

# **Gender Stereotyping in South African Constitutional Court Cases: An Interdisciplinary Approach to Gender Stereotyping**

Dissertation submitted in partial fulfilment of the requirement for the LLM Degree (General in Multidisciplinary Human Rights) by:

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## TABLE OF CONTENTS

CHAPTER ONE - INTRODUCTION.....	4
CHAPTER 2 – UNDERSTANDING GENDER STEREOTYPING .....	6
2.1. Gender and its importance .....	6
2.2. Gender stereotypes .....	8
2.3. Sex Stereotypes.....	8
CHAPTER THREE – REGIONAL INSTRUMENTS AND NATIONAL ACTS .....	11
3.1. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa .....	11
3.2. The Southern African Development Community Protocol on Gender and Development ...	14
3.3. South African Constitution and Bill of Rights – The right to equality and human dignity ....	16
3.3.1. The right to equality and human dignity .....	16
3.3.2. Substantive and formal equality .....	18
3.4. Equality test .....	21
3.5. Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) .....	25
4. STEREOTYPES IN SOUTH AFRICAN CASES .....	26
4.1. Introduction .....	26
4.2. Gender equality in South Africa court cases.....	27
4.2.1. <i>President of the Republic South Africa and Another v Hugo</i> .....	27
4.2.2. <i>Jordan and Others v The State</i> .....	30
4.2.4. <i>Sonke Gender Justice Network v Malema</i> .....	34
5. CONCLUSION.....	36
6. BIBLIOGRAPHY .....	37

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## CHAPTER ONE - INTRODUCTION

The main research problem addressed in this dissertation is gender stereotyping and its impact on gender equality. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Section 9 of the South African Constitution, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 will be analysed, as well as the extent to which courts have complied with them.

Modern society abounds with different patterns of behaviour and social organisation established on a principle influenced by gender relations. Some examples of these patterns of gender relations can be found in everyday social scenes, such as the expectation that the cashier who might assist you at any local store will be female, or expecting that the manager of the same local store will be male. Many of these social expectations go unnoticed since they are accepted as norms of our social set-up, to the extent that we pay them no attention until we encounter a situation that is contrary to these expectations.

Many of these expectations of behaviour or social organisation are considered stereotypes, but specifically gender stereotypes, which often results in discrimination against women and which may lead to human right abuses. The term 'stereotype' is defined as "an exaggerated belief associated with a category. Its function is to justify or rationalise our conduct in relation to that category".<sup>1</sup> Stereotyping occurs in many different circumstances and situations and it "remain[s] a central source of contention" in eliminating all forms of discrimination and gender inequalities.<sup>2</sup> South Africa, just like many other countries in the world, is a party to various international and regional instruments that promote human and women's rights (for example the Convention on the Political Rights of Women 1952 (193 U.N.T.S. 135), which was enforced on the 7<sup>th</sup> of July 1954).

Article 2(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol) states that state parties should eliminate gender stereotypes through education, information, public education, and communication strategies. There are various communication strategies that a state can use, two of which are their national legislations and their judiciaries. The Protocol was drafted and adopted in order to be "a new instrument to eliminate all forms of discrimination and human rights abuses

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<sup>1</sup> G.W. Allport. *The Nature of Prejudice* (1954) 10.

<sup>2</sup> Michael Pickering. *Stereotyping The Politics of Representation* (2001) x.

against African women and, thus, constitutes a new hope for African women.”<sup>3</sup> In this dissertation the question is raised whether or not South African Court cases have, through their judgments, identified harmful gender stereotypes and, whether or not through this identification the Court has tried to eliminate or refrain from gender stereotyping and discrimination in their judgments, as per Article 2(2) of the Protocol. How the Court has used the rights of equality and human dignity found in Sections 9 and 10 of the Constitution, with regard to gender stereotyping is also considered.

In analysing the aforementioned research problem the dissertation is structured as follows. Chapter Two focuses on gender stereotypes, firstly considering the definition of gender and why it matters, and secondly discussing the concepts of sex and gender stereotypes. Chapter Three addresses specific regional and national instruments and Acts that deal with gender equality. The regional instruments that will be discussed are the regional instruments of the Protocol to the African Charter, the Southern African Development Community Protocol on Gender and Development (SADC Gender Protocol), the national Acts of the South African Constitution, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). Chapter Three examines two fundamental rights in the SA Constitution that are designed to prevent gender stereotyping, the right to equality in Section 9 and the right to human dignity in Section 10.. Chapter Four analyses three court cases, two from the Constitutional Court and one from the Equality Court, which have utilised the national instruments discussed in Chapter Two of this dissertation. The main question to be addressed is whether or not the courts in the matters have identified and addressed gender stereotypes through the judgments and, whether or not the courts have protected the right to gender equality as envisioned by the South African instruments discussed in Chapter Two. Chapter Five summarises all that has been discussed, concentrating specifically on what can be concluded regarding how gender stereotyping has been addressed by South African legislation and courts.

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<sup>3</sup> Kaniye S.A. Ebeku. *Considering the Protocol on the Rights of Women in Africa* (2006) 24.

## CHAPTER 2 – UNDERSTANDING GENDER STEREOTYPING

This chapter briefly explores the meaning of the concepts of gender stereotyping and sex stereotypes in order to address the main research problem as stated above, which is examining gender stereotyping.

### **2.1. Gender and its importance**

A narrow definition of gender was based on the principle that it “represented the characteristics taken on by males and females as they encountered social life and culture through socialization”.<sup>4</sup> These characteristics were either psychological, social, or cultural aspects.<sup>5</sup> This definition of gender is considered too narrow and an inappropriate working definition of gender for two reasons: the first reason is that the natural differences, which are the biological, genetic, or physiological differences, and the social differences between men and women, cannot be separated.<sup>6</sup> The second reason is that the definition assumes that “gender is an exclusively individual characteristic... [And] is seen as sets of traits or behavioural dispositions that people come to possess based on their assignment to a particular sex category”.<sup>7</sup>

A less narrow definition of gender is that it is a “system of social practices” that “creates and maintains gender distinctions and that it “organizes relations of inequality on the basis of [these distinctions]”.<sup>8</sup> This definition shows that gender includes the formation of both differences and inequalities of both genders.<sup>9</sup> There are three features to this definition.<sup>10</sup> The first is that it is a process that is continuously being formed and reformed, so gender is not simply expressed, but also enacted or done.<sup>11</sup> The second part of the definition is that gender is not merely a characteristic of individuals, but that it “occurs at all levels of the social structure”, so it is a multilevel phenomenon.<sup>12</sup> Therefore, that means that social structures such as work, schools, etc. can be studied to see how they develop the concept of

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<sup>4</sup> Amy S. Wharton *The sociology of gender an introduction to theory and research* (2005) 6.

<sup>5</sup> *Supra.*

<sup>6</sup> *Supra.*

<sup>7</sup> *Supra* at 7.

<sup>8</sup> *Supra.*

<sup>9</sup> *Supra.*

<sup>10</sup> *Supra.*

<sup>11</sup> *Supra.*

<sup>12</sup> *Supra.*

gender.<sup>13</sup> The last part and feature of the definition is that gender “organizes relations of inequality”, as gender is one factor that determines how social resources are dispersed.<sup>14</sup>

Amy S. Wharton gives three reasons why gender matters and why studying gender matters. The first reason is that gender determines the characteristics of individuals, so it determines the behaviours individuals and the identities of individuals.<sup>15</sup> It is difficult to determine the ways in which an individual acquires their gendered characteristics, but what is certain is “that gender enters into how people see themselves, the ways they behave, and how they view others” and “gender identity may be among the most influential in shaping the standards people hold for themselves.”<sup>16</sup> The second reason Wharton gives is that it shapes social interactions.<sup>17</sup> Social interactions develop individuals’ identities and endorse and materialise gender.<sup>18</sup> Another important point about social interactions and gender is that social interactions depend on an individual’s sex categorisation.<sup>19</sup> Cecilia L. Ridgeway clearly states why this is so by observing that if a person’s gender is not clearly visible, people are almost incapable of interacting with each other and engaging in a social interaction between themselves.<sup>20</sup> The last reason given is that gender shapes the rules that govern social institutions in life, which are formal and less formally structured areas of life such as family, work, legal system, sports, marriage, etc.<sup>21</sup> In order to fully understand these social institutions in the social world, attention must be given to the ways that these institutions embody and emphasise gender meanings.<sup>22</sup> Amy S. Wharton summaries her three reasons by stating that:

“[G]ender gives shape and meaning to individuals, social relations, and institutions. We cannot fully understand the social world without attending to gender. But the opposite is equally true: We cannot understand gender without understanding the social world. As social life unfolds, gender is produced; as gender is produced, social life unfolds.”<sup>23</sup>

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<sup>13</sup> Amy S. Wharton. *Supra* note 4 at 7.

