

**INEQUITABLE BRIEFING PATTERNS IN THE SOUTH AFRICAN LEGAL
PROFESSION: A CRITICAL ANALYSIS OF GENDER PARITY AND
AFFIRMATIVE ACTION**

BY

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Declaration by the candidate

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Abstract

The staggering 'skewed briefing patterns' in the legal profession have been diagnosed as the mishaps that have shadowed the progression of women in the legal profession, along with the lingering sex and gender stereotyping and other interweaving discriminatory practices which destain women from accessing high-profile briefs due to misogynistic perspectives about the roles of men and women. These mishaps are set to be addressed through utilisation of qualitative desktop method that is phenomenologically foregathered from the trilogy of cross-cutting aims and objectives of this research. These issues are as follows: Firstly, the research found that both international and regional obligations make provisions for gender clause and affirmative action strategies. On the one hand, it was found that the state is obliged to implement affirmative action strategies to empower suitable female counsels by virtue of section 9(2) of the Constitution. Nevertheless, on the other hand, the concept of transformation affords 'equal opportunity' between men and women to compete equally for briefs. Secondly, this study found that, although the Draft Legal Sector Code, 2022 ('Draft LSC') is lauded for bringing transformation by setting targets/measures for procurement of legal services, it is a mere revitalisation of the ghosting Legal Services Sector Charter, 2007 ('LSSC') and a special measure intended to address racial discrimination and not gender. Thirdly, this research argues that the state must implement a flexible policy for briefing patterns in the legal profession.

Keywords: Advocate, affirmative action, brief, independence of the legal profession, profession, inequitable briefing pattern, transformation of the legal profession.

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List of abbreviations

AA	Affirmative Action
BDPA	Beijing Declaration and Platform of Action
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
EEA	Employment Equity Act
IBP	Inequitable Briefing Pattern
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
LPA	Legal Practice Act
LPC	Legal Practice Council
LSC	Legal Sector Code
LSSC	Legal Services Sector Charter
LSSA	Law Society of South Africa
NPFWEGE	National Policy Framework for Women’s Empowerment and Gender Equality
PEPUDA	Promotion of Equality and Prevention of Discrimination Act
PPPFA	Preferential Procurement Policy Framework Act
SDGEA	Solemn Declaration on Gender Equality in Africa
UDHR	Universal Declaration of Human Rights

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CHAPTER 1

INTRODUCTION AND OVERVIEW

1.1 Introduction

The issue of “inequitable briefing patterns” in the South African legal profession is a continuous social ill that needs to be addressed particularly with regard to gender parity. Therefore, the study seeks to critically discuss the challenges that hinders female advocates from accessing high-profile briefs. However, addressing these challenges has not always been an easy task to do, as the constitutional court in the case of *Cape Bar v Minister of Justice and Correctional Services and Others* stated as follows:

Transformation of the legal profession has been a goal that has eluded the South African society since the dawn of our democracy and is an area of challenge that our society has struggled to make strides in.¹

Similarly the Law Society of South Africa ('LSSA') observed that 'transformation of the legal profession' has been a hotly debated subject in South Africa, particularly with regard to 'briefing patterns'.² It cannot be gainsaid that, there is a difference between the things that are said and the things that are not said.³ It has been four years now of the unforgettable strike embarked by advocates who voiced out the disheartening 'skewed briefing patterns' which does not meet the demographic profile of the South African legal profession.⁴ Intriguingly, female advocates were robed up as if they were ready for court appearance to please 'your lordship'⁵ as they adamantly lifted their

¹ *Cape Bar v Minister of Justice and Correctional Services and Others* 2020 (6) SA 165 (CC) para 3.

² Law Society of South Africa 'Briefing Patterns in the Legal Profession' available at <<https://www.Issa.org.za/briefing-patterns-in-the-legal-profession/>> retrieved on 25 December 2023.

³ Rebecca Solnit, 'Silence and Powerlessness go Hand in Hand: Women's Voices Must be Heard' (2017) available at <<https://www.theguardian.com/commentisfree/2017/mar/08/silence-powerlessness-womens-voices-rebecca-solnit>> retrieved on 07 February 2024. Solnit in her article emphasized the fact that the things that are said or voiced out intrigue solutions and change.

⁴ See Advocate's Strike 'Black Lawyers, Advocates down tools in Mthatha' see the slogan 'we demand to be empowered on the video' available at <<https://youtu.be/QnoPypN7GA?si=px48PC2-NrELmG7G>. > retrieved on 24 November 2022.

⁵ Advocate's strike (footnote 4 above). The advocates looked good as if they were going to address 'your Lordship', unfortunately they were striking so that they can have that opportunity to address 'Your Lordship' on high-profile briefs.

heels on the street and joined the revolt 'demanding to be empowered'⁶ with the slogan, 'Brief Our Women'.⁷ Their altercation was grounded on the throes of briefs and that, even in the event they are briefed, such briefs are displeasing juxtaposed to their male counterparts. Moreover, they are also struggling to be paid for legal services rendered.⁸ The struggle of women in the legal profession is a deeply historical issue that was stamped by Justice Innes in the case of *Incorporated Law Society V Wookey* as thus:

The question is not whether this lady is likely, adequately, and satisfactorily to discharge the duties of a legal practitioner. If it were, then its solution would present few difficulties. The inquiry is simply whether she belongs to the class to which the terms of the section in question refer. If she does, then she is entitled to be indentured; if she does not, she has no such right, and the Court can give her none. And with that being so, assistance must be sought elsewhere. The legislature of the country is the only source from which relief in a case of this kind is obtained.⁹

Notwithstanding the absence of any official hurdles to admission,¹⁰ predominantly, females are primarily raising in quantity. Amidst the aforesaid, they endure sex stereotyping throughout their career.¹¹ Despite women's accomplishments, professionally qualified, job expertise, and most requisitely, legal competence, their femininity still hampers them in the course of their advancement.¹² This is due to universal ideology that a typical standard of advocacy requires attributes equated with men, rendering females naturally less capable of playing the position of advocate.¹³

⁶ Advocate's strike (footnote 4 above). See the slogan 'we demand to be empowered' on the video'.

⁷ Advocate's strike (footnote 4). See the slogan 'Brief Women' on the video.

⁸ See advocate's strike (footnote 4 above). Women voiced out that they receive inferior briefs, and that they are not paid timeously or even paid at all.

⁹ *Incorporated Law Society V Wookey* 1912 AD 623 at 653.

¹⁰ Ulrike Schultz and Gisela Shaw, 'Introduction: Women in the World's Legal Professions: Overview and Synthesis' in Ulrike Schultz and Gisela Shaw (eds) '*Women in the Worlds Legal Professions*' (3rd edition, open library 2003, last edited by Marc Bot 2023) xxv, noted that access to the legal profession is one thing while achieving equal participation is quite another. See also Rudo Runako Chitapi, 'Women in The Legal Profession in South Africa: Traversing the Tensions from the Bar to the Bench' (LLM Dissertation, University of Cape Town 2015) 14.

¹¹ David Jary and Julia Jary, 'Collins Dictionary of Sociology' (2nd Edn, Glasgow: Harper Collins publishers 1995).

¹² Michelle Norton, 'The Other Transformation Issues: Where Are the Women?' (2017) 23 *Forum, GCBSA* 30 available at <<https://gcbasa.co.za/law-journals/2017/april/2017-april-vol030-no1-pp27-34.pdf>> 08 February 2024.

¹³ Lilla Crouse, 'A Bar for Women' (2002) *SAJ/Advocate* 30; Deborah L. Rhode, 'Gender and the Profession: An American Perspective' in Ulrike Schultz and Gisela Shaw (eds), '*Women in the World's Legal professions*' (3rd Edn, hart publishing 2003) 13-15; Hilary Sommerland and Peter

The assumption is that females are incapable of devoting themselves to their career due to their endeavor to harmonize the irreconcilable model of mothering and lawyering exceptionally. The aforesaid is reinforced by Davis who once argued that:

The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race, and for the custody of the homes of the world. All life-long callings for women inconsistent with this radical and certain duties of their sex, as is the profession of law, are departure from the order of nature; and when voluntary, treason against it.¹⁴

Realistically, the body which is established to uphold and serve as a representation of a just and equitable South Africa persists the segregation that it is alleged to be combating is undoubtedly worrisome.¹⁵ In an attempt to eradicate injustices of the past, the Constitutional Court has developed a substantive standard for violations of equality since 1994.¹⁶ Invoking substantive equality, the South African state has implemented numerous employment regulations requiring, amongst other things, affirmative action ('AA').¹⁷ The Constitution¹⁸ allows affirmative action measures to be applied. Indispensably, section 9(2)¹⁹ and section 7(2)²⁰ of the Constitution are

Sanderson, 'Gender Choice and Commitment: Women Solicitors in England and Wales and the Struggle for Equal Status (1st Edn, eBook 1998); Hilary Sommerland, 'Women Solicitors in a Fractured Profession: Intersections of Gender and Professionalism in England and Wales' (2002) 9 *International Journal of The Legal Profession* 213-234; see also, Ryan Chan, 'Sexism at the Bar and the Equitable Briefing Policy: A Well-Meaning but Misguided Response to Gendered Briefing' (2017) 29 *Bond Law Review* 4-5.

¹⁴ 'Hansard: NA: Unrevised Hansard' (06 June 2023) Parliamentary Monitoring Group <<https://pmg.org.za/hansard/37169/>> retrieved on 05 July 2023. Both the house Chairperson Bagraim, and Deputy Minister of Justice and Correctional Services, Jeffery, during debate on commemoration of 100 year's anniversary on admission of women into the legal profession, were disheartened by the views once held by Judge P B Davis in a leading Cape Judge of the time. See also, "Note" (1917) 34 SA Law Journal 342-343; Chitapi (footnote 10 above) 5 and Kgomotso Ramotsho, 'Is the Constitution the Progressive Answer to the Future of Women in SA?' (2023) *De Rebus-SA Attorney's Journal*, available at <<https://www.derebus.org.za/is-the-constitution-the-progressive-answer-to-the-future-of-women-in-sa/>> retrieved on 01 June 2023. Ramotsho noted the remarks of Melius De Villiers.

¹⁵ 'Challenges Facing Women Lawyers in South Africa|LAW FOR ALL'. <<https://www.lawforall.co.za/legal-news/women-lawyers-equality-south-africa/>> Retrieved on 05 May 2023.

¹⁶ Narnia Bohler Muller, 'Developing a New Jurisprudence of Gender Equality in South Africa' (Doctor of Legum, University of Pretoria 2005) see under summary. See also Tamlynn Meyer, 'Reaching for Partnership: An Intersectional Study of Occupational Closure Among Women Attorneys in South Africa' (PhD thesis, University of Stellenbosch 2021) 18.

¹⁷ See legislation such Legal Practice Act 28 of 2014, Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, Preferential Procurement Framework Policy Act 5 of 2000, National Policy Framework for Women's Empowerment and Gender Equality, Women Empowerment and Gender Equality Bill 2013, and Employment Equity Act 55 of 1998.

¹⁸ See section 9(2) of the Constitution.

¹⁹ Section 9(2) & section 9(3) of the Constitution.

²⁰ Section 7(2) of the Constitution.

inseparable and interwoven. In crisp terms, to properly interpret section 9(3) of the Constitution, special measures enumerated in section 9(2) of the Constitution which enjoins section 7(2) of the Constitution are imperative. In the context of this study, section 7(2) of the Constitution²¹ makes a laudable step obliging the state briefers to promote gender equality during counsel-selection process. Nevertheless, the state's prolongation to oversight the implementation of a policy which unequivocally demarcate a criterion for state briefs is objectionable and unjustifiable and intended to camouflage the beingness of women in the advocate's profession.

Of particular importance, the words "may not discriminate" as utilised in section 9(3)²² of the Constitution, substantiate the essence of gender equality and that affirmative action measures may be applied to advance the previously disadvantaged groups. However, in the event affirmative action is justified by formal equality as a reverse discrimination, the fact that cannot be gainsaid is that, the state is obliged to make any means necessary to promote equitable representation of women in their briefing patterns by virtue of the utilisation of the word 'must' in section 7(2) of the Constitution.²³ This appears to be directive in nature, and shall, precisely be elucidated to possess an almighty character, mandating the state to promote equality.

The state's gender blind in their briefing patterns, intrigued a closer look at the national, regional, and international standards championing the rights of women. The South African law and the Constitution are both interpreted in accordance with international law, including human rights instruments.²⁴ Given the direct effect of section 39(1)(b) of the Constitution, the court's duty to observe universal rules when they interpret the Bill of Rights is of utmost significance.²⁵ In recognizing international

²¹ See for example section 7(2) of the Constitution which mandates the state to guarantee its constitutional duty by respecting, protecting, promoting, and fulfilling the constitutional rights contained in the Bill of Rights, including amongst other things, to implement effective policies to empower women.

²² See section 9(3) of the Constitution.

²³ Section 7(2) of the Constitution.

²⁴ *Glenister V President of the RSA and Others* 2011 (3) SA 347 (CC) para 97.

²⁵ *President of the RSA & Another v Women's Legal Centre Trust and Others* 2021 (2) SA 381 (SCA) Para 31.

law to emancipate women in the legal profession, several Covenants and Conventions were concluded to advance the Constitution's promotion of equality.²⁶

In November 2022, the state conveyed its plan to establish legal services procurement framework in accordance with section 217 of the Constitution,²⁷ to offer instructions for standards along with procedures to be adhered to for briefing patterns and protocols.²⁸ To this end, the current South African Draft Legal Sector Code ('Draft LSC') appears to bring hope to the transformative agenda of the legal profession. The step taken by the state shows its commitment to establish a briefing policy aiming at eradicating gender disparities.²⁹ Notwithstanding its intention to implement a briefing policy, the current method adopted in terms of briefs is not clear and reflect just the quantity of briefs advocates received and does not reflect the value of each brief and the number of women being briefed.³⁰ This is undoubtedly daunting particularly in a nation that is lauded to be undergoing transformation.³¹

1.2 Problem statement

Currently in South Africa, there is a lack of a neutral state policy for selection criteria of briefs which is applied by state briefers to search for suitable women. Affirmative action is mainly and easily applied in the workplace environment where the employee

²⁶ For example: International Covenant on Civil and Political Rights (ICCPR) was ratified in 1998 by South Africa; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was ratified in 1995; and International Covenant on Economic, Social and Cultural Rights (ICESCR) was ratified by South Africa in 1995.

²⁷ Glynnis Breytenbach and minister of Justice and Correctional Services 'National Assembly Question for Written Reply, Parliamentary Question: 4171' (2022) 2, *Parliamentary Monitoring Group NW5237E* <<https://pmg.org.za/files/RNW4171-221129.dox>> Retrieved on 13 October 2023.

²⁸ See 'National Assembly Question for Written Reply' (footnote 27 above) 3.

²⁹ See 'National Assembly Question for Written Reply' (footnote 27 above) 3.

³⁰ See Department of Justice and Constitutional Development (the DOJ & CD) 'State Attorney Services' (2018) <<https://www.justice.gov.za/branches/stateattorney.html>> retrieved 15 October 2023. The report of state briefs shows only the number of briefs received from December 2022 to August 2023 and does not even show how many women received such briefs and the caliber of the briefs received. See also "The Question of Skewed Briefing Patterns" *Judges Matters*, available at <<https://www.judgesmatter.co.za/opinions/the-question-of-skewed-briefing-patterns>> retrieved on 10 October 2023.

³¹ See in *Bato Star Fishing (PTY) Ltd v Minister of Environmental Affairs and Tourism & Others* 2004 (4) SA 490 (CC) para 76, the constitutional court remarked that South is a country that is in the process of transformation.

and the employer relationship exist.³² This is because the independence status of advocates makes it more difficult to invoke affirmative action measures.³³ In this regard, the state is failing to supervise briefers to address more general issues like boosting marginalised groups, they are continuously applying gender-blind selection criteria. Therefore, women still find it difficult to compete for high-profile briefs as they are typically ravaged by the stereotypical views that women lack the decisive commitment necessary to handle high-profile cases due to motherhood penalty. This being the case, the study analyses the legal framework which provokes the state to promote gender equality through affirmative action and transformative strategies in the legal profession particularly regarding state briefs.

1.3 Research questions

This study is based on the following research questions:

- Does the South African Legal Framework allow pro-woman policies and if so, should the state when implementing affirmative action and transformative measures consider the differences founded on the traditional gender roles that is, on the perception that women are primarily child-carers and men as breadwinners constitutes a sufficient justification for differentiation in treatment?

1.4 Aims and objectives of the research

The aims of this study are threefold. First, the study aims to critically analyse constitutional jurisprudence of substantive equality and whether gender clause can be interpreted to prompt the state to implement pro-women policies in the legal profession. Second, to closely look at the way gender clause is interpreted internationally and regionally to afford women special measures. Third, to pinpoint the hurdles encountered when applying affirmative action strategies and transformative

³² Section 13(1) of Act 55 of 1998.

³³ Section 165(2).

strategies amicably as opposed to dichotomous. The central objective of this study is to assess the impact of sex and gender stereotypes and other intertwined discriminatory practices on the ability of women to acquire the necessary experience required to access high-profile briefs.

1.5 Scope and limitations

It is undisputable that gender discrimination impact on all female practitioners in the legal profession³⁴ and all other professions mainly dominated by men. However, the scope of this research is thus delimited to the advocate's profession,³⁵ particularly regarding state briefs.

1.6 The significance of the research

Investigating whether professional profiles are changing is crucial, given the nation's aspirational aims of change and equality.³⁶ The aforesaid is particularly accurate in the legal system that is responsible for ensuring equality, justice, and transformation for underprivileged groups like women and people of colour.³⁷ There is a need to look into the legal profession and organisations with a feminism viewpoint, since the gendered consequences are persistently produced by this profession that might be restricting or unfavorable to females.³⁸ This is because, in terms of representation, race received most of the emphasis, while gender received less of it.³⁹

³⁴ Meyer (footnote 16 above). Meyer's thesis shows that female attorneys are also struggling to advance throughout their career.

