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THE ROLE OF WOMEN ADJUDICATORS IN POST-APARTHEID JURISPRUDENCE

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SUMMARY

Female judges who have occupied a seat and those that are still sitting on the Constitutional Court are in the minority compared to their male counterparts, who occupy a majority of the seats. This disparity, in part, contributes to the lack of judgments that follow a feminist approach. This means that most judgments will most likely not benefit women. In this mini-dissertation I draw awareness to the lack of gender representation that has, in turn, hampered the impact that female judges have in the advancement of gender equality jurisprudence.

I do so by focusing on two aspects that are closely related. In the first fold, I look at the Constitutional call for gender representation in our judiciary and argue its importance by highlighting that the presence of women makes a difference and it brings legitimacy to the judiciary. In the second fold, I agree that gender representation is important, however, I argue that it is not sufficient. Our Constitutional Court, in addition to women judges, needs feminist judgments that will profit women litigants and propagate a feminine discourse and an ethics of care in law. I refer to the work of Mary Jane Mossman where she looks at three principles of legal method, namely, characterisation of the issue, choice in precedence, and the interpretation of statutes. I do so in conjunction with two (out of four) aspects of judging highlighted by Rosemary Hunter, namely, extra-judicial activities and the court process, as solutions to the principles by Mossman.

To elaborate on the second fold, I consider two minority judgments from the Constitutional Court that are examples of feminist judging, namely, the *Jordan* and the *Volks* cases. I show how the women judges, through the minority judgments, looked at the facts broadly and holistically, and not through a formalistic approach.

Keywords: gender, discrimination, Constitutional Court, women judges, feminist, representation, equality

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1 CHAPTER 1: INTRODUCTION

1.1. PROBLEM STATEMENT

The achievement of equality, human dignity, and freedom under the South African Constitution is closely linked with the eradication of poverty and inequality.[1] In this mini-dissertation, I look at the eradication of gendered inequality by looking at a problem that is two-fold. Firstly, the South African Constitutional Court does not have a fair and sufficient representation of women judges since the advent of democracy. Secondly, our judiciary does not have enough feminist judgments that protect the interests and rights of women.

> Close to 50 per cent of the judiciary are now black, but only about 15 per cent are women. Looking back over 10/11 years there have been material changes, but we still have a long way to go to free the potential of black and women aspirant judges and to achieve the transformation that the Constitution demands. Transformation must remain high on the agenda.[2]

The quote above is central to the first fold of this mini-dissertation. In 2005, 11 years after the start of the constitutional dispensation, only fifteen percent of judges were women. I agree with former Chief Justice Arthur Chaskalson, as noted above, that transformation ought to remain a matter of high priority, specifically one that involves the equality of women amongst themselves and also with men.

By 2016, 22 years after the inauguration of the constitutional dispensation, 86 of the 242 judges occupying permanent positions in the country were women.[3] This amounts to only 36 percent of the seats in South Africa's superior courts[4], that is, all the High Courts in every province, the Labour Court, the Land Claims Court, the

1 C Albertyn 'Gendered transformation in South African jurisprudence: poor women and the Constitutional Court' (2011) 3 *Stellenbosch Law Review* 591.

2 A Chaskalson Farewell Speech (2 June 2005), discussed and cited in discussed and cited in C Hoexter & M Olivier *The judiciary in South Africa* (2014) 284.

3 M Toxopeus (Helen Suzman Foundation) 'Women in the judiciary' 8 June 2017 https://hsf.org.za/publications/hsf-briefs/women-in-the-judiciary#_ftn2 (accessed 22 August 2018).

Competition Appeals Court, the Electoral Court, the Supreme Court of Appeal, and finally the Constitutional Court. The increase in numbers cannot be denied, however, there is a sense unwillingness towards this increase, hence it is moving at a snail pace.

I mitigate for the presence of women on the Constitutional Court because of the substantive 'different factor' that they can bring to the Court, specifically by way of feminist judgements - especially in cases that involve gender inequality against women. Different people, in this case women, can bring different perspectives to judging. This is resonated fluently by Morne Olivier:[5]

> The benefit of a Constitutional Court comprising a mix of races and genders lies not in it 'representing' constituencies, but that collectively it is likely to be more accepting and understanding of the diverse cultures and groupings within society and their needs, because of its own experience of past disadvantage and/or discrimination.

Although, this does not assume that a female judge will necessarily always judge differently from a male judge; 'race and gender are not inevitable indicators of outcomes'.[6]

1.2. GENDER INEQUALITY IN THE SOUTH AFRICAN JUDICIARY

Against the backdrop of the research problem of this mini-dissertation, gender inequality is explored in two areas, namely, appointments in the judiciary and inequality against women litigants.

When South Africa's liberation was secured in political manifestos and legal compacts, women also obtained rights they were previously deprived of.[7] The rights obtained [equality included] were not necessarily translated into practice; the way in which we can identify and experience the liberation is when legal rights are

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4 M Toxopeus (note 3 above).

5 M Olivier 'A perspective on gender transformation of the South African judiciary' (2013) 130 *The South African Law Journal* 459.

6 M Olivier (note 5 above) 457.

7 F Kaganas & C Murray 'Law and women's rights in South Africa: An overview' in C Murray (ed) *Gender and the new South African legal order* (1994) 1.

translated into reality, and also in the manner in which they are augmented by the social change.[8] This will determine whether they have changed the lives of women or not and whether gender equality has been achieved or not. This responsibility of translating the liberation into practice is one that I bear partly on the shoulders of the judiciary and contend that women judges, in particular, are in a better position to carry the responsibility because I hold the view that being female is a crucial aspect of understanding and relating to women issues.

The extension of equal rights within marriage and inheritance, towards land, resources and leadership is transformative, and thus in line with the transformative constitutionalism project.[9] The deferment of men as heads of households and providers, and women as underlings who cater to the sexual and reproductive needs of men in patriarchal families and also various institutions of employment ought to take place hurriedly, in order to achieve gender equality.[10] The achievement of gender equality requires recognition of the entitlements women have to power, status and resources.[11] This deferment allows for the revaluing of the status of women in their capacity as learned judicial officials and of women litigants who live under laws that do not protect their interests. The recognition of women's entitlement to certain benefits as a way of achieving equality can also be shown through the amendment of certain laws.

1.3. MITIGATING THE NEED FOR MORE WOMEN JUDGES AND FEMINIST JUDGMENTS

1.3.1. The need for more women judges

> It is significant that there are no women's voices in any of the sites in which law was talked about: no women lawyers, no women politicians, no women 'experts'. An alliance of patriarchies relegated African women to the bottom of the social structure, and simultaneously

8 F Kaganas & C Murray (note 7 above) 1.

9 C Albertyn (note 1 above) 598.

10 C Albertyn (note 1 above) 598.

11 C Albertyn (note 1 above) 598.

> elevated and demeaned white women. They became not invisible, but inaudible, to state, polity and law.[12]

The above quote emphasises that the genesis of the law profession was characterised by male professionals.[13] Whether that defining characteristic has changed is a contest of how one chooses to interpret the inclusion of female legal professionals within the South African context, that being a 'previously' racial and gender biased environment.

Previously, women were excluded from the judiciary [including other professions] owing to the fixed notion that women were unsuited, by nature and by divine intent, to be at any other place but in a home setting,[14] donning their roles as homemakers. Beyond the Constitutional call for gender representation, more women judges are needed because of the difference that they bring, the principle of difference was acknowledged by Justice Sachs in this way:[15]

> What the Constitution requires is that the law and public constitutions acknowledge the variability of human beings and affirm the equal respect and concern that should be shown to all as they are… What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself.

The presence of judges that come from different backgrounds, women, for purposes of this mini-dissertation, sends out an all-important message of inclusion. Moreover, it promotes confidence in and legitimacy of the judiciary that would have otherwise been lacking if the different communities or backgrounds it ought to be protecting are excluded from its ranks.[16] This view is asserted in the documentary

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12 M Chanock *The making of South African legal culture 1902-1936: Fears, Favour and Prejudice* (2001) 26, discussed and cited in Hoexter & Olivier 254.

13 M Chanock (note 12 above) 254.

14 RB Cowan 'Do women on South Africa's courts make a difference?' in U Schultz & G Shaw (eds) *Gender and Judging* (2013) 317-318.

15 National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC).

16 C Albertyn 'Judicial diversity' in C Hoexter & M Olivier (eds) *The judiciary in South Africa* (2014) 260.

Courting Justice by the President of the Supreme Court of Appeal (SCA), Mandisa Maya:[17]

> South Africa has come a very long way since the era of democracy was ushered in 1994; but the sad reality is that for many of our people things have not changed that much. So it is important for those people, the millions of down-trodden people out there in the rural areas and townships, to be made to understand that the courts are theirs too. That's why we need to have transformation. It is critical for the Constitutional Court to have people who come from the places where disputes come from. Having someone like me here is what will make a woman from the rural areas and a woman from the township who has a legal dispute approach a court when they have a problem, knowing that one of theirs is sitting there.

The women judges in South Africa have submitted that the encounters, perceptions and understanding of women judges can bring diverse perspectives to legal reasoning.[18] This is due to their innate ability to adopt a 'contextual and relational care-based moral reasoning'.[19] Important to caution against is the belief that a certain kind of life experience, or a judge's gender or sexual orientation renders that judge biased, or inclined towards bias.[20]

1.3.2. The need for more feminist judgments

The primary and most important reason for the call towards the delivery of more feminist judgments is that such judgments benefit women who were previously disadvantaged due to laws that protect only the interests of women and disregard those of women. I will mitigate for the delivery of more feminist judgments by showing the impact of existing cases that sought for the equality of women.

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17 The documentary features seven South African women judges. Speaking from their courtrooms, chambers, homes and childhood communities, they convey their commitment to using their judicial authority to realise the Constitution's promises. See, for further information, *Courting Justice (2008)* at www.courtingjustice.com. (Hereafter Courting Justice).

18 C Albertyn (note 16 above) 264.

19 C Albertyn (note 16 above) 264.

20 M Olivier (note 5 above) 460.

S v Jordan and Others[21] *– Justice O'Regan dissents*

The case of *Jordan* dealt with the criminalisation of 'women' sex workers. Prostitution is an act whereby the prostitute and their customer engage in sexual intercourse, and both parties in actual fact consent to and participate in the intercourse.[22] Therefore, the argument presented, is that both the prostitute and client should be penalised and not just the prostitute. However, the majority judgment in this case penalised the act of only one party, being the female, who is often the prostitute.

The act, therefore, of making the prostitute the primary offender, in effect promotes and validates a pattern of sexual stereotyping which clashes with the principle of gender equality.[23]

Section 20 (1) (aA) of the Sexual Offences Act[24] was being challenged, and it states the following:

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

Justice O'Regan, along with Justice Sachs, dissented from the majority judgement. The majority judgment held that in interpreting the law above, the target to prostitutes (women) and not their customers (men) was not discriminatory and further held that the section is gender-neutral.[25]

The statements and arguments that will be discussed later in detail by O'Regan and Sachs do offer a different perception from the majority. A perception that will be highly praised by those committed to the cause of gender equality.

