GENDER-BASED AFFIRMATIVE ACTION IN THE APPOINTMENT OF HIGH COURT JUDGES

By

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DECLARATION

I, Anneli van Heerden (207066698), hereby declare that the dissertation for Masters in Law is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

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SUMMARY

The legitimacy of the judiciary is dependent on the racial and gender diversity of the courts. As a result of the oppressive policies imposed by the apartheid government, the High Court judiciary in 1994 was composed almost exclusively of white men. Judges were appointed at the behest of the executive arm of government and political considerations undoubtedly played a role in the selection process. As a result, the integrity of the judiciary was severely compromised in that the composition was entirely unrepresentative of the population it served, and they were appointed in order to further the strict racial policies of the apartheid government.

The Constitution of the Republic of South Africa came into being through multi-party negotiations and is to form the basis of a complete transformation of the South African society. In a clear move away from the judicial appointments procedure of the past, the Constitution specifies that judges are to be selected by the Judicial Services Commission which is an independent body composed of members from all three branches of the government. In its selection, the JSC is guided by section 174(2) of the Constitution which requires that the racial and gender demographics of the judiciary must be considered when judges are appointed so as to make the bench broadly reflective of the South Africa population.

Systemic discrimination of the past denied women the opportunity to gain the necessary knowledge and experience to be eligible for appointment to the bench. Special measures are therefore needed to advance women’s career path to the judiciary. In 2010, the Judicial Services Commission adopted selection criteria to be considered when shortlisting and selecting candidates to be recommended to the President for judicial appointment. Included in these criteria is the consideration of symbolism and potential.

Special measures to advance persons who were previously disadvantaged by discriminatory practices are permissible in terms of section 9(2) of the Constitution. It recognises that true substantive equality will not be achieved without special measures aimed at remedying to disadvantage still felt by many people in South Africa, including
women. The imposition of such measures does, however, have limitations. In the judiciary, specifically, demographic considerations can not be the primary consideration when judges are appointed. This could lead to a judiciary that is incapable to dispense justice to the population it serves because it does not have the required skill, knowledge and experience. On the other hand, if judges are appointed solely on technical merit, the judiciary is likely to remain male-dominated. The JSC therefore has to carefully balance the need for demographic transformation of the judiciary with the need to appoint technically competent judges.

In *Minister of Finance v van Heerden*, the Constitutional Court laid down three requirements which remedial measures must meet in order to pass constitutional muster. Firstly, the beneficiaries targeted by the remedial measure must be persons who have been discriminated against in the past. Secondly, it must be designed to protect or advance previously disadvantaged persons. Lastly, the remedial measures must promote the achievement of equality in the long term. Once a measures meets all three of these requirements, it is not considered to be unfair discrimination against previously advantaged persons who do not stand to benefit from the measure in question.

To safeguard the independence of the judiciary, judges are not considered to be employees of the state. This means that the provisions contained in labour legislation which requires the adoption of a formal employment equity plan when imposing affirmative action measures is not directly applicable to the appointment of judges. The Promotion of Equality and Prevention of Unfair Discrimination Act envisages the adoption of equality plans in all spheres not governed by labour legislation. These provisions are, however, not yet in force. As a result, there is no legislation that requires the Judicial Services Commission to adopt a formal affirmative action policy, and appointments made to address the gender imbalances on the judiciary are made on an *ad hoc* basis which runs counter to the test formulated in *van Heerden*.

A related problem is that the Judicial Services Commission has not given sufficient content on the criteria needed for judicial appointment. For instance, even though the Judicial Services Commission does consider the technical competence, it has not published any guidance as to what is considered to be the minimum threshold of formal
qualifications or experience needed to be appointed to judicial office. This has led many people to speculate that certain judges are appointed for ulterior purposes or, alternatively, that there exists some racial or gender bias within the Judicial Services Commission. This holds unfortunate consequences for the perceived legitimacy of the judiciary and strengthens the call for more structure and clarity in the appointment of judges.
CHAPTER 1

INTRODUCTION

1 1 BACKGROUND

The Constitution of the Republic of South Africa, 1996¹ (hereafter referred to as the Constitution) envisages a society where all men and women may live as equals.² However, centuries of discriminatory practices under colonial rule and apartheid have left the South African population as unequal as it is diverse. More than 20 years after the country’s liberation, the effects of these practices can still be felt, primarily by the female, black and disabled members of society. At the heart of the Constitution is the fundamental premise of transformation.³ South Africa needed to be transformed from a society which was deeply divided by injustice and exclusion, to one where the dignity and equality of all persons are respected.⁴ The judiciary, too, needed to be transformed so as to ensure the equitable representation of all the people in South Africa.⁵

It has been submitted that the "very legitimacy of the judiciary, and indeed the project of constitutional democracy" are dependent on the racial and gender diversity of the bench.⁶ Apartheid resulted in South Africa having a High Court bench composed almost exclusively of white men and, as a result, the judiciary was largely seen as illegitimate by the majority of the South African population.⁷ It is reported that in 1994, of the approximately 200 judges appointed to the High Court bench, only two were female and

¹ Citation of Constitutional Laws Act 5 of 2005.
² Section 1 of the Constitution.
³ Budlender “Transforming the Judiciary: The politics of the Judiciary in a Democratic South Africa” 2005 SALJ 715 716.
⁴ Budlender 2005 SALJ 715.
⁵ Budlender 2005 SALJ 716.
two were black. This not only led to what has been described as a “legitimacy crises”, but it was also in contradiction of the new democratic dispensation founded on the values of human dignity, equality and freedom.

Garbers describes three notions of equality. Firstly, he describes “equality in treatment” or the “symmetrical view” of equality. This notion, which is often called formal equality, recognises that discrimination occurs wherever persons are treated differently based on such factors as race, sex and gender. It does not take into account situations in which certain groups of people are purposely advantaged to redress past discrimination. In South Africa, certain groups of people are left at such a disadvantage that treating them in a formally equal manner now will fail to redress the inequalities of the past.

The second notion, “equality of opportunity”, recognises the need for measures aimed at equalising the opportunities available to designated groups of people. The equal opportunity approach recognises that “true equality cannot be achieved if individuals begin the race from different starting points”. It would, therefore, not impose an obligation to, for instance, favour job applicants from certain groups, but merely ensures each applicant receives an equal opportunity for employment.

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10 Section 7 of the Constitution.
12 Garbers 2003 Contemporary Labour Law 93.
13 Dupper “Affirmative Action and Substantive Equality: The South African Experience” 2002 14 SA Merc LJ 275 278. Sex is usually interpreted as referring to the biological differences between males and females, whereas gender refers to socially and culturally constructed between men and women. The terms are, however, generally used interchangeably by the courts. In this regard, see Albertyn & Goldblatt “Equality” in Woolman, Roux, & Bishop (eds) Constitutional Law of South Africa 2 ed 2011 RS 3 30-5.
14 Dupper 2002 SA Merc LJ 278.
16 Garbers 2003 Contemporary Labour Law 93.
18 Garbers 2003 Contemporary Labour Law 93.
The last notion is “equality of outcome”, the primary purpose of which is the elimination of disadvantages suffered by designated groups in the past, thereby bringing about “true substantive equality”.\(^{19}\) This approach recognizes the need for preferential treatment afforded to those persons who have been disadvantaged in the past\(^{20}\) and is also what is envisaged in the South African Constitution. The Constitutional Court itself has pointed out that merely removing the causes of past discrimination is insufficient and remedial action is necessary, otherwise those that have been prejudiced in the past will continue living at a disadvantage.\(^{21}\)

South Africa is also a party to a number of international and regional instruments prohibiting discrimination and promoting gender equality. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) is an instrument specifically aimed at the advancement of the rights of women, and was ratified by South Africa in December 1995.\(^{22}\) Article 4(1) of this convention makes specific provision for “temporary special measures aimed at accelerating *de facto* equality between men and women”, thereby supporting affirmative action measures aimed at rectifying gender imbalances.

In 1995 South Africa participated in a United Nations Conference on Women held in Beijing, and committed to the Beijing Platform of Action which aims to address twelve critical areas of concern as identified during the conference.\(^{23}\) As part of its obligations under the Beijing Platform, the South African government committed to encouraging the equitable representation of women in the judiciary, taking positive action where necessary

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\(^{19}\) Garbers 2003 *Contemporary Labour Law* 93.

\(^{20}\) *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice & Others* 1998 (12) BCLR 1517 (CC) and *President of RSA v Hugo* 1997 (6) BCLR 708 par [41].

\(^{21}\) *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice & Others* par [60].


to address gender imbalances.\textsuperscript{24} Moreover, as a signatory to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,\textsuperscript{25} South Africa is obligated to guarantee women’s equality before and equal protection under the law, by ensuring that they are equitably represented in the judiciary.\textsuperscript{26}

Through the Southern African Development Community (SADC) Protocol on Gender and Development, member states undertake to implement gender responsive policies and programmes to eliminate discrimination and achieve gender equality within their respective countries.\textsuperscript{27} This protocol is a fairly new addition to an array of regional instruments that seek to promote equality between men and women.\textsuperscript{28} This document was deemed necessary given the slow progress made by the SADC countries in meeting gender equality targets set in non-binding agreements.\textsuperscript{29} The SADC Protocol on Gender and Development sets time-frames for the achievement of certain objectives, thereby making it compulsory for member states to speed up the realization of gender equality.\textsuperscript{30} Importantly, Article 7 of the protocol binds member states to the enactment of legislative and other measures that will ensure the equitable representation of women in the judiciary, although no time-frame is prescribed for this section. Compliance with the protocol is enforced through a committee of ministers who are to ensure the effective implementation of the protocol in member states.\textsuperscript{31} It is too early to tell whether the objectives that this protocol aims to achieve will be realized. However, academic writers

\textsuperscript{26} Article 8 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.
\textsuperscript{27} See the objectives in article three of the SADC Protocol on Gender and Development. This document is available at https://www.sadc.int/files/8713/5292/8364/Protocol_on_Gender_and_Development_2008.pdf (accessed 2017-01-28).
\textsuperscript{28} This Protocol was signed in 2008, and by August 2010 there were still too few member states who had ratified it in order for it to come into effect. See Munalula “SADC Protocol on Gender and Development: A Roadmap to Equality?” 2011 SADC Law Journal 189 189.
\textsuperscript{29} Munalula 2011 SADC Law Journal 189.
\textsuperscript{30} See Munalula 2011 SADC Law Journal 192-193 for a complete list of objectives that are subject to time-frames.
\textsuperscript{31} See Article 34 of the SADC Protocol on Gender and Development.
remain optimistic.\textsuperscript{32} From the above it is obvious that South Africa, as part of the international community, is under a clear obligation to promote equality between men and women, both generally and in the appointment of judges.

The appointment of judges to the High Court of South Africa is governed by section 174 of the Constitution. Judges are to be appointed by the president on the advice of the Judicial Service Commission (hereafter the JSC).\textsuperscript{33} The JSC may choose its own procedure, but the majority of its members must support any decisions taken by it.\textsuperscript{34} The procedure presently followed by the JSC may be summarized as follows: Once a vacancy occurs, the JSC will call for nominations and interview short-listed candidates, after which it makes recommendations to the president as to which candidates will be most suitable for appointment.\textsuperscript{35} While the interviews are open to the public, the deliberations which follow thereon are made in private, and the selection of candidates to be recommended for judicial appointment is completed by consensus or secret ballot.\textsuperscript{36} Employing a secret ballot as the method for selecting candidates for recommendation to the president necessarily leaves the JSC unable to supply reasons for its selection and, as such, was found by the Supreme Court of Appeal to be “arbitrary and irrational”.\textsuperscript{37}

Section 174(1) of the Constitution states that any man or woman who is a fit and proper person and who is appropriately qualified may be appointed to judicial office. In its selection of candidates to be recommended for appointment, the JSC is furthermore guided by section 174(2) of the Constitution which specifies that the need of the judiciary to “reflect broadly the racial and gender composition of South Africa” must be considered when judicial appointments are made.\textsuperscript{38} As a result of past discriminatory practices, the High Court bench was composed almost entirely of white male judges when the Constitution took effect. The mandate contained in section 174(2) of the Constitution

\textsuperscript{32} Munalula 2011 SADC Law Journal 190.
\textsuperscript{33} Section 174(6) of the Constitution.
\textsuperscript{34} Section 178(6) of the Constitution.
\textsuperscript{35} The JSC Procedure was published as GN R432 in GG 24596 of 2003-03-27.
\textsuperscript{36} Regulation 3(k) of the JSC Procedure.
\textsuperscript{37} Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA).
\textsuperscript{38} Section 174(2) of the Constitution.
therefore warrants the imposition of affirmative action measures to ensure the appointment of members from previously disadvantaged groups to the judiciary, thereby promoting a bench that broadly reflects the demographic composition of the South African population.39

In 2010, the JSC adopted “supplementary criteria”40 to give further content to the prescripts of sections 174(1) and 174(2) of the Constitution.41 Among the factors to be considered when making its selection, the JSC is to consider symbolism and whether the candidate has appropriate potential.42 Even though the JSC has neither elaborated on nor provided definitions of symbolism and potential, it is clear that a consideration of these two factors has the aim of creating a more diverse judiciary.43 For instance, where the composition of a particular division of the High Court is overwhelmingly male, the symbolic value of appointing a female judge to the division in question could “tip the scales” in favour of a female judicial candidate.44 Similarly, where two appropriately qualified, fit and proper persons are competing for the same vacancy, a consideration of the less experienced candidate’s potential may place him or her on an equal footing with the candidate who has more experience. Since these measures are aimed at advancing or protecting persons who have been discriminated against by past practices, in this case women and black persons, it amounts to remedial measures as contemplated in the equality clause.

Section 9 of the Constitution prohibits discrimination of any person on one or more listed grounds, including sex and gender.45 Section 9(2) makes express provision for “legislative and other measures” designed to redress disadvantages suffered by designated

39 Malleson 2003 Feminist Legal Studies 16-17.
40 Olivier argues that the term “supplementary criteria” is misleading, as it does not add to the requirements stated in the Constitution but rather elaborates on the constitutional requirements. See Olivier “The Selection and Appointment of Judges” in Hoexter & Olivier (eds) The Judiciary in South Africa 116 133.
42 Ibid.
43 Davis “Judicial Appointments in South Africa” 2010 Advocate 40 43 at Fn 11.
45 Section 9 of the Constitution is also known as the "equality clause".
designated groups, thereby bringing about substantive equality in South Africa. In *Minister of Finance v van Heerden* (hereafter *van Heerden*), the Constitutional Court identified requirements which remedial measures must meet in order to fall within the ambit of section 9(2). According to this court, affirmative action measures must target persons or categories of persons who were unfairly discriminated against in the past, it must be designed for the protection or advancement of such persons and it must promote the achievement of equality in the long term. Remedial measures taken in compliance with section 174(2) of the Constitution must also meet these requirements in order to be constitutionally valid.

The Employment Equity Act (hereafter the EEA) and the Promotion of Equality and Prevention of Unfair Discrimination Act (hereafter the PEPUDA) were promulgated to give effect to section 9(2) of the Constitution and is specifically designed to promote equality. In *Khanyile v Commission for Conciliation, Mediation and Arbitration*, the court held that judicial officers do not qualify as employees for the purposes of South African labour legislation. To hold otherwise would be in conflict with their constitutional office and undermine the independence of the judiciary. The judge in this case drew from two foreign cases where it was determined that a judicial officer cannot be said to be an employee of the State. This was also accepted in *Du Preez v Minister of Justice and
Constitutional Development (hereafter Du Preez),\textsuperscript{57} where it was agreed that the EEA does not apply since magistrates, as judicial officers,\textsuperscript{58} are independent of the public service and are subject only to the Constitution.\textsuperscript{59} The PEPUDA finds application in situations where specific labour legislation does not apply.\textsuperscript{60} It is consequently the PEPUDA that regulates affirmative action taken in the appointment of judges.

The purpose of PEPUDA is, amongst others, to set out measures to advance persons who have been disadvantaged by past discrimination.\textsuperscript{61} In this way, the PEPUDA also recognises the need for affirmative action measures to eradicate the systemic inequality brought about by years of colonialism and apartheid.\textsuperscript{62} Chapter two of PEPUDA prohibits unfair discrimination, while section 8 deals specifically with unfair discrimination based on gender. The PEPUDA makes it clear that measures that are aimed at the advancement or protection of persons or groups of persons disadvantaged by discrimination is not unfair.\textsuperscript{63} Chapter 5 of the PEPUDA furthermore envisages the imposition of affirmative action to eradicate systemic forms of exclusion. At the time of writing, this part of the PEPUDA has not taken effect. Once promulgated, however, it will provide clear guidelines on the imposition affirmative action in spheres outside of employment.

1 2 Research objectives

Section 174(2) of the Constitution requires the JSC to consider the racial and gender demographics of the judiciary when selecting candidates for judicial appointment. As a result of the JSC’s efforts to comply with this mandate, the composition of the High Court bench is vastly different to what it was in 1994. In the annual report of the Office of the Chief Justice it is recorded that, of a total of 242 permanent judges of the High Court, 156

\textsuperscript{57} [2006] 3 All SA 271 (SE).
\textsuperscript{58} In terms section 1 of the Magistrates Act 90 of 1993.
\textsuperscript{59} Du Preez v Minister of Justice and Constitutional Development para 13.
\textsuperscript{60} Persons who may have recourse to the EEA are specifically excluded by section 5(3) of PEPUDA.
\textsuperscript{61} Section 1 of PEPUDA.
\textsuperscript{62} See the Preamble to PEPUDA.
\textsuperscript{63} Section 14 of PEPUDA.
judges are black, whereas 86 of the total are female. These statistics reveal a significant improvement in the racial diversity of the High Court bench, although women remain severely underrepresented in the judiciary. The primary objective of this study is to analyse the legal framework within which judicial appointments are made, focusing specifically on the measures undertaken to increase the gender diversity of the judiciary.

The measures alluded to above, specifically the adoption of symbolism and potential as criteria for the appointment of judges, are measures aimed at addressing the gender and racial imbalances in the judiciary. As such, it amounts to affirmative action measures that seek to advance persons who have been prejudiced by past discriminatory practices. In van Heerden, the Constitutional Court laid down the requirements that remedial measures must comply with in order to pass constitutional muster. The secondary aim of this research is to determine whether the adoption of the supplementary criteria meets the van Heerden requirements in order for it to be constitutionally valid.

Lastly, the method of appointing acting judges will be considered. The practice of appointing acting judges is firmly established in South Africa and is authorised by the Constitution. This practice is useful not only to ensure that the courts continue to function efficiently in circumstances where one or more of the permanent judges are absent, but also to enable the JSC to ascertain the suitability of a particular candidate for possible permanent appointment to the bench. It is therefore a means for the JSC to assess whether a candidate’s has the necessary potential to be permanently appointed.

Even though it has not been expressly stated as a requirement for permanent appointment, the JSC places much reliance on the record of the candidate in his or her

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67 Section 175(2) of the Constitution.
68 Olivier 2006 Obiter 554; Moerane “The meaning of Transformation of the Judiciary in the new South African Context” 2003 SALJ 708 713.
acting capacity when shortlisting and selecting permanent judges.\textsuperscript{69} This practice has been criticised, not only for the perceived threat to the independence of the judiciary, but also because it is alleged that acting judges are appointed as a means of delaying the filling of vacancies until members of the previously disadvantaged groups make themselves available for permanent appointment.\textsuperscript{70} It is necessary, therefore, to define and analyse the method adopted for the appointment of acting judges so as to determine the extent to which this may influence the gender demographics of the judiciary.

1 3 Research methodology

Both primary and secondary sources will be used to investigate the issues identified above. The primary sources that will be consulted are the Constitution, legislation, case law and international instruments, while the secondary sources include books, journal articles, published reports, newspaper articles and academic magazines.

The Constitution is the supreme law of South Africa\textsuperscript{71} and is to form the basis of this research. The JSC was, however, first established under the Interim Constitution.\textsuperscript{72} For this reason, both the Interim Constitution and Final Constitution are relevant to this study. Legislation that will be examined include legislation regulating the functioning of the court as well as legislation that gives expression to the equality clause in the Constitution. For instance, the EEA and the PEPUDA, as legislation giving effect to the constitutional rights to equality, are both considered in this study. Furthermore, the process through which the JSC is to select judges for recommendation to the President is contained in regulations

\textsuperscript{69} Olivier “The Selection and Appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 150.

\textsuperscript{70} Since the Constitution does not specify the number of permanent judges that must be presiding in a specific division some writers have come to the conclusion that the State President appoints acting judges so as to avoid the need to appoint more permanent judges. See Trengrove “The Prevalence of Acting Judges in the High Court - is it Consistent with an Independent Judiciary?” December 2007 Advocate 37 38 where the author argues that this was not the intention of section 175(2) of the Constitution.

\textsuperscript{71} Section 2 of the Constitution.

\textsuperscript{72} Section 105 of the Constitution of the Republic of South Africa, 1993.
published under the Judicial Service Commission Act (hereafter the JSC Act). The regulations as well as the enabling legislation therefore forms part of this study.

One of the most important international instruments relevant to this study is the Convention on the Elimination of all Forms of Discrimination against Women, which seeks to address gender imbalances observed globally. The Beijing Platform of Action will also be studied in detail, as it relates to critical aspects of the empowerment of women and gender equality, and since it makes specific mention of gender imbalance of the judiciary. The appointment of judges is in many respects comparable to that of the conventional employment sphere. Conventions that have been adopted by the International Labour Organization to ensure the observance of gender equality in employment matters will therefore also be considered. In addition, the International Covenant on Civil and Political Rights (hereafter ICCPR) and the Internal Covenant on Economic, Social and Cultural Rights (hereafter ICESCR), although not adopted specifically to address gender equality in member states, also contain provisions that require the observance of equality between men and women, and will therefore also be included in this study.

Regional and sub-regional instruments that will be consulted include the (SADC) Protocol on Gender and Development and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, both of which documents aim to eliminate unfair discrimination against women and ensure gender equality is observed in member states.

Case law will form a very important part of this study. The van Heerden case has been described as the *locus classicus* on affirmative action, and will therefore be studied in

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74 This document is available at [http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx) (accessed 2017-01-30).
75 This document is available at [http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx) (accessed 2017-01-30).
77 2004 (6) SA 121 (CC).
great detail. Another case of particular importance is South African Police Service v Solidarity obo Barnard (hereafter Barnard),\(^79\) which built on the van Heerden judgement and provided further guidance on the implementation of affirmative action.

South African cases that have particular relevance to the judiciary include Khanyile v Commission for Conciliation, Mediation and Arbitration, S v van Rooyen (General Council of Bar Intervening)\(^80\) and Du Preez v Minister of Justice and Constitutional Development. Some foreign cases will also be examined, firstly because our case law often refers to them, but also to briefly illustrate how affirmative action in other jurisdictions have been applied. Foreign cases will be considered where they have been referred to in local judgements, including Hannah v Government of the Republic of Namibia\(^81\) and Union of India v Pratibha Bonnerjea.\(^82\)

Journal articles that will be used as research material include articles from accredited legal journals, including electronic journals. Papers presented at conferences, workshops and seminars will also be referred to, especially papers presented at the National Judges Symposium, as well as addresses made at the first orientation course for new judges, both of which have been published in the South African Law Journal.\(^83\)

Internet sources will also be consulted as these are useful for finding information that may not have been published yet, such as current government statistics. In addition, reports and submissions by public-interest groups, such as the Women’s Legal Centre and the South African Chapter of the International Society of Women Judges, are readily available on the Internet. These interest groups often raise criticisms on judicial interviews. These observations will be studied in order to form an opinion regarding any sexism or prejudice that may be revealed. Furthermore, Internet sources will be used to obtain unreported cased, foreign cases, newspaper articles and international or electronic journal articles.

\(^{79}\) 2014 (6) SA 123 (CC).
\(^{80}\) 2002 (8) BCLR 810.
\(^{81}\) [2000] (4) SA 940 (NmLC).
\(^{82}\) [1996] AIR SC 690.
\(^{83}\) These were published in 1998 and 2003 respectively.
14 Limitations to the study

Certain legal and non-legal limitations exist with regard to this study. There are legislative reforms taking place with respect to the functioning of the courts which complicates researching matters relating to the judiciary. These reforms have significance particularly with respect to the administrative functioning of the courts and the independence of the judiciary. Even though reference may be made thereto, it is done so by way of providing background information only, and is by no means an exhaustive explanation of the functioning and independence of the courts.  

Non-legal limitations regarding the study include, firstly, the fact that affirmative action is one of the most “controversial and divisive” topics in South Africa and is prone to generate some resentment among the groups who do not stand to gain economical advantage from it. Care has been taken when analysing the government’s approach to the implementation of affirmative action policies so as to separate valued critique from unconstructive opinion. Secondly, some of the reasons why women are slow to make themselves available for appointment to the High Court bench is undoubtedly empirical in nature. This study does not aim to identify those reasons, focusing rather on the legal obstacles faced by women who desire to be appointed as a judge.

15 Chapter outline

In order to demonstrate inequalities that resulted from past appointment procedures and to explain the reasons for South Africa’s unrepresentative bench, chapter two focuses on the procedures adopted for judicial appointments in the past. In keeping with the

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84 For instance, the Constitution Seventeenth Amendment Act, 2012, the Superior Courts Act 10 of 2013 and the Judicial Matters Amendment Act 24 of 2015 have recently been passed as part of the government objective to rationalise the courts to suit the requirements of the Constitution. Many administrative functions formerly assumed by the Minister of Justice now falls within the functions of the Chief Justice. As a result, the Office of the Chief Justice was established as a separate government department. Ebrahim believes this to be the first step in a phased project that will ultimately lead to a judiciary-based system of court administration. Ebrahim “Governance and Administration of the Judicial System” in Hoexter & Olivier (eds) The Judiciary in South Africa 101 – 102.

constitutional requirement that international law be considered when interpreting the bill of rights.\textsuperscript{86} in chapter 3 the international, regional and sub-regional law relating to judicial appointments and gender equality are considered.

In chapter 4, the constitutional provisions that have specific relevance to the topic are discussed in detail. These provisions relate mostly to those sections that apply to the judiciary, especially with respect to judicial appointments and independence, as well as section 9 which ensure the observance of gender equality in South Africa.

Chapter 5 focuses on the legislation that is relevant to gender equality and, more specifically, that regulates the way in which affirmative action is implemented. In chapter 6, the measures that have been employed to increase the gender diversity of the bench are analysed in light of the requirements for affirmative action. In this chapter, possible legislative reforms that could aid the demographic transformation of the judiciary are suggested.

Chapter 7 will conclude the thesis with a summary of the previous chapters. As a conclusion, this chapter will provide the reader with a summarized view of the entire study. The conclusion will highlight the primary arguments raised in the previous chapters, and reiterate the main problems associated with the judicial appointments process in South Africa as well as the proposed methods which may be employed to ensure equal gender representation on the High Court bench.

\textsuperscript{86} Section 39(1) of the Constitution.
CHAPTER 2

HISTORY

2.1 Introduction

During the pre-colonial era in South Africa, the inhabitants of the territory were not organized within a constitutional framework that can be compared to that of modern day South Africa. The principal legal doctrines and techniques of modern-day South Africa were therefore imported together with the early judges and law books during the colonization of the country.

The first permanent settlement in South Africa was established at the Cape by the Dutch East India Company in 1652. This settlement was initially formed to serve as a refreshment post for ships travelling between the Netherlands and East Indies, but soon after its inception came to resemble a conventional settlement as employees of the Dutch East India Company were released from company service and granted “letters of freedom” permitting them to settle permanently within the territory.

From the beginning of settlement, the employees of the Dutch East India Company applied Roman-Dutch law. In 1803 the Colony was temporarily occupied by Britain, was

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89 Hahlo & Kahn *The South African Legal System and its Background* (1968) 567. In 1620 Andrew Shillinge and Humphrey Fitzherbert took possession of the Cape on behalf of King James of England. This act was, however, never ratified. When Jan van Riebeeck arrived in 1652, the Cape was therefore *res nullius* and through *occupatio* became a possession of the Netherlands. See Visagie “Die Regentsbedeling aan die Kaap onder die V.O.C” 1963 *Acta Juridica* 118 119.
90 *Ibid.* Initially, the principal interest of the Dutch East India Company was commercial and the government of the settlement was of secondary concern. Only after the first “free burghers” received their articles of freedom did the Company begin to organize itself as a constitutional authority. See Devenish “The Cape of Good Hope 1652-1909” in Mellet, Scott & Warmelo (eds) *Our Legal Heritage* (1982) 33 33-35.
91 The Charter bestowed upon the Dutch East India Company did not specify which law was to be applied in its foreign settlements; nor did it confer upon the Company the power to promulgate laws in the territories it inhabited. It is clear, however, that the Company followed the law as it applied in Holland, presumably because Holland was the most influential of the states that formed part of the Republic of the
relinquished in favour of the Netherlands for three years and occupied by Britain once more in 1806.\textsuperscript{92} Roman-Dutch law was to be retained as the common law of the country,\textsuperscript{93} however, the influence of English law can be observed from the earliest days of occupation.\textsuperscript{94} To provide a comprehensive history of judicial appointments in South Africa, it is therefore advisable to determine how judicial officers were appointed in the Netherlands and in England before the Cape was colonized.

\section*{2.2 The Netherlands}

During the 16\textsuperscript{th} Century, the Republic of the United Netherlands was not composed of one state.\textsuperscript{95} Instead, it comprised seven sovereign states,\textsuperscript{96} each of which had its own executive committee, laws and judicial organization.\textsuperscript{97} Deputies of each of the provinces formed the “Estates-General” which was the chief organ of the United Republic and had the power to deal with foreign affairs, defence and control of overseas possessions, amongst others.\textsuperscript{98}

The Estates-General had control also of the Dutch East India Company and bestowed upon it a charter in terms of which it could occupy foreign territories, build forts and fortifications, establish a military and conclude treaties with foreign nations.\textsuperscript{99} Disputes

\textsuperscript{92} Hahlo & Kahn \textit{The South African Legal System} 569. The Cape was restored to the Netherlands in terms of the Peace Treaty of Amiens of 27 March 1802.
\textsuperscript{93} The Cape Articles of Capitulation of January 1806 provided that “the burghers and inhabitants shall preserve all their rights and privileges which they have enjoyed hitherto”. Moreover, it is a settled principle in public international law as well as in English law, that the legal system of a conquered or ceded country remains in force until it is altered by the new ruler. See Hahlo & Kahn \textit{South Africa: The Development of its Laws and Constitution} (1960) 17.
\textsuperscript{94} Ibid.
\textsuperscript{95} Hahlo & Kahn \textit{South Africa} 10.
\textsuperscript{96} Holland, Zeeland, Friesland, Utrecht, Gelderland, Groningen and Overijssel all formed part of the Republic of the Netherlands. Drente was also a member of the Republic, but was too poor to contribute to the treasury and therefore had no vote in the general administration of the Republic. Parts of the Spanish kingdom that had been taken from the Spanish Crown during the war of independence also formed part of the Republic.
\textsuperscript{97} Hahlo & Kahn \textit{South Africa} 10.
\textsuperscript{98} Ibid.
that arose on the ships were heard by the Ship’s Council.\textsuperscript{100} The Council of each ship was composed of the persons occupying the five most senior positions on the ship.\textsuperscript{101} Temporary settlements that were formed on land were subject to the authority of the ship’s council. Where territory was permanently seized by the employees of the Company, however, formal court structures were established.\textsuperscript{102} To this end, the Charter authorized the Supreme governing body of the Dutch East India Company, the Council of Seventeen, to select \textit{Officiers van Justitie} (Officers of Justice) in its name in the foreign countries that came under its rule.\textsuperscript{103}

\section*{2.3 England}

In the past, judicial appointments in England were made by the Lord Chancellor.\textsuperscript{104} Traditionally, the Lord Chancellor was the head of the judiciary, a senior member of cabinet, as well as the Speaker in the House of Lords.\textsuperscript{105} During the 16\textsuperscript{th} Century in England, political favouritism was said to be the sole criterion upon which judicial appointments were made.\textsuperscript{106} For example, Queen Elizabeth I is said to have appointed her favourite dancing partner, Sir Christopher Hatton, as Lord Chancellor of England in 1587.\textsuperscript{107} In the same century, when asked whether, “\textit{ceteris paribus}, the best man would be appointed to a judicial position”, Lord Chancellor Halsbury answered “[\textit{c}eteris paribus be damned, I’m going to appoint my nephew”\textsuperscript{108}

\begin{thebibliography}{99}
\bibitem{100} Hahlo & Kahn \textit{The South African Legal System} 536.
\bibitem{101} Boeseken \textit{Suid-Afrikaanse Argiefstukke: Uit die Raad van Justisie, 1652 – 1672} (1986) viii. The 5 most senior persons were the ship’s skipper and senior officials, all of whom were appointed before the ship left harbour. Where a fleet of ships were travelling in convoy, the Council was called the \textit{Breê Raad} and consisted of the Commander of the fleet and the skippers and senior officials of each ship. See Hahlo & Kahn \textit{The South African Legal System} 536.
\bibitem{102} After the city of Jakarta (later Batavia) was seized, for example, the governance of the ship’s council became insufficient and more permanent structures for the administration of justice were established. See \textit{De 1958 THRHR} 87.
\bibitem{103} Zimmermann & Visser \textit{Southern Cross: Civil Law and Common Law in South Africa} (1996) 38. After William IV was appointed as as chief director of the Dutch East India Company, all senior appointments were to be made by him on recommendation of the Lord Seventeen. See Hahlo and Kahn \textit{The South African Legal system and its Background} 537.
\bibitem{105} Gillespie \textit{The English Legal System} (2007) 182 – 183.
\bibitem{107} Ibid.
\bibitem{108} Ibid.
\end{thebibliography}
Barristers were taught in one of four Inns of Court,\textsuperscript{109} and were drawn mainly from the sons of wealthy men or successful businessmen.\textsuperscript{110} It is from among the group of barristers that the Queen’s Council or King’s Council, depending on the gender of the sovereign at that time, would be appointed.\textsuperscript{111} It was under the First Queen Elizabeth that the Queen’s Council originated.\textsuperscript{112} This was presumably done because the Queen had lost faith in the advice of her senior barristers (called serjeants), and needed a council designed specifically to advise her, especially on matters of land law.\textsuperscript{113} In later years, it was the Lord Chancellor that made these appointments, although the criteria upon which these honours were bestowed, remained a secret.\textsuperscript{114}

### 2.4 The first European settlers

European explorers have landed on the shores of South Africa since the 15\textsuperscript{th} Century, but the first permanent European settlement, led by Jan van Riebeeck, was established only in the mid-seventeenth Century (1652) under the auspices of Dutch East India Company.\textsuperscript{115} At the beginning of the settlement, government was composed of the Commander (later called the Governor)\textsuperscript{116} and his administrative council.\textsuperscript{117} During these early days, disputes that arose were heard by a court fashioned along the lines of those found on the Broad Council of the ship.\textsuperscript{118} Thus, the first court case (of which the recording

\textsuperscript{109} Loncoln’s Inn, Gray’s Inn, the Inner Temple and the Middle Temple.
\textsuperscript{111} See generally Arnheim “Silk, Stuff & Nonsense” 1984 101 SALJ 376.
\textsuperscript{112} Arnheim 1984 SALJ 378.
\textsuperscript{113} Gauntlett 1990 Consultus 23.
\textsuperscript{114} There were suggestions in the past that the Queen’s Counsel was selected by the Chancellor, acting as a schoolmaster choosing his prefects and favouring his friends and family. See Kahn “Silk” 1974 91 SALJ 95 101.
\textsuperscript{115} Although there was some conflict originally as to whether the Cape of Good Hope (as the area of Cape Town was then known) fell under the domain of the Dutch East India Company or the Dutch West India Company, and which of their respective Charters should apply. In 1674 the matter was finally settled by the Estate-General which stated that the Dutch East India Company had rightful control of the Cape. See Visagie Regspleging en Reg aan die Kaap van 1652 to 1806 (1969) 40 – 41.
\textsuperscript{116} Van Riebeeck was the Commander of the Cape of Good Hope during the early years of its establishment as a refreshment post on route to India.
\textsuperscript{117} Visagie Regspleging en Reg aan die Kaap 41; Sachs Justice in South Africa 17.
\textsuperscript{118} Eybers Select Constitutional Documents illustrating South African History 1795 -1910 (1918) xvii.
survived) in the region of South Africa was heard in July 1652 by the Commander and four other senior officials of the fleet.119

As alluded to above, the Dutch East India Company had the authority to appoint the Officers of Justice although it did not exercise this authority in the Cape.120 Instead, it was the Commander, together with the executive council, that oversaw the administration of justice and adjudicated on all civil and criminal matters in the Cape.121 It was only in 1656 that it was resolved to separate the executive and judicial functions of the council.122 Henceforth, the administrative or executive functions were to be dealt with by the *Dagelijcxen Raet* and the judicial functions by the *Justitie ende Chrijghraet*.123 Separation of powers was, however, still non-existent as both bodies were constituted of the same members.124

After the first letters of freedom were granted in 1657, one free burgher (called a burgher councillor)125 was appointed to assist the council when trying cases involving free members of the settlement.126 The burgher councillor was appointed by the Commander who was to choose “one of the eldest and one of the most intelligent” from the free burghers at the Cape.127 This number was increased to two burgher councillors in 1658.128

In 1685 the need for an independent council to oversee the administration of justice was voiced by a Dutch-East India Company commissioner.129 As a result, the *Raad van*

119 Boeseken *Suid-Afrikaanse Argiefstukke* x.
120 Zimmermann & Visser *Southern Cross* 38.
121 Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 429.
122 Ibid.
123 Ibid.
124 As the boundaries of the colony expanded, it became necessary to establish local authorities to oversee the administration of justice in the outlying districts. As a result, the colleges of *landdrosten* and *heemraden* were created. These colleges are comparable to modern-day magistrate’s courts and will therefore not be discussed in any detail. See Hahlo & Kahn *South Africa* 13.
125 Devenish “The Cape of Good Hope” in Mellet et al *Our Legal Heritage* 33 36.
126 Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* 429.
128 Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* 429.
129 Visagie *Rregspleging* 42.
Justitie (hereafter the Council of Justice) was formed, which was to be the highest court in all civil and criminal matters and which was to be separate from the Raad van Politie (hereafter the Council of Policy). The Council of Justice was initially staffed by nine officials and three burgher councillors but was changed to six officials and six burgher councillors after the burghers successfully petitioned the Lords Seventeen for equal representation of burghers with company officials. The President of the Council of Justice was to be a member of the Council of Policy. The judges were appointed and removed at the Governor's pleasure, but the burgher councillors were to be appointed by the Council of Policy from a list of nominees composed by the Council of Justice. From 1785, burgher councillors became permanent members of the Council of Justice and no longer sat solely in matters concerning free burghers. The burgher councillors were appointed for life but, in order to ensure their independence of government, they received no salary.

There was some initial confusion as to what law should be applied in the Cape, since the Netherlands was composed of several independent states. In its charter, the Dutch East India Company did not specify what material law was to be used in the overseas colonies. It was clear, however, that the law as it applied in Holland was the law that was applied in the Cape. Roman-Dutch law, as it applied in Holland, was consequently accepted as the common law at the Cape.

Translations of a selection of the Old Dutch authorities makes it clear that women were incapable of appointment to judicial office. In terms of Van Leeuwen’s Roman-Dutch law,
"nearly the whole of womankind by reason of an inborn weakness is less suited for matters requiring knowledge and judgment than men, women are excluded from holding any office or dignity relating to the government of a people and its affairs". Voet came to the same conclusion with regards to the enrolment of women as attorneys and advocates: "It is clear practice of our Courts that no woman can be entered in the solemn and fixed number of Court Procurators…" Similarly, in the words of Huber "[w]omen are excluded from the office of attorney, as they are from all public offices". This was to be the position at the Cape for many years to come.

During the time of the First British Invasion, not much was changed in the administration of justice. Macartney was chosen by the English King as Governor of the Cape, and he was to ensure that the administration of justice was performed along the same lines as that which already existed in the Cape. In the instructions which he received, however, Macartney was directed to ensure that the administration of justice within the settlement was impartially administered. As a result, the composition of the Council of Justice was reduced and salaries were attached to the permanent offices of the court.

After the First British Invasion, the Cape was restored to the Netherlands once again. The Dutch East India Company no longer existed and the Cape was therefore under Batavian rule. Commissary-General De Mist was requested to advise the Cape

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141 Van Leeuwen (1,6,1) as quoted by Judge-President Innes in Incorporated Law Society v Wookey 1912 AD 623 632.
142 Voet (3, 3, 4) as quoted by Judge-President Innes in Incorporated Law Society v Wookey 63.
143 Similar prohibitions may be found in Roman Law. In terms of Praetor's Edict, women are prohibited from appearing as advocates and attorneys "[l]est contrary to the proper modesty of the female sex, they should mix themselves up in the affairs of others, and lest women should take upon themselves the duties of men". See Blum "Portia Today: No need for 'drag'" 1990 3 Consultus 12 15.
144 Visagie Regspleging aan die Kaap 94. The invasion was not meant to be permanent, but merely to bring the Cape under British protection after France declared war against England and Holland. See also Hahlo & Kahn South Africa 4.
145 Except he was to abolish torture. See Eybers Select Constitutional Documents 6 – 7.
146 Visagie Regspleging aan die Kaap 92.
147 Ibid, Theal History of South African since September 1795 (1908) 30.
148 This was as a result of the Treaty of Amiens of 1802 which temporarily ended the war between France and Great Britain.
149 Van der Merwe Die Kaap onder die Bataafske Republiek 1803 – 1806 (1926) 1.
150 Zimmermann & Visser Southern Cross 46.
government on the management of the Cape. In his provisional instructions, De Mist recommended that the Council of Justice be headed by a permanently-appointed President who was to be elected by the State government from three persons, nominated by the Asiatic Council. The nominees were selected from among the most prominent and able citizens at the Cape, or otherwise sent from the Netherlands. Only persons who had lived for 15 consecutive years, either in the Republic or one of its colonies, would be considered for the position of President of the Council of Justice. Furthermore, the nominees had to be qualified in the field of law. The President of the Council of Justice was to be assisted by a council of six members, three of whom were to be educated in law and selected by the Asiatic Council, the other three from more prominent settlers, preferably also trained in law. Section 66 of the provisional instructions ensured the independence of the Council of Justice. The Council of Policy resented the independence of the Council of Justice and accordingly this section was amended to allow the Governor of the Cape to limit the Council of Justice’s jurisdiction in matters that could prejudice the common interest.

When the Cape Colony was formally ceded to Britain in 1806, the administration of justice gradually began to resemble that of England. During this time, administration of justice was not independent in that judges were appointed and removed at the whim of the governor. Judges were appointed as a mark of favour, and judges frequently supplemented their income by having two or three other occupations. It was only in the

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151 Published in De Mist The Memorandum of Commissary J.A. de Mist containing Recommendation for the Form and Administration of Government at the Cape of Good Hope, 1802 (1920) with the translated text by Kathleen M. Jeffreys.
152 De Mist Memorandum 239. This council was called the Raad van Aziatische zaken en bezittingen and became the supreme ruling body over Asiatic possessions after the demise of the Dutch East India Company. See van Klaveren The Dutch Colonial System in the East Indies (1983) 76.
153 Ibid.
154 Ibid.
155 De Mist Memorandum 239.
156 Ibid.
157 Visagie Regspelig aan die Kaap 103
158 Van der Merwe Die Kaap onder die Bataafse Republiek 365.
160 Hosten et al Introduction to SA Law and Legal Theory 350.
161 Ibid.
late 1820’s that several changes were made to the courts of the Cape Colony. The change came about primarily as a result of the Colbrooke-Bigge Commission which recommended that an independent court system be created to act as a shield against abuse of government power and corruption.\textsuperscript{162} As a result, the First Charter of Justice was adopted in 1827 followed by the Second Charter of Justice in 1832.\textsuperscript{163}

The Charters of Justice established the Supreme Court of the Colony of the Cape of Good Hope, which was to replace the Council of Justice.\textsuperscript{164} This court was to be headed by a Chief Justice and three ordinary judges, all of whom had to have received their legal training in England or Scotland.\textsuperscript{165} In terms of section 3 of the Charter of Justice,\textsuperscript{166} judges of the Supreme Court were to be “nominated and appointed to such their Offices by Us, Our Heirs and Successors, by Letters Patent under the Public Seal of the said Colony”. The Chief Justice and other judges were selected from barristers practicing in England or Ireland, or otherwise had to have been enrolled as advocates in the courts of Scotland.\textsuperscript{167}

Judicial appointments were made from London by the Colonial Office and its chief officeholder, the Colonial Secretary.\textsuperscript{168} The person holding the seat as Colonial Secretary need not have been a barrister and often relied on the advice of others in assessing the legal qualifications of judicial candidates.\textsuperscript{169} There was no standard qualification needed for judicial appointment and the office of the Colonial Secretary was granted great freedom in its selection.\textsuperscript{170} With judicial appointments made by the Colonial Secretary, British barristers were inevitably favoured.\textsuperscript{171} However, few appropriately qualified judicial

\textsuperscript{162} Van der Merwe et al “Republic of South Africa” in Palmer (ed) \textit{Mixed Jurisdictions} 100.
\textsuperscript{163} \textit{Ibid}.
\textsuperscript{164} Zimmermann & Visser \textit{Southern Cross} 96; van der Merwe \textit{Die Kaap onder die Bataafse Republiek} 94.
\textsuperscript{165} Van der Merwe et al “Republic of South Africa” in Palmer (ed) \textit{Mixed Jurisdictions} 100. In fact, there was only one Scot ever to have been appointed to the Bench at the Cape, and that was William Menzies. For a detailed account of the life of Menzies, see Girvin “The Establishment of the Supreme Court of the Cape of Good Hope and its History under the Chief Justiceship of Sir John Wylde” 1992 109 \textit{SALJ} 291 - 301.
\textsuperscript{166} The two Charters of Justice both contain the same provision with respect to the appointment of judges.
\textsuperscript{167} Section 3 of the Charter of Justice of 1832.
\textsuperscript{168} Girvin 1992 \textit{SALJ} 294.
\textsuperscript{169} \textit{Ibid}.
\textsuperscript{170} \textit{Ibid}.
\textsuperscript{171} \textit{Ibid}.
candidates wanted to move to the Cape Colony, which resulted in the appointment of barristers who lacked the required skill and experience necessary for judicial appointment. Moreover, it is believed that politics often played a part in the selection and appointment of judges for the Cape Colony.

