GENDER EQUALITY IN EMPLOYMENT IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC) REGION

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ABSTRACT

The primary objective of this dissertation is to explore the ways in which gender discrimination in employment is being combated in the Southern African Development Community (SADC) region. My original intention was to simply examine what measures were being taken in the SADC to attain gender equality at work, and analyse these in light of the various models of equality and feminist theories relevant to the labour market. However, after my initial research it became clear that this approach was unlikely to yield the expected dividends. This was so for a variety of reasons. First, the varying levels of development in the region preclude the divulgence of any hard and fast rules regarding the position of women in 'the labour market'. Second, the 'labour market' is by no means a homogenous entity in Southern Africa, making generalisations more dangerous than ever. Third, it is difficult to accurately gauge the real impact of measures being taken at the regional level on practices and policies in member states. It appears that, even where policy and legislative changes have been made, there is little or no evidence to show that the position of women in the workplace has actually improved. Most importantly, however, was the nature of equality and feminist theories themselves, which has led to the formation of the overwhelming recurring hypothesis underlying this dissertation, namely that equality is as much about the limits of the law as its potential.

It was thus necessary to move away from my initial approach, which was predicated on a rather formal conception of the juridical, rights-based notion of equality, towards a much more contextual approach to the subject matter. This approach is borne of the understanding that equality for women in the Southern African labour market will not be attained in universities or parliaments alone. Rather, it is in the application of principles arising out of equality discourse to a specific context that any model purporting to attain gender equality in the workplace must ultimately stand or fall. Further, although increasing and widespread disillusionment with the 'failed notion of gender equality' has led to calls from some quarters for an end to the juridical, or rights-based, model of equality itself, I have resisted this conclusion for two reasons; namely, the lack of viable alternatives to the substantive model of equality offered by critics; and secondly, the fact that the 'hollow' nature of equality, in the sense that it

has no intrinsic meaning in isolation of the context to which it is applied, renders it unsusceptible to attack. A corollary of this reasoning is, of course, that those who would hide behind the rights-based model can be properly called to account and will not be permitted to merely pay lip-service to rights-talk without supporting such propositions with meaningful evidence of clear and tangible impact in key targeted areas of intervention.

Following the brief introduction in **chapter one**, **chapter two** proceeds to examine some of the relevant theoretical aspects of contemporary equality theory, including many of the issues alluded to above. Ultimately, while mindful of the various criticisms that have been levelled at the juridical notion of equality in recent years, I have argued for a substantive model of equality, insofar as it is capable of taking account of the context in which it is to be applied. It is asserted that, while criticisms have quite correctly exposed the ways in which equality discourse has actually masked entrenched patterns of gender discrimination in the labour market, none have yet successfully attacked the root of substantive equality, which calls for nothing more, or less, than the imperative to 'be equal'.

Having decided to rally behind the substantive model of equality, in **chapter three** I set about exploring, in general terms, the environmental or contextual factors informing our modern-day understanding of gender equality in employment. In light of the conceptual findings in chapter two, this contextual enquiry is exposed as the real heart of the debate, which is dissected and examined accordingly. Starting with the universal picture as set out in the Beijing Declaration and Platform for Action 1996, chapter three looks at crucial issues informing and constituting the environment in which any conception of gender equality must take root. In particular, the impact of globalisation on women workers, the gendered aspect of statist theories and the trend towards the 'feminisation' of poverty are explored. It is here that the desirability of regional harmonisation of labour standards becomes evident, as does the need for proactive state intervention aimed at addressing persisting cycles of entrenched gender discrimination and disadvantage. Finally, the role of international institutions such as the International Labour Organisation (ILO), and the opportunities for women's empowerment in the workplace presented by collective bargaining, are highlighted.

The focus then turns to the application of these contextual considerations within the SADC region itself. **Chapter four** explores the nature and extent of gender inequality in the labour markets of Southern Africa and looks at economic factors entrenching the feminisation of poverty throughout the region. In order to understand the range of the types of issues that are likely to be encountered in Southern Africa, country profiles are conducted on Lesotho and South Africa, which offer contrasting examples of almost polar proportions as regards economic development in the region. From the country profiles it is clear that a significant amount of intervention on the part of the state is required in order to combat the patriarchal heritage of customary and colonial law still operative throughout the region. Even where steps have been taken to ensure the eradication of sexist policies and laws, there is little evidence of direct positive impact on the lives of Southern African women.

Chapter five critically examines developments underway at the regional level in the SADC, and the SADC Employment and Labour Sector (ELS) in particular. Among other initiatives, the ELS has recently adopted a Gender Policy which sets out its plans for attaining gender equality in the workplace. Although measures such as the Gender Policy taken at the regional level are undoubtedly necessary and positive developments, much remains to be done by way of follow-up and implementation in member states. This chapter analyses these developments in light of the theoretical and contextual issues raised in foregoing chapters. In particular, from this regional perspective, the need for harmonisation of labour standards pertaining to gender equality, and an holistic approach to address the feminisation of poverty, including appropriate social protection measures, are argued for. **Chapter six** sets out a brief summary of the central arguments put forward in this dissertation, and provides some suggestions by way of outlook for gender equality in SADC labour markets.

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ABBREVIATIONS

ACL	African Customary Law
BCEA	Basic Conditions of Employment Act 75 of 1997 (South Africa)
BFOQ	Bona fide occupational qualification (United States)
CEDAW	International Convention on the Elimination of All Forms of Discrimination Against Women 1979
ECJ	European Court of Justice
EEA	Employment Equity Act 55 of 1998 (South Africa)
EEC	European Economic Community
ELS	Employment and Labour Sector
FDI	Foreign direct investment
ILJ	Industrial Law Journal
ILO	International Labour Organisation
IMF	International Monetary Foundation
LRA	Labour Relations Act 66 of 1995 (South Africa)
NGO	Non-governmental organisation
OHS	Occupational health and safety
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (South Africa)
PFA	Platform for Action (arising from Beijing Conference 1995)
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SALB	South African Labour Bulletin
SAP	Structural adjustment programme
SME	Small and medium enterprises
WBI	Women's Budgetary Initiative (South Africa)

CHAPTER I: INTRODUCTION

> "You can legislate equality all you want, but you cannot make people think it and live it, particularly if they have been conditioned through inherited tradition and their own life experience to the concept of inequality."
>
> - ***Justice Bertha Wilson***

Gender inequality in the labour market is rife throughout Southern Africa. Linked to this is the dire predicament of women living in conditions of abject poverty throughout the region. In recognition of these facts, attempts are currently underway at national and regional levels to redress the situation. However, in the absence of a clear articulation of the underlying understanding of equality and application of policy in the region, the success of such attempts is likely to be limited. Within the context of widespread disillusionment with the traditional models of equality, it is imperative that regional policies convey a clear message as to what notion of equality is appropriate in the Southern African context and how best to go about achieving it.

In discussing the meaning of gender equality in the labour market of the Southern African Development Community (SADC), this dissertation will look beyond the traditional notions of social contract, power and equality. Several prominent feminist theories will be relied upon in giving content to the notion of equality, as well as the limitations of the concept in its ability to bring about a more just and equal society. There is a need to recognise that formal, traditional equality is based on mistaken assumptions about truth and difference/sameness, and to go beyond a conception of equality in which power is apparently handed out on an equal basis between parties. Rather, one should look to the substance of the treatment and outcomes for the people concerned. Understanding equality requires that we explore how unequal power relations are being fashioned and perpetuated in society, and to engage in a process of transformation which takes the contextual reality of the status quo into account.

Exploring the meaning of equality is as much about the potential of the law as its limitations. While filter-down effects from the highest levels are necessary, these are

far from sufficient steps to removing impediments to the achievement of substantive equality and justice. The status quo is not composed of absolutes or incontrovertible truths or essentials. Any conception of equality based on this mistaken assumption is doomed to failure. Rather, in naming inequality and injustice where they exist, along with taking correlative remedial and preventative measures, we can move towards a more equal and just society. This entails that, instead of viewing equality as a pre-existing quantity that can simply be apportioned by the state to its citizens, the power relation itself is identified and challenged as part of an ongoing process of reform. The recognition of inequality and power imbalances as and where they exist is the first step towards a more egalitarian ebb and flow of power in societal relations.

The labour market is characterised by such untested build-ups and bottlenecks of power. Despite stated policies to the contrary and the move towards apparently neutral labour policies, laws and practices, gender discrimination and inequality continue to persist. The only way to remedy this situation is by a thorough, systematic analysis of the status quo, pointing out where untested norms and stereotypes are entrenched and operate to foster male advantage. The more these 'absolutes/essentials' are tested and exposed, the closer we may come to a freeing up of power relations in the labour market and society at large. This exercise requires a pro-active approach at both regional and national levels, based on a clear articulation of policy and a holistic view of application and enforcement mechanisms. Particularly within the SADC region, it is submitted that the balancing of power relations and the move towards a potentially 'more equal' state of affairs cannot be left to market forces alone. A pro-active approach predicated on sound policy direction and initiative is clearly called for in this region typified by past and continuing discrimination and profound gender inequality.

Contemporary rights theories in Southern Africa are inherited from Western social contract theory and informed by Western notions of equality and power. It is thus essential to engage in the types of extensive questioning exercises that we see in the industrialised West, through which seemingly incontrovertible truths are challenged and reformed. Given the history of colonialism and patriarchy in the region, it becomes even more important to break down what has been presented as truth but which really masks the reality of continuing oppression of, and systematic

discrimination against, women. Some recent developments in this area will be explored. It is perhaps even more important in a Southern African context to undertake the kinds of deconstruction and reconstruction exercises, now well underway in the industrialised world, that will bring us closer to a workable conception of what exactly is meant when we speak of gender equality.

The SADC Gender Programme has been moving towards gender equality through inter alia mainstreaming gender in all sectors and setting targets for gender representation in national decision-making structures. The SADC-ELS has recently adopted its Gender Policy, which calls for a prohibition on labour market and extra-market discrimination and calls for a pro-active approach from Member States to addressing the problem. This is undoubtedly a step in the right direction. However, this initial movement needs to be followed through with a clear articulation of the concept of equality underlying these initiatives, and fleshed out as it applies in specific areas. Given the conceptual and practical differences associated with gender equality, the ELS needs to elaborate on, engage and debate exactly what is meant by gender equality and how best to achieve it. In the absence of a clear understanding of the nature of equality and where its limitations lie, the ideal of gender equality will remain a distant dream.

As a contribution to the ongoing process of exposing and addressing unequal build-ups of power in society which impact upon women in the labour market, this paper will begin by exploring the meaning of the principle of equality in light of contemporary theories and critiques. Serious challenges have recently been posed to the juridical notion of equality, as well as the social contract theories upon which it is based. Can any conception of equality survive this 'deconstruction' or unbundling process? If so, what form would such a model take? A substantive approach to equality predicated on a contextual understanding of the issue will be advocated. This conception must be equipped to combat both direct and indirect discrimination, and must be able to accommodate women's 'difference' (from the male standard) by deviating from the symmetrical notion of equality where necessary. Critical to this discussion is a consideration of the modes of enforcement of equality rights in operation today. This paper will examine some of the shortcomings of the rights-based model and explore some of the available alternatives in this regard.

Moving from this theoretical examination, the discussion will shift towards the kinds of contextual issues that must be taken into account in delivering the promise of substantive equality. This part of the discussion is based on the recognition that the principle of equality per se is without content. It is in the application of the principle alone that 'equality' acquires meaning, and it is here, within the power dynamics at work in society, that the substantive model must stand or fall. It is only through an understanding of the socio-economic, moral and ideological terrain in which any conception of equality must take root that we can begin to devise appropriate strategies and interventions for addressing gender equality in employment. The inescapable conclusion is that, whatever strategies to attain equality are adopted, they will inevitably be 'coloured' by, by which is meant take their character or substance from, the environment of power relations in which they are to be implemented. Constituents of this environment currently include issues such as the effects of globalisation on women workers, the 'feminisation' of poverty, the link between women and the state, and the role of international organisations and instruments.

These theoretical and contextual considerations will then form the basis of an examination and critique of developments in the SADC region with regard to gender equality in employment. A brief situational analysis of the labour market in Southern Africa will be conducted, augmented by two country profiles (Lesotho and South Africa) on gender developments in employment. The focus will then shift to a critical discussion of steps being taken at the regional level to combat gender inequality in employment. The aim of this section is to examine the extent to which initiatives underway within the region are likely to have the desired effect, in light of the conceptual and contextual issues discussed earlier. Finally, it will be argued that, while there are many positive developments currently being implemented or planned, much work remains to be done with regard to formulating a clear conception of gender equality for the region and strategies designed for achieving the stated goals.

CHAPTER II: DECONSTRUCTING EQUALITY

2.1. Introduction

Contemporary equality jurisprudence is typified by an increasing sense of scepticism and disillusionment with the 'failed notion' of equality, as applied to various fields.[1] It has been pointed out that the principle of equality itself contains 'no substantive moral content of its own.'[2] The proposition that likes should be treated alike takes delivery of equal treatment no further without clarifying what exactly is contemplated by key concepts such as comparability, sameness and difference. In this sense, the notion of equality is colourless – it must be tied to an external set of principles or values before it can take on any relevant meaning.[3] It is external factors such as policy, legislation, enforcement and administration that give content and scope to the principle of equality. The proposition that equality is an inherently hollow principle underlies and informs the following discussion.

In traditional Western democratic states, the principle of equality may be said to rest on the notion that no human being is inherently of greater worth than any other.[4] It is this idea of equivalent inherent worth that leads to the abhorrence in society of certain specified forms of discrimination between persons. Equality is inextricably linked to the principles enshrined in democratic order such as human dignity, liberty, privacy and life. Without equality, there can be no talk of freedom or justice – it is nonsensical to claim that there is freedom between those who are unequal. How seriously a society takes the principle of equality can be said to be the yardstick by which we measure the success of a democracy. Conversely, the extent to which a state 'may

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[1] See for example Cornell D *At the Heart of Freedom: Feminism, Sex and Equality* and Hepple B 'Have Twenty-five Years of the Race Relations Acts in Britain Been a Failure?' *Discrimination: The Limits of the Law* (B. Hepple and E. M. Szyszczak, eds.) 19-34.

[2] Ben-Israel R 'Equality and Prohibition of Discrimination in Employment' *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* Volume 1 (Blainpain R et al eds.) 87, where Westen P 'The Empty Idea of Equality' 95 *Harvard Law Review* (1982) 537 is cited.

[3] Ben-Israel R 'Equality and Prohibition of Discrimination in Employment' *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* Volume 1 (Blainpain R et al eds.) 88

[4] Tribe L *American Constitutional Law* 1515-6, quoted in Chaskalson M et al "Equality" *Constitutional Law of South Africa* 14-5

legitimately intervene in the lives of its citizens to limit social inequality is the crucible of modern democratic politics'.[5]

The traditional, Western notion of democracy is broadly based on social contract theory, the tenets of which dictate that equality before the law is incubated in the neutral, culturally-sterile environment of the 'original position' or 'veil of ignorance'. On this view, the principle of egalitarian treatment between citizens arises out of a hypothetical world devoid of existing inequalities and political impurities. In such a world, perhaps, mere equal treatment between citizens would perpetuate and enrich the pre-existing equality inherent in society. However, it is an unfortunate fact that there is not, and has never been, any such equal State. This awareness makes it necessary to question the extent to which social contract theories are polluted by virtue of being based on some idyllic, pre-genesis state of human society. This questioning process will inevitably bring the ways in which the notion of equality has been interpreted in Western liberal democracies under the spotlight.

It is not possible to establish the meaning of equality without understanding the nature of power relations in society.[6] The traditional conception of power is representational in the sense that it casts people or groups of people in a particular relation to each other. This view of power, like equality, is based on social contract theory, which posits that the exercise of power by a sovereign over her or his subjects is legitimised by the contractual dynamic in which subjects have surrendered some of their natural rights in exchange for peace and prosperity. The consequences for a theory of equality would be that, where inequality exists, it could be rectified by action taken by the sovereign. Justice can be meted out or evenly distributed like helpings of a pie. However, in reality, the operation of social contract theory has been characterised by a marked failure to 'distribute' power equally between citizens. The terminal shortcoming of these conceptions of power and equality is that they are based on a host of unsustainable fictions, including the idea of a citizen as a holder of natural

[5] Chaskalson M et al *Constitutional Law of South Africa* 14-2

[6] See the argument that social legislation is the outcome of processes of conflict between different social groups and competing ideologies: 'what any particular group of people get is not just a matter of what they choose to want but what they can force or persuade other groups to let them have.' Abrams P Historical Sociology (Shepton Mallet, Open Books, 1982) 15, quoted in Hepple B 'Have Twenty-five Years of the Race Relations Acts in Britain Been a Failure' Discrimination: The Limits of the Law (B Hepple and EM Szyszczak, eds.) 30.

rights; the idyllic nature of the conditions under which principles of justice can be elucidated; and the designation of law as the fundamental manifestation of power; leading to the contention that:

> In order to conduct a concrete analysis of power relations, one would have to abandon the juridical notion of sovereignty. That model presupposes the individual as a subject of natural rights or original powers; it aims to account for the ideal genesis of the state; and it makes law the fundamental manifestation of power.[7]

Thus, instead of seeing power as a constant, which may be distributed equally by the state as between its subjects, it is necessary rather to examine how the relations between people actually operate. Power does not exist or inhere in the hands of the state or a person to be dished out at will. Rather, it exists only in a relational context, between actors, in the continuum of exchange between them. Power has no independent or extra-relational existence. It is constitutive rather than descriptive of relations between people. Acknowledgement of the impotence of the state to deliver some form of 'pre-packaged' justice in equal proportions to its passive citizens is the first step towards a more realistic understanding of what equality means. This requires a thorough reworking of how we understand power relations in society:

> Accordingly, the analysis does not revolve around the general principle of the law or the myth of power, but concerns itself with the complex and multiple practices of 'governmentality' that presupposes, on the one hand, the rational forms, technical procedures, instrumentations through which to operate, and, on the other, strategic games that subject the power relations they are supposed to guarantee to instability and reversal.[8]

Foucault's contribution to our understanding of power is important for at least two reasons. First, in focusing on the power relation itself, as opposed to some fictitious, idyllic model of power distribution as between sovereign and subject, it draws attention to the inability of traditional theories of equality to deliver the promised

[7] Foucault M *Ethics: Subjectivity and Truth Volume I* 59

equal distribution of power between all citizens. If true equality is to be achieved, new and innovative modes of delivery will have to be explored. The starting point is giving content to the meaning of equality, a meaning which has erroneously been ignored or assumed in the past. Second, Foucault's conception of power calls the dominant underlying political philosophy, on which our current understanding of equality is based, into account. This inevitably has consequences for our understanding of what equality means, where its shortcomings are, and how best to achieve it. Among the questions this raises, is that of finding a replacement for the abandoned traditional juridical model. Contemporary feminist theories, discussed below, pick up the thread here, indicting widespread disillusionment with the traditional models of equality and expanding upon possibilities for reform.

2.2. Formal versus substantive equality

The famous Aristotlean[9] imperative, to treat likes alike and difference differently in proportion to the sameness/difference, named an apparent paradox that lies at the heart of the equality debate. People are not in fact equal in every respect. It is the uniqueness of every person that is our common tie, the vein that runs through the principle of equality in the modern political dispensation.[10] From this flows the recognition that to deny equal treatment between people who are not in fact equal may serve only to perpetuate inequality. In order to achieve the goal of equality, disparate treatment is sometimes called for.[11] People who are disadvantaged in relation to others may require unequal treatment in order to secure an equal outcome. The apparent paradox lies in the fact that unequal treatment may be required in order to secure equality, an exigency that does not easily sit with traditional views on the matter.

