

**PROGRESSION OF SOUTH AFRICAN WOMEN IN THE
WORKPLACE: A STUDY OF THE RIGHT TO
DEVELOPMENT AND RELEVANT LEGAL FRAMEWORK
THAT UNDERPINS THE ERADICATION OF GENDER
DISPARITY IN THE WORKPLACE**

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DECLARATION

By submitting this dissertation, I hereby declare that the entirety of the work contained therein is my own original work, unless specifically indicated to the contrary in this text and that the work, in its entirety or in part, has not been previously submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.



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ABSTRACT

High levels of gender inequality in South African workplaces are a primary contributing factor towards women's lack of career progression. The fundamental purpose of this study was to identify the reasons why women continue to be one of the most vulnerable and marginalised group in the workplace, despite there being international, regional and domestic laws as well as policies and measures to assist the development of women.

This dissertation explores particular international and regional instruments pertaining to the right to development and women rights in order to determine their significance in advancing the position of women in the workplace. It was found that due to the lack of effective enforcement mechanisms minimal adjustments are being made to national laws. An in-depth analysis of South Africa's current legal framework promoting gender equality, non-discrimination and fair labour practices revealed while the country's constitutional and labour law framework provide numerous avenues to advance women's progression in the workplace, employers' failure to comply with such provisions or half-hearted efforts to implement them, disables women's right to development. Finally, South Africa's current programme of action aimed at giving practical effect to the country's gender transformation agenda was highlighted. In prioritising gender parity, the government through various policies seeks to reshape society and the country's workforce by recognising the challenges impeding women's development. An analysis of the South African judiciary and mining sector revealed that the gap between laws and policies and the situation on the ground in workplaces across the country, women's right to development appear to be stifled. Therefore, this dissertation has provided recommendations directly aimed at addressing the barriers which impede women's right to development and ultimately prevent their progression in the workplace. The goal is to ensure the success of both genders coexisting in the workplace, without the presence of dominance or discrimination.

LIST OF ABBREVIATIONS

African Commission	African Commission on Human and People’s Rights
ACHPR	African Charter on Human and Peoples Rights
African Women’s Protocol	Optional Protocol to the African Charter on Human and Peoples Rights on the Right of Women in Africa (Maputo Protocol)
AU	African Union
BBEEA	Broad-Based Black Economic Empowerment Act
Mining Charter	Broad-based Socio-Economic Empowerment Charter
BCEA	Basic Conditions of Employment Act
CC	Constitutional Court
CCMA	Commission for Conciliation, Medication and Arbitration
CEDAW	Convention on the Elimination of all Forms of Discrimination
Optional Protocol to CEDAW	Optional Protocol to the Convention on the Elimination of all Forms of Discrimination
CEE	Commission for Employment Equity
CGE	Commission for Gender Equality
CGEA	Commission for Gender Equality Act
DMR	Department of Mineral Resources
Draft Mining Charter	The Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry
EEA	Employment Equity Act
EEAA	Employment Equity Amendment Act
EEP	Employment Equity Plan
DOL	Department of Labour
GFP	Gender Focal Points
IAWJ	International Association of Women Judges
ICCPR	International Covenant on Civil and Political Rights
ICSECR	International Covenant on Social, Economic and Cultural Rights
JSC	Judicial Service Commission
ILO	International Labour Organisation
LC	Labour Court
LAC	Labour Appeal Court

LRA	Labour Relations Act
MDG	Millennium Development Goals
MPRDA	Mineral and Petroleum Resources Development Act
NEDLAC	National Economic Development and Labour Council
NEDLACA	National Economic Development and Labour Council Act
NGM	National Gender Machinery
NPD	National Development Plan
PEPUDA	Promotion of Equality and the Prevention of Unfair Discrimination
SAHRC	South African Human Rights Commission
SAWIMA	South African Women in Mining Association
SCA	Supreme Court of Appeal
SDA	Skills Development Act
SDG	Sustainable Development Goals
StatSA	Statistics South Africa
The Bill	National Minimum Wage Bill
WIMSA	Women in Mining South Africa
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRD	United National Declaration on the Right to Development

KEY WORDS

Women, right to development, gender equality, workplace, South Africa, and legal frameworks.

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CHAPTER 1

INTRODUCTION

1.1 Background

One of the main challenges facing the South African labour workforce is the high prevalence of gender inequality, which ultimately is a primary contributing factor towards women's lack of career progression. Despite South Africa's transition to a constitutional democracy and the plethora of laws, policies and measures adopted to assist this vulnerable and marginalised group, women continue to be treated as inferior and subordinate to men.

In light of the above, the United Nations Declaration on the Right to Development (UNDRD) affirms that all people have a right to development:

‘The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized’.¹

The right to development plays a vital role in ensuring that all women are accorded equal opportunities and are treated fairly. This encompasses women's right to expand their skills, knowledge and experience in order to progress in their chosen occupational fields. Stevens and Ntlama argue that:

‘the right to development is linked to many of the rights that are included in the Constitution,² such as the rights to equality, dignity, life, and freedom and security of the person’.³

The authors add that these rights which form the core values of South Africa's Bill of Rights need to be upheld as they directly promote women's right to development.⁴ Indeed, Stevens and Ntlama describe the right to development as a ‘beacon of hope’⁵ for women across the world, as it signifies prosperity and a better life.

¹ G.A. Res. 41/128, U.N. Doc. AIRES/41/128 (Dec.4, 1986) (hereinafter: UNDRD). The resolution was adopted by a majority of 146 to 1 (United States) with 8 abstentions. See Article 1(1) of UNDRD.

² The Constitution of the Republic of South Africa of 1996.

³ C Stevens & N Ntlama ‘An overview of South Africa's institutional framework in promoting women's right to development’ (2016) 20 *Law, Democracy & Development* 49.

⁴ Ibid.

⁵ R Ozoemena & M Hansungule ‘Development as a right in Africa: changing attitude for the realisation of women's substantive citizenship’ (2014) 18 *Law, Democracy and Development* 224.

The democratic South African government has made significant strides in affording all South Africans' access to their fundamental human rights. The living expression of these fundamental rights can be seen in, the Labour Relations Act (LRA)⁶ and the Employment Equity Act (EEA),⁷ which are particularly relevant to this study, aim, *inter alia*, to ensure 'social justice, labour peace and the democratisation of the workplace'.⁸ It also seeks to promote 'equal opportunity and fair treatment in employment through the elimination of unfair discrimination' and adopting measures that will ensure designated groups are visibly represented in all occupational levels.⁹

Notwithstanding these constitutional and legislative provisions, the South African labour workforce still witnesses great disparities between men and women. Janine Hicks, a commissioner at the Commission for Gender Equality (CGE),¹⁰ expresses dissatisfaction with the lacklustre approach taken by employers in realising gender transformation in the workplace.¹¹ Hicks, references the Businesswomen's Association 2010 statistics in her opinion piece which revealed that:

- '4.5% of the CEOs and 19.3% of the executive managers of the approximately 315 Johannesburg Stock Exchange- listed companies are women
- 73 companies listed on the JSE do not have a woman on their boards of directors
- 16.6% of company directors are women
- 6% of company chairs are women'.¹²

These statistics show that women have not yet succeeded in achieving equitable representation in the workplace. It is also evident in the fact that women workers are not accorded equal opportunities, equal wages and fair treatment. According to Statistics South Africa (StatsSA):¹³

⁶ Labour Relations Act 66 of 1995 (hereinafter: LRA).

⁷ Employment Equity Act 55 of 1998 (hereinafter: EEA).

⁸ Section 1 of the LRA.

⁹ Section 2 of the EEA.

¹⁰ Section 181(1) (d) of the Constitution.

¹¹ Sponsored Feature 'Diversity leads to better companies' Mail and Guardian Online 26 August 2011 available at <https://mg.co.za/article/2011-08-26-diversity-leads-to-better-companies>, accessed on 1 March 2018.

¹² Sponsored Feature 'Diversity leads to better companies' Mail and Guardian Online 26 August 2011 available at <https://mg.co.za/article/2011-08-26-diversity-leads-to-better-companies>, accessed on 1 March 2018.

¹³ Established in terms of Act 6 of 1999.

‘South African women generally bear the brunt of unemployment, constitute the majority of casual or contract workers, generally occupy positions in low-wage sectors, and are poorly represented in senior and top management positions’.¹⁴

Further official statistics show, that between 2009 and 2014, the majority of managerial and professional positions in countries were dominated by men.¹⁵ Apart from the economic implications of this situation, being treated as second class instils self-doubt among women in relation to their capabilities. This ultimately leads to women feeling degraded, since such perceptions violate their right to human dignity¹⁶ and freedom of association.¹⁷

On-going inequality results in a vicious cycle of women’s inferiority to men. It is clear that women’s fundamental human rights will not be fully realised until the challenges they confront in the workplace are addressed. It is against this background that this study examines the barriers to women’s progression in the workplace in order to ultimately find a way forward to ensure the success of both genders, coexisting in the workplace, without the presence of dominance or discrimination.¹⁸

1.2 Rationale for the Study

Gender disparity and unequal treatment of women are historical and contemporary features of the South African workplace. The proverbial glass ceiling prevents many women from progressing in their chosen occupations.¹⁹ This study acknowledges that South Africa is built on an unequal gender system. It also recognises the challenges women have faced and the struggles they have undertaken to obtain basic social, political, cultural and economic rights. The study’s main objective is thus to offer recommendations that will support the establishment of workplaces that promote equal representation and women’s development.

It is important to note that this not an isolated issue, but rather a matter of global concern. International, regional and domestic legal frameworks that aim to address gender inequality are

¹⁴ Statistics South Africa *Millennium Development Goals 3: Promote gender equality and empower women 2015* (2015) 12. (Herein: Millennium Development Goals 3).

¹⁵ Statistics South Africa ‘Labour market dynamics in South Africa, 2015’ available at <https://www.statssa.gov.za/publications/Report-02-11-02/Report-02-11-022015.pdf>, accessed on 20 February 2018.

¹⁶ Section 10 of the Constitution.

¹⁷ Section 18 of the Constitution.

¹⁸ P Martin & A Bernard ‘The experience of women in male-dominated occupations: a constructivist grounded theory inquiry’ (2013) 39 (2) *South African Journal of Industrial Psychology* 2.

¹⁹ D Botha ‘Barriers to career advancement of women in mining: A qualitative analysis’ (2017) 41 *South African Journal of Labour Relations* 25.

thus analysed. The instruments discussed in Chapters 2 and 3 include the UN Declaration on the Right to Development (UNDRD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),²⁰ International Labour Organisation (ILO) standards and guidelines,²¹ the Southern African Development Community (SADC) Protocol on Gender and Development,²² and the LRA and EEA, amongst others.

In addition to the above, the central projects and policies which form part of the South African government's national gender transformation agenda will also be highlighted. These include the National Development Plan (NDP) 2030, the National Gender Policy Framework on Women's Empowerment and Gender Equality and the various initiatives adopted to achieve the UN's Sustainable Development Goals (SDGs) 2030 and the ILO's standards and guidelines.

The aim is to identify practical plans to address current labour standards, practices and policies in order to promote women workers' rights and gender parity in the workplace.

1.3 Preliminary Literature Review

It is off alarming concern that the high levels of gender inequality and a lack of developmental opportunities for women workers are persistent features of the South African workplace that cut across occupational levels. A survey conducted in 2016 found that, globally, women occupy only 24% of senior and top leadership positions, while 33% of businesses reported that they had no women in such positions.²³ This is one of numerous studies that show an elevated level of male domination in senior and top management positions and this has become the norm in most South African companies.²⁴ In light of these statistics, Lagerberg observes that:

²⁰ Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1) (hereinafter: CEDAW). South Africa signed the Convention on 29 January 1993 and ratified it on 15 December 1995.

²¹ International Labour Organisation 'Introduction to International Labour Standards' available at <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/lang--en/index.htm>, accessed on 6 March 2018.

²² The SADC Protocol on Gender and Development was signed in August 2008 and was entered into force on 22 February 2013 (hereinafter: SADC Gender Protocol).

²³ F Lagerberg 'Senior business roles held by women up slightly to 24%' (8 March 2016) available at <https://www.granthornton.global/en/press/press-releases-2016/annual-global-survey-finds-senior-business-roles-held-by-women-up-slightly-to-24/>, accessed on 10 March 2018.

²⁴ Statistics South Africa 'Labour market dynamics in South Africa, 2015' available at <https://www.statssa.gov.za/publications/Report-02-11-02/Report-02-11-022015.pdf>, accessed on 20 February 2018.

‘Companies across developed nations have talked the talk on diversity in leadership for long enough. It’s time to put their promises into practice and deliver results. We know that businesses with diverse workforces can outperform their more homogenous peers and are better positioned to adapt to a rapidly changing global business environment’.²⁵

Moreover, within the South African context, patriarchy, stereotypes and sexist norms have contributed exponentially to gender inequality and women’s lack of development. Martin argues that:

‘...the challenges women face in attempting to penetrate successfully and persevere in historically male-dominated work environments emanate from traditional gender hierarchies and norms that prevail in the family and society’.²⁶

However, the flaw in Martin’s qualitative study is that three of the five participants had worked in their respective fields for less than two years.²⁷ This research is of the view that it is premature to discuss the participants’ advancement opportunities when they are just starting out. Therefore, the study should rather have targeted female employees that had proved their capabilities and had ample experience, but were still unable to progress within the company.

Further, Rarieya’s research focused on the stereotypes that perpetuate views on women’s capabilities.²⁸ The author relates real life cases where women attest to the fact that the root of marginalisation and unequal treatment of women in workplaces begins with employment policies.²⁹ Similarly, Martin agrees that male norms and gender prejudice have translated into workplace policies and practices. While some employers may appear to be complying with South Africa’s employment laws, subtle ways are found to ensure that male employees dominate executive positions and that the intake of women (who are often regarded as a liability) is restricted.

Bobbitt-Zeher notes that stereotypes that regard women as incompetent, unskilled, underdeveloped and not capable of holding executive positions reinforce the status quo. A case in

²⁵ F Lagerberg ‘Senior business roles held by women up slightly to 24%’ (8 March 2016) available at <https://www.grantthornton.global/en/press/press-releases-2016/annual-global-survey-finds-senior-business-roles-held-by-women-up-slightly-to-24/>, accessed on 10 March 2018.

²⁶ Martin & Bernard (note 18 above; 1).

²⁷ Ibid 4.

²⁸ J Rarieya ‘Women leaders in the workplace: The intangible barrier’ (2013), Human Sciences Research Council available at <http://www.hsrc.ac.za/en/review/hsrc-review-july-2013/women-leaders-in-the-workplace-the-intangible-barrier>, accessed on 22 February 2018.

²⁹ J Rarieya ‘Women leaders in the workplace: The intangible barrier’ (2013), Human Sciences Research Council available at <http://www.hsrc.ac.za/en/review/hsrc-review-july-2013/women-leaders-in-the-workplace-the-intangible-barrier>, accessed on 22 February 2018.

point is the South African judiciary. Freddy Mnyongani says that presently, the judiciary remains highly white male dominated, to the exclusion of all other races and genders that collectively make up the majority population in South Africa.³⁰ There seems to be a reluctant attitude towards engaging with views of the majority which call for a diverse and balanced judicial system.³¹ Further, Nomfundo Manyathi-Jele questions how fair the judiciary can be if women are denied positions on the bench as a result of generalised norms attached to being female.³² These authors collectively agree that such stereotypes remain visible in many contemporary workplaces and hinder the development of women.³³

Kasturi Naidu notes that patriarchy is also a prominent feature of all South African cultures:

‘This division of roles is evident not only in Western cultures in South Africa. It is also a significant feature of African, Hindu and Muslim cultures. Thus traditionally, across the wide spectrum of cultures in South Africa, women remained absent from the workplace’.³⁴

Naidu’s research was conducted in 1998. There have since been numerous new developments, including amendments to the EEA which forms the basis of the author’s research.³⁵ This study thus provides a more current framework against which to assess the challenges identified in Naidu’s research.

As noted previously, research has shown that women play a vital and productive role in many companies, in turn, fuelling the economy. Stones states that companies with women on their board tend to outperform their competitors.³⁶ She adds that this is because ‘women bring with them a certain level of leadership qualities, participative decision making and people development’ skills.³⁷ Stone cites a study conducted by Grant Thornton’s International Business Report that found that companies gained an edge over their competitors simply by employing more women in top and senior management positions.³⁸ Hicks note that:

³⁰ F Mnyongani ‘Whose morality? Towards a legal profession with an ethical content that is Africa’ (2009) 24 *SAPR/PL* 122 & 129.

³¹ *Ibid* 122.

³² N Manyathi-Jele ‘Women, the judiciary and transformation’ *De Rebus* 1 October 2018 at 11-13.

³³ Botha (note 19 above; 25). See D Bobbitt-Zeher ‘Gender Discrimination at work: Connecting Gender Stereotypes, Institutional Policies, and Gender Composition of Workplace’ (2011) 25(6) *Gender and Society* 771.

³⁴ K M Naidu *Indirect discrimination against women in the workplace* (unpublished LLM thesis, University of Natal, 1997) 74.

³⁵ The Employment Equity Amendment Act 47 of 2013 (hereinafter: EEAA).

³⁶ L Stones ‘Too many women stuck in the middle’ *Business Day* 01 July 2013 at 7.

³⁷ *Ibid*.

³⁸ Grant Thornton ‘Rise in numbers of women in business: More women making it into senior management roles, but mature economies lagging behind’ (15 August 2014) available at

‘Interestingly, from a corporate bottom line perspective, studies connecting corporate performance and gender diversity demonstrate that companies with a higher representation of women in senior management positions financially out-perform those with proportionately fewer women at the top—suggesting a business case for diversity. There is hard data to support the link between gender diversity and corporate performance—companies that understand the competitive advantage of gender diversity are smart enough to leverage that diversity. The point is not that women make a company more money, but a pattern of best practices, including female leadership, does’.³⁹

This suggests that collective efforts by government, regulatory authorities, employers and citizens to develop more female professionals would benefit business, women and the economy. Hicks further notes that the failure to alter the current status quo and increase the disproportionately low levels of women in managerial and directorship positions will only result in some of South Africa’s finest and skilled female professionals leaving the country to seek better career opportunities.⁴⁰

Guidelines compiled by the ILO also support women’s professional development. The International Labour Office notes that:

‘the international labour standards are tools for governments whom are seeking to draft and implement labour laws, social policy, in consultation with employers and worker organisations to meet the international norms’.⁴¹

The ILO publication, ‘*ABC of women worker’s rights and gender equality*’,⁴² addresses various issues relating to women and women workers’ rights. It notes that there is still an enormous break between the rights identified in international and national standards and their implementation in South Africa’s labour market.⁴³ South Africa is not alone in this regard. It is incomprehensible why countries fail to make greater references to these standards and guidelines. These standards ‘fight for a fair balance of opportunity, treatment, pay and representation between men and women in all areas of paid and unpaid employment and in

<https://www.grantthornton.global/en/press/press-releases-2013/Rise-in-numbers-of-women-in-business/>, accessed on 15 March 2018.

³⁹Sponsored Feature ‘Diversity leads to better companies’ Mail and Guardian Online 26 August 2011 available at <https://mg.co.za/article/2011-08-26-diversity-leads-to-better-companies>, accessed on 1 March 2018.

⁴⁰ Khulekani Magubane ‘Top Women go hunting jobs outside SA’ *Business Day* 13 April 2016 available at www.bizcommunity.com/Article/196/712/143240.html, accessed on 2 March 2018.

⁴¹ International Labour Office *ABC of women worker’s rights and gender equality* 2 ed (2007) 4.

⁴² Ibid.

⁴³ Ibid 1.

work-related decision making'.⁴⁴ Jean-Michel Servais concurs that, achieving equal opportunities and treatment between men and women starts with the domestic laws of a state.⁴⁵ Martin states that, the achievement of these goals also depends on how committed heads of states, government departments and employers are to making the necessary changes to domestic laws, which include workplace policies and practices.⁴⁶

Stevens and Ntlama focussed on different human rights and gender based instruments, including two Chapter 9 institutions, namely, the South African Human Rights Commission (SAHRC)⁴⁷ and the CGE.⁴⁸ These institutions have constitutional backing to promote initiatives aimed at realising women's right to development.⁴⁹ The authors also examined several international and regional instruments that incorporate provisions directed at realising women's right to development. However, implementation at domestic level remains a challenge. Further, the authors' research showed that the effective enforcement of these instruments could be used to strengthen the implementation of South Africa's gender transformation framework.

Finally, Stevens and Ntlama argue that in order to achieve gender equality and the equal development of women, government must adopt a comprehensive plan of action through its national programmes and projects which prioritises and promotes increased female participation in all occupational fields and levels.⁵⁰ This requires that employers come on board and make the necessary changes to their workplace policies and practices to ensure that they foster gender equality, non-discrimination and the right to development. Stones concurs, that practical measures need to be adopted to end the continuous cycle of gender disparity, male superiority and women's subordination in the workplace.⁵¹ Such efforts will create a more diverse and inclusive environment that offers men and women equal opportunities to flourish.

1.4 Research Questions

The study seeks to answer the following research questions:

⁴⁴ Ibid.

⁴⁵ J M Servais *International Labour Law* 2 ed (2009) 122.

⁴⁶ Martin & Bernard (note 18 above; 1).

⁴⁷ Section 181(1) (b) of the Constitution.

⁴⁸ Stevens & Ntlama (note 3 above; 46- 47).

⁴⁹ Ibid 47- 48.

⁵⁰ Ibid 52.

⁵¹ Stones (note 36 above; 7). Also see M Htun & S L Weldon 'When Do Governments Promote Women's Rights? A Framework for the Comparative Analysis of Sex Equality Policy' (2010) 8(1) *Symposium: A Comparative Politics of Gender* 209.

- I. How can international and regional instruments pertaining to the right to development and women workers' rights be used to advance the position of women in the workplace?
- II. Why are women regarded as a vulnerable and marginalised group in South Africa and what is the current legal framework pertaining to women in the workplace? Furthermore, to what extent is South Africa's labour legislation enabling or disabling women's right to development?
- III. What is South Africa's current programme of action aimed at giving practical effect to the country's gender transformation agenda? Why women are gravely underrepresented in South Africa's judiciary and mining sector? After assessing the legal framework aimed at addressing the progression of women, what is the current position of women within South Africa's labour workforce?

1.5 Limitations of the Study

This study primarily focuses on women in South Africa. The reason for limiting the study to women is due to the plight women have faced over the years in the flight for occupational equality. It is evident that women have suffered negative personal and social consequences as a result of their biological makeup.⁵² Furthermore, they continue to be unfairly treated in the workplace, where they are regarded as inferior and subordinate to men. While women comprise about 51% of the total South African population,⁵³ 'they constitute one of the most marginalised and vulnerable groups in this country'.⁵⁴

The second limitation is that, while numerous legal instruments are of relevance to this topic, the study focuses on particular instruments in order to find solutions to the unequal treatment accorded to women.⁵⁵

1.6 Principal Framework upon which the Research is Constructed

This dissertation focuses on issues and frameworks relating to women, gender and development. The milieu of discussing these issues requires the examination of both

⁵² Martin & Bernard (note 18 above; 2).

⁵³ 'Women in power: what do the statistics say?' available at <http://www.statssa.gov.za/?p=10325>, accessed on 17 February 2018.

⁵⁴ W Amien & M Paleker 'Women's Rights' (1997) 8 *South African Human Rights Yearbook* 321.

⁵⁵ Martin & Bernard (note 18 above; 2).

developmental and feminist theories. Within this context, the feminist theoretical framework and development frameworks intersect to form three main feminist developmental frameworks,⁵⁶ namely, women in development (WID), women and development (WAD) and gender and development (GAD). The GAD framework is adopted to guide and structure this research.

While discrimination on the grounds of race, religion and disability promotes inequality, this study focuses on gender as a core driver of inequality in South Africa. Due to the social construction of gender,⁵⁷ women suffer organisational and structural inequalities. ‘Development’ is the other central element of this research. This theme not only examines the root causes of deprivation, but various approaches that can be used to alleviate the factors that hinder women’s right to development.⁵⁸ Hence, the study accentuates the need for equal representation of both genders in the developmental process in order for all to succeed. In light of this:

‘GAD looks at the impact of development on both women and men. It seeks to ensure that both women and men participate in and benefit equally from development and so emphasises equality of benefit and control. It recognises that women may be involved in development, but not necessarily benefit from it. GAD is not concerned with women exclusively, but with the way in which gender relations allot specific roles, responsibilities and expectations between men and women, often to the detriment of women’.⁵⁹

The GAD approach does not specifically focus on either gender, but seeks to eradicate deep rooted gender disparities that exist in society and workplaces. However, it takes into account that, due to the fact that gender disparities predominantly impact on women, development affects women and men in different ways, often with a negative impact on women.⁶⁰

This study also places strong emphasis on the entrenched inequality and subjugation of women in South African society as this is the underlying cause of gender disparities. Again, ‘GAD focuses on the social or gender relations (i.e. the division of labour) between men and women in society’.⁶¹ It recognises that ‘women have not fully benefited from development processes,

⁵⁶ J L Parpart, M P Connelly & V E Barribeau *Theoretical Perspectives on Gender and Development* (2000) 51.

⁵⁷ Ibid 63.

⁵⁸ H Babacan ‘Women and Development’ (2011) 2 *Institutional issues involving ethics and justice* 3.

⁵⁹ L Muyoyeta *Women, Gender and Development* (2007) 7.

⁶⁰ Ibid 5.

⁶¹ Ibid 7.

programmes and projects to the same extent as men'.⁶² It is thus of vital importance for policy makers to review and formulate policies, rules, laws and programmes to challenge the fundamental inequalities that are ingrained in South African society.

1.7 Research Methodology

The research methodology used in the compilation of this dissertation is predominantly based on desktop research, which involves collecting and interpreting existing sources of information to conduct a critical, legal analysis with a view to answering the research questions. The information gathered included a collection of primary (conventions, legislation, and case law) and secondary (journal articles, web articles and textbooks) sources.

1.8 Structure of the Dissertation

Chapter 1 includes but is not limited to the background to the study, a preliminary literature review, the research questions, the study's limitations, the research methodology and the structure of the dissertation.

Chapter 2 examines particular international and regional instruments that could be used to develop South Africa's domestic labour law in relation to the advancement of women. The chapter also examines the extent to which these instruments have been successful in enforcing their provisions aimed at advancing the position of women in the workplace.

Chapter 3 focuses on the South African situation. It presents a brief historical overview that identifies and discusses the reasons why women are a vulnerable and marginalised group in South Africa. The country's current legal framework with regard to the eradication of gender disparity and unfair treatment of women in the workplace is also examined in order to determine the extent to which South Africa's labour legislation enables or disables women's right to development.

Chapter 4 analyses South Africa's current programme of action aimed at giving practical effect to the country's gender transformation agenda, thus, illustrating the extent to which South Africa is compliant with its international and regional obligations as well as giving practical effect to and developing its gender based laws. The South African judiciary and mining sector are examined to identify the barriers that prevent greater female representation in these fields.

⁶² Ibid 5.

Following an assessment of the legal framework and practical plans to address the plight of women in the workplace, the chapter will finally highlight their current position.

Chapter 5 presents the study's findings and offers recommendations on how to achieve greater advancement of South African women in the workplace, in lieu of the impending challenges to women's right to development.

1.9 Conclusion

This chapter presented the background to the research study. It noted that, despite on-going struggle, women have not yet succeeded in achieving equitable representation and opportunities. The question that arises is why this is the case given the numerous international, regional and national legal instruments promoting women's rights in the workplace and to development? With this in mind, Chapter 2 examines these international and regional instruments and their possible role in women's progression in the workplace.

CHAPTER 2

THE INTERNATIONAL AND REGIONAL FRAMEWORK PERTAINING TO THE RIGHTS AND INTERESTS OF WOMEN

2.1 Introduction

As noted in Chapter 1, women of all races, ages, sexual orientation and nationality confront gender discrimination, disparities, stereotypes and lack of developmental opportunities. In

order to address these global issues several international and regional instruments have been created.

This chapter examines various human rights treaties and conventions as well as other charters and declarations that aim to give women equal rights across the board; secure their fair treatment through the elimination of all forms of gender discrimination; and ensure women's right to development. Relevant standards and guidelines issued by the ILO are also explored.

Ultimately the successful implementation of these instruments depends on states signing and ratifying them, enforcing their provisions as well as submitting regular progress reports. Many of these instruments have proven to be extremely beneficial and are gradually achieving their entrenched objectives. However, some instruments have proven to be deficient in certain respects and need to be reviewed. This chapter thus evaluates how effective these instruments have been in achieving their objective to advance women's position in the labour market and society at large.

2.2 International Framework on Women, Equality and Development

The question of whether women's rights could be universal has been the subject of much debate.⁶³ International human rights in relation to women were formulated due to the fact that women all over the world experience inferior treatment and are deprived of their basic human rights. These instruments focus on women in order to address the challenges they encounter.⁶⁴ Reworking international human rights laws and labour laws to become more gender conscious was thus the first step.⁶⁵ Importantly, as a result of these instruments being internationally enforceable, their provisions stand at a position of strength serving as a universal platform on which all countries can implement these international provisions. Therefore, the rights, standards and guidelines provided for in these instruments are expected to be incorporated into the domestic law of member states as a sign of the countries' pledge to eradicating the violation of women's human rights and other gender disparities.