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21 *S v Jordan and Others* 2002 (6) SA 642 (CC) (hereafter *Jordan*).

22 *Jordan* (note 21 above) para 60.

23 *Jordan* (note 21 above) para 60.

24 Sexual Offences Act 23 of 1957 Sec 20 (1) (aA) (hereafter SOA).

25 RB Cowan (note 14 above) 322.

Volks NO v Robinson[26] – Justice O'Regan and Justice Mokgoro jointly dissent

According to Mtendeweka Mhango, the Constitutional Court in this case failed to push forward the transformation project.[27] The case dealt with the Maintenance of Surviving Spouses Act[28], where the court held that it was constitutionally acceptable to discriminate on the basis of one's marital status.

Mrs Robinson was in a permanent life partnership with the deceased for sixteen years and they both stayed together and shared in the household expenditures. After the death of the deceased, the law found that Mrs Robinson does not qualify as a widow or spouse and can therefore not claim maintenance in terms of the above piece of legislation.[29] The majority further found that the section was not in conflict with section 9 and 10 of the Constitution.

Catherine Albertyn criticised the majority decision by stating that the judgment was unsatisfactory in its privileging of marriage and its subsequent failure to accept an enlightened concept of cohabitation.[30]

Justice O'Regan and Mokgoro, in their dissenting judgment, took the approach of pointing out the similarities between marriage and cohabitation instead of the differences. Their argument reads:[31]

> Not every family is founded on a marriage recognised as such in law. Yet members of such families often play the same roles as in families which are founded on marriage and provide companionship, support and security to one another.

This judgment, like the one above, reinforced the negative stereotypes of unmarried women.

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26 *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) (hereafter *Volks*).

27 M Mhango 'Transformation and the judiciary' in C Hoexter & M Olivier (eds) *The judiciary in South Africa* (2014) 87.

28 Maintenance of Surviving Spouses Act 27 of 1990 (hereafter MSSA).

29 *Volks* (note 26 above) para 9.

30 M Mhango (note 27 above) 88.

31 *Volks* (note 26 above) para 106.

The two judgments above, both the majority and the minority in contrast, demonstrate the need for feminist judgments. If we continue to disregard the interests of women in our society, we, in effect, continue to accelerate gender inequality and support its enforcement in our laws.

1.4. CHAPTER OVERVIEW

In chapter 2, I look at the Constitutional call for gender representation in the South African judiciary. I do so by looking at how section 174(1)-(2) of the Constitution has been interpreted. The section stipulates the appointment criteria of a judicial officer, namely, the candidates that are appointed should be appropriately qualified,[32] and secondly, the judiciary should represent the race and gender demographics of our society.[33] I move on to the representation of women in the in the judiciary by discussing the appointment procedure and how such a procedure has been an obstacle for female candidates. This is because the gatekeepers [the Judicial Services Commission] are often men who hold patriarchal views of where women belong.[34] I close off the chapter by showing the current composition of the Constitutional Court in an effort to show how there still a need for more female judges and also underlining the importance of their presence in the Constitutional Court.

In chapter 3, I explore two legal principles to legal method, namely, characterisation of the issue, choice of precedent and interpretation of statute as discussed by Mary Jane Mossman.[35] The principles are discussed in conjunction with two of the four aspects that are involved in judging based on the work by

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32 The Constitution Act 108 of 1996 section 174(1) (hereafter The Constitution).

33 The Constitution section 174(2).

34 P Maithili 'Exclusion of women from the legal profession in the United States of America, the United Kingdom, and South Africa' 25 November 2012 https://ww3.lawschool.cornell.edu/AvonResources/Memo-Womens-exclusion-from-the-legal-profession.pdf (accessed 13 October 2018).

35 MJ Mossman 'Feminism and legal method: The difference it makes' (1987) 3 *Wisconsin Women's Law Journal* 156.

Rosemary Hunter. The first principle I look into is the characterisation of the issue, where I note a tendency of judges to eschew the political, moral and social significance of the legal issue before the court.[36] I suggest a way to alter that manner of characterisation, namely, the participation of judges in extra-judicial activities that will expose them to the realities of societies. Furthermore, these activities help judges to encounter fewer institutional constraints than they do in their task of judging.[37] Secondly, I look at the choice of precedents, here I show how judges use the lack of precedent to solidify their arguments and protect interests that serve men.[38] Finally, I look at the interpretation of statutes and the intentions of the legislators, where I will discuss how the interpretation of law relating to the claims by women is complicated by judges by insisting that it be interpreted formally.[39]

I go on further to look at two examples of feminist judgments that come from the Constitutional Court. Albeit, they were minority judgments. I discuss the cases separately starting with the prostitution case of *Jordan*, followed by the cohabitation case of *Volks*. I acknowledge that men, like Justice Albie Sachs, can and have delivered feminists judgments, and that such judgments are not only limited to women. However, for all intents and purposes, in this mini-dissertation, I place my focus on women and their aptitude to deliver feminist judgments that protect the rights of women.

In chapter 4 I provide my final remarks. I conclude by stating that the Constitutional Court does not have a fair gender representation at the moment. I also conclude by stating that representation of female judges in the Constitutional Court is imperative, but it is not enough that we stop at appointing more women. Therefore, in addition to that argument, I conclude by saying that as we continue in appointing more women, our Court also needs more feminist judgments for the reason that it is lacking in judgments that seek to protect and promote the rights of women. The

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36 MJ Mossman (note 35 above) 157.

37 R Hunter ‘Can feminist judges make a difference’ (2008) 15 *International Journal of the Legal Professions* 27.

38 MJ Mossman (35 above) 157.

39 MJ Mossman (note 35 above) 159.

cases I use as examples show this absence since the feminist judgments are minority judgments instead of majority judgments, therefore, they do not create law neither do they benefit and or change the lives of women.

2 CHAPTER 2 - THE CONSTITUTIONAL CALL FOR GENDER REPRESENTATION

2.1. INTRODUCTION

The central research problem of this mini-dissertation is that the Constitutional Court does not have enough women on the bench and it does not have enough feminist judgments. The research question that guides this chapter is why is it that there are not enough women in the Constitutional Court?

In this chapter, I look at the Constitutional call for gender representation. I break down the chapter by starting with a discussion of the Constitutional injunction on gender representation in the judiciary and how the section in the Constitution has been interpreted in various ways. Secondly, I look at the appointment procedure by Judicial Services Commission (hereafter the JSC) and show areas of that process that obstruct the appointment of women in the Constitutional Court. Thirdly, I point out the importance of appointing women in the Constitutional Court. Finally, I look at the current composition of the Constitutional Court before I conclude the chapter.

2.2. THE INTERPRETATION OF SECTION 174(1)-(2) OF THE CONSTITUTION

The Constitution of the Republic of South Africa[40] has often been described as being transformative by design and in its nature. Karl Klare coined the term 'transformative constitutionalism', and defined it as follows: [41]

> A long-term project of constitutional enactment, interpretation and enforcement (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a

40 The Constitution (note 32 above).

41 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

> democratic, participatory, and egalitarian direction … I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word.

Post-apartheid in South Africa was characterised by talks of and calls for a transformation in all the sectors of the economy.[42] For purposes of this section, I will look at gender transformation within the judiciary, because, like every other sector, it is not insusceptible to transformation.

The call for transformation is expressed in the Constitution. The Constitution in section 174(1)-(2) provides the following: [43]

> (1) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
>
> (2) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

The provision is relentlessly compelled by the universal acknowledgment of the fact that an all-white and all-male judiciary would not only be illegitimate but also ludicrous in a democratic South Africa.[44]

When looking at the current composition of the Constitutional Court, it seems that only men are the 'appropriately qualified' ones as they occupy majority of the seats. Currently there are nine judges and three of them are women.[45] For the past 24 years to date, the Constitutional Court has only had 6 female judges out of 26 judge's altogether.[46]

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42 MR Phooko & SB Radebe 'Twenty-three years of gender transformation in the Constitutional Court of South Africa: Progress or regression' (2016) 8 Constitutional Court Review 306.

43 The Constitution (note 32 above) section 174(1) - (2).

44 C Albertyn (note 16 above) 261.

45 Constitutional Court of South Africa https://www.concourt.org.za/index.php/judges/current-judges (accessed 5 December 2018).

46 Constitutional Court of South Africa (note 45 above).

Reality shows that, although the onus of appointing women (to balance the gender representation) as judges, together with that of racial representation, flows from the Constitutional injunction cited above, gender representation has remained behind the racial representation in the Constitutional Court.[47] Since 1994 to date, the Constitutional Court has had ten white judges and 16 black (including Indian and Coloured) judges altogether.[48] There is a racial balance, even though it is not 50/50.

Former Constitutional Court judge, Justice Kriegler interprets section 174 as follows: [49]

> The constitutional mandate instructs the Judicial Service Commission in section 174(1) to appoint people that are appropriately qualified. That is a precondition. That is a mandatory requirement. And then subsection (2), as a rider to that, says: and in doing that, have regard to the racial and gender balance on the Constitutional Court. And it is for obvious reasons that the Constitution, while mentioning the transformational criterion in subsection (2), demands in subsection (1) as the primary and essential requirement that appointees be appropriately qualified. Now these two essential factors, the one absolute and the other discretionary, have been turned on their heads.

Admittedly, the section in question creates uncertainty as to which of the two requirements ought to take preference, the merit requirement or the diversity requirement? Section 174(2) qualifies section 174(1) and the purpose of the qualifier is an effort to remedy the unevenness in the composition of the judiciary.[50]

Several debates have sprung forth regarding section 174, and those debates have been focused on the JSC. The point of the debates comes primarily from the perception that it seems as though section 174(2) has been interpreted as having more weight over section 174(1), more specifically that race is taking preference

47 E Bonthuys 'Gender and race in South African judicial appointments' (2015) 23 *Feminist Legal Studies* 127.

48 Constitutional Court of South Africa https://www.concourt.org.za/index.php/judges/former-judges (accessed 5 December 2018).

49 D Steward 'Jeremy Gauntless, race and judicial appointments' 14 November 2012 http://www.politicsweb.co.za/news-and-analysis/jeremy-gauntlett-race-and-judicial-appointments (accessed 7 October 2018).

50 L Siyo & JC Mubangizi 'The independence of South African judges: A constitutional and legislative perspective' http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Mubangizi.pdf (accessed 7 October 2018).

over merit. These debates, built on race and merit, are an indication and evidence that race transformation is being placed ahead of gender transformation, while the two should run parallel to one another.[51]

On the one hand, the JSC has been found at fault for its lack of ability in appointing an adequate number of women; this is related to section 174(2).[52] On the other hand, the JSC has also been criticised for its failure to appoint experienced white candidates - this is related to section 174(1) – and their inclination to appointing less knowledgeable black candidates.[53] It can be said that the provision is a two-edged sword; coming with both the positive and negative effects. The JSC, in responding to the merit requirement, will almost always do so at the expense of the requirement to diversify, and the opposite also holds true.

