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The challenges to gender equality in the legal profession in South Africa: A case for substantive equality as a means for achieving gender transformation

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Summary: *South Africa lags behind with regard to an effective framework supporting substantive equality in the legal profession. The structure of the legal profession and the number of women represented in the legal profession do not as yet reflect the diversity of South African society. A number of factors play a role in the skewed representation of female attorneys and advocates in the legal profession. In addition, formal equality cannot translate into gender transformation, as the issues that cause such inequalities extend beyond the scope of attaining sameness. International instruments suggest that special measures be adopted to achieve substantive equality specifically with regard to*

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the role of women in the workplace. This article analyses the current composition of the legal profession from the perspective of gender and race, while promoting the concept of substantive equality as a preferred approach to gender transformation in the legal profession. It considers the theoretical framework for gender equality as a human right in South Africa by examining relevant legislation and international and regional instruments, and analysing the extent to which the Cape Bar maternity policy, as an existing transformation initiative, implemented on the basis of a gender stereotype, encourages substantive gender transformation in the legal profession.

Key words: *gender equality; human rights; legal profession; substantive equality; formal equality; gender transformation; gender stereotypes*

1 Introduction

The structure of the legal profession and the number of women represented in the legal profession do not as yet characterise the diversity of South African society.¹ A number of factors play a role in the skewed representation of female attorneys and advocates in the legal profession, including pre-existing social networks predominated by male professionals based on established relationships;² clients and colleagues who question the intelligence, talent and experience of female practitioners;³ an unequal distribution of work to female practitioners;⁴ a lack of face time (being seen) by female practitioners as a result of them remaining primary child care givers in society;⁵ maternity leave as an obstacle to achieving target billable hours;⁶ a referral system that is slanted in favour of men;⁷ and gender

1 T Meyer 'Female attorneys in South Africa : A quantitative analysis' (2018) 42 *African Journal of Employee Relations* 2.

2 Centre for Applied Legal Studies 'Report on transformation of the legal profession in South Africa' (CALS Report) (2014) 37-38, <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/gender/Transformationpercent20ofpercent20thepercent20Legalpercent20Profession.pdf> (accessed 9 June 2019).

3 CALS Report (n 2) 44.

4 Commission for Gender Equality 'Discussion document on gender transformation in the judiciary and the legal sector' (2018) 104, <http://www.cge.org.za/wp-content/uploads/2016/12/DISCUSSION-DOCUMENT-ON-GENDER-TRANSFORMATION-IN-THE-JUDICIARY-AND-THE-LEGAL-SECTOR.pdf> ((accessed 9 June 2019).

5 CALS Report (n 2) 55.

6 CALS Report 37.

7 CALS Report 41.

stereotypes and gender bias which resounds throughout the legal profession.⁸

Reference to transformation, as applicable to the judiciary, has several meanings as expressed in legal writing.⁹ Moerane notes various opinions on the meaning of transformation. These include that judicial appointees espouse and promote the values enshrined as fundamental in the Constitution of the Republic of South Africa, 1996 (Constitution); the process of fostering a culture of accountability among the judiciary; the process whereby the courts are made more accessible to litigants and other court users; the re-organising and re-engineering of the structures and branches of the judiciary; and an evolution of the way in which judges perform their work.¹⁰ This article adopts the definition of transformation of the judiciary as a process whereby the appointment of judges reflects the broad composition of South African society, particularly with regard to gender.¹¹ It analyses the current composition of the legal profession from the perspective of gender and race, while promoting the concept of substantive equality as a preferred approach to gender transformation in the legal profession. It considers the theoretical framework for gender equality as a human right in South Africa by examining relevant international and regional instruments and analysing the extent to which the Cape Bar maternity policy, as an existing transformation initiative, implemented on the basis of a gender stereotype, encourages substantive gender transformation in the legal profession.

2 Current composition of the legal profession from the perspective of gender and race

As at January 2019, there were 27 223 reported attorneys, of which 12 084 were black, representing 44 per cent of attorneys in practice, 11 055 of these being women, translating to only 39 per cent of attorneys. Of the total number of attorneys, 4 849 – or 17,8 per cent – are black women.¹² The General Council of the Bar of South Africa's membership statistics as at 30 April 2017 demonstrate that

8 F Kathree 'Eight years at the bar and still discriminated against' (2004) *Advocate* 23.

9 G Budlender 'Transforming the judiciary: The politics of the judiciary in a democratic South Africa' (2005) 122 *South African Law Journal* 715; see also MTK Moerane 'The meaning of transformation of the judiciary in the new South African context' (2003) 120 *South African Law Journal* 708.

10 Moerane (n 9) 708.

11 As above.

12 Law Society's statistics on the attorneys' profession, <http://www.lssa.org.za/about-us/about-the-attorneys--profession/statistics-for-the-attorneys--profession> (accessed 6 June 2021).

there were 2 915 advocates on the roll, of which 1 065 were black, representing 36,5 per cent of advocates, of which 796 were women, translating to only 27,3 per cent. Of the women advocates, 338 were black.¹³ Thus, according to the latest statistics, 39 per cent of practising attorneys are women, of which 44 per cent are black; 27,3 per cent of advocates are women, while 36,5 per cent are black. The racial population in the country is such that black people constitute the majority of the population with white people constituting 8,9 per cent of the population.¹⁴ Women, on the other hand, constitute a majority of the population at 50,7 per cent.¹⁵ On the basis of the statistical comparison above, the gender and race composition of the attorneys' and advocates' profession does not reflect the population demographics of the country, especially when it comes to women legal practitioners. Gender equality is introduced in this context to explore whether substantive gender transformation can be achieved through feminist legal theory by making 'women and men within the legal profession, equal legally, socially and culturally'.¹⁶

From the information set out above, it appears that whereas there have been significant strides aimed at attaining equal numbers at representations of race and gender within the legal professions, gender representation still is not yet on par with race representation. Race representation remains significantly higher than gender representation in the attorneys' and advocates' fields of the legal profession. If gender equality is considered to mean that all persons who are in the same situation being accorded the same treatment,¹⁷ a marked gender inequality remains within the profession. A consideration of transformation of the legal profession in South Africa is viewed from a lens that places racial equality at the centre of the debate.¹⁸ There appears to be a perception of the 'ranking' of gender after race in the order of the recognised prohibited grounds of equality, which speaks to the order of transformation priorities. This perceived ranking may be informed by the fact that the recognised prohibited grounds of discrimination in the Bill of Rights list race

13 As at the date of this article, the 2017 statistics in respect of the advocates' profession were the most recent statistics available for consideration.

