ LRC "Submission to the Portfolio Committee on Women, Children and People with Disabilities on the Women's empowerment and Gender Equality Bill" 30 January 2014 <https://constitutionallyspeaking.co.za> (Date of use: 18 March 2018).

¹³² Section 2 of the EEA.

¹³³ Tapanya G "Unpacking the affirmative action equation from a constitutional perspective" 2017 (May) *De Rebus*.

¹³⁴ Tapanya 2017 *De Rebus*.

¹³⁵ Tapanya 2017 *De Rebus*.

¹³⁶ Section 4 of the EEA.

under the EEA. Designated employers must design and implement affirmative action measures for people from designated groups. In *Naidoo v Minister of Police*,¹³⁷ the essence of affirmative action was stated to be differentiating and preferring one member of a designated group of people so as to ensure substantive equality with the aim of redressing the effects of past discrimination and to promote equality. The EEA prohibits unfair discrimination, *inter alia*, on the basis of race and/or gender in terms of section 6. In this case, the South African Police Services (SAPS) Employment Equity plan was the subject of scrutiny. Despite Naidoo, a Black¹³⁸ woman, scoring higher than an African male officer similarly shortlisted for the position, the SAPS appointed the male for the position with the view that his appointment would address the underrepresentation of Africans on the police force. This Equity plan was found to fall short of the EEA's aim of promoting equal representation in the workplace and the court ordered the appointment of Naidoo over her African male counterpart. However, an affirmative action measure, in terms of the EEA, to the extent that it embodies a preference, whether on the grounds of race or gender, is not unfair discrimination, if it is designed to promote substantive equality of a designated group.

While the EEA does not contain a definition of equality, it can be argued that from the affirmative action purpose articulated in section 2 of the Act, the "equality" that the EEA intends to attain, is that of providing redress for past disadvantages experienced by certain designated groups. This would be in line with substantive equality that goes beyond merely treating all persons alike.

2.5.2. *The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)*

PEPUDA defines equality as including the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes.¹³⁹ In other words, substantive

¹³⁷ *Naidoo v Minister of Safety and Security and Another* (JS 566/2011) [2013] ZALCJHB 19; [2013] 5 BLLR 490 (LC); 2013 (3) SA 486 (LC); (2013) 34 ILJ 2279 (LC) [72].

¹³⁸ According to section 1 of the EEA, "black people" is a "generic term which means Africans, Coloureds and Indians."

¹³⁹ Section 1 of PEPUDA.

equality, as opposed to formal equality. Section 24(2) of PEPUDA places an obligation on all persons, not just the state, to promote equality. It binds the state and all persons in the country, but does not apply to any person to whom and to the extent to which the EEA applies.¹⁴⁰ As a general rule, the EEA will apply where an employment relationship arises and PEPUDA will apply in all other cases to regulate equality.

One such case was *Du Preez v Minister of Justice and Constitutional Development & Others*.¹⁴¹ In this case, PEPUDA applied and not the EEA, as magistrates were not considered to be employees of the state. In this case, a highly experienced White magistrate claimed that he had been unfairly discriminated against, by the interview panel applying selection criteria which acted as an absolute barrier to his selection, by excluding him from being considered for appointment to the Port Elizabeth Regional Court. The Department's defence was that the selection criteria was justified by its affirmative action policy. On the one hand, the Court recognised that affirmative action measures must be seen as essential and integral to the goal of equality; and not as limitations of or exceptions to equality rights.¹⁴² In terms of the definition of discrimination in PEPUDA, on the other hand, it found that the applicant's exclusion from the selection process amounted to discrimination and, therefore, it was necessary to consider whether it was fair. Although section 174(2) of the Constitution requires the need for the judiciary to reflect broadly with regard to the racial and gender composition of South Africa, when judicial officers are appointed, the court noted that this is not the only criterion; other criteria such as experience, legal knowledge, leadership and management skills must also be taken into account. However, such consideration had not been concluded and as a result, Black women with minimum qualifications, automatically prevailed over all other applicants. The selection was therefore held to be unfair.

¹⁴⁰ Section 5(1) and (3) of PEPUDA.

¹⁴¹ *Du Preez v Minister of Justice and Constitutional Development and Others* (368/04, ECJ24/2006) [2006] ZAECHC 17; [2006] 3 All SA 271 (SE); 2006 (9) BCLR 1094 (SE); [2006] 8 BLLR 767 (SE) (hereinafter the *Du Preez* case).

¹⁴² *Du Preez* case [18].

2.6. National Policy Framework for Women's Empowerment and Gender Equality

Although not a law of general application for purposes of the limitation clause in section 36 of the Constitution, Cabinet adopted, as a policy document, the National Framework for Women's Empowerment and Gender Equality (the National Gender Framework) in December 2000.¹⁴³ The National Gender Framework was formulated by the Office on the Status of Women, comprising of the Office on the Status of Women, the CGE, the Parliamentary Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women and several Non-Governmental Organisations (NGOs) working on gender and women's rights.¹⁴⁴ It applies to all government departments, provincial administrations, local structures, parastatals and other public entities.

The main purpose of the National Gender Framework is to establish a clear vision and structure to guide the process of developing laws, policies, procedures and practices which will serve to ensure equal rights and opportunities for women and men in all spheres and structures of government as well as in the workplace, the community and the family. The National Gender Framework is very clear on its definition of gender equality. It defines gender equality as:

... a situation where women and men have equal conditions for realizing their full human rights and potential; are able to contribute equally to national political, economic, social and cultural development; and benefit equally from the results. Gender Equality entails that the underlying causes of discrimination are systematically identified and removed in order to give women and men equal opportunities. The concept of Gender Equality, as used in this policy framework, takes into account women's existing subordinate positions within social relations and aims at the restructuring of society so as to eradicate male domination. Therefore, equality is understood to include both formal equality and substantive equality; not merely simple equality to men.¹⁴⁵

¹⁴³ Hills J "Addressing Gender Quotas in South Africa: Women Empowerment and Gender Equality Legislation" *Deakin Law Review* 2015(20) 167.

¹⁴⁴ Hills 2015 *Deakin Law Review* 167.

¹⁴⁵ National Gender Policy Framework Glossary of Terms xviii
http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=94056&p_country=ZAF&p_count=1051&p_classification=05&p_classcount=38 (Date of use: 05 October 2018).

This definition is clear that the intended equality to be implemented under the National Gender Framework entails both formal equality and substantive equality. It also takes an approach to equality that calls for the recognition of sameness and autonomous dignity for men and women while at the same time calling for the remedial and redistributive aspects of equality.

2.7. Conclusion

This chapter began by outlining the social context within which gender equality and a call for transformation should be understood. In this chapter, select examples of manifestations of stigma and stereotypes that arise as a result of patriarchy in South African society were discussed. This background led to the unpacking of the legal theoretical framework within which the right to gender equality is to be understood in the South African context. In other words, the laws and policy framework that are in place to address the gender inequalities that are experienced by women in society. The legal and policy framework available to attain gender equality is captured in international law instruments, constitutional provisions, legislation enacted to give effect to the constitutional provision of equality and in a national framework adopted by the government of South Africa. From the discussion of the existing legal and policy framework, it is apparent that the true essence of equality as is envisioned in the South African context, is substantive equality as opposed to mere formal equality. Formal equality is an objective of these measures, but this is with the ultimate aim of attaining substantive equality. Notions of a quota system as contained in the EEA are viewed as being symptomatic of a formal equality standard and not substantive equality. The Women Empowerment and Gender Equality Bill which sought to formalise a 50% quota system, in respect of gender, was referred to parliament for reconsideration and has to date, not been finalised or come into effect. Criticism against the 50% being the end goal of the proposed legislation was put before parliament prior to it withdrawing the Bill for further consideration.

This chapter demonstrates the view taken in Chapter 1 of this dissertation that substantive equality should be the aim of any initiatives taken with the purpose of attaining gender equality as required by the legal framework on equality. The question is therefore whether the formal recognition of equality and gender rights in

international treaties, the Constitution, ensuing legislation and government policy has resulted in meaningful gains for women in their daily lives. The situation of women in the legal profession in South Africa will be analysed in the following chapter, to assess the extent to which women's lived experiences reflect the advantages of having legal frameworks for gender equality, in place.

CHAPTER 3

GENDER TRANSFORMATION IN THE LEGAL PROFESSION IN SOUTH AFRICA: A FEMINIST PERSPECTIVE OF WHAT STANDS IN THE WAY OF EQUALITY

3.1. Introduction

Chapter 2 considered the theoretical framework within which the right to equality in South Africa should be analysed. It set out treaty, the constitutional, legislative and policy frameworks available for the implementation and realisation of equality. It started by firstly contextualising the need for equality in South Africa by setting out a sample of the manifestations of gender inequality as experienced by women in South African society. Chapter 3 will explore the extent to which the legal framework for gender equality has resulted in any advantages for women in South Africa. It does this by exploring the extent of gender transformation in the legal profession. It begins with an analysis of the gender and race composition of the legal profession by considering the most recently available statistics. Thereafter, it considers existing research studies and other reports documenting the experiences of women in the legal profession that pose as challenges to the attainment of gender transformation. As mentioned in Chapter 1, section 1.6, for this research, no new data was collected or analysed and the research does not involve human participants. In this chapter, a feminist lens will be adopted in considering the challenges to achieving gender transformation through substantive gender equality within the legal profession.¹⁴⁶

3.2. Feminist Legal Theory and the Workplace

¹⁴⁶ The scope of the dissertation, as mentioned in Chapter 1, covers issues relating to the transformation and advancement of female attorneys and advocates across all races in the legal profession in South Africa.

There are several varieties of feminist legal theory, some of which overlap.¹⁴⁷ All theories however, share an observation that the world is shaped by men, who for this reason, possess larger shares of power and privileges, and a belief that men and women should have political, social and economic equality.¹⁴⁸ The word 'woman' has evolved from its initial spelling of 'wifmann', meaning 'female human'.¹⁴⁹ It was observed that the word 'man' then simply meant 'human,' implying that wifmann were an extension of men. Overtime, this word developed from Old English into its modern day spelling of 'woman,' which as we can see, still holds its roots in patriarchy, a system that gives men accessibility to positions of power from which women are excluded. A change in spelling of the word 'women' as 'womyn' took hold in feminist circles in an effort to emphasise the idea that women are their own separate people, capable of operating on their own and without a man to aid them. From a South African academic perspective, Vahed explored the role of language as it relates to power.¹⁵⁰ Vahed examined the manner in which lexis (vocabulary) in a patriarchal society is manipulated to entrench patriarchal power. She proposes that in order for feminists to change a sexist world, they need to change the language that structures the sexist world. She suggests that this be done by analysing the language that society uses and change it, if it is offensive to any group, perhaps by changing the vocabulary. The use of 'womyn' instead of 'women' is part of the attempt to effect such a change. This spelling has further evolved to the choice of using the word 'womxn' which is seen as being intersectional, as it is meant to include transgender women, women of color, women from third world countries, and every other self-identifying woman.¹⁵¹ However, the variant spellings of 'womyn' and 'womxn' are not academically accepted. This unfortunate stance maintains the status quo in which patriarchy is dominant. To challenge the sexist language in academic writing, society has to change to allow for academic freedom that empowers academic writers with the option of self-identifying and naming. It is

¹⁴⁷ Levit N and Verchick RRM *A Primer: Feminist Legal Theory* (NYU Press New York 2006) 12.

¹⁴⁸ Levit and Verchick *A Primer: Feminist Legal Theory* 12.

¹⁴⁹ Emmanuel N "Why I Choose to Identify as a Womxn" 2017 <https://www.hercampus.com/school/washington/why-i-choose-identify-women> (Date of use: 23 April 2018).

¹⁵⁰ Vahed H "Empowering Women for Gender Equity 1994 (21) *Agenda Empowering Women for Gender Equity* 65-70.