<sup>14</sup> John E. Williams and Deborah L. Best. *Measuring sex stereotypes: a thirty-nation study* (1982) at 7.

<sup>15</sup> Amy S. Wharton. *Supra* note 4 at 9.

<sup>16</sup> *Supra*.

<sup>17</sup> *Supra* at 10.

<sup>18</sup> *Supra*.

<sup>19</sup> *Supra*.

<sup>20</sup> Cecilia L. Ridgeway. “Interaction and the Conservation of Gender Inequality” *American Sociological Review* (1997) 62:219.

<sup>21</sup> Amy S. Wharton. *Supra* note 4 at 10.

<sup>22</sup> *Supra*.

<sup>23</sup> *Supra*.

## **2.2. Gender stereotypes**

A definition of gender stereotypes is “socially constructed categories of ‘masculinity’ and ‘femininity’ that are confirmed by different behaviour depending on sex, different distribution of men and women within social roles and statuses, and are supported by a person’s psychological needs to behave in a socially acceptable manner and to feel integral and not discrepant”.<sup>24</sup> Gender stereotyping is the act of categorising or grouping together a specific group based on their gender, expecting that group to conform to specific behaviours determined for that group, and punishing those who behave in a contradictory manner to the stereotype.”<sup>25</sup> An example of specific behaviours that may be expected due to a stereotype about a specific group is the expectation that all women take on the role of the carer and giver in relationships and in family structures. Women are also expected to have set traits, which are usually compassion, nurturing, and sympathy. While the opposite is true of stereotypical men who are expected to be assertive, independent, competitive, career-focused, and courageous.

There are four critical points about the nature of stereotypes:

1. They are hard to identify and control;
2. They can be used to explain or justify inequalities;
3. They can influence both the behaviour of the individual who has a stereotype and the target of the stereotype; and
4. They are responsive to social norms created.<sup>26</sup>

## **2.3. Sex Stereotypes**

Sex stereotypes are general similarities in the characters and personalities that are associated with women and men, and that are accepted and believed across different cultures.<sup>27</sup> They are “the attribution of behaviours, abilities, inter-interests, values and roles to a person or group of persons on the basis of their sex”.<sup>28</sup> Sex stereotypes, which are very

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<sup>24</sup> Kliuchko, O.I. “Gender Stereotyping in Study Pressing Social Problems” Russian Social Science Review (2011) Vol. 52, No.2 at 17.

<sup>25</sup> Supra. .

<sup>26</sup> Operario, D. & Diske, S.T. Causes and Consequences of Stereotypes in Organizations (2001).

<sup>27</sup> John E. Williams and Deborah L. Best Supra note 14 at 15.

<sup>28</sup> Oonagh Hartnet, Gill Boden & Mary Fuller. *Women Sex-Role Stereotyping Collected Papers* (1979) at 219.



similar to generalisations, are assumptions that because a group of people share a common gender they should also share common interests, abilities, and values.<sup>29</sup>

John E. Williams and Deborah L. Best consider a sex stereotype to have four characteristics which are “to be cognitive, it is a set of beliefs, it deals with what men and women are like, and it is shared by the members of a particular group.”<sup>30</sup> This set of beliefs comprises behavioural traits or psychological characteristics that society associates with either men or women.<sup>31</sup> Stereotypes are also beliefs or generalisations of the traits or characteristics of groups of people.<sup>32</sup> This does not mean that all stereotypes are bad as “some stereotypes may be false and have no objective behavioural data to support them... Other stereotypes may contain elements of truth but not take into account the individual differences in traits occurring within groups or the degree of overlap between groups.”<sup>33</sup>

There are differences between the three terms of ‘sex roles’, ‘sex role stereotypes’, and ‘sex trait stereotypes’. Many theories and much research have failed to distinguish between these three different terms and this has led to confusion.<sup>34</sup> Sex roles are the “activities of social significance in which the two sexes actually participate with differential frequency”, so activities such as construction have been linked as a sex role that men participate in, while keeping the house in order, has been the sex role that has been viewed as where women are the majority participants.<sup>35</sup> Sex-role stereotypes and sex-trait stereotypes are two different categories/levels of sex stereotypes.<sup>36</sup> Sex-role stereotypes are the “beliefs concerning the general appropriateness of various roles and activities for men and for women”, while sex-trait stereotypes are the “psychological characteristics or behavioural traits that are believed to characterize men with much greater (or lesser) frequency than they characterize women” and vice versa.<sup>37</sup> The different terms are used to explain sex stereotypes.<sup>38</sup>

For there to be equality and respect of human dignity for both men and women, and role flexibility between the sexes, the beliefs of the different traits and characteristics of men and

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<sup>29</sup> Oonagh Hartnet, Gill Boden & Mary Fuller. *Supra* note 28 at 219. John E. Williams and Deborah L. Best *supra* note 14 at 16.

<sup>30</sup> John E. Williams and Deborah L. Best *supra* note 14 at 15.

<sup>31</sup> *Supra* at 15-16.

<sup>32</sup> *Supra* at 16.

<sup>33</sup> *Supra*.

<sup>34</sup> *Supra*.

<sup>35</sup> *Supra*.

<sup>36</sup> *Supra*.

<sup>37</sup> *Supra*.

<sup>38</sup> *Supra*.

women will have to develop to a point where a person's traits and characteristics are acquired less from stereotypes, and more from their own individual differences.<sup>39</sup>

For the purpose of this research, the terms 'gender stereotypes' and 'sex stereotypes' will be used interchangeably, even though gender stereotypes are more concerned with the social and cultural construction of men and women, and sex stereotypes are more concerned with the physical characteristics of men and women; the definition of gender provided by the Committee on the Elimination of Discrimination against Women adopts the definition of gender to incorporate both of these differences.

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<sup>39</sup> John E. Williams and Deborah L. Best supra note 14 at 13.

## CHAPTER THREE – REGIONAL INSTRUMENTS AND NATIONAL ACTS

This chapter discusses the regional instruments of the Protocol to the African Charter, the SADC Gender Protocol, and the national Acts of the Constitution and PEPUDA, in order to consider how gender stereotyping and gender equality is addressed on a regional and national level.

### ***3.1. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa***

The Protocol was adopted on 11 July 2003 in Maputo, Mozambique, as a legally binding multilateral addition to the African Charter on Human and Peoples’ Rights.<sup>40</sup> The Preamble of the Protocol clearly states the reasons that led to its creation:

“CONCERNED that despite the ratification of the African Charter on Human and Peoples’ Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices;”<sup>41</sup>

The Protocol, which is also known as the Maputo Protocol, only entered into force on the 25<sup>th</sup> November 2005. The African Commission on Human and Peoples’ Rights in this Protocol “laid down principles and rules aimed at solving legal problems relating to women’s rights and freedoms, and upon which African governments may base their legislation that may in one way or another affect the rights of women”.<sup>42</sup> The Protocol is not only important and significant for the African continent and for African women’s rights, but is also important for other countries and continents’ women’s rights, as it affirmed certain rights and “contains a number of global firsts”.<sup>43</sup>

The Protocol begins by defining what discrimination against women means, which it defines as the following:

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<sup>40</sup> Frans Viljoen. An Introduction to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa 16 WASH & LEE J.C.R. & SOC. Just. 11 (2009) 12.

<sup>41</sup> The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa July 2003 .

<sup>42</sup> Jamil Ddamulira Mujuzi. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa: South Africa’s reservations and interpretative declarations (2008) 43 – 44.

<sup>43</sup> Jamil Ddamulira Mujuzi. Supra note 42.