14 Statistics SA 'South Africa's population', <https://www.brandsouthafrica.com/people-culture/people/population> (accessed 6 June 2021).

15 As above.

16 J Lorber *Gender inequality: Feminist theories and politics* (2009) 4.

17 A Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 612.

18 M Norton 'The other transformation issue: Where are the women?' (2017) *Advocate* 28.

prior to gender. In this regard, South African Constitutional Court Judge Kriegler in a minority judgment noted:¹⁹

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

The political history of South Africa offers some insight into the reason why gender transformation is seen as less important than racial transformation, in that race has been prioritised over gender, both in general debates about transformation and in discussions of the legal system specifically.²⁰ This is based on the historical view of the African National Congress (ANC) of the root cause of oppression for women as racial and colonial domination as opposed to patriarchal power dynamics. This meant that when the ANC eventually accepted the goal of gender equality, it focused on the inclusion of women in formal state institutions.²¹ It did not look into the question of how to achieve substantive gender equality and fundamentally transform the gendered nature of formal state institutions, such as the judiciary.²²

Gender transformation initiatives must be differentiated from initiatives aimed at attaining racial transformation. This is not to suggest that racial and gender transformation initiatives ought to be considered as having competing interests. However, from the statistical information available on the racial and gender composition of the attorneys' and advocates' professions, it is apparent that the formal inclusion of women in these professions is still lagging behind as compared to the inclusion of black men which has significantly increased.

The gender and race composition of the attorneys' and advocates' profession, as demonstrated by the statistics above, does not reflect the population demographics of the country, especially when it comes to female legal practitioners. Due to the fact that women make up the majority of the population, one would have expected that the current makeup of the legal profession would be representative

19 *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC) (our emphasis).

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

21 Hassim (n 20) 182.

22 As above.

of women. As this is the definition of transformation adopted for purposes of this article (where the composition of the profession is a reflection of the composition of society) it is apparent that gender transformation in the legal profession is yet to be achieved.

3 Substantive equality as a preferred approach to promoting gender transformation in South Africa

A formal approach to equality seeks to attain sameness with like being treated the same.²³ This formal approach necessarily requires a comparison between similarly-placed persons, usually against the dominant norm that possesses the attributes of the dominant gender (male), culture, religion, ethnicity or sexuality.²⁴ In the case of pregnancy rights, in particular, the application of formal equality presents the practical problem of there being no male comparator for pregnancy.²⁵ A formal approach to gender equality calls for a direct comparison of male versus female practitioners to determine whether there is equality before the law.²⁶ As discussed by Fraser,²⁷ a formal equality analysis fails to recognise the social and cultural context that necessarily renders it incorrect to have a direct comparison between males, being the dominant norm comparator, and women. For instance, the terms on which merit in the legal profession is judged are often a product of the dominant group. Women's time spent on child care usually is ignored in assessing their prospects of career advancement in the profession.²⁸ While recognising these limitations of a formal application of the concept of gender equality, the statistics provided above demonstrate formal gender inequality in the legal profession.

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

23 S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 713.

24 Fredman (n 23) 716.

25 Fredman 719.

26 Smith (n 17) 612.

27 N Fraser 'From individual to group' in B Hepple & E Szyszczak (eds) *Discrimination: The limits of the law* (1992) 102-103.

28 Fredman (n 23) 719.

The preferred approach to understanding gender equality is substantive equality. This approach calls for a consideration of the impact of measures and policies aimed at attaining gender equality and is said to be manifested through legal mechanisms such as affirmative action.²⁹ In this regard, the idea of creating substantive equality within the legal practice profession is based on the understanding that inequality stems from long-established political, social and economic differences between men and women in the profession. These inequalities are entrenched in social values and behaviours, the institutions of society, the economic system and power relations. That substantive equality is intentionally asymmetrical is found in the fact that it focuses on the disadvantaged group rather than requiring equal treatment for its own sake.³⁰ In looking to capture the principle that equality should be located in the social context, responsive to those who are disadvantaged, demeaned, excluded or ignored,³¹ Fredman has proposed a frame of analysis for substantive equality. The four aims of substantive equality suggested by Albertyn and Fredman are to (i) redress social and economic disadvantage; (ii) counter stereotyping, stigma, prejudice, humiliation and violence based on a protected characteristics; (iii) enhance voice and participation countering political and social exclusion and accommodating and affirming differences, diversity and identity; and (iv) achieving structural changes.³² Fredman presents these components as a four-dimensional framework of aims and objectives that can be used to assess and assist in modifying policies and initiatives to attain substantive equality.³³ All dimensions are to be addressed in an interactive manner in order for substantive equality to be attained.³⁴ MacKinnon has challenged this proposed tool of analysis suggesting that the four dimensions fail to recognise the centrality of power relations – social hierarchy – that makes inequality unequal.³⁵ An analysis of the extent of gender equality in the legal profession, therefore, requires consideration of the extent to which legislative and non-legislative measures in the profession assist in creating equality of opportunity, and in eliminating barriers, which exclude women from participating and advancing in the profession.³⁶

29 Smith (n 17) 613.

30 C Albertyn & S Fredman 'Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments' (2015) *Acta Juridica* 434.

31 Fredman (n 23) 713.

32 Albertyn & Fredman (n 30) 439.

33 Fredman (n 23) 728.

34 S Fredman 'Substantive equality revisited: A rejoinder to Catharine MacKinnon' (2016) 14 *International Journal of Constitutional Law* 749.