2.2.1 The Universal Declaration of Human Rights

⁶³ R J Cook *Human Rights of women: national and international perspectives* (1994) 5.

⁶⁴ Ibid.

⁶⁵ Ibid 10.

The United Nations (UN) established the Human Rights Commission in 1946 with the principle purpose of spelling out the meaning of human rights.⁶⁶ This Commission formulated the International Bill of Rights⁶⁷ made up of three parts, namely, a declaration (the UDHR), two covenants (the International Covenant on Civil and Political Rights (ICCPR)⁶⁸ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶⁹) and finally, an enforcement mechanism to ensure international supervision.⁷⁰

The UDHR was adopted by the UN General Assembly in Paris on 10 December 1948.⁷¹ It serves as a ‘common standard of achievement for all peoples and all nations’.⁷² Melish notes:

‘Predicated on an understanding that the ideal of human dignity could not be secured without equal attention to the full family of civil, cultural, economic, political and social rights, which could not be divided or considered in isolation from each other, it comprised in one consolidated text the full scope of human rights and fundamental freedoms’.⁷³

While the UDHR is a very old document, its significance for the purposes of this study lies in the fact that the Human Rights Commission used it to promote an array of rights, including the right to freedom, dignity and to work, whilst facilitating the achievement of equal rights and promoting the elimination of discrimination.⁷⁴ However, the shortfall of this instrument lies in its non-binding powers, meaning that it relies on moral persuasion to secure state compliance with its provisions.⁷⁵ The Human Rights Commission sought to address this situation by making these fundamental human rights binding in its two subsequent covenants.

2.2.2 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

⁶⁶ J Rehman *International Human Rights Law* 2 ed (2010) 75-76.

⁶⁷ Ibid 76.

⁶⁸ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; came into force 23 March 1976, in accordance with Article 49 of the ICCPR (hereinafter: ICCPR).

⁶⁹ Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966; came into force 3 January 1976, in accordance with Article 27 of the ICESCR (hereinafter: ICESCR).

⁷⁰ Rehman (note 66 above; 76).

⁷¹ B Boutros-Ghali & United Nations *The United Nations and the advancement of women 1945-1996* 6ed (1996) 16.

⁷² Ibid.

⁷³ T J Melish ‘Introductory Note to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2009) 48 *International Legal Materials* 256.

⁷⁴ Boutros-Ghali & United Nations (note 71 above; 16).

⁷⁵ Rehman (note 66 above; 83).

A person's fundamental human rights cannot be realised without them attaining their basic social, economic, cultural, civil and political rights.⁷⁶ Women in particular are deprived of these core basic rights as a result of inequality of treatment, lack of opportunity and discriminatory practices. In order to secure the aforementioned rights:

‘By resolution 543 (VI) of 4 February 1952, the General Assembly directed the Commission on Human Rights to prepare, instead of just one Covenant, two draft treaties; a Covenant setting forth civil and political rights and a parallel Covenant providing for economic, social and cultural rights. The Commission completed its work in 1954’.⁷⁷

On 16 December 1966, the General Assembly finally adopted the ICCPR and the ICESCR.⁷⁸ The trend has been for these covenants to be signed and, depending on a state's legal system, either ratified simultaneously or left until a later date. To date, 161 states have acceded to the ICCPR, whilst 158 have ratified the ICESCR.⁷⁹ Both covenants entrench the core human rights of a person. However, for the purposes of this study, the ICESCR is of interest as its provisions on gender equality, non-discrimination and workers' rights, together with its implementation machinery and Optional Protocol,⁸⁰ make this instrument powerful, especially in the context of women's rights. As noted above, gender equality and non-discrimination are crucial to the realisation of social, economic and cultural rights.⁸¹ This is because the former cannot be achieved until the latter have been realised. Article 2(2) of the ICESCR prohibits discrimination of any kind, and Article 3 states that men and women must enjoy equal rights, thus, providing for complete gender equality.⁸²

To give practical effect to these provisions, Articles 16-25 place a duty on member states to submit periodic reports to the Committee on the ICESCR, outlining the measures adopted to achieve observance of the rights set out in the covenant.⁸³ However, the lack of serious consequences arising from failure to comply with this requirement offers a loophole that allows member states to evade submissions. Furthermore, given there is a cost implication for the

⁷⁶ Melish (note 73 above; 256).

⁷⁷ C Tomuschat 'International Covenant on Civil And Political Rights' 2008 *United Nations Audio visual Library of International Law* 1.

⁷⁸ Ibid 1-2.

⁷⁹ Ibid.

⁸⁰ U.N. Doc. A/RES/63/117 (Dec. 10, 2008) (hereinafter: ICESCR's Optional Protocol).

⁸¹ Rehman (note 66 above; 145).

⁸² Ibid.

⁸³ Ibid 166-167.

‘progressive realisation of social, economic and cultural rights’, this elevated the level of non-compliance, thus doubts were raised as to its effectiveness.⁸⁴

2.2.2.1 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

This deficiency was addressed in 2008, when the UN adopted the Optional Protocol to the ICESCR.⁸⁵ Article 16 of the ICESCR’s Optional Protocol requires state parties to disseminate and make the provisions of the ICESCR and its Optional Protocol widely known within the countries legal system as well as allow public access to all views, information and recommendations made by the ICESCR’s committee to the state party.⁸⁶ This provision aims to bridge the gap between the provisions set out in the instrument and domestic implementation. Furthermore, the ICESCR’s Optional Protocol sets out a detailed synopsis on the competence of the committee and its powers to oversee matters where states are not complying with or violating their obligations under the instrument.⁸⁷ The ICESCR Committee can thus consider submissions by the state party themselves or those made on behalf of individuals and will then make states aware of violations or deficiencies within their jurisdiction as well as the changes required to national laws and policies.⁸⁸

An analyse of both covenants demonstrates that commendable improvements have been made to ensure that these instruments serve their intended purpose, namely, that everyone, including women, are guaranteed basic fundamental rights. However, it has been argued that as a result of the rights affirmed by the ICESCR are positive rights (these rights are attached to the availability of state resources) renders their realisation arduous.⁸⁹ This is because, while positive rights require states to take voluntary action to realise their full value, they are required to do so only in relation to the availability funds and resources. It is submitted that, while this is a reasonable position, states are still required to prioritise the enforcement of these rights.⁹⁰ The ICESCR mandates this by necessitating each state party to take appropriate steps,

⁸⁴ Cost impediments coupled with ineffective enforcement severely hinder the achievement of social, economic and cultural rights that are the core of a women’s right to development.

⁸⁵ Rehman (note 66 above; 167).

⁸⁶ Ibid.

⁸⁷ Article 1-3 of the ICESCR’s Optional Protocol.

⁸⁸ Articles 2 & 8 of the ICESCR’s Optional Protocol.

⁸⁹ Rehman (note 66 above; 178).

⁹⁰ Ibid.

individually or through assistance to achieve the full realisation of the rights present in the covenant.⁹¹

2.2.3 Convention on the Elimination of all Forms of Discrimination against Women

Noting the shortcomings off the ICCPR and the ICESCR, the drafters of the CEDAW sought to establish it as a pioneer instrument for women's rights around the world. This revolutionary women's rights instrument is regarded as an international 'Bill of Rights' for women.⁹² It specifically addresses the challenges and injustices faced by them and recognise their needs and rights. According to Buenger:

'CEDAW, with some 187 members, is among one of the most widely ratified human rights agreements in the world, having been adopted by the United Nations General Assembly on December 18, 1979'.⁹³

Written in gender-neutral language, CEDAW embodies the fundamental principles of equality, dignity and, non-discrimination, as well as promoting women's civil, political, economic and social rights.⁹⁴ In recognition of such, 189 countries have ratified the convention, thereby, affirming its provisions.⁹⁵

The heart of CEDAW can be found in Article 2 which stipulates that once a state has ratified the convention, they have an obligation to pursue domestic means to advance its provisions.⁹⁶ Furthermore, Article 11 of CEDAW outlines appropriate measures state parties can adopt to restructure workplaces so as to eliminate discrimination against women and ensure employment equity. CEDAW recognises that the protection and enforcement of non-discrimination is equivalent to the status of a peremptory norm. This simply means that a firm obligation is placed on states 'to uphold this right without derogation or reservation'.⁹⁷

⁹¹ Article 2(1) of the ICESCR.

⁹² A Griffiths 'International Human Rights, Women, Gender and Culture: Perspectives from Africa' (2008) 8 *University of Botswana Law Journal* 82.

⁹³ M L Buenger 'Human Rights Conventions and Reservations: An Examination of a Critical Deficit in the Cedaw' (2013-2014) 20 *Buffalo Human Rights Law Review* 79.

⁹⁴ Griffiths (note 92 above; 82).

⁹⁵ Buenger (note 93 above; 79).

⁹⁶ Article 2 of CEDAW.

⁹⁷ CEDAW Committee 'General Recommendation' adopted by the Committee on the Elimination of Discrimination against Women, Sixth Session 1987, General Recommendation No. 4: Reservations.

In order to ensure the effectiveness of CEDAW's provisions, a Committee on the CEDAW was established in terms of Article 17 to monitor its implementation.⁹⁸ It is made up of elected nationals from state parties that monitor state compliance.⁹⁹ As with the ICESCR, one of their responsibilities is to receive regular annual reports from member states and to consider the 'legislative, judicial, administrative or other measures'¹⁰⁰ adopted by states to give effect to CEDAW's provisions. Furthermore, Article 21 of CEDAW empowers the committee to make suggestions and recommendations to member states, after examining their reports.¹⁰¹ These recommendations provide guidance on how to sustain progress made or the improvements that are required to better fulfil CEDAW's goals.

The premise of this ground-breaking convention is the need to achieve *de jure* and *de facto* equality (discussed below) and to eliminate all forms of discrimination against women. Interestingly, CEDAW expressly recognises the close relationship between equality and non-discrimination.¹⁰² What is unique about this convention is that these rights appear to be intertwined. It speaks of the fundamental importance of both and it makes clear that one cannot be achieved without the other. The meaning of equality as defined in Article 1 incorporates the following two aspects:

'The first, *de jure* compliance, requires that the legal framework of the state party accord with the obligations created by the Convention. The second indicium, *de facto* compliance, requires that the obligations created under the Convention are not just recorded in the laws of the country, but implemented in practice with the intended results'.¹⁰³

Article 2 of CEDAW reinforces this commitment by providing that all ratified countries have a duty to conform to the definitions set out in Article 1. Member states are thus expected to incorporate CEDAW's provisions on equality and non-discrimination in their domestic legal frameworks.¹⁰⁴ For example, CEDAW's core elements of what constitutes unfair discrimination can be found in South Africa's Constitution¹⁰⁵ and EEA.¹⁰⁶

⁹⁸ Article 17 of CEDAW.

⁹⁹ Article 17 (1) of CEDAW.

¹⁰⁰ See Article 18(1) of CEDAW.

¹⁰¹ V Jivan & C Forster 'Challenging Conventions: In Pursuit of Greater Legislative Compliance with CEDAW in the Pacific' (2010) 10 *Melbourne Journal of International Law* 659. See Article 21(1) of CEDAW.

¹⁰² A Facio & M I Morgan 'Equity or Equality for Women - Understanding CEDAW's Equality Principles' (2009) 60(5) *Alabama Law Review* 1142. See Article 1 of CEDAW.

¹⁰³ Jivan & Forster (note 101 above; 660).

¹⁰⁴ Article 2 of CEDAW.

¹⁰⁵ Section 9 of the Constitution.

¹⁰⁶ Section 5 and 6 of the EEA.

Article 2 thus aim to ensure that states do not merely ratify the convention without further involvement with the instrument, but rather, CEDAW makes states aware that their aim should be to effect visible changes to their domestic laws. This would bridge the equality gap between men and women and eradicate discriminatory laws.

CEDAW also offers a definition of what constitutes discrimination against women:

‘For the purposes of the present Convention, the term "discrimination against women" shall mean 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’.¹⁰⁷

Thus, CEDAW’s all-encompassing definition contains a wide variety of discriminatory acts which will constitute discrimination against women. Including the words ‘or any other field’ expands the scope to include cases not specifically included in this definition.¹⁰⁸ This section not only prohibits intentional forms of discrimination, but other acts or practices that have the effect of indirectly discriminating against women.¹⁰⁹

Although CEDAW is widely accepted, and has made tremendous strides in enforcing its provisions globally, its main shortcoming lies in Article 28 which provides for a large number of ‘Reservation’ provisions.¹¹⁰ These are said to impede the goal of ending all forms of discrimination against women.¹¹¹ States such as Argentina, Algeria, Malta, Australia, India and South Korea have used these provisions to avoid complying with some of CEDAW’s main provisions.¹¹² Despite the fact that the reservation provisions enable more states to accede to the convention, CEDAW’s overall positive effect will not be realised if parties are not willing to comply with the convention in its entirety.

¹⁰⁷ Facio & Morgan (note 102 above; 1142).

¹⁰⁸ M D Pauw ‘Women’s Rights: From Bad to Worse - Assessing the Evolution of Incompatible Reservations to the CEDAW Convention’ (2013) 29(77) *Merkourios - Gender in European and International Law* 57.

¹⁰⁹ Facio & Morgan (note 102 above; 1142-1143).

¹¹⁰ Article 28 of CEDAW. A reservation provision in an agreement (which CEDAW provides for) allows states to ratify the agreement, but to exempt themselves from certain of its provisions, provided this is not incompatible with the objects and purpose of the convention. See Buenger (note 93 above; 67).

¹¹¹ Ibid 79.

¹¹² Ibid 81.

Finally, as previously mentioned, reporting and monitoring mechanisms is a significant part of any treaty, as they ensure compliance.¹¹³ It has been argued that CEDAW's monitoring and state compliance mechanisms, as well as its reporting procedures could be improved.¹¹⁴ Given that CEDAW bases the effectiveness of its reporting requirements on transparency, rather than adopting binding and enforceable provisions to ensure compliance, it is regarded as having one of the weakest enforcement mechanisms among international treaties. Making these provisions binding would compel states to adhere to CEDAW's core provisions and reporting procedures.¹¹⁵ Furthermore, states rarely abide by the deadlines and dates set since CEDAW imposes no penalties or harsh consequences for not reporting promptly.¹¹⁶ These shortcomings need to be addressed if CEDAW is to become a fully-fledged women's rights instrument.

2.2.3.1 Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women

The Optional Protocol to CEDAW, which was created in order to strengthen CEDAW's enforcement and give greater effect to its objectives and goals, came into force on 22 December 2000.¹¹⁷ Thus far, it has been ratified by far fewer states than the convention itself, with only 106 countries acceding to it.¹¹⁸ The significance of the Optional Protocol lays in the fact that it:

‘[provides] for an individual complaints procedure and also provides for a procedure under which the committee can inquire into serious and systematic violations of the convention’.¹¹⁹

¹¹³ A Byrnes & M A Freeman ‘The Impact of the CEDAW Convention: Paths to Equality A Study for the World Bank’ 2012 available at <http://ssrn.com/abstract=2011655>, accessed on 26 April 2018. Every treaty, convention, covenant etc. has a regulatory body that monitors state compliance with its provisions. The monitoring procedures allow the regulatory body to oversee the implementation of the instrument's objectives, whilst the reporting procedures enable states (and in some cases individual citizens) to submit regular reports to the regulatory body on progress made in giving domestic effect to the instrument's goals and objectives. See H Charlesworth ‘What are “Women's International Human Rights”?’ in R J Cook *Human Rights of women: national and international perspectives* (1994) 195.

¹¹⁴ Buenger (note 93 above; 80).

¹¹⁵ Ibid 80-81.

¹¹⁶ M C Nussbaum ‘Women's Progress and Women's Human Rights’ (2016) 38 *Human Rights Quarterly* 604.

¹¹⁷ Optional Protocol to the Convention on the Elimination of Discrimination against Women adopted by General Assembly resolution A/54/4 on 6 October 1999 and opened for signature on 10 December 1999, Human Rights Day, entry into force 22 December 2000 (Herein Optional Protocol to CEDAW). See Rehman (note 66 above; 541).

¹¹⁸ Nussbaum (note 116 above; 603).

¹¹⁹ Rehman (note 66 above; 541-542).

On the face of it, the Optional Protocol has partially corrected the flaws in CEDAW's reporting mechanism.¹²⁰ One of the ways in which this has been done is by the Optional Protocol empowering CEDAW's Committee is to inquire into systematic violations of the convention.¹²¹ This means that, even if state parties refuse to submit periodic reports to the committee, it can still conduct its own investigation into a member state should it suspect that it violates or does not abide by the convention's provisions.¹²² This tool provides CEDAW insight on whether enforceable measures are being taken to end gender disparity and discrimination against women or whether states are evading their obligations under the Convention.

This provision has proved to be highly beneficial, as they make up for the shortcomings of CEDAW's weak enforcement system and reservations provisions. Accordingly, it is of vital importance that more states ratify the Optional Protocol.

2.2.4 The United Nations Declaration on the Right to Development

The UNDRD states that the right to development constitutes an inalienable human right which all people are entitled to by virtue of being a human being.¹²³ Article 1(1) read with Article 28 of the UNDRD goes on to state that the right to development is synonymous with all people being able to fully 'participate in, contribute to, and enjoy economic, social, cultural and political development'.¹²⁴ This is thus a collective right which is populated by human rights.

It is important to note that the UNDRD recognises that both individuals and people collectively are holders of this right.¹²⁵ Article 2 of the UNDRD alludes to the 'human person is the central subject of development and should be the active participant and beneficiary of the right to development'.¹²⁶ The proper interpretation as undertaken in the *Endorois* case,¹²⁷ suggests that

¹²⁰ Ibid 543.

¹²¹ Article 1 of Optional Protocol to CEDAW

¹²² See Article 8 of Optional Protocol to CEDAW.

¹²³ Article 1(1) of UNDRD.

¹²⁴ Article 1(1) and Article 8 of UNDRD.

¹²⁵ K De Feyter 'The Declaration on the Right to Development Revisited' 2013 *Journal of National Law University, Delhi* 20.

¹²⁶ Article 2(1) of UNDRD.

¹²⁷ *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of the Endorois Welfare Council v The Republic of Kenya* 276/2003 ACHPR (2009). The *Endorois* case is particularly relevant as it was the only case in Africa that dealt with the justifiability of the right to development. 'In this case, the Endorois people, an indigenous group were removed from their ancestral land to make way for tourism on Lake Bogoria. The African Commission held that the government of Kenya failed to take into account core element of the right to development, which is participation in the socio-economic development of the Endorois people'. See Ozoemena & Hansungule (note 5 above; 230-231).

this right is sufficiently broad to cover individuals, organisations (i.e. social groups), and groups of people which include indigenous sub-state groups who are often excluded from mainstream development policies.¹²⁸ This wide interpretation allows for ‘the entire population’ to actively participate in all that this right has to offer, thus, ensuring that the most vulnerable and marginalised groups are protected.¹²⁹ De Feyter recognises that, as a result of the vulnerability of certain groups of people (including women and people living in poverty) gross violations occur to their right to development.¹³⁰ Despite the UNDRD being non-binding, it has made tremendous strides in addressing critical developmental issues as well as placing emphasis on women’s full participation in this right.

Article 8(1) of the UNDRD is particularly relevant to this study, as it supports and encourages women’s right to development. It states that national measures must be enacted within states domestic laws to safeguard women’s meaningful participation in the development process and ensure they are accorded equal opportunities to improve their well-being.¹³¹ Therefore, the realisation of human rights requires a multidimensional cooperative effort by the international community, national governments and independent enforcement agencies. This researcher concurs with the right to development expert, Arjun Sengupta’s submission that in order for states to respect the mutuality of obligations between themselves and the UNDRD, they should be responsible for monitoring their own performance and obligations through the creation of national independent human rights commissions.¹³² South Africa established the SAHRC to undertake this task.

2.3 International Labour Law Framework

This section analyses the ILO’s standards and guidelines with regard to the promotion of women workers’ rights, occupational equality and non-discrimination of women in workplace all over the world.

¹²⁸ See D Newman *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (2011) 44.

¹²⁹ Article 2(3) of UNDRD. See Feyter (note 125 above; 23).

¹³⁰ *Ibid.*

¹³¹ Ozoemena & Hansungule (note 5 above; 227).

¹³² A Sengupta ‘On the Theory and Practice of the Right to Development’ (2002) 24(4) *HUM. RTS. Q.* 880-882.

2.3.1 International Labour Organisation

The ILO was established in 1919 and has led the way in not only setting appropriate labour norms, but in protecting women worker's rights.¹³³ The International Labour Office notes that:

'International labour standards are primarily tools for governments which are seeking to draft and implement labour law and social policy, in consideration with employer's and worker's organisations, to acceptable international norms. They prescribe, among other things, minimum working conditions and the principles of non-discrimination in its many aspects, and are usually designed for all workers irrespective of their sex, ethnicity, physical ability, or other attributes'.¹³⁴

The ILO affords women significant workplace protection and other workplace rights.¹³⁵ It has been a pioneer in promoting gender equality and non-discrimination in the working environment.¹³⁶ Of relevance to this research, the body of international labour standards comprises of the ILO conventions and recommendations, declarations and guidelines that regulate employment policies and practices in order to address the different challenges experienced by women in the workplace.¹³⁷ It is well documented that the ILO is dedicated at mainstreaming gender equality and women empowerment, as women's workers' rights constitute an integral part of its principle objectives.¹³⁸

The Discrimination (Employment and Occupation) Convention¹³⁹ is the most widely ratified convention.¹⁴⁰ Together with Recommendation No. 111 it addresses both discrimination and gender equality in the workplace.¹⁴¹ The Equal Remuneration Convention 2000,¹⁴² the Workers with Family Responsibilities Convention 1981,¹⁴³ and the Maternity Protection Convention

¹³³ ILO (note 41 above; xi).

¹³⁴ Ibid 4-5.

¹³⁵ E C Landau & Y Beigbeder *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (2008) 20.

¹³⁶ Ibid.

¹³⁷ ILO (note 41 above; 1).

¹³⁸ Ibid 3.

¹³⁹ ILO Discrimination (Employment and Occupation) Convention 111 of 1958, ratified in 1997 (Discrimination Convention).

¹⁴⁰ ILO (note 41 above; 9)

¹⁴¹ Ibid 6.

¹⁴² ILO Equal Remuneration Convention 100 of 1951, ratified in 2000 (Equal Remuneration Convention).

¹⁴³ The Workers with Family responsibilities Convention 165 of 1981. South Africa has not ratified this convention.

2000,¹⁴⁴ are the ILO's key gender equality instruments.¹⁴⁵ These instruments facilitate the ILO's central goal which is to advance equal opportunities between the sexes.

Consequently, fundamental importance is placed on gender parity with regard to promotions, conditions at work, fair treatment,¹⁴⁶ and ensuring the elimination of all forms of discrimination in the working environment. As such, the ILO's sub-instruments collectively provide for the universal endorsement of gender neutral and non-discriminatory laws and employment policies. It encourages all countries to ratify the different instruments, and to effectively implement their provisions and recommendations.¹⁴⁷ Furthermore, the ILO recommends that non-party states should also adopt its international standards as guidelines to shape their national laws and employment policies and practices.

The discussion on the ICESCR and CEDAW noted shortcomings in their enforcement and monitoring provisions. The ILO's monitoring system is set out in Article 22 of the organisation's Constitution.¹⁴⁸ It obliges states to submit reports on the measures they have adopted within their domestic laws that reflect the ILO standards.¹⁴⁹ However, it goes a step further and provides for a system of representation and complaints, whereby employers and worker associations that suspect or observe non-conformance by member states to the ILO's standards can lodge a complaint with the ILO's governing body.¹⁵⁰ This feature is an effective checking mechanism that obliges the relevant parties to ensure the integration of these international labour standards in their employment laws and workplace policies and practices.

However, in reality, policies and practices in workplaces around the world fall short of the ILO standards.¹⁵¹ Furthermore, women remain the most vulnerable group in most occupational fields. World Bank Indicators modelled according to ILO estimates place women in the vulnerable category of people in employment in the United Arab Emirates, Bahrain and sub-Saharan Africa.¹⁵² Furthermore, inequitable employment policies that indirectly discriminate

¹⁴⁴ The Maternity Protection Convention 183 of 2000. South Africa has not ratified this convention.

¹⁴⁵ ILO (note 41 above; 6).

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ International Labour Organisation 'Instrument for the Amendment of the Constitution of the International Labour Organisation' available at <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0188.pdf>, accessed on 24 May 2018.

¹⁴⁹ Article 22 of the International Labour Organisation Constitution.

¹⁵⁰ Landau & Beigbeder (note 135 above; 16).

¹⁵¹ Ibid 20-21.

¹⁵² The World Bank 'Vulnerable employment, female (% of female employment)' available at <http://api.worldbank.org/v2/en/indicator/SL.EMP.VULN.FE.ZS?downloadformat=excel>, accessed on 3 November 2018.

against female employees persist, thus adding to their vulnerability. It is an unacceptable reality that this is the global position, especially since having such a momentous body that provides companies with the right tools to shape workplace policies and practices.

Given that the ILO's standards and guidelines provide a platform for the advancement, development and progress of women in various occupational fields, efforts should be made to strengthen compliance. The advent of regional human rights and labour frameworks could also be key in advancing such rights in the multilateral framework.

2.4 The Regional Framework on Women, Equality and Development

Certain African scholars regard the international human rights framework as reflecting western characteristics.¹⁵³ Consequently, African countries refused to accept that these international human rights were in fact universal rights. It has been argued that they do not cater for the unique circumstances and problems experienced by African people, particularly African women.¹⁵⁴ Under the umbrella of the African Union (AU), African countries have thus sought to supplement international human rights laws and mechanisms, in order to cater for these unique challenges.¹⁵⁵ Accordingly, the African region created its own human rights system through the AU. This body intended on correcting the injustices suffered not only by African people in general, but emphasis was focused on addressing the plight of African women, especially in relation to occupational equality.

In historical and contemporary times, African women have not been treated equally to their male counterparts.¹⁵⁶ Many African cultures are highly patriarchal thus promote male domination, with women subjected to various abusive practices and locked out of professional occupations and positions of authority.¹⁵⁷ Thus, these countries had the herculean task of ensuring that, despite, cultural practices and traditions, women and women workers' rights should never be side-lined. The various regional instruments discussed below seek to accord African women full enjoyment of their human rights. While these instruments subscribe to

¹⁵³ B Faturoti 'Women's rights in Africa: an examination of African human rights systems in the context of CEDAW and the universalism versus cultural relativism debate' (2016) 3(1) *Journal of comparative law in Africa* 1.

¹⁵⁴ M S Nsibirwa 'Brief Analysis of the Draft Protocol to the African Charter on Human and People's Rights on the Rights of Women' 2001 *African Human Rights Law Journal* 40.

¹⁵⁵ M Forere & L 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* 436.

¹⁵⁶ O Odhiambo & W Heneveld 'Girls and schools in Sub-Saharan Africa: From analysis to action' 1995 *Africa Technical Series* 298.

¹⁵⁷ Faturoti (note 153 above; 1).

internationally accepted human rights, they also reflect practices, traditions and conditions that are unique to Africa.¹⁵⁸

2.4.1 The African Charter on Human and People's Rights

As noted earlier, international human rights instruments have been criticised for being unsuitable to the African context. However, given the need to address the injustices suffered by African women, African countries formulated its own body of human rights laws that took cognisance of the continent's social and cultural characteristics. This led to the adoption of the African Charter on Human and People's Rights (ACHPR).¹⁵⁹

The ACHPR was adopted by the AU in 1981.¹⁶⁰ The ACHPR is the only regional body that recognise the duty of states (collectively or individually) to 'ensure the exercise of the right to development'.¹⁶¹ Article 22(1) reaffirms that this right encompasses the ability of a person to fully enjoy their social, economic and cultural development, which in turn, improves their standard of living. Stevens and Ntlama adds to this topic by saying that:

'The right implies the fulfilment of internationally and regionally recognised principles of self-determination and full sovereignty over natural wealth and resources – as evidenced by the African Commission on Human and People's Rights (African Commission) in *Endorois*'.¹⁶²

The ACHPR also contains a number of provisions designed to eliminate all forms of discrimination against women¹⁶³ and to achieve equality.¹⁶⁴ However, the only provision that dealt specifically with women was Article 18(3) which provides that 'states shall ensure the elimination of every discrimination against women and ensure the protection of the rights of woman'.¹⁶⁵ According to Faturoti, the word 'every' in this provision 'embraces all aspects of discrimination and admits no exception'.¹⁶⁶

¹⁵⁸ Forere & Stone (note 155 above; 435-436). See C Heyns 'The African Regional Human Rights System: The African Charter' (2004) 108(3) *Penn State Law Review* 688-689.

¹⁵⁹ African Charter on Human and Peoples' Rights (27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 (hereinafter: African Charter).

¹⁶⁰ M B Tadesse, 'The African Women Protocol as Supplemental to the African Charter and Other Human Rights Instruments: A Brief Analysis' (2014) 5(1) *Bahir Dar University Journal of Law* 2.