Section 17 of the Charter empowered the Supreme Court to enroll advocates or barristers. In terms of this section “such and so many persons as shall have been admitted as barristers in England or Ireland” (emphasis added) may be admitted as barristers or advocates in the Supreme Court. However, women were not to be included in terms of this section. Only barristers, advocates, attorneys and solicitors who had received legal training in England, Ireland or Scotland, were eligible for appointment by the Supreme Court.

The colonial period ended in 1854, and by 1858 a legal qualification obtained in South Africa was considered to be suitable for admission as an advocate. Judges were no longer appointed solely from Britain, although the practice of appointing judges exclusively from the ranks of barristers remained. The practice of promoting senior members of the bar to the rank of “Queen’s Council” was adopted in South Africa and it

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172 Ibid.
173 Writing in 1836, lamenting the lack of uniformity in procedures adopted by judges on circuit, Martin commented that “it is indeed to be hoped that some more suitable qualification were requisite for our colonial judges than mere party influence, or aristocratic connections”. See Martin History of Southern Africa: Comprising the Cape of Good Hope, Mauritius, Seychelles, &c (1836) 193.
174 Section 17 of the Charter of Justice.
175 As per Solomon J in Incorporated Law Society v Wookey 1912 AD 623 636. “[B]y our law women are disentitled by reason of their sex from practising the profession of attorneys of the Court…merely by virtue of the practice which had been laid down by the Courts of Holland…” and also “on the construction of the statutes the word person as there used meant men only and did not include women”. This case is discussed in greater detail below.
176 Section 17 of the Charter of Justice.
178 This was as a result of the establishment of a Board of Examiners in terms of Act 4 of 1858. For a detailed account of the history of the requirements to be admitted as an attorney, see generally Wildeboer “The Origins of the Division of the Legal Profession in South Africa: A Brief Overview” 2010 Fundamina 199.
179 Sachs Justice in South Africa 46 – 47. In 1873 Henry de Villiers was elevated from Attorney-General to become the first colonial-born Chief Justice in the Colony. From this point on, all judicial appointments were made from the ranks of local practitioners. See Hahlo & Kahn South Africa: The Developments of its Laws and Constitution (1960) 208.
was these members that were mostly considered for judicial appointment.\textsuperscript{180} A barrister was elevated to Queen’s Council status by virtue of the receipt of letters patent. Interestingly, after a ship containing the letters patent sank on route to the Cape these appointments were made by the local Governor.\textsuperscript{181}

Although neither of the Charters of Justice nor any of the statutes in place contained any prohibition against women judges, barristers or solicitors, no female had entered the legal profession before the time South Africa became a Union.\textsuperscript{182} Even after the Solicitors Act of 1843 was passed in England, women were still not permitted to qualify and practise as solicitors.\textsuperscript{183} Section 48 of this Act provided specifically that, where the masculine gender is imputed in the wording of the Act, its application will be extended to women.\textsuperscript{184} Similarly, the Cape Acts 12 of 1858,\textsuperscript{185} 16 of 1873,\textsuperscript{186} 27 of 1883\textsuperscript{187} and the Cape Interpretation Act\textsuperscript{188} all refer to “persons”, with no indication that women are excluded from the term. Women, however, remained prohibited from practising as attorneys or solicitors, both here and in England\textsuperscript{189} and by implication were also barred from appointment as judges.

An application by an aspiring female attorney was heard for the first time in South Africa in 1909.\textsuperscript{190} The matter came before the Transvaal Supreme Court in the case of Schlesin \textit{v Incorporated Law Society}.\textsuperscript{191} In this case, Ms Sonya Schlesin sought an order compelling the Law Society to register her articles of clerkship. Bristowe J, however, referred to the long-standing practice of this country, as well as in England and Holland, not to permit women to practise as solicitors.\textsuperscript{192} He felt that the proper course of action

\textsuperscript{180} See generally Arnheim 1984 101 \textit{SALJ} 376.
\textsuperscript{181} Sachs \textit{Justice in South Africa} 47; Kahn “Silks” 1974 \textit{SALJ} 95 96.
\textsuperscript{182} \textit{Incorporated Law Society v Wookey} 626.
\textsuperscript{183} Blum 1990 \textit{Consultus} 13.
\textsuperscript{184} \textit{Wookey v Incorporated Law Society} 270.
\textsuperscript{185} This Act regulated the admission of barristers, attorneys, notaries and conveyancers.
\textsuperscript{186} This Act established and incorporated a university at the Cape of Good Hope and defined which persons may be admitted to study the law at said university.
\textsuperscript{187} This Act established an incorporated society for the colony of the Cape of Good Hope.
\textsuperscript{188} 5 of 1910.
\textsuperscript{189} Blum 1990 \textit{Consultus} 12.
\textsuperscript{190} This case was heard just before the unification and South Africa was technically still divided into four independent colonies.
\textsuperscript{191} 1909 TS 363.
\textsuperscript{192} Blum 1990 \textit{Consultus} 12.
would be to approach Parliament, and not the Courts. Bristowe J relied on the use of the word “attorney” in the Administration of Justice Proclamation which refers only to those persons who have always been capable of being attorneys; a class to which women did not belong. Furthermore, he made the important connection between the admittance of an attorney and the admittance of an advocate in that the same arguments in favour of admitting women attorneys could be raised in favour of women advocates. This would have meant an enormous change in the practice of the courts in South Africa, and he therefore refused to grant the application unless authorized by Parliament to do so.

This judgment reflected the popular view taken by the majority of the legal profession of the time. De Villiers, who was later to become Chief Justice of the Supreme Court, found it to be “a revolt against nature” that women should choose a legal career in the place of their maternal duties. He based his opinion, not on the personal injustice to the female aspiring attorney or advocate, but rather on the prejudices inflicted on society should women be allowed to pursue a legal career.

2.5 The Union of South Africa

In 1910 the four independent states unified under the Unification of South Africa Act of 1909 to form one British Colony of South Africa. This Act also created the Supreme Court of South Africa. In terms of section 100, judges were to be appointed by the Governor-General-in-Council, but no legal qualifications for judicial appointees were specified. The practice was to appoint judges almost exclusively from members of the Queen’s Council, as was done in the past. However, on several occasions appointments were

193 Schlesin v Incorporated Law Society 365.
194 Ibid.
195 Schlesin v Incorporated Law Society 366.
196 Schlesin v Incorporated Law Society 365-366
197 De Villiers “Women and the Legal Profession” 1918 35 SALJ 289 209.
198 Ibid. See also Davis “Women as Advocates and Attorneys” 1914 31 SALJ 283.
199 Section 95 of the South African Act of 1909.
200 Hahlo & Kahn South Africa 264 – 265.
made outside the ranks of practising attorneys, usually from members of the public service.  

It was not long after the *Schlesin* case was heard that a similar matter came before the Cape Provincial Division in *Incorporated Law Society v Wookey*. The Cape Provincial Division granted Ms Wookey's application to compel the Law Society to register her articles so as to allow her to practise as an attorney. This judgment was overturned on appeal, based on the fact that women could not be regarded as a “persons” in terms of section 20 of the Charters of Justice. This judgment was made notwithstanding the fact that in terms of the Union Interpretation Act, women were included in every statute where the words import application only to the male gender. The learned judge, after having cited Roman-Dutch authorities, came to the conclusion that the word “person” as used in the Charter of Justice as well as the Act and the Rules of Court, did not include women. The court also relied on the judgment in a Scottish court, where it was similarly held that reference to the word “persons” in legislation regulating the enrolment of law agents, did not include women.

It was not until 1923 that women were officially allowed to practise in the legal profession. In this year, the Women Legal Practitioners Act was assented to, which effectively allowed women to be admitted and enrolled as advocates, attorneys, notaries public or conveyancers in the Union. Women who wished to enter the legal profession

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201 Hahlo & Kahn *South Africa* 265 – 266. This was presumably done to reward those appointees for political services. See Van Blerk “Judicial Appointments: Some reflections” 1992 55 *THRHR* 559 564 - 565.


203 This case is discussed in Blum 1990 *Consultus* 12 and Crouse “A Bar for Women?” 2002 15 *Advocate* 30.

204 *Incorporated Law Society v Wookey* 624.

205 Section 7 of the Union Interpretation Act.

206 See the above discussion on Roman-Dutch authorities.

207 *Incorporated Law Society v Wookey* 624.


209 For a brief discussion on this case, see Blum 1990 *Consultus* 12.

210 Blum 1990 *Consultus* 12.

211 Act 7 of 1923.

212 Section 1 of the Women Legal Practitioners Act 7 of 1923.
would now be subject to the same terms and conditions as men, and any law of the Union that regulated entry to the profession would be interpreted accordingly.\footnote{214}

2 6 Apartheid

The National Party came to power in 1948 and set about restoring the imbalance between English- and Afrikaans-speaking judges.\footnote{215} Mr CR Swart, the then Minister of Justice, began to appoint only Afrikaans-speaking advocates as judges.\footnote{216} Section 10 of the Supreme Court Act\footnote{217} placed the appointment of judges in the hands of the State President. However, the general belief was that the President merely placed a rubberstamp on a selection made by the Minister of Justice.\footnote{218} In later years, the Chief Justice or the Judge President of the relevant division would determine whether there was a need for appointment and convey this need, together with a recommendation as to a suitable candidate, to the Minister of Justice.\footnote{219} Candidates for judicial appointment were identified from senior counsel, and were almost exclusively white and male.\footnote{220} The process of identifying judicial candidates was kept secret but political factors invariably played a role.\footnote{221} However, from the time of appointment, the public was carefully precluded from knowing the political affiliations of a judge.\footnote{222} This is the reason, according to Dugard, why no explicit study of political appointments to the bench was possible, resulting in a finding that all judges were appointed on merit.\footnote{223}

\footnote{214} As a result, the first female attorney and the first female advocate were admitted in 1926. However, it was not until 1969 that the first female judge sat on the South African bench. In this regard, see Blum 1990 Consultus 12 and also Kinnear Women in Developing Countries: A Reference Handbook (2011) 113. It is also interesting to note that, according to Wesson and du Plessis, there was still only one female judge presiding in South Africa in 1990 when political change commenced. See Wesson and du Plessis “Fifteen Years on: Central Issues relating to the Transformation of the South African Judiciary” 2008 SAJHR 187 191.
\footnote{215} Van Blerk 1992 THRHR 567.
\footnote{216} \textit{Ibid}. See also Sachs Justice in South Africa 257, where the author states that in 1922 only one quarter of the judges at that time had Afrikaans names, and many of these came from families who had been completely anglicized. In 1969, however, almost two-thirds of the judges had Afrikaans names. The reason cited for this was an attempt to balance the linguistic inequality in the courts.
\footnote{217} 59 of 1959.
\footnote{218} Mpati “Executive Control over the Judiciary” 2005 Advocate 32 32.
\footnote{219} Van der Merwe \textit{et al} “Republic of South Africa” in Palmer (ed) Mixed Jurisdictions 126.
\footnote{220} \textit{Ibid}.
\footnote{221} \textit{Ibid}.
\footnote{222} Dugard Human Rights and the South African Legal Order (1978) 284.
\footnote{223} \textit{Ibid}.
accepted that senior advocates who were sympathetic to the policies imposed by the executive were the favoured candidates for judicial appointment.\textsuperscript{224}

In 1979 the government appointed the Hoexter Commission to investigate the structure and functioning of the courts in South Africa.\textsuperscript{225} In his evidence before the Commission, Justice Didcott voiced his concern regarding the alarming number of judicial appointments and elevations to the Bench that occurred for reasons other than merit.\textsuperscript{226} He found this position to be inevitable where the appointment of judges was left to the sole discretion of the executive.\textsuperscript{227} The Commission itself found that in a number of cases, merit had not been the decisive factor leading to a judicial appointment.\textsuperscript{228} It also found that judicial appointments were often made without prior consultation with the Judge-President of the Supreme Court Division concerned.\textsuperscript{229} There was no statutory obligation to consult a Judge-President before appointment, and apparently no constitutional convention had developed in this regard.\textsuperscript{230} Even in the Appellate Division, appointments were made without prior consultation with the Chief Justice.\textsuperscript{231}

2.7 Acting judges

The practice of appointing acting judges has been severely criticized as undermining the independence of the judiciary.\textsuperscript{232} One of the reasons for such criticisms is that an acting judge does not enjoy the same security of tenure as that which is afforded to permanent judges.\textsuperscript{233} In \textit{R v Deitch},\textsuperscript{234} however, Stratford CJ held that such criticisms are to be

\begin{footnotesize}
\begin{itemize}
\item[224]\textsuperscript{224} Kahn “The Didcott Memorandum and Other Submission to the Hoexter Commission” 1980 97 \textit{SALJ} 651 661.
\item[225]\textsuperscript{225} Kahn 1980 \textit{SALJ} 651.
\item[226]\textsuperscript{226} Kahn 1980 \textit{SALJ} 661.
\item[227]\textsuperscript{227} Ibid.
\item[228]\textsuperscript{228} Gauntlett 1990 \textit{Consultus} 24.
\item[229]\textsuperscript{229} Ibid.
\item[230]\textsuperscript{230} Ibid.
\item[231]\textsuperscript{231} Ibid. In order to make these appointments, Parliament had to pass the Appellate Division Quorum Act 27 of 1955. This was presumably done in order to validate legislation which sought to disenfranchise coloured people. See Van Blerk 1992 \textit{THRHR} 572.
\item[232]\textsuperscript{232} Suzman “The Bench and the Bar: Two-way Traffic?” 1980 97 \textit{SALJ} 238 242 - 244.
\item[233]\textsuperscript{233} \textit{R v Deitch} 1939 AD 178. Whereas, permanent judges were appointed until the age of 70, acting judges were appointed on a temporary basis.
\item[234]\textsuperscript{234} 1939 AD 178.
\end{itemize}
\end{footnotesize}
weighed against the “practical necessity of such appointments in the interests of good order and government”.\textsuperscript{235}

The appointment of acting judges has long been practised in South Africa.\textsuperscript{236} Section 4 of the Cape Charter of Justice authorised the Governor of the Cape Colony to appoint a judge from another division of the Supreme Court to temporarily fill a judicial vacancy. This provision was extended by the Judge’s Act\textsuperscript{237} in that the Governor-General was permitted to appoint some “fit and proper person” to temporarily act as a judge “whenever it is expedient for any reason to do so”.\textsuperscript{238} The Supreme Court Act extended this provision even further. In terms of section 10(3) of this Act, whenever it was expedient to do so, the President may appoint a fit and proper person to act as a judge in the Supreme Court. This section also empowered the President to appoint an acting judge in addition to the permanent judges already presiding. The acting appointment was therefore not always necessary to fill a vacancy on the bench. Moreover, the President could appoint acting judges for any period he or she deemed necessary.\textsuperscript{239} Acting appointments made by the Minister of Justice was limited to one month.\textsuperscript{240}

\textbf{2.8 Conclusion}

From the above discussion it is clear that judicial appointments throughout South Africa’s history were often fraught with discrimination and secrecy, and political influence frequently played a dominant role during the selection process. During the earliest days of settlement at the Cape, Roman-Dutch law was applied. In terms of the old Dutch authorities, women were not eligible for appointment to judicial office. Furthermore, separation of powers was nonexistent, since no distinction was made between the executive and the judicial arms of government.

\begin{itemize}
\item \textsuperscript{235} \textit{R v Deitch} 186.
\item \textsuperscript{236} Olivier “The appointment of acting judges in South Africa and Lesotho” 2006 \textit{Obiter} 555 569.
\item \textsuperscript{237} 41 of 1941.
\item \textsuperscript{238} Section 4 of the Judge’s Act.
\item \textsuperscript{239} Section 10(3) of the Supreme Court Act.
\item \textsuperscript{240} Section 10(4) of the Supreme Court Act.
\end{itemize}
After the Cape Colony was formally ceded to Britain in 1806, several changes were made to the administration of justice. The Cape Charters of Justice, which lay down formal prerequisites for appointment to judicial office, were promulgated. Women, however, were still not eligible for judicial appointment, or even fit to practise as attorneys, since an interpretation of the word “persons” in the Cape Charters of Justice included men only. From 1923, after the Women Legal Practitioners Act was passed, women were legally entitled to practise in the legal profession.

Notwithstanding the legislative provisions enabling women legal practitioners to enter the profession, discriminatory practices in the appointment of judges arguably reached its zenith during the years of apartheid. This may largely be attributed to the need of the apartheid government to control the judiciary, which saw the appointment of judges left solely in the hands of the executive branch of government. An inevitable consequence of the appointment method employed during the years of apartheid was that the bench was not representative of society since the majority of the members of the bar were white and male.\textsuperscript{241} Corder believes that, due to the fact that the majority of judges appointed between 1950 and 1980 were white male members of the Pretoria Bar, the bench during those years was not even representative of the white community in South Africa.\textsuperscript{242} Until 1969, not one woman had ever been appointed to a bench, and even after the appointment of Justice Leonora van den Heever in 1969,\textsuperscript{243} no other female candidate was appointed before 1994.\textsuperscript{244} At the fall of apartheid, the High Court judiciary was therefore entirely unrepresentative of the South African population and the legal profession was in dire need of constitutional reforms to remedy the racial and gender imbalances of the bench.

\begin{footnotes}
\item[241] Van der Merwe et al “Republic of South Africa” in Palmer (ed) \textit{Mixed Jurisdictions} 126.
\item[243] Kinnear \textit{Women in Developing Countries} 113.
\item[244] Wesson & du Plessis 2008 \textit{SAJHR} 191.
\end{footnotes}
CHAPTER 3

INTERNATIONAL LAW

3 1 Introduction

As a result of the oppressive policies imposed by the apartheid state, South Africa was seen as a “delinquent state” within the international community and international human rights law was perceived to be a threat to the government. After the fall of apartheid, this view changed and international law is now seen as one of the pillars upon which our new constitutional dispensation is based. The primary and most effective means through which human rights are realized remains through national law. International human-rights law, however, provides a “normative beacon” of minimum standards to which countries must aspire.

Research has shown that women’s organizations have long pursued international recognition of women’s rights. Representatives of these organizations were present during the formation of the League of Nations in 1919 to lobby for the recognition of rights of particular concern to women. Their work was continued after the fall of the League and the formation of its successor, the United Nations, and through the years women’s rights became markedly more pronounced in the international arena.

In view of the above, this chapter first considers the application of international law under the new constitutional dispensation. Focus then shifts to the international and regional

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246 Ibid.
248 Ibid.
251 See generally De Haan “A Brief Survey of Women’s Rights from 1945 to 2009” 2010 (1) UN Chronicle 56.
instruments that ensure gender equality, specifically those that place South Africa under a mandate to ensure that a greater gender balance is achieved within the judiciary. Given the analogous nature of the appointment of judges to employment situations, a discussion of certain ILO conventions is included. Furthermore, attention is also paid to several soft-law instruments and institutions which aim to ensure the observance of gender equality within member states.

3 2 Domestic application of international law in South Africa

The sources of international law include customary international law and treaty (conventional) law, but it is the latter that is considered to be more defined and binding on sovereign states.

Treaties are agreements entered into between states whereby those states agree to be bound by the terms of the treaty concerned. Formally, only those countries that have signed and ratified a particular treaty are bound by its provisions, although certain treaties are said to have acquired the status of customary international law. Customary international law has been called the “common law of the international legal system” and is developed through state practice and custom. The International Court of Justice has identified two elements that must be present for a practice to be said to form part of customary international law: the rule must be followed extensively (usus), especially by

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252 Article 38(1) of the Statute of the International Court of Justice lists “general principles of law recognized by civilized nations” and “judicial decisions, and the teachings of the most highly qualified publicists” as the other two sources, although they are less seldom invoked. See Strydom & Hopkins “International Law” in Woolman, et al Constitutional Law of South Africa 2 ed 2011 RS 3 30-5.
255 Some writers argue that the Universal Declaration of Human Rights (UDHR) has attained the status of customary international law. Dugard, however, argues that only the more basic provisions of the UDHR falls into this category and are therefore binding on all states, regardless of the state of ratification. See Dugard International Law: A South African Perspective 4ed (2011) 326.
257 In the North Sea Continental Shelf Case 1969 ICJ Reports 3.
the states concerned, and the states must consider themselves legally compelled to follow the rule (*opinio juris*).\(^{258}\)

### 3.2.1 Treaty law

According to section 231 of the Constitution, the incorporation of treaties is dualistic in nature.\(^{259}\) The negotiation and signing of treaties are the exclusive mandate of the executive, although parliamentary ratification is required before a treaty is binding on the Republic.\(^{260}\)

An important distinction must be made with respect to those treaties that bind South Africa, and those that form part of South African legislation. Section 231(2) of the Constitution states that treaties that have been approved by the National Assembly and the National Council of Provinces bind the Republic. Section 231(4) requires the enactment of national legislation for international agreements to "become law in the Republic". The difference between these two provisions is that treaties that have been entered into by South Africa without the subsequent incorporating legislation referred to in subsection 4, merely bind the Republic in its international relations.\(^{261}\) Non-compliance with the provisions of the relevant treaty will render South Africa liable in terms of international law only.\(^{262}\) Once an Act of Parliament has incorporated a treaty into South African law, the provisions of the treaty may be invoked in domestic courts and tribunals.\(^{263}\)

### 3.2.2 Customary international law

Section 232 of the Constitution provides for the domestic application of customary international law. In terms of this section, customary international law forms part of South

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\(^{258}\) Dugard *International Law* 28.

\(^{259}\) Strydom & Hopkins "International Law" in Woolman *et al* *Constitutional Law* 30-9.

\(^{260}\) Section 231(1)-231(2) of the Constitution.

\(^{261}\) Church *et al* *Human Rights from a Comparative and International Law Perspective* 183.

\(^{262}\) Ibid.

\(^{263}\) Ibid.
African law unless it is inconsistent with the provisions of the Constitution or an Act of Parliament. It follows that common law and judicial precedent are subordinate to customary international law. The doctrine of *stare decisis* can therefore not be invoked to frustrate the application of a new rule of international customary law.

Although the Constitution leaves no doubt as to the applicability of customary international law in South Africa, the question as to which rules are accepted as customary international rules is not always easy to answer. As noted above, a rule must meet the twin requirements of *usus* and *opinio juris* in order to be considered a binding norm under customary international law. In assessing whether a certain norm meets these requirements, courts consult the decisions of international courts and tribunals, as well as domestic courts in foreign jurisdictions addressing the same issue.

South African courts have in the past been inconsistent in their approach to the number of states that should have accepted a customary international law rule for it to be considered binding on South Africa. In *Du Toit v Kruger*, for instance, De Villiers J would not accept a norm to form part of customary international law unless it could be shown that the rule was “universally accepted”, suggesting that a more stringent test was applied in South Africa than is required by international law itself. In *S v Petane*, however, it was held that the rule must be widely accepted, at the very least. Universal acceptance is therefore not required for a customary law rule to form part of South African domestic law.

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264 Dugard *International Law* 50.
266 *Ibid.* 51
267 Strydom & Hopkins “International Law” in Woolman *et al* *Constitutional Law* 30-8. See also *Kaunda v President of South Africa* 2004 (5) SA 191 (CC) where the Constitutional Court relied on judgements passed by the International Court of Justice, as well as a report by the International Law Commission to determine whether or not diplomatic protection is now recognized as a customary international law norm.
268 1905 22 SC 234 238.
269 Dugard *International Law* 51. In the *North Sea Continental Shelf Cases* the International Court of Justice required merely that state practice of the norm in question should have been “both extensive and virtually uniform”.
270 1988 (3) SA 51 (C).
271 *S v Petane* 56 – 57.
3 2 3 International law as an interpretative guide

Section 39(1) of the Constitution instructs South African courts to consider international law when interpreting the Bill of Rights. Furthermore, in terms of section 233, when interpreting any Act of Parliament, South African courts are to prefer any reasonable interpretation that is consistent with international law over an interpretation that is inconsistent with it. As interpretational guide, the Constitution Court itself has noted the significance of international law. In *S v Makwanyane*,272 the Court had to determine the applicability of international law in light of the Interim Constitution. Chaskalson P stated that:

> “public international law would include non-binding as well as binding law. They may both be used under the section273 as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter 3274 can be evaluated and understood.”275

Both binding and non-binding provisions in international instruments therefore apply to the domestic interpretation of the Bill of Rights.276 It is, however, not only the interpretation of the Bill of Rights that is informed by international law. In *Glenister v President of the Republic of South Africa*277 international law was applied to determine the constitutionality of two Acts of Parliament.278 Furthermore, as was found in *Daniels v Campbell*,279 common law and customary law should be developed so as to be consistent with the obligations imposed in terms of international law.280

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272 *S v Makwanyane*1995 (3) SA 391 (CC).
273 The equivalent to section 39 of the Final Constitution was section 35 in the Interim Constitution.
274 Chapter 3 was the Bill of Rights in the Interim Constitution.
275 *S v Makwanyane* 413E.
276 It is, in fact, not only the interpretation of the Bill of Rights that is informed by international law. In *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC), international law was applied to determine the constitutionality of an Act of Parliament.
277 2011 (3) SA 347 (CC).
278 The Acts of Parliament in question were the National Prosecuting Authority Amendment Act 56 of 2008 and the South African Police Service Amendment Act 57 of 2008 in terms of which the Directorate of Special Operations, a crime-fighting unit within the National Prosecuting Authority was disbanded and replaced by the Directorate of Priority Crime Investigations which was positioned within the South African Police Services. See *Glenister v President of the Republic of South Africa* [1].
279 2004 (5) SA 331 (CC).
280 *Daniels v Campbell* 354E-F.
The Constitution is therefore clear on the importance of international law and the application of it in domestic courts. The rest of this chapter provides a detailed and comprehensive analysis of the international instruments that ensure the observance of gender equality in state parties, specifically with respect to the appointment of judges.

3.3 International women’s rights instruments

Many gender-specific treaties and declarations that aim to advance the rights of women on a global scale exist today, and general international human-rights instruments also contain provisions relating to the equal enjoyment of rights by men and women. The focus of this chapter falls specifically on affirmative-action measures undertaken to ensure a greater representation of women in the judiciary. What follows, therefore, is a discussion on the most important gender-specific international instruments that provide for the imposition of affirmative-action measures which could affect the gender balance in the South African judiciary.

3.3.1 The Convention on the Elimination of all Forms of Discrimination against Women

From a gender equality perspective, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is the single most important instrument adopted by the UN. The CEDAW was adopted in 1979 as the first detailed, comprehensive and legally-binding international instrument ensuring gender equality. The rate and extent

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281 For instance, the Convention on the Nationality of Married Women, the Convention on the Political Rights of Women, the Declaration on the Elimination of Violence against Women and the Convention on the Elimination of All Forms of Discrimination against Women.

282 For instance, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights all contain provisions relating to gender equality.

283 Byrnes “The Convention on the Elimination of all Forms of Discrimination against Women” in Benedek, Kisaakye & Oberleitner (eds) Human Rights of Women: International Instruments and African Experiences 119 119. The predecessor to the CEDAW, the Declaration on the Elimination of Discrimination against Women was not considered binding, and other human rights-treaties failed to adequately cater to the unique position of women in society. A comprehensive and detailed treaty dedicated to the rights of women had been considered from as early of 1972 but became markedly more pronounced during the UN Decade for Women. Brautigam International Human Rights Law in Benedek et al Human Rights of Women 11.
of ratification of the CEDAW are commendable, with 187 state parties having ratified, acceded to or seceded this Convention. This accomplishment is, however, marred by the number of reservations made by signatories to the CEDAW. Although reservations are permitted in terms of article 28 of the CEDAW, concerns have been raised that several of the reservations made by state parties are so extensive as to make ratification virtually meaningless.

3 3 1 1 Formation, adoption and ratification

The CEDAW came about as a result of the acknowledgements that existing international instruments did not adequately and comprehensively address the disadvantages and harms faced by women. Calls for a comprehensive and detailed instrument addressing gender discrimination were made as early as 1946, although it was not until 1963 that the General Assembly called on the Commission on the Status of Women (hereafter CSW) to commence with the drafting process. The Declaration on the Elimination of Discrimination against Women was adopted by the General Assembly in 1967. As a

284 These figures are made available on the UN website at http://www.un.org/womenwatch/daw/cedaw/states.htm (accessed 10-08-2013).

285 A reservation to a treaty is defined as a unilateral statement made by the a state at the time of signing, ratifying, approving, accepting or acceding to a treaty that alters or excludes the application of certain provisions on that state. Schabas "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women" 1997 3 William and Mary Journal of Women and the Law 79 79-80. Reservations to CEDAW are very often justified by state parties on the local cultural, religious and traditional backgrounds of the state concerned. See Bowman "Safeguarding Women's Rights: Investigating the Effectiveness of the Convention on the Elimination of all Forms of Discrimination against Women" Undercurrent Journal 2012 50 51.

286 Reservations to the treaty are made permissible by article 28 of the Convention, but a reservation that is incompatible with the purpose of the Convention is not permitted. Two forms of reservations are identified. Firstly, some reservations simply modify the application of certain provisions of a treaty with respect to the state party entering the reservation. Secondly, some reservations entirely exclude state obligations in respect of certain provisions. The CEDAW is said to be the Convention with the highest number of reservations. See Ngaba "CEDAW: Eliminating Discrimination against Women" 1995 (27) Agenda 81 82. Bowman argues that this is one of the primary weaknesses of the CEDAW, especially considering the fact that the CEDAW Committee does not have the authority to regulate reservations made by state parties. See Bowman Undercurrent Journal 51.


288 This was acknowledged in the Preamble to CEDAW.

289 These calls were made by the British Federation of Business and Professional Women. Fraser "Becoming Human: The Origins and Development of Women’s Human Rights" 1999 (21) Human Rights Quarterly 853 889.

290 The CEDAW is available at http://www.unhcr.org/refworld/docid/3b00f05938.html (accessed 2013-03-31).
Declaration, this instrument was not legally binding on state parties, which prompted proposals for a comprehensive, legally binding convention to replace it.\textsuperscript{291} The CEDAW, once adopted, thus moved beyond the Declaration which was merely a broad, non-binding statement of the right to gender equality and non-discrimination.\textsuperscript{292}

In 1976, a draft Convention prepared by a special working group was taken up by the CSW with the aim of having the Convention completed and ready for signatures at the Copenhagen Convention in 1980.\textsuperscript{293} The CEDAW was adopted by the General Assembly in 1979 and opened for signatures during the mid-Decade Conference of the UN Decade for Women.\textsuperscript{294} The CEDAW entered into force in September 1981.\textsuperscript{295} It was signed by the South African government in 1993,\textsuperscript{296} after which the General Law Fourth Amendment Act was enacted to eliminate the last traces of gender discrimination so as to allow for the ratification of the CEDAW.\textsuperscript{297} On 15 December 1995 South Africa ratified CEDAW without reservation.\textsuperscript{298}

3 3 1 2 CEDAW provisions

The Preamble to the CEDAW affirms its belief that complete development of a country can not be achieved without full participation of women in all industries. It also states that despite the various international instruments in existence, extensive discrimination against women persists. By ratification of the CEDAW, state parties undertake to

\begin{footnotes}
\footnotetext{291}{Fraser 1999 Human Rights Quarterly 894.}
\footnotetext{293}{Fraser 1999 Human Rights Quarterly 899 – 900. The Copenhagen Convention formed part of a series of international conferences that were held between 1975 and 1985, and which aimed to improve the status of women globally. These conferences are discussed in greater detail below.}
\footnotetext{296}{Ngaba 1995 Agenda 81.}
\footnotetext{297}{Dugard \textit{International law} 335.}
\footnotetext{298}{Olivier “South Africa and international Human Rights Agreements: Procedure, Policy and Practice (Part 1)” 2003 (2) TSAR 293 302.}
\end{footnotes}
eliminate all forms of discrimination experienced by women in both the public and private spheres. Article 1 of CEDAW defines discrimination against women as:

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

This definition recognizes that discrimination can occur in many different forms and therefore prohibits any “distinction, exclusion or restriction” based on sex. Moreover, both direct and indirect practices which may discriminate against women are covered by the definition as is evidenced by the use of the words “purpose or effect”. Even practices that appear to be objectively neutral, but which have the effect of disproportionately excluding women from the enjoyment of a particular right, are prohibited. The definition therefore focuses not only on de jure, but also on the de facto enjoyment of the rights enumerated in the CEDAW.

Notwithstanding the broad protection offered by the definition of discrimination adopted by the drafters of CEDAW, the definition has been subject to criticism. The inclusion of the term “on the basis of equality with men” signifies that women are entitled only to those rights that are afforded to men under present human-rights instruments. It seeks to place women on an equal footing with men, yet fails to consider the social disadvantages suffered by women.

In terms of article 2 of the CEDAW, state parties are to pursue, without delay, all appropriate measures to eliminate discrimination against women. This provision imposes

300 Ibid.  
301 Ibid.  
303 It is not only the definition of discrimination that compares women’s enjoyment of human rights to that of men. Most articles in CEDAW use the same yardstick to measure the equal enjoyment of the rights between men and women.
a positive obligation on member states to, amongst other things, adopt legislative and other measures to prohibit gender-based discrimination.304

The Committee on the Elimination of All Forms of Discrimination against Women (the CEDAW Committee)305 has identified three obligations that are of paramount importance if this ideal is to be achieved.306 Firstly, state parties must eliminate all direct and indirect discrimination against women and protect women against acts of discrimination committed by public authorities, the judiciary, organizations, enterprises or private persons.307 Secondly, state parties are to employ effective programmes and policies aimed at improving *de facto* equality between men and women.308 Lastly, state parties must address gender-based stereotypes that affect women through actions by individual persons, legal or public institutions and structures.309

Bayefsky argues that the wording of article 2 is unfortunate, in that it incorporates limitations to the obligations imposed on member states.310 By enjoining state parties to pursue the elimination of discrimination against women “by all appropriate means and without delay” means that the obligation is not necessarily breached each time an act of discrimination occurs within the borders of a member state.311 The CEDAW Committee will then have to assess on a case-by-case basis whether the measures taken by the state party were sufficient to discharge its duty in terms of the CEDAW.312

Ensuring equal treatment between men and women is not enough to bring about *de facto* equality. In order to ensure true substantive equality, women must be given an equal start and an “enabling environment”, and in some instances non-identical treatment of men

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304 *S v Baloyi* 2002 (2) SA 425 (CC) 434A-B.
305 This Committee comprises a group of experts who are mandated to oversee the implementation of CEDAW. The roles and responsibilities of this Committee are explained more fully below.
and women is required to address socially constructed differences between them. In terms of article 4(1) of CEDAW, “temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination”. Affirmative-action measures implemented by state parties to improve the position of women and bring about substantive equality are therefore not prohibited in terms of CEDAW.

Article 7 of CEDAW states that:

“States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:
(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.”

The protection offered by article 7 includes all areas of public and political life, not only those specifically mentioned. It is a broad concept and includes the exercise of legislative, executive, administrative and judicial powers. It furthermore includes many areas of civil society, such as community-based organizations, trade unions and political parties. The Committee itself noted that women’s participation in the public sphere has, to a large extent due to stereotypical assumptions of the role of women in society, been confined to issues such as children, the environment and health. It also noted that the failure to achieve equal representation of women could be as a result of “outmoded...
practices and procedures which inadvertently promote men” and that special measures should be adopted to ensure the full and equal participation of women in public life.\textsuperscript{318} As such, the Committee has recommended that state parties adopt special measures, such as financially assisting and training female candidates and targeting women for appointment to public positions, including the judiciary.\textsuperscript{319}

3 3 1 3 Enforcement of CEDAW

Article 17 of the CEDAW provides for the establishment of a Committee on the Elimination of Discrimination against Women which is to oversee the state parties’ adherence to the obligations set by the CEDAW.\textsuperscript{320} State parties are required to draft reports periodically on its compliance with the obligations created under CEDAW and submit these to the CEDAW Committee.\textsuperscript{321} The initial report must be submitted due within one year after ratification of CEDAW, and state parties are to submit a report every four years thereafter.\textsuperscript{322} South Africa’s initial report was submitted in 1998.\textsuperscript{323} In 2009, South Africa submitted a combined 2\textsuperscript{nd}, 3\textsuperscript{rd} and 4\textsuperscript{th} report covering the period 1998 – 2008, after having failed to submit these report in time.

Shadow reports are reports that are voluntarily drafted by civil society groups and Non-government Organizations (hereafter NGO’s) in order to critique the state report and to provide information that the civil society group wishes to bring to the attention of the Committee.\textsuperscript{324} This provides an opportunity for the Committee to take the issues that are

\textsuperscript{318} Paragraph 15 of General Recommendation 23.
\textsuperscript{319} Ibid.
\textsuperscript{320} Eight other treaty bodies are established under different treaties. It is interesting to note that, with the exception of the Commission for the Elimination of Discrimination against Women, women are also not equitably represented on these treaty bodies. Moreover, the treaty body dedicated to the advancement of women’s rights, the CEDAW Committee, has been criticized for its overrepresentation of women. See Charlesworth, Chinkin & Wright “Feminist Approaches to International Law” 1991 (85) The American Journal of International Law 613 624.
\textsuperscript{321} Article 18 of CEDAW.
\textsuperscript{322} Ibid.
\textsuperscript{323} The report is available at \url{http://www.women.gov.za/attachments/article/100/CEDAW.pdf} (accessed 2017-01-21).
\textsuperscript{324} Steiner, Alston and Goodman International Human Rights in Context (2008) 851.
highlighted in the shadow report up during dialogue with the state in question. In response to the 2009 state report, the Commission of Gender Equality submitted a shadow report in which it noted with disappointment that the gender transformation of the High Court in South Africa has emerged as one of the most unsatisfactory areas of achieving gender equality. In a combined shadow report, the Centre for the Study of Violence and Reconciliation, the People Apposing Women Abuse and the Western Cape Network on Violence Against Women also reported on the low number of women in the judiciary in South Africa. This report also pointed out that the state report submitted to the CEDAW Committee failed to mention any substantive remedies on how to remedy the gender imbalance on the bench.

After examination of these reports, the CEDAW Committee enters into “constructive dialogue” with each of the state parties and publishes “concluding observations”, highlighting those aspects upon which the member state can improve. In 1998, for example, the Committee recommended that South Africa employ affirmative action measures to address the low number of female judges. In its concluding observations of 2011, the CEDAW Committee noted the slow progress made in terms of appointing more female judges, particularly when comparing it to women’s representation in Parliament and the public administration. The CEDAW Committee furthermore noted that the progress that was made to remedy gender imbalances in Parliament and the public administration is due to temporary special measures as contemplated in Article 4 of the CEDAW. As a result, the CEDAW Committee recommended that South Africa -

325 Ibid.
continues to adopt temporary special measures in the appointment of judges to ensure greater representation of women.  

Over time, treaty bodies have adopted the practice of developing objective, non-country specific “general comments” based on the reports submitted by state parties. These general comments have evolved to include not only critical remarks concerning state compliance, but also to provide an authoritative interpretation of the provisions contained in a specific treaty. These general comments have therefore evolved into “distinct juridical instruments” and carry considerable persuasive force, even though these are not legally binding due to the fact that they are written by a committee of experts who are not lawfully empowered to make binding interpretations of treaties.

It is under article 21 that the CEDAW Committee is empowered to make general recommendations. To date, the CEDAW Committee has adopted 34 general recommendations. Each general recommendation deals with a specific issue or provision in CEDAW and provides authoritative, albeit non-binding, guidance as to the interpretation of the provision concerned. Importantly, general recommendation 5 urges state parties to make better use of positive action, quota systems or preferential treatment so as to promote de facto equality between men and women. General recommendation 6 calls on state parties to strengthen national gender machinery, as well as the translation and publication of the CEDAW. General recommendation 23 furthermore reiterates the importance of equal participation between men and women in the public sphere. To this end, state parties are to employ temporary special measures to ensure

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331 Ibid.
335 These general recommendations are published online by the Office of the United Nations High Commissioner for Human Rights at http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx (accessed 2017-01-29).
336 National gender machinery refers to state institutions, non-government organizations and civil society groups established for the advancement of women. Structures that form part of the South African national gender machinery include the Office on the Status of Women, Gender Focal Points in government departments, specialized parliamentary committees and the Commission for Gender Equality. See Gouws “The State of National Gender Machinery” in Buhlungu, Daniel, Southall & Lutchman State of Nation: South Africa 2005 - 2006 144 144.
that women are equitably represented in domestic decision-making bodies, including the judiciary.\textsuperscript{337}

General recommendation 25 provides further scope on the adoption of the special measures contemplated in Article 4 of the CEDAW. It reiterates that the adoption of temporary special measures to accelerate \textit{de facto} equality between men and women is not discrimination. It furthermore stressed that the special measures must be temporary in nature and must be discontinued once the objectives of equality are achieved.\textsuperscript{338}

Apart from state-reporting and general recommendations, the CEDAW also contains an individual complaints-procedure in the form of the Optional Protocol to the Convention on the Elimination of all forms of Discrimination against Women (OPCEDAW). The OPCEDAW came about as a result of calls for the strengthening of the UN enforcement mechanisms\textsuperscript{339} and was adopted in 1999.\textsuperscript{340} The OPCEDAW allows individuals or groups of individuals to lay complaints to the Committee where they feel their rights, as protected under the Convention, were infringed upon by the government of the state party concerned.\textsuperscript{341} It furthermore empowers the CEDAW Committee to conduct enquiries after it has received information on grave or systematic violation of the CEDAW.\textsuperscript{342} To date, 108 countries have ratified the OPCEDAW.\textsuperscript{343} It was ratified by South Africa in 2005.\textsuperscript{344}

The CEDAW Committee is empowered to declare inadmissible any communication which is incompatible with CEDAW, which is ill-founded or cannot be substantiated, or where rights are abused by the submission of such communication.\textsuperscript{345} Furthermore, where the

\begin{itemize}
\item \textsuperscript{337} Paragraph 15 of General Recommendation 23. See also paragraph 43 of this recommendation.
\item \textsuperscript{338} Chapter 3 of General Recommendation 25.
\item \textsuperscript{339} Byrnes “Slow and Steady Wins the Race?: The Developments of an Option al Protocol to the Women’s Convention” 1997 91 Proceedings of the Annual Meeting (American Society of International Law 383 383.
\item \textsuperscript{341} Article 2 of the OPCEDAW.
\item \textsuperscript{342} Article 8 of the OPCEDAW.
\item \textsuperscript{343} These figures are made available on the UN website at http://indicators.ohchr.org/ (accessed 2017-01-29).
\item \textsuperscript{344} \textit{Ibid}.
\item \textsuperscript{345} Article 4 of the OPCEDAW.
\end{itemize}
complaint relates to a matter which has already been heard by the CEDAW Committee, or where the complainant did not exhaust all internal remedies before submitting the communication, the matter will similarly be declared inadmissible.\textsuperscript{346} Bowman argues that this last-mentioned requirement gravely weakens the effectiveness of the OPCEDAW in that discrimination often occurs in the pursuance of legal remedies at local level.\textsuperscript{347}

Cases that have been heard by the CEDAW Committee include the following topics:\textsuperscript{348} Discrimination in housing, domestic violence, reproductive rights, the rights of incarcerated women, parental leave, rape stereotypes applied by domestic courts and gender discrimination in employment.\textsuperscript{349}

3 3 2 ILO Conventions

The ILO was established as the first specialized agency under the League of Nations.\textsuperscript{350} Conventions entered into during the early years of the ILO were largely protective in nature, and were thus topics of much debate between the ILO and international women’s organizations.\textsuperscript{351} The ILO Night Work (Women) Convention of 1919 was particularly contested.\textsuperscript{352} In terms of this convention, women could not be required to work between 10 pm and 5 am so as to protect the health women and ensure their availability to fulfil their domestic tasks.\textsuperscript{353} The Maternity Protection Convention\textsuperscript{354} was adopted in the same year. This convention lay down strict rules with respect to paid leave for pregnant women,

\textsuperscript{346} Ibid.
\textsuperscript{347} Bowman \textit{Undercurrent Journal} 54.
\textsuperscript{348} The findings of these cases may be accessed at \url{http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm} (accessed 16-11-2014).
\textsuperscript{349} This last-mentioned case was brought against Turkey where domestic courts failed to recognize gender-based discrimination after a female employee was wrongfully dismissed from her employment. In this regard, see the findings of the CEDAW Committee available at \url{http://www.bayefsky.com//pdf/turkey_t5_cedaw_28_2010.pdf} (accessed 2017-01-29).
\textsuperscript{350} Van Daele “Writing ILO Histories: A State of the Art” in van Daele, Gargia, Goethem & van der Linden (eds) \textit{ILO Histories} 13.
\textsuperscript{351} Wickander “Demands on the ILO by Internationally Organized Women in 1919” in van Daele \textit{et al ILO Histories} 67 71.
\textsuperscript{352} Ibid.
\textsuperscript{353} Article 2 of the Night Work (Women) Convention, 1919.
\textsuperscript{354} Maternity Protection Convention, 1919.
a provision which placed a burden upon employers and arguably resulted in women of childbearing years being less favoured for employment.\textsuperscript{355} 

Over time, the focus of the ILO gradually shifted from that of offering women workers extra protection to ensuring that women are afforded equal rights to those of men.\textsuperscript{356} As part of the ILO’s mandate, it was to regulate issues concerning discrimination within the employment context.\textsuperscript{357} The ILO’s guiding principles on discrimination are codified under the Declaration of Philadelphia of 1944 which stated that “all human beings irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”.\textsuperscript{358} Importantly, the ILO Constitution and the Philadelphia Declaration lay out the complaint procedures where states do not conform to the principles as stated in the Declaration on Fundamental Principles and Rights at Work.\textsuperscript{359} In terms of the last-mentioned Declaration, all members of the ILO have to uphold the fundamental principles which form the subject of ILO Conventions.\textsuperscript{360} The elimination of discrimination in matters of employment and occupation is one of the principles to which this provision refers.\textsuperscript{361}

The ILO has adopted numerous conventions that aim to ensure that non-discrimination is observed in member states, the most important of which is the Discrimination (Employment and Occupation) Convention 111.\textsuperscript{362} This Convention describes discrimination as “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”\textsuperscript{363} Article 2 furthermore provides for the equal remuneration between men

\begin{footnotesize}
\begin{enumerate}
\item Miller “Geneva – Key to Equality': Inter-war Feminists and the League of Nations” 1994 \textit{Women's History Review} 219 223.
\item Servais \textit{International Labour Law} 154.
\item McKean \textit{Equality and Discrimination under International Law} (1983) 124.
\item McKean \textit{Equality and Discrimination} 124.
\item Servais \textit{International Labour Law} 67.
\item Article 2 of the Declaration on Fundamental Principles and Rights at Work.
\item Article 2(d) of the Declaration on Fundamental Principles and Rights at Work.
\item This document is available at \url{http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_85_en.pdf} (accessed 10-08-2013).
\item Article 1 of the Discrimination (Employment and Occupation) Convention 111.
\end{enumerate}
\end{footnotesize}
and women for work of equal value. It requires states to conduct objective appraisals of the work performed and to determine rates of remuneration based on methods in operation in the state concerned.\textsuperscript{364}

Importantly, in terms of Article 5(2) of the Discrimination (Employment and Occupation) Convention, member states may, after consultation with relevant workers' and employers’ organizations, impose affirmative-action measures to groups of workers generally recognized to be in need of special protection or assistance. Such measures shall not be deemed to be discrimination as defined in article 1 of the Discrimination (Employment and Occupation) Convention.