“.[A]ny distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life”.<sup>44</sup>

The Protocol was adopted to complement rather than replace the African Charter on Human and People’s Rights (the African Charter), which was the regional human rights charter that state parties in the region relied on, since the African Charter had key weaknesses and shortcomings in its provisions on women’s rights and government obligations in respect to women’s rights, since out of sixty Articles in the African Charter only one referred specifically to women.<sup>45</sup> Therefore, the weaknesses of the African Charter were used during the drafting of the Protocol as a guide to ensure that the various issues that women had and experienced were dealt with.<sup>46</sup> Some of the African Charter’s weaknesses were that it did not define what discrimination against women was, and it also failed to state that there must be a right to consent to marriage and that there must be equality in marriage.<sup>47</sup>

The Protocol seeks to promote gender equality and eliminate gender-based discrimination by dealing with human rights abuses, issues, and discrimination faced by African women.<sup>48</sup> It contains clauses which “guarantees comprehensive rights to women including the right to take part in the political process to social and political equality with men...”.<sup>49</sup> The Protocol deals with issues such as widows’ rights, inheritance rights, and reproductive rights. It is aimed at advancing gender equality by adopting the gender-mainstreaming strategy, which highlights “both women and gender-specific concern in the private and public realm.”<sup>50</sup> The Protocol contains rights that can be claimed to be violated before the African Commission on Human and Peoples Rights; but in order to be able to do that the country where the violation

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<sup>44</sup> Protocol supra note 41 at Article 1(f).

<sup>45</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, [http://www.achpr.org/english/info/women\\_pttoy.htm](http://www.achpr.org/english/info/women_pttoy.htm), accessed on the 4<sup>th</sup> February 2010. The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights, Center for reproductive rights briefing paper, February 2006, [www.reproductiverights.org](http://www.reproductiverights.org), 1.

<sup>46</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa supra note 41.

<sup>47</sup> The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights, Center for reproductive rights briefing paper, supra note 45.

<sup>48</sup> Judith Oder. *Reclaiming women’s social and economic rights in Africa. The Protocol to the African Charter on human and peoples’ rights on the rights of women in Africa: international developments* (2004) 13. Ebeku supra note 3 at 25.

<sup>49</sup> Maputo Protocol

[http://en.wikipedia.org/wiki/Protocol\\_to\\_the\\_African\\_Charter\\_on\\_Human\\_and\\_Peoples%E2%80%99\\_Rights\\_on\\_the\\_Rights\\_of\\_Women\\_in\\_Africa](http://en.wikipedia.org/wiki/Protocol_to_the_African_Charter_on_Human_and_Peoples%E2%80%99_Rights_on_the_Rights_of_Women_in_Africa), accessed on 4<sup>th</sup> February 2010.

<sup>50</sup> Emezat H. Mengesha. *Reconciling the need for advancing women’s rights in Africa and the dictates of international trade norms: the position of the Protocol on the Rights of Women in Africa: focus on the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (2006) 216.

occurred must have first ratified the Protocol (South Africa ratified the Protocol on the 17<sup>th</sup> December 2004), and, if it is required by the legal system of the country, it must have domesticated the Protocol into national legislation. If the Protocol is domesticated into a national legislation then a claim can be taken to a national tribunal, and only if the local remedy of taking it to the national tribunal fails can the claim be taken before the African commission.<sup>51</sup>

In ratifying the Protocol, South Africa made reservations and declarative interpretations. The key interpretative declaration that has relevance for this dissertation relates to Article 1(f) of the Protocol, which defined discrimination against women as “any distinction, exclusion or restriction or any differential treatment based on sex and whose objective or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life”.<sup>52</sup> The interpretative declaration made by South Africa in terms of this article reads:

“It is understood that the definition of “discrimination against women” in the Protocol has the same meaning and scope as is provided for in section 9 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), as interpreted by the Constitutional Court of South Africa from time to time.”<sup>53</sup>

The focus of this dissertation will be Article 2(2) of the Protocol, which is under the heading of Elimination of Discrimination against Women. Article 2(2) of the Protocol states as follows:

“State parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”

The courts of the state concerned can be used as a communication strategy regarding where the state/country stands with regard to the issue of gender discrimination, and may be used as a way to eliminate the bad consequences and violations that occur due to gender discrimination. Court judgments hold weight and importance in states, and the citizens of a state look to the courts to uphold their rights and to ensure its equality. The Protocol in Article 8 also shows the importance of the law and courts by stating that both women and

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<sup>51</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa supra note 41.

<sup>52</sup> Jamil Ddamulira Mujuzi supra note 42.

<sup>53</sup> Report of the Portfolio Committee on Labour on meeting with SETAs, dated 2 November 2004.

men must be treated equally before the law, and that they both have the right “to equal protection and benefit of the law”, and in order for this right to be enforced the article states that:

“(d) Law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;

(e) Women are represented equally in the judiciary and law enforcement organs;”<sup>54</sup>

### **3.2. The Southern African Development Community Protocol on Gender and Development**

The SADC Gender Protocol was signed and adopted by SADC Heads of State in August 2008. The SADC Protocol is a consolidation of various commitments on gender equality into one regional instrument. The SADC Gender Protocol had the following objectives:

- Empowerment of women;
- Elimination of discrimination;
- To achieve gender equality and equity through the development and implementation of gender responsive legislation, policies, programmes, and projects;
- To harmonise the implementation of the various international, continental, and regional obligations imposed by the instruments to which SADC member states have subscribed, such as the Convention on the Elimination of all Forms of Discrimination Against Women and the Protocol to the African Charter amongst others;
- To address gender issues and concerns, especially those not addressed by existing instruments;
- To set targets and time frames that are achievable for achieving gender equality;
- To monitor and evaluate member states progress towards targets etc.; and
- To deepen and strengthen regional integration.<sup>55</sup>

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<sup>54</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa supra note 41.

<sup>55</sup> Malebakeng Forere and Lee Stone. The SADC Protocol on Gender and Development: Duplication or Complementarity of the African Union Protocol on women’s rights (2009) 438 – 439. The Southern African Development Community (“SADC”) Protocol on Gender and Development August 2008 at Article 3.

The SADC Protocol in comparison to the African Protocol has many rights that are similar, rights that have been omitted, and rights that have been included that cannot be found in the African Protocol, but which are important for gender equality. The key rights that are noteworthy with regard to this dissertation are the following:

- The SADC Protocol not only sees the importance of protecting the girl child, but also the boy child, since Article 11 is headed as “The Girl and Boy Child”;
- One of the targets placed on state parties in terms of Article 12(2) is that “all legislative and other measures are accompanied by public awareness campaigns which demonstrate the vital link between the equal representation and participation of women and men in decision making positions, democracy, good governance and citizen participation.”; and
- Article 33(1) places an obligation on state parties to “ensure gender sensitive budgets and planning, including designating the necessary resources towards initiatives aimed at empowering women and girls”.

The SADC Protocol does not have a specific provision that deals with the right of gender equality and gender stereotypes; it simply defines the two concepts. The SADC Protocol defines gender equality as “the equal enjoyment of rights and the access to opportunities and outcomes, including resources, by women, men, girls and boys”, while it defines gender stereotypes as “the beliefs held about characteristics, traits and activity domains that are deemed appropriate for women, men, girls and boys based on their conventional roles both domestically and socially”. The SADC make it a principle that state parties should “harmonise national legislation, policies, strategies and programmes with relevant regional and international instruments related to the empowerment of women and girls for the purpose of ensuring gender equality and equity.”<sup>56</sup> In terms of equality in assessing justice, the SADC Protocol states that State parties should implement legislative and other measures that ensure “equality in the treatment of women in judicial and quasi-judicial proceedings or similar proceedings, including customary and traditional courts, and national reconciliation processes”.<sup>57</sup>

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<sup>56</sup> The SADC Protocol supra note 55 at Article 2 (1)(a)

<sup>57</sup> Supra at Article 7 (a).

### **3.3. South African Constitution and Bill of Rights – The right to equality and human dignity**

The Constitution of South Africa guarantees fundamental rights to all residents of South Africa. It includes the Bill of Rights that contains rights that are “universally accepted fundamental rights, freedoms and civil liberties”.<sup>58</sup> The importance of gender equality is clearly seen from Section 1 of the Constitution of South Africa that states the values of South African institutions, these values include “nonracialism and nonsexism alongside the supremacy of the Constitution, rule of law, universal adult suffrage, and a multiparty system.”<sup>59</sup> The rights to human dignity and equality are considered to be the founding values of the Constitution, and this is evident in the founding provision (Section 1) of the Constitution, which states:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms...”<sup>60</sup>

During the drafting of the Constitution of South Africa, gender equality was “firmly on the agenda” but the priority it should have been accorded was still disputed in 1993; factors such as “the extent to which it should determine the development of the many systems of customary law in the country were disputed.”<sup>61</sup>

#### **3.3.1. The right to equality and human dignity**

The right to human dignity is the “cornerstone for the protection of all other rights”, because in order to exercise all other rights a person must have human dignity, which entails a human being’s right to be treated in a humane manner and not in a sub-human manner.<sup>62</sup>

The right to human dignity is found in Section 10 of the Constitution and states that “everyone has the right to have their inherent dignity respected and protected”.<sup>63</sup>

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<sup>58</sup> IM Rautenbach & EFJ Malherbe. *Constitutional Law* (2004) 329.