³⁵ It is of utmost importance for this profession to be transformed bearing in mind that Hlapo once deemed the career of advocate not suitable for blacks and women because they have not mastered its intricacies. See Bruce Murray, 'The 46-Year-Long Wits LLB that Never Was' (2018) *CML News* (13 September 2022) available at <<https://www.wits.ac.za/curiosity/stories/the-46-year-long-wits-llb-that-never-was.html#:~:text=Nelson%20Mandela%20among%20wits,occasions%20between%201947%20and%201949>> Retrieved on 15 October 2023.

³⁶ Meyer (footnote 16 above) 27.

³⁷ Ibid.

³⁸ Ann Marie Goetz, 'Getting Institutions Right for Women in Development' (Zed Books 1997) 1; see also Meyer (footnote 16 above) 27.

³⁹ Meyer (footnote 16) 22-23.

1.7 Literature review

Advocates are unquestionably well-respected in the legal profession and frequently handle cases of higher caliber.⁴⁰ However, Sibanda observed that mostly high-profile briefs of the state are given to counsels who earned their reputation as leading counsels.⁴¹ Notwithstanding their experiences, Sibanda obscured a contrary perspective on their appointment and concerned about the perception in which cases of immense caliber in South Africa are only preserved in favor of males and characterised by the repetition for the select group of outstanding counsels.⁴² Sibanda observed that since decades, there has been a persistent issue with the lack of diversity and gender balance in the legal profession.⁴³

Gender balance is intrinsically linked to mother-hood perception that women lack the necessary commitment to take high-profile briefs. The hindrance of motherhood to career progression in the legal field is supported by the study of Rhode,⁴⁴ Kathree,⁴⁵ Chan,⁴⁶ Norton,⁴⁷ Chitapi,⁴⁸ and Meyer⁴⁹ who learnt that mothers who are legal practitioners are embedded by stereotype that mothers lack the necessary commitment. Notably, the Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities ('CCLP') provides that, if an advocate's commitments make it unreasonable for them to fulfil their duty of care in preparing the brief, they

⁴⁰ 'Advocates Wait for Silk Status: Whenever You're Ready, Mr Prez' *News 24* (07 September 2014) available <<https://www.news24.com/news24/advocates-wait-for-silk-status-when-ever-youre-ready-mr-prez-20150429>> retrieved on 13 December 2022.

⁴¹ Omphemetse S Sibanda, 'Where Legal Eagles Dare: Raising the Bar on Women Advocates' *Daily Maverick News* (16 October 2019) available at <<https://www.dailymaverick.co.za/opinionista/2019-10-16-where-legal-eagles-dare-raising-the-bar-on-women-advocates/>> retrieved on 05 August 2023.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Deborah L. Rhode, 'The Unfinished Agenda: Women and The Legal Profession' (2001) 15, *Chicago: ABA Commission on Women in the Profession*, available at <<http://womanlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf>> retrieved on 02 February 2023.

⁴⁵ Fayeza Kathree, 'Eight Years at the Bar and Still Discriminates Against: A Bar to Women?' (2004) 17 *SAJ* 23.

⁴⁶ Chan (see note 9 above) 23.

⁴⁷ Norton (see footnote 12 above) 30.

⁴⁸ Chitapi (see footnote 10 above) 53.

⁴⁹ Meyer (see footnote 16 above) 42 & 145-172.

must decline the offer of a brief.⁵⁰ Most female advocates decline high-profile cases and they end focusing on family law as they are preserved to possess the qualities of family law by virtue of their motherhood status.⁵¹ This leaves them severely under-represented in the most elite positions and disproportionately over-represented in the professions with the lowest prestige and pay.⁵² Scholars such as Chan,⁵³ Norton,⁵⁴ Sibanda,⁵⁵ and Bartlett,⁵⁶ observed that the denial of high-profile briefs hinders women to build reputable practices. In this regard, Kentridge posits that:

The less challenging work women receive, the less experience they have, the less they are qualified to do such work in the future, the less exposure they have, the less likely they are to become silks, and judges, and judges of appeal.⁵⁷

Although it is tempting to brief women in high-profile cases just to support affirmative action measures, the client's interests continue to be a valid objection to affirmative action laws. Most crucially, briefing encompasses a scrutiny of whether a counsel is suitable for a brief. This is because if a program is therefore grounded on somewhat criteria discounting excellence, resultantly it may be unfavorable to appoint females who are unqualified.⁵⁸ This may interfere with the outcome of client's case. However, Bacchi adamantly argues that merit is employed to uphold "existing unequal power relations," conceal "contradictory interests", and reinforce "informal cultural standards".⁵⁹ Similarly, Thornton argues that merit is an ill-defined notion that

⁵⁰ Code of Good Practice for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities.

⁵¹ See Margaret Thornton, 'Dissonance and Distrust: Women in the Legal Profession' (OUP, 1996); see also Epstein Cynthia Fuchs, 'Women in Law' (New York: Basic Books, 1981); Nancy Reichman and Joyce S. Sterling, 'Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers' (2004) 14 *Texas Journal of Women and the Law* 27, Norton (footnote 12 above) 31. Madeline E. Heilman, 'Gender stereotypes and Workplace Bias' (2012) 32 *Research in Organisation behaviour* 113-135, available at <<https://doi.org/10.1016/j.riob.2012.11.003>> retrieved on 08 February 2024.

⁵² Thornton (footnote 51 above).

⁵³ Chan (footnote 9 above) 163.

⁵⁴ Norton (footnote 12 above) 30.

⁵⁵ Sibanda (footnote 41 above).

⁵⁶ Francesca Bartlett, 'Model Advocates or a Model for Change?' (2008) 32 *Melbourne University Law Review* 351-353; see also Chan (footnote 9 above) 163.

⁵⁷ Janet Kentridge, 'Women at the Bar in England and Wales' (2004) 17 *AJA* 26-28; see also Norton (footnote 12 above) 30.

⁵⁸ Chan (footnote 9 above) 16.

⁵⁹ Chan (footnote 10 above) 17, see also Carol Bocchi, 'The Brick Wall: why so few women Become Senior Academics' (1993) 18 *Oxford Journal of Legal studies* 36-39; citing 'The Rule of power: The Implementation of Equal Employment Opportunity Law in a Corporate Setting' (1991) 12 *Dutch and Belgian Law and Society Journal* 69-76.

“permits and legitimises discriminatory acts”.⁶⁰ Nevertheless, Hunter and Meckelvie aver that selection on merit in the appointment of judges and advocates is barely accompanied by unequivocal selection criteria, rather the standard will mostly differ depending on the substance of the matter, the nature of briefing along with a customer concerned.⁶¹ Merit-based selections would impact severely on black women. This is because according to Justice Regan,⁶² Slater,⁶³ and Nkosi,⁶⁴ Meyer,⁶⁵ Madodoka and Odeku,⁶⁶ contents that the struggle of white women cannot be compared to that of black.

Although the main purpose is to promote gender-based briefing,⁶⁷ the aforesaid assertion is insightful by recognising the intersectionality of discrimination, as the literature suggests that there is a need to address the issue of briefs by implementing affirmative action policies to advance women. Therefore, it is submitted that, the lengthening of the state to implement affirmative policies to oversight the briefing patterns raises eyebrows about its constitutional mandate to promote gender equality.

⁶⁰ Margaret Thornton, 'The Liberal Promise: Anti-Discrimination Legislation in Australia' (1994) *Law, Sociology, political science* 19; see also Chan (footnote 9 above) 17. Kate Malleson, 'Rethinking the merit principle in Judicial Appointments' (2003) 33 *Journal of Law and Society* 128.

⁶¹ Bartlett (footnote 111 above) 32; Hunter and Mckelvie (footnote 71 above), see also Chan (footnote 9 above) 18.

⁶² See Kate O'Regan, 'Identifying the Barriers' (2004) 17 *SAJ / The Advocate* 30.

⁶³ See Jeniffer Slater, 'The Ethical Demise of the Political of Affirmative Action as a Motive for Enhancement Women and Education in South Africa: A Double Setback of Reverse Strategy' (2014) 40 *Stidia Historiae Ecclesisticae* 330.

⁶⁴ Wendy Nkosi, 'There Are No Women's Struggles, but Black Women's Struggles' (2022) *IOL News* (24 August 2022) available at <<https://www.iol.co.za/news/opinion/there-are-no-womens-struggles-but-black-womens-struggles-9f3be27f-687b-4c21-bc18-5fb098c780a4>> retrieved 04 December 2023.

⁶⁵ Meyer (footnote 16 above).

⁶⁶ Mothlatlego Dennis Matotoka and Kolawole Olusola Odeku, 'Unequal Remuneration in the South African Private Sector' (2022) 11 *African Journal of Gender, Society, and development* 83.

⁶⁷ Sibanda (footnote 41 above).

1.8 Clarification of essential concepts

Conceptual and terminological boundaries are established as part of the delimitation of a certain area of law.⁶⁸ In this regard, Bajcic⁶⁹ and Sefoka⁷⁰ avers that conceptualisation of legal jargon is never easy. Notwithstanding the difficulty, it is of cardinal importance for legal terms to be clarified to keep the purpose of this research aligned with the outcomes. Nevertheless, Sefoka⁷¹ citing Okunniga,⁷² observed that nobody can define law in a way that encompasses all definitions, not even a legal practitioner. Sefoka further avers that interpreting majority of the legal jargon is contentious.⁷³ To this end, the following definitions are not intended to end all existing definitions one may imagine.

1.8.1 Advocate

Narrowly construed, the Legal Practice Act 28 of 2014 ('LPA') defines an advocate as a lawyer who has been accepted and registered in terms of the LPA.⁷⁴ There are two types of advocates namely, 'referral advocates' by virtue of section 34(2)(a)(i) of the LPA,⁷⁵ and 'trust account advocates' by virtue of section 34(2)(a)(ii) of the LPA.⁷⁶ 'Trust account advocates' receive briefs from justice center, attorneys, or straight from public members.⁷⁷ 'Referral advocates' receives briefs from attorneys and are not allowed to accept briefs directly from the public.⁷⁸ However, the subjects on which briefs may be accepted by 'referral advocates' is not limited, so long as such briefs does not direct

⁶⁸ Martina Bajcic, 'Conceptualization of Legal Terms in Different Fields of Law: The Need for a Transparent Terminological Approach' (2011) 9 *Research in language* 82.

⁶⁹ Bajcic (footnote 138 above) 82.

⁷⁰ Isaiah Mmatipe Sefoka, 'Accentuating the Right to Ample Access to Quality Education in Rural South Africa: Legal Analysis' (LLM Dissertation, University of Limpopo 2016) 9.

⁷¹ Sefoka (footnote 70 above) 9.

⁷² Okunniga, 'Transplants and mongrels and the Law: The Nigerian Experiment' Inaugural Lecture series 62 delivered at University of Ife, Nigeria (1983) 2; see also Sefoka (footnote 70 above) 9.

⁷³ Sefoka (footnote 70 above) 9.

⁷⁴ Section 34(2)(a)(i) of Act 28 of 2014.

⁷⁵ CCLP (footnote 50) 2; see also section 34(2)(i) of Act 28 of 2014.

⁷⁶ Section 34(2)(a)(ii) of Act 28 of 2014.

⁷⁷ CCLP (footnote 50 above) para 38.3.

⁷⁸ *Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA) para 19; see also *Rosemann v General Council of the Bar of South Africa* 2004 (1) SA 568 (SCA) para 28.

advocate to do tasks that belong to an attorney.⁷⁹ Notably, the concept of advocate would be used interchangeably with counsel in this study.

1.8.2 Independence of the legal profession

Although there is no transparent definition of independence of the legal profession, advocates are autonomous specialists of advocacy and defenders of governing rules who fend off improper influence from anybody.⁸⁰ In essence, the concept of the independence of the legal profession means practicing the law impartially, fearlessly, and without favoritism.⁸¹

1.8.3 A brief and inequitable briefing pattern (IBP)

A case that is presented to a counsel is called a brief.⁸² Therefore, an 'inequitable briefing pattern', ('IBP') is a concept utilised to assess if an advocate is deserving prominent or inferior briefs. This creates an unequal distribution of legal services amongst advocates. Broadly construed, it describes how advocates gain employment from attorneys; as a result, a pattern of briefings appears when examining the cases that advocates receives.⁸³ In essence, the inequitable briefing pattern makes an evaluation as to whether an advocate normally handle simpler cases, in which they impose lower fees or do they handle high-profile cases in which they impose higher fees. The inequitable briefing pattern describes the manner in which low-profile briefs and high-profile briefs intersect with race, gender discrimination and other discriminatory practices prohibited in terms of section 9(3) of the Constitution. It is

⁷⁹ CCLP (footnote 50 above) para 23.2 & 23.2.1-23.2.19.

⁸⁰ CCLP (footnote 50 above) para 22.3.1.

⁸¹ Section 165(2) of the Constitution; see also the CCLP (footnote 50 above) para 25.1; 28.6.2.

⁸² Judges Matters 'The Question of Skewed Briefing Patterns' 2018, <<https://www.judgesmatters.co.za/opinions/the-question-of-skewed-briefing-patterns/>> retrieved on 31 December 2023.

⁸³ See Chitapi (footnote 10 above) 42; see also Nomfundo Manyathi-Jele 'Report: Transformation of the Legal Profession' available at <<https://www.saflii.org/za/journals/DEREBUS/2014/211.pdf>> retrieved on 26 March 2024, see also Department of Trade and Industry Notice 394 'Discussion Document on Gender Transformation in the Judiciary and the Legal Sector' (2018) 22.

noteworthy that women always speak of men receiving better briefs.⁸⁴ The concept of 'inequitable briefing pattern' in this study would be employed interchangeably with the term 'skewed briefing pattern'.

1.8.4 Transformation of the legal profession

The concept of 'transformation of the legal profession' has tremendously earned prominence⁸⁵ and it has been the chorus that is sang with blaring melodies without a full comprehension of the lyrics behind.⁸⁶ In this regard, Baloyi-Mere SC noted that although the term "transformation" has been lauded since the dawn of democracy, a meaningful discussion on what transformation is has never taken place.⁸⁷ Concerning those issues, Baloyi-Mere added that, there has never been a debate or discussion about how women have been marginalised.⁸⁸ Therefore, Langa observed that in legal terminology, 'transformation' has a highly specific meaning that is intricate to define.⁸⁹ Olivier acknowledged that the definition of 'transformation' is debatable.⁹⁰ Interestingly, Rapatsa comes to the rescue by defining transformation as a concept

⁸⁴ 'The Question of Skewed Briefing Patterns' (footnote 82 above); Chitapi (footnote 10 above) 42; see also Manyathi-Jele (footnote 83 above).

⁸⁵ Moses Retselisitsoe Phooko, 'Research Findings on Briefing Patterns' available at <https://www.Issa.org.za/wp-content/uploads/2019/11Briefing-Patterns-presentation-Tsiii-Phooko-Unisa_LSSA.pdf> retrieved on 28 December 2023; Draft Legal Sector Code (2022) 1; Legal Service Sector Charter (2007) 3; Kgomo Ramotsho, 'Stakeholders Urged to Work with the Office of the Solicitor-General' LSSA & De Rebus (2023), *De Rebus-SA Attorneys' Journal*, available at <<https://www.derebus.org.za/stakeholders-urged-to-work-with-the-office-of-the-solicitor-general/>> retrieved on 29 December 2023; Morne Olivier, 'A perspective on Gender Transformation of the South African Judiciary' (2013) 130 *SALJ* 449; Chitapi (footnote 10 above) 14; see also Meyer (footnote 16 above) 45.

⁸⁶ Moses Retselisitsoe Phooko and Sibusiso Blessing Radebe, 'Twenty-Three Years of Gender Transformation in the Constitutional Court of South Africa: Progress or Regression' (2016) 8 *Constitutional Court Review* 308.

⁸⁷ Ramotsho (footnote 85 above).

⁸⁸ *Ibid.*

⁸⁹ Justice Pius Langa, 'Transformative Constitutionalism' (2006) 17 *Stell LR* 351.

⁹⁰ Olivier (footnote 85 above) 449.

that signifies 'change'.⁹¹ Mbenenge⁹² adds a cherry on top to say that 'transformation' creates a 'change' that is organised and for the best.⁹³

1.8.5 Affirmative Action

The concept of affirmative action (AA) is defined in the Employment Equity Act (EEA) as:

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.⁹⁴

Surprisingly, while the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA')⁹⁵ is the main legislation prohibiting discrimination on persons (advocates) whom EEA does not apply, it does not define AA. Interestingly, Thomas⁹⁶ views AA as a proactive evolutionary mechanism which overcomes limitations and more efficiently activate dormant expedients to promote universal breakthrough. Given that the definition of AA in the EEA is widely applied by courts,⁹⁷ this study aims to apply AA as defined by Thomas and as it appears in the EEA interchangeably.

⁹¹ Mashele Rapatsa, 'Transformative Constitutionalism in South Africa: 20 Years of Democracy' (2014) 5 *Mediterranean Journal of Social Sciences* 890.

⁹² Justice Selby Mfanelo Mbenenge, 'Transformative Constitutionalism: A Judicial Perspective from the Eastern Cape' (2018) 32 *Speculum Juris* 2.

⁹³ Mbenenge (footnote 92 above) 3; Legal Practice Act 28 of 2014; see also Cathi Albertyn and Beth Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 249.

⁹⁴ Section 15(1) of Act 55 of 1998.

⁹⁵ See Act 4 of 2000.

⁹⁶ Williams Thomas, 'Affirmative Action as a Development Tool in the South African Business Interface' in Charl Adams, (eds) '*Affirmative Action in South Africa: A Gender Development Approach*' (1995); see also Yolande Sadie, 'Affirmative Action in South Africa: A Gender Development Approach' *African Journals* (1995) 25 *Africa Insight* 180.

