Twenty-Three Years of Gender Transformation in the Constitutional Court of South Africa: Progress or Regression

*Moses Retselisitsoe Phooko**
Sibusiso Blessing Radebe†

I Introduction

Following the adoption of the Constitution of the Republic of South Africa in 1996 (the Constitution), transformation of all sectors of the economy became a topical issue. The debates surrounding the transformation of the South African economy have at times become emotive, with some vociferously pushing for transformation of all sectors of the economy to be undertaken promptly and in line with the Constitution's promises,[1] while others have continuously resisted any form of transformation. The legal profession and the judiciary have not been immune to these ongoing calls for transformation.[2]

In 2017, South Africa celebrated 23 years of multiparty democracy. Despite this promising start, South Africa is still dealing with many challenges 23 years on, such as rampant corruption in both the private sector and the public sector, the failure of government to deliver basic services such as water, housing, quality education, quality healthcare services, basic sanitation, the escalating level of poverty and inequality, and transformation of the economy and of society general. Unsurprisingly, these challenges affect Black people most intensely, as a result of

* LLB (Hons) & Diploma in Human Rights (North-West University, Mafikeng); LLM in International Human Rights Law (University of Notre Dame, USA), LLD in International Law (University of South Africa). Former Law Clerk to the retired Justice Zak Yacoob of the Constitutional Court of South Africa; Advocate of the High Court of South Africa; Professor of Law, Head of Department, Department of Jurisprudence, Legal Pluralism, Criminal and Procedural Law, School of Law, University of Limpopo, Turfloop campus.

† LLB (University of the Witwatersrand); LLM in Public Law (Stellenbosch University); National Certificate in Advanced Trial Advocacy Skills (BLA); Diploma in Justiciability of Economic, Social and Cultural Rights: Theory and Practice (Åbo Akademi University, Finland); Post Graduate Diploma in Drafting & Interpretation of Contracts (University of Johannesburg); former Law Clerk to the retired Deputy Chief Justice D Moseneke; Attorney of the High Court; and currently Senior Legal Counsel in the ICT Sector.

[1] See Preamble to the Constitution.

[2] J Klaaren 'Transformation of the Judicial System in South Africa, 2012–2013' (2015) 47 *The George Washington International Law Review* 481.

South Africa's history of colonialism and apartheid.[3] In order to address these challenges, the current government has adopted a number of policies and laws targeting development and transformation objectives.[4]

These challenges arise in a legal context framed by constitutional commitments to improve the quality of life of all citizens, and free the potential of every person,[5] a guarantee of equality in s 9, and human dignity in s 10 of the Constitution. The Constitution has thus been described as 'transformative' in academic literature and by the courts.[6] Its stated purpose is to break the shackles of the past which were grounded in inequality and gross human rights violations, and to forge a new path for all South Africans.[7] The Constitution aims to 'dismantle systemic forms of disadvantage and subordination in our post-apartheid society.'[8] According to Fraser, in order to achieve social justice, a society would have to address the glaring forms of status subordination based on – for instance – race, gender, and sexual orientation as well as systemic patterns of social and economic disadvantage.[9] Fraser's analysis is applicable to South Africa as this is a society currently struggling to eliminate vast economic and status-based inequalities.

[3] S Terreblanche *A History of Inequality in South Africa: 1652–2002* (2002); SB Radebe 'The Challenges of Reconciliation in South Africa and the Poverty Connection' (2011) 26 *Southern African Public Law* 359, 359–360.

[4] Such as Breaking New Ground Policy: A Comprehensive Plan for the Development of Sustainable Human Settlement (September 2004); National Housing Code (2000, Revised in 2009); National Housing Programme: Housing Assistance in Emergency Circumstances (2004); Human Settlement Sector Strategy Plan 2009–2014 (2009); National Development Plan (2030); South African Schools Act 84 of 1996; Housing Act 107 of 1997; Higher Education Act 101 of 1997; National Water Act 36 of 1998; National Healthcare Act 61 of 2003; Employment Equity Act 55 of 1998 as amended ('EEA'), and the Broad-Based Black Economic Empowerment Act 53 of 2003 as amended ('BBBEE Act').

[5] See the Preamble to the Constitution.

[6] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 150. Scholars, judges and lawyers have elaborated on and explored the implications of transformative constitutionalism in various areas of constitutional law. See for example C Albertyn & B Goldblatt 'Facing the Challenges of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal on Human Rights* 248–275; S Liebenberg 'Needs, Rights and Transformation: Adjudicating Social Rights' (2006) 17 *Stellenbosch Law Review* 5–36; D Davis 'Transformation: The Constitutional Promise and Reality' (2010) 26 *South African Journal on Human Rights* 85–101; D Davis & K Klare 'Transformative Constitutionalism and the Common Law, and Customary Law' (2010) 26 (3) *South African Journal on Human Rights* 403–509; S Liebenberg *Socio-Economic Rights Adjudication Under a Transformative Constitution* (2010) 23–76. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others* [2004] ZACC 15, 2004 (4) SA 490 (CC); *Hassam v Jacobs NO & Others* [2009] ZACC 19, 2009 (5) SA 572 (CC), 2009 (11) BCLR 1148 (CC) at para 28; *Head of Department*: *Mpumalanga Department of Education & Another v Hoërskool Ermelo & Another* [2009] ZACC 32, 2010 (2) SA 415 (CC), 2010 (3) BCLR 177 (CC) at paras 47 and 55. For a critique of Klare's views on transformative constitutionalism, see T Roux 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference' (2009) 20 *Stellenbosch Law Review* 258–285.

[7] The Preamble to the Constitution states that the Constitution is the supreme law of the Republic, and was conceived so as to, amongst other objectives 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'.

[8] Liebenberg 'Needs, Rights' (note 6 above); S Liebenberg 'Transformative Constitutionalism and the Interdependence between Substantive Equality and Socio-economic Rights' (2007) 23 *South African Journal on Human Rights* 335–361, 338.

[9] See Fraser on the relationship between status subordination and distributional injustice, in N Fraser & A Honneth *Redistribution or Recognition? A Political-Philosophical Exchange* (2003) 7–70.

The challenge of transformation permeates all areas of life in South Africa, and the legal profession and the judiciary are no exceptions. Throughout its existence, there have been fewer women justices than male justices on the Constitutional Court ('the Court'). This is something that has been raised on several occasions by gender groups and civil society whenever a position becomes vacant at the Court. The purpose of this paper is to investigate why women have not been sufficiently represented on the Constitutional Court bench since the advent of democracy. To this end, the paper will inter alia attempt to ascertain whether there is a pool of suitably qualified women candidates to be appointed as justices to the Court. And what impediments or challenges contribute to the lack of suitably qualified women for appointment to the Court? To the extent that suitably qualified women candidates are available, why are they not being appointed to the Court? We will investigate the challenges and impediments that are faced by women during law school and after law school, in the legal profession (attorneys' profession, advocates' profession and academia), and the judiciary (lower courts), that prevent women from being appointed to the Court. Furthermore, the paper will consider how these challenges and impediments may be addressed over time so that there may be a gradual increase of the pool of suitably qualified women available for appointment to the Court.

In attempting to answer these questions and meet these arguments, we will first briefly explore the nature and meaning of transformation in general, and in the context of the South African judiciary. Secondly, we will argue that there are various significant impediments that prevent women academics, lawyers (practising advocates and attorneys), and judges from ascending to the Court. Flowing from this, we argue that these impediments have led to women academics, practicing lawyers and judges being overlooked for positions on the Court's bench, leading to an insufficient pool from which to select suitably qualified women candidates for the Court's bench over the past 23 years. Consequently, it will be submitted that gender transformation of the Court bench has not advanced adequately over the past 23 years. Thirdly, we will briefly explore the effects, if any, of this lack of a pool of suitably qualified women candidates for the Court's bench. Finally, we will submit tentative solutions to these impediments, and conclude.

II The Meaning of Transformation

A prominent Black male junior advocate from the Johannesburg Society of Advocates expressed a view to an attorney colleague of one of the authors that he does 'not know what transformation means', and that he does not want what he calls 'affirmative action briefs' but would like to receive briefs based only on his abilities. This view is ahistorical and highlights an unfortunate misunderstanding of transformation prevailing in some quarters. Transformation does not mean the absence and/or lack of ability, skills or potential. For instance, none of the legislation that deals with either employment equity or affirmative action requires

the appointment of unskilled Black people to positions or the distribution of work to Black people only because they are Black.[10]

Closely linked to these contestations is the fact that historically semi-skilled and unskilled White people enjoyed job reservation and economic opportunities by law only because they are White. As a result, they still enjoy a privileged position, having regard to the fact that most centres of the South African economy and institutions were largely left intact (untransformed) in the South African 'miracle' transition from apartheid rule to constitutional democracy.[11] This state of affairs has had the effects of embodying White privilege and White supremacy, because most White people have somehow convinced themselves that the economic, social and cultural advantages that they continue to enjoy are a result of hard work and luck,[12] and are not attributed to the structural effects of colonialism and apartheid. These are the people most likely people to claim that they do not understand the meaning of transformation, and oppose transformation, for fear of losing their past and present unearned economic, social and cultural privileges. What is transformation then?