¹⁶¹ Article 22(2) of African Charter. Stevens & Ntlama (note 3 above; 55).

¹⁶² *Ibid* 55.

¹⁶³ Article 2 of African Charter.

¹⁶⁴ Article 3 of African Charter.

¹⁶⁵ Faturoti (note 153 above; 164).

¹⁶⁶ *Ibid*.

However, these protections offered by the ACHPR were not sufficient, nor did the African Commission pay due attention to those countries that were committing gender-based discrimination against women.¹⁶⁷ Accordingly, further provisions that would cater for the various challenges women face and also an enforcement body that would uphold and fully commit to the protection of women's rights in Africa were desired.

2.4.1.1 Protocol to the African Charter on Human and Peoples' Rights Relating to the Rights of Women in Africa (Maputo Protocol)

The shortcomings of the ACHPR led to the AU's adoption of the Protocol to the African Charter on Human and Peoples' Rights relating to the Rights of Women in Africa, in 2003.¹⁶⁸ This protocol mainstreamed women's rights across Africa. Faturoti states that:

'The existence of a specific treaty on women's right has the benefit of underlining the issues which negatively impact upon women and forces states parties to adopt a more gendered interpretation of rights so that human rights can really begin to be seen as women's rights. The Protocol represents the greater visibility and the newly acquired strength of women's organisations in Africa'.¹⁶⁹

Unlike the ACHPR, the African Women's Protocol expressly defines discrimination,¹⁷⁰ and also addresses numerous harmful practices against women which constitute a violation of their fundamental human rights. Furthermore, Article 25(1) allows for remedies to be awarded to victims, which is provided by the state where the violation took place.¹⁷¹ This is a significant development in ensuring state compliance as a failure to do so would result in states having to answer to the African Commission for their oversight error.

¹⁶⁷ F Banda *Women, Law and Human Rights* (2005) 66-67.

¹⁶⁸ The Protocol to the African Charter on Human and Peoples' Rights Relating to the Rights of Women in Africa was finally adopted at the African Union meeting hosted by Mozambique in Maputo in July 2003 (hereinafter: African Women's Protocol). See Griffiths (note 92 above; 85).

¹⁶⁹ Faturoti (note 153 above; 167).

¹⁷⁰ Article 1 of African Women's Protocol states that "Discrimination against women" means 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 freedom in all spheres of life'.

¹⁷¹ Article 25(1) of the African Women's Protocol.

Furthermore, the Special Rapporteur on the Rights of Women in Africa fulfils similar duties, which include:

‘...assisting African governments in the development and enactment of policies that promotes and protect the human rights of women in Africa’.¹⁷²

Thus, unlike the instruments discussed earlier, the African Women's Protocol does not merely place an obligation on state parties to give effect to and implement its provisions, but demands that state parties enforce women's rights.¹⁷³ This is important as when pressure is placed on states they are more likely to fulfil their obligations as they wish to avoid the ramifications of non-performance, which include penalties, fines or other sanctions. However, the African Women's Protocol falls short in terms of lacking a monitoring body to ensure a narrow focus on women's rights in Africa.¹⁷⁴ The initial commission failed to efficiently oversee discriminatory and gender disparity practices in various African countries. Its likelihood of being able to pay full attention to violations of women's rights and becoming an enforcement body for all human rights under the ACHPR is thus slim.¹⁷⁵

Finally, Agenda 2063 is one of the AU's most recent commitments. It arose in relation to perceptions that, while the organisation is active in enacting various instruments, institutions and frameworks, it falls short in terms of implementation.¹⁷⁶ Moller observes that:

‘The ambitions of the African Union, the various sub-regional organisations on the continent and the national leaders are obvious and the determination to strive for their realisation seems sincere, at least in most cases. However, that there is a wide gap between these ambitions, plans, organisational setups etcetera and the actual accomplishments should come as no great surprise’.¹⁷⁷

Agenda 2063 aspire that, Africa will:

- ‘Be a continent where democratic values, culture, practices, universal principles of human rights, gender equality, justice and the rule of law are entrenched; and

¹⁷² Banda (note 167 above; 68).

¹⁷³ Faturoti (note 153 above; 81).

¹⁷⁴ Tadesse (note 160 above; 27).

¹⁷⁵ Ibid 28.

¹⁷⁶ I Jaoko 'Implementation Remains the Achilles Heel of the African Union: A Study of the African Peer-Review Mechanism (APRM)' 2016 *Strathmore Law Review* 7.

¹⁷⁷ B Moller 'The African Union as Security Actor: African Solutions to African Problems?' 2009 *Crisis States Working Paper No. 57, Series No. 2* 16.

- Have capable institutions and transformative leadership in place at all levels'.¹⁷⁸

This pledge aims to ensure that the integrated and prosperous future envisaged will become a living reality across the continent by the year 2063.¹⁷⁹ Its commitment to equality, human dignity, freedom, and prosperity comes at a time when authors such as Beiter question whether the 'age of human rights really [is] over?'.¹⁸⁰ Agenda 2063 reaffirms the relevance of human rights to the African continent, thus, laying the foundation to take it into a new human rights era.¹⁸¹

2.4.2 The Southern African Development Community Protocol on Gender and Development

The 2001 amendments to the SADC Treaty note that:

‘The core objectives of SADC have now been amended to “the achievement of development and economic growth, poverty alleviation enhancement of the standard and quality of life of the peoples of Southern Africa, and support for the socially disadvantaged through regional integration”’.¹⁸²

The negative impacts of colonisation on SADC countries meant that, post-independence, these states had to rebuild their governmental structures in order to restore stability and confidence in their legal systems.¹⁸³ Additional challenges included economic instability, segregation and a lack of education and employment opportunities. Women were most adversely affected by these challenges.¹⁸⁴ Thus, since gaining independence, many African countries have embarked on the mammoth task of transforming their countries' laws by gender sensitising their constitutional provisions, national policies and legislation.¹⁸⁵

¹⁷⁸ African Union Commission *Agenda 2063 The Africa we want* (2015) 5 (hereinafter: Agenda 2063).

¹⁷⁹ *Ibid* 1.

¹⁸⁰ K D Beiter 'Is the Age of Human Rights Really over - The Right to Education in Africa - Domestication, Human Rights-Based Development, and Extraterritorial State Obligations' (2017) 49 *Georgetown Journal of International Law* 12.

¹⁸¹ Agenda 2063 (note 178 above; 88).

¹⁸² Southern African Development Community Treaty (SADC Treaty) adopted in Windhoek, Namibia, August 1992, as amended in 2001. See Appendix A: SADC Member States.

¹⁸³ P Guramatunhu-Mudiwa 'Addressing the Issue of Gender Equity in the Presidency of the University System in the Southern African Development Community (SADC) Region' (2010) 2 *Forum on Public Policy* 2.

¹⁸⁴ *Ibid*.

¹⁸⁵ A Mama 'Rethinking African universities: Gender and transformation' (2009) 7(2) *Scholar and Feminist Online* 3.

However, marginalisation of women¹⁸⁶ remains visible in most SADC countries. Odaga and Heneveld observe that ‘the hierarchical marginalization of women is embedded in the culture of the region’.¹⁸⁷ Social and cultural norms dictate that men hold positions of authority and power. Women are expected to focus on their domestic duties and are not encouraged to pursue professional careers. The fact that SADC countries are predominantly led by male heads of state attests to this.

In seeking to address this situation,¹⁸⁸ the SADC Protocol on Gender and Development was signed on 17 August 2008.¹⁸⁹ Its objectives are to ‘take the Region a step closer to finding home-grown, concrete ways of achieving gender equity throughout its 15 member countries’.¹⁹⁰ Notably, the SADC Gender Protocol serves a two-fold purpose. It provides a system of principles to guide and advance gender equality and equity, and sets out implementation mechanisms in order effectively enforce its entrenched provisions.¹⁹¹ Monitoring and enforcement is provided for as follows:

‘At the regional level, there is a three-tier institutional structure made up of a Committee of Gender/Women’s Affairs Ministers overseeing a Committee of senior officials, who in turn supervise a Secretariat. The role of the structure is to monitor and evaluate the implementation of the Protocol through national action plans and analysis of data and biennial reports supplied by the state parties’.¹⁹²

Articles 3(b), 3(c) and 3(d) reinforce the Protocol’s enforcement provisions¹⁹³ which provide for times frames within which gender polices and targets are to be met. It also sets out plans for how countries can address gender gaps. Other provisions aim to develop women and promote women workers’ rights. For the purposes of this study, the relevant provisions are elimination of discrimination and achievement of gender equality provisions¹⁹⁴ that address emerging gender related issues and those that ‘set realistic, measurable targets, time frames and

¹⁸⁶ Guramatunhu-Mudiwa (note 183 above; 3).

¹⁸⁷ Odhiambo & Heneveld (note 156 above; 298).

¹⁸⁸ M M Munalula ‘SADC Protocol on Gender and Development: Road map to equality?’ 2011 *SADC Law Journal* 189.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid* 193.

¹⁹³ See Article 3 of SADC Gender Protocol.

¹⁹⁴ Article 3(b) of the SADC Gender Protocol.

indicators for achieving gender equality and equity'.¹⁹⁵ The SADC Gender Protocol also fills the gaps where existing treaties are inadequate or prove to be insufficient.¹⁹⁶

However, Forere and Stone note that several rights contained in the African Women's Protocol are duplicated in the SADC Gender protocol, raising concerns that no new value or substance was added by this instrument.¹⁹⁷ Indeed, some articles were copied verbatim. This is futile, as one of the objectives of the SADC Gender Protocol was to fill in the gap where other instruments were lacking.¹⁹⁸ Duplicating provisions will not improve nor promote the rights of women, but rather stifle progression. The only hope is for both mechanisms to be equally effective. Adding to the SADC Gender Protocol's shortcomings, it also omitted a number of pivotal rights without providing any valid explanations.¹⁹⁹ Some of these rights are vital for the attainment of African women's economic, social and political development.²⁰⁰ Yet again, this proves to be counterproductive and unbeneficial to the development of women.

Finally, on a more positive note, women's participation in the labour market in the SADC region has increased and their unemployment levels have decreased.²⁰¹ Much of this success is attributed to the SADC countries firm legal commitment at transforming their employment laws in order to integrate more women in their labour market. Olivier notes that:

'...constitutional and statutory interventions in SADC countries have increasingly challenged gender discrimination at the workplace level. This has in particular been the result of the introduction of gender-sensitive anti-discrimination and affirmative action legislation, supported by similar developments at the level of regional instruments'.²⁰²

2.5 Conclusion

Gender disparities and discriminatory practices persist in many countries, despite the fact that they are signatories to the international and regional instruments discussed in this chapter. This is due to the lack of effective enforcement mechanisms. It was noted that CEDAW relies on states being transparent and open. The unfortunate reality is that this is rarely the case.

¹⁹⁵ Article 3(d) of the SADC Gender Protocol.

¹⁹⁶ Article 3(c) of the SADC Gender Protocol.

¹⁹⁷ Forere & Stone (note 155 above; 441-442).

¹⁹⁸ *Ibid* 449.

¹⁹⁹ *Ibid* 444-447.

²⁰⁰ *Ibid* 447.

²⁰¹ M Olivier 'Gender Discrimination in Labour Law and Social Security: Perspectives from SADC' in O Dupper & C Garbers *Equality in the workplace: Reflections from South African and beyond* (2009) 227-228.

²⁰² *Ibid*.

International and regional instruments will only be effective if they are backed by effective implementation systems and procedures and firm state reporting mechanisms. Minimal adjustments to national laws are not effective and rarely lead to viable changes being made to the lives of their citizens, particularly women. Commitment to gender equality needs to go beyond lip service to embrace practical action. The only way to ensure the objectives of these instruments are being carried out is through the establishment of strong implementation systems and procedures as well as by having efficient state reporting mechanisms.

Having discussed the international and regional legal framework that underpins the eradication of gender disparities, the following chapter focuses on South Africa's legal framework relating to women workers' rights and gender equality in the workplace.

CHAPTER 3

SOUTH AFRICA'S LEGAL FRAMEWORK AIMED AT PROMOTING GENDER EQUALITY IN THE WORKPLACE

3.1 Introduction

As previously mentioned in Chapter 1, South Africa's history is based on an unequal gender system, with the gender scale tipping in favour of men. Consequently, women have been overlooked, ignored and excluded from various facets of society and in the workplace. While the democratic South African government has adopted numerous progressive laws and policies to promote gender equality, more than two decades after the demise of apartheid, gender stereotyping, marginalisation of women and patriarchy remain engrained in society. This chapter begins by providing an overview of the general position of women in South Africa and the role they played in the struggle for equality and freedom. This is followed by an in-depth analysis of South Africa's constitutional and labour legislative provisions that aim to promote gender equality, fair labour practices as well as address discrimination and discriminatory practices in the workplace. The objective is to assess whether these instruments enable or disable women's right to development.

3.2 Historical Overview on South African Women

Having identified the international and regional position of women in Chapter 2, the focus of this discussion is a study on the position of women in South Africa. It is important to acknowledge the leading role South African women have played in the struggle for freedom and equality²⁰³ whilst living with the challenges brought about by colonisation and apartheid. As McGregor notes, systematic discrimination, including sexism and inequality can be attributed to colonialism, patriarchy and apartheid.²⁰⁴

South Africa's pre-1994 all white male government imposed not only racial but gender segregation, thus, making certain the country remained divided. While white women also suffered restrictions, apartheid's discriminatory system ensured that women of colour's freedom of movement and opportunities were severely circumscribed.²⁰⁵ Statistics from the

²⁰³ Consciousness Admin 'History of Women's struggle in South Africa' (10 August 2014) available at <http://consciousness.co.za/history-of-womens-struggle-in-south-africa/>, accessed on 23 June 2018.

²⁰⁴ M McGregor 'Affirmative action and non-discrimination: South African law evaluated against international law' (2006) 39(3) *CILSA* 392.

²⁰⁵ 'People of colour' refer to Black, Indian and Coloured people.

1970s reveal that employment opportunities available to women in almost all professional occupations were deplorably limited.²⁰⁶ Whilst men occupied 627 785 positions in these fields, women occupied 270 050.²⁰⁷ Further surveys in the 1980s also point to higher unemployment rates among women in almost all professional and semi-professional fields, including administrative and clerical jobs as well as jobs in commerce. By and large, these stark figures are evidence of the oppressive laws that shackled women within the confines their households and menial jobs.²⁰⁸

As time progressed, the struggle for gender justice and racial equality became a conspicuous goal as women yearned for equal rights and status, both in society and in the workplace. South Africa's history recounts the story of the many women that opposed these repressive and discriminatory laws. The creation of the Bantu Women's League in 1918 to resist the pass laws, the 1950s Defiance Campaign and the famous women's march to the Union Buildings in 1956 to protest the pass laws are but some of the steps South African women took to break down a system that trampled their dignity and human rights.²⁰⁹ Together with the many men that fought the system, they were responsible for the attainment of constitutional democracy in 1994. These efforts meant that, on paper, women now attained equal rights and freedom as envisaged in the Constitution.

South Africa's post-1994 democratic government embarked on a comprehensive programme of constitutional and legislative reform to transform society's norms, governmental structures and the labour force. By 1995, marked shifts were evident in the labour market, with women occupying clerical, semi-professional and technical positions which were previously solely male-dominated.²¹⁰ Despite the fact that 'only 3% of women and 5% of men were managers and 4% of women and 3% of men were professionals',²¹¹ these statistics were a significant improvement and showed great promise for a democratic future.

²⁰⁶ Statistics South Africa 'South African Statistics 2000' available at <http://www.statssa.gov.za/publications/SAStatistics/SAStatistics2000.pdf>, accessed on 4 August 2018. See Appendix B: StatisticsSA 1970s Statistics.

²⁰⁷ Statistics South Africa 'South African Statistics 2000' available at <http://www.statssa.gov.za/publications/SAStatistics/SAStatistics2000.pdf>, accessed on 4 August 2018. See

²⁰⁸ Statistics South Africa 'South African Statistics 2000' available at <http://www.statssa.gov.za/publications/SAStatistics/SAStatistics2000.pdf>, accessed on 4 August 2018.

²⁰⁹ Consciousness Admin 'History of Women's struggle in South Africa' (10 August 2014) available at <http://consciousness.co.za/history-of-womens-struggle-in-south-africa/>, accessed on 23 June 2018.

²¹⁰ D Budlender & F M Orkin *Women and men in South Africa* (1998) 21.

²¹¹ Ibid. See Appendix C: Employment of Women Post-1994 Statistics.

South Africa's 1996 Constitution and other statutes that protect and promote the rights of women lie at the heart of the remarkable transformation witnessed since 1994. A continuation of this harmonious thread can be seen in the values enshrined in many of the country's labour laws, thus, ensuring that the labour relations regime is untainted by discriminatory practices.

The following sections examine South Africa's current legal framework which directly or indirectly regulates the position of women in the workplace. This is crucial in determining how effective South Africa's laws have been in addressing women's right to development.

3.3 The Constitutional Framework from a Gender Perspective

3.3.1 Background

As noted above, the South African government has adopted numerous reforms to improve the position of women in the country.²¹² Although there is no specific constitutional provision or statute that exclusively regulates the rights and interests of women, however, there are constitutional and legislative provisions, as well as enforcement institutions that offer protection and regulate the position of women.

Since the South African Constitution is the highest law in the land,²¹³ this discussion examines specific constitutional provisions intended to promote and protect the right to equality, fair labour practices, development and non-discrimination. The aim of these laws is to rectify past imbalances and restore the dignity and livelihoods of the previously disadvantaged, particularly women.²¹⁴

South Africa's all-encompassing constitutional framework lays the foundation for its statutory enactments and judicial intervention to give effect to the Constitution's wider purpose of ensuring women's progression, empowerment and advancement.²¹⁵ The country's labour ministry has steered a number of important pieces of legislation through Parliament. These include but are not limited to the LRA, the EEA, and the Basic Conditions of Employment Act (BCEA),²¹⁶ the Skills Development Act²¹⁷ and the Broad Based Black Economic

²¹² M O'Sullivan & C Murray 'Brooms sweeping oceans? Women's rights in South Africa's first decade of democracy' 2005 *Acta Juridica* 1.

²¹³ Preamble of the Constitution of the Republic of South Africa (hereinafter: Preamble).

²¹⁴ O'Sullivan & Murray (note 212 above; 1).

²¹⁵ Amien & Paleker (note 54 above; 321).

²¹⁶ Act 75 of 1997 (hereinafter: BCEA).

²¹⁷ Act 97 of 1998 (hereinafter: SDA).

Empowerment Act.²¹⁸ These statutes contain provisions that aim to address and regulate gender based issues within the employment context.²¹⁹

The following sub-section analyses the Constitution from a gender perspective, focusing on the South African government's efforts to address discrimination, inequality, oppression, exclusion, and the exploitation of women. Since there is significant overlap between the constitutional provisions discussed below and the EEA, the discussion on the Constitution is brief. An in-depth analysis of these provisions within the employment context is presented later in this chapter.

3.3.2 Constitutional Provisions

The South African Constitution represents a revolutionary break from the past. McGregor describing the fundamental purpose of the Constitution says that it:

‘... recognises the injustices of the past and sets out the need to establish a society based on equality, dignity and freedom. It aspires to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights. The founding values of the country are stated to be human dignity, the achievement of equality and the advancement of human rights and freedoms, and non-racialism and non-sexism’.²²⁰

As the supreme law of the land, the Constitution embodies full commitment to a new legal order where women and men are treated equally in all aspects of life. This is intended to overcome historical impediments which to a large extent, negatively impacted on the majority of women in South Africa. These constitutional rights are discussed in turn.

²¹⁸ Act 53 of 2003 (hereinafter: BBEEA).

²¹⁹ It is also important to mention that PEPUDA's aim is ‘To give effect to section 9 read with item 23(1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith’. Notwithstanding the fact that PEPUDA's jurisdiction does not extend to persons defined as “employees” that are regulated by the EEA, PEPUDA covers those workers that are excluded from the EEA, such as independent contractors. Moreover, PEPUDA's ambit is wider than the EEA as it promotes equality and prevents unfair discrimination in all spheres of society. See O'Sullivan & Murray (note 212 above; 2-3).

²²⁰ McGregor (note 204 above; 393).

3.3.2.1 The Right to Equality

Given South Africa's history of gender and racial divisions, the right to equality is one of the country's most important and safeguarded rights.²²¹ While the Constitution does not define the right to equality, the Promotion of Equality and Prevention of Unfair Discrimination Act²²² defines this right as 'including the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes de jure and de facto equality and also equality in terms of outcomes'.²²³

Furthermore, various provisions in the Constitution emphasise the importance of equality not only as a right but as a value that underpins South Africa's constitutional democracy. Firstly, the achievement of equality is enshrined in Section 1 of the founding provisions in the Bill of Rights,²²⁴ thus, reassuring citizens that the right to equality forms the backdrop of this democracy, and further reassuring women that their fight for gender equality and equal recognition will no longer be ignored.

Section 39(1) of the Constitution also draws on the concept of equality which requires that 'When interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.²²⁵ The courts are also required to apply a contextual interpretation to the right to equality, owing to South Africa's history of being an unequal society.²²⁶

Most importantly, the right to equality is recognised under Section 9(1) of the Constitution, commonly referred to as the equality clause. Section 9(1) of the Constitution provides that 'Everyone is equal before the law and has the right to equal protection and benefit of the law'.²²⁷ The end goal is to secure equality for all, however, formal equality is not sufficient to realise this objective.²²⁸ This is because it treats everyone as equals in all respects. Currie and De Waal define formal equality as follows:

²²¹ T Gideon *The constitutionality of the concept of demographic representivity, provided for in terms of the Employment Equity Amendment Act 47 of 2013* (unpublished LLM thesis, University of KwaZulu-Natal, 2015) 9.

²²² Act 4 of 2000 (hereinafter: PEPUDA).

²²³ Section 1 of PEPUDA.

²²⁴ Section 1(a) of the Constitution.

²²⁵ Section 39(1) (a) of the Constitution.

²²⁶ I Currie & J De Waal *Bill Of Rights Handbook* 6 ed (2013) 210.

²²⁷ See Section 9 of the Constitution.

²²⁸ Amien & Paleker (note 54 above; 322).

‘Formal equality simply requires that all persons are equal bearers of rights. On this view, inequality is an aberration that can be eliminated by extending the same rights and entitlements to all in accordance with the same “neutral” norm or standard of measurement. Formal equality does not take actual social and economic disparities between groups and individuals into account’.²²⁹

Given South Africa’s unequal past,²³⁰ certain groups of people (including women) suffered particular disadvantages. Thus, formal equality neglects to consider some of South Africa’s main constitutional guarantees,²³¹ such as rectifying past injustices and healing divisions in society.²³² It therefore needs to be supplemented with a more substantive approach, namely substantive equality, defined as follows:

‘Substantive equality, on the other hand, requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution’s commitment to equality is being upheld. The results or effects of a particular rule are highlighted rather than its mere form’.²³³

This all-encompassing definition illustrates that substantive equality is more in line with South Africa’s fundamental values, including redressing past imbalances. Sash, J unequivocally confirmed in the *Van Heerden* judgment that substantive equality can only be achieved when systematic and structural advantage and disadvantage based on a person’s race and gender are uprooted from the interpretation and application of the rule of law.²³⁴ Further, in the case of *President of the Republic of South Africa v Hugo*,²³⁵ the court held that:

‘We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context’.²³⁶

²²⁹ Currie & De Waal (note 226 above; 213).

²³⁰ Ibid.

²³¹ Ibid.

²³² Preamble (note 213 above).

²³³ Currie & De Waal (note 226 above; 213).

²³⁴ *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at [42] (hereinafter: *Van Heerden*).

²³⁵ 1997 (4) SA 1 (CC) (hereinafter: *Hugo*).

²³⁶ Ibid at [41]. See Currie & De Waal (note 226 above; 213).

The right to equality thus forms the backdrop to the broader purpose of the Constitution, forming a bridge from an unjust past to a future where women in particular are treated equally before the law and enjoy equal protection and benefit of the law.²³⁷ This right is of fundamental importance to all women in South Africa, as it supports their needs and provides them with an equal platform to men.²³⁸ However, it must be acknowledged that ‘restitutionary equality’ is interlinked with the idea of transformative constitutionalism.²³⁹ In the case of *Bato Star Fishing v Minister of Environmental Affairs and Tourism*,²⁴⁰ the court defined this to mean that, the constitutional right to equality is a process in the making and complete equality cannot be achieved overnight. Indeed, it is a long and difficult process. However, it is vital for transformation to be set in motion through the prism of the Constitution in order to secure its desired effect, which is equality for all.²⁴¹

Finally, in the context of transformative constitutionalism the concept of Ubuntu is relevant.²⁴² Ubuntu encapsulates the values of ‘personhood, humanity, humaneness and morality’.²⁴³ Within the realm of gender equality, these values recognise equal social, economic and political conditions of all people. Therefore, it fosters the idea that everyone is equal in worth and value, accordingly, everyone should enjoy these rights equally.²⁴⁴

3.3.2.2. Prohibition of Unfair Discrimination

This section analyses the constitutional provision on the prohibition of unfair discrimination. The aim is to merely highlight South Africa’s national apparatus designed to eradicate discrimination in the country. While there is no need to focus on an analysis of the test used to prove unfair discrimination under Section 9 of the Constitution, the test can be found in the case of *Harksen v Lane NO & Others*.²⁴⁵

²³⁷ Section 9(1) of the Constitution.

²³⁸ O’Sullivan & Murray (note 212 above; 14).

²³⁹ Currie & De Waal (note 226 above; 215).

²⁴⁰ 2004 (4) SA 490 (CC).

²⁴¹ *Ibid* at [74].

²⁴² J Y Mokgoro ‘Ubuntu and the Law in South Africa’ (1998) 4 *Baffalo Human Rights Law Review* 3. See L Stone ‘Two decades of jurisprudence on substantive gender equality: What the Constitutional Court got right and wrong’ (2016) 30(1) *Agenda* 12.

²⁴³ Mokgoro (note 242 above; 3).

²⁴⁴ Stone (note 242 above; 12-13).

²⁴⁵ 1998 (1) SA 300 (CC) (hereinafter: *Harksen v Lane*). The test for establishing unfair discrimination is: ‘Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have

Section 9(3) of the Constitution is the crux of non-discrimination as it unequivocally prohibits all forms of discrimination based on a non-exhaustive list of grounds, which include ‘race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’.²⁴⁶ These were the very same grounds used in the past to demean and oppress people with the intention of excluding them from various facets of society. Most importantly, discrimination infringed their right to dignity, that is, their right to self-worth.²⁴⁷ The right to human dignity²⁴⁸ in the new constitutional order is equally important and it operates in conjunction with the right to equality and freedom.²⁴⁹ In the case of *S v Makwanyane*,²⁵⁰ the court held that:

‘Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in ... [the Bill of Rights]’.²⁵¹

It is for this reason that the Constitution forbids unfair discrimination of any kind. In addition to the above listed grounds, it also outlaws discriminatory acts that are not included in this list, that is, unlisted or analogous grounds.²⁵² This means that there may be other acts or omissions which have the ability or potential ability to severely impair a person’s human dignity or affect them in a serious manner.²⁵³ Therefore, this constitutional extension provides an additional safeguard to protecting citizens for all types of discrimination.

It should also borne in mind that the notion of unfair discrimination is ultimately based on the idea of fairness, which considers the category of person being discriminated against, for example, women, people with disabilities or black people. Further, an evaluation of the

been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner... If [differentiation] has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation...’ at [325A].

²⁴⁶ Section 9(3) of the Constitution. McGregor (note 204 above; 394).

²⁴⁷ Ibid.

²⁴⁸ Section 10 of the Constitution.

²⁴⁹ Currie & De Waal (note 226 above; 250).

²⁵⁰ 1995 (3) SA 391 (CC).

²⁵¹ Ibid at [144]. See Currie & De Waal (note 226 above; 252).

²⁵² McGregor (note 204 above; 394).

²⁵³ Ibid.

resultant harm or impact on that particular person should be factored into the determination.²⁵⁴ This means that a balance has to be struck between the aim, objectives and public policy of government and violation of a person's right not to be unfairly discriminated against.²⁵⁵

Only once unfair discrimination has been established can the act or omission in question be prohibited. In contrast, the only way a discriminatory act can be accepted is if it is determined as being a justifiable limitation in accordance with Section 36 of the Constitution.²⁵⁶ Thus, only if the government's objective outweighs the impact of the discriminatory act or omission on the person concerned will the discriminatory act or omission be deemed justifiable and thus, permissible.

This constitutional imperative articulates the need for change which is guided by the Constitution.²⁵⁷ Accordingly, a duty is placed on all citizens to ensure that members of disadvantaged groups, such as women, do not suffer patterns of group disadvantage based on characteristics or attributes that define who they are.²⁵⁸ A holistic understanding of this provision in relation to women suggests that systematic progression of their rights and interests requires entrenched discriminatory practices and inequality to be unearthed in order to break free from the country's discriminatory past.²⁵⁹

3.3.2.3. Affirmative Action

Firstly, affirmative action is founded on the concept of substantive equality, which recognises a person's individuality and uniqueness. Section 9(2) of the Constitution provides for affirmative action as follows:

'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures, designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken'.²⁶⁰

²⁵⁴ McGregor (note 204 above; 394).