⁹⁷ *Dudley v City of Cape Town and Another* 2008 (29) ILJ 2685 (LAC) para 2; *Director-General of the Department of Labour v Jinhua Garments (Pty) Ltd* (2007) 28 ILJ 880 (LC) para 1, the court noted that EEA is the key to the implementation of AA; see also *Harmse v City of Cape Town* (2003) ZALC 53 para 21.

1.8.6 Profession

Although section 22 of the Constitution guarantees all individuals a freedom to choose a profession,⁹⁸ it does not define what a profession is. To conceptualize the word profession, Cruess et al⁹⁹ briefly defines it as:

An occupation whose core element is work based upon the mastery of a complex body of knowledge and skills. It is vocation in which knowledge of some department of science or learning or the practice of an art founded upon it is used in the service of others. Its members are governed by codes of ethics and profess a commitment to competence, integrity and morality, a truism, and the promotion of the public good within their domain. These commitments form the basis of a social contract between a profession and society, which in turn grants the profession a monopoly over the use of its knowledge based on the right to considerable autonomy in practice and the privilege of self-regulation.¹⁰⁰

In essence, the definition of profession notes the social sphere of the legal profession by highlighting the significance of expert credentials, in-depth vocational training, ethics, autonomy, and independence among other qualities.¹⁰¹

1.9 Methodology

This study therefore utilises a qualitative method. With that being said, the study applies legislation, books, online articles and other sources, cases, journal articles, reports, and discussion papers. The utilisation of qualitative method is appropriate and suitable in the sense that this study seeks to address the issue of “inequitable briefing patterns” in the South African legal profession due to gender parity, which is closely linked to invisible circumstances. Qualitative method is quite essential in discerning invisible circumstances, such as “social norms, power, status, gender roles, ethnicity, and religion”, whose contribution to development results might not be immediately obvious. Therefore, creating pro-women policy program interventions is extremely complex if these concerns are not understood from the ground root level. This being the case qualitative method display factors that may not be easily discernible which is

⁹⁸ Section 22 of the Constitution.

⁹⁹ Sylvia.R Cruess, Sharon Johnston, and Richard.R Cruess, 'Profession: A Working Definition for Medical Educators, Teaching and Learning in Medicine' (2004) 16 *Teaching and learning in medicine*.

¹⁰⁰ Cruess et al (footnote 99 above) 74-76.

¹⁰¹ Meyer (footnote 16 above) 72.

relevant to this study. In this study, to properly recommend measures which may assist the state in designing affirmative action interventions to transform the South African legal profession, it is essential to understand the aforesaid intangible factors which hinders women to access high-profile briefs in the advocate's profession.

1.10 Chapter outline

Chapter one introduces the study and provides the research overview. Chapter two critically analyses the South African legal framework which promotes affirmative action. The chapter looks specifically at gender clause which advocate for gender approach affirmative action. Chapter three critically analyses international and regional framework pertaining to special measures aiming at promoting gender equality and how these instruments bind the state to implement a briefing policy. Chapter four shows that the stereotypes and other intersecting discriminatory practices delay women in attaining the necessary experience required to access high-profile briefs. Lastly, chapter five provides conclusion and recommendations about the essence of implementing a briefing policy in the South African legal profession considering the transformative and AA strategies.

1.11 Summary

It is clear from the literature that women find it difficult to reconcile motherhood and being an advocate. To this date, the legal profession is stuck between promotion of equality through transformative measures or affirmative action measures. It is for this reason that the study is undertaken to look closely into gender clause and how it can be utilised to empower the state to consider the differences founded on the traditional gender roles and all stereotypes embedded upon women when implementing affirmative action policies. Policies involving affirmative action serves as extensions of equality,¹⁰² designed to make up for the injustices women faced in the past.

¹⁰² Erin Leigh Nel, 'The Justifications and Limits of Affirmative Action: A Jurisprudential and Legal Critique' (PhD Thesis, University of Stellenbosch 2011) 4.

CHAPTER 2

THE SOUTH AFRICAN LEGAL FRAMEWORK PERTAINING TO GENDER EQUITY AND AFFIRMATIVE ACTION

2.1 Introduction

Astoundingly, the 'inequitable briefing pattern' ('IBP') is the catastrophe has capriciously plagued the female advocate's trajectory to advance in the legal profession. To this end, it is undeniable that gender discrimination still persists in the legal field.¹⁰³ Nevertheless, it is worth noting that, the challenges junior and senior women advocates encounter in their line of work are due to more than just biased 'briefing' practices. Their suitability to access briefs may be impacted by additional characteristics, which are not always related to gender. In a broad sense, the field of law is stuffed with overlapping terms.¹⁰⁴ However, for this chapter, gender clause¹⁰⁵ is pursued to scrutinise the legal framework aiming at promoting special measures to emancipate women in the legal profession.¹⁰⁶

Although the background of the research intrigued the need to approach the legal framework with a gender perspective,¹⁰⁷ in the comparatively high number of cases reviewed by the Constitutional Court, there appears a tendency to treat gender and

¹⁰³ *Cape Bar v Minister of Justice and Correctional Services and Others* (footnote 1 above) para 2 & 3, the minister noted the racial and gender discrimination and the slow pace of change in the legal profession. Both the advocates' and the attorneys have been, and are still, dominated by white men.

¹⁰⁴ See *UNICEF Regional Office for South Asia 'Gender Equality: Glossary Terms and Concept'* (2017). The terms are gender equality, gender parity, gender bias, gender balance, gender-biased sex selection, gender-blindness, gender-gap, gender mainstreaming, gender equity, and gender accommodating.

¹⁰⁵ See 'Gender Equality: Glossary Terms and Concept' (footnote 183 above). Gender equity is defined as a concept involving the use of temporary special measures to compensate for historical or systemic bias or differentiation. Special measures refer to affirmative action policies.

¹⁰⁶ Section 9(3) includes gender as ground of discrimination. A gender perspective inquiry is needed due to persistent gendered circumstances that are continuously taking place in the legal profession.

¹⁰⁷ The problem statement as elucidated in chapter 1 shows that while it is desirable to pursue equal opportunity for men and women, the stereotypes hindering women's progression are birthed by gender discrimination. It is for this reason that an analysis of a gender clause is imperative in this study.

sex identically.¹⁰⁸ This being the case, the Constitution does not define gender. However, Albertyn and Goldblatt draws the line between the two grounds by defining gender as a phrase that is utilised to explicate the distinctions between females and males as they are perceived by society and culture, whereas sex is commonly understood to refer to the biologic differences between females and males.¹⁰⁹ To this end, sex and gender are inextricably intertwined¹¹⁰ in the pursuit of promoting affirmative action policies.¹¹¹ Notwithstanding the identical utilisation of sex and gender, in the case of *September v Subramoney*, Fortuin J stated that since each is designed as a different ground, it is reasonable to believe that there must be a differentiation between the two grounds.¹¹²

Being that as it may, the chapter thus shows on the one hand, that the incorporation of sex and gender as separate grounds in the Constitution meant that when policies are being implemented, they ought to be interpreted in a way that considers the intersectionality of inequalities suffered by women in the past. On the other hand, this chapter critically analyses gender clause as an enabling tool for affirmative action policies to emancipate women. Based on the foregoing, the chapter submits that, there is overwhelming evidence from the South African legal framework which gives effect to gender affirmative action policies to be applied in the legal profession.

¹⁰⁸ Catherine Albertyn and Beth Goldblatt, 'Equality' (eds) in Stu Woolman and Michael Bishop, 'Constitutional Law of South Africa' (2nd Edn, Juta, 2013) 03-07.

¹⁰⁹ Albertyn and Goldblatt (footnote 108 above) 03-07.

¹¹⁰ See *Mdunjeni-Ncula v MEC, Department of Health and Another* (2021) 12 BLLR 1195 (LAC) para 1 & 20. In this case, the appellant contended that she was discriminated based on gender differences in terms of salaries with her male counterparts. To this, Davis JA used sex and gender interchangeably, by holding that, there was no evidence to prove that any differentiation in salary was based on discrimination on the ground of gender or sex.

¹¹¹ It is imperative to interpret sex and gender as grounds of discrimination and to see how they fit well with affirmative action by invoking substantive equality. See also, Albertyn and Goldblatt (footnote 108) 7.

¹¹² *September v Subramoney NO and Others* 2019 4 All SA 927 (CC) para 106. Most interestingly, in the case of *Prinsloo v Van Der Linde and Another* 1997 (3) SA 1012 (CC) para 31, the court remarked that sex and gender discrimination are also important.

2.2 Constitution of the Republic of South Africa, 1996

The Constitution is the supreme law of the country in South Africa¹¹³ and any obligation imposed by the Constitution “must” be realised.¹¹⁴ Gender equality¹¹⁵ falls amongst other obligations sanctioned by the Constitution to be realised.¹¹⁶ Unquestionably, the historical discrimination against women and people of colour was condoned, sustained, and institutionalised.¹¹⁷ Noteworthy, Rapatsa asserts that, prior 1994, ‘political, economic, and social’ differentiation as well as disempowerment were pervasive under the authoritarian government that ruled the country.¹¹⁸ Matotoka and Odeku,¹¹⁹ observed that in attempt to support women’s emancipation, the Constitution has protected the right to equality, including gender equality, since the establishment of democracy in 1994. The cornerstone of the new South African regime is equality. The right to equality in section 9 of the Constitution establishes the legal entitlement by offering corrective and systematic measures for implementation.¹²⁰ Rapatsa,¹²¹ Albertyn and Goldblatt,¹²² observes that although the term “equality” is not defined in the Constitution for a number of reasons,¹²³ the legal and historical framework of the society in question affects what equality means.¹²⁴ In the case of *Minister of Home Affairs v Fourie*,¹²⁵ it has been noted that equality entails treating people equally regardless of their differences rather than eliminating them.¹²⁶

¹¹³ Section 2 of the Constitution.

¹¹⁴ Section 2 of the Constitution.

¹¹⁵ Section 9(2) and section 9(3) of the Constitution.

¹¹⁶ Section 9(2) of the Constitution read with section 7(2) of the Constitution.

¹¹⁷ Madala J in the case of *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) para 157, citing Mohamed J in the case of *S v Makwanyane* 1995 (3) SA 391 (CC) para 383.

¹¹⁸ Mashele Rapatsa ‘The Right to Equality Under South Africa’s Transformative Constitutionalism: A Myth or Reality?’ (2015) 11 *Acta Universitatis Danubius Juridica*; See also Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and political Rights, UN Doc E? CN.4/1985/4, Annex (1985).

¹¹⁹ Motlhatlego Dennis Matotoka and Kolawole Olusola Odeku, ‘Mainstreaming Black Women into Managerial Positions in the South African Corporate Sector in the Era of the Forth Industrial Revolution’ (4IR) per? (2021) 24 PER / PELJ 4.

¹²⁰ Section 9 of the Constitution.

¹²¹ Rapatsa (footnote 118 above).

¹²² Albertyn and Goldblatt (footnote 108 above).

¹²³ Rapatsa (footnote 118 above).

¹²⁴ Albertyn and Goldblatt (footnote 108 above) 3.

¹²⁵ *Minister of Home Affairs v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC) para 60.

¹²⁶ *Minister of Home Affairs v Fourie & Another* (footnote 125 above) para 60; see also Rapatsa (footnote 118 above).

The Constitution of the Republic of South Africa recognises the concept of the 'intersectionality of discrimination'.¹²⁷ Section 9(3) of the Constitution acknowledges this fact by using the phrase "on one or more grounds",¹²⁸ to denote that differentiation may be based on one or more listed or unlisted grounds, or on a single listed or unlisted ground combined with another.¹²⁹

Although not all forms of discrimination are expressly forbidden by the Constitution,¹³⁰ interestingly, the first stage of inquiring whether discrimination has taken place in the case of *Harksen v Lane No and Others* recognises the impact of stereotypes as it included a prejudice founded on traits and qualities that could diminish a person's basic human dignity.¹³¹ Stereotypes about women advocates not having the capacity to undertake high-profile cases impair their human dignity, which in turn amounts to discrimination. Against this backdrop, Chitapi¹³² and Meyer,¹³³ observed that the biased briefing habits toward women are the result of stereotypes, and this influences and validates the kind of job women do, and their competence for intricate financial transactions and significant legal issues is doubted. Regrettably, Operario and Diske noted that stereotypes can be used to excuse or rationalise injustices and are difficult to recognize and manage.¹³⁴ Laudably, the two-stage test in *Harksen v Lane No*,¹³⁵ possess an almighty character in influencing how to determine whether a certain

¹²⁷ Section 9(3) of the Constitution, *National Coalition for Gay and Lesbian Equality v Home Affairs* 2000 (2) SA 1 (CC) 2000 (1) 39 (CC) para 40, *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 112.

¹²⁸ Section 9(3) of the Constitution; see also Evade Grant and Joan G Small, 'Disadvantage and Discrimination: The Emerging Jurisprudence of the South African Constitutional Court' (2020) 51 *Northern Ireland Legal quarterly* 174, Grant and Small pointed out that the term 'on one or more grounds' in section 9(3) of the Constitution contemplates multiple ground applications.

¹²⁹ Albertyn and GoldBlatt (footnote 108 above) 51.

¹³⁰ *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC); *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); see also Nel (footnote 102 above) 37.

¹³¹ *Harksen v Lane* (footnote 130 above) para 46.

¹³² Chitapi (footnote 10 above) 65.

¹³³ Meyer (footnote 16 above) 43-44.

¹³⁴ Don Operario and Susan T. Fiske, 'Causes and Consequences of Stereotypes in Organizations' in Manuel London (eds) *How People Evaluate Others in Organizations* (1st Edn, Lawrence Erlbaum Associates 2001).

¹³⁵ *Harksen v Lane* (footnote 130 above) para 44-46.

measure constitutes unfair discrimination.¹³⁶ Such measures are being taken in the context of equality being a fundamental principle and right, as well as the shining beacon of the revolutionary constitutional vision,¹³⁷ which is built upon substantive equality.¹³⁸ Scholars acknowledge that substantive equality is transformative in nature.¹³⁹ This is so because, in contrast to formal equality, substantive equality takes individual differences into account.¹⁴⁰ Therefore, substantive equality is the recommended framework for comprehending gender equality.¹⁴¹ In this regard, the notion of achieving substantive equality in the legal field is predicated on the knowledge that the long-standing political, social, and economic disparities between females and males in the field are the root cause of inequality.¹⁴²

Despite the fact that the Constitutional Court has declared in several occasions that the equality enshrined in the Constitution is substantive rather than formal,¹⁴³ the judgements of the *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others*¹⁴⁴ and *S v Jordan and Others*,¹⁴⁵ show that, frequently even when substantive equality is the desired objective, the judgement's results always fall short of such goal.¹⁴⁶ This is because legal rules are pursued at the expense of situations

¹³⁶ For example, see, *King N.O and Others v De Jager and Others* 2021 (4) SA (CC) para 140; *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC) para 27; see also *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 29 & 36.

¹³⁷ *King N.O and Others v De Jager and Others* (footnote 136 above) para 77.

¹³⁸ Madeleine Loyson, 'Substantive Equality and Proof of Employment Discrimination: A Critical Analysis of the Changing Nature of the Test for Justification of Discrimination in Employment' (LLM Dissertation, Nelson Mandela Metropolitan University 2009) 8.

¹³⁹ Catherine Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253-276; Nel (footnote 102 above) 42; *Minister of Finance and Other v Van Heerden* (footnote 136 above) para 142; Dikgang Moseneke, 'The fourth Bram Fisher Memorial Lecture - Transformative adjudication' (2002) 18 *SAJHR*; Rapatsa (footnote 118 above); see also Matilda Lasseko-Phooko and Safia Mahomed, 'The Challenges to Gender Equality in the Legal profession in South Africa: A Case for Substantive Equality as a Means for achieving Gender Transformation' (2021) 21 *African Human Rights Law Journal* 499-500.

¹⁴⁰ Catherine Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 251; see also Nel (footnote 102 above) 41.

¹⁴¹ Lasseko-Phooko and Mahomed (footnote 139 above) 500.

¹⁴² *Ibid.*

¹⁴³ Lasseko-Phooko and Mahomed (footnote 139 above) 508.

¹⁴⁴ *The National Coalition for Gay Lesbian Equality & Another v Minister of Justice and Others* (footnote 127).

¹⁴⁵ *S v Jordan and Others* 2002 (6) SA 642 (CC).

¹⁴⁶ Lasseko-Phooko and Mahomed (footnote 139 above) 508; *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* (footnote 127 above); see also *S v Jordan and Others* (footnote 145 above).

women find themselves in as a result of harmful stereotypes. Botha¹⁴⁷ concurs with Pieterse,¹⁴⁸ that legal guidelines and the eradication of stereotypes are possible under section 9 of the Constitution.¹⁴⁹

To this end, the court aired in the case of *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* that restorative policies serve as an important constituent of 'transformative constitutional order'.¹⁵⁰ The cases of *Bato Star*,¹⁵¹ *Brink v Kitshoff*,¹⁵² *Minister of Finance and Others v Van Heerden*,¹⁵³ and *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others*¹⁵⁴ remarked that section 9(2) of the Constitution offers corrective procedures that support legislative and other initiatives meant to uplift and protect those who have been severely ravaged by unfair discrimination. The corrective measures are necessary because a simple ban on gender discrimination would not address the underlying imbalances that needs to be addressed, which is why this clause is required.¹⁵⁵ Section 9(2) and section 7(2) of the Constitution obliges the state to implement remedial measures. In the case of *Women's Legal Centre Trust v President of the Republic of South Africa and Others*,¹⁵⁶ *Qwelane v South African Human Rights Commission and Another*,¹⁵⁷ *Eskom Holdings SOC Ltd v Vaal River Development*

¹⁴⁷ Henk Botha, 'Metaphoric Reasoning and Transformative Constitutionalism (part 2)' (2003) 1 *Journal of South African Law | TSAR* 21-22.