Another significant instrument that was adopted by the ILO is the Declaration on Equality of Opportunity and Treatment of Women Workers of 1975.\textsuperscript{365} This Declaration not only prohibits discrimination based on sex and gender, but specifically provides for the imposition of special treatment in transitional periods to bring about gender equality in the workplace.\textsuperscript{366} Furthermore, the Declaration on Equality of Opportunity and Treatment of Women Workers also provides for equality in education and vocational training,\textsuperscript{367} as well as positive measures to encourage equal access to top positions in both the public and the private sectors in member states.\textsuperscript{368}

3 3 3 World Conferences and the UN Decade for Women

The UN’s commitment to the advancement of women and the elimination of gender-based discrimination is aptly illustrated by the UN’s Decade for Women. The UN Decade for Women has its roots in a declaration of the UN General Assembly in 1972 declaring 1975 to be International Women’s Year.\textsuperscript{369} The Conference of the International Women’s Year

\textsuperscript{364} Servais \textit{International Labour Law} 155-156.
\textsuperscript{365} McKean \textit{Equality and Discrimination} 187.
\textsuperscript{366} Article 1 and 2(2) of Declaration on Equality of Opportunity and Treatment of Women Workers. See also McKean \textit{Equality and Discrimination} 187.
\textsuperscript{367} Article 5(1) of the Declaration on Equality of Opportunity and Treatment of Women Workers.
\textsuperscript{368} Article 6(5) of the Declaration on Equality of Opportunity and Treatment of Women Workers.
\textsuperscript{369} At this time in history, two issues featured prominently in the workings of the UN, namely population and food. Women were seen to be the key factors to alleviating these problems since it can be directly
was held in Mexico City in 1975 and was the first inter-governmental conference ever to address women’s issues. During this conference, a World Plan of Action was adopted that proposed actions to be taken during the next decade, both nationally and internationally, to promote the three objectives of the conference, namely equality, development and peace. Accordingly, the decade between 1976 and 1985 was to become known as the UN Decade for Women where the World Plan of Action was to be implemented by member states.

The Mid-Decade Conference on Women was held in Copenhagen in 1980 to appraise and review the implementation of the World Plan of Action. The Decade for Women concluded with the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, which was held in Nairobi in 1985. This final conference culminated in the adoption of the Nairobi Forward-looking Strategies for the Advancement of Women. This conference completed a gradual shift in the way that the UN viewed women; where women were considered to be in need of welfare programmes and support measures to raise their status before the UN Decade for Women, focus shifted to the need for equal participation of women, which was later viewed as being fundamental to the development of society as a whole.

attributed to the way in which women live. The International Women’s Year was declared to address these issues. See Pietilä & Vickers Making Women Matter: The Role of the United Nations (1990) 72 - 75.  

370 Brautigam “International Human Rights Law” in Benedek et al Human Rights of Women 16

371 On a national level, the World Plan of Action called for the establishment of national gender machinery to accelerate the domestic implementation of the plan. Internationally, two women-specific institutions were created, namely the International Research and Training Institute for the Advancement of Women (INSTRAW) and United Nations Development Fund for Women (UNIFEM). Brautigam “International Human Rights Law” in Benedek et al Human Rights of Women 17.


The World Conference on Human Rights was held in Vienna in 1993. Although this conference was not dedicated to the advancement of women, the ensuing declaration\textsuperscript{376} did make special reference to the fact that women’s rights “are an inalienable, integral and indivisible part of universal human rights” and that the “the full and equal participation of women in political, civil, economic, social and cultural life…and the eradication of all forms of discrimination on the grounds of sex are priority objectives of the international community.”\textsuperscript{377}

A fourth world conference on women was held in Beijing in 1995, where twelve critical areas of concern were identified\textsuperscript{378} and, together with actions to be taken to improve upon these areas, were compiled under the Beijing Declaration and Platform for Action.\textsuperscript{379} The equal participation of women in power structures and decision-making bodies was the seventh area of concern, and member states formally committed themselves to attaining a gender balance within the judiciary.\textsuperscript{380}

It must be borne in mind that the declarations mentioned above are considered to form part of “soft law” and are not binding upon states in terms of international law unless they evolve into customary international obligations.\textsuperscript{381} The conferences did, however, set the scene for greater efforts to bring about equality between men and women globally and ensuring greater participation of women in the public life and both national and international decision-making structures.

\textsuperscript{376} The Vienna Declaration and Platform for Action is available at http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en (accessed 2013-04-03).
\textsuperscript{377} Paragraph 18 of the Vienna Declaration.
\textsuperscript{378} The twelve areas of concern are: women and poverty; access to education; access to health care; violence against women; the effects of armed conflict on women; economic inequality; inequality in the sharing of power and decisions-making; institutional mechanisms for the advancement of women; human rights of women; women and the environment; women and the media and the rights of the girl-child.
\textsuperscript{380} Paragraph 190(a) of the Beijing Platform for Action.
\textsuperscript{381} Viljoen \textit{International Human Rights Law in Africa} 30. A declaration that has, arguably, attained the status of customary international law is the Universal Declaration of Human Rights which is discussed below. In order to be considered to form part of international customary law, the norm must be widely accepted by state practice and it must be accepted as law by the states concerned. Church \textit{et al Human Rights} 164.
Apart from the declarations created during the World Conferences mentioned above, another important development, that of gender mainstreaming, was developed during the UN Decade for Women. Gender mainstreaming is defined as:

“[T]he process of assessing the implications for women and men of any planned action, including legislation, policies and programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.”

Gender mainstreaming, therefore, essentially ensures that a female perspective is considered at all stages of policy design, implementation and evaluation.383

Until recently, it was considered that women’s issues should be addressed by a specialized committee overseeing the implementation of the CEDAW only,384 and directives to mainstream gender issues through other UN institutions were rejected as “fundamentally misconceived”.385 It was only during the Vienna Conference in 1993 that it was publicly acknowledged that the international mechanisms aimed at promoting and protecting human rights did not adequately address concerns of women.386 Gallagher blames the failure of the international human-rights system to adequately address gender inequality on the fact that international human rights, although intended to be gender-neutral concepts, were conceived and defined without the participation of women.387 Feminists argue that, even where international instruments aim at equality of results (as

382 This definition was included in the ECOSOC Agreed Conclusions 1997/2 available at http://www.un.org/womenwatch/osagi/pdf/ECOSOCAC1997.2.PDF (accessed 2017-01-29).
384 The Committee on the Elimination of Discrimination of Women was established in terms of article 17 of the Convention. The role and mandate of this committee is discussed below.
opposed to equality of treatment), a male standard is applied.\textsuperscript{388} Similarly, where affirmative-action measures are recognized in international instruments, these measures are temporary techniques aimed to allow women to perform exactly the same as men.\textsuperscript{389} The result of the perceived gender neutrality of human rights, according to Gallagher, is that it fails to recognize that the equal treatment of persons in unequal situations will invariably perpetuate rather than alleviate discrimination.\textsuperscript{390}

During the Vienna Conference of 1993, it was formally recognized that “the equal status of women and the human rights of women...be integrated into the mainstream of the United Nations system-wide activity” and that this should “form an integral part of the United Nations human-rights activities”.\textsuperscript{391} Two years later, these calls were repeated and strengthened during the Beijing Conference, where it was included in the Beijing Platform of Action.\textsuperscript{392}

Prompted by the UN’s commitment to gender mainstreaming, treaty bodies\textsuperscript{393} have adopted measures to ensure the inclusion of a female perspective in the work carried out.\textsuperscript{394} The broad elements of gender mainstreaming as it applies to treaty bodies is to treat women’s rights as central issues and to give them equal consideration in the work carried out by the treaty body, to implement gender sensitivity in the interpretation of treaties and to consider the equal enjoyment of rights by men and women.\textsuperscript{395}

The International Commission of Jurists (ICJ) has furthermore noted that, in order to bring women’s rights into the mainstream activities of the UN, women have to be involved in the decision-making process of the UN human-rights structures.\textsuperscript{396} The ICJ has since

\textsuperscript{388} Charlesworth \textit{et al} 1991 \textit{The American Journal of International Law} 631.
\textsuperscript{390} Gallagher 1997 \textit{Human Rights Quarterly} 290.
\textsuperscript{391} Gallagher 1997 \textit{Human Rights Quarterly} 284.
\textsuperscript{392} Paragraphs 25 and 326 of the Beijing Platform for Action.
\textsuperscript{393} Treaty bodies are committees that are established under treaties that oversee the implementation of the obligation imposed by the relevant treaty.
\textsuperscript{395} Johnstone 2006 \textit{Human Rights Quarterly} 157.
\textsuperscript{396} Rishmawl “Approaches of the ICJ to Women’s Human Rights” in Cook \textit{Human Rights of Women} 344.
made a significant effort to appoint more women to its own staff, and believes that this rule should be followed by all regional and international human-rights bodies.

All the instruments and measures mentioned above were adopted with the specific aim of improving the status of women within the territories of member states. Several other instruments, however, contain provisions that impose obligations on states to eliminate gender-based discrimination and may inform greater efforts to ensure, through the imposition of affirmative action, substantive equality in judicial-appointment processes.

### 3.4 General Instruments

#### 3.4.1 The UN Charter and the formation of the Commission on the Status of Women

The Charter of the UN not only aims at securing international peace but, unlike the Covenant of the League of Nations, also includes "promoting and encouraging respect for human rights and for fundamental freedoms for all" as part of its objectives. All member states therefore carry a responsibility to protect and promote the human rights of individual human beings. The Preamble of the UN Charter affirms the equal rights of men and women of all nations, and article 1(3) of the UN Charter further states that human rights are accorded to each individual, regardless of race, sex, language or religion.

There were six organs created under the UN Charter: The General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the

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[401] Interestingly, especially considering the racial policies imposed by the South African government at the time, it was South African Prime Minister General Smuts who was largely responsible for the drafting of the UN Charter. See Dugard *International Law* 18.
International Court of Justice\textsuperscript{402} and the Secretariat.\textsuperscript{403} Under article 68 of the UN Charter, the Economic and Social Council (ECOSOC) was given the authority to establish commissions for the protection of human rights. In 1946, the ECOSOC established the UN Commission on Human Rights (Human Rights Commission)\textsuperscript{404} which, for the next two decades, focused its attention on setting international standards for the protection of human rights.\textsuperscript{405} This resulted in the formulation of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).\textsuperscript{406} Together, these three documents are known as the International Bill of Rights.\textsuperscript{407}

From as early as its first session, the ECOSOC recognized that issues pertaining to the status of women would require special attention, and accordingly a sub-committee on the status of women was established.\textsuperscript{408} Following concerns raised that a sub-committee would not adequately address the issues concerned, the sub-committee was elevated to an autonomous commission, the Commission on the Status of Women (CSW), during its second session.\textsuperscript{409}

The two basic mandates of the CSW are to “prepare recommendations and reports to the Council on promoting women’s rights in the political, economic, civil and educational fields” and to make recommendations on “urgent problems requiring immediate attention in the field of women’s rights with the object of implementing the principle that women

\textsuperscript{402} Although this chapter will focus on the substantive provisions relating to the empowerment of women, it is interesting to note that females are not equally represented in the International Court of Justice. Only 7% of the judges in this court are female. See United Nations The World’s Women 2010: Trends and Statistics (2010) 121. This is notwithstanding the fact that, according to article 8 of the UN Charter, no prohibition is placed on the participation of women in the organs of the UN.

\textsuperscript{403} Article 7 of the UN Charter.

\textsuperscript{404} This Commission was changed to the Human Rights Council in 2006. The Council is smaller, more permanent and more compliant with human rights than the Commission. Viljoen International Human Rights Law in Africa 59.

\textsuperscript{405} Church et al Human Rights 227.

\textsuperscript{406} Ibid.

\textsuperscript{407} Ibid.


and men shall have equal rights”. These functions were subsequently expanded to include other issues, such as promoting gender equality, overseeing the implementation of internationally-agreed measures aimed at the advancement of women, and reviewing progress at a national level. The Commission on the Status of Women was instrumental in the formulation and the subsequent adoption of the Declaration on the Elimination of Discrimination against Women, as well as its successor, the CEDAW.

3 4 2 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly on 10 December 1948. This declaration is a resolution of the UN General Assembly, and as such does not require ratification by member states. It does, however, carry far more weight than ordinary declarations and resolutions adopted by the General Assembly. Also, the more basic principles contained in the UDHR is considered binding as international customary law and is therefore applicable to all countries.

Article 2 of the UDHR states that every person is entitled to the rights contained in the UDHR “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other states”. This equal-rights requirement underlines each of the rights in the UDHR.

The UDHR not only pronounces on the basic rights of all humans, but is also an instrument aimed at the transformation of the “social and international order” in such a way that each of the rights contained therein may be realized in the future. To this end,

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411 Ibid.
414 Dugard, International Law 326.
it presents a standard of realization of the substantive rights in the instrument through progressive measures, such as affirmative action.418 Furthermore, article 8 of the UDHR provides that every person whose fundamental rights, as granted in terms of the constitution or by law, are infringed is entitled to “an effective remedy”. Ginsburg and Merritt argue that, in the context of many years of discrimination, “effective remedy” will certainly include some form of positive action from the government.419

3 4 3 The two covenants

The UDHR contained civil and political as well as economic, social and cultural rights that were later codified under the ICCPR and the ICESCR. Both documents were adopted by the UN General Assembly in 1966 and entered into force in 1976.420 South Africa ratified the ICCPR in 1998. The ICESCR was signed on 3 October 1994421 and ratified more than 20 years later in 2015.422

The ICCPR and the ICSECR both contain general and specific non-discrimination clauses.423 The general non-discrimination clauses of the Covenants are almost identical and both call on state parties to ensure the equal enjoyment of all the rights contained in the respective Covenants by everyone.424 In both cases sex is listed as one of the grounds upon which the equal enjoyment of rights may not be denied.425

418 Ibid.
420 Dugard International Law 327.
421 Ibid.
424 Article 2(2) ICESCR and article 2(1) ICCPR as well as article 3 of each of these documents.
425 The full list of prohibited grounds contained in each of the Covenants are “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

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The specific non-discrimination clauses are contained in article 3 of each of the Covenants. This article requires state parties to ensure the equal enjoyment between men and women of all the rights in the present Covenant. The Human Rights Committee has noted that the equal enjoyment of rights does not necessarily mean identical treatment and that in certain instances affirmative action measures are required in order to comply with this provision.\[426\] This Committee has also raised the same argument in terms of Article 26 of the ICCPR, which states that “[a]ll persons are equal before the law and are entitled without discrimination to equal protection of the law”. It does not, however, mean that all differentiations will amount to discrimination. Where a differentiation is based on objective and reasonable criteria it will not be prohibited in terms of this provision.\[427\]

### 3.5 Regional and sub-regional instruments

Despite the UN’s comprehensive protection of women’s rights, it does not specify the prejudices and harmful practices suffered by African women in particular.\[428\] Regional and sub-regional instruments have therefore been developed to address the issues and human rights violations peculiar to the African context. Even though this practice is widely acknowledged, it is generally accepted that these regional and sub-regional instruments may not be in conflict with the object and purpose of the UN treaties and may also not be used to justify non-compliance with international instruments.\[429\] Where conflicting obligations arise between a UN treaty and a regional or sub-regional instrument, the UN treaty prevails.\[430\]

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\[427\] This qualification was discussed by the Human Rights Committee in its 18\textsuperscript{th} General Recommendation. As alluded to above, these General Recommendations are not legally binding, but they do carry considerable persuasive force. General Recommendation 18 is published at http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e (accessed 04-04-2013).


The Organization of African Unity (OAU) was established in 1963. The Charter of the OAU did not make much reference to individual human rights and none of the commissions established under the Charter was dedicated to the protection of individual rights. Although the Preamble did require member states to have “due regard” to the rights in the UDHR, the principle of non-interference caused the OAU to disregard allegations of abuses of human rights in member states. In 2001, the OAU was replaced by the African Union (AU), a transition that created hopes for the future recognition and realization of human rights on the continent.

3 5 1 The African Union Constitutive Act

In sharp contrast to its predecessor, the AU Constitutive Act provides extensively for the promotion and protection of human rights. One of its objectives is the promotion and protection of human rights in accordance with the Charter on Human and Peoples’ Rights and other applicable instruments. Respect for human rights and the promotion of gender equality furthermore form part of its guiding principles.

There are nine organs of the AU established in terms of the Constitutive Act, including the Court of Justice. A Protocol of the Court of Justice of the AU was adopted setting

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432 Viljoen International Human Rights Law in Africa 157.
436 Article 3(h) of the AU Constitutive Act.
437 Article 4(m) of the AU Constitutive Act.
438 Article 4(l) of the AU Constitutive Act.
439 Article 5(1) of the AU Constitutive Act lists the nine organs as the Assembly of the Union, the Executive Council, the Pan-African Parliament, the Court of Justice, the Commission, the Permanent Representatives Committee, the Specialized Technical Committees, the Economic, Social and Cultural Council and the Financial Institutions. Article 5(2) furthermore recognizes other bodies that may be established by the General Assembly. For a discussion on the roles and mandates of each of these organs, see Viljoen International Human Rights Law in Africa 169 – 209 and Stefiszyn 2005 African Human Rights Law Journal 362 – 374.
440 The African Charter of Human and Peoples’ Rights provides for the establishment of the African Human Rights Court. The establishment of another court therefore led to confusion with respect to the jurisdiction of the respective courts and the possibility of an overlap. A second Protocol to merge the two courts (Protocol on the Statute of the African Court of Justice and Human Rights) was adopted but has
out the rules relating to the functioning of this court.\textsuperscript{441} Importantly, in terms of article 7(3) of this Protocol, equitable gender representation of the composition of this court is ensured.\textsuperscript{442}

The increasing awareness of the imperative of gender equality is also evidenced in the drafting of a Protocol on Amendments to the AU Constitutive Act, which was adopted in 2003 but which has not yet entered into force.\textsuperscript{443} This Protocol seeks to replace the sexist wording of the Constitutive Act with gender-neutral terms. For instance, reference to “founding fathers” in the Preamble will be changed to “founders” and the word “Chairman” replaced with “Chairperson”. The Protocol furthermore adds “effective participation of women in decision-making” to its objectives.\textsuperscript{444}

The Constitutive Act, however, fails to secure the human rights of African people in three important aspects, as highlighted by Viljoen.\textsuperscript{445} Firstly, the principle of non-interference by any member state in the affairs of any of the other states has been included in the Constitutive Act.\textsuperscript{446} Secondly, the observance of human rights is not a prerequisite for membership to the AU.\textsuperscript{447} Lastly, the AU Constitutive Act is not clear on enforcement procedures and the imposition of sanctions where member states fail to comply with the provisions of the AU Constitutive Act.\textsuperscript{448} The UN Charter, for instance, explicitly provides for the immediate expulsion from the United Nations of any member state that persistently not yet attained the 15 ratifications required for it to enter into force. See Viljoen \textit{International Human Rights Law in Africa} 205 and 449.

\begin{itemize}
\item \textsuperscript{441} This Protocol is available at \url{https://www.au.int/web/sites/default/files/treaties/7784-file-protocol_court_of_justice_of_the_african_union.pdf} (accessed 2017-01-29).
\item \textsuperscript{442} The Protocol that will merge the African Court on Human and Peoples’ Rights and the AU Court of Justice has a similar provision in article 5(2). This protocol is accessed at \url{https://www.au.int/web/sites/default/files/treaties/7792-file-protocol_statute_african_court_justice_and_human_rights.pdf} (accessed 2017-01-29).
\item \textsuperscript{443} Viljoen \textit{International Human Rights Law in Africa} 249.
\item \textsuperscript{444} Ibid.
\item \textsuperscript{445} Viljoen \textit{International Human Rights Law in Africa} 165.
\item \textsuperscript{446} Article 4(g) of the Constitutive Act lists “Non-interference by any Member State in the internal affairs of another” as one of the principles upon which the AU is founded. This principle has been relaxed to make provision for the interference by the African Union pursuant to a decision by the Assembly where war crimes, genocide and crimes against humanity are concerned. See Viljoen \textit{International Human Rights Law in Africa} 165.
\item \textsuperscript{447} Viljoen \textit{International Human Rights Law in Africa} 165.
\item \textsuperscript{448} Ibid.
\end{itemize}
violates the founding values of the UN. Consequently, a situation could arise where a member state persistently violates the norms of the AU Constitutive Act without any interference from member states or the imposition of penalties for such contravention.

3.5.2 The African Charter on Human and Peoples’ Rights

The African Charter on Human and Peoples’ Rights (ACHPR) was adopted in 1981 but only entered into force in 1986. It represents the first set of human-rights standards for the continent of Africa. This charter is distinct from other regional instruments as a result of the vast protection offered to women.

General non-discrimination provisions in the Charter include article 2 which ensures that the rights contained in the charter be enjoyed by every individual without any distinction with regard to race, gender, sex, ethnic group or other status. Moreover, article 3 provides that everyone is equal before the law and is entitled to equal protection of the law.

Significantly, article 18(3) of the charter requires states to ensure that all legal discrimination against women is eliminated and the rights of women and children, as stipulated in international instruments, are protected. This provision places a positive obligation on states to eliminate gender-based discrimination and to protect the rights of women, as required under international conventions, such as CEDAW. The context within which article 18(3) was placed is, however, unfortunate. Article 18 enjoins member states to assist families as the custodians of traditional values. It is within family relations

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449 Article 6 of the UN Charter.
450 Viljoen International Human Rights Law in Africa 161.
451 The drafting and adoption of the ACHPR was presumably done in response to the grave human rights abuses that occurred in the 1970’s in Uganda. See Viljoen International Human Rights Law in Africa 158.
453 This provision, however, has been the object of much criticism. Some consider the provision to be too general and that addressing the rights of women and children under the same provision equates the rights of women with that of children. Onaria “Introduction to the African System of Protection of Human Rights” in Benedek et al Human Rights of Women 233.
and cultural values that sex discrimination occurs most often.\textsuperscript{455} The provision therefore imposes conflicting obligations on state parties, since it requires states to protect the rights of women, while assisting the institutions that suppress it.\textsuperscript{456}

In terms of article 66 of the ACHPR, special protocols and agreements may be entered into to supplement the provisions of the Charter. Given that, despite the various international and regional agreements entered into, women in Africa are still subject to gender-based discrimination,\textsuperscript{457} a Protocol on the Rights of Women (African Women's Protocol) was adopted and came into force in November 2005.\textsuperscript{458} The adoption of the African Women's Protocol was necessitated by the inadequacy of the protection of women's rights provided by the ACHPR and the failure of CEDAW to address discrimination of African women in particular.\textsuperscript{459}

The African Women's Protocol was designed to complement the CEDAW, not to substitute it.\textsuperscript{460} Both instruments are applicable in Africa, and the African Commission on Human and Peoples' Rights can invoke the provisions of the African Women's Protocol as well as those of the CEDAW as interpretive guides.\textsuperscript{461}

The African Women's Protocol presents a progressive framework for the protection of women's rights.\textsuperscript{462} The Protocol stresses the importance of “specific positive” and

\textsuperscript{455} The fact that gender discrimination occurs most often within the private realm was also acknowledged by the drafters of CEDAW. Consequently, the CEDAW aims to eradicate discrimination in both the public and private spheres of society.

\textsuperscript{456} Onaria “Introduction to the African System of Protection of Human Rights” in Benedek et al Human Rights of Women 234234

\textsuperscript{457} See the Preamble to the Optional Protocol which is available at http://www.achpr.org/instruments/women-protocol/ (accessed 2017-01-29).


\textsuperscript{461} In terms of sections 60 and 61 of the AU Charter, the Human Rights Commission is entitled to draw inspiration from, among other sources, other instruments adopted by the United Nations and by the African countries in the field of human rights, as well as from the provisions of various instruments adopted within the specialized agencies of the United Nations to which the state parties to the Charter are members. The Human Rights Commission is also empowered to consider the general comments made by treaty bodies. See Forere & Stone 2009 African Human Rights Law Journal 439.

“corrective” measures to ensure the achievement of substantive equality for women in Africa and imposes an obligation on member states to adopt measures that would favour women above men.\textsuperscript{463}

In terms of Article 2 of the African Women’s Protocol, state parties commit themselves to take steps to achieve the elimination of harmful cultural practices which are based on the idea of the inferiority of either of the sexes, or on the stereotypical position of women in society. It furthermore clarifies the concept of “African values”,\textsuperscript{464} as those based on equality, peace and freedom, amongst others.\textsuperscript{465}

With respect to the participation of women in public life, article 9(2) of the African Women’s Protocol, requires member states to ensure the “increased and effective representation and participation of women at all levels of decision-making”. Importantly, article 8 provides that “all women and men are equal before the law and shall have the right to equal protection and benefit of the law”. To this end, state parties are to take appropriate measures to ensure that women are equally represented in the judiciary and other law enforcement organs.\textsuperscript{466}

In 1998, the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, in terms of which a court would adjudicate on disputes which arise from the ACHPR, was adopted.\textsuperscript{467} Article 5(3) allows individuals to lay complaints before the court only where governments have consented thereto.\textsuperscript{468} Complainants need not be personally victimized by discriminatory practices to submit communications to the court.\textsuperscript{469} Similar to the provision in the

\begin{footnotesize}
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\item \textsuperscript{463} Viljoen \textit{International Human Rights Law in Africa} 254.
\item \textsuperscript{464} See article 29(7) of the ACHPR.
\item \textsuperscript{465} See the Preamble to the African Women’s Protocol.
\item \textsuperscript{466} Article 8(e) of the African Women’s Protocol.
\item \textsuperscript{467} Viljoen \textit{International Human Rights Law in Africa} 412.
\item \textsuperscript{468} Article 34(6) of the Protocol states that member states must make a declaration accepting the competence of the Court to hear matters brought to it under article 5(3). Only five countries have made this declaration and South Africa is not one of them. Zambara “Lack of Commitment dooms Africa’s Human Rights Court” (2012-02-24) \url{http://mg.co.za/article/2012-02-24-lack-of-commitment-dooms-africas-human-rights-court} (accessed 03-04-2013).
\item \textsuperscript{469} Viljoen \textit{International Human Rights Law in Africa} 429.
\end{itemize}
\end{footnotesize}
Constitutive Act, this protocol provides for the “adequate” gender representation in the nomination and election of judges,\(^{470}\) although it remains unclear what proportion of male to female judges will satisfy this requirement.\(^{471}\)

3 5 3 Southern African Development Community

Regional Economic Communities (REC’s) were initially developed to ensure the economic integration of sub-regional areas.\(^{472}\) However, many of the treaties that establish REC’s, including the Southern African Development Community (SADC), have incorporated elements of human-rights protection.\(^{473}\) South Africa became a member of the SADC in 1994 after the attainment of democratic rule.\(^{474}\)

Under article 4(c) of the SADC treaty, member states undertake to act in accordance with, amongst others, the principle of human rights. While some REC treaties contain reference to the African Charter,\(^{475}\) human rights in the SADC are not linked to any human-rights instruments.\(^{476}\) The SADC has consequently adopted a number of standard-setting agreements, including the Protocol on Gender and Development (SADC Gender Protocol).\(^{477}\)

The primary objectives of the SADC Gender Protocol are listed in article 3. These objectives include the implementation of gender-responsive legislation to eliminate discrimination, achieve gender equality and harmonize the implementation of other instruments which impose gender-equality obligations on member states. Markedly, the


\(^{471}\) Biegon and Killander argue that “adequate” representation does not mean “equal” representation since there are 11 judges on the court. See Biegon and Killander “Human Rights Developments in the African Union during 2008” *African Human Rights Law Journal* 295 305.


\(^{473}\) See Forere & Stone 2009 *Human Rights Law Journal* 436 for other REC’s that have incorporated human rights in their establishing treaties.


SADC imposes time frames on the achievement of certain goals, thereby imposing a duty on state parties to accelerate the realization of gender equality.\textsuperscript{478}

Article 5 of the SADC Gender Protocol permits the use of affirmative-action measures to eliminate all barriers that prevent women from participating meaningfully in all spheres of life. Affirmative action is described as “a policy programme or measure that seeks to redress past discrimination through active measures to ensure equal opportunity and positive outcomes in all spheres of life”.\textsuperscript{479} Moreover, article 7(f) specifically enjoins member states to ensure the equitable representation of women in the judiciary.

The SADC adopted a Charter on Fundamental Social Rights in 2003.\textsuperscript{480} This charter aims to regulate employment-related and social-security issues within the SADC region.\textsuperscript{481} One of the objectives of this charter is to “promote the development of institutional capacities as well as vocational and technical skills” within the SADC.

Article 6 of the SADC Charter of Fundamental Social Rights deals specifically with the issue of gender equality within the employment setting in each of its member states. It aims to ensure the observance of gender equity and equal treatment and opportunities for men and women in access to employment, education, career development and vocational training, amongst others.\textsuperscript{482}

354 The Latimer House Principles

The Latimer House Principles are international guidelines compiled to ensure good governance and effective relations between the judiciary, parliament and the executive in

\textsuperscript{478} Article 3(d) of the Gender Protocol.
\textsuperscript{479} Article 1(2) of the Gender Protocol.
\textsuperscript{481} See the objectives of the Charter.
\textsuperscript{482} Article 6 of the SADC Charter on Fundamental Social Rights.
each of the Commonwealth countries. These principles maintain that a competent, impartial, honest and independent judiciary is vital to engendering public confidence, upholding the rule of law and to effectively dispense justice. To this end, members of the Commonwealth are to ensure that judicial appointments are made on well-defined criteria. The process adopted in the appointment of judges must further be aimed at ensuring that appointments are made on merit, whilst providing equal opportunity for all persons who are eligible for judicial appointment and that sufficient attention is paid to the elimination of discrimination and the progressive realization of gender equity in the appointment of judges.

The Latimer House Principles further advocate the establishment of judicial service commissions to assist in the appointment of judges. Guideline Two of the Latimer House Principles directs that the members of judicial service commissions should be drawn primarily from the senior rank of the judiciary so as to prevent undue political influence in the selection and appointment of judges. However, the South African JSC is composed mainly of parliamentarians and members of the executive, which raises concern that the appointment of judicial officers may be fraught with political influences.

3.6 Conclusion

Although not formally recognized, the rights of women have been a central concern of international human-rights law since the inception of the League of Nations in 1919. As

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484 Article IV of the Latimer House Principles.

485 Article IV(a) of the Latimer House Principles.

486 Ibid.

487 Guideline 2 of the Latimer House Principles.

488 Du Bois “Judicial selection in Post-Apartheid South Africa” in Russel & Malleson Appointing Judges in an Age of Judicial Power (2006) 290-292. The composition of the JSC is constitutionally entrenched under section 178. Importantly, the composition of the JSC under the Final Constitution is markedly different to that envisioned in section 105 of the Interim Constitution in that the majority of the members are now drawn from the executive and legislative branches of government. See Chapter 4 for an in-depth discussion on the South African JSC.
time passed, the right to gender equality became progressively more pronounced in the international arena but, as evidenced by the array of international instruments and treaty body dialogues, still remains a concern today.

The Constitution makes it clear that international law may be invoked in domestic courts and tribunals. Even where an instrument is not legally binding, it may still inform the interpretation of local statutes and the development of customary law and common law. Moreover, as signatory to various international, regional and sub-regional instruments, South Africa is under a duty to comply with the provisions thereof and to report on the progress of compliance to the respective treaty bodies.

The Constitutional Court itself has delivered several landmark decisions that were, to some extent, informed by the obligation imposed in terms of international law to ensure the observance of gender equality and non-discrimination based on sex and gender. For example, in *Bhe v Magistrate, Khayelitsha*, the Constitutional Court relied on both the CEDAW and the African Charter of Human and Peoples’ Rights to inform its decision to declare the customary rule of male primogeniture unconstitutional.

This chapter has provided a breakdown of both gender-specific and general instruments that require the observance of gender equality in member states. These instruments are found at international, regional and sub-regional level. At international level, the CEDAW is the most comprehensive instrument aimed at the elimination of discrimination against women. It not only requires state parties to eliminate any form of direct or indirect discrimination against women, but requires the imposition of affirmative action in order to ensure *de facto* equality between men and women. In its dialogue with South Africa, the CEDAW Committee has specifically recommended that South Africa makes use of special temporary measures to ensure the equitable representation of women in the judiciary. This illustrates that the gender imbalance in the South African judiciary is of particular concern to the CEDAW Committee.

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489 2005(1) SA 580 (CC).
490 In terms of this rule, only male descendants could qualify as intestate heirs to a deceased person.
491 *Bhe v Magistrate, Khayelitsha* 654F-H.
The ILO is a specialized agency under the UN that sets labour standards and develops policies and programmes which promote fair treatment of employees in member states. Although the ILO was not established specifically to address gender-based discrimination, several of the conventions adopted by this agency require member states to observe equality between male and female employees. Moreover, both the Discrimination (Employment and Occupation) Convention and the Declaration on Equality of Opportunity and Treatment of Women Workers recognize the need for positive measures and special treatment to ensure true equality is achieved in the workforce. Such measures or treatment is not deemed to be discriminatory in terms of the ILO.

The international commitment to gender equality was strengthened during the UN Decade for Women which led to the adoption of several declarations and other soft law documents through which member states formally commit themselves to the achievement of equality. In this regard, the Beijing Platform of Action is of particular significance as, through the adoption of this declaration, member states formally committed themselves to ensure that women are equally represented in domestic power structures, including the judiciary.

The UDHR, the ICCPR and the ICESCR are collectively known as the International Bill of Rights. Although the International Bill of Rights is not primarily aimed at addressing gender equality in member states, it does contain general and specific non-discrimination clauses. As such, member states must eliminate all forms of discrimination which are based on, *inter alia*, sex and gender and they must ensure that men and women are afforded equal enjoyment of rights and equal protection of the law. The International Bill of Rights also recognizes that under certain circumstances progressive measures, such as affirmative action, are needed to ensure the equal enjoyment of rights in the future.

At regional and sub-regional level, the AU and the SADC have both developed special protocols that aim to ensure the observance of gender equality in member states. The

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objectives of these protocols include equal representation of women in the judiciary, and both protocols permit the use of affirmative action to achieve this aim. Furthermore, the members of the Commonwealth of Nations must, in terms of the Latimer House Principles, ensure that men and women are afforded equal opportunities to be appointed to judicial office. In the South African context, this requires affirmative action measures that advance women and seek to place them on an equal footing with men.

The international, regional and sub-regional instruments described above place South Africa under a clear mandate to address the gender imbalances in the judiciary. Furthermore, none of the instruments described in this chapter prohibit the use of affirmative action to ensure the equitable representation of women on the bench. The next chapter then focuses on the constitutional provisions relating to gender equality and the judiciary and describes South Africa’s constitutional mandate to ensure greater gender representation of women in the judiciary.
CHAPTER 4

THE CONSTITUTIONAL FRAMEWORK FOR THE APPOINTMENT OF
JUDGES AND AFFIRMATIVE ACTION

4.1 Introduction

Before 1994, South Africa’s system of government was based on a constitutional system of Parliamentary sovereignty and all citizens and organs of state were subservient to Parliament.\(^493\) Parliamentary dominance can, under normal circumstances, be justified by the fact that Parliament is elected by and accountable to the citizens of the country who voted it into office.\(^494\) In a racially-divided state such as apartheid South Africa, however, the majority of the citizens were denied a common franchise and Parliament represented only the minority of the population.\(^495\) Apart from a very narrow right of review, courts were not able to exercise any meaningful control over the powers of the Legislature.\(^496\) Parliament could, and did, enact increasingly oppressive laws in an attempt to retain the status quo.

As opposition to apartheid grew, the South African government proclaimed states of emergency that further suspended the few civil liberties afforded to the majority of the people in South Africa.\(^497\) The result was, in the words of the Constitutional Court, “a debilitating war of internal political dissension and confrontation…and a dangerous combination of anxiety, frustration and anger among expanding proportions of the populace”.\(^498\)

\(^{494}\) Ibid.
\(^{495}\) Ibid.
\(^{496}\) Courts could not, for instance, declare an Act of Parliament invalid based on the fact that it violated human rights. Only where it was found that an improper procedure was followed in the passing of an Act could courts strike the relevant Act down. See De Waal *et al* *The Bill of Rights Handbook* 2 ed 3.
\(^{497}\) De Waal *et al* *The Bill of Rights Handbook* 2ed 4.
\(^{498}\) *Azapo v President of the Republic of South Africa* 1996 (4) SA 671 (CC) par [1].
Against this background, the peaceful transition into a democratic South Africa is often described as a miracle.\textsuperscript{499} Negotiations between the apartheid government and opposition parties for a democratic constitution started with the convening of the Conference for a Democratic South Africa in 1991, and ended two years later with the adoption of the Interim Constitution\textsuperscript{500} which was to ensure the continuity of the State until the adoption of the Final Constitution.\textsuperscript{501}

Both the Interim Constitution and the Final Constitution\textsuperscript{502} (the Constitution) includes transformation as a central theme.\textsuperscript{503} The Constitutional Court has, on several occasions, stressed the transformative ideal of both Constitutions.\textsuperscript{504} What the framers of the Constitution envisaged, however, is not mere legal reform but rather a transformation of legal and social structures.\textsuperscript{505} The Constitution therefore represents a “bridge between the past of a deeply divided society…and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex”.\textsuperscript{506}

The founding provisions of the Constitution describes South Africa as a “sovereign, democratic state founded on the…values [of]…human dignity, the achievement of equality and the advancement of human rights and freedoms”, non-racialism and non-sexism.\textsuperscript{507} The Constitutional Court has also stated that “the Constitution commands us

\textsuperscript{501} De Waal \textit{et al} \textit{The Bill of Rights Handbook} 4.
\textsuperscript{502} Constitution of the Republic of South Africa, 1996.
\textsuperscript{503} For a discussion on the transformative potential of the Interim Constitution, see Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” 1994 \textit{SAJHR} 31. Freedman makes a distinction between preservative constitutions and transformative constitutions. Whereas preservative constitutions aim to preserve values and governmental systems that have evolved from a stable past and in terms of which there is general consensus. Transformative constitutions, on the other hand, seek to reject the past and build a new society different to that which existed in the past. See Freedman \textit{Understanding the Constitution of the Republic of South Africa} (2013) 7.
\textsuperscript{504} See, for instance, \textit{Soobramoney v Minister of Health, Kwazulu Natal} 1998 1 SA 765 (CC) par [8] where Chaskalson P stated that “a commitment…to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order”.
\textsuperscript{505} Mhango “Transformation and the Judiciary” in Hoexter & Olivier (eds) \textit{The Judiciary in South Africa} (2014) 68.
\textsuperscript{506} See the Postamble of the Interim Constitution.
\textsuperscript{507} Section 1(a)-(b) of the Constitution.
to strive for a society built on the democratic values of human dignity, the achievement of equality and freedom”.508 This, in turn, is part of a broader project aimed at the transformation of the South African society as a whole.509

Transformation is understood to mean a complete reconstruction of society and a redistribution of power and resources. Given the demographic profile of the apartheid bench this reconstruction was also needed in the judiciary and has informed the transformational goals of the government in the appointment of High Court judges, both in terms of race and gender.

In view of the above, this chapter describes the constitutional framework within which the gender transformation of the South African judiciary is conducted. Particular attention is paid to the equality clause510 and the provisions relating to the appointment of High Court judges.511 It is argued that the principles in the equality provisions in the Constitution, specifically those relating to the imposition of affirmative action measures to advance previously disadvantaged groups, should inform decisions taken in order to redress the gender imbalance in the South African judiciary.

4 2 The Interim Constitution

In 1994, after South Africa’s first democratic elections, the Interim Constitution came into force.512 The Interim Constitution was intended to guide South Africa into a new democratic order, and as such was designed to be temporary.513 It furthermore described

508 Minister of Finance v van Heerden par [22].
510 Section 9 of the Constitution, 1996.
511 Section 174 of the Constitution.
512 For an account of women’s involvement in the deliberation process, see Albertyn “Women and the Transition to Democracy” in Murray (ed) Gender and the new South African Legal Order (1994) 39 49-60.
the procedure for the drafting of the Final Constitution, which was to be done within the framework of 34 Constitutional Principles.\footnote{Ibid. The Constitutional Principles are contained in Schedule 4 of the Interim Constitution. It was the task of the Constitutional Court to certify the text of Final Constitution only if it conformed to these principles.}

The Constitutional Principles provided, amongst others, for a democratic government which is committed to the achievement of equality between men and women;\footnote{Constitutional Principle 1.} the prohibition of all forms of discrimination, specifically based on race and gender and the promotion of racial and gender equality;\footnote{Constitutional Principle 3.} equality before the law and equitable legal processes, including programmes that are designed to redress disadvantages suffered in the past.\footnote{Constitutional Principle 5.} Although these principles have all been included in the text of the Final Constitution, they remain extremely important as interpretational guides.\footnote{Albertyn and Kentridge “Introducing the right to equality in the interim Constitution” 1994 SAJHR 149.}

Soon after the ANC took power, it released a policy statement in which it called for judges of the newly established Constitutional Court to be drawn from all sections of the South African community, based on wisdom, life experience, integrity and skills.\footnote{Albertyn “Judicial Diversity” in Hoexter & Olivier (eds) The Judiciary in South Africa (2014) 245 256.} In this document, titled \textit{Ready to Govern}, the ANC furthermore communicated its aim of transformation of the judiciary as a whole:

\begin{quote}
“\textit{The bench will be transformed in such a way as to consist of men and women drawn from all sections of South African society. This will be done without interfering with its independence and with a view to ensuring that justice is manifestly seen to be done in a non-racial and non-sexist way and that the wisdom, experience and competent judicial skills of all South Africans are represented.}”\footnote{Ibid.}
\end{quote}

The Interim Constitution in addition provided for the establishment of a Judicial Service Commission, an independent body composed of politicians, legal practitioners, judges and an academic, which was to make recommendations regarding the selection and
recruitment of judges.\footnote{Section 105 of the Interim Constitution. According to this section, the functions of the JSC furthermore includes making recommendations on the removal, terms of office and tenure of the judges of the newly created Supreme Court as well advising government departments on all other matters relating to the judiciary. The composition of the JSC is discussed in greater detail below.} For reasons of continuity, judges that were appointed before 1994 were to remain in office.\footnote{Section 241(2) of the Interim Constitution. See also Olivier “The Selection and Appointment of Judges” in Hoexter & Olivier \textit{The Judiciary in South Africa} 120. In terms of section 241(7)(a) of the Interim Constitution, these judges were required to swear an oath of office “affirming their commitment to uphold and protect the interim Constitution and the human rights entrenched in it, as well as to administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law”.} Future appointments to the bench were required to be fit and proper persons, “appointed by the President \textit{acting on the advice of the Judicial Service Commission}” (emphasis added).\footnote{Section 104 of the Interim Constitution.} This meant that the President had no discretion to reject the selection of the Judicial Service Commission (JSC), but was obliged to appoint the candidate so recommended.\footnote{Olivier “The Selection and Appointment of Judges” in Hoexter & Olivier \textit{The Judiciary in South Africa} 120 – 121. A different consultative procedure was adopted for the appointment of the Chief Justice in that section 97 of the Interim Constitution required the Chief Justice to be “appointed by the President in consultation with the Cabinet and after consultation with the Judicial Service Commission”. In terms of section 233 of the Interim Constitution, this meant that the President and the Cabinet had to concur as to whom to appoint as Chief Justice after taking serious consideration of the views taken by the JSC.} As far as the newly-created Constitutional Court is concerned, section 99(5)(d) of the Interim Constitution required the JSC, in selecting judges to be recommended for appointment to this court, to “have regard to the need to constitute a court which is independent and competent and representative in respect of race and gender”.\footnote{This was the first constitutional statement of representivity in the judiciary. See Albertyn \textit{Judicial Diversity} in Hoexter & Olivier \textit{The Judiciary in South Africa} 258. As part of a compromise during the negotiations, it was decided that, of the eleven judges of the Constitutional Court, the President of the country will appoint the President of the court and four other judges in consultation with Cabinet and after consultation with the Chief Justice. The remaining members of the Constitutional Court bench was to be appointed by the President from a list of nominees selected by the JSC.} Although this requirement was initially limited to the selection of judges of the Constitutional Court only, it set an important precedent for the text of the Final Constitution as far as the selection and appointment of all judges are concerned.\footnote{“Judicial Diversity” Hoexter & Olivier \textit{The Judiciary in South Africa} 258.}
4.3 The Final Constitution

The Final Constitution (hereafter the Constitution) was drafted by the Constitutional Assembly and certified by the Constitutional Court after having ascertained that the text was in line with the Constitutional Principles as enumerated in the Interim Constitution. The Constitution took effect on 4 February 1997 and is the supreme law of South Africa. The Preamble to the Constitution lists its objectives as follows:

- to heal the divisions of the past and to build a new society based on democratic values, social justice and fundamental human rights;
- to lay the foundations for a democratic and open society where, each citizen will be equally protected by the law and where government is based on the will of the people;
- to free the potential of each person and to improve the quality of all South African citizens;
- to build a united and democratic country which is able to take its rightful place as a sovereign state in family of nations.

