# Gender-Based Discrimination and Underrepresentation of Female Judges in the Superior Courts in South Africa – a Critical Analysis of International and Domestic Laws and Policies on the Protection of Women's Rights

**Rada Stoilova**
**STLRAD001**

**Minor Dissertation submitted for the degree of Master of Laws (LLM) in Human Rights**

**Faculty of Law**

**University of Cape Town**

Word Count: 23,197 (including footnotes and table of contents, excluding bibliography)

FEBRUARY 2024

University of Cape Town

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

University of Cape Town

**Research dissertation/research paper presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws in Human Rights in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.**

**I hereby declare that I have read and understood the regulations governing the submission of Master of Laws in International Law dissertations/ research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.**

# DECLARATION

**I hereby declare that I have read and understood the regulations governing the submission of Master of laws in Human Rights law dissertations/ research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.**

**Signature**Signed by candidate**……..** **Date: 11 February 2024**

# ACKNOWLEDGMENTS

First and foremost, I would like to express my deepest appreciation to my supervisors, Sapna Mesthrie and Salona Lutchman, for their invaluable guidance, support, and insightful feedback throughout the entire process of this research. The knowledge they shared with me as well as their dedication and constant encouragement played a pivotal role in shaping my thesis.

To my friends and family whose love and support has been a constant source of motivation throughout this journey.

I am also deeply grateful to my partner for their unconditional love, understanding, and constant encouragement. Thank you for believing in me, even when I doubted myself.

# ABSTRACT

Gender stereotypes, patriarchal ideologies and discriminatory cultural beliefs have resulted in continuous discrimination against women in all spheres of life. Throughout the years, women around the globe were denied basic human rights such as the rights to equality, safety, dignity, education, equal economic opportunities, and the right to vote among others. Today, despite the robust efforts under international, regional and domestic law to eliminate discrimination against women in all its forms, gender stereotypes remain the primary factor contributing to the disparity in the representation of women judges in the Superior Courts in South Africa.

This dissertation examines the issues of gender-based discrimination in the appointment of female judges to the Superior Courts in South Africa and the underrepresentation of women in senior positions in the post-apartheid independent judiciary. It addresses the question of whether women in the judiciary in South Africa are adequately protected by the laws and policies enacted on an international, regional, and domestic level on the protection of women's rights and the promotion of gender equality. It argues that while significant progress has been made over the years to ensure gender diversity on the bench, women in South Africa continue to face gender-based discrimination before and during judicial appointment processes in the Superior Courts and remain highly unrepresented in senior judicial positions. While the current international and regional human rights instruments provide a relatively extensive protection of women's right to equality in various spheres of life, they have omitted to address crucial factors in the achievement of gender equality in the workplace. Furthermore, South Africa has failed to fully implement *de facto* equality between women and men and to eliminate the key factors contributing to gender inequality on the Bench – namely, the harmful gender stereotypes and patriarchal attitudes deeply entrenched in the South African society.

# LIST OF ACRONYMS

Constitutional Court (CC)

Convention on the Elimination of All Forms of Discrimination (CEDAW)

Democratic Governance and Rights Unite (DGRU)

Deputy Chief Justice (DCJ)

Employment Equity Act (EEA)

Female genital mutilation (FGM)

High Court (HC)

Human Rights Committee (HRC)

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social and Cultural Rights (ICESCR)

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Judicial Service Commission (JSC)

Law Society of South Africa (LSSA)

Non-governmental organisations (NGOs)

Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)

Southern African Development Community (SADC)

Supreme Court of Appeal (SCA)

United Nations (UN)

Universal Declaration of Human Rights (UDHR)

Women Empowerment and Gender Equality Bill (the WEGE Bill)

# Contents

**CHAPTER I. INTRODUCTION** ..... 1

1.1. RESEARCH QUESTION AND ARGUMENT ..... **3**

1.2. METHODOLOGY ..... **4**

1.3. LITERATURE REVIEW ..... **4**

1.4. OVERVIEW OF CHAPTERS ..... **9**

**CHAPTER II. DEFINING KEY LEGAL AND SOCIAL CONCEPTS** ..... 11

2.1. THE ROOTS OF GENDER INEQUALITY ..... **11**

2.1.1. Patriarchy ..... 11

2.1.2. Colonial Times and Women in the Struggle Against Apartheid ..... 13

2.2. KEY LEGAL CONCEPTS ..... **14**

2.2.1. Equality ..... 15

2.2.2. Intersectionality ..... 18

**CHAPTER III. INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK** ..... 19

3.1. INTERNATIONAL LEGAL FRAMEWORK ..... **20**

3.1.1 The Convention on the Elimination of All Forms of Discrimination Against Women ..... **20**

3.1.2. The Beijing Platform for Action ..... **23**

3.2. REGIONAL LEGAL FRAMEWORK ..... **25**

3.2.1. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (The Maputo Protocol) ..... 25

3.2.2. The Southern African Development Community (SADC) Protocol on Gender and Development ..... 28

3.3. CONCLUSION ..... Error! Bookmark not defined.

**CHAPTER IV. NATIONAL LEGAL FRAMEWORK** ..... 30

4.1. THE CONSTITUTION ..... **30**

4.1.1. Substantive Equality in Promoting Gender Transformation ..... 31

4.1.2. Constitutional Requirements for Judicial Appointment ..... 32

4.2. WOMEN EMPOWERMENT AND GENDER EQAULITY BILL ..... **34**

4.3. THE EMPLOYMENT EQUITY ACT ..... **35**

**CHAPTER V. BARRRIERS PREVENTING WOMEN'S ADVANCEMENT IN THE JUDICIARY** ..... 37

5.1. BARRIERS FACED BY WOMEN BEFORE AND DURING THE JUDICIAL APPOINTMENT PROCESS ..... **38**

5.1.1. Divided Legal Profession – an Obstacle to Women's Advancement ..... 38

5.1.2 Judicial Appointment ..... 40

5.1.3. Discriminatory Perceptions of Women's Abilities in the Legal Profession ..... 46

**5.2. UNDERREPRESENTATION OF WOMEN IN SENIOR JUDICIAL POSITIONS ..... 48**

5.2.1. Harmful Stereotypes About Women in Leadership Roles ..... 49

5.2.3. Criteria for the Appointment of Judges in Senior Positions ..... 51

5.2.4. Prevalent Masculinist Culture Within the Judiciary ..... 52

5.3. CONCLUSION ..... **54**

**CHAPTER VI. CONCLUSION AND RECOMMENDATIONS** ..... 54

**BIBLIOGRAPHY** ..... 58

# CHAPTER I. INTRODUCTION

Gender stereotypes, patriarchal ideologies, discriminatory cultural beliefs and political interests have resulted in continuous discrimination against women in all spheres of life.[1] Throughout the years, women around the globe were denied basic human rights such as the rights to equality, safety, dignity, education, equal economic opportunities, and the right to vote among others.[2] In Norway, for instance - one of the most democratic countries in the world today - women had to fight for over a century to receive equal pay with men before they could enjoy their current status.[3] Furthermore, the constitutional amendment granting women in the United States the right to vote was only approved in 1920 after more than four decades of discussions.[4] These two examples merely serve to emphasise the lack of power that women previously held in politics, the economy and in society at large.

Today, although progress has been made in the promotion of gender equality, a 2023 UN Report reveals that women continue to face barriers to accessing their human rights due to pervasive discriminatory policies and gaps in the legal protection.[5] The Report demonstrates that 55 per cent of States have failed to enact laws that expressly prohibit both direct and indirect discrimination against women.[6] Furthermore, over a third of nations do not offer maternity leave in compliance with the International Labour Organisation (ILO), while almost half of the States do not 'mandate equal remuneration for work of equal value.'[7] Such limitations, as argued by Baker, often come as a result of prevailing patriarchal patterns that confine women to the home and relegate them to the roles of housewives and mothers, doubting their abilities outside of those areas.[8] They require women to be submissive and obedient in the home and reject their participation in the public domain.[9]

---

[1] Sangita Bharati 'Violations of Women's Human Rights' (2017) 5 *International Journal of Multidisciplinary and Current Research* at 1315.
[2] Ibid.
[3] Simrandip Sandhu 'Women's Rights to Vote and Laws Against Gender Discrimination: The Makeup for Gender Equality and Women's Empowerment' (2021) 13 *UC Merced Undergraduate Research Journal,* at 2.
[4] United States Senate, 'Woman Suffrage Centennial', available at: *https://www.senate.gov/about/women-of-the-senate/nineteenth-amendment-vertical-timeline.htm#:~:text=Approved%20by%20the%20Senate%20on,Nineteenth%20Amendment%20to%20the%20Constitution*, accessed on: 7 July2023.
[5] United Nations, 'The Sustainable Development Goals Report: Special Edition' (2023), available at: *https://unstats.un.org/sdgs/report/2023/The-Sustainable-Development-Goals-Report-2023.pdf,* accessed on: 13 July 2023, at 22.
[6] Ibid at 23.
[7] Ibid.
[8] Jean H. Baker 'The Long Road to Suffrage: How Women Won the Right to Vote' (2020) 99 *Foreign Affairs* 154 at 154.
[9] Ibid.

Such discrimination is similarly evident in the judiciary, where the Special Rapporteur on the independence of judges and lawyers identified, in 2021, that gender stereotypes constitute the primary factor contributing to the disparity in the representation of women judges across various courts and tribunals.[10] The Rapporteur recognised that such stereotypes cause various barriers to women's advancement in the judicial profession, including but not limited to, lack of transparency in judicial appointment processes, limited access to education for women, and sexual harassment and violence against women.[11]

That is the case in South Africa where in 2004, a whole decade after South Africa had become a democracy and adopted the Interim Constitution,[12] only 28 of the 210 judges in the country were women and there was no female judge president at the time.[13] While the representation of women in the judiciary has improved, with 44% of judges in the High Courts being women as of 2020/21,[14] Masengu[15] argues that women continue to face discrimination as regards their appointment in the judiciary. In research based on five legal sector meetings led over the course of three years, the Democratic Governance and Rights Unit identified that discriminatory perceptions of women's abilities and unequal distribution of work were key obstacles preventing women from obtaining employment within the judiciary.[16] Furthermore, the number of women holding senior positions in the judiciary remains extremely low.[17] South Africa has never had a female Chief Justice and it was only in 2022 that a woman, Mandisa Maya, was appointed as the Deputy Chief Justice (DCJ) of South Africa for the first time.[18] Maya DCJ was also the first woman to hold the roles of Deputy President and President of the Supreme Court of Appeal in 2015 and 2017, respectively.[19] This demonstrates the slow pace of

[10] Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, 'Participation of women in the administration of justice' (2021), at 8.
[11] Ibid at 9.
[12] Constitution of the Republic of South Africa Act 200 of 1993.
[13] Ruth B. Cowan 'Women's Representation on the Courts in the Republic of South Africa' (2006) *University of Maryland Law Journal of Race, Religion, Gender and Class* 291 at 303.
[14] The Judiciary Performance Report for the 2020/21 financial year, available at: *Judiciary_Newsletter_December_2021.pdf*, accessed on 7 July, at 6.
[15] Tabeth Masengu 'It's a Man's World: Barriers to Gender Transformation in the South African Judiciary: Perspectives from Women Advocates and Attorneys' (2016) 23 *International Journal of the Legal Profession* 305.
[16] Ibid.
[17] Judges Matter 'Women in Judicial Leadership' (2022) available at: *Women in judicial leadership - Judges Matter*, accessed on 9 November 2023.
[18] South African Chapter of International Association of Women Judges, Justice Mandisa Maya: Deputy Chief Judges of South Africa, available at: *https://www.justice.gov.za/saiawj/docs/Newsletter-2022-Jul-SACIAWJ.pdf,* accessed on 8 August 2023.
[19] Ibid at 2.

promoting gender equality on the bench and ensuring equality for women in the judicial profession in democratic South Africa.

This dissertation will examine the issue of gender-based discrimination during the appointment of women to the Superior Courts in South Africa and will further address the leading causes of the underrepresentation of women in senior positions in the post-apartheid independent judiciary. For the purposes of this dissertation, gender-based discrimination means discrimination against women which, as defined under Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[20] constitutes:

> 'Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'[21]

Furthermore, as mentioned above, sexual harassment and violence against women, also referred to as gender-based violence (GBV), are one of the key obstacles to women's advancement in the judiciary. In the South African context, that is hardly an exception. South Africa has a long history of violence against women[22] and, in fact, South Africa demonstrates one of the highest statistics in the world regarding GBV.[23] It is important to note that GBV, as recognised by the CEDAW Committee, is a form of discrimination against women as it affects women disproportionality, and it is 'directed towards a woman because she is a woman.'[24] The Committee further links such violence to the violation of various human rights such as the right to equal rights in the family and the right to just and favourable conditions of work. [25]

## 1.1. RESEARCH QUESTION AND ARGUMENT

This thesis addresses the question of whether women in the judiciary in South Africa are adequately protected by the laws and policies enacted on an international, regional, and domestic level on the protection of women's rights and the promotion of gender equality. It

---

[20] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: *https://www.refworld.org/docid/3ae6b3970.html*.
[21] Article 1 of CEDAW.
[22] Penelope Andrews 'Pursuing Gender Equality Through the Courts, the Role of South Africa's Women Judges' in J. Jarpa Dawuni *Gender, Judging and the Courts in Africa* (2021) 1st edition 189 at 193.
[23] Ibid.
[24] Committee of CEDAW General Recommendation No. 19: 'Violence against women' (1992), available at: *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38) | Refworld*, accessed: 1 of September, para 6.
[25] Ibid para 7.

argues that while significant progress has been made over the years to ensure gender diversity on the bench, women in South Africa continue to face gender-based discrimination before and during judicial appointment processes in the Superior Courts and remain highly unrepresented in senior judicial positions. While the current international and regional human rights instruments provide a relatively extensive protection of women's right to equality in various spheres of life, they have omitted to address crucial factors in the achievement of such equality. Furthermore, South Africa has failed to fully implement *de facto* equality between women and men and to eliminate the key factors contributing to gender inequality on the Bench – namely, the harmful gender stereotypes and patriarchal attitudes deeply entrenched in the South African society. The issue of gender-based discrimination in the judiciary will be examined through the lens of substantive equality and intersectionality.

## 1.2. METHODOLOGY

To address the argument, this dissertation will use a socio–legal approach. A socio-legal approach allows for the issue to be examined from a social, cultural, historical and legal perspective.[26] Considering the long history of racial and gender inequality in South Africa, the only way to fully comprehend the challenges and barriers that women judges face today is to examine the law together with the social and cultural perceptions of the role that women hold in society. This dissertation will use qualitative methods and desktop research. In addressing the aforementioned argument, this thesis will use primary sources such as international, regional and nation legislation and case law, as well as secondary sources such as books, journal articles and reports. It will further refer to the so-called soft law consisting of general recommendations and resolutions.

## 1.3. LITERATURE REVIEW

The literature discussed below provides a thorough critical analysis supporting the main points made in this paper and identifying the gaps in the laws and policies on the protection of women's rights at an international, regional, and national level. It examines the challenges, historical and current, faced by women on the bench as well as the role that women play in the post-apartheid transformation of the judiciary on the promotion of gender equality and bringing back legitimacy to the judicial system.

[26] Darren O'Donovan 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe (ed) *Legal Research Methods: Principles and Practicalities* (2016), at 6.

Kristina Bentley[27] argues that despite the efforts made under international, regional, and domestic law to protect women's rights, women in South Africa continue to suffer discrimination that stems from cultural, religious, and traditional views on the role of women in the family and in society. In her analysis, the author challenges claims made in the name of traditional patriarchal culture in South Africa which, she claims, is hierarchical, disenfranchising, and often dismissive of the rights of women. Bentley further argues that the ongoing economic marginalisation of women comes as a result of such patriarchal power. Her work will be referred to in an attempt to examine the roots of gender inequality in South Africa which, as this dissertation will also argue, continue to prevent women from receiving equal economic opportunities.

Ruth Cowan[28] discusses the legacy of apartheid in democratic South Africa and highlights the importance of transforming the new judiciary by gender. The author argues that more than a decade after the end of apartheid, women on the bench were still highly underrepresented due to the persistence of patriarchy, sexism and the restrictive effect that customary and religious laws have on women's rights. She looks at the negative experiences of women in the judiciary through analysing comments by male judges in which they publicly express discriminatory assumptions, attitudes, and beliefs towards women's abilities and their role in society. She further addresses the underrepresentation of women in senior positions and argues that, compared to men, there is still a significant gender-related prejudice in the way the Judicial Service Commission treated women during interviews which prevented women's advancement in the profession. Cowan concludes by making recommendations on the promotion of gender diversity in the judiciary.

Murray Wesson and Max Du Plessis[29] argue that transformation of the judiciary carries various meanings and in order to examine the progress that has been made in terms of transforming the apartheid judiciary into a new, democratic, independent and diverse judicial system, one should examine the issues concerning the appointment of judges, the need to diversify the judiciary and change the attitudes of the judiciary as well as the need to foster greater judicial accountability. Their approach is not focused particularly on gender equality on the bench, but they analyse gender diversity as a key to a successful judicial transformation. However, a

[27] Kristina Bentley 'Women's Human Rights & the Feminisation of Poverty in South Africa' (2004) 31 *Review of African Political Economy* 247.
[28] Ruth Cowan op cit note 6.
[29] Murray Wesson & Max Du Plessis 'Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary' (2008) 24 *SAJHR* 187.

limitation is that the authors do not discuss the challenges faced by women on the bench, nor do they address the continuous discriminatory attitudes towards women in the profession.