<sup>59</sup> Saras Jagwanth & Christina Murray. “No Nation Can Be Free When One Half of It Is Enslaved” *Constitutional Equality for Women in South Africa* (2005). *The Gender of Constitutional Jurisprudence* 1<sup>st</sup> ed at 233.

<sup>60</sup> The Constitution of the Republic of South Africa, Act 108 of 1996 1 at section 1. Iain Currie and Johan De Waal. *The Bill of Rights Handbook* (2005) 272. Elmene Bray. *Constitutional values and human dignity: Its value in education* *Perspectives in Education*, Volume 22(3), September 2004, 40.

<sup>61</sup> Saras Jagwanth & Christina Murray. *Supra* note 59 at 230.

<sup>62</sup> Rautenbach. *Supra* note 58 at 330. GE Devenish. *The South African Constitution* (2005) 61.

<sup>63</sup> The Constitution of the Republic of South Africa *supra* note 60.



Elmene Bray in “Constitutional values and human dignity: Its value in education” argues that human dignity “is part and parcel” of what makes someone “human”, since it “relates to a person’s inner human quality, self-worth and self-esteem”, and therefore this right is subjective.<sup>64</sup> In the case of *S v Makwanyane*, the Constitutional Court acknowledged the importance of protecting the right to human dignity; the Constitutional Court held the following:

“Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched...”<sup>65</sup> In the same case, the Constitutional Court acknowledged the importance of using this right in connection with other rights since they are clearly connected and there is a clear relationship between certain rights protected in the Constitutional Court and the right of human dignity.<sup>66</sup> One such right related to the right to human dignity is the right to equality.

The right to equality is stated in Section 9 of the Constitution and reads as follows:

“9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

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<sup>64</sup>Elmene Bray. Supra note 60 at 41.

<sup>65</sup>*S v Makwanyane* 1995 (3) SA 391 (CC) at para 328.

<sup>66</sup>Elmene Bray. Supra note 69 at 40-44. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) the Constitutional Court pointed out the relationship that exists between the right to equality and human dignity, namely that in order to protect a human being both rights are linked as they both protect the intrinsic worth of a human being.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”<sup>67</sup> The right of equality is linked to the right to human dignity due to the fact that it promotes the value of human dignity by ensuring that everyone has the right to be treated equally.<sup>68</sup> These two rights are so linked that whenever the Constitutional Court is determining whether there has been discrimination and inequality in a certain act or conduct they would look at whether a person’s human dignity has been violated”.<sup>69</sup>

The idea of equality can be described as “a moral idea that people who are similarly situated in relevant ways should be treated similarly”.<sup>70</sup> Section 9 has a comprehensive equality provision, which includes “the right to equality before the law, freedom from unfair discrimination, the provision for affirmative action measures, the elimination of unfair discrimination, and for national legislation to be enacted to prevent or prohibit unfair discrimination.”<sup>71</sup> The word ‘unfair’ “does not simply distinguish between different kinds of differentiation” but “actually sorts permissible discrimination from impermissible discrimination, where discrimination itself bears a pejorative meaning.”<sup>72</sup>

### **3.3.2. Substantive and formal equality**

There are two further approaches to equality, namely the substantive and formal approaches. In *Minister of Finance and Other v Van Heerde*, Sachs J describes these two different approaches as follows:

“The whole thrust of section 9(2) is to ensure that equality be looked at from a contextual and substantive point of view, and not a purely formal one ... our Constitution rejects the notion of purely formal equality, which would require the same treatment for all who find themselves in similar situations. Formal equality is based on a status-quo-oriented conservative approach which is particularly suited to countries where a great degree of actual equality or substantive equality has already been achieved. It looks at social situations in a neutral, colour-blind and gender-blind

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<sup>67</sup> The Constitution of South Africa. Supra note 60 at section 9.

<sup>68</sup> IM Rautenbach. Supra note 58 at 329.

<sup>69</sup> Henk Botha. *Equality, Plurality and Structural Power*(2009) 25 SAJHR at 2. Tameshnie Deane and Rashjee Brijmohanlall. *The Constitutional Court’s approach to equality* Codicillus XLIV No/Nr 2 at 94.

<sup>70</sup> Johan De Waal, Iain Currie & Gerhard Erasmus. *The Bill of Rights handbook* (2001) 198.

<sup>71</sup> Tameshnie Deane and Rashjee Brijmohanlall. Supra note 69 at 94.

<sup>72</sup> Supra.

way and requires compelling justification for any legal classification that takes account of race or gender. The substantive approach, on the other hand, requires that the test for constitutionality is not whether the measure concerned treats all affected by it in identical fashion. Rather it focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved. In this respect, the context in which the measure operates, the structures of advantage and disadvantage it deals with, the impact it has on those affected by it and its overall effect in helping to achieve a society based on equality, non-racialism and non-sexism, become the important signifiers”.<sup>73</sup>

The formal equality approach is based on the concept that “like persons should be treated alike and unlike persons not alike.”<sup>74</sup> A legal order that follows this approach is just if it provides all equal rights to all persons, and these persons are able to “compete on an equal footing”.<sup>75</sup> Simply stated, formal equality assumes that everyone has the same rights, and that by treating all people in the same manner inequality may be eradicated. This approach works well for some rights, for example, the right to vote that allows each citizen one vote each.<sup>76</sup> However this approach “ignores actual social and economic disparities between individuals and groups in society.”<sup>77</sup> Formal equality also disregards patterns of disadvantage, and does not break the cycle of discrimination; rather it favours people/groups that are already advantaged either by wealth, education, or similar factors.<sup>78</sup>

The substantive equality approach is the opposite of the formal equality approach since it “requires that actual social and economic conditions that have led to inequalities between groups and individuals be considered.”<sup>79</sup> As the essence of this approach proposes that in order to right past patterns of discrimination and prevent further and future discrimination, the right of equality should be upheld by respecting and acknowledging the differences

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<sup>73</sup> *Minister of Finance and Other v Van Heerden* 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC) (29 July 2004) at paragraph 142.

<sup>74</sup> Tameshnie Deane and Rashjree Brijmohanlall. *Supra* note 69 at 93-94.

<sup>75</sup> *Supra* at 94.

<sup>76</sup> Equal Rights Trust. *The ideas of equality and non-discrimination: formal and substantive equality* (2007).

<sup>77</sup> *Supra*.

<sup>78</sup> Sandra Liebenberg. *Equality rights & children: Moving beyond a one-size-fits-all approach* (2012) at 25.

<sup>79</sup> *Supra*.

between groups and individuals, “in order to accommodate their different needs and interests.”<sup>80</sup> A substantive equality approach “takes the circumstances of people into account and requires the law to ensure equality of outcome”.<sup>81</sup> Sandra Liebenberg states that substantive equality “aims to achieve equal outcomes for people in real world situations. It is closely attuned to the historical, social, economic and political context of inequality in a particular society, and recognizes that sometimes groups must be treated differently in order to compensate for existing inequalities and achieve fair outcomes. ... Depending on the context, substantive equality may entail creating equal opportunities for disadvantaged groups (“levelling the playing fields”) or redistributive measures in favour of such groups to enable them to achieve equal outcomes.”<sup>82</sup>

The aim of Section 9 is to eliminate the impact of group-based disadvantages that were historically experienced.<sup>83</sup> A substantive approach to equality is preferable to a formal equality approach, since the former approach seeks to promote the value of human dignity and prevent arbitrary treatment.<sup>84</sup> The Constitution of South Africa follows a substantive approach rather than a formal approach as it recognises that the right of equality cannot be upheld if all people and groups are treated equally all the time.<sup>85</sup>

The Constitutional Court is one of the measures designed to protect or advance persons, or categories of persons, in terms of Section 9 of the Constitution. By following the substantive approach, the equality section in the Constitution allows the South African government to classify and treat people differently for a number of reasons, as long as these reasons are legitimate and do not unfairly discriminate, indirectly or directly, on any of the listed grounds provided for in Section 9(3).<sup>86</sup> In order to ensure that the right of equality protects the right of human dignity, some classes of people have to be treated differently from others (substantive approach), since treating them equal to others would go against their right to human dignity.<sup>87</sup> Examples of classes of people who this applies to are disabled people, children, the elderly, and people who have been disadvantaged by unfair discrimination.<sup>88</sup> In order to determine whether the right of human dignity has been infringed, the Constitutional Court will look at whether “a person’s dignity and worth as a human being” has been

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<sup>80</sup> Sandra Liebenberg. Supra 78 at 25.