Morne Olivier, in attempting to interpret section 174(2), creates a continuum. On the one end of the continuum lies representation and on the other end of the continuum is diversity.[54] Both these spectrums will be succinctly explored.

Representation - If section 174(2) alluded to representation, then the provision in question would translate to changing of the face and look of the judiciary so as to reflect the racial and gender demographics of the country.[55] Thus, highlighting form and deflecting substance. The possible danger with focusing only on representation in judicial appointments is that judges may possibly be perceived as acting as representatives of their constituencies, and therefore, judging in a manner that furthers only the interests of the constituency.[56] This is similar to how parliament functions. It goes without saying, though, that increasing the number of female

51 L Siyo & JC Mubangizi (note 50 above).

52 L Siyo & JC Mubangizi (note 50 above).

53 L Siyo & JC Mubangizi (note 50 above).

54 M Olivier (note 5 above) 450.

55 M Olivier (note 5 above) 450.

56 M Olivier (note 5 above) 452.

judges in the Constitutional Court is an important marker for transformation as it is a way of redressing the injustices of the past.[57]

Diversity - Olivier goes onto the other end of the continuum, and there lies diversity. Diversity does not only consider race and gender. Diversity gives equal consideration to judicial philosophy, political views, religion, cultural heritage,[58] amongst many other factors, including race and gender. Therefore, the list provided is not a closed list. Also, race and gender do not enjoy preference over the other factors.

In concluding the interpretation of Olivier, as well as this section, the understanding is that in the middle of the continuum lies *representivity*, and that is where both representation, in its narrow sense, and diversity, in its broader sense, meet.[59] In such an instance, representivity would give precedence to race and gender to an extent, however, not at the expense of merit and some form of diversity in the broad sense.[60] The presence of female judges in the Constitutional Court should not just be a numbers game but it should be an extension to merit.

In the next section of this chapter, I look at how judicial appointments work in South Africa and the challenges faced in appointing female judges to the Constitutional Court.

2.3. JUDICIAL APPOINTMENTS BY THE JUDICIAL SERVICES COMMISSION

A critical field to look at when speaking of judicial transformation is the JSC. The JSC is a functionary that can be described as the vehicle that drives judicial transformation and more particularly, for purposes of this mini-dissertation, gender representation within the judiciary.

57 M Olivier (note 5 above) 451.

58 M Olivier (note 5 above) 452.

59 M Olivier (note 5 above) 452.

60 M Olivier (note 5 above) 452.

Nearing the end of the apartheid epoch, there had been a recognition and acceptance of the need to remodel the unaccountable and racially exclusive process through which judges were selected pre-1994.[61] As such, a solution to that need was the proposal of finding a transparent and accountable process for judicial appointments. The JSC was thereafter established as an independent body that would facilitate transparent and accountable appointment processes, and also perform the advisory role for the President who then makes the final appointments.

The JSC, as regulated by the Judicial Services Commission Act,[62] was established during the new Constitutional dispensation by the Constitution. Therefore, the powers of the JSC are sourced from the Constitution in section 178 and the above-mentioned national piece of legislation. The JSC is made up of the Chief Justice, the President of the Supreme Court of Appeal, one Judge President designated by the judges president, the Minister of Justice or an alternate designated by the minister, two practising advocates nominated from within the advocates' profession, two practising attorneys nominated from within the attorneys' profession, both the attorneys and the advocates are appointed by the president, one teacher of law designated by teachers of law at South African universities, six members of the National Assembly chosen by the assembly itself (of whom at least three are members of opposition parties represented in the National Assembly), four permanent delegates to the National Council of Provinces designated together by the Council, and four persons designated by the president as head of the national executive – after consulting the leaders of all the parties in the National Assembly.[63]

In terms of section 178 (5) of the Constitution, the JSC is authorised to advise the national government on any matter concerning the judiciary or the administration of justice. In addition, the JSC perform the following tasks: [64]

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61 C Hoexter & M Olivier 'The Judicial Services Commission' in C Hoexter & M Olivier (eds) The judiciary in South Africa (2014) 155.

62 Judicial Services Commission Act 9 of 1994.

63 The Constitution (note 32 above) section 178(1) (a) - (j).

64 Office of the Chief Justice Republic of South Africa https://www.judiciary.org.za/index.php/judicial-service-commission/about-the-jsc (accessed 5 December 2018).

a. interviewing candidates for judicial posts and making recommendations for appointment to the Constitutional Court; and
b. dealing with complaints brought against Judges.

The first function is handled by the JSC as a whole and the second function is run by a group of 13 commissioners.

The JSC is a body that has been assigned with the task of making recommendations for judicial appointments of superior courts, and largely plays the role of being the 'torch-bearer' of judicial transformation.'[65] In executing their role, section 174(2) of the Constitution directs the JSC to reflect broadly, in their recommendations, the racial and gender demographics of the South African society.

In the next section, I look at the challenges that obstruct women legal professionals from being appointed in the Constitutional Court.

2.4. CHALLENGES OBSTRUCTING THE APPOINTMENT OF WOMEN JUDGES ON THE CONSTITUTIONAL COURT

There are a number of hurdles that stand before the appointment of women in our courts. In South Africa, there is no active piece of legislation that inhibits women from becoming judges. Therefore, the shortage of female judges is attributable to other causes besides statutory provisions. The umbrella cause can be said to be the preferences of judicial gatekeepers, including the JSC and the Judge Presidents who hold positions that permit them to have a bearing on judicial appointments.[66] The JSC and the Judge Presidents are key doorkeepers who have been positioned at the doors of the courts.[67] The JSC, who have been delegated with the mandate of

65 MR Phooko & SB Radebe (note 42 above) 314.

66 P Maithili (note 34 above).

67 P Maithili (note 34 above).

advancing a more representative judiciary, may actually be obstructing the appointment of females instead of advancing them.[68]

The question at hand is what are the factors that impede women's progress in the profession? This question ought to be directed to those experiencing the inhibitions. The JSC has frequently asked this question when interviewing female candidates.[69] A positive from the JSC. It is, to an extent, a move in the right direction as the question and to whom it is directed to is a clear acknowledgment of the structural gender inequality and discrimination that infiltrates the legal profession.[70] The move is, furthermore, a consideration of the broader societal outlines of privilege and domination.[71]

There are, however, reasons given by the JSC of why more female candidates are not appointed in the superior courts. The reasons are rather confusing. On the one extreme, the JSC states that they actually submit more females as nominees than males as a way of increasing the presence of women on the Constitutional Court.[72] This is important for purposes of female representation in superior courts. On the other extreme, the JSC states that they will not nominate people solely based on the fact that they are women, as there are other factors that prevail over gender considerations.[73] Elsje Bonthuys writes that the factors that supposedly trump the gender requirement are vague and indistinguishable.[74] How then does the JSC make nominations? More females or other factors that prevail over gender considerations? A continuing reason given, however, for the lack of

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68 RB Cowan 'Women's representation on the courts in the Republic of South Africa' (2006) 6 *U. MD. L.J.* 313.

69 E Bonthuys (note 47 above) 135.

70 E Bonthuys (note 47 above) 135.

71 E Bonthuys (note 47 above) 135.

72 E Bonthuys (note 47 above) 135-136.

73 E Bonthuys (note 47 above) 135.

74 E Bonthuys (note 47 above) 136.

female appointments, is that there are not enough suitably qualified women who apply for judicial appointments.[75]

I now move to more reasons besides those directly given by the JSC that continue to obstruct the appointment of female judges.

Firstly, the continuing culture of patriarchy and sexism has resulted in the dearth of female judge appointments.[76] This is an example of a challenge that was inherited from the pre-democratic judiciary, and it continues to filter through to the current judiciary. Women have, and still are relegated to motherhood and are confined to the home space under the leadership and dominance of the male figure.[77] Although this can be seen as a barrier of the past, it is clear that it is still a subtle view that is held by most male judges who create a hostile environment for female judges, but also a view held by those who exercise the power of appointment.[78] Some men hold the belief that women who practice law are violating their duty; the duty being that 'the law of nature destines and qualifies the female sex for the bearing and nurture of the children'.[79]

Secondly, the reason for the underrepresentation of female judges in superior courts, for purposes of this mini-dissertation, the Constitutional Court, is because they are regrettably underrepresented in the legal pool from which candidates are chosen.[80] The number of women that graduate from South African law schools is substantial and these women constitute a majority of their classes and come out as the best-performing students.[81] It is without surprise why one would ask why then are women so underrepresented and furthermore, why they are not in this so-called

75 E Bonthuys (note 47 above) 136.

76 RB Cowan (note 68 above) 305.

77 RB Cowan (note 68 above) 305.

78 RB Cowan (note 68 above) 307.

79 R Davies 'Women as advocates and attorneys' (1914) 31 *South African Law Journal* 384.

80 RB Cowan (note 68 above) 312.

81 RB Cowan (note 68 above) 305.

'pool' of candidates to choose from. I will attempt to answer that by way of an example of women in academia who are unable to 'qualify' for the 'pool'. Women in academia face similar impediments as those faced by practicing lawyers, such as low pay, lack of training opportunities, and a lack of opportunities for advancement.[82] In addition to those challenges faced by female academics is the reality that there is rarely an allowance made for them to take time off work in order to serve as an acting judge; in such instances, they would have to take unpaid leave.[83]

Thirdly, also tying up with the aforesaid, is the unclear procedure of how one becomes an acting judge. In an article by Leanne Jansen, she points out the following, that 'anyone who had not spent time as an acting judge was unlikely to be considered a suitable candidate by the JSC, but few women were afforded this opportunity.'[84] A well-defined procedure would and can ensure that more women qualify to apply. The appointment of acting judges is done by the Judge Presidents of courts and it is unfortunate that they are unaccountable to anyone concerning acting vacancies; this process is not transparent and thus imbalanced due to the lack of an oversight mechanism.[85] Moreover, to qualify as an acting judge, one would have to be very successful, either as a lawyer or advocate; successful enough to take time off from practice for a period of a few months.[86] Success is a result of intense exposure. The problem lies in that if one does not receive quality work or briefings, or they are affected by the lack of maternity leave or are unable to recover their fees because of the 60/90 days rules at the bar, they are highly unlikely to be recognised by the Judge Presidents.[87] According to the 60/90 days rule, the unconditional waiting period before counsel's invoice is due for payment is 60 days in Johannesburg and 90 days in Cape Town.

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82 MR Phooko & SB Radebe (note 42 above) 329

83 MR Phooko & SB Radebe (note 42 above) 329.

84 Leanne Jansen 'Acting judge criteria' 12 August 2013 http://www.iol.co.za/news/crime-courts/acting-judge-criteria-needed-1560743 (accessed 26 September 2018).