As supreme law of the country, any law or administrative action that is inconsistent with the provisions of the Constitution is invalid. The Constitution furthermore contains a justiciable Bill of Rights, which protects both categories of rights traditionally considered

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527 The Constitutional Assembly consisted of the National Assembly and the Senate which sat jointly for the adoption of the Constitution within two years as from the date of its first sitting. See sections 68 and 73 of the Interim Constitution. See also Certification of the Constitution of the Republic of South Africa (1996) 4 SA 744 (CC) par [16].
528 Section 71 of the Interim Constitution.
529 See the Preamble to the Constitution.
530 Ibid.
531 This replaced the principle of Parliamentary supremacy that reigned before democratization. This shift held significant consequences for the administration of justice in South Africa. See Devenish A Commentary on the South African Bill of Rights (1999) 10.
532 Chapter 2 of the Constitution.
first-generation and the second-generation rights of all South African citizens. In terms of section 7(2) of the Constitution, the State is obliged to “respect, protect, promote and fulfill the rights in the bill of rights”. It is clear, therefore, that the State is under an obligation, not only to refrain from activities which infringe on the rights, but to act positively to fulfill them.

The rights in the Bill of Rights may, however, be limited in terms of section 36 of the Constitution. Any law that limits rights also infringes upon that right. Such an infringement will not be considered to be unconstitutional if it can be justified in terms of section 36. This section provides that any of the rights in the Bill of Rights may be limited, but only in terms of law of general application and only to the extent that it is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.

In order to determine whether a limitation may be justified under the general limitations clause, the courts follow a two-step analysis. It considers first whether an infringement of a right has occurred. If it is found in the affirmative, the courts will determine whether or not the infringement may be justified in terms of section 36. To this end, section 36 contains several factors a court must consider, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether or not there are less restrictive means to achieve the purpose.

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533 This category of rights are civil and political rights and are so called because they were awarded legal recognition first. Included in this category of rights are the rights to equality, freedom of speech, freedom association, etc. These rights are regarded as “negative” rights in that they do not impose a positive obligation on the State to provide for the basic needs of its citizens, but rather takes power away from government to act in certain ways.

534 Second-generation rights are socio-economic rights which place a duty on the government to secure for its citizens a “basic set of social goods”. The right to education, health care, food and shelter are examples of rights that fall under this category of rights. See De Waal et al Bill of Rights Handbook (1999) 418.

535 Devenish A Commentary 9.

536 Section 36 is known as the general limitations clause.


538 Ibid.

539 De Waal et al Bill of Rights 194.

540 See section 36(1)(a) – (e) of the Constitution.
The Constitutional Court in *S v van Rooyen*⁵⁴¹ found that the general limitations clause in section 36 applies only to the limitation of rights contained in the Bill of Rights. It can, therefore, not be invoked to limit provisions found elsewhere in the Constitution, including the provisions relating to the judiciary.⁵⁴²

### 4.3.1 The judiciary

The rights in the Constitution are justiciable, making it clear that courts are central in giving effect to the rights contained in the Bill of Rights. It is the responsibility of the courts to enforce rights and freedoms of all South Africans under the Constitution.⁵⁴³ Given the role of the courts in the past to enforce oppressive laws,⁵⁴⁴ the perception of the judiciary in the eyes of the majority of the South African population was one of disrespect and illegitimacy.⁵⁴⁵ This negative reputation did not cease after the fall of apartheid.⁵⁴⁶ Given the fact that the judges who were in office at the start of South Africa’s new democratic order were active participants of the old order, the perceived illegitimacy of the bench continued even after the Constitution took effect.⁵⁴⁷ It is therefore not surprising that the racial and gender demographics of the bench have taken on a particularly significant focus within the context of transformation of society as a whole.⁵⁴⁸

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⁵⁴¹ 2002 (5) SA 246 (CC).
⁵⁴² De Waal et al *The Bill of Rights Handbook* 150.
⁵⁴³ Mogadime “Elite Media Discourses” 2005 35 (4) *Journal of Black Studies* 155 159. See also *S v Van Rooyen* 2002 (8) BCLR 810 (CC) par [48], where it was held that “[i]n a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial power has been given to the judiciary to uphold the Constitution”.
⁵⁴⁴ In its report, the Truth and Reconciliation Commission found that “both the judiciary and the magistracy as well as the organised legal profession were locked into an overwhelmingly passive mindset which characterised the judgments of the bench in the fact of injustices of apartheid”.
⁵⁴⁶ Cowan “Women’s Representation on the Courts in the Republic of South Africa” 2006 *University of Maryland Law Journal of Race, Religion, Gender and Class* 297. This can, at least, partially be explained by the fact that the judiciary abstained from the legal hearing of the Truth and Reconciliation Commission.
4 3 1 1 The JSC

In the past, judicial appointments were made at the behest of the executive. In a clear move away from this procedure, the Constitution provides for the establishment of an independent body to oversee the selection and appointment of judges. Section 174(6) provides that judicial appointments are to be made by the President on the advice of the Judicial Service Commission (JSC). This means that the President must act on the instruction of the JSC and has no discretion to reject any of the recommendations made by it. The President is also not required to consult with Cabinet before an appointment is made, although the appointment must be countersigned by the Minister of Justice.

In terms of section 178, where the JSC is to perform its function as a judicial selection commission, it is to be composed of:

- the Chief Justice,
- the President of the Supreme Court of Appeal,
- one Judge President designated by the other Judges President,
- the Minister responsible for the administration of justice or his nominee,
- two practising advocates designated by the advocates’ profession and appointed by the President, who is to represent the profession,
- two practising attorneys designated by the attorneys’ profession and appointed by the President, who is to represent the profession.

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549 The independence of the appointment process was the main underlying rationale for creating the JSC. Malleson “Assessing the Performance of the Judicial Service Commission” 1999 SALJ 36 37.
550 This commission is also involved in the appointment of judges to some of the specialized courts in South Africa. See du Bois “Judicial Selection in Post-Apartheid South Africa” in Malleson and Russel (eds) Appointing Judges in an Age of Judicial Power (2006) 303.
552 In terms of section 101(2) of the Constitution.
553 Section 178(1)(a) of the Constitution.
554 Section 178(1)(b) of the Constitution.
555 Section 178(1)(c) of the Constitution.
556 Section 178(1)(d) of the Constitution.
557 Section 178(1)(e) of the Constitution.
558 Section 178(1)(f) of the Constitution.
• one law teacher designated by the teachers of law of the universities in South Africa;\textsuperscript{559}
• six persons from the National Assembly, designated by the National Assembly, at least three of whom must be members of the opposition parties;\textsuperscript{560}
• four permanent members of the National Council of Provinces, designated by this council with a supporting vote of six or more provinces;\textsuperscript{561}
• four persons designated by the President after consultation with all the leaders of parties represented in the National Assembly;\textsuperscript{562} and
• the Judge President of the relevant division of the court, together with the premier of the province concerned, where the appointment relates specifically to a vacancy in that division.\textsuperscript{563}

As far as the composition of the JSC is concerned, no consideration of gender equity is required in the selection of the members of the JSC.\textsuperscript{564} In 2004, only four of the 23 members of the JSC were female.\textsuperscript{565} During interviews, the JSC is said to be indifferent and hostile to female candidates.\textsuperscript{566} In addition, criticism has been raised that a body as large as the JSC is not conducive to detailed and successful deliberation over possible candidates. Davis argues that a reduced membership may promote more serious debate of which candidate to recommend for judicial appointment.\textsuperscript{567} Further criticisms against the composition of the JSC relate to the number of political appointees designated to serve on the commission.\textsuperscript{568} Concerns were raised that the composition of the JSC gives

\textsuperscript{559} Section 178(1)(g) of the Constitution.
\textsuperscript{560} Section 178(1)(h) of the Constitution.
\textsuperscript{561} Section 178(1)(i) of the Constitution.
\textsuperscript{562} Section 178(1)(j) of the Constitution.
\textsuperscript{563} Section 178(1)(k) of the Constitution.
\textsuperscript{564} Cowan 2006 University of Maryland Law Journal of Race, Religion, Gender and Class 314.
\textsuperscript{565} Ibid.
\textsuperscript{566} Ibid. In S v Van Rooyen 2002 (8) BCLR 810 par [61] the Constitutional Court had to decide on the Constitutionality of an Act which reconstituted the Magistrates' Commission. The court held that there was a "pressing need" to make this commission more representative of the South African population. See also du Bois "Judicial Selection in Post-Apartheid South Africa" in Malleson and Russel (eds) Appointing Judges in an Age of Judicial Power 287.
\textsuperscript{567} Davis “Judicial Appointments in South Africa” 2010 Advocate 40 42. The South African government, in its National Development Plan 2030, has also acknowledged that the size of the JSC may hamper the effective performance of its functions. See Olivier“ The Selection and Appointment of Judges” in Hoexter and Olivier The Judiciary in South Africa 167.
\textsuperscript{568} Olivier” The Selection and Appointment of Judges” Hoexter & Olivier The Judiciary in South Africa 168 -169.
the ruling party the ability to dominate proceedings and pursue political agendas in the appointment of judges.\textsuperscript{569}

These concerns were also raised during the certification of the Constitution.\textsuperscript{570} Here, it was argued that the influence exercised by the President in the appointment of judges, as well as the over-representation of the executive and the legislature on the JSC breached the constitutional principles.\textsuperscript{571} The Constitutional Court, however, rejected this argument based on the fact that the constitutional principles do not require the establishment of the JSC and its creation was a political choice made by the National Assembly working within the framework provided by the constitutional principles.\textsuperscript{572} It furthermore found that judicial appointments made by the executive or by a combination of the executive and the legislature is not inconsistent with the constitutional principles.\textsuperscript{573}

The JSC has the functions and powers assigned to it in terms of the Constitution and legislation.\textsuperscript{574} In terms of section 178(5), the JSC may advise the South African government on any matter relating to the administration of justice or the judiciary. The JSC is also involved in the removal and suspension of judges,\textsuperscript{575} although its main function is to advise the executive on the selection and appointment of judges.\textsuperscript{576}

\begin{footnotesize}
\textsuperscript{569} Members drawn from the legislature are excluded when the JSC performs functions other than the appointment of judges. See Olivier "The Selection and Appointment of Judges" in Hoexter & Olivier The Judiciary in South Africa 169.
\textsuperscript{571} Most notably, it was argued that these provisions breached constitutional principle VI, which called for separation of powers and constitutional principle VII, which required the judiciary to be appropriately qualified, independent and impartial. See Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 par [121] – [122].
\textsuperscript{572} Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 par [124].
\textsuperscript{573} Ibid.
\textsuperscript{574} Section 178(4) of the Constitution. The Judicial Service Commission Act 9 of 1994 was promulgated to regulate matters relating to the JSC. This Act is discussed in the chapter to follow.
\textsuperscript{575} In terms of section 177 of the Constitution.
\textsuperscript{576} Olivier "Is the South African Magistracy Legitimate?" 2001 SALJ 166 167.
\end{footnotesize}
4 3 1 2 Criteria for judicial appointment

Section 174(1) of the Constitution requires that any “appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer”. In its selection, the JSC is guided by section 174(2) of the Constitution which states that “the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered” when appointments to the bench are made.

The terms “appropriately qualified” and “fit and proper” are not defined in the Constitution. Although the two requirements may overlap, being “appropriately qualified” generally refers to academic and professional qualification, skill and experience. At present, there is no minimum qualification to become eligible for appointment to the bench and any academic qualification in law is sufficient. Merit should, however, be assessed on a case-by-case basis, since a particular court may require more knowledge and experience in a particular field of law than other courts would. It is also not clear what qualities a judicial candidate needs in order to be considered “fit and proper” for appointment as a judge. Cowan identifies five broad components to this requirement: independence, impartiality and fairness, integrity, judicial temperament and commitment to constitutional values.

In 2010 the JSC published a summary of the criteria it considers when making judicial selections. The primary criteria, as listed by the JSC, are founded on section 174(1) and (2) of the Constitution.

“1. Is the particular applicant an appropriately qualified person?”

577 Olivier “The Selection and Appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 134.
578 In the past, judges were drawn from the ranks of senior counsel, for which an LLB was a minimum requirement. By inference, as is argued by Hoexter and Olivier, an LLB degree was regarded as an unofficial minimum legal qualification to be considered for judicial appointments. See Olivier “The Selection and Appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 134.
580 Cowan Judicial Selection in South Africa 34.
581 The JSC Procedure was published as GN R432 in GG 24596 of 2003-03-27.
2. Is he or she a fit and proper person?
3. Would his or her appointment help to reflect the racial and gender composition of South Africa?“\textsuperscript{582}

The JSC has also formulated supplementary criteria:

\begin{itemize}
\item “1. Is the proposed appointee a person of integrity?
\item 2. Is the proposed appointee a person with the necessary energy and motivation?
\item 3. Is the proposed appointee a competent person?
\item (a) Technically competent.
\item (b) Capacity to give expression to the values of the Constitution.
\item 4. Is the proposed appointee an experienced person?
\item (a) Technically experienced.
\item (b) Experienced in regard to values and needs of the community.
\item 5. Does the proposed appointee possess appropriate potential?
\item 6. Symbolism. What message is given to the community at large by a particular appointment?”\textsuperscript{583}
\end{itemize}

The lists quoted above contains elements of both sections 174(1) and 174(2) of the Constitution. Given the fact that the JSC’s deliberations are made in private, it is however difficult to establish precisely how it balances the requirements of these two provisions, and which criteria weighs more heavily in favour of a particular candidate.

Davis argues that the best approach would be to consider section 174(2) only after a suitable candidate has been identified in terms of section 174(1).\textsuperscript{584} That is, to identify those candidates who are the best in terms of merit and then only consider the race and gender of those identified candidates before making its recommendation to the

\begin{footnotes}
\item\textsuperscript{582} \textit{Ibid.}
\item\textsuperscript{583} \textit{Ibid.}
\item\textsuperscript{584} Davis “Judicial Appointments in South Africa” 2010 \textit{Advocate} 40 42.
\end{footnotes}
A similar view was taken by Justice Johann Kriegler. The requirement that appointees be appropriately qualified is the primary requirement; the demographic considerations are merely a rider to that mandate. Olivier, however, argues that the requirements of sections 174(1) and 174(2) are considered collectively rather than individually. This is so given the fact that no clear distinction is drawn between the requirements of these two provisions in the list of criteria developed by the JSC. There is nothing to suggest that either of the two provisions takes precedence over the other.

Regardless, however, of the significance attached to section 174(2), it remains a constitutional imperative to redress the racial and gender imbalances on the bench. In order to comply with this imperative, the JSC has increased what Malleson calls “the candidate pool” for judicial appointment. In the past, judges were appointed exclusively from the ranks of senior council. Candidates are now drawn from the magistracy, attorneys' profession, as well as academia. Chaskalson warned that the JSC has already drawn deep into the existing pool, and that positive measures are needed to widen the pool and provide candidates with the experience necessary for appointment to the bench.

Malleson also argues that as long as women do not enjoy the functional and numerical equality on the bench, they still face direct and indirect disadvantage. The constitutional

585 Ibid.
587 Olivier “The Selection and Appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 133.
590 Chaskalson “The De Rebus Interview” 2002 409 De Rebus 10. Murray and Wesson believes that the former Chief Justice was referring to possible outreach programmes, where possible candidates coming from disadvantaged groups are identified and given the necessary qualifications and experience. Such programmes have been successful in other jurisdictions. See Murray and Wesson 2008 SAJHR 197.
591 Malleson “Justifying gender equality on the bench, why difference won’t do” 2003 Feminist Legal Studies 17.
commitment to gender equality, both as a value and a substantive right, justifies the implementation of affirmative action measures in the appointment of judges.\textsuperscript{592} No judicial system that values equality between men and women is going to remain exclusively male without a sufficient number of women, both black and white, joining the ranks of the judiciary.\textsuperscript{593}

There are no inherent qualities that make men better suited to the role of judging that justifies their domination of the bench.\textsuperscript{594} Women’s underrepresentation on the bench is therefore due to certain unfair arrangements, whether they be in the internal functioning of the legal profession or due to some external factors that disadvantage women.\textsuperscript{595} There can, therefore, not be any justification for the “near monopoly of judicial power” enjoyed by men and the disproportionately low numbers of women in the judiciary.\textsuperscript{596}

Bonthuys argues that merit is normally perceived as an attribute of an individual person that is unrelated to the social structures of race and gender.\textsuperscript{597} Furthermore, it is believed that there is a conflict between merit and affirmative action in that people are appointed either on merit, or as a result of affirmative action.\textsuperscript{598} The JSC has not been immune to this type of reasoning. Concerns have been raised that the method the JSC employs in conforming to its constitutional mandate of judicial transformation is that the merit of candidates is often overlooked in order to appoint a candidate who will enhance the demographic profile of the bench.\textsuperscript{599} The underlying assumption, according to Malleson,\textsuperscript{592} Davis “Judicial Appointments in South Africa” 2010 Advocate 40 41; Albertyn “Judicial Diversity” in Hoexter & Olivier The Judiciary in South Africa 272.\textsuperscript{593} Cowan 2006 University of Maryland Law Journal of Race, Religion, Gender and Class 302.\textsuperscript{594} Malleson 2003 Feminist Legal Studies 15. There is, in fact, much debate surrounding the issue of whether or not female judges judge differently than their male counterparts. On this, see Bonthuys “The Personal and the Judicial: Sex, Gender and Impartiality” 2008 SAJHR 239, where the author describes a study conducted on the judgments delivered by several judges presiding over gender cases. Her findings suggest that a feminist perspective does make a difference in the way a case is decided, although it is not only female judges who bring this feminist perspective to the bench. Justice Sachs’s judgements, she argues, reflects a feminist reasoning that is even more radical than those delivered by the female judges who formed part of the study.\textsuperscript{596} Malleson 2003 Feminist Legal Studies 15.\textsuperscript{599} Du Bois “Judicial Selection in Post-Apartheid South Africa” in Malleson & Russel Appointing Judges 290 -291. See also Hodes “Transformation of the legal profession: are we on the right path?” 1999
is that white, middle-aged men are appointed on merit while all the other judges are appointed to further the transformational goals of the JSC. Critics also argue that the Constitution is undermined when demographics are permitted to eclipse the constitutional values of non-racism and non-sexism. However, where diversity is taken as a factor in the collective competence of the judiciary, there cannot be said to be any unfair treatment to those who have been passed over for judicial selection. For instance, where it is accepted that diversity is a criterion for the competence of the bench as a whole, favouring a less qualified women over a more qualified man is justified as it enhances the collective competence of the judiciary.

This view is aptly expressed by Carmel Rickard, law journalist and former legal editor for the Sunday Times:

“Diversity…is a quality without which the Court is unlikely to be able to do justice to all the citizens of the country…[I]t is a component of competence. The court will not be competent to do justice unless, as a collegial whole, it can relate fully to the experience of all who seek its protection.”

Through the inclusion of “symbolism” and “potential” in the criteria to be used in the selection of judges, the JSC is attempting to encourage the appointment of more female and black judges. Symbolic representation refers to the need of the judiciary to be broadly representative of the community it serves in order for it to be legitimate. Through the use of symbolism as a selection criteria, the JSC attempts to determine what message

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Consultus 3 4, where the author quotes the Dean of Law of the University of Transkei as saying “[w]e do want blacks as judges in our law courts but they must be real judges - competent, efficient and knowledgeable. Anything cosmetic is unacceptable”.

Bonthuys 2008 SAJHR 249.


It must be stressed, however, that any person appointed as a judge must still be “suitably qualified” as required by section 174(1) of the Constitution. Appointing a person who is not suitably qualified will not be justified by the need to transform the bench along racial and gender lines.

Ibid.

Cowan 2006 University of Maryland Law Journal of Race, Religion, Gender and Class 301.

will be communicated to the community if a candidate of a particular demographic group is to be appointed.\textsuperscript{607} For instance, if there is a significant gender imbalance in a particular court, the appointment of more female judges to that court will have particular symbolic significance.\textsuperscript{608} Potential, on the other hand, allows the JSC to recommend a candidate for appointment even if he or she lacks experience when competing with a candidate who is considered to be more technically meritorious.\textsuperscript{609} Given the history of judicial appointments in South Africa, it is very often women candidates who are less experienced. Seen in this light, the criterion of potential may equal the playing field between male and female candidates competing for the same vacancy.

One must be careful, however, to distinguish between the representivity of the judiciary as compared to that of the legislature and the executive.\textsuperscript{610} Judges are meant to ensure that the law is applied equally to all persons, not to correspond to the interests of any specific group.\textsuperscript{611} There is still no right in South Africa to be judged by a person of the same race, gender, sexual orientation or other demographic attribute.\textsuperscript{612} This point was duly illustrated in \textit{President of the Republic of South Africa v South African Rugby Football Union},\textsuperscript{613} where it was held that a litigant has no entitlement to apply for recusal of a judicial officer simply because he or she is drawn from a different group or segment of society.

There is grave concern, given the homogenous nature of the judiciary, that judgments reflect the life experiences of only one segment of society.\textsuperscript{614} Information on the life

\begin{thebibliography}{10}
\bibitem{607} This much is stated in the JSC criteria which were published in 2010.
\bibitem{608} Olivier “The Selection and appointment of Judges” in Hoexter & Olivier (eds) \textit{The Judiciary in South Africa} 140.
\bibitem{610} Davis “Judicial Appointments in South Africa” 2010 \textit{Advocate} 41 42.
\bibitem{611} Ibid.
\bibitem{612} Du Bois “Judicial Selection in Post-Apartheid South Africa” in Malleson and Russel (eds) \textit{Appointing Judges} 281.
\bibitem{613} 1999 (4) SA (CC).
\bibitem{614} Mahoney “Gender and the Judiciary: Confronting Gender Bias” in Adams and Byrnes (eds) \textit{Gender Equality and the Judiciary} (1999) 85 90.
\end{thebibliography}
experiences of women and minority groups is not available for the majority of judges to draw on when adjudicating disputes. This, in turn, raises concern about the possible bias of court decisions and its ability to dispense justice “without fear, favour or prejudice”. A diverse judiciary will bring a plurality of views to the bench which not only enhances the judgments delivered by it, but also brings about greater legitimacy and respect for the judiciary. In Stoman v Minister of Safety and Security, van der Westhuizen J held that that efficiency and representivity cannot be separated. In the words of Sachs: “[j]ustice can neither be done nor be seen to be done until the judges and the lawyers are far more representative of the community as a whole”.

4 3 2 Acting judges

Section 175(2) of the Constitution provides for the appointment of acting judges, where it states “[t]he Cabinet member responsible for the administration of justice must appoint acting judges…after consulting the senior judge of the court which the acting judge will serve”. The practice of appointing acting judges is useful not only to ensure that courts continue to function efficiently in circumstances where one or more of its permanent judges are absent, but also to provide the necessary experience to persons pursuing a permanent appointment to the bench. This practice has, however, been severely criticised. It is not clear what the requirements are for candidates to be considered for acting appointments, even though the JSC eventually relies heavily on an acting

615 Mahoney “Gender and the Judiciary” in Adams and Byrnes Gender Equality and the Judiciary 90 and 106.
616 As it is required to do in terms of section 165(2) of the Constitution.
617 Wesson & Du Plessis 2008 SAJHR 194 quoting Kentridge “The Highest Court: Selecting the Judges” 2006 Cambridge Law Journal 55 61. In this regard, see also Budlender “Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa” 2005 SALJ 715 716, where the writer states that: “we have to face what I think is the inescapable fact that in general, black judges are more likely than white judges to understand and have some connectedness with the life experiences and concerns of the people who constitute the majority of our country’s people”.
618 2002 (3) SA 468 (T) 482 C-F.
621 Olivier 2006 Obiter 554.
appointment to evaluate the suitability of the acting judge for permanent appointment to the bench.623

The reason for such criticism is that the Minister of Justice appoints acting judges after consultation with the senior judge of the court for which the acting appointment is made.624 Even though the Minister must consider the advice given by the senior judge, he or she is not bound to follow it, and acting appointments are made without any consultation with the JSC.625 Interestingly, this power was raised as an objection in the Certification of the Constitution of the Republic of South Africa, 1996.626 The objection was, however, rejected by the Constitutional Court.627

In practice, the Judge President of the court to which an acting appointment is to be made has an almost decisive decision as to who is appointed.628 This necessarily means that acting appointments are made from a limited pool of candidates who are known to the Judge President of the division concerned.629 Olivier argues that women, in particular, have been marginalised by this practice.630

Further criticism to the appointment of acting judges relates to suspicions that the Minister appoints acting judges to delay permanent appointments until members of the previously disadvantaged groups make themselves available.631 The Constitutional Court has held that

"Acting appointments are essentially temporary appointments for temporary purposes.... If there is a vacancy in a court the JSC has a duty to fill it. It may no doubt delay or defer an appointment until a suitable candidate is identified, but it should not

623 Olivier 2006 Obiter 569.
624 Section 175(2) of the Constitution.
625 Trengrove 2007 Advocate 38.
626 1996 (10) BCLR 1253 (CC) par [125].
627 Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744 (CC) par [131].
628 Olivier” The Selection and Appointment of Judges” Hoexter & Olivier The Judiciary in South Africa 150.
629 Ibid.
630 Ibid.
631 Trengrove 2007 Advocate 38.
be assumed that it will abdicate its responsibility by allowing permanent vacancies to be filled indefinitely by acting Judges. . ." 632

Appointing large numbers of acting judges to assume the role assigned to duly appointed permanent judges, it may be argued, is not what was intended by section 175(2) of the Constitution. 633

Most acting judges are appointed from practising members of the legal profession. 634 To preserve the independence of the judiciary, permanent judges may not hold any other office for profit 635 and are required to sever all professional ties when accepting a judicial appointment. 636 Owing to the temporary nature of acting appointments, however, these principles do not apply to acting judges, which may create the perception of bias in the eyes of the public and bring the integrity of the judiciary in disrepute. 637

4 3 3 Gender equality in the Constitution

Not only is the whole of the Constitution couched in non-sexist terms, 638 but “non-sexism” is in addition included in its founding provisions. Section 1 lists the values upon which the new, democratic South Africa is to be founded.

The founding provisions of the Constitution envisage a society built on values of non-racialism, non-sexism and respect for human rights. This requires a complete transformation of the South African society which has, for many decades, been characterised by racism and patriarchy. Transformation, some have argued, is a

633  Trengrove 2007 Advocate 38.
634  Ibid.
635  In terms of section 2(6) of the Judges’ Remuneration and Conditions of Employment Act 47 of 2001.
636  In terms of Principle 15 of the Judicial Ethics Guidelines for Judges of South Africa.
637  Trengrove 2007 Advocate 38.
638  Du Plessis and Gouws argue that the replacement of the “his or her” in the Interim Constitution with the “their” in the Final Constitution weakened the wording’s effect since the use of “she” in addition to “he” reinforces the inclusion of women. Du Plessis & Gouws “The Gender Implications of the Final Constitution (with Particular Reference to the Bill of Rights)” 1996 SAPL 472 473. See also Cowan “Women’s Representation on the Courts in the Republic of South Africa” 2006 6 U. MD. LJ. Race, Religion, Gender & Class 291 292.
challenge which is particularly difficult when it comes to the achievement of equality, especially considering the inequalities inherited from apartheid.639

As a value and a right, equality, including general equality, is central to the social transformation of South Africa.640 As a foundational value, equality establishes an “aspirational ideal”641 which is “unfettered by institutional constraints” and gives substance to the rights contained in the Bill of Rights.642 It is as an essential guide to the interpretation and application of the Constitution.643 Equality, however, is also a substantive and enforceable right and entitles litigants to approach the courts where their right to equality has been infringed upon.644 In order to fully understand equality under the Constitution, it is therefore important to consider it from both perspectives.

4 3 3 1 Equality as a value

As a founding value, together with the values of dignity and freedom, equality informs the interpretation645 and application646 of all the rights contained in the Bill of Rights.647 The importance and centrality of the value of equality has on numerous occasions been

639 Albertyn and Goldblatt “Equality” in Woolman et al Constitutional Law of South Africa 2 ed 2011 RS 3 35-2. The Canadian Chief Justice, Beverley McLachlin, has called equality the most difficult right to realize, “a right that often promises more than it can deliver and tends to trouble the boundary between the judiciary, the legislature and the executive”. McLachlin “Equality: The Most Difficult Right” 2000 14 The Supreme Court Law Review 17.
640 Albertyn 2007 SAJHR 254-255.
644 Section 9. Equality is the first right in the bill of rights. Du Plessis and Corder argues that, even though the order in which the rights appear in Chapter 2 of the Constitution does not determine their respective importance with relation to one another, the drafters of Bill of Rights listed equality first to stress its “primary significance”. See Du Plessis and Corder Understanding South Africa’s Transitional Bill of Rights (1994) 139.
645 Section 39(1) of the Constitution states that courts, tribunals and other fora must, in interpreting the Bill of Rights, “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.
646 In terms of section 36 of the Constitution, any limitation to the rights contained in the Bill of Rights must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The limitations clause in the Constitution is discussed in greater detail below.
647 See van Reenen 1997 SAPL 152.
recognised by the courts. In *Minister of Finance v van Heerden*, for instance, the Constitutional Court held that:

“[t]he achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.”

At the heart of equality jurisprudence lies the concept of dignity, since the equality clause is offended primarily through a violation of dignity. In *President of RSA v Hugo*, the Constitutional Court found that the main purpose of our new constitutional order is to establish a society where all persons are accorded equal dignity. This, it argues, is the very reason behind a prohibition of unfair discrimination.

Given this central role in the realisation of equality, the meaning accorded to dignity necessarily defines the boundaries of the right to equality. Ackerman maintains that logical meaning can be given to equality only if one first asks the question “in respect of what are all human beings equal?” The answer to this question, he argues, is human dignity. In this sense, human dignity is the “criterion of reference” or the “criterion of attribution” of the right to equality.

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648 See for instance *President of RSA v Hugo* 1997 (4) SA (CC) 1 par [74] (CC), where Kriegler J, stated that “[e]quality is our Constitution’s focus and its organizing principle”. See also *Fraser v Children’s Court, Pretoria North* 1997 (2) SA 391 (CC) par [20], where the Constitutional Court held that equality “permeates and defines the very ethos upon which the Constitution is premised”.

649 2004 (6) SA 121 (CC).

650 *Minister of Finance v van Heerden* par [22].

651 See for instance *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para [41]; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) par [47].

652 Cowan 2001 SAJHR 40.

653 1997 (4) SA 1 (CC).

654 *President of RSA v Hugo* par [41].

655 Ibid.


658 Ackerman *Human Dignity* 19.

659 Ackerman *Human Dignity* 19 – 20.
This Kantian expression of equating equality with equal human worth or dignity has also been discussed by the Constitutional Court. In *S v Makwanyane*, for instance, O'Regan J, stated that “[t]he new Constitution stands as a monument to this society’s commitment to a future in which all human beings will be accorded with equal dignity and respect….” In *Prinsloo v van der Linde*, quoting with approval from a case heard in the Supreme Court of Canada, the court held that:

“Equality…means nothing if it does not represent a commitment to recognizing each person’s equal worth as human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.”

This approach has been subject to some criticism. It is argued that the core characteristics of equality are group-based disadvantage, vulnerability and harm, and it is these characteristics that should inform the concept of equality. By defining equality in terms of dignity, however, the essence of the right to equality is lost, and the equality right is limited to an “individualised conception” of the right divorced from the systemic nature of group-based discrimination. Moreover, given the abstract and indeterminate nature of dignity, informing the interpretation of the right to equality based on human dignity may further limit the transformative potential of this right.

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660 Ackermann *Human Dignity* 183.
661 1995 (3) SA 391 (CC).
662 *S v Makwanyane* par [344].
663 1997 (3) SA 1012 (CC).
664 In *Egan v Canada* (1995) 29 CRR (2d) 79 at 104 – 105 as quoted by the Constitutional Court in *Prinsloo v van der Linde* par [32].
665 Some argue that the substantive right to equality should be informed by the value of equality, as opposed to the value of dignity. See Albertyn and Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” 1998 *SAJHR* 248 254. See also Davis “Equality: the Majesty of Legoland Jurisprudence” 1999 *SALJ* 398 412-413, where the author criticises the Constitutional Court for not defining equality, but relying on dignity to give substance to the right to equality.
666 Albertyn and Goldblatt 1998 *SAJHR* 256.
667 Albertyn and Goldblatt 1998 *SAJHR* 258.
669 Albertyn and Goldblatt “Equality” in Woolman *et al Constitutional Law of South Africa* 2 ed 2011 RS 3 35-9. This is especially true where the right to dignity is given a narrow definition as was done in *Harksen v Lane* 1998 (1) SA 300 (CC).
A different view, however, may also be taken. Cowen argues that, even if the right to dignity is individualistic in nature, that individual still forms part of a group.\textsuperscript{670} The Constitutional Court’s interpretation of the right to dignity has evolved in such a way as to include a collective, group-based concept of the right.\textsuperscript{671} In \textit{Hugo}, for instance, the court held that “the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups”.\textsuperscript{672} In \textit{van Heerden}, the court went even further and stated that:

\begin{quote}
“Human dignity is harmed by unfair treatment…premised on the assumption that [a] disfavoured group is not worthy of dignity. At times, as our history amply demonstrates, such discrimination proceeds on the assumptions that the disfavoured group is inferior to other groups. And this is an assault on the human dignity of the disfavoured group. Equality as enshrined in our Constitution does not tolerate distinctions that treat other people as ‘second class citizens, that demean them as less capable for no good reason or that otherwise offend fundamental human dignity’”\textsuperscript{673}
\end{quote}

The Constitutional Court has also accorded dignity a more concrete definition by equating it with equal dignity and “equal moral worth”.\textsuperscript{674} An example of this approach can be seen in \textit{National Coalition for Gay and Lesbian Equality v Minister of Home Affairs}.\textsuperscript{675} Here, the court had to determine whether provisions in the Aliens Control Act,\textsuperscript{676} differentiating
between spouses of heterosexual partnerships and that of same-sex partners amounted to an infringement of the right to equality. In arriving at its decision, the court found that discriminating against gay and lesbian people means that they, whether one views them as individuals or as same-sex couples, “do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals”. It furthermore found that discrimination of this kind reinforces harmful stereotypes against homosexual people.

In a similar vein, in *Bhe v Magistrate, Khayelitsha*, the Constitutional Court found that the customary rule of primogeniture reinforced the social and economic exclusion of women and was an affront to their equal worth. From the jurisprudence of the Constitutional Court it is therefore clear that dignity is flexible enough to allow a court to use it to give substance to the equality right without impairing the transformational goal of the Constitution.

4.3.3.2 Equality as a right

The substantive right to equality is found in section 9 of the Constitution which contains five provisions. According to the Constitutional Court, these provisions are to be read comprehensively and in harmony with one another. Section 9(1) provides that “everyone is equal before the law and has the right to equal protection and benefit of the law”. In terms of section 9(3) and (4), no person may be discriminated against either by the State or in the private sphere. Section 9(3) furthermore lists specific grounds

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677 National Coalition for Gay and Lesbian Equality v Minister of Home Affairs par [42].
679 2005 (a) SA 580 (CC).
680 *Bhe v Magistrate, Khayelitsha* par [91] and [92]. See also par [187], where Ngcobo J, found that “[d]iscrimination conveys to the person who is discriminated against that the person is not of equal worth”.
682 Minister of Finance v van Heerden par [28].
683 Section 9(3) of the Constitution.
684 Section 9(4) of the Constitution.
upon which no person may be discriminated against, a contravention of which would be deemed to be unfair discrimination under section 9(5).

Section 9(2) of the Constitution, on the other hand, states that “[e]quality includes the full and equal enjoyment of all rights and freedoms” and that in order “to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”. The Constitution therefore goes beyond the mere prohibition of discrimination by allowing for the imposition of affirmative action measures to redress past discrimination and bring about substantive equality in South Africa.

From as early as the first gender-equality case heard by the Constitutional Court, *Brink v Kitshoff*, the court recognized the need for restitutionary measures to eradicate systems of discrimination. Similarly, in *President of the Republic of South Africa v Hugo*, the Constitutional Court stated that equal treatment on the basis of equal worth cannot be realised by identical treatment of persons in all circumstances, and in *National Coalition of Gay and Lesbian Equality v Minister of Justice*, the Constitutional Court warned that equality and uniformity must not be confused and that “uniformity can be the enemy of equality”. Moreover, in *van Heerden* the Constitutional Court found that affirmative action measures are not a “derogation from, but a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of

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685 1996 (4) SA 197 (CC).
686 As per O’Regan J, in *Brink v Kitshoff* 1996 (4) SA 197 par [42]: “[t]he drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination”. This judgement sent out a strong message that substantive equality, as opposed to formal equality, is to be favoured. Many subsequent gender cases followed this approach. See Bonthuys “The Personal and the Judicial: Sex, Gender and Impartiality” 2008 SAJHR 260. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) par [74].
687 1997 (6) BCLR 708 (CC).
688 See for instance *President of the Republic of South Africa v Hugo* (CC) at 729F-G; *National Coalition of Gay and Lesbian Equality v Minister of Justice*; *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA (CC).
689 1998 (12) BCLR 1517 (CC).
690 *National Coalition of Gay and Lesbian Equality v Minister of Justice* par [132].
Given South Africa’s specific historical context, equality before the law will not be achieved without remedial measures aimed at the eradication of systemic and institutionalised under-privilege. The primary object of remedial measures is to promote the achievement of equality.

One of the most contested questions about affirmative action measures was whether section 9(2) provides a complete defence against an allegation of unfair discrimination under section 9(3), or if it merely provides a means to determine whether such measures were fair. In the past, the High Courts approached the issue as though it were a special defence against a claim of unfair discrimination, although it was regarded as presumptively unfair if it related to one of the prohibited grounds in section 9(3).

In van Heerden the Constitutional Court found that it cannot be so that the Constitution at once authorises measured aimed at redressing past disadvantage and inequality but labels them as presumptively unfair at the same time. Writing for the majority, Moseneke J in van Heerden, held that:

"Legislative and other measures that properly fall within the requirements of section 9(2) are not presumptively unfair...differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by section 9(2)."

It follows that affirmative action measures which comply with the internal test in section 9(2) do not attract the fairness enquiry under section 9(3), nor will they be regarded as presumptively unfair under section 9(5) even if based on one of the prohibited grounds.

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691 This approach is different to the one followed in the past. In Public Servants Association of South Africa and Others v Minister of Justice and Others 1997 (3) SA 925 (T), for instance, the court regarded affirmative action measures as discrimination based on one of the prohibited grounds and had to be justified by the proponents of the measure in question.
692 Minister of Finance v van Heerden par [31].
693 Minister of Finance v van Heerden par [32].
694 Albertyn “Equality” in Cheadle et al The Bill of Rights 4-25.
695 For instance, the High Courts in Public Servants’ Association of South Africa and Another v Minister of Justice and Others and Motala and Another v University of Natal 1995 (3) BCLR 374 (D) both made use of this approach. See Albertyn “Equality” in Cheadle et al The Bill of Rights 4-25.
696 Minister of Finance v van Heerden par [32] - [33].
Section 9(2) therefore provides a complete defence to a claim that remedial measures constitute unfair discrimination.697

Initially, there was much debate surrounding the question of whether section 9(2) may be used merely as a defence to persons imposing remedial measures against a claim of unfair discrimination, or whether a person from a designated group may base a claim on the fact that he or she did not receive preferential treatment. This argument is generally known as the “shield versus sword” debate.698 If section 9(2) is to be regarded as a “sword”, it would allow an individual from a designated group to approach a court to compel the state to impose affirmative action.

The question whether section 9(2) can be interpreted in this light has recently been made even more compelling by the Constitutional Court’s statement that:

“Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality – a duty which binds the judiciary too.”699

Given the disadvantage still felt by many people in South Africa, a duty to promote the achievement of equality could imply that there is an obligation on the state to impose remedial measures in order to ensure that these people to not continue suffering prejudice as a result of past exclusion. On the other hand, the permissive language employed in section 9(2) as well as the deferential approach taken by the Constitutional Court in relation to affirmative action measures militates against and interpretation of this section as compelling the state to impose positive measures.700 Even if section 9(2) does not create an individual claim to persons who are aggrieved by the State’s failure to design and implement affirmative action policies it can provide a complete defence against an

699 Minister of Finance v van Heerden par [24].
allegation of unfair discrimination. provided that it meets the requirements of section 9(2) as explained by the Constitutional Court.\textsuperscript{701} When applied to affirmative action measures taken in compliance with section 174(2) of the Constitution, this means that a judicial candidate from a disadvantaged group can not claim a right to be appointed based on his or her group membership. It does however imply that the JSC, when faced with a claim of unfair discrimination by a candidate from a previously disadvantaged group, can defeat this claim by showing that the measures taken comply with the requirements laid down by the Constitutional Court.

4 3 3 3 The requirements for affirmative action

In \textit{van Heerden} the Constitutional Court listed three factors that must be satisfied for a measure to comply with the internal test in section 9(2):\textsuperscript{702}

\begin{enumerate}
\item It must first be determined whether the measures apply to persons or categories of persons who have been prejudiced by past discrimination.
\item It must then be determined whether the measures are designed to protect or advance persons or categories of persons who have been prejudiced.
\item Lastly, it must determine whether or not the measures promote the achievement of equality.
\end{enumerate}

Any affirmative action measures taken in terms of section 174(2) of the Constitution must therefore comply with the criteria set out in \textit{van Heerden}. For this reason, it is necessary to examine each of the criteria in detail.


\textsuperscript{702} \textit{Minister of Finance v van Heerden} par [37].
Does the measure target persons or category of persons who have been disadvantaged by unfair discrimination in the past?

The first step in the analysis involves a comparison between affected classes of persons. Affirmative action policies must be designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination. This criterion focuses on the persons that stand to benefit under the affirmative action policy and whether it is constituted of persons and categories of persons in need of remedial measures as required by section 9(2) of the Constitution. The Constitution does not expressly state who the beneficiaries of affirmative action policies should be, stating only that measures to advance or protect “persons or categories of persons disadvantaged by unfair discrimination” may be taken. In practice, however, affirmative action measures are predominantly taken to redress discrimination based on race, gender and disability. Black people, women of all races and disabled persons are therefore the primary targets for remedial measures. The terms “black people” does not refer only to persons of African descent, but also includes Coloured, Indian and Chinese people.

Woolman et al, identifies two questions that play an important role in identifying the beneficiaries of remedial measures. The first relates to whether one has to show actual disadvantage experienced by the favoured group, and the second is whether one can distinguish between persons within a group that have been disadvantaged by unfair discrimination.