<sup>81</sup> Johan De Waal, Iain Currie & Gerhard Erasmus. Supra note 70 at 347-8.

<sup>82</sup> Sandra Liebenberg. Supra 78 at 25.

<sup>83</sup> Henk Botha. Supra note 69 at 4.

<sup>84</sup> Johan De Waal, Iain Currie & Gerhard Erasmus. Supra note 70 at 349.

<sup>85</sup> Tameshnie Deane & Rashjee Brijmohanlall. Supra note 69 at 93. *Minister of Finance and Other v Van Heerden*. Supra note 73 at paragraph 26.

<sup>86</sup> Tameshnie Deane & Rashjee Brijmohanlall. Supra note 69 at 94.

<sup>87</sup> Rautenbach. Supra note 58 at 330.

<sup>88</sup> Supra.

infringed, if it has not, then the only right that has been infringed is the right of equality, found in Section 9.<sup>89</sup>

This research seeks to examine whether or not the Constitutional Court in the cases discussed below did indeed take account of these two rights, and whether or not they were applied in the manner that was constitutionally promised and envisaged. The research will also consider whether the Equality Court (a mechanism that was provided for by the PEPUDA<sup>90</sup>) has upheld the equality clause in a manner that could be an example to the Constitutional Courts, or whether there are similarities.

### **3.4. Equality test**

The test that is used to determine whether or not an Act or legislative provision follows the equality section, is the test laid down by the Constitutional Court in *Harksen v Lane* case.<sup>91</sup> The test is a three-stage test whereby the court states that three questions have to be answered in order to determine whether or not the Act or legislative provision is fair and constitutional.<sup>92</sup> The first question that has to be asked is whether or not it “differentiates or distinguishes between people or categories of people.”<sup>93</sup> In order to answer this question, one has to look at whether or not the Act or legislative provision differentiates between people or groups of people in its differentiation.<sup>94</sup> If there is a clear differentiation, then there must be a rational connection between the differentiation and a legitimate governmental purpose, if not then it is unconstitutional since it does not follow Section 9(1) of the Constitution.<sup>95</sup> If there is a rational connection, then the second question and stage of the test may be undertaken.<sup>96</sup>

The second question that is asked is whether or not the Act or legislation amounts to unfair discrimination. The first part of this question that has to be established is whether or not the Act or legislation amounts to discrimination on any of the grounds listed in Section 9(3) or any ground “which has to do with attributes and characteristics which, when manipulated,

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<sup>89</sup> G.E. Devenish. Supra note 62 at 55.

<sup>90</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>91</sup> *Harksen v Lane NO & Others*. 1997 (11) BCLR 1489 (CC).

<sup>92</sup> Tameshnie Deane & Rashjree Brijmohanlall. Supra note 69 at 95-96.

<sup>93</sup> Supra at 96.

<sup>94</sup> Supra.

<sup>95</sup> Supra.

<sup>96</sup> Supra.

have the potential to degrade or dehumanise people.”<sup>97</sup> As Goldstone J observed in the abovementioned case, in the past these characteristics were “used to ‘categorise’, marginalize and often oppress persons who have had, or who have associated these characteristics.”<sup>98</sup> The second part of this question that has to be established is whether or not the discrimination is unfair. If the discrimination is based on any of the grounds listed in Section 9(3), it is presumed to be unfair. If the discrimination is not based on any of the listed grounds, then the onus is on the party defending the provision to prove that it is not unfair, by submitting evidence that shows the impact of the Act or provision on the complainant or persons in a similar situation, and lists what rights and interests are affected (e.g. does it affect the right to human dignity).<sup>99</sup> Other factors that are considered are “what the nature of the measure in question is and what is sought to be achieved by it”, as well as whether the persons affected can be considered to belong to a vulnerable group that has experienced unfair discrimination in the past.<sup>100</sup> If it is proven that the Act or legislative provision is unfair discrimination, then the final stage of the test has to be undertaken.<sup>101</sup>

The final question that has to be answered is whether or not the unfair discrimination is justified in terms of Section 36 of the Constitution (the limitation clause). Section 36 reads as follows:

36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) The nature of the right;
- (b) The importance of the purpose of the limitation;
- (c) The nature and extent of the limitation;
- (d) The relation between the limitation and its purpose; and
- (e) Less restrictive means to achieve the purpose.

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<sup>97</sup> Tameshnie Deane & Rashjee Brijmohanlall. Supra note 69 at 96.

<sup>98</sup> *Harksen v Lane*. Supra note 91 at para 49. Saras Jagwanth & Christina Murray supra note 59 at 241.

<sup>99</sup> Tameshnie Deane & Rashjee Brijmohanlall. Supra note 69 at 97.

<sup>100</sup> Supra. Saras Jagwanth & Christina Murray. supra note 59 at 242.

<sup>101</sup> Supra.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights”.<sup>102</sup>

Section 36 provides for proportionality, so the Act or legislative provision “should therefore impair the right to equality no more than is necessary to accomplish the desired objective.”<sup>103</sup>

In the *Harksen* case Goldstone J noted the complex relationship between the specified grounds in which there is a temptation to “force them into ‘neatly self-contained categories’”, which he argues, should be resisted.<sup>104</sup> Sachs J in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* also made a similar argument; he “held that an impact and context-based approach to equality must recognise that grounds of unfair discrimination may intersect, and where this is found to be the case an evaluation of the impact of the discrimination cannot be done on one ground alone.”<sup>105</sup>

Henk Botha discusses these two rights, the right of equality and dignity, as a complex vision of equality since they are both interdependent and mutually supportive.<sup>106</sup> This understanding of equality is one that is flexible to changing circumstances since it recognises the fact that there are different forms of discrimination that cannot be analysed in the same manner.<sup>107</sup> However, Botha argues that this does not mean that different grounds of discrimination should each comprise different standards or tests.<sup>108</sup> Instead, he argues that “an appreciation of the complex relationship between the different principles and factors relevant to the determination of unfair discrimination and the variety of contexts within which they may apply” is required.<sup>109</sup> In simple terms, Botha argues that one takes into account all the surrounding factors and the social surroundings when determining whether or not there is unfair discrimination. The contexts that Botha argues are included are “not only the grounds of discrimination relied upon, but also the concrete life experiences of those affected, the intersectional nature of disadvantage, the nature of the applicants’ complaint (for example, whether they complain of unequal treatment or a failure to grant them an

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<sup>102</sup> The Constitution of South Africa supra note 60 at section 36. Saras Jagwanth & Christina Murray supra note 59 at 231.

<sup>103</sup> Tameshnie Deane & Rashjee Brijmohanlall. Supra note 69 at 97.

<sup>104</sup> *Harksen v Lane*. Supra note 91 at para 49. Saras Jagwanth & Christina Murray. supra note 59 at 242.

<sup>105</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Justice*. (1998), 12 BCLR 1517 (CC) at para. 113. Saras Jagwanth & Christina Murray. supra note 59 at 242.

<sup>106</sup> Henk Botha supra note 69 at 8.

<sup>107</sup> Supra.

<sup>108</sup> Supra at 10.

<sup>109</sup> Supra.

exemption from a general legal rule), and the different considerations that may be applicable in different spheres, such as education, employment, welfare and citizenship”.<sup>110</sup>

The advantage of following this complex vision of equality is that it upholds the Constitutional interpretation of the rights in the Bill of Rights and it leads to resisting

“the assumption that vulnerable groups represent homogenous social groups with stable identities. Even though it acknowledges that members of disadvantaged groups are likely to have certain experiences, outlooks and worldviews in common which deviate from dominant, middle-class sensibilities, it recognises that the relevant social identities are themselves contested. Like society at large, religious and cultural minorities are also subject to challenges to received norms and interpretations from within.”<sup>111</sup>

It is clear that Botha has used the discipline of sociology in association with his understanding of the right to equality and human dignity.