²⁵⁵ Ibid.

²⁵⁶ 'The respondent (usually the state) is required to show that the infringement is a justifiable limitation of the right. This entails showing that the criteria set out in s 36 are satisfied: the right has been limited by law of general application for reasons that can be considered reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. See Currie & De Waal (note 226 above; 217).

²⁵⁷ Stone (note 242 above; 11).

²⁵⁸ *Brink v Kitshoff NO* (CCT15/95) [1996] ZACC 9; 1996 (4) SA 197; 1996 (6) BCLR 752 at [42].

²⁵⁹ Stone (note 242 above; 11).

²⁶⁰ Section 9(2) of the Constitution.

Affirmative action relates to measures implemented whereby people from a disadvantaged group are preferred, favoured or benefited over someone who does not fall within that group.²⁶¹ Such measures predominantly use race, gender and any other protected grounds to benefit people from these groups.²⁶² The Constitution's commitment to affirmative action measures aims to ensure that those who were previously disadvantaged receive some recourse by being granted preferential treatment.²⁶³

The Constitution sanctions the use affirmative action measures, provided that the internal test contained in Section 9(2) is satisfied.²⁶⁴ Thus, if there has been a violation of the right to equality in terms of Section 9(1), but the test proffered in Section 9(2) can be satisfied, such violation will be deemed acceptable. In other words, the act in question will not be regarded as being unfairly discriminatory. This is premised on the fact that that government's intention is to provide restitutionary justice to the beneficiaries of these measures, so as to redress past discriminatory and unequal laws and practices that violated the rights of disadvantaged groups, including women.²⁶⁵

However, the concept of affirmative action is a controversial one.²⁶⁶ The main basis for concern is that by allowing a certain category of persons to be preferred over others, the state is continuing to foster inequality and discrimination, that is, reverse discrimination.²⁶⁷ Additionally, while solid arguments have been put forward to justify affirmative action, some regard it as impeding transformation.²⁶⁸ The researcher is of the view that transformation is a process which can only be achieved over time and that it is not possible to move forward whilst those who were unjustly treated and deprived of advancement, particularly black people and women, are still living with the consequences of past repressive laws. For example, previous practices prevented women from occupying positions of power and authority, and the effects of these practices are still visible in the labour market today. Examples include judiciary and

²⁶¹ Currie & De Waal (note 226 above; 241).

²⁶² S Gaibie 'Affirmative Action - Concepts and Controversies' (2014) 35 *ILJ* 2655.

²⁶³ Currie & De Waal (note 226 above; 241).

²⁶⁴ It must be shown that the measure (1) targets persons or categories of persons who have been disadvantaged by unfair discrimination; (2) is designed to protect and advance such persons or categories of persons and (3) promotes the achievement of equality. *Ibid* 241-242.

²⁶⁵ McGregor (note 204 above; 397).

²⁶⁶ Gaibie (note 262 above; 2655).

²⁶⁷ L Human *Affirmative Action and the Development of People: A Practical Guide* (1993) 1. Also see O Dupper 'Preliminary Remarks' in O Dupper... et al *Essential Employment Discrimination Law* (2004) 7.

²⁶⁸ Gaibie (note 262 above; 2655-2657).

the mining sector that remain highly male dominated. Accordingly, affirmative action offers a momentous bridge to establish a fair, equal and democratic future.²⁶⁹ These issues are taken up later in the discussion on the EEA.

3.3.2.4 Unfair Labour Practices

The concept of unfair labour practices is dealt with in more detail under the discussion on the LRA. However, it is worth mentioning that fair labour practices are constitutionally guaranteed in Section 23(1) of the Constitution which states that ‘everyone has a right to fair labour practices’.²⁷⁰ Subsection 23(2)-(4) refines this right and identifies its beneficiaries.²⁷¹ However, the Constitution does not define what constitutes an unfair labour practice. In the case of the *National Education Health & Allied Workers Union v University of Cape Town*²⁷² the court held that Section 23 of the Constitution is limited to a ‘relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both’.²⁷³

Moreover, the protection offered under Section 23 is evoked when any other act or omission occurs within the employment relationship that does not fit into the LRA’s limited definition of an unfair labour practice.²⁷⁴ Therefore, an employee who believes that their employer committed an unfair labour practice can bring their claim under Section 23 of the Constitution, thus, alleging that their employer’s conduct is a violation of their constitutional right to fair labour practices.²⁷⁵ However, the applicant would first have to challenge the constitutional deficiency of the LRA before relying on the Constitution.

3.3.2.5 The Right to Development

The legal foundation of the right to development has its origins in the UNDHR and its subsequent covenants.²⁷⁶ It marked a milestone, in that countries now recognised the right to

²⁶⁹ M MacEwe, O Dupper & A Louw ‘Employment Equity: A South African Case Study’ (2004) 6 *International Journal of Discrimination and the Law* 171.

²⁷⁰ Section 23(1) of the Constitution.

²⁷¹ Sections 23(2), 23(3) and 23(4) of the Constitution. See R Loux ‘The new unfair labour practice’ 2012 *Acta Juridica* 43.

²⁷² (2003) 24 *ILJ* 95 (CC).

²⁷³ *Ibid* at [40].

²⁷⁴ Loux (note 271 above; 41).

²⁷⁵ *Ibid* 41-43.

²⁷⁶ Stevens & Ntlama (note 3 above; 51-52)

development as a human right.²⁷⁷ Arjun Sengupta agrees that the right to development is a ‘vector of all rights’.²⁷⁸ He observes that:

‘...it is a collective right that protects a set of rights and values, in that if one right is improved, then no right deteriorates, but if any right is violated, the “vector” deteriorates and the right to development is violated’.²⁷⁹

The right to development is clearly a multi-layered one that must be collectively realised. While there is no specific constitutional provision regulating the right to development in South Africa, various fundamental rights in the Bill of Rights provide substance to this right. Stevens and Ntlama state that:

‘The right to development is linked to many of the rights that are included in the Constitution, such as the rights to equality, dignity, life and freedom and security of the person. These rights and freedoms are of great significance in that they are foundational for the equal protection and beneficial for the advancement, of the rights of the general populace and not only limited to women per se. It goes without saying that these rights constitute the basis for the protection of the rights in the Bill of Rights which include the indirect protection of women’s right to development’.²⁸⁰

Drawing from this analysis, a linkage should be made between these fundamental rights and the right to development. The empowerment of women and their ability to progress is a fundamental counter stone of the right to development. Ozoemena and Hansungule reaffirm the value of this right by saying that:

‘Bearing in mind the nature of the right to development which incorporates socio-economic rights, it is important to note that the negative obligation requires that the rights which citizens already possess cannot through actions of the State be taken away’.²⁸¹

Despite the above, the authors note that women’s socio-economic development is severely neglected in developing countries, including South Africa.²⁸²

²⁷⁷ M A Tadeq ‘Reflections on the right to development: Challenges and prospects’ (2010) 10 *African Human Rights Law Journal* 329.

²⁷⁸ S P Marks & B A Andreassen ‘Introduction’ in B A Andreassen & S P Marks (ed) *Development as a human right: Legal, political and economic dimensions* (2006) viii.

²⁷⁹ Ozoemena & Hansungule (note 5 above; 227).

²⁸⁰ Stevens & Ntlama (note 3 above; 47).

²⁸¹ Ozoemena & Hansungule (note 5 above; 232).

²⁸² *Ibid* 227.

As noted above, the prohibition of unfair discrimination and the right to equality, especially South Africa's commitment to substantive equality, acknowledge the plight of women. The other rights that make up the right to development are also constitutionally guaranteed rights and freedoms. Hence, the Constitution aspires to reform its legal and social order in order to ensure that women and other disadvantaged people are able to realise their full potential. Women's right to substantive equality and equality of opportunity are vital for their development, particularly in relation to occupational progression.²⁸³ The opposite is also true. Denying a woman's right to development ultimately means denying her constitutional right to participate in the development process, which violates her social, economic, cultural and political rights.²⁸⁴ The duty rests on all women, government and employers to ensure this reality is never accepted.

Therefore, the right to development requires that women's empowerment and advancement are prioritised by relevant stakeholders, as the right to development seeks to accelerate the national development of all women. Consequently, harnessing inter-related constitutional rights and the right to development is the means to advance women, especially within the labour market. This demands that government and employers prioritise the right to development of women so that they can fully enjoy their basic human rights, and in turn, alleviate their vulnerable status. The researcher concurs with Stevens and Ntlama that greater efforts by South Africa's Chapter 9 Institutions as well as the National Economic Development and Labour Council (NEDLAC) and the Commission for Employment Equity (CEE) in the employment context is necessary in order to create an environment that supports people's development and protects their constitutional rights.²⁸⁵

3.4 The Labour Legislation Framework Pertaining to Women workers in South Africa

²⁸³ Ibid.

²⁸⁴ Article 1(1) of UNDRD.

²⁸⁵ Stevens & Ntlama (note 3 above; 47).

3.4.1 Background

As noted above, Sections 9(4) and 23(5) of the Constitution provide for ‘National legislation must be enacted to prevent or prohibit unfair discrimination’,²⁸⁶ and for the creation of labour laws to regulate unfair labour practices that might arise within the employment setting.²⁸⁷ These provisions set in motion the enactment of various labour related statutes to regulate employment relationships and the working environment. For the purposes of this study, the discussion is limited to an analysis of the LRA and EEA. These statutes aim to create an equal and non-discriminatory labour workforce, which is free of unfair labour practices.

However, should an employee believe that any of their rights within the scope of their employment have been violated; they should seek resolution by first relying on the relevant provisions of the labour statutes. Du Toit explains this position well:

‘While “fundamental” in the sense of prevailing over all other laws, thus, a constitution at the same time represents “second” order rulemaking from the standpoint of everyday life. Citizens are governed in their conduct primarily by the rules of common law and statutes interpreted or enacted in terms of the Constitution; only if these sources are silent, or in conflict with the Constitution, does it become appropriate to invoke the relevant constitutional provision itself’.²⁸⁸

The discussion below focuses on female workers’ rights and those that underpin the eradication of gender disparities in the workplace. The aim is to ascertain whether these employment laws enable a women’s right to development.

3.4.2 Employment Equity Act

The Preamble to the EEA addresses discriminatory apartheid legislation that segregated workplaces and resulted in wide disparities between people of different race groups, genders and income levels. The Act acknowledges that, while these laws have been repealed, their effects linger in workplace policies and practices. Accordingly, the disadvantages suffered by these categories of people have to be rectified. Grogan stated that:

‘The Employment Equity Act 55 of 1998 aims to correct the demographic imbalance in the nation’s workforce by compelling employers to remove barriers to advancement of “blacks”,

²⁸⁶ Section 9(4) of the Constitution.

²⁸⁷ Section 23(5) of the Constitution.

²⁸⁸ D Du Toit ‘The Evolution of the Concept of Unfair Discrimination in South African Labour Law’ (2006) 27 *Industrial Law Journal (Juta)* 1313.

“coloureds”, “Indians”, women and the disabled, and actively to advance them in all categories of employment by “affirmative action”²⁸⁹.

In accordance with the above, the EEA’s core objectives are thus two-fold, namely, prohibition of unfair discrimination in the workplace and promotion of affirmative action measures to redress entrenched historical disadvantages.²⁹⁰ The following sub-section analyses the various equity provisions in the EEA which pertain to women’s rights in the workplace.

3.4.2.1 The Prohibition of Unfair Discrimination

In alignment with Section 9 of the Constitution, Chapter II of the EEA gives further substance to this right within the employment context.²⁹¹ The Department of Labour’s (DOL) intention behind restructuring and amending its employment laws was to ensure that inequality, gender and race segregation are eradicated post-apartheid.²⁹²

Section 5 of the EEA provides that ‘Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice’.²⁹³ This can be said to impose a blanket responsibility on all employers rather than only those that are categorised as designated employers.²⁹⁴ This provision can be interpreted to mean that:

- firstly, the section clearly places a responsibility on employers to abolish all past discriminatory policies and practices, thus realising the EEA’s envisaged goal of equity and equal opportunities for all; and
- secondly, the section also provides that employers have a responsibility not just to respond to discrimination that rises in the workplace, but also to pre-empt

²⁸⁹ J Grogan *Workplace Law* 11 ed (2014) 106.

²⁹⁰ O Dupper & C Garbers ‘The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace’ 2012 *Act Juridica* 224.

²⁹¹ *Ibid* 225.

²⁹² D du Toit ‘Protection against Unfair Discrimination: Cleaning up the Act?’ (2014) 35 *ILJ* 2623.

²⁹³ Section 5 of the EEA.

²⁹⁴ Section 1 of the EEA provides that ‘designated employer’ means- (a) a person who employs 50 or more employees; (b) a person who employs fewer than 50 employees but has a total annual turn-over that is equal to or above the applicable annual turn-over of a small business in terms of the Schedule 4 of this Act; applicable annual turn-over of a small business in terms of the Schedule 4 of this Act; (c) a municipality, as referred to in Chapter 7 of the Constitution; (d) an organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; and (e) an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement’.

discrimination in the workplace, thus, being proactive to effectively resolve such matters.²⁹⁵

Moreover, Section 5 is reinforced by Section 6(1) read with Section 6(3) of the EEA, which provides specific grounds on which an employee may not be discriminated against. Sex and gender are among the listed grounds.²⁹⁶ The Act also makes an important distinction between direct and indirect discrimination in the employment context:

‘Discrimination may be either direct or indirect. Direct discrimination occurs when adverse action is taken against people precisely because they possess one of the characteristics listed in s 6, or comparable attributes. Direct discrimination is invariably intentional. Indirect discrimination [an inherently statistical concept] occurs when seemingly objective or “neutral” barriers exclude members of particular groups because members of those groups happen to be unable to surmount the barriers - for example, a height or weight requirement that would exclude all but a tiny minority of women. Indirect discrimination may be intentional or unintentional, and the employee need not prove that he has been prejudiced or suffered losses’.²⁹⁷

This distinction is of fundamental importance to this study, as in many workplaces employers may in theory be compliant with the aims and objectives of the EEA, but in reality, the practical implementation of these policies and practices provides leeway to evade compliance. They thus have a smokescreen effect.²⁹⁸ Indirect discrimination present in company policies and practices is one of the primary drivers of disparity in the workplace. The DOL, through the EEA’s Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practice²⁹⁹ has provided employers with practical guidelines on how to address and eliminate equity barriers in the workplace.³⁰⁰ This Code requires the principle of ‘employment equity’ to be factored into every division of the employment circle. The Code recommends that:

²⁹⁵ E Fergus & D Collier ‘Race and gender equality at work: The role of the judiciary in promoting workplace transformation’ 2014 *SAJHR* 484.

²⁹⁶ Section 6(1) of EEA provides that ‘No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.’ The EEA only provides two defences for an employer to negate liability under Section 6 of the EEA. These are: s/he was acting in accordance with an affirmative action measure (discussed below) or her/his actions are justified based on the inherent requirements of the job (Section 6(2) of the EEA).

²⁹⁷ Grogan (note 289 above; 108-109).

²⁹⁸ The smokescreen effect can be described as an action or statement used to conceal actual plans or intentions.

²⁹⁹ Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practice, published under GN 1358 GG 27866, 4/09/2005 (Herein: the Code on Employment Equity).

³⁰⁰ Item 1 and Item 2 of the Code on Employment Equity.

‘...all employers should conduct an audit and analysis of all their employment policies and practices, as well as the working environment and facilities. The audit should identify whether any of the policies or practices applicable in the workplace contain any unfair discrimination or barriers to the recruitment, promotion, advancement and retention of members of designated groups. Once the actual or potential barriers are identified, an employer should consult about the strategies for eliminating these barriers. These strategies should be incorporated into the development and implementation of the Employment Equity Plan for that workplace. Regular monitoring in the workplace should occur to ensure that the unfair discriminatory policies or practices do not recur or manifest themselves in different ways’.³⁰¹

In addition to the above, selection and promotion requirements have been found to be highly discriminatory because employers are granted a certain degree of flexibility to employ or promote a candidate s/he deems fit. Unfortunately, women often are the victims of such subtle barriers. The Code on Employment Equity recognises that a significant obstacle to employment equity lies in employers being unable to attract a wider pool of applicants from the designed group.³⁰² This impediment can be overcome if employers adhere to the Code’s guidelines on ‘Recruitment and Selection’.³⁰³ If employers adopt a fair criterion, refrain from conducting interviews in an arbitrary manner and select a candidate who is not only suitably qualified, but also a designated employee, workplace diversity will thus be achieved.

The implication of the above means that employers will be held liable for not following through and giving practical effect to seemingly neutral policies, practices, and selection and promotion criterions.³⁰⁴ It is true that all discriminatory practices thus constitute an additional impediment to women’s development and cannot be left unchecked.³⁰⁵ In the US case of *Griggs v Duke Power Co*, the US Supreme Court in a unanimous judgment held that:

³⁰¹ Item 5.2.4 of the Code on Employment Equity.

³⁰² Item 7.2 of the Code on Employment Equity.

³⁰³ Item 7 of the Code on Employment Equity. See Appendix D: Recruitment and Selection Guidelines.

³⁰⁴ O Dupper & C Garbers ‘The Prohibition of Unfair Discrimination’ in O Dupper... et al *Essential Employment Discrimination Law* (2004) 44.

³⁰⁵ Naidu (note 34 above; 2-3).

‘...practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to “freeze” the status quo of prior discriminatory practices’.³⁰⁶

If this status quo is not challenged, women and other disadvantaged groups will remain vulnerable within South Africa’s labour market. This results in women being underrepresented and excluded from various professions, thereby impeding their right to development. Presently, even in the absence of indirect discriminatory practice women already carry the additional burden of their sex and gender when entering the workforce. Any further impediments will dampen their chances of realising their full potential and being given the opportunity to develop.

3.4.2.2 Affirmative Action

Affirmative action is first given constitutional recognition under Section 9(2) of the Constitution. In order to give legislative expression to this right, Chapter III of the EEA is solely dedicated to affirmative action in the workplace. The underlying purpose of the Act recognises that the only way to achieve employment equity is to promote equal opportunities, treat employees fairly and adopt affirmative action measures to assist designated groups.³⁰⁷ In line with Section 9 of the Constitution, affirmative action under the EEA aims to achieve equitable representation and diversity in the workplace,³⁰⁸ which is implicit to giving effect to substantive equality in the workplace.

Chapters II and III of the EEA differ in that, while the former merely promotes affirmative action measures,³⁰⁹ the latter compels all employers who qualify as a designated employer to implement such measures in order to address employment equity in the workplace. With regard to what constitutes an affirmative action measure, Section 15(1) provides that:

³⁰⁶ Dupper & Garbers (note 304 above; 44).

³⁰⁷ Section 2 of the EEA.

³⁰⁸ Gideon (note 221 above; 12).

³⁰⁹ Section 6(2) (a) of the EEA. See Grogan (note 289 above; 139).

‘(1) Affirmative action measures are measures designed to ensure that suitably qualified people from “designated groups” have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer’.³¹⁰

Grogan elaborates on this concept:

‘Affirmative action is a policy designed to permit a measure of discrimination *in favour* of employees disadvantaged by discrimination in the past. Although the Constitution and the EEA prohibit unfair discrimination, both expressly state that measures designed to remove the effects of past discrimination are not in themselves unfair. The acid test for affirmative action is when it ceases to be fair’.³¹¹

Therefore, the employer has a responsibility to evaluate all company policies and practices in order to ascertain if there are any 'employment barriers' that detrimentally affect members of a designated group.³¹² To assist employers, Item 5.3 of the Code on Employment Equity lays out comprehensive guidelines on the processes to be followed when addressing and developing a strategy to implement employment equity. The outcome of this process is to develop a viable employment equity plan so that historical employment barriers will no longer prevent designated employees from advancing in the workplace.

For the purposes of this study, an analysis of the affirmative act test is not required, although it is worth mentioning that the aim of the ‘rationality test’³¹³ is firstly, to target the previously disadvantaged, specifically those that were most susceptible to past discriminatory practices, namely, black people,³¹⁴ people with disabilities and women;³¹⁵ and secondly, to provide them

³¹⁰ Section 15(1) of the EEA. See Section 20 of the EEA. See Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans, published under GN 424 in GG 40840, 12/05.2017.

³¹¹ Grogan (note 289 above; 139).

³¹² Section 13 of the EEA provides that the ‘Duties of designated employers[include]- (1) Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act. (2) A designated employer must- (a) consult with its employees as required by section 16; (b) conduct an analysis as required by section 19; (c) prepare an employment equity plan as required by section 20; and (d) report to the Director-General on progress made in implementing its employment equity plan, as required by section 21’.

³¹³ The rationality test is laid out in the case of *Van Heerden*. In order to determine if a measure falls under s 9(2) the following three-fold inquiry has to be satisfied: ‘The yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons and the third requirement is whether the measure promotes the achievement of equality’ *Van Heerden* (note 234 above; para 37).

³¹⁴ The term black people in terms of Section 1 of the EEA includes African, Coloured and Indian people.

³¹⁵ Section 1 of the EEA.

with advancement opportunities so as to remedy the adverse effects of past unjust labour laws.³¹⁶ Gideon observes that:

‘Minority groups have been disadvantaged and continue to be disadvantaged under both the EEA and the EEAA. In the context of *Solidarity obo Barnard*, Barnard in her personal capacity and as a public servant belongs to a class of people who have been deeply affected by the past and present inequalities, namely, women. Just as there is a need to eradicate racial discrimination, there is also a need to remedy gender disadvantages’.³¹⁷

The case of *Barnard* illustrates that one of the main aims of affirmative action measures is to increase the level of female representation in every occupational field.³¹⁸ Drawing on this case, the researcher is of the view that a flexible notion of numerical targets is not in line with increasing gender representatively and promoting a more diverse workplace. This is because it allows an employer to deviate from the targets set in order to appoint a candidate s/he considers appropriate.³¹⁹ Accordingly, striking a balance between a quota (which is rigid) and a numerical target could be profoundly beneficial for the progression of women in the workplace.³²⁰

This is particularly relevant when a woman has all the necessary skills and experience to fill a position. The *Barnard* case emphasises the need for employers and selection committees to apply rationality and fairness in making decisions that have the potential to impact on previously disadvantaged employees. Remedying past injustice through affirmative action measures is a viable way to ensure demographic equity within the workplace,³²¹ as well as a greater proportion of women in senior positions. Finally, while an employer may designate a senior manager or other employee to ensure that the equity plan is adhered to, ultimately, the employer her/himself bears responsibility for full compliance with its equity targets.³²²

3.4.3 The Labour Relations Act

³¹⁶ Gideon (note 221 above; 12).

³¹⁷ *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at [171] (hereinafter: *Barnard*). See *Ibid* 17.

³¹⁸ *Ibid* at [109].

³¹⁹ *Ibid* at [87].

³²⁰ Gaibie (note 262 above; 2671).

³²¹ Grogan (note 289 above; 140).

³²² *Ibid* 414.

Prior to the enactment of the LRA, employees, especially vulnerable employees (women and black people) were subjected to unfair labour practices. Employers had complete power and control over how they choose to operate their businesses. Hence, due to there being no laws regulating the employment relationship, employees were subjected to unfair labour practices which included being dismissed without a proper reason or without following correct procedures.³²³ These actions were also justified under the common law, thus making the employer/employee relationship similar to a master and servant one.³²⁴ And unfortunately these employees were left without a remedy.

Significant change was brought about through the enactment of the LRA. Read in conjunction with Chapter 2 of the Constitution, the LRA's provisions aim to regulate workplace and employment relations.³²⁵ The discussion now turns to various unfair labour practices which have the potential to hinder women's development and advancement.

3.4.3.1 Unfair Labour Practices

As noted previously, Section 23(1) of the Constitution guarantees that 'everyone has the right to fair labour practices'. Section 185(b) read with Section 186(2) of the LRA was enacted to give effect to this provision. It provides for an 'open-textured' scope of impermissible acts which constitute unfair labour practices by an employer.³²⁶ This was the first time the concept of unfair labour practices was incorporated into South Africa's labour legislation framework. It means that an employer must act fairly in all actions relating to an employee. Should s/he act unfairly or prejudicially towards an employee, this will amount to an unfair labour practice.

³²³ Fergus & Collier (note 295 above; 484). The LRA's provisions regulating unfair dismissals and automatically unfair dismissals are beyond the scope of this dissertation. However, some information which must be mentioned is that Section 185 (a) of the LRA provides that 'every employee has the right not to be unfairly dismissed'. In terms of Section 188, an employee who alleges that they have been unfairly dismissed (dismissal relating to misconduct, incapacity or operational requirements) requires their employer to prove that there was a fair reason followed by a fair procedure when effecting the employee's dismissal. In addition to unfair dismissals, section 187 deals specifically with automatically unfair dismissals and the enquiry requires that the employee to show that their dismissal was based on any of the listed grounds mentioned in section 187 or 'on any arbitrary ground', then only will the dismissal be regarded as automatically unfair. Relevant to this dissertation, Section 187(1) (f) provides that a dismissal will be automatically unfair, if the dismissal of an employee was based on the grounds of gender or sex (among other grounds). Section 187(1) (f) is required to be read in conjunction with section 6(1) of the EEA. See Grogan (note 289 above; 120-121 & 191).

³²⁴ Grogan (note 289 above; 4).

³²⁵ Ibid 1.

³²⁶ Ibid 79.

Section 186 (2) of the LRA provides a closed list of acts that constitute unfair labour practices.³²⁷ Accordingly, in order for an employee to succeed in their claim, it has to be founded on one of these listed acts.³²⁸ Unlike the Constitution that offers protection to both the employer and employee, Section 186(2) of the LRA only protects employees against unfair conduct.³²⁹

The next subsection focuses on three types of unfair labour practices which are listed in Section 186 (2) of the LRA, namely, unfair practices relating to the promotion, demotion, or training of an employee. The reason is that issues surrounding women's progression in the workplace result from employers' unfair conduct. Further, prior to the promulgation of the LRA, many employers adopted unfair labour practices to block women from entering and/or advancing to more senior positions. Accordingly, to counteract such unfair conduct, the following practices must now be fairly exercised by employers in all circumstances.

i. Promotion

According to Grogan:

‘Disputes concerning promotion are not limited to claims of discriminatory treatment, although they may include such claims. Employees may also claim that they were overlooked for some unacceptable, irrelevant or invidious reason, or that the employer failed to follow agreed promotion policies and procedures, or failed to adhere to advertised criteria’.³³⁰

However, it is difficult to prove an unfair labour practice in relation to promotions in terms of Section 186(2) (a). This is because an employer is permitted a certain degree of flexibility to employ or promote an employee s/he deems most appropriate.³³¹ However, an employee who can show that the employer acted procedurally unfairly will have a valid claim.³³² The employee has to prove that in not promoting him or her even though s/he had the necessary

³²⁷ Section 186(2) of the LRA.

³²⁸ *Nawa & another v Department of Trade & Industry* [1998] 7 BLLR 701 (LC). See Grogan (note 289 above; 79).

³²⁹ Loux (note 271 above; 42).

³³⁰ Grogan (note 289 above; 81).

³³¹ See *Dlamini v Toyota SA Manufacturing* [2004] 25 ILJ 1513 (CCMA) where the court held that ‘In the area of appointments and promotions, in the absence of gross unreasonableness which leads the court or CCMA to draw an inference of mala fides, the CCMA or court should be hesitant to interfere with the exercise of management's discretion’ at [1517H]. This means that the promotion decision lies with the employer and courts should not interfere unless it is seriously flawed.

³³² Grogan (note 289 above; 82).

objective attributes required for the position, the employer acted in a discriminatory manner, unfairly or in bad faith.³³³ For an employee to succeed in their case they must be able to show that the employer had no justifiable reason for not giving him/her the position and that s/he acted capriciously in exercising their discretion.³³⁴

It can be argued that unfair promotions are one of the main reasons for women failing to progress within South Africa's labour market. While Section 186(2) (a) forces employers to justify their reasons for a promotion and show that correct procedures were followed, gaps remain that prevent women from being promoted to higher positions. Realising the right to development is intertwined with the notion of being afforded equal opportunities and treated fairly in respect of all employment decisions. Thus, for women to fully enjoy and participate in their right to development, they should not be discriminated against or overlooked for unacceptable reasons.³³⁵ In the case of *Botha and South African Police Services* PSSS 1797, the court held that:

‘...the applicant, a white female who was a qualified industrial psychologist applied to be promoted to a post in Psychological Services. She was initially recommended for the post by the selection panel, and minutes were produced to that effect. However, thereafter the marks allocated to another candidate, a black male were altered so that he received the same or higher mark on the selection criteria than the applicant. A new recommendation was then made in terms of which the black male candidate, who did not meet the selection criteria for the post as he was not a psychologist, was promoted. The arbitrator held that the conduct of the selection committee was *mala fides* and set aside its decision, promoting the applicant to the post in question’.³³⁶

The hurdles that remain in achieving the objectives of Section 186(2) are discussed in subsequent the chapter.

ii. Demotion

³³³ Ibid 81-82.