¹⁴⁸ Marius Pieterse, 'Stereotypes, Sameness, Difference, and Human Rights: Catch 22?' (2001) 16 *SAPL* 102.

¹⁴⁹ Loyson (footnote 138 above) 9 and Botha (footnote 147 above) 21-22.

¹⁵⁰ *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) para 1-2.

¹⁵¹ *Bato Star Fishing (PTY) Ltd v Minister of Environmental Affairs and Tourism and Others*, 2004 (4) SA 490 (CC) para 75.

¹⁵² *Brink v Kitshoff* NO 1996 (4) SA para 42.

¹⁵³ *Minister of Finance and Others v Van Heerden* (footnote 136 above) para 32.

¹⁵⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* (footnote 127 above) para 60.

¹⁵⁵ Charles Ngwenya, 'Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa: A Case Study of Contradictions in Inclusive Education' *African Disability Rights Yearbook* 144.

(2021) 1. Available at <<https://www.wadry.up.ac.za/section-a-articles/ngwenya-c>> Retrieved on 03 February 2024.

¹⁵⁶ *Women's Legal Centre Trust v President of the Republic of South Africa and Others* 2022 (5) SA 323 (CC) para 37.

¹⁵⁷ *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC) para 51.

Association and Others,¹⁵⁸ it was stated that section 7(2) of the Constitution obligates the state to take appropriate and practical actions. In the context of this study, such practical actions to be taken by the state include a briefing policy in the advocate's profession. This is because it has been difficult for the state to allocate legal services and to address the issue of briefing patterns.¹⁵⁹ Briefing patterns have mostly favored male advocates.¹⁶⁰ Therefore, gender clause ought to be used effectively with other intersecting grounds of discrimination to promote women specific policies.

It is fascinating that; section 217(2) of the Constitution permits state agencies to adopt procurement rules that prioritise groups of people who were underprivileged in the past.¹⁶¹ Such underprivileged people in this study includes women. Therefore, to give the policy referred to in section 217(2) effect, section 217(3) of the Constitution mandates the establishment of a legal framework.¹⁶²

2.3 Legal Practice Act 28 of 2014 (LPA)

The purpose of the Legal Practice Act ('LPA'), is to provide a legislative framework for the transformation of the legal profession underpinned by the Constitution.¹⁶³ To have a legal field that mostly reflects the demographics of the nation, it also aims to increase access to justice and implement policies that offer equitable opportunity for all aspiring legal practitioners.¹⁶⁴ Interestingly, when selecting council members, section 7(2)(a) of the LPA practicably and fairly takes into account the racial and gender makeup of South Africa.¹⁶⁵ Regrettably, such an appointment does not give rise to a possibility of

¹⁵⁸ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* 2023 (4) SA 325 (CC) para 110.

¹⁵⁹ Parliament of the Republic of South Africa "Summary: Review of the Women's Charter: Challenges to Effective Equality" 2. Available at <https://static.pmg.org.za/200522OVERVIEW_OF_LEGISLATIGRAMMES_AND_CHALLENGES_RELATED_TO_THE_ARTICLES_IN_THE_WOMENS_CHARTER_FOR_EFFECTIVE_EQUALITY.pdf> retrieved on 03 February 2024.

¹⁶⁰ Review of the Women's Charter (footnote 159 above) 2.

¹⁶¹ Section 217(2) of the Constitution.

¹⁶² Section 217(3) of the Constitution.

¹⁶³ Section 3(a) of Act 28 of 2014; see also Meyer (footnote 16) 51.

¹⁶⁴ Meyer (footnote 16 above) 51; see also section 5 of Act 28 of 2014.

¹⁶⁵ Section 7(2)(a) of Act 28 of 2014.

obtaining briefs,¹⁶⁶ serving as a council member provides a chance to support the legal field.¹⁶⁷ Against this backdrop, Lasseko-Phokoo and Mahomed¹⁶⁸ are of the opinion that the LPA lacks clear procedures aimed at achieving gender balance in the legal field.¹⁶⁹ Seemingly, the LPA has turned to formal equality rather than substantive equality to achieve transformation in terms of gender because section 94(1)(b) of the LPA empowers the minister to establish mechanisms to monitor progress on the implementation of empowerment programmes for “historically disadvantaged legal professionals” but is silent about gender.¹⁷⁰ Although the term “historically disadvantaged”, may be construed as to encompass those who have been discriminated against in terms of gender, there is no mention of gender discrimination in the context of briefing of advocates. It is worth noting that, the Legal Practice Council (hereinafter the ‘LPC’) is the regulatory organisation that oversees the matters of all legal professionals,¹⁷¹ and to supervise the reform of the legal field according to the LPA’s vision.¹⁷² Worryingly, the LPA and the Code of Conduct for Legal Practitioners (CCLP) does not make provision for special mechanisms to promote gender transformation. However, the CCLP’s recognition of the reality of race-based and gender-based bias and the briefing patterns of advocates during the process of conferring the silk status,¹⁷³ it’s a call for implementation of AA policies to be applied during selection of a counsel for a brief. If the CCLP recognises AA policies only during the selection of silk counsels, still gender-based discrimination¹⁷⁴ would remain a

¹⁶⁶ *Cape Bar v Minister of Justice and Correctional Services and Others* (footnote 1 above) para 53.

¹⁶⁷ *Cape Bar v Minister of Justice and Correctional Services and Others* (footnote 1 above) para 52.

¹⁶⁸ Lasseko-Phooko and Mahomed (footnote 139 above).

¹⁶⁹ Meyer (footnote 16 above) 51.

¹⁷⁰ Section 94(1)(b) of Act 28 of 2014, see also Meyer (footnote 16) 51-52.

¹⁷¹ *South African Legal Practice Council v Masha and Others* 2021 SA 430 (HC) para 1; see also *Jelan v South African Legal Practice Council* 2022 SA 3 (HC) para 5. The LPC stands in a position of authority of its members. Such authority gives them freedom to implement rules aiming at transforming the legal profession.

¹⁷² Section 3(a) of Act 28 of 2014; see also Meyer (footnote 16 above) 51.

¹⁷³ ‘Draft Criteria Procedures for the Recommendation of Conferment of Senior Counsel and Senior Attorney’ in terms of 8.2 of the Code of Conduct for Legal Practitioners (2020) para 3.2 (3.2.2).

¹⁷⁴ *Manisgh v General Council of the Bar and Others* 2014 SA (1) 83 (SCA) para 6. The CC disregarded the Manisgh contention that the institution of silk infringes the right to equality and freedom to choose a profession, this is because according to her, non-promotion to senior status has profound economic consequences for the barrister concerned and especially for those whose

stumbling block for women to attain the silk status¹⁷⁵ because not many women would meet the criteria for the selection of silk counsels¹⁷⁶ due to the inability to access high-profile briefs. Laudably, the Promotion of Equality and Prevention of Unfair Discrimination Act,¹⁷⁷ makes it clear that the codes of practice must be developed in a manner that promotes equality. Therefore, the CCLP must be developed by the LPC in line with the LPA to prioritise gender equality in the legal field.

2.4 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)

Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA') prohibits discrimination on ground of gender.¹⁷⁸ PEPUDA imposes obligations on the government and all individuals, excluding those to whom and to the extent that the EEA is applicable to promote gender equality.¹⁷⁹ The services' users apply PEPUDA,¹⁸⁰ this includes advocates who render legal services. Nevertheless, the provisions of PEPUDA in terms of the promotion of equality are not as detailed compared to EEA. Generally speaking, PEPUDA governs equality in all other situations, whereas the EEA particularly governs work relationships.¹⁸¹ Both in the case of *Du*

have been applying for silk, but who are unsuccessful in their applications suffer real disadvantage in their practices and great distress.

¹⁷⁵ *Mansigh v General Council of the Bar and Others* 2014 SA (1) 85 (CC) para 15 & 37. The constitutional court did not understand that the discrimination Mansigh complained of arises against the backdrop of disadvantages suffered by women throughout their career. (own emphasis added). See also Chitapi (footnote 10 above) 60, Chitapi reinforces the above emphasis by aptly stating that the inability to obtain experience in certain areas of work means the denial of advancement in other words improving seniority (silk). Additionally, high-profile briefs increase chances of attaining the silk status (seniority), that in turn helps them to receive more cases of high value.

¹⁷⁶ See *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC) para 30, Mansingh argued that the silk status signifies a recognition of professional quality, and her contention is in line with the criteria stipulated in the 'Draft Criteria Procedures for the Recommendation of conferment of Senior Counsel para 3.2.1 (footnote 173 above), which requires the background of good quality work and particularly a counsel who dealt with complicated cases before and have the necessary experience.

¹⁷⁷ Section 25(1)(C)(iii) and section 28(3)(b) of Act 4 of 2000.

¹⁷⁸ Section 8 of Act 4 of 2000.

¹⁷⁹ Section 5(1) and 5(3) of Act 4 of 2000; see also Loyson (footnote 138 above) 42.

¹⁸⁰ Loyson (footnote 138 above) 42.

¹⁸¹ Lasseko-Phooko and Mahomed (footnote 139 above) 514.

Preez v Minister of Justice and Constitutional Development & Others,¹⁸² and *Singh v Minister of Justice and Constitutional Development and Others*,¹⁸³ PEPUDA applied and not the EEA.¹⁸⁴ Section 9(2) of the Constitution and section 14(1) of the PEPUDA have strikingly identical phrasing, which is worth mentioning.¹⁸⁵ The sections speak about AA policies in the same terms.¹⁸⁶ However, the demarcation in the two provisions' phrasing is thus important: according to section 9(2) of the Constitution, certain actions "may be performed" in order to "promote the achievement of equality"; section 14(1) states that adopting such actions is "not unfair discrimination".¹⁸⁷ If at all feasible, the two provisions' differences must be harmonised.¹⁸⁸ Because of the Constitution's supremacy, section 14(1) of PPPFA should, if at all feasible, be interpreted so as to complement section 9(2) of the Constitution.¹⁸⁹ Section 8(h) of PEPUDA¹⁹⁰ provides that nobody may be unjustly excluded from opportunities, including those involving contracts for the provision of services in exchange for payment. In the context of this study, such services include rendering of legal services by advocates. Interestingly, section 8(i) of PEPUDA¹⁹¹ addresses the structural injustices that prevent women from open positions because of the sexual division of labour. The government is required by section 24(1) of PEPUDA¹⁹² to advance equality and ensure that it is realised. While section 8(h) of PEPUDA¹⁹³ deals with discrimination generally to include all genders, section 8(i) of the PEPUDA¹⁹⁴ is specifically focused on women. Section 25(1)(b) and 25(c)(i)(ii) of PPPFA,¹⁹⁵ stipulates that in order to

¹⁸² *Du Preez v Minister of Justice and Constitutional Development & Others* 2006 (3) All SA 271 (SE).

¹⁸³ *Singh v Minister of justice and Constitutional Development and Others*, 2013 (3) SA 66 (EC).

¹⁸⁴ *Du Preez v Minister of Justice and Constitutional Development & Others* (footnote 182 above) para 13; *Singh v Minister of justice and Constitutional Development and Others* (footnote 183 above) para 3.

¹⁸⁵ Section 9(2) of the Constitution & section 14(1) of Act 4 of 2000; *Du Preez v Minister of Justice and Constitutional Development & Others* (footnote 182 above) para 17.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ Section 9(2) of the Constitution; section 14(1) of 4 of 2000; see also *Du Preez v Minister of Justice and Constitutional Development & Others* (footnote 182 above) para 17-18.

¹⁹⁰ Section 8(h) of Act 4 of 2000.

¹⁹¹ Section 8(i) of Act 4 of 2000.

¹⁹² Section 24(1) of Act 4 of 2000.

¹⁹³ Section 8(h) of Act 4 of 2000.

¹⁹⁴ Section 8(i) of Act 4 of 2000.

¹⁹⁵ Section 25(1)(b) and section 25(1)(c)(i)(ii) of Act 5 of 2000.

advance equality, the state must take steps to create and carry out programs, action plans, and additional statutes.

2.5 Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA)

Section 2(1)(d)(i) of the Preferential Procurement Policy Framework Act ('PPPFA'),¹⁹⁶ includes gender as a ground to be considered during the implementation of procurement measures. Section 217(2)(a)¹⁹⁷ of the Constitution considers preferences of groups of people who have been unfairly discriminated against when awarding contracts. Therefore, section 217(3) of the Constitution authorises a framework to advance class of persons who have been denied equal opportunity in terms of contracts.¹⁹⁸ Noteworthy, the PPPFA was effectuated to enforce section 217 of the Constitution. Understandably, both minority and majority judgement in the case of *Minister of Finance v Afribusines NPC*,¹⁹⁹ agreed on the transformational requirements of section 217 of the Constitution. The majority further noted that the goals of section 217(2) are consistent with the Constitution's transformational character.²⁰⁰ Noteworthy, the provisions of section 9(2) and 217(2) of the Constitution complement each other.²⁰¹ For the vast majority of South Africans, true or substantive equality would always remain a "pie in the sky", and the Constitution's revolutionary mission would be unattainable in the absence of the aforementioned sections.²⁰² It was made clear in the case of *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*,²⁰³ that a fundamental component of the constitutional and legislative procurement system is the provision of economic remedy to individuals who were previously disadvantaged.²⁰⁴

¹⁹⁶ Section 2(1)(d)(i) of Act 5 of 2000.

¹⁹⁷ Section 217(2)(a) of the Constitution.

¹⁹⁸ Section 217(3) of the Constitution.

¹⁹⁹ *Minister of Finance v Afribusines NPC* 2022 (4) SA 362 (CC).

²⁰⁰ *Minister of Finance v Afribusines NPC* (footnote 199 above) para 98.

²⁰¹ *Minister of Finance v Afribusines NPC* (footnote 199 above) para 99.

²⁰² Ibid.

²⁰³ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*, 2014 (1) SA 604 (CC).

²⁰⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* (footnote 203 above) para 47.

Grief-stricken by the inequitable briefing patterns in the advocate's profession, on 11 November 2022 Breytenbach asked the minister of Justice and Correctional Services questions as to the rationale behind the absence of legal services procurement framework in the government and the plan of his department to implement one.²⁰⁵ The minister affirmatively answered the questions imposed by Breytenbach that their agency categorically plans to put in place a mechanism enabling government legal services procurement.²⁰⁶ In a brief statement, the minister mentioned that the main goals, which include the following, are pertinent details for the framework of state legal services' procurement:²⁰⁷

Transformation of legal services for state litigation. Implementation of the briefing policy that contributes towards eliminating current race and gender disparities in the legal profession. The briefing caters for previously disadvantaged; implementation of a random rotational system based on the case specific requirements that will ensure fair and equitable distribution of state litigation cases by balancing the number of briefs and value of briefs; increase exposure, transfer of knowledge and skills developments for previously disadvantaged in all areas of law; introduce performance measurement tools, success evaluation, ratings and peer review mechanisms to eliminate a perception that previously disadvantaged do not have capacity and capability to handle complex, high-profile and high value cases; and encourage a change in attitude so as to promote the inclusion of previously disadvantaged and willingness to transfer skills from the few law firms/advocates who have benefited from state legal matters to the majority of blacks and women legal practitioners.²⁰⁸

Although the minister emphasised the need for a briefing policy aimed at the eradication of race and gender, the current Draft LSC's main goal is to address racial discrimination in the legal profession and not gender. Interestingly, the minister acknowledges the implication of the perception that historically marginalised groups lack the necessary capacity to undertake high-profile briefs and further suggested mechanisms such as "performance measurement tools, success evaluation and ratings and peer review Mechanisms" to address such harmful perceptions. However, the most pressing issue is the minister's inclination to try to address race and gender jointly by suggesting the same measures. Therefore, it is quite important to acknowledge the fact that the challenges of women and men in the South African legal

²⁰⁵ National Assembly Question for Written Reply (footnote 27 above) 1.

²⁰⁶ National Assembly Question for Written Reply (footnote 27 above) 3-4.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

profession are not identical and should be treated differently. To this date, there is no policy that specifically address the issue of inequitable briefings in state departments in line with the preferential procurement of contracts apart from the Draft Legal Sector Code.

2.6 Draft Legal Sector Code: Codes of Good Practice on Broad-Based Black Economic Empowerment, 2022 (LSC)

The Draft Legal Sector Code ('Draft LSC'), intends to rectify the systemic exclusion of blacks from significant economic engagement,²⁰⁹ and to enable the legal sector's change so that it better reflects South Africa's demographics by making sure that a pool of qualified and skilled legal providers is created.²¹⁰ Furthermore, the Draft LSC mandates the implementation of review and monitoring procedures to end fronting and other strategies for evading such objectives.²¹¹ Legal professionals²¹² are obliged to follow and to abide by the Draft LSC together with Broad-Based Black Economic Empowerment ('B-BBEE') Codes of Good Practice in order to avoid fronting,²¹³ if they choose to be evaluated according to the B-BBEE policies and practices.²¹⁴ In the unreported case of *AERO-DUCT Moya v Minister of Public Works and another*,²¹⁵ it was enormously emphasised that fronting is a very highly significant misconduct that undercuts the goals of the constitutionally sanctioned "preference procurement policy".²¹⁶

Fronting in the advocate's profession should go far beyond just focussing on appointment of black female counsels who lacks the necessary expertise just to circumvent goals, but to appoint black female counsels on areas of law in which they were formerly marginalised and are mainly still precluded.²¹⁷ In the case of *Passenger*

²⁰⁹ Draft Legal Sector Code (2022) 1.

²¹⁰ Draft LSC (2022) 1-2.

²¹¹ Draft LSC (2022) 30 Para 8.2.8.

²¹² Draft LSC (2022) 31 para 9.2.2.

²¹³ Draft LSC (2022) 31 para 9.2 and Act 53 of 2003.

²¹⁴ Draft LSC (2022) 31 para 9.3.

²¹⁵ *AERO-Duct Moya v Minister of Public Works and Another* 2019 HC (Unreported case).