The right to equality is not only the motivation of the South African Constitution it is also the principle that organises and “highlights the need to create a new order in which there is equality between men and women and people of all races so that all citizens will be able to enjoy and exercise their fundamental rights and freedoms.”<sup>112</sup> There are various approaches to the right to equality. One approach to the right to equality is the group-based material and structural disadvantage approach that focuses on “the socio-economic circumstances and position of the individual in relation to his or her group and to group-based systemic disadvantage.”<sup>113</sup> A further approach is equality in terms of plurality and openness to radical difference.<sup>114</sup> It’s an ethical understanding of equality, which has been developed by Karin van Marle by drawing on the works of Drucilla Cornell and Iris Marion Young. This approach emphasises differences by promoting “the right of the individuals to a moral and psychic space in which they are free to imagine and re-imagine their identities”, and a space where “plurality of voices can be heard, in which a plurality of needs, interests, and viewpoints can be articulated without being assimilated to a single, universalised standpoint.”<sup>115</sup> Another

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<sup>110</sup> Henk Botha supra note 69 at 10.

<sup>111</sup> Supra at 16-17.

<sup>112</sup> Supra at 93.

<sup>113</sup> Supra at 4.

<sup>114</sup> Supra.

<sup>115</sup> Supra.



approach, which is used by the Constitutional Court, is the dignity-based approach, which looks at whether or not the unfair discrimination violates a person's human dignity.<sup>116</sup>

### **3.5. Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)**

PEPUDA was drafted due to Section 9(4) of the Constitution, which provided that national legislation must be enacted to prevent or prohibit unfair discrimination. The Act served four objectives:

1. The first objective was to comply with Section 9(4) of the Constitution, which provided that "National legislation must be enacted to prevent or prohibit unfair discrimination";
2. The second objective was to fulfil the international obligations placed on South Africa by two international conventions, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of all Forms of Discrimination against Women;
3. The third objective was to provide for remedies apart from civil litigation, thus making the possibility of redress available not just to those who could afford costly civil litigation; and
4. The final objective was to address the need for "a legal environment capable of eradication ... gender discrimination".<sup>117</sup>

The Act resulted in placing positive duties on the State to prohibit unfair discrimination and to uphold substantive equality.

The Act also provided for the creation of Equality Courts; all High Courts in terms of the Act were automatically designated as Equality Courts. The Equality Courts are mechanisms to ensure substantive equality and to provide civil remedies for victims of unfair discrimination. The Equality Court also provided alternative civil proceedings that are less costly and more accessible than the Constitutional Court.

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<sup>116</sup> Henk Botha supra note 69 at at 2.

<sup>117</sup> Barney Pitso. *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* Codicillus XLIV No/Nr 1 (2002) at 4.

## 4. STEREOTYPES IN SOUTH AFRICAN CASES

This chapter discusses three court cases that have been brought before the Constitutional Court and the Equality Court. An analysis has been done to determine how these matters have utilised the national Acts discussed in Chapter Four, and whether or not the courts in the matters have identified and addressed gender stereotypes through the judgments and, whether or not the Courts have protected the right to gender equality, as envisioned by the regional instruments and national Acts.

### 4.1. Introduction

As mentioned above, the Constitution of South Africa includes the Bill of Rights that contain first-, second-, and third-generation rights that are “universally accepted fundamental rights, freedoms and civil liberties”.<sup>118</sup> However a Constitution of any country simply provides a framework, which simply “legitimizes the demand for rights” without institutions that enforce, protect, and advance these rights. The Constitutional Court of South Africa is one institution that has been entrusted with the enforcement of the Constitution.<sup>119</sup> The “Constitutional Court contains the potential for progressive and transformative gender equality jurisprudence”.<sup>120</sup>

Constitutional matters’ jurisdiction, in terms of the South African hybrid legal system, is shared between the Constitutional Court and the Supreme Court of Appeal.<sup>121</sup> This section will look specifically at the Constitutional Court’s jurisprudence in terms of gender stereotypes (gender equality jurisprudence). It will look at the degree to which gender equality that is legitimised by the South African Constitution is enforced by the Constitutional Court, which has been entrusted with its enforcement alongside the Equality Court.<sup>122</sup>

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<sup>118</sup> IM Rautenbach & EFJ Malherbe. *supra* note 58 at 329.

<sup>119</sup> Saras Jagwanth & Christina Murray. *Supra* note 59 at 231–232, 236.

<sup>120</sup> *Supra* at 241.

<sup>121</sup> *Supra* at 232.

<sup>122</sup> *Supra* at 231-232.

This chapter analyses both the Constitutional Court and Equality Court judgments, considering not only whether or not the gender equality promised by the Constitution of South Africa has been secured and enforced, but also whether these judgments take into account “the concrete realities of social arrangements in society” (whether a substantive approach was taken by any of the judges) or whether there was any form of gender bias, be it “reliance on stereotypical attitudes about the nature and roles of men and women”, or reliance on ideologies or “myths and misconceptions about the social and economic realities encountered by both sexes”.<sup>123</sup>

## **4.2. Gender equality in South Africa court cases**

### **4.2.1. *President of the Republic South Africa and Another v Hugo***

The facts of the *President of the Republic of South Africa and Another v Hugo* (*Hugo case*) are the following. The President of South Africa had used his constitutional powers to pardon and relieve offenders in certain categories.<sup>124</sup> One of the categories of offenders released was certain mothers in prison who had minor children under the age of 12 years. The respondent was a single father with a son under the age of 12 at the time of pardon and he argued that the pardon was unconstitutional since it unfairly discriminated against him on the ground of sex or gender, and indirectly discriminated against his son as his sole parent was male.<sup>125</sup> The court a quo agreed with the respondent and ordered that the pardon be corrected within six months. The Minister of Correctional Service and the President appealed the judgment.

Goldstone J started by stating what they believed to be the President’s main motivation in granting this pardon, which was stated in the President’s affidavit in which the President clearly regards women as mothers having a special nurturing and caring role for young children, and also being primarily responsible for the care of these young children.<sup>126</sup> This is a clear stereotype of the role that mothers play in children’s lives, and it shows that the President had a belief and an image of women that was being enforced subtly through the pardon. The majority points out that there is “no statistical or survey evidence” to prove this

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<sup>123</sup> Saras Jagwanth & Christina Murray. Supra note 59 at 246. Kathleen E. Mahoney. *Gender and the Judiciary: Confronting Gender Bias* (1999) Gender Equality and the Judiciary Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-Child at the National Level Papers and Statements from the Caribbean Regional Judicial Colloquium Georgetown, Guyana 14 -17 April 1997 at 93.

<sup>124</sup> *President of the Republic of South Africa and Another v Hugo*. 1997 (6) BCLR 708.

<sup>125</sup> Supra at para 3.

<sup>126</sup> Supra at para 36 and 37.

fact, which they see as “a generalisation” since there are many different situations where this statement is not true, and that this generalisation is “one of the root causes of women’s inequality in our society”, “but sees no cause to doubt this fact.”<sup>127</sup>

Despite pointing out the stereotype and discrimination, the majority found that it is fair discrimination, since they argued that in order for the right to equality and human dignity to be promoted in this case, mothers have to be treated differently from fathers, since the social reality of the unequal burden that was faced by mothers at that time would lead to further discrimination against them if fathers were treated the same.<sup>128</sup> In this finding the majority followed an approach that is similar to the test that was later on laid down by the Constitutional Court in the *Harksen v Lane* case (discussed above)<sup>129</sup>, but more specifically Section 36(1) of the Constitution, in finding that this limitation is not only a justified discrimination but also justified limitation of a right, due to the relation connection between it and its purpose.

The majority in its judgment focused heavily on the interests and roles of women, which actually did more harm than good, and failed to focus on the main reason the President granted the pardon. In granting the pardon, the President had focused more on the interests of young children and less on what the Court in this case focused on, which was the different gender stereotypes that males and females hold in a child’s life, as illustrated in paragraph 46 of the judgment where the majority stated that “many fathers play only a secondary role in child rearing”. Even though the majority started off their judgment appearing to follow the substantive equality approach by taking into account the social inequality that the gender role of care givers placed on women, in the end it followed the formal equality approach since it did not break the cycle of stereotypes placed by social structures, and decided not to address the gender stereotype.

The key dissenting judgment in this case was delivered by Kriegler J who differed with the majority over one issue, that being that the pardon is “inconsistent with the prohibition against gender or sex discrimination”.<sup>130</sup> Kriegler noted how the issue of sex or gender discrimination was important for the drafters of the Constitution, and that the main aim of the

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<sup>127</sup> *Hugo*. Supra note 124 at para 36 and 37.