¹⁵¹ Emmanuel N "Why I Choose to Identify as a Womxn" 2017 <https://www.hercampus.com/school/washington/why-i-choose-identify-women> (Date of use: 23 April 2018).

beyond the scope of this dissertation to provide an in depth analysis and critique relating to terminology in respect of the use of 'womxn' as opposed to the academically accepted, 'women'. Therefore, this research retains the word "women" as an accepted term.

While feminists share the goal of achieving gender equality, they disagree on the meaning and the manner in which to attain this. This section considers the proposals made by a select number of feminist legal theories, on the meaning of gender equality within the workplace.

The Equal Treatment Theory is premised on the principle that the law should not treat a woman differently from a similarly situated man.¹⁵² In the workplace, this theory translates into the call for equal wages, equal employment and equal access to government benefits. This theory is predicated against protective legislation that is based on generalisations, even statistically correct ones, about women as a group.¹⁵³ The theory challenges the notion that "natural differences" justified dissimilar treatment under the law as these differences were in fact socially constructed.¹⁵⁴ The meaning of equality as advocated by this feminist legal theory is formal equality, where men and women are treated exactly the same.

Cultural Feminism is premised on the argument that formal equality does not always result in substantive equality.¹⁵⁵ This feminist legal theory criticises the Equal Treatment Theory as serving women only to the extent that they could prove that they are exactly like men.¹⁵⁶ It proposes that gender neutral laws and policies will not assist women to attain gender equality if they do not acknowledge women's different experiences and perspectives. This theory calls for a concept of legal equality in which laws and policies accommodate differences between men and women, be they biological or cultural differences. It notes that the workplace follows rules based heavily on male-dominated experiences. Within this context, it favours special maternity leave, flexible work arrangements or other workplace

¹⁵² Levit and Verchick *A Primer: Feminist Legal Theory* 12.

¹⁵³ Levit and Verchick *A Primer: Feminist Legal Theory* 13.

¹⁵⁴ Levit and Verchick *A Primer: Feminist Legal Theory* 14.

¹⁵⁵ Levit and Verchick *A Primer: Feminist Legal Theory* 14.

¹⁵⁶ Levit and Verchick *A Primer: Feminist Legal Theory* 15.

accommodation for women. This theory has been criticised for reinforcing gender stereotypes associated with domesticity.¹⁵⁷

The Equal Treatment Theory and the Cultural Feminism Theory continue to be a point of contention among feminist legal theorists. There is no agreement as to which of the two can result in the shared feminist aspiration of attaining gender equality. As demonstrated above, these theories pit formal equality against substantive equality as discussed in Chapter 1. In light of the fact that this dissertation seeks to advocate for substantive equality as a means by which to attain gender equality within the legal profession, it is proposed that the Cultural Feminism Theory is the preferred theory between the two.

The Cultural Feminism Theory requires that the differences between men and women be taken into account in the laws and practices in the legal profession, that seek to attain gender equality. These differences may be biological or cultural. Cultural differences are those that are based on social constructed ideas of what the norm ought to be. The role of these social constructions of men and women is considered in the next section, as they need to be deliberated in the laws and principles that aim to address equality.

3.3. Gender Stereotypes and the Legal Profession

Gender stereotypes are concerned with the social and cultural construction of men and women assigned on the basis of their different physical, biological, sexual and social functions.¹⁵⁸ Gender stereotyping is the use of gender stereotypic knowledge in forming an impression of an individual man or woman. Gender stereotyping becomes problematic when it operates to ignore individuals' characteristics, abilities, needs, wishes, and circumstances in ways that deny individuals their human rights and fundamental freedoms.¹⁵⁹

It is important to set out, at the outset, a distinction between what may be termed as stereotypes about female legal practitioners and the lived realities within the

¹⁵⁷ Levit and Verchick *A Primer: Feminist Legal Theory* 18.

¹⁵⁸ Cook RJ and Cusack S *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press Philadelphia 2010) 20.

¹⁵⁹ Cook and Cusack *Gender Stereotyping: Transnational Legal Perspectives* 20.

profession that inhibit female practitioners from excelling in the profession. The respondents in Chitapi's survey indicated that the existence of stereotypes about women being better suited for motherhood rather than working, being less competent, their ability to lead and their ability to be rational, operate to the detriment of female practitioners within the profession.¹⁶⁰ The impact of these stereotypes is manifest in the imbalance of briefing patterns. Briefing patterns are informed by the perception that with a home, husband and children to care for, a woman is incapable of giving a complicated matter her undivided attention.¹⁶¹ While the stereotypes remain entrenched in society, the roles traditionally played by women, as assigned by society, will continue. As a result, the lived realities of women remain a reflection of the gender stereotypes in existence. It is submitted that the relationship between gender stereotypes and the lived realities of female practitioners is one of cause and effect, on the one hand, while at the same time, both continue to have a separate but cumulative negative effect on the success of female legal professionals. To the extent that an initiative that seeks to address the effect of a stereotype fails to challenge the existence of the stereotype itself, the appropriateness of the initiative may be questionable.

3.4. Gender and race composition in the legal profession

Gender relations within the legal profession are reflective of long established historical norms informed and perpetuated by the role expectations formed within individual practitioners' private spheres, which form a gendered social order in which these norms originate.¹⁶² This understanding of gender relations is extrapolated from the definition of gender as:

A social status, a legal designation, and a personal identity. Through the social processes of gendering, gender divisions and their accompanying norms and role expectations are built into the major social institutions of society, such as the economy, the family, the state, culture, religion, and the law – the gendered social order – and

¹⁶⁰ Chitapi R *Women in the legal profession in South Africa: traversing the tension from the bar to the bench* (LLM thesis University of Cape Town Cape Town 2015) 51.

¹⁶¹ Kathree F "Eight years at the bar and still discriminated against" *Advocate* 2004 23.

¹⁶² Lorber J *Gender Inequality: Feminist Theories and Politics* (Oxford University Press, New York 2012) 15.

also into the norms and expectations governing individual behaviour.¹⁶³

According to Heilman's 'Lack of Fit' model, evaluations of women in the legal profession, a male-dominated area of work, is influenced by a perceived disjuncture between women's stereotypical qualities and job requirements.¹⁶⁴ This is based on beliefs about how men and women typically are or should be. Men being achievement-orientated (competence, ambition and task-focussed), having an inclination to take charge (dominance, assertiveness and forcefulness) and being rational (analytical capable, logical and objective) while women have concern for others (kindness, caring, considerate), have affiliative tendencies (warmth, friendliness and collaboration), deference (obedience, respectfulness and self-effacement), and emotional sensitivity (perceptiveness, friendliness and understanding).¹⁶⁵ The limitations presented by the perceived qualities of women in their advancement within the profession is apparent where these qualities are placed in comparison with the qualities perceived to be associated with men.¹⁶⁶ Based on Heilman's study, women struggle to be included within and to excel in male dominated fields because for them to be accepted as being well equipped for the traditionally male assigned roles, they must be viewed as possessing the stereotypical male assigned qualities.¹⁶⁷ As long as the terms of inclusion are determined by these perceived stereotypical views, and not changed, the existing structure of the legal profession will not be dismantled and women will remain excluded for failing to conform to male norms.¹⁶⁸

Consideration of transformation of the legal profession in South Africa is viewed from a lens that places racial equality at the centre of the debate.¹⁶⁹ There appears to be a perception of the 'ranking' of gender after race in the order of the recognised

¹⁶³ Lorber *Gender Inequality: Feminist Theories and Politics* 15.

¹⁶⁴ Heilman M "Sex bias in work settings: Lack of fit model research in organizational behaviour" 1983 (5) *Research in Organisational Behaviour* 269.

¹⁶⁵ Heilman 1983 *Research in Organisational Behaviour* 269.

¹⁶⁶ Heilman M and Lyness KS "When fit is fundamental: Performance evaluations and promotions of upper-level women and male managers" *Journal of Applied Psychology* 2006 (91) 77.

¹⁶⁷ Heilman M and Lyness KS "When fit is fundamental: Performance evaluations and promotions of upper-level women and male managers" 2006(91) *Journal of Applied Psychology* 777-785.
<https://pdfs.semanticscholar.org/3956/76e6435186a00aceafd6210ff157bccbbcd1.pdf> (Date of use: 3 March 2017).

¹⁶⁸ Norton M "The other transformation issue: Where are the women?" 2017 *Advocate* 28.

¹⁶⁹ Norton 2017 *Advocate* 27.

prohibited grounds of equality, which speaks to the order of transformation priorities. This perceived ranking may be informed by the fact that the recognised prohibited grounds of discrimination in the Bill of Rights lists race prior to gender. In this regard, Kriegler J in a minority judgment has noted the following:

Discrimination founded on gender or sex was manifestly a serious concern of the drafters of the Constitution. That is made plain by the Preamble (first main paragraph); the Postscript (first paragraph); the ranking of sex/gender discrimination immediately after racial discrimination in the enumeration of specifically prohibited bases for discriminating in s 8(2);...¹⁷⁰ (Own emphasis).

The political history of South Africa offers some insight into why gender transformation is seen as less important than racial transformation, in that race has been prioritised over gender, both in general debates about transformation and in discussions of the legal system specifically.¹⁷¹ This is based on the African National Congress' (ANC's) historical view of the primary source of oppression for women as racial and colonial domination as opposed to gender inequality. This meant that when the ANC eventually accepted the goal of gender equality, it focussed on the inclusion of women in formal state institutions.¹⁷² It did not look into the question of how to achieve substantive gender equality and fundamentally transform the gendered nature of formal state institutions, such as the judiciary.¹⁷³

Gender transformation initiatives must be differentiated from initiatives aimed at attaining racial transformation. This is not to suggest that racial and gender transformation initiatives ought to be considered as having competing interests. However, from the statistical information available on the racial and gender composition of the attorneys and advocates professions, it is apparent that the formal inclusion of women in these professions is still lagging behind as compared to the inclusion of Black men which has significantly increased. The two tables below demonstrate the contrast between the composition of the legal profession along racial and gender lines. Gender equality is introduced in this context to explore if

¹⁷⁰ *Hugo case* [73].

¹⁷¹ Hassim S "Voices, hierarchies and spaces: Reconfiguring the women's movement in democratic South Africa" 2005 (32) *Politikon* 182. Hassim details the 1980s liberation movement's focus on activities that would directly challenge the apartheid state with women contesting male domination within the political organisation that they belonged to.

¹⁷² Hassim 2005 (32) *Politikon* 182.

¹⁷³ Hassim 2005 (32) *Politikon* 182.

substantive gender transformation can be achieved through feminist legal theory by making women and men within the legal profession, equal - legally, socially and culturally.¹⁷⁴

Table 1: The gender and racial profile of the attorneys' profession as at July 2018.¹⁷⁵

RACE	TOTAL	%	GENDER	TOTAL	%
Black(African, Coloured and Indian)	11 659	43	Women	4 610	17
			Male	7 048	26
White	15 042	57	Women	6 063	23
			Male	8 980	34

Table 2: The gender and racial profile of the advocates' profession as at 30 April 2017.¹⁷⁶

RACE	TOTAL	%	GENDER	TOTAL	%
Black(African, Coloured and Indian)	1 065	36.5	Women	338	11.5
			Male	727	25
White	1 850	63.5	Women	458	15.7
			Male	1 392	47.8

Table 1 above illustrates that of a total of 26 701 practicing attorneys, 40% of them are women and 43% are Black. Table 2 illustrates that of a total of 2 915 advocates

¹⁷⁴ "The goal of feminism as a political movement is to make women and men more equal legally, socially and culturally." See Lorber *Gender Inequality: Feminist Theories and Politics* 4.