Herein lies the distinction between formal and substantive equality. A purely formal approach is predicated on the assumption that inequality in all its forms is aberrant and in conflict with the tenets of equality. On this view, inequality may be spirited

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[8] Foucault M *Ethics: Subjectivity and Truth Volume I* 203
[9] Aristotle *Ethica Nichomachea* Book V.3 at 1131a-b, quoted in Chaskalson A et al "Equality" *Constitutional Law of South Africa* 14-3
[10] Devenish G *A Commentary on the South African Bill of Rights* 35
[11] Chaskalson M et al "Equality" *Constitutional Law of South Africa* 14-3

away merely by treating all individuals in all circumstances in exactly the same way.[12] True to name, this represents a triumph of form or process over substance. A substantive approach, on the other hand, is concerned with equality of outcome rather than crude equal treatment alone. Substantive equality requires more than equality of form. Indeed, it may require inequality of form in order to achieve the all-important end: the form of treatment may have to give way to substance. This view, in taking the impact of past discriminatory practices into account, recognises that inequality needs to be redressed rather than simply removed.[13] It calls for a deeper, contextual[14] understanding of the positions of relevant parties in order to arrive at just and equal outcomes.

2.3. Direct and indirect discrimination

Modern legal systems recognise, and apply to varying degrees, the distinction between direct and indirect discrimination.[15] This flows from the recognition that discrimination may not be easily detected and may manifest in inconspicuous forms. Direct discrimination refers to circumstances in which a person is subject to prejudicial treatment merely by virtue of being associated with a particular class or category of person.[16] For example, a person may be denied employment on the basis of race, sex or some other characteristic.[17] Direct discrimination is usually, but not exclusively, associated with manifest intention on the part of the discriminator.[18] However, certain self-evident problems regarding proof of discrimination inevitably arise, unless the discriminator is careless or ignorant of the law. The prohibition of direct discrimination is linked to the notion of equal treatment, which dictates that

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[12] Chaskalson M et al "Equality" *Constitutional Law of South Africa* 14-4
[13] Chaskalson M et al "Equality" *Constitutional Law of South Africa* 15-5
[14] See *R v Turpin* [1989] 1 SCR 1296 at 1331-2, where the Canadian Supreme Court held that: 'it is only by examining the larger context that a court can determine whether differential treatment results in inequality, or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.' (quoted in Chaskalson M ea "Equality" *Constitutional Law of South Africa* 14-4)
[15] Chaskalson M et al "Equality" *Constitutional Law of South Africa* 14-22
[16] See Devenish G *A Commentary on the South African Bill of Rights* 46-9
[17] See *R v Birmingham City Council, Ex Parte Equal Opportunities Commission* [1989] AC 1155.
[18] See Chaskalson M et al "Equality" *Constitutional Law of South Africa* 14-22: 'Neither motive nor intention is relevant to the question of whether the detrimental treatment constitutes direct discrimination.'

certain people should not be treated less favourably than others on the basis of certain human characteristics or attributes.[19]

By contrast, indirect discrimination is a far more insidious, and thus dangerous, form of discrimination. Indirect discrimination occurs by means of actions or policies designed to achieve an apparently neutral objective, but which in fact operate to prejudice a disproportionate number of members of a certain category or class of persons.[20] This form of discrimination need not be intended by the discriminating party.[21] In the employment sense, indirect discrimination has been taken to refer to employment practices that are facially neutral, but which disproportionately affect members of disadvantaged groups and which cannot be adequately justified.[22] Examples include occupational height or weight[23] requirements which operate to exclude women from entering employment, or qualifications which are unrelated to the performance of a job but which may exclude persons from disadvantaged educational backgrounds.[24] The concept of indirect discrimination originated in the United States when the US Supreme Court held that Title VII of the Civil Rights Act 'prohibits not only overt discrimination but also practices that are fair in form, but discriminatory in operation.'[25] Protection against indirect discrimination was later adopted in jurisdictions such as the United Kingdom[26], Canada[27] and the European Community.[28] Indirect discrimination poses compelling questions concerning the proliferation of systematic and entrenched discrimination in society.

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[19] Ben-Israel R 'Equality and Prohibition of Discrimination in Employment' *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* Volume 1 (Blainpain R et al eds.) 90

[20] Chaskalson M ea "Equality" *Constitutional Law of South Africa* 14-23

[21] Chaskalson M ea "Equality" *Constitutional Law of South Africa* 14-23

[22] Dupper O 'Proving Indirect Discrimination in Employment: A South African View' 2000 (21) *ILJ* 747

[23] *Dothard v Rawlinson* 433 US 321 (1977)

[24] *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 88 ALR 621

[25] *Griggs v Duke Power Company* 401 US 424 (1971) at 431.

[26] Section 1 of the Sex Discrimination Act 1975 and section1 of the Race Relations Act 1976

[27] The Canadian Supreme Court has interpreted section 15(1) of the Charter to include a prohibition on indirect discrimination. See Chaskalson M et al "Equality" *Constitutional Law of South Africa* 14-22 Footnote 3.

[28] See for example Article 2(1) of the European Economic Community Council Directive 207 of 1976, cited in Chaskalson A ea "Equality" *Constitutional Law of South Africa* 14-22

2.4. Justification grounds

It has been observed that it is relatively easier for employers to justify indirect discrimination than direct discrimination.[29] In the United States, indirect discrimination can be justified on the basis of 'business necessity' or 'job-relatedness'[30], a test significantly less onerous than the 'bona fide occupational qualifications' (BFOQ) standard required in cases of direct discrimination.[31] The BFOQ is narrowly construed in the United States, restricted to those circumstances where a listed ground on discrimination 'is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.'[32] In *Dothard v Rawlinson*[33] the Supreme Court observed that the Equal Employment Opportunity Commission had consistently given the BFOQ defence a narrow interpretation, thereby concluding that:

> ... the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.[34]

The indirect discrimination standard of 'business necessity' requires the employer to show that the requirement in question is more than merely convenient or reasonable; rather, it must be 'reasonably necessary to the normal operation of the business.'[35] Thus, in *Diaz v Pan American World Airways*[36], the Court of Appeals for the Fifth Circuit Court held that 'discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively.'

The United Kingdom has opted for an exhaustive list of circumstances in which direct discrimination will be justifiable, under the banner of Genuine Occupational

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[29] Dupper O "Justifying Unfair Discrimination: The Development of a 'General Fairness Defence' in South African (Labour) Law" Acta Juridica 2001 (Forthcoming) [Hereafter Dupper]
[30] See *Griggs v Duke Power Co* 401 US 424 at 164, where the Supreme Court held in (the first) case of indirect discrimination that: 'The touchstone is business necessity. If a practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.'
[31] Dupper 13
[32] § 703(e) of Title VII, 42 USC § 2000e-2(e)
[33] 433 US 321
[34] 800.
[35] *Auto Workers v Johnson Controls* 499 US 187 (1991) at 201, cited in Dupper 14

Qualifications (GOQ).[37] This is in contrast to the more lenient standard of 'justifiability' applicable in cases of indirect discrimination.[38] The GOQ themselves pertain to 'physiology, privacy and decency, welfare and educational considerations, and authenticity.'[39] The GOQ exceptions have been narrowly construed.[40]

Certain Canadian jurisdictions followed this bifurcated approach to justification standards until the recent decision of the Canadian Supreme Court in *British Columbia (Public Service Employee Relations Commission) v BCGESU*,[41] where a new uniform standard was adopted. According to this approach, the employer must establish on a balance of probabilities:

1. that the employer adopted the standard for the purpose rationally connected to the performance of the job;
2. that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
3. that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose, i.e. that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.[42]

The basis for the bifurcated approach to justification grounds seems to be that certain types of discrimination are more acceptable than others, and that employers should be allowed a certain amount of leeway when it comes to discrimination of an indirect nature. This reasoning is unsound – discrimination is no less serious merely because it is indirect. In fact, the contrary is more likely to be the case, in light of the insidious and pervasive nature of indirect discrimination, and in view of the fact that a potential

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[36] 442 F2d 385 at 388
[37] Dupper 13
[38] See s1(1)(b)(ii) of the Sex Discrimination Act 1975 and s1(1)(b)(ii) of the Race Relations Act 1976, which require the employer to show that the requirement or condition complained of is 'justifiable irrespective of the [sex or race] of the person to whom it is applied.' [Dupper 13]
[39] Dupper 14
[40] Dupper 16
[41] [1999] 3 SCR 3, cited in Dupper 17
[42] Dupper 17

complainant already faces almost insurmountable hurdles in proof and evidence. For this reason the Canadian approach is to be preferred.

Within the SADC region, South Africa is a good example of a country that has adopted a uniform approach to defences against discrimination. For this reason, 'the precise classification of the dispute is relatively unimportant'[43] – the same justification grounds are available irrespective of the form of discrimination alleged. In South Africa, an employer may justify prima facie unfair (direct or indirect) discrimination on the basis of affirmative action or the 'inherent requirements of the job'.[44] In addition, however, it is now generally accepted that employers have a third option at their disposal, which has been called 'the general fairness defence'.[45] As the law prohibits only discrimination that is unfair, the employer may argue that, notwithstanding a prima facie case of unfair discrimination, the discrimination in question was in fact fair. This has lead to calls for a strict standard of scrutiny to be applied to this general fairness test in order not to undermine the efficacy of the other two justification grounds, or that of the system in general.[46] Given the sheer extent and entrenched nature of gender discrimination in the Southern African labour market, and in light of the problems inherent in proving discrimination and enforcing equality provisions, discussed below, it is vital that the region promotes a standard of scrutiny which allows employers to justify gender discrimination only in the narrowest of circumstances.

2.5. The limits of equality

To the extent that we speak of equality and justice we must challenge these notions as they perpetuate male norms and patriarchy. Equality is not a static concept, but rather develops as the needs and expectations of society change. As will be discussed below, the entire juridical model of equality has recently been brought into question, as far as its ability to deliver its stated promises is concerned. These considerations are

[43] Dupper 17
[44] See s187(2)(a) LRA and s6(2)(a)-(b) of the EEA
[45] Dupper 18
[46] Dupper 20. The Labour Courts are yet to thrash out a comprehensive approach to these issues. Initial indications in cases such as *Leonard Dingler Employee Representative Council v Leonard Dingler* (Pty) Ltd (1997) 11 BLLR 1438 (LC) suggest that the court will have to be wary in reliance on case law from comparative jurisdictions, where the bifurcated approach applies.

nowhere more evident than in the area of labour market equality between the sexes, including the problems posed by extra-market discrimination. In considering how these criticisms impact upon any chosen policy direction, it is important to consider whether any model of equality, including substantive equality, is resilient enough to withstand the challenge of contemporary feminist criticism.

2.5.1. The shortcomings of social contract theory

Modern liberal theories of justice are largely based on social contract theories, such as those of Rosseau, Hobbes, Locke and Rawles. According to these theories, modern conceptions or distributions of justice (between citizen and state) are best arrived at through hypothetical thought experiments in which all things are equal. It is only through the purity of these thought experiments, untainted by distorting socio-economic or political facts, that the conditions under which the 'original contract' between the state and the citizens can and would take place. These can be said to be the conditions under which a reasonable citizen living in the state of nature or behind the veil of ignorance would hand over some degree of liberty in exchange for protection and regulation by the state. It is upon this original contract that modern ideas of justice and equality are based. Thus the binding nature of the civil state is explained in a way that protects the image of the free citizen. This binding nature is justified in the name of freedom if, and only if, we cannot disagree with the proposition that we, as reasonable citizens, would not act in any way other then these hypothetical original contracting parties.

Carole Pateman[47] challenges this traditional conception of egalitarian society by making the compelling argument that the social contract tells only half the story, leaving out the essential, unspoken 'sexual contract' which underlies and co-exists within the broader, visible social contract. Pateman argues that the same contractual transaction that allowed the epistemological divorce from the feudal, hierarchical structures of medieval Europe, operated simultaneously to conceal and entrench the subjugation of the invisible, voiceless parties to the contract: women. Whereas men, who operated in the public, civil sphere, were seen as free to contract, women,

[47] Pateman C *The Sexual Contract* [Hereafter Pateman]

confined to the private/natural, pre-contractual realm, were not afforded such status. Thus, both in the private realm and in their more limited dealings in the civil world, women continue to be oppressed and subjugated through the invisible hierarchy at work in the 'free' civil world:

> To tell the story of the sexual contract is to show how sexual difference, what it is to be a 'man' or a 'woman', and the construction of sexual difference as political difference, is central to civil society.[48]

The social contract is seen as legitimately operational in the public, civil sphere alone. Social contract theorists maintain that it is not the role of the state to intervene into the private domain. Yet it is in the (hidden) private sphere where the subjugation of women begins, through the patriarchal rights preserved in the form of the marriage contract, conjugal relations and domestic work. When this is acknowledged, the seemingly universal nature of freedom, as articulated through the fiction of the original contract, appears decidedly less impressive for women:

> Similarly, the meaning of civil liberty and equality, secured and distributed impartially to all 'individuals' through civil law, can be understood only in opposition to natural subjection (of women) in the private sphere. Liberty and equality appear as universal ideals, rather than the natural attributes of the men (the brothers) who create the social order within which the ideals are given social expression, only because the civil sphere is conventionally considered on its own.[49]

Another author expressing her disillusionment with 'the failed idea of gender equality' is Drucilla Cornell,[50] who argues that women's struggle for equality in the conventional sense is limited as it preserves or reinforces hierarchies. The traditional concept of equality cannot deliver justice to women since the idea is loaded with inherent exclusions, resulting in its inevitable failure to challenge the very basis of

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[48] Pateman 16
[49] Pateman 114
[50] Cornell D *At the Heart of Freedom: Feminism, Sex and Equality* [Hereafter Cornell]

key societal institutions which serve to perpetuate gender inequality.[51] Even substantive equality is incapable of delivering true equality for as long as it takes an idealised representation of men as the yardstick against which women are measured:[52]

> Implicit in our insistence upon freedom from gender comparison is the demand for the space to reimagine our sexual difference beyond the confines of imposed notions of what it means to be a man or a woman.

Cornell argues for a concept of right that allows women to be recognised as the source of their own difference. This requires that women be treated as free and equal persons as themselves, not merely in relation to male norms or imposed conceptions of what is it to be a woman. It further calls for women to be included into the moral community of persons as an initial matter, and for the fair and equal treatment of women whenever their sexual difference needs to be taken into account. The demand to be treated as free and equal persons is based on the premise that the law should not operate to subject any persons to a social hierarchy. Cornell's call for maximum equal liberty warns against adopting a formalistic, definitional model of equality, which may limit the life chances and prospects of women by the very terms of such a definition. For example, a definition which portrays women as disadvantaged may entrench the perceived disadvantage while failing to deliver true freedom and equality to women:[53]

> Further, any definition of what a woman is, makes the imposed definition and not the woman, the source of the meaning of her sexual difference ... Our right to our person should not turn on the resolution of theoretical disputes about the nature of the female body and its relationship to culturally imposed norms of femininity.[54]

It is thus vital to separate the woman's claim to be a person from disagreement over the meaning of the concept of 'woman'. In their bid to be treated fairly within any distribution of resources posited by a theory of justice, women must ask what it means

[51] Cornell 5
[52] Cornell 6
[53] Cornell 20

to make these claims as "sexed" individuals. Cornell names the moral space in which this question can be answered 'the imaginary domain':[55]

> ... a heuristic device that can help us see that questions of what it means for sexed beings to be included in the moral community of persons as an initial matter must be explicitly addressed before principles of distributive justice can be defended by the moral procedure.

Cornell argues that this process of enquiry is not at odds with struggles for independence and the establishment of a national identity in third world countries in the wake of colonialism. On the contrary, if nationalism defines itself as liberation from all forms of recolonization, and not merely as a 'revival of old ways' (cultural conservatism), the trap whereby independence merely amounts to newly-forged relations between men can be avoided.

Cornell expands on Pateman's critique of social contract theory through her own criticism of the traditional public/private divide.[56] She expresses concern with theories based on traditional dichotomies, such as those of Habermas, who points out that whereas all can share equally in the 'public space', the private, intimate sphere of family life is seen as the 'closed and exclusive sphere of intimacy, sexuality and affection characterising the modern nuclear family'.[57] These traditional views are problematic on several levels. Firstly, this private/public dichotomy fails to appreciate that the categories of individuals referred to are in fact 'gendered identities'.[58] Secondly, the modern nuclear family, far from being a realm which can be assumed to be gender-neutral or colourless, is rather the site of 'egocentric, strategic and instrumental calculation as well as sites of usually exploitative exchanges of service, labour, cash and sex ... coercion and violence'.[59] The distinction is additionally misconceived insofar as it assumes that the public realm is representative of the common good, while the private is thought to represent particularistic social and

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[54] Cornell 20-1
[55] Cornell 14-5
[56] Benhabib S and Cornell D *Feminism as Critique*
[57] Benhabib S and Cornell D *Feminism as Critique* 6
[58] Benhabib S and Cornell D *Feminism as Critique* 7
[59] Benhabib S and Cornell D *Feminism as Critique* 7

economic interests'.[60] This misconception entails that women lose out as their interests are overridden in the name of the common good. As it stands, the public/private dichotomy is detrimental to the interests of women, who are largely excluded from the 'public' realm, in which 'individuals' are free civil subjects, and confined to the 'private' sphere into which such freedom does not extend.

As liberalism relies on the public/private dichotomy in its theories of justice [Rawles, Dworkin, Nozick, Hayek],[61] it has been criticised as supporting a jaded set of priorities, immersed in inequality, asymmetry, domination and invisible hierarchies.[62] Although the liberal response[63] can accommodate many feminist concerns, the purely legislative remedial approach cannot secure true gender equality. A deeper, more pervasive approach is required to acknowledge and accommodate the gender subtext of society 'which influences economic and private life, and obfusticates the extent to which liberal conceptions of reason and rationality have rendered woman's point of view irrational and particularistic or conretistic and trivial':[64]

> ... the vision of the atomic "unencumbered self" is a male one, since the degree of separateness and independence it postulates among individuals has never been the case for women.

2.5.2. Symmetry and individualism

Catherine O'Regan makes a compelling argument for the limits of equality legislation in its capacity to bring about change to women's working lives.[65] Women are, particularly but not exclusively in developing countries, confined to low-status, poorly remunerated work. There is an underlying complex matrix of reasons for this reality, including the discrimination of employers, the unequal sexual division of labour, the

[60] Benhabib S and Cornell D *Feminism as Critique* 8
[61] This is evident from the fact that it is the public persona who is the bearer of individual rights, while individual conceptions of the good life, seen as 'feminine' qualities such as emotional, sexual and domestic relations, are relegated to the private pre-contractual realm.
[62] Benhabib S and Cornell D *Feminism as Critique* 10
[63] Measures include the demand for full equality of rights for women, special legislative measures such as affirmative action and reform of marriage, property and criminal law – FAC 10.
[64] Benhabib S and Cornell D *Feminism as Critique* 11

double burden of women with regard to caring and domestic work, and the fact that the formal sector is designed with a male worker in mind.