85 MR Phooko & SB Radebe (note 42 above) 328.

86 MR Phooko & SB Radebe (note 42 above) 328

87 MR Phooko & SB Radebe (note 42 above) 329.

In the next section, I look at the difference female judges bring by being in the Constitutional Court.

2.5. THE DIFFERENCE FEMALE JUDGES MAKE IN THE CONSTITUTIONAL COURT

Important to caution against is the assumption that appointing women is merely just a measure of balancing the demographic composition. The appointment of women is not as inane or frivolous as merely having gender representation, or loosely put, having a female face on the Constitutional Court. The appointment of women translates to the appointment of a different experience, a different way of reasoning and also a different way of relating and understanding a case before the Constitutional Court.[88] The appointment of women judges translates to a transformation of the values, culture, and norms of the judiciary.[89] A constricted focus of appointing larger numbers of women, although obligatory, is ineffectual.[90]

The presence of judges that come from previously disadvantaged groups, women, for purposes of this mini-dissertation, sends out an all-important message of inclusion of all people who come from different walks of life. Judge Masipa observes the following:[91]

> In the past, people would stay away from court, and would rather sort things out themselves. Now, they see their black people and women on the Constitutional Court and they see well… maybe if we want justice then the High Court is the place where you go to.

Therefore, having women on the Constitutional Court bench has acted as a way of realising and actualising the right to access to courts,[92] especially for female litigants.

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88 C Albertyn (note 16 above) 276.

89 C Albertyn (note 16 above) 276.

90 E Bonthuys (note 47 above) 129.

91 Courting Justice (note 17 above).

92 The Constitution (note 32 above) section 34.

In this section, I have explored two important differences brought by the presence of female judges. Firstly, they legitimise the judiciary as an institution, secondly, they actualise the right to access to courts for female litigants through their different legal reasoning.

In the next section I look at the current composition of the Constitutional Court.

2.6. THE CURRENT COMPOSITION OF THE CONSTITUTIONAL COURT

In this section of the chapter, I will briefly give the progression or regression, the reader will decide, of female appointments in the Constitutional Court.

In 1994, under the new constitutional dispensation, the JSC exercised their functions for the first time in appointing the 11 justices that would serve on the new post-apartheid Constitutional Court. Of the 11 justices, two were women, Justice Yvonne Mokgoro and Justice Kate O'Regan; both of them had a background in academia as well as practice. 24 years later, it cannot be said that the number of female appointments has changed drastically.[93] The current Constitutional Court composition has just three female judges.

Justice Yvonne Mokgoro in 2010 suggested the following:

> It may not be constitutionally unreasonable for the JSC to take a most drastic corrective action, devoting a particular session to the consideration of women only for judicial appointment, advancing the currently much-needed gender balance in the judiciary and doing so having invited nominations for women.[94]

The above was suggested at a time when the Constitutional Court still only had two women on the Constitutional Court. Mokgoro and O'Regan had retired in 2009 and Justice Sisi Khampepe was appointed in 2009 and Justice Nkabinde was still on the Constitutional Court since her appointment in 2006. One can read in the infuriation that may have been circulating amongst many women in the legal profession. The suggestion by Mokgoro may, to an extent, be seen as extreme,

93 MR Phooko & SB Radebe (note 42 above) 318.

94 Y Mokgoro 'Judicial appointments' (2010) 23 *Advocate* 45.

however, but as Olivier says, maybe the shortage of women judges validates the extreme action.[95]

The third woman to be appointed was appointed in 2006, the appointment happened only 12 years later since 1994. The woman was Justice Bess Nkabinde.

The number of women judges in the Constitutional Court marginally improved with the appointment of Justice Mhlantla in 2015 and Justice Leona Theron in 2017.[96] Justice Nkabinde later retired, thus leaving three female judges. Currently, in October 2018, the Constitutional Court has nine judges and three of them are the abovementioned women. In essence, from 1994 to 2018, the Constitutional Court has, at most, had four women serving on the Constitutional Court Constitutional Court.

2.7. CONCLUSION

In this chapter I seek to respond to the research question of why there is a lack of female representation in the Constitutional Court. I look at the appointment of judicial officers by the JSC, with a specific focus on women appointments. I show how the judicial process, and specifically those who are in positions of making nominations are a hurdle for female judges who aspire to preside over the Constitutional Court. I also look at the challenges faced by females that contribute to the lack of female representation by giving the reasons provided by the JSC, but also reasons outside of the JSC. These reasons include underrepresentation in the legal profession and the unclear procedure of how one becomes an acting judge. I show how the presence of women makes a difference by explaining how their presence demonstrates that the previous exclusion of women was illegitimate. Their presence also means that the experiences and perspectives of women are brought into the decision making processes.[97]

95 M Olivier (note 5 above) 460.

96 MR Phooko & SB Radebe (note 42 above) 319.

97 R Hunter (note 37 above) 7.

I argue for greater representation of female judges on our Constitutional Court bench because they make a difference. In the next chapter I argue that while having more female judges is an important first step, it is, however, not sufficient. Our Constitutional Court, in addition to female judges, also needs feminist judgments because these are judgments that will reap benefits for women and propagate a feminine discourse together with an ethics of care in law.

3 CHAPTER 3 – A CALL FOR FEMINIST JUDGMENTS

3.1. INTRODUCTION

The central research problem of this mini-dissertation is that there are not enough women in the Constitutional Court, and moreover, our Constitutional Court does not have enough feminist judgments. The research question that guides this chapter is why do we not have sufficient feminist judgments in the South African jurisprudence?

The primary reason for the need for feminist judgments is that feminist judgments hold the likelihood of benefitting women and, furthermore, propagating a feminist discourse. A feminist approach to judging brings to realisation the shift from formal to substantive equality adopted by the Constitutional Court which allows for a move away from an abstract analysis of discrimination to one that focuses on the actual context in which the violation of rights occur.[98]

In this chapter, I primarily engage with the work of Mary Jane Mossman and I incorporate her work with Rosemary Hunter's work. I name and describe the three principles of legal method as discussed by Mossman, namely, the characterisation of the issue, the choice of legal precedent to decide the validity of women's claims, and the process of statutory interpretation.[99] In the discussion, I also incorporate some of the aspects involved in judging according to Hunter, namely, the court process and extra-judicial activities.[100]

After discussing the principles of legal method and the aspects involved in making a judgment, I look at cases that are examples of feminist judgments that have been delivered in the Constitutional Court, even though they were delivered in the minority judgment.

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98 C Albertyn 'Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court' (2011) 3 *Stellenbosch Law Review* 605.

99 MJ Mossman (note 35 above) 157.

100 R Hunter (note 37 above) 17.

3.2. INCORPORATING A FEMINIST PERSPECTIVE TO JUDGING - THE THREE PRINCIPLES OF LEGAL METHOD

Traditionally, the process of presiding over a case and delivering judgments has worked within a highly structured framework which offers very little opportunity for the fundamental questioning of the process of defining issues, choosing applicable principles and discounting inapplicable ideas.[101]

The need for more feminist judgments will require the incorporation a feminist perspective into judging. Such an incorporation will entail new methods of inquiry, especially in the process of decision-making. Below, I discuss three principles of legal method as examined by Mossman.

The discussion to follow attempts to point out that one of the most important projects of feminist jurisprudence [or perspective to judging} has been to intentionally detonate the fable of the disinterested, disengaged and distant judge.[102] This is in line with the transformative constitutionalism project in South Africa calling for the move from formal equality and towards substantive equality.[103]

3.2.1. Characterising the issue

In the *Jordan* and the *Volks* cases, the judges in the majority constantly characterised the legal issues in a narrow fashion and consequently exposed that the court was interested only in the law.[104] The consequence is that the law that they are interested in does not benefit the interests of women.

The traditional method of characterisation of a legal issue before the court is to detach the issue as far as possible from the social or political significance that

101 MJ Mossman (note 35 above) 149.

102 R Hunter (note 37 above) 16.

103 C Albertyn (note 98 above) 605.

104 MJ Mossman (note 35 above) 157.

befalls the legal issue or the current culture in which we live in.[105] This method ignores reality. Furthermore, this method of characterisation evades from responsibility; this means that in cases where the outcome is negative, the outcome is attributed to the law and not the judge who is interpreting the law.[106] As was the case in the judgment of *Jordan* and *Volks*, the judges relied heavily on the strict interpretation of the law. This method of characterisation, therefore, strengthens the law's detachment and a neutral stance.[107]

The blunder in eschewing the social and political significance of legal issues can be resolved by one of the aspects of judging discussed by Hunter, namely, partaking in extra-judicial activities.[108] Outside the bounds of being a judge, there are judges who participate in activities that inform who they become once they preside over cases. Some female judges participate in women judge's organisations – mostly for support from other women judges-, write articles and give speeches.[109] All of these activities require and assist the female judges to continue to challenge gender bias, seek to improve the lives of women and also promote substantive equality.[110]

3.2.2. The choice of legal precedent and culture to decide the validity of women's claims

The absence of legal precedence or even the absence of a culture from the past that validates legal claims by women creates a handicap for arguments that are in favour of women.[111] For instance, because sex work has always been shun upon, due to the

105 MJ Mossman (note 35 above) 157.

106 MJ Mossman (note 35 above) 158.

107 MJ Mossman (note 35 above) 158.

108 R Hunter (note 37 above) 27.

109 R Hunter (note 37 above) 27.

110 R Hunter (note 37 above) 27.

111 MJ Mossman (note 35 above) 159.

conservative culture we come from as South Africa, the court therefore reflected the spirit of the then times in their judgment and was unwilling to take into account the change in time and culture when they decided on the *Jordan* case.

The lack of a culture and/or legal precedence shows the adverse effects of the doctrine of precedence on newly-emerging claims to legal rights.[112] Therefore, if, in order for a claim to be supported, a precedence is required, then it would mean only existing claims will have a place in our courts.[113] As such, because enjoying some of the legal benefits of a marriage while one is cohabiting is not a familiar practice, this essentially translates in courts not upholding the claims brought to the court as was the case in *Volks*. The doctrine of precedence essentially becomes a means of protecting and maintaining the status quo, and moreover for justifying the denial of new claims.[114]

Depending heavily on existing culture and legal precedence can be attributed to the lack in time that judges take to listen cases. Hunter describes the importance of listening to stories of abuse visited upon women and children.[115] The part of listening to the stories follows the precepts of contextualisation, particularity and attention. According to the precepts, a judge will reason while taking into consideration the context of the case; the judge focuses on the reality of women's lived experience in each case and produces a decision that is customised rather than abstract.[116]

3.2.3. The process of statutory interpretation

The cases I discuss hereunder deal primarily with the interpretation of legislation and the impact of the interpretations. In the *Jordan* case it was contended by the majority

112 MJ Mossman (note 35 above) 159

113 MJ Mossman (note 35 above) 159.

114 MJ Mossman (note 35 above) 159.

115 R Hunter (note 37 above) 17.

116 R Hunter (note 37 above) 12.

judgment that the section in question was gender-neutral in that it used the words 'any person'.[117] Strictly interpreted, the section is gender-neutral; however, a broad interpretation that considers context shows that the section is actually gender-specific.