35 CA MacKinnon 'Substantive equality revisited: A rejoinder to Sandra Fredman' (2017) 15 *International Journal of Constitutional Law* 1176.

36 Smith (n 17) 613.

Such an analysis would take into account that overcoming these impediments makes greater equality of outcomes possible.

4 Legal framework for gender equality in South Africa: An analysis of international and local instruments

4.1 International instruments

Gender equality has been codified in several international human rights documents. Section 39 of the Constitution indicates that when interpreting the provisions in the Bill of Rights, a court, tribunal or forum must consider international law. For this purpose, we turn to discuss key international instruments that are relevant to South Africa, and consider whether the definition of equality that is intended in these documents is that which requires the implementation of formal equality or substantive equality.

4.1.1 *Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (Universal Declaration)³⁷ acknowledges equality of all men and women. Article 1 provides (in gender-neutral language) that 'all human beings are born free and equal in dignity and rights'. Article 7 provides for equal protection of the law and prohibits discrimination and any incitement to such discrimination. However, article 25(2) recognises an entitlement to special care and assistance for motherhood and childhood. The Universal Declaration is not binding on member states. However, this document codifies the human right to equality as an international law norm.

4.1.2 *International Covenant on Civil and Political Rights*

Article 2 of the International Covenant on Civil and Political Rights (ICCPR) provides for equal enjoyment of all the rights in the treaty without distinction on any grounds, including sex or other status.³⁸ Article 26 provides for equality before the law and prohibits discrimination on any grounds. Article 3 provides that states

37 Universal Declaration of Human Rights GA Res 217A (III), UN Doc A/810 (1948) 71.

38 International Covenant on Civil and Political Rights GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1966), 999 UNTS 171, 23 March 1976; ratified by South Africa in 1998.

undertake 'to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant'. That it is intended that the observance of this obligation by member states will result in the attainment of substantive equality, as opposed to formal equality, is captured by the Human Rights Committee's interpretation of article 3 in its General Comment 4. In the General Comment the Human Rights Committee criticised member states for under-reporting their compliance with article 3. It called for state reports to contain more information regarding the role of women in practice with a view to ascertaining what measures, in addition to purely legislative measures of protection, have been or are being taken to give effect to the precise and positive obligations on gender equality. Recognising that substantive gender equality cannot be attained by simply enacting laws, the Human Rights Committee noted that states are required not only to have measures of protection but also affirmative action designed to ensure the positive enjoyment of rights.³⁹

4.1.3 *International Covenant on Economic, Social and Cultural Rights*

Article 3 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴⁰ contains the 'equality guarantee' in similar language to that contained in ICCPR. Article 3 places an obligation on member states to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant. On a plain reading of this provision it is difficult to determine the precise definition of equality as envisaged in the Covenant. In its interpretative role, the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) endorsed the perspective that member states undertake to ensure that their citizens enjoy substantive and formal equality in the enjoyment of the rights contained in the Covenant.⁴¹ The essence of article 3 of ICESCR is that the rights set forth in the Covenant are to be enjoyed by men and women on a basis of substantive equality. This means that while expressions of formal equality may be found in constitutional provisions, legislation and policies, article 3 also

39 Human Rights Committee General Comment 4 art 3 (13th session 1981), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev 1 4 (1994).

40 International Covenant on Economic, Social and Cultural Rights GA Res 2200A (XXI), 21 UN Gaor Supp (No 16) 49, UN Doc A/6316 (1966), 993 UNTS 3, 3 January 1976; ratified by South Africa in 2015.

41 ESCR Committee General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (art 3 of the Covenant) para 6.

mandates the equal enjoyment of rights in the Covenant for men and women in practice.⁴²

Taking consideration of the lived experiences of women into account in its interpretation of article 3, the ESCR Committee further noted that the obligation undertaken by member states in this article calls on them to address gender-based social and cultural prejudices, provide for equality in the allocation of resources, and promote the sharing of responsibilities in the family, community and public life.⁴³ Article 7(a) of ICESCR speaks particularly to the work context. It requires member states to recognise the right of everyone to enjoy just and favourable conditions of work. Article 3, requiring gender equality in the work environment, requires that member states take steps to reduce the constraints that are faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for child care.⁴⁴

4.1.4 Convention on the Elimination of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁴⁵ focuses on non-discrimination against women.⁴⁶ Article 3 on equality must be read together with articles 2, 4 and 5. These require that measures be put in place by member states to attain formal equality and substantive equality. Article 3 forms the core of the obligation on member states to effect gender transformation. It provides a framework for the measures for structural transformation that are set out in articles 4 and 5 and reinforces the means by which this is to be done.⁴⁷ Article 3 provides:

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

42 As above.

43 ESCR Committee (n 41) para 22.

44 ESCR Committee para 24.

45 Convention on the Elimination of All Forms of Discrimination against Women GA Res 34/180, 34 UN Gaor Supp (No 46) 193, UN Doc A/34/46, 3 September 1981; ratified by South Africa in 1995.

46 C Chinkin & MA Freeman 'Introduction' in A Marsha et al *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A commentary* (2013) 17.