O'Regan points out that anti-discrimination legislation is primarily/exclusively aimed at remedying employer behaviour. For this reason it can only be of limited effect as employer behaviour is only one of a myriad of complex reasons and factors in need of redress. In particular, the tendency of anti-discrimination legislation to promote the principle of symmetrical treatment, along with its focus on the individual complainant, undermines its effectiveness to combat the kinds of systematic, entrenched inequality that is characteristic of the developing world.

Symmetrical treatment (the injunction to treat like people alike) is inappropriate where men and women are in fact different.[66] In these cases, the absence of a male comparator may effectively deny women recourse to the law. In addition, the tendency of the symmetrical approach to focus on symmetrical treatment rather than impact may mean that the principle fails to meet its stated objective. Where implemented, the principle of symmetrical treatment should be extended by allowing the use of hypothetical male comparators, permitting special rights as contained in affirmative action programmes and focussing on the impact of the treatment. However, these measures are simply ameliorative and cannot make the problem go away:

> The fundamental difficulty none the less persists. At times women are not 'like men', and they should therefore not be treated alike.[67]

The individualistic and casuistic basis of anti-discriminatory law gives rise to further concerns regarding its effectiveness. The insistence of the law to deal with individual litigants separately renders this aspect of the law inefficient when it comes to dealing with the kind of widespread, entrenched inequality with which we are concerned. In

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[65] O'Regan C 'Equality at work and the limits of the law: Symmetry and individualism in anti-discrimination legislation' in Murray C (ed) *Gender and the New South African Legal Order* [Hereafter O'Regan]

[66] O'Regan 67 Pregnancy and related issues is one example where difference ought to be taken into account.

[67] O'Regan 72

addition, the requirement in certain jurisdictions of blameworthy conduct on the part of the employer further restricts the ambit of protective legislation:

> This difficulty arises from the nature of anti-discrimination legislation itself. It is designed in the fashion of delictual liability: to impose compensatory duties on people who have wrongfully caused harm. This approach assumes that discrimination is aberrant conduct in our society; but the patterns of discrimination against women in employment ... suggest that this is not so.[68]

Further, insofar as anti-discrimination legislation requires employers to focus on the attributes or characteristics of the specific individual concerned, the individualised nature of the law may operate to the disadvantage of women. Although it is true that women do not constitute a homogenous group, but differ on grounds of class, race, disability etc., individual women, especially in developing countries, are unlikely to have the skills and qualifications required by employers.[69] Laws focusing on the individual are thus unlikely to have any impact on the gross, systematic inequalities rife in developing countries. However, other legislative responses, such as employment equity, affirmative action and pay equity measures, may fare better, since women can be treated as a group and need not depend on individual litigants.

Writing from a labour law perspective, Ricki Holtmaat[70] develops a powerful critique of the dominance and power of legal concepts over women. Holtmaat warns against the wholesale use of apparently neutral concepts which are in fact 'male' in essence. For example, the seemingly neutral term 'employee' presupposes the existence of a supportive housewife looking after domestic duties while the breadwinner husband is available to work. External conditions, such as family responsibilities, are considered irrelevant to the employment relationship, and regulation is highly individualised. Such a definition excludes most women, who are not supported by a housewife 'behind the scenes', and whose work is not recognised by the formal labour market. Holtmaat considers that calls for legal equality or equal treatment do not go far enough. Even substantive equality merely grants women the 'freedom' to fit into male

[68] O'Regan 77
[69] O'Regan 79

norms. Thus, women's demands for equality are 'doomed to failure unless we fundamentally examine the gender of crucial (legal) concepts, including that of equality itself.'[71] Where legal concepts are dominated by considerations that are essentially male, comparative equality-thinking is incapable of exposing hierarchies or articulating an effective counter-strategy.[72]

Instead, Holtmaat puts forward a strategy that goes beyond traditional legal equality:

- Law should not be taken as the starting point – power relations between men and women are the primary object of the enquiry.[73]
- While anti-discrimination laws are necessary to ensure equality, they are not sufficient.[74]
- Avoid thinking in dichotomies (male/female, private/public, etc.). The truth of one group should not come at the expense of that of any other.
- In addition to conventional measures, 'other law', aimed at fundamental equality between the contributions of men and women, must play a role in determining and applying law.[75]

Feminist post-modernism is sceptical of universals, science, language of the subject, etc. It questions how there can be a single feminist epistemological standpoint, and argues for the need for conceptual schemes that are more alert to difference.[76] Feminist post-modernism works with the following key assumptions:

- The hierarchical and pyramidical unity of the legal system is breaking down, as is the nation state;
- The individual is not the core element of the legal system, as much as are organisations and networks at play within society;

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[70] Holtmaat R 'The Power of Legal Concepts: The Development of a Feminist Theory of Law' *International Journal of the Sociology of Law* (1989) 17 481[Hereafter Holtmaat]
[71] Holtmaat 490
[72] Holtmaat 497
[73] Holtmaat 495
[74] Holtmaat 494
[75] Holtmaat 496-7
[76] Peterson H 'Perspectives of Women on Work and Law' *International Journal of the Sociology of Law* (1989) 17 327at 333 [Hereafter Peterson]

- The idea of progress as a guide for evaluation is losing power.[77]

Legal pluralism is compared to map-making, in which 'scales of legality' range from local or larger scale legality; to national or medium scale; and world, the smallest scale. The key is to look for different 'legal structures' governing the informal relations of women, i.e. one that looks at:[78]

- The rule-making capacity of local levels and how these operate;
- How different women cope with different conditions;
- The legal and political implications of the existence and development of informal and large-scale law on the local level and power relations between men and women;
- How women's work is regulated and organised;
- The extent to which differences are necessary, wanted, productive and creative;
- Which legal means are useful in establishing and supporting conditions of non-suppressive independent relations.

Peterson calls for a view of labour law that resists oppressive and unacceptable differences between men and women, while utilising those differences that are creative and productive. This entails a recognition of how collective bargaining and strike law are essentially 'male' in character, how the institution of freedom of contract presupposes a free and independent individual which has rarely been the case for women, how the competing evaluations between paid and unpaid work have marginalized women in the workforce, and how the legal system supports a sexual division of labour which keeps women in a subordinate economic position.[79]

In order to achieve gender equality in the workplace, women can no longer afford to merely rely on transformation of the formal legal system. An examination of (formal and informal) workplace rules and practices is necessary, as is the abandonment of the subject as the core element of the legal system. A greater diversification in the

[77] Peterson 333-4
[78] Peterson 334
[79] Peterson 336-7

regulation of women's working lives necessarily flows from the breakdown of the perceived unity of the legal system and the power of the nation state.[80] In the process, we should look more closely at the traditional legal systems and sets of norms at work in women's lives, as these may yield solutions as to how to protect groups of women.

2.5.3. Enforcement of Equality Provisions

In determining the approach to be adopted with regard to establishing a more equal society, it is essential to first determine the extent and nature of optimum state intervention. It is now well-established that it does cost employers to discriminate, mainly in the form of foregone profits.[81] This had lead to the hypothesis that 'over a period of time, under conditions of perfect competition, discrimination should be eliminated by the pressures of competition.'[82] This view is predicated on a passive role for the state. As the market will secure equality under the right conditions in the long run, there is no need for state intervention.

This proposition need not be refuted, however, in order to argue that the elimination of discrimination cannot be left to the market, for the following reasons:[83]

- Even under perfect conditions, competition will take a long time to erode existing discriminatory practices;
- Discrimination is more likely to persist where there is a monopoly;
- The market is unsuited to deal with entrenched cycles of indirect discrimination;
- The costs of discrimination fluctuate depending on whether or not there is a surplus of labour.

Essentially, those who argue for discrimination to be rectified by the free market alone are misguided in their underestimating of 'the existing inequitable distribution

[80] Peterson 340
[81] See Dex S (1992) *The Costs of Discriminating Against Migrant Workers: An International Review* (Geneva ILO); Becker G S (1957) *The Economics of Discrimination* (London and Chicago); Hepple B "Equality Laws and Economic Efficiency" (1997) 18 *ILJ* 598.
[82] Hepple B "Equality Laws and Economic Efficiency" (1997) 18 *ILJ* 598 at 600
[83] Hepple B "Equality Laws and Economic Efficiency" (1997) 18 *ILJ* 598 at 600-01

of wealth and power in society.'[84] State intervention is therefore justified on the economic argument that discrimination is socially wasteful, as well as on the moral ground that all persons should be treated as equals.[85] A proactive approach to combating discrimination should therefore be adopted by the state and civil society.

Once a proactive approach has been deemed necessary, the next issue is to determine the basis upon which intervention should take place. There are generally three modes of enforcing equality provisions:[86]

1. Administrative agencies. Typically the enforcement powers of labour inspectors include: the authority to bring violations of the law to the attention of some higher administrative body; to initiate proceedings; and to undertake conciliation/arbitration to resolve disputes or grievances. Limitations include: under-funding, infrastructure, communications, transport and lack of training.

2. Specialised enforcement bodies (established in terms of legislation). These generally have the power to receive individual or group complaints and to conduct investigations. The purpose is to assist victims of discrimination in an informal manner. The service should be free, non-legalistic and efficient.

3. Judicial Action. This usually takes the form of an individual action but class actions are becoming more prevalent. Limitations include relying on the existence of a legal right, jurisdictional issues, expenses and lack of expertise. Lack of appropriate remedies and enforcement of judgements may also be problematic.

Hepple argues that the experience of anti-discrimination laws all over the world, has been disappointing from the perspective that, while they have achieved minor successes vis-à-vis individuals, they have been ineffective in bringing about real changes in the socio-economic position of the poorest and most disadvantaged

[84] Hepple B "Equality Laws and Economic Efficiency" (1997) 18 *ILJ* 598 at 602
[85] Hepple B "Equality Laws and Economic Efficiency" (1997) 18 *ILJ* 598 at 603
[86] Date-Bah E (ed) *Promoting Gender Equality at Work: Turning Vision into Reality for the Twenty-first Century* 193-204 [Hereafter Date-Bah]

sections of society.[87] The law is ineffective for various reasons.[88] In particular, the law operates by 'individualizing conflict between specific parties'. Legal concepts must be clear, and specific victims and perpetrators must be identifiable. Where there has been entrenched, systematic discrimination for a long period of time, it is extremely difficult to bring the cycle of disadvantage within the ambit of anti-discrimination law. Further, the law is generally aimed at only one cause of the ongoing disadvantage, namely, the immediately identifiable act of discrimination at hand. This may treat the 'symptoms' of disadvantage for a select elite of individuals, while failing to address the larger concerns which secure the ongoing disadvantage of the majority. An approach that is serious about addressing disadvantage and discrimination in society must go beyond an individual complaints based system and intervene in the plethora of broader areas where disadvantage is bred.

Other practical reasons for the inadequacy of civilly enforceable equality at work provisions include: high expenses, inappropriate remedies, delays in the judicial process, trade union/lawyer apathy, under-resourced enforcement agencies, insurmountable burden of proof on the victim, and inability to combat entrenched, systematic discrimination.[89]

Consider the legal obstacles before an individual litigant trying to prove indirect discrimination in employment. The applicant must first show that the employer has applied some requirement or condition which, although neutral on the face of it, discriminated against the applicant. This makes it exceedingly difficult to cite informal modes of discrimination, such as 'word of mouth recruitment, shop floor understandings or vague and unadvertised subjective promotion procedures'.[90] In the UK, the 'requirement' must constitute an 'absolute bar' on the applicant and not

[87] Hepple B "Equality Laws and Economic Efficiency" (1997) 18 *ILJ* 598; Hepple B "Have Twenty-Five Years of the Race Relations Acts in Britain Been a Failure?" Discrimination: The Limits of the Law (B Hepple and E.M. Szyszczak, eds.) 19-34

[88] Hepple B "Equality Laws and Economic Efficiency" (1997) 18 *ILJ* 598 art 605

[89] Thomas and Taylor 'Enforcement of Equality Provisions' in Date-Bah (ed) *Gender Equality at Work* 191.

[90] Hepple B "Equality Laws and Economic Efficiency" (1997) 18 *ILJ* 598; Hepple B "Have Twenty-Five Years of the Race Relations Acts in Britain Been a Failure?" Discrimination: The Limits of the Law (B Hepple and E.M. Szyszczak, eds.) 23

merely a preferred practice.[91] In the US, litigants face the additional obstacle of having to specify the particular employment practice that has the disparate impact.[92]

Secondly, the applicant must show that she or he cannot comply with the requirement in question. In the context of race in the UK, the House of Lords has held that this need not mean that compliance be physically or inherently impossible. Rather, the 'test is whether he or she can do so consistently with the customs and cultural conditions of his or her ethnic group.'[93] This requires judges to make value judgements based on their own common sense views of what the mores, customs and traditions of a particular group are.

Thirdly, the complainant must show that the proportion of her or his group which can comply with the requirement is considerably smaller than the proportion of those who are not members of the group which can comply. In the US, the use of statistical evidence in this regard has developed to a highly developed, advanced stage.[94] For example, in the recent Supreme Court case of *Wards Cove Packaging Co v Antonio* the court essentially required the applicant to present an airtight statistical case.[95] This approach is justified in the US by the general availability of relevant data used in statistical analysis.[96] The statistical method of showing disparate impact has the advantage of certainty, but may, at the same time, serve to complicate proceedings and raise costs to extortionate levels. For these and other reasons, comparative jurisdictions have shied away from the wholesale use of statistics, and favoured a

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[91] According to the much-criticised judgment in *Perera v Civil Service Commission* [1983] IRLR 166 (CA).

[92] Section 703(k)(1)(B)(i) of the Civil Rights Act 1964 requires the complaining party to specify the particular employment practice that has the disparate impact complained of. In *Wards Cove Packing Co v Antonio* 490 US 642 (1989) the particularity requirement was confirmed, as the court held that the plaintiff was obliged to prove a specific or particular employment practice causing the disparate impact and could not rely on an undefined group of practices that caused disparate impact as a whole. Section 703(k)(1)(B)(i) of the Civil Rights Act 1991 now provides an exception to this rule in that a decision-making process may be defined as one if it cannot be separated. Contrast the position in the UK where it has been held that where more than one requirement is laid down the impact of all must be assessed together (*Jones v Chief Adjudication Officer* [1990] IRLR 533 (CA)).

[93] *Mandla v Lee* [1983] IRLR 209 (HL), quoted in Hepple B "Equality Laws and Economic Efficiency" (1997) 18 *ILJ* 598; Hepple B "Have Twenty-Five Years of the Race Relations Acts in Britain Been a Failure?" Discrimination: The Limits of the Law (B Hepple and E.M. Szyszczak, eds.)

[94] See Dupper O 'Proving Indirect Discrimination in Employment: A South African View' 2000 (21) *ILJ* 747 at 762

[95] 490 US 642, cited in Dupper O 'Proving Indirect Discrimination in Employment: A South African View' 2000 (21) *ILJ* 747

more common sense approach to the issue. In the UK for example, judges have imputed their own views of 'social facts' in the absence of clear statistical evidence. This has eased the burden on complainants in some cases[97] but has resulted in dubious decisions in others. Commonwealth jurisdictions have followed this more relaxed approach.[98]

In Australia it has been argued that, because of the undeveloped nature of labour force statistics, a flexible approach should be adopted by the tribunals and courts that would allow them to decide cases on the basis of whatever evidence is available under the circumstances.[99] Dupper suggests that there are strong practical reasons for adopting such an approach in the South African context, where similar difficulties are encountered.[100] It is submitted that this finding applies equally to the rest of the sub-region.

It is clear that the rights-based approach to securing equality in employment is rife with difficulties and contradictions. It is these fundamental difficulties to which Hepple alludes when he speaks of the 'naive instrumentalism' of law, in finding that:

> ... whether we rely on negative concepts like direct or indirect discrimination or a broader positive notion of 'equal opportunity', even 'fair opportunity', it would be illusory to believe that these can be translated into legal terms of art which will lead, without more, to the promised land of substantive equality.[101]

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[96] Dupper O 'Proving Indirect Discrimination in Employment: A South African View' 2000 (21) *ILJ* 747 at 763

[97] See *Briggs v North Eastern Education and Library Board* 1990 IRLR 181, where the Industrial Tribunal relied on general knowledge in finding that women are mainly responsible for child care; and compare Kidd v DRG (UK) Ltd [1985] ICR 405, where the opposite was effectively held. (Cited in Dupper O 'Proving Indirect Discrimination in Employment: A South African View' 2000 (21) *ILJ* 747 at 764-5

[98] On Australia, see Hunter *Indirect Discrimination in the Workplace* (1992) at 212, cited in Dupper O 'Proving Indirect Discrimination in Employment: A South African View' 2000 (21) *ILJ* 747 at 767.

[99] See Dupper O 'Proving Indirect Discrimination in Employment: A South African View' 2000 (21) *ILJ* 747 at 774

[100] Dupper O 'Proving Indirect Discrimination in Employment: A South African View' 2000 (21) *ILJ* 747 at 775

[101] Hepple B "Have Twenty-Five Years of the Race Relations Acts in Britain Been a Failure?" Discrimination: The Limits of the Law (B Hepple and E.M. Szyszczak, eds.) 26-7

If the rights-based approach is to be of any effect, the individual complaints process must be improved by 'building on pressures within the legal system.'[102] This should lead to a higher success rate for victims of discrimination, along with all the resultant knock-on effects. More importantly, however, Hepple suggests the introduction of 'a new regulatory framework', which moves beyond the adversarial individual complaints system, based on a number of principles:[103]

- The law must establish a clear standard. If the law is too flexible or ambiguous, it may be easily avoided by employers.
- The law must be supported by a vigorous enforcement mechanism, based on serious economic sanctions for non-compliance and rewards for compliance.
- The results achieved by employers must be objectively measurable.
- The law should impose liability on both employers and those individuals making discriminatory decisions.
- The law should encourage voluntary compliance from employers through appropriate planning, monitoring and assessment.
- Active NGO support for the law is essential.

The enforcement of so-called 'pay equity' provisions provides a useful example of the issues that may arise in implementing and applying laws relating to gender equality in employment. Although the concept of 'equal work for equal pay' has long been in existence, wage gaps between men and women persist throughout the world. This reflects the fact that women tend to work in female-dominated occupations that are poorly-remunerated.[104] Despite the fact these occupations may require the same skill, effort, responsibility, hours and working conditions, female-dominated jobs tend to pay less than male-dominated jobs. There is thus a need to move beyond mere 'equal work for equal pay' towards a new maxim 'equal pay for work of equal value' or 'comparable worth'.