¹⁷⁵ Law Society's statistics for the attorney's profession <http://www.lssa.org.za/about-us/about-the-attorneys--profession/statistics-for-the-attorneys--profession> (Date of use: 6 September 2018).

¹⁷⁶ Commission for Gender Equality "Discussion document on gender transformation in the judiciary and the legal sector" (2018) 97.

registered with the General Council of the Bar, 27.2% are women while 36.5% are Black. The racial population in the country is such that Black people constitute the majority of the population with White people constituting 8.9% of the population.¹⁷⁷ Women on the other hand constitute a majority of the population at 51.3%.¹⁷⁸ On the basis of the tabular comparison above, the gender and race composition of the attorneys' and advocates' profession do not reflect the population demographics of the country, especially when it comes to women legal practitioners. Due to the fact that women make up the majority of the population, one would have expected that the current makeup of the legal profession would be representative of women. As this (where the composition of the profession is a reflection of the composition of society) is the definition of transformation adopted for purposes of this research, it is apparent that gender transformation in the legal profession is yet to be achieved.

3.5. Factors that stand in the way of gender equality in the legal profession in South Africa

Attorneys, in the South African context, who gain significant authority in the judiciary, generally move into such positions of judicial authority from partnership in large law firms. This demonstrates the extent to which partnership speaks to their ability and responsibility.¹⁷⁹ In seeking to transform the judiciary, effort should be put into identifying and eliminating factors, based on gender inequalities, which hinder the career progression of female attorneys within law firms. Advocates appointed as judges have likewise been traditionally selected on the basis of their seniority and experience at the Bar. Seniority and experience at the Bar hinges on the advocate's ability to obtain high level briefs in areas that are stereotypically considered in the profession as complex areas of law, which are assigned to male advocates – who possess the 'appropriate qualities' to win the case. As such, where one seeks to increase the number of aptly qualified female advocates available for judicial appointment, effort should be made to identify and eliminate the gender inequalities that prevent women from gaining the requisite experience in practice at the Bar.

¹⁷⁷ Statistics SA "South Africa's population" <https://www.brandsouthafrica.com/people-culture/people/population> (Date of use: 1 June 2017).

¹⁷⁸ Statistics SA <https://www.brandsouthafrica.com/people-culture/people/population> (Date of use: 1 June 2017).

¹⁷⁹ Harrington M *Women Lawyers: Re-writing the Rules* (Penguin Group New York 1993) 17.

Advocates briefs come from attorneys. Partners, as decision makers in law firms, dictate the advocate that will be briefed in any given matter.¹⁸⁰ For this reason, the demographic and ownership features of the attorneys' practice determine the briefing patterns, exposure and seniority of advocates.¹⁸¹ Due to the scarce amount of empirical data documenting actual experiences of female practitioners, the remaining part of this chapter relies on the few available periodicals and research reports which consider the factors that influence the success of female practitioners in both the attorneys' and advocates' profession.

3.5.1. *Equality in the Attorneys' Profession*

Attorneys who socialise together tend to give each other work, yet, these social networks are usually pre-existing and based on relationships.¹⁸² This creates a barrier for the progression of women who are not part of the homogenous seniority, within these social networks. In corporate law firms the culture of partners socialising with clients and including in these social gatherings, a select few individuals who they have formed a rapport with, entrenches this systemic challenge to the advancement of women within the ranks of these firms. Social conversations with predominantly White male superiors, who are the gate keepers into these social circles, can be painfully awkward for female attorneys, where they are unable to participate in unifying conversations on historically White male sports, for instance.¹⁸³ Women who fail to or opt not to attempt to find a way to fit in with the homogenous seniority, are not likely to receive the necessary mentorship, training and exposure that would influence their career development within the firm. These social networks perpetuate the existing networks consisting of groups of similarly placed White males who support, interact and protect each other. With Black male

¹⁸⁰ Norton 2017 *Advocate* 32.

¹⁸¹ Bonthuys E "Gender and the Chief Justice: Principle or pretext?" 2013 (39) *Journal of Southern African Studies* 68.

¹⁸² Centre for Applied Legal Studies "Report on Transformation of the Legal Profession in South Africa" 2014 (Hereinafter referred to as the CALS Report).
<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Transformation%20of%20the%20Legal%20Profession.pdf> 37-38 (Date of use: 05 May 2017).

¹⁸³ CALS Report 37.

groups emerging, women are left with no group formation within which to provide each other with an advantage in career progression within law firms.¹⁸⁴

The attorneys in senior positions within law firms are seen to question the intelligence, talent or prior experience of women attorneys.¹⁸⁵ This manifests itself in various ways that hinders the progression of women within the structures of these organisations. The primary manner being that their exposure to a variety of complex matters is limited. This, despite the practice by some law firms of using women lawyers to attract government work but failing to allocate any of the work so obtained, to these women.¹⁸⁶ In this regard, respondents to the Centre for Applied Legal Studies (CALS) Report on Transformation of the Legal Profession (hereinafter referred to as the CALS Report) indicated that they had been included as part of the team bidding for government work, yet when the work was awarded to the firm, they never received any assignment on the work.¹⁸⁷ On this challenge, the CALS Report notes the perception that clients do not trust female attorneys.¹⁸⁸ I suggest that this perception is not so much a reflection of a client's organically cultivated view about female attorneys, as much as it is a view perpetuated by the senior male dominated decision makers within these firms, through the manner in which they interact with senior female lawyers in the presence of clients.¹⁸⁹ In my experience, if, for instance, a senior White male partner treats a junior female lawyer as incompetent and with little respect for her views in the presence of a client, the client's impression of the female lawyer will be a reflection of the senior male partner's conduct. Not much effort will be required to entrench this negative view about female attorneys where the client already has stereotypical views about women in male dominated professions.

Work allocation within law firms also serves as a challenge to the advancement of women within the attorneys' profession.¹⁹⁰ Work allocation is primarily at the discretion of the senior partners who are mostly men. Within a team, with a range

¹⁸⁴ CALS Report 41.

¹⁸⁵ CALS Report 44.

¹⁸⁶ CALS Report 43.

¹⁸⁷ CALS Report 43.

¹⁸⁸ CALS Report 44.

¹⁸⁹ CALS Report 45.

¹⁹⁰ Commission for Gender Equality "Discussion document on gender transformation in the judiciary and the legal sector" (2018) 104.

of lawyers of varying levels of experience, both male and female, the trend is for the White male senior partner to elect to give the work to the junior that has proven himself as being up to the task.¹⁹¹ However, the test of proving oneself is flawed in that it is required that the junior members are provided with equal opportunity to learn the work by doing it and being involved in the matters. To the extent that the work exposure is discretionary and primarily based on social networks and levels of comfort between the superior and the junior that he gives work to, the system of work allocation perpetuates the systematic gender discrimination within these law firms, as there is no way of holding senior partners accountable for a discriminatory allocation of work to juniors.¹⁹² With time, the same White male juniors continuously receive work and in turn, improve their skills and reputation within the firm at the expense of their female counterparts who are overlooked on the purported basis of them not having proved themselves, without them having control over the work allocation. The CALS Report notes the experience of a female participant who was employed as a candidate attorney at a law firm. Her White male counterpart attended the same school as the superior in charge of them. It was her experience that her counterpart received all the substantive work and was invited to client consultations while she was sent on errands and given administrative tasks on the basis of this element.¹⁹³

In addition, face time, (being seen), is key to receiving work assignments as a junior attorney within a law firm. From my experience, being seen at work is fundamental to developing a reputation within the corridors as being “committed” to the firm and a hard worker. This traditional perspective perpetuated by many, male and female professionals, within law firms, presents a problem for women who remain the primary child care givers in society.¹⁹⁴

The role that female attorneys play in child care also presents a challenge to their advancement within the hierarchy of the law firm. Large law firms for instance consider candidates for promotion on the basis of the amount of money billed in a financial year. The amount one bills in any period is a factor of the amount of time

¹⁹¹ Commission for Gender Equality “Discussion document on gender transformation in the judiciary and the legal sector” (2018) 104.

¹⁹² CALS Report 49.

¹⁹³ CALS Report 38.

¹⁹⁴ CALS Report 55.

spent on the work and the attorney's charge out rate.¹⁹⁵ The amount of billable work one receives and completes is therefore determinative of how much one bills.¹⁹⁶ It follows that where a female attorney is away on maternity leave for a period in a financial year, she loses out on billable hours and is unable to bill as much as her male counterparts who do not have to take time out for motherhood and parenthood, during a specific financial period. For junior attorneys, billable hours become a primary focus of competition and method of advancement within the hierarchy of the law firm. For partners, billable hours lead to greater income and influence in the firm.¹⁹⁷ From my experience, child care also affects a female attorney's capacity to increase face time by staying at the office late into the night, when she needs to attend to the responsibility of child care in the evenings and on weekends.

The issues mentioned above as challenges to the advancement of women in the law firm also present as challenges to them getting access to lucrative clients. This causes women to be underrepresented in the decision-making circles of the law firm. The current system is not conducive for women to grow professionally. It is simply a matter of whether they are prepared to comply with the demands of the legal profession by working more hours, and/or suspending their family life by for example, not giving birth, so as not to be away on maternity leave. In my opinion, it is a matter of being in or out.

3.5.2. *Equality in the Advocates' Profession*

The advocates Bar is a voluntary association. Advocates in a chamber do not share fees as they have independent practices. With this independence from a traditional employer-employee arrangement, comes a sense of independence absent within the attorneys' profession. Research has revealed that women advocates perceive this independence as providing notional flexibility in that while one is their own boss

¹⁹⁵ Wald E "A Primer on diversity, discrimination, and equality in the legal profession or who is responsible for pursuing diversity and why" 2011 (24) *The Georgetown Journal of Legal Ethics* 1123.

¹⁹⁶ Jaffe A "Stanford Law School policy practicum: retaining & advancing women in national law firms, White Paper May 2016" <https://law.stanford.edu/wp-content/uploads/2016/05/Women-in-Law-White-Paper-FINAL-May-31-2016.pdf> (Date of use: 1 June 2017).

¹⁹⁷ Jaffe A "Stanford Law School policy practicum: retaining & advancing women in national law firms, White Paper May 2016" 16.

and can leave chambers at their own volition, when swamped with work, there is no option to leave.¹⁹⁸ The perception being that one is only as good as their last brief.¹⁹⁹

The amount of work that women receive at the Bar is limited by the fact that the spread of work is through a referral system that is skewed in favour of men.²⁰⁰ The essence of the functioning of this referral system is that one must have in existence, access to a network of individuals who have the ability to increase ones work flow.²⁰¹ As a junior advocate coming into the profession, this requires access to attorneys, who will give you briefs, as well as within the Bar, to senior members of the Bar who will rope you in as a junior advocate on their matters. With regard to networks and relationships with attorneys, it is common practice for attorneys to brief the same counsel repeatedly, not based on the counsel's expertise in the various areas of law arising in different matters, but purely on the basis of their existing relationship.²⁰² Junior attorneys within law firms are then required to brief the counsel that "we - as a firm" or "we - as a team" use for matters repeatedly.²⁰³ This briefing pattern is determined by the existing relationship between the partners in the firm and a select group of advocates at the Bar.²⁰⁴ This makes it difficult or virtually impossible for new advocates to receive briefs where there are no existing relationships with the decision makers within the attorney firms. Junior attorneys who most likely have networks and relationships with their peers who may be junior counsel at the Bar, are not a significant source of new work for these advocates. For this reason, the importance of relationships within the Bar plays a big role in the success of the advocate within the profession. Once briefed by senior counsel on a matter, the junior counsel is provided with an opportunity to form a rapport with the attorneys from whom the matter emanates. This presents an opportunity for the advocate to impress the attorney and secure future briefs directly from the attorney.²⁰⁵

On occasion, and with increasing frequency, from my experience, a client will demand that in large commercial matters which require a team of advocates, that at

¹⁹⁸ Chitapi *Women in the legal profession in South Africa* 41.