²¹⁶ *AERO-Duct Moya v Minister of Public Works and another* (footnote 215 above) para 31.

²¹⁷ Draft LSC (2022) 20-21.

Rail Agency of South Africa v SwiFambo Rail Agency,²¹⁸ it was argued that the appointment of black females is used as 'tickets' to receive B-BBEE certificate as a result of fronting tactics.²¹⁹ Appallingly, the Draft LSC published in February 2021 required advocates to be silk counsels in order to benefit from the procurement policy,²²⁰ however, the recent Draft LSC 2022 issued by Minister of Trade, Industry and Competition in July 2022 does not require one to be a senior counsel²²¹ for the purpose of procurement of legal services by public entities and state organs.²²² Nevertheless, what remains intact is that the Draft LSC prioritises race over gender.²²³ White women are measured equally with their white male counterparts.²²⁴ This is because the Draft LSC is focused on race than gender and both white and black women suffered discrimination on the ground of gender. The measures used does not consider the intersectionality of discrimination. Noteworthy, in the case of *South African Police Service v Solidarity OBO Bernard*,²²⁵ observed that in South Africa, AA policies are implemented with the goal of gradually helping historically underprivileged class to take advantage of the openings in the workforce.²²⁶ Nevertheless, the rights of people who were historically privileged cannot be unjustly violated by such policies.²²⁷ Accordingly, Sakeliga argues that the government invoke section 9(2) to justify their anti-democratic race-based measures.²²⁸ In the same token, AfriForum observed that the majority of black practitioners are already far more likely to be

²¹⁸ *Passenger Rail Agency of South Africa v SwiFambo Rail Agency* 2017 (3) All SA 971 (GJ) para 91 & 95.

²¹⁹ Mothlatlego Dennis Matotoka and Kalawole Olusola Odeku, 'Exposing the use of Fronting to Circumvent Mainstreaming of Africa Women to managerial Positions in South Private Sector' (2022) 24 *Journal of International Women's Studies* 8.

²²⁰ See Draft LSC (2021) 78-79 'Measuring the procurement of legal services from a black woman senior advocate'. This means female advocates without seniority/silk status continues to suffer discrimination when it comes to high-profile briefs.

²²¹ Draft LSC (2022) issued by the Minister of Trade, Industry and Competition.

²²² Draft LSC 2021 issued by LPC (2021) 78-79, required advocates to be seniors for the purposes of procurement of legal services by public entities and state organs. See also Draft LSC (2022) 67, 'seniority' status was removed.

²²³ See Draft LSC (2021) 74-75.

²²⁴ Draft LSC (2022) 67.

²²⁵ *South African Police Service v Solidarity OBO Bernard* 2014 (6) SA 123 (CC).

²²⁶ *South African Police Service v Solidarity OBO Barnard* (footnote 368 above) and see also Matotoka and Odeku (footnote 188 above) 10.

²²⁷ Ibid.

²²⁸ Sakeliga NPC Submissions: Legal Sector Code, 2021 available at <<https://sakeliga.co.za/wpcontent/uploads/2022/07/2021.03.12-Sakeliga-submission-on-Legal-Sector-Code-2021.pdf>> retrieved on 1 January 2024.

employed or involved in other activities and the Draft LSC may disqualify white applicants, especially white females.²²⁹ It is worth noting that, the court in the case of *Van Heerden v Minister of Finance* remarked that it is inevitable that some members of society would be impacted by the transformational measures, especially those who were previously privileged.²³⁰

2.7 Employment Equity Act 55 of 1998 (EEA)

While Employment Equity Act²³¹ ('EEA'), does not define equality, one could contest that in accordance with the aims of affirmative action stated in section 2 of EEA, the "equality" that the EEA seeks to achieve is the correction of historical disadvantages suffered by specified populations.²³² However, AA as envisaged in the EEA requires the establishment of a contract of employment. Sadly, the procurement of legal services does not create an employment relationship between the state and advocates. Unless otherwise they are employed by the state.²³³ Given that advocates are not subject to the EEA,²³⁴ the compliance targets as set out in the Draft LSC do not align with those set out in the EEA.²³⁵ Appallingly, it is reasonable to anticipate that the legal field would lead by example and provide an official, all-inclusive AA plan that is open to all interested parties.²³⁶ Although PEPUDA remains the main framework governing discrimination in the legal profession, it seems that EEA can still be used as

²²⁹ AfriForum 'Commentary on Draft Legal Sector Code' (2021) 1, available at <https://afriforum.co.za/wp-content/uploads/2021/11/Commentary-on-the-draft-legal-sector-code_2021.pdf> retrieved on 1 January 2023.

²³⁰ *Minister of Finance v Van Heerden* (footnote 136 above) para 44.

²³¹ Act 55 of 1998.

²³² Lasseko-Phooko and Mahomed (footnote 139 above) 514.

²³³ EEA applies in case whereby counsels are employed in terms of section 34 of Act 28 of 2014, because there is an employment relationship between a counsel and the state.

²³⁴ Section 20 of 55 Of 1998.

²³⁵ LSSA comments-Draft LSC (2022) 8, available at <<https://www.Issa.org.za/wp-content/uploads/2022/10/LEGAL-SECTOR-CODE-LSSA-COMMENTS-OCT.pdf>> retrieved on 03 February 2023.

²³⁶ *Du Preez v Minister of Justice and Constitutional Development & Others* (footnote 182 above) para 13; see also *Singh v Minister of justice and Constitutional Development and Others* (footnote 183 above) para 43.

a guiding authority, as noted by Loyson,²³⁷ that PEPUDA lacks some of the details seen in EEA.²³⁸

2.8 National Policy Framework for Women's Empowerment and Gender Equality (NPFWEGE)

The National Policy Framework for Women's Empowerment and Gender Equality ('NPFWEGE') acknowledges affirmative action programmes for women as a principle aiming at:

Corrective measures through programmes targeting women to redress the legacies of discrimination and subordination. This means that special legislative and other measures are needed for the achievement of gender equality.²³⁹

It is quite fascinating that, the NPFWEGE's language of affirmative action policy is crafted chiefly on the basis of gender transformation. Laudably, the wording "special legislative", and "programmes targeting women", ought to be construed to mean implementation of pro-women policies. Contextually in this study, this means that apart from the Draft LSC, there ought to be a special policy targeting women advocates in terms of state briefs. However, on the flipside of it, the definition of 'gender equality' is clear that the intended equality as enumerated under the NPFWEGE entails both formal and substantive equality.²⁴⁰ Additionally, it takes a stance on equality that demands that men and women be treated with the same respect and autonomy and that the reparative and redistributive parts of equality be addressed.²⁴¹ In essence, the NPFWEGE policy is transformative in nature, as it places equal opportunity and special legislative measures in a harmonious relationship as opposed to dichotomous.

²³⁷ Loyson (footnote 138 above) 10.

²³⁸ Loyson (footnote 138 above) 10; see also *Du Preez v Minister of Justice and Constitutional Development and Others* (footnote 182 above) para 19. The court noted that, EEA is detailed compared to PEPUDA and that it can analogously be used as an authority.

²³⁹ NPFWEGE, 22.

²⁴⁰ NPFWEGE, Xviii; see also Lasseko-Phooko and Mahomed (footnote 139 above) 516.

²⁴¹ Lasseko-Phooko and Mahomed (footnote 139 above) 516.

2.9 Women Empowerment and Gender Equality Bill, 2013

The main objective of the Women Empowerment and Gender Equality Bill ('WEGE Bill') is to comply and abide by the internationally acclaimed rules,²⁴² to promote equality, most specifically gender equality.²⁴³ The WEGE Bill further seeks to attain gender equality by putting into practice methods, laws, and other regulations that fall under their purview and guarantee a 50/50% representation of men and women.²⁴⁴ Nevertheless, the implication of 50% representation²⁴⁵ is that it leads to application of quotas. Interestingly, 50% representation of women is highly commendable,²⁴⁶ and the Centre for Law Society observed that the intersectionality of prejudice is necessary to comprehend real gender equality.²⁴⁷ However, Centre for Constitution Rights noted that fifty percent representation is problematic since it establishes a quota system in violation of other legal provisions.²⁴⁸ Noteworthy, quotas were rejected in the case of *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and others*,²⁴⁹ and *South African Police Service v Solidarity OBO Barnard*,²⁵⁰ on the notion that AA policies can sometimes include numerical objectives and preferential treatment, but they are not the same as quotas,²⁵¹ because quotas amount to job reservation. If quotas are applied, it means that even in the event experienced male advocates are fit and proper persons with the necessary capabilities to take a brief, such briefs may be reserved for women who may lack the necessary experience.

²⁴² See the Women Empowerment and Gender Equality Bill [2013], section 3(1)(b) of chapter 1 of WEGE Bill, and section 8(2)(d) of chapter 3 of WEGE Bill.

²⁴³ Section 3(1)(a)(ii) of WEGE Bill.

²⁴⁴ Section 9(1)(c)(i) of WEGE Bill.

²⁴⁵ Section 7(1) of WEGE Bill.

²⁴⁶ Dorothy Ramodile, 'Women Empowerment and Gender Equality Bill [B50-2013]: Public Hearings with Minister' (2014) available at <<https://pmg.org.za/committee-meeting/16819/>> retrieved on 17 November 2023.

²⁴⁷ Ramodile (footnote 246 above).

²⁴⁸ Ibid.

²⁴⁹ *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC).

²⁵⁰ *South African Police Service v Solidarity OBO Barnard* (footnote 225 above).

²⁵¹ *Minister of Justice and constitutional development and Another v South African Restructuring and Insolvency Practitioner's association* 2018 (5) SA 524 (CC) para 14.

2.10 Summary

It is evident that the legal framework makes provisions for gender clauses which in turn vocalises the implementation of pro-woman policies in the legal field. Although the Draft LSC was adopted to transform the legal profession, what is most disheartening is that its provisions imply the end of professional self-regulation and introduce ministerial (political) control over the profession.²⁵² Regardless of how good the intentions of the Draft LSC are, it could affect the client's right to be represented by advocates of their choice,²⁵³ and the independence of the legal field from state influence.²⁵⁴ The client is faced with the reality that, when his or her attorney is appointing counsel on his or her behalf, the interest of the client is not the sole determining factor, but also the standing of the attorney in terms of scorecard which may compromise the integrity of services and advice if such counsel is non-compliance of scorecard. It is obvious that undermining the legal profession's independence is undesirable because it is essential to preserving the supremacy of the Constitution and enforcing the rule of law.²⁵⁵ Similar to the judiciary, the legal field's independence is unassailable and untouchable.²⁵⁶

²⁵² LSSA comments-Draft LSC (2022) 18. 5.1.

²⁵³ LSSA comments-Draft LSC (2022) 16. 3.4.6.

²⁵⁴ LSSA comments-Draft LSC (2022) 16. 3.4.7.

²⁵⁵ LSSA comments-Draft LSC (2022) 18. 5.1.

²⁵⁶ Ibid.

CHAPTER 3

THE INTERPRETATIVE LANGUAGE OF REGIONAL AND INTERNATIONAL FRAMEWORK PERTAINING TO GENDER EQUITY AND AFFIRMATIVE ACTION

3.1 Introduction

South Africa has ratified various conventions to eliminate all forms of discrimination against women.²⁵⁷ Noteworthy, there is a wide constitutional basis for²⁵⁸ both the interpretation and application of universal rules in domestic as well as the rules for developing international law.²⁵⁹ In this regard, Tshoose observes that, international law frequently influences how South African judges interpret local law.²⁶⁰ The aforementioned is supported by the matter of the *Republic of Angola v Springbok Investments (Pty) (Ltd)*,²⁶¹ that the theory of incorporation, which is accepted by South Africa, maintains that statutes or common law supersede rules of international law (the *ius gentium*).²⁶² This chapter, therefore, analyses the regional and international framework pertaining to gender equality and affirmative action.

3.2 Regional obligations

Gender equality is acknowledged on a national, regional, and worldwide level.²⁶³ Regionally, gender equality has been achieved as a result of the enactment and application of institutional gender-based regulations and measures.²⁶⁴ Ntlama and Stevens observed that, to achieve the goals of the protocols and other pertinent regional instruments regarding the development of women, the chapter 9 institutions

²⁵⁷ *Mahlangu and Another v Minister of Labour and Others* (footnote 136 above) para 43.

²⁵⁸ Dire Tladi, 'The Interpretation and Identification of International Law in South Africa' (2018) 135 *South African Law Journal* 710.

²⁵⁹ Tladi (footnote 258 above) 710.

²⁶⁰ Itumeleng Clerence Tshoose, 'Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa' (2022) 25(1) *PER/PELJ* 6.

²⁶¹ *Republic of Angola v Springbok Investments (Pty) Ltd* 2005 (2) BLR 159 (HC) 162.

²⁶² *Republic of Angola v Springbok Investments (Pty) Ltd* (footnote 261 above); see also Tshoose (footnote 260 above) 6.

²⁶³ Nomthandazo Ntlama and Clydenia Stevens, 'An Overview of South Africa's Institutional Framework in Promoting Women's Right to Development' (2016) 20 *Law, Democracy & Development* 64.

²⁶⁴ Ntlama and Stevens (footnote 263 above) 64.

are crucial on a regional level.²⁶⁵ South Africa has committed itself to the following regional gender equality instruments amongst others: the Solemn Declaration on Gender Equality in Africa 2004; the African Charter on Human and People's Rights 1981; and the Protocol to the African Charter on Human and People's Rights of Women in Africa 1986.

3.2.1 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003

Article 2(1)(c) of the Protocol of the African Charter on Human and People's Rights on the Rights of Women in Africa states that, gender perspective must be incorporated into all policy choices, laws, transformative initiatives, programs, and activities, as well as all other areas.²⁶⁶ Thus Article 2(1)(d) promotes AA and remedial action in those areas where prejudice against women is still present in the legislation.²⁶⁷ Interestingly, Article 26(2) of the Protocol of the African Charter on Human and People's Rights on the Rights of Women in Africa provides that state parties must take all required actions, including allocating funds and other resources to ensure that the rights outlined above are fully and successfully implemented.²⁶⁸

3.2.2 African Charter on Human and Peoples Rights, 1981 (ACHPR).

Notably, Article 3(1)(2) of the African Charter on Human and Peoples Rights ('ACHPR') recognises formal equality as it acknowledges that "every individual shall be equal before the law" and "every individual shall be entitled to equal protection of the law".²⁶⁹ While formal equality is desirable, the ACHPR's use of the words "the state shall ensure the elimination of every discrimination against women and also ensure

²⁶⁵ Ntlama and Stevens (footnote 263 above) 50, 59 & 67; see also Chapter 9 Institutions, particularly section 184 and 187 of the Constitution.

²⁶⁶ Article 2(1)(c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (1986).

²⁶⁷ Article 2(1)(d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

²⁶⁸ Article 26(2) of the Protocol of the African Charter on Human and People's Rights on the Rights of Women in Africa.

²⁶⁹ Article 3(1)(2) of the African Charter on Human and People's Rights (ACHPR) 1981.

the protection of the rights of women”, recognises substantive equality.²⁷⁰ Undoubtedly the elimination and protection of discrimination against women as stated in Article 18(3)²⁷¹ can only be done through special measures such as affirmative action. In the context on this study, the elimination of discrimination against women, means the state must implement pro-women policies aimed at eradicating the inequalities in terms of access to high-profile briefs in the South African legal profession. Special measures fall under the “right to development” as enumerated in Article 22(2) of ACHPR which imposes an obligation on the state to solely or jointly see to it that the “right to development” is exercised.²⁷² Therefore, it is submitted that the remarkable strike embarked by advocates and female advocates²⁷³ was indeed an exercise of their “right to development” in terms of Article 22(2) of ACHPR²⁷⁴ and a practical action to pressure the state to act in accordance with regional instruments.

3.2.3 Solemn Declaration on Gender Equality in Africa, 2004 (SDGEA)

The Solemn Declaration on Gender Equality in Africa (‘SDGEA’) reconfirms the Constitutive Act of African Union’s (‘CAAU’) pledge,²⁷⁵ as stated in Article 4(1) of the CAAU, to expand, speed up, and maintain efforts to advance gender equality at every level.²⁷⁶ The words “every level” includes the legal system. Although the SDGEA is silent about affirmative action, given that female advocates are hindered by networking strategies to advance in the legal profession,²⁷⁷ the SDGEA acknowledges that significant barriers and impediments to gender equality still exist and call for proactive, coordinated leadership and actions from all member states, especially

²⁷⁰ Article 18(3) of ACHPR (footnote 269 above).

²⁷¹ Article 18(3) of ACHPR (footnote 269 above).

²⁷² Article 22(2) of ACHPR (footnote 269 above).

²⁷³ See Advocate’s Strike (footnote 4 above).

²⁷⁴ Article 22(2) of ACHPR (footnote 269 above).

²⁷⁵ The Solemn Declaration on Gender Equality in Africa (2004) 1, see also article 4(1) of the Constitutive Act of African Union (2000).

²⁷⁶ See SDGEA, 1 (footnote 275).

²⁷⁷ Chitapi (footnote 10 above) 43-44. Chitapi noted that, advocates rely on networking strategies with attorneys, therefore the ability to access a network is a crucial factor in the success of a person’s practice and they function as endorsements, however, they are constituted by historical ties between male members. This protocol is very crucial by recognising the essence of networking. (own emphasis added).

networks focused on gender and development.²⁷⁸ Rhode²⁷⁹ confirms that women's marginalisation is exacerbated when they are unable to access informal networks, which has an impact on the work that advocates obtain.²⁸⁰ However, Rhode further observes that there are women who are reluctant to join women's networking groups.²⁸¹ Indeed the struggle of accessing briefs through networks with attorneys is catastrophic, and may lead to advocates having to access briefs from the public even though it is against the code of conducts regulating the profession.²⁸² It is quite interesting that, the SDGEA insists upon creation of networks that focuses on gender and development.²⁸³

3.3 International obligations

In the design of the constitutional system, universal law has a rightful place of prominence.²⁸⁴ This is not surprising because, Botha,²⁸⁵ Tladi,²⁸⁶ Coutsoodis and Du Plessis²⁸⁷ observed that the Constitution gives universal law priority since it is said to be 'international-law friendly'. The pride is deeply entrenched as a result of South African history and the role played by international law to fight against apartheid which led to the adoption of the Constitution.²⁸⁸ While the Constitution does not define Universal law, Strydom and Hopkins citing Waldock defines universal law as the corpus

²⁷⁸ See SDGEA, 1 (footnote 275 above).