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[102] Hepple B "Have Twenty-Five Years of the Race Relations Acts in Britain Been a Failure?" Discrimination: The Limits of the Law (B Hepple and E.M. Szyszczak, eds.) 31. For example, making allowance for class actions.
[103] Hepple B "Equality Laws and Economic Efficiency" (1997) 18 *ILJ* 598 at 606-7
[104] Morley Gunderson *Comparable Worth and Gender Discrimination: An International Perspective* (ILO 1994) 1 [Hereafter Gunderson]

There are typically four steps involved in applying comparable worth:[105]

1. Identify male- and female-dominated jobs
2. Determine the value of jobs through a process of job evaluation
3. Determine the relationship between pay and value
4. Make an appropriate wage adjustment

Each of these steps involves conceptual and practical challenges in application, which can become highly technical and exacting in nature. In developing policy in this regard, it is imperative not to allow too much leeway for employers to simply avoid responsibility by creative job-classification or grading. Problems may be exacerbated where there are high degrees of job segregation within sectors, as is the case in many Southern African countries. Policies and legislation must place obligations on the employer to de facto achieve pay equity, and it should not merely be left to the courts for enforcement. Instead, enforcement and monitoring agencies should be utilised, as well as incentive structures for employers to comply with the law. Even in developed countries, individual litigation is uncommon in this area:

> Comparable worth comparisons ... are particularly ill-suited to individual complaints, given the cost and complexities of challenging job evaluation procedures and collective agreements.[106]

The ILO Equal Remuneration Convention (100 of 1951) established the principle of equal pay for work of equal value. Remuneration is broadly defined to include all payments in cash or kind.[107] The Convention aims to cover all workers, whether covered by national legislation, wage agreements or collective agreements.[108] Article 3 requires that an objective appraisal of jobs be undertaken where this will assist in ensuring and promoting equal pay for work of equal value.[109] The Equal Remuneration Recommendation (90 of 1951) encourages governments to take appropriate action to:

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[105] Gunderson chapter 5 31-47
[106] Gunderson 60
[107] Article 1
[108] Article 2
[109] See Gunderson 58

- Ensure the application of equal remuneration for all employees of centralised government departments or agencies, or for employees subject to such statutory regulation or public control;
- Encourage its application to employees of state, provincial or local government departments or agencies, where these have jurisdiction over remuneration;
- Provide for the legal enactment of the general application of the principle of equal remuneration for work of equal value.[110]

In addition, the ILO Discrimination (Employment and Occupation) Convention (111 of 1958) and Recommendation (111 of 1958) prohibit discrimination in employment, including discrimination in remuneration levels. In European Community law, the original Treaty of Rome 1957 set out the principle of equal pay for equal work. The Equal Pay Directive 1975 expanded on this and expressly extended coverage to include equal pay for work of equal value. Job evaluations were sanctioned but not required for determining the comparative value of jobs.[111] In the EC countries, 'there appears to be agreement that comparisons should be based on concrete appraisals of the work actually performed by employees of different sexes within the same establishment', although there may be scope for making such comparisons across the different job sites of the same employer.[112]

Canada embodies the most extensive application of the principle, where all jurisdictions have some or other form of comparable worth legislation. Five jurisdictions have proactive legislation which places a positive obligation on the employer to implement pay equity, with the others relying on a complaints-based system.[113] In practice, pay equity is almost exclusively reserved for the public sector, although Ontario has recently begun phasing in application to the private sector.[114] Litigation in this area is rare:

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[110] See Gunderson 58
[111] Gunderson 59
[112] Gunderson 60
[113] Gunderson 61
[114] Gunderson 61

> Rather than litigation through the courts, the emphasis has been on enforcement through administrative agencies and tribunals responsible for enforcing employment standards or human rights and anti-discrimination legislation. In such agencies, the emphasis tends to be on conciliation and negotiated solutions as well as on educating the parties as to their responsibilities.[115]

In the United States, the Equal Pay Act 1963 and Title VII of the Civil Rights Act 1964 comprise the major pay equity legislation at federal level. The Equal Pay Act required equal pay for 'equal work in jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions'. In adopting this definition, Congress explicitly rejected the notion of comparative worth.[116] Title VII, the Equal Employment Opportunity Amendment 1964, prohibits both wage and employment opportunity discrimination on various grounds including sex. Although there was initial uncertainty regarding whether Title VII extended the equal pay principle to include comparable worth, subsequent court interpretations have generally rejected this interpretation.[117] However, although litigation has effectively been ruled out for individual complainants in comparable worth cases, state and local government agencies have managed to secure compliance to this principle through various studies and extensive research, leading to a high degree of self-regulatory adjustment of wage levels.[118]

Gunderson draws the following conclusions:[119]

1. In light of the disparities between the wage-fixing practices of various countries, no single, prevailing approach to pay equity exists.
2. Individual, complaints-based procedures are ineffective in dealing with comparable worth claims.
3. Centralization of wage-fixing may lead to a relative increase in the wages of women, but is not ideally suited for dealing with intra-organisation disparities.

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[115] Gunderson 62
[116] Gunderson 62
[117] See *AFSCME v State of Washington* 1985 US; *Christensen v State of Iowa* 1977, *Lemons v City and County of Denver* 1980 and *American Nurses' Association v Illinois* 1986.
[118] Gunderson 64

4. Proactive approaches to comparative worth have yielded results, but these are currently almost exclusively limited to the public sector.
5. Proactive systems give rise to difficult technical and legal issues, associated with the each stage of implementation, which must be clearly addressed in advance of adoption.
6. There are vast differences between having law 'on the books' and having it applied in practice.
7. Ongoing monitoring and evaluation of progress across countries is absolutely essential.

2.6. Conclusion

As the rights-based notion of equality, as well as the social contract theories on which it is based, comes under increasing pressure from both a theoretical and enforcement perspective, it is necessary to explore viable alternatives and prospects for revision. Inherent in the acknowledgement of the failure of the dominant, juridical notion of equality, is the recognition that the attainment of gender equality (in the true sense) cannot be left to the state alone. Rather, any successful model of gender equality in the workplace must prioritise the inclusion of all interested members of society as a starting point. It is submitted that it is only through a proactive, multi-layered and comprehensive approach to equality that the promise of substantive equality can be attained. This must include a variety of initiatives, beyond the traditional approach of individual litigation, aimed at securing compliance and enforcement of equality laws. The example of pay equity provisions is instructive in this regard. In addition, the law should narrowly circumscribe opportunities for employers to justify discrimination in the workplace. As we move away from a distributive understanding of equality in which the state is expected to 'deliver' egalitarian treatment to its unwitting, passive subjects, the challenge will essentially lie in the choice of strategic interventions which facilitate the attainment of equality as between active participants in the system. This requires a close look at the nature of power relations in society, and a thorough rooting out of imbalances where they are found to exist.

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[119] 66-8

The criticisms of the juridical model of equality provide a solid platform from which to engage in the types of deconstruction and unbundling exercises necessary to re-invent the working model of equality. However, where many contemporary theories seem to be lacking is in putting forward viable alternatives for the 'reconstruction' of the traditional model. Further, although they may purport to call the end of the juridical model of equality, this need not be seen as a challenge to a truly substantive understanding of the concept. Substantive equality, in itself, amounts to nothing more than an injunction to 'be equal'. In itself, this is a 'hollow' proposition, which can take on life or colour only through political intervention and juridical implementation. On this reading, it is meaningless to attack the substantive model of equality per se. Rather, when critics call for an end to the 'juridical model of equality', it is submitted that what is being referred to is the manner in which the notion of equality is interpreted and implemented within the arenas in which power relations are played out, for example, in the fields of law, economics, education and so on.

It is only substantive equality that can escape the pitfalls of the symmetry and individualisation inherent in a formal understanding of the concept. If gender equality has failed to materialise then it is, to a large degree due to the incursions of the tenets of formal equality. Further, there is no reason in principle as to why substantive equality cannot breach the public/private divide, levelling out the inequities arising from the unspoken sexual contract for example. Above all, substantive equality calls for a contextual, situation-specific approach to equality, taking the vital historical nature of power relations in society into account. To a large degree, it is the manner in which we have sought to attain equality, and the ways in which we have allowed patent inequality to fester behind seemingly neutral or laudatory principles, that is, or should be, the real focus of any critique of equality. This requires that we identify 'equality' for what it is: an empty shell that is completely dependant on the context, in which power relations play out, for its meaning. It is submitted that a proactive, all-embracing conception of substantive equality is the only viable model that can produce results for women in employment in Southern Africa. A thorough understanding of the environment in which this model must take root is required, as this is in fact the substance itself of which the concept of equality is constituted. It is therefore to this contextual basis for intervention that the discussion will now turn.

CHAPTER III: OVERVIEW OF THE ENVIRONMENTAL FACTORS INFORMING A CONTEMPORARY UNDERSTANDING OF GENDER EQUALITY IN EMPLOYMENT

3.1. Introduction

In chapter two, the concept of equality was described as effectively having no intrinsic meaning of its own distinct from the context in which it operates. In order to conduct an analysis of gender equality in the workplace, it is thus necessary to explore the contextual or environmental factors currently in operation at this time in our history. The aim of chapter three is to explore the types of factors that need to be taken into account in the formulation and implementation of 'equality at work' laws and policies. The starting point will be the Beijing Declaration 1996, which sets the universal context for gender equality, followed by a brief overview of issues such as the impact of globalisation on women workers, the feminisation of poverty, statism, collective bargaining, and the role of international organisations in promoting equality at work. The discussion remains general for now, with the emphasis shifting to the SADC region in particular in chapter four.

3.2. The Platform for Action (PFA) and the Beijing Declaration

The Fourth World Conference on Women was held in Beijing, China from 4-15 September 1995. The Conference was attended by 17000 participants, including 6000 delegates from 189 countries. The Beijing Declaration and the Platform for Action were the products of the Conference. The Beijing Declaration is important from a labour perspective in its recognition of a holistic, comprehensive approach to securing gender equality, including the need for economic empowerment and equal access to resources. It further acknowledges that the eradication of poverty can only be achieved through the involvement of women in all spheres of economic and social development. The Declaration calls for the elimination of all forms of discrimination

against women and the removal of all obstacles to gender equality.[120] Of particular significance is the Declaration's call to:

> Promote women's economic independence, including employment, and eradicate the persistent and increasing burden of poverty on women by addressing the structural causes of poverty through changes in economic structures, ensuring equal access for all women, including those in rural areas, as vital development agents, to productive resources, opportunities and public services.[121]

The significance of the Beijing Declaration cannot be underestimated from a labour perspective, as it includes equality in employment within the broader picture of poverty, macro-economic considerations and the provision of public services (health, education, electricity). It is submitted that this holistic approach is the only reasonable avenue through which to pursue gender equality at work. The attainment of equality in the labour market must begin long before entry into the labour market is contemplated. To this end, the nation state needs to take pro-active steps at all levels, both within and outside the labour market, to ensure that equality at work is an achievable goal.

The Platform for Action (PFA)

The global framework of the PFA essentially calls for harmonization of equality for women in line with 'human rights and fundamental freedoms' aimed at securing equality and empowerment for women. The framework seeks to achieve this harmonization in a manner which does not unduly encroach on the various regional and national situations, cultures and identities:

> While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the

[120] Fourth World Conference on Women Beijing, China 4-15 September 1995 *Platform for Action and the Beijing Declaration* United Nations Department of Public Information (1996) [Hereafter Beijing Declaration and PFA] item 24
[121] Beijing Declaration item 26

> duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[122]

The framework cites widespread economic recession, political instability and the failure of adjustment policies to take women and vulnerable groups into account, with their concomitant reduction in social expenditures on the part of States, as being key factors in the continued marginalization, unemployment and underemployment of women.[123] The framework further considers recession and adjustment as being instrumental in adding to the total workload of women:

> Women often have no choice but to take employment that lacks long-term job security or involves dangerous working conditions, to work in unprotected home-based production or to be unemployed. Many women enter the labour market in under-remunerated and undervalued jobs, seeking to improve their household income; others decide to migrate for the same purpose. Without any reduction in their other responsibilities, this has increased the total burden of work for women.[124]

The PFA sets out global critical areas of concern as being:[125]

- The persistent and increasing burden of poverty on women;
- Inequalities and inadequacies in an unequal access to education and training;
- Inequalities and inadequacies in an unequal access to health care and related services;
- Violence against women;
- The effects of armed or other kinds of conflict on women, including those living under foreign occupation;
- Inequality in economic structures and policies, in all forms of productive activities and in access to resources;

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[122] PFA item 10
[123] PFA items 16-21
[124] PFA item 19
[125] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 3

- Inequality between men and women in the sharing of power and decision-making at all levels;
- Insufficient mechanisms at all levels to promote the advancement of women;
- Lack of respect for and inadequate promotion and protection of the human rights of women;
- Stereotyping of women and inequality in women's access to and participation in all communication systems, especially in the media;
- Gender inequalities in the management of natural resources and in the safeguarding of the environment;
- Persistent discrimination against and violation of the rights of the girl-child.

3.3. The effects of globalisation on women workers

Kathryn Ward sums up what this means in terms of the international division of labour:[126]

> Global restructuring refers to the emergence of the global assembly line in which research and management are controlled by the core or developed countries while assembly line work is relegated to semiperiphery or periphery nations that occupy less privileged positions in the global economy.

This manifestation of global restructuring is attractive to multi-national corporations seeking greater access to markets, diffusion of political and economic costs, improved competitive abilities and product diversity.[127] In developing countries, global restructuring typically leads to a growth in the service sector, specialization in export industries and the increased use of female industrial workers in the informal sector.[128] As the informal sector is relatively unregulated by labour legislation, MNC's use women workers in order to keep labour costs low:[129]

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[126] Ward K (ed) *Women Workers and Global Restructuring* 1[Hereafter Ward]
[127] Ward 1
[128] Ward 1
[129] Ward 2

> ... by subcontracting industrial production to informal factories or home-based workers, employers can minimize competitive risks, wages and the threat of unionisation, while maximizing their flexibility in hiring, their overhead costs, and their production processes.

Maria Mies notes that, within this global division of labour, capitalism has fostered a sexual division of labour which has lead to a rapid process of the pauperisation of women:[130]

> ... due to the biologistic definition of women's interaction with her nature, her work both in giving birth and raising children as well as the rest of domestic work does not appear as work or labour. The concept of labour is usually reserved for men's productive work under capitalist conditions, which means work for the production of surplus value.

Mies asserts that, whereas men's tasks are seen as truly human in the civil sense (rational, conscious) those of women are regarded as 'natural'. The result is that the relationship between male and female workers is one of dominance and exploitation.[131] This has lead to a widespread 'housewifization' of women's labour – the externalisation of costs which otherwise would have to be covered by the capitalists. Women's labour is considered a natural, free source of production, leading to a dimunition of women's political and bargaining power and the perpetuation of women's subjugation at the hands of men:[132]

> As the housewife is linked to the wage-earning breadwinner, to the 'free' proletarian as a non-free worker, the 'freedom' of the proletarian to sell his labour power is based on the non-freedom of the housewife.

In the third world, Mies argues, women are the cheapest, most docile labour source for capitalist production purposes. By universalising 'housewife ideology' and promoting the concept of the nuclear family as 'progress', the work of women has

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[130] Mies M *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* 45 [Hereafter Mies]
[131] Mies 46

been marginalized as 'supplementary'. Mies asserts that the traditional liberal values of freedom and equality are not sufficient to attain real equality. The failure of labour law to deal with the informal sector is another capitalist tool with which women are oppressed. Mies argues for a new, feminist conception of labour which is capable of taking the male dominance of the labour market into account. Mies suggests reform of the goal-orientated nature of capitalist production towards a more meaningful, life-producing/enhancing conception of work.[133]

3.4. Women and the Economy

Although more research needs to be done in this area, it can be said that the consequences of globalisation (recession and structural adjustment) have greatly affected women in the workplace, exacerbating the inequalities between men and women.[134] In addition to unemployment, rigidity in working conditions and the disproportionate burden of family responsibilities shouldered by them, women are increasingly faced with particular problems, such as: 'low wages, little or no labour standards protection, poor working conditions, particularly with regard to women's occupational health and safety, low skill levels, and a lack of job security and social security.'[135] Women's domestic, agricultural and caring unremunerated work is often unrecorded and undervalued.[136]

Discrimination in the formal labour market is a huge obstacle faced by women:

> Discrimination in education and training, hiring and remuneration, promotion and horizontal mobility practices, as well as inflexible working conditions, lack of access to productive resources and inadequate sharing of family responsibilities, combined with a lack of or insufficient services such as child care, continue to restrict employment, economic, professional and other opportunities and mobility for women and make their involvement stressful.[137]

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[132] Mies 110
[133] Mies 216-8
[134] PFA items 151 and 157
[135] PFA item158
[136] PFA item 156

Attitudinal discrimination affects women's chances of promotion, while sexual harassment is a severe and widespread form of discrimination which can prevent women 'from making a contribution commensurate with their abilities.'[138]

Gender analysis of market and extra-market work is given insufficient attention in the formation of labour market and related policies:[139]

> To realize fully equality between women and men in their contribution to the economy, active efforts are required for equal recognition and appreciation of the influence that the work, experience, knowledge and values of both women and men have in society.[140]

In order to secure this equality, the PFA proposes the following actions:[141]

- Promote women's economic rights and independence, including access to employment, appropriate working conditions and control over economic resources. In particular, nation states are called upon to pass anti-discrimination and equal opportunity legislation, including equal pay measures; take the various forms of women's unremunerated work into account; open up access to finance and other resources for women; and ensure safe working practices, the right to organize and access to justice for women workers.
- Facilitate women's equal access to resources, employment, markets and trade. This includes the fostering by states of women's self-employment and small enterprises.
- Provide business services, training and access to markets, information and technology, particularly to low-income women;
- Strengthen women's economic capacity and commercial networks;
- Eliminate occupational segregation and all forms of employment discrimination. In particular, states should go beyond anti-discrimination and

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[137] PFA 152
[138] PFA 161
[139] PFA 155
[140] PFA 163
[141] PFA 165-80

pursue other methods of compliance from employers, while at the same time making individual complaints processes and trade union empowerment measures more efficient;

- Promote harmonization of work and family responsibilities for women and men. This involves the active encouragement by the state of shifting attitudes and practices towards a more balanced view of gender roles in the rearing of children, as well as a review of related policies and programmes, including social security legislation and taxation systems.

3.5. Women and the State in Africa

In light of the current writings on globalisation and its effects on developing (African) nations, Africa is seen as a powerless entity blown about by global forces beyond the control of individual nation states, divided and exploited by the predatory practices of first world economies. At the same time, postmodernists challenge the meaning of statehood, citizenship and subjectivity, calling into question ways of being and relating that have hitherto been regarded as essential or absolute. In the African context, dependency theorists focus on the external factors informing development and crisis in the region.[142] In these terms, Africa is seen as little more than a catalyst in the perpetual cycle of capital accumulation – a cog in a process from which those in the first world benefit. Africa has been ruthlessly exploited by the industrialised world. Desperate for foreign direct investment (FDI), African states have been forced into stooping to labour standards and wages that would be entirely unacceptable in the contracting, first world nations. Its inferior bargaining power in the international economy has seen African states contracting out their land, labour and production on highly unfavourable terms. From a gendered perspective, this dependency on the first world leaves women 'last in a long line of victims of international capital'.[143]

Globalisation and increased interdependence and internationalisation of labour markets have created employment opportunities for women, but these tend to be flexible and precarious forms of work such as atypical, casual, part-time or home-

[142] Parpart J and Standt K (eds) *Women and the State in Africa* 2 [Hereafter Parpart and Standt]
[143] Parpart and Standt 3

based labour.[144] The crisis present in the third world can be articulated in terms of ongoing recession, crippling foreign debt, deteriorating terms of trade with international partners and the (supposedly short term) impact of structural adjustments on the state economy. This has led to a trend of public sector contraction and market-orientated development policies.[145] The prescriptive policies of the World Bank and International Monetary Foundation (IMF) have led to an artificially dominant model of monetarist, market-based economics in third world states with a view to halting inflation, improving economic efficiency, settling debt and promotion of growth through the unhindered operation of the market.