The Collins English Dictionary defines 'transformation' as a change or alteration, especially a radical one.[13] In our view, this definition accords very well with the design and purpose of the Constitution, taking into account the historical context of the South African society, and a future that it attempts to shape in the process of correcting past and present injustices.[14] The Constitution has also been described as transformative in nature by Karl Klare, who coined the

[10] See, for example, the EEA and the BBBEE Act. In particular, see the definition of suitably qualified person in EEA s 1. Curiously, the definition of designated groups includes all women without reflecting their degrees of disadvantage, although White women and women from other racial groups did not, and do not suffer the same economic disadvantage and exclusion. This is repeated in the definition of Broad-Based Economic Empowerment in the BBBEE, which also includes all women. The Preamble to the BBBEE Act, however, acknowledges the central importance of race when it records: 'WHEREAS under apartheid race was used to control access to South Africa's productive resources and access to skills; WHEREAS South Africa's economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills; WHEREAS South Africa's economy performs below its potential because of the low level of income earned and generated by the majority of its people; AND WHEREAS, unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race'. See also S Plaatje *Native Life in South Africa* (1916); S Terreblanche (note 3 above) at 6 and 229; E Bonthuys 'Gender and Race in South African Judicial Appointments' (2015) 23 *Feminist Legal Studies* 130.

[11] Radebe (note 3 above); S Matthews 'Shifting White identities in South Africa: White Africanness and the Struggle for Racial Justice' (2015) 16 *Phronimon* 117.

[12] N Valji *Race and Reconciliation in a Post-TRC South Africa* (2004)(Valji records how the Black youth have internalized their poverty as 'something natural and inherent to those experiencing it, while many White people mistakenly believe that their success and economic power is the result of hard work, and sheer luck, not deliberate racist policies of the past that ensured their economic benefits, and the maintenance of these economic inequalities through laws, policies and violence against other races, mainly Black people'). See also: AR Chapman & H van der Merwe 'Did the TRC Deliver?' in AR Chapman & H van der Merwe (eds) *Truth and Reconciliation in South Africa: Did The TRC Deliver*? (2008) 241, 277–278.

[13] *Collins English Dictionary Desktop Edition* (2004).

[14] See the Preamble to the Constitution.

term 'transformative constitutionalism'.[15] By transformative constitutionalism, he means:

> [A] long term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word.[16]

Despite the fact that the word transformation does not appear anywhere in the Constitution, it has now been widely accepted that the Constitution is aimed at radically changing or transforming the political, social and economic space in South Africa, and that transformation lies at the heart of its design.[17] However, there is seemingly no consensus regarding how this will be achieved,[18] and different aspects of transformation have generated substantial litigation over the years in different contexts, including employment equity and judicial appointments.[19] Albertyn and Goldblatt argue that transformation requires a complete remake of the state and society, and the distribution of power and resources in an equitable manner.[20] The challenge, according to Albertyn and Goldblatt, is to address structural forms of domination, and material disadvantages anchored by race, gender, class, and other related grounds.[21] The eradication of structural forms of domination and material disadvantage will ensure the improvement of the quality of life for all citizens and free the potential of each person in line with the Constitution's vision.[22]

Achieving equality in the context of transformation also requires an understanding by law-makers, and those in charge of institutions of society that equality forms the centre of the constitutional vision and promise of transformation, as well as an understanding of equality as a value, and equality as a right.[23] Equality as a value gives meaning to the vision of the Constitution by acting as an interpretive tool, while equality as a right provides a justiciable cause of action on which to seek substantive equality (remedies) for persons and groups of persons affected by structural forms of domination and material

[15] Klare (note 6 above).

[16] Ibid at 150–151.

[17] G Budlender 'Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa' (2005) 4 *South African Journal on Human Rights* 716; M Olivier 'A Perspective on Transformation of the South African Judiciary' (2013) *South African Journal on Human Rights* 449.

[18] Bonthuys (note 10 above) 128.

[19] See for example, *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23, 2014 (6) 123 (CC); *Judicial Service Commission & Another v Cape Bar Council & Another* [2012] ZASCA 115, 2013 (1) SA 170 (SCA), 2012 (11) BCLR 1239 (SCA).

[20] Albertyn & Goldblatt (note 6 above) at 249; J Seeking & N Nattras *Class, Race, and Inequality In South Africa* (2005) 340–345.

[21] Albertyn & Goldblatt (note 6 above) at 249.

[22] See Preamble to the Constitution, and Albertyn & Goldblatt (note 6 above) at 249.

[23] Albertyn & Goldblatt (note 6 above) at 250.

disadvantage.[24] The learned authors warn in this context that the right to equality in s 9 of the Constitution should be interpreted in a flexible and evolving manner because interpreting it conservatively can lead to its use 'to restrict legal and administrative measures in favour of disadvantaged groups or entrench privilege rather than remedy disadvantage'.[25]

Seen in this light, equality as an important ingredient in the transformation project must be interpreted and understood as substantive, rather than formal, equality.[26] While formal equality is guaranteed in s 9(1) of the Constitution, s 9(2) of the Constitution requires the state and other role players to take legislative and other measures to protect or advance persons that have been disadvantaged by unfair discrimination. Interpreting and understanding equality in a substantive manner entails understanding it as a means to correct structurally entrenched social and economic inequalities.[27] In this way, those who take measures to advance substantive equality in terms of s 9 of the Constitution will be justified because their action is aimed at correcting past injustices. In reference to substantive equality in *Minister of Finance & Another v Van Heerden*, Moseneke DCJ correctly said that taking positive steps to redress past inequality 'promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination'.[28] In order to determine whether a measures falls within the scope of s 9(2) of the Constitution, one has to determine whether the steps (a) target a class of persons who were previously disadvantaged by unfair discrimination; (b) seek to protect or advance such persons; and (c) whether the steps promote the achievement of equality.[29] In our view, this requires judges, employers, the JSC and lawyers to understand and take into account the context of the inequality, and the source and impact of any structurally entrenched inequalities that impede individuals and groups from realising their full potential.[30] This way, differences and disadvantage are put at the centre of the investigation and remedies fashioned because peoples' actual lived experiences are examined, instead of the abstract conceptions of similar treatment embedded in the formal conceptions of equality prevalent in many liberal legal systems.[31]

Formal equality, on the other hand, entails the idea that all people should be given equal treatment, regardless of their actual circumstances.[32] Interpreting and understanding equality formally means that the law and institutions of society do not take into account the gross inequalities attributed to race, gender, and socio-economic positions, and real experiences and many other factors affecting

[24] Ibid at 249–250.
[25] Ibid at 250.
[26] Ibid; C Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253, 255–256. See also A Smith 'Equality Constitutional Adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 609–632.
[27] Albertyn (note 26 above) at 259.
[28] *Minister of Finance & Another v Van Heerden* [2004] ZACC 3, 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at para 37.
[29] Ibid.
[30] Albertyn (note 26 above) at 258–259.
[31] Albertyn & Goldblatt (note 6 above) at 252–254.
[32] Ibid at 250.

people who are not privileged or occupying dominant positions in society.[33] The results of this approach for equality are that these vulnerable individuals and groups are treated the same as everyone in society, and the structural social and economic inequalities are never fully dealt with.[34] What happens instead is that vulnerable individuals and groups affected by these structural social and economic inequalities by reason of their race, gender, sexual orientation, socio-economic status or other status, are merely accommodated within the existing system and status quo, leaving the structural social and economic inequalities largely intact. This does not go far enough in addressing the structural social and economic inequalities, but merely co-opts these vulnerable groups into an already established status quo that is blind to their differences and disadvantages.[35]

In order to address the above dilemma, a substantive conception of equality must be deployed by the affected individuals and groups, courts and lawyers. This approach must also be alive to the need to prohibit unfair discrimination on prohibited grounds (whether based on race, gender, sexual orientation, socio-economic status and other factors) but also emphasise positive and forward-looking forms of differentiation that appropriately recognise and affirm these differences.[36] This is because the substantive conception of equality closely aligns with the transformative vision and promise of the Constitution as it aims to address these structural social and economic inequalities that are based on race, gender, sexual orientation, socio-economic status and other factors, and also aims to move the axis of power that maintains this status quo.[37] This approach therefore also embraces and closely aligns with Klare's conception of transformative constitutionalism mentioned above.[38]