Words in pieces of legislation are interpreted by seeking to understand the intentions of the legislator at the time in which the piece of legislation was enacted, therefore, ignoring the present time and culture. After interpreting, judges experience a sense of confidence that the legislators then [presumably men], would have agreed with their interpretation.[118]

In order for South African courts to deliver more feminist judgments, the judiciary ought to counter attack the strict dictates of legal method. Therefore, a feminist judgment will, in light of cases involving legal claims by women, 'seek to find more facts, refuse to exclude some ideas as irrelevant to the decision making process, and will not be accepting of the need to abstract from the particular circumstances and make an either/or decision.'[119]

In the next section I look at examples of feminist minority judgments in South Africa. The purpose of the section to follow is to highlight the importance of having feminist perspectives in judgments through the assertion that feminist perspectives challenge deeply held and often hallowed beliefs that are embedded in emotions and voiced in primitive imagery.[120] Furthermore, feminist perspectives contest vested interests and uproot perspectives that are familiar.[121] These areas that need to be challenged are highlighted substantially through the cases that I will discuss below, where judgments opposing feminist judgments are a projection of protected interests, familiar perspectives and hallowed beliefs.

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117 *Jordan* (note 21 above) para 9.

118 MJ Mossman (note 35 above) 163.

119 MJ Mossman (note 35 above) 163.

120 MJ Mossman (note 35 above) 147.

121 MJ Mossman (note 35 above) 147.

3.3. FEMINIST MINORITY JUDGMENT ON PROSTITUTION - *JORDAN*

Eight years after the appointment of judges in the Constitutional Court, the court decided to criminalise the selling of sex but not the buying of sex. This judgment was discriminatory towards women as the 'main sellers' of sexual pleasure.[122]

At the core of this case are the Constitutional challenges that are based on human dignity, freedom of person, privacy and economic activity.[123] The case dealt with prostitution as a trade.

The section in legislation that I focus on is section 20 (1) (aA) of the Sexual Offences Act, (hereafter the SOA).[124] The section, through an aerial view, criminalises the trade of commercial sex. However, one of the issues being contended is that the criminalisation of prostitution or commercial sex targets only the sex workers and not those that pay for the 'service' and thus results in unfair discrimination towards women.[125] The section reads as follows:[126]

> "20. Persons living on earnings of prostitution or committing or assisting in commission of indecent acts. –
> (1) Any person who –
> . . . .
> (aA) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward;
> . . . .
> shall be guilty of an offence."

Justice Ngcobo, who delivered the majority judgment, provided his views by saying that the section actually penalises 'any' person who engages in sex for a reward, therefore, such a person could be a female and could also be a male sex

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122 J Simpson, 'Stereotyping sex workers: S v Jordan and others" Mini-dissertation submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: *Student Symposium on Women's Human Rights* 9 (2009) 1.

123 *Jordan* (note 21 above) para 1.

124 SOA (note 24 above) section 20 (1).

125 RB Cowen (note 14 above) 322.

126 SOA (note 24 above) Section 20 (1)(aA).

employee; placing emphasis on the point that the section is gender-neutral.[127] Based on that understanding, the section does not amount to discrimination on the grounds of gender, as argued by the minority judgment.

The following section attempts to provide an assessment of both the majority and minority judgments and furthermore highlight why the minority judgment should have been the majority judgment as a response to the call for more feminist judgments.

3.3.1. Facts of the case

The case involves three appellants who were convicted in a lower court as they were in contravention of the SOA. The first appellant was Ellen Jordan, the owner of the brothel. The second appellant was Louisa Broodryk, a salaried employee of the first appellant. The third appellant was Christine Jacobs, a sex worker. All three appellants had been in contravention of the SOA and they admitted to that, however, they argued that the relevant provisions that they have contravened must be declared to be unconstitutional.

The court of the first instance, the Magistrate Court, could not for obvious jurisdictional reasons, deal with constitutional matters. Therefore, the case was taken on appeal to the Pretoria High Court and the court declared section 20 (1)(aA) to be unconstitutional and referred the matter to the Constitutional Court so that they could confirm the invalidity.

When the case went to the Constitutional Court, the Court held that the section in question was not unconstitutional; therefore, the invalidity was not confirmed. The following section will provide an analysis of the majority and minority judgments, as the two judgments fundamentally differ on their outlook. The two judgments show a gendered breakdown and interpretation of the rights to equality, human dignity and privacy in the context of sex trade work.[128] The purpose of the section to follow is to show the gender callousness that was illustrated, keeping in

127 *Jordan* (note 21 above) para 9.

mind that the majority and minority judgments were given by a male and a female judge respectively.

3.3.2. How it was judged

Majority judgment delivered by Justice Ngcobo

The majority judgment presented four arguments relating to section 20(1) (aA), however, this mini-dissertation will only focus on two. Firstly, the provision does not discriminate directly as it is gender-neutral. Secondly, the provision does not discriminate indirectly since there is a difference between sex workers and their customers. The issue in question was that of determining the constitutionality of section 20(1) (aA) based on whether it discriminated, either directly or indirectly, against women on the ground of gender.

In dealing with the question of direct discrimination, Justice Ngcobo wrote that "the section penalises 'any person' who engages in sex for reward. The section clearly applies to male sex workers as well as female sex workers. The section is therefore gender-neutral."[129] This is how the court characterised the issue, through the strict and narrow interpretation on the law.

According to that interpretation, the section sanctions the sex worker, be it a man or a woman, who is involved in the business of commercial sex. Jennifer Simpsons expresses that although the argument posed by Justice Ngcobo is technically correct, it actually pays no attention to the realities of the context in which the law truly operates and the lop-sided effects on female sex workers.[130] The context is that, on the one hand, sex workers are often women who are vulnerable, illiterate and who have very few options at their disposal on how to earn a living.[131]

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128 U Jivan & D Perumal "'Let's talk about sex, baby'- but not in the Constitutional Court; Some comments on the gendered nature of legal reasoning in the Jordan case" (2004) 17 *South African Journal of Criminal Justice* 368.

129 *Jordan* (note 21 above) para 9.

130 J Simpson (note 122 above) 8.

On the other hand, the customers of the sexual services are men who are, generally, of a higher economic status. [132]

In the quote below, the Justice Ngcobo further elaborates his view by saying that the customer is penalised at common law as an accomplice and also in terms of a different piece of legislation. This assumedly strengthens the fact that the section in the SOA is not inclined or applicable only to one gender.

> The differentiation made by the section must be viewed against the fact that a man or woman who pays for sex is guilty of criminal conduct and liable to the same punishment as the sex worker. At common law, the customer is a *socius criminis* and also commits an offence under section 18 of the Riotous Assemblies Act. In terms of the Riotous Assemblies Act, the customer is liable to the same punishment to which the sex worker is liable.[133]

The above quote deals with the second argument of indirect discrimination. The above extract places emphasis on the objective that the section in the SOA is trying to reach, which is to prohibit commercial sex, and not to necessarily protect the customer.[134]As a result, the Court took an absolute criminalisation approach to prostitution.

The avowals made by the Court are, however, problematic in their reliance of section 18 of the Riotous Assemblies Act.[135] With regard to the penalisation of the customer through another piece of legislation, it is not clear whether it was the intention of the legislator of that time to actually criminalise the purchaser of commercial sex.

The argument by Justice Ngcobo that the customer of the sexual pleasure(s) is targeted as *socius criminis* (accomplice in a crime) under the Riotous Assemblies

131 J Simpson (note 122 above) 8.

132 J Simpson (note 122 above) 8.

133 *Jordan* (note 21 above) para 11.

134 *Jordan* (note 21 above) para 12.

135 Riotous Assemblies Act 17 of 1956.

Act calls for consideration. Upon reference to the judgment of the High Court and the decision under analysis here, one cannot find any reference to the client in the case being sued as *socius criminis* in the trial.[136] Therefore, the argument by Justice Ngcobo is not resounding. In addition, the majority failed to appreciate that a statute, in this case, the SOA, can either expressly or by necessary implication, exclude the liability of the accomplice in their reliance on the discredited apartheid statute.[137] The legislature, in drafting the SOA, made unambiguous provisions for cases where persons who aid with or further the commission of offenses under the SOA are to fall within its domain.[138]

Justice Ngcobo also stated that the point of the SOA is to outlaw commercial sex.[139] This argument does not, however, resist the opinion that the Act could truly achieve the purpose by just sanctioning both parties[140] – the nature of commercial sex is that it involves the customer and the sex worker, therefore, if the purpose is to really censure commercial sex, it can be done by penalising both parties and not just the seller.

Minority judgment delivered by Justice O'Regan and Justice Sachs

The minority judgment is important for the development of our jurisprudence as it provides a more contextual analysis of the substantive understanding of gender equality.

The minority judgment was written by Justice O'Regan and Justice Sachs. Their contention was that section 20(1) (aA) should be declared to be inconsistent with the Constitution. The minority judgment held that, at face value, the section

136 K Kalwahali 'The Criminalisation of prostitution in South African criminal law' unpublished LLM dissertation, University of South Africa, 2009 20.

137 U Jivan & D Perumal (note 128 above) 374.

138 U Jivan & D Perumal (note 128 above) 374.

139 *Jordan* (note 21 above) para 15.

140 K Kalwahali (note 136 above) 20.

appears to be gender-neutral; however, it should not be taken at face value as it does not take into account the subjective bearing of the provision in society.[141]

The section penalises the sex worker (purveyor) and not the purchaser. The minority argued the section amounts to indirect discrimination. They substantiated their position by pointing out that sex workers are every so often, although not entirely, female, and their customers are mostly, while not entirely, male.[142] The consequence of this indirect discrimination is that it creates a stigma that is prejudicial to women. The female sex worker is viewed and accepted in society as the social outsider, while the male customer is accepted or ignored by society.[143] With that being so, on the one hand, the 'act' moralises the women and, on the other hand, the 'act' applauses the men. The minority paint this picture: [144]

> She is visible and denounced, her existence tainted by her activity. He is faceless, a mere ingredient in her offence rather than a criminal in his own right, who returns to respectability after the encounter.

The above quote is plainly unfair; the societal views impair the dignity of the female sex worker. By raising this particular point, it is noteworthy to mention how Justice O'Regan (and Justice Sachs) is intentional in being that different voice for the vulnerable women and, by the same token, showing sensitivity to the demands of gender equality. The quintessence of the minority's argument is that both the sex worker and the customer should be liable to prosecution and that prosecuting only the seller of the sexual services perpetuates stereotypes that affect the female sex workers adversely.