The effect of adjustment policies has been typified by a contraction of government expenditure and removal of import controls, leading to higher levels of unemployment, currency devaluation, the cutting of welfare, education and other social programmes, as well as a shift of expenditure from provision of basic needs to repayment of loans.[146] Since women are highly concentrated in the public sector and are otherwise consumers of welfare, structural adjustment programmes (SAP's) have had an adverse impact on them. As both producers and household managers, women's employment and real earnings in the informal sector have been reduced by the induced recession of demand restraint, while as mothers and social organisers, women have suffered as a result of the depletion of health and education facilities.[147]

In 1991, the Commonwealth Secretariat[148] reported that women's unemployment, informal sector participation and unpaid family labour[149] rise under SAP's. Although the report concluded that women fared no worse than men, and that women were the main beneficiaries of expansion of export processing under adjustment, it is necessary to analyse not just changes in incomes and employment levels, but also trends in working hours and the intensity of work from a gender perspective, and to take restraints on women's flexibility into account. It is only through taking gender

[144] Date-Bah ea *Promoting Gender Equality at Work* 10
[145] Ashfar H and Dennis C *Women and Adjustment Policies in the Third World* 3 [Hereafter Ashfar and Dennis]
[146] Ashfar and Dennis 3-4
[147] Ashfar and Dennis 33
[148] See Date-Bah 39
[149] This serves to limit women's abilities to take advantage of new incentives/opportunities.

considerations, such as household and caring roles, into account that the optimal allocation of women's labour can be facilitated.[150]

The formal sector is the first to be affected by structural adjustment, as demand restraint, shedding employment and wage declines take their toll. This is especially true of the public sector and previously protected/subsidised private sector concerns. As this is precisely where the majority of Sub-Saharan African women in the formal sector are located, SAP's have an adverse and disproportionate impact on women.[151] This trend applies to the entire formal sector, as women tend to be concentrated in lower skill and occupational levels than men, rendering them more vulnerable to retrenchment.[152] Further, women tend to receive less than men in terms of retrenchment packages and wage reductions.[153]

SAP's affect the informal sector as it is forced to soak up un(der)employment, causing labour-crowding and reduced demand (recession) in what is already a low-return, low-productivity sector catering to low-income consumers.[154] Another view states that, although the informal sector has potential for growth, it has been held back by distortions favouring formal sector industry.[155] In either case, the informal sector is highly heterogeneous and non-tradable. Although some areas of the informal sector may ally with the formal sector as privatisation takes effect, the nature of work becomes increasingly casual, unregulated and unprotected.[156]

In order to remedy the adverse impact and optimise positive effects of SAP's on women, radical re-thinking is called for. It is clear that women, and the poorest of the poor, are suffering in the short term while states are waiting for the market to 'pick up the bill' in the future. Frances Stewart argues that the following elements need to be introduced into the operation of SAP's:[157]

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[150] Date-Bah 40
[151] Date-Bah 40-1
[152] Date-Bah 41
[153] Date-Bah 43
[154] Date-Bah 29
[155] Date-Bah 29
[156] Date-Bah 30
[157] Ashfar and Dennis 35-43

1. Adopt more expansionary macro-policies, reducing the recessionary elements in structural adjustment;
2. Redesign adjustment packages to accommodate women's interests;
3. Introduce special measures to support women in their efforts to maintain standards for themselves and their families;
4. Institutional reform, support policies and monitoring.

Despite the preponderance of contemporary research downplaying the role of the state in the modern global dispensation, statist theories emphasise the role and responsibility of the state in putting its own house in order. Even though it may merely be one building block or piece of the puzzle, insignificant in global terms, the structure and functioning of the state clearly continues to have everyday impact on the lives of women living in Southern Africa. In particular, statist theorists argue that the male-dominated nature of the state deprives women of the power to make history on their own terms:[158]

> Whether in its indigenous, colonial, or modern forms, the state has been overwhelmingly controlled by men; this control has been translated into laws, policies, and spending patterns which not coincidentally benefit men.

Whatever view we take of the way the state interacts with its subjects/citizens, there is a marked failure to acknowledge the extent to which men dominate the structures of the state. This dominance is entrenched in the origins and composition of the state, and extends (across classes) to accessibility and resource allocation of the state.[159] Where women are marginalized in relation to the state, there is clearly a need to rectify this through inter alia improving representation, inclusion of women's issues, good governance, and examining the apparently neutral policies which prejudice women. But it is also necessary to look into the fact that women's control of resources/power is more often outside the state than within it.[160]

[158] Parpart and Standt 1
[159] Parpart and Standt 6
[160] Parpart and Standt 8

3.6. The feminisation of poverty

The PFA notes that the increasing feminisation of poverty is a global trend. There are now over one billion people living in unacceptable conditions of poverty, most of whom are women and most of whom are situated in developing countries.[161] Among the various manifestations of poverty are:

> ... lack of income and productive resources sufficient to ensure a sustainable livelihood; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increasing morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion.[162]

The feminisation of poverty is exacerbated by the responses of nation states to the demands of a globalised economy, which have lead to widespread economic restructuring and adjustment programmes. As these programmes have often failed to take the situation of women and other vulnerable groups into account, they have inevitably resulted in a worsening of economic conditions for the most impoverished members of society. There is consequently a need to restructure macro-economic policies in a way which takes women into account and which includes women at the policy-making level.[163] In this regard, it is essential to consider factors such as gender disparities in economic power-sharing, migration trends and consequent changes in family structures, as well as the general impact of economic restructuring on the workloads (market and extra-market) and other burdens of women.[164] Other factors which must be taken into account include:[165]

- The rigidity of socially ascribed gender roles;
- Women's limited access to power, education, training and productive resources;

[161] PFA item 47
[162] PFA item 47
[163] PFA item 47
[164] PFA item 47
[165] PFA items 48-51

- The failure to adequately mainstream gender in economic development policies;
- The various forms of work, both remunerated and unremunerated, by which women contribute to the economy and which deepen the poverty of women;
- The absence of economic opportunities and autonomy for women;
- Lack of access to economic resources, including credit, land ownership, inheritance, education, support services and decision-making structures.

In order to address the feminisation of poverty, the PFA calls on states and social partners to take various actions. These include the review of macroeconomic policies to address the needs of impoverished women; the revision of laws and administration to secure women's equal rights to access to economic resources; the provision of savings and credit mechanisms; and the development of gender-aware methodologies to research and address the feminisation of poverty.[166]

The phenomenon of the feminisation of poverty seems to be especially acute in Southern Africa. A primary reason for this is the fact that the work that women do is only partially recognised as falling within the labour market. Mhone[167] classifies women's roles along the following lines:

- Child-bearers/rearers/household managers
- Producers of food (subsistence and market)
- Entrepreneurs and informal sector workers
- Formal sector wage-earners

These multiple roles have evolved in Africa through cultural patriarchal heritage as entrenched and strengthened under modern market relations and colonialism; the policies of post-colonial African governments and other influences such as droughts, civil strife, epidemics, and external global trends. In Africa, women are mired in poverty because of the following factors:[168]

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[166] PFA items 58-68
[167] Mhone G *African Women Workers, Economic Reform, Globalisation, AIDS and Civil Strife* [Hereafter Mhone]
[168] Mhone 15

1. The situational factor – women are located in Africa;
2. More women than men are located in rural areas;
3. The second largest proportion of women is to be found in the informal sector, characterised by poor working conditions, income and prospects;
4. Women in the formal sector are generally in low-paying, insecure occupations;
5. Women are burdened by multiple roles.

Mhone distinguishes between the strategic needs of women, being the need to resolve the unequal nature of the division of labour as exists within the socio-economic fabric of society, from practical needs, which represent immediate concerns with the current position in which women find themselves. Strategic proposals include: dealing with the dual legal legacies in operation in African countries; broadening productive opportunities for women; education and training (skills development); organising women (trade unions); promotion of women's rights. Practical solutions include welfare and ameliorative policies and social security safety nets.

3.7. The role of the International Labour Organisation (ILO)

The ILO has highlighted four main lines of action aimed at achieving gender equality in the workplace:[169]

1. Integrated strategies for the promotion of equality, including: tripartite dialogue, institutional capacities, awareness-raising, data-collection, research, planning and information (dissemination). This is realised through: policy formulation and implementation, legislation and enforcement, active labour market policies, employment promotion, training, targeting small and medium enterprises (SME's) for development, industrial relation schemes, occupational health and safety (OHS), social security initiatives and capacity building among organisations such as trade unions.

[169] *Women and Work: Selected ILO Policy Documents* ILO 1994

2. Targeting disadvantaged and vulnerable women. This includes women working in rural areas, informal sector, hazardous workplaces, migrant and displaced women.

3. Women and decision-making. This highlights the need to promote women, secure women's representation in key decision-making areas, such as government, business, labour and civil organisations, and to directly address women's needs and interests (for example on the bargaining and legislative agendas.)

4. Gender-responsive employment and labour policies and planning. This speaks of the need to include gender in policies designed to deal with restructuring issues, the response to globalisation, transitional democracy, demographic change, educational change and their effects on family, the workplace, the community and society.

In particular, the ILO has argued for a strategy that can address gender issues in Africa in both the short and longer terms.[170] Short-term poverty alleviation should aim at ensuring food security, primary health care, childcare and nutrition centres, education and training and providing for the special needs of vulnerable women. In the longer term, policies should aim to ensure that women enter viable, productive employment spheres. This may require additional skills and education support. Macro-level action demands that the state's definition of 'work' be expansive enough to include market and non-market, formal and informal. The multiple roles and subordinate and vulnerable status of women should be taken into account. Nationally, women's representation in tripartite structures of governance is essential, as is the need for women's needs to be taken into account in resource-allocation policies. Regionally, policies must be actively designed with gender in mind. In addition, the state should design policies aimed at ensuring employment promotion, education and training, workers' rights, information and data-collection.

[170] *Women, Work and Poverty in Africa* ILO 1994

3.8. Collective Bargaining

An important aspect of democracy and governance is the need to empower women through representation at the workplace. This is possible through trade union representation, education and skills, training in negotiating and putting women's issues on the bargaining agenda. However, it should be noted that these forms of empowerment are limited in application to the formal sector of the recognised labour market alone, where women are underrepresented or heavily segregated in terms of occupation. As such, such initiatives do not reach the informal sector, the unemployed, or unrecognised forms of work such as household work. In addition, many of the sectors in which women work are not conducive to conducting strikes or other forms of industrial action, e.g. nursing, teaching/care work, in contrast to typically 'male' work such as production line assembly. O'Regan and Thompson,[171] making recommendations in a South African context, maintain that special measures are required to ensure that women are represented in the leadership of trade unions, where women constitute a distinct minority. Further, the bargaining agenda must be analysed and amended to remove direct and indirect discrimination. Topics for bargaining should include: maternity rights, health care for women, flexible working hours, sexual harassment, career breaks, affirmative action and child-care facilities in the workplace. African trade unions should tap into women workers in the urban informal and rural sectors, as this represents a significant, unorganised and vulnerable group. Through solidarity and representation, women can acquire greater rights in the workplace, training and confidence, transform the image of the work done in these sectors (and government's opinion) and thus increase the chances of government and other assistance.

Trade unionism and collective bargaining constitutes an important source of working women's empowerment. There are many stumbling blocks and the limits of collective bargaining must be borne in mind. However, this can form an important part of a multi-faceted approach to securing gender equality in the workplace.

3.9. Conclusion

This chapter has sought to highlight some of the issues and concerns that must be taken into account in formulating or assessing measures designed to achieve gender equality at work. The Beijing Declaration and PFA is one of the most powerful instruments in the armoury of the women's movement today. It sets out the broad, global context in which we must question existing and proposed policies and practices in the labour market and incidental areas. Globalisation was perhaps *the* catchword of the 1990's, and will continue to be for the foreseeable future. The impact of the new global economy on employment trends and individual work relationships is only now beginning to be gauged. The specific problems and opportunities this phenomenon poses for developing countries forces us to look at employment equity in a new light. In particular, the feminisation of poverty requires urgent and comprehensive action in order to reverse the trend as women increasingly find themselves battling against destitution, starvation and extreme levels of impoverishment. The interaction between social security and labour market regulation is critical in this regard. A symbiotic collusion is possible, but will require a great deal of co-operation, information sharing and imagination before yielding the desired outcomes. As employers continue to demand flexibility and non-intervention from nation states, we must devise fresh approaches to securing the fundamental rights of women at work, including finding the right balance between state (and other forms of) regulation and flexibility in the labour market. In the search for a balanced approach to regulation the structures of collective bargaining and trade unionism can provide part of the solution. In addition, the role of international organisations such as the ILO cannot be underestimated in this regard.

These and other concerns constitute the environment to which any substantive conception of equality must adapt if it is to take effect. As was argued in chapter two, the concept of equality itself bears little meaning. Rather, a model of equality in the workplace can only be judged based on whether or not it is equipped to deal with the challenges and opportunities present in the very environment in which it must take

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[171] O'Regan K and Thompson C *Collective Bargaining and the Promotion of Equality: The Case of*

root. It is these factors which, viewed in the historical context of the region, largely inform and determine the nature of iniquitous power relations for women in the labour market. It is therefore at these points that interventions must be planned and targeted if bottlenecks of power are to be dislodged and equality for women attained. The focus will now shift, in chapter four, to an examination of the steps being taken in the SADC region to ensure gender equality in the labour market.

CHAPTER IV: GENDER EQUALITY IN SOUTHERN AFRICAN LABOUR MARKETS

4.1. Introduction

The Southern African Development Coordination Conference (SADCC) was established in 1980 with the aim of reducing the dependence of the region on the outside world, especially South Africa, and promoting economic co-operation between member states. SADCC was composed of nine members: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. The 1992 Treaty of Windhoek launched the Southern African Development Community (SADC), effectively replacing the SADCC. In addition to the nine states named above, SADC member states currently include: the Democratic Republic of the Congo, Mauritius, Namibia, Seychelles and South Africa. Whereas the aims of SADCC were largely limited to 'development coordination' with a 'concentration on infrastructure development'[172], SADC has pursued a more aggressive regional economic integration agenda, as now set out in its Trade Protocol 1996.

> Established on the principles of balance, equity and mutual benefit, SADC has embarked on an integration process whose vision is aimed at creating a single political economic space built on democratic principles, equitable and sustainable development, improved living standards of the citizens, free movement of factors of production and goods and services.[173]

In August 1995, the SADC Employment and Labour Sector (ELS) was created in light of the recognised need for a specialist body to address problems arising out of labour market regulation and escalating unemployment and poverty levels. The Employment and Labour Secretariat is currently based in Lusaka, Zambia.

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[172] Clarke M et al *Labour Standards and Regional Integration in Southern Africa: Prospects for Harmonisation* 15.

[173] Chitambo A *SADC Policy Dimensions of Social Protection* Unpublished paper presented at SADC Social Security Expert Conference 17 October 2001, Johannesburg.

In the remainder of this chapter, the nature of gender discrimination in SADC labour markets will first be considered in general, then with specific reference to two member states as examples – Lesotho and South Africa. The aim is to establish a clear idea of the types of issues that are likely to arise within the region. In Chapter V, Developments within the SADC-ELS aimed at addressing gender inequality will be critically discussed in light of the theoretical and contextual considerations set out in the foregoing chapters of this dissertation.

4.2. The Nature of SADC labour markets

SADC Member States are faced, without exception, with problems of both growth and development, leading to high levels of poverty and unemployment. The SADC region is typified by enclave economic activity, in which the formal sector accounts for the majority of economic growth, but only a small proportion of employment.[174] In other words, while the majority of the labour force is engaged in informal economic activity, it is the formal sector which accounts for the bulk of GDP, but which absorbs only a minority of the labour force.

These enclave economic structures can be largely attributed to the colonial legacy of almost all of the Member States. Attempts at transformation have failed throughout the region, and 'have resulted in adverse terms of trade for rural economies and small and micro enterprises in which women are concentrated.'[175] This, coupled with increasing population and dependency rates, as well as the rising need to care for victims of HIV/AIDS, has lead to an increased economic burden for women in both rural and urban areas.[176]

SADC Member States are currently plagued by widespread structural unemployment and underemployment, which is caused largely by an increase in the supply of labour with concomitant constraints on the demand for labour, such as low economic growth, skewed distribution of assets and downsizing in the formal economy.[177] Cyclical

[174] *SADC-ELS Draft Report of a Study on the Formulation of Policy Objectives, Priorities and Strategies for the SADC-ELS* 2000 Unpublished 4 [Hereafter *Draft Report*]
[175] *Draft Report* 5
[176] *Draft Report* 5
[177] *Draft Report* 14

unemployment, resulting from downward cyclical trends in the economy, and frictional unemployment, arising from operational changes made by local employers, are also adding to the region's overall unemployment problems.[178]

Throughout the region, these kinds of unemployment can be ascribed to various distortions in the labour market:[179]

- Distributive inefficiencies, created by unequal or restricted access to key economic resources such as land, education, training and finance;
- Allocative inefficiencies, referring to the misallocation of resources across the economy as a whole;
- Microeconomic inefficiencies, relating to 'distortions at the enterprise level which militate against economic efficiency, international competitiveness and increased employment absorption';
- Dynamic inefficiencies, which arise as a result of the above-mentioned distortions, creating a vicious circle from which the economy cannot escape.

Within the SADC context, it has been noted that the conventional approach, which relies on market forces to establish growth, which will in turn bring employment, is ill-conceived.[180] Due to the enclave nature of most SADC economies, it is clear that economic growth will by no means secure increased employment, let alone at the levels required to meet the increasing supplies of labour. The passive approach further underestimates the structural nature of the unemployment problem in the region, for which a more proactive stance on the part of states is required. If it is accepted that the passive approach will serve only to perpetuate the distortions set out above, it follows that the position of women in the labour market will be in no way improved. In fact, the converse appears probable. It is therefore clear that a proactive stance is required at regional and national levels to combat the problems of unemployment and poverty. From a gender perspective, bearing in mind the trend towards the feminisation of poverty discussed in chapter three, and widespread discrimination throughout the labour market, it is clear that a passive or non-interventionist approach will result only

[178] *Draft Report* 15
[179] *Draft Report* 16-7
[180] *Draft Report* 18

in the perpetuation of women's subjugated position within the region. There is clearly a need for a comprehensive policy approach which takes the realities of the status quo into account.

By way of elaboration on labour market conditions currently in place in Southern Africa, cursory country profiles on two SADC member states are set out below. Lesotho and South Africa have been chosen as examples illustrative of a clear range of issues and factors that need to be addressed throughout the region. It is also significant to note the different approaches taken by these two countries, which represent a broad variance in levels of development, in combating gender inequality in employment.