Furthermore, Tabeth Masengu[30] conducted research based on five legal sector meetings led over the course of three years which main aim was to identify the key factors leading to the inadequate representation of women on the bench. Two key obstacles to women's ascension were identified in all five meetings, namely, the unequal distribution of work and the discriminatory perceptions of women's abilities. Masengu analyses the roots of these obstacles and the effect that they have on women's progress in the legal profession. She supports Wesson and Du Plessis's view that significant progress has been made in the advancement of gender diversity on the bench. However, she concludes that women continue to face discrimination as regards the appointment of women in the judiciary.

Penelope Andrews[31] further examines the importance of women in the judiciary through analysing the way women judges have interpreted the Constitution[32] in their judgements and their contribution to the transformation of the judiciary since the end of apartheid. By examining Constitutional Court (CC) judgements of female judges, Andrews demonstrates the distinct way that female judges frame legal issues and the role their judgements play in ensuring credibility and legitimacy of the judiciary among the population. She argues that although women face challenges in accessing the judiciary, once they are appointed, they make a real difference. Her perspective of the issue is crucial for this dissertation as not only it analyses the historical exclusion of women in the legal profession and the challenges that they continue to face in the judiciary, but it also highlights the importance of women on the bench through real examples of how their work has benefited the transformation of the judiciary and has contributed to the promotion of gender equality.

The Convention on the Elimination of All Forms of Discrimination (CEDAW) is the key international legal instrument on the protection of women's rights. CEDAW 'goes beyond the concept of discrimination'[33] used in various other international legal standards and norms. While most human rights treaties prohibit discrimination based on sex, they simply extend the rights listed therein to women, instead of 'engendering' the right itself.[34] Engendering the rights

[30] Tabeth Masengu op cit note 15.
[31] Penelope Andrews op cit note 22.
[32] Constitution of the Republic of South Africa, 1996.
[33] CEDAW Committee *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures,* para 5.
[34] Sandra Fredman 'Engendering Socio-Economic Rights' (2009) 25 *SAJHR* 410 at 425.

means addressing the gendered nature of social institutions and structures and amending the right as to apply fairly to women and meet their needs.[35] Such are the aim and purpose of CEDAW which is the first international treaty providing such robust protection of the rights of women and is one of the most widely ratified human rights treaties. The Convention, however, has been criticised for its failure to recognise the unique struggles of women on the African continent.

A crucial instrument on the protection of women's rights on a regional level is the Maputo Protocol. Compared to CEDAW, the Maputo Protocol deals with a wider range of rights, and it is more specific in its evaluation of rights as it takes into consideration the struggles of African women in particular.[36] The Protocol addresses violence against women in a number of its provisions, recognising that women on the African continent experience high levels of violence in all its forms. Importantly, in its definition of violence, the Protocol includes 'all acts perpetrated against women which cause or could cause them… economic harm…'[37] Furthermore, the Maputo Protocol obliges States to 'ensure increased and effective representation and participation of women at all levels of decision-making'[38] and adopt measures guaranteeing women equal economic opportunities. The provision calls for States to promote equal access to employment[39] and equal remuneration for jobs of equal value[40] as well as to 'ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace.'[41]

To further address gender inequalities in Southern Africa, the Southern African Development Community (SADC) adopted the SADC Gender and Development Protocol[42] in 2013. Zirima describes the SADC Protocol as 'the most far-reaching of any sub-regional instrument for achieving gender equality'.[43] The Protocol promotes gender diversity and equality in all public and private sectors, including the judiciary. For example, Article 7(f) recognises the need of women's equitable participation in all courts as a key factor in ensuring gender equality in

[35] Ibid.
[36] F. Viljoen 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11 at 21.
[37] Article 1(j), Maputo Protocol.
[38] Ibid Article 9(2)
[39] Ibid Article 13(a).
[40] Ibid Article 13(b).
[41] Ibid Article 13.
[42] Southern African Development Community, *Southern African Protocol on Gender and Development,* 2008.
[43] P Zirima 'SADC Protocol: From commitments to action' (2009) 9 *Southern African News Features*.

accessing justice and Article 12 obliges States to ensure that at least fifty percent of decision-making positions in the public and private sectors are held by women.

However, other scholars criticise the SADC Protocol for being 'a clumsily drafted document that is not likely to achieve its stated purpose,'[44] due to the omission of the Protocol to protect certain rights protected under the Maputo Protocol. Taking into consideration both the complimentary and the duplication provisions of the SADC Protocol to the Maputo Protocol as well as the omissions of the latter, Forere and Stone criticise the SADC Protocol for failing to achieve its purpose to 'fill in the gaps' in the legal principles provided under the Maputo Protocol.[45] They further argue that the omission of the SADC Protocol to protect certain rights could result in State Parties 'relying on the 'less onerous' provisions of the SADC Gender Protocol, while ostensibly upholding the binding obligations that they have voluntarily undertaken at the AU level.'[46]

On a domestic level, women's rights to equality and equal representation find protection under the supreme law of the State – the 1996 Constitution, as well as the Employment Equity Act (EEA). The EEA remains the key law on the promotion of equality in the workplace,[47] and it prohibits 'unfair discrimination' on various grounds including 'race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin'[48] among others. However, the EEA has been criticised for its failure to adopt a gender-responsive approach in that it does not address the root causes of gender equality in the workplace.[49]

Finally, the Women Empowerment and Gender Equality Bill[50] (the WEGE Bill) was introduced in 2013 to address the South African government's failure to embody the principle of substantive equality under the Constitution and other relevant legislation on the protection of women's rights.[51] The Bill, however, has not been adopted by Parliament and it is, therefore, not legally binding. Furthermore, the WEGE Bill has been criticised by various non-

---

[44] 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) 9 *African Human Rights Law Journal* 434 at 440.
[45] Ibid.
[46] Ibid.
[47] Nicola Smit 'The Contribution of Labour Law and Non-discrimination Law to Empowerment and Social Justice in an Unequal Society: A South African Perspective' (2013) 29 *International Journal of Comparative Labour Law and Industrial Relations* 390 at 378.
[48] Section 6(1).
[49] Smit op cit note 47 at 378.
[50] Women Empowerment and Gender Equality Bill, B50-2013, (2013).
[51] Sibanda N. 'Challenges and prospects of the South African Women Empowerment and Gender Equality Bill' (2016) University of the Witwatersrand, Johannesburg, at 20, available at: *http://wiredspace.wits.ac.za/handle/10539/22151,* accessed on 28th September, at 18.

governmental organisations (NGOs) and private actors to be 'a weak and watered-down duplication of already existing legislation with nothing new to order.'[52] They argue that the Bill fails to address the roots and causes of gender discrimination in South Africa which results in subsequent failure to achieve its purpose.[53] For example, the Bill does not contain any substantive provision to address patriarchy, as required by CEDAW and the Maputo Protocol.

## 1.4. OVERVIEW OF CHAPTERS

To better understand the issue of gender inequality in South Africa, Chapter II will begin by providing a brief historical overview of the impacts of colonialism and apartheid on the lives of women. It will look at the formation of discriminatory patriarchal ideologies during those times and the way patriarchy manifests in the workplace, and in the judiciary in particular. The exclusion of women from the apartheid judiciary will be given further consideration as at the time, the judiciary was predominantly white and male.[54] Thereafter, Chapter II will turn to define the key legal concepts used in this thesis. It will pay particular attention to the concepts of substantive equality and intersectionality which are key in granting women equal rights with men in all spheres of life.

Chapter III of this thesis will provide a thorough critical analysis of the international and regional legal framework on the promotion of gender equality. It will begin by examining the key legal instruments on the protection of women's rights, namely CEDAW and the Maputo Protocol and it will analyse the way they address the key factors causing gender discrimination against women in the judicial profession. Chapter III will pay further attention to the Beijing Platform for Action and the SADC Protocol on Gender Development. The discussion in Chapter III provides a detailed comparison between the aforementioned legal documents on international and regional level and identifies their gaps and shortcomings.

Chapter IV will then focus on the domestication of the international and regional legal principles in South Africa. It will examine the principle of equality enshrined in s9 the Constitution and analyse whether South Africa has adopted a substantive equality approach as required under international law. Thereafter, the Chapter will examine the constitutional requirements for the appointment of judges as they lie at the core of the appointment process. Finally, Chapter IV will turn to examine the relevant national laws and policies that give effect to the right to equality provided for under s9 of the Constitution, such as the Women

[52] Ibid.
[53] Ibid.
[54] Cowan op cit note 6 at 298.

Empowerment and Gender Equality Bill (the WEGE Bill) and the Employment Equity Act (EEA).

By observing the main challenges that South African women face on the Bench, Chapter V aims to demonstrate that the legal framework discussed above is not properly applied. The chapter will first focus on gender discrimination during the hiring process and the main obstacles that prevent women from being appointed as judges, before moving the focus on issues that women face in senior judicial positions. It will discuss barriers relating to the legal criteria for judicial appointment, the lack of transparency during judicial appointment procedures and the discriminatory perceptions of women in the legal profession.

After critically analysing the key obstacles to women's advancement in the judiciary, this thesis will conclude that despite the robust efforts under international, regional, and national law to protect the rights of women and promote gender diversity on the bench, the failure of the South African government to properly address the persistent cultural and traditional discriminatory beliefs and attitudes towards women prevents women from receiving equal opportunities in the judicial profession. The final chapter will make recommendations on the improvement of the legal framework on the protection of women and the promotion of gender diversity in the judiciary.

# CHAPTER II. DEFINING KEY LEGAL AND SOCIAL CONCEPTS

Gender roles, predominantly benefiting men, are the social norms assigned to people based on their sex.[55] Such norms, more often than not, result in discrimination against women and are argued to not only affect the way men and women interact, but to also create high inequalities in the distribution of power and resources in society.[56] To better understand the discrimination faced by women in today's judiciary, it is first important to examine the roots of gender inequality in South Africa as well as provide a brief historical background of the judicial system. To do so, this chapter will first define the concept of patriarchy and the way it is manifested in the workplace and will trace back its origins to the strict laws and policies imposed during colonial times and the apartheid regime. The chapter will then introduce the concepts of substantive equality and intersectionality which are key in addressing the prevailing patriarchal attitudes in the South African society today.

## 2.1. THE ROOTS OF GENDER INEQUALITY

### 2.1.1. Patriarchy

As mentioned above, gender roles generate inequality amongst women and men as they particularly benefit men.[57] Such roles are deeply entrenched in the patriarchal culture and result in serious violations of women's rights. Patriarchy, as defined by Marren Akatsa-Bukachi, is 'the organisation of social life and institutional structures in which men have ultimate control over most aspects of women's lives and actions.'[58] By encouraging men's domination of women, the patriarchal system deprives women of their basic human rights and creates inequality among the genders. Another widespread definition of the concept is the one given by Keevy who describes patriarchy as 'the institutionalised social hierarchy in traditional African societies whereby the extended family grants males authority and power over women'.[59] This definition, however, creates the wrong perception that patriarchy has always

[55] Zuziwe Khuzwayo 'Separate Space: An approach to addressing gender inequality in the workplace' (2016) 17 *Journal of International Women's Studies* 91 at 91.
[56] Ibid.
[57] Ibid.
[58] Marren Akatsa-Bukachi 'African Feminism, Does it Exist' (2005) Presentation made at the Tanzania Gender Networking Programme, Gender Festival, September 6- 9, 1-14.
[59] Ilze Keevy 'African Philosophical Values and Constitutionalism: A Feminist Perspective on Ubuntu as a Constitutional Value' (2008) Doctor Legum Thesis. Faculty of Law, University of the Free State Bloemfontein at 414.

been, and is only, common across Africa. This will be argued against in the next sub-section of this chapter.

Today, patriarchy is still evident in South Africa, resulting in high levels of gender inequality in various spheres of society.[60] One such sphere is the workplace where patriarchy often takes the form of a culture that 'regards men as…superior to [their] female colleagues'.[61] According to Khuzwayo, women are denied equal opportunities in leadership positions and are rather allocated cheap and highly exploitative roles since positions of power 'are not seen in society as feminine'.[62] She further recognises that employers often favour the strong aggressive attitude while labelling the displaying of emotions as 'weak' and 'unworthy' in a working environment.[63] This creates a masculine work environment which women generally consider difficult to work in, 'as women have been socialised to not be aggressive.'[64] Andrews further addresses the pervasive patriarchy and sexism entrenched in the legal profession in South Africa, and argues that there is a deeply embedded masculinist culture which discourages women to pursue a career in the field.[65] Andrews further argues that patriarchal attitudes pervade in the judicial appointment processes, which has posed a significant barrier to the advancement of gender equality in the judiciary.[66] Examples of that, as will be discussed in more detail in Chapter V, are the stereotypes that women cannot work long hours as they are the primary caregivers and that they do not possess the necessary professional and personal skills required in leadership judicial positions. Smit notes that since patriarchy is not, in itself, deemed a legal issue, it is difficult to be identified and addressed.[67] However, the unfair gender-based discrimination observed in patriarchal societies is illegal both under international and domestic law.[68]

To fully comprehend the effect of patriarchal South Africa on women in the workplace today, it is important to look back at the formation of patriarchy during colonial times and apartheid.

---

[60] Zuziwe Khuzwayo op cit note 55 at 98.
[61] Ibid.
[62] Ibid, at 94.
[63] Ibid.
[64] Ibid.
[65] Penelope Andrews op cit note 22 at 193.
[66] Ibid.
[67] D. M. Smit 'Joining the "Old Boys' Club": Equality for Women in the South African Judiciary and Other Male-Dominated Workplaces' (2020) 41 *ILJ* 48.
[68] Ibid.

### 2.1.2. Colonial Times and Women in the Struggle Against Apartheid

Many historical writings on pre-colonial Africa suggest that patriarchal oppression in African societies has been dominant long before colonialism. However, such views have been strongly criticised by scholars such as Moagi and Mtombeni who argue that those interpretations of pre-colonial history are mainly found in mainstream literature written by men, about men, and for men. They further argue that such literature fails to consider pre-colonial women's unique roles in society, their positive contributions to the economy or their leadership roles in shaping the cultures and societies in which they lived. [69] Moagi and Mtombeni recognise women's roles in pre-colonial history and argue that gender inequality on the African continent came as a legacy of colonial times and that, prior to colonialism, African women and men coexisted harmoniously and 'enjoyed mutual benefits of their normative system'.[70] However, under colonial rules, women were denied opportunities to be active in fields such as education, politics, governance, economics and religion, which resulted in the formation of a patriarchal culture and 'marked the beginning of women's relative neglect'[71] in African societies.

In addition to the destructive consequences of colonial rules, in 1948 South Africa marked the beginning of the apartheid – the legal regime of racial and ethnic segregation that lasted for almost 50 years. With its oppressive and discriminatory laws, the apartheid regime created one of the most unequal societies in the world.[72] During apartheid, 97% of the judiciary was white and male[73] and the courts at the time simply applied the repressive laws without questioning their justifiability or taking into consideration the human rights violations that came as a result from them. [74] The apartheid government acted only for the benefit of the white society and constantly repressed black demands for inclusion. At the time, more than half of the population was denied basic human rights such as the right to be free from discrimination, the right to

[69] Idowu Agbaje 'Colonialism and Gender in Africa: A Critical History' in Yacob-Haliso, O. Falola, T. (eds) *The Palgrave Handbook of African Women's Studies* (2021), pp 1275–1294, available at: *https://doi-org.ezproxy.uct.ac.za/10.1007/978-3-030-28099-4_3,* accessed on: 16 August 2023.
[70] Ntshangase M. & Matabane T. 'The History of Gender Inequality: Analysis of Gender Inequality as a Colonial Legacy in Africa' (2022) 11 *African Journal of Gender, Society and Development* 185 at 187.
[71] Ibid.
[72] The World Bank Report on *Inequality in Southern Africa: An Assessment of the Southern African Custom Union* (2023) at 1, available at: *https://documents1.worldbank.org/curated/en/099125303072236903/pdf/P1649270c02a1f06b0a3ae02e57eadd7a82.pdf,* accessed on 10 August 2023.
[73] Ruth B. Cowan op cit note at 298
[74] J. Traverso 'Transformation of the Judiciary: Changing the Racial and Gender Composition', Presentation at Roundtable Discussion Hosted by the Inst. for Democracy and the Univ. of Cape Town's Democratic Governance and Rights Unit 11 (Oct. 11-12, 2005).

vote, freedom of speech and assembly, freedom of movement, and basic labour rights.[75] Similar to colonial times, gendered labour policies were central to the apartheid regime.[76] Young men went away for work in the gold and diamond mines while women stayed in the homelands, 'cheaply raising compliant workers'[77] and taking care of their home, which means their work was limited to the domestic sphere.[78] In 1951, new patriarchal laws were passed, where black women were to remain legal minors throughout their lives.[79] That meant that black women had no independence and legally belonged to their fathers or male relatives. Therefore, it was not possible for them to enter contracts, own properties on their name or enjoy any of the rights enjoyed by their male counterparts. In the family, women were generally subject to their husbands which was the case for women from all races in South Africa, including whites.[80] However, the struggles of women of colour significantly differ from those of white women as women of colour are further discriminated based on their race. This is addressed by international legal instruments on the protection of women such as CEDAW which recognise the need for eradicating all forms of racism, apartheid and colonialism in order to achieve full equality for all women.[81]

## 2.2. KEY LEGAL CONCEPTS

When looking at gender inequality and discrimination against women in a country like South Africa, it is crucial to consider the long history of discrimination and segregation that South African societies have experienced throughout the years. By examining the periods of colonialism and apartheid, it became clear that while all African people were oppressed, women were more vulnerable than men and were, in fact, deprived of more rights and freedoms than their male counterparts. That is because African women are discriminated against on the basis of both race and gender, while men only experience discrimination based on their race. Although the discussion above focused on African women and their history, it was examined in section 2.1.2. that all women encounter the struggles of patriarchy, regardless of their race.[82] While this thesis examines the role and challenges of all women in the judicial system in South Africa, it acknowledges that African, Coloured and Indian women experience higher levels of

[75] Clancy M. 'Women and Apartheid' (2017) Department of History, Bridgewater State University *https://doi.org/10.1093/acrefore/9780190277734.013.184,* p.4.
[76] Ibid.
[77] Ibid at.4.
[78] South African History Online, 'The Role of Women in the Struggle against Apartheid', 15 July 1980, available at: *https://www.sahistory.org.za/archive/role-women-struggle-against-apartheid-15-july-1980.*
[79] Clancy M. op cit note 75
[80] Ibid at 5.
[81] CEDAW Preamble.
[82] Clancy M. op cit note 75 at 5.

discrimination and the challenges that they face, before and after appointment in the judiciary, sometimes vary.