3.3.3. Conclusion

From both the majority and the minority judgment, there was a concerted understanding of the purpose of the SOA, that is, the SOA sought a legitimate

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141 *Jordan* (note 21 above) para 40.

142 *Jordan* (note 21 above) para 59.

143 *Jordan* (note 21 above) para 64.

144 *Jordan* (note 21 above) para 64.

purpose of ensuring that commercial sex is prohibited.[145] Justice Ngcobo, in concluding his judgment, also made mention that he agreed with the minority judgment in that section 20 (1) (aA), the criminalisation of prostitution, should not be a way of violating the rights to privacy, freedom, and security, and the right to economic activity.[146] Neither should the criminalisation create a ground of discrimination, as it did with the majority judgment.

The majority have illustrated their unwillingness to accept a wider definition of equality by choosing to rely on obtuse references to legislation that has no bearing on the issue of prostitution. On top of that, they continued using unsubstantiated assertions in order to reinforce this unwillingness. The majority has defended the law by saying that it is legitimate to target the sex worker in an attempt to outlaw commercial sex, and there are other provisions under which the customer can be held liable.[147]

Simpsons says that the above approach is erroneous as it gives the sex worker the role of being the primary offender, while the customer assumes the role of a secondary offender who is an accomplice or helper in the crime being committed by the primary offender.[148] There is clearly an unequal legal and moral culpability placed on both parties.

The statements and defenses provided in the minority judgment by Justice O'Regan (and Justice Sachs) took into serious consideration the gender-related aspects concerning prostitution; therefore, those that are committed to the demands of gender equality would applaud this judgment.[149] The next section will, again, look at a case where female judges were in the minority judgment.

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145 U Jivan & D Perumal (note 128 above) 371.

146 *Jordan* (note 21 above) para 31.

147 J Simpson (note 122 above) 14.

148 J Simpson (note 122 above) 14.

149 RB Cowen (note 14 above) 324.

3.4. THE FEMINIST MINORITY JUDGMENT OF COHABITATION - *VOLKS*

In this section, I continue in my attempt to show how female justices have made a difference in the development of our jurisprudence through their dissenting stances and through the adoption of a feminist approach to judging.

In the *Volks* case, the piece of legislation that was being challenged on the grounds of constitutionality was section 2(1) of the Maintenance of Surviving Spouses Act (hereafter MSSA), read with section 1, which confers the right to claim maintenance from the estate of the deceased spouse in instances where they are unable to support themselves.[150]

What is central to this case is the question of whether the provision should extend, in the application, to survivors of permanent life partnership.[151] Therefore, not only apply to those who had been legally married during their lifetime.

3.4.1. Facts of the case

Mrs. Robinson, the respondent, was in a permanent life partnership which lasted for 16 years with Mr. Shandling, until his death. During their relationship, the two never got married and no children were ever born from their relationship.[152] Their relationship was an example of the classic cohabitation relationship, which is often labeled as 'living together as man and wife.'[153]The two occupied a flat together in Cape Town and Mr. Shandling was the main breadwinner as Mrs. Robinson had never been employed on a permanent basis; therefore, she did not have a regular income stream. The only regular money that came into her bank account every

150 *Volks* (note 26 above) para 1.

151 *Volks* (note 26 above) para 2.

152 *Volks* (note 26 above) para 3.

153 B Smith 'Rethinking Volks v Robinson: The implications of applying a "contextualised choice model" to prospective South African domestic partnership legislation' (2010) *Potchefstroom Electronic Law Journa*l 13 240.

month was for household necessities that would be deposited by Mr. Shandling.[154] Mrs. Robinson was registered as a dependent on the deceased's medical aid and even more, the deceased suffered from bi-polar and manic depression where Mrs. Robinson nursed and cared for him.[155]The couple attended events as partners and were regarded and accepted as a couple by their mutual friends. In addition to that, Mrs. Robinson appeared to have been accepted by the deceased's children as she would, on occasion, travel with Mr. Shandling to the United States of America to visit the three children of Mr. Shandling who were born from his previous marriage.[156]

The deceased left a will in which he bequeathed to his life partner a motor vehicle, some of the contents of the flat they both occupied, and also a sum of R100 000. According to the will, Mrs. Robinson was meant to remain in the flat for a period that does not exceed nine months after the death of Mr. Shandling.[157]

Following the death of Mr. Shandling and during the winding up of the deceased's estate, Mrs. Robinson instituted a claim for maintenance from the deceased's estate in terms section 2(1) of the MSSA. The section upon which the claim is based provides the following: [158]

> If a marriage is dissolved by death after the commencement of this Act, the survivor shall have a claim against the estate of the deceased spouse for the provision of his [or her] reasonable maintenance needs until the death or remarriage in so far as he [or she] is not able to provide therefore from his own means and earnings.

The MSSA entitles a survivor, who was in a marriage that has been terminated by death, to institute a claim for maintenance against the deceased's estate to the extent to which the survivor's own means and earnings are insufficient.[159] The appellant, in this case, refused the claim by Mrs. Robinson on the

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154 *Volks* (note 26 above) para 5.

155 *Volks* (note 26 above) para 6.

156 B Smith (note 153 above) 240.

157 *Volks* (note 26 above) para 7.

158 MSSA (note 28 above) section 2(1).

159 B Smith (note 153 above) 241.

basis that Mrs. Robinson is not a spouse for purposes of the MSSA. The executor's refusal was correctly valid when looking at the literal reading of the Act.[160] A survivor has been defined as 'the surviving spouse in a marriage dissolved by death.'[161]

Mrs. Robinson consequently applied to the High Court for an order that would declare her a survivor of the deceased for purposes of the MSSA.[162] In addition to that, she challenged the constitutionality of the definition of the words 'spouse', 'survivor', and 'marriage' in the Act, as she felt that there was no reference to survivors of life partnerships, and thus no benefit in terms of the Act would accrue to her.[163]

The decision of the High Court was that the MSSA discriminated unfairly on the grounds of equality and human dignity, and consequently ordered, *inter alia*, the following:[164]

1. The definition of 'survivor' in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as if it included the following words as the words 'dissolved by death': 'and includes the surviving partner of a life partnership.'
2. The omission from the definition in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the following, at the end of the existing definitions, is unconstitutional and invalid:
   ' "Spouse" for the purposes of this Act shall include a person in a permanent life partnership';
   ' "Marriage" for the purposes of this Act shall include a permanent life partnership.'

The decision of the High Court was referred to the Constitutional Court for confirmation. This is in line with section 167(5) of the Constitution that provides that the Constitution makes the final decision on whether a piece of legislation is constitutional and should also confirm any order of invalidity made by the higher courts. The case had four judgments that were delivered by the Constitutional Court,

160 B Smith (note 153 above) 241.

161 MSSA (note 28 above) section 1.

162 *Volks* (note 26 above) para 12.

163 *Volks* (note 26 above) para 12.

164 *Volks* (note 26 above) para 25.

two of them being the majority and the other two being the minority judgment. The next section will discuss all judgments except for the last minority judgment by Justice Sachs.

3.4.2. How it was judged

Majority judgment delivered by Justice Skweyiya

In the majority judgment, Justice Skweyiya found that an interpretation of section 2 of the MSSA that would embrace permanent life partnerships would be 'unduly strained' and patently inconsistent with the context and structure of the text. [165]

In addition to that, the Court found the section to not be in contravention of the right to equality and the right to dignity as encapsulated in the Constitution. However, Justice Skweyiya accepted that the section did amount to discrimination on the grounds of marital status, although, the pertinent question was whether the discrimination was unfair.[166]

According to Justice Skweyiya's interpretation of the challenged law, he finds the provision to be unambiguous and plain. The Court stated that section 2(1) was but an extension of the invariable consequence of marriage, the consequence being the reciprocal duty between living married persons that should extend to the estate of the deceased spouse.[167] As a result, the purpose is for the reciprocal duty of support to continue to be operated after the death of one party. This is a fair, and again, technically correct interpretation of what the legislature may have intended; it is not an unclear or vague provision.

The Court, in this case, took an objective and formalistic manner of legal reasoning, where the law is applied as is without considering the circumstances

165 *Volks* (note 26 above) para 45.

166 *Volks* (note 26 above) para 50.

167 *Volks* (note 26 above) para 39.

surrounding the case. This can be said to go against the transformative constitutionalism project.

If it does count for anything at all, Justice Skweyiya did express how he has a genuine concern for the vulnerable women who wish to get married but cannot (predominantly because the man has no intention of marrying the woman and he is content with the existing arrangement) and later become 'victims of cohabitation.'[168]

In addressing the right to dignity, the Court again said that the section does not undermine her dignity or in any way tell her relationship is worth any less than that of someone who is married.[169] The Court in this instance has conveyed a clear message to Mrs. Robinson that there is a fundamental difference, when it comes to maintenance, between those that belong to the internationally recognised institution of marriage and those that do not belong, like her. It is not an easy argument to accept because Mrs. Robinson is being told that her dignity is indeed worth less than that of someone who is married and the reason tended on is her marital status.[170] The Court could have challenged the section, as was done in the High Court considering the dynamics of the facts of the case.

The bottom line of this judgment was to make it clear that the Court's interpretation of the challenged section is not unfair in not imposing the duty upon the estate of the deceased in instances where that kind of duty never arose by operation of law during the lifetime of that person. In essence, 'it is not appropriate that an obligation that did not exist before death be posthumously imposed'.[171] In essence, Mr. Shandling was supporting Mrs. Robinson out of his own will and not out of the operation of the law, as it would be the case in a marriage institution that is operating under the recognised law. Mr. Shandling could have, at any stage of the relationship decided to stop supporting Mrs. Robinson and there would not be any legal obligation that would weigh on him.

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168 *Volks* (note 26 above) para 68.

169 *Volks* (note 26 above) para 62.

170 L Wildenboer 'Marrying domestic partnerships and the Constitution: A discussion of Volks NO v Robinson 2005 5 BCLR 446 (CC)' (2005) 20 *South African Public Law* 462.

171 *Volks* (note 26 above) para 62.

Majority judgment delivered by Justice Ngcobo

This is a separate judgment that is concurring with the majority as written by Justice Skweyiya. At this stage, it is important to note that both the majority judgments have been written by male figures and the minority by female figures. The premise of accepting that the challenged provision is discriminatory but not unfair for Justice Ngcobo is that of the 'right to freely marry' that is available to everyone.

Justice Ngcobo's emphasis is on the point of marriage being a matter of choice between two parties. Therefore, those that choose to marry will enjoy certain benefits and lose other benefits by operation of law, and the inverse will happen for those that choose to not get married.[172] In essence, you made your bed so lie on it. According to this judgment the entitlement of those in permanent relationships to the protection of the MSSA is solely dependent on the parties' decision to get married or not.[173] Objectively speaking again, the law does indeed give the couple the option of getting married, but that on its own is not sufficient to deprive a couple of the benefits. Liezl Wildenboer expresses that the affording of legal benefits through marriage alone is like saying that 'all couples are equal, but married couples are more equal than others.'[174]

Beth Goldblatt criticises the choice argument by saying the following: [175]

> The libertarian presumption of free choice is incorrect. It is itself premised on the idea that all people entering into family arrangements are equally placed. This is not so. Men and women approach intimate relationships from different social positions with different measures of bargaining power. Gender inequality and patriarchy result in women lacking the choice freely and equally to set the terms of their relationship. It is precisely because weaker parties (usually women) are unable to compel the other partner to enter into a contract or register their relationship that they need protection.