4.3. Country profiles: Lesotho and South Africa

4.3.1. Lesotho

In a 1994 ILO report it was noted that, in addition to being driven by economic trends and demographic factors, 'gender economic inequality is underpinned and reproduced by structural economic factors whose origin is partly cultural, partly legal, partly geographical and partly historical.'[181] The labour landscape in Lesotho is characterized by high instances of labour migration and high participation of women and girls in unrecognised forms of work, especially in rural areas.[182] Labour migration has had an adverse impact upon women in a number of ways. In particular, the consequent underdevelopment of household based farming; the increased differentiation in the de facto access to productive resources; and the increase of the burden of women's reproductive and productive roles have increased the economic vulnerability of women in Lesotho.[183]

In 1994, the formal sector accounted for a meagre 9% of the total workforce, of which women account for about 36%.[184] Women were the predominant workforce in sectors

[181] ILO *Promoting Gender Equality in Employment in Lesotho: An Agenda for Action* 1994 7 [Hereafter ILO 1994]
[182] ILO 1994 9
[183] ILO 1994 11
[184] ILO 1994 16

such as manufacturing and wholesale, retail and restaurants and hotels. Job segregation in Lesotho resulted in a conglomeration of women workers in poorly paid areas. High unemployment (23%) facilitated extreme exploitation, especially in some of the labour-intensive manufacturing industries.[185]

About 80-86% of the population of Lesotho live in rural areas, where the fundamental issues of gender economic inequality are manifested.[186] Women living in rural areas are disadvantaged both as members of male-headed households and as heads of households themselves. Male-headed households in rural areas have greater access to productive resources such as land, livestock, credit and training, while female-headed households 'face insurmountable odds and constraints in attempting to make a viable living in rural areas.'[187] The 1994 report accordingly held that:

> ... although the basis of the subordination of women is rooted in socio-cultural norms and practices and is also legitimised by both customary and modern law, its manifestation in terms of pervasive forms of gender economic inequalities in both the formal and non-formal sectors is a consequence of both structural and behavioural factors in the economic sphere.[188]

In dealing with the legal framework of gender equality in Lesotho, the 1994 report highlighted three major areas of concern: shortcomings in the legal provisions which serve to impede equality; inefficient implementation of existing equality laws; and the inefficient allocation of resources and administration.[189]

Although the Constitution of Lesotho provides for freedom from discrimination on the basis of sex,[190] extensive qualifications are set out, such as the exclusion of customary law, as well as laws pertaining to the traditional 'private domain' such as marriage, divorce, property and inheritance.[191] Lesotho has a dual legal system, in which customary law and Roman-Dutch law operate side-by-side. Under both

[185] ILO 1994 16
[186] ILO 1994 20
[187] ILO 1994 25
[188] ILO 1994 27
[189] ILO 1994 44
[190] Section 18
[191] ILO 1994 45

systems, women are generally regarded as minors, and consequently denied full legal capacity.[192] The adverse legal consequences of women's minority status cannot be underestimated, especially with regard to areas such as land and property rights, inheritance, contractual capacity, locus standi in judicio and pensions.

The Labour Code Order 1992 (the Code) establishes the principle of non-discrimination in line with international labour standards.[193] It appears that both direct and indirect discrimination are prohibited,[194] as is sexual harassment. The principle of equal pay for work of equal value is asserted in section 5(3). Despite the broad protective wording of section 5, questions remain concerning the legal literacy of potential female complainants.[195]

Maternity protection is extended by sections 133-7 of the Code. However, it appears that in practice, employers have failed to enter into the spirit of these provisions and in fact regularly violate even the letter of the law, indicating widespread ignorance of the law on the part of employees and a marked lack of faith in the administrative and judicial processes.[196] Other provisions in the Code bring Lesotho in line with international labour standards in the areas of nursing and family responsibilities,[197] night work[198], work in mines[199], and occupational health and safety.

Despite the apparent protection afforded women in the labour market, there are signs that the necessary enforcement of protective provisions is not forthcoming. For example, the 1994 report found that:

> Despite the obvious activity of the labour inspectorate, the major involvement of women in enforcement activities (25 of the 34 Labour Officers are women),

[192] ILO 1994 45
[193] Code s5
[194] Section 5(4) allows employers to distinguish between people on the basis of 'narrowly defined inherent requirements'.
[195] ILO 1994 50
[196] ILO 1994 51
[197] Section 137
[198] Section 130
[199] Section 132

and the majority of women being the subject ... of enforcement action, there seems to be little gender sensitivity.[200]

The report recommended that Lesotho embark on a legal literacy campaign, informing women of their legal rights in relation to labour. Other suggestions included the drafting of codes of practice, the updating and streamlining of legal aid, and the development of gender-sensitive law reform and social security programmes.[201]

According to a later ILO report conducted in 1998, The latter half of the 1990's in Lesotho was characterized by robust growth of the gross domestic product, mainly due to an increase in industrial production.[202] Most of the demographic and labour force trends continued unchanged. Unemployment rose marginally, agriculture remained the largest employer and, in general, migrant labour to South Africa and informal sector employment remained at high levels. Subsistence farming continued to be the major source of income for rural households.[203]

The economic position of women workers remained largely unchanged since the 1994 Report. Women tended to be overrepresented in the agricultural and informal sectors, and in general continued to earn lower wages than men.[204] The trend towards female-headed households continued in both the rural and urban areas, while differentiation with regard to access to productive resources in rural areas continued to have an adverse impact on female-headed households.[205]

Similarly, the legal position of women has remained unaltered since 1994. The Constitution has not been amended, leaving the anomalous situation regarding gender equality intact.[206] The other discriminatory laws mentioned in the original report remain in place, and women continue to be deemed perpetual minors in most aspects

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[200] ILO *Promoting Gender Equality in Employment in Lesotho: An Agenda for Action* 1994 56
[201] ILO *Promoting Gender Equality in Employment in Lesotho: An Agenda for Action* 1994 56-8
[202] ILO *Promoting Gender Equality in Employment in Lesotho: An Update and Background Report Prepared for ILO/UNDP Workshop Held at Lesotho Sun, Maseru, 25-7 February 1998* Unpublished Paper 1
[203] 2-4
[204] 4-5
[205] 5-6
[206] 16

of legal life.[207] Despite the existence of progressive labour laws as set out in the Labour Code 1992, enforcement has thus far proved ineffective. Although the Labour Court is fully operational and busy, and despite evidence that infringements of women workers' rights are rampant, no gender-related complaints have yet reached this forum.[208] The position regarding the labour inspectorate remains unchanged and inspectors continue to be insensitive to gender issues.[209] No codes of practice had yet been drawn up regarding gender equality at the time of publication of the report.[210] One significant change is that in February 1997 commissioners were finally appointed to the Law Reform Commission.[211] The Commission appears to be gender-sensitive, three of the commissioners being women.

4.3.2. South Africa

Emerging from a recent past of widespread discrimination in all spheres of life, the budding South African constitutional democracy is taking bold steps to ensure gender equality in the workplace. Women workers can now be said to be the bearers of constitutional and legal rights equal to those of men, representing a radical break from the discriminatory and dehumanising practices of the past. However, it has been pointed out that this alone cannot secure liberation in practice. Rather, it is 'the way in which legal rights are translated into reality and the way they are supplemented by social change that determine whether they change women's lives.'[212]

Under the Roman-Dutch system of family law in South Africa, women were deprived of legal capacity and essentially placed under the tutelage of their husbands. This impacted on all aspects of legal life, including matrimonial property, contractual capacity, locus standi in judicio and custody and guardianship of children.[213] Many of these blatantly iniquitous provisions survived until the early 1990's, when a formal notion of equality took effect.[214]

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[207] 17
[208] 20
[209] 20
[210] 22
[211] 22. The Law Reform Commission was established by the Law Reform Act 5 of 1993.
[212] Kaganas F and Murray C 'Law and Women's rights in South Africa: An Overview' in *Gender and the New South African Legal Order* (Murray C ed) 1 [Hereafter Kaganas and Murray]
[213] Kaganas and Murray 8-10
[214] Kaganas and Murray 12-6

In addition to the discriminatory effects of Roman-Dutch law, African women were, and to a large extent continue to be, faced with the additional challenges of African Customary Law (ACL), which operates on a pluralistic basis in South Africa:

> Under customary law, women are always subjected to the authority of a patriarch, moving from the control of their guardians to that of their husbands. The male head of the household represents the family and a woman cannot generally contract or litigate without assistance. Husbands control virtually all the family's property while wives' rights are confined to things such as items of a personal nature. Women cannot initiate the divorce process but must enlist the help of the bridewealth owner, who may have a vested interest in the continued existence of the marriage. Husbands, on the other hand, may simply unilaterally repudiate their wives or, if they wish to retain the bridewealth, can rely on specified grounds. Finally, on divorce, the children 'belong' to the husband's family.[215]

The South African labour market is one of the locations where the enormity of the entrenched nature of gender discrimination is apparent. In general, women are over-represented in a small number of sectors which tend to pay less than male-dominated sectors.[216] Women are typically found in low-level, poorly paid occupations, even when they are engaged in 'professional' work.[217] They are significantly underrepresented in management positions and are paid less even when they do the same work as their male counterparts.[218] In addition, there is a clear racial divide between women in the labour market:

> Approximately a third of all African women in regular employment and over half of those in casual employment are in domestic work. On the other hand of

[215] Kaganas and Murray 17 (footnotes omitted). See also Bennett TW *A Sourcebook of African Customary Law for Southern Africa* Juta 1995 301 on.
[216] Kaganas and Murray 28
[217] Kaganas and Murray 28-9
[218] Kaganas and Murray 29

> the 3770 women reflected in the 1991 *Manpower Survey* as being in managerial positions, only four were Africans.[219]

Such was the entrenched nature of gender discrimination in the workplace that the topic was not seriously debated by academics until the beginning of the 1980's, following the 1981 amendments to the Labour Relations Act and the 1983 amendments to the Basic Conditions of Employment Act.[220] Following the removal of the most blatant forms of gender discrimination in the workplace and society in general, the debate began to shift away from mere compliance with the tenets of formal equality, towards a more substantive understanding of the concept.[221] This arose from the recognition that a symmetrical approach to equality could not address the types of pervasive, entrenched discrimination in operation in the South African labour market.[222]

Equality for women in the labour market in post-1994 South Africa

The right to sex and gender equality was entrenched in both the Interim[223] and Final[224] Constitution, both of which clearly had a substantive notion of equality in mind.[225] Section 9 proscribes both direct and indirect unfair discrimination on a number of listed grounds, including race, gender, sex and pregnancy. In particular, section 9(2), which describes equality as including 'the full and equal enjoyment of all rights and freedoms', envisages affirmative action measures for disadvantaged groups for the purposes of promoting the achievement of equality. Section 9(4) provides that national legislation must be enacted to prevent or prohibit unfair discrimination. To this end, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of

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[219] Kaganas and Murray 29
[220] Kaganas and Murray 29
[221] See Du Toit et al *Labour Relations Law: A Comprehensive Guide* (3ed) 430, where a contextual approach that can take the 'social landscape against which the discrimination occurs' into account in devising counter-discrimination strategies.
[222] Kaganas and Murray 31. See also Albertyn C 'Women in the transition to democracy in South Africa' in *Gender and the New South African Legal Order* (Murray C ed) 39-63, for a more detailed account of the recent history of South African women's struggle for equality.
[223] Section 8 of Act 200 of 1993
[224] Section 9 of Act 108 of 1996
[225] See Pretorius JL et al *Employment Equity Law* Butterworths 2001 2-5, where the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 1 BCLR 39 (CC) is cited as authority for the view that the Constitution endorses a substantive notion of equality.

2000 (PEPUDA) has been described as 'the principal legislation ... that articulates and gives expression to the constitutional equality clause.'[226]

Regarding labour legislation, the Labour Relations Act[227] initially embodied the right to equality set out in the Constitution, as well as the principles of non-discrimination built up by the Industrial Court under the unfair labour practice jurisdiction of the previous Act.[228] This function has now effectively been taken over by the Employment Equity Act.[229] The EEA prohibits direct and indirect unfair discrimination in the workplace on any grounds, including gender, sex, pregnancy and family responsibility.[230] Harassment of an employee is included within the definition of unfair discrimination on the same grounds.[231] Positive obligations are placed on employers to ensure that equal opportunities are promoted through the removal of unfair discrimination in employment policies and practices.[232] In particular, the EEA introduces a form of vicarious liability for employers where employees contravene the provisions of the Act.[233] Job applicants are also protected for the first time in South Africa.[234] Although the wording of the section is problematic and its effect unclear, some attempt has been made at reversing the onus of proof where an employee has made out a prima facie case of discrimination.[235] Apart from the general defence that the discrimination in question is fair, employers are limited to two justification grounds: 'affirmative action consistent with the purposes of [the EEA]', and the 'inherent requirements of the job.'[236]

Chapter III of the EEA provides for mandatory affirmative action measures to be taken by certain 'designated employers' in respect of certain 'designated groups'

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[226] Gutto S *Equality and Non-Discrimination in South Africa: The Political Economy of Law and Law Making* [New Africa Books 2001]123. A discussion of this legislation, which deals with equality in society generally, and not the labour market in particular, is beyond the scope of this work. It is hoped that PEPUDA will have the desired impact on the types of extra-market discrimination detailed elsewhere.

[227] 66 of 1995 [LRA]. See also the provisions on maternity (s25) and family responsibility leave (27) in the Basic Conditions of Employment Act 75 of 1997 [BCEA].

[228] Act 28 of 1956

[229] 55 of 1998 [EEA]

[230] Section 6(1)

[231] Section 6(3)

[232] Section 5

[233] Section 60

[234] Section 9

[235] Section 11

[236] Section 6(2). See the discussion on justification grounds in 2.4. above.

specified in the Act.[237] Employers are obliged to take measures 'designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce.'[238] A gradual process of implementation is envisaged, through the adoption of successive employment equity plans, drawn up in consultation with employees, which are based on 'numerical goals'[239] rather than quotas. It is clear from the wording of the EEA that a balanced approach to employment equity has been adopted. Employers are granted a fair degree of flexibility within the general requirements of the Act. Monitoring is the responsibility of trade unions and labour inspectors, coupled with the employer's 'burden to inform'[240] and as overseen by the CCMA and Labour Court.[241] In addition, a Commission for Employment Equity, entrusted with the task of advising the Minister of Labour on matters relating to employment equity, is established by the EEA[242].

It is clear that South Africa has made impressive progress through the provision of an ambitious array of constitutional and legal rights for women in line with developments in many first world countries. However, the question remains as to whether these rights will translate into a meaningful improvement for the dire plight of South African women in the workplace. It has been argued that, despite the provision of rights on paper for women, a number of factors mitigate against the attainment of de facto equality for women in all aspects of society.[243] These factors include: gender-based definitions of social roles and responsibilities; prevailing patriarchal societal structures based on stereotypes of the position of women; and the sexual division of labour and access to resources such as training and education, as well as the amenities of life.[244] In the context of the labour market, the global economic shift towards atypical forms of work, coupled with the continued sexual

[237] Designated employers are generally those who employ more than 50 employees. Designated groups are 'black people, women and people with disabilities' [s1].
[238] Section 15(1)
[239] Section 20(2)(c)
[240] Pretorius et al *Employment Equity Law* 11-3
[241] See Chapter V EEA
[242] Chapter IV
[243] Kehler J 'Women's rights versus women's realities: Why do they not coincide?' *Rights Now* NADEL Issue 9 June 2001 1 [Hereafter Kehler]
[244] Kehler 2

division of labour, has increased the vulnerability of the positions of many women.[245] Despite the promulgation of equity laws and constitutional rights:

> ... in reality, most women are employed in lower-paid positions without any job security and are confronted by structural inequality and gender-based discrimination. In addition, a substantial number of women are located in the informal sector, while those in the formal employment sector are primarily employed either part-time or as casual labourers.[246]

Recent statistics show that women in general, and African women in particular, are adversely affected by unemployment and poverty.[247] In addition there is widespread non-compliance with legal requirements such as those concerning maternity leave.[248] It is within this context that the success of the promulgation of constitutional and labour rights must be viewed. Comprehensive, multi-layered interventions are required by the state and stakeholders in order to ensure that women's rights differ significantly from the reality in which they live. South Africa has clearly embarked in the right direction with regard to the employment equity for women. However, it is clear that the country is still a long way from ensuring that substantive equality becomes a reality for South African women. In this respect, targeting of key areas for action is required. In particular, it is submitted that the following areas need to be prioritised:[249]

- Effective skills development, training and education for women;
- Extending social security protection to women, especially the rural and urban poor;
- Removing barriers to participation in the labour market for women, such as working hours and retirement ages;

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[245] Kehler 3. See also Fredman S 'Labour Law in Flux: The Changing Composition of the Workforce' *ILJ* Volume 26 No.4 December 1997 337; and Samson M 'Globalisation: Women pay the price' *SALB* Vol 21 No.1 February 1997 8.

[246] Kehler 4

[247] Kehler 4-5, citing the 1999 October Household Survey in South Africa, which found that almost half of women live in rural areas with little to no access to services and social goods. Sixty percent of female-headed households live in poverty, as compared to 31% of male-headed households.

[248] Kehler 4, citing a study done by the Commission for Gender Equality, which found that women workers are still confronted with discriminatory practices, despite legal provisions being in place.

- Effective inclusion of women in affirmative action programmes as provided for in the EEA;
- Aggressively reducing gaps in earnings between men and women in line with the principle of equal pay for work of equal value;
- The enforcement of existing protections pertaining to pregnancy, sexual harassment and family responsibilities.

As alluded to in Chapter II, the issue of pregnancy for women at work raises particular problems. A brief case study follows exploring some of the pitfalls that may arise in implementing even seemingly progressive laws and policies in this regard.

4.3.3. Case study: Enforcement of protections of pregnant employees in South Africa

The example of pregnancy in the workplace is illustrative of the difficulties that may arise in the absence of a clear policy setting out the rights of women in this regard. It is submitted that more is required than the mere assertion that women have the right to equality. Mere formal equality cannot assure women of equal treatment before the law. Even a substantive notion of equality may be ineffective in the hands of the wrong judiciary. The traditional conception of formal equality rests on the proposition that like people should be treated alike. This has resulted in the removal of many overt barriers to the progression of women in society, but is limited in its reliance on symmetrical treatment.[250] In particular, this approach encounters problems when it comes to the issue of pregnancy, where women are clearly different from men. Several approaches have been developed in response to this apparently insurmountable obstacle.[251]

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[249] Some of these suggestions were made by Bhoola U 'Outlawing Discrimination: Women in the Workplace' *The Innes Labour Brief* Vol 8 No 1 September 1996 17 at 21-4

[250] For a discussion on the shortcomings of this approach, see O'Regan C 'Equality at work and the limits of the law: Symmetry and individualism in anti-discrimination legislation' in *Gender and the New South African Legal Order* (1994) 64.

[251] Fredman S 'A difference with distinction: Pregnancy and parenthood reassessed' 110 (1994) *The Law Quarterly Review* 106-23.

Firstly, a strictly formal approach merely sees that there is no male comparator and gives up any attempt at securing equality.[252] The second approach seeks a comparator in men who are in a comparable situation (ill).[253] The third school of thought holds that, since only women get pregnant, discrimination on the basis of pregnancy amounts to sex discrimination.[254] All these approaches involve a degree of superficiality and inherent comparison where no comparisons are really appropriate. This led to the development of the specific rights approach, which does not require a similarly situated male comparator, and allows the question of who bears the social costs of pregnancy to be confronted directly.[255] The allocation of specific rights, however, is only as effective as the legislators and the courts allow, and may be limited by lack of political will and obstructionist or inefficient judicial practices.

South Africa is a good example of the specific rights approach, which is in keeping with the substantive model of equality enshrined in its Constitution. Pregnancy is listed as a protected ground in s9(3) Constitution, s6(1) of the Employment Equity Act[256] (EEA) and s187(1)(e) of the Labour Relations Act[257] (LRA). Where an employee is dismissed for reasons related to her pregnancy, the dismissal will be deemed to be automatically unfair. It will then be for the employer to prove that the dismissal was in fact fair, an onus which, it is submitted, will be extremely difficult to discharge.[258] Similarly, job applicants excluded on the basis of pregnancy will be able to claim unfair discrimination within the meaning of s6(1) of the EEA, which prohibits unfair discrimination in any employment policy or practice on the basis of pregnancy inter alia. As pregnancy is a listed ground, the plaintiff need only prove that the discriminatory treatment is linked to her pregnancy. The court will then presume both discrimination and unfairness. Despite these presumptions, an employer may justify discrimination on the basis it was 'an inherent requirement of the job.'