³³⁴ Ibid 82. An exception is that when an employer is following an equity plan with regard to an affirmative action measure, this rejection is legitimately justified.

³³⁵ Ibid 63.

³³⁶ An unreported arbitration held under the auspices of the Safety and Security Sectoral Bargaining Council. See S Molony *The Developing Law of Promotion of Employees in South Africa* (unpublished LLM thesis, University of KwaZulu-Natal, 2006) 172-173.

The LRA also provides that demotions must be carried out in a fair manner.³³⁷ In the case of *Murray v Independent Newspapers*,³³⁸ it was held that:

‘An employee who alleged that he had been demoted must show, objectively speaking, [prove] that he had suffered a loss of benefits or diminution in status’.³³⁹

Just as promotions affect women’s right to development in the workplace, so does demoting a woman without a rational reason as her chances to progress are unduly halted by such acts. In a real life story, Irah recounted how she was demoted soon after returning from maternity leave without her employer providing a just reason.³⁴⁰ In this case, it can be assumed that false gender norms or added family responsibilities motivated the demotion. Such situations persist in many workplaces today and adds to women’s inability progression. The LRA now enables a victim of such unfair labour practice to seek recourse against an employer who reduces their status based on their gender, sex, pregnancy and maternity leave.

iii. Training

Training is required for any employee to climb the corporate ladder. This not only enables them to acquire the necessary skills, but develops their knowledge and experience, thus, providing them with the essential tools to progress in their careers. Broadening their skills set and gaining experience in different fields enables women to break free from vulnerability and inferiority and realise their social and economic rights.

Section 186 (2) (a) of the LRA in relation to the provision of training is one of the fundamental rights that anchor the right to development. The very essence of development requires furthering and intensifying of one’s ability to enjoy their social and economic rights. Hence, training opportunities allows women to expand their employment potential and allows them to propel forward in any profession.

The shortcoming of Section 186 (2) of the LRA in relation to training is that there is no guidance on the circumstances in which an employer is obliged to train her/his employees, nor are

³³⁷ Grogan (note 289 above; 85).

³³⁸ [2003] 24 *ILJ* 1420 (CCMA).

³³⁹ *Ibid* at [1420H].

³⁴⁰ Irah ‘Unfair labour practice - demotion after maternity leave’ (19 February 2016) available at <https://www.health24.com/Experts/Question/Unfair-labour-practice-demotion-after-maternity-leave-20160219-18>, accessed on 05 August 2018.

enforceable guidelines provided on the steps an employer should take to ensure that the training offered is satisfactorily conducted. Furthermore, the labour courts have set minimal precedents in this regard.³⁴¹ Grogan states that the Commission for Conciliation, Mediation and Arbitration (CCMA) appears to have some authority to guide employers with regard to training.³⁴² However, this remains a grey area. In one of the few cases dealing with the provision of training, *Maritime Industries Trade Union of SA v Transnet Ltd*,³⁴³ it was found that:

‘The commissioner had erred by finding that the employees had either a contractual right or a legitimate expectation to the training to which they claimed they were entitled. Had the employees proved that they had such a right or expectation, the court would presumably have ruled in their favour’.³⁴⁴

3.5 Conclusion

While South Africa’s constitutional democracy has made great strides in extending rights to all, inequality and discrimination persist in communities and workplaces. Women continue to live in the shadow of men. Patriarchy and stereotypes characterise family settings, society at large and work environments. These are among the factors that cause South African women’s continued vulnerability and marginalisation.

The country’s constitutional and labour law framework provides the mechanisms required to eliminate unfair discrimination and attain equality in the workplace. It is also accepted that these laws are comprehensive and correctly address gender based issues as discussed. However, as with many of the international and regional instruments, the problem lies with implementation. For women and other previously disadvantaged groups to make meaningful progress, employers need to take cognisance of the barriers confronting them and adopt strategies to alleviate obstacles to their development. While both the EEA and the LRA provide numerous avenues to advance non-discrimination and women’s progression in the workplace, employers’ failure to comply with such provisions or half-hearted efforts to implement them will continue to undermine women’s right to development.

³⁴¹ Grogan (note 289 above; 86).

³⁴² Ibid.

³⁴³ (2002) 23 *ILJ* 2213 (LAC).

³⁴⁴ Grogan (note 289 above; 86).

Chapter 4 will now discuss South Africa's national gender transformation agenda which is designed to give practical effect to the legal frameworks discussed in Chapters 2 and 3.

CHAPTER 4

THE ROLE OF GOVERNMENT IN IMPLEMENTING AND GIVING PRIORITY TO A NEW GENDERED LABOUR MARKET

4.1 Introduction

Chapters 2 and 3 examined the international, regional and domestic legal frameworks that underpin the eradication of gender disparity in the workplace as well as the rights that protect and promote women workers' interests. This chapter examines South Africa's current programme of action aimed at giving legal effect to the country's gender transformation agenda. These initiatives illustrate the extent to which South Africa is compliant with its international and regional obligations and gives practical effect to its own gender based laws.

It is important to stress that, it is not sufficient for a government to merely enact legislation or become a signatory to an international agreement; the real test lies in the programmes, policies and practices endorsed and/or adopted by states to realise the rights of women within the labour market. The chapter begins by examining South Africa's so-called 'national gender machinery', which includes the Minister of Women in the Office of the Presidency, the CGE and the CEE.³⁴⁵ This is followed by a discussion on the role played by the South African government in implementing and giving priority to various gender based projects, plans and policies in order to accelerate the level of female representation in the workplace. The South African judiciary and the mining sector are also examined. Women are gravely underrepresented in these sectors despite laws, enforcement associations and policies designed to offer protection to female employees. Identifying the shortfalls in these sectors will provide insight into the barriers impeding women's development. Finally, having discussed South Africa's national gender agenda which drives the progression of women, the research will draw a general conclusion in respect of the current position of women within the labour workforce.

4.2 South Africa's National Gender Machinery

³⁴⁵ Established in terms of Section 28 of the EEA.

In seeking to achieve its twin goals of gender equality and the emancipation of women, South Africa adopted the international concept of national gender mechanisms.³⁴⁶ This concept is premised on eradicating inequalities, whilst integrating women in development. Albertyn explains:

‘The aims of national gender machinery have been described as “transforming the institutions, procedures, consultative processes, budgetary allocations and priorities of government to take account of the needs and aspirations of women”’.³⁴⁷

The national gender machinery is a national enforcement framework for South Africa’s national gender plan, which uses various institutions and agencies to develop and enforce a gendered programme of action for the country.³⁴⁸ It mainly comprises of the Minister of Women, together with national enforcement bodies, the CGE and CEE. The latter institutions focus on mainstreaming gender equality in all facets of life (including the workplace) in order to achieve a non-sexist, non-discriminatory and non-oppressive society.³⁴⁹ This section discusses these institutions aims, objectives and functions in relation to advancing the status of women and uprooting acts of gender disparity.

4.2.1 The Minister of Women

The Minister of Women in the Office of the Presidency was created by President Cyril Ramaphosa soon after he assumed office in 2018.³⁵⁰ Minister Bathabile Dlamini currently runs this office and also has political responsibility for South Africa's Department of Women. This office derives its constitutional mandate from Section 9 of the Constitution and is dedicated to upholding the right to equality, whilst remedying the past and current effects of discrimination, subordination and disempowerment of women. This Ministry’s first call of action was to develop a ‘National Gender Policy Framework’ that will oversee South Africa’s gender transformation agenda within the different branches of government.³⁵¹ The Department of Women’s ‘Strategic Plan 2015-2020’ states that the plan’s mission is to ‘Accelerate socio-

³⁴⁶ R Manjoo ‘South Africa's National Gender Machinery’ 2005 *Acta Juridica* 243.

³⁴⁷ C Albertyn 'National machinery for ensuring gender equality' in S Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 9.

³⁴⁸ Commission on Gender Equality *20-Year Reviewing Report* (2017) 35 (hereinafter: CGE 20-Year Reviewing Report).

³⁴⁹ Manjoo (note 346 above; 252-253).

³⁵⁰ The Citizen ‘Full list of ministers following ‘New Dawn’ Cabinet reshuffle’ (27 February 2018) available at <https://citizen.co.za/news/south-africa/1837107/full-list-of-ministers-following-new-dawn-cabinet-reshuffle/>, accessed on 7 July 2018.

³⁵¹ CGE 20-Year Reviewing Report (note 348 above; 35).

economic transformation for women empowerment and the advancement of gender equality'.³⁵² It is important to note that this office has national responsibility for not only ensuring the incorporation of policies and mechanisms promoting women's advancement in all government projects, but to develop strategic objectives and implementation plans to mainstream gender equality across the country.³⁵³ Mabandla is of the view that:

'a strong commission on the status of women and a ministry located at national level, coupled with a regulated office of the public defender, should provide solid mechanisms for the promotion of women's human rights'.³⁵⁴

Some of the focus areas the Minister of Women's office address includes economic participation; education; poverty; inequality; social protection; health; basic services; violence against women and children and advancing employment opportunities for women.³⁵⁵ These areas form the crux of the vulnerability women face in South Africa. The fact that the country has established an entire ministry dealing solely with women's issues is a major step forward in promoting women's rights. Furthermore, given that this office is located within the executive branch of government (highest decision making level), it is able to foster gender equality within all branches of government, including national projects, policies and programmes.³⁵⁶

4.2.2 Commission for Gender Equality

The South African Constitution makes provision for the creation of six Chapter 9 Institutions,³⁵⁷ one of which is the CGE.³⁵⁸ As a Chapter 9 Institution, it is required to act as an independent and impartial body which is subject only to the Constitution and other laws.³⁵⁹ At the heart of this institution lies the need to address the challenges emanating from a legacy of ill-treatment, discrimination and oppression of the women in South Africa.³⁶⁰ The vision of the CGE is as follows:

'The Commission on Gender Equality (CGE) is committed to creating a society free from gender discrimination, and all other forms of oppression, in which all people will have the

³⁵² Department of Women *Strategic Plan 2015–2020* (2015) 7 (hereinafter: Strategic Plan 2015–2020).

³⁵³ Manjoo (note 346 above; 249).

³⁵⁴ B Mabandla 'Choices for South African Women' (1994) 20 *Agenda* 29.

³⁵⁵ Strategic Plan 2015–2020 (note 352 above; 15).

³⁵⁶ Manjoo (note 346 above; 251).

³⁵⁷ Section 181(1) of the Constitution.

³⁵⁸ Act 39 of 1996.

³⁵⁹ Section 181(2) of the Constitution.

³⁶⁰ R Manjoo 'Case Study: The Commission for Gender Equality, South Africa - Promotion and Protection of Gender Equality - are Separate Structures Necessary?' (2005) 14(2) *Griffith Law Review* 268.

opportunity and means to realize their full potential, regardless of race, sex, gender, class, religion, sexual orientation, disability, or geographical location'.³⁶¹

The CGE's functions are set out in Section 187 of the Constitution and Section 11 of the Commission on Gender Equality Act.³⁶² The commission's significance lies in the fact that it is an all-encompassing body which serves to 'monitor, investigate, research, educate, lobby, advise and report'³⁶³ on gender related issues, whether a violation of a constitutional right or a legislative provision that concerns the protection and promotion of gender equality. The CGE regulates both the private and public sectors and acts as an advisory body to Parliament, to whom it reports its findings on its monitoring activities. The CGE also has the authority to make recommendations, but lacks enforcement powers.³⁶⁴ This institution is crucial to women's advancement because, firstly, its mandate includes protecting the fundamental rights that underpin women's development;³⁶⁵ and secondly, it is responsible for addressing gender equality across sectors.³⁶⁶ Finally, the CGE also responds to and remedies complaints in respect of violations of gender based provisions. For example, in *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*,³⁶⁷ the CGE acted as *amicus curiae* in a case that provided a:

'...challenge to the discriminatory aspects of the sexual offences law which criminalised commercial sex work and the keeping of a brothel...The *amicus* intervention in the Constitutional Court pointed out that this provision constitutes gender discrimination, as it largely impacts on women. The CGE records and research showed that women are primarily the service providers and that this provision has had an adverse impact on them'.³⁶⁸

The Commission has stepped in and provided additional information to the court in various other cases, thus, fulfilling its investigative and research functions.³⁶⁹ Furthermore, the CGE

³⁶¹ Vision of the CGE, April 1999.

³⁶² See Section 187 of the Constitution and Section 11 of the Commission on Gender Equality Act for the functions of the Commission on Gender Equality.

³⁶³ Manjoo (note 360 above; 273). See CGE 20-Year Reviewing Report (note 353 above; 39).

³⁶⁴ Manjoo (note 360 above; 273).

³⁶⁵ Ibid.

³⁶⁶ Stevens & Ntlama (note 3 above; 47).

³⁶⁷ (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (hereinafter: *S v Jordan*).

³⁶⁸ Manjoo (note 360 above; 275).

³⁶⁹ See the case of *S v Jordan* (note 367 above). The CGE was *amicus curiae* in this landmark decision in 'South Africa with regard to Sexual worker's human rights and the decriminalisation of sex work in South Africa'. See CGE 20-Year Reviewing Report (note 348 above; 82). Also see the case of *Mphela v Manamela and others* (case no. 1/2016, Seshogo Magistrates Court – Equality Court), 'The CGE was again admitted as *amicus curiae* in this matter. The complainant in this matter was unfairly discriminated against by the school principal on the grounds of sexual orientation'. See CGE 20-Year Reviewing Report (note 348 above; 102).

conducts investigative hearings into various industries, people and educational institutions in order to monitor gender transformation and employment equity issues as well as developments in these areas. In a recent CGE report on transformation across sectors titled ‘Women workers still bear the brunt of slow pace inclusive workplaces’,³⁷⁰ the CGE concluded that:

‘The Commission’s Employment Equity report points to a dire situation of gender discrimination in the workplace, e.g. inadequate policy adherence that seek to empower women. The report has also noted an increase in reported cases of sexual harassment and rape. The Gender Commission is also cognisant that there are pay gaps between men and women, yet they are doing the same job with similar qualification. The Commission will continue to support any structure in our society that has a deep interest in ensuring that gender discrimination, women empowerment and career progression of women in the workplace is addressed’.³⁷¹

The report goes on to provide recommendations for industry leaders and trade unions on the importance of recognising women’s basic rights in the workplace. It notes that this calls for the adoption of best practices across sectors to strengthen gender related policies and practices and boost women’s empowerment.³⁷²

While the CGE is an impartial and independent body it is largely dependent on the state for funding and resources.³⁷³ It appears that this negatively impacts on its ability to remain completely independent. The need to secure its operational efficiency may lead the commission to compromise its impartiality.

4.2.3 Commission for Employment Equity

The CEE was established in 1999 in accordance with Section 28 of the EEA.³⁷⁴ It investigates the degree to which South Africa’s labour market has transformed since the enactment of the

³⁷⁰ I Makonko ‘Women workers still bear the brunt of slow pace Inclusive workplaces’ (26 August 2017) available at <http://www.cge.org.za/women-workers-still-bear-the-brunt-of-slow-pace-inclusive-workplaces/>, accessed on 3 August 2018.

³⁷¹ I Makonko ‘Women workers still bear the brunt of slow pace Inclusive workplaces’ (26 August 2017) available at <http://www.cge.org.za/women-workers-still-bear-the-brunt-of-slow-pace-inclusive-workplaces/>, accessed on 3 August 2018.

³⁷² I Makonko ‘Women workers still bear the brunt of slow pace Inclusive workplaces’ (26 August 2017) available at <http://www.cge.org.za/women-workers-still-bear-the-brunt-of-slow-pace-inclusive-workplaces/>, accessed on 3 August 2018.

³⁷³ The CGE receives other financial contributions from sundry sources and donor partners. See Commission for Gender Equality *Annual report 2015/16* (2016) 107.

³⁷⁴ Section 28 of the EEA.

EEA³⁷⁵ and it is also a monitoring and enforcement body that regulates employment equity. It aims to facilitate a more inclusive working environment for all employees.³⁷⁶ The principle functions of the CEE can be found in Section 30 of the EEA. They include but are not limited to advising the Minister of Labour on matters relating to the Code of Good Practices, regulations and policies matters concerning the Act.³⁷⁷ The commission also grants awards to employers for being complaint with and furthering the purposes of the EEA.³⁷⁸

The CEE produces an annual report that informs the Minister of Labour and the public on the current status of the country's labour workforce each year. According to the CEE, employers are required to submit annual equity reports to the Employment Equity Public Register.³⁷⁹ This enables the commission to accurately assess the level of transformation of the labour market. Such data is also used to set future plans and targets. The CEE Report 2017-2018 noted that:

‘During the 2017 employment equity reporting cycle, 27 163 employment equity reports were submitted by designated employers, representing 7 299 428 employees. This represents at least three times the number of reports submitted since the first reporting cycle’.³⁸⁰

The report also provided that in 2017 male employees dominated every sector, including top management, senior management, professionally qualified and technically skilled jobs.³⁸¹ Men had held 77.1% of all top management positions.³⁸² Further states reported that women occupied only 459 of a total of 1 469 available managerial positions.³⁸³ The report adds that:

‘The highest increase in representation of women is noted at Senior Management level, which is 18.8% increase. This bleak picture is after 20 years and is far from desirable’.³⁸⁴

The CEE relies firmly on the EEA and the SDA as the driving mechanisms to bridge the gender equality and unfair discrimination gap.³⁸⁵ Working together, these Acts have the ability to

³⁷⁵ Department of Labour *Commission for Employment Equity Report 2017-2018* (2018) 2 (hereinafter: Equity Report 2017-2018).

³⁷⁶ Section 30(2) of the EEA. See Ibid vi.

³⁷⁷ Section 30(1) (a)-(c) of the EEA.

³⁷⁸ Section 30(2) (a) of the EEA.

³⁷⁹ Equity Report 2017-2018 (note 375 above; 2).

³⁸⁰ Ibid.

³⁸¹ Ibid 3. See Appendix E: Occupational level statistics by race and gender.

³⁸² Equity Report 2017-2018 (note 375 above; 3).

³⁸³ Statistics South Africa ‘Quarterly Labour Force Survey Quarter 2: 2017’ available at <https://www.statssa.gov.za/publications/P0211/P02112ndQuarter2017.pdf>, accessed on 7 August 2018. See Appendix F: 2017 Employment by sex and occupation statistics.

³⁸⁴ Equity Report 2017-2018 (note 375 above; 3).

³⁸⁵ Ibid.

harness the full potential of the country's diverse economically active population.³⁸⁶ However, the stark figures depicted above show that the SDA has produced minimal results. The purpose of this Act is to increase the pool of skilled labour, especially through developing and training people from designated groups.³⁸⁷ Improved strategies need to be formulated in the coming years in order to find a more effective ways for these Acts to complement each other and drive transformation of the labour market.

Finally, the CEE hopes to address the barriers identified above through its 'Strategic Priorities 2016-2021'.³⁸⁸ Priority areas include:

- Provide sound advice to the Minister of Labour on the EEA, Regulations, Codes of Good Practice, Policy and any other Employment Equity related matters;
- Engage stakeholders in order to promote effective implementation of the objectives of the EEA;
- Conduct research in order to inform and enrich the work of the Commission and
- Monitor, evaluate and report on employment equity trends in the country.³⁸⁹

These priority areas have been set up with the aim that by 2021 there will be equitable representation of all types of employees in South Africa's workforce.

4.3 South Africa's Plan for a New Gender Dimension within the Labour Market

As noted above, South Africa's national gender machinery consist of various national gender institutions that were established to promote and enforce gender based laws, policies and programmes. This section discusses these projects, plans and programmes.

South Africa's national gender programme of action reinforces its commitment to the ILO, UN, CEDAW, Beijing Declaration and SADC. Projects and initiatives which form part of the government's gender equality and women empowerment agenda include the NDP 2030, the National Gender Policy Framework on Women's Empowerment and Gender Equality and the

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ Ibid 9.

³⁸⁹ Ibid.

various ways in which South Africa is promoting the achievement of the UN's SDGs 2030 and the ILO's standards and guidelines. Such initiatives are further aimed at strengthening South Africa's internal labour standards. Ultimately, effective compliance translates to women progressing in all occupational levels and in every occupational category.

4.3.1 The National Gender Policy Framework on Women's Empowerment and Gender Equality

The Office on the Status of Women adopted the National Gender Policy Framework on Women's Empowerment and Gender Equality (hereinafter: referred to as the National Gender Policy) in the year 2000 as part of the government's national gender plan.³⁹⁰ The policy now forms part of the Department of Women in the Office of the Presidency's long term gender policy framework.³⁹¹ Given South Africa's commitment to the Beijing Declaration and Platform for Action and CEDAW, as well as its sub-regional obligations to SADC, the National Gender Policy Framework was created to show its dedication to address the plight of women in society and workplaces.³⁹² It places an obligation on all national departments and their respective ministries to mainstream gender inclusive policies, procedures, practices and recommendations in order to transform the country and improve the socio-economic and political status of women.³⁹³ The framework's objectives include:

- 'Establish policies, programmes, structures and mechanisms to empower women and to transform gender relations in all aspects of work, at all levels of government as well as within the broader society;
- Ensure that gender considerations are effectively integrated into all aspects of government [including the DOL] policies, activities and programmes;
- Establish an institutional framework for the advancement of the status of women, as well as the achievement of gender equality; and
- Advocate for the promotion of new attitudes, values and behaviour, and a culture of respect for all human beings in line with the new policy'.³⁹⁴

³⁹⁰ The City of Cape Town *Women Empowerment and Gender Equality a Draft Policy Discussion Document* (2004) 11.

³⁹¹ Ibid.

³⁹² Office on the Status of Women *South Africa's National Policy Framework for Women's Empowerment and Gender Equality* (2003) 3-4.

³⁹³ Department of Cooperative Governance Traditional Affairs *Gender Policy Framework for Local Government 2015-2020* (2015) 25-26 (hereinafter: Gender Policy Framework for Local Government 2015-2020). Also see Strategic Plan 2015–2020 (note 352 above; 10).

³⁹⁴ Gender Policy Framework for Local Government 2015-2020 (note 393 above; 26).

The policy is also goal orientated in that it seeks to ensure that the country's labour workforce gets to a position where men and women are equal in all respects, in line with Section 9 of the Constitution and Section 6 of the EEA. Moreover, the National Policy Framework utilises gender focal points (GFPs)³⁹⁵ to achieve its objectives:

‘The placement of gender focal points (GFPs) in the offices of the Directors-General with access to strategic decision making processes, will enable them to support gender mainstreaming in all programmes in their departments and find the most suitable mechanisms, such as gender responsive budgeting or gender score cards, to mainstream gender and ensure that the strategic plans of their departments have gender indicators...’.³⁹⁶

Furthermore, the National Policy Framework relies on South Africa's national gender machinery for the effective enforcement and monitoring of its legal framework. This is a powerful gender instrument since mainstreaming gender equality and the empowerment of women at all levels of government policy, legislation, planning and budgeting, will surely yield significant transformation. It can be concluded that the National Policy Framework has the potential to remedy discrimination and marginalisation of women in the workplace simply because of its wide scope and national authority.

4.3.2 Sustainable Development Goals

Following the expiry of the Millennium Development Goals (MDGs) in 2015,³⁹⁷ 193 member states met in New York on the 70th anniversary of the UN to adopt 17 SDGs which are to be

³⁹⁵ Gender Focal Points refer ‘... to quantitative indicators based on sex disaggregated statistical data - which provides separate measures for men and women on...[various categories]’. ‘Gender Indicators: What, Why and How?’ available at <http://www.oecd.org/development/gender-development/43041409.pdf>, accessed on 24 September 2018.

³⁹⁶ Strategic Plan 2015–2020 (note 352 above; 10).

³⁹⁷ Statistics South Africa *Localizing and Mainstreaming Sustainable Development Goals: An Inclusive Implementation Process* (2015) 7 (hereinafter: StatsSA Localizing and Mainstreaming Sustainable Development Goals). See Statistics South Africa *Millennium Development Goals: Country report 2015*(2015) 17. It is worth noting that the South African government's commitment to the MDGs led to the adoption of ‘a rights-based developmental framework within its national development plans and strategies’, one of which was the NDP 2030. With particular emphasis on MDG 3 (Promote Gender Equality and Empower Women), government's efforts is visible across South Africa's many gender transformation initiatives and anchored by its constitutional provisions, national legislative provisions and policy initiatives, such as Section 9 of the Constitution, the EEA, LRA and the NDP 2030.

achieved by the year 2030 in order to continue the sustainable development trajectory.³⁹⁸ The SDGs are more universal, ambitious, broader and integrated than the MDGs. Sustainable development,

‘...embraces the so-called triple bottom line approach to human wellbeing. Almost all the world’s societies acknowledge that they aim for a combination of economic development, environmental sustainability, and social inclusion, but the specific objectives differ globally, between and within societies’.³⁹⁹

A lack of economic development and social inclusion are among the many obstacles impeding the national progression of women. Accordingly, SDG 5 (Gender Equality) is solely directed at women’s equality and empowerment. More importantly this goal plays an integral role in all dimensions of the other SDGs’.⁴⁰⁰ The Economic Commission for Africa notes that:

‘Sustainable Development Goal 5, to achieve gender equality and empower all women and girls, underscores the importance of improving gender equality and opportunities for sustainable development and how the negative impact of discrimination against women and girls can impede economic and social development. Gender equality is integral to sustainable development and an essential ingredient for economic progress. When women and girls have the means to fully participate in and contribute to socioeconomic development, direct and indirect benefits lead to the betterment of societies and nation States as a whole’.⁴⁰¹

South Africa’s active compliance with SDG 5 has tremendous significance for its labour market. In addressing employment equity through policies and projects, the government has taken local realities of developmental and gender issues into account. For example, local government is aware of the developmental and gender related issues that affect the communities it serves. In order to assist national government to transform gender relations across society, local government formulated its own ‘Gender Policy Framework 2015-2020’

³⁹⁸ J D Sachs ‘From Millennium Development Goals to Sustainable Development Goals’ (2012) 379 *Viewpoint* 2206. See S Pandey ‘The Road From Millennium Development Goals to Sustainable Development Goals by 2030: Social Work’s Role in Empowering Women and Girls’ (2017) 32(2) *Affilia: Journal of Women and Social Work* 125.

³⁹⁹ Sachs (note 398 above; 2206).

⁴⁰⁰ UN Women ‘SDG 5: Achieve gender equality and empower all women and girls’ available at <http://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality>, accessed on 29 August 2018.

⁴⁰¹ Economic Commission for Africa 2017 *Africa Sustainable Development Report: Tracking Progress on Agenda 2063 and the Sustainable Development Goals* (2017) 66 (hereinafter: 2017 Africa Sustainable Development Report).

that aims to harness local projects to reduce inequality and accelerate women's development by 2020.⁴⁰² The South African Local Government Association (SALGA) created a checklist of activities, including political participation, policy making, and recruitment for municipal posts that should prioritise the employment of women.⁴⁰³ Clearly, this policy demonstrates local government's plan to try increase the level of female representation in government positions. SDG 5 provides this programme with international reinforcement, as it also demands greater number of women to be considered and given more opportunities in leadership roles.⁴⁰⁴ StatsSA is optimistic that if the SDGs are tailored to South Africa's national, sub-national and local frameworks, their targets will be achieved by 2030.⁴⁰⁵

4.3.3 The International Labour Organisation

As noted previously, the ILO sets the benchmark for global labour standards. Since re-joining the ILO in 1994,⁴⁰⁶ South Africa has ratified 27 conventions (8 of which are the ILO's fundamental Conventions) and 24 are still in force.⁴⁰⁷ South Africa's labour laws are anchored on the ILO's standards and guiding principles. For example, South Africa's compliance with the ILO's Freedom of Association and Protection of the Right to Organise Convention⁴⁰⁸ can be found in Sections 17 and 18 of the Constitution as well as Sections 4, 6 and 64 of the LRA. The government also used the Discrimination (Employment and Occupation) Convention as a yardstick for drafting Sections 9 and 23 of the Constitution, Section 6 of the EEA and the preamble to the LRA. To further demonstrate South Africa's meaningful implementation of the ILO's labour standards, the government established the CEE, CCMA⁴⁰⁹ and NEDLAC⁴¹⁰ that stand as 'watch dogs', constantly monitoring compliance with labour laws.

Recent developments in South Africa's labour laws were influenced by the ILO's Equal Remuneration Convention 1951 (No. 100)⁴¹¹ and Minimum Wage-Fixing Machinery

⁴⁰² Gender Policy Framework for Local Government 2015-2020 (note 393 above; 11).

⁴⁰³ Ibid 41-42.

⁴⁰⁴ 2017 Africa Sustainable Development Report (note 401 above; 67).

⁴⁰⁵ StatsSA Localizing and Mainstreaming Sustainable Development Goals (note 397 above; 71-79).

⁴⁰⁶ International Relations and Cooperation 'International Labour Organisation (ILO)' available at <http://www.dirco.gov.za/foreign/Multilateral/inter/ilo.htm>, accessed on 30 August 2018.

⁴⁰⁷ International Labour Organisation 'Ratifications for South Africa' available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888, accessed on 30 August 2018.

⁴⁰⁸ ILO Freedom of Association and Protection of the right to Organise Convention 87 of 1948, ratified in 1996.