Therefore, the issue of gender-based discrimination in the judiciary will be examined through the lens of substantive equality and intersectionality. Substantive equality recognises the oppression that women suffer as a result of the prevalent patriarchal attitudes and aims to create a framework which offers women equal opportunities in all spheres of life through addressing the disadvantages that they face.[83] Furthermore, the concept of intersectionality is particularly pertinent in the South African context as it further distinguishes between the struggles of women of colour, compared to those of white women in South Africa. It recognises the intersectional identities of underprivileged groups of women and seeks to provide a more thorough understanding of the discrimination that women from different backgrounds face.

### 2.2.1. Equality

#### *2.2.1.1. Formal Equality*

The traditional idea of equality suggests that States are obliged to provide equal rights and opportunities for women and men and treat them equally, establishing a 'formal legal obligation of equal treatment of women and men.'[84] Formal equality suggests that everyone should be treated equally without taking into consideration their sex or gender. However, simply ignoring the biological differences of men and women and the disadvantages that women face results in more inequality. Fredman argues that formal equality expects women to conform to male-oriented social structures instead of challenging the structures itself.[85] In the workplace, women are often expected to do the same jobs and work the same hours as men to receive equal pay. However, employers fail to take into consideration childcare and other responsibilities in the home that often prevent women from working the same hours as their male counterparts. That being said, 'equal consideration for all may demand very unequal treatment in favour of the disadvantaged.'[86]

A good example of formal equality is the landmark American case of *Griggs v. Duke Power.*[87] In this case, the applicants for a job were required to have qualifications which were not needed

---

[83] Sandra Fredman op cit note 34 at 419.
[84] UN Committee on the Elimination of Discrimination Against Women (CEDAW) *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures* (2004), para 7, available at: *https://www.refworld.org/docid/453882a7e0.html*, accessed on: 17 September 2023.
[85] Sandra Fredman op cit note 34 at 419.
[86] Amartya Sen 'Inequality Reexamined' 1995 *Oxford Press,* available at: https://doi.org/10.1093/0198289286.001.0001, accessed on 17 September 2023.
[87] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

for the job. The employer did not discriminate between applicants and required everyone to demonstrated certain literacy and high school qualifications, but the fact that black people were not given equal opportunities as white people in school, resulted in fewer black people qualifying for the job. When it comes to women in the workplace, the same theory is applied. A woman is only given the same opportunities and treated equally with men when 'they can conform to the paradigm male working pattern, of full-time, continuous work or uninterrupted by childcare.'[88]

***2.2.2. Substantive Equality***

Substantive equality, on the other hand, provides a different, more holistic approach in addressing gender inequality. Substantive equality was argued for the first time in 1989 before the Supreme Court of Canada[89] where the idea of formal equality was rejected for the first time in a legal argument.[90] According to the UN, substantive equality

> goes far beyond creating formal legal equality for women (where all are equal under the law) and means that governments are responsible for the impact of laws. This requires governments to tailor legislation to respond to the realities of women's lives. Striving for substantive equality also places a responsibility on governments to implement laws, through gender-responsive governance and functioning justice systems that meet women's needs.

Fredman argues that substantive equality is comprised of four different elements, or four 'dimensions', which despite of being interconnected, require careful separate consideration.[91] According to her, all four dimensions of substantive equality must be achieved.[92] The first dimension recognises the material and social disadvantages of women which make women vulnerable to further marginalisation and discrimination,[93] and focuses on remedying such historical disadvantages. Secondly, as discussed above, high levels of stereotyping, prejudice and violence against women constitute the key factors contributing to gender inequality and oppression of women in South Africa. These often come as a result of the cultural and patriarchal beliefs of people in the South African society and result in the deprivation of women of rights such as their right to equal education and equal economic opportunities. The recognition dimension, as Fredman describes it, is the second dimension of substantive equality

---

[88] Sandra Fredman 'Challenging the Frontiers of Gender Equality: Women at Work Chapter Author(s)' in Rebecca J. Cook *Frontiers of Gender Equality* (2023) 38-54, at 40.
[89] Andrews v The Law Society of British Columbia and the Attorney General of British Columbia 3 (1996).
[90] C. MacKinnon 'Substantive equality revisited: A reply to Sandra Fredman' (2016) *Oxford University Press and New York University School of Law* 739, at 739.
[91] Sandra Fredman op cit note 88 at 40.
[92] Ibid.
[93] Ibid.

and it recognises the need to address stigma, stereotyping, humiliation and violence on the ground of gender as a separate element, since 'such wrongs can be experienced regardless of relative socio-economic disadvantage'.[94] The third dimension requires transformation of existing male-oriented institutions and social structures. According to Fredman, power disparities inside the family often exacerbate power disparities in the public domain and vice versa.[95] Finally, Fredman argues that in order to eradicate discrimination and deal with the issues addressed in the first three dimensions of substantive equality, women must be given voice and participation in issues affecting them and their communities. That is in fact one of the most important aspects of achieving equality and it is at the heart of this thesis' argument. If women are underrepresented in decision-making positions, they are unable to create the opportunities for themselves.

MacKinnon, on the other hand, criticises Fredman's theory of the four dimensions of substantive equality on the basis that it is ambiguous, and it does not offer instructions for identifying disadvantages.[96] She further claims that the second dimension must not be a separate dimension as it simply lists some of the forms of social disadvantage affecting women in society. This thesis, however, argues that the second dimension specifically addresses the key factors leading to the marginalisation of women and gender inequality and it is in fact crucial to pay special attention to them. Giving stigma, stereotyping and prejudice further attention allows for the issue to be examined in more detail instead of broadly including it in the first dimension of redressing disadvantages where it may easily be neglected. Furthermore, Fredman argues that all four dimensions are interrelated and must therefore be addressed altogether. For example, she argues that stereotypes associating women with care and domestic work directly disadvantages them in the workplace.[97] This is often the case when it comes to women in leadership positions. Since women are mostly seen in the roles of mothers, wives, caregivers and housewives, their abilities in decision-making are often questioned and their opportunities become limited.[98] Therefore, the first and the second dimension, although closely related, do not represent the same issue. The disadvantages referred to in the first dimension

[94] Fredman op cit note 34.
[94] A. Sen, 'Inequality Re-examined (Oxford University Press).
[95] Ibid.
[96] MacKinnon C. 'Substantive equality revisited: A reply to Sandra Fredman' (2016) *Oxford University Press and New York University School of Law*, 739, at 740.
[97] Fredman op cit note 88.
[98] Ibid.

are the result of the stereotyping, stigma and violence addressed in the second dimension, and they both require separate attention.

### 2.2.2. Intersectionality

In addition to the substantive equality approach, international human rights law recognises the need for a better protection of individuals facing discrimination based on multiple grounds, such as race, gender, disability and age among others.[99] Such discrimination has been referred to by international actors as 'intersectional discrimination,' or 'intersectionality'.[100] The term was first used by Kimberlé Crenshaw in 1989 to address the position of black women in the United States.[101] McCall describes intersectionality as 'the most important theoretical contribution that women studies… have made so far.'[102]

The UN defines intersectionality as a:

> concept and theoretical framework that facilitate recognition of the complex ways in which social identities overlap and create compounding experiences of discrimination and concurrent forms of oppression based on two or more grounds, such as gender identity or expression, sex, sexual orientation, ethnicity, caste, descent or inherited status, age, class, disability or health status. [103]

In addition, the UN definition highlights that intersectionality focuses on the narratives, empowerment and agency of people and groups who experience intersecting discrimination, as well as the socio-structural aspects of marginalisation, inequality, and discrimination. Therefore, certain groups of women, such as elderly, disabled and migrant women, ethnic minority women and women and girls on the street, experience higher levels of discrimination.[104]

Addressing intersectional discrimination is particularly important in the context of South Africa, due to the great religious, racial, and ethnic diversity of women in the country. As discussed earlier in this chapter, women of colour face higher levels of discrimination in society

---

[99] Meghan Campbell 'CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination' (2015) 11 *Revista Direito Gv, São Paulo* 479.
[100] Ibid.
[101] K Crenshaw 'Demarginalizing the intersection of race and sex: a black feminist critique of anti-discrimination doctrine, feminist theory, and anti-racist policies' (1989) 4 *University of Chicago Legal Forum*.
[102] McCall 'The Complexity of Intersectionality' (2005) Signs: *Journal of Women in Culture and Society* 30 at 1771.
[103] The United Nations Network on Racial Discrimination and Protection of Minorities, Guidance Note on Intersectionality, Racial Discrimination & Protection of Minorities, available at: *GuidanceNoteonIntersectionality.pdf (ohchr.org)*, at 11.
[104] Clare E. 'Exile and Pride: Disability, Queerness and Liberation' (1999) *South End Press*.

as they experience discrimination on the grounds of gender and race, unlike white women who are privileged in respect of their race. Similar to substantive equality, which takes into consideration the differences between men and women, intersectionality recognises that women from different ethnic, religious, cultural and racial groups face different challenges and, therefore, require different protection under the law.

# CHAPTER III. INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

International and regional human rights laws play a significant role in the protection and the promotion of women's rights on a national level. That is because the courts in South Africa are legally obliged to consider international law when interpreting the rights protected under the Constitution.[105] Section 39 of the Constitution stipulates that while considering foreign law is beneficial, the Courts are required to examine international law when interpreting the Bill of Rights. Furthermore, s.233 of the Constitution goes further to oblige the courts to interpret national legislation in a way consistent with the State's international obligations.

Therefore, this thesis will first analyse the international and regional legal standards on the protection of women's rights before moving the focus on the laws and policies enacted on a domestic level in Chapter IV. This Chapter will begin by examining the international legal framework on the promotion of gender equality. It will interpret the principles of equality and non-discrimination under CEDAW and discuss the challenges in applying those principles in practice. Thereafter, the Chapter will proceed to analyse the African laws on the elimination of gender discrimination by critically examining the gaps in the laws and outline the differences between international and regional protections. It will argue that regional instruments are significant in the protection of African women due to the diversity of women on the African continent and the different challenges that they face.

[105] S39 of the Constitution.

## 3.1. INTERNATIONAL LEGAL FRAMEWORK

### 3.1.1 The Convention on the Elimination of All Forms of Discrimination Against Women

After more than 30 years of work by the UN Commission on the Status of Women, the UN General Assembly adopted CEDAW in 1979.[106] The Convention entered into force in 1981 and since then, it has been viewed as the most comprehensive international legal document on the protection of women's rights.[107] South Africa ratified the Convention in 1995, a year after its transition into a democratic state.[108] In its Preamble, CEDAW acknowledges the protection provided under various international human rights documents such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). It further recognises the so-called 'soft law' promoting equality between men and women, in the form of resolutions, declarations and recommendations adopted by the UN. The Preamble of the Convention notes, however, that despite the various instruments in place, there is still widespread discrimination against women.[109] Notably, CEDAW emphasises that in order to achieve full enjoyment of the rights of men and women, all forms of racial discrimination, apartheid, colonialism and neo-colonialism must be eradicated.[110] Therefore, CEDAW acknowledges intersectionality and addresses the fact that women of colour suffer greater discrimination. However, before moving on to examine the way CEDAW addresses intersectionality, it is important to first discuss the way it promotes gender equality and non-discrimination.

#### *3.1.1.1. The principles of Equality and Non-Discrimination*

The principles of equality and non-discrimination are part of the formation of the rule of law,[111] which in itself is the driving mechanism of the UN system. It provides that:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally

[106] UN General Assembly, available at: *Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979 | OHCHR.*
[107] Ibid.
[108] UN Human Rights Office of the High Commissioner, Ratification Status, available at*: OHCHR Dashboard*.
[109] CEDAW Preamble, para 7.
[110] Ibid para 11.
[111] United Nations and the Rule of Law 'Equality and Non-Discrimination' available at: *https://www.un.org/ruleoflaw/thematic-areas/human-rights/equality-and-non-discrimination/#.*

> enforced and independently adjudicated, and which are consistent with international human rights norms and standards.

Therefore, the principles of non-discrimination and equality are known as the governing principles of international human rights law. They find protection in various human rights treaties such as the ICCPR, ICESCR and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and are key in the promotion and the protection of women's rights under CEDAW. However, CEDAW 'goes beyond the concept of discrimination'[112] used in the aforementioned instruments. While most human rights treaties prohibit discrimination based on sex, they simply extend the rights listed therein to women, instead of 'engendering' the right itself.[113] Engendering the rights means addressing the gendered nature of social institutions and structures and amending the right as to apply fairly to women and meet their needs.[114] Such are the aim and purpose of CEDAW which is the first international treaty providing such robust protection of the rights of women and is one of the most widely ratified human rights treaties. Furthermore, while the concepts of equality and discrimination have been used interchangeably by scholars, according to CEDAW, the right to equality is broader than the right to be free from discrimination as the latter only protects individuals from discrimination based on certain grounds listed in the treaty.[115]

As discussed in Chapter II, international law differentiates between a formal and a substantive approach to equality. In order to achieve full parity between women and men, CEDAW promotes both substantive and formal equality. Although it was examined that the idea of formal equality often causes further inequalities for women, formal equality is not always detrimental and, in some instances, it is needed. That is because certain provisions, such as Article 7(a) and Article 9 of CEDAW which guarantee women's equal rights with men to vote and to acquire, change or retain their nationality, are straightforward and do not require differentiation in favour of women.

On the other hand, Article 3 and 4 of the Convention call for the adoption of all appropriate measures to ensure women's full development in the political, social, economic and cultural fields and recognise the need for adopting temporary special measures 'aimed at accelerating *de facto* equality between men and women.' [116] Article 4 further sets out that such measures

---

[112] Ibid.
[113] Fredman op cit note 34 at 217.
[114] Ibid.
[115] CEDAW Committee, *General recommendation No. 25,* para 5.
[116] Article 4(1).

shall not be considered discriminatory towards men,[117] hence adopting a substantive equality approach. The provision acknowledges that women have suffered and continue to suffer disadvantages that men do not, and therefore identifies the need to adopt special measures to address those disadvantages and provide de facto equality. Furthermore, Article 5 of CEDAW obliges States to take positive steps to eliminate deeply embedded social and cultural norms resulting in gendered roles and harmful stereotypes on the inferiority of men.[118] Article 5 has been claimed to follow a 'transformative equality' approach. The CEDAW Committee argues that transformative equality is not a stand-alone method, but rather an essential component of achieving substantive equality.[119] The transformational aspect of substantive equality focuses on the reform of institutions, organisations, and structures to eliminate 'historically determined male paradigms of power and life patterns.'[120] Therefore, it becomes evident from the discussion above that CEDAW calls for the adoption of gender-sensitive and gender-responsive laws and policies on the protection of women. The UN International Children's Emergency Fund (UNICEF) has established that incorporating a gender-sensitive approach into laws and policies aimed at the promotion of gender equality means recognising and addressing the gender differences that lead to discrimination against women.[121] In addition, the UN distinguishes between laws and policies that are gender-responsive and gender-sensitive. While a gender-sensitive strategy intends to 'do no harm,'[122] policies adopting a gender-responsive approach strive to 'do better'.[123] Thus, a gender-responsive approach acknowledges that laws and policies must focus on eliminating the causes that contribute to gender-based discrimination in order to eradicate it.

#### *3.1.1.2. Intersectionality under CEDAW*

As discussed in Chapter II of this thesis, intersectionality refers to the various identities of an individual such as race, gender and age, and recognises that discrimination often arises on more than one of the protected grounds. However, CEDAW has been criticised for its failure to recognise women's intersectional identity and to ensure that women experiencing

---

[117] Ibid.
[118] Article 3 of CEDAW.
[119] Meghan Campbell op cit note 99 at 486.
[120] CEDAW Committee, *General recommendation No. 25,* para 10.
[121] UNICEF, Gender Equality, Glossary of Terms and Concepts, UNICEF Regional Office for South Africa, November 2017, *https://www.unicef.org/rosa/media/1761/file/Genderglossarytermsandconcepts.pdf.*
[122] The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (UN-REDD Programme), 'Gender and REDD+: Promoting Transformational Change and Innovation in REDD+ Action', available at: *https://www.un-redd.org/sites/default/files/2021-12/Gender%20FINAL%281%29_1.pdf.*
[123] Ibid.

discrimination on more than one of the listed grounds are protected. Chinkin and Freeman criticise the Convention for 'not recognising the complexity of discriminatory practices directed as intersecting identities.'[124] That is because although the Convention addresses poverty, colonialism and racial discrimination, the text of the treaty makes no further references on these issues. On the other hand, scholars like Campbell argue that such views constitute a misreading of CEDAW and that although the treaty does not refer to intersectional discrimination in its provisions, it does recognise the different experiences of all women.[125] She further argues that CEDAW's main aim to eliminate discrimination against women in all its forms[126] obliges State Parties to 'appreciate and account for all the identities, experiences and factors that contribute to gender discrimination and inequality.'[127] She argues that by focusing on one specific ground of discrimination, sex, instead of examining the relationship between sex and other discrimination grounds, CEDAW allows for a broad interpretation of intersectional discrimination, instead of limiting its scope to certain grounds of discrimination.[128]

However, this thesis agrees with the judgment of Chinkin and Freeman that CEDAW fails to fully protect women's rights on the African continent due to its omission to address violence against women which, as stated above, is a key obstacle to women's advancement in the judiciary. This thesis will provide a more detailed discussion of the shortcomings of CEDAW in the next section of this thesis in the form of a comparison between the Maputo Protocol and the Convention.