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[252] *Turley v Allders Stores* [1980] ICR 66 (EAT); *Geduldig v Aiello* 417 US 484 (1974); *General Electric v Gilbert* 429 US 125 (1976).
[253] *Hayes v Malleable Men's Working Club and Institute* [1985] ICR 703.
[254] *Dekker* Case C-177/88 [1990] 1 ECR 3941
[255] Fredman 118
[256] Act 55 of 1998
[257] Act 66 of 1995
[258] Note that the provisions of s187(2) LRA, dealing with employer defences, does not apply in respect of pregnancy. The employer would have to show, for example, that the dismissal is in fact based on some other ground, such as incapacity or operational requirements, and not pregnancy per se.

Employer defences should be limited to narrow cases of operational necessity, occupational health and safety and, in extreme circumstances, incapacity of the pregnant applicant to do the job. In South African, the narrow wording of s187 LRA leaves the employer no scope to argue that the dismissal of a pregnant woman is justified given the inherent requirements of the job. The employer may attempt to argue that, where an applicant did not divulge that she was pregnant, she was dismissed by reason of breach of good faith. In this regard, the recent ECJ judgement *Tele-Danmark*[259] is instructive as it holds that 'a worker is not obliged to inform her employer of her condition, since the employer is not entitled to take it into account on recruitment.'[260] This case is important for other reasons as well, as it expands the ECJ jurisprudence on the matter by extending[261] the protection afforded in previous decisions to temporary, fixed term contract workers. It should be noted that, whereas article 5(1) of Directive 76/207 prohibits discrimination on the grounds of sex, the wording of the LRA is even stronger in proscribing dismissal on grounds of pregnancy.

In South Africa, a prospective employee may rely on the alternative argument that she has been discriminated against in being refused employment on the basis of pregnancy. Here, she will rely on her status as a job applicant in terms of s9 EEA. In *Whitehead v Woolworths*[262], the employer argued that, since uninterrupted continuity was an inherent requirement of the job, there was no discrimination on the basis of pregnancy in not employing a pregnant applicant.[263] The rationale was that the employer would likewise exclude a male applicant who could not satisfy the continuity requirement. The Labour Court held that job continuity was not an inherent requirement of the job, and found for the applicant on that basis. On appeal,[264] the case resulted in three separate judgements. Zondo AJP held that the applicant had not shown that she should have been chosen for the job.[265] Conradie JA found that the employer failed to show that continuity was an inherent requirement of the job.[266] On

[259] C-109/00 4 October 2001
[260] Par 24
[261] See for example *Webb* [1994] ECR I-3567 par 19
[262] (1999) 20 ILJ 2133 (LC)
[263] Par 19
[264] *Woolworths v Whitehead* (2000) 21 ILJ 571 (LAC)
[265] Para 19
[266] Para 47

the other hand, Willis JA, in a now infamous decision, held that continuity did indeed constitute an inherent requirement of the job.[267] In so doing, it is submitted that he paid undue deference to the commercial rationale proffered by the employer.

The *Woolworths* case shows that even the widest form of protection offered to pregnant women may not be generous enough if left to the devices of a resistant or ill-informed judiciary. It is submitted that member states should spell out in codes of good practice the very limited conditions in which employers may exclude or dismiss women on the basis of pregnancy. *Woolworths* further serves as an illustration of just how difficult it may be for women to cross the initial barrier of linking differential treatment to their pregnancy. These difficulties should be taken into account in formulating policy on pregnancy in the workplace.

Although the development of reasonable equality jurisprudence has been slow in South Africa, it is submitted that the courts will ultimately arrive at an interpretation of the law that gives effect to the substantive notion of equality, as well as the specific rights afforded pregnant women in the workplace. If nothing else, *Woolworths* has introduced new levels of uncertainty into this aspect of the law. Nevertheless, on a proper reading of the South African Constitution and legislation, foreign and international law[268], it is submitted that the courts will in future adopt a broad, purposive approach to the protection of pregnant women at work, and a suitably restrictive one to employer defences of inherent requirements of the job and other commercial rationale.

4.4. Summary

It is clear that the attainment of gender equality in the Southern African labour market is a long way off. Already typified by high levels of unemployment, and now faced with the pressures of globalisation, structural adjustment programmes, increasing population levels, HIV/AIDS and many other challenges, the task of reversing the entrenched patterns of gender discrimination in the region seem unassailable.

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[267] Para 134-8

[268] See for example the ILO Protection of Maternity Rights Convention No.3 of 1919 and Convention No. 103 of 1952, which provide for special maternity rights for women.

Nevertheless, it is submitted that the first step towards gender equality in the labour market is the development of a thorough understanding of the context in which programmes and policies are to operate. With the help of studies such as that carried out by the ILO in Lesotho, this initial step can be said to be underway.

Given the vast disparities in economies and other areas, it is probably not appropriate to make direct comparisons between the situations of Lesotho and South Africa as discussed above. Nevertheless, it is useful to note the stages of development of the two countries insofar as they may represent a range of issues that may arise within the regional context. It is clear that, despite intervention by international bodies such as the ILO, Lesotho had not made much progress, as far as gender equality in employment is concerned, in the period 1994-1998. Women continue to be treated as secondary citizens, and this is clearly having an impact on their economic and occupational positions. South Africa, on the other hand, has made clear progress in recent years. At least on the statute books, direct forms of gender discrimination have been abandoned. Nevertheless, it is clear that the South African labour market continues to be characterised by high levels of gender discrimination, a position that is not aided by judicial decisions such as that of the South African Labour Appeal Court in the *Woolworths* case.

From the above it appears that a comprehensive, all-embracing approach to gender equality in the labour market is required at the regional level. It is only through such an approach that the entire spectrum of exigencies present throughout the region can be adequately catered for. It is to developments at the regional level that we now turn.

CHAPTER V: APPRAISAL OF REGIONAL DEVELOPMENTS IN THE SADC

5.1.Developments in the SADC-ELS

Although gender equality in the workplace has formed the basis of numerous international instruments and programmes, it is only recently that attempts have been made at a regional level to address the issue in Southern Africa. In 1997, the SADC Council of Ministers adopted the Policy and Institutional framework to mainstream gender into SADC institutions, policies, programmes and activities. Later that year, the SADC Heads of State and Government signed the SADC Declaration on Gender and Development and the Addendum on the Prevention of Violence Against Women and Children (1998). More recently in 2000, the SADC-ELS adopted its Gender Policy. In March 2001, the Committee of Ministers and Social Partners adopted the Charter of Fundamental Social Rights, the aims of which include the 'equal treatment of men and women' and social protection.

In its 1999 progress report on gender and development, the SADC Gender Programme conducted a review of the regional situation. The review found that, as far as women's access to economic structures, productive activities and control of resources were concerned:

> 'In all the SADC countries women are the majority of the poor; they also have limited access to land, credit and capital investment, and are further poorly represented in the formal employment sector. When they are employed, it is in the low paying stereotyped jobs such as teachers, nurses and secretaries. The majority of women work within the informal sector, where income is low and unreliable. Women's access to resources is hindered by harmful traditional practices, low level of education, their marginalization in the economy and lack of collateral.'[269]

The report found that Member States were in various stages of developing policy and institutional frameworks to address gender concerns. In particular:

- 'Although they vary in size, all Member States have national gender machineries in the form of Gender/Women's Affairs Ministries, Units, Bureaus, Departments or Divisions ... charged with the responsibility of coordinating and facilitating gender-related activities at national and sectoral levels.'[270]
- Some countries have explicit gender or 'women in development' policies, while others are in the process of formulating them.[271]
- Some countries have established Gender Focal Points, while others are in the process of doing so – either senior government officials with responsibility of ensuring that all government policies and programmes within each sector have a gender perspective[272] or independent bodies with powers to monitor the achievement of gender equality in the country.[273]
- Non-Governmental Organisations (NGO's) operate in many Member States, implementing programmes aimed at women's empowerment and poverty alleviation. Collaboration with government takes place to varying degrees.[274]

Power-sharing at all levels of decision making has been prioritised in the region. The need to promote equitable gender representation at all levels of decision making was recognised in the 1995 Beijing Declaration as well as the 1997 SADC Declaration on Gender and Development, which requires that Member States achieve thirty percent representation of women in all levels of government decision making by 2005. The report shows that average representation currently hovers around the fifteen percent mark.[275]

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[269] *1998/1999 Progress Report: Gender and Development*, presented by the SADC Gender Programme in Mbabane, Kingdom of Swaziland, February 2000 at 7.
[270] At 3
[271] At 3
[272] Zimbabwe for example.
[273] At 4 - e.g. South Africa's Commission on Gender Equality
[274] At 4
[275] At 4-5

Initiatives aimed at achieving greater gender equality in Member States include: training programmes/capacity building for women; micro-credit programmes; micro-enterprises support; and NGO action. At the regional level, the SADC Women in Business Network is comprised of women in business associations from various SADC countries.[276] In addition, all SADC countries (except Swaziland, which has acceded, but not yet ratified) have ratified the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW).

In all SADC countries, customary and Roman-Dutch/colonial law subordinates women in relation to men, resulting in negative implications for women's inheritance rights, access to family property and resources such as credit, land and livestock. Moves are currently afoot within Member States to eradicate these extra-labour market constraints, but 'much needs to be done to make CEDAW a living document'.[277]

The SADC Council of Ministers adopted the policy and institutional framework for gender mainstreaming in SADC in February 1997. The institutional framework has four components:

- A Standing Committee of Ministers responsible for Gender Affairs in the region is established;
- An Advisory Committee, consisting of one government and one NGO representative from each Member State, which advises the Standing Committee of Ministers and other sectoral committees of ministers on gender issues;
- Gender Focal Points, established at sectoral level to ensure that gender is taken into account in all sectoral initiatives, and that gender is placed on the agenda of all ministerial meetings;
- A Gender Unit is established at regional level in the SADC Secretariat, consisting of at least two officers at a senior level. Its task is to advise all

[276] At 7
[277] At 8

SADC institutions on gender issues, and coordinate all gender structures in SADC.[278]

Since 1997, steps have been taken to put the agreed-upon institutional structures in place.

In July 2000, the SADC-ELS adopted its Gender Policy, in order to comply with its obligations under the SADC Gender Programme towards the achievement of gender equality in the labour market in the region. The Gender Policy acknowledges that, in general, the labour market in Southern Africa is characterised by gender inequalities. It calls for the review and reform of discriminatory legislation, labour laws, policies and practices. However, in recognising that gender-neutral policies 'ignore the reality that women have not had, and still do not have, equal opportunities in the labour market,' the document calls 'upon member states to commit themselves to the development and implementation of gender sensitive policies, and positive action measures to promote equality of women in work and employment.'[279]

The Gender Policy recognises that gender inequality is 'multi-faceted and pervades all institutions'. The labour market is itself characterised by widespread gender inequality, caused by both labour market and extra-market discrimination. Labour market discrimination pertains to:

> 'the use of non-productivity related criteria in the allocation and utilisation of labour (such as recruitment, hiring, remuneration, firing and retrenchments). These non-productivity criteria may be related to factors such as gender, race, age and ethnicity.'

Extra-market discrimination is concerned with:

> ... factors outside the labour market which affect the supply of, and demand for labour. These include: differential access to services (i.e. education and training, social welfare), unequal access to employment, unequal access to

[278] At 9

household wealth and income. These differences result in unequal access to education and training. Women, as a group, are often victims of extra-market discrimination. Unequal access to education and training, for example, often results in women being disadvantaged in getting access to jobs (especially jobs that are not jobs typically filled by women).

The Gender Policy notes that there are six general trends within the region which disadvantage women in the labour market:

- Legal impediments are 'laws that undermine gender equality in work and employment', which can be labour laws or extra-market laws which effectively disadvantage women at work;
- Discriminatory policies in the trade and industry, economic or labour sectors 'may have a different impact on women and men, thereby creating barriers to gender equality';
- The lack of policies, or inadequate policies, for example, in the areas of pay equity, maternity and sexual harassment legislation;
- The lack of implementation of existing laws and legislation, including lack of enforcement and monitoring mechanisms, and inadequate access for women to justice;
- The existence of gender-neutral laws that have aspects that disadvantage women;
- Built-in practices and attitudes that have the effect of discriminating against women.

The stated overall aims of the policy are:

a. to implement a gender policy in the SADC-ELS which will operate throughout the sector and throughout the region;
b. to encourage gender sensitivity in labour and employment policies and practices in the region;

[279] Preamble

c. to encourage the development and implementation of policies which promote gender equality; and
d. to identify areas of activity that the ELS can undertake to help address gender discrimination in the labour market of the region.

In order to achieve this, the drafters of the policy envisage a process of legislative review, in which existing laws and employment practices are reviewed and reformed throughout the region. The policy prioritises education of training, both in order to raise awareness about gender issues as well as to actively develop the skills base of women in the region. It further calls for the development of a Human Resource Plan, aimed at 'setting up and implementing non-discriminatory procedures for hiring, promotion, remuneration, selection for training, retrenchment practices and the use of gender disaggregated data'. In order to achieve these goals, a comprehensive programme of research, monitoring and evaluation is envisaged, including research on the impact of HIV/AIDS and globalisation on women in the labour market.

5.2. Critical analysis

The Gender Policy and related gender programmes devised by the ELS, are positive and ambitious developments in the region in the general move towards securing gender equality for women in the workplace. The very existence of such initiatives testifies as to how far the region has come in its goal of mainstreaming gender and reducing inequality and injustice between the sexes. However, in order to maximise efficiency of outcome and to give effect to the stated aims of the ELS, it is necessary to expand on the provisions of the Gender Policy. One of the successes of the Gender Policy is that it forces us to consider many questions that have been hitherto ignored. What conception of equality is best for the region? How is it to be articulated in light of the context of the regional situation? How far can any conception of equality take us in light of recent jurisprudential developments concerning gender equality? How is equality to be developed in specific areas such as pregnancy and pay equity? It is in the task of answering such questions that the success of the Gender Policy will ultimately be measured. The remainder of this paper will examine some of the issues and difficulties which may arise in this process of questioning.

5.2.1. Formal versus substantive equality

It is submitted that, in light of the previous and existing patriarchal customary and colonial practices rife throughout the region, nothing short of a substantive approach to equality is appropriate for the SADC-ELS. A formal approach will only serve to mask and perpetuate existing gender equalities. Although the ELS Gender Policy does not expressly state that it endorses the substantive approach, there is ample evidence to suggest that it does. The preamble calls for a reform of discriminatory laws, which would be in line with a formal approach to equality. However, it goes further in stating that 'it is not sufficient to implement gender-blind policies as such policies ignore the reality that women have not had, and still do not have, equal opportunities in the labour market.' Thus, the policy calls for 'positive action measures to promote equality of women in work and employment.' The included targeting of extra-market discrimination further suggests that the policy is concerned with substantive outcomes which move beyond mere equal treatment of parties.

This substantive approach is in keeping with the general underlying philosophy of the SADC Gender Programme, which supports a pro-active, substantive approach to equality, as evidenced by its call for thirty percent representation of women in political decision-making structures by 2005. The ELS Gender Policy takes cognisance of the importance of taking the context of gender inequality into account. In giving content to the substantive model of equality it adopts, it is vital to allow the reality of the status quo in the region to inform the exposition and implementation of gender equality in the labour market.

5.2.2. Indirect and direct discrimination

Although it recognises that 'gender-neutral laws' may have a discriminatory impact on women, the ELS Gender Policy does not expressly state that it supports the elimination of direct and indirect discrimination. It defines labour market discrimination as being 'the use of non-productivity related criteria in the allocation and utilisation of labour' which may be related to factors such as gender, race, age and ethnicity. This definition is problematic, as it seems to cover only direct

discrimination. There is no mention here of seemingly neutral policies and practices which in fact have a differential impact on women. While an element of prohibition of differential impact is included in the definition of extra-market discrimination, the policy would do well to expressly state that any intended prohibition of indirect discrimination. It may, however, be deduced that the policy prohibits indirect discrimination, on the basis that this necessarily flows from its adoption of the substantive approach to equality. In line with its commitment to achieving de facto equality in society, the substantive approach necessarily entails a prohibition of indirect and direct discrimination. Any truly substantive conception of equality must include in its enforcement machinery a prohibition of both direct and indirect discrimination. Nevertheless, the absence of a clear and express prohibition of indirect discrimination is undoubtedly a weakness of the Gender Policy.

5.2.3. Limits of equality

The ELS Gender Policy is stated in general terms, presumably to allow for the widespread disparities in approaches and varying levels of development between Member States. Although it would have been desirable clearly spell out the model of equality on which the policy is based, it is apparent that substantive equality is promoted. We can further state, although with less certainty, that a prohibition of both direct and indirect discrimination is envisaged. However, even though a substantive model of equality is adopted, serious challenges face the region in determining its content and scope. The next major task is to assess or interpret the content to be given to this model, and how it is to be applied in specific circumstances. Contemporary feminist theory questions whether even the substantive model of equality can deliver. It was argued in chapter two that the substantive model of equality can accommodate these concerns, as long as due account is taken of the context in which it is to operate.

The SADC Gender Review 1998/9 noted that there was a great deal of disparity with regard to enforcement mechanisms throughout the region. The ELS Gender Policy envisages a comprehensive programme of legislative review and reform, the development of a Human Resources Plan, and an ongoing system of education, training, research and evaluation, co-ordinated through the ELS. The policy does not state a preference for any particular mode of enforcement of equality laws. It is

probably true that there is no single, optimal model in this regard. Rather, enforcement depends on the infrastructure and particular circumstances of each Member State. Nevertheless, it is essential that an exchange of information takes place between Member States, supplemented by the technical expertise of international organisations, in order to establish some guidelines as to best practice of enforcement mechanisms. Any policy that does not address the challenges arising from enforcement issues risks becoming nothing more than a superficial, ineffectual legislative shell containing promises of equality which cannot be kept.

5.2.4. SADC responses to the Beijing Declaration

In the build-up to the Beijing Conference, a task force was created to provide guidance to the region on gender issues. This task force was transformed into the Regional Advisory Committee (RAC) in May 1996.[280] The RAC has continued to collaborate with gender experts and SADC representatives, with the aim of ensuring that gender is prioritised and mainstreamed in all SADC initiatives.

Following the adoption of the PFA, current programmes underway in Member States include plans to strengthen institutional mechanisms 'to design, promote, monitor, advocate and mobilize support for policies to advance the status of women.'[281] Various steps are also being taken to improve political and economic empowerment of women.[282] An interesting development as far as economic empowerment is concerned is the South African Women's Budget Initiative (WBI), which scrutinizes national and provincial budgetary allocations for direct and indirect gender discrimination. Legal reforms are further underway throughout the region in order to secure greater human and legal rights protection for women.[283] This includes

[280] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 1
[281] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 11
[282] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 13-7. See the SADC Gender and Development Declaration 1997.
[283] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 19

initiatives towards the eradication of gender violence[284], and the provision of a higher standard of education[285] and health care [286] to women living in Southern African countries.

At the regional level, drawing from the global concerns set out in the PFA expressed in 3.2. above, SADC Member States have identified the following four priority areas:[287]

- Insufficient mechanisms at all levels to promote the advancement of women;
- Inequalities between women and men in the sharing of power and decision-making at all levels;
- Inequalities in economic structures and policies in all forms of productive activities at all levels;
- Lack of respect for, and inadequate promotion and protection of human rights of women and the girl-child.