¹⁹⁹ Chitapi *Women in the legal profession in South Africa* 41.

²⁰⁰ Chitapi *Women in the legal profession in South Africa* 42.

²⁰¹ CALS Report 41.

²⁰² Norton 2017 *Advocate* 32.

²⁰³ Norton 2017 *Advocate* 32.

²⁰⁴ Norton 2017 *Advocate* 32.

²⁰⁵ Norton 2017 *Advocate* 34.

least the junior counsel is Black. In this regard, it is sufficient that a male Black junior advocate is brought into the matter. On rare occasion, will the client specify that a woman of any race group must be briefed onto the matter, in the same manner in which insistence on Black counsel is made. In order to meet client's transformation requirements, selecting a male Black advocate suffices.

It follows that partners in law firms determine who will receive briefs from the firm based on the existing relationships with members of the Bar. The senior members of the Bar who receive these briefs, in turn, determine which junior counsel they will brief in the matter. It also follows that the key to a shift in the briefing patterns currently sits with the senior attorneys and senior members of the Bar.²⁰⁶ To consider why this status quo is a hindrance to gender equality within the profession, the chapter will now consider the basis on which briefs are transferred within the existing network. Historical ties between male members is a vital element of this network.²⁰⁷ The basis of these male member networks spans from relationships that began at school, at university or on the golf course, to being from a certain geographical area.²⁰⁸ The tongue-in-cheek exchange between Chief Justice Mogoeng Mogoeng and Advocate Ishmael Semanya during an argument before the Constitutional Court, in response to the submission that Advocate Semanya meant no disrespect in disagreeing with the Chief Justice, the Chief Justice responded: "I know you do not, were we not roommates?" speaks to this point.²⁰⁹

Parenthood presents a gendered effect on women at the Bar. Judicial notice of this reality in women's working lives was taken by the Constitutional Court in the majority judgement in the *Hugo* case when Justice Goldberg stated that:

[t]he primary bonding with the mother and the role of mothers as the primary nurturers and care givers extends well into childhood. The reasons for this are partly historical and the role of the socialisation of women who are socialised to fulfil the role of primary nurturers and

²⁰⁶ CALS Report 41.

²⁰⁷ Chitapi *Women in the legal profession in South Africa* 44.

²⁰⁸ Chitapi *Women in the legal profession in South Africa* 44.

²⁰⁹ Record of proceedings televised on live television by ENCA News on 15 March 2017 at 10am. <https://www.enca.com/south-africa/march-to-constitutional-court-for-zuma-secret-ballot> (Date of use: 23 May 2017).

care givers of children, especially pre-adolescent children and are perceived by society as such.²¹⁰

All in all, the legal profession operates on the assumption that a legal practitioner, regardless of gender, should dedicate “sufficient” hours at work to prove that he/she is a hard worker.²¹¹ This ignores the fact that women have the responsibility, in most instances, to perform other household chores such as preparing meals for their families and spending time with their children.²¹² The demands of the legal profession are to a large extent ignorant of the additional roles that women play, apart from fulfilling their employment obligations.²¹³

From Chitapi’s research, it emerged that female advocates perceived parenthood as a challenge in that taking time off for maternity leave meant interrupting one’s practice. On returning from maternity leave, re-establishing oneself meant “starting from scratch.”²¹⁴ Further, that the unequal gender roles require that female advocates with children carry the responsibility of family care, a burden that their male counterparts do not have to deal with. The Cape Bar, as have other Bar Associations in the country, adopted a maternity leave policy to assist women.²¹⁵ Chitapi’s research indicates that this was well received among the respondents and had benefited female advocates.²¹⁶ This policy will be discussed in detail in Chapter 4.

Mentoring is said to have beneficial effects for women who face greater organisational, relational and personal barriers in the advocates’ profession.²¹⁷ A lack of mentoring has been identified as a barrier hindering the advancement of female advocates at the Bar and a contributory reason for their leaving the Bar

²¹⁰ *Hugo case* [70].

²¹¹ Commission for Gender Equality “Discussion document on gender transformation in the judiciary and the legal sector” (2018) 103.

²¹² Commission for Gender Equality “Discussion document on gender transformation in the judiciary and the legal sector” (2018) 103.

²¹³ Commission for Gender Equality “Discussion document on gender transformation in the judiciary and the legal sector” (2018) 103.

²¹⁴ Chitapi *Women in the legal profession in South Africa* 54.

²¹⁵ Chitapi *Women in the legal profession in South Africa* 56.

²¹⁶ Chitapi *Women in the legal profession in South Africa* 56. This policy will be discussed in greater detail in Chapter 4.

²¹⁷ Wallace JE “The benefits of mentoring for women lawyers” 2001 (58) *Journal of Vocational Behavior* 366.

altogether.²¹⁸ Most junior female advocates or pupils have expressed that they receive no mentorship.²¹⁹ The effect of this is that they start their practices having no idea how to develop them and how to create relationships with attorneys who specialise in their areas of interest. According to Martin (a female advocate), it is high time that people started mentoring juniors even beyond the pupillage stage.²²⁰ Respondents surveyed by Chitapi echoed the vital role of mentoring in that it afforded an avenue into existing networks by opening up an opportunity for one to be guided, gain experience and be introduced to attorneys and clients.²²¹ The impact of a mentoring relationship varies from respondent to respondent in Chitapi's survey, because the success of the process depends wholly on the mentor and his/her ability and willingness to be generous with his/her time in order to develop a relationship with the mentee.²²² The key finding from this section of Chitapi's survey is that while acknowledging the crucial role of mentoring, in ensuring the accomplishment of the profession, a vast majority of the respondents did not mentor anybody.

Gender stereotypes about women in society present themselves as a barrier to the advancement of female advocates in the profession. Stereotypes about women being better suited for motherhood rather than working, being less competent, about their ability to lead and their ability to be rational, operate within the profession. The respondents surveyed by Chitapi confirmed this and indicated in their responses that gender bias operates in the profession. The gender bias is informed by the perception that because of the way that the profession operates, it is more suited to men. As a result, male advocates and attorneys show less confidence in female advocates. This gender bias and stereotyping manifests itself in existing briefing patterns.²²³ Chitapi's respondents indicated that they have been pigeon holed into

²¹⁸ Proceedings at the Summit on Briefing Patterns in the Legal Profession held at Emperor's Palace, Kempton Park 31 March 2016. The Report <http://www.issa.org.za/summit-on-briefing-patterns-march-2016> (Date of use: 05 June 2017).

²¹⁹ Advocate Samantha Martin's presentation at the Summit on Briefing Patterns in the Legal Profession held at Emperor's Palace, Kempton Park 31 March 2016. The Report <http://www.issa.org.za/summit-on-briefing-patterns-march-2016> (Date of use: 05 June 2017).

²²⁰ Advocate Samantha Martin's presentation at the Summit on Briefing Patterns in the Legal Profession held at Emperor's Palace, Kempton Park 31 March 2016.

²²¹ Chitapi *Women in the legal profession in South Africa* 47.

²²² Chitapi *Women in the legal profession in South Africa* 48.

²²³ Commission for Gender Equality "Discussion document on gender transformation in the judiciary and the legal sector" (2018) 106.

the 'softer' 'easier' legal practice areas of family law and criminal law, keeping them out of more complex and lucrative practice areas such as commercial law.²²⁴ This was also raised in a Summit on Briefing Patterns in the Legal Profession, convened to discuss briefing patterns in the legal profession where another female practitioner, Ms Rangata, vehemently challenged the perception that women lawyers are best suited for family law and criminal law work.²²⁵

During 2004, Kathree noted that there was gender bias and stereotypes within the Bar in Cape Town, in that there existed a perception that women do not have the right temperament for complicated matters.²²⁶ She further speculated that this perception may be informed by the view that with a home, husband and children to care for, a woman is incapable of giving a complicated matter her undivided attention.²²⁷ In 2017, Norton highlighted the same challenges existing within the Bar for female advocates.²²⁸ In her article, Norton points out that the impact of childbearing and parenting, and persistent gender stereotyping are significant barriers to attaining and sustaining strong practices within the Bar.²²⁹ Formal equality may have facilitated an increase in the number of women entering the profession, however, the challenges that have remained unchanged between 2004 (Kathree's writing) and 2017 (Norton's writing) indicate that the solution one should propose for gender transformation, will not be found in continued inclusion in numbers only. What is required is a more fundamental change in the social and cultural elements that facilitate the continued stereotyping of female advocates. Until this is achieved, progress in gender transformation will remain a case of moving one step forward and two steps back.

3.6. Conclusion

²²⁴ Chitapi *Women in the legal profession in South Africa* 51.

²²⁵ Bait seng Rangata's presentation at the Summit on Briefing Patterns in the Legal Profession in South Africa held at Emperor's Palace, Kempton Park 31 March 2016. The Report <http://www.lssa.org.za/summit-on-briefing-patterns-march-2016> (Date of use: 05 June 2017).

²²⁶ Kathree 2004 *Advocate* 23.

²²⁷ Kathree 2004 *Advocate* 23.

²²⁸ Norton 2017 *Advocate* 27-34.

²²⁹ Norton 2007 *Advocate* 27.

In light of the above exposition, this chapter has revealed that the dominant means of measuring transformation in the legal profession has been with reference to inclusion in numbers. In this regard, the statistics available illustrate that gender transformation is yet to be attained in the legal profession. This chapter has focussed on the structural and systematic challenges within the profession that hinder the achievement of substantive equality for women. It has been demonstrated that the basis of these challenges is the operation of persistent stigma and stereotypes that inform women's experiences within the profession. The true nature of the challenges that prevent gender transformation has been identified as being premised on gender stereotypes and the practical effect that these stereotypes have on the lived realities of female practitioners. The question is therefore; what steps are required to address the systematic challenges that have been identified in this chapter. Chapter 4 will consider what is required of the legal profession for it to address the stigma and stereotypes that are the basis of the challenges that hinder female advancement and success in the legal profession.

CHAPTER 4

A FEMINIST ANALYSIS OF THE CAPE BAR MATERNITY POLICY AS A 'TRANSFORMATION' INITIATIVE OF THE LEGAL PROFESSION IN SOUTH AFRICA: DOES IT ACHIEVE SUBSTANTIVE GENDER EQUALITY?

4.1. Introduction

Chapter 3 considered the gender and race composition of the legal profession. It also considered the challenges to achieving gender transformation through substantive gender equality within the legal profession. The chapter demonstrated that the legal profession currently adopts a formal equality perspective on achieving gender transformation rather than a substantive equality perspective. From that chapter, it is evident that there is a need for more to be done in order to attain both formal and substantive gender equality within the profession, if this is to facilitate an increase in the pool of aptly qualified female legal practitioners, who will be available for appointment to the judiciary. The analysis in Chapter 3 brought to the fore an array of disproportionately female job challenges that women in the legal profession currently experience. The manner in which these challenges practically prevent women's success within the profession was also discussed.

As outlined in Chapter 1, section 1.3, the constitutional imperative for gender transformation of the judiciary is contained in section 174(2) of the Constitution. The objective set out therein is that of attaining a judiciary that is broadly representative of the racial and gender composition of South Africa. Chapter 2 concluded that the theoretical framework on equality in South Africa is consistent with the approach that ascribes substantive equality to the meaning of equality. Chapter 3 demonstrated the need for measures aimed at achieving gender transformation in the legal profession as a prerequisite to realising the constitutional obligation of transforming the judiciary.