⁴⁰⁹ Established in terms of Section 112 of the LRA.

⁴¹⁰ National Economic Development and Labour Council Act 35 of 1994.

⁴¹¹ ILO Equal Remuneration Convention 100 of 1951, ratified in 2000 (hereinafter: Equal Remuneration Convention).

Convention 1928 (No. 26).⁴¹² This resulted in amendments to Sections 6(4) and 6(5) of the EEA and the recently adopted National Minimum Wage Bill.⁴¹³

The Equal Remuneration Convention requires heads of state to enact national laws and regulations to promote ‘Equal Pay for Work of Equal Value’ in all occupations among men and women.⁴¹⁴ The principle of equal pay is also lobbied for by Article 2 of the Discrimination Convention⁴¹⁵ and Article 19(2) (a) of the SADC Gender and Development Protocol.⁴¹⁶ Recent amendments⁴¹⁷ to Sections 6(4) and 6(5) of the EEA regulate equal pay claims between employers and employees.⁴¹⁸ Ebrahim explains that:

‘Section 6(4) of the EEA prohibits unfair discrimination in terms and conditions of employment between employees performing the same or substantially the same work or work of equal value. [Section 6(4) of the EEA provides for three causes of action in respect of equal pay. They are as follows: (a) equal pay for the same work; (b) equal pay for substantially the same work; and (c) equal pay for work of equal value]. Section 6(5) of the EEA allows the Minister of Labour to prescribe the criteria and methodology for assessing work of equal value after consultation with the Commission for Employment Equity’.⁴¹⁹

Further, in order to resolve any complexities surrounding this principle, the Minister of Labour published the Employment Equity Regulations⁴²⁰ together with the Code of Good Practice on Equal Pay/ Remuneration for Work of Equal Value.⁴²¹ The regulation lists factors to ‘evaluate whether two different jobs are of equal value’⁴²² and a methodology on how to resolve an equal pay dispute,⁴²³ while the Code on Equal Pay provides practical guidelines for employers on how to promote and apply the equal pay principle within the workplace.⁴²⁴

⁴¹² ILO Minimum Wage-Fixing Machinery Convention 1928 (No.26), ratified in 1932 (hereinafter: Minimum Wage-Fixing Machinery Convention).

⁴¹³ National Minimum Wage Bill published under GN 10779 of GG 41257, 17/11 2017 (hereinafter: the Bill).

⁴¹⁴Article 2(2) (a) and Article 2(1) of the Equal Remuneration Convention. See Articles 2(2) (b)-(d) of the Minimum Wage-Fixing Machinery Convention. Also see S Ebrahim ‘Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom’ (2016) 19 *PER/ PELJ* 2.

⁴¹⁵ Article 2 of the ILO Discrimination Convention.

⁴¹⁶ Article 19(2) (a) of the SADC Protocol. Also see Ebrahim (note 414 above; 2).

⁴¹⁷ The amendments were made in terms of the EEAA.

⁴¹⁸ Ebrahim (note 414 above; 1-2).

⁴¹⁹ Section 6(4) – (5) of the EEA. See *Ibid* 1.

⁴²⁰ Employment Equity Regulations published under GN R595 of GG 37873, 1/08/2014 (hereinafter: Employment Equity Regulations).

⁴²¹ Code of Good Practice on Equal Pay/ Remuneration for Work of Equal Value published under GN 448 of GG 38837, 1/ 06/ 2015 (hereinafter: Code on Equal Pay).

⁴²² Ebrahim (note 414 above; 2).

⁴²³ *Ibid*.

⁴²⁴ Item 1 of the Code on Equal Pay.

The adoption of the equal pay principle means that Sections 6(4) and 6(5) of the EEA gives women the right to demand to be paid in line with their male counterparts, who essentially perform the same or similar duties. This will have the overall effect of not only improving women's socio-economic circumstances, but also according female employees a salary that is worth the value she contributes to the company. Moreover, Sections 6(4) and 6(5) of the EEA indirectly gives effect to women's right to development as a result of realising their socio-economic rights. The fact that these sections place men and women on the same footing is a milestone for the labour market as they enable past discriminatory practices to be eradicated and gender disparity to be reduced.

The most recent development in South Africa's labour law is the National Minimum Wage Bill being signed into law.⁴²⁵ From a close study it appears that the Bill is based on the ILO's Minimum Wage-Fixing Machinery Convention. The idea behind this convention is to protect vulnerable workers, especially:

‘...workers employed in certain of the trades or parts of trades (and in particular in home working trades) in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low’.⁴²⁶

Accordingly, the Convention offers a broad scope for member states to set up national machinery that enables different sectors to adopt a minimum wage threshold, either through enactment of a statute, an order of a court or tribunal, or by means of concluding a collective agreement.⁴²⁷

The concept of a minimum wage has gained traction in many countries as it was considered to be a fair and just modality to restore labour stability.⁴²⁸ Now that the Bill has been signed into

⁴²⁵ ‘The National Minimum Wage Act sets South Africa's first national minimum wage at R20 an hour – equivalent to R3 500 per month, depending on the number of hours worked – and creates a phase-in period for farm workers, forestry workers, domestic workers, welfare sector and care workers, due to their vulnerability to disemployment.’ See The Presidency Republic of South Africa ‘President signs National Minimum Wage Bill into Law’ (26 November 2018) available at <http://www.thepresidency.gov.za/press-statements/president-signs-national-minimum-wage-bill-law>, accessed on 30 November 2018.

⁴²⁶ Article 1 of the Minimum Wage-Fixing Machinery Convention.

⁴²⁷ ‘Everything you need to know about the minimum wage bill before it comes into effect’ (9 July 2018) available at <https://businesstech.co.za/news/business/257267/everything-you-need-to-know-about-the-minimum-wage-bill-before-it-comes-into-effect/>, accessed on 30 August 2018. See NEDLAC *National Minimum Wage Report: Recommendations on Policy and Implementation* (2016) 21 & 125 (hereinafter: NEDLAC Report).

⁴²⁸ ‘Everything you need to know about the minimum wage bill before it comes into effect’ (9 July 2018) available at <https://businesstech.co.za/news/business/257267/everything-you-need-to-know-about-the-minimum-wage-bill-before-it-comes-into-effect/>, accessed on 30 August 2018. See NEDLAC Report (note 427 above; 21).

law it is expected to be enforceable early 2019.⁴²⁹ It aims to address the systematic challenges confronting the majority of the most vulnerable workers in the labour market, who are subjected to low wages, poverty, and enormous levels of inequality.⁴³⁰ The Bill sets a minimum wage that cannot be waived by a collective agreement or unilaterally by an employer (such an act will constitute an unfair labour practice).⁴³¹ NEDLAC fully supports the introduction of a national minimum wage as it believes this will uplift the country's poorest and most vulnerable workers,⁴³² many of whom are women. Women make up a large portion of low-paid and unskilled workers, such as domestic workers and unskilled agricultural labour.⁴³³ Minister of Labour, Ms Mildred Oliphant considers the National Minimum Wage Act to be a milestone for South Africa as vulnerable low-paid workers live under extreme hardship and are denied their fundamental rights.⁴³⁴ Therefore, the National Minimum Wage Act will now bring these informal workers into the realm of labour law protection and provide them with the framework to challenge inequalities and unfair labour treatment should their employers sidestep the new national wage threshold.

4.3.4 The National Development Plan 2030

The final element of South Africa's programme of action to be discussed is the NDP 2030. The South African government has always been open to measures that will generate more jobs and diversifying the labour market.⁴³⁵

The Cabinet adopted the NDP 2030 in 2012.⁴³⁶ It serves as a long-term vision and plan to eliminate poverty and reduce inequality by 2030. The NDP 2030 emerged as a result of the National Planning Commission's Diagnostic Report,⁴³⁷ which revealed South Africa's

⁴²⁹ 'Everything you need to know about the minimum wage bill before it comes into effect' (9 July 2018) available at <https://businesstech.co.za/news/business/257267/everything-you-need-to-know-about-the-minimum-wage-bill-before-it-comes-into-effect/>, accessed on 30 August 2018.

⁴³⁰ Bill (note 413 above; 233).

⁴³¹ 'Everything you need to know about the minimum wage bill before it comes into effect' (9 July 2018) available at <https://businesstech.co.za/news/business/257267/everything-you-need-to-know-about-the-minimum-wage-bill-before-it-comes-into-effect/>, accessed on 30 August 2018. See Chapter 4 of the Bill.

⁴³² NEDLAC Report (note 427 above; 14).

⁴³³ Statistics South Africa *Quarterly Labour Force Survey, Quarter 2* (2017) 64. See Appendix F.

⁴³⁴ L Omarjee 'National Assembly's approval of Minimum Wage Bill a milestone — Oliphant' (29 May 2018) *Mail & Guardian* available at <https://mg.co.za/article/2018-05-29-national-assemblys-approval-of-minimum-wage-bill-a-milestone-oliphant>, accessed on 30 August 2018.

⁴³⁵ Department of Labour *Revised Strategic Plan 2015-2020* (2017) 6.

⁴³⁶ National Science and Technology Forum 'Understanding the context of the National Development Plan (NDP)' (September 2017) available at <http://www.nstf.org.za/wp-content/uploads/2017/10/The-NDP-part-1-to-4-Sep2017-06.pdf>, accessed on 28 July 2018.

⁴³⁷ National Planning Commission *Diagnostic Report* (2011) available at <https://www.nationalplanningcommission.org.za/Downloads/diagnostic-overview.pdf>, accessed on 26 July 2018.

achievements and shortcomings since 1994.⁴³⁸ The core finding ‘identified a failure to implement policies and an absence of broad partnerships as the main reasons for [the country’s] slow progress’.⁴³⁹

The ‘National Development Plan 2013: Our Future – Make it Work’⁴⁴⁰ acknowledges that South Africa’s transition to a democratic state has been successful; however, the country remains divided and many of its people are imprisoned by poverty and inequality. South African society and workplace remains inherently unequal and opportunities still seem to be shaped by apartheid norms.⁴⁴¹ Consequently, women and other disadvantaged people are unable to live the lives they desire.⁴⁴² The NDP states that:

‘This plan envisions a South Africa where everyone feels free yet bounded to others; where everyone embraces their full potential, a country where opportunity is determined not by birth, but by ability, education and hard work. Realising such a society will require transformation of the economy and focused efforts to build the country’s capabilities. To eliminate poverty and reduce inequality, the economy must grow faster and in ways that benefit all South Africans’.⁴⁴³

This multidimensional framework encapsulates 15 chapters, all of which embrace the theme of gender equality and equal opportunity for all.⁴⁴⁴ The NDP also incorporates a plan specifically for women. It envisages a shift occurring by 2030 when conditions will exist that allow women to develop to their full potential.⁴⁴⁵

Given that gender inequality is seen as a serious impediment to the plan’s goals, the NDP proposes a range of measures to advance and promote the rights of women.⁴⁴⁶ Its recommendations include:

⁴³⁸ National Science and Technology Forum ‘Understanding the context of the National Development Plan (NDP)’ (September 2017) available at <http://www.nstf.org.za/wp-content/uploads/2017/10/The-NDP-part-1-to-4-Sep2017-06.pdf>, accessed on 28 July 2018.

⁴³⁹ National Science and Technology Forum ‘Understanding the context of the National Development Plan (NDP)’ (September 2017) available at <http://www.nstf.org.za/wp-content/uploads/2017/10/The-NDP-part-1-to-4-Sep2017-06.pdf>, accessed on 28 July 2018.

⁴⁴⁰ National Planning Commission *National Development Plan 2030 Our Future - make it work* (2012) 1 (hereinafter: NDP 2030).

⁴⁴¹ Ibid 1 and 24.

⁴⁴² Ibid.

⁴⁴³ Ibid 24.

⁴⁴⁴ Ibid 1 and 24-25.

⁴⁴⁵ C Levendale ‘International Women’s Conference: Towards Women’s Economic Empowerment: An overview of challenges, achievements, legislative mechanisms and programmes’ (11 August 2017) available at <https://www.parliament.gov.za/storage/app/media/uploadedfiles/International%20Womens%20Conference%202017%20-%20Womens%20Economic%20Empowerment%20-%20August%202017.pdf>, accessed on 28 July 2018.

⁴⁴⁶ NDP 2030 (note 440 above; 43).

- reducing the unemployment rate among women,
- promoting transformation through encouraging greater participation and the empowerment of women in the workforce,
- building an equitable society where opportunity is not based on gender,
- supporting women in leadership roles across society and ensuring that cultural, societal, religious and educational barriers to women's progression are addressed, and
- Developing women in the labour market.⁴⁴⁷

In order to achieve these objectives, the National Planning Commission⁴⁴⁸ has been assigned the task of ensuring that national institutions, such as the CGE, CEE and the SAHRC's roles, responsibilities and programmes of action are mainstreamed and that they monitor the achievement of NDP's targets.⁴⁴⁹ The NDP affirms that transforming South Africa's workforce and uniting the country requires a joint effort by all who live in this great nation. Realising South Africa's constitutional values and commitments through the NDP's implementation and monitoring mechanisms has the ability to secure a non-sexist, non-discriminatory, integrated and equal society and labour workforce by 2030.

4.4 Particular Sectors where Women are Under-represented

The South African judiciary and mining sector are among the numerous fields where women are gravely excluded, not only from acquiring jobs but advancing in these fields. These sectors continue to be male dominated despite domestic laws and international standards necessitating diversity. This poses a serious impediment to the development of women in these occupations. This section examines the legal framework that governs these sectors, as well as various initiatives to expand the level of female representation. The research aims to identify the barriers which create a glass ceiling to the progression of women in these fields.

4.4.1 The Judiciary

⁴⁴⁷ Ibid.

⁴⁴⁸ 'The National Planning Commission was established in May 2010 to develop a long term vision and strategic plan for South Africa', including coordinating and monitoring the implementation of the NDP 2030. See 'National Planning Commission' available at <https://www.nationalplanningcommission.org.za/Pages/About-Us.aspx>, accessed on 27 September 2018.

⁴⁴⁹ NDP 2030 (note 440 above; 47).

In seeking to improve its image and restore legitimacy to South Africa's judicial system, Section 174 of the 1996 Constitution pledged to transform the judiciary into an independent, non-racist and non-sexist institution. Sections 174(2) and 174(1) are respectively known as the 'diversity' and 'merit requirement' provisions.⁴⁵⁰ Section 174(2) places an obligation on the Judicial Service Commission (JSC) to always consider the fundamental importance of creating a more diverse and representative judicial system when deliberating the appointment of judicial officers.⁴⁵¹ It thus facilitates judicial transformation which can be linked to a form of affirmative action in terms of both race and gender.⁴⁵² Diversity demands greater representatively in order to create a more layered and value-laden judicial system that secures the acceptance, respect and confidence of the majority of the South African population.⁴⁵³

Section 174(1) provides that a potential judge must be 'appropriately qualified' and be a 'fit and proper person'.⁴⁵⁴ This criterion is regarded as absolute requirements for the selection of judicial officers. However, according to former Chief Justice Chaskalson, the JSC gives more weight to merit, rather than focusing on the need for a broader and more diverse judiciary.⁴⁵⁵ This researcher is of the view that a more appropriate approach would be that proposed by Olivier who argues for a balance between the need for diversity and technical ability.⁴⁵⁶ Careful analysis of the JSC's selection criteria for appointing judges to different benches within South Africa's judicial system reveals that they fuse these two requirements.⁴⁵⁷

Notwithstanding these commitments, gender representation within South Africa's court structures remains skewed. Statistics compiled in 2017 by the CGE in response to complaints

⁴⁵⁰ R B Cowan 'Women's Representation on the Courts in the Republic of South Africa' (2006) 6(291) *U. MD. L.J. RACE, RELIGION, GENDER & CLASS* 299. See M Olivier 'A Perspective on Gender Transformation of the South African Judiciary' (2013) 130 *The South African Law Journal* 449-450. See Sections 174(1) and 174(2) of the Constitution.

⁴⁵¹Section 174 (2) of the Constitution. The need for the judiciary to broadly reflect the racial and gender composition of South Africa must be considered when judicial officers are appointed. See Olivier (note 450 above; 449-450).

⁴⁵² Ibid 450.

⁴⁵³ Ibid 450-451.

⁴⁵⁴ Section 174(1) of the Constitution. Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person appointed to the Constitutional Court must be a South African citizen.

⁴⁵⁵ Olivier (note 450 above; 454-455). And F du Bois 'Judicial selection in post-apartheid South Africa' in K Malleson & P H Russell *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (2006) 287.

⁴⁵⁶ Olivier (note 450 above; 455).

⁴⁵⁷ Judicial Service Commission 'New guidelines for selection judges – JSC' (16 September 2010) available at <http://www.politicsweb.co.za/documents/new-guidelines-for-selection-judges--jsc>, accessed on 08 September 2018. See Appendix G: JSC's criteria for judicial appointments.

lodged by the Democratic Governance and Rights Unit⁴⁵⁸ and Sonke Gender Justice (discussion to follow) on the lack of gender transformation in the judiciary, showed that only 35% of permanent judges were women, with 65% male.⁴⁵⁹ Moreover, CGE also found that:

‘Over the past 20 years the number of women on the **Constitutional Court** has remained unchanged: two in 1994 and two in 2014 while the percentage of women in other High Courts remains below 30%: as at October 2013, there were 77 women judges out of a total of 239 in South Africa’.⁴⁶⁰

Moreover:

‘... Since June 2012 there have been two rounds of for appointments to the Constitutional Court. During these two rounds, nine candidates were interviewed, of whom eight were men and one was a woman. Out of these two processes, two men were appointed. At the level of the **Supreme Court of Appeal (SCA)**, there have been three interview processes since June 2012. Fifteen candidates were interviewed. Of these candidates, there were 13 men and two women. Six men and one woman were appointed out of these processes. At **High Court** level, which includes the Labour Appeal Court, Labour Courts, Electoral Courts and Land Claims Courts, there have been four interview processes. During these processes, 61 candidates were interviewed, of whom 32 were men and 29 were women. These processes led to the appointment of 17 men and 14 women judges’.⁴⁶¹

These statistics starkly depict male domination of the judiciary at all levels despite various initiatives to promote women’s progression in this field.⁴⁶² It is perplexing to fathom why this is the present situation despite having constitutional backing mandating greater representation of people of colour and women.

⁴⁵⁸ ‘The DGRU is an action oriented research unit based in the law faculty at the University of Cape Town. Its two pillars are: Judicial Governance and Free Access to Law. One aspect of the judicial governance pillar focuses on the need to transform the judiciary in order to promote gender representation as mandated by the South African Constitution’. See DGRU and Sonke Gender Justice *Outcomes of the Democratic Governance and Rights Unit (UCT) and Sonke Gender Justice's: Gender Transformation of the Judiciary Project 2013–2014* (2015) 3 (hereinafter: Gender Transformation of the Judiciary Project 2013–2014).

⁴⁵⁹ Commission for Gender Equality *Discussion Document on Gender Transformation in the Judiciary and the Legal Sector* (2018) 10 (hereinafter: CGE – Gender transformation in the Judiciary). See Appendix H: Permanent employed judges.

⁴⁶⁰ Centre for Applied Legal Studies *Transformation of the Legal Profession* (2014) 6.

⁴⁶¹ Ibid.

⁴⁶² CGE – Gender transformation in the Judiciary (note 459 above; 17).

i. The Role of Non-Profit Organisations (NPOs) in Seeking Judicial Reform

The South African Chapter of the International Association of Women Judges (South African Chapter IAWJ), Sonke Gender Justice and the South African Women Lawyers Association (SAWLA) are non-profit, non-governmental organisations (NGOs) that are committed to ensuring that all women and girls have access to justice and that women's representation is increased at all levels of the judicial system.⁴⁶³

The South African Chapter IAWJ was established in 2004 out of concern that equality and parity between male and female judges as well as overall gender transformation within the legal system had been slow paced.⁴⁶⁴ Its programmes highlight the reasons why female judges are vital assets to the judiciary.⁴⁶⁵ These include the fact that female judges understand and empathise with women or young girls, whilst patriarchal or discriminatory practices leave women feeling vulnerable and weak.⁴⁶⁶ Furthermore, having more female judges on the bench, especially in high positions, gives women an opportunity to be part of important decision making processes, enabling them to refine and gender sensitise statutory laws and judicial precedent.⁴⁶⁷ It is clear from the South African Chapter of the IAWJ's vision and their activities, including their judicial training programme⁴⁶⁸ that in order to achieve gender balance and promote inclusivity within the judiciary, more practical plans need to be set in motion. This would have a ripple effect that will improve the well-being of all women.

Sonke Gender Justice is an NPO that was established in 2006.⁴⁶⁹ It aims to transform South Africa so that men and women co-exist and benefit as equal members of society, thus, strengthening the country's democracy.⁴⁷⁰ Sonke Gender Justice also provides information in

⁴⁶³ See International Association of Women Judges *Strategic Plan 2014-17* (2014) 1 (hereinafter: IAWJ – Strategic Plan 2014-2017). See the Constitution of the South African Women Lawyers Association (SAWLA) (2006) 7-9 (hereinafter: SAWLA Constitution).

⁴⁶⁴ 'South African Chapter of the International Association of Women Judges' available at <http://www.justice.gov.za/saiawj/about.html>, accessed on 20 August 2018.

⁴⁶⁵ 'South African Chapter of the International Association of Women Judges' available at <http://www.justice.gov.za/saiawj/about.html>, accessed on 20 August 2018.

⁴⁶⁶ 'South African Chapter of the International Association of Women Judges: Programs to Promote Gender Equality & Equal Justice' available at <http://www.iawj.org/programs/>, accessed on 20 August 2018.

⁴⁶⁷ 'Programs to Promote Gender Equality & Equal Justice' available at <http://www.iawj.org/programs/>, accessed on 20 August 2018.

⁴⁶⁸ The IAWJ works with and through its chapters to provide training that is responsive to local needs with the content guided and shaped by in-country judges.

⁴⁶⁹ D Peacock 'South Africa's Sonke Gender Justice Network: Educating men for gender equality' (2013) 27(1) *Agenda* 128.

⁴⁷⁰ *Ibid.*

various cases and participates in decision-making processes in order to promote non-sexism. Their investigation surrounding the ‘The Gender Transformation of the Judiciary Project’ revealed manifest impediments that are posing serious barriers to the progression of women within the legal profession. As noted earlier, the CGE responded to concerns raised by Sonke Gender Justice by investigating the gender composition of the South African judiciary in 1994, and 19 years later after the enactment of Section 174(2) of the Constitution. The commission found that in 1994 the judiciary was made up of 165 judges, with 163 positions filled by men. In 2013, men occupied 173 of 247 seats, with women trailing far behind with 74 positions.⁴⁷¹ The JSC’s response to this information was extremely disappointing; it merely acknowledged that there is a gender imbalance within South Africa’s judicial structures and that more needed to be done by various legal organisations and women’s associations to address this issue.⁴⁷² No information was forthcoming on what steps the JSC itself proposed to take. This calls the JSC’s commitment to ensuring greater representation of women on the bench into question.

Lastly, the SAWLA was established in 2006 as a national networking forum for women in the legal profession in order to advance and empower female lawyers and judges.⁴⁷³ It also seeks to promote women’s access to the legal sector in order to give them a platform to participate in national policy decision making processes, thus playing a role in transforming the judiciary and enhancing its legitimacy.⁴⁷⁴ Together with other organisations, SAWLA identified various challenges faced by female candidates. The first is a lack of effective development, management and training programmes for women judges.⁴⁷⁵ As a result of South Africa’s unequal history, the majority of women were denied the opportunity of becoming judicial officers. Hence, training and development programmes would enable women to further their legal careers. Secondly, the legal fertility, including male judges, does not encourage or support women in their legal careers.⁴⁷⁶ This could be due to the desire to maintain male domination or the notion that men are better qualified and better decision makers than female judges. Thirdly, women who are fortunate enough to make it onto the bench find that their opinions and views are often overlooked or they are excluded from the decision making process. In an article in

⁴⁷¹ Commission for Gender Equality *Lack of Gender Transformation in the Judiciary Investigative Report* (2016) 29-30 (hereinafter: CGE Investigative Report). See Appendix I: Progression comparison diagram of the judiciary.

⁴⁷² Ibid 31.

⁴⁷³ ‘South African Women Lawyers Association (SAWLA)’ available at <http://www.sawla.org.za/>, accessed on 23 August 2018.

⁴⁷⁴ SAWLA Constitution (note 463 above; 4-5).

⁴⁷⁵ IAWJ – Strategic Plan 2014-2017 (note 463 above; 2).

⁴⁷⁶ SAWLA Constitution (note 463 above; 9).

the *Sunday Times* titled ‘Women Judges tell of the Struggle for Acceptance’;⁴⁷⁷ a female judge spoke openly about her experience on the bench:

‘Normally, amongst the judges who will hear a case together, you talk beforehand about the issues that you want to raise when the matter is argued in court. In the first few years, they would not talk to me and even once we were in court, on the bench, I would sit there like a spare wheel’.⁴⁷⁸

It would thus seem that constitutional guarantees have not resulted in the transformation of South Africa’s judiciary. The failure to create a balanced and equally representative judiciary results in the majority population losing confidence and assurance in the legal system. A solid action plan is required to address the barriers that are hampering women’s progression and restore the public’s faith in this system.

4.4.2 The Mining Sector

Given that the mining industry is extremely labour intensive and operates in a dangerous working environment, it has been dominated by men. Mercier and Gier describe this sector as follows:

‘Mining’s tumultuous history evokes images of rootless, brawny and often militant men, whether labouring in sixteenth-century Peru or twenty-first century South Africa, but women are often ignored or reduced to shadowy figures in the background supporting male miner family members’.⁴⁷⁹

Previously, in order to comply with international and South African laws, women were prohibited from working underground. Article 2 of the ILO’s Underground Work (Women) Convention 45 of 1935⁴⁸⁰ and the South African Minerals Act⁴⁸¹ banned women from being

⁴⁷⁷ C Rickard ‘Women Judges tell of Struggle for Acceptance’ *Sunday Times* 10 April 2005 at 11.

⁴⁷⁸ Ibid.

⁴⁷⁹ L Mercier & J Gier ‘Reconsidering Women and Gender in Mining’ (2007) 5(3) *History Compass* 995.

⁴⁸⁰ ILO Underground Work (Women) Convention 45 of 1935, ratified in 1936.

‘Females employed in health and welfare services; and females who, in the course of their studies, spend a period of training in the underground parts of a mine’ available at <http://www.ilo.org/public/english/protection/safework/cis/oshworld/ilostd/c045.h>, accessed on 29 August 2018.

⁴⁸¹ Act 50 of 1991.

employed as miners.⁴⁸² The international community slowly started to shift its position and ILO Convention 176 (Safety and Health in Mines Convention, 1995) lifted this restriction.⁴⁸³ Following the transition to democracy in 1994, the government repealed the South African Minerals Act and replaced it with the Mineral and Petroleum Resources Development Act⁴⁸⁴ together with the Broad-based Socio-Economic Empowerment Charter.⁴⁸⁵ The principle objective was to promote gender equality, rectify past disadvantages and include women in all core mining functions.⁴⁸⁶

The MPRDA aims to:

‘Substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation’s mineral and petroleum resources’.⁴⁸⁷

Its promulgation resulted in a slow but noticeable increase in the number of women working in all functions in the mining industry. While no evidence points to a lack of good will in achieving these goals;⁴⁸⁸ the DOL noted that women only made up 12% of the South African mining labour force in 2017.⁴⁸⁹ Studies by Botha and Cronjé, the DOL as well as Mercier and Gier showed that, the mining environment promotes a culture of masculinity, gender stereotyping and sexist views of women.⁴⁹⁰ Furthermore, there are few career opportunities available to women in this sector.⁴⁹¹ Botha and Cronjé observe that the barriers include:

⁴⁸² A P Benya *Women in Mining: A Challenge to Occupational Culture in Mines* (unpublished LLM dissertation, University of the Witwatersrand, 2009) 4.

⁴⁸³ ILO Safety and Health in Mines Convention 176 of 1995, ratified in 2000. The ILO Underground Work (Women) Convention 45 of 1935 was revised and is currently in force.

⁴⁸⁴ Act 28 of 2002 (hereinafter: (MPRDA)).

⁴⁸⁵ Broad-based Socio-Economic Empowerment Charter, published under GN 611 of GG 41714, 15/06/2018 (hereinafter: Mining Charter).

⁴⁸⁶ Also see D Botha & F Cronjé ‘Women in mining: A conceptual framework for gender issues in the South African mining sector’ (2015) 39 *South African Journal of Labour Relations* 10.

⁴⁸⁷ Section 2(d) of MPRDA.

⁴⁸⁸ Botha & Cronjé (note 486 above; 10). See Appendix J: 2017/2018 Mining and quarrying statistics.

⁴⁸⁹ Minerals Council South Africa *Women in Mining* (2017) 2 (hereinafter: MCSA – Women in mining) See Appendix K: Women in mining statistics.

⁴⁹⁰ Mercier & Gier (note 479 above; 997).

⁴⁹¹ Botha & Cronjé (note 486 above; 11).