47 Chinkin & Freeman (n 46) 114.

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

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

Article 4(2) highlights that special measures aimed at protecting maternity are not considered discriminatory. This provision is key in understanding the need for the integration of special programmes such as the Cape Bar maternity policy which will be considered in part 5. Raday states that for substantive equality to materialise, it is legitimate and necessary to make provision for the role that women play in procreation and to put in place special measures as required to address their specific needs in this role despite these measures only targeting women in their reproductive roles.⁴⁸ In contrast, however, is the question of child rearing, which is a non-biological aspect of maternity. Raday states that article 4(2) of CEDAW allows for special measures to protect maternity, which includes child rearing. However, Raday further states that this protected measure would be available to men and women on a gender-neutral basis, so as to counter the stereotypically imposed gendered division of labour that currently predominantly allocates child rearing to women.⁴⁹ Phooko and Radebe have suggested specific measures that may achieve the purpose of countering imposed gendered division of labour for the legal profession as a whole.⁵⁰ These include paternity leave so that parenting responsibilities are equally shared between men and women; a flexible and clear transfer policy for judges that does not require them to apply to the Judicial Service Commission (JSC) when requesting to be transferred to another division of the High Court, where their family members are based, and flexible working hours for both female and male legal practitioners.⁵¹

48 F Raday 'Article 4' in Marsha et al (n 46) 137.

49 Raday (n 48) 139.

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

51 Phooko & Radebe (n 50) 313.

Holtmaat's assessment is that article 5 of CEDAW acknowledges that the foundation of gender discriminatory practices affecting women in society are gender stereotypes and fixed parental gender roles.⁵² It therefore follows that eliminating gender discrimination requires that these root causes of gender discrimination are eradicated.⁵³ Article 5 of CEDAW creates obligations on member states to take steps towards modification of mind sets on stereotypes and predetermined gender roles in society. The key provisions in understanding gender equality, articles 2, 3, 4 and 5 of CEDAW, indicate that CEDAW requires member states to take measures towards attaining a change in access to opportunities for men and women, a change in the value systems of institutions and systems to enable them to shift away from historically-determined male paradigms of power and life patterns.⁵⁴

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

Article 2 of the African Charter on Human and Peoples' Rights (African Charter)⁵⁵ guarantees gender equality by recognising an entitlement to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind, such as sex. Article 18(3) of the African Charter requires that states ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)⁵⁶ further expounds on this right. Acknowledging that addressing gender stereotypes is central to attaining gender equality, article 2(2) of the Women's Protocol calls on member states, in fulfilling their African Charter obligation, to address gender inequality, to

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

52 R Holtmaat 'Article 5' in Marsha et al (n 46) 145.

53 As above.

54 Raday (n 48) 140.

55 African Charter on Human and Peoples' Rights 21 October 1986; signed by South Africa in 1996 and ratified in 1996.

56 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 25 November 2005.

On this basis, article 2(2) of the African Women's Protocol supplements the equality clause contained in the African Charter and intends for the realisation of substantive gender equality rather than formal equality. Article 6(i) of the Women's Protocol seeks to dismantle stereotypes relating to parental roles in a marriage context by requiring that a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children. Broader than a marriage context, the Women's Protocol addresses this under article 13(I) which recognises that both parents bear the primary responsibility for the upbringing and development of children. Article 8 of the Women's Protocol provides for equality before the law and equal benefit and protection of the law. This obligation includes requiring that states ensure that women are represented equally in the judiciary and law enforcement organs. We now turn to discuss relevant national legislation that has a bearing on gender equality in South Africa.

4.2 South African constitutional framework

4.2.1 *South Africa's historical context with regard to the recognition of the right to equality*

Before 1994 South Africa was a repressive regime characterised by a widespread system of political, economic and social discrimination and disenfranchisement.⁵⁷ However, gender inequality can be traced in the historically, yet universally-existing patriarchal systems and structures that have existed for many years, placing males at the centre of decision making, headship and occupation of the political and production arenas of societies – African and non-African.⁵⁸ South Africa, as with many countries that attained independence as a result of liberation struggles, officially recognised the contribution of women in the struggle for independence.⁵⁹ This recognition should have led to the elimination of the legal trials affecting women, primarily through the inclusion of equality and non-discrimination clauses in the national Constitution.⁶⁰

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

58 B Akala & JJ Divala 'Gender equity tensions in South Africa's post-apartheid higher education: In defence of differentiation' (2006) 30 *South African Journal of Higher Education* 1.

59 F Banda *Women, the law and human rights: An African perspective* (2005) 171.

60 Banda (n 59) 26.

Equality was poised in the interim Constitution of South Africa as a tool to augment the process of transforming a nation deeply divided by its past, characterised by strife, conflict, untold suffering and injustice, into one based on democratic values, social justice and the respect and protection of human rights for all.⁶¹ South African women with diverse backgrounds were involved in the constitutionalisation of women's rights, including gender equality in South Africa.⁶² This was achieved by ensuring that women's participation in the process was initiated well before the constitutional process embarked in earnest, with a series of workshops and conferences in which a Charter for Women's Rights was discussed.⁶³ Through this process, a counter-conservative group of lobbyists calling for the retention of male authority in the home and recognition of traditional rule and customary law as superior to gender equality came about and sought to similarly inform the post-apartheid constitution-making process.⁶⁴ Despite this conservative group's agenda, gender equality was secured by the fact that the counsels of parties in the negotiations were required to have a female negotiator and advisor. The women selected as negotiators in the constitution-making process organised themselves into a women's caucus to address issues of concern specific to women. Their participation in the process can largely account for the recognition of gender issues in the constitution-making process.⁶⁵

4.2.2 *Equality in the Constitution*

Post-1994 the Constitution pursued constitutional transformation from the pre-1994 dispensation, by affirming the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of, *inter alia*, gender.⁶⁶ Equality among all our people lies at the heart of the Constitution.⁶⁷ Section 1 of the Constitution promotes the values upon which the Republic of South Africa is founded, including human dignity, the achievement of equality and the advancement of human rights and freedoms. Equality is one of the three foundational constitutional values captured under section 7(1) of the Constitution.⁶⁸ Holistically,

61 Rapatsa (n 57) 2.

62 B Mabandla 'Women in South Africa and the constitution-making process' in J Peters & A Wolper (eds) *Women's rights: Human rights* (1995) 68.

63 As above.

64 As above.

65 As above.

66 Rapatsa (n 57) 2.

67 *President of the Republic of South Africa & Another v Hugo* 1997 (4) SA 1 (CC) para 74.