### 3.1.2. The Beijing Platform for Action

Following the Fourth World Conference on Women in 1995, 189 UN member states adopted the Beijing Declaration and Platform for Action[129] (BPfA),[130] which has been argued to be 'the most comprehensive and transformative global agenda for the achievement of gender equality and the empowerment of women and girls.'[131] The BPfA outlines 12 critical areas of concern

[124] Campbell 'CEDAW and Women's Intersecting Identities: a Pioneering New Approach to Intersectional Discrimination' (2015), 486.
[125] Ibid.
[126] Article 2, CEDAW
[127] Campbell op cit note 99 487.
[128] Ibid.
[129] United Nations, *Beijing Declaration and Platform of Action,* adopted at the Fourth World Conference on Women, 27 October 1995, available at*: https://www.refworld.org/docid/3dde04324.html.*
[130] United Nations Economic and Social Council (ECOSOC) 'Twenty-Year Review of the Implementation of the Beijing Declaration and Platform for Action (BPfA) + 20' (2014) Africa Regional Review Summary Report 1995-2014, at 1.
[131] UN Development Programme, 'What is Beijing Platform for Action,' available at: *What is Beijing Platform for Action? | United Nations Development Programme (undp.org)*

to direct the mainstreaming of gender in laws, policies, strategies, and programmes.[132] Reiterating the fundamental principle that women's and girls' rights are an intrinsic, integral, and inseparable aspect of universal human rights, the Declaration called upon Member States to commit to the attainment of the goals of equality, development, and peace for all women.[133] At the very beginning of its text, the Declaration sets out its mission to empower women and advance their participation in all spheres of public and private life.[134] It calls for the principle of shared power and responsibility to be established 'between women and men at home, in the workplace and in the wider national and international communities.'[135]

The Platform addresses women's economic rights, recognising that women's employment, economic, professional, and other opportunities, are still restricted by discrimination in 'education and training, hiring, compensation, and promotion, inflexible working conditions, limited access to productive resources, and inadequate sharing of family responsibilities.'[136] It calls for governments to address the economic potential and independence of women by promoting an active 'policy of mainstreaming a gender perspective in all policies and programmes so that before decisions are taken, an analysis is made of the effects on women and men, respectively.'[137]

Another important critical area under the Beijing Platform focuses on women in power and decision-making and recognises uneven power relations in various levels of society, 'from the most personal to the highly public.'[138] It argues that women's active engagement and their representation in decision-making at all levels are essential for achieving equality, progress, and peace and recommends States to take effective measures to ensure that women are equally represented in government, public administrative entities and in the judiciary.[139] It further recommends States to set specific targets and implement plans and strategies for achieving them as well as to take appropriate measures to achieve shared work and parental responsibilities between women and men as to promote women's increased participation in public life.[140]

---

[132] Ibid.
[133] Ibid.
[134] Beijing Declaration and Platform of Action, op cit note 129 para 1.
[135] Ibid.
[136] Ibid, Article 152.
[137] Ibid, Article 164.
[138] Ibid, Article 181.
[139] Ibid Article 190(a).
[140] Ibid, Article 190(i).

Therefore, the Beijing Platform for Action plays a crucial role in the advancement of women in the workplace, and in the judiciary in particular, as not only it explicitly calls for the adoption of strategies on achieving 50% representation of women in all spheres of life, but it also expressly obliges States to promote the economic potential and independence of women by promoting an active 'policy of mainstreaming a gender perspective in all policies and programmes.'[141] The failure to adopt such policies, as will be argued later in this thesis, has resulted in the subsequent failure of the South African government to promote gender diversity within the judiciary.

## 3.2. REGIONAL LEGAL FRAMEWORK

Following the international standards discussed above, the African Union has adopted regional legal instruments on the protection of women's rights in Africa. The regional legal framework recognises and addresses the struggles and challenges of African women which significantly differ from those of non-African women. The need for regional laws is another example of the importance to recognise the intersectional identities of women and the consequences suffered where there is discrimination on more than one grounds.

### 3.2.1. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (The Maputo Protocol)

The Maputo Protocol entered into force in 2005, one year after its adoption by the African Union[142] and South Africa was one of the first African States to ratify the treaty in 2004. The Protocol is unique in that it recognises the individual needs of African women and, therefore, deals with a wider range of rights and protections than CEDAW. Furthermore, compared to the Convention, the Protocol provides a deeper evaluation of the rights enshrined therein.[143]

To begin with, Article 2 of the Protocol obliges State Parties to combat all forms of discrimination against women through ensuring constitutional protection of women's rights and the principle of equality.[144] The provision further calls for the enactment of gender-sensitive legislation on the protection of women in all spheres of life.[145] Again, that is an important step as it recognises that gender neutral laws will only result in further discrimination

---

[141] Article 164.
[142] Justice Lucy Asuagbor (African Commission on Human and Peoples' Rights) 'Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' (2016) available at: *Status of Implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa - World | ReliefWeb*.
[143] F. Viljoen op cit note 36 at 21.
[144] Article 2(1)(a) of the Maputo Protocol.
[145] Ibid Article 2(1)(c).

against women. Furthermore, like Article 6 of CEDAW, Article 2 obliges State Parties to 'modifying the social and cultural patterns of conduct of women and men'[146] through education and other measures. As already discussed earlier in this chapter, addressing social and cultural factors resulting in gender inequality lies at the heart of the battle in eradicating it. That is because, as it will be further discussed in Chapter V of this thesis, patriarchal attitudes and gender stereotypes are the main factors preventing women from receiving equal opportunities in the judiciary as men.[147]

The Protocol defines discrimination against women as

> 'any 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.'[148]

While both CEDAW and the Maputo Protocol fail to differentiate between sex and gender and include gender as a prohibited ground of discrimination, Article 1(k) of the Maputo Protocol defines women as 'all persons of female gender'.[149] The difference between both concepts is that while sex only refers to the biological and physiological realities of men and women,[150] gender refers to the 'socially constructed identities, attributes and roles for women and men and the cultural meaning imposed by society onto biological differences, which are consistently reflected within the justice system and its institutions.'[151] Therefore, the latter provides a broader protection of women. Discrimination based on both gender and sex is prohibited under s.9(3) of the South African Constitution.

A particularly important provision for the purpose of this thesis is Article 9(2) of the Protocol which obliges States to 'ensure increased and effective representation and participation of women at all levels of decision-making.'[152] Such promotion of women's advancement in decision-making is not provided under CEDAW, although it is a worldwide struggle that

---

[146] Ibid Article 2(2).
[147] Masengu op cit note 15.
[148] Article 1(f).
[149] Article 1(k).
[150] UNICEF, Gender Equality, Glossary of Terms and Concepts, UNICEF Regional Office for South Africa, November 2017, available at *https://www.unicef.org/rosa/media/1761/file/Genderglossarytermsandconcepts.pdf.*
[151] CEDAW/C/GC/33, para. 7).
[152] Article 9.

women face. That is because although a significant progress has been made in achieving gender equality in the workplace, women continue to be underrepresented in leadership positions.[153]

The Protocol further provides greater protection for socio-economic rights which under CEDAW are in some cases only limited to 'rural women'.[154] Article 13 of the Protocol obliges States to adopt measures to guarantee women equal economic opportunities. The provision calls for States to promote equal access to employment[155] and equal remuneration for jobs of equal value[156] as well as to 'ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace.'[157] The Protocol goes further as to address various factors resulting in gender inequality in the workplace. Those are the unpaid work that women do at home, and the struggles that pregnant women face, among others.[158]

Finally, it is important to observe one of the most significant differences between CEDAW and the Maputo Protocol – violence against women, or GBV. As discussed in the Introduction chapter of this thesis, GBV has been recognised by the CEDAW Committee as a form of discrimination against women.[159] However, the text of CEDAW itself does not make any explicit mention of violence against women. On the other hand, the Maputo Protocol refers to violence against women, including sexual harassment, in several of its provision and provides a comprehensive definition of violence against women. The Protocol defines violence against women as:

> all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.[160]

Importantly, the provision refers to various forms of harm, including economic harm. Furthermore, the treaty recognises other forms of violence such as sexual and verbal violence in most of its provisions. Addressing violence against women as a key obstacle to gender equality is crucial.

---

[153] Judges Matter op cit note 17.
[154] F. Viljoen op cit note 36 at 21.
[155] Article 13(a), Maputo Protocol.
[156] Ibid, Article 13(b).
[157] Ibid, Article 13(c).
[158] Ibid, Article 13(h) and 13(j).
[159] CEDAW Committee, *General Recommendation 19,* op cit note 24.
[160] Article 1(j).

Despite the extensive protection that the Maputo Protocol offers to women on the African continent, Forere and Stone argue that the Protocol fails to establish clear obligations of States to ensure women's advancement in leadership in all spheres of life.[161] Such gaps have been filled in under the SADC Protocol on Geder and Development.[162]

### 3.2.2. The Southern African Development Community (SADC) Protocol on Gender and Development

The Southern African Development Community (SADC) aims to achieve a 'peaceful, inclusive, competitive, middle-to high-income industrialised region where all citizens enjoy sustainable economic well-being, justice and freedom'.[163] SADC recognises the role of women in achieving these goals and prohibits discrimination on the grounds of both sex and gender.[164]

The SADC Gender and Development Protocol came into force in 2013 to further address gender inequalities in Southern Africa and provide for the empowerment of women[165] through the development of a gender responsive legal framework.[166] Zirima describe the SADC Protocol as 'the most far-reaching of any sub-regional instrument for achieving gender equality'.[167] Although other scholars criticise the SADC Protocol for being 'a clumsily drafted document that is not likely to achieve its stated purpose,'[168] it has been commended for its inclusion of rights which have been omitted from the Maputo Protocol but play significant role in the pursuit of gender equality.[169] For example, Article 33(1) of the SADC protocol obliges states to make allocations of budgetary resources to gender equality awareness. The importance of investing in women's rights education and gender equality awareness has been referred to in various other instruments such as the Maputo Protocol[170] and CEDAW.[171] However, neither CEDAW, nor the Maputo Protocol provide such specific directions and obligations to States to allocate budgetary resources for gender equality awareness. Furthermore, the SADC Protocol challenges the patriarchal systems embedded in decision-making.[172] The Protocol's provision on women in decision-making has been seen as remarkable as it obliges States to ensure that

[161] Forere and Stone op cit note 44.
[162] Forere and Stone op cit note 44.
[163]SADC 'Gender Equality and Women Empowerment, available at: *Gender Equality & Women Empowerment | SADC.*
[164] Article 6(2) of the SADC Protocol.
[165] Ibid, Article 3(a).
[166] P Zirima op cit note 43.
[167] Ibid.
[168] Forere and Stone op cit note 44.
[169] Ibid.
[170] Article12(3)
[171] Article 10(c)
[172] Forere and Stone op cit note 44.

at least fifty percent of decision-making positions in the public and private sectors are held by women.[173] While the Maputo Protocol provides for 'increased and effective representation and participation of women at all levels of decision making',[174] the focus in the Maputo Protocol is placed particularly on political participation while the SADC Protocol provides for representation of women in all spheres.[175]

Notably, Article 7(f) of the SADC Protocol recognises the need of women's equitable participation in all courts as a key factor in ensuring gender equality in accessing justice.[176] Article 15 obliges State Parties to ensure equal representation of women and men in 'policy formulation and implementation of economic policies.'[177] The SADC Protocol, however, has omitted to protect other rights protected under the Maputo Protocol. For instance, the SADC Protocol does not protect women's right 'to choose the number of children they want to have and the decision concerning the spacing between these children.'[178] Such omission is crucial in the context of protecting women's economic rights and their right to be equally represented in leadership and decision-making positions since having children is seen as one of the key obstacles to women's advancement in the workplace.[179] That comes as a result of the harmful gender stereotypes that women are the primary caregivers and their main roles are linked to the roles of being mothers and wives. Therefore, taking into consideration both the complimentary and the duplication provisions of the SADC Protocol to the Maputo Protocol as well as the omissions of the latter addressed above, the SADC Protocol has been criticised for failing to achieve its purpose to 'fill in the gaps' in the legal principles provided under the Maputo Protocol.[180] Furthermore, it is argued that omission of the SADC Protocol to protect certain rights could result in State Parties 'relying on the "less onerous" provisions of the SADC Gender Protocol, while ostensibly upholding the binding obligations that they have voluntarily undertaken at the AU level.'[181]

[173] Article 12 of the SADC Protocol
[174] Article 9(2).
[175] Forere and Stone op cit note 44.
[176] Zirima op cit note 43.
[177] Article 15(1).
[178] Maputo Protocol, Article 14(b).
[179] Zirima op cit note 43.
[180] Forere and Stone op cit note 44.
[181] Ibid.

# CHAPTER IV. NATIONAL LEGAL FRAMEWORK

Section 231 of the Constitution establishes the process of ratification and enactment of international law in South Africa and stipulates that in order for international agreements to become binding in South Africa, they must be enacted through the adoption of national legislation.[182] Chapter IV will, therefore, turn to analyse the way South Africa has domesticated the laws discussed above and examine whether it has effectively followed its international obligations. As already discussed in Chapter III, South Africa has ratified both CEDAW and the Maputo Protocol and has committed to protecting the rights and freedoms of women on a national level. The chapter will begin by examining whether the Constitution adopts a substantive equality approach, as required by international law, and observe the way the CC has applied this approach. Thereafter, this chapter will continue to discuss the constitutional requirements for the appointment of judges as they lie at the core of the appointment process. Finally, Chapter IV will turn to examine the relevant national legislation on the promotion and the protection of gender equality in the workplace.

## 4.1. THE CONSTITUTION

The South African Constitution is argued to represent one of the most progressive constitutions in the world[183] and it is the key national law to deal with issues of gender inequality. The Constitution is based on the values of human dignity, equality and freedom[184] and it contains a comprehensive Bill of Rights protecting the rights and freedoms of 'all people in [the] country'.[185] The difference between values and rights, as recognised by the Court in the case of Minister of Home Affairs v National Institute for Crime Prevention,[186] lies in that while values do not give rise to enforceable rights in themselves, they are of fundamental importance and give substance to all the provisions in the Constitution.[187] Furthermore, as set out under s.39(1)(a), the Courts are obliged to promote the key values when interpreting the rights enshrined in the Constitution. Therefore, as a value and a legally enforceable right, equality lies at the core of the Constitution and must be considered in the interpretation and implementation of all other rights enshrined therein.

---

[182] S.231(4).
[183] Crush, J. 'The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa' (2001) 38 *International Migration* 103.
[184] S.1(a).
[185] S.7(1).
[186] and the Re-Integration of Offenders (NICRO) and Others (CCT 03/04) [2004] ZACC 10.
[187] Ibid para 21.

### 4.1.1. Substantive Equality in Promoting Gender Transformation

Section 9 of the Constitution protects everyone's right to equality and non-discrimination by granting everyone the 'full and equal enjoyment of all rights and freedoms.'[188] The provision prohibits both direct and indirect discrimination on one or more of the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[189] As argued by Phooko and Mahomed, while there is no specific definition of equality established under the Constitution, it intends to 'provide substance to transformative constitutionalism that, in turn, will transform the past and present, to build a better future.'[190] That, according to Albertyn, is due to the fact that the values enshrined in the Constitution allow for the Courts to evaluate and interpret the Bill of Rights in consistency with the principles of equal dignity, equal substantive opportunities and eradication of disadvantage and subordination.[191] Therefore, it allows for issues of gender inequality to be examined contextually, contradicting the idea of formal equality based on equal treatment without any consideration of relevant social and economic conditions of people's lives. Albertyn further argues that the CC has developed the legal application of substantive equality by identifying four key elements that give the concept a 'transformative potential'.[192] Firstly, it focuses on understanding inequality in its social and historical context and recognises difference as a positive feature of society. Secondly, it pays particular attention to the aim of the right to equality and its underlying values, to resolve systematic disadvantage or subordination. Finally, the CC has found that 'an additional feature of transformative substantive equality would be its ability to affirm or imagine a future society through practical (remedies) and normative (values) means.[193]

A significant judgment implementing the concepts of substantive equality and intersectionality is the judgement in Mahlangu and Another v Minister of Labour.[194] The case concerns the death of a domestic worker who drowned in her employer's pool. When the deceased's daughter, who was financially dependent on her, turned to the Department of Labour to ask for any kind of compensation under the Compensation for Occupational Injuries and Diseases Act

---

[188] S.9(2).
[189] Section 9(3).
[190] Matilda Lasseko-Phooko & Safia Mahomed 'The challenges to gender equality in the legal profession in South Africa: A case for substantive equality as a means for achieving gender transformation' (2021) 21 *African Human Rights Law Journal* 494 - 521, at 508.
[191] Catherine Albertyn 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' (2018) 34 *SAJHR* 441.
[192] Catherine Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253 at 258.
[193] Ibid.
[194] and Others [2020] ZACC 24.