‘poor mentoring systems and career paths; inadequate infrastructure facilities; health and safety issues; physical ability challenges; resistance by male workers; sexual harassment; shift work; and issues related to pregnancy and working hours’.⁴⁹²

The herculean task thus lies ahead of establishing gender equality in a sector where women are clearly unwelcome.⁴⁹³ The fact that 13 years after legislation enabled women to be employed in the mining sector, there is only 12% female representation shows that there is significant hesitation and reluctance to admit women in this industry. Wynn notes that conditions in the industry, management attitudes, the mining culture, inherent risks and physically arduous work,⁴⁹⁴ create substantial obstacles that hamper career advancement and the professional opportunities available to women.⁴⁹⁵ It should be acknowledged that mining jobs require strength and stamina to handle massive equipment. The DOL rightfully states that:

‘Working underground is not a straightforward decision, however. South Africa has – in the gold and platinum industries – some of the very deepest mines in the world. And added to that is the fact that these mines are historically very labour-intensive with physically arduous work under challenging conditions. Often, the physical strength and effort required from many underground jobs simply precludes many women from being able to effectively do them. Some of the most difficult jobs, such as rock drill operators, may also have physiological risks for women’.⁴⁹⁶

However, more should be done by the Department of Mineral Resources (DMR) to increase female participation in mining work. Recommendations such as tailoring mining equipment and gear to accommodate females will assist in alleviating some of the inherent barriers.

i. The Role of Non-Profit Organisations (NPOs) in Seeking Gender Reform in the Mining Sector

Several women’s organisations have been formed to ensure the sustainable development and progression of women in the mining industry. They include the South African Women in Mining Association (SAWIMA) and Women in Mining South Africa (WIMSA).

⁴⁹² Ibid.

⁴⁹³ Ibid.

⁴⁹⁴ E J Wynn ‘Women in the Mining Industry’ (2001) available at <http://www.ausimm.com.au/content/docs/wynn.pdf>, accessed on 22 August 2018.

⁴⁹⁵ Botha & Cronjé (note 486 above; 11).

⁴⁹⁶ MCSA – Women in mining (note 489 above; 2).

SAWIMA was established in 1999 with the assistance of the Department of Minerals and Energy.⁴⁹⁷ It aims to empower informal mining groups and promote female participation in all levels of the mining environment, which is in accordance with the Mining Charter.⁴⁹⁸ SAWIMA launches initiatives to lobby support for and enhance the position of women in the mining industry.⁴⁹⁹ It was established at a time when the government was exploring programmes and projects to promote gender transformation in this sector, as mobilising greater female participation within the mining sector was a priority area.⁵⁰⁰ A Briefing by the DMR noted that:

- ‘The support that the Department of Minerals and Energy provided to women was informed by a realisation that there was an alarming absence of women’s participation in the mining and energy sectors.
- A vision was developed to see more women assuming an important role in the mining and energy industry’.⁵⁰¹

SAWIMA aims to:

- Ensure greater inclusion of women within the formal and informal activities in the mining sector;
- address the needs, interests and challenges women face within the mining sector and to implement a programme of action;
- identify women’s training and development needs; and
- formulate or seek assistance from other organisations such as MEETI⁵⁰² to assist in training female mine workers.⁵⁰³

⁴⁹⁷ Department of Mineral Resources *Briefing by the Department on SAWIMA and the Intended Objectives on Establishing the Organisation* (2011) 3 (hereinafter: DMR Briefing).

⁴⁹⁸ South African Women in Mining Association (SAWIMA) ‘*Transformation in the Mining Sector*’ (23 November 2011) available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/111123dmr_0.ppt, accessed on 25 August 2018.

⁴⁹⁹ DMR Briefing (note 497 above; 4).

⁵⁰⁰ Ibid 2-3.

⁵⁰¹ Ibid 3.

⁵⁰² Minerals and Energy Education Training Institute.

⁵⁰³ DMR Briefing (note 497 above; 4-5).

However, the association's 'Transformation in the Mining Sector Report', states that the unfortunate reality is that SAWIMA is unlikely to achieve its targets.⁵⁰⁴ The reasons provided show that insignificant progress has been made in the past twenty years to meet the Mining Charters targets, Big Mining Houses employment equity scorecards are not well monitored and there are no consequences for not meeting these targets.⁵⁰⁵

The other important mining association is WIMSA. WIMSA was established in 2003 to support professional women within the mining sector.⁵⁰⁶ It is an:

'empowering network to inspire, support and develop the progression of women working in the mining industry by providing access to education, skills development, mentorship and representation'.⁵⁰⁷

Research conducted by WIMSA found that, as a result of the number of male employees in this sector, women confront a glass ceiling which stifles their career progression.⁵⁰⁸ Furthermore, the lack of legislative and internal support for women prevents them from reaching their full potential.⁵⁰⁹ Taken together, these factors make it extremely difficult for women to enter and progress to more senior positions in mining companies.⁵¹⁰ Chair of WIMSA, Claire McMaster, motivates for a holistic approach to the development of women within this industry:

'Creating a culture that supports diversity can only be driven by the CEO and senior leaders. Once senior leadership commitment is visible, it needs to be supported by the appropriate policies and procedures such as flexible working arrangements, career development

⁵⁰⁴ South African Women in Mining Association (SAWIMA) 'Transformation in the Mining Sector' (23 November 2011) available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/111123dmr_0.ppt, accessed on 25 August 2018.

⁵⁰⁵ South African Women in Mining Association (SAWIMA) 'Transformation in the Mining Sector' (23 November 2011) available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/111123dmr_0.ppt, accessed on 25 August 2018.

⁵⁰⁶ K Dimmer 'Q & A: Women in the Mining SA' *Johannesburg Stock Exchange Magazine Supplement* available at <http://www.jsemagazine.co.za/jse-supplement/qa-women-mining-sa/>, accessed on 28 August 2018.

⁵⁰⁷ K Dimmer 'Q & A: Women in the Mining SA' *Johannesburg Stock Exchange Magazine Supplement* available at <http://www.jsemagazine.co.za/jse-supplement/qa-women-mining-sa/>, accessed on 28 August 2018.

⁵⁰⁸ K Dimmer 'Q & A: Women in the Mining SA' *Johannesburg Stock Exchange Magazine Supplement* available at <http://www.jsemagazine.co.za/jse-supplement/qa-women-mining-sa/>, accessed on 28 August 2018.

⁵⁰⁹ K Dimmer 'Q & A: Women in the Mining SA' *Johannesburg Stock Exchange Magazine Supplement* available at <http://www.jsemagazine.co.za/jse-supplement/qa-women-mining-sa/>, accessed on 28 August 2018.

⁵¹⁰ K Dimmer 'Q & A: Women in the Mining SA' *Johannesburg Stock Exchange Magazine Supplement* available at <http://www.jsemagazine.co.za/jse-supplement/qa-women-mining-sa/> accessed on 28 August 2018.

programmes, coaching and then practical factors like equipment and services that support women in the workplace'.⁵¹¹

There have been several amendments to the Mining Charter over the years and the most recent Draft 2018 Mining Charter⁵¹² includes a section on Employment Equity and provides for greater representation of professional women.⁵¹³ The Charter stipulates that, within a five year period, black women should occupy a minimum of 20% of the positions on all mining companies' boards.⁵¹⁴ It also provides that 15% of executive and junior management positions as well as 20% of middle management positions must be occupied by women.⁵¹⁵ These baseline requirements are essential to expand female representation and career development within the mining sector.⁵¹⁶

4.5 Current Position and Challenges confronting Women in the South African Labour Market

The democratic dispensation resulted in major initiatives to address the plight of women in the South African labour market. In addition to constitutional protection, an array of statutory provisions bestows equal rights on men and women. Together with the social drive for women to succeed, these rights and protections address past oppressive and discriminatory laws and practices that excluded women from entering various occupations.

This chapter has shown that, overall, the South African workforce is more diverse and inclusive due to comprehensive legislation and policy initiatives. The rationale behind the aforementioned laws and projects were to eradicate gender disparity and elevate female representation in the workplace; and to a certain degree this has been achieved. A sterling example is Professor Nomthandazo Ntlama, who despite her impoverished background in one of South Africa's former 'homelands' is a law professor at the University of Fort Hare, a member of the SAHRC, and an elected member of the JSC panel. Such success stories show

⁵¹¹ K Dimmer 'Q & A: Women in the Mining SA' Johannesburg Stock Exchange Magazine Supplement available at <http://www.jsemagazine.co.za/jse-supplement/qa-women-mining-sa/>, accessed on 28 August 2018.

⁵¹² The Draft Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, published under GN 611 of GG 41714, 15/06/2018 (hereinafter: 2018 Draft Mining Charter).

⁵¹³ Ibid 24-27.

⁵¹⁴ Ibid 28-29.

⁵¹⁵ Ibid 29.

⁵¹⁶ Penalties for non-compliance with the Mining Charter and Mineral and Petroleum Resources Development Act can be found in Section 99 of the Mineral and Petroleum Resources Development Act.

that, prioritising the well-being and progression of all citizens opens the door to endless possibilities.

Nonetheless, two decades later the gap between laws and policies and the situation on the ground in workplaces across the country illustrates that much remains to be done and that many women still lack fundamental rights.⁵¹⁷ A gradual adjustment in re-organising South Africa's labour workforce was expected, but the realities set out above are antithesis of a democratic country. Lewis-Enright, Crafford and Crous note that:

‘...despite progressive legislation and aggressive organisational policies aimed at integrating women into senior management structures, little progress has been made’.⁵¹⁸

Indeed,

‘In South Africa, statistics show that although women make up 52% of the adult population, and have a 41% representation in the workforce, they hold a relatively small percentage of influential positions. Only 7% of South African directors are female, 3% of chairs of boards are female, and 2% of CEOs are female’.⁵¹⁹

Additionally, the discussion proffered on the South African judiciary and mining sector revealed further challenges confronting female employees in work settings which include stereotypical views of women, male dominance and self-doubt. In a survey of 17 men and women working in the finance division of a large company, respondents noted that the fact that women bear children slows their career progression.⁵²⁰ Many employers are reluctant to employ and/or promote women as a result of generalised assumptions. Employers assume that a time might come when women will choose motherhood over their career and this decision will negatively affect the business.⁵²¹ The unfortunate reality is that these preconceived and fallacious conjectures form the core of many recruitment and promotion decisions which is significantly prejudicing women.

On the other hand, subconscious fear of not being able to juggle work and family responsibilities prevents many women from furthering their careers.⁵²² Moreover, many

⁵¹⁷ K Lewis-Enright, A Crafford & F Crous ‘Towards a workplace conducive to the career advancement of women’ (2009) 35(1) *SA Journal of Industrial Psychology/SA Tydskrif vir Bedryfsielkunde* 136.

⁵¹⁸ Ibid.

⁵¹⁹ Ibid.

⁵²⁰ Ibid.

⁵²¹ Ibid.

⁵²² Ibid.

companies support a particular office culture in which women feel uncomfortable and ignored.⁵²³ For example, male employees may gather informally in a ‘gentleman’s club’.⁵²⁴ Within such casual meetings, men tend to belittle and stereotype women. They also form cliques within the working environment.⁵²⁵ A masculine workplace culture reinforces women’s marginalisation and vulnerability. Research has also shown that many businesses offer very little or no support to women in the workplace,⁵²⁶ especially with regard to family responsibilities. While the BCEA grants employees the right to family responsibility leave and the Code on Employment Equity encourages such measures, women are cast in a negative light when they exercise this right. Stereotypes of women resurface, such as ‘a woman’s place is in the home’.⁵²⁷ It appears that the barriers identified in the survey above correlate to a large extent with the barriers found within judicial and mining sectors. Therefore, a general finding that can be made is that these hurdles are hampering the growth and development of women within the national labour market as a whole. Unfortunately, many of these barriers are based on generalised and false assumptions about women.

The impediments to women’s advancement ignore the fact that women possess a wide range of skills that could greatly benefit any company.⁵²⁸ Hubner’s research found that women process information faster than men; multi-task more efficiently and have greater social thinking and interaction skills.⁵²⁹ They are also strategic thinkers; while men might be risk-takers, women analyse the situation in greater detail, ensuring that all risks taken are calculated and are weighed against the rewards.⁵³⁰

This suggests that a more diverse workforce, especially with regard to increased representation of women in top management positions, could improve labour productivity and grow a business and the economy. It calls for employers to not only abide by legislative requirements, but to commit to South Africa’s gender transformation agenda.

4.6 Conclusion

⁵²³ Ibid 137.

⁵²⁴ Ibid 136.

⁵²⁵ Ibid.

⁵²⁶ Ibid 137.

⁵²⁷ Ibid 136-137.

⁵²⁸ K Hubner ‘Women bring different skills to the workplace’ *Feature Women’s Month* 31 August 2017 10.

⁵²⁹ Ibid.

⁵³⁰ Ibid.

This chapter outlined South Africa's holistic gender transformation plan. In prioritising gender parity, the government seeks to reshape society and the country's workforce by recognising the challenges impeding women's development. South Africa's gender transformation agenda stretches across all branches of government. However, much remains to be done. Given that employment equity laws have been in place for 20 years, it could be expected that 50/50 gender representation would have been achieved in workplaces. The examples of the judiciary and the mining industry discussed in this chapter show that these employment laws and gender based programmes have not had the desired effect.

Chapter 5 presents an overall conclusion and recommendations to accelerate women's progression and overall career development in South Africa.

CHAPTER 5

CONCLUSION

5.1 Introduction

'Freedom cannot be achieved unless women have been emancipated from all forms of oppression. All of us must take this on, that the objectives of the Reconstruction and Development Programme will not have been realized unless we see in visible and practical terms that the condition of women in our country has radically changed for the better, and that they have been empowered to intervene in all aspects of life as equals of any other member of society'.⁵³¹

The excerpt above captures this study's aim of addressing the underlying barriers that are instrumental in the lack of women's progression within South Africa's labour market. The fundamental purpose of this study was to address the vulnerable position of women within the workplace despite having international, regional and national laws as well as policies and measures to assist the development of this relegated group.

⁵³¹ C Albertyn...et al 'Engendering the Political Agenda in South Africa' in INSTRAW (U.N. ed) (2000) *Engendering the Political Agenda: The Role of the State, Women's Organizations and the International Community* 162-163 (Quoting First State of the Nation Address to Parliament (May 24, 1994)).

To achieve this aim, three objectives were set. Firstly, the study sought to examine relevant international and regional instruments that regulate women's labour rights and the right to development, in order to ascertain the extent to which they are advancing the position of women. Secondly, the research aimed to highlight the vulnerable position of South African women and thereafter, provide an in-depth analysis of South Africa's current legal framework that is designed to promote the right to equality, fair labour practices and the elimination of unfair discrimination. This enabled an analysis of the extent to which South Africa's labour legislation enables or disables women's right to development. Finally, the study examined South Africa's current programme of action that aims to give practical effect to South Africa's gender transformation agenda. The objective was to determine the extent to which South Africa is compliant with its international and regional commitments and is giving practical effect to its own gender-based laws. The South African judiciary and mining sector where women are gravely underrepresented were also examined and the reasons for this state of affairs were identified. Cumulatively, the different chapters of this dissertation offered a coherent evaluation of the current position of women within South Africa's labour market.

This chapter begins by discussing the study's findings. This is followed by recommendations on how to overcome the challenges which impede women's right to development and ultimately prevent their progression in the workplace. The chapter concludes with an overall reflection on the research.

5.2 Findings

Chapter 2

Chapter 2 analysed various international and regional human rights and labour instruments. The analysis revealed various challenges that inhibit their overall success and desired outcomes. The first is the lack of efficient enforcement and monitoring mechanisms. Both the ICESCR and CEDAW were found to have extremely weak enforcement structures, thereby providing a loophole for member states to evade complying with their commitments.⁵³² This paves the way for violations within the territories of member states. Moreover, these instruments usually rely on a single body or committee to oversee implementation, enforcement and monitoring of their provisions. Having a single monitoring committee is a burdensome arrangement that has resulted in failure to identify violations. As noted in Chapter 2 on the

⁵³² Chapter 2; pages 16, 20 & 31-32.

discussion of the African Women's Protocol, it is questionable whether a single commission is capable of focusing on women's rights violations, while also acting as an enforcement body for all the other rights under the instrument and its sub-instruments.⁵³³ This structural flaw also creates uncertainties in determining whether or not the instrument's provisions are practically addressing the challenges it seeks to tackle at domestic level.

Secondly, the research found that there are gaps between the rights set out in instruments and countries' domestic laws. The principle cause lies in states failing to submit periodical reports on their progress made in implementing the instruments' provisions. Many instruments lack mandatory state reporting requirements and procedures demanding regular submissions. This translates to the instrument becoming futile and extraneous, since it is not known if the rights and freedoms it entrenches are meaningfully carried out.

Finally, it was found that very few international and regional instruments impose penalties, fines or sanctions on member states for noncompliance with their provisions. There may be underlying reasons for this omission, but it nevertheless is a weighty impediment. This offers states further reason to evade their commitments, thus, calling the effectiveness and value of the instrument into question.

Chapter 3

The analysis of South Africa's constitutional and labour legislative provisions revealed many positive findings in terms of rights that impact on women's development. The laws governing the right to equality, non-discrimination and fair labour practices are comprehensive and are goal-orientated. However, the shortfall lies in the lack of implementation. Similar to the findings in Chapter 2 but within a different context, the real value of all laws, particularly labour laws, lies in employers' level of compliance in workplace settings. When powerful laws and policies are not applied, their purpose is lost.

Further, it was found that while some employers acknowledge at face value the laws governing gender disparity, the vulnerability and ill-protected status of women are still not factored into pivotal decisions taken by them. Having powerful laws and policies, but failing to consider the in peril state of women when applying these laws and policies, this loses the purpose behind

⁵³³ Chapter 2; page 28.

such measures. This is particularly relevant when it comes to recruitment, selection and promotion decisions.

Finally, the study found that women's lack of representation in the executive and legislative arms of government as well as in top and senior management positions in companies has resulted in poor mainstreaming of gender based issues across government departments and on corporate agendas as women's voices are absent. This results in these entrenched barriers continuing to hinder the progression of women.

Chapter 4

Chapter 4 identified several challenges confronting South Africa's national gender agenda. Firstly, it was found that one of the underlining causes of women's slow progression within various occupational fields lies in entrenched gender norms and stereotypes that falsely perpetuate the abilities and characteristics of women. Given that the workplace is a microcosm of society, prejudicial perceptions of women held by society at large have penetrated the workplace and are impacting workplace equity. The harrowing statistics presented in Chapter 4 illustrate the grim reality of female under-representation in the sectors discussed and it is evident that fallacious sexist and gender norms contribute to this state of affairs.⁵³⁴

Secondly, the study found that a lack of training, occupational support and fair recruitment and promotion criteria prevent women's advancement. The evaluation of the South African judiciary and mining sector revealed that diversity is severely lacking in these occupational fields. While constitutional and legislative measures have been adopted to increase women's representation in these sectors, they have not been effective. This can be attributed to gender bias masquerading in unfair labour practices. A working environment which is unsupportive of women and does not provide training or mentoring opportunities stifles the growth of its employees, especially women.

Finally, it was concluded that when employers and government departments fail to give effect to the laws and policies regulating women workers' rights, this effectively denies a woman her basic fundamental rights, including her right to development. It was acknowledged that gender transformation is a process which cannot be achieved overnight. However, this cannot be used as an excuse by employers, government or citizens to fail to comply with laws, policies and programmes. The research is able to conclude that should the relevant parties fail to

⁵³⁴ Chapter 4; pages 76 – 77 & 81.

acknowledge the gravity of their failed attempts at realising the objectives of these polices, the consequences for women are dire. Essentially this translates to prolonging women from being able to fully partake in basic human rights. In light of this, the CEE should take a much firmer stance against employers who fail to comply with its regular equity reporting requirements.

5.3 Recommendations

5.3.1 Effective monitoring mechanisms and state compliance

The effectiveness of any international or regional instrument lies in the level of state compliance. Monitoring regular state compliance is the only way to determine whether visible changes are being effected within a country's domestic laws. It is thus recommended that instruments with manifestly weak enforcement mechanisms, their monitoring bodies or committees should amend their state reporting procedures and impose a mandatory obligation on member states to submit annual compliance reports by a stipulated date or face strict penalties. Assistance should be offered to states that are under-resourced and struggle to meet their obligations on time. It is further recommended that a regional body be established that draws on various internal resources to assist countries in complying with reporting obligations.

Moreover, an independent monitoring and enforcement body should be established for each instrument, which is fully committed to protecting different classes of rights, for example, an independent commission to monitor the rights of women or those of children. Therefore, it is strongly recommended that a separate commission be established under those instruments offering women direct or indirect protection in order to effectively regulate and monitor the rights of women. This will drastically elevate the effectiveness of the instrument in achieving their desired outcomes.

Finally, increased sanctions, fines and penalties should be introduced for failure to adhere to the instruments' provisions. It is suggested that placing a certain level of pressure on states to comply with and implement the instruments provisions is an effective strategy, as states will be more inclined to fulfil their obligations so as to avoid the ramifications of non-performance. It is submitted that, were CEDAW to follow the example of the African Women's Protocol in providing for penalties, fines or other sanctions, their global level of state compliance would drastically improve.

5.3.2 Enabling equality, non-discrimination and fair labour practices

The laws regulating equality, non-discrimination and fair labour practices are intended to address the challenges faced by vulnerable and marginalised employees, and women form a significant portion of this bracket. The study suggests that a failure to consider the vulnerable position of women when making employment or promotion decisions constitutes a complete contravention of the aforementioned laws. These laws cannot be viewed in isolation, without considering the lives, conditions and status of women when applying these laws.⁵³⁵ In order to monitor whether such unfair practices are being carried out, given that the CCMA and its labour inspectors are already overburdened, it is recommended that an internal monitoring system be introduced, comprising of representatives of trade unions, NGOs operating in the relevant industries and Chapter 9 Institutions (example, the CGE or SAHRC). These stakeholders currently monitor and hold employers accountable for the non-compliance with their labour obligations. It is thus fitting they collectively monitor employers' commitment to addressing employment equity. They would also offer a strong shield against further violations and indirect discriminatory practices.

Furthermore, the study's findings pointed to two areas in which increased state intervention is desperately required. Firstly, while affirmative action aims to expand workplace representatively, as noted in Chapter 3,⁵³⁶ numerical targets and representativeness are not absolute requirements when employers appoint or promote an employee.⁵³⁷ It is thus recommended that a proportionate mix be established between numerical targets and quotas (which are more rigid) within occupational fields.⁵³⁸ Thus, a more rigid approach to democratic representative in the workplace is the only viable solution to compel employers to be more compliant with EEA's equity laws. This would provide employers with the degree of flexibility they require, while making it obligatory to increase female representation within the workplace.

Secondly, greater support is required from government and employers to integrate work and family responsibilities. The Code on Employment Equity requires employers to 'consider' accommodating and supporting the creation of a flexible working environment for employees

⁵³⁵ R Ozoemena 'Legislation as a critical tool in addressing social change in South Africa: Lessons from *Mayelane v Ngwenyama*' (2015) 18(4) *PER/PERJ* 976.

⁵³⁶ Chapter 3; page 52.

⁵³⁷ *Barnard* (note 317 above; para 68). Also see Gaibie (note 262 above; 2671).

⁵³⁸ Gaibie (note 262 above; 2671).

with family responsibilities.⁵³⁹ However, as a result of no authoritative law mandating employers to follow through with such measures (as the Code is non-binding), the lived reality shows that employers do not priorities such measures in the workplace. It is suggested that financial contributions to child care (including child care facilities) and policy initiatives as well as providing flexible work-family considerations would ease the burden on female employees, as women are the primary care-givers within many homes. In Norway, despite the country not being a fully developed state (similar to South Africa), their government and employers provide financial, legal and structural contributions to various institutions' child care and family policies in order to support and stimulate women's employment.⁵⁴⁰ Drawing from this example, flexible working arrangements, workplace crèches and leave options would serve as a catalyst for greater number of women applying for senior and top management positions.

Finally, these recommendations stand a better chance of succeeding if women occupy more positions within national government and executive positions in companies. This would enable women to influence and gender sensitive legislation and company policies and practices to be enacted. They would be able to mainstream gender issues and assist in eradicating the key impediments to women's right to development. As noted in Chapter 1, research has shown that companies with more women on their boards outperform their competitors simply because women have an array of different skills, outlook and work ethic which gives the company a complete edge.⁵⁴¹ In turn, this grows the economy. It is clear that this recommendation would have a full circle effect.

5.3.3 Addressing gender norming, occupational support and the lack of training

It is recommended that stereotypes, gender norming and patriarchy should not only be addressed at workplace level, but should also be dealt with as wider social issues which affect homes, communities and schools. Having said this, employers have a particular responsibility to address issues of male domination, fallacious stereotypes, gender prejudice and the belittlement of women through company policies, practices, workshops and training. Again, trade unions, NGO representatives and independent institutions (such as the CGE or CEE)

⁵³⁹ Item 11 of the Code on Employment Equity.

⁵⁴⁰ K Eknes 'Financing Early Childhood Education and Care in Norway' (2000) available at <https://www.oecd.org/education/skills-beyond-school/1917465.pdf>, accessed on 13 November 2018.

⁵⁴¹ Chapter 1; pages 6-7. See Stones (note 36 above; 7).

should conduct regular internal inspections to scrutinise workplace policies and practices and ensure that employers are fulfilling their responsibilities.

Secondly, in order to address concerns of poor occupational support, employers should be educated to be more open and supportive of female employees. This would ensure that selection panels and other employees are more accommodating and willing to recruit, promote and interact with women. The attitude of employers towards women also affects the overall ethos and operating culture of the working environment. If employers act as role models in supporting an open, diverse and neutral work environment, this sets a strong precedent for employees to follow.

Further, in order to address the issue of ineffective training, it is recommended that mandatory legislative provisions imposing a duty on all employers to train and develop their employees on an on-going basis is required. This would be highly beneficial to all employees, especially women, who were excluded from various occupations for many years. It is also suggested that the Code on Employment Equity extend its depth to include guidelines for employer on how and when this duty should be carried out as well as a system to monitor whether employers are effectively adhering to this employment equity obligation. Therefore, in order to put both men and women on an equal playing fields, having legislative authority necessitating employers to offer constant training, and a comprehensive Code to guide employers on how and when this duty ought to be carried out, this will give women the opportunity to develop their skills, knowledge and experience in order to fruitfully exercise their right to development.

Finally, it is recommended that an on-going programme of action should form part of South Africa's national gender programme of action. It is crucial that gender considerations are factored into all national, provincial and local government plans and projects as part of a comprehensive effort to reach the goal of 50/50 gender representation in all sectors. It is recommended that gender related policies and projects should not only set realistic goals for the achievement of the stipulated outcomes, but also offer incentives or rewards to employers in order to encourage them to submit their equity reports on time or significantly increase the level of female representation in their workplace. This will provide encouragement and motivation for employers and government departments to accelerate gender transformation in South Africa, thus fully realising the right to development in the country.

5.4 Conclusion

Equal protection and opportunities lie at the heart of women's ability to progress. This study showed that, while South Africa has adopted a range of laws, policies and practices to promote women's empowerment and progression, much remains to be done. Government, employers and other relevant stakeholders should thus collaborate to address the identified hurdles and ensure that women's right to development is realised. The failure to address these issues results in women bearing the brunt of inequality and slow progress. Therefore, this study concludes by emphasising that the progression of South African women in the workplace is profoundly dependent on the successful implementation of the legal frameworks underpinning gender disparity. Accordingly, positive steps taken in this regard will unearth the barriers that are impeding women's right to development.

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The World Bank ‘Vulnerable employment, female (% of female employment)’ available at <http://api.worldbank.org/v2/en/indicator/SL.EMP.VULN.FE.ZS?downloadformat=excel>, accessed on 3 November 2018.

NEWSPAPER ARTICLES

Hubner, K ‘Women bring different skills to the workplace’ *Feature Women’s Month* 31 August 2017, at 10.

Manyathi-Jele, N ‘Women, the judiciary and transformation’ *De Rebus* 1 October 2018, at 11-13.

Rickard, C ‘Women Judges tell of Struggle for Acceptance’ *Sunday Times* 10 April 2005, at 11.

Stones, L ‘Too many women stuck in the middle’ *Business Day* 01 July 2013, at 7.

APPENDICES

Appendix A: SADC Member States

SADC MEMBER STATES

Angola



Mauritius



Botswana



Mozambique



Comoros



Namibia



Democratic Republic of Congo



Seychelles



Eswatini



South Africa



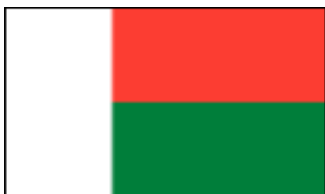
Lesotho



United Republic of Tanzania



Madagascar



Zambia



Malawi



Zimbabwe



Source: South African Development Community: Towards a Common Future ‘SADC Member States’ available at <https://www.sadc.int/member-states/>, accessed on 23 May 2018.