<sup>128</sup> Supra at 43, 112-113. Henk Botha. Supra note 69 at 729.

<sup>129</sup> Supra note 91.

<sup>130</sup> *Hugo* supra note 124 at para 64.

Constitution was to promote an egalitarian society.<sup>131</sup> Kriegler agreed with the majority's finding that just because women bear the most responsibilities with regard to children does not mean that we have to discriminate on both men and women.<sup>132</sup> However, Kriegler did not agree with the majority upholding the Act, even though there is a stereotype of men and women in the Act, and stated that this stereotype "is a root cause of women's inequality in our society" and "it is both a result and cause of prejudice; a societal attitude which relegates women to subservient...role".<sup>133</sup> Kriegler also stated that the majority relied "on a generalisation regarding parental roles which is the result of disadvantage and discrimination."<sup>134</sup>

Kriegler took issue on the majority's stereotype of women to "indicate the discrimination", he stated:<sup>135</sup>

"One of the ways in which one accords equal dignity and respect to persons is by seeking to protect the basic choices they make about their own identities. Reliance on the generalisation that women are the primary care givers is harmful in its tendency to cramp and stunt the efforts of both men and women to form their identities freely".

The judge further stated that in order to promote equality, the choices that people make of their own identities has to be protected, and as a society we should not impose roles "on men and women, not by virtue of their individual characteristics, qualities or choices, but on the basis of predetermined, albeit time-honoured, gender scripts."<sup>136</sup> In this way, the judge tried to break away from gender being a system that "creates and maintains gender distinctions", but promotes seeing people as de-gendered individuals and decreases gender distinctions and differences.<sup>137</sup>

Kriegler also pointed out that the President's whole focus was the interests of the children and not women or mothers in general.<sup>138</sup> He also pointed out that a small number of women benefited due to the pardon, however the view that a women's place is in the home is to the detriment of so many women; he stated correctly that:<sup>139</sup>

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<sup>131</sup> *Hugo* supra note 124 at para 73 and 74.

<sup>132</sup> *Supra* at para 80.

<sup>133</sup> *Supra*.

<sup>134</sup> *Supra* at para 78.

<sup>135</sup> *Supra* at para 80. Sandra Fredman. *Gender and Transformation in the South African Constitutional Court* (2013) at 259.

<sup>136</sup> *Hugo* supra note 124 at para 80 and 83.

<sup>137</sup> Amy S Wharton supra note 4 at 7.

<sup>138</sup> *Hugo* supra note 124 at para 83.

<sup>139</sup> *Supra* at para 83

The limited benefit in this case cannot justify the reinforcement of a view that is a root cause of women's inequality in our society. In truth there is no advantage to women qua women in the President's conduct, merely a favour to perceived child minders.

Kriegler clearly sought to achieve a decision that was attuned to the social inequality that women face due to such stereotypes, in line with substantive equality. As for the majority, they relied "on judicial notice or assumptions of unproved facts", which "is a familiar one for a court to resort to when it is unwilling to deflect what it regards as a legitimate government policy to further substantive equality."<sup>140</sup> The majority failed in its role of "applying substantive equality remains a supervisory one, to guard against stereotypical assumptions and unwarranted generalisations which can cause or perpetuate disadvantage."<sup>141</sup>

#### **4.2.2. *Jordan and Others v The State***

The facts of *Jordan and Others v The State* (*Jordan case*) are the following. A brothel-owner, a prostitute, and a brothel employee were the appellants in this case. The appellants had been previously convicted in the magistrate's court of contravening the Sexual Offences Act 23 of 1957 (herein to be called the prostitution provision).<sup>142</sup> They appealed to the High Court which found that Section 20(1)(aA) in the Act, which criminalised carnal intercourse for reward, was unconstitutional and invalid since it only criminalised the prostitute and not the client, so therefore, it was considered unfair discrimination (thus the third appellant's conviction, the prostitute's, was set aside). However, the High Court found that Sections 2, 3(b), and 3(c) of the Act, which criminalises keeping or managing a brothel, were constitutional and valid, thus confirming the conviction of the other appellants. The appellants then further appealed to the Constitutional Court, arguing that Sections 2, 3(b), and 3(c) were unconstitutional, and that the order validating Section 20(1)(aA) should be confirmed. The State opposed both arguments.

The Constitutional Court collectively agreed with the High Court's finding, but the Court was divided (six to five) on whether or not Section 20(1)(aA) was unfair gender discrimination, and on the constitutionality of the provision.

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<sup>140</sup> Sandra Fredman. *Supra* note 135 at 260.

<sup>141</sup> *Supra* at 261.

<sup>142</sup> *Jordan and Others v The State* 2002 (11) BCLR 1117 (CC).

The majority (Ngcobo J with Chaskalson CJ, Kriegler, Madala JJ, Du Plessis and Skweyiya AJ concurring) found, when dealing with the question of whether or not Section 20(1) (aA) discriminates unfairly against women, that there is no gender discrimination in the relevant section. Instead, it found that the section was gender-neutral.<sup>143</sup> The Court clearly points out that they are not convinced by the argument “that gender discrimination exists simply because there are more female prostitutes than male prostitutes”.<sup>144</sup> By stating the previous quoted comment, the majority preferred to focus on the Act and to follow a formal equality approach in preferring to remain neutral, and failed to take into account the existing gender power relation inequalities that it was faced with.<sup>145</sup> This is clearly against the right to equality being considered substantively, as the fact there are more female prostitutes than males is a circumstance that the court should have taken into account for equality to be upheld substantively.<sup>146</sup>

Even though the majority pointed out that there is a stereotype in society concerning women who are prostitutes, this being that women who engage in this occupation have low morals (“the stigma”), they did nothing to protect the right to equality that people affected by this stereotype should have in terms of Section 9(2). Instead, the majority adhered to a formal equality approach in finding that the section, in referring to “any person”, applied to both males and females, and did not favour either one above the other. The majority failed to follow a substantive equality approach by arguing that the stereotype was not due to the law, but rather society; in this way the majority failed to achieve equal outcome for the right of prostitutes, as human beings, to be treated equally, and to have their human dignity protected due to the real world situation they faced. Henk Botha’s argues that the majority clearly did not follow previous judgments’ reasoning; instead the court in this case “divorces the law from social attitudes and separates the inquiry into the constitutionality of the provision from questions of its enforcement, smack of a formal understanding of equality and a failure to situate its inquiry within a broader context of systemic gender discrimination.”<sup>147</sup>

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<sup>143</sup> *Jordan and Others v The State* supra note 142 at para 15.

<sup>144</sup> *Supra* at para 17.

<sup>145</sup> Sandra Fredman supra note 135 at 261 – 262.

<sup>146</sup> Henk Botha supra note 69 at 727.

<sup>147</sup> *Supra*.

The minority (O'Regan and Sachs JJ with Langa DCJ, Ackermann and Goldstone JJ concurring) found similarly to the High Court that Section 20 (1) (aA) does amount to unfair discrimination, since it only criminalises the conduct of the prostitute, and not that of the client.<sup>148</sup> The minority used academic commentators and law enforcement officers' practice as proof that there is a general acceptance of its finding, in this way they analysed the different social structures. The majority took a substantive approach, aiming to achieve an outcome that took into account the real world situation, and an outcome that was attuned to the historical, social, and economic context of the inequality<sup>149</sup>:

“This distinction is, indeed, one which for years has been espoused both as a matter of law and social practice. The female prostitute has been the social outcast, the male patron has been accepted or ignored. 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. In terms of the sexual double standards prevalent in our society, he has often been regarded either as having given in to temptation, or as having done the sort of thing that men do. Thus, a man visiting a prostitute is not considered by many to have acted in a morally reprehensible fashion. A woman who is a prostitute is considered by most to be beyond the pale. The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women.”

The minority in the case took a substantive equality approach by considering various social factors, for example, they point out that women are forced into the profession of prostitution by circumstances such as financial needs or family needs.<sup>150</sup> They also differed from the majority in finding that the “prostitutes are overwhelmingly (though not exclusively) female, and patrons are overwhelmingly (though not exclusively) male”.<sup>151</sup> The minority's conclusion of the impact of the section is that it “exacerbates the burden of sexual stereotyping borne by women and in particular sex workers”, and that the section does not constitute unfair discrimination.<sup>152</sup> The minority differed from Ngcobo J's judgment and found that it is not only social attitude that gives rise to stigma, but also the law. They clearly found that what the law does in the section is that it “reinforces and perpetuates sexual stereotypes which degrade the prostitute but does not equally stigmatise the client” which they find is clearly in conflict

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<sup>148</sup> *Jordan* supra note 142 at para 50.