68 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46, where Justice Yacoob described them as the foundational values of

equality is enshrined in the Constitution as a legal right and as a value. Section 9 provides for the legal right providing procedural and remedial action for enforcement. The Preamble to the Constitution and section 7(1) articulate the value system that informs the legal right. Read in this way, although the Constitution does not contain a definition for the term 'equality' on various grounds, it was intended that equality, as contemplated therein, was to provide substance to transformative constitutionalism that, in turn, will transform the past and present, to build a better future.⁶⁹ Existing jurisprudence provides an indication of the meaning of gender equality as required by the Constitution. In addition, case law⁷⁰ adopts diverging views on the content of equality. Although the South African Constitutional Court in a number of cases has pronounced that equality as envisioned in the Constitution is substantive equality as opposed to formal equality, stark contrasts exist in the oscillating nature of the Constitutional Court's judgments in dealing with the distinction in the meaning of equality as envisaged in the Constitution. The judgments of the *National Coalition* and *Jordan* cases demonstrate that often times while the intention is to effect substantive equality, the outcomes of the judgment, in fact, does not achieve this.

Equality as meaning, acknowledging sameness – with equal importance and equal value – was first captured in *Hugo*⁷¹ as according all human beings equal dignity and respect regardless of their membership of particular groups.⁷² Albertyn suggests that equality in this sense is measured by dignity which requires that women are affirmed as autonomous human beings, not property of another, whose bodies are owned and disposed of by others, or glorified as wives and mothers defined only on the basis of their reproductive and sexual roles as relative to the role of men.⁷³

Equality in the Constitution also has to be understood to entail a remedial and redistributive aspect captured as a legal right in section 9(2) of the Constitution. The recognition of sameness and the redistributive aspect of equality nonetheless are not mutually exclusive.⁷⁴ Section 9(1) serves to recognise sameness and the dignity

our society by stating that '[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society ...'

69 Rapatsa (n 57) 8.

70 *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC); see also *Jordan & Others v State* 2001 (6) SA 642 (CC).

71 *President of the Republic of President of the Republic of South Africa & Another v Hugo* (n 67) para 73.

72 *President of the Republic of President of the Republic of South Africa & Another v Hugo* (n 67) para 41.

73 Albertyn & Fredman (n 30) 188.

74 S Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 3 *South African Journal on Human Rights* 223.

of women, but this alone will not result in substantive equality. Redistribution through substantive equality addressed in section 9(2) of the Constitution is necessary to address the systemic inequality which would otherwise be left untouched by a mere prohibition of gender discrimination.⁷⁵

The redistributive element of substantive equality calls into question the extent to which the implementation of special measures aimed at achieving equality results in the limitation of the equality rights of men in the legal profession. This assessment requires a consideration of the circumstances under which the limitation of the equality rights of men in the legal profession is justifiable. Section 36 of the Constitution provides for the limitation of rights, including the right to equality. The right to equality is a non-derogable (protected) right with respect to *unfair* discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.⁷⁶ The right to equality in respect of gender is derogable and hence subject to limitations. Sex is a prohibited ground of discrimination that renders differential treatment on the basis of physical characteristics of either being a man or a woman automatically unfair discrimination. Sex is more concerned with physical characteristics of men and women, whereas gender is more concerned with the social and cultural construction of men and women.⁷⁷ The limitation of rights as captured in section 36 of the Constitution is a reflection of the international Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights⁷⁸ which provide for circumstances under which the human rights contained in ICCPR can be limited. One of the principles that has received international acceptance is that the provisions allowing for restrictions or limitations of rights must be narrowly and strictly construed.⁷⁹ This is premised on the idea that the protection of human rights is a general rule and human rights limitations are a mere exception to the rule.⁸⁰

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

76 Table of Non-Derogable Rights as set out in the Bill of Rights in the Constitution, 1996 (our emphasis).

77 A Bizimana 'Gender stereotyping in South African Constitutional Court cases: An interdisciplinary approach to gender stereotyping' LLM dissertation, University of Pretoria, 2015.

78 Siracusa Principles (n 57).

79 Siracusa Principles (n 57) art 3 provides that '[a]ll limitation clauses shall be interpreted strictly and in favour of the right at issue'.

80 H Nyane 'Limitation of human rights under the Constitution of Lesotho and the jurisprudence of superior courts' (2015) 23 *Lesotho Law Journal* 8.

In the case of *Pretoria City Council v Walker*⁸¹ the Constitutional Court was faced with determining the validity of a situation comparable to the situation where women in the legal profession would be beneficiaries of special measures in line with the equality requirements set out in the Constitution and equality legislation. In this case Walker sought a declaration that, *inter alia*, a policy by the City Council to charge residents of a formerly 'white area' in the suburbs rates based on consumption tariffs where consumption was measured by meters on the property and residents of formerly 'black areas' in the townships, a flat rate per household regardless of actual consumption, unconstitutional for being unfair discrimination. On this particular point the Court found that the action of the City Council was discriminatory but that such discrimination was held to be fair. This measure of differentiating the tariffs was found to be a reasonable limitation on the right to equality of other groups. The Court found that the discrimination did not have an unfair impact on the residents of the suburbs who had not been disadvantaged by the racial policies and practices of the past. From an economic point of view, the victims of the discrimination were neither disadvantaged nor vulnerable.⁸²

In *Parks Victoria (Anti-Discrimination Exemption)*, an Australian case,⁸³ the tribunal was also faced with determining the validity of a situation comparable to the situation where women in the legal profession would be beneficiaries of special measures in line with the equality requirements set out in the Constitution and equality legislation. In this case Parks Victoria wanted to advertise for and employ indigenous people to care for Wurundjeri country. The tribunal held that the purpose of the activity was to provide employment opportunities to indigenous people, to increase the number of indigenous people employed by Parks Victoria, to provide opportunities for connection and care for the Wurundjeri country by its traditional owners and also for the maintenance of the culture associated with the country. The tribunal was satisfied that the measure was proportionate because at the time the application was made, only 7,6 per cent of Parks Victoria's workforce was indigenous. This measure of limiting the employment opportunity to aboriginal people was found to be a reasonable limitation on the right to equality of other groups.

81 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

82 *Pretoria City Council v Walker* (n 81) para 47.