From this it is clear that the economic and political empowerment of women is an area of great concern in Southern Africa. This calls for gender equality in the labour market, as well as the prevention of extra-market discrimination impacting on the labour market. If empowerment is to be taken seriously, a multi-faceted and comprehensive approach is required. However, it is perhaps significant that 'women and poverty' per se is not mentioned as a priority area within the region. This is disturbing as it is precisely for regions such as SADC that the priority area is the most relevant, and where action by states is most required. Despite the fact that seven Member States regarded poverty as an area of priority concern,[288] it appears from the Gender Monitor that it did not make the grade as an overall area of priority.

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[284] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 21. Seven SADC Member States identified gender violence as a priority area as one of their National Priority Areas of Concern.
[285] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 25
[286] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 29
[287] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 3
[288] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 4-8. Angola, Botswana, Malawi, Mozambique, South Africa, Tanzania and Zambia nominated poverty alleviation as an area of priority. It may well be that,

4.5.5. Globalisation and women workers

Crudely stated, the pressures of globalisation have led to a drive for flexibility, deregulation and non-intervention in national and supra-national labour markets. Seemingly counter to this is the notion of substantive equality, which requires a proactive state role in creating an environment in which gender equality can be attained. The neo-liberal argument may be along the lines of: a proactive approach by the state will add to the costs of production, creating more unemployment and thus less equality for women. However, as argued in chapter two, it is clear that discrimination itself is socially wasteful and increases the costs of production in the long run. It is equally clear that, in the Southern African region, the entrenched nature of gender inequality renders it unsuitable for the 'market forces', passive approach to succeed. Recently, it has been asserted that the real debate is not whether the labour market ought to be regulated, but rather 'which regulatory regime will best serve the social and economic needs of a given region or nation.'[289]

In many respects the challenges and opportunities caused by global market forces are the most pressing issues facing the SADC region. SADC initially resisted the pressures towards trade liberalisation on grounds that a 'laissez-faire approach to regional integration, in a region with gross inequalities, would be inappropriate, and tend to entrench existing inequalities and imbalances.'[290] However, there has been a marked shift towards trade liberalisation in the region, culminating in the Trade Protocol 1996, which paves the way for the free movement of goods and services and capital. The inherent danger in this policy shift is that capital flows will be freed up and attracted to those member states where the costs of production are lowest and labour standards weak or non-existent.[291] This may herald a 'race to the bottom' as member states compete by dropping labour standards in order to attract investment. In

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in choosing regional areas of priority, the ground of 'poverty' may have been subsumed under the heading 'Inequalities in economic structures and policies ...' This would be a grave error however, as this head does not directly address the poverty of women.

[289] Clarke M et al *Labour Standards and Regional Integration in Southern Africa: Prospects for Harmonisation* 11

[290] SADCC (1992) Theme Document, Maputo Conference. Gaborone: 29-31 January 1992, quoted in Clarke M et al *Labour Standards and Regional Integration in Southern Africa: Prospects for Harmonisation* 15-6.

[291] Clarke 17

this equation, women, who occupy the lowliest positions in the labour market, are likely to be the most vulnerable to exploitation. There is clearly a need for harmonisation of labour standards in the region which can create a minimum base level of worker rights. Along with measures securing the rights to organise and bargain collectively, equality in the workplace should be prioritised in formulating this minimum floor of rights.

The substantive model of equality adopted by the ELS in its Gender Policy is an important first step towards ensuring that gender equality in the workplace is included in the establishment of harmonised labour standards in the region. As has been argued throughout this dissertation, a substantive approach to equality necessarily entails a high degree of intervention by the state and other stakeholders, in order to eradicate existing patterns of entrenched discrimination. The Gender Policy notes that '[g]eneral policies of liberalisation tariff reduction may have a particularly negative impact on some sectors of the economy – often sectors (such as clothing and textile) that are dominated by women.'[292] As part of the strategic direction of the Gender Policy, research on the impact of globalisation on employment is called for, particularly relating to the gendered nature of changing employment patterns at national and regional levels.[293] Harmonisation requires strong action at both national and regional levels. If it is to be successful, a clear conception of gender equality and its application, within the meaning of the policy, needs to be conveyed to member states from the regional co-ordinating unit. In this respect the Gender Policy needs to be expanded on, clarified and actively supplemented by clear guidelines and directives.

4.5.6. Women and the economy

Measures are being taken by SADC Member States towards empowering women in the economy. In South Africa, for example, the Women's Budget Initiative (WBI), introduced in March 1996, scrutinizes ways in which national and provincial budgets

[292] Gender Policy 5
[293] Gender Policy 7-8

serve to entrench gender inequality and disempowerment.[294] Among other findings, the WBI has highlighted the need for women's unpaid labour to be recognized and given economic value.[295] In Tanzania, the state has undertaken projects aimed at providing a greater percentage of women with access to credit, while in Zambia, the Strategic Plan for the Advancement of Women aims at increasing women's access to productive resources and the promotion of women's entrepreneurial activities.[296] The Mozambique government has established certain training projects for women and has increased access to credit and support for female-headed households.[297] At the regional level, the RAC is working in conjunction with the SADC Gender Unit to review the impact of sectoral policies on women's lives and investigate how to facilitate greater market access to women.[298]

The ELS Gender Policy recognises that extra-market discrimination, including unequal access to services, employment, household wealth and income, is a primary source of labour market discrimination. The policy cites discriminatory policies in areas such as trade and industry, finance and law, as having an adverse impact on women in the labour market.[299] This holistic approach to addressing inequality in employment is to be welcomed, and is in line with the substantive conception of equality underlying the policy. By way of follow-up, it is now necessary to develop and expand on exactly how the ELS intends to remove bottlenecks and iniquitous distributions of power within the economy.

4.5.7. Women and the state

The role of the state in securing gender equality in the workplace is closely related to the regulation/flexibility debate mentioned in 4.5.5. above. The substantive notion of equality informing the ELS Gender Policy requires a proactive stance to be adopted

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[294] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 15
[295] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 16
[296] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 16-7
[297] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 17
[298] SADC, SARDC *SADC Gender Monitor: Monitoring Implementation of the Beijing Commitments by SADC Member States* Issue 1 February 1999 17

by the state. Harmonisation of equality protection can only be secured through active state involvement, as facilitated by the ELS at the regional level. The policy further calls for a holistic approach to addressing gender inequality. This requires that integrated, multi-disciplinary strategies be adopted by member states in order to eliminate both market and extra-market discrimination. It is vital that the ELS co-ordinate and facilitate the degrees of state intervention envisaged, if harmonisation of equality provisions are to be taken seriously.

The SADC Gender Programme's plan to have thirty percent representation of women in decision making and governance by 2005 is clearly a step towards achieving greater representation and inclusion in structures of power, as are the institutional and policy measures adopted by the Programme. This will undoubtedly have filter-down effects for women in the labour market, as women's issues are mainstreamed in all sectors.

4.5.8. The feminisation of poverty

It was noted above that, although women and poverty was deemed an area of critical concern in the global context by the PFA, the Southern African region did not select it as a priority area of special regional significance. This is an inexplicable oversight, especially when one considers that the feminisation of poverty is particularly acute in the Southern African context, as set out in chapter three. Although the feminisation of poverty is not expressly mentioned in the ELS Gender Policy, the phenomenon is implicitly acknowledged in the use of the concept of 'extra-market discrimination', where the view is taken that differential access to wealth and services impedes women's equal access to the labour market. The omission to directly confront the feminisation of poverty, however, is a serious flaw of the policy. The social policy development role of the ELS must necessarily include modes of combating the impoverishment of women, especially where this phenomenon is shown to be linked to inequality in employment. In general it can be accepted that, even with the removal of barriers to employment such as iniquitous distribution of resources and skills shortages, entry into the labour market, especially the formal sector, cannot be

[299] Gender Policy 5

guaranteed for all. It is at this point that intervention of a different kind is perhaps necessitated, concerned with ensuring social inclusion through the provision of social protection for SADC citizens.

In this regard, the technical sub-committee to the ELS on Occupational Health and Safety and Social Security has made some progress. While an in-depth discussion of developments is beyond the scope of this dissertation, it should be noted that much interaction is currently taking place regarding prospects for harmonisation of social protection systems in the region.[300] In particular, issues such as the manifestation of informal social security systems, traditional, African forms of social security and social security as a human right are drawing much attention throughout the region. The Revised Draft Social Charter of Fundamental Rights in the SADC establishes the framework in which harmonisation of social protection schemes can take place. The preamble cites the alleviation of poverty as one of its chief objectives. Article 8, which deals with social protection seeks to guarantee social protection to workers and 'sufficient resources and social assistance' to persons 'who have been unable to either enter or re-enter the labour market and have no means of subsistence.'

Developments such as the above should be linked to initiatives taken under the auspices of the ELS Gender Programme, to ensure a balanced, integrated approach to gender equality in the labour market. Areas for intervention would include the extension of social protection measures to vulnerable groups such as rural and urban poor women, and the elimination of indirect gender discrimination in employee benefit schemes of a more formal nature, where, for example, inferior benefits accrue to part-time workers.

4.5.9. SADC and the ILO

International organisations such as the ILO can play an extremely significant supporting role in the harmonisation of labour standards throughout the region. Co-operation at the regional and national levels can secure direct and indirect benefits for

[300] See for example, Olivier M 'Regional Social Security: Are Innovative Developments in Southern Africa Relevant to the European Context?' Unpublished paper presented at the EISS Conference: Bergen, 27-29/09/01.

women in the labour market. SADC entered into a Memorandum of Understanding with the ILO in 1998, containing provisions pertaining to consultation, exchange of information, attendance at meetings and the provision of expertise. At the end of 2000, all but three member states had ratified Convention 100, while four member states were yet to ratify Convention 111, both of which deal with the elimination of discrimination in employment.[301] The status of the ILO in the region is evident from the fact that ratification of its core Conventions is promoted in terms of article three of the Draft Social Charter of Fundamental Rights in the SADC.

In keeping with the region's long and close co-operative relationship with the ILO, the ELS Gender Policy calls for the ratification and implementation of international labour standards in the region, as set out in the ILO Conventions and Recommendations. In addition, the ELS should consider utilising the ILO and other international agencies in a training and technical expertise capacity, as envisaged by the Memorandum of Understanding. This would not only give Member States access to a wealth of information and resources regarding gender issues, but would also serve to bring about greater harmonisation of employment laws, policies and practices in the region.

4.5.10. Collective bargaining

It is significant that all fourteen member states have ratified ILO Convention 98 on collective bargaining.[302] This is in line with the priority of the ELS to strengthen collective bargaining at all levels.[303] Article one of the Draft Social Charter deals with freedom of association and collective bargaining, affording workers and employers the rights necessary to facilitate effective collective bargaining. Despite the stated aim of the sector to 'mainstream' gender in all its policies, there is no mention of the gendered aspect of collective bargaining discussed in chapter three.

Although the ELS Gender Policy does not expressly mention collective bargaining, it is clear that it would fall under any review of 'practices' and 'laws' which the policy

[301] Source: Draft Report of a Study on the Formulation of Policy Objectives, Priorities and Strategies for the SADC ELS, November 2000 at 50-1 [Draft Report].
[302] Note however, that five member states are yet to ratify Convention 87 on freedom of association.

seeks to reform. In addition, the policy's promotion of education and training will indirectly see greater representation of women in the labour movement and the prioritising of gender issues on the bargaining agenda. Despite its limitations, collective bargaining is an area which has great potential for moving towards the attainment of gender equality in the SADC labour market.

4.6. Conclusion

The preceding two chapters have sought to critically analyse developments aimed at securing gender equality in employment in the SADC region in light of the conceptual and environmental issues discussed in preceding chapters. Although there is a broad range of levels of development throughout the region, it can be said that SADC labour markets are typified by high levels of unemployment and poverty. As a consequence of patterns of previous disadvantage occasioned by patriarchal Roman-Dutch colonial law and African customary law, current trends in the labour market operate disproportionately to the detriment of women. The entrenched nature of this disadvantage militates against a passive, non-interventionist approach on the part of the state. Rather, a pro-active stance is required to eliminate the ongoing patterns of discrimination and disadvantage of which women are currently bearing the brunt.

The country profiles of Lesotho and South Africa illustrate the types of issues that need to be addressed at the regional and national levels if harmonisation of gender programmes is to take place. While significant efforts have been made in Lesotho to bring anti-discrimination legislation into line with best international practice, the 1998 ILO survey illustrates that broader, extra-market laws and circumstances continue to severely prejudice women. In South Africa, on the other hand, the new constitutional dispensation, accompanied by well-developed labour legislation, is yet to take visible effect on patterns of entrenched discrimination in society in general and the labour market in particular. This calls into question the modes of enforcement inherent in the rights-based model of equality, as discussed in chapter two.

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[303] Draft Report 53-4

At the regional level, the SADC-ELS is struggling to co-ordinate the harmonisation of gender equality in employment in light of the massive shifts currently taking place in the global economic environment. As the role of the state is being redefined by downward pressures on regulation and increasing calls from the owners of capital for flexibility and trade liberalisation, the need for harmonisation of labour standards has become evident in relation to the perceived threat of a 'race to the bottom' among member states seeking to attract investment. Along with other regional initiatives, the ELS Gender Policy is to be commended for its adoption of a substantive model of equality that recognises the need for a contextual, holistic approach to combating discrimination in employment. However, given a number of shortcomings and uncertainties in the Gender Policy, a dire need for clarification and expansion of its terms exists. This becomes especially apparent when one considers the central role which the ELS, supported by bodies such as the ILO, must play in the harmonisation process.

CHAPTER VI: SUMMATION AND OUTLOOK

Equality does not exist in a vacuum. It cannot be dished out to recipients by some controlling sovereign quantifying similarity and difference as between subjects. Equality in itself signifies nothing more or less than an equation. It cannot be eaten, it will not pay the rent and, for the women of Southern Africa, it will not secure jobs. Two consequences flow from the recognition of the hollow nature of equality. First, proponents of the traditional, juridical model are forced to stop hiding behind the meaningless jargon of equality discourse, and; second, critics of equality must come to the conclusion that the concept itself is not capable of being attacked in a meaningful way. Substantive equality tells us nothing more than to 'be equal' under the circumstances. To date no more just or fair imperative has been forthcoming.

Criticisms of the juridical model of equality abound, all of which are aimed at the manner in which equality has been implemented in society, i.e. in the liberal democratic tradition which views the subject as a holder of rights to be asserted against the sovereign. Critics have correctly pointed out that this 'institution' of equality is based on the flawed theory of the social contract which, among other weaknesses, has concealed and perpetuated gender inequality through the artificial divide between public and private life, conveniently excluding half of the population in the process. The traditional model of equal treatment further suffers from fatal flaws of undue formalism, symmetry and individualism, ignoring the crucial broader environment in which gender inequality festers. This formal model of equality, which relies primarily on individual litigation for enforcement, is incapable of eradicating entrenched forms of discrimination.

Throughout this dissertation, the point has been made that these criticisms cannot apply to the substantive conception of equality, which operates as no more than a catalyst through which policy and law take effect. It takes the enquiry no further to attack the 'lifeless' injunction to 'be equal'. Time is better served exploring the failings of the system as actually applied in society. It is only in the application of equality that the concept acquires 'life' or meaning, capable of being measured as a success or failure. Thus, instead of attacking the concept at the theoretical point at which the citizen purports to assert some 'right' against the sovereign, it is prudent to

look beyond the hollow concept of equality to examine the power relations between parties as they interact in the modern state and supra-national structures. It is this understanding of substantive equality that has informed this dissertation.

As substantive equality necessarily entails a contextual enquiry into the nature of power relations in society, an examination of the issues at play in shaping contemporary equality discourse, as applied to women in the labour market, was necessary. This element of the discussion yielded an unnerving picture of the pressures of globalisation on developing countries towards trade liberalisation and reducing costs of production, and hence, labour standards. The role of the state in this scenario seems to be one of increasing marginalization, irrelevance even, although this need not be the case. All of these factors were seen to impact negatively and disproportionately on women in the labour market. It was argued that a passive approach predicated upon non-intervention and a reliance on market forces, could not effectively eliminate gender discrimination in the labour market. Rather, a pro-active substantive model of equality, capable of taking previous patterns of disadvantage into account, was called for. Such an approach would require a holistic, well-targeted system of interventions aimed at reversing the current trends of discrimination against women in employment and the feminisation of poverty. Integration and co-operation between stakeholders were viewed as essential in order to combat both labour market and extra-market discrimination and disadvantage. To this end, the role of international bodies such as the ILO was emphasised.

Within the Southern African context, the starting point was the dire, adverse effects experienced by women in the labour market as a result of global economic trends, which tend to exacerbate existing disadvantages caused by the patriarchal legacy of colonial and African customary law. Faced with global pressures towards trade liberalisation, the SADC is currently taking steps that will result in gradual tariff reductions towards the ultimate ideal of a free trade zone in Southern Africa. In light of fears of the classic 'race to the bottom' with regard to labour standards, it was argued that harmonisation of labour standards with an emphasis on a pro-active, substantive approach to equality is necessary. Such an approach needs strong co-ordination at the central level, given the varying levels of development throughout the region.

The Gender Policy of the ELS marks the beginning of this process. The policy is positive in many respects, but is in urgent need of expansion and clarification. In its current state, it is too vague to be truly effective in bringing about an end to gender discrimination in the region's labour markets. Bearing in mind the examples of Lesotho, which has developed politically correct labour laws only to be undermined by a patriarchal common law, and South Africa, where even the most progressive framework of labour legislation seems to be having little to no effect on the adverse position of women in labour market, a far stronger approach to the situation is required.

In particular, the following suggestions can be elucidated:

- Whatever conception of equality is proposed, its implementation must be premised on an holistic, multi-disciplinary approach that addresses not only discrimination, but also the wider cycles of disadvantage endured by women in all spheres of society;
- Model codes of good practice and guidelines, dealing with all aspects of implementation and enforcement of employment equity, should be developed for implementation by member states. These should express exactly what is anticipated in the operative model of equality, in order to minimise chances of adverse administrative or judicial intervention;
- Information-sharing and ongoing research is vital in the region for the purposes of dissemination of best practice and mutually-relevant experiences;
- The inherent weaknesses in the application of the traditional, juridical notion of equality should be taken into account, especially with regard to enforcement provisions, where innovative solutions should be sought;
- The process should be an inclusive one, drawing on all stakeholders, government departments and interested parties as participants, and looking at all areas in which cycles of disadvantage may be perpetuated;
- The role of the ILO and other bodies should be fully exploited from the perspective of harmonisation, training and capacity building, and as a source of information exchange.

In the final equation, the concept of equality has survived unchanged for millennia. It is the manner in which equality is interpreted, implemented and enforced within a specific historical-legal context that is the real measure of effectiveness. In the Southern African region in 2002, the need for an integrated, holistic and harmonised approach to gender equality in the labour market has never been greater. Active intervention based on a comprehensive model of substantive equality is required at national and regional levels. Current developments illustrate that progress is being made, albeit in a slow and uncertain way. The situation calls for a well-devised and carefully considered approach, taking account of contemporary criticisms of the juridical model, aimed at intervention in the key areas of society where bottlenecks of power serve to perpetuate gender inequality. Nothing less will suffice. Above all, equality will not be attained without the shifting of the dominant mind-set and attitude in society at large that continues to view women as second-class citizens. To this end, the expectation that equality is something that can be dished out or distributed must be shed and replaced with an active incorporation of the principle of equality into every aspect of life, transgressing the traditional public/private divide and exposing inequality and discrimination as they manifest in the everyday power relations between people.

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