172 *Volks* (note 26 above) para 92.

173 *Volks* (note 26 above) para 91.

174 L Wildenboer (note 170 above) 462.

175 B Goldblatt 'Regulating domestic partnerships – A necessary step in the development of South African family law' (2003) 120 *South African Law Journal* 616.

Bearing the above criticism in mind, domestic partnerships are growing at a rapid speed and that reality cannot be ignored or discharged. The majority judgment, in this case, denotes a clinical adherence to matrimonial law in instances where it is clear that the choice to marry is every so often only an illusion.[176] Many couples in South Africa are living together as married couples, and it is not, in most cases, that they have chosen not to get married but circumstances are often not allowing – the reasons could be finances, culture, religion, family and many more factors that can influence a person's reasons for not getting married.

The requirement to first get married for one to gain access to certain protections that are limited to those married violates an individual's right not to be unfairly discriminated against on the grounds of their marital status, as well as that person's right to freedom of religion, conscience, belief, and culture.[177] The legislature cannot take zero notice of it without, at the same time, insulting the constitutional injunction of unfair discrimination on the grounds of marital status.[178]

In both majority judgments, there is a clear failure to liberate oneself [the Court] from the boundaries of legal formalism. In the next section, the mini-dissertation looks at the minority judgment.

Minority judgment delivered by Justice O'Regan and Justice Mokgoro

The minority judgment established the manifestation of a life partnership by looking at certain factors that were a testament to the relationship between Mr. Shandling and Mrs. Robinson. Namely, the couple cohabited for sixteen years, Mr. Robinson paid an allowance towards Mrs. Robinson for household expenses, Mr. Shandling had Mrs. Robinson as his dependant on his medical aid, the undisputed close and intimate relationship between the couple and the last factor is that Mrs. Robinson nursed Mr. Shandling through stints of ill-health.[179] All these factors are indicative of

176 B Smith (note 153 above) 245.

177 L Wildenboer (note 170 above) 462.

178 L Wildenboer (note 170 above) 462.

179 *Volks* (note 26 above) para 104.

the fact that both parties considered themselves to be in a permanent life partnership where they assumed duties of mutual support.

The two female justices premised their judgment on the fact that the concept of family, today, is not necessarily founded on a marriage that is recognised by law and yet in all instances, the members of such families (recognised by law or not) play the same roles such as providing companionship, support and security to one another.[180]

Historically, only those married in terms of common law were recognised and later on South Africa recognised customary marriages which included polygynous marriages in terms of the Recognition of Customary Marriages Act.[181] They also recognised same-sex unions in terms of the Civil Union Act,[182] although the recognition of same-sex marriages was decided ten months after this case.

Marriage is a continuously evolving institution legally, and that evolution is a clear image and reaction to the changes in the larger community.[183] Based on the developments in our case law and legislation on cases relating to family and marriage, all of them were argued on the ground of discrimination on the basis of marital status and they consequently came out victorious. It is, therefore, a constitutional prescript that families that are founded outside the ambit of civilly recognised marriages should not be subjects of unfair discrimination.[184] As such, the minority held that where a relationship that is socially and functionally similar to marriage, as with Mr. Shandling and Mrs. Robinson, is not regulated in the same way as marriage, then discrimination on the grounds of marital status will unavoidably rise.[185]

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180 *Volks* (note 26 above) para 106.

181 Recognition of Customary Marriages Act 120 of 1998.

182 Civil Union Act 17 of 2006.

183 *Volks* (note 26 above) para 111.

184 *Volks* (note 26 above) para 107.

185 *Volks* (note 26 above) para 108.

The question that arises is whether the discrimination is fair or otherwise. This is where the minority judgment differs with the majority judgments above. The minority answered the question of whether the discrimination was unfair in the affirmative.

Firstly, partners who are cohabiting are a vulnerable group and are gravely impacted by the exclusion on section 2(1) of the MSSA, in the absence of any other law or provision. The minority explained that the impact will be grave in instances where the partners in a life partnership have undertaken reciprocal duties of support, and where the survivor is in need of maintenance and there has been no equitable distribution to the surviving partner from the deceased's estate.[186] In this instance, the minority did not dismiss the vulnerability of women, but they instead argued its relevance.[187]

The injustice or unfairness does not lie in the fact that the challenged section regulates the rights of surviving spouses, but rather in the fact that similar remedies are not offered to surviving partners who are in domestic partnerships, which are socially and functionally similar to marriage.[188] Therefore, the absence of a regulation that would make available an equitable protection to cohabitants who have been living like husband and wife renders section 2(1) discriminatory in an unfair manner.

The justices proposed for the definition of the 'spouse' to be extended so as to include surviving partners of domestic relationships.

In the case, the justices focused on a specific type of cohabitants, namely, those that have existed for a long time and have consequently undertaken the duties of mutual support and one where a pattern of vulnerability and dependence has been formed. [189] This category of cohabitants should be afforded some form of protection and the legislature cannot continue to disregard this category of cohabitants.

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186 *Volks* (note 26 above) para 132.

187 RB Cowen (note 14 above) 325.

188 L Wildenboer (note 170 above) 463.

189 RB Cowen (note 14 above) 325.

3.4.3. Conclusion

The case challenged a circumstance that has been left undeveloped for a long period. A circumstance that has been accepted. A circumstance that we often view as an abomination and immoral, mostly based on religious views. A circumstance that could no longer be ignored, but was shockingly ignored by the Court.

Both majority judgments chose not to legally recognise cohabitation as a new kind of family arrangement. The majority judgment failed to advance the transformation goals of social justice and substantive equality between women and men.[190] The Court failed to reflect the living conditions of the broader community. The majority judgment had the opportunity to develop the jurisprudence, an opportunity to interpret equality in a different light; however, the Court asserted their position by expressing that the law expects cohabiting partners to get married in order for them to enjoy the invariable consequences of marriage.[191] This was a missed opportunity.

The minority judgment sought to protect the interests of the vulnerable group, that being partners who are in a life partnership, by pointing towards the fact that section 2(1) not only discriminates against that vulnerable group on the grounds of marital status, but it does so unfairly. The minority judgment did not look at the differences between marriage and cohabiting relationships. Instead, they chose to look at the commonalities. It is widely known that South Africa has one of the most liberal constitutions when compared to other countries, the minority, in their judgment, tried to bring forth to manifestation the liberalism of the Constitution.[192]

In light of the purpose of this mini-dissertation, through these case analyses, I attempted to show that women, although in the minority, do contribute to the development and evolution of our jurisprudence. Female justices do, in most instances that involve the minority and the vulnerable, like Justice Sachs did in his minority judgment, try to step outside the confines of black letter law and instead

190 M Mhango (note 27 above) 88.

191 *Volks* (note 26 above) para 92.

192 L Wildenboer (note 170 above) 466.

base their reasoning on the general spirit, purport and object of the all so renowned liberal Constitution. Mokgoro and O'Regan have affirmed a 'transformatory idea of society'[193] unlike the majority who remained 'socially conservative.'[194]

3.5. HOW HAVING A WOMEN JUDGE CAN AFFECT THE RIGHTS OF FEMALE LITIGANTS.

> A gendered institution often fails to be responsive to, or to even recognise the needs of, persons of the other gender. A gendered organisation is structured and more responsive to the needs of the dominant gender. In short, the courts are gendered institutions, and that gender is male.[195]

The presence of women judges on the Constitutional Court is a cry for transformation; moreover, it is inadvertently a cry for familiarity and for the opening up of the doors of the courts for female litigants facing problems that can only, at most, be understood by a fellow woman.

193 C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 268.

194 C Albertyn (note 193 above) 268.

195 CF Bremer 'Gender matters' (2014) 17 *The Journal of Gender, Race & Justice* 427.

The question of gender is a central theme to this mini-dissertation, and it leans on the postulation that men and women attend to adjudication differently. Gender matters, it matters to the litigants, and it also matters to the general perception of the quality of justice.[196]

In this section, I draw a link of how the protection of women's rights can be brought to realisation through the composition of women in the Constitutional Court who deliver judgments that respond to the needs of women. As already referred to, familiarity is significant. Mandisa Maya says:

> Having someone like me here is what will make a woman from the rural areas and a woman from the township who has a legal dispute approach a court when they have a problem, knowing that one of theirs is sitting there.[197]

Familiarity is closely connected to feeling comfortable.[198] The courtroom ought to create a space where women feel comfortable to articulate their lived experiences and also vocalise how the law violates rights and interests. Familiarity, for female litigants, should be fashioned through the appointment of more women as judges. Once the presence of women has been appropriately established, then feminist judgments can take root.

196 CF Bremer (note 195 above) 428.

197 Courting Justice (note 17 above).

198 Raj Raghunathan 'Familiarity breeds enjoyment' 17 January 2012 https://www.psychologytoday.com/us/blog/sapient-nature/201201/familiarity-breeds-enjoyment (accessed 16 February 2019).

Feminist judges (not restricted only to women, however, for purposes of this mini-dissertation, the focus is on women) can start to ask the 'woman question'. These are a collection of questions that are intended to detect the gender implications of rules and practices which may otherwise look as if they are neutral.[199] These questions contend that rules must be applied in a way that does not continue to disadvantage women. The purpose of asking the 'woman question' is to expose areas in law that are not only non-neutral, but are also typically male.[200] The anticipated end result is that more and more women will not only have access to the courts through familiarity, but they will also enjoy access to justice through feminist judgments.

3.6. CONCLUSION

In all the cases discussed above, the interests of women were intentionally protected by the female judges and in some instances males judges like Justice Sachs.

In this chapter I looked the three principles of legal method by Mossman and incorporated into the principles some of the aspects involved in judging by Hunter. I analysed two cases, namely the *Jordan* and *Volks* case. These are cases that I have found to be reflections of feminist judgments. The cases were examined with the motive of demonstrating and substantiating the position held in this mini-dissertation, that being, the presence of women on the Constitutional Court does make a difference especially in matters concerning women and show the need for more feminist judgments. Furthermore, to reverberate that the constitutional call for gender representation in our courts goes beyond the appointment of a gender previously disadvantaged; it goes far deeper than what can be likened to an ‘affirmative action’. The women in all two cases were voluble, even in the two cases where the women’s views failed to convince their colleagues.[201] The minority judgments in both cases are a valuable framework for feminist judgments within the South African context. I also

199 Diana Mabasa 'Women judges: Are they doing justice to the cause' 22 July 2016 http://www.derebus.org.za/women-judges-justices-cause/ (accessed 16 February 2019).