83 L. Papaelia 'Tribunal considers special measures and discrimination under the Charter and new Equal Opportunity Act' Human Rights Case Summaries, <https://www.hrlc.org.au/human-rights-case-summaries/tribunal-considers-special-measures-and-discrimination-under-the-charter-and-new-equal-opportunity-act> (accessed 9 June 2019).

Similarly, it is arguable that should a limitation of the right to equality of men in the legal profession be proposed, by the intentional action of increasing the number of women in the legal profession, this would be justifiable in accordance with the criteria in section 36 of the Constitution and, therefore, constitutionally valid.⁸⁴ In addition, the purpose of the limitation would not constitute *unfair* discrimination based on sex or gender, as the goal of such limitation would be to balance and proportionally allow for the adequate representation of women in the legal profession. Furthermore, section 9(5) of the Constitution outlines that discrimination is unfair unless it is established that the discrimination is fair. On this basis, such discrimination would not be 'unfair' but rather would allow for the realisation of the right to equality, in a just and fair manner, as enshrined in the Bill of Rights.

The legitimacy of the laws that enable these special measures is determined by considering if it is a law of general application and is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁸⁵ All forms of legislation and common law qualify as 'a law of general application' but policies or practices do not.⁸⁶ On this basis, the laws in South Africa that are in place to promote the attainment of equality in the legal profession are considered.

4.3 South African legislative framework

Section 9(2) of the Constitution requires the state to put in place legislative and policy measures to promote the attainment of equality. There are several laws that give effect to the right to equality in various arenas in South Africa. Some of these laws operate to regulate women's private life experiences, such as the recognition of customary marriages under the Recognition of Customary Marriages Act,⁸⁷ and others operate to regulate women's public life experiences. In the context of employment law, the Employment Equity Act (EEA)⁸⁸ provides the legal framework for the advancement of women in employment. All other gender relationships and interactions in society, not bound by the equality provisions of the EEA, are regulated under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).⁸⁹ The Women Empowerment

84 I Currie & J de Waal *The Bill of Rights handbook* (2005) 164.

85 Currie & De Waal (n 84) 168.

86 Currie & De Waal 169.

87 Act 120 of 1998.

88 Act 55 of 1998.

89 Act 4 of 2000.

and Gender Equality Bill was passed by the National Assembly in March 2014. However, following the receipt of comments from various civil society organisations working on human rights, in general, and women's rights, in particular, the Bill was referred for further consultation to Parliament.⁹⁰ The Bill's stated objective was:

to give effect to section 9 of the Constitution of the Republic of South Africa, 1996, in so far as the empowerment of women and gender equality is concerned; to establish a legislative framework for the empowerment of women; to align all aspects of laws and implementation of laws relating to women empowerment, and the appointment and representation of women in decision making positions and structures; and to provide for matters connected therewith.⁹¹

The Bill sought to impose a quota system of a minimum of 50 per cent gender representation in institutions. This in itself was a source of criticism against the Bill, as it could result in a new form of inequality. The Centre for Constitutional Rights submitted the view that the pursuit of achieving a minimum of 50 per cent representation of women in various walks of society is paradoxical, as anything more than 50 per cent representation, in effect, will create a new inequality.⁹² The Legal Resources Centre in its submission to Parliament noted that this model would not amount to substantive equality, but rather formal equality.⁹³

4.3.1 *Employment Equity Act*

The purpose of the Employment Equity Act (EEA) is to

achieve equity in the workplace by (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure *their equitable representation* in all occupational categories and levels in the workforce.⁹⁴

90 L Nomadolo 'Gender-based discrimination in the workplace in South Africa' *Joburg Post* 28 July 2017, <https://www.joburgpost.co.za/2017/07/28/gender-based-discrimination-workplace-south-africa/> (accessed 9 March 2018).

91 Women Empowerment and Gender Equality Bill, https://www.juta.co.za/media/filestore/2013/11/B50_2013.pdf (accessed 9 June 2019).

92 CFR 'An analysis: The Women Empowerment and Gender Equality Bill', https://www.juta.co.za/media/filestore/2013/11/B50_2013.pdf (accessed 9 June 2019).

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

94 Sec 2 Employment Equity Act 55 of 1998 (our emphasis).

Tapanya distinguishes broad representivity and demographic representivity as a means to be adopted in the attainment of equality.⁹⁵ In May 2017 Tapanya argued that the EEA adopts a standard of affirmative action measures, not reflected in section 9(2) of the Constitution which reads in equitable representation as a requirement of substantive equality. The practical effect of this standard is the potential application of the concept of demographic representivity – a mechanism that operates in the same way as racial quotas.⁹⁶ Broad representivity, on the other hand, is the standard required under section 174(2) of the Constitution in the appointment of judicial officers. This standard only requires the presence in an employer's workforce, of the race and gender classes, which are represented in South Africa's national demographic profiles.⁹⁷

The EEA applies to all employers and employees except to members of the national defence force, the national intelligence agency and the South African secret service.⁹⁸ The implementation of affirmative action measures is not by choice under the EEA. Designated employers must design and implement affirmative action measures for people from designated groups. In *Naidoo v Minister of Police*⁹⁹ the essence of affirmative action was stated to be differentiating and preferring one member of a designated group of people so as to ensure substantive equality with the aim of redressing the effects of past discrimination and to promote equality. The EEA prohibits unfair discrimination, *inter alia*, on the basis of race and/or gender in terms of section 6. In this case the South African Police Services (SAPS) Employment Equity Plan was the subject of scrutiny. Despite Naidoo, a black¹⁰⁰ woman, scoring higher than an African male officer similarly shortlisted for the position, the SAPS appointed the male for the position with the view that his appointment would address the underrepresentation of Africans on the police force. This equity plan was found to fall short of the EEA's aim of promoting equal representation in the workplace and the court ordered the appointment of Naidoo over her African male counterpart. However, an affirmative action measure, in terms of the EEA, to the extent that it embodies a preference, whether on the grounds of race or gender, does not constitute unfair discrimination, if it is designed to promote substantive equality of a designated group.