(COIDA), she was informed that domestic workers working in private households did not fall under the definition of employee in terms of the Act. With reference to various international and regional treaties as well as s.9 of the Constitution, the CC found the relevant provision of COIDA unconstitutional on the ground that it further discriminates against a particular group which has already been 'historically discriminated against, because they are often women, because they are often Black, *and* because they are often Black women.'[195] The Court recalled the transformative purpose of the Constitution in the interpretation of socio-economic rights and stated that 'the approach to interpreting the rights in the Bill of Rights… gives effect to constitutional values including substantive equality.'[196] The Court further addressed the importance of adopting an intersectionality legal framework to achieve substantive protection of equality,[197] referring to the case of Hassam where it was stated that intersectionality 'will achieve the progressive realisation of our transformative constitutionalism.'[198]

Hassam is another landmark case which adopted a substantive equality approach in granting Muslim widows in polygynous marriages the right to claim from estates where the deceased died without leaving a will. The Court argued that the constitutional goal of substantive equality will not be achieved, should such women be excluded from the ambit of the Intestate Succession Act 81 of 1987, which was the case before the court.[199]

### 4.1.2. Constitutional Requirements for Judicial Appointment

The key guidelines around the appointment of judicial officers in South Africa are set out under s174 of the Constitution. The provision stipulates that 'any appropriately qualified woman or man who is a fit and proper person can be appointed as a judicial officer'.[200] Furthermore, s174(2) addresses the need for the judiciary to reflect broadly the racial and gender compositions of South Africa.[201] While s.174 does not provide a definition of a 'fit' and 'proper' person, it clearly adopts the principle of substantive equality in seeking to address the imbalances of the past through calling for affirmative action measures. The second requirement, however, has received extensive criticism. Justice Kriegler, for example, has

[195] Mahlangu and Another v Minister of Labour, op cit note 194.
[196] Ibid Para 55.
[197] Ibid Para 70.
[198] Hassam v Jacobs N.O. [2009] ZACC 19, para 28.
[199] Ibid
[200] S.174(1).
[201] S174(2).

argued that s.174(2) is 'mere guide and not a requirement for judicial appointment.[202] He states that:

> The constitutional mandate instructs the Judicial Service Commission in section 174(1) to appoint people that are appropriately qualified. That's a precondition. That's a mandatory requirement. And then subsection (2), as a rider to that, says: and in doing that, have regard to the racial and gender balance on the Bench.[203]

His arguments, however, has been described as 'narrow' by Siyo and JC Mubangizi who, on the other hand, argue that reading s.174(2) as a mere guide instead of a prerequisite for appointment would result in the provision being in conflict with s.9(2) of the Constitution and the EEA which call for the adoption of affirmative action measures to address the inequalities of the past.[204] They further argue that a judiciary that reflects broadly the gender composition of society 'bodes well for public confidence in it.'[205] The same argument has been presented by Cowan who claimed that in order for the judiciary to gain back its legitimacy after apartheid, it needs to be completely transformed by gender and race.[206]

The process for appointing the President and Deputy President of the Supreme Court of Appeal, as well as the Chief Justice and Deputy Chief Justice, is outlined in Section 174(3) of the Constitution. Particularly, the Chief Justice and Deputy Chief Justice are chosen by the President after consulting the heads of the National Assembly's parties as well as the JSC. Nevertheless, the President only needs to consult the JSC with reference to the President and Deputy President of the Supreme Court of Appeal. Candidates to all other 15 leadership positions are appointed on the JSC's recommendation, while the President appoints justices to the Ordinary Constitutional Court from a shortlist submitted by the JSC. The Constitution does not provide a separate criterion for the appointment of judges in leadership judicial appointments. Furthermore, the words 'appropriately qualified' and 'fit and proper' are not defined further in the Constitution, regardless of the kind of judicial office in question.

---

[202] Judge Johann Kriegler 'Can Judicial Independence Survive Transformation?' (2009)a public lecture delivered at the Wits School of Law, available at: *Can Judicial Independence Survive Transformation? – A public lecture delivered by Judge Johann Kriegler at the Wits School of Law - Constitutionally Speaking,* accessed on: 7th December 2023.

[203] Ibid,

[204] Siyo, L, & Mubangizi, JC. 'The independence of South African judges: A constitutional and legislative perspective' (2015) 18 *Potchefstroom Electronic Law Journal* 817.

[205] Ibid

[206] Cowan op cit note 6 at 291.

## 4.2. WOMEN EMPOWERMENT AND GENDER EQAULITY BILL

In its 2011 concluding observations, the Committee on the Elimination of Discrimination against Women addressed South Africa's failure to embody the principle of substantive equality under the Constitution and other relevant legislation on the protection of women's rights.[207] The Committee, therefore, recommended the State to submit a Gender Equality Bill as soon as possible in order to 'achieve *de jure* equality for women'.[208] Thus, as a direct response to the Committee's recommendations, the National Assembly passed the Women Empowerment and Gender Equality Bill[209] (the WEGE Bill) in March, 2014 .[210] The Bill's key purpose is to give effect to women's right to equality[211] in all spheres of life as well as protect and promote the values of non-racialism and non-sexism protected under the Constitution.[212] It further aims to achieve 50 per cent representation of women in decision making positions.[213] According to the former department of Women, Children and People with Disabilities, the Bill fills the gap in the current legislative framework in the promotion of women's economic empowerment[214] as s(2)(4) of the Bill obliges public and private bodies with more than 150 employees to develop strategies and submit plans on the implementation of the Bill.[215] The Bill further takes into consideration the international and regional laws discussed above and aims to 'provide for the development and implementation of public education programmes on practices that unfairly discriminate on grounds of gender in order to promote gender equality and social cohesion.'[216]

While some argue that the WEGE Bill is a significant development in the area of gender equality and women's rights in South Africa, others criticise it for its ambiguity and failure to address negative socio-cultural norms.[217] The WEGE Bill has been criticised by various non-governmental organisations (NGOs) and private actors to be 'a weak and watered-down

---

[207] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women – South Africa*, 5 April 2011, CEDAW/C/ZAF/CO/4, available at: **CEDAW/C/ALB/CO/3/CRP (icj.org).*

[208] Ibid.

[209] Women Empowerment and Gender Equality Bill 2012 (South Africa), available at: *B50_2013.pdf (juta.co.za).*

[210] Hills J. 'Addressing Gender Quotas in South Africa: Women Empowerment and Gender Equality Legislation' (2015) 20 *Deakin Law Review* 153.

[211] Section 9 of the Constitution.

[212] Section 3(a) of the Bill.

[213] Section 3(e) of the WEGE Bill.

[214] Sibanda 'Challenges and prospects of the South African Women Empowerment and Gender Equality Bill' . (2016) at 20.

[215] Ibid.

[216] Section 3(g) of the WEGE Bill.

[217] Sibanda N. op cit note 51 at 20.

duplication of already existing legislation with nothing new to order.'[218] They argue that the Bill fails to address the roots and causes of gender discrimination in the country which result in subsequent failure to achieve its purpose.[219] As already established in earlier in this thesis, patriarchy has been recognised as one of the key obstacles to gender equality on the workplace and in the judiciary in particular. However, the Bill has been criticised for failing to follow its obligations under article 2 of CEDAW which requires States to enact effective guidelines of gender equality and address the need to prevent patriarchal norms and structures in society.[220] Furthermore, the Maputo Protocol recognises the detrimental effect of patriarchy and traditional and cultural practices to gender equality in African States. Such provisions, however, have not been provided under the WEGE Bill. While it calls for effective measures on the empowerment of women and the elimination of discrimination, in has no 'substantive provision to challenge or address patriarchy.'[221] The Bill was further criticised for failing to recognise the diversity of women in South Africa and address the marginalisation of particular groups of women.[222] As established above, the varying identities and experiences of women in South Africa call for special measures and protections. Furthermore, the Bill was introduced in 2014 and ten years later, it is still to be passed into law, which constitutes significant failure of South Africa to follow its international obligations.

## 4.3. THE EMPLOYMENT EQUITY ACT

As obliged under s.9(2) of the Constitution, the South African government has enacted several fundamental laws on the promotion and the protection of the right to equality on a domestic level. Such are the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[223], the Labour Relations Act (LRA)[224] and the Employment Equity Act (EEA),[225] among others. While all three Acts give effect to the right to equality and non-discrimination, their focus differs. For example, although PEPUDA gives effect to the principle of substantive equality[226] and requires everyone, not just the government, to advance such equality,[227] the Act does not apply to cases of unfair discrimination covered by the EEA.[228] Furthermore, the LRA

[218] Sibanda op cit note 51 at 20.
[219] Ibid.
[220] Article 2.
[221] Sibanda op cit note 51 at 20.
[222] Ibid.
[223] 4 of 2000.
[224] 66 of 1995.
[225] 55 of 1998.
[226] S.1(ix).
[227] S.24(2).
[228] 5(3).

seeks to promote economic development and labour practice by prohibiting unfair discrimination, particularly in the areas of dismissals,[229] freedom of association[230] and the promotion of employees and the taking of disciplinary actions against employees.[231] However, despite the importance of both the LRA and the EEA in employment matters concerning gender discrimination, the latter remains the key law on the promotion of equality in the workplace.[232] To promote the right to equality protected under the Constitution, the EEA adopts a substantive equality approach by setting out two key requirements. Firstly, it prohibits unfair discrimination to promote equal opportunity and fair treatment.[233] Secondly, it calls for the adoption of affirmative action measures in addressing 'the disadvantages in employment experienced by designated groups.'[234]

Section 6 of the EEA prohibits 'unfair discrimination' on various grounds including 'race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin'[235] among others. The inclusion of the ground of family responsibility is particularly important for the purposes of this thesis as it is one of the key reasons' women are being discriminated against in the judiciary. That is due to the belief that women are the primary caregivers, and their roles are primarily set within the home and the family. The Act lists two grounds which allow for fair differentiation and those are affirmative action and 'distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.'[236] Allowing space for affirmative measures is a crucial part of substantive equality and a necessary requirement in the transformation of such an unequal society.[237] In Naidoo v Minister of Police 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.[238] The CC in Minister of Finance and Other v. Van Heerden[239] ruled that 'affirmative action is not reverse discrimination, but part and parcel of substantive equality.'[240] Despite adopting a substantive equality approach, the Act has been criticised for its use of the term 'unfair discrimination' as the term is argued to be problematic

[229] S.187.
[230] S.5.
[231] 186(2).
[232] Smit op cit note 47 at 378.
[233] S.2(a).
[234] S.2(b).
[235] Section 6(1).
[236] Section 6(2)(b)
[237] Smit op cit note 47.
[238] Naidoo v Minister of Safety and Security & Another 2013 (3) SA 486 (LC) para 72.
[239] 2004 (6) SA 121 (CC).
[240] Nicola Smit op cit note 47 at 384.

in terms of interpretation and application.[241] The Act further fails to properly address the root causes of gender-based discrimination in the workplace. Although it provides for affirmative action, it does not explicitly recognise the persistent issues of patriarchy and gender stereotypes and it does not recognise the fact the women are disproportionately affected by gender discrimination. In other words, the Act fails to adopt a gender-responsive approach.

## CHAPTER V. BARRRIERS PREVENTING WOMEN'S ADVANCEMENT IN THE JUDICIARY

Despite the laws and policies in place, figures from the past few years demonstrate that gender equality in the judiciary, especially in leadership judicial positions, has not been achieved.[242] In a 2021 Judiciary Performance Report, Justice Zondo stated that although a substantial progress has been made in achieving gender equality on the Bench, equal representation of women and men has not yet been achieved.[243] The report demonstrates that 44% of all judges, 234 at the time, were women.[244] However, the report does not consider leadership judicial positions where women remain significantly underrepresented.[245] In 2022, there were five open leadership positions in the judiciary of which women were only shortlisted in three courts.[246] As of September 2022, out of 19 leadership positions in the judiciary, there were 2 women holding a permanent Head of Court positions and four women were appointed as Deputy Heads of Court.[247] Furthermore, of the nine permanent justices in the CC, only three are women – constituting 33 per cent of the CC's bench. As for the SCA and the High Courts, 48% and 40% of the judges are women, respectively.[248] Data from February 2022 demonstrates that there are presently 254 judges in the Superior Courts, which comprise the Supreme Court of Appeal (SCA), the CC, and the High Courts (HC), including specialised courts.[249]

Masengu among other legal scholars, argues that while the Judicial Service Commission (JSC) has done significant progress in transforming the judiciary by race, they have failed to achieve the same in terms of gender transformation.[250] She particularly refers to a 2012 JSC interview

---

[241] Ibid at 378.
[242] Judges Matter op cit note 17.
[243] Judiciary Performance Report for the 2020/21 op cit note 14.
[244] Ibid.
[245] Judges Matter 'Women in Judicial Leadership' op cit note 17,
[246] Ibid.
[247] Ibid.
[248] Ibid.
[249] Judges Matter 'Women and the Bench: What Justice Mandisa May's interviews tells us about women's place in the judiciary' (2022) available at: *Women and the bench: What Justice Mandisa Maya's interview tells us about women's place in the judiciary - Judges Matter*, accessed on: 15 November 2023.
[250] Masengu, op cit note 15.

where the Chief Justice at the time almost criticised the attention paid to gender transformation, 'when racial transformation was still an issue.'[251] Such statements demonstrate that instead of considering the intersectional identities of candidates together, the judiciary prioritised racial transformation, leaving the issue of underrepresentation of women behind.[252] The underrepresentation of women in the judiciary comes as a result of various factors, ranging from pervasive patriarchal attitudes and male-oriented work environment to violence against women and sexual harassment at the workplace.[253] Therefore, as argued by the Commission for Gender Equality (CGE), 'the slow pace of gender transformation of the judiciary cannot be examined and in turn rectified in isolation.'[254] This Chapter aims to examine the key obstacles preventing women from entering the judiciary and the underrepresentation of women in senior judicial positions.

## 5.1. BARRIERS FACED BY WOMEN BEFORE AND DURING THE JUDICIAL APPOINTMENT PROCESS

This section will begin by discussing the composition of the legal profession in South Africa and the gender-based discrimination resulting from it. It will argue that the division of the legal profession into attorneys and advocates creates more obstacles to women's advancement in the profession. Thereafter, this section will continue to examine the judicial appointment process and the discrimination that women face before and during their interviews with the Judicial Service Commission. Finally, this section will address the masculinist culture which the legal profession has been formed around and discuss the discriminatory attitudes towards women practitioners and their abilities in the field.

### 5.1.1. Divided Legal Profession – an Obstacle to Women's Advancement

Similar to the British legal system, the legal profession in South Africa is divided into advocates, who appear before the high courts and attorneys, mostly practicing in the magistrates' courts.[255] Data from 2016/17 shows that although there were more women law graduates, women registered for articles amounted to only 44% of all registered people.[256]

---

[251] Ibid
[252] Ibid.
[253] Report of the Special Rapporteur on the independence of judges and lawyers, op cit note 10.
[254] Commission for Gender Equality, Discussion Document on Gender Transformation in the Judiciary and the Legal Sector (2018) available at*: *Commission for Gender Equality Act: Gender transformation in the Judiciary and the Legal Sector (cge.org.za),* accessed on: 15 November 2023.
[255] Masengu op cit note 15 at 307.
[256] Women's Legal Centre & Equality and Justice 'Tipping the Scales: Realities and Remedies for Gender Transformation of the Legal Profession' (2018) available at: *https://wlce.co.za/wp-content/uploads/2021/12/Tipping-the-Scales-297x210-1.pdf,* accessed on 17 November 2023.

Furthermore, women amounted to less than 40% of the practicing attorneys in the Cape Law Society, the Free State Law Society and the Law Society of the Northern Provinces, and 43% of the practicing attorneys in the KwaZulu Natal Law Society.[257] According to the Law Society of South Africa, the situation slightly improved in 2022 where women comprised 42% of all registered attorneys.[258] However, it is important to note that there were more white female attorneys (22%) registered in 2022 than black female attorneys (20%),[259] therefore highlighting the failure to address the intersectional identities of black women. Nevertheless, while gender inequalities are evident within the attorneys' profession, the situation worsens in the case of registered advocates. Statistics from 2016 demonstrate that 56% of the law graduates were women.[260] Yet, in 2017 female made up only 27% of the registered advocates.[261]

According to Dawuni and Kang, such division in the legal profession has become a source of inequalities between male and female practitioners, and judges in particular.[262] One reason for that lies in the fact that judges in the past were mainly appointed from the ranks of senior advocates. Former Judge President of the Gauteng High Court, Bernard Ngoepe, stated in 2000 that 'the best source of appointment is the advocate's profession because magistrates, academics and attorneys have limited experience and competence.'[263] However, despite the laws and policies in place today, the situation has not changed much. Bonthuys argues that qualified candidates coming from the ranks of attorneys, legal advisors, magistrates and even junior advocates, are still not given proper consideration for judicial appointment.[264] It has been observed during the 2010-2015 judicial appointment period, that although advocates comprised only 35% of the 265 judicial vacancies' candidates, 43% of the 101 successful candidates appointed to the judiciary were advocates.[265] Therefore, taking these statistics into consideration, together with the data provided above on the amount of female registered advocates in 2017, it is evident that the division of the legal profession into advocates and attorneys constitutes a significant obstacle to the appointment of women in the judiciary in

[257] Ibid at 16.
[258] Law Society of South Africa 'Statistics for the attorneys' profession' (2022), available at: *Statistics for the Attorneys' Profession – LSSA* , accessed on 20 November 2023.
[259] Ibid.
[260] Women's Legal Centre & Equality and Justice op cit note 256.
[261] Ibid.
[262] Jarpa Dawuni & A. Kang 'Her ladyship chief justice: the rise of female leaders in the judiciary in Africa' (2015) 62 *Africa Today*, 45–69.
[263] Masengu op cit note 15 at 307
[264] Elsje Bonthuys 'Gender and Race in South African Judicial Appointments' (2015) 23 *Fem Leg Stud*, 127–148, at 133.
[265] Masengu op cit note 15 at 308.