<sup>149</sup> *Supra* at para 41-42; 64.

<sup>150</sup> *Supra* at para 68.

<sup>151</sup> *Supra* at para 59.

<sup>152</sup> *Supra* at para 69 and 71.



with the Constitution.<sup>153</sup> The minority can also be said to be choosing not to enforce the ideologies. As instead of just seeing it as “just the way things are” they chose to go against just settling, and rather chose to go against it to eliminate the gender stereotype and inequality. They can also be said to have chosen not to opt for following the stereotypes and inequalities simply for there to be an order, but instead they chose to follow a more open-minded attitude that is in line with substantive equality.

The minority clearly also uses the three-stage Harksen’s test. The first question in the test that has to be asked is whether or not the act/provision “differentiates or distinguishes between people or categories of people.”<sup>154</sup> The second question of the Harksen test is to ask whether or not the act/provision amounts to unfair discrimination. This second question, as discussed above, is answered by first establishing whether the act/provision amounts to unfair discrimination on any of the grounds listed in Section 9(3) or any ground “which has to do with attributes and characteristics which, when manipulated, have the potential to degrade or dehumanise people.”<sup>155</sup> The second part of the question entails establishing whether or not the discrimination is unfair. Should the discrimination be based on any of the grounds listed in Section 9(3) that it is automatically presumed to be unfair, but should it not be any of the grounds listed then the onus is on the party defending the act/provision to prove that it’s unfair through submitting evidence. If it is proven that the act/provision is unfair discrimination, then the final stage of the test has to be answered of whether or not the unfair discrimination is justified in terms of the limitation clause (Section 36 of the Constitution stated in section 3.4. of this dissertation).<sup>156</sup>

The Minority in using the Harksen test starts off by identifying identifies that there is a clear differentiation between male and female prostitutes, as well differentiation between the prostitute and the client. The minority also pointed out that there is no rational connection between the differentiation and a legitimate governmental purpose. Instead the minority stated that what the law does in the section is that it “reinforces and perpetuates sexual stereotypes which degrade the prostitute but does not equally stigmatise the client”, which they found to be clearly in conflict with the Constitution.<sup>157</sup> Using the Harksen test, the minority was correct in finding that there is unfair discrimination, since there is a rational connection and there is a differentiation. However, it can be argued that the majority took

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<sup>153</sup> *Jordan supra note 142 at para 72.*

<sup>154</sup> Tameshnie Deane & Rashjee Brijmohanlall. *Supra note 69 at 96.*

<sup>155</sup> *Supra.*

<sup>156</sup> *Supra at 97. Saras Jagwanth & Christina Murray supra note 59 at 242.*

<sup>157</sup> *Jordan supra note 142 at para 72.*

into account the importance of the discrimination and the purpose of it, which was to enforce the Sexual Offences Act and criminalise keeping or managing a brothel, and found that it was a justifiable limitation that is allowed in terms of Section 36(1) of the Constitution.

#### **4.2.4. *Sonke Gender Justice Network v Malema***

Unlike the above two cases of *Hugo* and *Jordan*, which were brought before the Constitutional Court, this matter was brought before the Equality Court in line with PEPUDA. In this matter, the respondent was called to the Court to answer for comments he made during a speech he delivered whilst addressing members of the public on 22 January 2009 at the Cape Peninsula Technikon in Cape Town. The comment that in question was the following:

“When a woman didn't enjoy it, she leaves early in the morning. Those who had a nice time will wait until the sun comes out, requests breakfast and taxi money. In the morning that lady requested breakfast and taxi money. You don't ask for taxi money from somebody who raped you.”<sup>158</sup>

The Equality Court was asked to make a finding on whether or not the comments amounted to hate speech and harassment in terms of Sections 10 and 11 of PEPUDA. The complainant sought appropriate declaratory relief, an unconditional apology for the statements, and an order for compensation in terms of S21(2)(e) of PEPUDA.

The respondent argued that comments were not offensive to gender equality, nor hate speech, but instead amounted to fair comment, and relied on one of the grounds of limitations set out in S12 of the Equality Act.

The Equality Court started off by examining first whether or not the comments amounted to hate speech, and whether or not the words fell within the prescribed exclusions. In their examination, the Court looked at the evidence presented by the complaint. The first was evidence given by Mr Mbuyiselo Botha, for the complainant, who considered the comments made by the respondent “to encourage women to be seen as sexual objects” and “to be seen as fair game and stereotyped them.”<sup>159</sup> The second evidence given for the complainant was provided by the second witness, Ms. Lisa Vetten, Senior Researcher and Policy Analyst

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<sup>158</sup> *Sonke Gender Justice Network v Malema* (2010 (7) BCLR 729 (EqC)) [2010] ZAEQC 2; 02/2009 (15 March 2010) at para 2.

<sup>159</sup> *Supra* at para 17 (b) (iii).

of the Tshwaranang Legal Advocacy Centre to the Violence against Women.. Ms. Vetten gave evidence that the comments relied “upon generalisations about women, rape and consent.”<sup>160</sup> She argued that “myths and stereotypes are typically created by groups dominant in society. Thus, when men proclaim what is and is not sexual violence, and justify their reason” .<sup>161</sup>

The judgment in this case is unlike the Constitutional Court’s judgments discussed above in which the judges in the respective cases delved into the judgments. The presiding judge in this case, Cellis C.J., focused more on the facts and evidence presented before the Court in the judgment. The presiding judge took into account both sides’ evidence and found that she was satisfied that the uttered words could reasonably be construed as hurtful, harmful, and demeaning to women.<sup>162</sup>

The Equality Court in this judgment stuck to the evidence presented before it and went through it systemically using PEPUDA. On adhering to the evidence presented, it adopted a substantive equality approach as it took into account the surrounding circumstances presented in the evidence, and it ensured that its conclusions were in line with the surrounding circumstances. It is unlike the Constitutional Court judgment which went into depth about the generalisations (stereotypes) and its views about same, but rather adhered to the facts that resulted in a fair judgment, which is devoid of any feelings or views, but rather focused on the facts and followed a substantive approach in achieving an equal outcome for the parties.

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<sup>160</sup> *Sonke Gender Justice Network v Malema* *Supra* note 158 at para 17 (b) (vii).

<sup>161</sup> *Supra* at para 17 (b) (vii).

<sup>162</sup> *Supra* at para 17 (b) (x)

## 5. CONCLUSION

“It is one of the great paradoxes of South Africa’s constitutional transition that the Constitution commits us to a non-racial and non-sexist society, and yet recognises that we can eradicate discrimination and redress disadvantage only if we remain conscious of the deep racial and sexual fault lines characterising our society.”<sup>163</sup>

As stated in the introduction of this dissertation the main research problem addressed gender stereotyping and its impact on gender equality looking at regional instruments and national legislative Acts, as well as national court cases in SA, to consider the extent to which such courts have complied with, especially the national legislative Acts.

From the above discussed national acts and regional instruments, the definitions of discrimination against women and gender stereotypes have the two following common factors:

- Exclusion, distinction, or differential treatment based on sex; and
- Beliefs held about characteristics, traits, and activity associated with a specific sex.

Even though both the Protocol and the SADC Protocol were adopted way before the Constitution, it can be said that the Constitution and PEPUDA are in line with the regional instrument of the SADC Protocol, since these legislative Acts ensure equality in the treatment of women in judicial procedures and are also aligned to the rights contained in the Protocol since claims that deal with gender equality can be taken to a national tribunal.

From the abovementioned cases it is evident that there is still gender stereotyping in our society. The courts have been used as good communication strategies to eliminate and diminish these stereotypes, in line with Article 2(2) of the Protocol and, in this, the courts promote the rights of equality and human dignity that are protected in the Constitution. In the matters brought before the Constitutional Court, the majority of Constitutional Court judges recognised and pointed out the gender/sex stereotypes and discrimination that were apparent. However, South African Courts still have to remain conscious of these discriminations, and promote gender equality in line with both national Acts and the regional instruments.

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<sup>163</sup> Henk Botha Supra note 69 at 1.

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