Chapter 4 will analyse the extent to which the Cape Bar Maternity Policy as an existing transformative initiative is appropriate in order to achieve the goal set out in section 174(2) of the Constitution. In summary, this initiative will be assessed to consider the extent to which it addresses the disproportionately female job challenges faced by women in the legal profession. This initiative is analysed as it is premised on the gender stereotypes around women's parenthood role in society. If the negative experiences of women in the legal profession are demonstrably as a result of gender stigma and stereotypes, the question that will be considered is whether there is any justification in relying on gender stereotypes in formulating a transformation initiative. This discussion will be preceded by a consideration of the views on this question as set out in the *Hugo* case.

Chapter 4 will then contain an analysis of whether the Cape Bar Maternity Policy is discriminatory in itself by virtue of the fact that it is premised on gender stereotypes. This analysis will predominantly be based on the test applied by Mosoneke J in the case of *Minister of Finance v Van Heerden*.²³⁰ This test requires that measures adopted to achieve equality must be necessary and appropriate to achieve the objective that is pursued and the impact of the measure must be proportionate to the objective.²³¹

4.2. What substantive equality requires of the legal profession

Gender equality is set out in the Constitution discussed in Chapter 1 above and given effect within the EEA and PEPUDA. However, the exposition in Chapter 3 demonstrates that despite legal equality and the entrenchment of human and legal rights, the material conditions of women in the legal profession has not significantly changed, considering the entrenched patriarchal norms in place, which keep women in positions of subordination in the profession.²³² A legalistic response to a social

²³⁰ 2004 (6) SA 121 (CC) (hereinafter the *Van Heerden* case). This case was concerned with section 9(2) of the Constitution which prescribes affirmative action measures generally.

²³¹ Wesson and du Plessis "The transformation of the judiciary: fifteen year policy review, South African Presidency" http://www.thepresidency.gov.za/docs/reports/15year_review/jcps/transformation_judiciary.pdf (Date of use: 25 October 2016).

²³² Pieterse-Spies A "The role of legislation in promoting equality: A South African experience" 2003 (4) *Tydskrif vir die Suid-Afrikaanse Reg* 678.

phenomenon cannot bring about the real social transformation required to attain substantive gender equality. The legalistic responses must in fact be designed and implemented to take into account the real conditions of women's lives and the gender power relations at play within the legal profession, as described in Chapter 3.

4.2.1. *Recognising and remedying unconscious reactions, habits and stereotypes*

Endorsing the view of Connell, I am of the opinion that gender inequalities are based in gender relations, in the complex webs of relationships that exist at every level of human experience.²³³ Gender inequality is entrenched in the structures of society, built into the organisation of marriages and families, work, the economy, politics, religions, the arts and other cultural productions and the very language we speak.²³⁴ Substantive equality requires a conscious decision by individuals within the profession to operate with a more acutely aware frame of mind in all interactions with women in the legal profession. In this way, one is called on to be conscious to one's personal, religious and culturally premised prejudices, social perceptions and stereotypical views.²³⁵ Only by being aware of these traits and being cognisant that one is required to shift away from them, can there be an attempt at altering the systematic gender inequalities identified in Chapter 3. It is submitted that this calls for initiatives driven at an individual level before it can be said to be the accepted manner of practice within institutions, law firms and professional bodies. Decision makers can be motivated to initiate and sustain a shift, by monitoring the effect that their stereotypical views about female practitioners have, with regard to their interactions with them. However, this will depend on their individual awareness and understanding of intuitive bias and how it works and their individual accountability for their briefing decisions, initiating and maintaining mentoring relationships, work

²³³ Connell RW "The role of men and boys in achieving gender equality" Expert group meeting organised by DAW in collaboration with ILO and UNAIDS, 21-4 October 2003. The report of the meeting is available at: www.un.org/womenwatch/daw/egm/men-boys2003/Connell-bp.pdf (Date of use: 21 May 2017).

²³⁴ Lorber *Gender Inequality: Feminist Theories and Politics* 6.

²³⁵ Discrimination as a multidimensional problem which is maintained by structural, institutional, personal and cultural levels that are part of a system that makes discrimination possible. See Portilla PK *Redressing Everyday Discrimination: The Weakness and Potential of Anti-Discrimination Law* (Routledge, New York 2016) 61-2.

allocation and the level of institutional commitment to gender equality in the profession.²³⁶

Majority of the decision makers within the legal profession limit the transformation of the profession by perpetuating gender inequality based on stereotypes as an unconscious habit, often unwittingly.²³⁷ Shifting gender inequality of the profession therefore calls for these decision makers to take responsibility for their actions. In this regard, Potilla precisely describes the type of change advocated for as follows:

Indeed it is the lack of understanding of the injustice created by [unconscious reactions, habits and stereotypes] that needs to be assessed and should be the object of redress. In other words, and to a large extent, the comprehension of the injustice that results from unintended reactions, habits and stereotypes that produce the oppression of some groups, is the aim that should be pursued by any remedy for this level of discrimination. And the reasons why stereotyping and discriminatory expressions are unjust should be made public so everyone takes part in this process of politicising culture. To ask [decision makers who determine advancement in the legal profession] to take responsibility for their actions is not the same thing as assigning moral or, as it often stands now, even legal culpability to them.²³⁸

Young puts this in the following way:

To blame a [decision maker] means to make that person liable for punishment... Calling on [decision makers] to take responsibility for their actions, habits, feelings, attitudes, images and associations on the other hand, is forward looking; it asks the person 'from here on out' to submit such unconscious behaviour to reflection, to work to change habits and attitudes.²³⁹

On the basis of the descriptions above, this dissertation postulates that the legal profession's leadership needs to steer away from the tendency to make broad declarations regarding the extent of gender transformation within attorneys firms and advocates groups and the Department of Justice and Constitutional Development. Their general reliance on the statistics that reflect inclusion of women,

²³⁶ Norton *Advocate* 32.

²³⁷ Potilla *Redressing Everyday Discrimination: The Weakness and Potential of Anti-Discrimination Law* (Routledge, New York 2016) 61-2.

²³⁸ Portilla *Redressing Everyday Discrimination* 72-3.

²³⁹ Portilla *Redressing Everyday Discrimination* 78.

rather than substantive gender equality can no longer suffice as the bar by which progress in this regard is measured.

4.2.2. *Recognising differences perpetuated by the gendered social order*

Recognition of difference as part of equality, while crucial to a substantive understanding of equality, is not necessarily evidence of transformative ends. To facilitate transformative ends, there is a need for the legal profession to embrace an acceptance of the differences between women and men in the profession that is open to dismantling dominant norms and institutions.²⁴⁰ To this end, the profession should seek initiatives, practices, policies and other measures that contribute to the dismantling of systemic inequalities and the establishment of new norms. To demonstrate the recognition of difference as a means to the achievement of an end, i.e. dismantling of systemic inequalities, I cite examples observed in court proceedings in 2017. On 22 May 2017, appearing before the honourable Hartford AJ at the Johannesburg Local Division of the High Court in the matter between *Levenstein and Others v Frenkel and Others*,²⁴¹ all counsel sought to complete proceedings on the same day despite the matter having been allocated two days for hearing. In a bid to accommodate this request, the honourable Acting Judge proposed that parties proceed to finalise their submissions beyond the formal court hours which are 09h00 to 16h00. Prior to giving a direction on this, the honourable Acting Judge inquired as to whether all counsel present were in agreement with this proposed arrangement. To this end, a female counsel interjected and brought it to the court's attention that she was unable to continue past 16h30 as she had to collect her child from school. She had not made alternative arrangements and would not be able to be at the court until a later hour. The honourable Acting Judge responded by stating that the court is structured within court hours and she recognises that people organise their lives around those hours. For this reason, she could not let proceedings continue past normal hours and all counsel were required to return on the second allocated day to complete the proceedings. When one

²⁴⁰ Albertyn 2007 (23) *South African Journal of Human Rights* 274.

²⁴¹ *L and Others v Frankel and Others* (29573/2016) [2017] ZAGPJHC 140; 2017 (2) SACR 257 (GJ) (15 June 2017).

speaks of gender transformation requiring substantive equality to be recognised, this provides a classic example of the progress that substantive equality can bring about in the profession. To the extent that a presiding officer takes cognisance of the reality of the female counsel's family commitments and conversely to the extent that female counsel are in a courtroom in which she is comfortable enough to raise her family commitment as a hindrance to proceedings, without fear of reprimand or negative perceptions about her work ethic from the judge and her peers, is encouraging. The gendered reality of the parenthood role played by women is imposed on them purely by virtue of their being women. The existing gendered social order does not impose the same burden on their male counterparts. In recognising this gendered experience as a factor in choosing whether to proceed with the hearing past normal working hours, demonstrates a step towards attaining substantive gender equality that is reflective of the lived experiences of women. The end result of this process should however be a society in which the gendered burden of parenthood is not borne solely by women but is more evenly shared between women and men.

In contrast, are proceedings that took place before the Constitutional Court in the matter between *United Democratic Movement and Others v Speaker of the National Assembly*²⁴² on 16 May 2017. Arguments in this matter were heard by the Constitutional Court until just before 20h00. These proceedings, unlike the proceedings before the honourable Acting Judge Clare Hartford, as described above, were broadcast on live television in South Africa. In what seems to be a display of the male dominance of the advocates' profession, the message broadcast on live television was that for all considering entering and excelling in the profession, one must be prepared for scenarios in which court proceedings will continue until 20h00. In a society in which women are the primary care givers for children by the gendered social order, the interpretation of the message portrayed by this display, is that in those times one will be required to make a choice between being involved in high profile complex types of matters or seeing to their parental responsibilities. The reason that proceedings lasted until 20h00 is because parties argued their matters for longer than their allocated time even though there was no prior

²⁴² *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC).

agreement about the proceedings going on beyond official court hours. The question that arises from this incident is if the Chief Justice made enquiries with counsel before him as to their availability to proceed past the normal hours in arguing the matter, to what extent would female advocates in the court have been able to declare their inability to proceed on live television, in circumstances under which this would be perceived as incompetence, laziness or worse still, confirmation of them being unequal to their male counterparts and in the wrong profession as, dissident speech marks a woman as an outsider, someone who does not belong - not equal.²⁴³ While the Constitutional Court has established some jurisprudence on issues around substantive equality, gender discrimination and women as primary care givers, it failed to apply its own principles, in that one would have expected a brief discussion with practitioners when it became clear that arguments may proceed past the allocated times. In this way, it is submitted that the Constitutional Court, on this occasion, failed to consider the realities of women's lives, on the bench, the advocates and their briefing attorneys in the courtroom, compared to the example which occurred in the High Court.

4.2.3. *Incentives for progressive legal professionals*

The narration above of proceedings observed before the honourable Hartford AJ demonstrate that appointing women [and men] knowledgeable about and sensitive to the gendered implications of law, life and judging, is likely to result in transformation of the legal profession. For this outcome to be achieved, the promotion of attorneys and advocates in the hierarchy and candidates being considered by the JSC for judicial appointment should be evaluated on specific factors.²⁴⁴ These factors include whether they are openly committed to furthering gender equality and using feminist modes of judicial reasoning, interactions within professional bodies and challenging existing norms.²⁴⁵ If these were determinative factors in advancement decisions, transformation would be the natural outcome.²⁴⁶

²⁴³ Harrington *Women Lawyers: Re-writing the Rules* 40.

²⁴⁴ Bonthuys 2015 *Feminist Legal Studies* 132.

²⁴⁵ Bonthuys 2015 *Feminist Legal Studies* 132.

²⁴⁶ Bonthuys 2015 *Feminist Legal Studies* 132.