²⁷⁹ Deborah L. Rhode, 'Speech: Stanford Women the Difference "Difference" Makes' (2002) <<https://womenlaw.stanford.edu/pdf/rhodespeech.pdf>> retrieved on 18 November 2023.

²⁸⁰ Rhode (footnote 279 above); see also Chitapi (footnote 10 above) 21.

²⁸¹ Rhode (footnote 279 above) 6.

²⁸² Para 27.2 of CCLP, 26 (footnote 50 above), makes it clear that counsels receive briefs from attorneys and not from the public.

²⁸³ See SDGEA, 1 (footnote 275 above).

²⁸⁴ *Law society of South Africa & Others v President of the Republic of South Africa & Others* 2019 (3) SA 30 (CC) para 4; see also Andreas Coutsoodis and Max Du Plessis, 'We are All International Lawyers; Now What? Taking Seriously the Constitutional Injunction to Integrate International Law Obligations into South African Law' (2020) 10 *Constitutional Court Review* 156.

²⁸⁵ Neville Botha, 'Justice Sachs and the Interpretation of International Law by the Constitutional Court: Equity or Expediency?' (2010) 25 *SA Public Law* 235.

²⁸⁶ Dire Tladi, 'Interpretation of Treaties in an International Law-Friendly Framework: The Case of South Africa' in Helmut Philip Aust and Georg Nolte, (eds) *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP, 2016); see also Tladi (footnote 258 above) 708.

²⁸⁷ Coutsoodis and Du Plessis (footnote 284 above) 157.

²⁸⁸ Section 231(5) of the Constitution; see also Lourens Du Plessis, 'Interpretation' in Stu Woolman, Michael Bishop, and Jason Brickhill, *Constitutional Law of South Africa* Vol 2 (2nd Edn, Juta & Co Ltd 2013) at 32-176.

of laws that are regulating and binding states with regard to their interactions with other states.²⁸⁹ The bond of the relationship with other states is reinforced in terms of section 231 of the Constitution which requires the state to sign and ratify all international agreements, which includes amongst other things but not limited to covenants, declarations, and conventions to regulate international law. Given that South Africa signed and ratified the above international instruments, the language utilised to interpret the right to equality, most particularly with regard to gender clause and special measures such as AA, ought to be sanctioned in South Africa when interpreting the law.²⁹⁰

In this regard, the Bill of Rights and legislation are interpreted in accordance with section 39(1)(b) and section 233 of the Constitution discretely.²⁹¹ Although these provisions concern interpretation of domestic law, they have reserved a special room for consideration of international law. The Constitution has double language in section 39: first, it asks for deliberation rather than application.²⁹² Secondly, the words “must consider international law” as stipulated in section 39(1)(b) of the Constitution imposes an obligation which leaves the courts with no choice but to abide by international regulations when interpreting the law. Section 233 of the Constitution contains an obligatory international-flavoured interpretative injunction. Bearing section 233 of the Constitution in mind, the court in the matter of *Centre for Child Law and Others v Minister of Basic Education and Others; National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd*, emphatically stated that when interpreting the law, any reasonable reading of the law that is consistent must be given precedence

²⁸⁹Humphrey Waldock, ‘The Law of Nations’ (6th Ed, 1963) 1; see also Hennie Strydom and Kevin Hopkins, ‘International Law’ in Stu Woolman and Michael Bishop, ‘*Constitutional Law of South Africa*’ (2nd Edn, Juta & Co Ltd March 2012) at 30-1.

²⁹⁰ Beijing Declaration and Platform of Action (1995) 10. Also see ‘Women’s Human Rights International Justice Resource Center’ available at <https://ijrcenter.org/thematic-research-guides/women’s-human-rights/#Gender_Equality> retrieved on 16 October 2023; Article 4 of Convention on the Elimination of Discrimination Against Women (1981); Article 7 of the Universal Declaration of Human Rights (1948); Article 26 of the International Covenant Civil Political Rights (1966); Article 2(2) of International Covenant on Economic Social and Cultural Rights.

²⁹¹ Tladi (footnote 258 above) 711.

²⁹² Ibid.

by the courts over any view that conflicts with universal law.²⁹³ Given the supremacy of the Constitution, application of universal law must not contradict the Constitution.²⁹⁴

Being that as it may, the research focuses on the most prominent international instruments to find out whether South Africa interpret gender clause and special measures in accordance with international standards such as the Beijing Declaration and Platform of Action 1995; the Covenant on the Elimination of All Forms of Discriminations Against Women 1981; the Universal Declaration of Human Rights 1948; International Covenant on Civil and Political Rights 1966 and International Covenant on Social, Economic, and Cultural Rights 1966.

3.3.1 Beijing Declaration and Platform of Action, 1995 (BDPA)

According to Beijing Declaration Platform of Action ('BDPA'), states, institutions, and individuals must devote resources, create procedures, and hold one another accountable for promoting and defending women's rights in order for gender equality to be realised.²⁹⁵ The BDPA requires the state to instigate gender equality in public administration, judicial branch, and governmental bodies and committees by establishing goals and taking action to significantly raise the proportion of women in order to attain equal representation of men and women.²⁹⁶ It is worth noting that advocates are part of the judiciary.²⁹⁷ Moreover, the BDPA is critical in the development of forward-looking agenda for achieving gender equality.²⁹⁸

²⁹³ *National Union of Metal Workers of South Africa v Bader Bop (Pty) Ltd* 2003 SA 513 (CC) para 37; see also *Centre for Child Law and Others v Minister basic Education and Others* 2020 (3) SA 141 (ECG) para 121.

²⁹⁴ *The Minister of Justice and Constitutional Development & Others v Prince* 2018 (6) SA 393 (CC) para 82.

²⁹⁵ Beijing Declaration and Platform of Action, 10 (footnote 290). Also see 'Women's Human Rights International Justice Resource Center' available at <https://ijrcenter.org/thematic-research-guides/women's-human-rights/#Gender_Equality> retrieved on 16 October 2023.

²⁹⁶ BDPA, 81 para 190(a) (footnote 290).

²⁹⁷ Section 178(1)(e) of the Constitution.

²⁹⁸ BDPA, 10 (footnote 290).

3.3.2 Convention on the Elimination of all Forms of Discrimination Against Women, 1981 (CEDAW)

Article 4 of the Convention on the Elimination of all Forms of Discrimination Against Women ('CEDAW'), provides that states must take additional steps to ensure that gender equality is achieved in practice so that it is not regarded as discrimination under the current Convention.²⁹⁹ However, these are only short-term measures. Schoep-Schilling observed that a literal interpretation of Article 5 of CEDAW only authorises AA policies and does not make such policies mandatory.³⁰⁰ Article 2(b) and Article 2(e) of CEDAW provides that State parties are required to take pertinent legislative along with policies, which encompasses sanctions where applicable, outlawing any form of discrimination against women by individuals, groups or businesses.³⁰¹ Additionally, Article 3 of CEDAW reiterates the commitment to take all reasonable necessary steps to guarantee women's complete development and advancement. The concept of equality of opportunity alone is no longer sufficient to guarantee equality of results due to deeply ingrained nature of sexual disparity in the customs of the society.³⁰² In this regard, substantive equality is required to protect previously disadvantaged by providing special measures.

3.3.3 Universal Declaration of Human Rights, 1948 (UDHR)

The Universal Declaration of Human Rights ('UDHR') declares that everyone is equal before the law and has the right to equal protection without facing any discrimination.³⁰³ Moreover, the UDHR laudably promotes gender equality in the workplace and the freedom to choose one's own line of work.³⁰⁴ In the context of this

²⁹⁹ Article 4 of Convention on the Elimination of Discrimination Against Women (footnote 290).

³⁰⁰ Hanna Beate Schoep-Schilling, 'Achieving the Rights Results: Affirmative Action and Article 4 of the Women's Convention' *International Women's Rights Action Watch, University of Minnesota Human Rights Library*. Available at <https://hrlibrary.umn.edu/iwraw/achieving_rights1997.html> Retrieved on 02 October 2023.

³⁰¹ Schoep-Schilling (footnote 300 above).

³⁰² Schoep-Schilling (footnote 300 above).

³⁰³ Article 7 of the Universal Declaration of Human Rights (footnote 290 above).

³⁰⁴ Article 23 (1) of UDHR (footnote 290 above).

study, this means both male and female advocates are equal. It is clear that the UDHR does recognise the intersectionality of discrimination,³⁰⁵ and substantive equality in terms of motherhood penalty.³⁰⁶ The literature in chapter 1 of this study demonstrated the manner in which motherhood hinders female advocates from accessing high-profile briefs³⁰⁷ and the UDHR's recognition that motherhood is entitled to 'special care and assistance',³⁰⁸ is a call for special measures aimed at empowering women. Although this is a declaration, it has a binding effect on states as it has become part of international law.

3.3.4 International Covenant on Civil and Political Rights 1966, (ICCPR)

Article 26 of the International Covenant on Civil and Political Rights ('ICCPR') recognises equal opportunity in that it provides that every individual has the right to equal legal protection.³⁰⁹ While the Constitution explicitly listed sex and gender separately,³¹⁰ the ICCPR only listed sex,³¹¹ and does not provide for special measures for persons disadvantaged by unfair discrimination. Nevertheless, the use of "other opinion"³¹² in the ICCPR as a ground of discrimination is a recognition of the intersectionality of discrimination, emanating from the deeply rooted opinions about certain groups of individuals.³¹³ Therefore, such groups of individuals in this study includes female advocates. Although this is a declaration, it has a binding effect on states as it has become part of international law.

³⁰⁵ Article 2 of UDHR) (footnote 290 above).

³⁰⁶ Article 2 of UDHR (footnote 290 above).

³⁰⁷ Deborah L. Rhode, 'The Unfinished Agenda: Women and The Legal Profession' (2001) 15, *Chicago: ABA Commission on Women in the Profession*, available at <<http://womanlaw.stanford.edu/pdf/aba.unfinished.agenda.pdf>> retrieved on 02 February 2023; Fayeeza Kathree, 'Eight Years at the Bar and Still Discriminates Against: A Bar to Women?' (2004) 17 *SAJ* 23; Chan (see note 9 above) 23; Norton (see footnote 12 above) 30; Chitapi (see footnote 10 above) 53; see also Meyer (see footnote 16 above) 42 & 145-172.

³⁰⁸ Article 25(2) of UDHR (footnote 290 above).

³⁰⁹ Article 26 of the International Covenant Civil Political Rights.

³¹⁰ Section 9(3) of the Constitution.

³¹¹ Articles 26 of the ICCPR (footnote 290 above).

³¹² Articles 26 of the ICCPR (290 above).

³¹³ Albertyn and Goldblatt (footnote 108 above) 76.

3.3.5 International Covenant on Economic, Social, and Cultural Rights, 1966 (ICESCR)

Article 2(2) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR),³¹⁴ recognises the intersectionality of discrimination in a similar fashion with the ICCPR.³¹⁵ Nevertheless, both ICESCR and ICCPR does not make provision for gender but included 'sex' as ground of discrimination and other grounds. Intriguingly, the two covenants further utilize the words "other opinion" as ground of discrimination.³¹⁶ The ICESCR guarantees men and women the same opportunity to exercise all of the covenant's economic, social, and cultural rights.³¹⁷ Nevertheless, seniority and competence are prerequisites for equal opportunity to be promoted to a higher level.³¹⁸ It is not a dispute that, seniority in the advocate's profession attracts high-profile cases which can be viewed as a promotion. This is because high-profile cases require extensive experience, integrity, and excellence in advocacy and counsels with the silk status are fully equipped with experience and the necessary competence.³¹⁹ In essence Article 3 of the ICESCR promotes formal equality by giving all men and women advocates equal right to receive high-profile briefs subject to the condition that they possess the necessary competence and seniority required. Notwithstanding the non-explicit provision of AA measures, Article 3 of the ICESCR considers the lived experiences of women, mandating that member states confront social and cultural inequalities based on gender,³²⁰ and men and women are entitled to enjoy the rights outlined in Article 3 of the ICESCR on the basis of substantive equality.³²¹

³¹⁴ Article 2(2) of International Covenant on Economic Social and Cultural Rights (footnote 290 above).

³¹⁵ Article 26 of ICCPR (footnote 290 above).

³¹⁶ Article 2(2) of ICESCR and Article 26 of ICCPR (footnote 290 above).

³¹⁷ Article 3 of ICESCR (footnote 290 above).

³¹⁸ Article 7(c) of ICESCR (footnote 290 above).

³¹⁹ *Mansigh v General Council of the Bar and Others* (footnote 175 above) para 9.

³²⁰ Article 3 of ICESCR; see also *Lasseko-Phooko and Mahomed* (footnote 139 above) 503.

³²¹ *Lasseko-Phooko and Mahomed* (footnote 139 above) 502.

3.4 Summary

Both international and regional law provides for AA strategies to advance the previously disadvantaged. Section 232 of the Constitution is consistent with the international and regional obligations by enforcing the right to equality in terms of section 9(2) of the Constitution to promote special measures. Although South Africa is lauded for ratifying the most prominent international and regional laws which promotes gender equality and special measures but still fails to interpret section 39(1)(b) and 233 of the Constitution pragmatically to implement pro-woman policies.

CHAPTER 4

THE TRACTION BETWEEN AFFIRMATIVE ACTION STRATEGIES AND TRANSFORMATIVE STRATEGIES

4.1 Introduction

While at first glance one would assume that transformative and affirmative action strategies are synonymous, Fraser observed a distinction between affirmative action strategies and transformative strategies.³²² Nel clarifies the distinction by pointing out that AA techniques strive to treat the stumbling blocks without addressing the fundamental causes while transformational strategies aim to change the generative framework that creates such stumbling blocks.³²³ The dilemma arises against the backdrop of simultaneously promoting affirmative action and transformative strategies. Given that women's experiential knowledge is valued less than that of men,³²⁴ Nicolson argues that affirmative action is necessary to counter the unfavorable effect of cultural capital.

Therefore, the chapter further argues that transformative strategies can assist to remove the lingering stereotypes about the roles of women and men, while at the same time applying affirmative action strategies to deal with the disadvantages emanating from the lingering stereotypes. In this regard, the two strategies complement each other and must be applied harmoniously as opposed to dichotomous.³²⁵ The harmonious application of transformative and AA strategies can assist in developing flexible briefing policy, that considers both positive and negative

³²² Nancy Fraser, 'Justice Interruptus: Critical Reflections on the 'Post-Socialist Condition' (1st Edn, Routledge 1997); see also Madeine Arnot, 'Gender Equality, Pedagogy and Citizenship: Affirmative and Transformative Approaches in the UK' (2006) 4 *Theory and research in education* 132.

³²³ Nel (footnote 102 above) 9.

³²⁴ Donald Nicolson, 'Affirmative Action in the Legal Profession' (2006) 33 *Journal of Law and Society* 109-125; see also Chitapi (footnote 10 above) xlv & 19.

³²⁵ Positive measures align with affirmative action strategies. See Phooko and Radebe (footnote 86 above) 312.

measures³²⁶ to enable legislation that focuses on preparing suitably qualified and experienced women to expand a pool upon which briefers can choose woman advocates for lucrative briefs.

4.2 The suitability of an advocate for a brief

Affirmative action measures values suitability.³²⁷ The most important inquiry currently is whether there is a pool of suitably qualified female counsels to accept high-profile briefs. This question is raised against the backdrop of the fact that both transformative and affirmative action strategies aim to empower suitably qualified candidates. It is often assumed that what is termed 'affirmative action briefs'³²⁸ are given to unsuitable candidates. Nevertheless, Phooko and Radebe, clarified such presumptions by agreeing that both transformation and AA does not imply a lack of capacity, talent, or abilities.³²⁹ Meaning that, affirmative action briefs are also grounded on merits which counts both qualitative and quantitative experience.

4.2.1 Experience (qualitative and quantitative)

The educational experience of advocates starts with LLB degree, pupillage through practical vocational training ('PVT'), and fit and proper test for the purpose of admission. Nevertheless, Mueller argues that acquiring a degree does not demonstrate one's ability to excel in the workplace; rather, it merely shows one can succeed in

³²⁶ Negative measures align with transformative strategies. See Phooko and Radebe (footnote 86 above) 312, observed that implementation of the negative measures requires the eradication of paternity leave so that the parenting responsibilities are equally shared between men and women. This line of argument by Phooko and Radebe intersect with Nel's conception of transformation which seek to eradicate all the generative framework that causes the inequalities. See also Nel (footnote 102 above) 9.

³²⁷ Section 15(1) of Act 55 of 1998.

³²⁸ Phooko and Radebe (footnote 86 above) 308.