South Africa. To address this issue, Chief Justice Raymond Zondo has announced as part of the JSC appointment process in October 2023, that the judiciary will now consider appointment academics to the Bench, and the CC in particular.[266] However, given the pervasive discriminatory perceptions and the unwillingness of the JSC to appoint candidates from the ranks other than advocates, it is yet to be observed whether the new approach will be effectively implemented and whether it will enhance women's access to the judiciary.

Furthermore, due to the slow progress in transforming the legal profession to reflect the race and gender diversity of South Africa, the National Assembly adopted the Legal Practice Act[267] in 2016 which came into full operation in October 2018.[268] The Act serves to give effect to the rights and values protected under the Constitution in the legal profession, and 'facilitate and enhance an independent legal profession.'[269] Importantly, the Act seeks to eliminate the barriers between advocates and attorneys by transforming the legal profession 'into a profession which is broadly representative of the Republic's demographics under a single regulatory body.'[270] However, while Andrews has argued that the Act 'should go some way' in eliminating some of the barriers that women judges experience in accessing the judiciary, it is evident by the statistics presented above that there has not been a significant improvement in representation of women in all levels of the legal profession.[271]

### 5.1.2 Judicial Appointment

#### *5.1.2.1. Structure, Role and Powers of the Judicial Service Commission*

Before proceeding to examine the barriers that women face during the appointment process, this section will first look at the structure, powers and the role of the JSC. The JSC was introduced in 1994 as a response to the long history of racial and gender exclusion in South Africa. Its main purpose was to introduce a more open and legitimate appointment process and a process that is 'less likely to be abused by the executive'.[272] The JSC was established under section 178 of the Constitution and it has been argued to be 'the most important body for assisting and protecting the independence, impartiality, dignity, accessibility and effectiveness

---

[266] Franny Rabkin 'Lawyers and academics may be appointed directly to the Constitutional Court, says Zondo' (2023) available at: *Lawyers and academics may be appointed directly to the Constitutional Court, says Zondo (businesslive.co.za),* accessed on: 15 December 2023.
[267] No. 28 of 2014.
[268] Women's Legal Centre & Equality and Justice op cit note 256 at 24.
[269] The Legal Practice Act op cit note 267, Preamble.
[270] Ibid, Preamble.
[271] Ibid.
[272] Tabeth Masengu, 'The Judicial Service Commission and the appointment of Women: more to it than meets the eye' (2020) 27 *International Journal of the Legal* 161 at 162.

of the courts.'[273] The gender transformation of the judiciary is one of the key purposes of the JSC.[274]

The composition of the JSC is established under section 178 of the Constitution which provides that the JSC is chaired by the Chief Justice of South Africa and has a membership of between 23 and 25 judges, practicing lawyers, politicians and law professors.[275] As argued by Kate Malleson, the JSC is such a large body as it is a result of compromise during the negotiation process.[276] While the legal community demanded a body, the majority of which was legal, the ANC advocated a 'politically dominated composition,'[277] resulting in the majority status of legislators in the JSC. That, however, has been argued to negatively influence the appointment process, leading to unjust appointments.[278] In 2017, former Judge President Kgomo clearly expressed his views on the matter, saying that 'the JSC is not properly constituted because it is overloaded with politicians'.[279]

A significant tension between politicians and the judiciary as well as the negative political influence in judicial appointments have been observed on numerous occasions. One such example was reflected during the 2015 appointment process,[280] where the JSC interviewed four candidates for a CC's vacancy, all of which were women. Furthermore, one of the candidates for the position of Deputy President of the Supreme Court of Appeal at the time was Justice Mandisa Maya – the first woman to ever be nominated for this position.[281] This was described by women's rights advocates as a significant moment in the history of gender equality on the Bench in South Africa. Especially because opponents of judicial transformation have criticised the process for prioritising transformation at the expense of quality.[282] However, this important historical moment was interrupted and overshadowed by unnecessary political questions during the interviews. Instead of focusing on the candidates' brilliant CVs and their extensive

---

[273] Masengu 'What Lies beneath: The Complex Nature of Appointing Women Judges in Zambia and South Africa' (2020) Universiteit Gent. Faculteit Recht en Criminologie.
[274] Ibid.
[275] S. 178(1).
[276] Murray Wesson and Gilbert Marcus 'The Transformation of the Judiciary' in C. Jenkins & M. Du Plessis (Eds.), *Law, Nation-Building and Transformation: The South African Experience in Perspective* (Series on Transitional Justice) (2014), at 205.
[277] Ibid.
[278] Ibid.
[279] Interview with former Judge President Frans Kgomo, 7 April 2017.
[280] Masengu op cit note 272 at 164.
[281] Ibid.
[282] Judge Johann Kriegler, 'Can Judicial Independence Survive Transformation?' (2009)a public lecture delivered at the Wits School of Law, available at: *Can Judicial Independence Survive Transformation? – A public lecture delivered by Judge Johann Kriegler at the Wits School of Law - Constitutionally Speaking,* accessed on: 7th December 2023.

experience in the field, the Ministry of Justice chose to place the focus on 'assessing whether the candidates had the potential to make dangerous judgments.'[283] This came as a result of the Minister of Justice's reaction to a recent decision of the HC which held the government accountable for its failure to detain Sudanese President Omar Al-Bashir, as has been ordered by the International Criminal Court. The HC's decision had become a source of political conflict prior to the JSC interviews and took over during the appointment process. Masengu argues that the incident was especially shocking and unexpected since none of the candidates interviewed at the time were applying to the HC where the decision in question came from. Due to the tension between judicial and executive members of the JSC, candidates and other members 'became increasingly uncomfortable' and what was meant to be a just and equitable judicial appointment process, had turned out to be an inference 'that judges shouldn't hand down negative decisions that could influence political governance.'[284]

Furthermore, another issue arising from the political dominance in the JSC, as argued by Masengu, is that judicial decisions that were not in favour of the ANC are often used against the judges that made the decisions.[285] During her interview with the JSC, Judge Phatsoane was interrogated and criticised for her decision to sentence a former member of the ANC to 15 years of imprisonment for corruption and money-laundering.[286] The interview of Judge Phatsoane has been described as an example where candidates are expected to play the role of political activists more than that of judges, which rejects the whole idea of an independent judiciary. Judge Phatsoane was not appointed, which has been argued by Masengu to discourage other judges who have decided against members of the ANC to apply for promotions.[287] Therefore, it becomes evident that while the JSC is required by law to ensure a just and open appointment process and refrain from any form of discrimination during such process, the political tension between its members has prevented it from achieving its purpose. While the examples provided above affect both men and women, they demonstrate the way that complexities in the JSC's composition further undermine the gender transformation of the judiciary. However, the composition of the JSC is not the only obstacle leading to unjust results. The next section of this Chapter will focus on the pervasive gender prejudice that has been observed during the appointment process, which further prevents women's advancement in the profession.

---

[283] Ibid.
[284] Masengu op cit note 272.
[285] Ibid at 165.
[286] Ibid.
[287] Ibid.

***5.1.2.2. Lack of Transparency in Judicial Appointment Procedures***

Judicial transformation, as discussed in Chapter II of this thesis, requires a complete shift in the judicial appointment process, demanding equal and fair gender and racial representation on the bench and a change in 'underlying attitudes of the judiciary to see them embracing the principles of a fundamentally new legal order.'[288] While the JSC has significantly contributed to the improvement of gender representation in the judiciary, Masengu argues that 'partiality, patronage and power dynamics' are still evident in the JSC and the judicial appointment process, however, they appear in different forms today.[289]

The Constitution sets out two key requirements for judicial appointments, calling for the appointment of a fit and proper person[290] and consideration of the gender and racial composition of society.[291] According to s178(6) of the Constitution, the JSC is free to 'determine its own procedure, but decisions of the Commission must be supported by a majority of its members'. It is important to note that the JSC carries the responsibility of recommending candidates for Superior Court appointments,[292] except for appointments of the Chief Justice, Deputy Chief Justice, President and Deputy President of the Supreme Court. The latter will be discussed in the next Chapter of this thesis. Whenever there is a vacancy, the JSC solicits nominations, interviews the candidates, and then makes recommendations to the President.[293] While the Commission has been commended for allowing access of the greater public to judicial appointment interviews as a step to achieving equality in democratic South Africa, there are two aspects the has become subjects of debates and criticism.

Firstly, the JSC procedure and criteria for appointing successful candidates have been argued to be too broad and lacking certainty.[294] While the JSC provides a public judicial appointment procedure and calls for comments on the shortlisted candidates before conducting interviews, the JSC keeps process of shortlisting candidates private and does not disclose the list of those who have been nominated but not shortlisted.[295] Andrews has questioned the effectiveness of such private shortlisting procedure and has argued that it allows for decisions to be negatively

[288] Murray Wesson & Max Du Plessis op cit note 29 at 192.
[289] Tabeth Masengu, 'The Judicial Service Commission and the appointment of Women'.
[290] 174(1).
[291] 174(2).
[292] Masengu, op cit note 273.
[293] Murray Wesson and Gilbert Marcus op cit note 276 at 205.
[294] CGE op cit note 254 at 59.
[295] Ibid at 11.

influenced by political views and other factors.[296] While the JSC has often attempted to justify the slow transformation of the judiciary with the low number of women's applications to judicial vacancies, no evidence have been provided to support such statements, as the number of women applying is not disclosed.[297] The reasoning behind keeping the full list of applicants private is to protect the privacy of those who are not successful in the process. However, scholars and other legal professionals have argued that while it is important to protect candidates, that should not come at the expense of jeopardising the legitimacy of the appointment process.[298] Furthermore, the JSC has also been criticised for not articulating their reasons for appointing a particular candidate clearly, as their discussions after the interviews also remain private. However, as argued by Mpati JA, little would be achieved if the JSC were to disclose its deliberations. The public would, in his view, 'do better to focus on the criteria that the JSC employs'. [299]

Secondly, the CGE finds that the lack of transparency during the appointment of Acting Judges represents another serious obstacle to the appointment of women in the judiciary.[300] That is due to the fact that although having acting experience is not a formal prerequisite,[301] it significantly improves candidates' understanding of the work in the Superior Courts and gives them valuable experience in writing judgments.[302] Therefore, very few candidates have been appointed without having served at the court they are applying for. The CGE found that every applicant is asked if they have ever held an acting role.[303] However, prior to 2016, there were no guidelines on the appointment of acting judges and such appointments were made solely on the discretion of the Presidents of the various provincial divisions. Due to the private nature of the process and the lack of transparency, the members responsible for making the appointments ended up appointing candidates who were known to them and rejected many qualified applicants fit for the roles. That also resulted in very few women being appointed as acting judges. Between the years of 2010 and 2016, only 1124 of the 6000 appointed acting judges were women.[304] That constitutes a mere 20% of the vacancies. Therefore, since the acting experiences is highly priced by the JSC, candidates lacking such experiences are rarely

[296] Penelope Andrews 'The South African Judicial Appointments Process' (2006) 44 *Osgoode Hall Law Journal* 565 at 569.
[297] Masengu op cit note 272.
[298] Ibid at 169.
[299] Murray Wesson and Gilbert Marcus op cit note 276 at 205.
[300] CGE op cit note 254 at 52.
[301] Masengu op cit note 272 at 166.
[302] Ibid
[303] CGE op cit note 254 at 43.
[304] Masengu op cit note 272.

considered. Following a report from the Democratic Governance and Rights Unit (DGRU) and Sonke Gender Justice (Sonke), as well as various other complaints regarding the process, the JSC addressed the unjust process by providing the Judge Presidents of the different provincial divisions with concrete guidelines on the appointment process.[305] The new process suggests the adoption of a selection committee whose main task is to recommend candidates that represent the racial and gender composition of South Africa. Such candidates are required to meet two-fold criteria, requiring candidates to demonstrate that they are appropriately qualified for the position and that they have been practicing for at least ten years. However, the guidelines have been criticised for being too vague in that the JSC has not defined 'appropriately qualified'.[306] To address this criticism, the JSC adopted new guidelines in 2023 on the criteria for judicial appointments, which focus on legal experience, integrity, and independence[307] and has been argued by the Judges Matter to 'clearly spell out the important qualities aspirant judges must possess, and how the JSC will assess them in the public interview.'[308] However, having in mind the continuous failure over the years of the JSC to follow its obligations in providing a transparent and just appointment process, the Judges Matter has advised the JSC to adopt a commissioner code of conduct along with a recall procedure for misbehaving commissioners who consistently disobey the chairperson's decisions or engage in other forms of misconduct.[309] The effectiveness of the revised criteria of the JSC is yet to be observed.

As argued by Andrews, despite the laws and policies adopted on a national level on ensuring gender equality in all spheres of life, and in the judiciary in particular, the South African society, including members of the JSC, is still 'steeped deeply in patriarchal and masculinist cultural attitudes'.[310]Andrews recalls that when she was interviewed by the JSC for an appointment to the CC in 2005, she was asked whether 'a boyfriend would encourage [her] return to South Africa'.[311] Another female judge experienced similar experience during her interview with the JSC where she was called 'overbearing'[312] Furthermore, Andrews pays particular attention to the story of an openly gay female candidate who applied for the senior position of Deputy

[305] Ibid.
[306] Masengu op cit note 273 at 249.
[307] JSC, Summary and Explanation of the Criteria and Guidelines Used by the JSC When Considering Candidates for Judicial Appointment, available at: *Criteria_and_Guidelines_For_Judicial_Appointment-2.pdf (judgesmatter.co.za),* accessed on: 20 November 2023.
[308] Judges Matter 'Comments and Recommendations on the JSC's Revised Criteria for Judicial Appointments', available at: *[Media Statement] Judges Matter submits comment on JSC's criteria for Judicial Appointments - Judges Matter,* accessed on 20 November 2023.
[309] Ibid,
[310] Penelope Andrews op cit note 269 at 571.
[311] Penelope Andrews op cit note 22 at 197.
[312] Ibid.

Judge-President and was questioned about her sexual orientation during the interview. Andrews argues that the most concerning aspect of this incident is the fact that such unconstitutional questions were asked publicly and no one, not even the Chief Justice attempted to prevent it. She concludes that the attitudes during the interview were representative of the attitudes in South Africa as a whole, and that 'only a fundamental rethink of the make-up, operation and processes of the JSC, with the stated goals of gender equality, will satisfy the constitutional mandate of inclusivity and equality in the judiciary.'[313]

### 5.1.3. Discriminatory Perceptions of Women's Abilities in the Legal Profession

As discussed in Chapter II of this thesis, patriarchal ideologies are central to the issue of discrimination against women in the workplace. In the legal profession, women's abilities are often underestimated, due to the socially accepted roles of women in society as mothers, wives and caregivers. In 2012, the DGRU together with Sonke requested the CGE to investigate the causes and factors leading to the slow progress in judicial transformation by gender, claiming that women continue to face discrimination with regards to acting appointment opportunities and treatment at the JSC interviews.[314] However, due to the Commission's failure to carry out a timely investigation, the DGRU and Sonke conducted research in the form of five legal sector meetings over the course of three years to identify the barriers to women's advancement in the legal profession.[315] The meetings took the form of discussions between attorneys, advocates, judges, magistrates and academics in five different provinces and identified five key barriers. In a 2016 study, Dr Masengu focuses on two of those barriers, one of which is the discriminatory perceptions of women's abilities in the profession. Msasengu argues that this barrier has been identified in all five meetings and discusses some of the negative experiences of female participants in the study. One speaker, for instance, addresses an incident where a Senior Council (SC) openly shared his discriminatory views on radio when he was questioned on why women are not appointed as Senior Counsel. The participant argued that the SC's response 'that "clients want a litigator that can win", just confirmed the attitude out there, which is that taking on a woman means you risk losing your case.'[316]

Other participants in the meetings further addressed the impact that socially accepted gender roles have on women in the profession by stating that the assumption that men play a lesser

---

[313] Ibid.
[314] Masengu op cit note 15 at 313.
[315] Sonke Gender Justice and DGRU 'Gender Transformation of the Judiciary Project 2013–2014' (2015) available at: *https://genderjustice.org.za/publication/gender-transformation-of-the-judiciary-project-2013-2014/*, accessed on: 10 November 2023.
[316] Masengu op cit note 15 at 313.

role in the upbringing of children and in their day-to-day care needs, implies that men are more suitable for practice.[317] Despite the fact that the EEA prohibits discrimination based on the grounds of pregnancy, marital status and family responsibilities, it is evident that such discrimination prevails in the legal profession. Participants have further argued that more and more women are faced with the dilemma of whether to have a family or career. One participant in the study even says that in order to protect their career, women 'have gone to the extent of hiding their pregnancies'.[318] That is due to the fact that pregnant women are often seen as vulnerable, 'hormonal' and not being able to work more hours. In 2009, the Cape Bar introduced a maternity policy 'as a transformation initiative of the legal profession in South Africa'.[319] The policy allows members of the Bar to take maternity leave up to one year. However, the policy has been criticised for being based on the gender stereotype that women are the primary caregivers and results in discrimination. Parallel presumptions that males are not responsible for their homes serve to perpetuate preconceptions about women's domestic duties.[320] Because of the way the maternity policy works, men who choose to become fathers and take care of their families at home will not benefit from the program in the same way that women do, and therefore, despite the fact that women are given the opportunity to take paid leave, they are not given the option to have the father to look after the child instead.