Hunter, highlights the true nature of the challenge of transformation in a manner that resounds with my own opinion:

These assumptions about the difference that women in power make, however, now appear at best naïve and at worst essentialist. Why did we think that women would transform institutions without simultaneously-or alternatively-being transformed by them? Why did we believe that women appointed to positions of power would be “representative” of women as a group, rather than being those who most resemble the traditional incumbents and are thus considered least likely to disturb the status *quo*? Why did we assume that women appointed to these positions would have the capacity to represent the whole, diverse range of women’s perspectives and experiences? And why did we imagine that individual women would want potentially to risk their newly-acquired status by taking a stand on behalf of other women, when it would be much safer for them to keep their heads down and attempt to gain some legitimacy amongst their sceptical peers and jealous subordinates? After all, women have not exactly been welcomed into the halls of power with open arms, and invited to rearrange furniture. Consequently, it seems more useful at this juncture to ask about feminism and power, rather than women and power.²⁴⁷

In considering advancement and recognition within the legal profession, focus should shift to identifying persons within these institutions and professional bodies who are demonstrably committed to the profound social transformation required to achieve gender transformation, judging from what they have said and done to demonstrate their commitment to changing the structural inequalities that exist in the profession.²⁴⁸ Candidates before the JSC should be questioned about what they have done in their professional spaces towards gender transformation. It is submitted that the current interview process before the JSC does not facilitate the questioning of candidates, male and female, on their views on gender equality or scrutinise their judgments in this regard.²⁴⁹ There is however, record of the JSC questioning a candidate about his conscious or unconscious stereotypical views about women in the appointment of Judge PJJ Olivier to the Supreme Court of Appeal in 1994. In proceedings before the JSC, a rape judgement by the candidate was questioned, in which he suggested that a sexual offender should receive a

²⁴⁷ Hunter R “Can feminist judges make a difference?” in Shultz I *et al* (eds) *Women in the Judiciary* (Routledge London 2012) 7.

²⁴⁸ Budlender 2005 *SALJ* 720.

²⁴⁹ Bonthuys 2015 *JSAS* 135.

lesser sentence because he was overcome by lust and because the effect on the victim of rape by an acquaintance is less than that on a victim of rape by a stranger.²⁵⁰ In the same light, attorneys in practice need to be evaluated for positions of partnership, and as members of the executive committee of the firm and attaining recognition as senior counsel on the basis of what they can demonstrate to have done towards the dismantling of the gendered social order within these firms. This includes the extent to which they have actively influenced work allocation; briefing patterns; mentoring of junior female attorneys and advocates to facilitate their access to networks that facilitate work allocation; and challenge the historical negative connotations attached to the lack of 'face time' and the briefing of female advocates who are working mothers. These are some examples of what should be considered in the evaluation of attorneys with regard to their progression.

4.3. Gender Stereotypes as Justification for Transformative Initiatives in the Legal Profession

Various factors prohibiting the success of women in the legal profession have been considered in Chapter 3. Of these factors, various sex and gender role stereotypes have been demonstrated as being a main cause of the negative job challenges that have been reported to prohibit women's success in the legal profession. Advocating for initiatives that encourage substantive equality in the legal profession, necessarily entails calling for relevant authorities to promote protection from disproportionately female job situations that exist in the legal profession.²⁵¹ These initiatives would take into account the difference in situation of practitioners with family responsibilities assigned to them by operation of the 'sex role' stereotype. This approach may however, be criticised for reinforcing the traditional underlying sexual division of social functions and the unequal treatment of men and women at work.²⁵²

This research finds that this criticism is, not without foundation. It endorses Ross' view that the obligation to eliminate gender stereotypes is central to the realisation

²⁵⁰ Bonthuys 2015 JSAS 69.

²⁵¹ Ross D *Women's Human Rights: International Comparative Law Casebook* (University of Pennsylvania Press Philadelphia 2008) 286.

²⁵² Ross *Women's Human Rights* 288.

of substantive equality.²⁵³ Where a law, policy or practice results in a difference in treatment on the basis of a gender stereotype, that has the purpose or effect of impairing or nullifying women's equal human rights and freedoms, it is a form of discrimination.²⁵⁴ On the one hand, it is the lived reality of women that they continue to operate within the constraints of the existing social and cultural gender imposed stereotypes. To enable women to function at the same level as men in the work environment, women's lived realities have to be acknowledged, informed by privilege and/or historical marginalisation of women, thereby facilitating substantive equality. On the other hand, any effort that seems to reinforce, rather than dismantle this stereotypical reality, runs the risk of being discriminatory in itself. This conundrum was clearly illustrated in the *Hugo* case. The court was called upon to consider whether a transformative measure based on the sexual role gender stereotype, on the role of women and men as child care providers, was constitutionally permissible.

4.3.1 *The Hugo Case*²⁵⁵

The *Hugo* case came before the Constitutional Court of South Africa as an appeal to a judgment of the High Court. John Phillip Peter Hugo, a single father who had just started serving a fifteen-and-a-half-year sentence, brought the action. On 27 June 1994, the President of South Africa signed a Presidential Act in terms of which special remission of sentences was granted to certain categories of prisoners. The category of direct relevance to the case was "all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years". Mr Hugo would have qualified for remission, but for the fact that he was the father, and not the mother, of his son who was under the age of twelve years at the relevant date. In the court *a quo*, the respondent alleged that the Presidential Act was in violation of the provisions of the interim Constitution's equality provision in as much as it unfairly discriminated against him on the grounds of sex or gender and indirectly against his son, because his incarcerated parent was not a woman. The court *a quo* found in Mr Hugo's favour. The decision was appealed before the Constitutional Court. This

²⁵³ Cook and Cusack *Gender Stereotyping: Transnational Legal Perspectives* 117.

²⁵⁴ Cook and Cusack *Gender Stereotyping: Transnational Legal Perspectives* 118.

²⁵⁵ President of the Republic of South Africa and another v Hugo [1997] ZACC 4; 1997 (4) SA 1 (CC) (hereinafter the Hugo case).

case is considered for guidance on the question of whether a gender stereotype may be an acceptable justification for an action aimed at attaining gender equality. Particularly, bearing in mind that stereotyping causes harm that impairs or nullifies women's human rights and freedoms.

The gender stereotype in question in this case is the sex role of women as primary care-givers. The measure aimed at remedying the inequalities of the past was the remission of prison sentences for all mothers with children under the age of 12 years old. The question that the court could not agree on unanimously was whether relying on the gender stereotype that women are primary care givers, was justified to remedy the burden of motherhood experienced by women in society.

Goldstone J, writing the majority judgment, found that the Presidential Act was constitutional. On the question of stereotypes, citing the case of *Incorporated Law Society v Wookey*,²⁵⁶ Goldstone J accepted that the stereotype relied on by the President has been a historical source of discrimination against women. As mentioned in Chapter 1, it was relied on as the basis for denying Wookey admission into the legal profession. Goldstone J recognised the result of the operation of the sex stereotype as being a hindrance to women to compete in the labour market and as one of the causes of deep inequalities experienced by women in employment.²⁵⁷ However, his view was that to use the stereotype for justifying treatment that deprives women of benefits or advantages or imposes disadvantages upon them, would clearly be unfair discrimination. In finding the Presidential Act constitutionally compliant and fair, he held that the Presidential Act in question did not deprive women of benefits or advantages.²⁵⁸ Cook and Cusack have pronounced of Goldstone's judgment, that while he recognised the elimination of gender stereotyping as important, he recognised the challenges presented by the reality of women's child care responsibilities and the impossibility of immediately dismantling existing gender conventions.²⁵⁹ Together with O'Regan J, Goldstone J has been

²⁵⁶ 1912 AD 623.

²⁵⁷ *Hugo* case [38].

²⁵⁸ *Hugo* case [39].

²⁵⁹ Cook and Cusack *Gender Stereotyping: Transnational Legal Perspectives* 212.

noted to have implicitly recognised that the long term objective of gender equality will be achieved if men are encouraged to participate in child rearing.²⁶⁰

Kriegler J penned a dissent in which he found that the pardon, although issued in good faith, for ostensibly rational reasons and manifestly to the advantage of some members of a traditionally disadvantaged class, was inconsistent with the prohibition against gender or sex discrimination, had not been shown to be fair and was as a result, invalid.²⁶¹ One of three reasons for which he was unable to find that the presumption of unfairness that arose once the differentiation of the prisoners along sex and gender lines had been rebutted by the President was his strong disagreement with the majority judgement by Goldstone J, that the stereotype can be a justification for the Presidential Act. His strongly worded view on this warrants a reproduction:

In my view the notion relied upon by the President, namely that women are to be regarded as the primary care givers of young children, is a root cause of women's inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so vehemently condemns. Section 8 and the other provisions mentioned above outlawing gender or sex discrimination were designed to undermine and not to perpetuate patterns of discrimination of this kind....Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely.²⁶²

On the position taken by Goldstone J that where a stereotype does not result in a disadvantage it is justifiable, Kriegler J stated, without deciding on this point, that in very narrow circumstances a generalisation - although reflecting a discriminatory reality - could be vindicated if its ultimate implications were equalising.²⁶³ He however qualified this by explaining that in these cases, there would need to be strong evidence to indicate that the advantages flowing from the perpetuation of a stereotype compensate for obvious and profoundly troubling disadvantages and that

²⁶⁰ Cook and Cusack *Gender Stereotyping: Transnational Legal Perspectives* 121.

²⁶¹ *Hugo case* [64].

²⁶² *Hugo case* [80].

²⁶³ *Hugo case* [82].

the context would have to be one in which discriminatory benefits were appropriate.²⁶⁴

A transformation initiative that seeks to provide equal opportunities for men and women within the legal profession must address social, cultural and economic factors that have historically excluded or limited women's equal participation in public life.²⁶⁵ In this way, society will gradually but surely move from the self-fulfilling cycle of discrimination that forces women to continue to assume the role of primary family caregiver, which fosters the stereotype within the legal profession and in society as a whole, that women are not committed to work and are not as valuable as men at work.²⁶⁶

4.4. Analysis of a Gender Transformation Initiative in the Legal Profession: The Cape Bar Maternity Policy

Drucilla Cornell offers a definition of transformation as bringing about a change radical enough to so dramatically restructure any system that the identity of the system is itself altered.²⁶⁷ This is the objective of transformation initiatives within the legal profession with the aim being achieving a judiciary that is broadly reflective of South African society as a whole. Taking from the principles set out by Moseneke J in the *Van Heerden* case read with those set out in the *Hugo* case, the analysis of a selected initiative in this chapter will consider whether:

- 1) It is a measure adopted to achieve equality;
- 2) It is necessary and appropriate to achieve the objective of enabling substantive equality in the legal profession; and
- 3) If the impact of the measure is proportionate to the objectives. On this test, I will consider, if it is a measure that cause the differential treatment of women and men based on a gender stereotype, therefore amounting to

²⁶⁴ *Hugo* case [82].

²⁶⁵ Dejo Olowu "Mainstreaming women equating men: Charting an inclusionary approach to transformative development in the African decade for women" 2011(15) *Law Democracy and Development* 17.

²⁶⁶ Ross *Women's Human Rights* 313.

²⁶⁷ Van Marle K "The doubly prized world – on transformation, ethical feminism, deconstruction and justice" (1996) *The Comparative and International Law Journal of Southern Africa* 329.

discrimination. If so, whether the discriminatory impact is proportionate to the objective of the measure. The test in determining proportionality asks whether the application, enforcement or perpetuation of a gender stereotype denies women a benefit, imposes on them a burden or degrades women, diminishes their dignity or otherwise marginalises them.²⁶⁸ This initiative will be analysed here to test whether it is in itself, justifiable as a gender transformation measure.