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703 Minister of Finance v van Heerden par [39]
707 Section 9(2) of the Constitution.
708 The legislation envisaged in section 9(2) of the Constitution, the Employment Equity Act and the Promotion of Equality and Prevention of Unfair Discrimination Act identifies these categories of persons as potential beneficiaries of affirmative action measures.
709 See section 1 of the EEA. This definition is discussed in greater detail in the chapter to follow.
discrimination (relative disadvantage).\textsuperscript{711} With regard to the first question, the Constitutional Court has given a “qualified ‘yes’”\textsuperscript{712} answer in that, in order to be constitutional, an affirmative action measure must “favour a group or category designated in section 9(2)” and “[t]he beneficiaries must be shown to be disadvantaged by unfair discrimination”.\textsuperscript{713} It is qualified in that the group targeted by the remedial measure must have been disadvantaged by unfair discrimination, even though some members of the group did not suffer actual disadvantage.\textsuperscript{714} The Constitutional Court’s approach stems from the recognition that the divisions and cleavages adopted from the apartheid era emerged from group-based discrimination based mainly on race and gender.\textsuperscript{715} In order to heal the divisions of the past, extensive remedial and group-based measures must be taken.\textsuperscript{716}

It is often difficult, even undesirable, to devise an affirmative action measure with “pure differentiation” demarcating the classes affected with exact precision.\textsuperscript{717} In any group of persons, whether favoured or disfavoured in terms of the affirmative action measure, there could be windfall beneficiaries or what the Constitutional Court referred to as “jammergevalle” (persons who did not necessarily benefit from past discrimination but are now not included in the preferential treatment).\textsuperscript{718} This, however, cannot undermine the legal efficacy of an affirmative action measure.\textsuperscript{719} Drawing on observations made by the Supreme Court of Canada,\textsuperscript{720} the Constitutional Court has held that:

“The fact that it may create a disadvantage in certain exceptional cases while benefiting a legitimate group as a whole does not justify the conclusion that it is prejudicial”.\textsuperscript{721}

\textsuperscript{711} Ibid.
\textsuperscript{713} Minister of Finance v van Heerden par [38].
\textsuperscript{714} Albertyn “Equality” in Cheadle et al The Bill of Rights 4-27.
\textsuperscript{715} Albertyn and Goldblatt “Equality” in Woolman et al Constitutional Law of South Africa 2 ed 2011 RS 3 35-34. See also the minority judgement of Sachs J Minister of Finance v van Heerden par 144.
\textsuperscript{717} Minister of Finance v van Heerden par [39].
\textsuperscript{718} Minister of Finance v van Heerden par [39] and [21].
\textsuperscript{719} Minister of Finance v van Heerden par [39].
\textsuperscript{720} Thibaudeau v Canada 29 CRR (2d) 1 (SCC).
\textsuperscript{721} Minister of Finance v van Heerden par [39].
The efficacy of the remedial measure in question should therefore be judged by whether the “overwhelming majority” of persons benefiting under the scheme has been disadvantaged by unfair discrimination.\footnote{722}{Minister of Finance v van Heerden par [40]. In this case, the beneficiaries of the remedial measure was all new Parliamentarians that entered Parliament for the first time in 1994 at the advent of the new democratic order. Among the new Parliamentarians, 20% were not previously disadvantaged. The majority of the Constitutional Court held that the 80% previously disadvantaged beneficiaries constituted a “vast majority”. Mokgoro J and Ncgobo J, however, dissented from this reasoning and held there were too many previously advantaged individuals who benefitted from the remedial measure, and the group of beneficiaries was therefore “too loosely defined”. Albertyn “Equality” in Cheadle \textit{et al} \textit{The Bill of Rights} 4-26.} In two separate minority judgements in \textit{van Heerden}, Mokgoro J and Ncgobo J found that where a group is too loosely defined so as to include too many previously advantaged individuals, remedial measures in favour of that group should not fall within the protection afforded by section 9(2) of the Constitution.\footnote{723}{Minister of Finance v van Heerden par [105] and [108].} The different views taken by the majority and minority judgments in \textit{van Heerden} illustrates a substantive disagreement as to the level of judicial scrutiny a court should impose on affirmative action measures.\footnote{724}{Albertyn and Goldblatt “Equality” in Woolman \textit{et al} \textit{Constitutional Law of South Africa} 2 ed 2011 RS 3 35-35.} Whereas the majority of the court took a deferential approach by setting a relatively low threshold of compliance,\footnote{725}{\textit{Ibid.}} the minority judgements maintain that closer scrutiny is needed. In the words of Mokgoro J:

“[S]ection 9(2), as an instrument of transformation and the creation of a truly equal society, is powerful and unapologetic. It would therefore be improper and unfortunate for section 9(2) to be used in circumstances for which it was not intended. If used in circumstances where a measure does not in fact advance those previously targeted for disadvantage, the effect would be to render constitutionally compliant a measure which has the potential to discriminate unfairly.”\footnote{726}{Minister of Finance v van Heerden par [87]. The problems associated with defining disadvantage is not unique to South Africa. In India, for example, it became particularly contentious when it was discovered that the affirmative action policies in place had the tendency to benefit only an elite few of the disadvantaged groups.\footnote{726}{Ibid.} In order to remedy the situation, the Indian Supreme Court changed its approach to require, not only membership of a disadvantaged group, but also evidence of actual socio-economic disadvantage, thereby excluding the “creamy layer” from preferential policies. See Nair “The search for equality through Constitutional Process: The Indian Experience” in Jagwanth & Kalula \textit{Equality Law: Reflections from South Africa and Elsewhere} (2001) 255 265.}

Identifying the beneficiaries of affirmative action policies becomes more difficult where the measure in question advances one disadvantaged group at the expense of another.
historically disadvantaged group. Such a policy will be permissible if the group benefiting under the policy has suffered greater disadvantage relative to the disfavoured group of persons.\footnote{Albertyn “Equality” in Cheadle et al The Bill of Rights 4-28.} In \textit{Motala v University of Natal},\footnote{1995 (3) BCLR 374 (D).} for instance, a university admissions policy favouring African students over Indian students was found to be constitutional based on the fact that the poor quality of education which African students were subjected to in the past meant that African students could not compete with other racial groups where admissions were based on merit alone. In other words, African students experienced greater disadvantaged than Indian students, despite the latter group also having suffered unfair discrimination in the past.\footnote{This was also recognised by Sachs J in \textit{van Heerden} par [149] who referred to this as a “more difficult problem”.} This justified the university’s policy in limiting the number of students from other racial groups so as to allow more African students entry.\footnote{Albertyn “Equality” in Cheadle et al The Bill of Rights 4-28.}

Another problematic issue in identifying the beneficiaries of affirmative action relates to the way in which certain groups of persons are previously disadvantaged in a multitude of ways.\footnote{Albertyn and Goldblatt “Equality” in Woolman et al Constitutional Law of South Africa 2 ed 2011 RS 3 35-36.} Black women, for instance, suffered discrimination based both on sex and gender, as well as race. To properly address this intersectional disadvantage, affirmative action measures must be specifically tailored to particular groups.\footnote{Albertyn “Equality” in Cheadle et al The Bill of Rights 4-28.} A policy may therefore target African, as opposed to all black people, or black women, as opposed to all women.\footnote{Ibid.} In such instances, the definition of the preferred group must be justified by actual relative disadvantage suffered by the group in the past.\footnote{Ibid.}

\textit{Is the measure designed to protect or advance such persons or categories of persons?}

Section 9(2) of the Constitution requires remedial measures to be “designed to” advance or protect previously disadvantaged groups. Writing on the equivalent provision under the
Interim Constitution, Mureinik identified two different interpretations that can be attached to the phrase “designed to achieve”. The first interpretation can mean “intended to achieve” in which case the suitability of the affirmative action methods would not be in question as long as the person imposing the measures can show that it is intended to advance or protect persons previously disadvantaged by unfair discrimination. A more appropriate interpretation suggests that the word “designed” should be interpreted as meaning “constructed so as to achieve”. This latter interpretation would mean that courts are required to test the purpose as well as the means of the affirmative action measures. A court will therefore first enquire what the measure is intended to achieve, and secondly whether the measure is structured to achieve the intended end. The High Court in van Heerden, furthermore required that the proponents of the affirmative action measures must prove that it is necessary to disfavour certain categories of persons in order to benefit previously disadvantaged categories. Since the defendants were unable to discharge this onus, the remedial measures were struck down as unconstitutional.

The Constitutional Court in van Heerden, however, rejected the High Court’s approach and held that section 9(2) of the Constitution does not require such a standard of necessity. Nor does it require a proponent of affirmative action to prove that there are no less onerous means of achieving the intended outcome. Even though the future is

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735 Section 8(3) of the Interim Constitution.
736 An earlier draft of this section used the words “aimed at” in the place of “designed to achieve” which sparked a controversy over the level of scrutiny a court would have been allowed to take in adjudicating disputes on affirmative action. The fear was that any the wording of this section would allow a court merely to have regard to the aim of the measure or policy, and not whether the intended outcome is likely to be achieved. See Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” 1994 SAJHR 31 47.
738 Mureinik 1994 SAJHR 47.
741 Minister of Finance v van Heerden par [14].
742 Ibid.
743 Minister of Finance v van Heerden par [42].
744 Minister of Finance v van Heerden par [43].
hard to predict and it can not be said with certainty that the measure in question will have the desired outcome, what is needed is that the remedial measure in question must “be reasonably capable of attaining the desired outcome”.745 A remedial measure that is “arbitrary, capricious or display naked preference” cannot be said to be designed to achieve the objectives authorised by the Constitution.746 If it is clear that measures are not reasonably likely to achieve its purpose (that of advancing or benefitting those who have been disadvantaged by unfair discrimination) it would not constitute measures contemplated by the Constitution.747

**Does measure promote the achievement of equality?**

The last criterion identified in *van Heerden* requires a court to have regard to the effect of the remedial measure within the broader society by weighing up the beneficial purpose of the affirmative action measure against any possible harm that its implementation may cause.748 This involves analysing the impact of the measure on both the groups that are being advanced and those that are not, though emphasis is placed on the group which is being promoted by the remedial measure in question.749

In assessing whether a measure will promote the achievement of equality, the court must have regard to the entire class of persons complaining of unfair discrimination. It is therefore a group-based analysis, concerned more with the remedial purpose of the measure than the impact on individual complainants.750 The Constitutional Court in *van Heerden* accepted that achieving the goal of substantive equality often comes at a price to those groups who benefitted from past discriminatory laws.751 It is, however, clear that

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745 *Minister of Finance v van Heerden* par [41]
750 *Ibid.* It is exactly this focus on the remedial purpose of the affirmative action measures that sets it apart from the unfairness enquiry under section 9(3) in terms of the minority judgement of Mokgoro J in *Van Heerden v Minister of Finance* paras [78] – [79].
751 *Van Heerden v Minister of Finance* par [44]. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* par [76] and *Bel Porto School Governing Body and Others v Premier of the Province, Western Cape, and Another* 2002 (3) SA 265 (CC) par [7].
the long-term goal of our society is a non-racial and non-sexist society where all persons are treated as human beings of equal worth and equal dignity.\footnote{752}{Van Heerden v Minister of Finance par [44]} The remedial measure in question must promote this constitutional goal and should therefore “not constitute an abuse of power or impose substantial and undue harm” on those who do not stand to benefit from the scheme.\footnote{753}{Albertyn and Goldblatt “Equality” in Woolman et al Constitutional Law of South Africa 2 ed 2011 RS 3 35-39.}

With the first two criteria, as listed in \textit{van Heerden}, emphasis is placed on the design of the measure. This third and final prong of the analysis focuses both on the measure and on its implementation.\footnote{754}{South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC) par [143].} The word “achievement” implies an effect or impact of the measure which can not be tested without considering the action that was taken in its implementation.\footnote{755}{Ibid.} To be valid, both the implementation of the measure as well as the measure itself must comply with the Constitution.\footnote{756}{Ibid.}

\textbf{4 4 Conclusion}

From the discussion above, it can be seen that the judicial appointments process is vastly different to the approach followed before the Constitution took effect. This is to a large extent due to the establishment of the JSC which oversees the selection process. The JSC may follow its own procedure when selecting judges for recommendation to the President, but section 174 requires that only suitably qualified, fit and proper persons can be appointed as judges and that the racial and gender demographics of the judiciary must be considered when judicial officers are appointed. The Constitution therefore does not specify that the candidate with the best technical merit must be appointed, nor does it imply that only persons whose demographic profile will enhance the diversity of the judiciary should always be selected.
Too much emphasis on either one of these requirements could have devastating implications for the integrity of the judiciary. Given our historical past, the most formally qualified and technically experienced candidates will in most cases be white males. Appointments made on technical merit alone will therefore not enhance the diversity of the judiciary. On the other hand, a disregard for the technical merit in favour of demographic considerations could lead to a judiciary that is not able to deliver justice effectively.

The procedure adopted by the JSC does not provide any clarity on the weight to be attached to these considerations as the members deliberate on these in private. The criteria published in 2010 suggests that the JSC does not consider either the technical merit or the race and gender of the candidates to be the primary consideration for judicial selection, and that section 174 is rather seen in a holistic manner. This is so because no distinction is drawn between those criteria that tests the candidates' technical merit and those that seek to enhance the diversity of the judiciary.

By the inclusions of symbolism and potential in the criteria adopted for the selection of judges, the JSC seeks to comply with section 174(2) of the Constitution by selecting more black persons and women to be appointed to the bench. Since these criteria are aimed at advancing previously disadvantaged persons, in this case women and black persons, it constitutes remedial measures as contemplated in section 9(2) of the Constitution.

The Constitutional Court has held that true substantive equality can not be achieved without remedial measures that aim to advance persons and categories of persons that were discriminated against in the past. Affirmative action cases that have come before the Constitutional Court, most notably van Heerden, provide important guidelines that affirmative action measures must adhere to, both at the time of its formulation as well as when it is being implemented. Any measure taken by the JSC to advance women and black persons in compliance with section 174(2) of the Constitution must also meet these requirements. Chapter 6 of this thesis provides a detailed analysis of the selection criteria in order to determine if it complies with the van Heerden requirements.
It has furthermore been shown that, in order to be appointed permanently as a judge, it is desirable to have held acting appointments in the past. Unfortunately, the process through which acting appointments are made is cast in doubt, and no clear guidelines are available as to the requirements that need to be satisfied to be considered for an acting position. Acting appointments not only allows a judicial candidate the opportunity to prove his or her competence, but also lets the candidate acquire much-needed exposure and experience in judicial work. It is therefore submitted that more women in acting positions in the judiciary could widen the pool from which permanent appointments are made.

In the next chapter, the focus shifts to legislation that relates to the promotion of gender equality and those Acts which seek to regulate the activities of the JSC.
Chapter 5

Legislative provisions relating to affirmative action and the appointment of judges

5 1 Introduction

The Constitution is the supreme law of South Africa, and all obligations imposed by it must be obeyed. Constitutional rights are formulated in broad terms, and national legislation is needed to give content to its terms and provide remedies where rights have been infringed upon. This is recognised in section 9(4) of the Constitution which requires national legislation to be enacted to prohibit or prevent unfair discrimination. In terms of Item 23(1) of Schedule 6 to the Constitution, national legislation envisaged in section 9 had to be enacted within three years of the date on which the Constitution took effect.

The Legislature’s compliance with section 9(4) of the Constitution took the form of the EEA and the PEPUDA. In accordance with the principle of subsidiarity, once legislation is enacted to give effect to the Constitution, litigants may no longer rely directly on a constitutional provision except in cases where the constitutionality of the Act concerned, other legislation or conduct that does not fall within the ambit of the Act is challenged.

The EEA has been praised as being “remarkably sophisticated” in its methods of attaining equality in the workforce. The purpose of the EEA to promote equality in employment

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757 Section 2 of the Constitution.
758 The Constitution took effect on 4 February 1997. PEPUDA was assented to by the President of the Republic of South Africa on 2 February 2000. In other words, the PEPUDA was enacted 2 days before the lapse of time granted by the Constitutional Assembly.
759 Du Preez v Minister of Justice and Constitutional Development [2006] 3 All SA 271 (SE) par [13].
760 In terms of this principle, remedies found in legislation and common law must be exhausted first before relying on constitutional provisions. Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amicus Curiae) 2006 (2) SA 311 (CC). In relation to the application of this principle to the PEPUDA, see MEC for Education: Kwazulu-Natal and Others v Pillay 2008 (1) SA 474 (CC) par [40].
by eliminating unfair discrimination\textsuperscript{762} and to regulate affirmative action measures that seek to ensure equitable representation of designated groups in the workforce.\textsuperscript{763} While the prohibition against unfair discrimination applies to all employers, only designated employers are required to implement affirmative action. All designated employers must adopt employment equity plans according to which affirmative action is imposed. As such, Chapter 3 of the EEA contains detailed guidelines on the form and content of the employment equity plans.

In \textit{Khanyile v Commission for Conciliation, Mediation and Arbitration} (hereafter \textit{Khanyile}),\textsuperscript{764} the court held that judicial officers\textsuperscript{765} do not qualify as employees for the purposes of South African labour legislation.\textsuperscript{766} To hold otherwise would be in conflict with their constitutional office and undermine the independence of the judiciary.\textsuperscript{767} The process of judicial appointments are however in many respects akin to appointment in the employment sphere. Furthermore, remarkable similarities exist between the EEA and the PEPUDA, particularly with the provisions relating to affirmative action. This was recognised by the court in \textit{Du Preez} which stated that the wording of the two Acts are

\begin{footnotesize}
\begin{tabular}{ll}
\textsuperscript{762} & Section 2(a) of the EEA. \\
\textsuperscript{763} & Section 2(b) of the EEA. \\
\textsuperscript{764} & \textit{Khanyile v Commission for Conciliation, Mediation and Arbitration} LC (unreported) 2004-11-26 Case no 532/2002. \\
\textsuperscript{765} & \textit{Khanyile v Commission for Conciliation, Mediation and Arbitration} par [30] – [34]. Although this case involved the question as to whether a magistrate may be deemed an employee in terms of the Labour Relations Act 66 of 1995, Grogan argues that the same conclusion would inevitably be reached in the case of High Court judges. See Grogan \textit{Workplace law} (2009) 28. \\
\textsuperscript{766} & \textit{Khanyile v Commission for Conciliation, Mediation and Arbitration} par [30]. \\
\textsuperscript{767} & The judge in this case drew from two foreign cases where it was determined that a judicial officer cannot be said to be an employee of the State. In \textit{Hannah v Government of the Republic of Namibia} [2000] (4) SA 940 (NmLC) it was held that a judge is not an employee in terms of the Namibian Labour Relations Act 6 of 1992. The definition in this Act is almost identical to the one in the South African Labour Relations Act 66 of 1995 and the EEA. The second case considered was \textit{Union of India v Pratibha Bonnerjeea} [1996] AIR SC 690, where the Indian Supreme Court held that a High Court judge would not be able to “discharge his duties without fear or favour, affection or ill-will” if he were to regard the State as his master. This would be in conflict with judicial independence, since the judge, as the servant, would have to “carry out the directives of his master”. See \textit{Khanyile v Commission for Conciliation, Mediation and Arbitration} par [31] – [32]. Interestingly, when asked about his employment history in the standard questionnaire judicial candidates complete when applying for appointment to the bench, Chief Justice Mogoeng is reported to have answered that, since his appointment as a judge, he had been employed by the South African government. During the ensuing JSC interview, he furthermore added that he should rather have answered that he was employed by the Department of Justice. In this regard, see Wallis “Judges: Servants of Justice or Civil Servants?” 2012 129 \textit{SALJ} 656.
\end{tabular}
\end{footnotesize}
sufficiently similar for authority on the one Act to assist in the interpretation of the other.\textsuperscript{768} Both Acts were also promulgated in response to the dictate in section 9(4) of the Constitution and provide content and meaning to the equality clause. For this reason, both the EEA and the PEPUDA is considered in this chapter.

The PEPUDA binds the State and all persons, and finds application where the EEA does not.\textsuperscript{769} Similar to the EEA, the PEPUDA prohibits unfair discrimination and aims to address systemic equality through the imposition of affirmative action. Chapter 5 of the PEPUDA envisages the formulation and adoption of equality plans in which measures that will be adopted to achieve equality are set out. Equality claims that are brought in terms of the PEPUDA are heard by specialised equality courts established specifically for this purpose.\textsuperscript{770}

In \textit{Du Preez v Minister of Justice and Constitutional Development} (hereafter \textit{Du Preez}), the court recognised that the application of the PEPUDA is driven by the constitutional mandate to diversify the judiciary.\textsuperscript{771} Consequently, it is through the PEPUDA that the right to equality in the appointment of judges is enforced. This chapter therefore starts with a detailed discussion on the provisions of the PEPUDA, particularly those relating to the imposition of affirmative action measures.

\textit{Du Preez} is only one of several important cases dealing with the appointments to Magistrates’ Courts that have been heard by our courts. Case law dealing specifically with non-discrimination and affirmative action in the appointment of magistrates is of particular significance to this study, as section 174(2) of the Constitution applies to the whole of the judiciary which includes judges and magistrates.\textsuperscript{772} An authoritative interpretation of these provisions must therefore be considered by the JSC when appointing judges to the High Court bench.

\textsuperscript{768} \textit{Du Preez v Minister of Justice and Constitutional Development} par [17].
\textsuperscript{769} Sections 5(1) and 5(3) of the PEPUDA.
\textsuperscript{770} Chapter 4 of the PEPUDA.
\textsuperscript{771} \textit{Du Preez v Minister of Justice and Constitutional Development} par [25].
\textsuperscript{772} \textit{Singh v Minister of Justice and Constitutional Development} 2013 (3) SA 66.
In order to determine the extent to which one can draw on these cases as authoritative guidance in the appointment of judges, the constitutional position of magistrates must be examined in detail. This chapter shows that in the past, magistrates were seen as public servants and therefore employees of the State, although the same cannot be said of the magistracy today. Magistrates are increasingly seen as holding a constitutional position similar to that of judges. This chapter therefore provides a detailed analysis of case law dealing with the appointment of magistrates, specifically focusing on the way that the PEPUDA informed the courts’ reasoning.

Affirmative action measures have also been imposed in spheres outside of employment and courts have had to test the validity of these measures without the detailed provisions contained in the EEA. In Minister of Justice and Constitutional Development v South African Restructuring And Insolvency Practitioners Association (hereafter SARIPA), for instance, the court had to decide on the validity of remedial measures taken in terms of legislation regulating the insolvency industry. This case is discussed in detail as it shows how courts have applied the van Heerden requirements to remedial measures taken outside of the employment sphere.

The aim of this chapter is therefore threefold. Firstly, it provides a detailed discussion on the provisions of the PEPUDA and the EEA, focusing specifically on those provisions which require affirmative action measures to be imposed in order to address past exclusionary practices. Secondly, this chapter examines the position of magistrates and case law dealing with affirmative action in the selection and recruitment of magistrates. The way in which the PEPUDA informed the decisions of the court in these cases is also considered. Lastly, this chapter aims to show how the constitutional requirements can be applied to remedial measures taken outside of the employment sphere. This provides authority for remedial measures taken to correct the gender imbalances in the judiciary as the appointment of judges is not subject to employment legislation.

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773 See President of South Africa and Others v Reinecke 2014 (3) SA 205 (SCA).
774 SCA (unreported) 2016-12-02 Case no 69315.
The purpose of the PEPUDA is to give effect to section 9 of the Constitution so as to “prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith”. It was assented to by the President of the Republic of South Africa on 2 February 2000 and took effect in a piecemeal fashion, although certain parts have not yet commenced.

The PEPUDA is a very ambitious piece of legislation aimed at the complete eradication of economic and social inequality inherited from the apartheid era. The reach of the PEPUDA is much wider than that of persons prejudiced by past unfair discriminatory practices in that it also targets all persons disadvantaged by present discriminatory practices.

As in section 9 of the Constitution, the meaning of equality in the PEPUDA is twofold in that it aims, firstly, to prevent unfair discrimination and secondly, to promote equality by the enforcement of positive measures to advance persons and groups of persons who have suffered discrimination in the past. In this regard, the PEPUDA appears to go...
further than the Constitution, given that section 9(2) of the Constitution merely allows for affirmative action measures, but does not necessarily require it.\footnote{This is apparent in the wording of the section: “To promote the achievement of equality, legislative and other measures to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination \emph{may be taken}” (own emphasis). In \textit{National Coalition for Gay and Lesbian Equality v Minister of Home Affairs} 2000 (20) SA (CC) par [62] the Constitutional Court has, however, suggested that section 9(2) of the Constitution should not be read as permissive but rather places an obligation on the State to “promote the achievement of such equality” by “legislative and other measures designed to protect or advance person or categories of persons, disadvantaged by unfair discrimination”.}

5.2.1 Affirmative action in the PEPUDA

Chapter 5 of the PEPUDA contains extensive provisions relating to the imposition of positive measures and affirmative action. It can, however, not be read in isolation and should be read together with other provisions in the Act condoning or requiring the imposition of affirmative action.\footnote{Gutto \textit{Equality and Non-discrimination in South Africa} (2001) 208.}

The preamble to the PEPUDA recognises that the promotion of equality “implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups that were dispossessed of their land and resources, deprived of their human dignity and that continue to endure the consequences”.\footnote{Albertyn \textit{Introduction} 125.} Section 2 lists the objectives of the PEPUDA, including the object of setting out measures to advance persons who have been disadvantaged by unfair discrimination.\footnote{Section 2(g) of the PEPUDA.} In terms of the interpretation provisions of PEPUDA, section 3(d) enjoins any person interpreting the provisions to do so in such a manner as to give effect to the Constitution, including section 9(2) which requires measures to be taken to redress past discrimination. Under the guiding principles contained in section 4 of the PEPUDA, the “use of corrective or restorative measures in conjunction with measures of a deterrent nature”\footnote{Section 4(1)(a) of the PEPUDA.} is a principle that applies to the adjudication of any proceedings instituted in terms of the Act, and the need to “take measures at all levels to eliminate systemic
discrimination and equalities” should be recognised and taken into account in the application of this Act.\footnote{Section 4(2)(b) of the PEPUDA.}

Section 8 of the PEPUDA, which deals exclusively with the prohibition of unfair discrimination based on gender, recognises that failing to take steps to reasonably accommodate the needs of women also constitutes a form of unfair discrimination.\footnote{Section 8(h) of the PEPUDA. Sections 7(e) and 9(c) contains similar provisions requiring reasonable accommodation in terms of race and disability respectively.}

Section 14 of the PEPUDA, which deals with fairness enquiry, states that “measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination” do not constitute unfair discrimination.\footnote{Section 14(1) of the PEPUDA. See also \textit{South African Police Service v Solidarity obo Barnard} par [138] where Van der Westhuizen J indicates that, given the similarity of the wording between section 14(1) of the PEPUDA, section 6(1) of the Employment Equity Act and section 9(2) of the Constitution, these sections should carry similar interpretations.}

Moreover, whether and to what extent a defendant has taken steps to address disadvantage or to accommodate diversity are factors to be taken into account in the fairness enquiry.\footnote{Section 14(3)(i) of the PEPUDA.}

Lastly, where a court has found that a complainant has suffered unfair discrimination, a court may order the defendant to take special measures to address the unfair discrimination,\footnote{Section 21(2)(h) of the PEPUDA.} or directing the defendant to make reasonable accommodation in favour of a group of persons.\footnote{Section 21(2)(i) of the PEPUDA.}

As alluded to above, the main positive action provisions of the PEPUDA are contained in chapter 5. The general responsibility placed on all persons to promote equality is contained in section 24 of the PEPUDA. This section places a burden on the State as well as all persons\footnote{“Person” is described in section 1 of the PEPUDA to include “a juristic person, a non-juristic entity, a group or a category of persons”.} to promote equality, while there is an additional burden placed on the State to achieve equality.

\footnotesize{\begin{itemize}
\item Section 4(2)(b) of the PEPUDA.
\item Section 8(h) of the PEPUDA. Sections 7(e) and 9(c) contains similar provisions requiring reasonable accommodation in terms of race and disability respectively.
\item Section 14(1) of the PEPUDA. See also \textit{South African Police Service v Solidarity obo Barnard} par [138] where Van der Westhuizen J indicates that, given the similarity of the wording between section 14(1) of the PEPUDA, section 6(1) of the Employment Equity Act and section 9(2) of the Constitution, these sections should carry similar interpretations.
\item Section 14(3)(i) of the PEPUDA.
\item Section 21(2)(h) of the PEPUDA.
\item Section 21(2)(i) of the PEPUDA.
\item “Person” is described in section 1 of the PEPUDA to include “a juristic person, a non-juristic entity, a group or a category of persons”.}

Section 25 of the PEPUDA places a more specific obligation on the State to promote equality and lists several actions that must be taken in order to comply with this duty. In terms of section 25(1) the State must develop awareness of fundamental rights and take measures to formulate and implement programmes to promote equality. Where appropriate or necessary, the State is also required to, *inter alia*, develop action plans to combat any unfair discrimination, promulgate legislation to promote equality, and develop codes of practice to promote equality and further develop guidelines in respect of reasonable accommodation.

Section 25(4) of the PEPUDA specifically enjoins all Ministers to implement, within available resources, measures aimed at the achievement of equality. This is to be done by eliminating any form of discrimination within their area of competence and by preparing and implementing equality plans together with time frames for its implementation. These equality plans are to be submitted to the South African Human Rights Commission to be dealt with in a prescribed manner and in consultation with the Commission on Gender Equality. Section 26 of the PEPUDA places a similar duty on all persons performing a public function.

The requirements regarding the equality plans that must be formulated and implemented in terms of section 25 are expanded upon in regulations published by the Minister in June of 2003. These regulations contain detailed provisions on the content that must be included in the equality plan, including an analysis of inequalities and unfair discrimination, the goals to be achieved in terms of the equality plan, the measures that will be implemented to achieve these goals, time frames for the implementation of the measures and mechanisms and criteria to evaluate to monitor and evaluate the implementation of the equality plans.

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792 Sections 26 and 27 of the PEPUDA places a duty to promote equality on persons operating in the public domain and private persons respectively.
793 Section 25(1)(c) of the PEPUDA.
794 Sections 25(4)(a) and (b) of the PEPUDA.
795 Section 25(5) of the PEPUDA.
797 Regulation 24(3)(c).
Section 25 of the PEPUDA has been criticised as “constitutionally suspect” as the development and implementation of departmental equality plans are made subject to the availability of resources. Unlike socio-economic rights in the Bill of Rights, the right to equality is not limited by available resources, and a limitation of this kind may be unconstitutional. Furthermore, the duty on the State to develop certain positive measures only “where necessary or appropriate”, will make enforcement of this section difficult.

Section 28 of the PEPUDA is more explicit in addressing unfair discrimination based on race, gender and disability. Section 28(3) places a duty on the State, institutions performing public functions and all persons to eliminate discrimination based on these grounds in particular, as well as to promote equality. These parties are to, inter alia, audit laws, policies and practices and enact laws, develop progressive policies, initiate codes of practice to eliminate discriminatory aspects thereof, and adopt viable action plans for the promotion and achievement of equality in respect of race, gender and disability.

No definition is provided for the term “equality plans” in the PEPUDA. Gutto is of the opinion that it will include employment equity plans (as found under the EEA), although a much broader scope is envisaged in the PEPUDA. It will therefore apply to institutions in their internal recruitment as well as to their activities in the broader society. He further

799 Albertyn Introduction 134.
800 Section 25(1)(c) of the PEPUDA.
801 Albertyn Introduction 134.
802 Interestingly, this section requires courts to consider it to be an aggravating factor if it is proved that unfair discrimination based on race, gender or disability played a part in the commission of a criminal offence. This may lead to a heavier sentence being imposed. See section 28(1) of the PEPUDA.
803 Liebenberg and O’Sullivan, however, argue that, even though the Act places emphasis on race, gender and disability, the State is already under an obligation to eliminate discrimination based on any of the prohibited grounds in the Constitution. See Liebenberg and O’Sullivan in Jagwanth & Kalula Equality Law 102.
804 Section 28(3)(b) of the PEPUDA.
806 Gutto Equality and Non-discrimination 214.
argues that enforcement of the equality plans, including affirmative action measures, are likely to follow along the same lines as that of employment equity plans formulated under the EEA.\textsuperscript{807}

The promotion of equality provisions of the PEPUDA are not yet in force, and it remains to be seen whether a court will construe this section as imposing an obligation on the State to formulate equity plans to address the underrepresentation of black, female and disabled persons within the individual institutions. If one was to follow the argument of Gutto above, it could mean that institutions and bodies that are not subject to the EEA will also be placed under a duty to implement affirmative action plans in order to address the underrepresentation of black, female and disabled persons. By implication, when applied to the topic at hand, the State would be under a duty to develop formal affirmative action policies to address the gender imbalance on the bench.

5 2 2 Enforcement of the PEPUDA

The primary responsibility for monitoring conformity to the duties of section 25 of the PEPUDA lies with the South African Human Rights Commission (hereafter SAHRC) and, to a lesser extent, the Commission for Gender Equality (hereafter CGE) and other constitutional institutions.\textsuperscript{808} These institutions are given the power to request the State,\textsuperscript{809} or any person, to provide information on measures that have been taken to achieve equality, including legislative and executive action, as well as information on the extent of compliance with programmes, codes of practice and legislation.\textsuperscript{810} Furthermore, a

\textsuperscript{807} \textit{Ibid.}

\textsuperscript{808} Section 24(2) of the PEPUDA. Both the South African Human Rights Commission and the Commission on Gender Equality have similar powers in terms of their enabling Acts and the Constitution. See Albertyn \textit{et al Introduction} 132.

\textsuperscript{809} The definition of “the State” in section 1(xxviii) of the PEPUDA is very similar to the definition provided for “organ of state” in section 239 of the Constitution, and includes “any department of State or administration in the national, provincial or local sphere of government” or “any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of any legislation or under customary law or tradition”. Reference to functionaries or institutions that exercise public power or performing a public function in terms of customary law or tradition was added to the definition in the PEPUDA.

\textsuperscript{810} Section 25(2) of the PEPUDA.
progress report on the implementation of the envisaged equality plans, detailing the progress that has been made as well as time frames that have not been met, must be submitted to the SAHRC annually.\(^{811}\) The SAHRC may then make recommendations on measures that may be put in place to expedite the implementation of the equality plans.\(^ {812}\)

The SAHRC is also given a duty in terms of section 28(2) of the PEPUDA to report on the extent to which unfair discrimination, based on race, gender and disability, still persists in South Africa, including what the effects thereof are, and recommendations on how to address these.

As far as the promotion of equality chapter of the PEPUDA is concerned, it remains to be seen whether, and to what extent, Chapter 5 is legally enforceable in a court.\(^ {813}\) In other words, will a litigant from a previously disadvantaged group be able to claim the imposition of affirmative action where the State has failed to formulate and implement equality plans? Certain authors are of the view that this is a valid interpretation of this chapter of the PEPUDA.\(^ {814}\) This would mean that these provisions could be a sword to be used against the State for failing in its obligations to implement affirmative action measures to address the gender imbalance on the bench. This interpretation appears to correlate with the view of the North Gauteng High Court in *Singh v Minister of Justice and Constitutional Development* (hereafter *Singh*).\(^ {815}\)

The PEPUDA furthermore establishes equality courts where complainants may institute proceedings based on the provisions of the Act.\(^ {816}\) Every High Court is an equality court for its area of jurisdiction, and the Judge President of the court concerned may designate the judicial officers that are to adjudicate on equality proceedings.\(^ {817}\) Magistrates’ Courts

\(^{811}\) Regulations 26(1) and (2) published as GN R764 in GG of 2003-06-13.
\(^{812}\) Regulation 26(3).
\(^{813}\) Albertyn *et al Introduction* 134.
\(^{815}\) 2013 (3) SA 66 (EqC). See below for a more detailed discussion on this case.
\(^{816}\) Chapter 4 of the PEPUDA.
\(^{817}\) Section 16(1)(a) of the PEPUDA.
may also sit as equality courts if so designated by the Minister.\textsuperscript{818} Before a judge may hear an equality dispute, he or she must have completed a specialised training course.\textsuperscript{819} These training courses are now developed by the South African Judicial Education Institute.\textsuperscript{820}

The standing provisions in section 20 of the PEPUDA are generous and allow for proceedings to be instituted by individuals,\textsuperscript{821} as class actions,\textsuperscript{822} as well as public-interest actions.\textsuperscript{823} The SAHRC and the Commission for Gender Equality are also entitled to institute proceedings.\textsuperscript{824} The powers of the Equality Courts in making orders have been described as “ground-breaking” and incorporate corrective, deterrent and restitutive remedies that may be imposed, including an order that reasonable accommodation be made for designated groups of persons.\textsuperscript{825} These courts, however, remain underutilised and academic authors are questioning its efficiency as catalysts for social transformation.\textsuperscript{826}

\textbf{5 3 The JSC Act}

In terms of section 178(6) of the Constitution, the JSC may select its own procedure in carrying out its functions, however the majority of council members should agree with any

\begin{footnotesize}
\textsuperscript{819} Section 16(2) of the PEPUDA.
\textsuperscript{820} In terms of an amendment to the PEPUDA contained in section 11 of the Judicial Matters Amendment Act 24 of 2015. Before this amendment, section 31 of the PEPUDA provided that the training courses are to be developed by the Chief Justice, in consultation with the JSC and the Magistrates' Commission. A date for the commencement of the amending legislation is still to be proclaimed.
\textsuperscript{821} Section 10(1)(a) and (b) of the PEPUDA.
\textsuperscript{822} Section 20(1)(c) of the PEPUDA.
\textsuperscript{823} Section 20(1)(e) of the PEPUDA.
\textsuperscript{824} Section 20(1)(f) of the PEPUDA.
\textsuperscript{825} Holness & Rule “Barriers to Advocacy and Litigation in the Equality Courts for Persons with Disabilities” 2014 7(5) PER 1907 1918. See section 21(2) for a non-exhaustive list of orders the Equality Courts may make.
\end{footnotesize}
decisions taken for it to be ratified.\textsuperscript{827} Section 5 of the JSC Act furthermore states that the procedure adopted by the JSC must be published by the Minister in the \textit{Gazette}.

The procedure currently employed by the JSC has been published and may be summarized as follows: The Judge President of the relevant division of the High Court notifies the JSC when a vacancy occurs.\textsuperscript{828} The JSC then advertises the position and seeks nominations for possible candidates to fill the post.\textsuperscript{829} Each member of the JSC is provided with a list of the names of all the candidates. The members are given the opportunity make further nominations and to inform the screening committee if they strongly believe that a particular candidate should be included in the shortlist.\textsuperscript{830} The Screening Committee of the JSC then formulates a short-list of possible candidates all of whom must be qualified for judicial appointment.\textsuperscript{831} The shortlist of candidates are then circulated to all the members of the JSC, who are granted another opportunity to add the name of a candidate who was duly nominated, but was not included in the shortlist. Shortlisted candidates are then interviewed in the public,\textsuperscript{832} after which the JSC deliberates on the merits of each candidate and, through consensus or majority vote, make its selections of candidates to be recommended for appointment.\textsuperscript{833}

Openness is a particularly important concept in judicial selection.\textsuperscript{834} Since judges are not elected, as is the practice in other jurisdictions, South African judges must derive their legitimacy from some other source to gain public support.\textsuperscript{835} Support will naturally arise where the public is included in the selection and appointment process of judges.\textsuperscript{836} Although the JSC publishes a list of shortlisted candidates and conducts its interviews in public, these interviews may not be recorded by electronic media and the deliberations

\begin{footnotesize}
\textsuperscript{827} Section 178(6) of the Constitution.
\textsuperscript{828} Regulation 3(a) of the JSC Procedure.
\textsuperscript{829} Regulation 3(b) of the JSC Procedure.
\textsuperscript{830} Regulation 3(d) of the JSC Procedure.
\textsuperscript{831} Regulation 3(e) of the JSC Procedure.
\textsuperscript{832} Regulation 3(j) of the JSC Procedure.
\textsuperscript{833} Regulation 3(k) of the JSC Procedure.
\textsuperscript{834} Malleson “Assessing the performance of the Judicial Service Commission” 1999 \textit{SALJ} 36 40.
\textsuperscript{835} \textit{Ibid}.
\textsuperscript{836} \textit{Ibid}.
\end{footnotesize}
which follow thereon are made in private.\textsuperscript{837} Furthermore, the selection of candidates to be recommended for judicial appointment is completed by consensus or secret ballot.\textsuperscript{838} Employing a secret ballot as the method for selecting candidates for recommendation to the President necessarily leaves the JSC unable to supply reasons for its selection and, as such, was found by the Western Cape High Court to be “arbitrary and irrational”.\textsuperscript{839}

In the case of \textit{Judicial Service Commission v Cape Bar Council}, the Supreme Court of Appeal confirmed the above view that the JSC must be able to supply reasons for its selection of candidates it recommends for appointment. Even though there is no express legislative or constitutional mandate requiring the JSC to supply reasons for not recommending a particular candidate for appointment to the High Court bench,\textsuperscript{840} the obligation is implied by the constitutional principle of legality.\textsuperscript{841} In terms of this principle, all exercise of public power must be rational.\textsuperscript{842} Accordingly, all persons or functionaries who perform a public power may be called upon to explain the rationality of any decision taken which would, of necessity, require them to supply reasons.\textsuperscript{843} Importantly, this court furthermore agreed with the court \textit{a quo} that a decision taken by the JSC regarding the appointment of judges is reviewable in terms of the principle of legality.\textsuperscript{844} If an unsuccessful candidate is not supplied the reasons for not being recommended for appointment, he or she will not know whether or not to challenge the decision of the JSC on review.\textsuperscript{845} The court in \textit{Judicial Service Commission v Cape Bar} drew on the judgement of the Constitutional Court in \textit{Bell Porto School Governing Body v Premier, Western Cape},\textsuperscript{846} where Mokgoro J stated that:

\begin{footnotesize}
\begin{enumerate}
\item Oliver and Baloro “Towards a legitimate South African Judiciary” 2001 \textit{Journal for Juridical Science} 31 42.
\item Regulation 3(k) of the JSC Procedure published as GN R432 in GG 24596 of 2003-03-27.
\item \textit{Cape Bar Council v Judicial Service Commission} [2012] 2 All SA 143 (WCC) par [126].
\item The JSC is, in terms of Rule 2(m) of the JSC’s 2003 Procedure, required to supply reasons for its recommendations to the Constitutional Court. The JSC Procedure was published as GN R432 in GG 24596 of 2003-03-27.
\item \textit{Judicial Service Commission v Cape Bar Council} par [43] – [44].
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Ibid.}
\item \textit{Judicial Service Commission v Cape Bar Council} par [20].
\item \textit{Ibid.}
\item \textit{Judicial Service Commission v Cape Bar Council} par [44].
\item 2002 (3) SA 265 (CC).
\end{enumerate}
\end{footnotesize}
“The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law.”

The SCA did not, however, express any view on how extensive the reasons must be, who should be entitled to request them or under which circumstances such a request can be made. More recently however, the Helen Suzman Foundation (hereafter HSF) lodged an application in the Western Cape High Court in which it claimed an order for the disclosure of the full record of the deliberations that took place after interviews for judicial appointment were held in October 2012.848 This application was made after the HSF received a “Record of Proceedings” including, inter alia, a summary of the recorded deliberations which were compiled by the Chief Justice.849 Both the High Court and the SCA found that the Record of Proceedings was sufficient under the circumstances.850

Drawing on procedures for the appointment of judges in other countries, the court held that too much transparency in the selection process could deter potential candidates from accepting a nomination for appointment, even more so given the fact that full record of deliberations very often contains particularly frank remarks about the suitability of certain candidates.851

5 4 The EEA

The EEA was promulgated in 1998 and is the main statute that regulates equality and discrimination in employment.852 The purpose of the EEA, as stipulated in section 2, is twofold. It aims, firstly, to promote fair treatment and equal opportunity in employment by eliminating unfair discrimination.853 Secondly, it aims to ensure equitable representation

847 Bell Porto School Governing Body v Premier, Western Cape par [159] as quoted in Judicial Service Commission v Cape Bar Council par [44].
848 Helen Suzman Foundation v Judicial Service Commission and Others 2015 (2) SA 498 (WCC).
849 Helen Suzman Foundation v Judicial Service Commission and Others par [3].
850 Helen Suzman Foundation v Judicial Service Commission and Others 2017 (1) SA 367 (SCA) par [39].
851 Helen Suzman Foundation v Judicial Service Commission and Others par [39].
853 Section 2(a) of the EEA.
of designated groups in the workforce by redressing disadvantage through the implementation of affirmative action measures. 854

Chapter 2 of the EEA contains the provisions prohibiting direct and indirect unfair discrimination in any employment policy or practice. 855 This part of the EEA applies to all employers. Chapter 3, on the other hand, places an obligation only on designated employers to impose affirmative action measures. 856 Designated employers include employers who employ more than 50 employees, employers who make an annual turnover equal to or above the annual turnover of a small business, 857 organs of state and employers appointed as designated employers in terms of a collective agreement. 858 Section 14 of the EEA furthermore provides that employers who fall outside of the scope of designated employers can, by notification to the Director-General, voluntarily bind itself to the application of chapter 3 as though it is a designated employer.

The EEA is, to some extent, supplemented by the PEPUDA in that the PEPUDA provides protection against unfair discrimination to persons who are not covered by the EEA. 859 Persons who are specifically excluded from the ambit of the EEA include members of the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and the staff and directors of Comsec. 860 The EEA furthermore applies only to persons who are defined as employees. As alluded to above, magistrates and judges are not considered to be employees for the purposes of the EEA. For this reason, only a brief description of affirmative action plans under the EEA is provided, followed by a detailed discussion of the general requirements for affirmative action in light of the van Heerden judgement.

854 Section 2(b) of the EEA.
855 Section 6 of the EEA.
856 Section 12 and 13 of the EEA.
857 Schedule 4 of the EEA contains the turnover amounts for each occupational sector.
858 Section 1 of the EEA.
859 Dupper et al Understanding the Employment Equity Act 3 Comsec is a company which is set up in terms of the Electronic Communications Security (Pty) Ltd Act 68 of 2002 and provides electronic communications security services and products to organs of state.
860 Section 4(3) of the EEA.
5 4 1 Affirmative action under the EEA

The main affirmative action provisions of the EEA are found in chapter 3 which applies only to designated employers. Section 13(1) of the EEA places an obligation on all designated employers to implement affirmative action measures in favour of designated groups\(^{861}\) in order to achieve employment equity. The EEA therefore not only permits affirmative action, but requires designated employers to undertake it.\(^ {862}\) Affirmative action measures are defined as “measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer”.\(^ {863}\)

Designated employers are required to conduct an analysis to identify employment barriers and to determine the level of underrepresentation from designated groups in all occupational levels of the workforce.\(^ {864}\) According to Grogan, the workforce analysis serves two important purposes.\(^ {865}\) Firstly, it assists designated employers in setting goals and targets to address the underrepresentation of persons from designated groups.\(^ {866}\) Secondly, by benchmarking the information collected during the workforce analysis, designated employers are better placed to monitor and evaluate changes to the workforce profile over time.\(^ {867}\) Section 13 furthermore requires of designated employers to prepare an employment equity plan and report to the Director-General on the progress that has been made in the implementation of the employment equity plan. These duties are to be undertaken in consultation with employees.\(^ {868}\)

\(^{861}\) Designated groups are defined in the EEA as black person, women and people with disabilities. See below for an in-depth discussion of this definition.