95 G Tapanya 'Unpacking the affirmative action equation from a constitutional perspective' (2017) *De Rebus* 32.

96 As above.

97 As above.

98 Sec 4 Employment Equity Act 55 of 1998.

99 *Naidoo v Minister of Safety and Security & Another* 2013 (3) SA 486 (LC) para 72.

100 According to sec 1 of the Employment Equity Act 55 of 1998, 'black people' is a 'generic term which means Africans, coloureds and Indians'.

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

4.3.2 *Promotion of Equality and Prevention of Unfair Discrimination Act*

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) defines equality as including the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes,¹⁰¹ in other words, substantive equality, as opposed to formal equality. Section 24(2) of PEPUDA places an obligation on all persons, not only the state, to promote equality. It binds the state and all persons in the country, but does not apply to any person to whom and to the extent to which the EEA applies.¹⁰² As a general rule, the EEA will apply where an employment relationship arises and PEPUDA will apply in all other cases to regulate equality.

One such case was *Du Preez v Minister of Justice and Constitutional Development & Others*.¹⁰³ In this case PEPUDA applied and not the EEA, as magistrates were not considered to be employees of the state. In this case a highly-experienced white magistrate claimed that he had been unfairly discriminated against, by the interview panel applying selection criteria which acted as an absolute barrier to his selection, by excluding him from being considered for appointment to the Port Elizabeth regional court. The Department's defence was that the selection criteria was justified by its affirmative action policy. On the one hand, the Court recognised that affirmative action measures must be seen as essential and integral to the goal of equality, and not as limitations of or exceptions to equality rights.¹⁰⁴ In terms of the definition of discrimination in PEPUDA, on the other hand, it found that the applicant's exclusion from the selection process amounted to discrimination and, therefore, it was necessary to consider whether it was fair. Although section 174(2) of the Constitution requires the

101 Sec 1 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

102 Secs 5(1) & 5(3) Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

103 *Du Preez v Minister of Justice and Constitutional Development & Others* (2006) 3 All SA 271 (SE).

104 *Du Preez* (n 103) para 18.

need for the judiciary to reflect broadly with regard to the racial and gender composition of South Africa, when judicial officers are appointed, the Court noted that this is not the only criterion, and that other criteria, such as experience, legal knowledge, leadership and management skills, must also be taken into account. However, such consideration had not been concluded and, as a result, black women with minimum qualifications automatically prevailed over all other applicants. The selection, therefore, was held to be unfair.

4.4 National Policy Framework for Women's Empowerment and Gender Equality

Although not a law of general application for purposes of the limitation clause in section 36 of the Constitution, cabinet in December 2000 adopted, as a policy document, the National Framework for Women's Empowerment and Gender Equality (National Gender Framework).¹⁰⁵ The National Gender Framework was formulated by the Office on the Status of Women, comprising of the Office on the Status of Women, the Commission for Gender Equality (CGE), the Parliamentary Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women and several non-governmental organisations (NGOs) working on gender and women's rights.¹⁰⁶ It applies to all government departments, provincial administrations, local structures, parastatals and other public entities.

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

a situation where women and men have equal conditions for realizing their full human rights and potential; are able to contribute equally to national political, economic, social and cultural development; and benefit equally from the results. Gender equality entails that the underlying causes of discrimination are systematically identified and removed in order to give women and men equal opportunities. The concept of gender equality, as used in this policy framework, takes into account women's existing subordinate positions within social relations and aims at the restructuring of society so as to eradicate

105 J Hills 'Addressing gender quotas in South Africa: Women empowerment and gender equality legislation' (2015) 20 *Deakin Law Review* 167.

106 As above.

male domination. Therefore, equality is understood to include both formal equality and substantive equality; not merely simple equality to men.¹⁰⁷

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

5 An analysis of the Cape Bar maternity policy as a 'transformation' initiative of the legal profession in South Africa

Cornell offers a definition of transformation as bringing about a change radical enough to so dramatically restructure any system that the identity of the system itself is altered.¹⁰⁸ This is the objective of transformation initiatives in the legal profession with the aim being to achieve a judiciary that is broadly reflective of South African society as a whole. Taking from the principles set out by Moseneke J in *Minister of Finance v Van Heerden*,¹⁰⁹ read with those set out in the *Hugo* case, the analysis of this selected initiative in this part will consider the following:

- (1) Is it a measure adopted to achieve equality?
- (2) Is it necessary and appropriate to achieve the objective of enabling substantive equality in the legal profession?
- (3) Is the impact of the measure proportionate to the objectives?

On this test, it will be considered whether it is a measure that causes the differential treatment of women and men based on a gender stereotype, therefore amounting to discrimination and, if so, whether the discriminatory impact is proportionate to the objective of the measure. The test in determining proportionality asks whether the application, enforcement or perpetuation of a gender stereotype denies women a benefit, imposes on them a burden or degrades women, diminishes their dignity or otherwise marginalises them.¹¹⁰

107 National Gender Policy Framework Glossary of Terms xviii, http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=94056&p_country=ZAF&p_count=1051&p_classification=05&p_classcount=38 (accessed 9 June 2019).

108 K van Marle 'The doubly prized world – On transformation, ethical feminism, deconstruction and justice' (1996) *Comparative and International Law Journal of Southern Africa* 329.

109 2004 (6) SA 121 (CC). This case was concerned with sec 9(2) of the Constitution, 1996 which prescribes affirmative action measures generally.

110 RJ Cook & S Cusack 'Gender stereotyping: Transnational legal perspectives' (2010) 17.

This initiative will be analysed here to test whether it in itself is justifiable as a gender transformation measure.