LABOUR
Economically active population aged 15-65 years
Industry divisions, 1951-1970

Industry divisions	Census year	Total													
		Total		Male		Female		African/Black		Coloured		Indian/Asian		White	
		6	7	7	8	8	9	9	10	10	11	11	12	12	
Agriculture, forestry and fishing	1951	1 508 642	1 405 902	102 740	1 252 616	97 674	12 928	145 424							
	1960	1 687 486	1 485 569	201 917	1 437 900	120 252	10 847	118 487							
	1970	2 482 452	1 593 080	889 372	2 260 386	116 836	7 317	97 913							
Mining and quarrying	1951	510 091	506 915	3 176	448 790	3 800	542	56 959							
	1960	614 852	610 781	4 071	548 169	4 489	595	61 599							
	1970	680 384	673 729	6 655	609 823	7 164	720	62 677							
Manufacturing	1951	502 100	428 740	73 360	227 203	70 262	22 005	182 630							
	1960	643 520	546 937	96 583	308 332	93 180	31 640	210 368							
	1970	1 026 082	810 917	215 165	513 926	166 105	64 448	281 603							
Electricity, gas and water	1951	25 380	25 031	349	16 614	1 564	162	7 040							
	1960	28 332	27 721	611	16 411	1 825	63	10 033							
	1970	46 761	45 029	1 732	29 918	2 460	204	14 179							
Construction	1951	240 139	238 331	1 808	131 937	38 721	2 303	67 178							
	1960	275 920	273 487	2 433	161 238	40 027	2 321	72 334							
	1970	475 595	464 070	11 525	289 851	78 589	9 142	98 013							
Commerce and finance	1951	327 639	252 690	74 949	100 700	24 993	23 107	178 839							
	1960	642 592	480 791	161 801	247 296	56 362	36 866	302 068							
	1970	897 835	627 785	270 050	346 477	83 937	53 697	413 724							
Transport and communication	1951	202 866	191 905	10 961	73 029	14 194	2 461	113 182							
	1960	204 981	188 403	6 378	68 796	16 648	3 750	115 787							
	1970	338 249	309 858	28 391	138 459	27 559	7 286	164 945							
Services	1951	1 073 605	456 188	617 417	740 989	111 472	16 856	204 288							
	1960	1 137 038	449 308	687 730	1 768 4	133 908	15 797	215 649							
	1970	1 595 840	584 774	1 011 066	1 088 950	159 535	22 342	325 013							
Unemployed and not classifiable	1951	202 125	179 435	22 690	118 136	41 844	14 117	28 028							
	1960	485 976	334 017	151 959	330 034	28 983	44 711								
	1970	571 050	281 011	290 039	429 045	74 027	17 144	50 834							

Source: Statistics South Africa 'South African Statistics 2000' available at <http://www.statssa.gov.za/publications/SAS1Statistics2000.pdf>, accessed on 4 August 2018.

Work: Employment by occupation

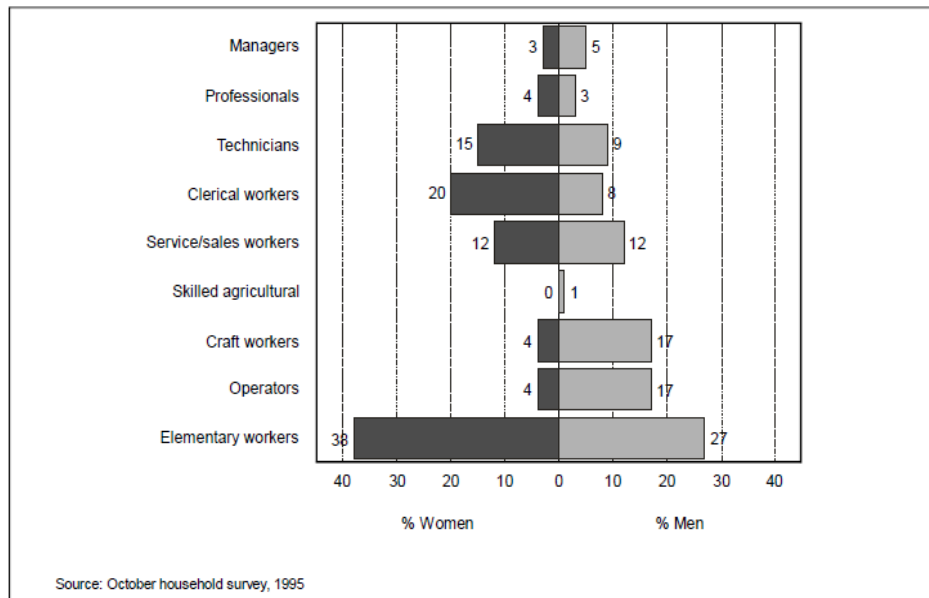


Figure 19: Employment distribution by occupation and gender

- Occupations in South Africa tend to differ by gender. A large proportion of women are found in elementary (or unskilled), clerical and semi-professional or technical occupations, while a large proportion of men are in elementary, operator and artisan or craft occupations.
- Figure 19 shows that 38% of all women who were employed in October 1995 were in elementary occupations.
- However, over half (51%) of employed African women were in elementary occupations. The percentages for men in such occupations were much lower, at 27% of all men and 36% of African men.
- A large number of women were also employed as clerks (20%), technicians and associate professionals (15%) and service or shop workers (12%). Among men, on the other hand, craft workers (17%) and operators (17%) predominated.
- Only 3% of women and 5% of men were managers, and 4% of women and 3% of men were professionals. Overall, under a quarter (22%) of the managers were women. Only 9% were African women and 45% were white men. Close on four out of ten (39%) of the professionals were women.
- Over a third (34%) of those employed in elementary occupations were domestic and related workers. Eighty-seven percent of all domestic and related workers were women. Three-quarters (75%) were African women.

Source: D Budlender & F M Orkin
Women and men in South Africa
 (1998) 21.

**CODE OF GOOD PRACTICE ON THE INTEGRATION OF EMPLOYMENT
EQUITY INTO HUMAN RESOURCE POLICIES AND PRACTICE**

7. Recruitment & Selection

7.1. Scope

7.1.1. Recruitment and selection is the process that employers use to attract applicants for a job to determine their suitability. This involves various selection techniques such as short listing, scoring, interviews, assessment and reference checks.

7.1.2. This section identifies some of the strategies that can be used to attract a wide pool of applicants from designated groups.

7.2. Impact on Employment Equity

Recruitment and selection processes should be conducted fairly and without unfair discrimination. One of the barriers in the recruitment process is the inability to attract sufficient numbers from the designated groups. Attracting as many applicants as possible from designated groups may ensure that a larger skills pool is available from which to recruit. Recruitment and selection is often the most important mechanism to achieve numerical targets and to increase the representivity of designated groups in the workplace.

7.2.1. A number of areas in recruitment and selection should be reviewed to eliminate unfair discrimination: These include:

7.2.1.1. Advertising and head hunting;

7.2.1.2. The job application form;

7.2.1.3. The short listing process;

7.2.1.4. Interviews;

7.2.1.5. Job offers;

7.2.1.6. Record keeping; and

7.2.1.7. Reference checking.

7.3. Policy and Practice

7.3.1. The recruitment process should be informed by the employer's employment equity plan, including the recommended affirmative action provisions.

7.3.2. Employers should have written policies and practices that outline their approach to recruitment and selection. This document should:

7.3.2.1. Reflect the values and goals of the employer's employment equity policy or ethos; and

7.3.2.2. Include a statement relating to affirmative action and the employer's intention to redress past inequalities.

7.3.3. Where an employer utilises the services of recruitment agencies, it should make the recruitment agency aware of its employment equity policy.

Advertising positions

7.3.4. When advertising positions employers should refer to their employment equity policy or values and indicate their position on affirmative action.

7.3.5. Job advertisements should place emphasis on suitability for the job, and should accurately reflect the inherent or essential requirements (i.e. the core functions) of the job and competency specifications.

7.3.6. Employers may consider placing all advertisements for positions internally even if a job is being advertised externally. This will make current employees aware of the opportunities that exist within the workplace.

7.3.7. When advertising positions, employers may state that preference will be given to members of designated groups. However, this does not suggest that the process of recruitment excludes members from non-designated groups.

7.3.8. Where possible, employers should place their job advertisements so that it is accessible to groups that are under-represented.

7.3.8.1. Employees who are on maternity leave should be informed of positions advertised in the workplace.

Job Application Forms

7.3.9. A job application form is a mechanism that is used by an employer as part of selecting a suitable applicant for a position.

7.3.10. The purpose of a job application form is to:

7.3.10.1. standardise the information employers receive from job applicants. This should reduce the probability for unfair discrimination;

7.3.10.2. ensure that the information received from job applicants focuses on the requirements of the job and does not result in indirect unfair discrimination; and

7.3.10.3. obtain biographical information to provide an employer with an easy mechanism for monitoring applications from various designated groups.

Short-listing of Job Applicants

7.3.11. Short listing is a process in which an employer considers all applications, including curriculum vitae and other relevant documents. An employer should place those job applicants who meet the criteria on a shortlist.

7.3.12. The process of short-listing job applicants should be standardized. Where no standards exist, an approach should be decided on before short- listing commences.

7.3.13. An employer should consider involving more than one person in the process of short-listing applicants to minimize individual bias.

7.3.14. The short-listing panel should be balanced in terms representivity.

7.3.15. Where an employer has outsourced the short- listing process, every effort must be made to ensure that the process is consistent with the recruitment and selection policies of the employer.

7.3.16. An employer should not rely on second hand knowledge or assumptions about the type of work the applicant may be able to do.

7.3.17. An employer should ensure that it short-lists as many suitably qualified applicants from designated groups as possible.

7.3.18. Suitably qualified⁶ applicants must meet the essential job⁷ requirements.

7.3.19. When short-listing, an employer could include applicants from designated groups who meet most but not all the minimum requirements. These applicants with potential could be considered for development to meet all the job requirements within a specified timeframe.

Interviews

7.3.20. An interview is a selection tool that provides an employer with the opportunity to meet a job applicant face-to-face.

7.3.21. Employers should use the same panel in the short-listing and interviewing process.

7.3.22. Employers should provide training and guidance to the panel conducting the interviews on:

7.3.22.1. interviewing skills;

7.3.22.2. the measuring system;

7.3.22.3. employment equity and affirmative action; and

7.3.22.4. matters relating to diversity, including skills for recognizing different dimensions of merit.

7.3.23. Employers may develop a standard interview questionnaire. This is a questionnaire prepared before the interview listing a set of questions that will be asked of each applicant interviewed to determine the applicant's suitability for the job. The interview questionnaire should be based on the job description, particularly essential elements of the job and competency specifications. Employers should regularly audit their interview questionnaires to ensure that they do not contain questions that are potentially discriminatory.

7.3.24. An employer should consistently and objectively assess all applicants interviewed using as a basis the job description, competency specification and the measuring system. The same amount of time should be allocated for each candidate and the same or similar questions should be asked.

7.3.25. The measuring system should be standardized. An employer must allocate weightings to ensure that there is a balance between matching job requirements, numerical targets and the needs of the employer.

Making the job offer

7.3.26. Employers should ensure that a realistic job preview is provided to ensure that both the candidate and employer's expectations are congruent. This is to facilitate the retention of employees from designated groups by effectively managing expectations before the candidate accepts a position, i.e. it must be clear to the candidate on what their expectations are, lines of authority and specific responsibilities;

7.3.27. Where a candidate does not accept a job offer, an employer should conduct an "exit" type interview to establish the reasons for not accepting the offer. This will enable the employer to identify and remove existing barriers.

Record keeping

7.3.28. An employer should keep copies of all documents relating to each stage of the recruitment process for a reasonable period of time after the position has been filled. These documents will be important in the case where an applicant challenges the recruitment process and selection.

7.3.29. An employer may keep data on its recruitment processes to inform its employment equity strategy and for monitoring changes in attitudes and actions of managers. This information could include:

7.3.29.1. the demographic details of candidates who apply, those who are short listed, interviewed and those who are made offers;

7.3.29.2. the demographic details of candidates in relation to short listing, interviewing and job offers made in each department to establish which sections within the workplace are advancing the employment equity profile of the employer. The employer can then focus attention on those departments that are not successful in advancing the employment equity objectives; and

7.3.29.3. the persons who were involved in the short listing, interview and job offer process.

Reference checks of job applicants

7.3.30. The purpose of a reference check is to verify information provided by an applicant during the selection process.

7.3.31. Reference checks should not be conducted in a manner that unfairly discriminates. The same type of reference checks must be conducted on all short-listed applicants.

7.3.32. An employer should only conduct integrity checks, such as verifying the qualifications of an applicant, contacting credit references and investigating whether the applicant has a criminal record, if this is relevant to the requirements of the job.

7.4. Key Links to Other Topics in the Code

7.4.1. Implementing Employment Equity - Recruitment and selection must be aligned to the employer's affirmative action strategy, as reflected in its Employment Equity Plan, which sets out the detail in relation to the numerical targets for each designated group by occupational categories and levels.

7.4.2. Disability - The employer should not unfairly discriminate on the ground of disability. In the context of disability, there are specific recruitment and selection issues that arise. In particular, an employer is required to make reasonable accommodation for the needs of applicants with disabilities. Employers should seek guidance from the Code of Good Practice on the Employment of People with Disabilities and the Technical Assistance Guidelines on the Employment of People with Disabilities.

7.4.3. Attraction and Retention - The ability of an employer to attract employees from designated groups will depend on a combination of factors, which include recruitment and selection practices, competitive benefits, career opportunities, an affirming environment, reputation and image of the employer.

7.4.4. Assessments - Where an employer makes use of assessments during the selection process, they should refer to the relevant section of this Code.

7.4.5. HIV and AIDS Status - An employer should not unfairly discriminate on the ground of HIV and AIDS. Employers could use the Code of Good Practice on Key Aspects of HIV/AIDS and Employment for guidance in this area.

Source: Item 7 of the Code on Employment Equity.

Appendix E: Occupational level statistics by race and gender

OCCUPATIONAL LEVEL	PERIOD	WHITE	AFRICAN	COLOURED	INDIAN	MALE	FEMALE
Top Management	2001	87%	6%	3%	4%	87%	13%
	2017	67%	14.3%	5.1%	9.4%	77.1%	22.9%
Senior Management	2001	81%	9%	5%	5%	80%	20%
	2017	56.1%	22.1%	7.7%	10.9%	66.2%	38.8%
Professionally Qualified	2001	56%	33%	6%	5%	62%	38%
	2017	36.5%	42.2%	9.6%	8.8%	53.4%	46.6%
Technical Skilled	2001	18%	58%	18%	6%	60%	40%
	2017	19.6%	61.7%	11.3%	5.6%	52.9%	47.1%

Source: Department of Labour Commission for Employment Equity Report 2017-2018 (2018) 3.

Table 3.5: Employed by sex and occupation – South Africa														
	Apr-Jun 2016		Jul-Sep 2016		Oct-Dec 2016		Jan-Mar 2017		Apr-Jun 2017		Qtr-to-qtr change		Year-on-year change	
	Thousand	Thousand	Thousand	Thousand	Thousand	Thousand	Thousand	Thousand	Thousand	Thousand	Thousand	Percent	Thousand	Percent
Both sexes	15 545	15 833	16 069	16 212	16 100	-113	554	-0.7	3.6					
Manager	1 314	1 352	1 420	1 448	1 469	21	155	1.5	11.8					
Professional	857	835	892	895	897	2	40	0.2	4.6					
Technician	1 495	1 465	1 479	1 435	1 457	23	-38	1.6	-2.5					
Clerk	1 621	1 651	1 681	1 751	1 746	-5	126	-0.3	7.8					
Sales and services	2 437	2 474	2 484	2 478	2 447	-31	10	-1.2	0.4					
Skilled agriculture	66	72	66	69	58	-10	-8	-15.0	-11.7					
Craft and related trade	1 890	1 947	1 977	2 018	1 969	-48	79	-2.4	4.2					
Plant and machine operator	1 218	1 312	1 319	1 332	1 283	-50	65	-3.7	5.3					
Elementary	3 634	3 700	3 758	3 778	3 726	-52	92	-1.4	2.5					
Domestic worker	1 013	1 026	993	1 007	1 041	34	28	3.4	2.8					
Women	6 754	6 873	7 031	7 182	7 078	-105	324	-1.5	4.8					
Manager	406	426	452	497	459	-38	53	-7.7	13.0					
Professional	450	440	439	455	446	-9	-3	-1.9	-0.7					
Technician	798	815	821	790	784	-5	-14	-0.7	-1.7					
Clerk	1 170	1 176	1 195	1 264	1 269	6	99	0.5	8.5					
Sales and services	1 175	1 173	1 213	1 232	1 161	-70	-14	-5.7	-1.2					
Skilled agriculture	14	15	13	10	11	1	-3	12.2	-19.3					
Craft and related trade	203	206	199	202	198	-4	-5	-2.2	-2.6					
Plant and machine operator	153	172	159	181	149	-31	-4	-17.3	-2.6					
Elementary	1 431	1 480	1 574	1 582	1 603	20	172	1.3	12.0					
Domestic worker	953	970	966	969	996	26	42	2.7	4.4					
Men	8 792	8 960	9 037	9 030	9 022	-8	230	-0.1	2.6					
Manager	908	926	968	951	1 010	59	102	6.3	11.2					
Professional	408	394	453	440	451	11	43	2.5	10.6					
Technician	697	651	658	645	673	28	-24	4.3	-3.4					
Clerk	450	475	486	487	477	-10	27	-2.1	5.9					
Sales and services	1 262	1 300	1 271	1 246	1 286	39	24	3.2	1.9					
Skilled agriculture	52	57	53	59	47	-12	-5	-19.6	-9.7					
Craft and related trade	1 687	1 740	1 778	1 815	1 772	-44	84	-2.4	5.0					
Plant and machine operator	1 064	1 140	1 159	1 151	1 133	-18	69	-1.6	6.5					
Elementary	2 203	2 221	2 185	2 195	2 123	-73	-80	-3.3	-3.6					
Domestic worker	59	56	27	38	45	8	-14	20.4	-23.8					

For all values of 10 000 or lower, the sample size is too small for reliable estimates. Due to rounding, numbers do not necessarily add up to totals.

Source: Statistics South Africa ‘Quarterly Labour Force Survey Quarter 2: 2017’ available at <https://www.statssa.gov.za/publications/P0211/P02112ndQuarter2017.pdf>, accessed on 7 August 2018.



**REPUBLIC OF SOUTH AFRICA
JUDICIAL SERVICE COMMISSION
SUMMARY OF THE CRITERIA USED BY THE JUDICIAL SERVICE
COMMISSION WHEN CONSIDERING CANDIDATES FOR JUDICIAL
APPOINTMENTS**

At its Special Sitting held, in Johannesburg on 10 September 2010, the Judicial Service Commission resolved, after a lengthy debate and a review of the Guidelines that had been adopted in 1998, to publish the criteria used when considering candidates for judicial appointments. This decision is in line with the JSC's principle that the process of judicial appointments should be open and transparent to the public so as to enhance public trust in the judiciary.

The following criteria are used in the interview of candidates, and in the evaluation exercise during the deliberations by the members of the Commission:

Criteria stated in the Constitution

1. Is the particular applicant an appropriately qualified person?
2. Is he or she a fit and proper person, and
3. Would his or her appointment help to reflect the racial and gender composition of South Africa?

Supplementary Criteria

1. Is the proposed appointee a person of integrity?
2. Is the proposed appointee a person with the necessary energy and motivation?
3. Is the proposed appointee a competent person?
 - (a) Technically competent
 - (b) Capacity to give expression to the values of the Constitution
4. Is the proposed appointee an experienced person?
 - (a) Technically experienced
 - (b) Experienced in regard to values and needs of the community
5. Does the proposed appointee possess appropriate potential?
6. Symbolism. What message is given to the community at large by a particular appointment?

Statement issued by the Judicial Service Commission, September 15 2010.

Source: Judicial Service Commission 'New guidelines for selection judges – JSC' (16 September 2010) Available at <http://www.politicsweb.co.za/documents/new-guidelines-for-selection-judges--jsc>, accessed on 08 September 201

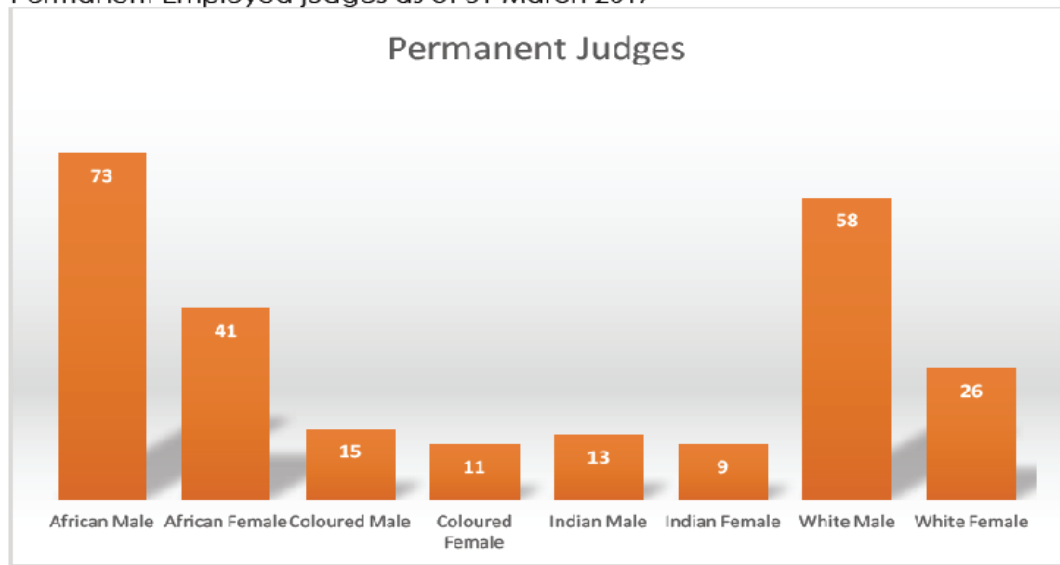
Appendix H: Permanent employed judges

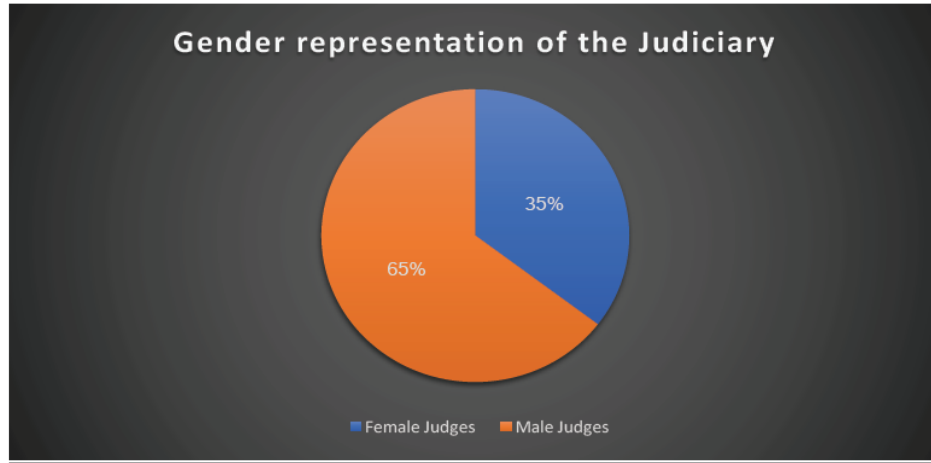
2.3 Visual Illustration of the status quo

Despite the achievements and gains stemming from the lodged complaint, the gender representation of the legal sector remains skewed. The graphs hereunder provide visual illustration of the current gender disproportionality of the legal sector, grossly apparent at leadership positions: -

2.3.1 Gender representation in the judiciary

Permanent Employed judges as of 31 March 2017





2.3.2 Gender representation in the magistracy

Permanent employed Magistrates as of December 2016.

Source: Commission for Gender Equality *Discussion Document on Gender Transformation in the Judiciary and Legal Sector* (2018) 10-11.

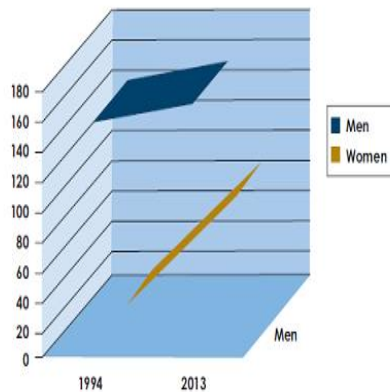
Appendix I: Progression comparison diagram of the judiciary

COURT	MALE	FEMALE
Constitutional Court	9	2
Supreme Court of Appeal	19	8
Northern Cape	4	3
Eastern Cape: Grahamstown & Port Elizabeth	12	5
Bisho	3	1
Mthatha	4	3
Western Cape	23	10
North West	3	3
Free State	10	4
North & South Gauteng	62	22
KwaZulu-Natal	18	9
Labour Court	6	4
Total	173	74

The JSC rightly commented on the progress made since 27 April 1994: -

There were 165 Judges, 160 of those were white men, three were black men and two were white women. At that stage there was no black woman Judge in South Africa.

Progression / Comparison:
1994 to 2013



Source:
Commission for
Gender Equality
*Lack of Gender
Transformation in
the Judiciary
Investigative
Report (2016) 29-
30.*

²² For the compilation of CGE's CEDAW baseline report.

MINING AND QUARRYING

WORKFORCE PROFILE FOR ALL EMPLOYEES	Male				Female				Foreign National			Total
	A	C	I	W	A	C	I	W	Male	Female		
Top Management	301 20.0%	29 1.9%	39 2.6%	849 56.4%	88 5.8%	10 0.7%	15 1.0%	121 8.0%	52 3.5%	2 0.1%	2 100.0%	1 506 100.0%
Senior Management	948 19.3%	131 2.7%	174 3.5%	2 689 54.8%	249 5.1%	44 0.9%	71 1.4%	449 9.2%	132 2.7%	18 0.4%	18 100.0%	4 905 100.0%
Professionally qualified and experienced specialists and mid-management	5 052 28.2%	578 3.2%	429 2.4%	7 203 40.3%	1 794 10.0%	202 1.1%	265 1.5%	1 880 10.5%	405 2.3%	76 0.4%	76 100.0%	17 884 100.0%
Skilled technical and academically qualified workers, junior management, supervisors, foremen, and superintendents	41 927 50.0%	3 300 3.9%	490 0.6%	19 514 23.3%	9 396 11.2%	860 1.0%	303 0.4%	4 457 5.3%	3 581 4.3%	90 0.1%	90 100.0%	83 918 100.0%
Semi-skilled and discretionary decision making	132 70.6%	3 781 2.0%	128 0.1%	3 171 1.7%	17 820 9.5%	969 0.5%	99 0.1%	1 659 0.9%	27 193 14.5%	210 0.1%	210 100.0%	187 272 100.0%
Unskilled and defined decision making	77 998 70.1%	718 0.6%	17 0.0%	665 0.6%	16 299 14.7%	251 0.2%	6 0.0%	86 0.1%	14 173 12.7%	1 025 0.9%	1 025 100.0%	111 238 100.0%
TOTAL PERMANENT	258 468 63.5%	8 537 2.1%	1 277 0.3%	34 091 8.4%	45 646 11.2%	2 336 0.6%	759 0.2%	8 652 2.1%	45 536 11.2%	1 421 0.3%	1 421 100.0%	406 723 100.0%
Temporary employees	4 299 60.7%	278 3.9%	21 0.3%	658 9.3%	1 355 19.1%	106 1.5%	21 0.3%	185 2.6%	150 2.1%	8 0.1%	8 100.0%	7 081 100.0%
GRAND TOTAL	262 767	8 815	1 298	34 749	47 001	2 442	780	8 837	45 686	1 429	1 429	413 804

Source: Department of Labour
Commission for Employment
Equity Report 2017-2018 (2018)
79.

THE NUMBERS



The number of women working in the mining sector has increased significantly in the past 15 years or so – from around 11,400 in 2002 to around 53,000 women in 2015, increasing to 53,179 in 2017. Women represent 12% of the mining labour force of 464,667.

Women in mining

Category	Number of women employees	Percentage of women employees (%)
Top management	241	14.9
Senior management	817	15.9
Professionally qualified and middle management	3,436	18
Skilled technical professions	15,391	18
Total women	53,179	12

Percentage of women in the workforce by commodity (2015)

Commodity	Percentage of workforce which is female (%)
Gold	11
PGMs	11
Diamonds	13
Coal	12
Chrome	16
Iron ore	14
Manganese	15
Cement, lime aggregates and sand	12

Department of Labour Employment Equity Report 2016/17

3 September 2018

Ms Therusha Moodley 214523679
School of Law
Howard Campus

Dear Ms Moodley

Protocol reference number: HSS/1393/018M

Project title: Progression of South African women in the workplace: A study of the right to development and relevant legal framework that underpins the eradication of gender disparity in the workplace

FULL APPROVAL – No Risk/Exemption Application

In response to your application received 11 January 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully



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Professor Shenuka Singh (Chair)
Humanities & Social Sciences Research Ethics Committee

/pm

cc Supervisor: Clydenia Stevens
cc. Academic Leader Research: Dr Shannon Bosch
cc. School Administrator: Ms Robynne Louw/Mr P Ramsewak

Humanities & Social Sciences Research Ethics Committee
Dr Shenuka Singh (Chair)

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