\(^{863}\) Section 15(1) of the EEA.

\(^{864}\) Section 13(2) read with section 19 of the EEA.

\(^{865}\) Dupper *et al* *Understanding the Employment Equity Act* 123.

\(^{866}\) Ibid.

\(^{867}\) Ibid.

\(^{868}\) Section 17 of the EEA.
Section 20 of the EEA provides detailed guidelines on what the employment equity plan of designated employers must include. According to this section, an employment equity plan must comprise the following:

- which affirmative action measures are to be implemented;
- the objectives to be achieved for each year of the plan;
- annual timetables within which objectives other than numerical goals are to be achieved;
- the duration of the plan;
- procedures for the monitoring and evaluation of the employment equity plans;
- the persons responsible for the monitoring and implementation; and
- procedures for the resolution of disputes concerning the application and interpretation of the employment equity plan.\(^\text{869}\)

Where an underrepresentation of designated groups have been identified through the workforce analysis conducted in terms of section 13(2), the employment equity plan must also include:

- the numerical goals needed to achieve equitable representation;
- a timetable detailing the timeframe within which these goals are to be achieved; and
- the strategies intended to achieve the numerical goals.\(^\text{870}\)

While the sections mentioned above all form part of the Chapter 3 of the EEA, and as such applies only to designated employers, section 6 also contains important affirmative action provisions and applies to all employers, regardless of whether they fit the description of designated employer. Section 6(1) contains a general prohibition against unfair discrimination. In terms of this section, no employee may be discriminated against, whether directly or indirectly, based on one or more listed grounds.\(^\text{871}\) Section 6(2), on

\(^{869}\) Section 20 (2) of the EEA.  
\(^{870}\) Section 20(2)(c) of the EEA.  
\(^{871}\) The listed grounds include race, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion,
the other hand, makes it clear that taking affirmative action measures which are consistent with the purposes of the EEA are not considered to be unfair discrimination. This means that affirmative action measures will not attract the unfairness presumption contemplated in section 11 of the EEA.\(^{872}\) Affirmative action therefore provides a complete defence against a claim of unfair discrimination where an employer is seeking to implement measures to redress the disadvantage suffered by certain groups in the past.

The “shield versus sword” debate, has also been raised in terms of the EEA, and two contradictory judgements in this regard were passed before the matter was finally settled by the Labour Appeal Court.\(^{873}\) In *Harmse v City of Cape Town*\(^{874}\) the court held that all employers\(^{875}\) are under a duty to implement affirmative action measures, failure of which constitutes a violation against the rights of a designated employee not to be unfairly discriminated against.\(^{876}\) In effect, this interpretation allows individual employees to base a cause of action on affirmative action, and thus constituted a sword to an aggrieved applicant.\(^{877}\) The opposite, however, was found in *Dudley v City of Cape Town*,\(^{878}\) where the court found that a prohibition on unfair discrimination may found an individual claim, but there is no individual right to affirmative action. It is merely a shield available to employers discriminating against members from the non-designated groups in order to fulfil its affirmative action obligations. When taken on appeal, the judgement in *Dudley*

\(^{872}\) Section 11 of the EEA contains provisions relating to the burden of proof in discrimination-related cases. Normally, if it is alleged that discrimination took place based on one of the listed grounds, the discrimination is presumed to be unfair. However, where the complaint relates to measures designed to protect or advance persons from previously disadvantaged groups, it will not attract the unfairness presumption. See Dupper et al *Understanding the Employment Equity Act* 85.

\(^{873}\) Van der Walt “The Equality Court’s View on Affirmative Action and Unfair Discrimination” 2006 *Obiter* 674 674.

\(^{874}\) (2003) 24 ILJ 1130 (LC).

\(^{875}\) Interestingly, the court found that Sections 20(3)-(5) of the EEA, which starts with “For the purpose of this Act” and deals with the concept of “suitably qualified” persons for the purpose of affirmative action, applies to the whole Act and not only Chapter 3. Therefore, even though Chapter 3 of the Act applies to designated employers only, the prohibition on discrimination based on an applicant’s lack of experience applies even to those employers which fall short of the definition of “designated employer”. Consequently, all employers were placed under a duty to implement affirmative action measures and not only those employers qualifying as “designated employers”. Failure to do so would give rise to an individual remedy of unfair discrimination. In this regard, see Garbers 2003 *Contemporary Labour Law* 91.

\(^{876}\) *Harmse v City of Cape Town* par [39].

\(^{877}\) Cooper 2004 *ILJ* 843.

was confirmed by the Labour Appeal Court.\textsuperscript{879} In the employment sense, therefore, affirmative action does not create an individual claim to persons who are aggrieved by an employer’s failure to abide by the obligations imposed by affirmative action policies.

All affirmative action measures, whether in compliance with chapter 3 of the EEA, or used as defence against a claim of unfair discrimination, must still comply with the constitutional requirements for affirmative action as explained in the previous chapter. It is therefore necessary to determine how the provisions of the EEA relate to the three requirements formulated by the Constitutional Court in van Heerden. As alluded to above, due to the similarity in the wording between the EEA and the PEPUDA, an authoritative interpretation of the EEA can inform the interpretation of the PEPUDA.

\textit{Does the measure target persons or category of persons who have been disadvantaged by unfair discrimination in the past?}

The first requirement for affirmative action is that the beneficiaries of affirmative action must be persons who have been discriminated against by past policies and practices. As alluded to above, the EEA aims to ensure that “suitably qualified” persons from “designated groups” are “equitably represented” at all occupational levels of the workforce.\textsuperscript{880} This aim is furthermore repeated in section 15 of the EEA which defines affirmative action measures as measures designed to ensure that “suitably qualified” persons from “designated groups” are “equitably represented” in the workforce. In order to identify the persons who stand to benefit from affirmative action measures under the EEA, accurate definitions of the terms “suitably qualified”, “designated groups” and “equitable representation” is therefore needed.

The Constitution defines the beneficiaries of affirmative action broadly as persons or groups of persons who have been disadvantaged by unfair discrimination.\textsuperscript{881} The EEA

\begin{itemize}
\item \textsuperscript{879} Dudley \textit{v City of Cape Town and Another} [2008] 12 BLLR 1155 (LAC).
\item \textsuperscript{880} Section 2(b) of the EEA.
\item \textsuperscript{881} Section 9(2) of the Constitution.
\end{itemize}
narrow this group down to “designated groups”. Designated groups are defined in section 1 of the EEA as “black persons, women and people with disabilities”. Black persons, in turn, are defined as Africans, Coloureds and Indians. In Chinese Association v Minister of Labour the court furthermore found that persons of Chinese descent are also regarded as black for the purposes of affirmative action.

The term “designated group” does not extend to foreign nationals. In Auf der Heyde v University of Cape Town the Labour Court found that the definition of designated groups does not include non-citizens. The court came to this conclusion by looking at the purpose of remedial measures. Affirmative action programmes should be designed to work to the advantage of persons or categories of person disadvantaged by unfair discrimination. Non-citizens did not suffer disadvantage by discriminatory policies previously applied in South Africa and should therefore not benefit from remedial measures aimed at addressing the inequalities is caused. In 2013, the definition of designated group in the EEA was amended to include a proviso that only South African citizens are to be included in the term.

The term “suitably qualified” is defined in section 1 of the EEA as to mean persons contemplated in section 20(3) the EEA. According to section 20(3), a person may be

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882 Section 15 of the EEA.
883 Section 1 of the EEA.
884 Ibid.
885 TPD (unreported) 2008-06-18 Case no 59251/07.
886 LC (unreported) 2000-05-30 Case no 603/98. Although this case was brought in terms of the unfair dismissal provisions of the Labour Relations Act 66 of 1995, the respondent’s disputed conduct amounted to an appointment made in terms of its Employment Equity Policy which means that it forms precedent for the current discussion. On appeal, however, the Labour Appeal Court found that there was no dismissal and the issue of fairness consequently did not arise. See University of Cape Town v Auf der Heyde [2001] 12 BLLR 1316.
887 Auf der Heyde v University of Cape Town paras [69 – 72]. Pretorius et al argues that under certain circumstances non-citizens may derive benefit from an affirmative action policy. In support of this argument, they quote the following passage from the Labour Appeal Court’s judgement in City of Cape Town v Auf der Heyde [2001] 12 BLLR 1316 (LAC): “The fact that he is black and was to serve as a positive role model for black students was a factor in the overall evaluation of [the candidate]. It is therefore not inconceivable that black, female or disabled foreign nationals may be favoured in terms of an affirmative action policy, especially if the appointment of the non-citizen in question may contribute to the dismantling patterns of discrimination in employment. See Pretorius “Requirements of Affirmative Action in terms of section 9(2) of the Constitution” in Pretorius, Klink & Ngwena (eds) Employment Equity Law (2001) 9-14.
888 Section 1 of the EEA.
suitably qualified as a result of any one or a combination of certain factors, namely, formal qualifications, prior learning, relevant experience and the capacity to acquire the ability to do the job within a reasonable time. In terms of section 20(4), when determining the capacity of a candidate to acquire the ability to do the job, potential employers may not unfairly discriminate against any person solely on the ground that the particular applicant lacks the relevant experience.

This wide definition of suitably qualified implies that membership of one of the designated groups is not only a factor that can break the tie where two equally suitable candidates are competing for the same position. Instead, it is a factor that can outweigh the other considerations provided that the person has the ability to acquire, within a reasonable time, the skills necessary to do the job. In other words, where one candidate from a designated group and one candidate from a non-designated group competes for the same position, the candidate from the designated group may be preferred even if he or she lacks the formal qualifications of the candidate from the non-designated group, provided that the employer believes this person has the ability to acquire the necessary skills within a reasonable time.

In Van Dyk v Kouga Municipality, for instance, a female candidate was shortlisted for a position with the municipality even though she did not possess of the formal qualifications needed for appointment. The selection committee for the municipality, however, believed that she had the necessary capacity to acquire the ability to do the work within a reasonable time. This belief proved to be founded as the successful female candidate did acquire the formal qualification in question after her appointment. The court found that there was no unfair discrimination on the part of the municipality for not appointing the applicant in this matter, even though the applicant was the only candidate with the necessary formal qualifications.

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890 Dupper et al Understanding the Employment Equity Act 106.
892 Van Dyk v Kouga Municipality par [14]
893 In this case, the court made a distinction between formal qualifications for the post in question and formal qualifications that is a requirement in terms of legislation. Where formal qualifications are needed
As a general rule, courts are unwilling to interfere with the manner in which employers define the term “suitably qualified”. The criteria may, however, not be used in such a way as to amount to an absolute barrier by persons from non-designated groups. Moreover, in Independent Municipal and Allied Workers Union v Greater Louis Trichardt Traditional Local Council the Labour Court was willing to investigate whether the criteria used by the employer was applied properly. In this case, the employer did not properly consider the criteria for the position, including the potential to acquire the ability to perform the work, before making an appointment, and the appointment was consequently set aside.

Lastly, the term “equitable representation” is not defined in the EEA, yet certain provisions in the EEA and the Good Practice Guidelines provide indications as to what the term could mean. In compliance with section 19(2) of the EEA, designated employers are to conduct an analysis of their workforce profile to determine the degree of underrepresentation of designated groups within their workforce when formulating their employment equity plans. The Good Practice Guidelines provides that this workforce analysis must be conducted with reference to “up-to-date demographic data”. The data designated employers refer to may be regional, provincial or national depending, to a large extent, on level of responsibility and the degree of specialisation of the position in terms of legislation, such as a medical degree to practise as a doctor, a potential employer may not be able to rely on the fact that a candidate has the potential to acquire the relevant qualification when determining the suitability of candidates. This is, however, not the case where legislation does not prescribe the qualifications practitioners of a certain occupation must have.

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894 Dupper et al Understanding the Employment Equity Act 107.
895 Ibid.
896 (2000) ILJ 1119 (LC) par [20].
897 Independent Municipal and Allied Workers Union v Greater Louis Trichardt Traditional Local Council v Greater Louis Trichardt Traditional Local Council [32].
899 According to Dupper, the workforce analysis serves two important purposes. Firstly, it assists designated employers in setting goals and targets to address the underrepresentation of persons from designated groups. Secondly, by benchmarking the information collected during the workforce analysis, designated employers are better placed to monitor and evaluate changes to the workforce profile over time. Dupper et al Understanding the Employment Equity Act 123.
900 Item 6.1.3.2 (c) of the Code of Good Practice.
A high degree of specialisation may require candidates to be recruited from a larger recruitment area.\textsuperscript{902}

Furthermore, when assessing a designated employer’s compliance with the EEA, the Director-General may consider the “extent to which suitably qualified people from and amongst the different designated groups are ‘equitably represented’ within each occupational level in that employer’s workforce in relation to the demographic profile of the national and regional economically active population” (own emphasis).\textsuperscript{903} The ultimate goal is therefore to make the workforce reflective of the demographics of the economically active population.\textsuperscript{904}

In order to make the workforce reflective of the demographics of the economically active people, designated groups are ranked in order of preference depending on the number of persons represented in each demographic group. If national demographics are to be employed, it means that the order of preference are: Africans, whites, coloureds, Indians and disabled, with a female component within each group.\textsuperscript{905} A problem associated with this scenario is that it can deprive minority groups of representation in the higher paying and more senior positions of the workforce where fewer posts are available.\textsuperscript{906} If a candidate from one of these groups is not selected because the numerical targets for the particular group has already been met, it runs counter to the remedial nature of affirmative action and unjustly ignores the qualifications, ability and experience of the candidate.\textsuperscript{907}

\textsuperscript{901} Dupper et al Understanding the Employment Equity Act 129; Item 6.1.3.2 (f) of the Code of Good Practice.
\textsuperscript{902} Gaibie “Affirmative Action – Concepts and Controversies” 2014 35 ILJ 2655 2676.
\textsuperscript{903} Before the amendments in 2014, this section made the consideration of both regional and national demographics compulsory when assessing a designated employer’s compliance with the EEA. Even though this obligation was made discretionary by the amendments, the Labour Appeal Court held in Solidarity v Department of Correctional Services 2015 (4) SA 277 (LAC) that “there will be factual contexts in which it is difficult to envisage how a plan could pass legal muster without a consideration of regional demographics”. See Solidarity v Department of Correctional Services par [58]. On appeal, the Constitutional Court based its decision only on the wording of the pre-amendment Act. See Solidarity v Department of Correctional Services 2016 (5) SA 594 (CC).
\textsuperscript{904} This is in terms of item 8.4.1 of an earlier version of the Code of Good Practice published as GN R1394 in GG 20626 1999-11-23.
\textsuperscript{905} Gaibie 2014 ILJ 2676.
\textsuperscript{906} Ibid.
\textsuperscript{907} South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC) par [149].
This last point is well illustrated by the facts of *Naidoo v Minister of Safety and Security*. The plaintiff, a female Indian applicant, applied for a position within the South African Police Services (SAPS) but was not appointed based on the fact that, according to the SAPS’ employment equity plan, Indian females were already ideally represented at the occupational level concerned. The targets set in the employment equity plan reflected that only 2.5 percent of posts are to be allocated to Indians. In terms of this employment equity plan, the gender ratio was to be 70/30 percent in favour of males. Based on these two provisions of the employment equity plan, 0.75 percent of posts at the relevant occupational level were to be allocated to Indian females. In effect, this meant that even if one Indian female was appointed, this demographic group would be overrepresented in terms of the employment equity plan. Based on this consideration, an African candidate was appointed.

The Labour Court found that the way in which the employment equity plan was constructed posed an absolute barrier to female Indian applicants, and therefore runs counter to the purposes of both the EEA and the Constitution. On appeal however, the Labour Appeal Court found that, had more positions been available, there would not have been any barrier to the appointment of Indian females and the targets therefore did not amount to an absolute barrier.

A question that is furthermore raised by the above discussion is whether an affirmative action plan must allow all designated groups to benefit equally, or whether it is permissible to concentrate more heavily on certain groups only. In other words, can an affirmative action programme benefit one disadvantaged group to a greater extent than another designated group? The Constitutional Court in *van Heerden* did not deal with this issue.

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908 (2013) 34 ILJ 2279 (LC).
909 *Naidoo v Minister of Safety and Security* par [35].
910 *Naidoo v Minister of Safety and Security* par [135].
911 *Naidoo v Minister of Safety and Security* par [6].
912 *Minister of Safety and Security v Naidoo* [2015] 11 BLLR 1129 (LAC) par [47].
directly, flagging it rather as “a more difficult problem” to be considered at a later time.\textsuperscript{914} The goal of affirmative action under the EEA however, is to ensure “equitable representation” of members from designated groups at all occupational levels in the workforce. It follows, therefore, that a designated employer will identify the designated groups which are most underrepresented in its workforce when setting targets for its employment equity policies. Giving preference to candidates from underrepresented groups based on their level of underrepresentation will therefore be justified.\textsuperscript{915}

\textit{Is the measure designed to protect or advance such persons or categories of persons?}

The second leg of the \textit{van Heerden} test requires affirmative action measures to be designed to protect or advance persons from previously disadvantaged groups. The Constitutional Court in \textit{van Heerden} held that there must be a rational connection between the measures and the desired outcome. Even before the enactment of the EEA, the court in \textit{Public Servants’ Association of South Africa v Minister of Justice}\textsuperscript{916} required a rational connection between the affirmative action measures and the intended objectives. This rational connection between means and ends was also required by the court in \textit{Stoman v Minister of Safety and Security}\textsuperscript{917} where it was held that “a policy or practice which can be regarded as haphazard, random and overhasty, could hardly be described as measures designed to achieve something”.\textsuperscript{918} According to the court in \textit{Gordon v Department of Health}\textsuperscript{919} the rationality requirement can easier be satisfied if the employer has a properly formulated affirmative action policy.

When preferring one designated group over another, the court in \textit{Munsamy v Minister of Safety and Security}\textsuperscript{920} identified certain factors an employer must prove to show that its conduct was in line with a rational and coherent employment equity plan, thereby

\textsuperscript{914} \textit{Minister of Finance v van Heerden} 2004 (6) SA 121 (CC).
\textsuperscript{915} Dupper \textit{et al} \textit{Understanding the Employment Equity Act} 104.
\textsuperscript{916} (1997) 18 ILJ 241 (A).
\textsuperscript{917} 2002 (3) SA 468 (T).
\textsuperscript{918} \textit{Stoman v Minister of Safety and Security} 480 [A]-[D].
\textsuperscript{919} 2009 (1) BCLR 44 (SCA).
\textsuperscript{920} (2013) 34 ILJ 2900 (LC).
satisfying the rationality requirement of affirmative action measures. Firstly, a proper workplace profile audit must have been carried out which shows an underrepresentation of the preferred group. In the absence of credible evidence showing that there is discrimination-related underrepresentation of designated persons in the workforce, an employer may have difficulty proving the rationality of its affirmative action programmes. A designated employer is not required to produce perfectly accurate audits with resultant numerical goals, but major discrepancies between numerical targets and proven underrepresentation of a particular demographic group may render to affirmative action policy irrational.

An employer must also show that the affirmative action measures it implemented is sufficiently coherent as not to lend itself open to abuse or arbitrary application. In casu, the disputed measure was an arbitrary allocation of a points-scoring system which was not contained in any employment equity plan. The measure must furthermore be permitted by both the employment equity plan as well as the EEA. Lastly, the employer must show that the measure in question arose out of proper consultation and is intended to address inequitable representation of the preferred designated group.

Does the measure promote the achievement of equality?

The third and final prong of the van Heerden test requires affirmative action measures to promote the achievement of equality by advancing persons or groups of persons previously disadvantaged by unfair discrimination. In order to test the effect of the remedial measure in question, it is necessary to contemplate actions that were taken in terms thereof. This final prong therefore focuses not only on the affirmative action

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921 Munsamy v Minister of Safety and Security par [29]. On appeal, the decision of the court a quo was overturned, finding that there was, in fact, a valid employment equity plan in place. The criteria listed by the court a quo was however not in dispute. See South African Police Services v Public Service Association of South Africa and Others [2015] 8 BLLR 805 (LAC) par [31].
923 Munsamy v Minister of Safety and Security pars [55] – [56].
924 Ibid.
925 South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC) par [143].
measure itself, but also on its implementation.\textsuperscript{926} This is recognised also by the EEA which focuses attention on the decisions taken by designated employers in terms of an employment policy or practice.\textsuperscript{927}

The first case concerning the lawfulness of the individual implementation of a valid affirmative action measure to reach the Constitutional Court is South African Police Services v Solidarity obo Barnard (hereafter Barnard).\textsuperscript{928} A unanimous court held that courts do have the power to test the legitimacy of affirmative action measures, both at its formulation as well as its implementation stages, although four different judgements differed on the level of scrutiny needed in this regard.\textsuperscript{929}

The main judgement in Barnard held that “there is no reason why courts are precluded from deciding whether a valid Employment Equity Plan has been put into practice lawfully”.\textsuperscript{930} Writing for the majority, Moseneke ACJ held as follows:

“There is no valid reason why courts are precluded from deciding whether a valid Employment Equity Plan has been put into practice lawfully. This is plainly so because a validly adopted Employment Equity Plan must be put to use lawfully. It may not be harnessed beyond its lawful limits or applied capriciously or for an ulterior or impermissible purpose.”

The main judgement found the appropriate level of scrutiny must, as a bare minimum be that of rationality.\textsuperscript{931} This means that any decisions taken in terms of a validly-adopted restitutionary measure must be rationally linked to the terms and objects of the measure.\textsuperscript{932} Importantly, the court found that the rationality requirement is a bare minimum when testing the validity of conduct. This implies that under certain

\begin{footnotesize}
\textsuperscript{926} Ibid.
\textsuperscript{927} Section 15(3) of the EEA. See also South African Police Service v Solidarity obo Barnard par [145].
\textsuperscript{928} South African Police Service v Solidarity obo Barnard par [75].
\textsuperscript{930} South African Police Service v Solidarity obo Barnard par [38]
\textsuperscript{931} South African Police Service v Solidarity obo Barnard par [39]
\textsuperscript{932} Ibid.
\end{footnotesize}
circumstances a stricter standard should be applied, although it did not elaborate on the circumstances under which a stricter standard should apply.

In a separate, concurring judgement, Cameron J, Froneman J and Majiedt AJ (hereafter the first concurring judgement) saw the need to formulate a standard that can be applied to the implementation of remedial measures adopted pursuant to the EEA specifically. This standard must be rigorous enough to make sure that the implementation of an affirmative action measure is consistent with the purpose of EEA. They found the rationality standard to be too deferential because any decision that is taken in accordance with a validly adopted affirmative action policy, even when numerical targets are followed by rote, will bear some rational connection to its purpose. According to them, the appropriate standard is fairness as it is encompassing enough to allow courts to assess whether the implementation of remedial measures are consistent with the purpose of the EEA which recognises the importance of “fair treatment in employment”. Moreover, according to the first concurring judgement, several provisions in the EEA require fairness in the implementation of remedial measures.

Firstly, section 15(3) of the EEA requires the implementation of affirmative action measures that includes “preferential treatment and numerical goals, but exclude quota’s”. The EEA does not contain a definition of quota’s, and the majority judgement found it unnecessary to define the term. The majority did, however, explain the difference between numerical goals and quota’s as follows:

“[T]he primary distinction between numerical goals and targets lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by section

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933 Rautenbach “Requirements for Affirmative Action and Requirements for the Limitation of Rights” 2015 2 TSAR 431 435.
934 South African Police Service v Solidarity obo Barnard par [40]. Rautenbach argues that where dignity is compromised a stricter level of scrutiny is needed. See Rautenbach 2015 TSAR 435.
935 The main judgement in Barnard did not find it necessary to deal with this standard. See South African Police Service v Solidarity obo Barnard pars [39] and [75].
936 South African Police Service v Solidarity obo Barnard par [97].
937 South African Police Service v Solidarity obo Barnard par [96].
938 Section 2(a) of the EEA.
939 South African Police Service v Solidarity obo Barnard pars [98] and [100].
940 South African Police Service v Solidarity obo Barnard par [42].
15(3) of the [Employment Equity] Act. The same section endorses numerical targets in pursuit of workplace representivity and equity. They serve as a flexible employment guideline to designated employer.  

Both the main judgement and the first concurring judgement therefore require some flexibility in the pursuit of numerical targets contained in an employment equity plan. In a similar vein, both of these judgements also refer to section 15(4) of the EEA which states that employers are not required to take any action in terms of an employment equity plan that establishes an absolute barrier to the employment or advancement of people from non-designated groups. Lastly, the EEA also insists that affirmative action measures must be "based on equal dignity and respect of all people".

The abovementioned sections of the EEA informed the opinion of Cameron J, Froneman J and Majiedt AJ that fairness is the appropriate standard to be applied when testing the validity of decisions taken in terms of a validly adopted employment equity plan. Van der Westhuizen J, on the other hand, warned against the danger of internal inconsistency if one should employ a fairness standard in testing affirmative action measures. Fairness is tested under the enquiry into unfair discrimination, whereas affirmative action measures are tested against the requirements laid out in the van Heerden judgement. According to the second concurring judgement the appropriate standard when testing the implementation of remedial measures is proportionality. Having found that the limitation clause is not directly applicable, Van der Westhuizen J found the formula contained in the limitations clause nevertheless useful when a court needs to determine the impact of the enforcement of one right on another.

941 South African Police Service v Solidarity obo Barnard par [54].
942 South African Police Service v Solidarity obo Barnard par [87].
943 Section 15(2)(b) of the EEA.
944 South African Police Service v Solidarity obo Barnard par [158].
945 The test for unfair discrimination was formulated in Harksen v Lane 1998 (1) SA 300. The Constitutional Court in van Heerden found that the test for unfair discrimination is not suitable to test the constitutionality of affirmative action measures. See Minister of Finance v van Heerden par [32].
946 South African Police Service v Solidarity obo Barnard par [158].
948 Section 36 of the Constitution.
949 South African Police Service v Solidarity obo Barnard par [164].
The respondents in *Barnard* argued that the applicant’s employment equity policy was so rigid as to amount to the imposition of quota’s because the allowed the employer to leave a position vacant until a suitably qualified person from a designated group becomes available for appointment. This principle is now colloquially known as the “Barnard principle”. In *Solidarity v Department of Correctional Services* the Constitutional Court found that this principle can also apply to designated groups who are overrepresented at the occupational level concerned. If this principle is to be applied to the appointment of judges, it means that the JSC may leave positions in the judiciary vacant until such a time as a suitably qualified, fit and proper female candidate is nominated for judicial appointment.

5 5 Magistrates

A detailed analysis of the position of magistrates and the appointments process adopted for the appointment of magistrates is not within the scope of this study. This part of the chapter aims rather to provide a brief summary of these issues to determine if, and to what extent, case law dealing with the appointment of magistrates should provide guidance in the selection and recruitment of judges.

5 5 1 The position of magistrates

In the past magistrates were part of the public service, and were appointed by the Minister of Justice in terms of section 9 the Magistrates’ Courts Act. Although there was no prohibition against the appointment of magistrates from outside of the public service, the majority of magistrates were former public prosecutors who were employed...
by the Department of Justice.\textsuperscript{955} The appointments process followed in the pre-
democratic era was neither transparent nor independent of the Executive.\textsuperscript{956} Moreover, magistrates were issued directives from the Department of Justice; they could be transferred to another court without their consent; merit assessments determined whether a magistrate could be promoted, and the Executive was given the power to hold enquiries into charges of misconduct on the part of magistrates.\textsuperscript{957} As a result, the legitimacy of the magistracy was severely compromised,\textsuperscript{958} with the common perception that magistrates were politically influenced in the performance of their duties.\textsuperscript{959}

In 1993, the Hoexter Commission\textsuperscript{960} recommended that magistrates be removed from the public service, which precipitated the drafting and passing of the Magistrates Act.\textsuperscript{961} This Act provides for the establishment of the Magistrates’ Commission\textsuperscript{962} which is to ensure that the “appointment, promotion, transfer or discharge of, or disciplinary steps taken against, judicial officers in the lower courts take place without favour or prejudice”.\textsuperscript{963} The Magistrates Act signalled the beginning of a gradual shift to remove magistrates completely from the public service and bring them in line with the conditions of service of High Court judges.\textsuperscript{964} This enhances the need to consider the position of magistrates to determine the extent to which magisterial appointments may provide authority for the appointment of judges to the High Court.

\textsuperscript{955} Gready & Kgalema “Magistrates under Apartheid: A case study of the Politicisation of Justice and Complicity in Human Rights Abuse” 2003 \textit{SAJHR} 141 145. See also Mokgatle “The Exclusion of Blacks from the South African Judicial System” 1987 \textit{SAJHR} 44 49, where the author avers that there was not a single black prosecutor in March 1985.
\textsuperscript{956} Olivier “The Magistracy” in Hoexter & Olivier \textit{The Judiciary in South Africa} 323.
\textsuperscript{957} Gready and Kgalema 2003 \textit{SAJHR} 145.
\textsuperscript{958} Olivier “The Magistracy” in Hoexter & Olivier \textit{The Judiciary in South Africa} 32.
\textsuperscript{959} Gready and Kgalema 2003 \textit{SAJHR} 145.
\textsuperscript{960} The Commission of Enquiry into the Structure and Functioning of the Courts.
\textsuperscript{961} 90 or 1993. See \textit{Van Rooyen v the State} par [79].
\textsuperscript{962} Section 2 of the Magistrates Act. The Constitution does not expressly provide for the establishment of the Magistrates’ Commission. Section 109 of the Interim Constitution, however, stated that a Magistrates’ Commission must be established, although it did not prescribe the composition of this body. See \textit{van Rooyen v the State} par [53].
\textsuperscript{963} Section 4(a) of the Magistrates Act.
\textsuperscript{964} Olivier “The Magistracy” in Hoexter & Olivier \textit{The Judiciary in South Africa} 349 – 350.
In *President of South Africa v Reinecke*, the SCA was enjoined to determine the position of magistrates in the period between 2001 and 2002.\(^{965}\) The court found that, although the Magistrates Act removed magistrates from many provisions of the Public Service Act,\(^{966}\) magistrates were still employees of the State within the general public service.\(^{967}\) However, the court found that the Magistrates Act did provide important limitations on the executive power to determine the conditions of service of magistrates,\(^{968}\) and brought the independence and conditions of service of magistrates closer to that of judges.\(^{969}\)

Section 3 of the Magistrates Act, as amended in 1996, provides for the composition of the Magistrates’ Commission. As presently constituted, the Magistrates’ Commission consists of the Minister, the head of the justice college, a judge, six magistrates, four legal practitioners,\(^{970}\) a teacher of law, eight members of Parliament and five nominees of the executive.\(^{971}\) Three of the magistrates and all the members of the legal profession are, however, designated by the executive.\(^{972}\)

Prior to 1996, however, this Commission consisted of 11 persons, only two of whom were not designated by the judiciary or the legal profession.\(^{973}\) Moreover, given the demographic profile of the judiciary and the legal profession, only one member of the Magistrates’ Commission was not white and male.\(^{974}\) The changes came about as a result of the Magistrates’ Commission’s insistence that the composition of the Commission must change in order to reflect the demographics of the country and to allow members of the junior magistracy to be included.\(^{975}\)

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\(^{965}\) *President of South Africa v Reinecke* par [7].

\(^{966}\) Act 111 of 1984.

\(^{967}\) *President of South Africa v Reinecke* par [12].

\(^{968}\) *President of South Africa v Reinecke* par [10]. For instance, limitations were imposed on the Minister’s powers with respect to the determination of magistrates’ salaries as well as the suspension and removal of magistrates.

\(^{969}\) *President of South Africa v Reinecke* par [11].

\(^{970}\) Two members of the attorneys’ profession and two advocates.

\(^{971}\) *S v van Rooyen* par [40].

\(^{972}\) *S v van Rooyen* par [45].

\(^{973}\) *S v van Rooyen* par [44]-[45].


\(^{975}\) *Ibid.* See, however, Van Dijkhorst “The Future of the Magistracy” 2000 *Advocate* 39, where the author, a former member of the Magistrates’ Commission and a judge of the High Court, is of the opinion that the
These legislative amendments to the composition of the Magistrates’ Commission were challenged on constitutional grounds in *S v van Rooyen* (hereafter *van Rooyen*), where the court *a quo* found that it infringed on the separation of powers doctrine, and made the commission insufficiently independent of the Executive.\(^{976}\) The Constitutional Court, however, overturned this decision, finding that the independence of the magistracy is not necessarily compromised by the fact that the majority of the members of the commission were designated by the Legislature and the Executive.\(^{977}\) Moreover, the composition of this Commission, to a large extent, coincides with the composition of the JSC which was created by the Constitution and found to be in line with the constitutional principles in the *Certification* judgment.\(^{978}\)

In *Van Rooyen*, the Constitutional Court in addition explained the differences between judges and magistrates. Firstly, the court highlighted the fact that the Constitution makes a distinction between the manner in which magistrates are appointed as opposed to the appointment of judges. Section 174(6) of the Constitution requires judges to be appointed by the President on the advice of the JSC, while section 174(7) provides that all other judicial officers, including magistrates, must be appointed in terms of legislation.\(^{979}\) Secondly, the jurisdiction of the Magistrates’ Courts is less extensive than that of the High Courts and is determined by legislation, where High Courts have inherent power to hear any matter not assigned to another court by an Act of Parliament.\(^{980}\) Thirdly, the Magistrates Act requires magistrates to perform certain administrative functions, while judges never had this duty.\(^{981}\) Lastly, although the constitutional provisions relating to the independence of the judiciary apply to all judicial officers, it does not mean that the same

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\(^{976}\) *S v van Rooyen* par [46].
\(^{977}\) *S v van Rooyen* par [106].
\(^{978}\) *S v van Rooyen* par [59].
\(^{979}\) *S v van Rooyen* par [16] and [28].
\(^{980}\) *S v van Rooyen* par [28]. This is in terms of sections 169 and 170 of the Constitution.
\(^{981}\) *S v van Rooyen* par [84].
level of independence is required in all courts, and it is generally accepted that Magistrates’ Courts enjoy less independence than High Courts.\textsuperscript{982}

Notwithstanding these differences, the Constitutional Court held that magistrates are judicial officers and not employees of the State.\textsuperscript{983} Subsequent legislative intervention reinforced magistrates’ constitutional position as part of the judiciary. Most notably, the Independent Commission for the Remuneration of Public Office-bearers Act\textsuperscript{984} was amended in 2003\textsuperscript{985} to include magistrates under the definition of “office-bearer”, thereby bringing the manner of remuneration of magistrates in line with that of judges.\textsuperscript{986} Furthermore, in terms of the new Superior Courts Act,\textsuperscript{987} the Chief Justice or the Judge President of a division of the High Court must coordinate the judicial functions of all Magistrates’ Courts falling within that jurisdiction.\textsuperscript{988} As a result, Olivier argues, magistrates have what academics describe as a “statutorily-provided \textit{sui-generis} status”\textsuperscript{989}.

Further legislative changes are pending which aim to unify the entire judicial system and further integrate the lower courts as part of the judiciary.\textsuperscript{990} The creation of the Office of

\textsuperscript{982} S \textit{v van Rooyen} par [22]. See also Wallis 2012 \textit{SALJ} 673, where the author lists several differences in the conditions of service between judges and magistrates. By way of example, in terms of section 176(3) of the Constitution, the salaries and benefits payable to judges may not be reduced. No similar provision is provided in relation to magistrates. The author concludes that no comparison between the employment conditions between magistrates and judges can be made, and that it is clear that magistrates are still part of the public service.

\textsuperscript{983} S \textit{v van Rooyen} par [139].

\textsuperscript{984} 92 of 1997.

\textsuperscript{985} The amendment was made in the form of the Judicial Officers (Amendment of Conditions of Service) Act 28 of 2003.

\textsuperscript{986} Section 1 of the Independent Commission for the Remuneration of Public Office-bearers Act. In the Discussion Document on the Transformation of the Judicial System and the role of the Judiciary in the Development South Africa, it is stated that this amendment was implemented to delink magistrates from the Public Service. This document is available at \url{http://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf} (accessed 2017-01-30).

\textsuperscript{987} 10 of 2013.

\textsuperscript{988} Section 8(4)(c) read with section 8(2) and (3) of the Superior Courts Act.


\textsuperscript{990} Manyathi-Jele “Single Judiciary Discussed at Judicial Officers Association of South Africa AGM” \textit{De Rebus} 2014 8 10.
the Chief Justice\textsuperscript{991} is regarded as the first step in a phased approach to overhaul the structure of the courts and to establish a judiciary-based system of court administration.\textsuperscript{992} This would ultimately see the amalgamation of the appointment functions of the JSC and the Magistrates’ Commission into one body which will oversee the appointment of both judges and magistrates.\textsuperscript{993}

5 5 2 The appointment of magistrates

In light of the discussion on the position of magistrates above, and considering also that sections 174(1) and (2) of the Constitution applies also to the appointment of both magistrates and judges,\textsuperscript{994} it is submitted that certain guidelines on the interpretation of these sections can be drawn from case law dealing with the appointment of magistrates.

In terms of section 10 of the Magistrates Act, the Minister appoints magistrates “after consultation with the Magistrates' Commission”.\textsuperscript{995} The Minister is not bound by the advice of the commission, but merely has a duty to consult the commission before an appointment is made.\textsuperscript{996} The procedure for shortlisting and selection of magistrates is provided for in the Regulations for Judicial Officers in Lower Courts\textsuperscript{997} and can be summarised as follows: Vacancies may be advertised by the Director-General, detailing where and at what level the vacancy exists, the duties that the successful applicant will be required to perform, the requirements for appointment as well as instructions on the submission of applications and supporting documents that must be included.\textsuperscript{998}

\textsuperscript{991} See below for a more detailed discussion on the creation of the Office of the Chief Justice.
\textsuperscript{992} Olivier “The Selection and Appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 101 - 102
\textsuperscript{993} Olivier “The Magistracy” in Hoexter & Olivier The Judiciary in South Africa 325.
\textsuperscript{994} Khanyile \textit{v Commission for Conciliation, Mediation and Arbitration} 2004 ILJ 2348 (LC) par [18]. These sections make use of the term "judicial officers" which applies to judges and magistrates.
\textsuperscript{995} In terms of section 9(1)(aA) of the Magistrates' Courts Act, this power may be delegated to the Director-General, a Chief Magistrate or the head of a regional division, amongst others.
\textsuperscript{996} See Olivier “The Magistracy” in Hoexter & Olivier The Judiciary in South Africa 324. This provision of the Act was also challenged in \textit{S v van Rooyen}, where the Constitutional Court, drawing on the decision in the \textit{First Certification Judgement}, found that appointments made by the Minister do not infringe on the independence of the judiciary and therefore cannot be constitutionally objectionable. See \textit{S v van Rooyen} par [109].
\textsuperscript{997} GN743 in GG 26316 of 2004-04-30.
\textsuperscript{998} See Regulation 4.
Applications are then received by the Magistrates’ Commission after which the shortlisting is done through a subcommittee.\textsuperscript{999} Interviews take place with shortlisted candidates,\textsuperscript{1000} and names of the suitable candidates are then conveyed to the Minister.\textsuperscript{1001}

The candidates identified by this process are required to attend a training course at the South African Judicial Education Institute,\textsuperscript{1002} after which they serve a probationary period of six months to the satisfaction of the Magistrates’ Commission, unless the Minister has exempted a particular candidate from either of these two requirements.\textsuperscript{1003} Once the training is completed or the exemption granted, the successful candidates will be recommended to the Minister for appointment. Interestingly, the power of the Magistrates’ Commission in selecting magistrates is reviewable in terms of the Promotion of Administrative Justice Act,\textsuperscript{1004} while the similar function of the JSC is expressly excluded.\textsuperscript{1005}

As far as academic qualifications are concerned, the Magistrates’ Court Act mirrors the constitutional provisions for judicial officers with a general requirement that magistrates must be fit and proper persons and must be appropriately qualified.\textsuperscript{1006} The regulations expand on this general requirement, stating that a prospective magistrate must be a South African citizen or permanent resident, a fit and proper person, in good health, competent in the official languages which the Magistrates’ Commission deems necessary, and be legally qualified as required by the Constitution and legislation.\textsuperscript{1007} The advertisements calling for applications for appointment as a magistrate also require that

\footnotesize{\textsuperscript{999} The shortlist must, however, be ratified by the full commission. See Olivier “The Magistracy” in Hoexter & Olivier \textit{The Judiciary in South Africa} 326.}
\footnotesize{\textsuperscript{1000} These interviews are conducted in private, unlike the interviews conducted by the JSC. Furthermore, it is the screening committee that conducts the interviews except in the case of appointments at the level of regional magistrate, Chief Magistrate or Regional Court President, in which case the whole of the Magistrates’ Commission is involved.}
\footnotesize{\textsuperscript{1001} Olivier “The Magistracy” in Hoexter & Olivier \textit{The Judiciary in South Africa} 327.}
\footnotesize{\textsuperscript{1002} \textit{Ibid. The regulations, however, still refer to the Justice College which was the predecessor to the SAJEI.}}
\footnotesize{\textsuperscript{1003} Regulations 3(1)(f)(i) and (ii). The probationary period may be extended if the Magistrates’ Commission is not satisfied with the performance of an aspirant magistrate.}
\footnotesize{\textsuperscript{1004} Act 3 of 2000.}
\footnotesize{\textsuperscript{1005} Section 1(b)(gg) of the Promotion of Administrative Justice Act.}
\footnotesize{\textsuperscript{1006} Section 10 of the Magistrates’ Court Act.}
\footnotesize{\textsuperscript{1007} Regulation 3(1).}
the applicant must have an “appropriate legal qualification”, which the Magistrates’ Commission has interpreted as meaning a three-year qualification in law, as well as appropriate post-university legal experience.\textsuperscript{1008}

In its selection of magistrates, the Magistrates’ Commission is furthermore guided by section 174(2) of the Constitution which requires that the gender and racial demographics of the court be considered when judicial officers are appointed. Interestingly, the advertisements make specific mention of section 174(2) as well as section 9 of the Constitution when calling for applications to fill a vacancy in the magistracy.\textsuperscript{1009}

The procedure practised in the past for shortlisting candidates for magisterial appointment was explained in detail by the court in \textit{Du Preez}.\textsuperscript{1010} The Magistrate’s Commission employed a points-system whereby candidates were awarded points for each of the selection criteria.\textsuperscript{1011} For instance, being black could earn a candidate a score of 3 points for race, and being female could earn her another 3 points for gender. Depending on the demographic profile of the bench in question, a different weight is attached to different criteria.\textsuperscript{1012} In the court where the complainant in \textit{Du Preez} applied for a position, there was already an overrepresentation of white male magistrates. As a result, the points system was so constructed that the maximum numbers of points a white male could earn was still less than a black female with considerably less experience.\textsuperscript{1013}

Since it was established that the EEA does not apply to magistrates, the plaintiff in \textit{Du Preez} sought relief through the PEPUDA for claims of unfair discrimination based on race and gender against the Magistrate’s Commission.\textsuperscript{1014} In order to determine whether the discrimination was fair, the court had regard to section 14(2)(c) of the PEPUDA that asks whether the discrimination “reasonably and justifiably differentiates between persons

\begin{itemize}
\item\textsuperscript{1008} Olivier “The Magistracy” in Hoexter & Olivier \textit{The Judiciary in South Africa} 329.
\item\textsuperscript{1009} Ibid.
\item\textsuperscript{1010} 2006 (5) SA 592 (EqC).
\item\textsuperscript{1011} Du Preez v Minister of Justice and Constitutional Development par [30] – [31].
\item\textsuperscript{1012} Du Preez v Minister of Justice and Constitutional Development par [33].
\item\textsuperscript{1013} Du Preez v Minister of Justice and Constitutional Development par [30].
\item\textsuperscript{1014} Du Preez v Minister of Justice and Constitutional Development par [3].
\end{itemize}
according to objectively determinable criteria, intrinsic to the activity concerned”. The court then explained the heavy workload experienced by magistrates and that the task requires maturity and insight “for which there is no substitute for experience”. By disregarding the complainant’s experience in the selection process, the Magistrates’ Commission had unfairly discriminated against him. Constructing the points system as it did, the Magistrates’ Commission had created an “insurmountable obstacle” to the complainant, which amounted to an absolute barrier to appointment. The court consequently ordered a re-advertisement of the post in question.

Another important matter that was raised by the court in Du Preez was that the Magistrates’ Commission did not have a formal and comprehensive affirmative action plan in place to guide the selection process. Instead, the court had to piece together the implications of a departmental policy from the respondent’s documentation and testimony delivered by various officials in court. Although it did not order the Magistrates’ Commission to draft such a policy, the court found the lack of a formalised affirmative action plan to be unsatisfactory and rudimentary.