Connected to the substantive conception of equality is the interpretation of s 9 of the Constitution. A reading of s 9(1) and (2), read with s 9(3) of the Constitution makes it clear that equality, and by extension transformation, embrace both the need for positive measures (affirmative action measures and other measures) and negative measures (prohibition against direct or indirect discrimination) in order to achieve substantive equality.[39] Positive measures could include measures aimed at proactively eradicating all forms of structural social and economic inequalities that have race, gender, sexual orientation, socio-economic status and other factors as their genesis. In the context of gender transformation of the Court's bench, these positive measures may include, as we explore in more detail below, a flexible appointment policy;[40] enabling legislation that focuses on women, especially Black women who are suitably qualified and experienced to gradually prepare them for positions on the Court's bench; a streamlined judicial training

[33] Ibid at 250–252.
[34] Albertyn (note 26 above) at 256, 263 and 273.
[35] Ibid at 256.
[36] Ibid at 260.
[37] Ibid at 256–257.
[38] Ibid at 257.
[39] See Albertyn & Goldblatt (note 6 above) at 266–268; Albertyn (note 26 above) at 258–261.
[40] This would include a policy that does not focus heavily on acting experience as a main requirement for appointment to the bench, and may include job shadowing of the High Courts' judges and the Court's justices.

programme aimed at promoting and appointing experienced women academics, practising lawyers, and judicial officers from lower courts to the Court's bench; and equitable distribution of quality legal work.

Negative measures on the other hand may include the eradication and prevention of all forms of unfair discrimination, whether direct or indirect, whether based on listed or unlisted grounds. This could include paternity leave so that the parenting responsibilities are equally shared between men and women; a flexible and clear transfer policy for judges that does not require them to apply when requesting to be transferred to another division of the high court, where their family members are based; legislation that includes same-sex couples in the provisions of the Judges Remuneration and Conditions of Employment Act 88 of 1989; flexible working hours for both female and male judges, lawyers, and academic professionals to enable them to equally look after and attend to their family responsibilities.

Adopting a range of positive and negative measures has the potential to increase the number of suitably qualified and experienced women for appointment to the Court's bench in the medium to long-term so that the Court's gender composition may become more representative. This is important in itself, in light of the fact that women make up the majority of people in South Africa, and of students graduating from law schools across the country. It is also instrumentally important because the people that make up a society must see themselves in every institution that plays a vital role in their lives, for that institution to attain legitimacy and remain legitimate.

III Judicial Appointments And Transformation

A Appointment of Judges before 1994

What does transformation entail, then, in the context of judicial appointments? In order to properly navigate this question, it is necessary to refer to the past. In principle, prior to 1994 judicial, appointments were made by the President. However, there are views that in reality, judicial appointments under the apartheid dispensation were made by the Minister of Justice, with the President simply approving the decisions of the Minister.[41] In later years, the judicial appointment process under apartheid evolved somewhat, in that judicial appointments were made on the recommendations of the Chief Justice or Judge President of the affected court.[42] The candidates for judicial appointment were drawn from the ranks of Senior Counsel, and were as a result White and male.[43] There was also

[41] J Radebe 'Transformation in the Judiciary – A Constitutional Imperative' Inaugural Lecture, University of the Free State (6 October 2004), available at www.law.wits.ac.za/sca/speeches/mpati.pdf (accessed 05 August 2016) 11; RB Cowan 'Women's Representation on the Courts in the Republic of South Africa' (2006) 6 *University of Maryland Law Journal of Race Religion Gender* 291, 296–298.

[42] CJ Mahomed et al 'The Legal System in South Africa 1960-1994' (1998) 115 *South African Journal on Human Rights* 22, 32.

[43] C Albertyn & E Bonthuys 'South Africa: A Transformative Constitution and a Representative Judiciary' in G Bauer & J Dawuni *Gender and the Judiciary in Africa: From Obscurity to Parity* (2006); R Chitapi *Women in the Legal Profession in South Africa: Traversing the Tensions from the Bar to the Bench* (LLM thesis, University of Cape Town, 2015) 6; see also Bonthuys (note 10 above) at 133.

a lack of transparency in the process used to identify candidates for judicial appointment. Because the criteria used were not clear and transparent, it seemed that candidates were appointed and promoted because of their political leanings and connections.[44]

At the dawn of democracy in 1994, the judiciary remained almost entirely White and male, with the exception of three Black men, and one White woman.[45] The judiciary was left intact at the dawn of democracy, despite the fact that it was used as an instrument to protect and preserve the status quo under apartheid, with the exception of a few brave judges who attempted to interpret legislation and the law in creative ways that preserved human rights.[46] The judiciary was left intact apparently for reasons of continuity.[47]

B Appointment of Judges After 1994

The new constitutional dispensation brought about many positive changes in South Africa. The process for judicial appointments underwent radical changes. This process started with the establishment of the Judicial Services Commission (JSC), an independent body tasked with making recommendations for judicial appointments, and the torch-bearer of judicial transformation.[48] The Constitution established the JSC, a body composed of the Chief Justice, who presides over the meetings of the JSC, the President of the Supreme Court of Appeal, one Judge President designated by the Judges Presidents, the Cabinet member responsible for the administration of justice or an alternate designated by that Cabinet member, two practising advocates, two practising attorneys, one law teacher, six members of the National Assembly, at least three of whom must be members of opposition parties represented in the National Assembly, four permanent delegates to the National Council of Provinces, and four persons designated by the President after consultation with the leaders of all the parties in the National Assembly.[49] The Judicial Service Commission Act 9 of 1994 also provides that when the JSC is considering matters related to a specific High Court, the Judge President and Premier of the Province concerned or an alternate designated by each of them should be present.[50]

[44] S Kentridge 'Telling the Truth About Law' (1982) 99 *South African Journal Law Journal* 648, 652.

[45] MTK Moerane 'The Meaning of Transformation of the Judiciary in the New South African Context' (2003) 120 *South African Journal Law Journal* 709, 712.

[46] See Cowan (note 41 above) at 296–298.

[47] M Wesson & M du Plessis 'The Transformation of the Judiciary: Fifteen Year Policy Review' (2008), available at http://www.thepresidency.gov.za/docs/reports/15year_review/jcps/ transformation judiciary.pdf.

[48] See Constitution s 178, read with the Judicial Service Commission Act 9 of 1994 as amended. See also Budlender (note 17 above) at 717; Y Mokgoro 'Judicial Appointments' (2010) *Advocate* 43–48, 44.

[49] JSC Act ss 178(1)(a)–(j).

[50] JSC Act s 178(1)(k).

C The Judicial Appointment Criteria

Central to the JSC's role in the judicial appointment process is to act as the torch-bearer of transformation by ensuring that gender and racial balance of the judiciary is achieved in a manner that would not only promote the judiciary's legitimacy in the eyes of the public, but also ensure and entrench the judiciary's independence in line with constitutional prescripts.[51] This means that society must see itself in the judiciary that serves it or that is tasked with upholding and protecting its human rights. But what criteria does the JSC rely on in the appointment process?[52]

The starting point in understanding the criteria applied in judicial appointments is the Constitution, specifically ss 174(1)–(4). These provisions require that for one to be considered for appointment as a judicial officer, he/she must be 'appropriately qualified' and that the appointing bodies such as the JSC should consider 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa'. However, in respect of the Constitutional Court, such person must also be a South African citizen. The words 'appropriately qualified' and 'fit and proper' do not admit of easy definitions because of their relative and fluid nature.[53] Does appropriately qualified mean the candidate for judicial appointment must have a certain level of legal education? If so, what level? Or does it mean that the candidates should have a certain number of years in legal practice either as a judge, an attorney or advocate? What areas of the law must the candidate have experience in, in relation to the need for a diverse bench in terms of skills? If the candidate is an academic, how much experience in teaching law and publishing should they possess? How many times should the candidate for judicial appointment have acted as a judge? The difficulty associated with these questions presented itself in 2012 to the surprise and disappointment of many people when a vacancy occurred in the Constitutional Court and the President declined to appoint Judge Mandisa Maya, a highly regarded senior judge on the Supreme Court of Appeal (and now its President). This despite the fact that she possesses 'high academic qualifications and the fact that she had been one of the four candidates recommended by the JSC'.[54] In our view, the complexity of these unresolved questions means that the criteria for appointment will remain contentious.[55]

The second criterion applicable to judicial appointments relates to the need for the judiciary to be broadly representative of South Africa in terms of race and gender.[56] The rationale for the requirement in s 174(2) appears to be three-fold. Firstly, there is the need to reverse the legacy of the inherited unrepresentative judicial system. Secondly, there is a need to restore and/or ensure judicial legitimacy.