As a result of such discriminatory perceptions of women's roles in their families and in society, former Judge President Molemela argued that women 'are often not allowed to participate in complex cases or if they do, their work is not acknowledged'[321] which makes them feel undervalued and discourages them from participating in such matters. He further argued that refusing to create an environment that meets women's needs, women 'are forced to conform to a system that cherishes the dominant male experience which is, amongst other things, absent of family burdens and willing to work extra-long hours.'[322]

In 2016, as a response to the DGRU and Sonke's complaint, the CGE published a report on gender equality in the judiciary and in 2018 the CGE further published a discussion document on gender transformation in the judiciary. The CGE confirmed the findings of the legal meetings that female legal practitioners' work and competencies have been undervalued and

[317] Ibid at 10.
[318] Ibid.
[319] Matilda Lasseko-Phooko and Safia Mahomed op cit note 190.
[320] Ibid at 518.
[321] Masengu op cit note 15 at 314.
[322] Ibid.

that women have been generally perceived as not fit and qualified in complex litigation matters.[323] That, as argued in the discussion, comes as a result of the strongly patriarchal landscape of the legal profession. Recognising the urgent need for gender transformation of the judiciary, judicial leaders have stressed the fact that women in the judiciary must be qualified and that they will not just appoint 'any women' in order to diversify the bench.[324] Nonetheless, gender stereotyping and cultural perceptions of women's roles in society undermine efforts to significantly prepare women, leading to the belief that there are no competent women. According to the Law Society of South Africa (LSSA), there is an assumption in the legal field that women are not capable of handling stress or long hours of work and have less experience than men.[325] Additionally, they lack the assertiveness of male practitioners and get 'too emotionally involved' with their clients.[326] Such stereotypes of women and their abilities in the legal sphere have led to women having to work twice as hard as men 'to get 50% of the recognition that males (from all race groups) receive.'[327] Furthermore, in former Constitutional Court Justice O'Regan's survey in 2004, almost all participants recognised that women advocates lack confidence in regards to litigation. They also recognised that this comes as a result of harmful gender stereotyping and the views that women are 'not tough enough, or articulate enough, to argue cases.'[328]

## 5.2. UNDERREPRESENTATION OF WOMEN IN SENIOR JUDICIAL POSITIONS

While the previous section discussed discrimination against women and challenges that they face before and during judicial appointment processes, this section aims to particularly address the underrepresentation of women in senior judicial positions. The Federal Glass Ceiling Commission has defined 'glass ceiling' in the judicial system context as the unseen barrier preventing women from ascending to higher positions within the system, irrespective of their accomplishments or qualifications. [329] That is the case in South Africa where very little progress has been achieved in promoting gender diversity in leadership judicial roles. The 'Judges

[323] Commission for Gender Equality, Discussion Document on Gender Transformation in the Judiciary and the Legal Sector (2018).
[324] Masengu op cit note 15.
[325] Women's Legal Centre & Equality and Justice op cit note 256 at 32.
[326] Ibid.
[327] Ibid.
[328]Masengu op cit note 15.
[329] Federal Glass Ceiling Commission 'A Solid investment: Making full use of the nation's human capital' available at: *A Solid Investment: Making Full Use of the Nation's Human Capital: Final Recommendations of the Glass Ceiling Commission (cornell.edu),* at 4.

Matter' campaign, a leading campaign for gender equality on the Bench in South Africa, pays particular attention to the underrepresentation of women in senior judicial positions and recognises that despite the fact that more than 40% of the judges in the Superior Courts are women, the percentage of women in senior positions remains low. [330]As of 2022, only three of the 19 Court Presidents were women, and only four others held the positions of Deputy Presidents.[331] There has never been a woman Chief Justice in South Africa and Justice Mandisa Maya is the first woman to ever be appointed as the Deputy Chief Justice in 2022. She is also the first woman to ever hold the positions of President and Deputy President of the SCA. Furthermore, according to the 2016 CGE investigative report: 'The number of women on the Constitutional Court has remained unchanged over the past 20 years: two in 1994 and two in 2014.'[332] Currently, only three of the nine seats are being occupied by women. These statistics demonstrate the slow progress in transforming the judiciary by gender. Furthermore, Smit recognises that the justice system as a whole is the root cause of the underrepresentation of women in the judiciary in general and in leadership judicial positions in particular.[333]

### 5.2.1. Harmful Stereotypes About Women in Leadership Roles

As observed by ILO, while most men held permanent, often leadership positions across the globe, women frequently had to settle for 'junior part-time and temporary positions.'[334] Furthermore, Smit observes data from 2017 which shows that 'the higher the job level, the further female employment figures drop'.[335] The annual report of the Commission for Employment Equity (CEE) identifies that in 2022/2023, only 37.2% of the senior management positions were held by women.[336] The Commission expressed its disappointment with the slow pace of transformation and called for urgent action from the private and the public sector.[337]

That, as has been argued by legal scholars, comes as a result of the harmful gender stereotypes and the way that women are viewed in society. According to Masengu, people's preconceived notions about leaders are a major source of bias against female leaders.[338] People specifically

---

[330] Judges Matter op cit note 249.
[331] Ibid.
[332] Commission for Gender Equality op cit note 254.
[333] D. M. Smit, 'Joining the 'Old Boys' Club": Equality for Women in the South African Judiciary and Other Male-Dominated Workplaces,' Industrial Law Journal (Juta) 41, no. 1 (January 2020): 48-70.
[334] Linda Wirth 'Breaking through the Glass Ceiling: Women in Management' (ILO 2001), available at: *BIT (ilo.org).*
[335] D. M. Smit op cit note 333.
[336] Commission for Employment Equity, 23rd Annual Report (2022/2023), available at*: *23rd-CEE-Annual-Report-2022-to-2023.pdf (eecms.co.za),* accessed on: 9 December 2023.
[337] Ibid.
[338] Masengu op cit note 273 at 146.

do not think of women in leadership roles. Therefore, prejudice can develop when people view women as potential or current leaders. The criticism arises from the discrepancy between the traits that people identify as primarily communal and associated with women and the traits that people believe are primarily agentic and necessary for a leader to succeed.[339] To put it briefly, any role that affirms the qualities of power, authority, independence, and assertiveness that women are not typically associated with leads to prejudice. Thus, it is evident that despite women's entry into politics, government, and other fields, outdated views of them still exist. Instead, they have evolved into views of women that are biased against and devoid of legitimacy when it comes to female leaders. Research indicates that comprehension of the dynamics and anticipations surrounding women and men in leadership positions necessitates an understanding of conventional sex role stereotypes.

In 2023, the Institute for African Women in Law released a report focusing on the barriers preventing women from accessing senior judicial positions in South Africa. One of the key challenges addressed in the report are the continuous patriarchal beliefs that women do not possess leadership qualities. The report specifically discusses Justice Mandisa Maya's interview for the position of a Deputy Chief Justice. During her interview with the JSC, Justice Maya was asked if 'South Africa was ready for a female Chief Justice'.[340] Therefore, it is evident from this comment that even today, not only there is discrimination against women, often in the form of sexist comments like the one mentioned above, but such discrimination is expressed publicly and by actors who are legally obliged to transform the judiciary by gender and ensure gender equality in all spheres. To the comment, Justice Mandisa Maya responded that 'South Africa has always been ready to have a female Chief Justice'[341] and stressed that she is good at her job, not because she is a woman, but just because she is a good judge. Despite the fact that the JSC recommended Justice Maya for the positions, the President chose not to appoint her.

---

[339] Ibid.

[340] African Women in Law 'The Rise of African Women Chief Justices: A Missed Opportunity for South Africa?' (2023) available at: *https://www.africanwomeninlaw.com/post/the-rise-of-african-women-chief-justices-a-missed-opportunity-for-southafrica#:~:text=As%20of%202021%2C%2043%25%20percent,the%20superior%20courts%20were%20women,* accessed on: 03 December 2023.

[341] Ibid.

### 5.2.3. Criteria for the Appointment of Judges in Senior Positions

While the criteria for the appointment of judges and acting judges have been criticised for being too broad, such criteria does not exist at all when it comes to the appointment of judges in senior positions.[342]

Data from 2017 to 2022 shows that 13 out of the 39 candidates interviewed for senior judicial position were women.[343] It has been continuously argued that the lack of women in senior judicial positions comes as a result of the fact the women 'are not putting themselves forward for vacancies.'[344] However, Masengu dismisses this notion and instead argues that it is the attitude of the JSC and the prevalent gender bias that is the reason behind the underrepresentation of women in judicial leadership.[345] She pays particular attention to the way the JSC assesses potential leaders. She notes that due to the lack of criteria regarding leadership positions, it is difficult to evaluate the approach of the JSC in the appointment of judges to senior positions. In an attempt to identify the key requirements for the positions of Judge President and Deputy Judge President, Masengu interviewed various people from the legal community. It became clear from her survey that those are related to the candidate's experience at the bench and in the legal profession in general, as well as one's ability to mentor junior judges and acting judges and 'garner people around a common vision.'[346] Masengu further discusses the fact that judges who are nominated for leadership positions are automatically shortlisted, as 'they have already proved they meet the competency requirements for the bench.'[347] However, the question that Masengu asks is how does the JSC separates senior judicial positions from all other judicial positions. She assessed the top five questions asked during interviews for leadership positions in the period between 2010 and 2014 and identified that the JSC mainly asked candidates questions about their experience, relationship with colleagues, knowledge of the challenges facing their courts, the lack of women in the judiciary and backlog of cases.[348] While these are all important and relevant questions, Masengu argues

[342] Tabeth Masengu 'A perspective on women and leadership in the South African judiciary' (2015) *SAJHR* 655.
[343] The Institute for African Women in Law 'South African Judiciary' (2023) available at: *https://www.africanwomeninlaw.com/_files/ugd/229dcd_46623786de7b45cdbcf1a9177b40e691.pdf,* accessed on: 03 December 2023.
[344] Tabeth Masengu op cit note 272.
[345] Ibid.
[346] Tabeth Masengu, op cit note 342.
[347] Ibid at 660.
[348] Ibid.

that the approach of the JSC has continuously resulted in discrimination against women and has therefore caused the underrepresentation of women in senior positions.[349]

As discussed earlier in this chapter, the lack of acting experience has proven a serious obstacle to the appointment of women in the judiciary, as women are rarely appointed to acting positions. Masengu argues that the issue of lack of acting experience becomes even greater when it comes to leadership positions.[350] During her interview for the position of a President of the High Court, Mocumie J was required to have pervious acting experience at a leadership role in order to be considered for the positions. When she asked why she was required acting experience and pointed out that the Chief Justice himself had been previously appointed as a Judge President without an acting experience as such, the JSC ignored her question by insinuating that 'with no acting experience, a candidate would probably not be able to handle the responsibilities of leadership.'[351] However, statistics from previous years demonstrate that men have been appointed as Judge Presidents without having acted as such. Therefore, Masengu finds that the JSC applies different rules in the appointment of women and men to leadership positions, 'with the unspoken thought being that women need the 'training' while men do not.'[352] Another case that demonstrates this practice is the case of judge Anne-Marie de Vos who was promised by the then Judge President of the North Gauteng High Court that both her and her male colleague will be given an equal opportunity to act at a Deputy Judge President before the interviews for the position. However, while her male colleague was appointed to act, Judge De Vos's turn never came, which consequently resulted in her application for DJP being rejected, and unsurprisingly, her male colleague was appointed for the position. Despite being promised an acting opportunity, judge De Vos could not request that she is given such from the Judge President, as 'a judge has to wait to be picked by the JP of their division or another to act, and research has shown that this is increasingly not happening.'[353] Therefore, the lack of a clear criteria for the appointment of judges in leadership positions results in greater discrimination against women applying for such provisions.

### 5.2.4. Prevalent Masculinist Culture Within the Judiciary

As already discussed, various times in this thesis, patriarchal attitudes are evident in all aspects of the legal profession. The higher the position, the more discrimination women are faced with.

---

[349] Ibid.
[350] Ibid.
[351] Ibid at 661.
[352] Ibid.
[353] Ibid.

Women are forced to constantly prove themselves and their abilities, even after they have entered the judiciary. Especially after they have entered the judiciary. Furthermore, the JSC often fails to accommodate women's needs and only creates a work environment that is suitable for men. That is one of the key factors preventing women's advancement in the judiciary.

Masengu addresses the issue by discussing the appalling outcome of the case of Judge Nozuko Mjali.[354] Judge Mjali was appointed at the Eastern Cape High Court in Mthatha when she requested to be transferred to the Bisho seat of the same division. The reason for that was the arrest of her husband who was charged with the rape of their domestic worker in front of their children in their home in Bisho.[355] The arrest of her husband was public and was widely reported in the media, and therefore the JSC was aware of the incident. Judge Mjali was appointed as a Judge in the High Court in 2010 and her application for a transfer in 2014 did not receive any negative comments. According to Judicial Service Commission Act[356] Regulation 4, a judge who wants to be transferred must apply for a position and go through the usual interview process with the JSC. While it was expected that Judge Mjali's interview would go effortlessly, taking into consideration her judicial experience and the serious reason behind her application for transfer, the JSC did not show any support or empathy for the difficult circumstances that Judge Mjali and her children were facing. Even after Judge Mjali publicly explained the situation that her family was going through and the fact that her children were traumatised by what had happened and were left without a parent supervision after her husband's arrest, the JSC continued to question her reason for requesting a transfer and repeatedly asked her to justify her plea to move from a rural court to one nearer an urban centre. The JSC even went so far as to ask why she did not send her children to boarding school. After the complete lack of empathy and understanding from the members of the JSC and the President of her division, Judge Mjali was left in tears and her application for transfer was rejected. Notably, the JSC did not disclose their reasons on why they did not recommend Judge Mjali and left the vacancy open. That is another example of the failure of the JSC to provide a transparent interviewing process. The legal community was shocked and devastated by the negative attitude that Judge Mjali was met with during her interview. The incident has been discussed by various other interview participants who criticised the JSC's failure to provide

[354] Tabeth Masengu op cit note 273.
[355] Ibid.
[356] 9 of 1994.

support and consider the challenges that women judges, especially those who have children, continue to face.

This case is just one example of how the judiciary fails to accommodate women's needs and address the challenges that women face. The message sent by the JSC at the interview was that the JSC would not 'cut [women] any slack' for being mothers.[357] Judges Matter, notes that women are more likely than men to request transfers due to family circumstances, as many women bear the responsibility of serving as the primary caregiver.[358] However, they argue that the JSC does not seem to understand the different needs of male and female judges and to, therefore, provide the necessary protection for women.[359]

### 5.3. CONCLUSION

It became evident form the discussion presented above that the root causes of discrimination against women in the judicial profession in South Africa are far from being eliminated. The discussion demonstrated that, to this day, judicial leaders who serve as key actors in the gender transformation of the judiciary continue to express discriminatory views against women and limit women's opportunities within the judiciary. The analyses of the persistent patriarchal attitudes during judicial appointment processes highlights the consequences of the failure of the current legislation to adopt a gender-responsive approach in dealing with gender discrimination in the workplace. Furthermore, it was demonstrated that the lack of a transparent shortlisting process in judicial appointments and the lack of a clear criteria in the appointment of judges in senior positions are key obstacles to achieving gender diversity on the Bench. This illustrates that the current laws on the protection of women's rights are not properly implemented.

## CHAPTER VI. CONCLUSION AND RECOMMENDATIONS

In conclusion, this thesis has shed light on the persistent issue of discrimination against women within the judiciary in South Africa which leads to the inadequate representation of women on the Bench. Despite the robust efforts under international, regional and domestic law to protect women's rights to equality and non-discrimination in all spheres of life, the elimination of root causes such as gender stereotypes and patriarchal attitudes has proven extremely difficult. The discussion provided above demonstrates that while CEDAW remains the most relevant

[357] Masengu, op cit note 273.
[358] Judges Matter, 'Transfers Between Courts: the Unspoken Shaming of Women' (2021) available at: *Transfers between courts: the unspoken shaming of women - Judges Matter, accessed on: 5 December 2023.*
[359] Ibid.

international instrument on the promotion of gender equality, it fails to properly address the unique struggles of African women and to adopt an intersectionality approach. Furthermore, despite adopting a more holistic approach in the evaluation and the protection of the rights of women in Africa, the Maputo Protocol and the SADC Protocol contain significant gaps regarding the promotion of women's economic advancement. For example, the Maputo Protocol has focused on increasing representation of women particularly in the political field, failing to ensure adequate representation of women in other spheres. On the other hand, while the SADC Protocol has filled this gap by setting specific guidelines and calling for the representation of women in all fields, including the judiciary, it has omitted to protect women's autonomy to choose the number of children they want to have and the decision concerning the spacing between these children. That, however, is a crucial aspect of ensuring women's advancement in the judiciary as childcare is one of the key factors leading to gender inequality in the workplace.

In addition, this thesis observed a failure on the part of the South African government follow its international obligations on the promotion of economic gender equality, by omitting to enact the WEGE Bill. While a draft of the Bill has been provided in 2014, it fails to properly address the root cases of discrimination against women and adopt a gender-responsive approach in achieving gender equality. That is also the case under the EEA which ahs been criticised for the same reasons.