The Cape Bar has a maternity policy that was introduced in discussions at its 2009 Annual General Meeting.²⁶⁹ It is not aimed at addressing the organisation of the family. In terms of this policy, *inter alia*, members of the Bar taking maternity leave are entitled to a year's leave of absence without any loss of domestic seniority (this period may be extended on good cause shown), remission from Bar dues and partial remission from chambers rental and floor dues. In addition, members on maternity leave may at election, practice at home during their maternity leave period.²⁷⁰ This type of transformation initiative is set up on the basis of the gender stereotype that women are the primary care givers. Despite it being a stereotype, this is a role that female advocates continue to play in their everyday realities. The Johannesburg Bar has a similar policy.²⁷¹ These maternity policies acknowledge the reality of women's childbearing and parental roles and attempt to create conditions that will enable women to remain in practice at the Bar, despite their child care responsibilities. These policies are the only policies in the legal profession that attempt to attain gender equality by relying on gender stereotypes that relate to childbearing and parental roles of women in society. The validity of a similar measure has been considered by the Court of Justice of the European Communities.

Germany adopted a law for the Protection of Working Mothers that provided that mothers enjoyed a compulsory eight-week convalescence period after childbirth. On

²⁶⁸ Cook and Coosack *Gender Stereotyping: Transnational Legal Perspectives* 119.

²⁶⁹ Transformation at the Cape Bar <https://capebar.co.za/transformation/> (Date of use: 4 April 2017).

²⁷⁰ Budlender G "Cape Bar adopts new maternity policy" <https://www.sabar.co.za/law-journals/2009/december/2009-december-vol022-no3-pp10-11.pdf> (Date of use: 4 April 2017); See also: Pillay K "The Cape Bar's Maternity Policy" <https://www.sabar.co.za/law-journals/2012/august/2012-august-vol025-no2-p13.pdf> (Date of use: 4 April 2017).

²⁷¹ Johannesburg Society of Advocates Maternity Policy in Relation to Members <https://johannesburgbar.co.za/wp-content/uploads/MATERNITY-POLICY-2-OCT-2012.pdf> (Date of use: 4 April 2017).

expiry of the convalescence period, until the child reached the age of six months, mothers were entitled to maternity leave. The plaintiff, a father, claimed benefits due during the maternity leave period, as he took care of the child while the child's mother returned to work after expiry of the convalescent period. This claim was unsuccessful. In determining the validity of measures adopted by Germany in connection with pregnancy and maternity, the Court of Justice of the European Communities held that the directive under consideration recognised the legitimacy, in terms of the principle of equal treatment, of protecting a woman's needs in two respects.

First it is legitimate to ensure the protection of a woman's biological conditions during pregnancy and thereafter until such birth and secondly it is legitimate to protect the special relationship between a woman and her child over the period that follows pregnancy and child birth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment... such leave may legitimately be reserved to the mothers to the exclusion of other persons.²⁷²

However, while the policy may seemingly pass muster in the European Court of Justice, the fact that it reinforces a gender stereotype makes the policy discriminatory. As such, the test as to the appropriateness of adopting this measure as a means to transform the Cape Bar will be considered on the basis of the principles set out in the *Van Heerden* and *Hugo* cases.

4.4.1. *Is it a measure adopted to achieve equality?*

The policy was adopted to remove, or at least mitigate, one of the serious obstacles to women becoming members of the Bar, and retaining their membership - the consequences of maternity. This is noted as a hindrance to the success of many female practitioners.

²⁷² *Hofmann v Barmer Ersatzkasse* Court of Justice of the European Communities Case 184/83, 1984 E.C.R 3047 (1984) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61983CJ0184> (Date of use: 12 July 2017).

4.4.2. Is it necessary and appropriate to achieve the objective of enabling substantive equality in the legal profession?

The necessity of a measure aimed at addressing the imbalance with regard to the burden of motherhood and child care as imposed on women by societal norms, is undeniable. It is however, not appropriate that the measure does not in itself address the family dynamics or societal dictates that require that a woman must remain the primary child minder in society.

4.4.3. Is the impact of the measure proportionate to the objective?

The impact of the measure is such that it causes the differential treatment of women and men based on a gender stereotype, therefore amounting to discrimination. Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibility for men. This results in men being denied the opportunity to enable them to assume family responsibility. The impact of the maternity policy is such that men, who become fathers and elect to stay at home to care for their children, will not receive the same benefits from the policy as their female counterparts. This is therefore, discrimination. The question then remains, whether this discriminatory impact is proportionate to the objective of the measure.

The test in determining proportionality is whether the application, enforcement or perpetuation of a gender stereotype in the measure denies women a benefit, imposes on them a burden or degrades women, diminishes their dignity or otherwise marginalises them. Much as the measure is discriminatory, I am of the view that the perpetuation of the gender stereotype in respect of the role of women as mothers, which is used to justify this policy, does not deny women a benefit, impose on them a burden or degrade women. Neither does it diminish their dignity or otherwise marginalise them. It is in effect a recognition of the reality of women's lives as they experience it. Until such time as societal attitudes are addressed and women are no longer perceived as primary child care providers, this measure serves to achieve substantive equality at the Cape Bar.

4.5. Conclusion

This chapter provided information on what steps are required to attain substantive gender equality by addressing the challenges experienced by women in the profession. It further considered the extent to which the Cape Bar Maternity Policy, as an existing transformation initiative, is appropriate, in order to achieve the equality goal set out in section 174(2) of the Constitution. It considered the extent to which it addresses the disproportionate employment challenges faced by women in the profession and whether it is justifiable despite perpetuating gender stereotypes on the child caring role of women in society. It demonstrates that these types of special measures have not lost their justification. Having considered the challenges and possible solutions to address these challenges, the question to be considered further in this research is therefore what recommendations can be put forward to practically address the challenges experienced in the profession by women. In this regard, Chapter 5 will summarise the key findings of the study in a thematic manner, provide recommendations for addressing gender transformation in the legal profession, and ultimately the judiciary, and provide a conclusion to the research.

CHAPTER 5

RECOMMENDATIONS

5.1. Introduction

The broader question that this research asks is: what is required of the legal profession that will result in substantive equality, which is necessary to achieve gender transformation? In seeking to answer this broader question, the research set the following as the objectives of the research:

- (a) To consider the theoretical framework for gender equality in South Africa.
- (b) To analyse the current composition of the legal profession in South Africa from the perspective of gender and race.
- (c) To discuss the challenges to gender transformation in the legal profession in South Africa from a feminist perspective.
- (d) To consider measures that would be required to address challenges to gender transformation and encourage substantive gender transformation in the legal profession in South Africa.
- (d) To analyse the extent to which the Cape Bar Maternity Policy, as an existing transformation initiative, implemented on the basis of an existing gender stereotype, encourages substantive gender transformation in the legal profession.

In attempting to answer the research question, Chapter 1 set the background for the research, including providing the meaning of transformation that is adopted for purposes of this study and set out a brief summary of the legal profession in South Africa.

Chapter 2 canvassed the constitutional, legislative and policy measures put in place in South Africa to address the concept of equality at the turn of democracy. It also

contained a discussion of the relevant international law instruments on equality that bind South Africa in respect of gender equality. This information provided the context within which to analyse transformation efforts undertaken in the legal profession. Before setting out the legal context within which to analyse transformation, Chapter 2 began by considering the manner in which marginalisation of women in society tends to manifest. This consideration of the South African social context for an equality discussion was intended to ensure that this research takes into account the actual realities of women's lives, their perceived place within the community and the power, resources and interests implicated by calling for gender transformation.

Chapter 3 explored the extent to which the legal framework for gender equality has resulted in any advantages for women in South Africa. It did this by exploring the extent of gender transformation in the legal profession. It began with an analysis of the gender and race composition of the legal profession by considering the most recently available statistics. Thereafter, it considered existing research studies and other reports documenting the experiences of women in the legal profession that pose as challenges to the attainment of gender transformation. It also included my own lived experiences within the profession. In this chapter, a feminist lens was adopted in considering the challenges to achieving gender transformation through substantive gender equality within the legal profession.

Chapter 4 analysed the extent to which the Cape Bar Maternity Policy as an existing transformative initiative is appropriate in order to achieve the goal set out in section 174(2) of the Constitution. In summary, this initiative was assessed to consider the extent to which it addresses the disproportionate female job challenges faced by women in the legal profession. This initiative was analysed as it is premised on the gender stereotypes around women's parenthood role in society. The research found that the negative experiences of women in the legal profession are demonstrably as a result of gender stigma and stereotypes. The question that was then considered is whether there is any justification in relying on gender stereotypes in formulating a transformation initiative. This discussion was preceded by a consideration of the views set out in the *Hugo* case. Chapter 4 then considered whether the Cape Bar Maternity Policy is discriminatory in itself by virtue of the fact that it is premised on gender stereotypes. This analysis was predominantly based on the test applied by

Moseneke J in the *Van Heerden* case. This test requires that measures adopted to achieve equality must be necessary and appropriate to achieve the objective that is pursued and the impact of the measure must be proportionate to the objective.²⁷³ I concluded that although discriminatory, the Cape Bar Maternity Policy was in fact justifiable.

5. 2. Summary and key findings

The first objective of the research was to consider the theoretical framework for gender equality in South Africa. This research met this objective in Chapter 2. This chapter began by outlining the social context within which gender equality and a call for transformation should be understood. In this chapter, select examples of manifestations of stigma and stereotypes that arise as a result of patriarchy in South African society were discussed. This background led to the unpacking of the legal theoretical framework within which the right to gender equality is to be understood in the South African context. In other words, the laws and policy frameworks that are in place to address the gender inequalities that are experienced by women in society. The legal and policy frameworks available to attain gender equality are captured in international instruments, constitutional provisions, legislation enacted to give effect to the fundamental right of equality and in a national framework adopted by the government of South Africa. From the discussion of the existing legal and policy frameworks, it is apparent that the true essence of equality as is envisioned in the South African context, is substantive equality as opposed to mere formal equality. This is captured and reiterated in provisions of the UDHR, ICCPR, ICSEER, CEDAW, the Constitution and the EEA.

The question was therefore whether the formal recognition of equality and gender rights in the Constitution, ensuing legislation and government policy has resulted in meaningful gains for women in their daily lives. The situation of women in the legal profession in South Africa was analysed to assess the extent to which women's lived

²⁷³ Wesson and du Plessis "The transformation of the judiciary: fifteen year policy review, South African Presidency"
http://www.thepresidency.gov.za/docs/reports/15year_review/jcps/transformation_judiciary.pdf (Date of use: 25 October 2016).

experiences reflect the advantages of having legal frameworks for gender equality, in place. The second objective was therefore to analyse the current composition of the legal profession in South Africa from the perspective of gender and race.

Table 1 in section 3.4 of Chapter 3 illustrates that of a total of 26 701 practicing attorneys, 40% of them are women and 43% are Black. Table 2 illustrates that of a total of 2 915 advocates registered with the General Council of the Bar, 27.2% are women while 36.5% are Black. The racial population in the country is such that Black people constitute the majority of the population with White people constituting 8.9% of the population.²⁷⁴ Women on the other hand constitute a majority of the population at 51.3%.²⁷⁵ These tables demonstrate that the gender and race composition of the attorneys' and advocates' profession do not reflect the population demographics of the country, especially when it comes to female legal practitioners. Due to the fact that women make up the majority of the population, one would have expected that the current makeup of the legal profession would be representative of women.

Having found that gender transformation in the legal profession is still needed, the objective of discussing the challenges to gender transformation in the legal profession in South Africa from a feminist perspective was interrogated. Chapter 3 began by considering two feminist theories on gender equality, Cultural Feminism Theory and Equal Treatment Theory. Cultural Feminism Theory was shown to be premised on the argument that formal equality does not always result in substantive equality.²⁷⁶ This feminist legal theory criticises the Equal Treatment Theory as serving women only to the extent that they could prove that they are exactly like men.²⁷⁷ It proposes that gender neutral laws and policies will not assist women to attain gender equality if they do not acknowledge women's different experiences and perspectives. This theory calls for a concept of legal equality in which laws and policies accommodate differences between men and women, be they biological or cultural differences. It notes that the workplace follows rules based heavily on male-dominated experiences. Within this context, it favours special maternity leave,

²⁷⁴ Statistics SA "South Africa's population" <https://www.brandsouthafrica.com/people-culture/people/population> (Date of use: 1 June 2017).