[51] Budlender (note 17 above) at 716–717.

[52] See generally S Cowen *Judicial Selection in South Africa* (2013).

[53] See Mokgoro (note 48 above) at 45.

[54] Bonthuys (note 10 above) at 133.

[55] The meaning of appropriately qualified and fit and proper, along with the questions we raise therein have not been clarified by the JSC, even in the JSC Act: Procedure of Commission. This represents a missed opportunity by the JSC.

[56] See Constitution s 174(2).

Thirdly, there is a need to ensure judicial independence.[57] The need to reverse the legacy of an unrepresentative judiciary, ensuring the judiciary's legitimacy, and independence are three interrelated necessities because a judiciary that is not representative in relation to the composition of the society on whose behalf it adjudicates and dispenses justice is unlikely to enjoy public confidence.[58] Such a judiciary is also likely to be seen as being illegitimate and lacking independence.[59] This is why there is a need for a judiciary to be representative of the society it serves and be diverse; but what does this entail? Is it all about numbers or is there more to it? Yes and no. Yes, because a representative judiciary is good as an end in itself, as society must see itself in the judiciary, so numbers matter. However, Geoff Budlender, Ruth Cowan and Morné Olivier correctly recognise that there is more to it. Budlender argues that we need to see ourselves in our judiciary, and feel that the judiciary is part of us.[60]

Budlender argues further that we need to face reality and accept that Black judges are more likely than White judges to have closeness to the life experiences and the needs of the majority people of South Africa. By the same stroke, women judges are more likely than male judges to have a better understanding of issues affecting women, especially in a society where women make up 51.3 per cent of the population.[61] Women are also likely to have a better understanding of issues affecting children because historically and presently, they are disproportionately saddled with raising and caring for children.

Olivier points out some challenges with regard to representivity and diversity. He argues that representivity and diversity are usually confusingly used as interchangeable concepts to describe the requirements of s 174(2) of the Constitution.[62] Cowen, too, identifies the need to distinguish these concepts, pointing out that a bench of a single judge or two or three judges cannot be 'diverse', and that the hope should be for a judiciary that is more diverse at all levels.[63] The challenge, according to Olivier, is that there is no common understanding of the meaning of representivity and diversity owing to the difficulty with defining representivity and diversity.[64] However, he correctly asserts that s 174(2) of the Constitution calls for some form of affirmative action in judicial appointments to address the domination of the judiciary by one minority group.[65] But the requirement in s 174(1) of the Constitution, according to him, is a complicating factor because of a lack of clarity with regard to its relationship to the requirements in s 174(2) of the Constitution.[66] The JSC has not helped matters when it comes to

[57] See Budlender (note 17 above) at 716–717; Cowan (note 41 above) at 299–302; Mokgoro (note 48 above) at 45; and Olivier (note 17 above) at 449–452.

[58] Budlender (note 17 above) at 716.

[59] Ibid at 716–717; Cowan (note 41 above) at 299–302.

[60] Budlender (note 17 above) at 716; Cowan (note 41 above) at 299–302; Olivier (note 17 above) at 449–452.

[61] Statistics South Africa. See the website at: http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf.

[62] Olivier (note 17 above) at 450.

[63] Cowen (note 52 above) at 69.

[64] Olivier (note 17 above) at 450.

[65] Ibid at 450.

[66] Ibid.

this debate because of its failure to express a definitive view of its understanding of ss 174(1) and (2), and the focus on whether they are mutually exclusive.[67]

We support the view that the merit requirement in s 174(1) should be re-interpreted to also encompass the candidate's understanding and fidelity to constitutional values, and the qualities required of a judge, which include empathy and judicial philosophy,[68] as well as that merit and diversity should be interpreted to include the candidate's view of patriarchy, sexism, gender-stereotypes, women oppression and marginalisation, and how these should be reversed, irrespective of whether the candidate for judicial appointment is male or female.[69] Although these factors are partially considered from time-to-time by the JSC, the JSC has not been consistent in doing so, as at times, it appears to be going through the motions with regard to some candidate during its interviews, as is apparent from the questions put to each candidate. This may perhaps be attributed to the lack of transparency and clear criteria for selection and appointment of judges that makes it difficult to decipher whether each candidate is subjected to the same criteria, that covers these factors.

In our view, and closely related to the above, the requirements for judicial appointments as found in ss 174(1) and (2) of the Constitution are not mutually exclusive, and should not raise too much contestation. When read together, as they should be, one requirement should not be elevated above the other. In this context, we support the suggestion that race and gender should not be treated as the end in themselves because of the dangers highlighted by Olivier,[70] but should be given equal importance in judicial appointments along the other countless factors such as judicial philosophy, professional background and expertise, political views, cultural heritage, language, religious affiliations and geographical factors.[71] The JSC, in most interviews of candidates for judicial appointments, tends to be too preoccupied with race and gender to the detriment of the above factors that are equally important. Candidates for judicial appointment are seldom quizzed on their judicial philosophy, political views, cultural heritage, religious affiliations, gender views, geographical factors, and other relevant factors. If this were done, it could assist the JSC and the public to have a better understanding of what type of judges the candidates are likely to be if appointed.

It would be useful for the JSC, working with the Minister of Justice and Correctional Service and the institutions mentioned in the Procedure of

[67] C Albertyn 'Judicial Diversity' in C Hoexter & M Olivier (eds) *The Judiciary in South Africa* (2014) 245, 276–277 and 280.

[68] Albertyn (note 67 above) at 277; Cowen (note 52 above) at 43–62.

[69] M Hunter, T Hodgson & C Thorpe 'Women are not a Proxy: Why the Constitution Requires Feminist Judges' (2015) *South African Journal on Human Rights* 579, 586–587.

[70] Olivier (note 17 above) at 450–452. The dangers highlighted cover the dangers of failing to seriously question deeper issues of race and gender beyond skin pigmentation and sex.

[71] Ibid at 452.

Commission, to clarify the meaning of suitably qualified and fit and proper[72] person found in s 174(1) of the Constitution.

D The Composition of the Constitutional Court 23 Years on

The composition of the original Constitutional Court bench exhibited a promising start in terms women representation, because it started with two permanent appointments of women in 1994, both with experience in academia and the practice of law.[73] The other nine justices (although all men), also came with a diverse skills set as they were drawn from the legal profession (advocates and attorneys, and the bench).[74] These numbers have not changed much in the past 23 years. As of May 2005, more than a decade later, the Constitutional Court still had two women justices.[75] A third, Justice Nkabinde, was appointed shortly thereafter in 2006.[76]

The court still lags behind in terms of women representation, at its most promising year, the court had three women justices, Justices Mokgoro, O'Regan and Nkabinde.[77] The retirement of Justices O'Regan, and Mokgoro in 2009 and the subsequent appointment of Justice Khampepe in 2009 meant that women representation at the court went down to two women, Justices Nkabinde and Khampepe, out of eleven justices.[78]

It is also worth noting that more women graduate from law schools across the country than men,[79] but less women enter the legal profession than men.[80] In total, women of all racial groups make up only 24 per cent of all practising advocates in South Africa, while 64 per cent of all female advocates are White. White women advocates make up 15.7 per cent of advocates across South Africa, while only 4 per cent are African women despite African women making up 41 per cent of the total population.[81] A further 2.8 per cent are Indian women, and 1.6 per cent Coloured women. In contrast, White men make up 56 per cent of all advocates, and White men and White women combined make up 71 per cent of all advocates.[82] The number of admitted women attorneys was on par with that of men in 2004, but exceeded the number of admitted men in 2006.[83] In 2014,

[72] The meaning of fit and proper has received a considerable amount of attention from the courts and academics alike but still remains vague. In the context of the admission of legal practitioners and their striking from the roll, the courts are conferred a wide discretion in determining a person's 'fitness'. See, for example, *Summerley v Law Society, Northern Provinces* [2006] ZASCA 59, 2006 (5) SA 613 (SCA) at para 2.

[73] These were Justices Yvonne Mokgoro and Katherine O'Regan. They both retired in 2009.

[74] Olivier (note 17 above) at 454.

[75] See the Constitutional Court website available at http://www.constitutionalcourt.org.za/site/judges/formerjudges.htm.

[76] Cowan (note 41 above) at 303.

[77] C Oxtoby 'New appointments to the Constitutional Court 2009–2012' (2013) *South African Law Journal* 230.

[78] Ibid at 230.

[79] Albertyn & Bonthuys (note 43 above) at 58.

[80] Bonthuys (note 10 above) at 132–133.

[81] Ibid at 132.

[82] Ibid at 133.