³²⁹ Phooko and Radebe (footnote 86 above) 308; see also Cebolenkosi Makhaye, 'I've Changed Says South African Law: Has the Judiciary Opened up to Black Women Lawyers?' (2020) 14 *Pretoria Student Law Review* 41.

academia.³³⁰ It is therefore argued in the context of this study that acquiring a degree is not a solid basis of success in the advocate's profession, it requires extensive practical vocational training.³³¹ Therefore, after having undergone PVT and having been admitted as an advocate, it is necessary to acquire more experience by choosing an area of specialty or expertise.³³² Even while working experience can help one to get a certain position, if one does not pursue higher education, they may not have the abilities necessary to advance in their career in the future.³³³ It is for this reason that women are often disregarded for high-profile cases due to the assumption that they lack the necessary experience. For example, notwithstanding the educational background of advocate Kholeka Gcaleka,³³⁴ she was attacked based on experience,³³⁵ most particularly years of experience.³³⁶ Based on the aforementioned, Fort *et al* argues that though it is conceivable for two people to have the same amount of work experience, their experiences may differ greatly in terms of the kinds of experiences they have had due to the difficulty and complexity of those experiences, and the amount of knowledge they have gained from them.³³⁷ In essence, there is a philosophical and factual distinction between the amount and quality of one's employment experience.³³⁸ A person's total years of experience or time spent at a specific job or organisation are referred to as the quantity dimension.³³⁹ Most studies

³³⁰ Annie Mueller, 'Education vs Experience: which One Gets the Job? (2022) available at <<https://www.investopedia.com/financial-edge/0511/work-experience-vs.-education-which-lands-you-the-best-job.aspx>> retrieved on 31 December 2023.

³³¹ See section 27(1) and 94(1)(a) of act 28 of 2014.

³³² See Code of Conduct for Legal Practitioners para 8.

³³³ Mueller (footnote 330 above).

³³⁴ Speech by Glynnis Breytenbach MP 'DA Opposes Consideration of Kholeka Gcaleka for Public Protector' 2023, available at <<https://www.da.org.za/2023/10/da-oppose-consideration-of-kholeka-gcaleka-for-public-protector>> retrieved on 16 December 2023, Advocate Breytenbach argued that Gcaleka meets the minimum educational requirements.

³³⁵ 'DA Opposes Consideration of Advocate Kholeka Gcaleka' (footnote 334 above) Breytenbach argued that although Gcaleka occupied the position of Deputy Public Protector (DPP) for 2 years, she has not been the most effective and efficient DPP and further stated that she was peripherally involved in the Mdluli matter, which cannot be regarded as success.

³³⁶ See DA opposes consideration of advocate Kholeka (footnote 334 above).

³³⁷ Scott DeRue, 'Quantity or Quality? Work Experience as a Predictor of MBA Students Success' GMAC Research Reports (2009) 1, available at <http://www.gmac.com/~media/Files/gmac/Research/research-report-series/rr0909_workexperience.pdf> retrieved on 14 February 2024.

³³⁸ DeRue (footnote 337 above) 1; see also Paul. E Tesluk and Rick. R Jacobs, 'Toward an Integrated Model of Work Experience' (1998) 51 *Personnel Psychology* 338-339. Available at <<https://psycnet.apa.org/doi/10.1111/j.1744-6570.1998.tb00728.x>> Retrieved on 14 December 2024.

³³⁹ DeRue (footnote 337 above) 2.

on job experience concentrate on the quantitative aspect concerning time,³⁴⁰ specifically with regard to the number of years spent in a given job or organisation or the total number of years of work experience.³⁴¹ It is worth noting that the legal profession values both quantitative and qualitative experience. Therefore, the lack of qualitative and quantitative experience by female advocates due to stereotypical views impeded upon them ought to be remedied.

4.2.2.1 The impact of gender and sex stereotyping on qualitative and quantitative experience

Given that the legal profession value years of experience, it takes time for women to acquire the necessary experience, due to the breaks they take for child-rearing, and they are stereotypically viewed as lacking quantitative experience and consequently unsuitable for high-profile briefs. Mokgoro and Regan JJ in the case of *Volks No v Robinson & others*,³⁴² acknowledged that women find it challenging to compete in the workforce due to discriminatory behaviors in the workplace and the inequitable distribution of labour in households. Jansen once spoke about the struggle of juggling family responsibilities and the advocate's profession as follows:

I became pregnant in 1986 with my first child and I actually had to go to court 9 months and 6 days pregnant and do court case. I carried heavy suitcases to the Johannesburg Court, did the trial, went into labour that evening, gave birth to my daughter that Saturday morning and I was back at chamber on Thursday. So, I actually had four or five days off, that's it... I suffered three miscarriages, because I could never take time off, because if I did take time off, attorneys would stop briefing me.³⁴³

³⁴⁰ Tesluk and Jacobs (footnote 338 above).

³⁴¹ DeRue (footnote 337 above) 2.

³⁴² *Volks No v Robinson & Others* [2005] ZACC 2, 2005 (5) BCLR 446 (CC) para 109.

³⁴³ 'FULL TEXT: JSC Interview with Mabel Jansen' *News 24* (11 May 2016) available at <<http://www.news24.com/SouthAfrica/News/full-text-jsc-interview-with-mabel-jansen-20160511>> retrieved on 10 February 2024; see also Crouse (footnote 13 above) 31. Crouse also testified that she had to attend a court case a day before she gives birth and having to return to the Bar immediately after birthing her child. This is deeply disheartening.

It is quite not surprising that, the research findings of Phooko and Radebe;³⁴⁴ Centre for Applied Legal Studies Report (hereinafter 'CALs Report');³⁴⁵ Chitapi;³⁴⁶ and Meyer³⁴⁷ support the above statement of advocate Jansen that the fear of taking time off for maternity leave lies at the heart of financial burdens because of losing briefs from attorneys whilst on maternity leave. The establishment of the legal system was heavily influenced by patriarchy, and it does not consider the diverse positions that women lawyers should play during their careers,³⁴⁸ one such example of those roles include motherhood. This is due to the fact that its foundation is the idea that all people, regardless of gender are capable of having the same working hours and schedules.³⁴⁹ Thus, ignoring the socially imposed responsibilities that are associated with women, such as caring for and raising children.³⁵⁰ To this end, a primary reason why women are disadvantaged in society is the failure to recognise these elements.³⁵¹ Rather than discouraging these gender stereotypes, the legal field must foster an environment that allows both females and males to fulfil their parental obligations.³⁵²

Evidently, the speech delivered by Denner in the current Hansard: NA: Unrevised on 6 June 2023, shows how gendered stereotyping still lingers. Denner adamantly voiced out about the impact of gender stereotyping on women's career in the legal profession and alluded that:

Yes, there are fee and brief disparities; yes, discrimination, barriers, and stumbling blocks, such as sexual harassment and the ever-present boys club establishment that hamper equal participation in the legal profession. Women mainly being primary childcare providers is a factor that must be accounted for. We have to contend with female stereotypes on a daily basis, such as the perception that women are more emotional and more sensitive than men and therefore, are not tough enough to do this kind of work and that we're only there to take notes or pour tea and any woman in the legal profession,

³⁴⁴ Phooko and Radebe (footnote 86 above) 326.

³⁴⁵ Centre for Applied Legal Studies 'Report on Transformation of the Legal Profession in South Africa' (CALs Report) (2014) 37-38, available at

<<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-andmanagement/researchentities/cals/documents/programmes/gender/Transformation%20of%20the%20Legal%20Profession.pdf>> retrieved on 1 January 2024.

³⁴⁶ Chitapi (footnote 10 above) 54-55.

³⁴⁷ Meyer (footnote 16 above) 164.

³⁴⁸ Hansard (footnote 14 above).

³⁴⁹ Phooko and Radebe (footnote 86 above) 323.

³⁵⁰ Phooko and Radebe (footnote 86 above) 323-324.

³⁵¹ Phooko and Radebe (footnote 86 above) 324.

³⁵² Ibid.

myself included, can confirm this. But we have triumphed over worse, we are breaking down those stereotypes and barriers, come hell or high water on a daily basis.³⁵³

Breaking down these stereotypes requires robust teamwork from all three spheres of government. In this regard, the primary engine behind changes in the legal field is the state.³⁵⁴ Firstly, the executive must be held responsible for restructuring the economy to prepare budgets that aims at creating opportunities for women. As Phooko and Radebe argues that it is a waste of time and energy to discuss gender transformation in isolation from the economy.³⁵⁵ Secondly, the legislature must consider both positive and negative measures along with the intersectionality of discrimination when implementing policies. Thirdly, the judiciary must endeavor to eradicate judicial stereotyping.³⁵⁶ In this regard, Pillay acknowledges that eliminating stereotypes by the judges ought to be a top of concern. Pillay further asserts that:

Explicit action is required to ensure that government officials, especially those working in the justice system, do not deliver decisions based on harmful stereotypes and undermine the human rights of women and girls. Rather, officials should be identifying and challenging such negative beliefs, to help create environments that more fully respect the human rights of women and girls and build a culture of equality. If we are serious about achieving gender equality..., we must devote more energy to dismantling prejudicial presumptions about women and men. We must stop perpetuating misguided ideas of what women should or should not be or do, based solely on the fact of being female. Instead, we must see them for who they are – unique human beings in all their diversity. This is the demand of equality, which is the foundation of human rights law.³⁵⁷

Given that judges have unique position of power, Kriegler³⁵⁸ observed that they can imbue stereotypes with legal authority and added legitimacy because they 'put the stamp of approval of the state' on them. To this date, women are still suffering from sex and gendered stereotypes birthed by the case of the *President of the Republic of South Africa v Hugo*.³⁵⁹ Ravaged by the injurious gendered stereotypes, Moroka

³⁵³ Hansard (footnote 14 above).

³⁵⁴ Phooko and Radebe (footnote 86 above) 322.

³⁵⁵ Ibid.

³⁵⁶ In *S v Jordan & Others* (footnote 145 above) para 65. O'Regan acknowledged that cultural expectations which requires women to act in a particular manner reinforced gender stereotypes.

³⁵⁷ Navi Pillay, 'Equality and Justice in the Courtroom', Huffington post (05 March 2014) available at <<https://www.ohchr.org/en/2014/06/equality-and-justice-courtroom>> Retrieved on 14 February 2024. Simone Cusack, 'Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases' Final Paper (2014) iii.

³⁵⁸ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 85.

³⁵⁹ *President of the Republic of South Africa v Hugo* (footnote 358 above) para 46, 64 & 78; Ariane Bizimana, 'Gender Stereotyping in South African Constitutional Court Cases: An interdisciplinary approach to Gender Stereotyping' (LLM Dissertation, University of Pretoria);

opened up in the ceremonial sitting held in the local division of the High Court in Johannesburg that throughout her career path, she struggled to balance work and home life.³⁶⁰ Moroka added that there was a point she had to bring her five-year-old child with her at work.³⁶¹ The aforesaid convinced the deputy minister of Justice and Correctional Services on June 2023 Hansard: National Assembly suggesting a gendered approach special measure as thus:

I think we should do more to allow more flexibility for women in working conditions for women practicing law. We must remove the glass ceiling. We very often measure legal experience and specific years but what about a woman who decides to take a year or two away from the legal profession. That break should not count against her when it comes to career advancement or her suitability for the bench. It's also about the type of work and briefs women are given and exposed to.³⁶²

The minister's suggestion above, means a practical application of substantive equality by not measuring women equally with their male counterparts in terms of quantitative and qualitative experience. Notwithstanding South Africa's constitutional commitment to equality, the distribution of parental responsibilities is still primarily dependent on gender.³⁶³ The reason for this is that women's identities are constructed by societal and cultural expectations around the house and childcare duties, and they compete with work cultures that are male-dominated and do not give in to the needs of women.³⁶⁴ Such expectations frequently require women to put their families before their lucrative occupations.³⁶⁵ Women are more probably to choose roles or careers that allow them to work fewer hours or with flexibility.³⁶⁶

Albertyn and Goldblatt (footnote 93 above) 264-65; see also Albertyn and Goldblatt (footnote 108 above) 45. A male prisoner was unsuccessful because majority of the court viewed him as part of privileged fathers rather than as a primary care giver. The focus was more on the interest of children than on the different gender stereotypes that men and women hold in child's life, as the majority stated that fathers play a secondary role on a child's life.

³⁶⁰ Hansard (footnote 14 above).

³⁶¹ Ibid.

³⁶² Hansard (footnote 14 above).

³⁶³ *Buttner v Buttner* 2006 (3) SA 23 (SCA) para 6 & 8. The Husband was a quantity surveyor and a businessman, while the wife primarily took care of the domestic and child-care responsibilities. When the couple's first child was born, the wife resigned from her employment to raise the child. After the second child's birth, the wife was at times employed as a part-time travel agent and part-time estate agent.

³⁶⁴ Meyer (footnote 16 above) 166.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

The aforesaid is reinforced by an African proverb that says: '*Go tswala ke go feka maand*' meaning (to give birth, is to devise plans), read in conjunction with: '*Mmago ngwana o swara thipa ka bogaleng*', interpreted as thus: (the mother will go out of her way, even taking risks at times, for the safety and welfare of her children).³⁶⁷ Men are not required to perform parenting responsibilities, although being expected to work with the same level of activity and productivity as women to reconcile work and being independent.³⁶⁸

Curiously, Pieterse's article titled '*May Real Men Cry in Court? Masculinity, Equality, and the South African Constitutional Court*',³⁶⁹ intersect with the long-lived idiom that says '*Monna ke Nku, o llela teng*' which literally means '*A man is a sheep, he cries within himself*'. Realistically this proverb is interpreted to mean '*a real man is strong and courageous, he does not expose his problems publicly*'.³⁷⁰ In this regard, Pieterse argued that men are not allowed to challenge traditional gender stereotypes, freely form and adapt to their identities, or take part in the shift of gendered norms because of the court's interpretation of sex and gender equality, which upholds expectations about masculinity which is the primary factors that lead to women's subordination. Nevertheless, the obstacles to career progression that women lawyers face, particularly those who have family and childcare duties, are numerous and difficult to overcome.³⁷¹ Being in two places at once and spending the night at home taking care of family and clients are difficult tasks.³⁷² Therefore, if men starts challenging the gendered norms that denies them an opportunity to take enough time to care for their newly born children, this would break the burden of balancing work and family responsibilities embedded upon women.

³⁶⁷ Madipoane Mesenya, 'A literary figure or patriarchal reality? Reflections on the eset hayil in light of depictions of womanhood from selected Yoruba and Sotho proverbs' (2018) 39 available at http://www.cielo.org.za/csielo.php?script=sci_arttext&pid=S2074-770520180001000100041 retrieved on 31 December 2023.

³⁶⁸ Ibid.

³⁶⁹ Marius Pieterse, 'May Real Men Cry in Court? Masculinity, Equality, and the South African constitutional Court' (2014) 40 *Journal of Southern African Studies*.

³⁷⁰ Victor Maropeng Mojela, 'Etymological aspects of Idiomatic and proverbial Expressions in the Lexicographic Development of Sesotho sa La Leboa: A semantic analysis' (2004) 14 *Lexikos* 336.

³⁷¹ Susan Smith Blakely, 'Master Leave for Women Lawyers is no Vacation' (2020) available at <https://msjd-org/blog/article/maternity-leave-for-women-lawyers-is-no-vacation> retrieved on 28 November 2023.

³⁷² Blakely (footnote 371 above).

However, men are hindered by the saying ‘*Monna ke Nku o llela teng*’, which makes it difficult for them to approach the courts to fight these gendered norms that denies them the opportunity to share family responsibilities at home as they fear being classified as “weak men” as opposed to “real men”. Indeed, “*Ngwana yo a sa lleng o hwela tharing*”.³⁷³ This implies that those who cannot voice out cannot hope to be heard and it further warns that suffering in silence ends in an inevitable demise. In essence the aforesaid African proverb encourages people to voice out their concerns. Pieterse’s dream of seeing men crying out in courts to fight the gendered norms seems to be a reality. The breaking ground cases of *MIA v State Information Technology Agency (Pty) Ltd*,³⁷⁴ and *Van Wyk & Others v Minister of Employment and Labour*, overturned the decision of the *President of the Republic of South Africa v Hugo*, as they broke the gendered stereotype that women are primary care givers,³⁷⁵ and family relationships that are gravely illogical to the Constitution. In the case of *MIA v State Information Technology Agency (Pty) Ltd*, the employer’s reluctance to provide ‘maternity leave’ to a male employee who was party to a civil union was found by the court to constitute unjust discrimination.³⁷⁶ Moreover, the court stated that there was no justification for not granting the worker ‘maternity leave’ for an equivalent amount of time to that which is granted to women who have just given birth.³⁷⁷ It cannot be gainsaid that, this case is significant and very progressive as it recognises that family and parental duties must be shared equally between the parents.

Similarly, the major argument in the case of *Van Wyk & Others v Minister of Employment and Labour*, was that, the father should also bear an equal amount of the heavy duties of child care, as it is unjust to assume that the mother is destined to

³⁷³ UNISA – Proverbs Dictionary – University of South Africa & Goitsemodimo Kaelo, ‘Yo O Sa Leleng: Ignites Provocative Dialogue’ *Press reader* (17 November 2023).

³⁷⁴ *MIA v State Information Technology Agency (Pty) Ltd*, 2015 (6) SA 250 (LC), [2015] 7 BLLR 694 (LC).

³⁷⁵ *Van Wyk & Others v Minister of Employment and Labour*, 2024 (45) ILJ 194 (GJ) para 26-27. It was noted that the non-provision of paternity leave equal to maternity leave impairs on the dignity of both the father and the mother’s choice to partake in the parenting responsibilities. Furthermore, that women are automatically primary care givers.

³⁷⁶ *MIA v State Information Technology Agency (Pty) Ltd* (footnote 374 above) para 17-19 & 23.

³⁷⁷ *Ibid*.

be the primary caregiver.³⁷⁸ Of significance to note in this case is that the reason for a need to share parental responsibilities equally between women and men is that Mrs Van Wyk's trade was at risk of falling apart had she remained at home for child caring for a long period, because she was running an independent trade and as such Mr Van Wyk opted to take parental leave equal to women,³⁷⁹ and it was granted. To this, the court reasoned that it is not appropriate to use ingrained cultural conventions that elevate motherhood as a platform to differentiate between the duties of fathers and mothers.³⁸⁰ Notably, the impact of differentiation in roles between men and women impact negatively on women advocates' expertise and experience, practice area of law which renders them unsuitable for cases of high standard. Most importantly AA prioritises suitability, and the fact that women's progression is delayed by motherhood penalty and other intersecting discriminatory practices does not excuse them from meeting the same requirements as men.