Singh was another case based on unfair discrimination brought under the PEPUDA against the Magistrates’ Commission. The complaint was brought by a visually disabled Indian woman who had applied for appointment as a magistrate. She alleged that the Magistrates’ Commission had unfairly discriminated against her based on her race, gender and disability after she had been overlooked for appointment. The court found that her non-appointment was not as a result of disability, but the failure of the Magistrates’ Commission to take her gender and disability into consideration was a serious injustice and a contravention of the PEPUDA.

1015 Du Preez v Minister of Justice and Constitutional Development par [36].
1016 Du Preez v Minister of Justice and Constitutional Development par [35] – [38].
1017 Du Preez v Minister of Justice and Constitutional Development par [41].
1018 For criticism on the court’s finding, see Van der Walt and Kituri “The Equality Court’s View on Affirmative Action and Unfair Discrimination” 2006 Obiter 674-681.
1019 Du Preez v Minister of Justice and Constitutional Development par [43].
1020 Ibid.
1021 Singh v Minister of Justice and Constitutional Development par [9].
1022 Singh v Minister of Justice and Constitutional Development par [32] and [47].
The respondents in this case argued that the complainant was not selected because section 174(2) of the Constitution requires that the need for the judiciary to reflect the gender and racial demographics of the country be considered in the appointment of judicial officers. Appointing the complainant, so they argued, would not have done justice to the racial profile of the particular court in question.\textsuperscript{1023} To this, the court answered that:

"It is...important to consider the provisions of section 174(2) in the context of the Constitution as a whole...the Constitution promotes a diverse and a legitimate judiciary. Section 9(2) of the Constitution, read with the Equality Act, clearly places a complementary duty on the state to take active measures to promote the equality of people with disabilities."	extsuperscript{1024}

The court stressed that the complainant’s disability does not give her an automatic right to be shortlisted, but it is a factor that must be considered equally with race and gender.\textsuperscript{1025} Consequently, the court ordered the Magistrates' Commission to change its selection criteria to reflect disability as a factor to be considered in the shortlisting of candidates.\textsuperscript{1026} Importantly, the court called upon the Magistrates' Commission to develop a “formal and comprehensive statement of policies and criteria to be used and/or applied in short-listing, evaluation and appointment for positions as magistrates which policies and criteria must clearly mention that the provisions of section 174 (2) and section 9 of the Constitution will be taken into consideration in the short-listing and the filling of the posts”.\textsuperscript{1027}

The court in \textit{Singh} furthermore held that the Magistrates' Commission should have serious regard to sections 174(2) and 9 of the Constitution, as well as the PEPUDA, when formulating selection criteria for the appointment and promotion of magistrates,\textsuperscript{1028} and

\begin{itemize}
  \item \textsuperscript{1023} \textit{Singh v Minister of Justice and Constitutional Development} par [46].
  \item \textsuperscript{1024} \textit{Singh v Minister of Justice and Constitutional Development} par [23].
  \item \textsuperscript{1025} \textit{Singh v Minister of Justice and Constitutional Development} par [43].
  \item \textsuperscript{1026} \textit{Singh v Minister of Justice and Constitutional Development} par [1].
  \item \textsuperscript{1027} \textit{Ibid.}
  \item \textsuperscript{1028} \textit{Singh v Minister of Justice and Constitutional Development} par [1].
\end{itemize}
that the requirements of section 174(2) of the Constitution should not override the importance of the equality provision.\textsuperscript{1029}

5 6 Affirmative action outside of the employment sphere

The above discussion relates to legislation condoning or requiring the application of affirmative action measures in an employment context or, in the case of the appointment of magistrates and judges, in a context similar to that of employment. While the EEA does not find direct application in the appointment of judges, such appointments hold remarkable similarities to appointments in a conventional labour setting. Affirmative action can, however, also be applied outside of the employment sphere. For instance, affirmative action measures have successfully been applied to university admissions,\textsuperscript{1030} the allocation of fishing quotas\textsuperscript{1031} and unequal rates for municipal service charges.\textsuperscript{1032} Affirmative action measures that are applied in these spheres must still comply with the requirements set out in \textit{van Heerden}. The case of SARIPA is of particular significance in this regard, as it explained how the criteria enumerated in \textit{van Heerden} can be applied to a setting outside of the employment field.

The case concerned the validity of policy developed by the Minister of Justice and Constitutional Development in accordance with insolvency legislation to regulate the allocation of liquidation matters to insolvency practitioners.\textsuperscript{1033} This appointments policy

\textsuperscript{1029} Singh \textit{v} Minister of Justice and Constitutional Development par [37].
\textsuperscript{1030} Motala \textit{v} University of Natal 1995 (3) BCLR 374 (D).
\textsuperscript{1031} Bato Star Fishing (Pty) Ltd \textit{v} Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC).
\textsuperscript{1032} Pretoria City Council \textit{v} Walker 1998 (2) SA 363 (CC). This case concerned a flat rate imposed for municipal service charges in previously disadvantaged townships, while inhabitants of previously advantaged townships were required to pay a higher rate. The Constitutional Court decided to deal with this case in terms of the unfair discrimination provision of the Interim Constitution and found that, while the difference between the two rates do amount to indirect discrimination, it was not unfair discrimination given the fact that the townships which paid the lower flat rate was much more disadvantaged compared to the other townships. This case highlights the overlap between the unfair discrimination provisions and the affirmative action provision in the Constitution. See Albertyn & Goldblatt “Equality” in Woolman \textit{et al}, \textit{Constitutional Law of South Africa} 35-40.
contained affirmative action measures and was to form the basis of the transformation of the insolvency profession.\textsuperscript{1034} In terms of this policy, insolvency practitioners were to be allocated to insolvency cases by the Master of the High Court from a list formulated for this purpose. The policy divided the Master’s list into various demographic categories, each containing the names of the insolvency practitioners who fit a specific demographic profile.\textsuperscript{1035} Allocations were to be made on a 4:3:2:1 ratio, with the effect that 40% of the allocations were to be made from amongst black women, 30% from black men, 20% from white women and 10% from white men and all persons who became citizens after 1994.\textsuperscript{1036} Within each category the names of the practitioners were furthermore arranged in alphabetical order and the Master was required to make selections in the same order in which the names appeared on the list within each demographic category.\textsuperscript{1037} Appointments were to be made in a rote fashion without taking into consideration the suitability of each practitioner when allocations were made.\textsuperscript{1038} The court found this policy to be at odds with the second leg of the \textit{van Heerden} test for a number of reasons.

Firstly, no rational basis for the Master’s list existed as no meaningful investigation was undertaken to determine if there are a sufficient number of insolvency practitioners available to populate each of the demographic groups on the list.\textsuperscript{1039} If only a small number of black female practitioners are available, allocating 40% of matters to this group could lead to a situation where these practitioners would not be able to cope with the sheer amount of work to be done.\textsuperscript{1040} The drafters of the policy also did not consider the impact of the ratio when applied in reality.\textsuperscript{1041} The largest group of insolvency practitioners fell within the last category on the Master’s list, yet they were allocated the least number of appointments. All persons born after 1994, regardless of race and gender, also formed

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{1034} \textit{Minister of Justice and Constitutional Development and Another v SA Restructuring And Insolvency Practitioners Association and Others} par [11].
  \item \textsuperscript{1035} \textit{Minister of Justice and Constitutional Development and Another v SA Restructuring And Insolvency Practitioners Association and Others} par [12].
  \item \textsuperscript{1036} Ibid.
  \item \textsuperscript{1037} Ibid.
  \item \textsuperscript{1038} \textit{Minister of Justice and Constitutional Development and Another v SA Restructuring And Insolvency Practitioners Association and Others} par [50].
  \item \textsuperscript{1039} \textit{Minister of Justice and Constitutional Development and Another v SA Restructuring And Insolvency Practitioners Association and Others} par [36] – [37].
  \item \textsuperscript{1040} Ibid.
  \item \textsuperscript{1041} Ibid.
\end{itemize}
\end{footnotesize}
part of this group. The ratio could therefore have deterred young persons from previously disadvantaged groups to enter the insolvency profession.\textsuperscript{1042}

The court furthermore found that, while the aim of the policy was to allow more people from disadvantaged backgrounds to be appointed as insolvency practitioners, playing “a mere numbers game” is not likely to achieve this purpose.\textsuperscript{1043} Simply increasing the number of previously disadvantaged persons without addressing the need to match individual skill to the position to which he or she was to be appointed would go no further than promoting formal equality which was at odds with the purpose of remedial measures in general.\textsuperscript{1044} Moreover, the appointments policy had no expiration date which would have made it difficult to assess whether or not the policy was likely to achieve its intended outcome.\textsuperscript{1045}

The court also pointed out that, even though the policy required that only qualified persons were to be included in the Master’s list, the Master had to appoint practitioners in alphabetical order and had no discretion to choose them based on the individual skills needed for the matter in question. Complex matters, for instance, requires the skills of an experienced insolvency practitioner. The only discretion the Master had is that where the next-in-line candidate on the list was not suitably qualified for the liquidation in question, the Master was to appoint another candidate from the list as co-trustee.\textsuperscript{1046} These appointments were to be made in addition to the appointment of the unsuitable candidate and also in alphabetical order.\textsuperscript{1047} According to the SCA, this appointments mechanism

\textsuperscript{1042} Ibid.
\textsuperscript{1043} See the High Court decision in SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development 2015 (2) SA 430 (WCC) par [156]. This was also confirmed by the SCA in Minister of Justice and Constitutional Development and Another v SA Restructuring And Insolvency Practitioners Association and Others par [32]-[36].
\textsuperscript{1044} SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development par [156]. The Constitutional Court in South African Police Service v Solidarity obo Barnard made a similar remark at par [41].
\textsuperscript{1045} SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development paras [160] – [161].
\textsuperscript{1046} Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association par [34].
\textsuperscript{1047} Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association par [34].
contained all of the rigidity yet none of the flexibility required of affirmative action measures, thereby rendering it arbitrary and capricious.\textsuperscript{1048}

The court \textit{a quo} furthermore added that applying a strict appointment mechanism and providing no discretion to deviate from the affirmative action policy in an environment where there was an insufficient number of persons from disadvantaged backgrounds eligible for appointment, increased the likelihood of fronting which was more likely to disadvantage the very groups it aimed to advance.\textsuperscript{1049} This is significant not only in the insolvency profession but equally so in the appointment of judges. In both instances, white males dominated the profession while women and black persons comprised a very small minority.\textsuperscript{1050} In seeking to impose remedial measures to ensure equitable representation of these groups, policy drafters must be mindful of over-rigidity in the measures they choose to adopt.

\textbf{5 7 Conclusion}

The PEPUDA gives effect to section 9 of the Constitution by prohibiting unfair discrimination and placing a duty upon persons to impose affirmative action measures to eradicate systemic discrimination in all spheres of life. Even though the promotion of equality provisions of the PEPUDA are not yet in effect, section 14(3)(i) requires a court to consider whether or not positive measures are implemented to address discrimination and to accommodate diversity. Where such measures are not taken, a court may find that a complainant is, in fact, being discriminated against.

Chapter 5 of the PEPUDA, on the other hand, imposes an obligation on organs of State to devise and implement formal equality plans, which can be construed as a duty to have
affirmative action plans in place similar to those required by the EEA.1051 This provision will place a duty on the implementation formal affirmative action plans to address the gender imbalances in the judiciary. However, this part of the PEPUDA has not taken effect, and no date has been set for its commencement.1052 While it is unclear, therefore, whether or not a court will interpret this provision in such a light, the High Court in Du Preez voiced its dissatisfaction at the lack of a formal affirmative action plan in the case of the appointment of magistrates.1053 Given the analogous nature and functions of the JSC and the Magistrates’ Commission, a similar argument can be made in the case of judicial appointments by the JSC.

The EEA was promulgated to regulate the imposition of affirmative action in employment. Although formal employment equity plans are required only of designated employers, all employers are under a duty to promote equal opportunities for all persons. Given the discriminatory history of South Africa, it is submitted that this can not be done without active measures to promote black persons, women and people with disabilities who were discriminated against in the past.

Any remedial measures taken in compliance with the EEA must conform to the van Heerden test in order to pass constitutional muster. This chapter has shown how the EEA has been interpreted in light of the requirements set out in van Heerden. Given the similarities between the EEA and the PEPUDA, and the fact that both Acts were promulgated in terms of the same constitutional provision, it is submitted that remedial measures taken in terms of the PEPUDA must conform to the same standards.

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1051 Gutto Equality and Non-discrimination 214.
1052 Recently, the SAHRC explained that a possible reason for the inactivity of the promulgation of these provisions is uncertainty as to whether the government has the necessary resources and professional capacity to comply with the requirements thereof. The SAHRC furthermore noted that this is a serious impediment to the realisation of the right to equality. See South African Human Rights Commission “Equality Roundtable Dialogue Report” (27 March 2014) http://www.sahrc.org.za/home/21/files/Equality%20Roundtable%20Dialogue%20Report.pdf (accessed 2016-01-15).
1053 Du Preez v Minister of Justice and Constitutional Development par [43].
Magistrates and judges, even though holding different constitutional positions, are appointed in a very similar fashion. Several legislative amendments have recently been taken to bring the position of magistrates closer to that of judges. Moreover, the constitutional provisions relating to the appointment of judicial officers apply to both judges and magistrates. It is therefore submitted that case law dealing with the appointment of magistrates can, to some extent, provide guidance on the correct interpretation of these provisions when judges are appointed.

Two cases dealing directly with discrimination and affirmative action in the appointment of magistrates therefore find application. Firstly, in Du Preez, the court found that a points-system that effectively excluded certain demographic groups from consideration for magisterial appointment amounted to unfair discrimination. Secondly, in Singh, the court found that the Magistrates' Commission had considered the provisions of section 175(2) of the Constitution to the exclusion of other relevant constitutional and legislative provisions. In particular, the court held that section 9(2) of the Constitution and the PEPUDA must be considered alongside with section 174(2) of the Constitution and that these provisions place a duty on the State to impose positive measures to promote equality, in this case the equality of persons with disabilities. Drawing on these cases, it is argued that a similar duty is placed on the JSC in the appointment of judges.

Lastly, this chapter has shown how the requirements of affirmative action are applied to spheres outside of employment. The court in SARIPA pointed out that remedial measures must be rationally related to the advancement of previously disadvantaged people. An appointments policy that is too rigid and does not allow a decision-maker the flexibility to match individual skills of candidates to the position in question, is not rationally connected to the aim it seeks to achieve. In the next chapter, the principles enumerated above are applied to the case of judicial appointments. In particular, the next chapter will determine

1054 Most significantly, section 174(2) of the Constitution which states that the racial and gender profile of the court must be taken into consideration when judicial officers are made.
1055 Du Preez v Minister of Justice and Constitutional Development par [41].
1056 Singh v Minister of Justice and Constitutional Development par [1].
whether or not the measures taken by the JSC to correct the gender imbalance on the bench comply with the constitutional and legislative requirements of affirmative action.
CHAPTER 6

AN ANALYSIS OF THE JSC’S CRITERIA AGAINST THE
CONSTITUTIONAL REQUIREMENTS FOR AFFIRMATIVE ACTION

6.1 Introduction

The main focus of this research has been to provide a detailed explanation of the different constitutional and legislative provisions that impact on the selection and appointment of judges. Firstly, section 174 of the Constitution requires not only that every man and woman selected for judicial appointment must be appropriately qualified and must be a fit and proper person, but also that the racial and gender demographics of the South African population must be considered in judicial selection with the view of making the judiciary broadly reflective of the community it serves.\textsuperscript{1057}

It has furthermore been shown that as a result of the discriminatory policies of the past, black persons and women are underrepresented in the judiciary. The same discriminatory policies furthermore denied them equal educational and employment opportunities, with the result being that many of them lack the necessary qualifications and experience to compete successfully for judicial appointment with their male and white counterparts.

In order to address the underrepresentation of women in the judiciary therefore requires positive remedial measures. One of the ways in which this is done, is through the criteria employed by the JSC when shortlisting and selecting candidates to be recommended for judicial office, specifically by including symbolism and potential as factors to be considered during the appointment process.

Section 9(2) of the Constitution allows for remedial measures that protect or advance those persons who were discriminated against in the past. This provision is given further

\textsuperscript{1057} Section 174(2) of the Constitution.
content in the EEA\textsuperscript{1058} and the PEPUDA.\textsuperscript{1059} Both these Acts seek to prohibit unfair discrimination and regulate the imposition of remedial measures, albeit in different spheres. The EEA applies only in the employment sphere and, as such, is not directly applicable to the appointment of judges. The PEPUDA, on the other hand, applies where the EEA does not, yet its affirmative action provisions are not yet in force. Given the similarities between these two Acts, however, many of the principles concerning affirmative action that have been made by the court in interpreting the EEA, can inform an authoritative interpretation of the PEPUDA.

The \textit{locus classicus} for the lawfulness of remedial measures is \textit{Minister of Finance v van Heerden} where the Constitutional Court laid down three requirements that such measures must meet. These requirements are that the beneficiaries of affirmative action must be persons who have been disadvantaged against in the past, the measures employed must be designed so as to make the advancement of these persons reasonably likely and that the measures must promote the long-term ideal of non-racism and non-sexism. The primary aim of this chapter is to determine whether the JSC’s criteria meet these requirements. As such, the criteria are matched against each of the \textit{van Heerden} requirements, and possible shortcomings or areas of non-compliance are identified.

Many of the criteria employed by the JSC are open-ended and vague, and symbolism and potential is no different. The JSC has thus far not provided any clarity on the exact meaning of “symbolism” and “potential”, nor has it indicated when, and under what circumstances, greater weight may be attached to these criteria. In order to determine whether they comply with the \textit{van Heerden} requirements, further content to the criteria is provided and certain suggestions as to the proper weight to be attached to symbolism and potential are considered.

\textsuperscript{1058} 55 of 1998.
\textsuperscript{1059} 4 of 2000.
6 2 The van Heerden requirements

6 2 1 Does the measure target persons previously disadvantaged by discrimination?

According to section 9(2) of the Constitution, the beneficiaries of affirmative action must be persons who have been previously disadvantaged by unfair discrimination. This has been expounded upon and given content in legislation, most notably, the EEA and the PEPUDA. In the EEA, black persons, women and people with disabilities are identified as the possible beneficiaries of affirmative action. While the beneficiaries of affirmative action in terms of the PEPUDA are not as closely defined as in the EEA, Chapter 5 of the PEPUDA will, once promulgated, require the state to take remedial measures for the promotion and achievement of equality in respect of race, gender and disability. In the South Africa context, and given the discriminatory legacy of our past, any reference to the promotion of gender equality means that it will be women who stand to benefit from remedial measures.

Prior to 1994, the two fundamental bases for discrimination were race and gender. This, in turn, has led to a distortion of the composition of the judiciary along racial and gender lines, and has had a compromising effect on women and black persons’ advancement in the legal profession and their judicial aspirations. It is for this reason that section 174(2) of the Constitution requires that the racial and gender imbalances must be rectified and, as Olivier contends, the JSC guidelines include considerations of symbolism and potential.

Another group that has, however, been discriminated against by past discriminatory policies is disabled people. Section 174(2) of the Constitution does not explicitly refer to disabled persons but the Equality Court in Singh found that the text of this section does not preclude the Magistrates’ Commission from promoting persons with disabilities in the

1061 Cowan Judicial Selection in South Africa 70.
1062 Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 139.
selection and recruitment of magistrates.\textsuperscript{1063} The court took a holistic view of the Constitution and held that section 174, read with section 9 and the PEPUDA, creates two obligations. Firstly, the creation of a diverse and legitimate judiciary, and secondly the protection and advancement of persons who were discriminated against in the past.\textsuperscript{1064} The court emphasised that the obligation to diversify the bench does not eclipse the obligation to advance previously disadvantaged persons, but rather complements and reinforces it.\textsuperscript{1065} While section 174(2) of the Constitution refers to race and gender, it makes use of these factors as indicators of diversity, and not to have racial and gender considerations trump other bases of past exclusion.\textsuperscript{1066}

Drawing on the judgement in \textit{S v Bresier},\textsuperscript{1067} the Equality Court held that the aim of section 174(2) of the Constitution is to create diversity in the judiciary so as to increase the legitimacy of the bench and bringing different perspective to the bench, thereby enhancing the adjudication process. Seen in this light, judicial transformation should not stop at racial and gender diversity, but differences in ethnic background, religious affiliations, cultural belief and practices, languages, sexual orientation and employment and educational experiences should also be considered when judges are selected.\textsuperscript{1068} Cowan believes that such a wide interpretation to section 174(2) of the Constitution could imply that judges are appointed to represent specific social groups or interests in the community, which is an argument that should be rejected.\textsuperscript{1069}

Affirmative action normally operates in favour of black persons, women and disabled people. Section 9(3) of the Constitution, however, contains a non-exhaustive list of grounds upon which no person may be discriminated against, including sexual orientation, language etc. The non-discrimination provisions of the equality clause means

\textsuperscript{1063} Singh \textit{v The Minister of Justice and Constitutional Development} par [26].
\textsuperscript{1064} Singh \textit{v The Minister of Justice and Constitutional Development} par [31]; See also Holness “Employment Equity and Elimination of Discrimination: Where are women with Disabilities in the Hierarchy?” 2016 Agenda 49 53.
\textsuperscript{1065} Singh \textit{v The Minister of Justice and Constitutional Development} par [31].
\textsuperscript{1066} \textit{Ibid}.
\textsuperscript{1067} 2002 (4) SA 524 (C) at 539 [B] – [D]
\textsuperscript{1068} See Olivier “The Selection and appointment of Judges” in Hoexter & Olivier \textit{The Judiciary in South Africa} 139 where the author makes a similar argument.
\textsuperscript{1069} See Cowan \textit{Judicial Selection in South Africa} 58.
that candidates may not be discriminated against based on these grounds in the judicial
selection process, even if affirmative action in the selection of judges does not necessarily
operate in their favour.\textsuperscript{1070}

The JSC’s criteria for the appointment of judges does not explicitly include disability as
one of the considerations to be taken into account when selecting candidates for judicial
appointments. It may be argued that the criteria, in particular the criteria of symbolism
and potential, is flexible enough to allow the members of the JSC to consider disability
when selecting candidates to be recommended for judicial appointment. It is submitted,
however that, based on the finding of the Equality Court in \textit{Singh}, disability should be
specifically included in the selection criteria.

When using symbolism as a selection criteria, the JSC attempts to determine what
message will be communicated to the community if a candidate of a particular
demographic group is to be appointed to the High Court in question.\textsuperscript{1071} For instance,
where past exclusionary practices which denied the appointment of female judges led to
a significant gender imbalance in a particular court, the appointment of more female
judges to that court will have particular symbolic significance.\textsuperscript{1072}

In practice, the JSC attaches great weight to the symbolism criterion.\textsuperscript{1073} Moerane
explains it as follows:

\begin{quote}
“\[T\]he fact that a particular appointment will have a symbolic value that gives a positive
message to the community at large, may tip the scales in favour of a particular
candidate especially where there is competition for a vacancy. A hypothetical example
would be the appointment of an Indian female judge to a Division where there were
no female judges at all and wherein Indians were by law previously denied the right
of residence”.\textsuperscript{1074}
\end{quote}

\textsuperscript{1070} Cowan \textit{Judicial Selection in South Africa} 11.
\textsuperscript{1071} This much is stated in the JSC criteria which were published in 2010.
\textsuperscript{1072} Olivier “The Selection and appointment of Judges” in Hoexter & Olivier \textit{The Judiciary in South Africa}
140.
\textsuperscript{1073} \textit{Ibid.}
\textsuperscript{1074} Moerane 2003 \textit{SALJ} 714.
Two things become apparent from reading the above statement: Firstly, it indicates that the JSC, when shortlisting and selecting judges on the High Court bench, takes the demographics of the particular province into consideration when filling a vacancy within that particular High Court. This argument is also supported by the reasons offered by the JSC when an imminently qualified white male candidate was overlooked for appointment to the Western Cape High Court. According to the stated reasons, appointing another while male to that particular High Court bench would have violated the mandate imposed by section 174(2) of the Constitution. In the same round of interviews, however, the JSC selected three white males for appointment to other Divisions of the High Court, indicating that there was a stronger need for redress in the Western Cape as compared to other courts.

The second observation is that it shows that the JSC does not necessarily consider race and gender to the exclusion of one another. If statistical analysis shows an underrepresentation of, for instance, black female judges in a particular court, the JSC attempts to fill the vacancy with a candidate who is both black and female. This accords with two of the main rationales behind affirmative action in the appointment of judges which is to increase the legitimacy of the bench and to provide a “plurality of views” in the adjudication process. If the absence of black females is particularly pronounced in a certain division of the High Court, appointing a black female will be symbolically significant and increase the legitimacy and diversity of views of the bench in question. Where a remedial measure aims to address intersectional disadvantage, as is the case where the JSC attempts to fill a vacancy with a candidate who has been disadvantaged on the bases

1075 In this case, it was Jeremy Gauntlett SC who was overlooked for appointment. This led to a court case in which the Helen Suzman Foundation sought an order for a full disclosure of the records of the deliberations that were conducted before the members of the JSC cast their votes as to the most suitable candidates for judicial selection. See Helen Suzman Foundation v Judicial Service Commission and Others [2017] 1 All SA 58 (SCA) par [2].
1078 Wesson and du Plessis 2008 SAJHR 199.
of both race and gender, the measure can be specifically tailored to allow more black female judges to be selected.\textsuperscript{1079}

A carefully-constructed appointments policy may also obviate a problem generally associated with addressing gender imbalances, as pointed out by Bonthuys.\textsuperscript{1080} Women, in general, are underrepresented on the High Court bench. However, research shows that black women are more underrepresented than women from other demographic groups.\textsuperscript{1081} Appointing more white women, for instance, will at best not alleviate this underrepresentation and, at worse, even serve to aggravate their underrepresentation, since appointing a female judge of any demographic group will increase the total percentage of women thereby reducing the chances of black females being appointed.\textsuperscript{1082} A policy tailored to allow more black female appointees will also negate the oft-cited criticism raised against the JSC that it promotes racial representivity at the expense of gender,\textsuperscript{1083} as a measure that targets black women in particular will justify overlooking a white woman for selection.

As alluded to above, potential is another factor that is considered in the selection of candidates for judicial appointment and allows the JSC to recommend a candidate for appointment even if he or she lacks experience or possesses “a different kind of experience or competence”\textsuperscript{1084} when competing with a candidate who is considered to be more technically meritorious.\textsuperscript{1085} According to Justice Kate O’Regan, judging a candidate’s potential will involve an assessment of whether the candidate realises that he

\begin{footnotes}
\item[1080] Bonthuys “Gender and Race in South African Judicial Appointments” 2015 Feminist Legal Studies 127 133.
\item[1081] Bonthuys 2015 Feminist Legal Studies 127.
\item[1082] Bonthuys 2015 Feminist Legal Studies 133.
\item[1083] See, for instance, Mokgoro “Judicial Appointments” December 2010 Advocate 43 46 and Albertyn “Judicial Diversity” in Hoexter & Olivier The Judiciary in South Africa 280.
\item[1084] Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 140.
\end{footnotes}
or she has less experience than would be ideal for judicial appointment, that he or she
knows where to acquire the knowledge that is lacking, whether he or she has the ability
to learn and grow professionally, and whether he or she is likely to seek advice from other
persons who can help.\textsuperscript{1086}

One of the ways in which aspirant judicial appointees can gain experience and for the
JSC to assess a candidate’s potential is through acting appointments.\textsuperscript{1087} Seen in this
light, the practice of appointing acting judges has great potential to accelerate the gender
transformation of the High Court judiciary.\textsuperscript{1088} Furthermore, the record of the JSC
indicates that great significance is attached to the judicial record of the candidate in his
or her acting appointment, even though it has not formally been recognized as a criteria
for permanent appointment.\textsuperscript{1089} Research has shown that very often women are
overlooked for acting appointments which,\textsuperscript{1090} in turn, reduces their chances of being
selected for permanent appointment. Increasing the number of female acting judges will
therefore broaden the pool of women from which permanent judges can be selected,
thereby aiding the transformative goals of section 174(2) of the Constitution.\textsuperscript{1091}

The absence of guidelines within which acting appointments are made has prompted
rumours that these appointments may be made for ulterior purposes and that race is often
the overriding consideration when selecting acting judges.\textsuperscript{1092} It is precisely this type of
secrecy, racial bias and political favouritism that has led to the illegitimate judiciary
adopted from the apartheid era. Calls have been made for clarity on the criteria

\textsuperscript{1086} Ibid.
\textsuperscript{1087} Olivier “The appointment of acting judges in South Africa and Lesotho” 2006 Obiter 555 569.
\textsuperscript{1088} Corder “Appointment, Discipline and Removal of Judges in South Africa” in Lee (ed) Judiciaries in
Comparative Perspective (2011) 96 106.
\textsuperscript{1089} Ibid.
\textsuperscript{1090} Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa
150.
\textsuperscript{1091} Former Minister Madbandla is reported to have actively requested that Judge President’s include
women in the list of candidates for acting appointments, although she was severely criticized and even
labelled a racist as a result. See Masengu & Tilley “Is the Appointment of Acting Judges Transparent?”
2015 De Rebus 112 and Quintal “Justice Minister Branded a Racist” (26 January 2007)
\textsuperscript{1092} Corder “Appointment, Discipline and Removal of Judges in South Africa” in Lee (ed) Judiciaries in
Comparative Perspective (2011) 96 106.
considered when making acting appointments,\textsuperscript{1093} which criteria should contain a consideration of the gender demographics of the judiciary.\textsuperscript{1094}

An assessment of a candidate’s potential becomes more difficult when one considers the fact that the JSC has given no guidelines on how much experience is required before a candidate will be considered for judicial appointment. This forms part of a broader debate surrounding the relative weight to be attached to the criteria when selecting judges. On numerous occasions, the JSC has been criticised for elevating symbolism and potential (the so-called affirmative action provisions) over other criteria.\textsuperscript{1095} This speaks directly to the interplay between section 174(1) and section 174(2) of the Constitution.

If section 174(1) of the Constitution is to be seen as primary consideration, the merit criteria becomes the most important factor and would result in the best technically qualified candidate to be appointed each time a vacancy arises. According to Olivier, this approach completely ignores the diversity imperative and the unequal playing field caused by systemic discrimination against women.\textsuperscript{1096} The other extreme is where demographics are considered to the exclusion of all the other criteria. This would, in effect, amount to a quota system.\textsuperscript{1097}

Neither one of the above extremes seems to be what the JSC has in mind.\textsuperscript{1098} According to the JSC:

\begin{quote}
“There are a wide variety of factors that are taken into account by the Screening Committee before deciding to include or exclude a particular nominee. These include but are not limited to the recommendation of the Judge President, the support of the
\end{quote}

\textsuperscript{1093} Masengu & Tilley 2015 \textit{De Rebus} 112.
\textsuperscript{1096} Olivier “The Selection and appointment of Judges” in Hoexter & Olivier \textit{The Judiciary in South Africa} 138.
\textsuperscript{1097} Olivier “The Selection and appointment of Judges” in Hoexter & Olivier \textit{The Judiciary in South Africa} 138 – 139.
\textsuperscript{1098} \textit{Ibid.}
candidate’s professional body, the need to fulfil the constitutional mandate of the Judicial Service Commission (JSC) so as to ensure transformation of the Bench to reflect the ethnic and gender composition of the population, the particular judicial needs of the division concerned, the candidate’s age and range of expertise, including whether he or she has served as an Acting Judge in the division or at all, and the relative strength and merits of the various candidates in relation to one another.”

This indicates that the JSC takes a holistic view of the requirements in section 174(1) and section 174(2) and that neither the demographics nor the technical competence of a candidate is the primary consideration when selecting candidates to be shortlisted.

It is not difficult to see that demographic considerations can serve as a tie-breaker where two equally qualified candidates are competing for the same vacancy. This, however, is not the aim of affirmative action. According to the court in *Stoman v Minister of Safety and Security*,\(^\text{1100}\) to allow affirmative action measures to be considered only where two candidates have the same qualifications and merit will not promote equality in a society that is still suffering from the effects of racial and gender oppression caused by apartheid policies.\(^\text{1101}\) It follows, therefore, that a female candidate may be selected even if she lacks the same technical qualifications and experience of male candidates competing for the same vacancy, as long as the certain minimum qualifications are met.\(^\text{1102}\)

A problem occurs, however, where a candidate from an overrepresented group is substantially more qualified than the candidate from an underrepresented group. In such an instance, careful consideration of the racial and gender needs of the particular division is required, but demographic considerations cannot be the only relevant factor.\(^\text{1103}\) It must be determined which qualities distinguish the candidates from one another, and whether

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\(^{1099}\) This quotation was taken from the response to a request by the Open Democracy Advice Centre on behalf of the Democratic Rights and Governance Unit for access to documents reflecting the criteria that the JSC makes use of when deliberating on the suitability of candidates for judicial appointment. See *Cowan Judicial Selection in South* 7 – 8.

\(^{1100}\) (2002) 23 ILJ 1020 (T).

\(^{1101}\) *Stoman v Minister of Safety and Security* 1033[G].

\(^{1102}\) This does not mean, however, that the merit requirement can be ignored in the pursuit of demographic representivity. See *Stoman v Minister of Safety and Security* 1034[C]–[D] where Van der Westhuizen J held that “The requirement of rationality remains, however, and the appointment of people who are wholly unqualified, or less than suitably qualified, or incapable, in responsible positions cannot be justified”.

\(^{1103}\) *Cowan Judicial Selection in South* 58.
the qualities of the more qualified candidate would assist the court in discharging its judicial functions.\textsuperscript{1104} It is therefore not a question of weighing up the relative technical merits of the competing candidates, but rather an assessment of the overall needs of the divisions and the judiciary as a whole, including the need to diversify the bench.\textsuperscript{1105}

During the discussion conducted by the JSC on the qualities needed for judicial appointment, it was reiterated that judicial appointees must all possess a certain level of technical expertise, but beyond this level it is demographic considerations that count.\textsuperscript{1106} This indicates that there is a certain “threshold of performance” a candidate must meet before racial or gender demographics come into play.\textsuperscript{1107} This resonates with the “suitably qualified” requirements for the application of affirmative action in the conventional labour setting. The JSC has not fully indicated what this threshold of performance is,\textsuperscript{1108} yet some indication may be gleaned from the Constitution and the criteria adopted by the JSC. Labour jurisprudence also provides further guidelines.

Section 174(1) of the Constitution requires judicial appointees to be appropriately qualified and fit and proper persons. The JSC has not specified any specific academic qualifications judicial candidates need to have to be suitable for judicial office.\textsuperscript{1109} It is still a requirement, however, that candidates must have some qualification in law.\textsuperscript{1110} The President of the SCA has expressed the view that the term “suitably qualified” can not be interpreted as referring to academic qualifications only.\textsuperscript{1111} According to him, knowledge and experience also forms part of the enquiry.\textsuperscript{1112} Experience, in turn, does not refer only

\textsuperscript{1104} Ibid.
\textsuperscript{1105} Ibid.
\textsuperscript{1106} Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 140.
\textsuperscript{1107} Critics of the JSC are of the opinion that this threshold of performance is not set high enough. For instance, Sir Sydney Kentridge has said that the JSC “has not been sufficiently rigorous in ensuring that legal knowledge and experience accompany the other qualities needed for the transformation of the judiciary”. See Kentridge “The Highest Court: Selecting the Judges” 2003 Advocate 35 40.
\textsuperscript{1108} See chapter 4 for a discussion on the qualifications needed for judicial appointment.
\textsuperscript{1109} Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 134.
\textsuperscript{1110} Ibid.
\textsuperscript{1111} Mpati “Transformation in the South African Judiciary – A Constitutional Imperative” 2006 High Court Quarterly Review 75 81.
\textsuperscript{1112} Ibid.
to technical experience but, according the JSC guidelines, also considers experience in respect of the needs and values of the community.\textsuperscript{1113}

Different courts may require different types and levels of knowledge and experience in candidates. For instance, an appointment to the Labour Court would necessarily require a candidate to have sufficient knowledge and experience in labour matters to be considered sufficiently qualified for appointment.\textsuperscript{1114} Cowan argues that under the constitutional dispensation in South Africa, all judges should have knowledge and experience of constitutional law.\textsuperscript{1115} This requires judges to have sufficient competence to engage in moral reasoning when adjudicating on open-ended issues inherent in a judicial system of normative values.\textsuperscript{1116} The JSC guidelines also indicate that the capacity to give expression to the values of the Constitution is one of the factors to be considered when judges are selected.

The criteria listed as supplementary criteria in the JSC’s guidelines provide some content to, although not clarity on, the “fit and proper” criterion for judicial appointment. For instance, it is asked whether the candidate is a person of integrity and whether he or she has the necessary motivation and energy for judicial office. To this, Cowan adds that judicial appointees must be independent, impartial and fair, must be committed to the constitutional values and must have a temperament fit for judicial office.\textsuperscript{1117}

In assessing a candidate’s integrity, the JSC tries to determine whether or not the candidate is “someone who is faithful to his or her principles” and whether he or she has

\textsuperscript{1113} This is the practice also in other jurisdictions. In the UK, for instance, merit has been redefined to include “an understanding of the diversity of the communities which the courts and tribunal serve and an understanding of differing needs” under the overall quality of “an ability to understand and deal fairly”. See Bindman & Monaghan “Judicial Diversity: Accelerating Change” (November 2014) https://jac.judiciary.gov.uk/sites/default/files/sync/news/accelerating_change_finalrev_0.pdf (accessed 2017-0-30)
\textsuperscript{1114} Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 134.
\textsuperscript{1115} Cowan Judicial Selection in South Africa 23.
\textsuperscript{1116} Ibid.
\textsuperscript{1117} Cowan Judicial Selection in South Africa 34; Van Zyl “The Judiciary as Bastion of the Legal Order in Challenging Times” 2009 PER 6.
the necessary traits to uphold a good personal and professional reputation. Further content can be sought from the Code of Judicial conduct which requires judges to always act in a manner befitting their office, not only in exercising the judicial function, but also in their private lives.

The energy and motivation criterion, however, focusses more narrowly on the candidate’s work ethic, productivity and industry. One way in which this can be assessed is to have regard to the record of the candidate during his or her term of acting appointment to determine whether or not he or she was able to deliver judgements without any undue delay.

Although independence and impartiality are not listed in the JSC guidelines, these traits are indispensable to the adjudicatory process as it entails resistance to any internal or external influences as is required by the Constitution. This requires judges not only to distance themselves from influence from the other branches of government, but also to distance themselves from any irrelevant predispositions and personal beliefs which may influence them in the adjudicatory process.

One of the most important attributes a judicial appointee must possess is a firm commitment to the values contained in the Constitution. This is so because each of the values contained in the Constitution has far-reaching implications for litigants who

1118 Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 136.
1119 Article 5 of the Code of Judicial Conduct. A Code of Judicial Conduct is envisaged in section 12 of the JSC Act, was approved by Parliament and published as GN R865 in GG 35802 of 2012-10-18.
1120 Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 137.
1121 Ibid.
1122 Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 135. Other sources also indicate the importance of independence and impartiality inherent in the function of judicial office. Article 6(1) of Schedule 2 of the Constitution, for instance, requires each judge to swear or affirm to uphold the Constitution and to dispense justice to all persons “without fear, favour or prejudice”. Article 4 of the Code of Judicial Conduct furthermore requires all judges to uphold the independence of the judiciary and to maintain an independence of mind when discharging adjudicative duties.
1123 Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 136.
approach the court in order to exercise their rights. This is different from the requirement of being technically competent to give expression to the Constitution as described above.\textsuperscript{1124} It requires, amongst others, a deeply-rooted commitment to the achievement of equality, the creation of a non-racist and non-sexist society and respect for the rule of law and the Constitution as the supreme law of the land.\textsuperscript{1125}

The last component of Cowan’s definition of “fit and proper” is that of judicial temperament.\textsuperscript{1126} This criterion is not listed as one of the factors considered by the JSC in its guidelines, yet one of the JSC’s reasons for not selecting Gauntlett SC for judicial appointment in 2012 is that he did not possess the necessary humility for judicial office.\textsuperscript{1127} This indicates that at least some reliance is placed on it during the selection process. A temperament fit for judicial office encompasses a range of qualities, not least of which is humility, open-mindedness, courtesy, patience and respect.\textsuperscript{1128}

In the above discussion, much reliance is placed on academic literature explaining the different components of what constitutes appropriate qualification and the qualities inherent in a fit and proper person as the JSC has not given sufficient content in this regard. Moreover, once having selected only appropriately qualified and fit and proper candidates during the screening process, it still remains unclear to what extent symbolism and potential can work to advance those groups of persons who are underrepresented in the judiciary. It is submitted that these issues require clarity.\textsuperscript{1129}

\textsuperscript{1124} Cowan \textit{Judicial Selection in South Africa} 40.
\textsuperscript{1125} Ibid.
\textsuperscript{1126} Olivier “The Selection and appointment of Judges” in Hoexter & Olivier \textit{The Judiciary in South Africa} 136.
\textsuperscript{1128} Olivier “The Selection and appointment of Judges” in Hoexter & Olivier \textit{The Judiciary in South Africa} 136.
\textsuperscript{1129} A private members Bill has been introduced in Parliament that sought to give further content to the criteria to be used when judges are selecting, as well as the relative weight to be attached to demographic considerations.\textsuperscript{1129} This bill has subsequently been withdrawn.
6 2 2 Is the measure designed to protect or advance such persons or categories of persons?

Affirmative action measures must be designed to achieve the protection or advancement of persons who have been discriminated against in the past. The remedial measure must be “reasonably capable of attaining the desired outcome” which is the advancement of previously disadvantaged persons or groups of persons. When determining whether a particular measure satisfies this second requirement for affirmative action measures, a court must determine what the measure is intended to achieve, and then determine whether the measure is structured in such a way as to make the desired end likely to be achieved.

There can be little doubt that including symbolism and potential into the criteria for judicial selections, the intention is to allow more female and black candidates an opportunity to be appointed to judicial office, thereby bringing the demographics of the judiciary in line with that of the South African community. Whether it can be said that simply including these criteria into a list of factors to be considered in the selection process is likely to achieve this end, is not clear.

In Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Council\textsuperscript{1130} the court held that, in order to survive judicial scrutiny, there must be a programme or a policy and that the programme or policy must be designed to adequately protect or advance persons or groups of persons who have been disadvantaged against in the past.\textsuperscript{1131} The SCA in Gordon v Department of Health\textsuperscript{1132} has furthermore held that an appointment itself cannot be a measure as contemplated in section 9(2) of the Constitution, and that affirmative action appointments made on an \textit{ad hoc} basis without a formal policy is arbitrary.\textsuperscript{1133} \textit{Ad hoc} and random action, even if intended to advance or

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\item \textsuperscript{1130} [1999] ZALC 107.
\item \textsuperscript{1131} Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Council par [19].
\item \textsuperscript{1132} 2008 (6) SA 522 (SCA).
\item \textsuperscript{1133} Gordon v Department of Health par [25] – [26].
\end{itemize}
\end{footnotesize}
protect those previously disadvantaged by unfair discrimination, can not be said to be designed for such a purpose.\textsuperscript{1134}

The court in \textit{Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Council} highlighted the reasons for developing formal affirmative action plans as follows:

\textquote{These requirements ensure that there is accountability and transparency. They ensure that there is a measure or standard against which the implementation of affirmative action is measured or tested. They ensure that no arbitrary or unfair practices occur under the guise of affirmative action. They also ensure full knowledge and participation in the establishment and implementation of the programme.}\textsuperscript{1135}

Based on the above considerations, it is submitted that a formal affirmative action policy is needed to guide the gender transformation of the judiciary. This will ensure that these actions are rationally related to the object of advancing those previously disadvantaged by discrimination, thereby satisfying the second leg in the \textit{van Heerden} test. Such a policy will furthermore lend greater transparency to the appointment process. Transparency is of particular significance given the enormous public power wielded by the JSC in selecting candidates for judicial appointment and the fact that the majority of the members on the JSC are not drawn from the legal profession, but from the Legislature and the Executive.\textsuperscript{1136}

Section 25(4)(b) of the PEPUDA requires ministers to draw up equality plans. Although no formal definition is supplied for equality plans, the regulations (hereafter the PEPUDA

\textsuperscript{1134} \textit{Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Council} par [19].
\textsuperscript{1135} \textit{Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Council} [1999] ZALC 107 par [20].
\textsuperscript{1136} An unfortunate consequence concerning the process of judicial appointments and the composition of the JSC is that the independence of the judiciary has come into question. The key purpose behind the establishment of the JSC is to ensure an independent process for the appointment of judges. However, of the 23 members on the JSC, only 8 are drawn from the legal profession. The remaining 15 are what Van Zyl calls “political appointees”. See Van Zyl 2009 \textit{PER} 10. These concerns were raised during the certification of the Constitution. The Constitutional Court, however, found that judicial appointments made by the executive or by a combination of the executive and the legislature is not inconsistent with the constitutional principles. See \textit{Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa}, 1996 1996 (4) SA 744 (CC).
regulations) published in relation to this mandate provides a list of factors to be included therein:1137

“(i) an analysis of the areas of unfair discrimination and inequalities;
(ii) the goals and objectives to be achieved;
(iii) the measures to be implemented to achieve these goals and objectives;
(iv) time frames for the implementation of each of the measures;
(v) the mechanisms to monitor the implementation of the equality plan; and
(vi) the criteria to evaluate the implementation of the equality plan;”1138

The regulations furthermore stipulate that the equality plans must be applicable for a period of five years,1139 and must be drafted in consultation with the Minister of Finance, the community, as well as the Commission on Gender Equality, the Human Rights Commission, the Public Protector and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.1140

While section 25(4) places the obligation to draft and implement equality plans on the minister, section 26 places a similar duty on all persons performing public functions. The JSC is a public body wielding public power.1141 At first glance, therefore, it appears as though both these sections have bearing on affirmative action plans to be drafted for the appointment of judges, with different functionaries undertaking the obligation. Determining who carries the ultimate responsibility to draft equality plans therefore requires a careful analysis of the constitutional position of the judiciary in relation to the Ministry of Justice.