[83] Ibid at 132.

the number of practising male attorneys far exceeded that of practising women attorneys.[84] More recently the attorneys' profession is still dominated by White men, currently 60 per cent of all attorneys are White, and only 38 per cent of practising attorneys are women.[85] This is significant and explains the slow pace of transformation in general and in the judiciary because not only is the legal profession dominated by White people, the economy is also largely still owned by White people.[86] We address this in detail under the sub-heading 'the umbrella impediment' below.

The numbers of women justices at the Court went above the 2009 numbers, with the recent appointments of Justice Mhlantla in 2015 and Justice Leona Theron in 2017 making it four women justices, joining Justices Nkabinde and Khampepe (three Black women and one Coloured woman),[87] until Justice Nkabinde retired at the end of 2017 and the number dropped back to three women judges. Despite some progress, this figure remains less than half the bench. This record also does not reflect the demographics of the South African society in that we are yet to see the appointment of Indian women justices to the Court.[88] There is still some flickering hope because, as at the time of writing, there are two vacant judicial positions at the Court created by the retirement of Justice Nkabinde.

The number of acting women justices at the Court also makes for interesting reading. By our count, there have been 31 acting appointments since the inception of the Court. Between 1995 and 2011, there were 17 acting appointments 1 of whom was a woman (Judge Van Heerden) against 16 men. Since 2011 there have been 14 acting appointments, of which six have been women.[89] Therefore, of a total of 31 judges who have acted at the Court since its inception, 24 were men and seven were women.[90] This is the grim picture when acting judicial appointments have become one of the unwritten requirements for permanent judicial appointments. Similarly, the emerging picture from the other superior courts when it comes to women judges is also not encouraging except for the recent appointment of Justice Maya as President of the Supreme Court of Appeal. In 1994, there were only two women judges out of 200 judges.[91] Ten years later

[84] Ibid at 132–133.

[85] Law Society of South Africa 2016 review of the attorneys profession, available at: http://www.lssa.org.za/about-us/about-the-attorneys-profession/lssa-lexisnexis-review-of-the-attorneys -profession-2016.

[86] Retired Deputy Chief Justice D Moseneke 'The life of Godfrey Mokgonane Pitje as a professional, activist, educator: Reflections to aspiring lawyers', The Godfrey Mokgonane Pitje Inaugural Memorial Lecture (09 October 2015, Constitution Hill) 12, available at http://www.lawlibrary.co.za /notice/updates/2015/images/moseneke_pitjememoriallecture_2015.pdf.

[87] See Presidency website, available at http://www.thepresidency.gov.za/pebble.asp?relid=20989.

[88] Bonthuys (note 10 above) at 133. However, the said number was reduced to three when Justice Nkabinde retired on December 2017.

[89] The problem with counting is that the Constitutional Court website is not fully up to date but also that when a judge that acted previously is then appointed permanently their profile is moved to the permanent judges section.

[90] See Constitutional Court website, available at http://www.constitutionalcourt.org.za/site/judges/actingjudges.htm.

[91] D Ntsebeza The Fifth Annual Griffiths and Victoria Mxenge Memorial Lecture 'Transformation of the judiciary: The Role of the Judicial Service Commission' (24 April 2014), available at http://lectures.mandela.ac.za/lectures/media/Store/ documents/Public%20Lectures/Inaugural-Griffiths-And-Victoria-Mxenge-Memorial-Lecture.pdf at 9.

only 28 (13.3 per cent) out of 210 superior courts judges were women.[92] By 2013, this number improved marginally, to 23 per cent women representation in the judiciary.[93] In 2014, there was slight improvement and the number of women judges moved to 32 per cent.[94] Obviously, when there are few women judges in the other divisions of the courts, it follows that there will be few women to be considered for the appointment to the Constitutional Court. Perhaps the appointment of Justice Maya as the first female President of the Supreme Court of Appeal since 1910[95] signals a new era. Unfortunately, she enters a court that is fuelled by racial tensions and divisions, something that appears to have eluded the male leaders for many years to resolve.[96] It is nonetheless hoped that she will be able to address the existing racial tensions and divisions in that court and that her presence might influence the current perception of the SCA as being regarded as pro-business, anti-Black and against the poor.[97]

We are not only advocating for more women to merely add numbers on the bench. We contend that more female justices will eliminate the traditional stereotype that the legal profession is reserved for men. More women on the bench will help address the notion of the 'boys' club'. As Moult has argued, 'increased visibility of women in the judiciary is essential to breaking down these patriarchal stereotypes and normalizing the way in which female judges are perceived and treated'.[98] The presence of female justices will further encourage young female lawyers to aspire to become judges.[99] This will in turn assist in making the courtrooms more accommodative for women generally, including female witnesses.[100] Additionally, more female justices will give a different perspective on issues such as child abuse, domestic violence and rape.[101] What are the barriers or impediments that are responsible for the paucity of women justices at the Court 23 years on? The next section attempts to answer this question by going through some of the barriers on a woman's way to ascend to the bench of the Constitutional Court.

[92] Cowan (note 41 above) at 303.

[93] Olivier (note 17 above) at 460.

[94] Bonthuys (note 10 above) at 130.

[95] A Janse van Rensburg 'In Focus: Meet the new president of the SCA, Mandisa Maya' *News24* (2 June 2017), available at https://www.news24.com/Opinions/IN-FOCUS/in-focus-meet-the-new-president-of-the-sca-mandisa-maya-20170602.

[96] F Rabkin 'Racial Tension, Lack of Collegiality Rife at Supreme Court of Appeal, JSC Hears' *Mail & Guardian* (4 April 2017), available at https://mg.co.za/article/2017-04-04-racial-tension-lack-of-collegiality-rife-at-supreme-court-of-appeal-jsc-hears.

[97] For a recent comparison of the courts in this regard, see J Dugard 'Testing the Transformative Premise of the South African Constitutional Court: A Comparison of High Courts, Supreme Court of Appeal and Constitutional Court Socio-economic Rights Decisions, 1994–2015' (2016) 20(8) *International Journal of Human Rights* 1132–1160.

[98] K Moult 'More Women on the Bench offer a Better Gender Perspective' *Mail & Guardian* (31 May 2012), available at https://mg.co.za/article/2012-05-31-more-women-on-the-bench-offer-a-better-gender-perspective.

[99] Ibid.

[100] Ibid.

[101] N Grossman 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?' (2012) 2 *Chicago Journal of International Law* 656–658.

IV Impediments to Appointment to the Court

A The Umbrella Impediment

The 'umbrella' impediment leading to a lack of a suitable pool of women for appointment to the Court, and the lack of gender transformation and transformation in the legal profession, is directly linked to the largely untransformed economy, in which the minority who control the economy (mainly White men) dispense patronage, to the exclusion of Black people and women, especially Black women.[102] The control of the economy by White people means that they also control economic opportunities and advancement in the professions, including the legal profession, as recently noted by the retired Deputy Chief Justice, Dikgang Moseneke.[103] There is also yawning gender inequality in South Africa, so much so that a household headed by a man has a 28 per cent chance of being poor, while that officially headed by a woman has a 40 per cent chance of being poor, and a household with a de facto woman head of the household has a 53 per cent chance of being poor.[104] What is more, women-headed households tend to be heavily reliant on state pensions and social grants as women make up 41 per cent of the population. Poverty for Black women is much worse as it is clothed with a double-edged sword of gender disadvantage as they experience inequality based on their gender and race.[105]

Closely linked to gender and poverty as impediments to advancement in the legal profession are class and poverty. The dawn of democracy also witnessed a steady rise of a Black middle class, as well as a small Black elite class. This can be attributed to progressive government policies and legislation aimed at furthering the vision of the Constitution.[106] There is no consensus on the size of the Black middle class, but it is generally accepted that this group is relatively small compared to the rest of the Black population that remain trapped in poverty and misery, who are unskilled and uneducated, and with limited access to socio-economic goods and services. Black people from outside this narrow Black middle class are highly unlikely to make in it the legal profession, without directed positive

[102] Moseneke (note 86 above) at 12–13.

[103] Justice Dikgang Moseneke *Address by Wits Chancellor, during the Naming of the Robert Sobukwe Building* (University of Witwatersrand, 18 September 2017), available at http://www.polity.org.za/article/sa-justice-dikgang-moseneke-address-by-wits-chancellor-during-the-naming-of-the-robert-sobukwe-building-university-of-witswatersrand-johannesburg-17092017-2017-09-18.