200 Diana Mabasa (note 199 above).

201 RB Cowen (note 14 above) 328.

looked at the relationship between the presence of women judges and the protection of female litigants through feminist judgments.

4 CHAPTER 4 - CONCLUDING REMARKS

In this mini-dissertation, I argue that the presence of more women on the Constitutional Court makes a substantive difference, more so in matters that affect vulnerable groups, women.

I look at the judicial appointment process by the JSC and scrutinise it accordingly. The scrutiny concerns their interpretation of section 174(1)-(2) of the Constitution. The JSC, as the torch-bearers for judicial transformation, have been at fault in furthering the race agenda and leaving behind it the gender transformation. The Constitutional Court is reflective more of the racial demographics of South Africa than it is of the gender demographics. In view of South Africa's racially divided past, this mini-dissertation does not fault the racial transformation taking place, however, the mini-dissertation criticizes why racial transformation in the judiciary is taking head place. Whereas, the rate of its progression can and should run parallel with the gender transformation.

I furthermore mitigate for the delivery of feminist judgments in our judiciary by exploring three traditional principles to legal method and the two aspects of judging that can influence the traditional principles to legal method.

In order to illustrate these arguments, I look at two cases, where the main focus was on how women judges interpreted the law differently from their male counterparts. The minority judgments in the *Jordan* and *Volks* cases provide a legal framework to judging in as far as women are involved.

In concluding, I show that female judges do have a bearing on the promotion of gender equality jurisprudence and also the protection of vulnerable groups. I do so by showing that the women judges that have been discussed were fully participating members of the Court through their provision of arguments that would have, if not for the women, been weaker or absent.[202]

202 RB Cowan (note 14 above) 332.

Bibliography

Books

Bonthuys, E & Albertyn, C (eds) (2007) *Gender, Law and Justice* Juta & Co. Ltd: Cape Town.

Chanock, M (2001) *The making of South African legal culture 1902-1936: Fears, Favour and Prejudice* Cambridge University Press: Cambridge.

Cornel, D *et al The dignity jurisprudence of the Constitutional Court of South Africa* Fordham University Press: USA.

Graycar, R & Morgan, J *The hidden gender of law* The Federation Press: Australia.

Hoexter, C & Olivier, M (2014) *The judiciary in South Africa* Juta & Co. Ltd: Cape Town.

Hunter, R, McGlynn, C & Rackley, E (eds) (2010) *Feminist judgments: From theory to practice* Hart Publishing: Oxford and Portland, Oregon.

Kenney, S (2013) *Gender & Justice: Why women in the judiciary really matter* Routledge: New York

Linnegar, J & McGilllivary Ken (eds) (1998) *Women & the law in South Africa: Empowerment through enlightenment* Juta & Co Ltd: Pretoria.

Louw, AS & Van Schalkwyk, LN (2018) *Introduction to Family Law* Juta & Co Ltd: Pretoria.

Murray, C (ed) (1994) *Gender and the new South African legal order* Juta & Co Ltd: Cape Town.

Murray, C & O'Sullivan M (eds) (2005) *Advancing women's rights* Juta & Co Ltd: Cape Town.

Schultz, U & Shaw, G (eds) (2013) *Gender and Judging* Hart Publishing Ltd: Oxford.

Chapters

Albertyn, C 'Judicial diversity' in Hoexter, C & Olivier, M (eds) (2014) *The Judiciary in South Africa* Juta & Co. Ltd: Cape Town.

Cowan, RB 'South Africa's women judges make a difference' in Schultz, U & Shaw, G (eds) (2013) *Gender and Judging* Hart Publishing Ltd: Oxford.

Cosser, M, Bohler-Muller, N & Pienaar, G 'Chapter 1: Introduction' in Cosser, M, Bohler-Muller, N & Pienaar, G (eds) (2018) *Making the road by walking: The evolution of the South African Constitution* PULP: Pretoria.

Hoexter, C & Olivier, M 'The Judicial Services Commission' in C Hoexter & M Olivier (eds) (2014) *The judiciary in South Africa* Juta & Co. Ltd: Cape Town.

Kaganas, F & Murray, C 'Law and women's rights in South Africa: An overview' in C Murray (ed) (1994) *Gender and the new South African legal order* Juta & Co. Ltd: Cape Town.

Mhango, M 'Transformation and the judiciary' in Hoexter, C & Olivier, M (eds) (2014) *The Judiciary in South Africa* Juta & Co. Ltd: Cape Town.

O'Regan, K 'The Constitutional Court: A Judge's perspective' in Hoexter, C & Olivier, M (eds) (2014) *The Judiciary in South Africa* Juta & Co. Ltd: Cape Town.

Case law

Mazibuko v City of Johannesburg 2010 (3) SA 1 (CC).

National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC

S v Jordan and Others [2002] ZACC 22. 2002 (6) SA 642 (CC).

S v Makwanyane and Another 1995 (3) SA 391 (CC).

Volks NO v Robinson and Others 2005 (5) BCLR 446 (CC).

Legislation

Civil Union Act 17 of 2006.

Maintenance of Surviving Spouses Act 27 of 1990.

Judicial Services Commission Act 9 of 1994.

Recognition of Customary Marriages Act 120 of 1998.

Riotous Assemblies Act 17 of 1956.

Sexual Offences Act 23 of 1957.

The Constitution of the Republic of South Africa, 1996.

Journal articles

Albertyn, C 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253.

Albertyn, C 'Gendered transformation in South African jurisprudence: Poor women and the Constitutional Court' (2011) 3 *Stellenbosch Law Review* 591.

Bingham, T 'The judges: active or passive?' (2005) 139 *Proceedings of the British Academy* 70.

Bonthuys, E 'Gender and race in South African judicial appointments' (2015) 23 *Feminist Legal Studies* 127.

Bremer, CF 'Gender matters' (2014) 17 *The Journal of Gender, Race & Justice* 427.

Cain, PA Good and bad bias: a comment on feminist theory and judging (1988) 61 *Southern California Law Review* 1945.

Couzens, E 'Avoiding Mazibuko: Water Security and Constitutional Rights in Southern African Case Law' (2015) 18 *Potchefstroom Electronic Law Journal* 1164.

Cowan, RB 'Women's representation on the courts in the Republic of South Africa' (2006) 6 *U. MD. L.J.* 291.

Davies, R Women as advocates and attorneys (1914) 31 *South African Law Journal* 383.

Dyani, N 'An opportunity missed for male rape survivors in South Africa; Masiya v Director of Public Prosecutions and Another' (2008) 52 *Journal of African Law* 284.

Goldblatt, B 'Regulating domestic partnerships – A necessary step in the development of South African family law' (2003) 120 *South African Law Journal* 610.

Hunter, R 'Can feminist judges make a difference?' (2008) 15 *International Journal of the Legal Profession* 6.

Jivan, U & Perumal, D "'Let's talk about sex, baby'- but not in the Constitutional Court; Some comments on the gendered nature of legal reasoning in the Jordan case" (2004) 17 *South African Journal of Criminal Justice* 368.

Klare, K 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

Menkel-Meadow, C 'Portia in a different voice: Speculations of a women's lawyering process' (1985) 1 *Berkeley Women's Law Journal* 39.

Mokgoro, Y 'Judicial appointments' (2010) 23 *Advocate* 43.

Mossman, MJ 'Feminism and legal method: The difference it makes' (1987) 3 *Wisconsin Women's Law Journal* 147.

Olivier, M 'A perspective on gender transformation of the South African judiciary' (2013) 130 *The South African Law Journal* 448.

Phooko, MR & Radebe, SB 'Twenty-three years of gender transformation in the Constitutional Court of South Africa: Progress or regression' (2016) 8 *Constitutional Court Review* 306.

Smith, B 'Rethinking Volks v Robinson: The implications of applying a "contextualised choice model" to prospective South African domestic partnership legislation' (2010) *Potchefstroom Electronic Law Journa*l 13 238.

Wildenboer, L 'Marrying domestic partnerships and the Constitution: A discussion of Volks NO v Robinson 2005 5 BCLR 446 (CC)' (2005) 20 *South African Public Law* 459.

Websites

Constitutional Court Oral History Project 'Bess Nkabinde' http://www.historicalmini-dissertations.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-N70-001-jpeg.pdf (accessed 31 October 2018).

Constitutional Court Oral History Project 'Yvonne Mokgoro' http://www.historicalmini-dissertations.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-M60-001-jpeg.pdf (accessed 31 October 2018).

Constitutional Court of South Africa https://www.concourt.org.za/index.php/judges/former-judges (accessed 5 December 2018).

Constitutional Court of South Africa https://www.concourt.org.za/index.php/judges/current-judges (accessed 5 December 2018).

Dave Steward 'Jeremy Gauntless, race and judicial appointments' 14 November 2012 http://www.politicsweb.co.za/news-and-analysis/jeremy-gauntlett-race-and-judicial-appointments (accessed 7 October 2018).

Diana Mabasa 'Women judges: Are they doing justice to the cause' 22 July 2016 http://www.derebus.org.za/women-judges-justices-cause/ (accessed 16 February 2019).

http://www.cge.org.za/wp-content/uploads/2016/12/CGE-Lack-of-Gender-Transformation-in-the-Judiciary-Investigative-Report-.pdf (accessed 19 August 2018).

http://www.sahistory.org.za/people/kate-oregan (accessed 31 October 2018).

Leanne Jansen 'Acting judge criteria' 12 August 2013 http://www.iol.co.za/news/crime-courts/acting-judge-criteria-needed-1560743. (accessed 26 September 2018).

Maithili, P 'Exclusion of women from the legal profession in the United States of America, the United Kingdom, and South Africa' 25 November 2012 https://ww3.lawschool.cornell.edu/AvonResources/Memo-Womens-exclusion-from-the-legal-profession.pdf (accessed 13 October 2018).

Michelle Toxopeus (Helen Suzman Foundation) 'Women in the judiciary' 8 June 2017 https://hsf.org.za/publications/hsf-briefs/women-in-the-judiciary#_ftn2 (accessed 22 August 2018).

Raj Raghunathan 'Familiarity breeds enjoyment' 17 January 2012 https://www.psychologytoday.com/us/blog/sapient-nature/201201/familiarity-breeds-enjoyment (accessed 16 February 2019).

Siyo L & Mubangizi JC 'The independence of South African judges: A constitutional and legislative perspective' http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Mubangizi.pdf (accessed 7 October 2018).

Dissertation

Kalwahali, K 'The Criminalisation of prostitution in South African criminal law' (2009) Unpublished LLM dissertation, University of South Africa.

Simpson, J 'Stereotyping sex workers: S v Jordan and others" Mini-dissertation submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women's Human Rights 9 (2009) 1.

Other

Lipman, JT *Courting Justice* (2010) DVD.