Finally, the discussion in Chapter V examined the multifaceted nature of discrimination against women in the South African judiciary, ranging from embedded prejudices and cultural stereotypes to structural inequalities and institutional obstacles. It analysed the way these factors contribute to the underrepresentation of women in judicial positions and undermine their authority within the legal profession. Notably, it was argued that it is, in fact, members of the JSC, among other important actors in the judicial transformation, that fail to promote women's advancement in the legal profession and protect women in the judiciary. The omission of the JSC to adopt a transparent shortlisting procedure for judicial appointments and to implement separate criteria for the appointment of judges in senior positions, has resulted in subsequent failure effectively implement the current measures in place and ensure a *de facto* equality between men and women on the Bench and to protect the principle of non-discrimination enshrined in the Constitution.

The exclusion of women from the judiciary not only results in the failure of the JSC to broadly reflect the gender compositions of the country, as required under s.174 of the Constitution, but

also compromises the legitimacy of the judiciary and the implementation of the fundamental values of the Constitution. This failure underscores the need for a more rigorous and holistic approach in addressing the root causes of discrimination and advancing substantive equality within the judiciary. Therefore, this thesis makes the following recommendations:

Firstly, this thesis calls for the immediate implementation by the JSC of a policy plan aimed at achieving 50 per cent representation of women at the various levels of the judiciary. In that sense, this thesis further recommends the enactment of the WEGE Bill into law. However, since it was discussed that the current text of the WEGE Bill fails to address the root causes of gender discrimination in the country, it is unlikely for the Bill to achieve its purpose. Therefore, before passing the Bill into law, the government should make significant amendments to the Bill as to adopt a gender-sensitive and gender-responsive approach in addressing patriarchy and gender stereotypes. In addition, as required by the Beijing Platform for Action, the government should implement gender mainstreaming strategies across all government departments and institutions, ensuring that gender perspectives are integrated into policy development, planning, budgeting, and service delivery.

Furthermore, the government should take positive steps in strengthening the monitoring mechanisms on the implementation of current legislation on the promotion of gender equality in the workplace such as the EEA. Specifically, it should enhance collaboration and cooperative strategies among various actors working on the promotion of gender equality such as the GGE, the Ministry of Women, Children, and People with Disabilities, the Ministry of Labour and the Employment Equity Commission to oversee and monitor endeavours towards gender inclusivity in workplace.[360] Finally, it the EEA should expressly recognise the intersectionality of gender with other forms of discrimination, such as race, disability, and sexual orientation, and adopt a gender-responsive approach in addressing gender inequality in the work place. In other words, it should be amended as to recognise that women are disproportionately affected by gender-based discrimination and address the roots of such discrimination against women.

In terms of improving the representation of women in leadership positions, the JSC should adopt clear guidelines setting out separate, more transparent criteria for the appointment of

[360] South African Human Rights Commission Equality Report Commentaries on Equality: Race, Gender, Disability and LGBTI Issues (2012) available at: *Assessing Gender Equity in Employment: (sahrc.org.za)*, accessed on 7 January 2024.

judges in senior positions.[361] Furthermore, the JSC should adopt a transparent shortlisting process for judicial vacancies in the appointing of both permanent and acting judicial officers.

By implementing these recommendations, South Africa can enhance the legal protection of women's rights to equality within the judiciary and contribute to building a more inclusive and equitable justice system.

[361] The Institute for African Women in Law 'South African Judiciary' (2023) available at: *https://www.africanwomeninlaw.com/_files/ugd/229dcd_46623786de7b45cdbcf1a9177b40e691.pdf, a*ccessed on: 03 December 2023.

# BIBLIOGRAPHY

## Primary Sources


### International Legislation

- Universal Declaration on Human Rights, 1949
- UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249
- UN General Assembly, *International Covenant on Civil and Political Rights, 16 December 1966*, United Nations, Treaty Series, vol. 999
- UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993
- United Nations, *Beijing Declaration and Platform of Action*, adopted at the Fourth World Conference on Women, 27 October 1995

### Regional Legislation

- African Union, *Charter on Human and People's Rights*
- African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003
- Southern African Development Community, *Southern African Protocol on Gender and Development,* 2008

### National Legislation

- Constitution of the Republic of South Africa, 1996
- Employment Equity Act 55 of 1998
- The Judicial Service Commission Act 9 of 1994
- The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
- The Labour Relations Act 66 of 1995
- The Attorneys Act 53 of 1979 (Repealed)
- The Legal Practice Act 28 of 2014

- Women Empowerment and Gender Equality Bill, B50-2013, (2013)

**National Case Law:**

- Naidoo v Minister of Safety and Security & Another 2013 (3) SA 486 (LC)
- Minister of Finance and Other v. Van Heerden 2004 (6) SA 121 (CC)
- Hassam v Jacobs N.O. [2009] ZACC 19
- Mahlangu and Another v Minister of Labour and Others [2020] ZACC 24
- Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others (CCT 03/04) [2004] ZACC 10

**Foreign Case Law**

- Griggs v. Duke Power Co., 401 U.S. 424 (1971) (US)
- Andrews v. The Law Society of British Columbia and the Attorney General of British Columbia 3 (1996) (Canada)


## Secondary Sources


**Journal Articles**

- Allen A. 'Intersectional Human Rights at CEDAW: Promises, Transmissions and Impact' (2018) *York University*
- Albertyn, Catherine 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR*, 253
- Albertyn, Catherine 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' (2018) 34 *SAJHR* 441
- Bonthuys, Elsie 'Gender and Race in South African Judicial Appointments' (2015) 23 *Fem Leg Stud* 127
- Campbell, Meghan 'CEDAW and Women's Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination' (2015) 11 *Revista Direito Gv, São Paulo* 479

- M. Clancy 'Women and Apartheid' (2017) Department of History, Bridgewater State University *https://doi.org/10.1093/acrefore/9780190277734.013.184*
- Crenshaw, K. 'Demarginalizing the intersection of race and sex: a black feminist critique of anti-discrimination doctrine, feminist theory, and anti-racist policies' (1989) University of Chicago Legal Forum, Vol. 4
- Cusack S. & Pusey L. 'CEDAW and the Rights to Non-Discrimination and Equality' (2013) 14 *Melb J Int'l L* 54
- Dawuni, J. & Kang, A 'Her ladyship chief justice: the rise of female leaders in the judiciary in Africa' (2015) 62 *Africa Today*, 45-69
- O'Donovan, Darren 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in Laura Cahillane and Jennifer Schweppe (ed) *Legal Research Methods: Principles and Practicalities* (2016)
- Jean H. Baker, 'The Long Road to Suffrage: How Women Won the Right to Vote' (2020) 99 *Foreign Affairs* 154
- Bentley, Kristina 'Women's Human Rights & the Feminisation of Poverty in South Africa' (2004) 31 *Review of African Political Economy* 247
- Hills J. 'Addressing Gender Quotas in South Africa: Women Empowerment and Gender Equality Legislation' (2015) 20 *Deakin Law Review* 153 -184
- MacKinnon C., 'Substantive equality revisited: A reply to Sandra Fredman', (2016), Oxford University Press and New York University School of Law, 739 – 746
- Forere, Malebakeng and Stone, Lee 'The SADC Protocol on Gender and Development: Duplication or complementarity of the African Union Protocol on Women's Rights?'
- Wesson, Murray & Du Plessis, Max 'Fifteen Years On: Central Issues Relating to the Transformation of the South African Judiciary' (2008) 24 *SAJHR* 187
- Ntshangase M. & Matabane T. 'The History of Gender Inequality: Analysis of Gender Inequality as a Colonial Legacy in Africa' (2022) 11 *African Journal of Gender, Society and Development* 185
- Ntuli HS, 'Conflict between Traditional Cultural Practices for Women and South African Government Laws' (2019) Gender & Behaviour, ISSN: 1596- 9231, 12710

- Zirima, P. 'SADC Protocol: From commitments to action' (2009) 9 *Southern African News Features*
- Fredman, Sandra 'Engendering Socio-Economic Rights' (2009) 25 *SAJHR* 410
- Bharati, Sangita 'Violations of Women's Human Rights' (2017) 5 *International Journal of Multidisciplinary and Current Research*
- Penelope Andrews 'The South African Judicial Appointments Process' (2006) 44 *Osgoode Hall Law Journal* 565
- Crush, J. 'The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa' (2001) 38 *International Migration* 103
- Phooko M. and Mahomed S 'The challenges to gender equality in the legal profession in South Africa: A case for substantive equality as a means for achieving gender transformation' (2021) 21 *African Human Rights Law Journal* 494
- Sandhu, Simrandip 'Women's Rights to Vote and Laws Against Gender Discrimination: The Makeup for Gender Equality and Women's Empowerment' (2021) 13 *UC Merced Undergraduate Research Journal*
- Sibanda N. 'Challenges and prospects of the South African Women Empowerment and Gender Equality Bill' (2016) University of the Witwatersrand, Johannesburg
- Sen, A. 'Inequality Reexamined' 1995 Oxford Press, available at: *https://doi.org/10.1093/0198289286.001.0001*, accessed on 17 September 2023
- Smit, Nicola 'The Contribution of Labour Law and Non-discrimination Law to Empowerment and Social Justice in an Unequal Society: A South African Perspective' (2013) 29 *International Journal of Comparative Labour Law and Industrial Relations* 375
- Smit, D 'Joining the "Old Boys" Club': Equality for Women in the South African Judiciary and Other Male-Dominated Workplaces' (2020) 41 *ILJ (Juta)* 4
- Tamale, Sylvia 'The Right to Culture and the Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa,' (2008), 16 *Feminist Legal Studies* 47
- Masengu, Tabeth 'It's a Man's World: Barriers to Gender Transformation in the South African Judiciary: Perspectives from Women Advocates and Attorneys' (2016) 23 *International Journal of the Legal Profession*

- Masengu, Tabeth 'A Perspective on Women and Leadership in the South African Judiciary' (2015) 31 *SAJHR* 655
- Masengu, Tabeth 'The Judicial Service Commission and the appointment of Women: more to it than meets the eye' (2020) 27 *International Journal of the Legal* 161
- Viljoen, F. 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11
- Khuzwayo, Zuziwe 'Separate Space: An approach to addressing gender inequality in the workplace' (2016) 17 *Journal of International Women's Studies* 91


**Chapters of Books**


- Agbaje, Idowu 'Colonialism and Gender in Africa: A Critical History' in Yacob-Haliso, O. Falola, T. (eds) *The Palgrave Handbook of African Women's Studies* (2021), 1275–1294
- Andrews, Penelope 'Pursuing Gender Equality Through the Courts, the Role of South Africa's Women Judges' in J. Jarpa Dawuni *Gender, Judging and the Courts in Africa* (2021) 1st edition, 189–203
- Fredman, Sandra 'Challenging the Frontiers of Gender Equality: Women at Work Chapter Author(s)' in Rebecca J. Cook *Frontiers of Gender Equality,* (2023), 38-54
- Wesson, Murray and Gilbert, Marcus 'The Transformation of the Judiciary' in C. Jenkins & M. Du Plessis (Eds.), *Law, Nation-Building and Transformation: The South African Experience in Perspective* (Series on Transitional Justice) (2014)


**Reports**


- Canadian Institutes of Health Research, available at: *https://cihr-irsc.gc.ca/e/48642.html*
- Commission for Gender Equality, Discussion Document on Gender Transformation in the Judiciary and the Legal Sector (2018) available at: **Commission for Gender Equality Act: Gender transformation in the Judiciary and the Legal Sector (cge.org.za)*, accessed on: 15 November 2023.

- Commission for Gender Equality 'Lack of Gender Transformation in the Judiciary Investigative Report' (2016) at.11, available at: *https://static.pmg.org.za/171031CGE-Lack-of-Gender-.pdf*, accessed on: 17 November 2023
- Commission for Employment Equity, 23rd Annual Report (2022/2023), available at*: *23rd-CEE-Annual-Report-2022-to-2023.pdf (eecms.co.za),* accessed on: 9 December 2023
- Report of the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, 'Participation of women in the administration of justice' (2021)
- South African Chapter of International Association of Women Judges, Justice Mandisa Maya: Deputy Chief Judges of South Africa, available at: *https://www.justice.gov.za/saiawj/docs/Newsletter-2022-Jul-SACIAWJ.pdf*
- Sonke Gender Justice and DGRU 'Gender Transformation of the Judiciary Project 2013–2014' (2015) available at: https://genderjustice.org.za/publication/gender-transformation-of-the-judiciary-project-2013-2014/ accessed on: 10 November 2023
- The Judiciary Performance Report for the 2020/21 financial year, available at: *Judiciary_Newsletter_December_2021.pdf*
- The Institute for African Women in Law 'South African Judiciary' (2023) available at: *https://www.africanwomeninlaw.com/_files/ugd/229dcd_46623786de7b45cdbcf1a9177b40e691.pdf,* accessed on: 03 December 2023
- The Institute for African Women in Law 'The Rise of African Women Chief Justices: A Missed Opportunity for South Africa?' (2023) available at: *https://www.africanwomeninlaw.com/post/the-rise-of-african-women-chief-justices-a-missed-opportunity-for-southafrica#:~:text=As%20of%202021%2C%2043%25%20percent,the%20superior%20courts%20were%20women,* accessed on: 03 December 2023
- United States Senate, 'Woman Suffrage Centennial', available at: *https://www.senate.gov/about/women-of-the-senate/nineteenth-amendment-vertical-timeline.htm#:~:text=Approved%20by%20the%20Senate%20on,Nineteenth%20Amendment%20to%20the%20Constitution*

- UN, 'The Sustainable Development Goals Report: Special Edition' (2023), available at: *https://unstats.un.org/sdgs/report/2023/The-Sustainable-Development-Goals-Report-2023.pdf*
- UN Committee on the Rights of Persons with Disabilities, General Comment No. 6 on Equality and Non-Discrimination, (2018), available at: *https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/119/05/PDF/G1811905.pdf?OpenElement*
- World Health Organisation (WHO), Gender and Health, available at: *https://www.who.int/health-topics/gender#tab=tab_1*
- UN Treaty Body Database, Ratification Status for CEDAW, available at: *https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en*
- The United Nations Network on Racial Discrimination and Protection of Minorities, Guidance Note on Intersectionality, Racial Discrimination & Protection of Minorities, available at: *GuidanceNoteonIntersectionality.pdf (ohchr.org)*
- United Nations and the Rule of Law, 'Equality and Non-Discrimination', available at: *https://www.un.org/ruleoflaw/thematic-areas/human-rights/equality-and-non-discrimination/#*
- The World Bank Report on *Inequality in Southern Africa: An Assessment of the Southern African Custom Union* (2023) available at *https://documents1.worldbank.org/curated/en/099125303072236903/pdf/P1649270c02a1f06b0a3ae02e57eadd7a82.pdf*
- Women's Legal Centre & Equality and Justice 'Tipping the Scales: Realities and Remedies for Gender Transformation of the Legal Profession' (2018)


**General Recommendations and Concluding Observations**


- UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, (2004), para 7, available at: *https://www.refworld.org/docid/453882a7e0.html*

- CESCR, General Comment No. 20, 'Non-discrimination in economic, social and cultural rights', (2009), para 27, available at: *tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F20&Lang=en*
- UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Concluding observations of the Committee on the Elimination of Discrimination against Women – South Africa*, 5 April 2011, CEDAW/C/ZAF/CO/4, available at: **CEDAW/C/ALB/CO/3/CRP (icj.org)*


**Websites**


- Judges Matter 'Women in Judicial Leadership' (2022) available at: *Women in judicial leadership - Judges Matter*, accessed on 9 November 2023.
- Judges Matter 'Transfers Between Courts: the Unspoken Shaming of Women' (2021) available at: *Transfers between courts: the unspoken shaming of women - Judges Matter*, accessed on
- Judges Matter 'Women and the Bench: What Justice Mandisa Maya's Interview Tells Us About Women's Place in the Judiciary' (2022) available at: https://www.judgesmatter.co.za/opinions/women-and-the-bench-what-justice-mandisa-mayas-interview-tells-us-about-a-womens-place-in-the-judiciary accessed on 5 December 2023
- South African History Online, 'The Role of Women in the Struggle against Apartheid', 15 July 1980, available at: *https://www.sahistory.org.za/archive/role-women-struggle-against-apartheid-15-july-1980*
- History of the Court, The Constitutional Court, available at: *History (concourt.org.za)*


**Dissertations**


- Keevy, I *African Philosophical Values and Constitutionalism: A Feminist Perspective on Ubuntu as a Constitutional Value* (Doctor Legum Thesis, Faculty of Law, University of the Free State Bloemfontein, 2008)

- Masengu, Tabeth *What Lies beneath : The Complex Nature of Appointing Women Judges in Zambia and South Africa* (Universiteit Gent, Faculteit Recht en Criminologie, 2020)
- Sibanda N. *Challenges and prospects of the South African Women Empowerment and Gender Equality Bill* (University of the Witwatersrand, Johannesburg, 2016)


**Public Lectures/ Presentations**


- Akatsa-Bukachi, M 'African Feminism, does it exist?' Presentation made at the Tanzania Gender Networking Programme (2005) *Gender Festival*, 1-14
- Judge Johann Kriegler 'Can Judicial Independence Survive Transformation?' (2009) a public lecture delivered at the Wits School of Law, available at: *Can Judicial Independence Survive Transformation? – A public lecture delivered by Judge Johann Kriegler at the Wits School of Law - Constitutionally Speaking,* accessed on: 7th December 2023.
- Traverso, J 'Transformation of the Judiciary: Changing the Racial and Gender Composition' Presentation at Roundtable Discussion Hosted by the Inst. for Democracy and the Univ. of Cape Town's Democratic Governance and Rights Unit