[104] M Leibbrandt, I Woolard, A Finn & J Argent 'Trends in South African Income Distribution and Poverty Since The Fall of Apartheid' (2010) *OECD Social Employment Working Papers No 101 OECD Publishing.*

[105] Leibbrandt et al (note 104 above). The coloured community has a significant number of poor people when compared to the white and Indian people, which have relatively low poverty rates. According to the 1999 October Household Survey, 52 per cent of Africans and 17 per cent of coloureds are poor, compared with 5 per cent of Indians and whites. Africans make up 78 per cent of the population and they account for 95 per cent of the poor. The South African Survey 2008/9 by SAIRR indicates that the proportion of people living in relative poverty by race almost ten years later (1999–2008/9) is: Africans 49.0 per cent; Coloured 16.9 per cent; Indians 6.4 per cent and Whites 3.6 per cent.

[106] See Preamble to the Constitution, read with Constitution s 9; Seeking & Nattrass (note 20 above); J May (ed) *Poverty and Inequality in South Africa: Meeting the Challenges* (2000) 30 and 34.

measures aimed at upskilling them, educating them and giving them access to socio-economic goods and services.

However, some responsibility should also be placed at the door of the government in all its manifestations as the largest consumer of legal services, for not doing enough to uplift women in the legal profession through the distribution of legal work and other programmes. The government is the main policy driver of transformation in the legal profession[107] and has a constitutional duty to ensure that past injustices are redressed.[108] If the government does not address economic imbalance, the status quo is more likely to prevail. Therefore, talking about gender transformation in the judiciary without focusing on the economy as the starting point, as many debates around transformation usually do, is a waste of time and energy.

B Other Impediments

Women are not only under-represented on South Africa's apex court, but in all the courts up to the Constitutional Court.[109] The exclusion of women from the legal profession in its entirety is something that was systematic and encouraged through legislation in South Africa and elsewhere.[110] The interpretation of the word 'persons' in the law that dealt with the admission of those who sought to be lawyers was narrowly interpreted so as to refer to men only to the exclusion of women.[111] In *Incorporated Law Society v Wookey*,[112] the court had to determine whether the term 'persons' in the law regulating the admission of attorneys referred to men and women. The court ruled that the word 'persons' meant male persons only.[113] This meant that women could not be admitted to the legal profession to practice law. Consequently, there was no way that they could become judges.

It was only in 1923 when women were allowed to practice law through the promulgation of the Women's Legal Practitioner's Act.[114] This opened the way for them to enter the legal profession and, in theory, to ascend to other positions within the profession such as becoming judges. However, it was only in 1969 that the tide started turning with regard to judicial appointments when the first woman judge (Judge Leonora van den Heever) was appointed to the Supreme

[107] See Legal Practice Act 28 of 2014 ss 3(a) and (b)(iii) whose purposes includes the 'transformation and restructuring of the legal profession that embraces the values underpinning the Constitution' and to ensure that there are 'measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic'.

[108] See Constitution s 9(2).

[109] Bonthuys (note 10 above) at 133.

[110] P Maithili 'Exclusion of Women from the Legal Profession in the United States of America, the United Kingdom, and South Africa Date' (25 November 2012), available at http://ww3.lawschool.cornell.edu/AvonResources/ Memo-Womens-exclusion-from-the-legalprofession.pdf.

[111] K O'Regan 'Transforming the Judiciary: Notes from a Continuing South African Journey' (Ethel Benjamin Lecture, 23 April 2012); M Swart 'The Carfinian Curse: The Attitudes of South African Judges Towards Women between 1900 and 1920, 120s' (2003) *African Law Journal* 536, 548–51.

[112] 1912 AD 623.

[113] See also *Schlesin v Incorporated Law Society* 1909 TSC 363. This is the first case that barred women from becoming members of the legal profession.

[114] Act 7 of 1923.

Court of Appeal.[115] The first ever women judge was appointed to one of South Africa's High Court divisions towards the end of the 1990s.[116] On her first day at work and to her surprise, she discovered that the court did not have toilet facilities for women.[117] Male dominance in the judiciary has lasted for many years and is something that will not be resolved overnight. In comments that reflect a notion that the pool of women High Court judges is still insufficient, some of the Judicial Service Commissioners have asked 'whether women had organised themselves into an effective force'.[118] There are now female judges from the lower courts up to the Constitutonal Court. The Court currently has three permanent women justices out of eleven justices. One of the four current acting justices – Judge Goliath – is a woman.

Other challenges facing women include; excessive working hours and non-recognition of their roles as parents who have to take care of children.[119] For example:

> [A] female judge asked to be transferred from one division in the Eastern Cape to another, citing dramatic changes to her family circumstances which required her to live with her children who were at the time living in a different city. The JSC refused. In fact, a high ranking female member of the JSC reportedly responded to the judge's tearful description of her children's circumstances with '[t]hat will not get you any sympathy from us'.[120]

This reported incident indicates that the nature of the workplace and the job does not accommodate family responsibilities.[121] This is where there is a need for transformation in the work of the judiciary to accommodate parental responsibilities of both men and women. It is, of course, not only women who have parental responsibilities but men too. O'Regan J, in her dissenting opinion in *President of the Republic of South Africa v Hugo*, stated that 'the responsibility for child rearing is also one of the factors that renders women less competitive and less successful in the labour market'.[122] This observation is correct because the legal profession is created on the premise that everyone, regardless of gender, has the same capacity for working hours and arrangements. This ignores the socially constructed roles that are associated with women such as child upbringing and

[115] E Bonthuys 'Gender and the Chief Justice: Principle or Pretext' (2013) 39(1) *Journal of Southern African Studies* 59, 65.

[116] P De Vos 'Where are all the Women Judges?' *Constitutionally Speaking* (29 April 2010), available at http://constitutionallyspeaking.co.za/where-are-all-the-women-judges/.

[117] Ibid.

[118] T Masengu & K Hindle 'The New JSC in a Man's World' *The Conmag* (10 November 2014), available at http://www.theconmag.co.za/2014/11/10/the-new-jsc-and-the-patriarchy/.

[119] This section cannot discuss all the challenges that are inhibiting women from ascending to the bench but to rather focus on some of the most significant and salient issues. See, further, Centre for Applied Legal Studies *Report on Transformation of the Legal Profession* (2014), available at https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management /research entities/cals/documents/programmes/gender/Transformation%20of%20the%20Legal%20Profession.pdf

[120] Bonthuys (note 10 above) at 135.

[121] Deliberation on the Summit organised by the Law Society of South Africa on briefing patterns in the legal profession in South Africa (Kempton Park, 31 March 2016). See also Bonthuys (note 10 above) at 136.

[122] *President of the Republic of South Africa v Hugo* [1997] ZACC 4, 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 110.

care. This assertion is supported by another dissenting judgment of Mokgoro and O'Regan JJ in *Volks NO v Robinson & Others*,[123] where she held that the Constitution prohibits discrimination based on marital grounds and that it also requires those who did not marry in terms of 'civilly recognised marriages' not to be subjected to unfair discrimination.[124] In addition, she highlighted that certain rules governing marriage 'were discriminatory against women, not expressly, but in effect'.[125] It is in this regard that we align ourselves with the following views of Mokgoro and O'Regan JJ:

> [T]hese rules often failed to acknowledge the division of labour within the household, in terms of which women bore primary and often sole responsibility for the maintenance of the household and caring for children and elderly members of the family. The responsibilities so often borne by women across all South African communities, whether wealthy or poor, and regardless of colour, meant that women were less likely to be able to participate in the labour market as successfully as men. … The effect of the unequal division of labour in the household, and discriminatory practices in the labour market, meant that … [women] were also less able to compete in the labour market.[126]

The above observations reflects the existing prejudices against women which exist in various settings including the workplace. We submit that the failure to acknowledge these factors is a root cause of women's disadvantage in our society.[127] The legal profession should in no way promote these gender stereotypes but ought to create a conducive environment in which both men and women will be in a position to fulfil their parental responsibilities.