The Cape Bar has a maternity policy that was introduced in discussions at its 2009 annual general meeting.¹¹¹ It is not aimed at addressing the organisation of the family. In terms of this policy, *inter alia*, members of the Bar taking maternity leave are entitled to a year's leave of absence without any loss of domestic seniority (this period may be extended on good cause shown), remission from Bar dues and partial remission from chambers rental and floor dues. In addition, members on maternity leave may, at election, practise at home during their maternity leave period.¹¹² This type of transformation initiative is set up on the basis of the gender stereotype that women are the primary care givers. Despite it being a stereotype, this is a role that female advocates continue to play in their everyday realities. The Johannesburg Bar has a similar policy.¹¹³ However, this article analyses the Cape Bar policy as it was the first to be implemented in the advocates' profession. These maternity policies acknowledge the reality of women's child-bearing and parental roles and attempt to create conditions that will enable women to remain in practice at the Bar, despite their child care responsibilities. These policies are the only policies in the legal profession that attempt to attain gender equality by relying on gender stereotypes that relate to child-bearing and parental roles of women in society. The test as to the appropriateness of adopting this measure as a means to transform the Cape Bar despite it reinforcing gender stereotypes will be considered on the basis of the principles set out in the *Van Heerden* and *Hugo* cases.

5.1 Is it a measure adopted to achieve equality?

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

111 Transformation at the Cape Bar, <https://capebar.co.za/transformation/> 2019 (accessed 9 June 2019).

112 G Budlender 'Cape Bar adopts new maternity policy' 2009, <https://www.sabar.co.za/law-journals/2009/december/2009-december-vol022-no3-pp10-11.pdf> (accessed 9 June 2019). See also K Pillay 'The Cape Bar's maternity policy' 2012, <https://www.sabar.co.za/law-journals/2012/august/2012-august-vol025-no2-p13.pdf> (accessed 9 June 2019).

113 Johannesburg Society of Advocates maternity policy in relation to members 2012, <https://johannesburgbar.co.za/wp-content/uploads/MATERNITY-POLICY-2-OCT-2012.pdf> (accessed 9 June 2019).

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

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

5.3 Is the impact of the measure proportionate to the objective?

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

The test in determining proportionality is whether the application, enforcement or perpetuation of a gender stereotype in the measure denies women a benefit, imposes on them a burden or degrades women, diminishes their dignity or otherwise marginalises them. As much as the measure is discriminatory, it is submitted that the perpetuation of the gender stereotype in respect of the role of women as mothers, which is used to justify this policy, neither denies women a benefit, impose on them a burden or degrade women, nor does it diminish their dignity or otherwise marginalise them. It in effect is a recognition of the reality of women's lives as they experience it. Until such time as societal attitudes are addressed and women are no longer perceived as primary child care providers, this measure serves to achieve substantive equality at the Cape Bar.

6 Proposals to ensure substantive equality is attained in the legal profession in South Africa

6.1 Special measures to achieve gender equality

Redistribution through substantive equality addressed in section 9(2) of the Constitution is necessary to address the systemic inequality which would otherwise be left untouched by a mere prohibition of gender discrimination.¹¹⁴ Section 5 of the EEA applies to all employers and provides that '[e]very employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice'. The argument by Fergus and Collier on the interpretation of this section by courts and employers informs this recommendation. They propose that this section of the EEA imposes a duty on employers to pre-empt discrimination in their workplaces, rather than merely respond to it and that in interpreting the section, one should not confine policies and practices to cleanly identifiable programmes and systems, and overt forms of discriminatory conduct. Discriminatory cultures, as well as more opaque barriers to change, are omitted from its scope. Yet, this is contrary to the EEA's definition of 'employment practices', which expressly includes 'working environments'.¹¹⁵ This requires that practitioners acknowledge that race transformation is not a substitute for gender transformation. They should internalise equality as a value and as a human right contained in the Constitution.¹¹⁶

6.2 Individual accountability for championing gender equality

An individual's perceptions about women's place in private and public life do not change because they arrive at the workplace. It is impractical to expect such a person who may, for example, hold beliefs that women are incapable of focused critical thought, to think a woman capable of being the lead counsel in a complex corporate law class action suit – no matter what his or her organisation's position is on gender transformation. This recommendation call for an acknowledgment that is not aimed at a blaming exercise, but rather to say that 'from here on out' they will work not to submit

114 Ngwenya (n 75).

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

116 S Pather 'Equal treatment: Addressing sexual and gender discrimination' 1999 *Alternation* 164.

to their unconscious bias. This requires that the individuals in the profession reflect on and work to change their habits and attitudes.

6.3 Review the advancement requirements

There is a need for institutions to re-assess how they define leadership and how they identify and nurture talent.¹¹⁷ The legal profession is required to address the advancement criteria to take into account requirements that are based on the 'lack of fit criteria' that uses the masculine norm as the standard for determining suitability. This not only has a negative impact on female legal practitioners but also fails to provide space for gender diversity by excluding male practitioners who do not conform to the masculine socially-assigned gender roles and behaviours. These members of the profession include homosexual, transgender, intersex and bisexual men. In reviewing the policy measures to achieve gender equality, the legal profession is required to create spaces within which female experiences can be shared and concretised in a manner that will inform the policy-making processes.

7 Conclusion

Formal equality cannot translate into gender transformation of the legal profession, as the issues causing such inequalities extend beyond the scope of attaining sameness. The domestic, regional and international law framework suggests that special measures be adopted in order to achieve substantive equality specifically with regard to the role of women in the workplace. The Cape Bar maternity policy is an example of a special measure that recognises the realities of women's lived experiences with regard to pregnancy and child care and aims to cater for these realities. This article has demonstrated the validity of the dilemma facing feminists of how to affirm the feminine without reverting to stereotypes about women as all accounts of the feminine seem to reset the trap of rigid gender identities, deny real differences among women and reflect the history of oppression and discrimination instead of the idea of equality.¹¹⁸ The Cape Bar maternity policy concluded that with the aim of attaining equality for a group that has historically been marginalised in the work space, reliance on gender stereotypes to inform special measures targeted at women can be justified. While discriminatory,

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

118 Van Marle (n 108) 329.

it is a case of fair discrimination, as supported by section 9 of the Constitution and an instance of a special measure from which South Africa should learn with respect to achieving meaningful gender transformation in the legal profession.