²⁷⁵ Statistics SA <https://www.brandsouthafrica.com/people-culture/people/population> (Date of use: 1 June 2017).

²⁷⁶ Levit and Verchick *A Primer: Feminist Legal Theory* 14.

²⁷⁷ Levit and Verchick *A Primer: Feminist Legal Theory* 15.

flexible work arrangements or other workplace accommodation for women. This theory has been criticised for reinforcing gender stereotypes associated with domesticity.²⁷⁸

The Equal Treatment Theory and the Cultural Feminism Theory were further shown as contentious among feminist legal theorists. These theories pit formal equality against substantive equality. Nonetheless, the Cultural Feminism Theory was shown to be the preferred theory for purposes of this dissertation. The Cultural Feminism Theory requires that the differences between men and women be taken into account in the laws and practices in the legal profession that seek to attain gender equality. These differences may be biological or cultural. Cultural differences are those that are based on socially constructed ideas of what the norm ought to be. The role of these social constructions of men and women were considered in the laws and principles that aim to address equality.

The lived realities of women remain a reflection of the gender stereotypes in existence. It was shown that the relationship between gender stereotypes and the lived realities of female practitioners is one of cause and effect, on the one hand, while at the same time, both continue to have a separate but cumulative negative effect on the success of female legal professionals.

It was further demonstrated that the basis of the challenges to success of female practitioners in the legal profession is the operation of persistent stigma and stereotypes that inform their experiences within the profession. Gender stereotypes about women in society present themselves as a barrier to the advancement of female practitioners in the profession. Stereotypes about women being better suited for motherhood rather than working, being less competent, about their ability to lead and their ability to be rational, operate within the profession. The issues mentioned above as challenges to the advancement of women in the law firm also present as challenges to them getting access to lucrative clients. This causes them to be underrepresented in decision-making circles. The current system is not conducive for women to grow professionally. It is simply a matter of whether they are prepared to comply with the demands of the legal profession by working more hours, and/or

²⁷⁸ Levit and Verchick *A Primer: Feminist Legal Theory* 18.

suspending their family life by for example, not giving birth, so as not to be away on maternity leave. In my opinion, it is a matter of being in or out.

Having identified the true nature of the barriers to success for female practitioners in the legal profession, the next objective of considering measures that would be required to address challenges to gender transformation and encourage substantive gender transformation in the legal profession in South Africa, was discussed.

The research concluded that a legalistic response to a social phenomenon cannot bring about the real social transformation required to attain substantive gender equality. The legalistic responses must in fact be designed and implemented to take into account the real conditions of women's lives and the gender power relations at play within the legal profession. The obligation to eliminate gender stereotypes is central to the realisation of substantive equality. In this regard, consideration was given to the manner in which: recognising and remedying unconscious reactions habits and stereotypes; recognising differences perpetuated by the gendered social order; and offering incentives for progressive legal practitioners, can address this social phenomenon.

Finally, the research analysed the extent to which the Cape Bar Maternity Policy, as an existing transformation initiative, implemented on the basis of an existing gender stereotype, encourages substantive gender transformation in the legal profession.

A transformation initiative that seeks to provide equal opportunities for men and women within the legal profession must address social, cultural and economic factors that have historically excluded or limited women's equal participation in public life.²⁷⁹ In this way, society will gradually but surely move from the self-fulfilling cycle of discrimination that forces women to continue to assume the role of primary family caregiver, which fosters the stereotype within the legal profession and in society as a whole, that women are not committed to work and are not as valuable

²⁷⁹ Dejo Olowu "Mainstreaming women equating men: Charting an inclusionary approach to transformative development in the African decade for women" 2011(15) *Law Democracy and Development* 17.

as men, at work.²⁸⁰ The research concluded that the initiative, although premised on a gender stereotype, was in fact justifiable.

5.3. Recommendations

5.3.1 *Special Measures to achieve gender equality*

Redistribution through substantive equality addressed in section 9(2) of the Constitution is necessary to address the systemic inequality which would otherwise be left untouched by a mere prohibition of gender discrimination.²⁸¹ Section 5 of the EEA applies to all employers and provides that: “[e]very employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice”. The argument by Fergus and Collier on the interpretation of this section by courts and employers, informs this recommendation. They propose that this section of the EEA imposes a duty on employers to pre-empt discrimination in their workplaces, rather than merely respond to it and that in interpreting the section, one should not confine policies and practices to cleanly identifiable programmes and systems, and overt forms of discriminatory conduct. Discriminatory cultures, as well as more opaque barriers to change, are omitted from its scope. Yet, this is contrary to the EEA’s definition of “employment practices”, which expressly includes “working environments”.²⁸² This requires that practitioners acknowledge that race transformation is not a substitute for gender transformation. Practical steps that can be taken in this regard include re-consideration of the value of face time within the legal practice and allowing for flexible working hours for child caring parents in the profession. Where maternity leave is provided for, the environment should not be such that those who opt to take the benefit become disadvantaged for it. The acknowledgment of the disadvantage that comes from exercising the option to take maternity leave has given rise to the perception within the profession that the female legal practitioners who do take their full maternity leave are not committed to their work. This practice should be discouraged at any

²⁸⁰ Ross *Women’s Human Rights* 313.

²⁸¹ Ngwenya C “Western Cape Forum For Intellectual Disability v Government of the Republic of South Africa: A case study of contradictions in inclusive education” (2013) 1 ADRY 144.

²⁸² Fergus E and Collier D “Race and gender equality at work: the role of the judiciary in promoting workplace transformation” (2014) 30 *South African Journal on Human Rights* 486.

expense. Practitioner, male and female, should internalise special measures, such as maternity leave, as a manifestation of equality as a value and as a human right contained in the Constitution.²⁸³

5.3.2 Individual accountability for championing gender equality

An individual's perceptions about women's place in private and public life do not change because they arrive at the workplace. It is impractical to expect such a person, who may for example hold beliefs that women are incapable of focussed critical thought, to think a woman capable of being the lead counsel in a complex corporate law class action suit - no matter what his/her firm's position is on gender transformation. In my opinion, senior attorneys and advocates, in decision-making circles, think that they are gender-sensitive when in fact they are not. This recommendation calls for an acknowledgment that is not aimed at a blaming exercise, but rather to say "from here on out" they will work not to submit to their unconscious bias. This requires that the individuals within the profession reflect on and work to change their habits and attitudes. This then raises the question of how to monitor the extent to which individuals are actually working to change their habits and attitudes. Attorneys in practice need to be evaluated for positions of partnership, and as members of the executive committee of the firm and advocates considered for recognition as senior counsel on the basis of what they can demonstrate to have done towards the dismantling of the gendered social order within these firms and practice groups. This includes the extent to which they have actively influenced work allocation; briefing patterns; mentoring of junior female attorneys and advocates to facilitate their access to networks that facilitate work allocation; and challenge the historical negative connotations attached to the lack of 'face time' and the briefing of female advocates who are working mothers.

5.3.3 Review advancement requirements

²⁸³ Pather S "Equal treatment: addressing sexual and gender discrimination" 1999 (January) *Alternation* 164-179.

There is a need for institutions to re-assess how they define leadership and how they identify and nurture talent.²⁸⁴ The legal profession is required to address the advancement criteria to take into account requirements that are based on the 'lack of fit criteria' that uses the masculine norm as the standard for determining suitability. This does not only have a negative impact on female legal practitioners but also fails to provide space for gender diversity by excluding male practitioners who do not conform to the masculine socially assigned gender and sex roles and behaviours. These members of the profession include homosexual, transgender, intersex and bisexual men. In reviewing the policy measures to achieve gender equality, the legal profession is required to create spaces within which the female experiences can be shared and concretised in a manner that will inform the policy making processes.

5.4. Conclusion

This research has demonstrated the validity of the dilemma facing feminists of how to affirm the feminine without reverting to stereotypes about women as all accounts of the feminine seem to reset the trap of rigid gender identities, deny real differences among women and reflect the history of oppression and discrimination instead of the idea of equality.²⁸⁵ The analysis of the Cape Bar Maternity Policy concluded that with the aim of attaining equality for a group that has historically been marginalised in the workspace, reliance on gender stereotypes to inform special measures targeted at women, can be justified.

The positive obligations contained in international and regional law, the Constitution and legislation, requires that duty holders identify patterns of inequality and take proactive measures to address them.²⁸⁶ This obligation calls for more than just refraining from discrimination.²⁸⁷ Furthermore, these steps will need to be more than just an increased representation but rather promote changes to the institutional and

²⁸⁴ Richter R "Mending the gender gap: Advancing tomorrow's women leaders" <https://www.pwc.com/us/en/industries/financial-services/library/gender-gap-women-in-financial-services.html> (Date of Use: 7 June 2018).

²⁸⁵ Van Marle K 1996 *CILJSA* 329.

²⁸⁶ Jagwanth 2005 *Acta Juridica* 131.

²⁸⁷ Jagwanth 2005 *Acta Juridica* 131.

societal arrangements which lead to and perpetuate discrimination.²⁸⁸ The steps to be made in this regard will need to be much greater than merely devising special measures on the basis of gender stereotypes. It requires transformative measures that are directly aimed at dismantling gender stereotypes. Transformative measures as required under Article 4(2) of CEDAW must allow women, like men, to rear children as well as participate fully in the work space. This requires a dismantling of the engrained public world perceptions in order for child care and parenting to be seen as valued common responsibilities of the male and female parent and the community.²⁸⁹

²⁸⁸ Jagwanth 2005 *Acta Juridica* 131.

²⁸⁹ Raday in *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* 139.

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ANNEXURES

Annexure 1: Ethical clearance

COLLEGE OF LAW RESEARCH ETHICS REVIEW COMMITTEE

Date: 2017/04/05

Reference: ST 32 / 2017

Applicant: MEK Lasseko

Dear MEK Lasseko
(Supervisor : Dr F Mnyongani)

DECISION: ETHICS APPROVAL

Name	MEK Lasseko
Proposal	CHALLENGES TO GENDER EQUALITY IN THE LEGAL PROFESSION IN SOUTH AFRICA: A CASE FOR PUTTING GENDER ON THE TRANSFORMATION AGENDA
Qualification	LLM

Thank you for the application for research ethics clearance by the College of Law Research Ethics Review Committee for the above mentioned research. **Final approval is granted.**

The application was reviewed in compliance with the Unisa Policy on Research Ethics.

The proposed research may now commence with the proviso that:

1. *The researcher will ensure that the research project adheres to the values and principles expressed in the Unisa Policy on Research Ethics which can be found at the following website:*

http://www.unisa.ac.za/cmsys/staff/contents/departments/res_policies/docs/Policy_Research%20Ethics_rev%20app%20Council_22.06.2012.pdf

2. *Any adverse circumstances arising in the undertaking of the research project that is relevant to the ethicality of the study, as well as changes in the methodology, should be communicated in writing to the College of Law Ethical Review Committee.*

An amended application could be requested if there are substantial changes from the existing proposal, especially if those changes affect any of the study-related risks for the research participants

- 3. The researcher will ensure that the research project adheres to any applicable national legislation, professional codes of conduct, institutional guidelines and scientific standards relevant to the specific field of study.*

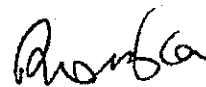
Note:

The reference number (top right corner of this communique) should be clearly indicated on all forms of communication (e.g. Webmail, E-mail messages, letters) with the intended research participants, as well as with the URERC.

Kind regards



PROF D GOVENDER
CHAIR PERSON: RESEARCH ETHICS
REVIEW COMMITTEE
COLLEGE OF LAW



PROF R SONGCA
EXECUTIVE DEAN:
COLLEGE OF LAW