The stereotypes that prejudice women are found in many settings. For example, in another dissenting judgment of O'Regan and Sachs JJ in *S v Jordan & Others (Sex Workers Education and Advocacy Task Team and & Amici Curiae)*, she recognised that the expectations which demand women to culturally conduct themselves in a particular way reinforced gender stereotypes.[128] As Justices O'Regan and Sachs observed:

> [T]he stigma is prejudicial to women, and runs along the fault lines of archetypal presuppositions about male and female behaviour, thereby fostering gender inequality. [As a result] the harmful social prejudices against women are reflected and reinforced.[129]

O'Regan and Sachs JJ held (in dissent) that the criminal law which punished female prostitutes but excluded those who buy (men) constituted indirect discrimination against women. We submit that gender equality can only be achieved in a society in which the potential of both men and women is allowed to flourish, their parental responsibilities are both catered for in the work place, their unique features are accommodated, and that existing social and cultural activities

[123] *Volks NO v Robinson & Others* [2005] ZACC 2, 2005 (5) BCLR 446 (CC) at para 109.
[124] Ibid at para 106.
[125] Ibid at para 109.
[126] Ibid.
[127] Ibid at para 110.
[128] *S v Jordan & Others (Sex Workers Education and Advocacy Task Team & Others Amici Curiae)* [2002] ZACC 22, 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC) at para 65.
[129] Ibid.

that prejudice women are eliminated. As was correctly observed by O'Regan and Sachs JJ in *S v Jordan*, 'the vision of equality that is contained in our Constitution shall be properly advanced in a society where child upbringing responsibilities are equally shared across all parents'.[130]

Another factor that suppresses women's talents is gender stereotyping in the legal profession. Empirical research reflects that women are required to work twice as hard as their male counterparts in order to prove that they are also capable of doing good work.[131] As a result of this, briefing patterns favour men at the expense of women.[132] A recent *Draft Report on Research Findings on the Distribution of Legal Work in the Legal Profession in South Africa* concluded that women receive less work compared to their male counterparts.[133] The consequence of this is that those who run their own law firms struggle to make an income and eventually join the private sector where they will receive a guaranteed monthly income. Those who are at the Bar struggle to pay their practice fees and eventually leave the bar for opportunities in the private sector. Additionally, lucrative commercial work such as corporate and banking work is not given to women, thus denying them the necessary exposure and skill that will make them suitable for appointment as judges.[134]

The legal sector meetings on gender transformation of the judiciary between 2013 and 2015 held by the Democratic Governance and Rights Unit together with Sonke Gender Justice also revealed that there is a lack of mentoring for women. The Legal Sector Meetings revealed:

> Women exit the profession more frequently than men at every level, specifically in the attorneys and advocates profession. This is partially linked to a lack of mentorship for women at the Bar and in law firms. It was reported that time and learning opportunities are focused more on male junior advocates and attorneys to the detriment of women. Ultimately, the more women that exit the profession, the smaller the pool of women candidates to appoint to the bench.[135]

Indeed, when women get frustrated in the profession and no one is listening to their concerns, they will go where the working environment is more accommodating. Another barrier is that women are discriminated against based on their sex when they fall pregnant. In the words of Advocate Samantha Martin, 'pregnancy is viewed as a form of incapability'.[136] She alluded to comments from attorneys who indicated that they were not briefing certain female advocates because they were pregnant.[137] Pregnancy and lack of maternity leave is a major impediment for attracting suitable women to the Bench. Advocate Jansen once explained:

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[130] *Hugo* (note 122 above) at para 113.

[131] CALS *Report on Transformation* (note 119 above) at 33.

[132] Ibid at 33–34.

[133] The Draft Report is available at http://www.lssa.org.za/upload/Draft%20Briefing%20Patterns%20Report.pdf; T Norman 'The Plight of Women' (2004) 17(2) *The Advocate* 24.

[134] The legal sector meetings on gender transformation of the judiciary between 2013 and 2015 held by the Democratic Governance and Rights Unit together with Sonke Gender Justice (on file with authors).

[135] A copy of the Report is on file with the authors.

[136] Presentation by S Martins at LSSA Conference (note 121 above).

[137] Ibid.

> I became pregnant in 1986 with my first child and I actually had to go to court 9 months and 6 days pregnant and do a court case. I carried heavy suitcases to the Johannesburg Court, did the trial, went into labour that evening, gave birth to my daughter that Saturday morning and I was back at chambers on the Thursday. So, I actually had four or five days off, that's it…. I then suffered three miscarriages, because I could never take time off, because if I did take time off, attorneys would stop briefing me.[138]

This further illustrates that the legal profession does not cater for the needs of women and disregards the fact that they fall pregnant, and have to take some time off in order to raise the child. It is simply a matter of being in or out – or 'take it or leave it'. Being absent for too long from practise results in financial difficulties and losing clients and/or briefs. Budlender notes that absence from the Bar based on maternity reasons not only interrupts one's process of building a practice but that the 'member also suffers significant other disadvantages, such as having to pay rent for chambers and Bar dues during the period of absence'.[139] Further, 'if she takes leave of absence, she loses domestic seniority'.[140] Recently, the Cape Bar adopted a Policy on Maternity that would entitle a member to take maternity leave for a period of one year without loss to her domestic seniority, remission from Bar dues and chamber rentals.[141] This move is laudable and it is submitted that it should be adopted by all other Societies of Advocates, and by the attorneys' profession.

The distribution of work at social events is also a major concern as it contributes to patronage and exclusion. Investigations support concerns that legal work is distributed among those who socialise together on the golf courses and other extramural activities.[142] A study has found that certain advocates who participated in a survey 'observed that the experience of being at the Bar is significantly different for Black male and women advocates because they feel like a cultural minority'.[143] This means that in a social context where people think, express themselves and socialise in certain ways that may be related to their race and gender, the work will also flow according to these social networks. For example, advocates, attorneys, and corporate lawyers now commonly joke that 'one cannot succeed if one does not go skiing with the right people'.[144] One respondent to the survey expressed the view that it was better to play golf or go skiing instead of opposing the system.[145]

In one respect, the winds of change are blowing in the right direction because male employees in a civil union are now allowed to take maternity leave. In *MIA*

[138] JSC Interview with Mabel Jansen, available at http://www.news24.com/SouthAfrica/News/full-text-jsc-interview-with-mabel-jansen-20160511.

[139] G Budlender 'Cape Bar Adopts New Maternity Policy' (2009) 20(3) *The Advocate* 10, available at: http://www.sabar.co.za/law-journals/2009/december/2009-december-vol022-no3-pp10-11.pdf; See also Norman (note 133 above); and K Hofmeyr 'Maternity Matters: could 9 months end your Practice' (2015) 28(1) *The Advocate* 34.

[140] Budlender (note 139 above).

[141] Ibid.

[142] CALS *Report on Transformation* (note 119 above) at 33.

[143] Ibid.

[144] Ibid at 38.

[145] Ibid.

v State Information Technology Agency (Pty) Ltd, the court found the employer's refusal to grant maternity leave to a male employee involved in a civil union amounted to unfair discrimination, and that there was no reason why the employee concerned should not be entitled to 'maternity leave' for the same duration as that enjoyed by women who have given birth.[146] This case is significant and very progressive in its recognition that family or parental care responsibilities should be shared between the parents of the child, and in its recognition that it is in the best interests of the child to receive family or parental care from both parents. This case also paves the way for a constitutional challenge to the provisions of the Basic Conditions of Employment Act 75 of 1997 dealing with maternity on the grounds that they unfairly discriminate against partners in a civil union, and against heterosexual male employees by failing to afford them the same parental leave rights as women who have given birth. The enjoyment of the same parental leave rights by all parents would go a long way in allowing parents to share family or parental care responsibilities and enabling women at the Bar and in the attorneys' profession, and in academia to pursue their careers.

Another impediment to legal practice are the challenges at the entry level. Socio-economic conditions prevent many women and men from entering the profession due to a meagre pay for candidate attorneys in most law firms. The position is worse when it comes to pupillage as there is limited funding to support one throughout the year of pupillage. The introduction of Discretionary Grants from the Safety and Security Sector Education (SASSETA Funding) for 2017/2018 financial year for placement of candidate attorneys and pupils is commendable and highly welcomed.[147] It is hoped that it will open many doors for those who wish to practice including women.

The other laudable efforts to attract talent to the Bar are the recent introduction of the annual Arthur Chaskalson Pupillage Fellowship by the Legal Resources Centre in partnership with the Johannesburg Bar and the Cape Bar in 2016 aimed at Black, and particularly Black female, aspirant advocates. Following the completion of pupillage, the pupils may be invited to serve as junior counsel in the Legal Resource Centre's Constitutional Litigation Unit in Johannesburg or Cape Town, subject to the availability of funds, and thereafter return to the Bar.[148] We are also informed that other organisations, such as the Socio-economic Rights Institute, South African Human Rights Commission and Lawyers for Human Rights are developing similar programs aimed at bridging the pupillage gap which are aimed at financially supporting their employees who choose to pursue a career at the Bar.

[146] *MIA v State Information Technology Agency (Pty) Ltd* [2015] ZALCD 20, 2015 (6) SA 250 (LC), [2015] 7 BLLR 694 (LC) at paras 17–19 and 23.

[147] See advert for Discretionary Grants 1st Funding Window 2017/18 Financial Year, available at: http://www.sasseta.org.za/content/tinymce/plugins/openfile/uploads/Discretionary_Grants_2017_18/Discretionary_Grants_Projects.pdf.

[148] D Chambers 'Lawyers Ready to Foot R100,000 Bar Bill in Transformation Drive' *Times Live* (1 September 2016), available at http://www.timeslive.co.za/local/2016/09/01/Lawyers-ready-to-foot-R100%E2%80%9A000-Bar-bill-in-transformation-drive?platform=hootsuite.