4.2.3 The promotion of equal opportunity for designated groups

As alluded above, the deputy minister of Justice and Correctional Services' suggestion that women should not be measured in terms of years of experience because most women take gap years to raise children, is in essence an anticipated special measure aiming at promoting AA for previously designated groups. Bearing in mind the principles outlined in the case of *Minister of Finance v Van Heerden*³⁸¹ along with those set out in the case of the *President of the Republic of South Africa v Hugo*,³⁸² the suggested measure of the minister which provides that women should not be measured equally with their male counterparts in terms of years of experience would be analysed as follows:

1. Is it a measure adopted to achieve equality?
2. Is it necessary and appropriate to achieve the objective of enabling substantive equality in the legal profession?

³⁷⁸ *Van Wyk & Others v Minister of Employment and Labour* (footnote 375 above) para 27.

³⁷⁹ *Van Wyk & Others v Minister of Employment and Labour* (footnote 375 above) para 28.

³⁸⁰ *Van Wyk & Others v Minister of Employment and Labour* (footnote 375 above) para 26.

³⁸¹ *Minister of Finance v Van Heerden* (footnote 136 above).

³⁸² *The President of the Republic of South Africa v Hugo* (footnote 358 above).

3. Is the impact of the measure proportionate to the objectives?

Based on the aforesaid, the inquiry is whether the measure suggested by the minister which provides that women should not be measured in terms of quantitative experience due to the break taken by women for child-rearing causes the differential treatment of women and men based on a sex or gender stereotype. Thus, amounting to discrimination, and if so, whether the discriminatory impact is proportionate to the objective of the measure. In the case of *S v Makwanyane*,³⁸³ the court said that a democratic society's ability to limit constitutional rights for justifiable and essential purposes requires balancing conflicting objectives and deciding based on proportionality. To this end, the proportionality test in South Africa is chiefly anchored on the Canadian test as articulated in the case of *R v Oakes* as thus:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair as little as possible the right or freedom in question. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the charter right or freedom, and the objective which has been identified as of sufficient importance.³⁸⁴

Given the foregoing, the criterion for assessing proportionality examines whether the use, upholding, or continuation of gender or sex stereotypes deprives women of an advantage, places a cost on them, or degrades, reduces, or marginalises females in any other way,³⁸⁵ when regard is had to the necessary quantitative experience required for high-profile briefs. The measure suggested by the minister will be analysed to test whether it is a justifiable measure aiming at gender transformation in the legal profession.

4.2.3.1 Is it a measure adopted to achieve equality?

The measure is to be adopted to remove or at least mitigate, the obstacles hindering women from accessing high-profile briefs in equal measure with their male

³⁸³ *S v Makwanyane* para 104 (footnote 117 above).

³⁸⁴ *R v Oakes* [1987] LRC 477.

³⁸⁵ *Lasseko-Phooko and Mahamed* (footnote 139 above) 516.

counterparts. Most particularly measure women in terms of years of experience while some take a break of a year or two for child-rearing. This is observed by the minister as a hindrance of many female advocates to access high-profile briefs.³⁸⁶

4.2.3.2 Is it necessary and appropriate to achieve the objective of enabling substantive equality in the advocate's profession?

The necessity of the measure is aimed at addressing the inequalities in terms of the burden of motherhood as imposed on women by societal norms. However, it is not appropriate given that, the measure fails to address family dynamics or societal dictates that require that a woman must remain the primary child carer. While the aim is to correct the problem of equalising obstacles between men and women, the consequence of this 'preferential treatment' is that it may create a stereotype that all members of the disadvantaged group, being female advocates, are unworthy of the briefs they have received.³⁸⁷ This is because such briefs would be given to them even though they lack the necessary qualitative and quantitative experience required.

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

The impact of the suggested measure is such that it causes the differential treatment of women and men based on sex or gender stereotype, therefore resulting in discrimination. However, a formal approach invariably necessitates comparing similarly situated individuals, typically against the dominant norm that is characterized by the characteristics of the dominant gender (male), culture, religion, nationality, or sexual orientation.³⁸⁸ It is worth noting that, the practical issue of no male comparator for pregnancy arises when formal equality is applied, namely in the context of pregnancy rights.³⁸⁹ Therefore, when evaluating women's chances of career progress in their field, the amount of time they spend caring for children is typically disregarded. It is for this reason that the minister's suggested measure aims to address the lack of

³⁸⁶ Hansard (footnote 14 above).

³⁸⁷ Chan (footnote 9 above) 24.

³⁸⁸ Sandra Fredman 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 716.

³⁸⁹ Fredman (footnote 388 above) 719.

quantitative experience by female advocates. Nevertheless, since the landmark judgement of *Van Wyk & Others v Minister of Employment and Labour*,³⁹⁰ fathers are now allowed to take four months of parental leave equal to women. This means that, the suggested measure of the minister indirectly discriminates on men who decides to share parental responsibilities equally with their women, as their years of experience would also be interrupted by such an undertaking to care for their children should they decide to take a break of a year or two. Secondly, the measure discriminates upon women who are suffering from other discriminatory practices other than gender, such as class.³⁹¹

4.2.4 Seniority

Experience is a determining factor in seniority, as silk status holders are considered exceptionally skilled and outstanding advocates.³⁹² Since they are senior, they have the authority to decline a brief if it does not logically need the involvement of senior counsel given the nature of the brief and the work at hand.³⁹³ The aforesaid supports the idea that advocates with silk are considered for lucrative cases since their status indicates success, knowledge, and experience.³⁹⁴ The application process of becoming Silk requires advocates to show that they have what is required of them, such as great advocacy abilities, excellent judgment, and in-depth legal understanding.³⁹⁵ It cannot be gainsaid that, seniority gives access to employment opportunities in fields like opinion work and arbitration (where the status of a silk makes the opinion more meaningful).³⁹⁶ Regrettably, the difficulty for some women with the role of seniority lay in the way in which the status of silk (the highest level of seniority) is achievable.³⁹⁷ The fact that the criteria for selection of senior counsel requires that one must have

³⁹⁰ *Van Wyk & Others v Minister of Employment and Labour* (footnote 375 above).

³⁹¹ Phooko and Radebe (footnote 86 above) 321-322, they have observed that the main impediment of women to advance in the legal profession, particularly black women is the economic disadvantage.

³⁹² Chitapi (footnote 10 above) 76-78.

³⁹³ CCLP (footnote 50 above) 26.

³⁹⁴ CCLP (footnote 50 above) para 3.4.4.

³⁹⁵ The Lawyer Portal 'What is Silk Lawyer' (2023) Available at <<https://www.thelawyerportal.com/blog/what-is-a-silk-lawyer/>> Retrieved on 31 December 2023.

³⁹⁶ Chitapi (footnote 10 above) 60.

³⁹⁷ Ibid.

appeared in the Labour Appeal Court³⁹⁸ is really disturbing, given that women have developed themselves in matrimonial law due to the lingering stereotypes that women are primary caregivers.

4.2.5 Practice area of law

Notwithstanding the attainment of silk status which attracts high-profile briefs, most counsels limit their area of practices,³⁹⁹ and they are briefed based on their limited areas of practice. While Sibanda is concerned that, with its unequal gender selections, the state is unintentionally strengthening and supporting the historical privilege of men in the legal field,⁴⁰⁰ it is noteworthy that an area of specialty remains relevant during selection of a counsel. Women are briefed on family law cases because matrimonial cases deal mainly with family matters and children as they are stereotypically deemed to possess knowledge in family issues. This being the case, two of South Africa's top women advocates as pointed out by Sibanda are mainly focused on family law, for example: in the case of *B v B*,⁴⁰¹ advocate Beverly Fourie SC, was recognised as one of the most experienced advocate, especially in matrimonial matters. Similarly, Adelele De Wet SC specialises in family law.⁴⁰² Regrettably, the most high-profile cases of the state do not basically require family law experts. Males have established themselves in areas of law that grants them monopoly to access high-profile briefs and acquired the necessary qualitative and the quantitative experience in terms of their work. This undoubtedly boost the male privilege in the legal profession as observed by Sibanda.

4.2.6 Professional ethics

Unlike ordinary workplaces, the concept of the legal profession prioritises ethical conduct. Ethical standards are the cornerstone of the legal profession. They preserve

³⁹⁸ CCLP (footnote 50 above).

³⁹⁹ CCLP (footnote 50 above) 26.1.

⁴⁰⁰ Sibanda (footnote 41 above).

⁴⁰¹ *B v B* [2011] ZAGPJHC 132 para 2.

⁴⁰² Advocate's Group Twenty-One' available at <<https://advocatesgroup21.co.za/adele-de-wet-sc/>> retrieved on 14 December 2023. Advocate A.A De Wet SC, appeared for the applicant in a matrimonial case of *L S v R S* [2019] ZAGPJHC 442.

the legal profession by retaining its honour, integrity, and reputation, which, in turn, determines the efficiency and the longevity of the profession. It is worth noting that the reputation of the legal profession can be retained if good quality legal services are provided to boost public confidence in the legal profession. In the case of *Pretoria Society of Advocates v Ledwaba*,⁴⁰³ the court stated that 'an advocate may not lack the sense of responsibility, honesty, and integrity which is characteristics of an advocate. Thus, practitioners who lacks those qualities cannot be expected to play their part.⁴⁰⁴ Ethically, an advocate is indebted to the client to perform duties such as adequate representation. This would require extensive expert qualifications to provide efficient legal services. Therefore, briefing women who lacks the necessary expertise would subject them to unethical professional conduct by receiving briefs in which they do not have competence to deal with them diligently and risk being struck off the roll.

4.3 Summary

In a nutshell, the concept of AA values suitability. Thus, experience is indispensable,⁴⁰⁵ a person's ability to handle the work and possess the required character and personality traits can only be determined by their appropriate experience.⁴⁰⁶ Selecting applicants with little legal experience will put them under a lot of stress, which could affect how well they perform.⁴⁰⁷ However, to overemphasise experience (qualitative and quantitative) or using it as a strict comparable standard would only serve to reinforce historical prejudice,⁴⁰⁸ because women take career breaks for childcaring which impacts on their quantitative experience. It is submitted that there is currently no clear criterion used to promote gender equality. There is indeed a need for an all-encompassing pro-woman policy that considers an overall development aimed at the distribution of briefs amongst women and yet at the same time valuing the essence of merits during the selection of a counsel.

⁴⁰³ *Pretoria Society of Advocates v Ledwaba* 2014 ZAGPPHC 849.

⁴⁰⁴ *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) para 126.

⁴⁰⁵ *Du Preez v Minister of Justice and Constitutional Development & Others* (footnote 182 above) para 36.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Du Preez v Minister of Justice and Constitutional Development & Others* (footnote 182 above) para 35.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Summarily, this chapter provides concluding remarks of the proceeding chapters of this research. In chapter 1 the study begun with a brief contextual examination of the impact of sexism and gender stereotyping on the quality of briefs female advocates receives. The literature observed that these issues are enormously experienced by women (both juniors and seniors). In finding a solution to address these issues, this study utilised a desktop qualitative method. Chapter 2 found that the legal framework provides for a gender clause, which in turn obliges the state to consider pro-woman policies. Although the Draft LSC is meant to transform the legal profession, it was argued that the procurement of legal services prioritises race over gender.

Chapter 3 found that the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social, and Cultural Rights ("ICESCR") the Universal Declaration of Human Rights ("UDHR"), do not straightforwardly embrace affirmative action strategies but rather insists upon equal opportunity between women and men. Interestingly, the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") is commendable in terms of affirmative action measures. Quite impressive is that CEDAW is specifically designed particularly to promote pro-women policies.

Chapter 4 found that although the stereotypes about motherhood hinder women from acquiring the necessary experience to enable them to receive high-profile briefs, special measures drafted only on that basis cannot be justified based on the new developments of parenting. The chapter suggested an all-encompassing policy that considers the intersectionality of discrimination. Furthermore, although AA has always

been understood as a temporary solution, it will take time to eliminate the inequalities that apartheid brought about.⁴⁰⁹

5.2 Recommendations

The Empowerment of women is not happening in any significant way in departments. Apart from general policies and practices that affect all staff, there are no specific programmes that recognize women as a separate interest group with specific interests and needs. This includes issues related to recruitment, training and addressing the practical needs of women.⁴¹⁰

Notwithstanding section 94(1)(b) of the LPA⁴¹¹ which attempted to recognise the reality of the inequalities in the South African legal profession, this section seems to empower the minister to make rules which “monitor progress” on the implementation of the programmes with regards to empowerment of “historically disadvantaged legal practitioners”. What is apparent from section 94(1)(b) of the LPA is that the minister’s duty is to “monitor” programmes aimed at the empowerment of “historically disadvantaged legal professionals”, whilst LPC’s duty is to initiate or make suggestions on empowerment mechanisms and submit them to the minister for approval and monitoring. Loosely interpreted, the minister is only tasked with observing and keeping record of advancement or empowerment of “historically disadvantaged legal practitioners”.

This section lacks clarity on the empowerment of women, because “historically disadvantaged legal practitioners”, may as well recognise race discrimination over gender. Unsurprisingly, the LPC suggested the process for the development of a transformation through the Draft LSC which was guided by the B-BBEE Act.⁴¹² It is clear that the meaning of “historically disadvantaged legal practitioners” as

⁴⁰⁹ Muriel Tapiwa Mushariwa, ‘UNISA v REYNHARDT [2010] BLLR 1272 (LAC): Does Affirmative Action Have a Lifecycle?’ (2012) 15 *PER / PELJ* 422.

⁴¹⁰ Public Service Commission Report (PSC) 2006; Ayola Bangani and Shikha Vyas-Doorgapersad, ‘The Implementation of gender equality within the South African Public Service (1994-2019)’ (2020) 8(1) *Africa’s Public Service Performance Review* 2, available at <<https://doi.org/10.4102/apsdpr.v8i1.353>> retrieved on 04 February 2024; see also Tsholo Mzawazi Solomon Nhlapo and Shika Vyas-Doorgapersad, S ‘Human Resource Provisioning Strategy for Gender Equality Within the Department of Correctional Services: The Case of Groenpunt Management Area’ (2016) 24 *Administration Publica* 171.

⁴¹¹ Section 94(1)(b) of Act 28 of 2014.

⁴¹² Draft Legal Sector Code, 1.

enumerated in section 94(1)(b) means the empowerment of black people, and does not consider gender discrimination because the main aim of the Draft LSC which is the programme implemented to empower “historically disadvantaged legal practitioners” in terms of section 94(1)(b) of LPA, is intended to address the inequalities resulting from the systematic exclusion of black people.⁴¹³ Sadly, this programme is based on race, as opposed to gender. Therefore, there is no specific programme that recognises women as a separate interest group with special needs which addresses the issue of inequitable briefing patterns in the South African legal profession. Based on the aforesaid, it is therefore recommended that:

- LPC must make suggestions regarding the amendment of the LPA specifically aimed at promoting special measures for women to increase the exposure of females in the legal profession in line with regional and international laws. This is because whilst section 94(1)(b) of LPA authorises the minister to “monitor progress” of empowerment programmes intended to empower the “historically disadvantaged legal practitioners”, there is no specific rule which authorises LPC to suggest such empowering programmes in which the minister is obliged to monitor. Therefore, the amendment should focus on adding sub-section 6(a)(b) under section 95 of LPA as follows:

Section 95(6)(a)(b) _The council must suggest rules which recognise the intersectionality of discrimination by implementing special measures/affirmative action measures which include amongst other things preferential treatment and numerical goals but exclude quotas relating to_

- (a) Programs that promote equitable access of briefs by junior and senior advocates which consider gender equality in selection criteria, however, such programmes should not create an absolute barrier to the prospective or continued employment opportunities and advancement of people who are not “historically disadvantaged legal practitioners”.

⁴¹³ Draft LSC, 1.

(b) Programs that promote equitable access of instructions for junior and senior attorneys which consider gender equality in selection criteria, however, such programmes should not create an absolute barrier to the prospective or continued employment opportunities and advancement of people who are not “historically disadvantaged legal practitioners”.

The above recommended section should be read in conjunction with section 94(1)(b) of the LPA.

- To this end, the state in its briefings must incorporate flexible measures and not mandatory so that men may benefit in case there are no suitable women to accept such a brief at that moment. Therefore, the state briefing entities must have a regularly updated list of female advocates obtained from chambers, with the relevant experience, seniority, expertise, and most importantly to brief women in areas of law in which women were denied briefs in the past due to lingering sex and gender stereotypes. The criteria must aim at locating suitable women (juniors and seniors) who demonstrate interest in the relevant practice area of law.
- The state must put in place a transparent annual report in line with its briefing policy to record amongst other things, the number of women and men briefed, the practice area of law in which they were briefed, the number of briefs, and the value of briefs.
- Furthermore, the state must also consider the establishment of statutory-driven monitoring mechanisms such as a “Briefing Committee” whose mandate would be to monitor the briefing patterns and report their findings to parliament so that appropriate policies and strategies can be implemented to ensure equitable briefing.

In a nutshell, it is therefore submitted that although the national, regional and international instruments recognise gender affirmative action measures, the independence status of the legal profession has made it difficult for LPC to suggest special measures which allow pro-women policies recognising the unique experiences of women advocates, such as motherhood, stereotypes and the intersectional issues

that hinders them to access high-profile briefs. This being the case, the recommended insertion or amendment in terms of LPA as stated above must be considered. Given the intersectionality of discrimination in terms of section 9(3) of the Constitution, it is therefore worth mentioning that gender discrimination is not the only factor which hinders women from accessing high-profile briefs. Therefore, there is indeed a need for further research that would extensively study "class" as a ground of discrimination and the way it may contribute to inability of women to access high-profile briefs. Relevant to this study, further comparative legal research is required to explore foreign law and how the law deals with the issue of inequitable briefing patterns.

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