1137 GN 563 in GG 26316 of 2004-04-30. These regulations have been published but has not taken force at the time of writing.
1138 It is interesting to note the similarity between the factors that are to be included in the equality plans in terms of the PEPUDA compared to the factors to be included in employment equity plans under the EEA. See section 20 of the EEA.
1139 Item 24(1)(b) of the Regulations.
1140 Item 24(2) of the Regulations.
Traditionally the administration of the courts was vested in the Executive.\textsuperscript{1142} Schedule 6 of the Constitution, however, requires that as soon as practical after the Constitution took effect, all courts, including their composition, structure, jurisdiction and functioning must be rationalised to suit the requirements of the Constitution.\textsuperscript{1143} In response to this, the Minister of Justice tabled two Bills before Parliament, namely the Constitution Seventeenth Amendment Bill\textsuperscript{1144} and the Superior Courts Bill,\textsuperscript{1145} both of which were subsequently adopted and signed into law by the President.\textsuperscript{1146}

The Constitution Seventeenth Amendment Act reaffirms the Chief Justice as the head of the judiciary,\textsuperscript{1147} and makes the Constitutional Court the apex court in South Africa.\textsuperscript{1148} As the head of the judiciary, the Chief Justice "exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts".\textsuperscript{1149} The Superior Courts Act\textsuperscript{1150} builds on this mandate in recognising that "since the Constitution provides that the judicial authority is vested in all courts, it is desirable to provide for a uniform framework for judicial management, by the judiciary, of the judicial functions of all courts".\textsuperscript{1151} These two Acts add to the already heavy burden placed on the Chief Justice in terms of the Constitution and legislation, and necessitated the creation of the Office of the Chief Justice (hereafter the OCJ) to assist the Chief Justice in carrying out his or her functions.\textsuperscript{1152}

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\item \textsuperscript{1142} Ebrahim "Governance and Administration of the Judicial System" in Hoexter & Olivier \textit{The Judiciary in South Africa} 99.
\item \textsuperscript{1143} Item 16(6) of Schedule 6 of the Constitution.
\item \textsuperscript{1144} B6 of 2011.
\item \textsuperscript{1145} B7B of 2011.
\item \textsuperscript{1146} The Constitution Seventeenth Amendment Act was signed by the President on 1 February 2013 while the Superior Courts Act was signed on 14 August 2013. Both Acts were brought into operation on 23 August 2013 in terms of proclamations 35 and 36 published in GG 36774 of 2013-08-22. The earlier versions of these bills were severely criticised for infringing on the independence of the judiciary and the doctrine of separation of powers. See, for instance, Albertyn "Judicial Independence and the Constitution Fourteenth Amendment Bill" 2006 22 \textit{SAJHR} 126 and Spilg "Conference on Judicial Independence" April 2006 \textit{Advocate} 5.
\item \textsuperscript{1147} Section 1 of the Constitution Seventeenth Amendment Act.
\item \textsuperscript{1148} Section 3 of the Constitution Seventeenth Amendment Act. Before this amendment, the Constitutional Court was the highest court in all constitutional matters with the Supreme Court of Appeal being the highest court of appeal in all non-constitutional matters.
\item \textsuperscript{1149} Section 165(6) of the Constitution.
\item \textsuperscript{1150} Act 10 of 2013.
\item \textsuperscript{1151} Preamble to the Superior Courts Act.
\item \textsuperscript{1152} Ebrahim "Governance and Administration of the Judicial System" in Hoexter & Olivier \textit{The Judiciary in South Africa} 112.
\end{itemize}
In September 2010 the OCJ was established as a separate government department under the Public Service Act.\textsuperscript{1153} The function of the OCJ is, \textit{inter alia}, to establish structures to assist the Chief Justice in the performance of his or her functions, to provide a protocol structure to assist the Chief Justice as head of the judiciary and to put in place administrative support for the OCJ, including financial- and information- systems management, human-resource provision and legal services.\textsuperscript{1154}

Although not formally approved, these objectives strengthen the perception that the creation of the OCJ is the first step in a phased project that will ultimately lead to a judiciary-based system of court administration.\textsuperscript{1155} Once completed, it may be argued that the duty to develop equality plans will not lie with the Minister of Justice, but rather with the JSC itself.

Irrespective of functionary upon which the duty to comply with Chapter 5 of the PEPUDA ultimately lies, it is clear that the second leg of the \textit{van Heerden} test requires more than mere \textit{ad hoc} decisions and that an overarching affirmative action plan is required to satisfy the rationality test. Once the PEPUDA regulations have taken effect, the drafters of the equality plans will have clear guidelines on what is to be included in these plans. Until such a time, however, certain principles have over the years been developed by the courts. The discussion below centers on the general requirements that affirmative action policies should meet in order to satisfy the rationality requirement in \textit{van Heerden}. Since

\textsuperscript{1153} 103 of 1994.
\textsuperscript{1155} Ebrahim "Governance and Administration of the Judicial System" in Hoexter & Olivier \textit{The Judiciary in South Africa} 101 – 102. This can be contrasted with the executive-based model of court administration which allows the executive to control many of the functions now assumed by the OCJ. As Justice Ngcobo observed in 2003, the executive-based model of court administration compromises the independence of the judiciary in that no judiciary can be truly independent if it is "substantially dependent upon the executive branch not only for its funding but also for many features of its day-to-day functions and operations."
the appointment of judges is not subject to the EEA, the technical aspects of employment equity policies contained in the EEA is not considered.

Firstly, an investigation must be conducted to determine the level of underrepresentation of women on the bench. This is similar to the workforce analysis conducted in terms of the EEA and should be used in setting the targets for demographic transformation as well as to monitor the progress that has been made in addressing gender and racial underrepresentation on the bench. It is submitted that, when setting demographic targets, the drafters of the equality plans should have regard to the level of the court in question and compare the racial and gender representivity of the court in relation to the demographics of the population it is meant to serve. For instance, when filling vacancies on the Constitutional Court or the SCA, national demographics should be the benchmark when setting numerical targets. On the other hand, if appointments need to be made to the High Court, the demographic breakdown of the province in question should inform the targets set for the division concerned.

Secondly, the plan should not introduce a quota system. The Constitutional Court has held that the main difference between numerical targets and quotas lies in the fact that targets are flexible, whereas quotas are rigid. As pointed out by the SCA in SARIPA, quotas will not advance substantive equality and could even perpetuate systemic inequalities. Importantly, the High Court also pointed out that quotas could lead to

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1156 In Minister of Justice and Constitutional Development and Another v SA Restructuring And Insolvency Practitioners Association and Others [2016] ZASCA 196 par [47]. The SCA found that there can be no rational basis for an affirmative action policy if reliable information regarding demographics is not available.

1157 Dupper et al Understanding the Employment Equity Act 123.

1158 This was a requirement in terms of the pre-amended section 15(2)(d)(i) of the EEA and may, given the circumstances of a particular case, still be required today. See Solidarity v Department of Correctional Services 2015 (4) SA 277 (LAC) par [58]. The PEPUDA does not make reference to specific data to be used in the formulating of equality plans. It may be argued, however, that in order to increase the legitimacy of the each division of the High Court, the racial and gender composition of each High Court bench should be broadly reflective of province in question.

1159 See Minister of Justice and Constitutional Development and Another v SA Restructuring And Insolvency Practitioners Association and Others par [32] where the SCA held that a quota is a form of “arbitrariness, caprice or naked preference”.


1161 Minister of Justice and Constitutional Development and Another v SA Restructuring And Insolvency Practitioners Association and Others par [36] – [37].
fronting where there are insufficient numbers of persons from disadvantaged groups eligible for appointment. This is of particular significance for gender-based affirmative action in the appointment of judges given the relatively small pool of women qualified for judicial appointment which resulted from the systemic exclusion of women from the profession in the past, as well as the fact that women are often reluctant to accept nominations for judicial appointments. This is also recognised by the JSC which has, on numerous occasions, pointed out that women are slow to make themselves available for judicial appointment. Rigid adherence to a quota system under such circumstances may lead to judicial appointments made solely for the purpose of advancing gender representation on the bench, without matching the individual skills of each appointee to the position he or she is appointed.

In a similar vein, an affirmative action policy should allow for some deviation in exceptional circumstances so as to introduce some flexibility into the appointments process. For instance, where a suitably qualified member from a demographically underrepresented group competes with a candidate with exceptional skill and expertise, but who forms part of an overrepresented group, deviation from the affirmative action policy could mean that the better-qualified candidate ultimately gets appointed. Where the needs of a particular court requires expert knowledge or skill, or a certain type of experience, deviations must be allowed to ensure the proper functioning of the court in question. Such a deviation clause must, however, be carefully constructed so as to not leave it open for arbitrary application.

Lastly, clear and feasible timeframes must be included in affirmative action policies. According to the court in SARIPA, where no timeframes are included in such policies, it

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1162 SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development par [156].
1163 See, for instance, O'Reilly “Is the Call for Gender Transformation in the Judiciary being Heeded?” 2013 De Rebus 53.
1164 In Solidarity v Department of Correctional Services 2016 (5) SA 594 (CC) the Constitutional Court held that where a policy allows for some deviation the targets are not so rigid as to amount to quotas.
1165 Solidarity v Department of Correctional Services par [51].
1166 Where a vacancy arises in a specialist court, logic dictates that it should be filled by a person who has knowledge and experience in that particular field of law.
will be difficult to assess whether or not the intended outcomes are likely to be achieved. In setting timeframes for the achievement of the numerical targets, it is submitted that the drafters of the policy must be mindful of the relatively low numbers of women eligible for judicial appointment. Shorter timeframes may accelerate the achievement of a demographically representative bench, but attempting to reach numerical targets in unrealistically short timeframes may lead to the same negative consequences as the rigid adherence to quotas explained above.

6 2 3 Does the measure promote the achievement of equality?

The third leg of the test for constitutionally-compliant remedial measures asks whether the measures that are employed will promote the achievement of equality in the long term. This necessarily looks at whether or not a validly-adopted remedial measure is applied in a lawful manner. To this end, a court will determine whether the remedial measure imposes substantial or undue harm on any person, or whether it undermines the ultimate goal of section 9 of the Constitution which is to promote a non-racial and non-sexist society where all persons enjoy equal rights and freedoms. Two requirements therefore flow from this leg of the van Heerden test: Firstly, validly-adopted affirmative action policies should not be implemented in such a way as to completely exclude any segment of the South African population. Secondly, affirmative action policies must be implemented in a manner consistent with the purpose of remedial measures.

It is not inconceivable that an affirmative action policy that allows for some flexibility can be implemented in such a manner as to amount to the imposition of quotas or pose an absolute barrier to the appointment or advancement of persons who do not stand to benefit therefrom. The aim of transformation of the judiciary, in terms of section 174(2) of the Constitution, is to have a judiciary that is “broadly representative” of the demographics of the South African population. The aim is therefore not to transform the judiciary to reflect the racial and gender breakdown of the population in direct proportion.

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1167 SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development par [160] – [161].
1168 South African Police Service v Solidarity obo Barnard par [66].
The record of the JSC is not suggestive of such inflexibility,\textsuperscript{1169} and in many instances white men have been selected even where suitably qualified persons from underrepresented groups have made themselves available for appointment.\textsuperscript{1170} The \textit{ad hoc} manner in which these appointments have been made leave many people speculating that such selections were made for ulterior motives.\textsuperscript{1171}

The Constitutional Court in \textit{Barnard} indicated that a valid remedial measure must be rationally related to the terms of the purpose of the measure, and that it must promote the advancement of its legitimate goals and not for any ulterior or impermissible purpose.\textsuperscript{1172} The deliberations of the JSC are made in private and the judicial selection process is completed by secret ballot. It is therefore difficult to discern whether decisions taken in the pursuit of demographic representivity bears a rational relationship with its purpose.

Greater transparency in the selection process has been introduced by the decision of the SCA in \textit{Judicial Service Commission v Cape Bar Council},\textsuperscript{1173} by requiring the JSC to furnish reasons for the non-appointment of individual candidates when called upon to do so.\textsuperscript{1174} This case concerned a decision on the part of the JSC to leave two vacancies open in the Western Cape High Court. In labour matters, it is now a settled principle that vacancies may be left open until such a time as a suitably qualified person from an underrepresented group becomes available for appointment.\textsuperscript{1175} Whether or not this practice is permissible in the appointment of judges remains unclear, as the both the court

\begin{itemize}
\item \textsuperscript{1169} Olivier “The Selection and appointment of Judges” in Hoexter & Olivier \textit{The Judiciary in South Africa} 139.
\item \textsuperscript{1170} See, however, Smuts “The Judiciary: Do White Males need not Apply?” 05 April 2013 \url{http://www.politicsweb.co.za/news-and-analysis/the-judiciary-do-white-males-not-need-apply} (accessed 2017-01-10).
\item \textsuperscript{1171} Calland “JSC’s Attitude Open Door to Conservatism” 12 April 2013 \url{http://mg.co.za/article/2013-04-12-jscs-attitude-opens-door-to-conservatism} (accessed 2017-01-09).
\item \textsuperscript{1172} \textit{South African Police Service v Solidarity obo Barnard} par [38] – [39].
\item \textsuperscript{1173} 2012 (11) BCLR 1239 (SCA).
\item \textsuperscript{1174} \textit{Judicial Service Commission v Cape Bar Council} par [51].
\item \textsuperscript{1175} This is in terms of the decision in the Constitutional Court in \textit{South African Police Service v Solidarity obo Barnard}.\n\end{itemize}
a quo\textsuperscript{1176} and the SCA based its finding of irrationality on the fact that the JSC was unable to provide reasons for not appointing imminently suitable candidates.\textsuperscript{1177}

The fact that the JSC’s decision was found to be irrational because it could not supply reasons for the decision does not, however, mean that the decision could not be found to be valid if it was able to supply adequate reasons for it. Nor does it imply that demographic considerations would be an insufficient reason to leave a vacancy open. It is argued that under such circumstances, a valid appointments policy setting out the targets to be reached will assist the JSC in showing that there is a rational reason for leaving positions vacant. This will enable the JSC to leave positions vacant until such a time as there is a sufficiently qualified female candidate that can be appointed.

In confirming that the JSC is under a duty to supply reasons for its decisions when called upon to do so, the SCA highlighted the following important purposes reasons may serve:

“In the first place, a duty to give reasons entails a duty to rationalise the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached requires one to address one’s mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair: it is also conducive to public confidence in the administrative decision-making process. Thirdly – and probably a major reason for the reluctance to give reasons – rational criticism of a decision may only be made when the reasons for it are known. This subjects the administration to public scrutiny and it also provides an important basis for appeal or review. Finally, reasons may serve a genuine educative purpose, for example where an applicant has been refused on grounds which he is able to correct for the purpose of future applications.”\textsuperscript{1178}

Supplying reasons for the decisions taken in the selection of judges would go a long way to show that the actions taken were consistent with the overall purpose of remedial measures, thereby satisfying the rationality requirement. Two well-established principles with respect to providing reasons is that they must always be recorded at the time that

\begin{itemize}
\item \textsuperscript{1176} \textit{Cape Bar Council v Judicial Service Commission} 2012 (4) BCLR 406 (WCC).
\item \textsuperscript{1177} \textit{Judicial Service Commission v Cape Bar Council} [45].
\item \textsuperscript{1178} \textit{Judicial Service Commission v Cape Bar Council} par [46].
\end{itemize}
the decision is taken and that they must be comprehensive and detailed enough to enable a candidate to determine to what extent he or she failed to meet the selection criteria. Adequate reasons will depend on the circumstances of the case, but a blanket statement that a particular candidate did not meet the selection criteria, or failed to gain enough votes within the JSC will not be sufficient.

6 4 Conclusion

The above discussion has tested the JSC’s criteria against the requirements laid down by the Constitutional Court in van Heerden. One of the overarching problems is that there is very little clarity provided by the JSC on its own criteria. Not many people would argue that there is a grave need to transform the judiciary gender lines, but the vagueness of the selection criteria has left many persons questioning the motives of including symbolism and potential as selection criteria, as well as the independence of the judicial appointees. This problem is permeated through all three legs of the van Heerden test, but can easily be resolved by providing clearer guidelines.

The beneficiaries of affirmative action must be persons who have been discriminated against in the past. This usually means that remedial measures are aimed at black, female and disabled persons. Even though the criteria do not explicitly state that symbolism and potential are considered to advance previously disadvantaged persons or groups of persons, academic opinion suggests that these criteria have been included in compliance with section 174(2) of the Constitution. This constitutional provision refers to the racial

1179 This must be distinguished from the need to supply a full transcript of the deliberations. Even though the deliberations are recorded, the court in Judicial Service Commission v Cape Bar Council held that the JSC is under no duty to disclose it.
1180 Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 184.
1181 Ibid.
and gender demographics of the judiciary. It follows, therefore, that women and black people are the targets of these remedial measures.

Both women and black people have been disadvantaged by unfair discrimination, yet they are not the only groups negatively affected by apartheid policies. This was recognised by the court in Singh which ordered the Magistrates’ Commission to revise its selection criteria so as to accommodate the advancement of persons with disabilities. The court based its decision on a holistic reading of the Constitution, particularly section 9 and section 174(2), both of which apply to the appointment of judges to the High Court. Based on the Equality Court’s reading of these provisions, it is submitted that the JSC should also include disability as a factor to be considered when selecting judges for appointment.

Symbolism allows the JSC to consider the demographics of a particular division of the High Court and match it to the demographics of the province where it is seated.1185 As such, it is a particularly powerful tool if one considers that the aim of transforming the judiciary is to increase the legitimacy of the bench and to bring different life experiences and perspective to the adjudicatory process. It also allows the JSC to tailor its selection to suit the needs of the particular division to which it is seeking to make an appointment.

Potential permits the JSC to select a candidate with less knowledge and experience but who shows the necessary capacity for judicial office.1186 This does not mean that knowledge and experience becomes irrelevant, as the JSC itself has indicated that all judicial appointees must have a certain level of expertise. It has not, however, indicated what this level of knowledge and experience may be.1187 It is therefore difficult to determine to what extent potential plays a part in the selection process.

1185 Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 140.
1187 Olivier “The Selection and appointment of Judges” in Hoexter & Olivier The Judiciary in South Africa 140.
The second leg of the \textit{van Heerden} tests requires remedial measures to show a reasonable likelihood to advance persons or groups of persons who have been discriminated against in the past. On this leg, it may be argued, the measures imposed by the JSC fails the test. This is because the appointments that have been made thus far have appeared to be \textit{ad hoc} and random, and no policy has been drafted setting out the demographic targets to be reached. Without such a policy, it may be difficult for the JSC to show a rational relationship between its actions and the purpose of remedial measures.

Although the PEPUDA regulations contain details of the contents to be included in equality plans, these regulations have not yet taken effect. There is therefore no legislation requiring the formulation and adoption of an overarching policy, yet on many occasions the courts have required some formality in the imposition of affirmative action measures. Case law also dictates that affirmative action policies should, firstly, be based on reliable statistical data collected through a thorough investigation to determine the level of underrepresentation of previously disadvantaged group.\textsuperscript{1188} The policy should furthermore not be so rigid as to amount to quotas and should allow for deviations in exceptional circumstances.\textsuperscript{1189} Lastly, the policy should also contain feasible timeframes within which the demographic targets are to be reached.\textsuperscript{1190}

The third leg of the \textit{van Heerden} test focuses not only on the formulation and adoption of affirmative action policies, but also on the implementation thereof. It has been determined that section 174(2) of the Constitution does not seek to exclude any demographic group through the implementation of affirmative action. Rather, it requires that broad representivity be considered in the selection and appointment of judges. This means that symbolism should not become the overriding criterion when judges are selected as, given the current demographics of the bench, this necessarily excludes all white males from

\textsuperscript{1188} \textit{Minister of Justice and Constitutional Development and Another v SA Restructuring And Insolvency Practitioners Association and Others} par [47].
\textsuperscript{1189} \textit{Minister of Justice and Constitutional Development and Another v SA Restructuring And Insolvency Practitioners Association and Others} par [32]; \textit{Solidarity v Department of Correctional Services} par [53].
\textsuperscript{1190} \textit{SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development} par [160] – [161].
future consideration. This constitutes an absolute barrier to appointment which has not found favour by the court, either generally or in a conventional labour setting.
Chapter 7

Gender-Based affirmative action in the appointment of High Court judges in South Africa: Concluding remarks

Before the advent of the democracy in South Africa, the country was deeply divided by systemic racism and sexism, the effects of which can still be felt by the majority of the people living within its borders. As a result of these discriminatory policies, the South African judiciary was almost exclusively composed of white men.1191

From the earliest time of colonisation, only male persons were qualified for judicial appointment since, in terms of Roman Dutch authorities, women were not eligible to enter the legal profession.1192 Even after the Cape colony was formally ceded to Britain, women were still disqualified for judicial appointment. During this time in history, a practice developed to appoint judges exclusively from the ranks of senior counsel. An interpretation of the word “persons” in the Cape Charters of Justice effectively denied women the opportunity to practise law, either as attorneys or advocates, and by implication also barred them from judicial appointment.1193 Only from 1923 when the Women Legal Practitioners Act was passed, were women allowed to practise in the legal profession.

Discriminatory practices in the appointment of judges continued during the apartheid era, partly owing to need of the apartheid government to appoint judges who were sympathetic to the oppressive racial policies it imposed.1194 Furthermore, judges were still appointed exclusively from the rank of senior counsel, the members of which were primarily white and male. It is therefore not surprising that at the fall of apartheid, of the approximately 200 High Court judges in the judiciary, only two were female and two were black.

1191 See Chapter 1.
1192 See Chapter 2 for a discussion on the Roman-Dutch authorities.
1193 In terms of the Appellate Division of the High Court in Wookey v Incorporated Law Society 1912 CPD 263.
1194 See Chapter 2 6 for a discussion on judicial appointments during the apartheid era.
Moreover, leaving the discretion as to who was to be appointed as judges solely in the hands of the executive had serious implications for the independence of the judiciary, as many judges were appointed as a token of political favouritism. As a result, the integrity of the judiciary was severely compromised.

The advent of the constitutional dispensation in South Africa heralded a new era of equality and respect for human rights. Not only was the Constitution drafted with an entrenched and justiciable Bill of Rights, but international human rights law is no longer seen as a threat to the government, which is evidenced by the number of international, regional and sub-regional human rights instruments that have been ratified since 1994. The Constitution makes it clear that international law must be considered when interpreting the Bill of Rights. South Africa is furthermore bound by treaties that have been ratified and, once incorporated into national legislation, these instruments may also be invoked in domestic courts.

In terms of international, regional and sub-regional instruments, South Africa is under an obligation to increase the number of female judges through positive measures. As far as UN treaties are concerned, the CEDAW is the single most important and comprehensive instrument in ensuring that gender equality is observed in member states. It explicitly permits the use of affirmative action to correct gender imbalances in the judiciary at domestic level. As is apparent from the recommendations made by the CEDAW Committee to the South African government, affirmative action must be applied to the appointment of judges to address the gender imbalance in the judiciary in order fully complying with the provisions of CEDAW.

Several ILO conventions have also been adopted that permits the use of remedial measures to ensure that women are granted the same educational and vocational opportunities as men. Moreover, the ICCPR, the ICSECR, even though they are not

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1195 Chapter 2 of the Constitution.
1196 See Chapter 3 for an in-depth discussion on international law.
1197 Section 39 of the Constitution.
1198 The enforcement procedures of the CEDAW is discussed in chapter 3 3 1 3 above.
adopted specifically to address gender equality, also requires member states to impose remedial measures to correct the gender imbalances on the bench.

The UN has furthermore adopted several declarations and soft law instruments which are not considered binding unless the principles contained therein evolve into customary international law.\(^{1199}\) By adopting these instruments, however, South Africa formally committed itself to the achievement of equality between men and women. The Beijing Declaration and Platform for Action specifically lists equal participation of women in decision-making bodies, including the judiciary, as one area of concern that must be addressed by signatories.\(^{1200}\)

Regional and sub-regional instruments have been adopted to address social concerns specific to the African continent. In this regard, the ACHPR and the SADC are of particular significance because each of them have, subsequent to the adoption of the main treaty, adopted protocols that address gender discrimination in particular. Both the African Woman’s Protocol and the SADC Gender Protocol furthermore requires member states to address gender imbalances within the judiciary through corrective measures.\(^{1201}\)

The Latimer House Principles are international standard that seek to ensure the creation of an independent judiciary in members of the Commonwealth of Nations.\(^{1202}\) To this end, it specifies that judges should be selected by an independent judicial service commission, the members of which must be drawn primarily from the judiciary. In terms of the Latimer House Principles, judges must be appointed on merit, but all eligible men and women must be provided an equal opportunity to be considered for appointment. In the South African context, this can not be achieved without measures that are aimed at advancing women in the judicial appointments process.

\(^{1199}\) Most of these soft-law instruments were formulated and adopted during the UN Decade for Women. See chapter 3 3 3.

\(^{1200}\) The fact that South Africa considers itself bound by the Beijing Declaration and Platform for Action is evidenced by the report drafted by the Commission for Gender Equality on South Africa’s implementation of the declaration. See Chapter 3 3 3.

\(^{1201}\) See Chapter 3 5 above.

\(^{1202}\) See Chapter 3 5 4 above.
Even though international, regional and sub-regional instruments provide a comprehensive framework for the protection of the rights of women, it is through domestic law that gender inequality can most effectively be realised.\textsuperscript{1203} It is therefore through the Constitution and national legislation that gender imbalances in the judiciary should be corrected.

Section 174(2) of the Constitution requires the judiciary to broadly reflect the racial and gender composition of the South African population. Given the homogenous nature of the bench before 1994, this meant that the JSC had to take active steps to allow more women and black judges to be appointed as judges. Systemic discrimination denied women the opportunity to gain the necessary experience in order to compete with their male counterparts for appointment to judicial office. In order to remedy this disadvantage and allow women an equal opportunity to be appointed to the bench, remedial measures aimed at the advancement of women must be taken. To this end, the JSC included “symbolism” and “potential” as factors to be considered when selecting candidates to be recommended for judicial office.\textsuperscript{1204}

Remedial measures are permitted in terms of section 9(2) of the Constitution. The Constitutional Court has stated that, without remedial measures aimed at addressing the disadvantage to which certain groups have been subjected, the constitutional ideal of substantive equality will not be achieved.\textsuperscript{1205} Stated differently, without affirmative action, the equality guarantee in section 9 of the Constitution can not be realized. This means that, without remedial measures aimed at advancing women and encouraging the appointment of more female judges, the gender imbalances in the judiciary is set to continue indefinitely. A male-dominated bench is not only unlikely to understand the

\textsuperscript{1203} Viljoen \textit{International Human Rights Law in Africa} 9.
\textsuperscript{1204} See chapter 4 3 2 2 above for a discussion on the selection criteria.
\textsuperscript{1205} \textit{Brink v Kitshoff} 1996 (4) SA 197 (CC).
everyday struggles faced by women in South Africa,¹²⁰⁶ but may also hold serious consequences for the legitimacy of the judiciary.¹²⁰⁷

Both the EEA and the PEPUDA recognises the need for affirmative action in order to address the imbalances in society caused by the discriminatory policies imposed by successive governments in the past. Both these Act furthermore explicitly states that it is not unfair discrimination to take measures that protects or advances persons who suffered discrimination in the past. While the EEA contains detailed regulatory mechanisms for affirmative action taken in employment, the PEPUDA regulations will, once promulgated, do the same in all spheres not governed by the EEA. The wording of the relevant provisions of the Acts are couched in such similar terms as to warrant an authoritative interpretation of the one, to assist in the interpretation of the other.¹²⁰⁸

In van Heerden, the Constitutional Court laid down the test to determine whether a particular remedial measure is constitutionally valid.¹²⁰⁹ It held that in order to pass constitutional muster, affirmative action measures must target persons or groups of persons who have been discriminated against in the past, it must be designed to advance such persons and it must promote the achievement of equality in the long run. Any measures taken in terms of section 174(2) of the Constitution to address the gender imbalances in the judiciary must therefore comply with test.

This study has shown that the remedial measures adopted by the JSC, in this case the inclusion of symbolism and potential as factors to be considered in the appointment of judges, does not comply with the van Heerden test in all respects. Firstly, as far as identifying the beneficiaries of affirmative action is concerned, the criteria makes no mention of disability as a factor to be considered when shortlisting and selecting judges

¹²⁰⁶ One of the main rationales for a diverse judiciary is to bring different life perspectives to the adjudicatory process.
¹²⁰⁷ The apartheid judiciary was largely seen as illegitimate as a result of the racial and gender composition of the bench. See chapter 1 1 above.
¹²⁰⁸ Du Preez v Minister of Justice and Constitutional Development [2006] 3 All SA 271 (SE).
for recommendation to the President for judicial appointment. Even though section 174(2) refers only to race and gender, the Equality Court in Sigh found that, not having regard to a candidate’s disability, was unfairly discriminatory. In this regard, a holistic reading of the PEPUDA, section 9 and section 174 of the Constitution mandates the inclusion of disability in the selection criteria of magistrates. The same provisions apply also in the appointment of judges to the High Court of South Africa. As such, the JSC should also aim to advance disabled persons when selecting judges.

It has furthermore been shown that the JSC does not seek to address either the racial imbalances or the gender imbalances in the judiciary to the exclusion of one another. In other words, where a particular High Court lacks the presence of black females, as opposed to black persons or female persons in general, the JSC seeks to fill vacancies with black female appointees. Where this is done, an affirmative action policy should be specifically tailored to address this intersectional disadvantage. The JSC has, however, not adopted such a policy, and appointments made in order to address this disadvantage runs the risk of being labelled ad hoc. This not only runs counter to the second leg of the van Heerden test, but also reinforces the criticism that the JSC often promotes racial representivity at the expense of gender representivity.

Another problem that stems from the lack of a formal policy for judicial appointments, is the fact that the JSC has not given any guidelines as to the technical merit and experience needed by candidates before demographic considerations can play a role. For instance, it has not indicated what formal qualification is needed to be considered for appointment, nor has it specified the number of years’ experience needed before potential as a criterion will tip the scales in favour of a particular candidate.

Section 174(1) of the Constitution requires that judicial appointees must be “suitably qualified”. Furthermore, in terms of labour jurisprudence, affirmative action policies can only operate in favour of candidates from designated groups who are suitably qualified.

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1210 See Chapter 6 2 1 above.
Without objective criteria to assess the suitability of a candidate, the JSC opens itself to the criticism that it promotes demographic diversity at the expense of technical merit. The crux of criticism of this nature is that the JSC has not given any indication of the relevant weight to be attached to either section 174(1) or section 174(2) of the Constitution. Where demographic considerations in terms of section 174(2) of the Constitution is considered to be the overriding factor when judges are selected, technical merit becomes a secondary consideration and judicial appointees will lack the knowledge and experience needed for judicial office. On the other hand, where demographic considerations are relegated to a secondary consideration and the best technically qualified candidate is always appointed, the bench will remain largely untransformed given the disadvantages suffered by women in the past. In both instances will the integrity of the judiciary be compromised.

The regulations to the PEPUDA contain detailed guidelines on the content of equality plans that will, once the relevant provision of the PEPUDA has taken effect, require the JSC to formulate an affirmative action policy similar to that which is required of designated employers in terms of the EEA. The relevant provisions of the EEA and the PEPUDA are remarkably similar. Until such a time as these provisions of PEPUDA has taken effect, therefore, guidelines can be sought from labour jurisprudence.

Lastly, it has been shown that an appropriate interpretation of section 174(2) of the Constitution does not exclude any demographic group from consideration for judicial appointment. This is necessary in order to satisfy the third leg in the van Heerden test. This means that symbolism and potential is not the overriding criteria when judges are selected as, given the current demographics of the judiciary, a different interpretation will exclude all white males from future consideration and constitute an absolute barrier to appointment.

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1212 Section 15(1) of the EEA.
1213 See chapter 6 2 2 above.
1214 See chapter 5 3 of above for a detailed discussion on labour jurisprudence.
1215 See chapter 6 2 3 above.
**Recommendations**

Several problems were identified through this study. The recommendations below offer potential solutions to these problems. This in no way implies that they are the only solutions, or even the best solutions, to address the identified problems.

The first recommendation is that the JSC provides more content to the criteria adopted in 2010. These criteria must set out the formal qualifications and level of experience needed to be considered for judicial appointment. The JSC should furthermore provide clarity on how the symbolism and potential of candidates are assessed and the relative weight it attaches to these criteria. Only then would aspirant judges know what the threshold of performance is and be able to assess whether or not they comply with the technical merit for judicial appointment.

The second recommendation is that the JSC adopts a formal affirmative action policy setting out targets to be reached within certain timeframes. This policy should be formulated after a thorough investigation into the demographic representivity of each division of the High Court has been conducted to determine the level of underrepresentation of female judges within each particular division. Until such a time as the regulations to Chapter 5 of the PEPUDA is promulgated, the JSC should have regard to the principles that have been formed through affirmative action jurisprudence, including labour jurisprudence.

The targets that are set for each division must furthermore not be so rigid as to amount to quota’s. These targets must furthermore not be applied in an overly-rigid fashion. Flexible targets that are applied in an inflexible manner still amount to quota’s and is prohibited in terms of the Constitutional Court. As the court in *SARIPA* pointed out, appointments that are made based on an inflexible quota system goes no further than promoting formal equality, especially where there is an insufficient number of women with the necessary formal qualifications for judicial appointment. The policy should furthermore
allow for deviations to be made in exceptional circumstances, for instance where the needs of the particular court requires expert skill and knowledge.

A formal policy for the implementation of affirmative action in the appointment of judges will furthermore aid the JSC in supplying reasons for not choosing a candidate from an overrepresented group, thereby complying with the Supreme Court of Appeal’s finding in *Judicial Service Commission v Cape Bar Council*. It will also mean that decisions taken to correct the gender imbalances in the judiciary complies with the rationality standard as required by the *van Heerden* test.

The third recommendation is that the composition of the JSC should be revised. Even though the Constitutional Court ruled that it is not unconstitutional for the executive and the legislative branches of government to be involved in the appointment of judges, the current composition is not consistent with the Latimer House Principles adopted for the Commonwealth of Nations. The sheer number of members on the JSC also makes it difficult for them to deliberate effectively. The composition of the JSC should therefore be reduced, and the majority of the members should be drawn from the legal profession. Furthermore, although it does not guarantee the appointment of more female judges, the composition of the JSC must also reflect the gender demographics of the population. The JSC is a public body that wields enormous public power. In order to reach the transformational goals of the Constitution, all power structures must be transformed and women should be equitably represented in all decision-making bodies.

The last recommendation is that the procedure for the appointment of acting judges must be revised to allow a greater number of women the opportunity to for acting appointments. The record of a candidate in his or her acting capacity is an important indicator of his or her potential for judicial office. The JSC is unlikely to recommend a candidate for permanent appointment if he or she has not been appointed in an acting capacity before. Furthermore, acting appointments have the added advantage of exposing an aspirant judge to judicial work, thereby increasing his or her level of experience. This, in turn, increases the likelihood of the candidate being appointed to a permanent position. If more
females are appointed in acting capacity, the pool of qualified female candidates from which judicial appointments can be made is increased.
Table of cases

Auf der Heyde v University of Cape Town [200] 8 BLLR (LC).

Azapo v President of the Republic of South Africa 1996 (4) SA 671 (CC).

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (7) BCLR 687 (CC).

Bel Porto School Governing Body and Others v Premier of the Province, Western Cape, and Another 2002 (3) SA 265 (CC).

Bhe v Magistrate, Khayelitsha 2005 (1) SA 580 (CC).


Chinese Association v Minister of Labour TPD (unreported) 2008-06-18 Case no 59251/07.

Daniels v Campbell 2004 (5) SA 331 (CC).


Dudley v City of Cape Town and Another [2008] 12 BLLR 1155 (LAC).

Du Preez v Minister of Justice and Constitutional Development [2006] 3 All SA 271 (SE).

Du Toit v Kruger 1905 22 SC 234.

Fraser v Children’s Court, Pretoria North 1997 (2) SA 391 (CC).

Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC).

Gordon v Department of Health 2009 (1) BCLR 44 (SCA).

Government of Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).

Harksen v Lane NO and Others 1998 (1) SA 300 (CC).

Harmse v City of Cape Town (2003) 24 ILJ 1130 (LC).

Helen Suzman Foundation v Judicial Service Commission and Others 2015 (2) SA 498 (WCC).

Helen Suzman Foundation v Judicial Service Commission and Others 2017 (1) SA 367 (SCA).

Incorporated Law Society v Wookey 1912 AD 623.

Independent Municipal and Allied Workers Union v Greater Louis Trichardt Traditional Local Council (2000) ILJ 1119 (LC).


Kaunda v President of South Africa 2004 (5) SA 191 (CC).

Khosa v Minister for Social Development 2004 (6) SA 505 (CC).

Maharaj v National Horseracing Authority of Southern Africa 2008 (4) SA 59 (N).

MEC for Education: Kwazulu-Natal and Others v Pillay 2008 (1) SA 474 (CC).


Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amicus Curiae) 2006 (2) SA 311.

Minister of Justice and Constitutional Development v South African Restructuring And Insolvency Practitioners Association SCA (unreported) 2016-12-02 Case no 69315.


Motala and Another v University of Natal 1995 (3) BCLR 374 (D).

Munsamy v Minister of Safety and Security (2013) 34 ILJ 2900 (LC).

Naidoo v Minister of Safety and Security (2013) 34 ILJ 2279 (LC).

National Coalition for Gay & Lesbian Equality & Another v Minister of Justice & Others 1998 (12) BCLR 1517 (CC).

President of RSA v Hugo 1997 (6) BCLR 708 (CC).

President of South Africa and Others v Reinecke 2014 (3) SA 205 (SCA).
President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA (CC).

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

Prinsloo v van der Linde 1997 (3) SA 1012 (CC).

Public Servants Association of South Africa and Others v Minister of Justice and Others 1997 (3) SA 925 (T).

S v Baloyi 2002 (2) SA 425 (CC).

S v Bresier 2002 (4) SA 524 (C).

R v Deitch 1939 AD 178.

S v Makwanyane 1995 (3) SA 391 (CC).

S v Petane 1988 (3) SA 51 (C).

S v van Rooyen (General Council of Bar Intervening) 2002 (8) BCLR 810.

SA Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development 2015 (2) SA 430 (WCC).


Singh v Minister of Justice and Constitutional Development 2013 (3) SA 66 (EqC).

South African Police Services v Public Service Association of South Africa and Others [2015] 8 BLLR 805 (LAC).

Solidarity v Department of Correctional Services 2015 (4) SA 277 (LAC).

Solidarity v Department of Correctional Services 2016 (5) SA 594 (CC).

Soobramoney v Minister of Health, Kwazulu Natal 1998 1 SA 765 (CC).

Stoman v Minister of Safety and Security 2002 (3) SA 468 (T).

University of Cape Town v Auf der Heyde [2001] 12 BLLR 1316 (LAC).


International Case Law

North Sea Continental Shelf Case 1969 ICJ Reports 3.
Table of statutes


Appellate Division Quorum Act 27 of 1955.

Cape Articles of Capitulation of January 1806.

Cape Act 12 of 1858.

Cape Act 16 of 1873.

Cape Act 27 of 1883.

Cape Interpretation Act 5 of 1910.

Citation of Constitutional Laws Act 5 of 2005.


First Charter of Justice of 1827.

Insolvency Act 24 of 1936.


Judge’s Act 41 of 1941.


Magistrates Act 90 of 1993.


National Prosecuting Authority Amendment Act 56 of 2008.


Public Examiners Act 4 of 1858.

Public Service Act 111 of 1984.
Public Service Act 103 of 1994.

Second Charter of Justice of 1832.

South African Act of 1909.


Superior Courts Act 10 of 2013.

Supreme Court Act 59 of 1959.

Union Interpretation Act 5 of 1910.

Women Legal Practitioners Act 7 of 1923.

Women Empowerment and Gender Equality Bill [B50-2013].

**Government Gazettes**


GN 862 in GG 39131 of 2015-08-28.


GN R432 in GG 24596 of 2003-03-27.

GN1202 in GG 40316 of 2016-08-30.
GN R1394 inGG 20626 1999-11-23.

GN R865 inGG 35802 of 2012-10-18.

Proc R35 inGG 36774 of 2013-08-22.

Proc R36 inGG 36774 of 2013-08-22.

**Bills**

Constitution Seventeenth Amendment Bill B6 of 2011.

Superior Courts Bill B7B of 2011.

**International instruments**


Covenant of the League of Nations 1919.


Declaration on Fundamental Principles and Rights at Work 1998.


International Covenant on Civil and Political Rights 1966.


International Labour Organisation Constitution 1919.


Maternity Protection Convention 1919.

Nairobi Forward-looking Strategies for the Advancement of Women 1985.

Night Work (Women) Convention 1919.


Peace Treaty of Amiens 1802.


SADC Protocol on Gender and Development 2008.

Statute of the International Court of Justice 1945.


Universal Declaration of Human Rights 1948.

Vienna Declaration and Platform for Action 1993.

World Plan of Action 1975.

**United Nations Recommendations**


CEDAW Committee *Report compiled after the Consideration of South Africa’s Initial Report* Supplement No. 38 (A/53/38/Rev1).

ECOSOC *Coordination of the Policies and Activities of the Specialized Agencies and Other Bodies of the United Nations System* (A/52/3).

**Additional Reports**


CEDAW Committee *Findings of the CEDAW Committee against Turkey* CEDAW/C151/D/28/2010.


**Foreign cases**

*Hannah v Government of the Republic of Namibia* [2000] (4) SA 940 (NmLC)

*Union of India v Pratibha Bonnerjea* [1996] AIR SC 690.

*Hall v Society of Law Agents* (38 Scottish Law Reporter, p 776)

*Thibaudeau v Canada* 29 CRR (2d) 1 (SCC).

**Foreign statutes**

Bibliography

Books


De Mist, JA *The Memorandum of Commissary J.A. de Mist containing Recommendation for the Form and Administration of Government at the Cape of Good Hope, 1802* (1920)


Liebenberg, S The Constitution of South Africa from a Gender Perspective (1995) Community Law Centre at the University of the Western Cape: Cape Town.


Theal, GM *History of South Africa since September 1795* (1908) S. Sonnenschein: London.


Van Zyl, DH *Geskiedenis van die Romeins-Hollandse Reg* (1979) Butterworths: Durban.


**Journal articles**


Albertyn, C “Judicial Independence and the Constitution Fourteenth Amendment Bill” 2006 22 *SAJHR* 126.

Arnheim, MTW “Silk, Stuff & Nonsense” 1984 101 *SALJ* 376.

Blum, K “Portia Today: No need for ‘drag’” 1990 3 *Consultus* 12.


Bonthuys, E “The Personal and the Judicial: Sex, Gender and Impartiality” 2008 *SAJHR* 239.


Chaskalson, A “The De Rebus Interview” 2002 409 *De Rebus* 10.


Davis, RPB “Women as Advocates and Attorneys” 1914 31 SALJ 283.

De Haan, F “A Brief Survey of Women’s Rights from 1945 to 2009” 2010 (1) UN Chronicle 56.

De Villiers, M “Women and the Legal Profession” 1918 35 SALJ 289.


Hodes, P “Transformation of the legal profession: are we on the right path?” 1999 *Consultus* 3.


Kahn, E “Silk” 1974 91 SALJ 95.

Kahn, E “The Didcott Memorandum and Other Submission to the Hoexter Commission” 1980 97 SALJ 651.


Mokgoro, Y “Judicial Appointments” December 2010 *Advocate* 43.


Mpati, L “Executive Control over the Judiciary” 2005 *Advocate* 32.


Olivier, ME “South Africa and International Human Rights Agreements: Procedure, Policy and Practice (Part 1)” 2003 (2) *TSAR* 293.

Olivier, M “Is the South African Magistracy Legitimate?” 2001 *SALJ* 166.

Olivier, M "The appointment of acting judges in South Africa and Lesotho" 2006 *Obiter* 555.


O’Reilly, K “Is the Call for Gender Transformation in the Judiciary being Heeded?” 2013 *De Rebus* 53.


Rautenbach, IM “Requirements for Affirmative Action and Requirements for the Limitation of Rights” 2015 2 *TSAR* 431.


Rood, L “Fairbridges celebrates 200 years” 2012 24 *De Rebus* 63.


Trengrove, J "The Prevalence of Acting Judges in the High Court - is it Consistent with an Independent Judiciary?" December 2007 *Advocate* 37.


Wallis, M “Judges: Servants of Justice or Civil Servants?” 2012 129 *SALJ* 656.

Web Sources


Bindman & Monaghan “Judicial Diversity: Accelerating Change” (November 2014)  

Calland “JSC’s Attitude Open Door to Conservatism” 12 April 2013  

Commonwealth Network “South Africa in the Commonwealth” (undated)  

De Vos “Affirmative Action: It’s Simpler than you Think” (08 September 2014)  


De Vos “Running the Gauntlet: Why the Struggle for Appointment?” (09 November 2012)  


Conference papers

O'Regan *Transforming the Judiciary: Notes from a Continuing South African Journey*


[https://otagowomenlawyerssociety.files.wordpress.com/2014/05/kate-oregan-2012.pdf](https://otagowomenlawyerssociety.files.wordpress.com/2014/05/kate-oregan-2012.pdf)

(accessed 2017-01-30).