The Johannesburg Society of Advocates has also passed a laudable resolution on 29 October 2015 aimed at influencing and changing briefing patterns.[149] In terms of this resolution, each group leader is required to compile a transformation report, detailing that group's progress and achievements on transformation. The transformation report requires that the group report on the number of briefs in which each senior member involved Black juniors as an important part of the legal team and on both a fee-charging and pro bono basis for the period under review. The Report must also contain information in relation to the court and type of matters the Black juniors were involved in.

The failure to submit the transformation Report by 30 September of each year constitutes unprofessional conduct. Likewise, the failure by each senior member of a group to submit the information required in terms of Rule 6 to the group leader constitutes unprofessional conduct. The resolution also makes it unprofessional conduct for any lead counsel to accept or remain in a brief where there are three or more counsel (including lead counsel) for the same client or set of clients in the same matter, where no member of the team of counsel is a Black person. Also, lead counsel is required to take positive steps to ensure that Black women are identified and given preference. This will require a monitoring system that will ensure that such people are also exposed to lucrative and interesting legal work.

The other factor affecting the appointment of female judges is the lack of transparency and/or clear procedure about how one becomes an acting judge. Leanne Jansen has correctly pointed out that 'anyone who had not spent time as an acting judge was unlikely to be considered a suitable candidate by the Judicial Service Commission, but few women were afforded this opportunity'.[150] Indeed, once there is an open procedure that is known to everyone, many more women would likely avail themselves for positions on the Bench. One current trend is clear in that 'anybody who has not spent time as an acting judge is [more] unlikely to be found appointable by the JSC'. This process is controlled by judges president of various divisions of high courts who are not accountable to anyone regarding the acting positions.[151] This is a problem if a judge president does not appoint female acting judges. Further, there is no transparency in this process and it may be viewed as unfair because of the absence of any oversight mechanism. It may also be unfair because 'we often trust those who are part of our social networks' and judges president are thus more likely to give preference to those in their circles, prejudicing others in the process.[152]

It must be mentioned that some divisions, such as the Gauteng Division, advertise by way of a circular and interested candidates avail themselves for acting positions on the Bench.[153] The circular still does not address the problem of

[149] The resolution is available at https://johannesburgbar.co.za/wp-content/uploads/ADOPTED-RESOLUTION-AT-THE-AGM-29-OCTOBER-2015.pdf.

[150] L Jansen 'Acting Judge Criteria Needed' *Independent Online* (12 August 2013), available at: http://www.iol.co.za/news/crime-courts/acting-judge-criteria-needed-1560743.

[151] Ibid.

[152] T Masengu & A Tilley 'Is the Appointment of Acting Judges Transparent?' (2015) 24 *De Rebus* 2.

[153] Ibid.

excluding others. Those who practice in small towns, for example, are likely not to see a circular that is only available in one court situated in Gauteng. There is therefore a need for a holistic approach that will try as far as possible to accommodate everyone and be widely circulated to reach the majority of those who have a keen interest to become judges.

The other challenge in taking up an acting position on the bench is that one must be highly successful, either as an attorney or as an advocate, to be able to take time off work or from practice for a few months. This presents significant challenges for women because of the impediments we have already pointed out above. If one does not receive quality work, if they are unable to recover their fees either because the client or attorneys delay paying them or because of the 60/90 days rule at the bar,[154] or if they are adversely affected by the lack of maternity leave, they are unlikely to be noticed by the Judges Presidents. Currently, one must be 'seen' by the Judges Presidents to be eligible for an acting position, amongst other mysterious requirements.

Women academics largely face similar impediments as those experienced by practising lawyers, such as paltry pay, lack of training opportunities, and a lack of opportunities for advancement. They are also in danger of missing out on opportunities because of the limited acting exposure. For example, one academic applicant for judicial appointment, Prof K Govender, missed out apparently because it emerged during his JSC interview that he had penned a judgment in a criminal matter of approximately 200 pages.[155] The commissioners referred to the huge workload in high courts and the need to dispense judgements without delay. It became clear that many did not consider him to be a suitable candidate for the position. Being an academic should not be seen as a disadvantage. Instead, suitably qualified and experienced women academics should also be invited to acting positions as it is 'clear that some candidates follow very diverse career paths and one would hope that this would not count against them'.[156] Despite the flaws in the process, it must be noted that some female academics have received acting appointments, such as Prof N Ntlama, who has recently acted as a judge in the Bhisho High Court.[157]

Another challenge for academics is that there is usually no allowance made for one to take time off work to serve as an acting judge. One is required to take unpaid leave. Academics therefore cannot afford to stay away from work for a

[154] In Cape Town, the peremptory waiting period before counsel's invoice is due for payment is 60 days, and the period is 90 days in Johannesburg. These waiting periods have no factual or legal basis, especially since in commerce, invoices are normally due and payable in 30 days, after which interest accrues. The private sector is known to pay invoices of small and medium enterprises earlier than 30 days as part of the Broad-Based Black Economic Empowerment enterprise development, and in turn are able to claim BBBEE points. Many early-career junior counsel have suffered as a result of these senseless waiting periods, with many leaving the Bar for the private sector, while others have been sequestrated.

[155] N Tolsi 'Old Boys' Club Poses Problems for JSC' *Mail & Guardian* (30 October 2015), available at https://mg.co.za/article/2015-10-30-00-old-boys-club-poses-problems-for-jsc.

[156] Ibid.

[157] T Jumo 'Law Academic Completes Inaugural Acting High Court Judge Tenure' (15 February 2017), available at: http://law.ukzn.ac.za/news/17-02-09/Law_Academic_Completes_Inaugural_Acting_High_Court_Judge_Tenure.aspx.

long period. As a result, they are disadvantaged as their practical exposure is more likely to be limited.

V Conclusion

There has been slow progress to elevate more women justices to the Constitutional Court. The approach to appointment of judges by the JSC remains unclear, especially when it comes to factors such as 'appropriately qualified' and 'fit and proper'. This is despite the fact that the Constitution places an obligation on the JSC to consider 'the need for the judiciary to reflect broadly the racial and gender composition of South Africa'. In our view, the JSC has failed to inject life into this provision as there are only three female justices at the Court after 23 years into constitutional democracy.

The slow progress is caused in part by impediments in the legal profession, such as failing to accommodate women's (and men's) parental and family responsibilities. Because of the pressure and demands of the legal profession, they opt for other jobs in the private sector where they will find greater accommodation and flexibility. This leaves the legal profession with fewer women who could be regarded as suitably qualified in order to be considered and appointed to the Court. Unless the challenges facing women in the legal profession are appropriately and proactively addressed, women will continue to leave the profession, reducing the pool of potential justices for appointment to the Court. In our view, however, it is not enough to suggest that there are few suitably qualified women to choose from. Instead, the questions should be: where are the suitably qualified women? Why are they leaving the legal profession? And how can the legal profession ensure that these women stay in the legal profession and avail themselves for judicial service. Furthermore, the role of social networking, through working social events such as golf and cricket, should be accounted for and addressed.

There is an urgent need to radically restructure the economy so that the majority of the population is empowered. This would be expected to have positive cascading effects that may lead to an improvement in the distribution of work to women in the legal progression. In turn, and with time, the pool from which suitably qualified women for appointment to the Constitutional Court should widen. In addition, government in all its manifestations and as the largest consumer of legal services needs to urgently do more to empower women in the legal profession.

The JSC needs to prioritise appointing more women judges to the lower courts to increase the pool for appointment to the Court. It is also worrying that – since the appointment of Justices Mokgoro and O'Regan from academia to the original bench in 1994 – little or no consideration has been given to appointing legal academics to the bench. Some outstanding women lawyers who have practised briefly are in academia and should also be considered for appointment to the Court. Training measures should be put in place for aspirant female judges within the legal profession including academia. The JSC and those who are tasked with approving its recommendations should play a more active role in order to ensure that the judiciary is representative of the South African population. In addition, the criteria for appointment of acting judges should be transparent and uniform across all divisions. The criteria should also accommodate academics by exploring

innovative measures such as securing funding that will enable them to act for longer period without being on unpaid leave for too long.

There should also be increased funding for pupil advocates and candidate attorneys in order to attract a bigger pool of suitable candidates entering the profession, who in time will be eligible for judicial appointment. This, too, requires increased funding to support black and female graduates to enter practice. Finally, there must be provision for men and women to take financially supported parental leave both in the advocates' and attorneys' profession without any adverse consequences such as having to pay for Bar dues.

Taking stock of progress after 23 years, much still needs to be done to achieve gender parity in the judiciary and especially on the Court. All the relevant stakeholders – including government, the JSC, the legal profession, and senior judges – have important roles to play if the next quarter-century is to see the necessary change.